42/79

SUPREME COURT OF VICTORIA

VAUGHAN v BECHMANN

Beach J

31 July 1979

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT BREATH TEST – READING OF 0.250% BAC – DRIVER SAID THAT HE HAD ONLY CONSUMED FIVE 7-OZ GLASSES OF BEER PRIOR TO THE TEST – DRIVER WAS COHERENT WHEN APPREHENDED AND HAD THE DEMEANOUR OF A SOBER MAN – CERTIFICATE NOT PERSONALLY HANDED TO DRIVER WHEN TEST COMPLETED – WHETHER SUFFICIENT COMPLIANCE WITH STATUTORY PROVISION – CERTIFICATE TENDERED TO COURT PURPORTED TO BE A COPY OF THE CERTIFICATE – WHETHER SUFFICIENT – AT THE HEARING THE MAGISTRATE ACCEPTED THE EVIDENCE AS TO THE DRIVER'S CONSUMPTION OF ALCOHOL – DRIVER CONVICTED OF OFFENCE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F, 80G, 81A.

HELD: Order nisi absolute. Conviction set aside. Information dismissed.

1. What s80F (2) of the *Motor Car Act* 1958 ('Act') requires (*inter alia*) is that the operator of the breath analysing instrument shall deliver to the person whose breath has been analysed a certificate in the form or to the effect of Schedule Seven as soon as practicable after a sample of that person's breath has been analysed. Can it be said that the operator has complied with that provision in the event he does not personally hand the certificate to the person whose breath has been analysed but hands it to a third person who then, and in his presence, hands it to the person whose breath has been analysed? The section does not require the operator to personally hand the certificate to the person whose breath has been analysed – it requires him to deliver it to him. That requires him to do no more than ensure that the person whose breath has been analysed receives the certificate as soon as practicable after the analysis. It is of no consequence whether he personally hands the certificate to that person or hands it to him via a third person. There is sufficient compliance with the sub-section once he has caused it to be delivered in the way he did in this case.

2. S80F(3) of the Act provides that a document purporting to be a copy of any certificate given in accordance with sub-s(2) "shall be *prima facie* evidence" etc. The significant word in the sub-section for present purposes is the word "purporting". The document tendered in evidence on behalf of the informant purported to be a copy of the certificate given in accordance with sub-s(2). The certificate was headed "Schedule Seven - Motor Car Act 1958" and was in the form or to the effect of the certificate in Schedule Seven. Under the words "Schedule Seven – Motor Car Act 1958" there appeared the words "Certificate of Authorized Operator of Breath Analysing Instrument". The fact that the informant did not check the copy tendered in evidence with the certificate given to the defendant was of no significance whatsoever. If the document tendered purported to be such a copy that was sufficient.

3. In the present case the certificate tendered in evidence certified that the breath analysing instrument indicated that the percentage of alcohol present in the blood of the defendant was .250 per cent. By virtue of the provisions of s80F(1) of the Act that was evidence that that was the percentage of alcohol present in the defendant's blood at the time his breath was analysed. The defendant swore that between approximately 7pm and 9.15pm he had consumed the equivalent of five 7-oz glasses of beer. The magistrate accepted that evidence and accepted that that was the only alcohol he had consumed. The evidence further established that apart from the fact that there was a smell of alcohol on the defendant's breath and that his eyes were a bit bloodshot he was perfectly coherent and his demeanour had been that of a sober man.

4. It is now a matter of notoriety that the consumption of approximately five 7-oz. glasses of beer could not produce a percentage of alcohol in a person's blood as high as .250 or anything like that figure. That fact is now so generally known as to give rise to the presumption that all persons are aware of it. Since the introduction of the legislation under discussion the authorities in Victoria have constantly been at pains to bring home to the public the fact that the consumption of five standard alcoholic drinks will produce a blood alcohol content of about .05 per cent.

5. In the present case the Magistrate had before him evidence in the form of the breathalyzer

reading that the alcoholic content of the defendant's blood was .250 per cent. On the other hand he accepted the evidence which established that the defendant had only consumed five 7-oz. glasses of beer, was perfectly coherent when apprehended and had the demeanour of a sober man. Once the Magistrate accepted that evidence he had no alternative but to reject the evidence as to the breathalyzer reading. As there was no other evidence as to the alcoholic content of the defendant's blood, the information should then have been dismissed.

BEACH J: This is the return of an order nisi to review a decision of the Magistrates' Court at Geelong given on the 14th November 1978 when Gerd Bechmann was convicted of the offence that he did on the 21st October 1978 at Anglesea drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 ml. of blood was in excess of .05 per cent.

From the evidence given in the court below it appeared that at approximately 9.30 on the night in question the defendant was intercepted by two police, the informant and a Sergeant of Police named Hicks, as he was driving his motor vehicle along the Ocean Road near Anglesea. The defendant was conveyed to the Geelong Police Station and at 10.11pm was given a test on a breath analyzing instrument by Constable Henry Arthur Kamstra, a person authorised by the Chief Commissioner of Police to operate such an instrument.

That test indicated that the quantity of alcohol then present in the blood of the defendant was .250 grams of alcohol per 100 ml. of blood which expressed as a percentage was .250 per cent. At 10.21pm Kamstra prepared a certificate purporting to be under the provisions of s80F of the *Motor Car Act* in the form or to the effect of Schedule Seven to the Act, signed the certificate and handed two copies to the informant. The informant, in the presence of Kamstra handed one copy of the certificate to the defendant.

Before the Magistrate the only witness called by the police to give evidence against the defendant was Sergeant Hicks. He swore that having intercepted the defendant at approximately 9.30pm on that evening he asked the defendant his name and address and asked him to produce his licence. The defendant gave his correct name and address but said that he did not have his licence with him. Noticing that the defendant's breath smelt of alcohol, Sergeant Hicks asked the defendant whether he had been drinking, to which the defendant replied that he had consumed beer at the hotel. The defendant was then conveyed to the Geelong Police Station where he was given the breath test by Constable Kamstra. According to Sergeant Hicks when the defendant was informed that the breathalyzer reading was .250 per cent, he replied, "You've got to be joking".

During the course of cross-examination, Sergeant Hicks was asked whether there was anything about the defendant's demeanour, apart from the fact that his breath smelled of alcohol, to indicate he had been drinking. To that, Sergeant Hicks replied that the defendant's eyes were a bit bloodshot. He was then asked whether there was anything apart from the smell of liquor on the defendant's breath and the fact that his eyes were bloodshot to indicate the defendant had consumed alcohol, to which he replied, "No". Sergeant Hicks then agreed that the defendant had been perfectly coherent that evening and that his demeanour had been that of a sober man. When it was put to Sergeant Hicks that those facts were totally inconsistent with a reading of .250 per cent, he replied that it depended on the individual. When it was put to him that from his experience most people with a reading of .250 would be heavily under the influence: and certainly exhibit visible signs of being drunk, such as unsteady gait, inability to comprehend questions and slurring of words, he again replied that it was determined by the individual. Sergeant Hicks agreed that at the time the breathalyzer test was given to the defendant, the defendant had stated that he was experienced in the use and operation of scientific machines using a Galvometer as part of their apparatus and that he wanted to see the exact reading. That request was refused. When it was put to Sergeant Hicks that the needle on the Galvometer had not moved from zero during either of the tests given by the defendant, he agreed that it did not on the first occasion as the operator had not operated the breathalyzer. However he believed that the needle moved on the second occasion.

During the course of his evidence, Sergeant Hicks sought to tender a document said to be a copy of the certificate in the form of Schedule Seven handed to the defendant by the informant at 10.21pm on the 21st October 1978. Objection was taken to the production of that document on two grounds. In the first instance it was contended, that as the breathalyzer operator had not personally handed the certificate to the defendant, he had not complied with the provisions of

s80F(2) of the Act. In the second instance it was said that as Sergeant Hicks had not checked the document sought to be tendered with the certificate handed to the defendant by the informant, there was no evidence that the document sought to be tendered was in fact a copy of that certificate. The Magistrate over-ruled those objections and admitted the certificate in evidence.

Before the Magistrate the defendant gave evidence to the effect that on the night in question he spent between the hours of approximately 7 o'clock and 9.15 o'clock at the Anglesea Hotel playing snooker. During that time he consumed four glasses of beer. After leaving the hotel he spoke to some people gathered around a bonfire outside the hotel and whilst speaking to them consumed approximately half the contents of a small can of beer. The defendant's evidence as to what occurred at the time he was given a breathalyzer test at the Geelong Police Station appears in paragraph 10 of his Affidavit sworn 12 December 1978 and was to this effect:

> "That I was introduced to another police officer who apparently was in charge of the breathalyzer machine. That the Machine was on the desk on the left-hand side of me about 1' to 1½' away from me. That I looked at the Galvometer on the machine and the needle was on zero. That I was asked to blow into the machine which I did and then the operator did something by way of appearing to adjust or perform some operation to the left side of the breathalyzer. That I looked at the Galvometer and there was no movement of the needle. It remained on zero. That I told the operator that I was an instrument maker and that I wanted to see the exact reading which request was refused with the words, 'No, You can't your a smart cookie!' That I was then told to blow into the breathalyzer again which I did and again the Galvometer remained on zero. That my lip was swollen and I had blood in my mouth and I asked the operator whether that would make any difference to which he replied No. That when the reading of .250 was put to me I did reply, 'You've got to be joking '".

During the course of the case for the defendant, counsel sought to tender in evidence a document published by the Government Printer and circulated throughout the State of Victoria. On one side of the document the words, "Don't blow your licence - .05%" were printed; on the other side and amongst general information relating to drinking and driving the words "5 standard drinks will take you to about .05%, more than one drink an hour after that will take you over the legal limit". The Magistrate refused to accept the document in evidence on the basis that although it was published by the Government Printer he could not take judicial notice of and/or place any weight on the effect of its contents.

At the conclusion of the whole of the evidence it was submitted on behalf of the defendant that the uncontradicted evidence of the defendant to the effect that he had only consumed four 7-oz glasses of beer and approximately half a small can of beer taken together with the evidence of his demeanour, etc. was such as to override the *prima facie* effect of the reading on the certificate. The Magistrate rejected that submission stating that he accepted that the defendant had duly consumed the equivalent of five beers and no more but that in the absence of some form of scientific or expert evidence would not find the *prima facie* effect of the certificate rebutted. The Magistrate then convicted the defendant and fined him $150; cancelled all licences held by him under the Act and disqualified him from obtaining any further licence for a period of two years.

On 18 December 1978 Master Brett granted an order nisi to review that decision. The order nisi was granted on the following: grounds:

> "1. That the Magistrate was wrong in finding that s80F of the *Motor Car Act* had been complied with.
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> (2) That in any event, the Magistrate even if correct in finding that s80F of the *Motor Car Act* had been complied with was wrong on the evidence in finding that the *prima facie* effect of the certificate therein referred to had not been rebutted.
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> (3) That the Magistrate was wrong in finding that the *prima facie* effect of the said Certificate could only be rebutted by scientific and/or expert evidence.
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> (4) That on the evidence the Magistrate should have dismissed the Information."

In support of ground 1 it was first argued on behalf of the defendant that as the certificate in the form of Schedule Seven had not been personally handed to the defendant by the breathalyzer operator, the breathalyzer operator had not complied with s80F of the Act and the certificate should not have been admitted in evidence by the Magistrate. It was next argued that as Sergeant Hicks

had not checked the copy certificate received by the Magistrate in evidence with the certificate handed to the defendant at 10.21pm on the 21st of October 1978, there was no evidence that the document tendered was a copy of that certificate and on that basis it should not have been received in evidence.

To determine these matters one must first have regard to the provisions of sub-ss(1), (2) and (3) of s80F. Those sub-sections are in the following form:

> "(1) Where the question whether any person was or was not under the influence of intoxicating liquor or where the question as to the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant—
> (a) upon any trial for manslaughter or negligently causing grievous bodily harm arising out of the driving of a motor car; or
> (b) upon any trial or hearing for an offence against sub-section (1) of section 318 of the *Crimes Act* 1958; or
> (c) upon any hearing for an offence against section 80A, section 80B, section 81A, or section 82 of this Act—
> then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the percentage of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorized in that behalf by the Chief Commissioner of Police and the percentage of alcohol so indicated shall subject to compliance with the provisions of sub-section (4) be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument.
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> (2) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument shall sign and deliver to the person whose breath has been analysed a certificate in or to the effect of Schedule Seven of the percentage of alcohol indicated by the analysis to be present in his blood (which may be by way of an indication on a scale) and of the date and time at which the analysis was made.
>
> (3) A document purporting to be a copy of any certificate given in accordance with the provisions of sub-section (2) and purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-section (1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness."

What sub-s(2) requires (*inter alia*) is that the operator of the breath analysing instrument shall deliver to the person whose breath has been analysed a certificate in the form or to the effect of Schedule Seven as soon as practicable after a sample of that person's breath has been analysed. Can it be said that the operator has complied with that provision in the event he does not personally hand the certificate to the person whose breath has been analysed but hands it to a third person who then, and in his presence, hands it to the person whose breath has been analysed? In my opinion it can. The section does not require the operator to personally hand the certificate to the person whose breath has been analysed – it requires him to deliver it to him. I consider that requires him to do no more than ensure that the person whose breath has been analysed receives the certificate as soon as practicable after the analysis. To my mind it is of no consequence whether he personally hands the certificate to that person or hands it to him via a third person. There is sufficient compliance with the sub-section once he has caused it to be delivered in the way he did in this case.

Sub-section (3) provides that a document purporting to be a copy of any certificate given in accordance with sub-s(2) "shall be *prima facie* evidence" etc. In my opinion the significant word in the sub-section for present purposes is the word "purporting". Did the document tendered in evidence on behalf of the informant purport to be a copy of the certificate given in accordance with sub-s(2)? The short answer to that question is yes. The certificate was headed "Schedule Seven - Motor Car Act 1958" and was in the form or to the effect of the certificate in Schedule Seven. Under the words "Schedule Seven – Motor Car Act 1958" there appeared the words "Certificate of Authorized Operator of Breath Analysing Instrument". The certificate then states. "I, Henry Arthur Kamstra of Geelong Police Station Constable of Police, hereby certify:-

> "1. That I am a person authorized by the Chief Commissioner of Police under section 80E of the Motor Car Act 1958 to operate a breath analysing instrument;

> 2. That on the 21st day of October 1978 at 10.11 p.m. at Geelong Police Station I did analyse a sample of the breath of Gerd Bechmann of 77 Power Street, St Albans by means of a breath analysing instrument
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> 3. That the breath analyzing instrument I used in the course of such analysis was on the day referred to—
> (a) of a type approved for the purposes of the said section 80E by the Governor in Council by notice published in the Government Gazette
> (b) an instrument in relation to which all regulations made under s80F with respect instruments were complied with; and
> (c) in proper working operated by me in accordance with the regulations.
>
> 4. That the said instrument indicated that the quantity of alcohol present in the blood of the said Gerd Bechmann at the time and place referred to was 0.250 grams of alcohol per 100 millilitres of blood which, expressed as a percentage, is 0.250 per centum; and
>
> 5. That as soon as practicable after the completion of the breath analysis namely at 10.21 p.m. on the said day delivered this certificate to the said Gerd Bechmann in accordance with the provisions of sub-section (2) of the said section 80F.
> DATED this 21st day of October 1978."

Kamstra's signature then appeared above the words "Signature of Authorized Operator". "Rank Constable" "No. 18149".

On the face of it that certificate clearly purported to be a copy of the certificate delivered by Constable Kamstra to the defendant at 10.21pm on the 21st October 1978. That Sergeant Hicks did not check the copy tendered in evidence with the certificate given to the defendant that night is in my opinion of no significance whatsoever. If the document tendered purported to be such a copy that to my mind was sufficient.

It follows from the views I have expressed that there was compliance with s80F of the Act so far as the certificate in question was concerned. I find therefore ground 1 of the order nisi has not been made out.

Grounds 2, 3 and 4 can conveniently be dealt with together.

The principal argument advanced in support of those grounds by counsel for the defendant was that the certificate admitted in evidence by the Magistrate was only *prima facie* evidence of the facts and matters stated in it. Thus it was open to the defendant to adduce evidence with a view to rebutting any fact or matter set out in the certificate. In the event a defendant chose to call such evidence it was then for the Magistrate to consider the whole of the evidence called in relation to that particular fact or matter and make a finding in relation to it bearing in mind at the time he did so that the burden lay upon the informant of satisfying him beyond reasonable doubt in so far as that particular fact or matter was concerned.

What was challenged by the defendant in the present case was the statement and I quote:

> "4. That the said instrument indicated that the quantity of alcohol present in the blood of the said Gerd Beckmann at the time and place referred to was 0.250 grams of alcohol per 100 millilitres of blood which, expressed as a percentage, is 0.250 per centum."

It was said that in view of the evidence adduced by the defendant in cross-examination of Sergeant Hicks and his own evidence the reading of .250 was clearly wrong. As a matter of common knowledge a person would have to consume substantially more than five 7-oz. glasses of beer to produce a reading as high as that. Once the Magistrate accepted the defendant's evidence that he had not consumed more than that quantity of beer that evening, as he did, he should then have rejected the statement in the certificate to the effect that the alcoholic content in the defendant's blood was .250 per cent. In the event the Magistrate rejected the evidence of the reading or more accurately was not satisfied beyond reasonable doubt in relation to it, as there was no other evidence before him establishing the alcoholic content of the defendant's blood at the relevant time, he would then have no alternative but to dismiss the information. It was further said that the evidence called by the defendant to rebut any fact or matter appearing in the certificate need not be scientific or expert evidence but could be lay evidence as it was in this case.

For the informant it was contended that in the first instance one must consider what fact or matter it is that appears in the certificate. In the present case the fact or matter appearing in the certificate was not that the defendant's blood contained .250 grams of alcohol per 100 millilitres of blood but that the breath analysing instrument indicated that that was the quantity of alcohol present in the defendant's blood at the time the test was conducted. Thus the fact to be challenged by the defendant in so far as the certificate was concerned was not whether his blood in fact contained that quantity of alcohol but whether the breath analysing instrument indicated that it did at the time the test was given. The evidence to be looked at by the Magistrate therefore was the evidence placed before him in relation to the reading of the breath analysing instrument. In that connection it was said that the only evidence was the statement in the certificate itself. The defendant had not produced any evidence to the effect that when tested the instrument did not indicate that the quantity of alcohol present in his blood was .250 grams per 100 millilitres of blood. What was said therefore was that in the absence of evidence challenging the actual reading of the breathalyzer the magistrate had no option but to accept the fact that the reading was 0.250 grams per 100 millilitres which expressed as a percentage was .250 per cent.

It was submitted that having reached that stage one must then consider the effect of sub-s (1) of s80F in relation to the matter.

Sub-section (1) provides, *inter alia*, that evidence may be given of the percentage of alcohol indicated to be present in the blood of that person by a breath analysing instrument and the percentage of alcohol so indicated shall be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument.

In the present case the breath analysing instrument indicated that the percentage of alcohol in the defendant's blood was .250 per cent. By virtue of the provisions of sub-s(1) that was evidence of the percentage of alcohol present in his blood at the time his breath was analysed.

Finally it was contended that once one reached that stage the only way a defendant could escape was by satisfying the onus cast upon him by s80G of the Act.

Section 80G provides;

> "For the purposes of this Division if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed."

In the present case the defendant had not called any evidence to establish what percentage of alcohol was present in his blood at the time the offence was committed and therefore had not satisfied the onus which rested on him.

It would seem to me that there is a fallacy in this argument advanced on behalf of the informant. The argument proceeds on the basis that once the evidence is given of the percentage of alcohol indicated to be present in the blood of a defendant by a breath analysing instrument, by virtue of the provisions of sub-s(1), a court must conclude that that was the percentage of alcohol present in his blood at the time his breath was analysed leaving it to the defendant to exculpate himself if he can by satisfying the onus cast upon him by s80G. I do not consider that that is the situation. Whilst evidence of the percentage of alcohol indicated to be present in the blood of that person by a breath analysing instrument is by virtue of the provisions of sub-s(1) of s80F evidence of the percentage of alcohol present in the blood of that person at the time his breath was analysed by the instrument, it need not necessarily be the only evidence placed before a court in relation to the matter as indeed sub-s(1) makes clear. A defendant is not precluded from placing before a court such admissible evidence as he wishes whether it be of a scientific or expert nature or not in relation to the matter.

A court looking at the whole of the evidence placed before it including the percentage of alcohol indicated to be present in the blood of the person in question, by the breath analysing instrument, must then make a finding in relation to the matter, that is, a finding as to what was the percentage of alcohol present in the blood of that person at the time his breath was analysed by the instrument.

In the present case the certificate tendered in evidence certified that the breath analysing instrument indicated that the percentage of alcohol present in the blood of the defendant was .250 per cent. By virtue of the provisions of sub-s(1) that was evidence that that was the percentage of alcohol present in the defendant's blood at the time his breath was analysed. The defendant swore that between approximately 7pm and 9.15pm he had consumed the equivalent of five 7-oz glasses of beer. The magistrate accepted that evidence and accepted that that was the only alcohol he had consumed. The evidence further established that apart from the fact that there was a smell of alcohol on the defendant's breath and that his eyes were a bit bloodshot he was perfectly coherent and his demeanour had been that of a sober man.

In my opinion it is now a matter of notoriety that the consumption of approximately five 7-oz. glasses of beer could not produce a percentage of alcohol in a person's blood as high as .250 or anything like that figure. I consider that that fact is now so generally known as to give rise to the presumption that all persons are aware of it. Since the introduction of the legislation under discussion the authorities in this State have constantly been at pains to bring home to the public the fact that the consumption of five standard alcoholic drinks will produce a blood alcohol content of about .05 per cent.

In the present case the Magistrate had before him evidence in the form of the breathalyzer reading that the alcoholic content of the defendant's blood was .250 per cent. On the other hand he accepted the evidence which established that the defendant had only consumed five 7-oz. glasses of beer, was perfectly coherent when apprehended and had the demeanour of a sober man. In my opinion once the Magistrate accepted that evidence he had no alternative but to reject the evidence as to the breathalyzer reading. As there was no other evidence as to the alcoholic content, of the defendant's blood, the information should then have been dismissed.

Accordingly the order nisi will be made absolute with $200 costs. The application will be set aside and the information will be dismissed.
