

22/78

SUPREME COURT OF VICTORIA

WALLACE v COOK

McInerney J

15 March 1978

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO FURNISH SAMPLE OF BREATH FOR ANALYSIS – WHETHER DEFENDANT HAD A REASON OF SUBSTANTIAL CHARACTER FOR SUCH REFUSAL – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80F(11)(a).

At the hearing before a Magistrates' Court, evidence was given that a motor car, the registration No. of which was LED 994 and having a black eagle on one side, was involved in a collision at about 8:20. At about 9.15 the vehicle was found garaged with the bonnet still warm. The police evidence was that the defendant conceded that he had driven the car earlier that evening, that no one else had driven the car, that the defendant said he knew nothing of any accident and that he denied having consumed liquor before returning home. Evidence was also given that the defendant, at the time of the police visit to his premises, was in bed and upon being summoned was unsteady on his feet and had a smell of alcohol on his breath. The defendant testified that on arriving home he had drunk between one third and one half bottle of whisky, took tablets for a severe headache and then retired to bed. The charge was found proved. Upon appeal—

HELD: Order nisi discharged.

The Magistrate was right in law in finding the charge proved. When it was analysed, the defendant's reason was fundamentally a reason that he desired to avoid providing information which might be used against him because he considered that the use made would be unfair, in that the reading would show a percentage of alcohol in the blood greater than would have existed at the time of the driving. In fact, however, if the reading had yielded that result, the defendant could have met that evidence by adducing evidence of his subsequent consumption of liquor. He was not entitled to refuse to furnish a sample of his breath simply because the sample so rendered might have yielded a result showing a percentage of blood alcohol greater than might have prevailed at the time of the driving. The defendant was not disadvantaged by that circumstance. He was not shut out from relying on a defence otherwise open to him.

McINERNEY J: ... The defendant gave evidence that he did not undergo the breath analysis test because he had not been drinking intoxicating liquor prior to driving the car that night and because intoxicating liquor had been consumed by him after driving. I should add that the defendant's evidence as to the consumption of the liquor was supported by evidence given by the defendant's wife. She gave other evidence which was not accepted by the Magistrate.

The Magistrate, in giving his reasons, stated that although he was unable to make a finding as to whether the defendant had been drinking prior to driving or not, he was satisfied that the defendant had consumed a quantity of intoxicating liquor after driving, but he did not find that the consumption of intoxicating liquor after driving constituted a reason of a substantial character so as to avail the defendant of a defence to this charge.

The ground in the order nisi argued by Mr Aizen is in these terms:

'1. that the learned Stipendiary Magistrate was in error in holding that the consumption of intoxicating liquor after driving was not a reason of a substantial character so as to avail him of that defence.'

With that ground, although he did not argue it separately. Mr Aizen coupled ground 9 as follows:

'2. On the evidence the learned Stipendiary Magistrate was in error in not dismissing the information.'

He is entitled to argue that ground on the footing that the Magistrate has found, on evidence which it was open to the Magistrate to accept, that whether or not the defendant had

consumed liquor prior to the driving in Heatherton Road, which gave rise to these proceedings, he was satisfied that the defendant had consumed a quantity of intoxicating liquor after driving. Mr Aizen was further entitled to rely on the evidence elicited by him in cross-examination of Senior Constable Orr of the Breath Analysis Section, who gave evidence, so far as was relevant in these terms:

'He was asked that if a person who had not been drinking whilst driving had consumed intoxicating liquor of about one quarter to one half of a full bottle of whisky immediately after driving, and whether a test conducted some one or two hours after drinking would show accurately later the blood alcohol at the time of driving. He replied, "No". He was then asked if a person had been drinking and had consumed a similar amount of alcohol in similar circumstances, whether the reading obtained would over-estimate the alcohol reading obtained. He replied, "Yes". He was asked if therefore a breakdown can only give a reading at the time of the test. He replied, "Yes".

The Magistrate said he was not satisfied that the defendant had a reason of a substantial character for refusing the breath test. That must mean that the Magistrate was not satisfied that the defendant had some reason of a substantial character for his refusal, other than a desire to avoid providing information which might be used against him.

It may be accepted that in almost every case in which a defendant refuses to undergo a breath test, his refusal is based, at least in part, on a desire to avoid providing information which might be used against him. The provisions of sub-s(12) which exonerate the person charged from the consequences of his refusal to undergo a breath test, if he satisfies the court that there was some reason of a substantial character for his refusal, other than a desire to avoid providing information which might be used against him, are capable of being applied in two sets of circumstances, (1) where there is a reason of a substantial character which does not stem at all from and is not associated in any way with a desire to avoid providing information which might be used against him, and (2) cases where over and above a desire to avoid providing information which might be used against him, the defendant has some reason of a substantial character for refusing to undergo the breath test.

Some light is cast on the meaning of sub-s(12) of the provisions of s80G. That section creates a statutory presumption, in the circumstances therein specified that the percentage of alcohol present in the blood at the time of the taking of the test is the same percentage as was present in the blood at the time of the offence. That presumption operates unless the contrary is proved. Section 80G leaves it open to the defendant to adduce evidence to show some reason why the court should not act on the statutory presumption. An obvious case where the presumption would be rebutted and the contrary proved might be a case such as the present, if, in fact, it is shown that the defendant, between the time of the incident involving his driving and his undergoing the breath test, has consumed a large quantity of alcohol. Whether it would be necessary in such a case to adduce scientific evidence to show the precise way in which the consumption of alcohol subsequent to the time of the incident can operate to destroy or qualify the statutory presumption is a matter I need not here consider, but obviously if the defendant had undergone the test in the present case it would have been open to him to lead evidence that after coming home he had consumed the quantity of liquor he said he had, in order to rebut any inference or presumption arising from the blood alcohol reading given on the breath analysis test.

What constitutes a reason of a substantial character within the meaning of sub-s(12) of s80F has been considered by the Full Court in the case of *Burns v Storey* [1970] VicRp 50; (1970) VR 388. I accept — as of course I am bound to — both the decision and the reasons for that decision. In particular I accept what fell from Their Honours at p391 of the report. The facts of that case illustrate what might be and what in fact was there held to be a reason of a substantial character for the defendant's refusal to undergo a breath test.

I have come to the conclusion that the Magistrate was right in law in the decision which he gave. It seems, to me that when it is analysed the defendant's reason is fundamentally a reason that he desired to avoid providing information which might be used against him because he considered that the use made would be unfair, in that the reading would show a percentage of alcohol in the blood greater than would have existed at the time of the driving. In fact, however, if the reading had yielded that result, the defendant could have met that evidence by adducing evidence of his subsequent consumption of liquor. I do not think he was entitled to refuse to

furnish a sample of his breath simply because the sample so rendered might have yielded a result showing a percentage of blood alcohol greater than might have prevailed at the time of the driving. The defendant was not disadvantaged by that circumstance. He was not shut out from relying on a defence otherwise open to him. I do not consider in those circumstances, that there was a reason of a substantial character for the defendant's refusal. ...
