13/81

SUPREME COURT OF VICTORIA

HEALY v WRIGHT

Starke J

26 March 1981

MOTOR TRAFFIC – DRINK/DRIVING – READING 0.20% – DEFENDANT CONVICTED – EVIDENCE TAKEN BY MAGISTRATE ABOUT DEFENDANT'S CONSUMPTION OF INTOXICATING LIQUOR PRIOR TO DRIVING – DEFENDANT SAID HE HAD 8-10 BEERS – MAGISTRATE READ DOWN READING TO LESS THAN .15%BAC – DEFENDANT DISQUALIFIED FROM DRIVING FOR 12 MONTHS – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80G, 81(A).

HELD: Order nisi absolute.
On general principle it is not open to a magistrate to draw any inference as to the likely effect on a person of the consumption of intoxicating liquor. Matters of this technical nature are not of the requisite notoriety that a magistrate can take judicial notice of what a certain number of beers does or does not amount to in percentages of alcohol in any person's blood. Accordingly, the magistrate was in error in accepting the evidence of the defendant's consumption of alcohol and acting on the blood/alcohol reading being less than 0.20%.

***McArthur v McRae* [1974] VicRp 43; (1974) VR 353; and**
***Caughey v McClaer*, unrep, O'Bryan J, 9 March 1977, followed.**
***Vaughan v Bechmann*, unrep, Beach J, 31 July 1979, not followed.**

STARKE J: This is an order nisi to review a decision of Mr R DeGruchy, a Stipendiary Magistrate, sitting at the Magistrates' Court in Stawell. The facts are very simple: the respondent was apprehended driving a motor car in the streets of Stawell at sometime between ten and eleven. It appeared to the arresting constable that he had been drinking. He was taken to the Stawell Police Station and there he was subject to a breath test and the result was that it was shown that there was .2 grams of alcohol per 100 millimetres in his blood. He was duly charged with having driven a motor car with a blood count of more than .05 and he came before the Magistrate in the Stawell Court on the 9 June 1980 and there he pleaded guilty. The Magistrate fined him $150, cancelled his driving licence and ordered that he should be disqualified from holding a driving licence for a period of 12 months. It is said that, because of the provisions of s81(A), the Magistrate was bound to make an order that the respondent should be disqualified from holding any driving licence for at least two years.

The facts were these – both to the police and in the witness box below, the respondent said that he had had 8 or 10 beers in two hotels, which he had visited during the evening. There was, apparently, no evidence given as to what blood count 8 or 10 beers would probably represent. The Magistrate, in fixing the penalty, said this:

> "I am satisfied the defendant's reading was over .05 but I am hesitant about the certificate reading. There could have been an honest mistake. Some tablets that are taken do accentuate your reading. There is a strong possibility that there was an incorrect reading tabulated but I am satisfied the reading would have been over .1. I rely on his statement that he had drunk 10 beers but I am not satisfied that the reading would have been over .15."

Under s80G of the *Motor Car Act*, it is provided as follows:

> "If it is established that, at any time within two hours after an alleged offence, a certain percentage of alcohol is present in the blood of the person charged to have offended it shall be presumed, until the contrary is proved, that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed."

This section clearly passes the burden to the respondent, once it has been proved by the production of the required certificate, that his blood count was a stated percentage. Proof, of

course, is only on the balance of probabilities. The evidence did not disclose what percentages 8 or 10 beers would show, nor was there any evidence that the particular pills he had taken would have had any effect on his blood count. It is important to bear in mind that the burden of proof was on him.

The question, and the short point to be determined in this case, is this – was the magistrate, because no doubt of his knowledge gleaned in other cases, very likely many other cases, entitled, by accepting his evidence which he did and which he was entitled to do, and proceed to infer that 8 or 10 beers could not produce a blood count of .2? On general principle, in my view, it is clear that he could not draw any such inference. The only basis for any argument to the contrary is that the matter is of such notoriety that magistrates could, and I should, take judicial notice of it. I do not regard matters of this technical nature to be of the requisite notoriety to enable me to take judicial notice of what a certain number of beers does or does not amount to, in percentages of alcohol in this man or any person's blood.

I am supported in forming this view by a decision of Harris J in *McArthur v McRae* [1974] VicRp 43; (1964) VR 353. There is also an unreported decision of O'Bryan J *Alexander Caughey v McClaer*, delivered 9 March 1977 which is to the same effect. I am informed that there is a decision of Beach J in *Vaughan v Bechmann*, unreported, delivered 31 July 1979 to the opposite effect. As a matter of principle, I am quite clear in my own mind that the decisions of Harris J and O'Bryan J are correct and that that of Beach J is not and, accordingly, I propose to follow the decisions of Harris J and O'Bryan J. In the circumstances, the order nisi will ne made absolute.

APPEARANCES: For the applicant Healy: Mr PC Golombek, counsel. Mr D Yeaman, State Crown Solicitor.
