85/76

SUPREME COURT OF VICTORIA

WATERS v GOOD

Nelson J

30 August 1976

MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .05 – COMPLIANCE WITH MOTOR CAR REGULATIONS FOR HANDLING OF BLOOD SAMPLE – WHETHER NECESSARY FOR INFORMANT TO PROVE COMPLIANCE WITH THE REGULATIONS – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80D, 80F.

In this review the taking of a blood sample was used to prove the alcohol content. The defendant was conveyed to hospital and pursuant to s80 of *Motor Car Act* a medical practitioner took a blood sample for analysis. The Sixth Schedule Certificate was put into evidence. The informant's affidavit stated that he was present and saw the doctor take the blood sample, divide it into three bottles, one sample on being handed to him, he conveyed it to the Forensic Science Laboratory. According to the answering affidavit by the defendant's solicitor, the informant said he was handed two bottles containing samples and took both to the Laboratory.

However at the conclusion of the informant's case a submission was made that there was no evidence of compliance with the provisions of the *Motor Car Regulations* relating to handing of blood samples by the medical practitioner to a "prescribed safekeeper" and to their safekeeping thereafter, that since such provisions were mandatory the information should be dismissed. The Magistrate stated he accepted the Sixth Schedule Certificate but could not be satisfied beyond reasonable doubt that the doctor and the hospital complied with the regulations and therefore dismissed the information. Upon Order Nisi to review—

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrate to be re-heard in accordance with the judgment.

1. It has been decided in several cases in the Supreme Court that where an informant relies upon the provisions of s80D(1) or s80F(1) of the *Motor Car Act* 1958, in order to prove the percentage of alcohol present in the blood of a person charged with an offence to which these sub-sections refer, it is not necessary for the informant to prove compliance with the regulations as to the taking of a sample of blood or the use of a breath analysing instrument as the case may be.

***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; and**
***Pavlovic v Krizman*, unrep, Gowans J, 29 May 1975, followed.**

2. There was nothing in the provisions of the *Motor Car Act* relating to regulations made thereunder which warranted the view that the content of a particular regulation may determine whether or not it has a different effect from that of any other regulation on the operation of the substantive provisions of the Act. Accordingly, the Court was not prepared to say that those decisions were wrong. They covered the question raised in this case and it was proposed to follow them.

3. Even if the relevant provisions of regulations 219 and 223H had appeared in the Act itself, so that the decisions referred to were not apposite, the Court would not be satisfied that the implication contended for should be made. If such an implication was made, it would be necessary for the informant to prove compliance with the required procedure in every prosecution in which the provisions of s80D were relied upon. The evidentiary provisions in that section would not enable proof to be given by any of the certificates for which the provision was made. In view of the obvious intention disclosed in those provisions to dispense with the necessity of calling expert witnesses, unless the defendant exercised his right to have them called, it would be inconceivable that the legislature intended to require the proof of compliance by one of those witnesses with the procedure laid down, but refrained from permitting that proof to be given by the appropriate certificate. An implication in a statute will only be made in accordance with a legislative intention found to exist upon a consideration of the stature as a whole.

4. It followed that the inability of the magistrate to be satisfied at the end of the informant's case that the doctor or the hospital complied with the regulations did not in itself warrant the dismissal of the information. As this was the only reason given by him for his decision, he was clearly in error.

NELSON J: ... It is unfortunate that the learned magistrate was not more explicit as to the regulations which he was not satisfied had been complied with. In view, however, of his statement that he accepted the Schedule Six certificate, which certified that all the regulations relating to the collection of the sample of blood were complied with, his reasons must, I think, be interpreted to mean that he was not satisfied that in other respects the doctor and the hospital had complied with the regulations. This, I think, particularly in the light of the submission made to him must refer to the regulations relating to the handing by the medical practitioner of a sample or samples to the prescribed safe-keeper and the subsequent holding or disposal of such sample or samples.

It was contended by Mr Fricke for the informant that the expression 'all the regulations relating to the collection of the Sample of blood', which was contained in the Schedule Six certificate, included the provisions of regulation 223B insofar as that regulation required the medical practitioner to deliver parts of the sample to the police, the prescribed safekeeper or the person from whom it was taken. He relied for this contention on the unreported decision of Gowans J in *Pavlovic v Krisman* (29th May 1975), where His Honour held that the word 'collection' was wide enough and apt enough to cover more than the taking of the blood and to include the dividing of the blood into parts and its placing in separate containers as required by regulation 223. Mr Fricke contended that the word 'collection' was also wide enough and apt enough to cover the further disposition of the sample by delivery of parts of it to the various persons referred to in regulations 223A(c) and 223B.

Whether this is so or not (and I do not think in this case I am required to determine the question) I would not be prepared to interpret the magistrate's reasons as indicating that his acceptance of the Schedule Six certificate went this far. Such an interpretation would be inconsistent with the immediately following statement that the Magistrate was not satisfied that the doctor complied with the regulations. The delivery of the parts of the sample to the various persons mentioned in the regulation is the last requirement placed upon the medical practitioner. On the material before the magistrate, having regard to the dispute upon the affidavits, it was in relation to this matter alone that any reasonable doubt as to compliance by the doctor with the regulations would exist and I am satisfied it was to this matter alone in relation to any possible non-compliance by the doctor with the regulations that the magistrate was referring.

In the circumstances of this case, regulation 223B required that the medical practitioner should hand one of the containers to the informant, who was a member of the Police Force present during the taking of the sample, and the other container to the prescribed safekeeper at the hospital. There could be no doubt that one of the containers (at least) was handed to the informant. The question which therefore arises is whether the stated inability of the magistrate at the end of the informant's case to be satisfied beyond reasonable doubt that the medical practitioner handed one of the containers to the prescribed safekeeper and that 'the hospital' (presumably the prescribed safekeeper) thereafter complied with the regulations entitled him to dismiss the information. There was no evidence that at any stage the defendant made any request to anyone for one of the containers.

It has been decided in several cases in this court that where an informant relies upon the provisions of ss(1) of s80D or ss(1) of s80F, in order to prove the percentage of alcohol present in the blood of a person charged with an offence to which these sub-sections refer, it is not necessary for him to prove compliance with the regulations as to the taking of a sample of blood or the use of a breath analysing instrument as the case may be, (see *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 and *Pavlovic v Krizman*, *supra*, unreported).

Mr Phipps, who appeared for the defendant, did not contend that these cases had been wrongly decided but he contended that a distinction was to be drawn between, on the one hand, regulations which were directed to the proper taking of a blood sample and its analysis or to the proper use of the breath analysing instrument and, on the other hand, regulations which were directed to the preservation of a portion of a blood sample for the protection of the alleged offender. He contended that the authorities cited related to the former class of such regulations and not to the latter. In relation to the latter, he contended that the same principle should be applied as to the requirements of s291 of the *Health Act* 1958 in a prosecution for a breach of that Act.

Division 5 of the *Health Act* 1958 makes provision for the purchase of food for analysis. Section 281(1) provides that any person purchasing any food with the intention of submitting the same for analysis shall notify the seller of his intention, divide the food into three parts, deliver one part to the seller if required so to do, retain the second part for future comparison and, if he desires to have an analysis made, submit the third Part to an analyst for analysis. Section 297 provides that the court before which any information or appeal is heard may, at the request of either party, cause the second part of any food taken for analysis to be sent to another analyst who shall make an analysis for the information of the court.

In *Maher v WJ Drever Pty Ltd* [1967] VicRp 9; (1967) VR 65, the Full Court, in a case where an order had been made under s297 at the request of the defendant, that the second part of the food purchased should be sent for analysis, held that compliance with the provision that the second part should be retained for future comparison was a condition precedent to conviction. Starke J, with whom O'Bryan J concurred, stated (at p80) that he had not considered the situation which might arise if no order was sought or made under s297, and expressly limited his decision to the situation when such an order had been made.

This decision followed consideration of a long line of cases, both in Victoria and in the United Kingdom, in which it had been held under legislation *in pari materia* with the provisions of the *Health Act* that a person would not be convicted of an offence if the procedure laid down in the Act had not been observed. In my opinion, it is not necessary for me to deal in detail with these decisions, because the prohibition against conviction which the court has found in such cases rests upon an implication to be drawn from the provisions of the relevant legislation. It is in each case a matter of interpretation of such legislation. That, of course, does not mean that in the interpretation of a particular Act a court may not be influenced by the interpretation given to another Act in similar terms, but it is by the terms of the Act under review that its meaning must be determined.

The form of certificate by the person responsible for the safekeeping of samples of blood which the Act directs shall be admitted in evidence, (Schedule Six A), refers only to the keeping of one container and that is a container which is delivered to a member of the Police Force. It makes no reference to any container which under the regulations is to be kept for handing to the person from whom the blood sample was taken. In a case where the prosecution is based upon the analysis of a sample which was in a container received by a member of the Police Force from prescribed safekeeper, proof of the identity of such container with the one labelled by the medical practitioner would clearly be necessary, and the certificate provides *prima facie* evidence of this fact. It also, so far as it may be relevant, provides *prima facie* proof that the contents were preserved in good condition and that the regulations relating to the safe-keeping and storage of the container and its contents were complied with.

It, however, affords no evidence as to the second container or the compliance with the regulations relating to its safekeeping and storage. If, then, proof of the compliance with such regulations is a necessary part of the informant's case, the Act makes no provision for such proof by certificate, and in all cases the informant would have to prove that matter by other evidence. In practice this could only be done by calling the prescribed safe-keeper, and the provisions of ss(3A) and of sub-s (7) and (8) insofar as the latter sub-sections relate to the safekeeper, would be of no real effect.

The contention by Mr Phipps that an implication arises under the legislation that compliance of certain regulations is a condition precedent to a conviction based on the provisions of s80D rests upon the similarities of the requirements of such regulations with the requirements of the *Health Act* in cases where such a condition precedent has been implied. There is, of course, an important dissimilarity in that the *Health Act* makes specific provision for the court to have recourse to the part of the sample of food which is directed to be retained for future comparison, whereas there is no such prescribed procedure under the *Motor Car Act*. The presence of such a provision may well play an important part in raising an implication that compliance with the requirement that such a part of the sample should be retained for future comparison is a condition precedent to conviction. Moreover, once such an implication is found to exist in relation to any particular requirement in the procedure laid down, it may be difficult to withstand the inference that the implication arises in relation to all the requirements of the legislation.

However, in my opinion, the answer to Mr Phipps' contention is given by the various decisions of this court in which it was held that under the relevant provisions of the *Motor Car Act* it is not necessary for an informant to prove compliance with the regulations. I can find nothing in the provisions of the Act relating to regulations made thereunder which warrants the view that the content of a particular regulation may determine whether or not it has a different effect from that of any other regulation on the operation of the substantive provisions of the act. I am not prepared, any more than Mr Phipps was prepared, to say that these decisions were wrong. In my opinion, they cover the question raised in this case and I propose to follow them.

In deference, however, to Mr Phipps' well presented argument, I may say that even if the relevant provisions of regulations 219 and 223H had appeared in the Act itself, so that the decisions to which I have referred were not apposite, I would not be satisfied that the implication for which he contends should be made. As I have pointed out, if such an implication is made, it would be necessary for the informant to prove compliance with the required procedure in every prosecution in which the provisions of s80D were relied upon. The evidentiary provisions in that section would not enable proof to be given by any of the certificates for which the provision is made. In view of the obvious intention disclosed in those provisions to dispense with the necessity of calling expert witnesses, unless the defendant exercised his right to have them called, it would, in my opinion, be inconceivable that the legislature intended to require the proof of compliance by one of those witnesses with the procedure laid down, but refrained from permitting that proof to be given by the appropriate certificate. An implication in a statute will of course only be made in accordance with a legislative intention found to exist upon a consideration of the stature as a whole.

It follows that, in my opinion, the inability of the magistrate to be satisfied at the end of the informant's case that the doctor or the hospital complied with the regulations did not in itself warrant the dismissal of the information. As this was the only reason given by him for his decision, he was clearly in error. The grounds upon which the order nisi was granted are not, in my opinion, very artistically framed, but I think the terms of ground 1 in substance cover the error in the magistrate's decision and the order will be made absolute on that ground with costs which I fix as agreed at $200. The order dismissing the information will be set aside and the information remitted to the court for re-hearing in the light of my decision. There will be a certificate to the defendant under the *Appeal Costs Fund Act*.
