56/78

SUPREME COURT OF VICTORIA

VAN ELST v TANNER

Lush J

7 September 1978

MOTOR TRAFFIC – DRINK/DRIVING – READING 0.014%BAC – EVIDENCE GIVEN BY DEFENDANT THAT HE ONLY CONSUMED HALF A BOTTLE OF BEER – EXPERT EVIDENCE LED TO SHOW THAT SUCH CONSUMPTION WOULD RESULT IN A READING OF .02%BAC – EVIDENCE GIVEN BY DEFENDANT'S WIFE IN CONFLICT WITH DEFENDANT'S VERSION – CHARGE DISMISSED BY MAGISTRATE – WEIGHT TO BE GIVEN TO CERTIFICATE OF ANALYSIS AND EVIDENCE OF OPERATION – EVIDENCE IN REBUTTAL – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A(1).

At a hearing before a Magistrates' Court, the prosecution led evidence that the respondent, when breathalysed, had a blood alcohol concentration of .140 per cent. The respondent gave evidence of having consumed only half a bottle of beer on the morning of the test, together with some medicine and some valium. Whilst at first he denied having consumed liquor the previous night, he admitted having drunk the other half of the bottle of beer. He further gave evidence that he had retired at about 8 or 9 the previous night. This evidence was in conflict with evidence given by the respondent's de facto wife, who deposed that a few of his Army friends had called that night with a few bottles. She said that she went to bed at 8.00pm, that the respondent had had a late night but that she did not know how much he had drunk that night and was not aware of the time he had gone to bed. An expert witness called by the respondent gave evidence that to have had a reading of .140 per cent at the time of the test, the respondent would have had to have a reading of .380 per cent at midnight the night before, accepting that he had only consumed two glasses of beer on the day of the test. He further deposed that he had conducted a test on the respondent simulating the conditions given in evidence by the respondent, obtaining readings of .02 and .018 per cent. The Magistrate dismissed the information. On review—

HELD: Order absolute. Dismissal set aside. Remitted to be reheard by another Magistrate.

1. Whilst the ultimate burden of proof rests with the prosecution, the result of analysis is to be accepted by a court unless other admissible evidence, upon a reasonable view of that evidence affects the probative force of the result of such analysis creating a reasonable doubt as to the validity of such result of analysis.

2. The provisions of s80F of the *Motor Car Act* 1958 lead to the result that either an operator's evidence or evidence by certificate of the result of a test will, in the ordinary case and there is nothing abnormal in this respect about this case, have the result that until evidence is adduced throwing doubt on the certificate or on the analysis result, that result should be accepted by the court. That view is consistent with the authorities referred to.

3. Accordingly. the probative force of the direct evidence of the police test was logically left unaffected by the total evidence led on the defendant's behalf, and if that was correct, the decision reached by the magistrate was one which he could not properly reach.

4. That the magistrate decided here was a question of fact, but the reason why his decision should be interfered with is that upon analysis there does not appear a basis in the evidence for that decision.

LUSH J: On 22nd July, 1977, the respondent was driving a motor car in what appears to have been a public parking area in West Geelong. As he turned into a vacant parking bay his car knocked down a pedestrian. The accident does not seem to have been a severe one, but there is no evidence as to what its consequences were except that the pedestrian, who was an elderly woman, was taken away in an ambulance. The police officer who attended, the informant in the subsequent proceedings, questioned the respondent at the site and said that he detected such a smell of liquor upon the defendant that he asked him first to take a preliminary breath test, the result of which was positive and subsequently to go to the police station and take a breathalyser test the result of which was a reading of .140 per cent.

From the first encounter onwards the respondent said that he had had two beers at about

breakfast time on the morning of the 22nd July, having taken his breakfast at about 10.00am and that he had had nothing to drink afterwards. He referred at the police station to taking a medicine or medicines which had an alcoholic content. Those medicines were also taken at about the time he had breakfast.

The witnesses called by the informant were the informant himself, the pedestrian who was knocked down and the breathalyser officer, Sergeant Oreo. For the defence, the respondent gave evidence as also did his de facto wife, and an expert witness named Francis Parsons. At the end of the evidence the Stipendiary Magistrate said that he accepted the defendant's evidence that he had consumed only half a bottle of beer on the morning of the police test and that evidence, together with certain observations of the expert witness to which I shall come when I deal in greater detail with the evidence, created a doubt in his mind and, accordingly, he dismissed the information.

[After reviewing relevant sections of the Motor Car Act*, His Honour continued]* ... As will be seen, the controversy in this case was whether the evidence established the percentage of alcohol alleged by the prosecution at the time of the analysis. If it did, then s80G operated. If it did not, then there was nothing upon which s80G could operate.

It will be seen that the effect of s80F(1) is no more than to make the result of the instrument test admissible evidence of the percentage of alcohol present in the blood of the person tested. In cases in which a certificate of the result of the test can be used in evidence, s-s3 provides that the certificate shall be *prima facie* evidence of, amongst other things, the result of the analysis. It was put to me in the course of argument that s-s3 by the use of the expression '*prima facie* evidence' gave greater evidentiary weight to a certificate when it is used than to the evidence of an operator when the operator is called to give the evidence. It may be doubted whether that is so, because what the certificate says is not that the percentage was the amount stated but that the instrument indicated that the quantity of alcohol present was so much which, expressed as a percentage, is so much percent. This comment is consistent with language used by Nelson J in *Lloyd v Thorburn* [1974] VicRp 2; (1974) VR 12 at p15.

There is abundant authority for the proposition that the result of the breathalyser test, whether given in evidence by the operator or by means of a certificate, is not conclusive, but that it is open to a court to bring in a finding contrary to the result of the test. I need refer only to the cases of *Saxe v Kellett* [1970] VicRp 79; (1970) VR 600, and to an unreported decision of Starke J given on 8th November, 1976, *Sachse v Emms*.

Mr Garde, who appeared before me for the respondent, argued that there was not sufficient evidence in the present case that s80F(5) had been complied with, and accordingly the operative provision of that sub-section, which gives the statements to which it refers *prima facie* effect, did not apply here. If I may say so, this argument does not appear to me to go to the root of this case. In the first place, an analysis of what was said when compared with the regulations reveals that the deficiencies were not great, and in any case no point was made of them below, and so far as the magistrate's reasons show nothing turned upon them in the formation of his decision.

In any case there is abundant authority that failure to establish the matters referred to in s-s5 does not make the certificate given under s-s1 inadmissible; see *Lloyd v Thorburn* (*supra*) at p17. Nelson J there summarised observations which he had made at pp15-17 and after referring with approval to the judgment of McInerney J in *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, said:

> "His honour then went on to indicate that cases may occur where the failure to comply with the regulations could be a relevant circumstance in relation to the offence charged and could justify a dismissal, but his view was clearly that a finding that the regulations had been complied with was not an essential pre-requisite to the admissibility of evidence of the results of an analysis, and indeed even a finding that they had not been complied with would not render such evidence inadmissible. He considered, and I respectfully agree, that the question of non-compliance with the regulations was a question relevant to the weight to be attached to the evidence of the analysis, not a matter going to its admissibility."

As I have already said, no point was made at the hearing of any of the suggested deficiencies.

I should, I think, refer to some discussion before me of the question of the burden of proof in cases of this kind. In *Sachse v Emms* Starke J used language indicating that he treated the production of a certificate of the result of an analysis as throwing the burden of proving that the certificate was wrong upon the defendant. It was not necessary for His Honour to examine the question whether this was a precise statement of the law because the learned magistrate in the case before him had said that he accepted the evidence led for the defence. I referred to this case earlier, and in its result it showed that evidence led against the evidence of the result of an analysis can defeat the latter.

In other cases to which I was referred, particularly *Saxe v Kellett* (*supra*) a decision of Anderson J and *LLoyd v Thorburn* and the cases cited in the later decision, other judges of this court appear to have been careful to avoid using language indicating that either the proof of the result of an analysis by the operator, or proof of that result by the certificate, affects the ultimate onus of proof in the case.

As at present advised, my view on this matter is that none of the provisions of s80F have the effect of moving the ultimate onus of proof to the defence. I consider it unnecessary to decide that matter finally in the present case, and because I take that view I have not asked counsel to argue the matter out in detail before me. I think, however, and in this I agree, with respect, with Nelson J that the scheme of this Act is such that the leading of the kinds of evidence which s80F contemplates will produce in all cases that I can at present call to mind a situation in which the court of trial should act upon the analysis unless there is other evidence in the case which creates a doubt as to the validity of its result. In the case of evidence given either by the operator or by certificate the court will almost inevitably be in the position that the evidence so given is the only direct evidence of the blood alcohol percentage at the time of analysis called before it. Any other evidence relevant to that question will be circumstantial evidence from which the court may be invited to draw inferences. The result of the tests, however, will be the only direct evidence and will in itself not be directly contradicted, and it seems to me in those circumstances appropriate that a court should look to the defence to advance some reason by adducing evidence of its own or by bringing forward matters in the course of the prosecution case which can in the mind of the court throw a doubt upon the result of the analysis.

The real difficulties in this case arise from the defence evidence. The defendant, in his evidence-in-chief, said that he got up at nine o'clock, had two valium tablets and two glasses of medicine, and he then had breakfast and consumed half a bott]e of beer and two more glasses of medicine. He then went to the doctor's and subsequently shopping with his wife, and it was during the latter excursion that the accident occurred.

The answering affidavit asserts that, in addition to the evidence about drinking half a bottle of beer, at about the time he had breakfast, the respondent also said that he had opened a bottle of beer the night before and drunk the first half of the bottle, and it also says that he stated, at a later stage in evidence, that he had nothing to drink after that during the morning.

In cross-examination, he said that he had got out of bed at ten o'clock although his usual time of rising was 7.30, because he didn't feel, to quote his words, 'too good.' He then repeated his statements about the consumption of medicine, valium and beer. When asked, "When did you have the two glasses of beer?' he said, 'Straight after breakfast.'

He denied at first that he had had anything to drink on the previous night but, when asked where the half-bottle of beer came from, he said, 'It was left over from the night before.' He was asked what he had to drink the night before and he said, 'Just the half-bottle', and he also said that he had gone to bed at about eight or nine o'clock the night before.

At this stage, it seemed clear that the line which the defence was designed to take was that there had been no significant drinking whatever on the previous night and no drinking beyond the two glasses of beer and the alcohol containing medicine on the morning of the 22nd.

The next witness called, however, was the defendant's de facto wife. She said that her husband got up at nine o'clock on the morning in question, had breakfast about ten and had some beer immediately after breakfast. She also referred to the valium tablets and the medicine. She

was asked, 'Does he generally drink alcohol after breakfast in the mornings?' and she answered, 'Sometimes'. She was then asked, 'What time did he go to bed the night before?' the answer was 'I do not know. A few Army friends came round with a few bottles.' She was asked what time she went to bed herself and said, '8pm.,' and repeated that she didn't know what time her husband. went to bed nor how much he had had to drink the previous night. When asked why he got up at ten o'clock in the morning – the question was either nine o'clock or ten o'clock – she answered that he had a late night the night before and slept in, and she said that she did not know what time he finished drinking the night before.

This evidence put a very different complexion on the position of the defence. It indicated that a necessary line of inquiry, if doubt was to be cast on the breathalyser result, was to investigate the drinking activities of the night before. The evidence of the respondent's wife was seriously at difference with his. The direct conflict is over the time that he went to bed, but the mention of the friends coming around with bottles presents a very different picture from that presented by the respondent's evidence that he drank half a bottle of beer from his own refrigerator and, looked at as a whole, the wife's evidence suggests a grave incompleteness in the respondent's evidence.

The remaining witness was the expert witness to whom I have referred and it is, I think, a fair inference that he had been asked, to give evidence upon the basis of facts given in evidence by the respondent himself, and not upon the basis of any additional matters referred to by his wife and, accordingly, he initially gave evidence of two matters only. One was that he had conducted a test of his own on the defendant in conditions which were shown, partly by his evidence but mostly by the evidence of the respondent and his wife, to have simulated the conditions of the 22nd July, and the results of the tests which he had taken at the end of that experiment were readings of .02 and .018 per cent at times approximating to the times of the test conducted by the police on the 22nd July. He suggested that a particular error by the police operator might have produced the result shown by the police instrument. The operator had not been, it would seem, specifically asked about this error himself.

The second matter that his evidence dealt with came at the conclusion of his evidence, partly in re-examination and partly, it would seem, in answer to a question asked by the Stipendiary Magistrate. The answer elicited in re-examination was that if the respondent had only consumed half a bottle of beer on the 22nd July, it would be impossible for him to have a reading of .140 per cent at the time the test was taken on that day, and the answer elicited by the Stipendiary Magistrate's question was that to have a reading of .140 per cent at 1.50pm the respondent would have had to have a reading of .388 per cent at midnight the night before, assuming that he had not consumed any more than two glasses of alcohol on the day of the test.

In giving judgment the Stipendiary Magistrate said that the defendant's evidence that he had consumed only half a bottle of beer on the morning of the police test has been consistent throughout, and he was prepared to accept it. He also said that the only discrepancy in the evidence of the respondent and his de facto wife appeared to be in relation to the exact time that he consumed the half bottle of beer, and that he accepted that some Army friends of the defendant had had a drink with the defendant on the night before the Police test but that there was nothing to suggest that the respondent consumed the amount of alcohol on that night which would have been necessary to give him a reading high enough to mean that he would still have a reading of .140 at 1.50pm on the 22nd July. He made an observation about the expert evidence, accepting the result of the check test, and said that the defendant had raised a doubt in the case and that he must have the benefit of the doubt. Accordingly the information must be dismissed.

Turning to the first three grounds of the order to review, nothing in this particular case turns on the matters referred to in s80F(1). Whatever doubt the magistrate expressed about the result of the certificate did not spring from lack of evidence of the matters referred to in that sub-section. The second and third grounds are those about which this problem centres. As I have indicated, my opinion is that the provisions of s80F lead to the result that either an operator's evidence or evidence by certificate of the result of a test will, in the ordinary case and there is nothing abnormal in this respect about this case, have the result that until evidence is adduced throwing doubt on the certificate or on the analysis result, that result should be accepted by the court. That view is consistent with the authorities to which I have referred.

What, in my opinion, has happened in the present case is that the learned magistrate has treated as relevant to the assessment of the probative force of the operator's evidence matters which, in my opinion, were not relevant to that assessment. From the time when the respondent's wife gave her evidence it was clear that there was a possibility that the result of the breath test on the 22nd July might be related to the consumption of alcohol during the night of the 21st/22nd. There was, in the end, no evidence at all of the extent of that consumption and no evidence at all that it was impossible that whatever was consumed during that night might be relevant to the result. I say that there was no evidence at all of the consumption of that night because, in spite of what he actually said, it was in my opinion impossible for the magistrate to accept the respondent's evidence that he had drunk half a bottle of beer and put the other half away in the refrigerator early in the night of the 21st/22nd in the light of the wife's evidence. The respondent's evidence of the consumption of the half bottle of beer was the only evidence of consumption during the night of the 21st/22nd and with that gone, nothing was left. I say that there was no evidence that it was impossible for the consumption of that night to be relevant to the result shown in the test because there was only the flimsiest and most artificial justification for regarding the expert witness's answers in re-examination, and to the magistrate, as relevant to the facts of the case at all.

Once the respondent's evidence of his activities on the night of 21st/22nd had been destroyed – and I draw attention to the fact that the magistrate expressly accepted a significant part of the wife's evidence – there was no reason for assuming that he had stopped drinking at midnight, and the expert's answers in re-examination to the magistrate were based upon the assumption that there had been no consumption after midnight. There is nothing in the evidence which justifies any such assumption. The evidence of the check test was possibly not irrelevant in the case, but it was of no value until the respondent's evidence was accepted, and the prosecution case had practically conceded that if that evidence was true the indicated analysis was wrong. Accordingly my opinion is that the probative force of the direct evidence of the police test was logically left unaffected by the total evidence led on the defendant's behalf, and if that is correct, the decision reached by the magistrate was one which he could not properly reach.

There are three matters in the facts of the case which I mention because I intend, as will appear, to send this case back for a new hearing. They are all matters which the magistrate so far as his statements show ignored. I do no more than draw attention to them, and I make no comment on the significance which ought to be attributed to them. In the case of the third, as will be seen, it will be of significance that may vary from judge to judge, magistrate to magistrate, or court to court. The three matters are these:

The first is that the preliminary test showed a result above .05 per cent. The statute does not make a preliminary test evidence of the fact, but the respondent's case involves necessarily the proposition that two tests on instruments were defective. The second matter is that at the time he was spoken to by the informant, the respondent smelt of beer to an extent that could be noticed in the open air. The third fact is the circumstance that the respondent, after what his wife described as a late night, was having beer immediately after breakfast at ten o'clock in the morning.

I was for some time concerned with the question whether all that arose in this case was a question of fact, so that I refer, however, to an observation in the judgment of the Full Court in *King v McLellan; Kerley v Farrell* [1974] VicRp 92; (1974) VR 773 at 783. I refer to the whole of the long paragraph which appears on that page, but I quote only its opening words:

> "Though it is proper to say that every reasonable presumption should be made in favour of the decision of the magistrate, and that it should be upheld provided it can be supported upon any reasonable view of the evidence open to the magistrate, it is necessary that it appear in the proceedings before the magistrate that there existed a basis for his decision."

That the magistrate decided here was a question of fact, but the reason why, in my opinion, his decision should be interfered with is that upon analysis there does not appear a basis in the evidence for that decision. *[After ordering that the Order Nisi be made absolute, His Honour directed that the case be sent down to be re-heard by a court constituted by another magistrate.]*