24/83

SUPREME COURT OF VICTORIA

GOURLAY v FREEMAN

Southwell J

11 May 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – BLOOD SAMPLE TAKEN MORE THAN 2 HOURS AFTER DRIVING – SUBMISSION OF NON-COMPLIANCE WITH REGULATIONS: *MOTOR CAR ACT*, SS81A, 80G; *MOTOR CAR (BLOOD SAMPLES) REGULATIONS* 1977.

F. admitted that he was the driver of a motor car which collided with a pole "not later than about 10.15pm." F. was injured in the collision, and was admitted to hospital where, at about 1.00am a doctor took a blood sample from him. The subsequent analysis of the blood sample indicated 0.176 % blood/alcohol. F. was charged, and when the matter came on for hearing, the doctor was cross-examined concerning his taking of the blood sample. At the end of the evidence for the prosecution, defence counsel submitted there was no case to answer on the ground that the doctor failed to comply with the Regulations. The Magistrate agreed and dismissed the information. Upon order nisi to review—

HELD: Order nisi absolute.
(1) The informant does not have to prove that the doctor complied with the Regulations.
***Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596;**
***Huntington v Jupp* MC 24/78; and**
***Attwood v Lacy* (unrep, 24 May 1979), applied.**

(2) No law provides that the doctor taking the blood sample must read the actual Regulations.

(3) It is no answer to a charge of exceeding .05% that the blood sample was not taken within 2 hours of the driving.
***Wright v Bastin (No 2)* [1979] VicRp 35; (1979) VR 329; and**
***R v Cheer* [1979] VicRp 53; (1979) VR 541, applied.**

SOUTHWELL J: *[After setting out the facts, His Honour continued]:* … **[3]** The informant obtained an order nisi to review that decision on grounds which were subdivided into eight in number. Before me both counsel argued the case on the basis that either all or none of the grounds were made out. It was conceded by Mr Wilson that the informant did not have to prove compliance with the *Motor Car (Blood Samples) Regulations* 1977 (see *Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596; *Huntington v Jupp*, O'Bryan J, unrep, 19 May 1978; *Attwood v Lacy* Gray J, unrep, 24 May 1979), and further conceded that the certificates under Schedules 6 and 8 were admissible. Nevertheless, Mr Wilson argued the magistrate was entitled to entertain such doubts as to the reliability and weight of the evidence as to justify the **[4/5]** dismissal of the information. It was said that he could do so as a matter of discretion upon the authority of *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 at p326.

The case now before me raises no new point of law, it concerns no difficulty of interpretation. The simple question is whether on the evidence it was open to the magistrate to have dismissed the information at that stage of the hearing. Accordingly, I turn at once to a brief analysis of the magistrate's findings.

> (1) "That Dr Barnett by not personally ensuring that the sample bottles contained preservatives plus coagulant failed to comply with the Regulations."

The first answer to that is virtually conceded – the informant does not have to prove compliance. This finding was apparently based on part of the cross-examination of Dr Barnett where, in answer to a question whether the bottles supplied with the blood sampling kit were clean, it was said:

> "Dr Barnett gave evidence that sealed bottles were supplied with the blood sampling kit and that apart from having a few grains of white powder in the bottom they were empty. Dr Barnett said that

the white powder was an anti-coagulant and that he knew this was so because after he placed the blood in the bottles and inverted them several times, the blood did not clot."

To interpret that, as Mr Wilson submitted it should be interpreted, as involving affirmative evidence that there was no preservative present is in my view an unwarranted interpretation – but one I should add which was not placed upon it by the Magistrate.

[6] The Magistrate appears not to have applied his mind to the inferences which might be drawn from the uncontradicted evidence of Dr Barnett concerning his training, and the sampling kit including the instructions card. To my mind there appears in the evidence little room for doubt that the regulations were complied with.

(2) "That Dr Barnett by failing to read the actual regulations had failed to comply with the regulations."

Dr Barnett stated that the regulations were complied with, but admitted in cross-examination that he had not read the actual regulations (as published by the Government Printer) but merely the instruction card accompanying the sample kit, a card entitled "Regulations". That card was not called for or tendered in evidence. The magistrate appears not to have applied his mind to the inferences which might clearly be drawn from all the surrounding circumstances including the matters I have earlier referred to. Certainly it was not open to the magistrate to have found that the regulations were not complied with by reason of the failure of Dr Barnett to read them. No law provides that the doctor taking the sample must read the actual regulations.

(3) "The *prima facie* evidence...could not now be accepted as the *viva voce* evidence did not support the contention that the regulation had been complied with."

The answer to this appears under paragraph numbered 1 above. However, I am bound to add that I am unable to discern in the evidence anything which tended to prove that the regulations were not complied with.

(4) "There existed reasonable doubt as to whether the blood sample was taken within two hours of the accident."

There **[7]** did indeed, but there is abundant authority for the proposition that this is no answer: *Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329 at p337; *R v Cheer* [1979] VicRp 53; (1979) VR 541.

Mr Wilson, in comprehensive submissions, painstakingly, and if I may say so, ingeniously went through the evidence in an endeavour to justify the existence of a doubt in the mind of the magistrate as to proof on one or other elements in the charge, and thereby to justify the dismissal of the information. The note of the magistrate's findings do not permit of any ready answer to the question whether the magistrate had regard to the appropriate principles in deciding whether there was a case to answer – see *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671; *R v Chee* [1980] VicRp 32; (1980) VR 303; *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; [1978] VR 505 at p512; (1978) 3 ACLR 289; [1978] ACLC 40-381. The magistrate made no reference to some of the matters relied upon by Mr Wilson as pointing to the unreliability or lack of weight in the evidence. In my opinion, the magistrate was in error in dismissing the information. There was abundant evidence upon which he could have been satisfied of guilt indeed, if the evidence stayed as it is, having regard to the high reading at 1 a.m. – .176 per cent, I find some difficulty in comprehending the basis of any reasonable doubt that the reading was in excess of .05 per cent at 10.15 pm. Accordingly, the order nisi must be made absolute and the matter remitted to the magistrate to be further dealt with according to law. The respondent is to pay the applicant's costs to be taxed and reserve costs.

As to the application for a granting of a certificate under s13 of the *Appeals Costs Fund Act*, I believe, that generally speaking, where as in the case the magistrate is persuaded by what seems to me to be unmeritorious submissions to dismiss an information, the party whose counsel so acts ought not to have recourse to the Fund. I am not prepared therefore to grant the certificate.