5/98; [1997] VSC 46

SUPREME COURT OF VICTORIA — COURT OF APPEAL

WRIGHT v MORTON

Tadgell, Ormiston and Charles JJA

14, 15 May, 23 September 1997

[1998] 3 VR 316; (1997) 95 A Crim R 125; (1997) 26 MVR 159

MOTOR TRAFFIC – DRINK/DRIVING – CHARGES LAID UNDER S49(1)(b) AND (g) OF *ROAD SAFETY ACT* 1986 – BLOOD SAMPLE TAKEN OUTSIDE 3-HOUR PERIOD – CHARGE UNDER S49(1)(g) DISMISSED – CERTIFICATES OF THE TAKING AND ANALYSIS OF A BLOOD SAMPLE ADMITTED INTO EVIDENCE – WHETHER SUCH CERTIFICATES ADMISSIBLE – PRESUMPTION OF CONTINUANCE – PRESUMPTION APPLIED - DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR IN APPLYING PRESUMPTION – FAILURE BY DEFENDANT TO GIVE EVIDENCE – WHETHER ADVERSE INFERENCES COULD BE DRAWN: *ROAD SAFETY ACT* 1986, SS48(1A), 49(1)(b),(g), 57(2)(3)(4).

1. Per Charles JA, with Ormiston JA agreeing:
(a) Section 57 of the *Road Safety Act* 1986 ("Act") provides a statutory basis for the admission into evidence of the taking of a sample of blood from the driver of a motor vehicle and of the analysis of that sample. Under s57(2) of the Act, evidence of the taking and analysis of a blood sample may be given subject to the provisos that —

(i) the sample was taken within 3 hours after the person drove a motor vehicle; and
(ii) the analysis of that sample was carried out within 12 months after it was taken.

Where either of the time limits has not been complied with, it is open to the prosecution to elicit such evidence from an appropriately qualified expert. However, where the prosecution seeks to rely on certificates under s57(3) and (4) of the Act to prove the facts stated in them, the prosecution must comply with the two time limits specified in s57(2).

***Wright v Bastin (No 2)* [1979] VicRp 35; [1979] VR 329; and**
***R v Cheer* [1979] VicRp 53; [1979] VR 541, not followed.**
***Wright v Morton* (1996) 87 ACrimR 446; 24 MVR 497; MC 26/96, overruled (except as to ruling in relation to the meaning of "legally qualified medical practitioner").**

(b) Accordingly, where a magistrate was satisfied that the prosecution had not established that a blood sample had been taken within 3 hours after the person drove a motor vehicle, the magistrate was in error in admitting into evidence the certificates relating to the taking and analysis of the person's blood sample.

2. Per the Court:
(a) Assuming that the certificates were properly admitted into evidence under s57(3) and (4) of the Act, it was not open to the magistrate to find the charge under s49(1)(b) of the Act proved by applying the presumption of continuance. Courts are entitled to accept that when alcohol is consumed it is progressively absorbed into and eliminated from the blood. However, the effect of alcohol may vary between individuals and according to circumstances; the blood alcohol concentration of any individual is constantly changing, never at rest. In the present case, since the blood sample was taken after the statutory 3-hour period had expired, it was not open to the magistrate to draw inferences to the prejudice of the defendant when dealing with an element as volatile as changing blood alcohol levels.

***Smith v Maddison* [1967] VicRp 34; [1967] VR 307; and**
***Heywood v Robinson* [1975] VicRp 55; [1975] VR 562, not followed.**
***R v Olejarnik* (1994) 33 NSWLR 567; (1994) 72 A Crim R 542; (1994) 19 MVR 125, followed.**

(b) The failure by the defendant to give evidence on the issue of post-driving consumption of alcohol was not a fact which enabled the magistrate to draw inferences more readily against him. Apart from the certificates which should not have been admitted into evidence, the deficiencies in the prosecution case entitled the defendant to remain silent and rely on the burden of proof cast upon the prosecution.

***Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23, referred to.**

TADGELL JA: [1] Having had the advantage of reading in draft the reasons prepared by Charles JA, I agree with him that this appeal should succeed. I do so without reservation on the ground that, if the certificate of analysis was properly received in evidence, the presumption of continuance could not be applied to establish the appellant's blood alcohol concentration at the time of the alleged offence, there being no satisfactory evidence that the blood sample had been taken within three hours of the driving of the motor vehicle. I cannot say that it is a notorious fact that any person's blood alcohol concentration three hours after a given point of time is necessarily no higher than it was at that point, even if it be assumed that he ingested nothing in the meantime. I decided otherwise in the unreported case of *James v Sanderson*, 23 March 1982. With the benefit of the argument on this appeal, I must say of that case, to adopt the language of Bramwell B, *arguendo*, in *Andrews v Styrap* (1872) 26 LT 704 at 706, that "The matter does not appear to me now as it appears to have appeared to me then". I do not wish to add to what Charles JA has written on the matter of the application of the presumption of continuance. [*His Honour then dealt with the other question raised by the appeal and concluded that a certificate under s57(4) was not* prima facie *inadmissible merely because it related to an analysis of a blood sample not proved to have been taken within the 3-hour period.*]

ORMISTON JA: [1] In this appeal I have had the benefit of reading in draft form the judgments of both Tadgell JA and Charles JA which each agree that the appeal should be allowed and the conviction quashed. They differ as to the meaning and operation of sub-ss(3) and (4) of s57 of the *Road Safety Act* 1986 but, with much hesitation, I have concluded that the interpretation of Charles JA should be preferred. So, for the reasons stated by him, I agree that the appeal should be allowed.

CHARLES JA: [*His Honour set out the facts, the nature of the evidence given on the hearing of the charges, the magistrate's decision, the questions of law raised on appeal and continued*]... **[7]** The appeal raises two issues, both important and both of some difficulty. The first is whether the certificates tendered in evidence before the magistrate of the taking and analysis of the blood sample from the appellant, were admissible in evidence and proved the facts stated in them, having regard to the terms of the legislation. The second question is whether, assuming that the certificates were properly admitted and were relevant, they established as against the appellant that at the time the car he was driving was involved in the accident on 9 April 1994, the concentration of alcohol present in his blood either exceeded the prescribed concentration or was .140 per cent, having regard to the presumption of continuance.

I now turn to the relevant provisions of the *Road Safety Act* 1986, all of which, save for certain definitions, may be found in Part V of the Act. The sections of the Act are quoted below in the form in which they stood as at the date of the collision. A large number of amendments have since been made to the *Road Safety Act* 1986, in particular by the *Road Safety (Amendment) Act* 1994. Some of these amendments were dealt with in the reasons of the learned judge. The later amendments to the *Road Safety Act* 1986 are not, I think, significant to the issues debated in this Court. [*His Honour then set out the relevant provisions of Sections 47, 48 and 49, referred to section 50 and 56, set out in full the provisions of section 57 and continued*]... **[11]** Before the magistrate and the learned judge, one point argued at length on behalf of the appellant was that the certificate as to the taking of the blood sample did not purport to be signed by a "registered medical practitioner"; rather it purported to be signed by a "legally qualified medical practitioner". The *Medical Practice Act* 1994 had substituted, in ss56 and 57, in the definition of "doctor", for "legally qualified" the word "registered". The magistrate rejected this objection, and the learned judge in his very careful reasons also dealt comprehensively with, and rejected that submission. Mr Hardy, who appeared before the learned judge and in this Court for the appellant, did not pursue that issue, which constituted the first question of law under s92 of the *Magistrates' Court Act*, before this Court.

It is convenient to deal first with the question whether the certificates relied on by the prosecution were admissible in evidence and proved the facts stated in them. The purpose (s47(c) of the Act) of ss57 and 58, as I have said, is to provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol, and to assist in the stamping out of a social mischief by reducing the number of drivers whose driving is impaired by alcohol and other drugs. Cf. s47(b). Section 57 provides a statutory basis for the admission into evidence of the taking of a sample of blood from a driver of a motor vehicle and of the analysis of that sample. This evidence could, as Menhennitt J said in *Wright v Bastin (No 2)* [1979] VicRp 35;

[1979] VR 329 at 332, all be established by oral evidence from an expert quite independently of the statutory provisions. On the other hand, in the absence of the statutory provisions, evidence at least of the analysis of the sample would be inadmissible unless given by an appropriately qualified expert, for reasons which appear later.

Under s57(2) evidence of the taking of a blood sample, and of the analysis of that sample, may be given, subject to the two provisos that, (a) the sample is taken **[12]** within three hours after the person drove a motor vehicle and, (b) the analysis of that sample was carried out within 12 months after it was taken. Section 49(1)(b) and (g) and s57(2) variously refer to the expression a person who "drove or was in charge of a motor vehicle", but for convenience I shall use the verb "drive" hereafter in this judgment for that composite expression. Part V of the Act contains numerous references to a time limit of three hours after driving; see e.g. ss48(1)(a), 49(1)(f) and (g), 53(1)(c), 53(4), 55(2) and 57(2).

A prosecution for the offences created by s49(1)(a) or (b) of driving while more than the prescribed concentration of alcohol is present, is assisted by the statutory presumption in s48(1), that if at any time within three hours after an alleged offence a certain concentration of alcohol is present, not less than that concentration was present at the time of driving, unless the contrary is established. In a prosecution under s49(1)(f) or (g), where the driver has recorded an excessive blood alcohol concentration within three hours after driving, s48(1A) adds a second statutory presumption of guilt unless the driver gives sworn evidence, corroborated by another person, which establishes that this blood alcohol concentration was due solely to consumption after driving.

The inclusion in s57(2) of the time limit of three hours for the taking of a blood sample from a driver is directly linked to the like limit appearing in s48(1)(a) and in the offences created by s49(1)(f) and (g). This limit was extended from two to three hours by the 1986 Act. The intent of the legislature in the creation of such a time limit is obvious; in aid of the prosecution of a drinking driver, and to prevent technical defences, it is a reasonable assumption that a person who is shown to have a certain concentration of alcohol in the blood at a particular time had, (unless he or she establishes the contrary) at least the same blood alcohol concentration up to three hours beforehand; while fairness to the sober driver who has his or her first drink for the day after arriving home is maintained by providing that driver with a defence, but putting the onus on him or her to establish that fact. The defence of post-driving consumption of alcohol was first introduced into the legislation in 1989 after the decision of the Full **[13]** Court in *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1. But while the legislature's intention is clear, the obverse of that reasonable assumption is, it seems to me, that no similar presumption can be made once the period of three hours has expired, for reasons both of fairness and relevance.

Section 57(2), by permitting the giving of evidence of a sample taken within three hours after a person drove a motor vehicle, accommodates precisely the statutory presumption in s48(1)(a) and the offences created by s49(1)(f) and (g). Fairness to potential defendants is retained by limiting the operation of s57(2) to the giving of evidence of the analysis of a blood sample taken within three hours. Like considerations prevent such evidence being given if the blood sample has not been analysed within 12 months; no doubt because the view was taken that the integrity of such a sample could not be guaranteed beyond 12 months. If, however, it were thought appropriate to proceed against a driver where either of the time limits had not been complied with, it would always be open to the prosecution to call expert evidence.

In these circumstances Mr Hardy's submission was that the evident purpose of s57(3) and (4) was to provide a simple and effective means, viz. by certificate, of establishing the evidence made admissible by s57(2). These sub-sections, the argument ran, were in aid of sub-s(2) and were not intended to have independent operation. Accordingly, evidence could not be given by certificate under sub-s(3) unless the medical practitioner had taken the blood sample within three hours after the person drove - and a certificate could not be given under sub-s(4) unless, as I followed the argument, both time limits specified in sub-s(2) had been met.

The answering argument made by Ms Douglas, who appeared in this Court for the Crown, was that sub-ss(3) and (4) contained no words of limitation which prevented certificates becoming admissible under them unless the sample had been taken within three hours. Both sub-sections simply referred to the evidence being made admissible in any proceedings referred to in sub-s(2).

And sub-s(2) itself expressly maintains the common law means of proving these matters by use of the expression "without affecting the admissibility of any evidence which might be given **[14]** apart from the provisions of this section." In support of the argument that sub-ss(3) and (4) have an operation quite separate from sub-s(2), it was submitted that sub-s(2) deals with the sort of evidence that can be called in the proceedings mentioned, while the later sub-sections provide a way of calling that evidence, but without the assistance of the deeming provision (s48(1)). In other words, if the sample was taken outside the limit of three hours, the prosecution would have to rely on the presumption of continuance or call expert evidence to establish an offence against s49(1)(b). Ms Douglas also relied on *Wright v Bastin (No 2)* and the decision of the Full Court in *R v Cheer* [1979] VicRp 53; [1979] VR 541, both of which referred in detail to the comparable provisions of the legislation (the *Motor Car Act* 1958 ss80B, 80D, 80F, 80G and 80DA) in place in 1979.

If the history of the legislation, and the authorities based upon the legislation extant in 1979, are put to one side, I should have no doubt that the interpretation for which Mr Hardy contends is correct, for the following reasons. I have already referred to the fact that s57(2) makes admissible certain evidence, provided the two time limits are fulfilled, for the purposes of criminal proceedings in which the influence of alcohol upon a driver is likely to be relevant. The construction contended for by the appellant gives meaning and content to the expressions "within 3 hours", "that sample" and "within 12 months after it was taken" in s57(2), whereas under the Crown's construction, these words have no obvious purpose and appear meaningless. A medical practitioner would ordinarily be expected to have the necessary qualifications to give oral evidence, without the aid of s57(2), of the taking of a blood sample.

The effect of s57(2) is, it seems to me, that such a practitioner may give this evidence orally notwithstanding that a period of up to three hours may have elapsed since the driver last drove the motor vehicle. So also under s57(2), if a properly qualified analyst is in court, oral evidence may be given of the analysis of a sample taken within three hours, provided that analysis was made within 12 months after the sample was taken. At common law such evidence would not have been admissible, because, as Tadgell J observed in *Pippos v Craig* [1993] VicRp 44; [1993] 1 VR 603 at 621; (1992) 16 MVR 327; [1992] Aust Torts Reports 81-196, to express a concentration of alcohol in terms of a unit of weight (gram) per unit of **[15]** volume is to engage in an essentially arbitrary exercise, requiring explanation of what is meant by it, before it can rationally be taken to mean anything. It may be that such evidence would also be inadmissible at common law having regard to the time which might elapse (up to 12 months) before the analysis was made. If, as the Crown contends, sub-ss(3) and (4) are not merely in aid of sub-s(2), but are to be read and have operation independently, the consequence is that a medical practitioner who could have given oral evidence only of the taking of a blood sample within three hours, may provide a certificate even though the sample was taken (say) days after the last moment of driving and which is thereby made admissible regardless of relevance, while an approved analyst is able to give a certificate of the analysis of that sample regardless of when the sample was taken or analysed.

Even though provision is made in sub-ss(7) and (7A) for the giver of a certificate to be required to attend for cross-examination, to give sub-ss(3) and (4) an operation unqualified by the time limits contained in sub-s(2) is, in my view, not necessary to the proper operation of s57 as a whole. Furthermore, if sub-s(4) is to be read with, and in aid of, sub-s(2), these sub-sections work harmoniously together. The definition of "approved analyst" in s57(1)(b) is then appropriate to the giver of a certificate under sub-s(4), since an approved analyst is a person "who has been approved ... as a properly qualified analyst for the purposes of this section". The phrase "properly qualified analyst" is then used in sub-s(2), but not in sub-s(4). If sub-s(4) has independent existence, it follows that a certificate may be given by a person, not necessarily an expert, even though the analysis was not carried out within 12 months. Furthermore the fact that, under sub-s(2), evidence of the taking and analysis of a blood sample is made admissible in the various proceedings severally referred to, and that both sub-ss(3) and (4) specifically refer to the relevant certificates being "admissible in evidence in any proceeding referred to in sub-section (2)" also suggests to me that the proper interpretation of these sub-sections is that they are to be read together, and that the latter sub-sections are in aid of sub-s(2). On this view the legislative charter of admissibility requires compliance with the two time limits specified in sub-s(2) and, as Hedigan J said in *Entwistle v Parkes* (25th September 1992, unreported, at 6) –

> **[16]** "in circumstances where the prosecuting authority seeks to rely on special legislative provisions permitting it to rely on documents which, without more, would be otherwise inadmissible as proof of their contents, then it must comply with the legislative charter of admissibility."

At first instance and before the learned judge, the admissibility of both certificates was challenged on the ground that the medical practitioner's certificate showed that the sample had not been taken within three hours. The magistrate held, correctly on the evidence in my view, that the prosecution had not established that the sample was taken within three hours, since the evidence left reasonably open the possibility that the accident could have happened up to ten minutes before 6.25 pm. The magistrate however ruled the certificates admissible. Before the learned judge the admissibility of the certificates was again challenged on this ground, but Mr Hardy conceded before his Honour that his submission was inconsistent with the reasoning of Menhennitt J in *Wright v Bastin (No 2)* and with the decision of the Full Court in *Cheer*, at 547. The learned judge held that Mr Hardy's submission was inconsistent with the statutory provisions but, I think, relied principally upon the two 1979 decisions to which I have referred as authority requiring him to reject the appellant's arguments on this issue.

Possibly the last word on the subject of legislative history and its usefulness was written by Scalia J in *Taylor v United States* 495 US 575 at 603; 109 L Ed 2d 607; 110 SCt 2143; 17 Idaho 18. But notwithstanding his Honour's rejection of legislative history as useful only to demonstrate a judge's conscientiousness it is nonetheless necessary for me to deal briefly with the history of the sections in the 1986 Act. Their ancestry is not difficult to discover. Of the sections which were considered relevant by Menhennitt J in *Wright v Bastin (No 2)* and which are set out in [1979] VR at 332-4, s80D(1) of the *Motor Car Act* 1958 is the ancestor of s57(2); sub-ss(3) and (4) of s57 follow sub-ss(3) and (4) of s80D. Section 80D(11) is the ancestor of s57(9); s80DA(1) of the 1958 Act precedes s56(2); s80F(1) of the 1958 Act becomes s58(1); s80G of the 1958 Act is now to be found in s48(1)(a); and the offence contained in s80B of the 1958 Act is now to be found in s49(1)(a). But although the ancestry of the 1986 sections is reasonably **[17]** apparent, there are significant differences in the wording and content of the relevant provisions. [*After referring to a passage by Menhennitt J in* Wright v Bastin (No 2)*, the provisions of s80D(2) of the* Motor Car Act *1958 and a passage from* R v Cheer*, His Honour continued*]...**[18]**

In my view there are significant differences between the relevant sections of the *Motor Car Act* 1958 in force in 1979 and the 1986 Act. The omission of any provision comparable to s80D(2) is, I think, of particular importance. The offences created by s49(1)(f) and (g) were introduced by the 1986 Act. In *Lamb v Morrow* [1986] VicRp 61; [1986] VR 623; (1986) 3 MVR 175, the Full Court had held that the provisions of the *Motor Car Act* did not then create a statutory presumption in favour of the accuracy of breathalysers, and that it was therefore open to a defendant to elicit evidence that breathalysers in general do not always accurately show the percentage of alcohol in the blood. In *Meeking v Crisp* it was accepted (at 744) that *Lamb v Morrow* inspired the insertion of s49(1)(f), with the Full Court noticing (at 745) in relation to the 1986 legislation that "the records of parliamentary debates reflect the clearest intention to treat evidence of post-driving consumption of alcohol as inadmissible".

The two-hour limit after driving, for the purpose both of the statutory presumption in s80G, and for the taking of a blood sample in s80D, was extended in 1986 to three hours. And there are sufficient other **[19]** differences of consequence in the wording of the individual sections to lead me to the conclusion that, since I think the interpretation of sub-ss(3) and (4) in the context of s57 as a whole is clear and unambiguous, the decision of the Full Court in *Cheer* as to the effect of the 1979 legislation should not be regarded as an authority requiring a different interpretation of the 1986 sub-sections. To those considerations I add that, had Parliament in 1986 intended certificates to be admissible under s57(3) and (4) regardless of the time when a blood sample was taken or analysed, it would have been a simple matter to say so in clear words. In my view, *Wright v Bastin (No 2)* and *Cheer* should not now be regarded as authority for the conclusion under the relevant provisions of the *Road Safety Act* that where a blood sample is taken more than three hours after driving, a certificate is admissible in evidence under sub-ss(3) or (4) of s57 in relation to the taking or analysis of such a sample.

I acknowledge the force of the considerations which have persuaded Tadgell JA to take a different view of the operation of s57(2) and (4). Insofar as his Honour relies on the inclusion in s57(2) of "any proceedings conducted by a coroner" (paragraph (d)), I would only add that a coroner,

at least when conducting an inquest, would have no need (had it not been for the inclusion of s56(6)) to rely on s57(4) to admit either of the certificates tendered in the present case. A coroner's inquest is not bound by the strict law of evidence; *R v Divine, ex p. Walton* [1930] 2 KB 29, 36. In this State a coroner may be informed and conduct an inquest in any manner the coroner reasonably thinks fit; see the *Coroners Act* 1985 s44. Accordingly on the first issue in this appeal, the appellant's objection to the tender by the prosecution of both certificates should have been upheld, since, on the facts found by the magistrate, the prosecution had not established that the blood sample was taken within three hours of the time when the accident occurred.

I now turn to the second main issue. On the assumption that the certificates were properly admitted, they established that at 9.25 pm, the appellant had a blood alcohol content of 0.140 per cent. The accident, and the last moment at which the appellant may be said to have driven his car, could have occurred, as the magistrate **[20]** found, as much as three hours ten minutes beforehand. Accordingly the appellant could not be found guilty of the charge under s49(1)(g) and was duly acquitted of it. What relevance, then, did the fact that the appellant had a blood alcohol content of .014 per cent at a time which may have been three hours ten minutes after he last drove his car, have in relation to the charge under s49(1)(b)?

By a series of decisions of single judges of this court, it has been held in like circumstances that a court is entitled to apply the presumption of continuance, in the absence of evidence to the contrary, with the consequence that the magistrate would have been entitled to conclude that the blood alcohol content of the appellant at the time of last driving was not less than 0.140 per cent at the time of the accident. The magistrate so held. The learned judge applied these decisions, referring to *Smith v Maddison* [1967] VicRp 34; [1967] VR 307; *Turner v Bunworth* (10 June 1970, Menhennitt J, unreported); *De Kruiff v Smith* [1971] VicRp 94; [1971] VR 761; *Heywood v Robinson* [1975] VicRp 55; [1975] VR 562; *Wright v Bastin (No 2)* [1979] VicRp 35; [1979] VR 329; and *Nutting v Ryder* (1994) 20 MVR 294, at 307-314. I am indebted to Tadgell JA. for the reference to his Honour's own decision in *James v Sanderson*, (23 March 1982, unreported) where his Honour followed *Smith v Maddison* and applied the presumption of continuance in circumstances where, the relevant limit then being two hours, a defendant was shown by analysis of a blood sample to have a blood alcohol content of .214 per cent, two hours and 45 minutes after his car collided with an electric light pole.

The reasoning behind the decisions consistently applied in Victoria was first set out by McInerney J in *Smith v Maddison*. It may be as well to quote at some length his Honour's reasons and the passage from *Wigmore on Evidence.* [*After quoting the reasons and passage and referring to Tadgell J's decision in* James v Sanderson *and a passage by Menhennitt J in* Turner v Bunworth*, His Honour continued*]... **[22]** In *Pippos v Craig*, Brooking, Southwell and Tadgell JJ were concerned with a claim for damages in negligence arising out of the death of a woman pedestrian who was struck by a car. A blood sample was taken from the deceased's body during an autopsy and revealed a blood alcohol content of 0.235 per cent. The analysis was made up to a fortnight after the deceased's death. All members of the Court held that **[23]** the blood sample was relevant and admissible. Brooking J held that it was open to the jury to conclude that the blood alcohol concentration probably existed at the time of death, that it was open to a jury to take the view that the blood alcohol level would peak a relatively short time after drinking had ceased and that thereafter it would decline, and that it was open to the jury to treat evidence of a blood alcohol level in the deceased of 0.235 per cent as making it probable that she was intoxicated to a substantial degree. His Honour, referring to *Smith v Maddison* and *Heywood v Robinson*, said (at 608) –

> "In the present case it was in my view open to the jury to find that the analysis accurately showed the blood alcohol content at the time of death. The relevant time was of course that of the accident, which preceded the death by about two hours. Mr Winneke did not submit that it was not open to the jury to find that if the blood alcohol content was 0.235 at the time of death it was at least at that level at the time of the accident. It is open to juries to take the view, in the light of their own experience of the effect of the consumption of alcohol, leaving aside the significance, as regards judicial notice, of the widespread public discussion in recent years of the effect of the consumption of alcohol on blood alcohol levels, that the blood alcohol level will peak a relatively short time after drinking ceases and that thereafter it will decline."

I shall return to the judgment of Tadgell J in this case shortly. Although the Victorian decisions have repeatedly referred to the "presumption" of continuance, that presumption is really

no more than "simply giving a name to an inference that is reasonably drawn from an immense variety of circumstances in cases heard in our courts" (Wells, *Evidence and Advocacy,* 1988, 186). In the fifth Australian edition of *Cross on Evidence*, the learned author argues (para.1125) that it would be best to avoid the use of the word "presumption" altogether, citing the following passage from the judgment of Dixon J in *Axon v Axon* [1937] HCA 80; (1937) 59 CLR 395 at 404; [1938] ALR 89 –

> "When it is proved that a human being exists at a specified time the proof will support the inference that he was alive at a later time to which, having regard to all the circumstances, it is reasonably likely that in the ordinary course of events he would survive. It is not a rigid presumption of law. The greater the length of the time the weaker the support for the inference ... the presumption of life is but a deduction from probabilities and must always depend on the accompanying facts."

[24] The same point was, I think, made by Walsh JA in *Donoghue v St. Luke's Hospital Pty Ltd* (1968) 12 FLR 164; (1968) 70 SR (NSW) 203; [1969] 2 NSWR 647 at 657, as follows –

> "In the circumstances of this case, I think it is unnecessary to refer to cases concerning the presumption of continuance, or concerning the circumstances in which it may operate retrospectively. In my opinion, these are really no more than a recognition that there are situations in which, by a process of reasoning and inference, a fact may be found to exist at a particular time, without direct proof of its existence then, because of its proved existence at another point of time either earlier or later. But this is of no assistance, unless the facts proved are such that it is legitimate to infer from them the existence of the facts of which direct proof is not available."

See also Roscoe's *Digest of the Law of Evidence,* 13th ed, (1875) 37. The effect of s48(1)(a) of the Act is that a statutory presumption of continuance may be said to apply for a period of three hours after an alleged offence against para.(a) or (b) of s49(1); so that, if a person is shown to have a certain blood alcohol concentration at any such time, it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood at the time the offence was alleged to have been committed. This statutory presumption has in Canada been called the presumption of "identity" (*R v St. Pierre* (1995) 122 DLR 4th 619 per Iacobucci J at 631-633). A like statutory presumption applies in many other jurisdictions (e.g. *Traffic Act* 1909 (NSW) s11; *Road Traffic Act* 1961 (SA) s47g(1); *Traffic Act* 1949 (Qld), s15G; *Traffic Act* 1949 (NT), s8C(1); *Criminal Code (Canada)* s258(1)(c)).

Mr Hardy argued that the Victorian decisions wrongly applied the presumption of continuance beyond the statutory three hour period, for two reasons, first, because ss48(1)(a) and 57(2) covered the field and, secondly, because there was no reason in logic to conclude that a blood alcohol concentration is a matter so permanent that it is likely to have continued unchanged in its current form, rate and extent, notwithstanding the passage of a period of time in excess of three hours. As to the dangers of reaching positive conclusions about a person's behaviour as a result of the ingestion of alcohol or indeed about blood alcohol levels, reference was made to the **[25]** analysis in the judgment of Tadgell J in *Pippos v Craig* at 621-623. I have already referred to these pages in his Honour's reasons, in demonstrating that at common law evidence of a blood alcohol analysis, without further explanation of its meaning would simply be inadmissible. It was his Honour's view, at 622, that "it is a notorious scientific fact that the effect of alcohol, and of a given amount of alcohol, may vary between individuals and according to circumstances". Cf. also *R v Cheer* at 545, 547.

While Ms Douglas was not able to produce any case from any other jurisdiction taking the same approach to the application of the presumption of continuance as have Victorian judges, Mr Hardy was able to support his argument with cases from a wide range of jurisdictions where courts have refused in like circumstances to apply the presumption; see e.g. for South Australia, *Cavanett v Chambers* [1968] SASR 97 per Bray CJ at 99-100; *Berry v Lowcock* (1980) 27 SASR 108 per Jacobs J at 114; *Ween v Higgins* (1990) 11 MVR 487 per Mullighan J at 495; the Northern Territory, *Griffiths v Errington* (1981) 7 NTR 3; (1981) 50 FLR 370 per Muirhead J at 337; Queensland, *Kaye v Isbell* (1991) 15 QLR 11 per Judge McGuire at 12; and in the Court of Criminal Appeal in New South Wales, in *R v Olejarnik* (1994) 33 NSWLR 567 at 572-573; (1994) 72 A Crim R 542; (1994) 19 MVR 125.

In *Cavanett v Chambers*, Bray CJ said (in 1968) that "it is conceivable, but I doubt it, that

in the course of time, even in the absence of statutory provisions like the Western Australian ones, knowledge of the effect of blood alcohol percentages may become so notorious and trite, and so generally accepted as reliable to pass into the ordinary common stock of knowledge ... but that time is not yet" (at 100). In 1993, Brooking J in *Pippos v Craig* quoted the comments of Bray CJ and said, at 610, that he thought that the "time had come in Victoria to reject the view that judges sitting alone and juries can never, in the absence of expert evidence concerning its effect on behaviour, treat evidence of a given blood alcohol concentration as showing anything more than that there was alcohol present in the bloodstream." In *Griffiths v Errington*, Muirhead J after referring to *Smith v Maddison* and *Heywood v Robinson* said, at 377, that he believed great caution must be exercised **[26]** in applying the presumption of continuance to matters such as the chemical content of blood when one initial presumption must be that change is occurring and when the factors causing change and the rate of change were matters for experts.

In *R v Olejarnik*, the last act of driving took place at about 7.26 pm and the breath analysis was made at 9.40 pm Accordingly the time limit (two hours) in the relevant New South Wales section had been exceeded by about 14 minutes and the Crown was accordingly denied the benefit of the deeming provision in the sub-section. Carruthers J said at 572, that –

> "The statutory two hours is an arbitrary period and I do not consider that it is open to a court to draw inferences from that period to the prejudice of a defendant, when questions of a scientific nature are in issue. Similarly, I cannot agree with the views expressed by McInerney J in *Smith v Maddison* and Menhennitt J in *Heywood v Robinson*, that the Crown may be able to call in aid the presumption of continuance in a case such as the present. In my respectful view when one is dealing with an element as volatile as changing blood alcohol levels, the presumption of continuance can play no part. It is one thing to say that because Mt. Everest was in existence ten years ago this is strong evidence that it exists today ... and another thing to say that because a person's blood alcohol level was 0.110 at 9.40 pm, then it was 0.110 at 7.26 pm ... I conclude therefore, that the absence of expert evidence of a pharmacological nature, or an indication by the Crown that it proposed to call such evidence, the learned trial judge was required, in the proper exercise of his discretion, to reject the tender of the certificate as no weight could be placed upon the reading contained therein to establish the fact in issue."

Mr Hardy also cited to us a number of Canadian authorities on the comparable provisions of the Canadian criminal code. In this jurisdiction too, the courts have repeatedly refused to apply the presumption of continuance in like circumstances; see *R v May* (1971) 5 CCC (2nd) 213 at 217; *R v Shiels* (1973) 11 CCC (2nd) 421 at 425; *R v Hamm* (1973) 15 CCC (2nd) 32 at 36; *R v Gale* (1991) 65 CCC (3rd) 373 at 383-384.

Before deciding whether a court can draw inferences from the fact that a person's blood alcohol concentration is .140% three hours and ten minutes after an accident, as to the person's likely blood alcohol concentration at the time of the **[27]** accident, it is necessary to examine the extent to which a court can take judicial notice of the rate of changing blood alcohol levels and the factors which might influence them. Courts are, by now, no doubt entitled to accept that alcohol, once consumed, is progressively absorbed into, and eliminated from, the blood. But it is equally notorious that the effect of alcohol and of a given amount of alcohol, may vary between individuals and according to circumstances. Ms Douglas conceded in argument that blood alcohol will peak and, as she put it, "go down after a short time, one hour or so"; and also that the rate will vary depending upon a person's sex, size, and metabolism and whether the person is a heavy or light drinker. [*After referring to certain texts, articles and cases concerning the rates of absorption and elimination of alcohol and the factors which affect these rates, His Honour continued*]... **[29]** The question whether the presumption of continuance may be applied to a person's blood alcohol level over a period in excess of three hours, faces at the outset the obstacle that the blood alcohol concentration of any individual is constantly changing, never at rest. I have mentioned the varying expert views as to rates of absorption and elimination of alcohol and the factors which affect these rates, not to suggest that these views are necessarily correct, but merely to show the difficulty involved in asserting as a notorious scientific fact (or taking judicial notice of) any assumption as to the rates by which alcohol is absorbed into, or eliminated from, a person's blood. Having regard to the opinions discussed above, it would plainly be impossible, in the absence of expert pharmacological evidence, in the present case to arrive at any figure which would accurately represent the blood alcohol content of the appellant at 6.15 pm, the earliest time at which on the evidence the accident may have occurred. There may be much to be said for the likelihood that at the time of the accident

the appellant's blood alcohol content was above – possibly significantly above – the permissible limit of .05%.

But in the absence of expert evidence, my inclination would be to agree with Carruthers J in *Olejarnik* that, since the blood sample was taken after the statutory three hour period had expired, it was not open to the magistrate to draw inferences to the prejudice of the appellant when dealing with an element as volatile as changing blood alcohol levels. If, however, the issue is approached in the manner suggested in *Cross*, and by Walsh JA in *Donoghue v St. Luke's Hospital*, that is, whether a fact (excessive blood alcohol content) may by a process of reasoning and inference be found to exist at a particular time, then an examination of the facts established in this case would, in my view, make it even more difficult to establish what the appellant's blood alcohol content was at 6.15 pm. The prosecution case was that at and after Culgoa, in the last period of driving before the collision, certain of the passengers in the car had been drinking beer. The appellant himself told the informant at Swan Hill Hospital that he had been drinking at Culgoa (a couple of stubbies) and might have had one on the way. He told Senior Constable **[30]** Spanic that after the accident, and being in a lot of pain, he consumed quite a few mouthfuls of bourbon. Spanic's evidence included that the appellant said his first drink that day was between 5 and 5.30 pm and continued up to 6.30 pm, or a bit before, before the accident.

In these circumstances it would, I think, be an exercise in mere speculation to attempt an assessment, without the aid of expert evidence, of what the appellant's blood alcohol content was at the time of the accident. He plainly may still have been in the absorption phase, possibly very early in that phase, and one which, according to McDermott, may take up to 90 minutes. The hypothesis consistent with innocence which was rejected by Menhennitt J as speculative possibility in *Turner v Bunworth* (the possibility of consumption of a substantial amount of liquor shortly before, or even after, the accident) cannot, I think, be similarly dismissed in this case. In criminal proceedings, it must always be borne in mind that, as Gowans J said in *Chappell v Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376 at 392 –

> "Before drawing an inference of guilt he would have had to consider whether the circumstances left open a reasonable hypothesis consistent with innocence and be satisfied that they did not: *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619 at 630, 651; 17 ALR 566."

The appellant did not give evidence, and on the related issue of post-driving consumption, this fact was treated by the learned judge as a powerful consideration entitling the magistrate to conclude that it was not reasonable or rational to find the explanation for the blood alcohol reading of .14% in post-accident consumption of alcohol. His Honour referred to a passage in *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23, in the joint judgment of Mason CJ, Deane and Dawson JJ at 227-228 as follows –

> "In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused."

But, as their Honours said in the passage immediately following the words just quoted, at 228, –

> **[31]** "Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence ... Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case ...".

In the present case the evidence against the appellant, apart from the certificates, was that he was the driver of a car which had been involved in an accident, that he smelt of alcohol and that he admitted drinking three stubbies in the hour before the accident and asserted also that he had drunk a number of mouthfuls of bourbon after the accident. His counsel had objected to the certificates relating to the blood sample, which were the only substantial evidence against him on the charges under s49(1)(b) and (g) of the Act, the objection being in my view one which

should have succeeded. Objection had also been taken to reliance by the prosecution on the presumption of continuance in the absence of expert evidence. In such a situation the deficiencies in the prosecution case were, I think, such as to entitle the appellant to remain silent and rely on the burden of proof cast upon the prosecution, without inferences being drawn more readily against him. In all the circumstances of the case, in my view it was not open to the magistrate, even if the certificates had been properly admitted into evidence, to find the charge under s49(1)(b) proved against the appellant or that his blood alcohol reading at the time of the offence was .14%, by application of the presumption of continuance. The appellant should therefore succeed also on the second major issue argued in this Court.

The question then becomes what course should now be taken by this Court; that is, whether the charge under s49(1)(b) should now be dismissed, or whether the matter should be referred back to the magistrate to give the prosecution an opportunity to mend its hand by calling appropriate expert evidence. **[32]** The objection to the admissibility of the certificates was, on the evidence of Mr Cassidy's affidavit (which was not challenged), properly and clearly taken when the certificates were tendered in evidence. The prosecution case was closed without any suggestion that the Crown proposed, if necessary, to call expert evidence. I think the Crown clearly elected to take its chance that the certificates would be admitted and that the presumption of continuance would be applied, and is bound by that decision. The certificates were, as it seems to me, under challenge from the outset. In my view the appeal should be allowed and the appropriate consequential order is that the charge should now be dismissed by this Court.

APPEARANCES: For the Appellant: Mr GA Hardy, counsel. Lamb Cassidy, solicitors. For the Respondent: Ms CD Douglas, counsel. Solicitor for Public Prosecutions.
