50/69

SUPREME COURT OF VICTORIA

BARKER v BURKE

Newton J

22 June, 15 July 1970 — [1970] VicRp 111; [1970] VR 884

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT WHILST DRIVING HIS MOTOR CAR COLLIDED WITH ANOTHER – INTERCEPTED BY POLICE – BREATH TEST SHOWED .265BAC – DEFENDANT HAD CONSUMED A LARGE QUANTITY OF BEER LACED WITH BRANDY – DEFENDANT CHARGED WITH DRIVING WHILST UNDER THE INFLUENCE OF INTOXICATING LIQUOR, EXCEED .O5% AND FAILING TO IMMEDIATELY STOP HIS MOTOR CAR AFTER THE ACCIDENT – WHETHER DEFENCE OF AUTOMATISM AVAILABLE – WHETHER *PROUDMAN v DAYMAN* DEFENCE AVAILABLE – CHARGES DISMISSED BY MAGISTRATE ON THE GROUNDS THAT THE DEFENDANT HAD BEEN MADE DRUNK INVOLUNTARILY, THAT HE HAD NOT INTENTIONALLY DRIVEN HIS MOTOR CAR AND THAT HE WAS NOT RESPONSIBLE FOR DRIVING HIS CAR OR FOR ANYTHING THAT OCCURRED IN CONSEQUENCE THEREOF – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80, 80B, 81A.

HELD: Orders nisi in each case made absolute. Dismissals set aside. Remitted for hearing and determination in accordance with the law.

1. Section 80B(1) of the *Motor Car Act* 1958 ('Act') is not concerned with the circumstances under which a person becomes under the influence of intoxicating liquor (or of any drug). Nor does it forbid a person from coming under the influence of liquor or drugs. It simply makes it an offence for a person to drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car.

2. s80B(1) of the Act makes it an offence simply to "drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car". There is no reference to knowledge or intention and no implication should be made that in order to commit the offence a driver must know that he is under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car, or must be reckless or indifferent as to whether he is in that state, or must intend to drive in that state. Any such implication would defeat the object of s80B, because it is notorious that one of the effects of alcohol (and of many drugs) is not only to render a person incapable of properly driving a car but also to encourage him not to accept that he is in that condition. Hence, *mens rea* in the sense of knowledge of the relevant facts, or reckless indifference, or intention, is not an element of the offence created by s80B.

3. Where a person drives a motor car while under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the car, it is not a defence to a charge under s80B(1) of the Act that he was at the time in a state of alcohol-induced automatism, for which others were responsible.

4. It would certainly have been open to the Magistrate to have been satisfied beyond reasonable doubt on the evidence that the defendant was not in a state of automatism. For example, he was able to conduct relatively rational conversations with Stirling and Constable Barker; his performances in the sobriety tests, although not good, were by no means hopeless; and in fact he succeeded in driving his car along a number of streets. It was unnecessary to decide whether it would have been open to the Magistrate on the evidence to have held that the possibility of the defendant having been in a state of automatism while driving his car was not excluded beyond reasonable doubt.

5. In relation to the *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; [1944] ALR 64 defence, there was no evidence that when the defendant was driving his car he honestly believed that he was not under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car. His evidence was that he did not remember driving the car at all. And even if he had honestly held a belief that he was not so affected by liquor as to be incapable of having proper control of his car, such belief would not have been based on reasonable grounds: his blood alcohol level was found to be .265, so that he must have felt drunk; he was driving very erratically; he was aware that he had drunk quite a substantial quantity of beer; and from his own symptoms he could reasonably have concluded that the beer had been a good deal more potent that he had supposed.

6. There was evidence upon which the Magistrate could have been satisfied beyond reasonable doubt that the defendant was aware of the accident at the time of its occurrence, notwithstanding his inebriated condition. The defendant told a witness that he remembered hitting a car back in Courtney Street, and also Constable Barker's evidence that Burke, when asked whether he was involved in an accident a few minutes earlier, said: "I think so. I remember something going bang."

7. If the Magistrate was satisfied beyond reasonable doubt that the defendant was not driving in a state of automatism and knew of the occurrence of the accident and did not stop, then the Magistrate ought to have convicted him in respect of the information of failing to stop after an accident.

NEWTON J: This is the return of three orders nisi to review decisions of the Court of Petty Sessions at Melbourne on 17 February 1970, whereby three informations against the present respondent, Gerald James Burke (whom I shall call "Burke"), were dismissed.

By one information (which I shall call "the first information") Burke was charged under s80B of the *Motor Car Act* 1958 (as amended) that on 24 December 1969 at North Melbourne he "did drive a motor car on a highway, to wit Harris Street, whilst under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of such motor car".

By another information (which I shall call "the second information") Burke was charged under s81A of the *Motor Car Act* 1958 (as amended) that on 24 December 1969 at North Melbourne he "did drive a motor car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood is more than .05 per centum".

By the last information (which I shall call "the third information") Burke was charged under s80 of the *Motor Car Act* 1958 (as amended) that on 24 December 1969 at North Melbourne he "being the driver of a motor car on a highway, to wit Harris Street, and where owing to the presence of such motor car an accident occurred whereby property was damaged, did fail to immediately stop such motor car". (It would appear that in this information "Harris Street" ought to be "Courtney Street", but no point was made of this before the Court of Petty Sessions or before me, and it could be cured by amendment).

The Court of Petty Sessions was constituted by Mr A Vale SM. Burke was represented by counsel. An inspector of police prosecuted. All three informations were heard together. Burke pleaded "not guilty" to each of them.

Three witnesses were called for the prosecution, namely, Alan Raymond Stirling (whom I shall call "Stirling"), Constable Barker (who was the informant and is the present applicant), and Constable Hart. The evidence of Constable Hart simply corroborated the evidence of Constable Barker. The general effect of the evidence for the prosecution, so far as presently material, may be summarized as follows:—

At about 6 p.m. on Wednesday, 24 December 1969, a grey Plymouth sedan motor car driven by Burke collided with, and damaged, a Holden utility belonging to Stirling, which was then parked in a parking area in the centre of Courtney Street, North Melbourne. Burke drove away from the scene. He was followed soon afterwards by Stirling and one Robinson, who intercepted him in Harker Street, North Melbourne. A short conversation then took place between Stirling and Burke, in the course of which Burke at first said that he did not think that he had hit a car back in Courtney Street, although he could have, but later said, after the damage to his own car had been pointed out, that he remembered hitting a car there. When asked by Stirling for his name and address, Burke muttered something unintelligible. Burke then drove off, but his engine stopped and his car rolled some distance, after which he got out and pushed it. Stirling then returned to Courtney Street. Not long afterwards Constables Barker and Hart found Burke seated in his car in Harris Street, North Melbourne, about half a mile from the scene of the collision with Stirling's car in Courtney Street. Burke's car was then stationary and about three feet over the footpath. Burke's eyes had a glazed look and he took about five seconds to acknowledge Constable Barker's presence by turning and looking in his direction. A conversation then took place between Constable Barker and Burke, which Constable Barker described in his evidence as follows:—

"I said: 'Are you the driver of this car?' He replied: 'I must be I am sitting here.' His speech was clear, however, he took considerable time in pronouncing each word. I said: 'What is your

name and address?' He said: 'Gerry Burke.' I said: 'And what is your address?' He said: 'I told you, 120 Devenshire Road, Sunshine.' I said: 'Will you get out of the car?' He said: 'Yes.' "The defendant then got out of his car without any difficulty but when he was standing he was swaying so heavily that he leant on the bonnet of his car for support. At this stage I was standing about 18 in. in front of the defendant. I noticed his breath smelt strongly of liquor. "I said: 'Were you involved in an accident a few minutes ago?' He said: 'I think so, I remember something going bang.' I said:'Is that where you damaged your car?' "The defendant looked slowly down towards the damaged panels of his car, he then looked up and looked at me. He didn't answer this question. "I said: 'Can you remember where you had this accident?' He said: 'No.' I said: 'Will you accompany me back to where I believe you were involved in an accident a few minutes ago?' He said:'Whatever you say mate.'" Constables Barker and Hart then took Burke in their police van back to the scene of the accident in Courtney Street. From there he was taken to the North Melbourne Police Station, where a further conversation took place between Constable Barker and Burke, which Constable Barker in his evidence described as follows:—

"I said to the defendant: 'Have you been drinking liquor today?' He said: 'Yes.' I said: 'What type of liquor?' He said: 'Beer.' I said: 'How much have you had to drink?' He said: I don't know.' I said: 'When did you start drinking?' He said: 'I suppose we started about 1.00 o'clock today.' I said: 'Who do you mean by we?' He said: 'My mates I was drinking with.' I said: 'When did you stop drinking?' He said: 'I don't know, I guess it was about half past five.' I said: 'Is the Plymouth motor car, GMS-108 your car?' He said: 'Yes.' I said: 'Are you used to driving it?' He said: 'Yes, driving is my job.' I said: 'After you finished drinking today did you have any mates in your car with you?' He said: 'No.'"

A breath analysis test was then conducted on Burke at about 7 p.m. by First Constable Studley of the Breath Analysis Section. According to the "Schedule 7A Certificate" which was tendered in evidence, the test showed a blood alcohol level of .265: see s408A of the *Crimes Act* 1958 (as amended).

Following the breath analysis test, Burke attempted to carry out various sobriety tests at Constable Barker's request. His performances in these tests, although not hopeless, were far from good, and were entirely consistent with his being significantly affected by alcohol. Burke was then formally charged with the offences now in question.

This concludes my summary of the evidence for the prosecution.

Three witnesses were called for the defence, namely, John McMullen (whom I shall call "McMullen"), Barry Keith Newlands (whom I shall call "Newlands") and Burke himself.

McMullen said that he was a driver. The substance of his evidence-in-chief was as follows: "On 24 December 1969 I, with Barry Newlands and the defendant and two others had drunk five bottles of beer at work about midday. Newlands and I had decided to induce the defendant to have more drink at a nearby hotel and so Newlands took the keys to the defendant's car and the three of us went to a hotel. There each of us drank six ten-ounce glasses of beer. I obtained the drinks whilst the defendant and Newlands watched snooker players. Unknown to the defendant I purchased four double brandies and poured a double brandy into each of four of the ten-ounce glasses of beer drunk by the defendant. We were at the hotel for about three hours. I am a regular drinker and know what the effect of the brandy and the beer would be on the defendant."

The substance of McMullen's evidence in cross-examination was as follows: "I am a regular drinker and well know the effects of drink in any man particularly the effect of a quantity of four double brandies on top of six ten-ounce glasses of beer on the defendant. I 'spiked' the defendant's beer deliberately. I was aware that the defendant was drunk after drinking the liquor. I did not interfere when I saw Newlands give the defendant back his car keys and I did not interfere when I saw the defendant leave the hotel. At this stage, in my opinion, the defendant was not fit to drive a car. When the defendant left the hotel he was walking unaided. I did not know that the defendant was going to drive his car."

Newlands said that he was a driver. The substance of his evidence-in-chief was as follows: "After McMullen, the defendant, myself and some others had drunk five bottles of beer at work I

took the defendant's car keys and the defendant, McMullen and myself went to a nearby hotel, where, in the space of about three hours, we each drank six ten- ounce glasses of beer. The defendant and I watched snooker players whilst McMullen obtained the brandies. I saw McMullen putting brandy into the defendant's beer but I did not interfere. I am a regular drinker and know the effect liquor would have had on the defendant who was not a regular drinker."

The substance of Newlands' evidence in cross-examination was as follows: "I knew that the defendant was drunk as a result of drinking the liquor at the hotel. I knew this when I returned to the defendant the keys of his car and told him to go and have a sleep. I did not take the defendant to his car or in any way ensure that he did not drive it. The defendant was not aware that the brandy was in his beer."

The substance of Burke's evidence-in-chief was as follows: "I am not a regular drinker but usually restrict myself to four or five beers on social occasions. On 24 December 1969 I together with the others from work had drunk five bottles of beer and then because Newlands had taken my car keys, I agreed to go to the hotel. I recall having drunk five ten-ounce glasses of beer. I did not know that I was drinking brandy in the beer. I had never in my life drank brandy or other spirits. I cannot remember leaving the hotel, driving the car or having an accident. My next recollection is at the North Melbourne Police Station when I was being charged. I had no intention of drinking beer or brandy or of getting drunk or of driving my car whilst drunk."

Burke was not cross-examined. Counsel for Burke then cited *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; [1944] ALR 64, to the Stipendiary Magistrate. He submitted that the evidence of McMullen, Newlands and Burke himself showed that Burke had had no intention of getting drunk and no intention of driving his car whilst drunk. He further submitted that Burke was not responsible for his actions because of being in a state of intoxication into which he had been inveigled by the actions of McMullen, and should not be convicted.

The Stipendiary Magistrate said that he agreed with these submissions, and he then dismissed the three informations.

The prosecutor then asked the Stipendiary Magistrate what was the basis for his dismissal of the three informations. The Stipendiary Magistrate said that he had "reached an assumption of fact" that Burke had been deceived into drinking liquor and that having done so involuntarily, he had become affected in a manner not intended by him. The Stipendiary Magistrate further said that he was, therefore, satisfied that Burke was not responsible for his condition or for his subsequent act in driving his car.

The Stipendiary Magistrate recommended an investigation by the police into the conduct of McMullen and Newlands in administering four double brandies to Burke in six ten-ounce glasses of beer.

The grounds of each of the three orders nisi are as follows:—

1. That the Stipendiary Magistrate was in error in dismissing the information.

2. That the Stipendiary Magistrate should have convicted the defendant of the offence for which he was charged.

3. That the Stipendiary Magistrate should have held that each of his findings of fact—

(a) that the defendant had been deceived into drinking liquor;

(b) that the defendant had drunk liquor involuntarily;

(c) that the defendant had become affected in a manner not intended by him;

(d) that the defendant was not responsible for his condition or for his subsequent act in driving his car—

(if such findings of fact were made by him) was not relevant to the question whether the defendant was guilty of the offences for which he was charged.

4. That the Stipendiary Magistrate should have held that the evidence of the witnesses called on behalf of the defendant did not disclose any defence to the offence with which the defendant was charged. In my opinion, each of the three orders nisi should be made absolute. It is convenient to deal first with what I have called the first information.

Section 80B(1) of the *Motor Car Act* 1958 (as amended) is as follows:—

"80B (1) Any person who drives a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car shall be guilty of an offence and shall be liable in the case of a first offence to a fine of not more than $200 or to imprisonment for a term of not more than six months and in the case of a second or any subsequent offence to imprisonment for a term of not more than twelve months, and upon any conviction for the said offence the court shall, if the offender holds any licence to drive a motor car under this Act cancel that licence, and shall, whether or not he holds any such licence, disqualify him from obtaining any such licence for such time, not being less than twelve months, as the court thinks fit; and at the end of any such period of disqualification a licence to drive a motor car shall not be issued to the offender except upon the order of a Court of Petty Sessions consisting of a Stipendiary Magistrate sitting alone and no application for such an order shall be made to the court unless at least fourteen days' notice of intention so to apply has been given in writing to the Chief Commissioner of Police and to the clerk of courts."

The remaining sub-sections of s80B are irrelevant to the present matter, save that s80B(4) provides that "drug" means any substance or preparation declared by the Governor in Council to be a drug for the purposes of s318 of the *Crimes Act* 1958 which deals with culpable driving causing death.

In my opinion, it was established beyond reasonable doubt by uncontradicted evidence that on 24 December 1969 Burke had driven a motor car while under the influence on intoxicating liquor to such an extent as to be incapable of having proper control of the motor car: see, for example. *R v Burnside* [1962] VicRp 14; [1962] VR 96. Indeed this was not disputed in the Court of Petty Sessions, nor before me. It would appear from the reasons given by the Stipendiary Magistrate that he dismissed the first information (and also the second and third informations), because he considered:—

(a) that Burke had been made drunk involuntarily through McMullen surreptitiously pouring double brandies into four of his glasses of beer; and

(b) that Burke had not intentionally or knowingly driven his car whilst under the influence of intoxicating liquor; and

(c) that Burke was "not responsible" for driving his car, or for anything which occurred in consequence thereof.

But in my opinion these circumstances, whether taken singly or in combination, provided no answer to the charge under s80B(1). I propose to deal with them in order.

As to circumstance (a) In my opinion, this was irrelevant. Section 80B(1) is not concerned with the circumstances under which a person becomes under the influence of intoxicating liquor (or of any drug). Nor does it forbid a person from coming under the influence of liquor or drugs. It simply makes it an offence for a person to drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car.

This conclusion is, in my opinion, supported by *Armstrong v Clark* [1957] 2 QB 391; [1957] 1 All ER 433, and *August v Fingleton* [1964] SASR 22; see too *R v Wickens* (1958) 42 Cr App R 236. The object of s80B is to prevent persons from driving motor cars, which are very dangerous machines unless properly controlled, if they are so affected by liquor or drugs as to be incapable of having proper control: see, for example, *August v Fingleton*, *supra*. How they become so affected is immaterial.

As to circumstance (b) s80B(1) makes it an offence simply to "drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car". There is no reference to knowledge or intention. And in

my opinion, no implication should be made that in order to commit the offence a driver must know that he is under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car, or must be reckless or indifferent as to whether he is in that state, or must intend to drive in that state. Any such implication would defeat the object of s80B, because it is notorious that one of the effects of alcohol (and of many drugs) is not only to render a person incapable of properly driving a car but also to encourage him not to accept that he is in that condition. Hence, in my opinion, *mens rea* in the sense of knowledge of the relevant facts, or reckless indifference, or intention, is not an element of the offence created by s80B. This conclusion appears to me to be supported by *August v Fingleton*, *supra*, especially, at pp25, 26; *Armstrong v Clark*, *supra*; *Harding v Price* [1948] 1 KB 695 at p703, per Humphreys J; [1948] 1 All ER 283, and *R v Hyatt* [1945] 4 DLR 439. See, too, *R v Coventry* [1938] HCA 31; (1937) 59 CLR 633; [1938] ALR 420, and *Crichton v Victorian Dairies Ltd* [1965] VicRp 6; [1965] VR 49, at pp51, 52.

It is unnecessary to decide whether a driver's honest belief based on reasonable grounds that he was not under the influence of intoxicating liquor or of any drugs (as the case might be) to such an extent as to be incapable of having proper control of his motor car would be a defence to a charge under s80B: see, for example, *Proudman v Dayman*, *supra*; *Bergin v Stack* [1953] HCA 53; (1953) 88 CLR 248, especially at p254, per Webb J, pp260-3 per Fullagar J (with whom Williams and Taylor JJ agreed), and pp272, 273 per Kitto J; [1953] ALR 805, and *Crichton v Victorian Dairies Ltd*, *supra*. In the present case there was no evidence that when Burke was driving his car he honestly believed that he was not under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of his car. His evidence was that he did not remember driving the car at all. And even if he had honestly held a belief that he was not so affected by liquor as to be incapable of having proper control of his car, such belief would not, in my opinion, have been based on reasonable grounds: his blood alcohol level was found to be .265, so that he must have felt drunk; he was driving very erratically; he was aware that he had drunk quite a substantial quantity of beer; and from his own symptoms he could reasonably have concluded that the beer had been a good deal more potent that he had supposed.

As to circumstance (c) perhaps by his reference to Burke not being responsible for driving his car the Stipendiary Magistrate simply had in mind the same idea as that expressed by Park J in *Pearson's Case* (1835) 2 Lewin 144; 168 ER 1108, when he said:

> "Voluntary drunkenness is no excuse for crime. If a party be made drunk by stratagem, or the fraud of another, he is not responsible."

See, too, article by JP Bourke in 20 ALJ 418, especially at pp418, 419. But, in my view, this *dictum* of Park J requires considerable qualification in the light of later decisions, the present position being in general that simply drunkenness (not being linked with any disease of the mind), whether voluntary or involuntary, is no defence to a criminal charge, unless it prevented the accused from having the necessary intention or *mens rea*: see Smith and Hogan, *Criminal Law*, 2nd ed. (1969), pp131-6, and Howard, *Australian Criminal Law* (1965), pp15-6 and 284-7. As earlier indicated, in my opinion, no specific intent or *mens rea* forms any element of the offence created by s80B. And I have already given reasons for the conclusion that for the purposes of s80B the circumstances under which a driver becomes under the influence of liquor or drugs are irrelevant.

I doubt whether the Stipendiary Magistrate by his reference to Burke not being responsible for his actions intended to convey that he considered that Burke at the material time was in a state of alcohol-induced automatism, or that he considered that it is a defence to a charge under s80B that the defendant was driving in a state of alcohol-induced automatism. But I should say that, in my opinion, this would not be a defence. It would be quite inconsistent with the object of s80B, if the words "who drives a motor car" in s80B(1) were given a meaning which excluded driving in a state of alcoholic automatism. Indeed this would make nonsense of the section: see *August v Fingleton* [1964] SASR 22 at pp25, 26.

Very possibly the words in s80B(1) "who drives a motor car" require some element of voluntariness. For example, if a person who was under the influence of liquor to such an extent as to be incapable of having proper control of a motor car, was compelled to drive a car at pistol point, then he might not be guilty of an offence under s80B; cf *Ryan v R* [1967] HCA 2; (1967) 121

CLR 205; (1966) 40 ALJR 488, especially at p501 per Menzies J and pp504, 505, per Windeyer J [1967] ALR 577; *Iannella v French* [1968] HCA 14; (1968) 119 CLR 84; [1968] ALR 385 at p400; 41 ALJR 389; and *R v Hurley and Murray* [1967] VicRp 57; [1967] VR 526. But in the present case Burke acted wholly voluntarily in driving his car in the sense that, subject only to the effect of alcohol upon his mental processes, he drove of his own free will.

Mr Frederico, who appeared before me for Burke, submitted in substance that the Stipendiary Magistrate's reasons showed that he considered on the evidence that Burke had involuntarily and without negligence on his own part been reduced to a state of alcoholic automatism at the time when he drove his car, so that he could not be guilty of an offence under s80B. But for the reasons which I have stated I consider that where a person drives a motor car while under the influence of intoxicating liquor to such an extent as to be incapable of having proper control of the car, it is not a defence to a charge under s80B(1) that he was at the time in a state of alcohol-induced automatism, for which others were responsible.

In my view, s80B(1) says in substance, so far as presently material, that a man whom his companions make drunk must not drive a motor car.

I should, I think, say that I am by no means certain that the Stipendiary Magistrate in fact took either the affirmative view that Burke had been reduced to a state of alcoholic automatism, or the negative view that this possibility had not been excluded beyond reasonable doubt. Automatism is perhaps an imprecise term. I understand it to be a condition in which a man acts independently of his will, like a sleepwalker: see, for example, *Ryan v R*, *supra*, especially at 40 ALJR p501 per Menzies J; *R v Carter* [1959] VicRp 19; [1959] VR 105; [1959] ALR 335; *R v Scott* [1967] VicRp 31; [1967] VR 276; *Hill v Baxter* [1958] 1 QB 277; *Watmore v Jenkins* [1962] 2 QB 572, especially at pp585-7; [1962] 2 All ER 868; *R v Holmes* [1960] WAR 122, especially at p125, and *R v Cottle* [1958] NZLR 999. In the present case I consider that it would certainly have been open to the Stipendiary Magistrate to have been satisfied beyond reasonable doubt on the evidence that Burke was not in a state of automatism. For example, Burke was able to conduct relatively rational conversations with Stirling and Constable Barker; his performances in the sobriety tests, although not good, were by no means hopeless; and in fact he succeeded in driving his car along a number of streets. I find it unnecessary to decide whether it would have been open to the Stipendiary Magistrate on the evidence to have held that the possibility of Burke having been in a state of automatism while driving his car was not excluded beyond reasonable doubt: cf *Hill v Baxter*, *supra*, and *Watmore v Jenkins*, *supra*.

I now turn to the second information. Section 81A(1), s81A(2) and s81A(3) of the *Motor Car Act* 1958 is as follows:—

> "81A (1) Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood is more than .05 per centum shall be guilty of an offence and shall be liable in the case of a first offence to a fine of not more than $100 or in the case of a second or any subsequent offence to a fine of not more than $200 or to imprisonment for a term of not more than one month.
>
> "(2) For the purposes of this section if it is established that the percentage of alcohol in the blood of the person concerned was more than .05 per centum per one hundred millilitres of blood at any time within two hours after the alleged offence it shall be presumed unless the contrary is proved that the percentage of alcohol was more than .05 per centum at the time of the alleged offence.
>
> "(3) In addition to imposing a fine or a term of imprisonment a court convicting a person for an offence against subs(1) shall notwithstanding the provisions of subs(4) of s26 cancel the licence of such person to drive a motor car and—
>
> (a) in the case of a first offence--disqualify him from obtaining a licence for not less than three months; and
>
> (b) in the case of a second or subsequent offence—
> disqualify him from obtaining a licence for not less than twelve months."

Subs(4) and subs(5) of s81A are irrelevant to the present matter.

The evidence established beyond reasonable doubt that Burke was driving his car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood was more than .05 per cent. Burke ought, therefore, in my opinion, to have been convicted notwithstanding the matters relied on by the Stipendiary Magistrate. My reasons for this conclusion are similar to those already stated in relation to the first information. In summary form they are as follows:—

(1) Section 81A is concerned only with preventing persons with a blood alcohol level in excess of .05 from driving motor cars. It is not concerned with how a person achieves a blood alcohol level in excess of .05. Hence the circumstance that Burke achieved his blood alcohol level of .265 by the deceitful practices of his companions is irrelevant.

(2) Motor cars are dangerous things, and the plain object of s81A is to prevent persons with blood alcohol level in excess of .05 from driving them. In my opinion, *mens rea* is not an element of the offence created by s81A, save in so far as honest mistake based on reasonable grounds would be a defence, as to which I express no conclusion. In the present case there is no evidence that Burke believed that his blood alcohol level was not more than .05, and if in fact he had held such a belief, it would not, in my opinion, have been based on reasonable grounds. As earlier indicated, he must have felt drunk; he was driving erratically; he was aware that he had been drinking quite a substantial amount of beer; and he could reasonably have concluded from his own symptoms that the beer had been a good deal more potent than he had supposed.

(3) Even if Burke was in a state of alcohol-induced automatism, in my opinion, a person who drives a motor car in such a state nevertheless "drives" it within the meaning of s81A. Any other view could make nonsense of s81A. Subject to the effects which alcohol had upon his mental processes, Burke at the material time was driving his car of his own free will.

I now turn to the third information. Section 80(1) provides, so far as presently material, as follows:

"80 (1) Where owing to the presence of a motor car on any highway an accident occurs...whereby any property, including any vehicle...is damaged...the person driving the motor car shall immediately stop the motor car."

Section 80(2) provides, so far as material, that any person who contravenes or fails to comply with any provision of s80(1) shall be guilty of an offence.

The evidence for the prosecution established beyond reasonable doubt that owing to the presence of Burke's motor car in Courtney Street an accident occurred whereby Stirling's vehicle was damaged. This was not disputed before the Stipendiary Magistrate, nor before me. And, in my opinion, it was open to the Stipendiary Magistrate to infer beyond reasonable doubt from the evidence that Burke did not immediately stop his car after the accident: see *Critchley v Downs* [1964] SASR 350, and *Norling v Woolacott* [1964] SASR 377.

But the Stipendiary Magistrate did not in his reasons advert to this last matter at all, so that his dismissal of the third information would not appear to have been based upon a conclusion that he was not satisfied beyond reasonable doubt that Burke failed to stop. Indeed, the Stipendiary Magistrate gave no separate reasons for his dismissal of the third information from his reasons for dismissing the first information and the second information. And the Stipendiary Magistrate's reasons for dismissing the first information and the second information do not appear to me to be obviously relevant to the third information. It is certainly not clear to me that the Stipendiary Magistrate intended to convey that he was not satisfied that Burke was aware that his car had been involved in an accident, or that he considered that at the time of the accident Burke was so drunk that he was in a state of automatism, so as not to fall within the description in s80(1) "the person driving the motor car": cf. *R v Carter*, *supra* (at VR) pp112, 113; *Hill v Baxter*, *supra*, and *Watmore v Jenkins*, *supra*. The latter conclusion would in fact involve the former. Section 80(1) does involve an element of *mens rea* in that the driver must have been aware that his vehicle was involved in the accident: see *Hubbard v Beck* (1946) 64 WN (NSW) 20, and *Harding v Price* [1948] 1 KB 695; [1948] 1 All ER 283; see, too, *Ex parte Bedser* (1968) 88 WN (Pt 1) (NSW) 53; [1969] 2 NSWR 268. But, in my opinion, there was evidence upon which the Stipendiary Magistrate could have been satisfied beyond reasonable doubt that Burke was aware of the accident at the time of its occurrence, notwithstanding his inebriated condition, namely, Stirling's evidence that Burke told him that he remembered hitting a car back in Courtney Street, and also Constable Barker's

evidence that Burke, when asked whether he was involved in an accident a few minutes earlier, said: "I think so. I remember something going bang."

It is thus, in my opinion, not clear that the Stipendiary Magistrate dismissed the third information for any reason which would have been open to him in law on the evidence, and I think that the dismissal of the third information must, therefore, be set aside. Whether Burke is ultimately convicted or acquitted in respect of the third information will be a matter for the Stipendiary Magistrate to decide. If, as I am disposed to think, the Stipendiary Magistrate dismissed the third information simply because he thought that the reason why Burke did not stop after the accident was that he was too drunk to bother about it, although he knew that the accident had occurred, and because the Stipendiary Magistrate thought that Burke's condition was due to the deceitful practices of McMullen and Newlands in relation to the double brandies, then, in my view, his reasons for dismissing the third information were wrong in law. If the Stipendiary Magistrate was satisfied beyond reasonable doubt that Burke was not driving in a state of automatism and knew of the occurrence of the accident and did not stop, then the Stipendiary Magistrate ought to have convicted him in respect of the third information.

Subject to anything which counsel may now wish to say, I think that in the circumstances I should simply order that the orders of the Court of Petty Sessions dismissing each information be set aside and that each information be remitted to the Magistrate's Court at Melbourne to be further heard and dealt with in conformity with this judgment. It may be that if Burke is convicted in respect of the first information, the informant will withdraw the second information and perhaps also the third information. But I express no view as to whether he should do this.

Subject to any submissions which counsel may now wish to make, I propose to order in respect of each order nisi as follows:—

1. Order that the order nisi be made absolute.

2. Order that the order of the Court of Petty Sessions dismissing the information be set aside, and that the matter be remitted to the Magistrates' Court at Melbourne to be further heard and dealt with in accordance with these reasons for judgment.

In so far as concerns the order nisi relating to the first information, there will be also an order that Burke pay the costs of the applicant/informant, including reserved costs, all of which costs I fix at $120. And in relation to this order nisi I shall grant an indemnity certificate to Burke pursuant to s13(1) of the *Appeal Costs Fund Act* 1964. It may perhaps be of help to say that the form of the indemnity certificate is set out in Form 1 of the Schedule to the *Appeal Costs Fund Regulations* 1965, and I have to sign it. Since the three orders to review were heard together, I think that there should be only one set of costs.

Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
Solicitors for the defendant: Patrick J Cannon and Testro.
