41/79

SUPREME COURT OF VICTORIA

PENHALLARIACK v KNIGHT

McGarvie J

26 June 1979

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INVOLVED IN MOTOR VEHICLE ACCIDENT – CONVEYED TO HOSPITAL – BLOOD SAMPLE TAKEN – WHEN ANALYSED FOUND TO SHOW BAC .223% – DRIVER SUBSEQUENTLY CHARGED WITH DRIVING A MOTOR CAR WITH MORE THAN .05% BAC – CERTIFICATES OF MEDICAL PRACTITIONER AND ANALYST TENDERED IN EVIDENCE – NO CASE SUBMISSION MADE UPHELD BY MAGISTRATE ON GROUND THAT IT HAD NOT BEEN PROVED BEYOND REASONABLE DOUBT THAT REGULATIONS COMPLIED WITH – WHETHER COMPLIANCE WITH REGULATIONS AN INGREDIENT OF THE OFFENCE – MATTERS TO CONSIDER ON THE MAKING OF A NO-CASE SUBMISSION – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80D; 80G; *MOTOR CAR REGULATIONS*, RR223B-E.

HELD: Order nisi absolute. Order dismissing the charge set aside. Remitted for determination according to law.

1. The elements of the offence charged are (1) that the respondent was driving the motor car, and (2) that while doing so, the percentage of alcohol in his blood was more than .05 per cent. There was evidence that within two hours of the alleged offence a legally qualified medical practitioner had taken a blood sample from the respondent and placed it in two containers suitably labelled. There was evidence that the blood in one of those containers was analysed by an authorized analyst and found to contain .233 per cent alcohol.

2. It is not a condition of the admissibility of the evidence made admissible by the relevant sections of the *Motor Car Act* 1958 ('Act') that it be proved that the regulations were complied with. Nor is it an element of the offence that the regulations were complied with. Section 80D of the Act shows that there is nothing in that section nor in any other section of the Act which provides the proof that the regulations relating to the safe-keeping of the samples of blood taken under Section 80DA shall be a condition precedent to conviction of an offence against Section 81A.

***Woodward v McNab*, unrep, VSC Murray J, 31 August 1978, followed.**

3. Accordingly, the Magistrate was wrong in holding that it was necessary for the Informant to prove to the Court that Regulations 223B, 223D and 223E of the *Motor Car (Blood Samples) Regulations* 1977 had been strictly complied with.

4. The magistrate was in error in considering the 'no case to answer' submission in applying the standard of whether the elements of the charge had been proved beyond reasonable doubt. The test should be stated in this way: At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a balance of probability in favour of the inference which the prosecution seeks to draw?

***R v Chee* [1980] VicRp 32; [1980] VR 303, applied.**

McGARVIE J: This is the return of an order to review the order made on 19th September 1978 by the Magistrates' Court at Camberwell, constituted by a Magistrate, dismissing an information against the respondent of driving a motor car with a percentage of more than .05 per cent of alcohol in his blood. Mr David Byrne of counsel appears for the informant who is now the applicant but the respondent, although served with the order and affidavit, has not appeared.

On the hearing of the information a witness gave evidence of seeing a motor car, which turned out to have been driven by the respondent, cross to the kerb on the wrong side of a traffic-free road early in the morning of 30th November 1977 and collide with a steel pole. The witness assisted the respondent who was bleeding from the mouth.

The informant gave evidence that at the scene of the collision he interviewed the respondent, the driver of the car, who admitted that he had been drinking and who was then taken to the Box

Hill and District Hospital by ambulance with multiple injuries.

Section 80D(1) of the *Motor Car Act* 1958 provides that on such a charge as this, evidence may be given of the taking from the person charged of a sample of blood by a legally qualified medical practitioner within two hours after the alleged offence, of the analysis of the sample by a properly qualified analyst and of the percentage of alcohol found by the analyst to be present in the sample. Section 80D(2)(b) provides that where evidence of the taking and the analysis of a sample of blood is accepted by the court and the evidence is that the percentage of alcohol in the blood exceeds .05 per cent, that is *prima facie* evidence of the quantity of alcohol in the person's blood at the time the sample was taken. Section 80G provides that 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 was present in the person's blood at the time of the alleged offence.

Sub-section 3 of s80D makes a certificate purporting to be signed by a legally qualified medical practitioner to the effect of Schedule Six admissible on the charge as *prima facie* proof of the statements in it. There was tendered in evidence a certificate in the appropriate form, purporting to be signed by a legally qualified medical practitioner, stating that he collected a sample of the blood of the respondent at 4am on 30th November 1977, that all Regulations relating to the collection of the sample were complied with and that the sample was placed in two containers labelled with the respondent's name and the date and time taken.

A Constable Rodway gave evidence that on 7th December 1977 he collected from a locked box kept in the Casualty Section of the Box Hill and District Hospital a sealed bottle containing a liquid described in the medical practitioner's certificate and delivered it that day through a chute to a locked refrigerator kept at the Forensic Science Laboratory.

Sub-section 4 of s80D makes a certificate purporting to be signed by an approved analyst to the effect of Schedule Eight, as to the percentage of alcohol found by the analyst in a sample of blood, admissible on the charge as *prima facie* evidence of the facts it states. There was tendered in evidence a certificate in the appropriate form purporting to be signed by an approved analyst of the Forensic Science Laboratory stating that on 5th January 1978 he analysed by an approved method a sample of blood received by him that day and labelled with the respondent's name and the date and time taken and that he found .223 per cent of alcohol in the sample. The *Motor Car (Blood samples) Regulations* 1977 were tendered and the case for the informant was closed.

The solicitor for the respondent then submitted that there was no case to answer. The first submission was that there was no evidence that the sample had been collected within two hours after the alleged offence. The Magistrate rejected that submission.

The other submission was that it had not been proved that all the relevant regulations had been complied with. The respondent's solicitor submitted that the statements in the medical practitioner's certificate that all regulations relating to the collection of the sample were complied with, operated only as evidence of compliance with the regulations applying to what was strictly the collection of the sample. He submitted that the certificate provided no proof of compliance with the regulations which prescribed what was to be done after the sample had been collected. He contended that there was no proof that regulations 223B to 223E had been complied with. Those regulations apply to samples of blood taken under s80DA. Where a person over the age of 15 years is brought into a hospital for examination or treatment in consequence of an accident involving a motor car, the legally qualified medical practitioner immediately responsible for the examination or treatment is obliged by s80DA to take a sample of the person’s blood for analysis whether the person consents or not. The sample had been taken from the respondent in compliance with the obligation imposed by that section on the responsible medical practitioner. The evidence that he was driving a motor car is evidence that he was over 15.

Regulation 223B in the circumstances of this case required the medical practitioner, after he had taken the blood sample, placed it in two containers and sealed and labelled the containers, to place the container in a locked receptacle provided for the purposes and to hand the other to the prescribed safe-keeper. Where the person whose blood had been taken makes the appropriate

request, the second container is to be delivered to that person instead of to the prescribed safe-keeper. Regulation 223C defines who is a prescribed safe-keeper.

Regulation 223D requires a prescribed safe-keeper, as soon as he receives a container of a sample of blood, to number the container and enter into a register the particulars on the label attached to the container. By regulation 223E a prescribed safe-keeper to whom a container of a sample of blood is handed, is to cause the container to be stored under refrigeration and to ensure that no-one but a prescribed safe-keeper has access to it so long as it is held in the hospital. Regulation 223G requires the prescribed safe-keeper, if he receives the appropriate request within the prescribed time, to deliver the container he is keeping to the person from whom the sample was taken. Regulation 223H requires the safe-keeper to enter details in the register upon delivering the container to the person from whom the sample was taken. The obvious purpose of this part of the scheme is to provide a system which ensures that a part of the sample other than the part to be analysed by the approved analyst is kept by the safe-keeper in secure and suitable conditions so that the person from whom the sample was taken may obtain the part kept by the safe-keeper and have it analysed for himself.

I consider to be correct the submission that the medical practitioner's certificate was evidence only of compliance with those regulations applying to the process of the collection of the sample. That was decided by O'Bryan J in *Huntington v Jupp* (unreported) 19th May 1978 and with respect I agree. It follows that the certificate was no evidence of compliance with regulations 223B to 223H which prescribe the procedure to be followed after the blood sample has been collected.

The Magistrate, in giving his decision, stated that it had not been proved beyond reasonable doubt that regulations 223B, 223D and 223E had been complied with. He stated that the regulations must not only be strictly complied with, but it must be shown to the court that they had been complied with. He said that as there was no proof before the court that this had been done the information was dismissed.

It is important to bear in mind that the elements of the offence charged are (1) that the respondent was driving the motor car, and (2) that while doing so, the percentage of alcohol in his blood was more than .05 per cent. There was evidence that within two hours of the alleged offence a legally qualified medical practitioner had taken a blood sample from the respondent and placed it in two containers suitably labelled. There was evidence that the blood in one of those containers was analysed by an authorized analyst and found to contain .233 per cent alcohol.

The effect of the submission of the respondent's solicitor that there was no proof that the two containers were handled in accordance with the procedures prescribed by the regulations. I will refer to the container destined for the analyst as the analyst's container and that destined for the respondent as the respondent's container.

So far as the analyst's container is concerned, the submission amounted to one that it had not been proved

> (1) that the medical practitioner placed the container in a locked receptacle provided for that purpose (regulation 223B(b)(1)) and
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> (2) perhaps by implication from regulation 223G(b) that it was collected by a member of the Police force from that locked receptacle.

It is necessary to bear in mind the limited prescription by the regulations of what is to be done with the analyst's container. In *Huntington v Jupp* (above) at p8 O'Bryan J said:

> "It is interesting to observe that whilst regulation 223E, prescribes a safe-keeper shall cause the container he receives to be stored under refrigeration and kept under strict control in the hospital, there is no regulation governing the conditions for storage and control of the container which is in the locked receptacle in the hospital. Nor is there any regulation governing the condition for storage and control of the container when it reaches the analyst. This may appear surprising as the sample of blood in the container in the locked receptacle will be the one used to provide evidence in court if, on analysis, it is positive to alcohol."

So far as the respondent's container is concerned, the submission was that it had not been proved that it was handed to the safe-keeper by the medical practitioner and was kept by the safe-keeper as required by the regulations.

It is not a condition of the admissibility of the evidence made admissible by the sections of the Act to which I have referred that it be proved that the regulations were complied with. Nor is it an element of the offence that the regulations were complied with. The most recent decision on this question which has been drawn to my attention *Woodward v McNab* (unreported), 31 August 1978, Murray J said at p4a:

> "However a careful perusal of Section 80D of the *Motor Car Act* shows that there is nothing in that section nor in any other section of the Act which provides the proof that the regulations relating to the safe-keeping of the samples of blood taken under Section 80DA shall be a condition precedent to conviction of an offence against Section 81A. Having regard to the considerable amount of discussion on this point in the decisions of this Court, it is not necessary for me to enter into further discussion about it. I need only refer to *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84; *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596; *Lloyd v Thorburn* [1974] VicRp 2; (1974) VR 12; *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 and the following unreported decisions: *Pavlovic v Krizman* (Gowans J, 29 May 1975); *Waters v Goode* (Nelson J, 30 August 1976) and *Collins v Mithen* (Gowans J, 21 May 1975)."

To those decisions there should be added the decision to the same effect of O'Bryan J in *Huntington v Jupp* (above). It follows that the applicant has made out the first ground of the order nisi which is:

> "That the Magistrate was wrong in holding that it was necessary for the Informant to prove to the Court that Regulations 223B, 223D and 223E of the *Motor Car (Blood Samples) Regulations* 1977 had been strictly complied with."

Although it is not necessary to go further, I mention that it is recognised in the decisions to which I have referred or which are mentioned by Murray J in the passages I have quoted, that even if it were necessary to show compliance with the regulations, the presumption of regularity raises a presumption that they have been complied with. Similarly, those cases have referred to the presumption of continuance, from which the presumption arises that the sample analysed had not deteriorated from the time when it we taken.

It is only fair to the Magistrate to mention that the Prosecutor did not refer the Magistrate to any of the decisions to which I have referred. His submission was that the medical practitioner's certificate proved compliance with regulations 223B to 223E, a submission which I have found to be erroneous.

I also mention another relevant matter. The Magistrate did not apply the correct standard in deciding whether there was a case to answer. The standard was stated by the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671 as follows:

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law. Unless there is some special statutory provision on the subject, a ruling that there is a 'case to answer' has no effect whatever on the onus of proof, which rests on the prosecution from beginning to end. After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. This is a question of fact."

It is therefore not correct in considering a submission that there is 'no case to answer' to apply the standard of whether the elements of the charge have been established beyond reasonable doubt.

There is some recent lack of unanimity of opinion as to what is the precise standard to be applied in that situation. In *Wilson v Buttery* (1926) SASR 150 at 154 it was said by the Full Court of South Australia:

> "At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw?"

The correctness of the principle stated in *Wilson v Buttery* was argued before me upon an order to review in *Wilson v Kuhl* [1979] VicRp 34; [1979] VR 315 which I decided on 31 October 1978. I concluded that the statement of principle in *Wilson v Buttery* was inconsistent with the principle stated by the High Court in *May v O'Sullivan*. I concluded:

> "I consider that the test is not whether the evidence establishes a substantial balance of probability in favour of guilt but whether there is evidence which if accepted, would provide evidence of each element of the charge."

I added:

> "In a case where there is evidence which, if accepted, would provide evidence of each element of the charge, a Magistrate may still in some cases be entitled to exercise a discretion to dismiss the information without calling on the defendant. Where technically there is evidence on which the defendant could lawfully be convicted but the Magistrate concludes that there is a mere scintilla of evidence or that the evidence is so lacking in weight or reliability that no reasonable tribunal could safely convict on it, he may dismiss the information: *Benney v Dowling* [1959] VicRp 41; (1959) VR 237 at 242; *Mooney v James* [1949] VicLawRp 6; (1949) VLR 22 at 32; *Practice Note* (1962) 1 All ER 448; [1962] 1 WLR 227."

In that case I had not been referred to the decision of McInerney J in *Commissioner for Corporate Affairs v Green* [1978] VicRp 48; (1970) VR 505. There His Honour considered the statement of the Full Court of South Australia in *Wilson v Buttery* and the principle stated by the High Court in *May v O'Sullivan*. With the suggestion that the word "substantial" be excised, McInerney J treated the statement in *Wilson v Buttery* as correct. See pp512-3. On that basis the test would be stated in this way:

> "At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a balance of probability in favour of the inference which the prosecution seeks to draw?"

On this question the Court of Criminal Appeal consisting of McInerney, Anderson and Brooking JJ, in a recent decision, *R v Chee* on 27th April 1979; [1980] VicRp 32; [1980] VR 303] expressed a similar view to the view of McInerney J in the earlier case and treated the passage from *Wilson v Buttery* having apparently been approved by the High Court in *May v O'Sullivan* (See pages 15 to 16 of the judgment). While the position is as it is at present, in my opinion a Magistrate should apply the standard which has the approval of that recent decision of the Full Court.

There will be the following order: The order nisi is made absolute. The order dismissing the information is set aside and the information is remitted to the Magistrates' Court at Camberwell to be further heard by the Magistrate or, if necessary, to be reheard by another Magistrate and to be determined in accordance with law. The respondent is to pay the applicant $200 as the costs of this appeal. I reserve to the respondent liberty to apply under the *Appeals Costs Fund Act*.
