

51/83

## SUPREME COURT OF VICTORIA

**PETERS v FLUDE**

Gray J

15 August 1983

**MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – BLOOD SAMPLE TAKEN – EVIDENCE BY DEFENDANT OF HIS BELIEF THAT HE CONSUMED ALCOHOL AFTER DRIVING – PRESUMPTION: MOTOR CAR ACT 1958, SS80G, 81A.**

F. was involved in a motor car accident. He was conveyed to hospital where a blood sample was taken from him, indicating a blood/alcohol level of .149%. When the matter came on for hearing, F. gave evidence that his recollection of the accident was blurred, but that he believed – on the information of a friend – that he had been given brandy to drink whilst waiting for the ambulance. As the friend was outside Australia at the date of hearing, F. sought to tender a statutory declaration made by the friend; this was excluded from evidence. However, the court dismissed the information on the ground that the evidence of subsequent drinking raised a reasonable doubt. On order nisi to review—

**HELD: Order nisi absolute.**

**1. It was not reasonably open to the court to do other than act on the presumption expressed in s80G of the Motor Car Act.**

**2. Obiter: Where there is evidence that a defendant has consumed alcohol after driving but before being tested, it does not follow that the defendant should be acquitted.**

*Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR 329, applied.

**GRAY J:** [After setting out the facts, His Honour continued]: ... [4] It can be seen that the only admissible evidence before the court was that constituting the prosecution case and the sworn evidence of the defendant. It is clear that there was no admissible evidence at all to show that the respondent had consumed any alcohol after the accident. The Statutory Declaration of the witness was rightly excluded from evidence, and the respondent's statement of his belief was clearly inadmissible hearsay material.

Section 80G of the *Motor Car Act* provides that:

"If it is established that within two hours of an alleged offence a certain percentage of alcohol is present in the blood of the person charged, it shall be presumed until the contrary is proved, that not less than that percentage of alcohol was present in the defendant's blood at the time of the commission of the offence."

I should add that the evidence showed that this blood sample was taken within two hours of the time of the happening of the accident. The sample was taken at 12.15 a.m., whereas the defendant admitted that the accident happened at approximately 11.30 pm. The result of the proof of the presence in the respondent's blood of a [5] forbidden percentage of alcohol meant that the Court was obliged to presume that the forbidden percentage of alcohol was present in the defendant's blood at the time of the commission of the offence. There was no evidence to the contrary, and in my opinion the Magistrates' Court was obliged to proceed in accordance with the presumption. I should add that even if there had been admissible evidence before the Magistrates' Court that the defendant had had a glass of brandy after the accident, it would by no means have followed that the defendant should have been acquitted. In this regard I refer to *Wright v Bastin (No. 2)* [1979] VicRp 35; (1979) VR at p329. In particular I refer to a passage at p342 in the judgment of Menhennitt J:

"In other words, in my view of this defendant to avail himself of this evidence in the circumstances of this case, he would need to show not merely that he consumed some alcohol, but that that alcohol at least as a matter of probabilities explained the difference between the permissible limit and the blood alcohol content at the time when the sample was taken."

In that case His Honour had before him evidence that the defendant had consumed liquor following the accident but, nonetheless, upheld the Magistrate's decision whereby the defendant had been convicted.

To my mind, this case is a simple one. The Magistrates' Court had ample evidence to support a conviction. There was a statutory presumption in relation to the matter which the Magistrates' Court [6] departed from in dismissing the information. It was not reasonably open to the Magistrates' Court to do other than act on the presumption expressed in s80G of the *Motor Car Act* and, accordingly, I am satisfied that the court was in error in dismissing the information. So, in the circumstances, the defendant having gone into evidence and put his case, I feel justified in substituting a conviction for the order of dismissal made by the Magistrates' Court.

**APPEARANCE:** For the applicant Peters: Mr M Adams, counsel. AG McLean, Acting Crown Solicitor.

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