25/82

SUPREME COURT OF VICTORIA

FRANCIS v STEVENS

Crockett J

17 February 1982 — [1983] VicRp 21; [1983] 1 VR 260

MOTOR TRAFFIC – DRINK/DRIVING – BAC 0.07% – SCHEDULE 7 CERTIFICATE ADMITTED INTO EVIDENCE – CERTIFICATE PROVIDED *PRIMA FACIE* PROOF OF DRIVER'S BAC – EVIDENCE GIVEN BY ANALYTICAL SCIENTIST TO EFFECT THAT BREATHALYSER CAN OVER- OR UNDER-ESTIMATE BAC – MAGISTRATE IN DOUBT WHETHER BAC WAS MORE THAN 0.05% – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SCHED 7.

HELD: Order Nisi dismissed.
1. The statutory provision enabling the 7th Schedule form when completed by the operator to be tendered, and when tendered to be used as *prima facie* proof of the contents to be found therein, does no more than cast an evidentiary burden on the defendant without affecting the ultimate legal burden on the prosecution. This means that if the matter is raised as a disputed issue, as it was in this case, then it is for the prosecution to prove – and prove beyond reasonable doubt – that the concentration at the time of the breathalyser exceeded .05 per cent. In that connection the 7th Schedule form can afford some evidence, although it is open to the Court to take the view that the evidence is of little cogency if the court is of the view that the contrary evidence led is disposed to raise doubt as to the efficacy of the reading as recorded in that form.

2. Notwithstanding the criticisms made of the expert's evidence, essentially it was to the effect that a breathalyser machine of the same type used to test the breath of the defendant is one which is capable of making errors in the sense of providing an under- or over-reading and that an over-reading could possibly occur at a recorded level of .07 per cent to the extent that the actual blood alcohol content was no more than .05 per cent. Whilst the hypothesis created might be thought to rest upon relatively tenuous grounds, it is not possible to say that the hypothesis was not a reasonable one for the Magistrate to conclude had been established and that, accordingly, it was open to him to reach the conclusion that he was not satisfied beyond reasonable doubt that the information had been established and that, accordingly, it should be dismissed.

CROCKETT J: This is the return of an order nisi seeking to review an order of dismissal by the Magistrates' Court at Sunshine. The proceedings in question were the return of an information in which the applicant was the informant and the respondent the defendant and in which the respondent was charged with having driven a motor car on a highway whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres exceeded .05 per cent.

Evidence was given by the informant of an authorised operator of a breath analysis machine having conducted a test on the defendant in the presence of the informant following which a form in conformity with that to be found in the 7th Schedule of the *Motor Car Act* was completed. In the relevant part of that form it maintained that the breathalyser testing had shown the quantity of alcohol present in the blood of the defendant to be .07 per cent. The informant swore that the operator, after the completion of the test and the making out of the Schedule 7 form, said to the defendant, "My analysis shows you have a blood alcohol concentration of .07 per cent", to which the defendant replied, "I don't want to believe it". The informant further testified that he then said to the defendant, "What is your reason for driving a motor car when the percentage of alcohol in your blood exceeds .05 per cent?" To which the defendant replied, "I didn't believe I was over .05 per cent". The evidence did not disclose the defendant as having at any time made any admission as to the quantity of alcohol that he had consumed prior to the tests being conducted, although there was evidence of an admission that some alcohol had in that time in fact been consumed.

The effect, by reason of the operation of the relevant provisions of the Act, of this introduction into evidence of the 7th Schedule form is that the matters contained therein are to be treated as *prima facie* proved. This evidentiary operation of the form can be defeated in the event that

appropriate notice is given for the attendance at the hearing of the operator who completed the document. No such notice was given in this case and, in consequence at the conclusion of the case for the prosecution the Magistrate had before him a document which by force of law operated so as, among other things, to afford *prima facie* proof that the defendant's blood alcohol concentration at the time of the test on him was .07 per cent.

The defendant himself gave no evidence but called a Mr Graeme Young who stated his vocation to be that of analytical scientist. The substance of Mr Young's evidence was that he was in possession of a Smith & Wesson model 900A type breathalyser and on it he had conducted several hundred tests. In nearly all of those tests he had taken blood samples from the subject at the same time as he had taken the breath analysis sample and found one case where the breathalyser had over-estimated the blood alcohol level by .012 per cent. On one other occasion an overestimation of .021 per cent was found. Mr Young said that the breathalyser in his possession, and on which he had conducted such tests, was of the same type as that used by the Victoria Police Force. He said also that from his experience the breathalyser can under-estimate the blood alcohol reading by as much as .045 per cent. He added that from his examination of writings on the subject, and in particular what had been said by McCallum and Scroggy, he believed that the breathalyser instrument was capable of an over-estimation of up to .028 per cent, and that it was capable of an under-estimation of up to .067 per cent, According to his evidence, his judgment of the extent of over or underestimation was calculated by a comparison of the reading provided by the breathalyser which was analysing a sample of breath and the reading obtained by analysing an actual sample of the blood taken from the subject at the same time. Mr Young was not cross-examined by the prosecutor, and the Magistrate expressed himself as not being able on that evidence to be satisfied beyond reasonable doubt that the defendant's blood alcohol level at the time of his having driven the car was in excess of the statutory limit of .05 per cent. Accordingly, the information was dismissed.

The order nisi to review that order of dismissal has been granted on three grounds, the first of which is in these terms "that on the evidence (whether given on oath or not) it was not reasonably open to the Magistrate to find that there was a reasonable doubt as to whether the percentage of alcohol in the blood of the defendant expressed in grams per 100 millilitres of blood was more than .05 per cent.

The remaining two grounds are really amplifications of the first, the second being expressed as its not having been reasonably open to the Magistrate to find that the evidence of the witness Young displaced the statutory presumptions created by the relevant provisions of the *Motor Car Act* 1958, and the third ground maintaining that the decision of the Magistrate which dismissed the information was contrary to the evidence or the weight of the evidence.

In my view, the grounds raise the single question as to whether it was possible on the evidence to treat the witness Young's evidence as being of such sufficiency as to enable it to be used to displace the *prima facie* presumption that the blood alcohol reading was .07 per cent; that is to say, capable of so displacing the presumption in the sense that it was capable of raising a reasonable doubt as to whether or not the Crown had established an essential element in the case.

The authorities, I think now make it plain that the statutory provision enabling the 7th Schedule form when completed by the operator to be tendered, and when tendered to be used as *prima facie* proof of the contents to be found therein, does no more than cast an evidentiary burden on the defendant without affecting the ultimate legal burden on the prosecution. This means that if the matter is raised as a disputed issue, as it was in this case, then it is for the prosecution to prove – and prove beyond reasonable doubt – that the concentration at the time of the breathalyser exceeded .05 per cent. In that connection, of course, the 7th Schedule form can afford some evidence, although it is open to the Court to take the view that the evidence is of little cogency if the court is of the view that the contrary evidence led is disposed to raise doubt as to the efficacy of the reading as recorded in that form.

In this case the question is whether the evidence shows it to be a reasonable hypothesis that the concentration given by the breathalyser was .02 per cent higher than the concentration actually in the driver's blood at the time that the breathalyser was used, and whether there is

any evidence excluding such a hypothesis, if such exists. If the Magistrate could reasonably take the view that Mr Young's evidence established such a hypothesis, I think it is clear that it is open to him to treat the 7th Schedule form as not being capable of excluding that hypothesis. In such circumstances his conclusion to dismiss the information on the ground that he was not satisfied that the information had been proved beyond reasonable doubt would have been correct.

In the proceedings before me the respondent has not appeared nor has he been legally represented. In those circumstances, counsel appearing for the informant/applicant has quite properly referred me to all relevant authorities of which he has notice regardless of whether these authorities might assist his argument or not. I think an examination of those authorities discloses that the approach to the solution of the matter now raised for determination is in the circumstances of this case as I have already endeavoured to describe it.

In submitting on the material to which I have referred that Young's testimony lacked, or was of such insufficient, cogency as to establish a reasonable hypothesis such as I have mentioned, a number of matters were referred to. In the first place, it was pointed out that there was no direct evidence given as to what the defendant's blood alcohol reading was at the material time, that is to say, there was no evidence elicited by either side from any person that he in fact administered a blood alcohol test on the defendant in the evening in question. Then it was said that the witness Young gave no evidence of what was described as any subjective assessment, that is to say, that he had himself administered a breath analysis test, or, for that matter, a blood sample test, on the defendant on the night in question, nor had he on any subsequent date conducted any such test with a view to determining whether the defendant may have in some way been idiosyncratic vis-à-vis blood alcohol testing. Then it was pointed out that the evidence did not disclose what actual amount of alcohol had been consumed by the defendant during any relevant period immediately preceding his apprehension and the blood analysis testing's taking place.

Finally, much emphasis was placed upon the fact that the witness Young gave no evidence of whether a variation in the reading provided by a breath analysis machine was one which could be expected particularly at the level which the reading which the 7th Schedule form said was revealed with respect to this particular defendant, namely, .07 per cent. In other words, it was said that the evidence for such machines' potential to record variations in readings was of the most general kind and in that regard could not be said to be sufficiently tied to the facts of this case as to make the supposed capacity for error relevantly useful. These and other criticisms made of the evidence would undoubtedly be considerations worthy of the Magistrate's attention when he had to determine the sufficiency of the material before him for the purpose of deciding if it raised a reasonable doubt in relation to an essential element of the prosecution case. It must, I think, be assumed that these matters were present to the mind of the Magistrate and, after giving them all due consideration I find myself unable to say, notwithstanding those criticisms of the cogency of the witness Young's evidence, that it was not possible for the Magistrate to conclude that he was not satisfied beyond reasonable doubt as to whether at the material time the defendant's blood alcohol reading was in excess of .05 per cent.

Notwithstanding the criticisms made of the witness Young's evidence, essentially it is to the effect that a breathalyser machine of the same type used to test the breath of the defendant is one which is capable of making errors in the sense of providing an under- or over-reading and that an over -reading could possibly occur at a recorded level of .07 per cent to the extent that the actual blood alcohol content was no more than .05 per cent.

Whilst the hypothesis created might be thought to rest upon relatively tenuous grounds, it is, I think, not possible to say that the hypothesis was not a reasonable one for the Magistrate to conclude had been established and that, accordingly, it was open to him to reach the conclusion that he was not satisfied beyond reasonable doubt that the information had been established and that, accordingly, it should be dismissed.

I would just add by way of postscript that if it may be thought that the result of such a conclusion is to leave it open in many prosecutions for this particular type of alleged offence for those who are guilty to escape culpability by reliance upon testimony such as that provided by Mr Young in this case, then the way is clear to avoid such a consequence by the introduction into the legislation of a provision in the same terms as that to be found in Section 47G1(1a) of the *Road*

Traffic Act 1961-1979 of South Australia. In an apparent attempt to achieve just such a result that provision was recently enacted and the Full Court of the Supreme Court of South Australia in *Richardson v Fingleton* (1980) 24 SASR 511 has held that by reason of such provision evidence from a scientist of the possibility of error in a breath analysing instrument is now inadmissible in a prosecution for an offence of this kind.

The order nisi will be dismissed.
