24/08; [2008] VSC 130

SUPREME COURT OF VICTORIA

DPP v MITCHELL

Curtain J

18, 22 April 2008 — (2008) 50 MVR 83

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE ADMITTED INTO EVIDENCE – BAC 0.131% – STATEMENT IN RECORD OF INTERVIEW THAT DRIVER CONSUMED "FIVE OR SIX POTS OF FULL STRENGTH BEER" – FINDING BY MAGISTRATE THAT IN THE ABSENCE OF EXPERT EVIDENCE CHARGE NOT PROVED – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS48(1)(a); 49(1)(b).

1. The wording of s48(1)(a) of the *Road Safety Act* 1986 ('Act') is unambiguous. It creates a statutory presumption and reverses the onus of proof. It casts upon the defendant the burden of establishing on the balance of probabilities that at the time at which the offence was committed the concentration of alcohol was less than that alleged.

2. The authorities establish that this must be done by sworn evidence. That may be by the calling of expert evidence to reduce the reading to a significantly lower level so as to bring it into a lower category of penalty or by eliciting evidence from the prosecution expert witness to that effect. This was not done here. The record of interview was a self-serving statement. It was not sworn evidence and thus could not be said to be sufficient to displace the presumption on the balance of probabilities. Even if the defendant had given sworn evidence consistent with his answers in the record of interview, that alone would not have displaced the statutory presumption.

3. In short, there was no evidence before the Magistrate which was capable of displacing the statutory presumption and thus, as there was no dispute that the blood sample was taken within three hours after the offence, the Magistrate was obliged, pursuant to the provisions of s48(1)(a), to accept as conclusively established that the defendant's blood alcohol reading at the time of driving was 0.131%. Even if such expert evidence had been called, there was nothing in the material before the court which would warrant a conclusion that the defendant's blood alcohol was below 0.05%, which it would have needed to have been in order for the Magistrate to dismiss the charge.

***Matthews v Van de Maat*, MC52/1983;**

***Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225, applied.**

CURTAIN J:

1. On 21 August 2005 the respondent, Luke Mitchell, while riding his motorcycle in Brunswick Street, Fitzroy, collided with a car executing a U-turn. Mr Mitchell left the scene and went to a friend's house. After some short time, he asked for an ambulance to be called and two ambulance paramedics subsequently attended and conveyed him to St Vincent's Hospital. At 1.30 a.m. a blood sample was taken from him in the presence of the informant. One sample was given to Mr Mitchell's brother and the other two samples were collected from a secured container at the hospital, and one of those samples was conveyed to the Victoria Forensic Science Centre where it was analysed and found to contain a blood alcohol concentration of 0.131%.

2. On 8 March 2006, Mr Mitchell was interviewed by the police. He stated that he had drunk four or five pots of beer over a five hour period[1] prior to the collision and that he had little recollection of the events immediately after the collision or how he got to his friend's house. He did recall, however, that at his friend's house he had two, three shots of "tequila or vodka or something – it was white"[2], before being taken to the hospital.

3. Mr Mitchell was subsequently charged as follows:

> Charge 1: Failing to render assistance after an accident contrary to s61(1)(b) of the *Road Safety Act* 1986,
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> Charge 2: Failing to give a name and address after an accident contrary to s61(1)(c) of the *Road Safety Act* 1986,

> Charge 3: Driving a motor vehicle while more than the prescribed concentration of alcohol (0.05%) was present in his blood (alleged reading 0.131%) contrary to s49(1)(b) of the *Road Safety Act* 1986.
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> Charge 4: Within three hours of driving a motor vehicle he had a sample of blood taken in accordance with s55(9A) (sic)[3] of the *Road Safety Act* 1986 which, upon analysis, was found to contain alcohol in more than the prescribed concentration of alcohol (alleged reading 0.131%) contrary to s49(1)(g) of the *Road Safety Act* 1986.

4. On 2 August 2007, Mr Mitchell appeared before Magistrate Hayes at the Melbourne Magistrates' Court. He was represented by Mr McCloskey of counsel and he pleaded not guilty to the charges. As the hearing progressed, three of the charges were withdrawn and the case proceeded on charge three, driving a motor vehicle while more than the prescribed concentration of alcohol (0.05%) was present in his blood (alleged reading 0.131%) contrary to s49(1)(b) of the *Road Safety Act* 1986.

5. The only issue at the hearing appears to be the qualifications of the analyst, Peter James McCaffery. At the time of conducting the analysis, he had not then obtained the appropriate certification. Her Honour, having heard evidence as to his experience and expertise, found, as she was entitled to under the provisions of s57(1)(a)(ii) of the *Road Safety Act*, that he was qualified to give the expert evidence as to the analysis. Accordingly, the reading of 0.131% was admitted into evidence. Although the doctor who took the sample and the courier who collected it from the hospital also gave evidence and were cross-examined, there was no challenge to legislative or regulatory compliance.

6. The prosecution called Simon O'Connell, the friend whose house Mr Mitchell went to after the collision. He gave evidence that he did not see Mr Mitchell drink alcohol at his place. Both ambulance paramedics gave evidence that Mr Mitchell said to them that he had drunk "five pints of beer"[4]. The prosecution tendered the record of interview and closed its case. Mr McCloskey addressed her Honour in the following terms:

> "I think we have made all the submissions I can make so I imagine you'll be finding the charges proven".

Her Honour then adjourned for luncheon, during which time she indicated she would read the interview. Upon resuming court after the adjournment, her Honour dismissed the charge.

7. In giving her reasons for doing so, her Honour posed the question as follows:[5]

> "So the question for me is whether at the time he was riding on the road at the time of the accident, just prior to the accident, he had .131 blood alcohol content in his system."

8. Her Honour noted the evidence of the ambulance officers, but discounted it because she said it did not provide a "time context". Her Honour said that the record of interview stated that between 5.00 p.m. and 11.30 p.m. Mr Mitchell said he consumed "five or six pots of full strength beer" punctuated by glasses of water.[6] Her Honour then stated as follows:

> "I think in the circumstances that I cannot be – or I have not been persuaded, in the absence of expert evidence, as to what his blood alcohol content might have been. On that scenario I have not been persuaded beyond reasonable doubt that he was in excess of .05 at the time he was riding his motorbike, and as a consequence I dismiss the charge."

9. The Director of Public Prosecutions now brings this appeal pursuant to s92 of the *Magistrates' Court Act* on the ground that the Magistrate erred in law in failing to find that the defendant's blood alcohol concentration at the time of driving was 0.131%.

10. The appeal poses the following questions of law:

> (1) If admissible evidence is led to establish the blood alcohol concentration of a person charged under s49(1)(b) of the *Road Safety Act* 1986, is the Magistrate bound to accept that evidence in the absence of evidence to the contrary being proved?
>
> (2) Must the contrary be proved under s48(1)(a) of the *Road Safety Act* 1986 by evidence that is admissible according to law in the hearing of a summary offence?

(3) Is a self-serving statement as to alcohol consumption made in a police record of interview admissible as evidence under s48(1)(a) of the *Road Safety Act* 1986 when the prosecution challenges it and there is no sworn evidence to establish the facts asserted in the statement?

11. Section 48(1)(a) of the *Road Safety Act* 1986 provides as follows:

> "If it is established that at any time within three hours after an alleged offence against paragraph (a) or (b) of s49(1) a certain concentration of alcohol was present in the blood or breath of the person charged with the offence it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood or breath (as the case requires) at the time at which the offence is alleged to have been committed."

12. The wording of the section is unambiguous. It creates a statutory presumption and reverses the onus of proof. It casts upon the defendant the burden of establishing on the balance of probabilities that at the time at which the offence is committed the concentration of alcohol was less than that alleged.

13. The authorities establish that this must be done by sworn evidence.[7] That may be by the calling of expert evidence to reduce the reading to a significantly lower level so as to bring it into a lower category of penalty or by eliciting evidence from the prosecution expert witness to that effect. This was not done here. The record of interview was a self-serving statement. It was not sworn evidence and thus could not be said to be sufficient to displace the presumption on the balance of probabilities. Even if Mr Mitchell had given sworn evidence consistent with his answers in the record of interview, that alone would not have displaced the statutory presumption. His statements in his interview were not supported by the evidence of Mr O'Connell and were contrary to the admissions made to the paramedics. In short, there was no evidence before her Honour which was capable of displacing the statutory presumption and thus, as there was no dispute that the blood sample was taken within three hours after the offence, her Honour was obliged, pursuant to the provisions of s48(1)(a), to accept as conclusively established that Mr Mitchell's blood alcohol reading at the time of driving was 0.131%. Her Honour has either misdirected herself as to the meaning of s48(1)(a) of the *Road Safety Act* 1986 as her reasons appear to indicate or its requirements were not brought to her attention.

14. Even if such expert evidence had been called, there was nothing in the material before the court which would warrant a conclusion that Mr Mitchell's blood alcohol was below 0.05%, which it would have needed to have been in order for her Honour to dismiss the charge. Accordingly, I am satisfied that her Honour has fallen into appellable error.

15. The answer to the three questions posed is as follows: Question (1): Yes; Question (2): Yes; Question (3): No.

16. Accordingly, the appeal is allowed and the order made on 2 August 2007 by Magistrate F.A. Hayes in the Magistrates' Court at Melbourne in case number U02028104, whereby her Honour dismissed the charge contrary to s49(1)(b) of the *Road Safety Act* 1986, be quashed and that charge be remitted back to the Magistrates' Court at Melbourne for hearing and determination according to law.

17. The appellant has sought that the respondent pay the appellant's costs of this appeal, however I do not propose to make such an order. The respondent's counsel at the Magistrates' Court did not submit to her Honour that the statutory presumption in s48(1) of the *Road Safety Act* 1986 had been displaced. He made no submissions on the subject at all and, indeed, appeared to concede to her Honour that the charge would be proven. Mr Mitchell has taken no part in these proceedings and has not done anything to protract or delay these proceedings. In these circumstances I propose to exercise my discretion and not make an order as to costs.

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[1] Question 22 Record of Interview.
[2] Questions 70, 73 Record of Interview.
[3] This charge alleged the wrong section. It should have been alleged in accordance with s56 of the *Road Safety Act*.
[4] Transcript pp.25, 27, 30 and 32.
[5] Transcript p.107.
[6] Transcript p.107. Mr Mitchell, at question 134 of his record of interview, said "... probably had four or five pots over about five hours". There was no reference to six pots in the record of interview.
[7] *Caughey v McClaer* (unreported Supreme Court (Vic), O'Bryan J, 9 March 1977), and *Matthews v Van*

De Maat (unreported Supreme Court (Vic) Gobbo J, 28 September 1983), *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225.

APPEARANCES: For the appellant DPP (on behalf of Jason Leigh McKenzie): Mr Elston SC, counsel. Office of Public Prosecutions. For the respondent Mitchell: No appearance.
