38/77

SUPREME COURT OF VICTORIA

ELLIOTT v WILSON

O'Bryan J

18 March 1977

MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE TO SUPPORT 6TH SCHEDULE CERTIFICATE – EVIDENCE THAT ONE SAMPLE TAKEN AND DEALT WITH UNDER THE REGULATIONS – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80(D)(3A).

The defendant was involved in an accident when a motor cycle he was riding collided with a car. At the hearing of a .05 charge the informant tendered in evidence, without objection, to prove the defendant's blood alcohol content, schedule 6 and schedule 6A under section 80D(3) of the *Motor Car Act* 1958. Defendant's counsel argued that there was doubt cast on the Schedule 6A Certificate relied upon by the informant in the chain of events commencing with the taking of a blood sample and terminating with an analysis of part of that blood sample. Consequently, he contended the Magistrate was entitled to have had a reasonable doubt whether the analyst did receive portion of a sample of the defendant's blood taken by Dr V Cherny on the 31st day of January 1976. The Magistrate dismissed the information. Upon Order Nisi to Review—

HELD: Order absolute. Dismissal set aside.

1. The informant had to prove beyond reasonable doubt the container which contained part of the sample of the defendant's blood, and which was labelled by the medical practitioner who took the sample, was the same sample of blood analysed by the analyst. The defendant's evidence did not cast any doubt upon any of those matters and there was nothing for the Magistrate to become confused about.

2. The correct decision in this case depended upon a proper appreciation being made of the evidence before the Magistrate and it was unnecessary to go to authority. On the admissible evidence before him, the Magistrate ought to have found the information proved. On no view of the evidence most favourable to the defendant could a Magistrate have entertained a reasonable doubt about any of the elements that had to be proved in the informant's case.

3. The submissions made by Counsel that there was *prima facie* evidence of more samples taken from the defendant than were accounted for in the certificate and that there was an irregularity because there was an error in the number of samples was untenable. There was but one sample of blood proved to have been taken from the defendant by Dr V Cherny on the 31st day of January 1976 at 7 pm, and that sample was then divided into three parts and dealt with in accordance with the regulations.

O'BRYAN J: "I have read the certificate. It carried an identifying number, 34133. It follows the form of Schedule 6 which was inserted into the *Motor Car Act* 1958 by Act No. 1843, s10 and was amended by Act No. 8430, s7(3). It provides *prima facie* proof of the following facts and matters:

1. That Dr V Cherny of the Base Hospital collected a sample of the blood of Ray Wilson (the defendant) at 7 pm. on the 31st day of January, 1976.
2. That all the regulations relating to the collection of such sample were complied with.
3. That the sample was placed in two containers labelled 'Ray Wilson, 31/1/76, 7 pm.'.

I have underlined the words 'a sample', 'the sample' and 'two containers', because during the argument presented to me on behalf of the defendant, counsel for the defendant repeatedly ignored the precise language used in the Schedule 6 Certificate and in Schedule 6A Certificate. He preferred to refer to 'the samples' and 'the separation of the samples into containers' which is quite erroneous. I suspect that in the Magistrates' Court similar inaccuracy of expression probably occurred and this may well have led the Magistrate to become confused about the events relating to the taking of a blood sample, which I shall relate shortly.

A Schedule 6 Certificate may be tendered in evidence under the provisions of s80D(3A). *[After setting out the provisions of s80D(3A) of the Motor Car Act 1958, His Honour continued]* ...The sample of blood taken by Dr V Cherny was taken under s80DA. The signatory of the certificate, Dr Roger

Foot, held the position of Senior Resident Medical Officer in the District Base Hospital on the first day of February 1976. Under Statutory Rule No. 112 of 1974 – *Motor Car (Blood Samples) Regulations* – the Senior Resident Medical Officer of the District Base Hospital was a prescribed safekeeper of samples of blood (Regulations 223B, 223C and Eighty-Seventh Schedule.)

I have read the certificate. It follows the form of Schedule 6 which was inserted into the *Motor Car Act* 1958 by Act No. 8430 s7(4). It provides *prima facie* proof of the following facts and matters:

> 1. That Dr Roger Foot of the Base Hospital held the office of Senior Resident Medical Officer in the said hospital and was a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA of the *Motor Car Act* 1958 on the 10th day of February 1976.
> 2. That at 9 a.m. on the 1st day of February 1976 Dr Foot received a container labelled 'Ray Wilson 31.1.76, 7 pm. V Cherny', containing portion of a sample of blood.
> 3. That Dr Foot caused the container to be kept safely so that the contents were preserved in good condition until 9.40 a.m. on the 10th day of February 1976 when the container was delivered to Noel Robinson, a member of the Police.
> 4. That all regulations relating to the safekeeping and storage of the container and its contents were complied with.

For the reasons I expressed in relation to the Schedule 6 Certificate, I have again underlined the words 'a container', 'containing portion of a sample of blood' and 'the container' to emphasise the singular.

An approved analyst, under s80D of the *Motor Car Act* was called to prove that on the 5th day of March 1976 he analysed a sealed bottle containing blood and labelled 'Ray Wilson, 7 pm., 31.1.76 with an indecipherable signature'. The result of the analysis was .098 grammes of alcohol per one hundred millilitres of blood.

When that evidence had been adduced the informant closed his case. Mr C Riordan on behalf of the defendant then produced a document purporting to be a Schedule 6A Certificate and tendered it to the Magistrate.

There is a dispute as to whether this document was formally tendered in evidence without objection. However, I believe, to resolve the conflict, I should rely upon the answering affidavit sworn by Mr C Riordan which states that the document in question was tendered in evidence without objection.

I have examined the document. It is in the form of a Schedule 6A Certificate, save for one significant difference. The words 'a member of the Police Force' which appear in the *pro forma* of the Schedule 6A, have been struck out of the document tendered to the Magistrate by Mr C Riordan.

What legal effect this change in the body of the certificate would have had, if objection had been taken to its admissibility at the hearing, may be a nice question for decision in another case! It is unnecessary for me to concern myself further with that question, because I accept the fact that the document was admitted into evidence in this case without objection.

The form of this document enables me to infer that on the 5th day of August 1976 the defendant requested a Dr Charles David Kerr of the Base Hospital to deliver to him a container labelled 'Ray Wilson, 31.1.76, 7 pm.' which had been prepared by Dr V Cherny under the *Motor Car (Blood Samples) Regulations* 1974, previously referred to. This is the only reasonable inference for the Magistrate to have drawn, in the absence of further explanatory evidence. I shall return to consider the regulations again, in view of the argument relied upon by counsel for the defendant in the case before me.

The Magistrate had before him in evidence a document in the form of a certificate 'in or to the effect of Schedule 6A'. At most, in the proceedings before him, the Magistrate may have allowed the defendant to use the document 'as *prima facie* proof of the facts and matters therein contained'. (S80D(3A.)

As a document admitted without objection, or as a Schedule 6A Certificate, it could provide *prima facie* proof of the following facts and matters:

> 1. That Dr Charles David Kerr of the Base Hospital held the office of Senior Resident Medical Officer in the said hospital and was a person of the class prescribed as being responsible for the safekeeping of samples of blood taken under s80DA of the *Motor Car Act* 1958 on the 5th day August 1976.,
> 2. That at 9 a.m. on the 1st day of February 1976, Dr Kerr received a container labelled 'Ray Wilson, 31.1.76, 7 pm.' containing portion of a sample of blood.
> 3. That Dr Kerr caused the container to be kept safely so that the contents were preserved in good condition until 8.45 a.m. on the 5th August 1976, when the container was delivered to Raymond Wilson (the defendant).
> 4. That all regulations relating to the safekeeping and storage of the container and its contents were complied with.

Again, I have underlined the words 'a container', 'containing portion of a sample of blood' and 'the container', to emphasise the singular.

The Magistrate now had evidence before him which proved the collection of a sample of blood from the defendant by Dr V Cherny and the labelling of two containers with the marking, 'Ray Wilson, 31.1.76, 7 pm. V Cherny'. He also had evidence that portion of the sample was placed into two containers labelled in the manner I have indicated.

Counsel for the defendant then tendered to the Magistrate a book which is properly known as the 'Blood Alcohol Book'. (See the affidavit of the said John Walter Gale sworn the 10th day of March 1977).

It came from the Hospital and it matters not, in my view, how it came to be tendered as an exhibit by the defendant's counsel. Counsel appearing for each of the parties before me agreed that I should regard the book as being in evidence before the Magistrate without objection.

The book reveals that a Dr V Cherny collected a sample of blood from a Ray Wilson at 7 pm. on the 31st day of January 1976. It appears to have been accepted by everyone that the Ray Wilson referred to in the Blood Alcohol Book was the defendant, though there was no formal proof this was so. The book went on to reveal that on the 1st day of February 1976 at 9 a.m. three bottles were received by the safekeeper, Dr Foot. The certificate number referred to in the book is 34133. That number is identical with the Schedule 6 Certificate I previously referred to.

The Magistrate proceeded to dismiss the information, stating that on all the evidence there was considerable confusion in the case.

Mr Uren submitted that the introduction of the second Schedule 6A Certificate did not justify the Magistrate's comment about being confused. He submitted that the informant's evidence had proved beyond reasonable doubt that a blood sample had been taken by a legally qualified medical practitioner within two hours after the accident he admitted he was involved in. Part of the sample had been placed into a labelled container which was later analysed. The blood contained a quantity of alcohol in excess of that permitted by the law.

Mr J Riordan developed an ingenious argument which was designed to show me that the Magistrate was entitled to find he was not satisfied beyond reasonable doubt of the defendant's guilt. Mr J Riordan sought to use the Blood Alcohol Book, and the reference in it to three bottles and the Schedule 6A Certificate of Dr Kerr, and the reference in it to a container labelled Ray Wilson, to argue that there may have been four containers of blood and possibly the analyst analysed the wrong person's blood. He argued that there was doubt cast on the Schedule 6A Certificate relied upon by the informant in the chain of events commencing with the taking of a blood sample and terminating with an analysis of part of that blood sample. Consequently, he contended the Magistrate was entitled to have had a reasonable doubt whether the analyst did receive portion of a sample of the defendant's blood taken by Dr V Cherny on the 31st day of January 1976.

In my opinion there should have been no room for confusion in the Magistrate's mind at all. Had his attention been directed to the *Motor Car (Blood Samples) Regulations* 1974, he would have appreciated that, by Regulation 223:

> 'A medical practitioner after withdrawing a blood sample shall—
> (a) divide it into three approximately equal parts;

(b) place each of two such parts in a dry glass container bearing a label stating certain information'.

Regulation 223A then requires the medical practitioner to—

'(a) seal each container; and
(b) attach to each container a label bearing his signature, the date and time the blood sample was taken and the name of the person front whom the sample was taken'.

An examination of the Blood Alcohol Book shows that the sample was placed in three bottles as required by Regulation 223 and Certificate No. 34133 was prepared. Certificate No. 34133 relates to the sample taken from the defendant and the placing of such sample in two labelled containers in compliance with Regulation 223A. The informant's Schedule 6A Certificate relates to one of the labelled containers and the defendant's Schedule 6A Certificate relates to the other. The two certificates proved that one part of the sample was placed in a sealed container which was labelled, and another part of the sample was likewise placed in a sealed container which was labelled. In due course, an approved analyst analysed the contents of the container which was handed over to Noel Robinson, a member of the Police Force, by Dr Foot and the alcohol level was determined. Mr Uren was prepared to support the informant's case by reference to authority, and in particular he relied upon *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 and an unreported judgment of Gowans J in *Collins v Mithen* (delivered 21.5.75), where the presumption of regularity in this type of case is discussed. In my opinion, the correct decision in this case depends upon a proper appreciation being made of the evidence before the Magistrate and it is unnecessary to go to authority. On the admissible evidence before him, the Magistrate ought to have found the information proved. On no view of the evidence most favourable to the defendant could a Magistrate have entertained a reasonable doubt about any of the elements that had to be proved in the informant's case.

The informant had to prove beyond reasonable doubt the container which contained part of the sample of the defendant's blood, and which was labelled by the medical practitioner who took the sample, was the same sample of blood analysed by the analyst. The defendant's evidence did not cast any doubt upon any of those matters, in my opinion, and there was nothing for the Magistrate to become confused about.

The submissions made by Mr J Riordan to myself that there was *prima facie* evidence of more samples taken from the defendant than were accounted for in the certificate and that there was an irregularity because there was an error in the number of samples is untenable. There was but one sample of blood proved to have been taken from the defendant by Dr V Cherny on the 31st day of January 1976 at 7 pm, and that sample was then divided into three parts and dealt with in accordance with the regulations.

For these reasons I consider that the defendant should have been convicted of the offence charged in the information. The order nisi will be made absolute on grounds (e) and (f). The order of the court below dismissing the information will be set aside and the information remitted to the Magistrates' Court at Shepparton to convict the defendant and impose such penalty as in the circumstances should be thought proper. ...
