57/78

SUPREME COURT OF VICTORIA

WOODWARD v McNAB

Murray J

31 August 1978

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE TENDERED SHOWING A BAC OF 0.22% – CHARGE DISMISSED – MAGISTRATE ACCEPTED SUBMISSION THAT A CERTIFICATE SHOULD HAVE BEEN TENDERED WHICH SHOWED THAT THE RELEVANT REGULATIONS HAD BEEN COMPLIED WITH – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80D(3A).

At a hearing before a Magistrates' Court evidence was given that the respondent was the driver of a motor car which was involved in a collision. The prosecution led evidence of a conversation had with the respondent, tendered a certificate as to the taking of a blood sample (within 2 hours of the accident) and a further certificate showing that the blood, when analysed, had a blood/alcohol concentration of .22 per cent. The information was dismissed after the prosecution closed its case, it having been submitted that a certificate pursuant to section 80D(3A) should have been tendered. Upon an Order nisi to review—

HELD: Order absolute. Remitted to the Magistrate to be dealt with according to law.
However a careful perusal of section 80D of the *Motor Car Act* shows that there is nothing in that section nor in any other section of the Act which provides that proof that the regulations relating to the safe keeping of the samples of blood taken under section 80DA shall be a condition precedent to conviction of an offence against section 81A. Having regard to the considerable amount of discussion on this point in the decisions of the Supreme Court, it is not necessary to enter into further discussion about it.

***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;**
***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78;**
and the following unreported decisions:
***Pavlovic v Krizman* (Gowans J, 29 May 1975);**
***Waters v Goode* (Nelson J, 30 August 1976); and**
***Collins v Mithen* (Gowans J 21 May 1975), referred to.**

MURRAY J: ... From what was said by the Stipendiary Magistrate it appears to me that he accepted the submission made on behalf of the respondent by his solicitor that it was necessary for the prosecution to tender a certificate in accordance with section 80D(3A) in order to prove that the regulations relating to the safe keeping of samples of blood had been complied with. It is interesting to note that as the regulations now stand the only requirement relating to the disposition and care of the blood sample which is subsequently analysed appears in regulation 223B of the *Motor Car (Blood Samples) Regulations* 1977 (SR 29/1977).

In the present case no member of the police force was apparently present when the blood sample was taken and the only obligation relating to the blood sample subsequently sent for analysis appears in regulation 223B(b)(i) namely that the doctor taking the sample must place it in a locked receptacle provided for the purpose. The remainder of the provisions of the regulations relating to the safe keeping under refrigeration of the blood samples relates to the sample which is subsequently available for the person whose blood has been taken. It follows that the regulations themselves make no provision for the proper handling and safe keeping of the blood sample which is subsequently analysed between the time when the blood is taken and the time when it is analysed save that, at the hospital, it just be kept in a locked receptacle. It may therefore be that the regulations themselves adopt the presumption of regularity in relation to the safe keeping of the blood sample when it is taken to the Forensic Science Laboratory and stored pending analysis.

However it is clear that the Stipendiary Magistrate took the view that it was a condition

precedent for the prosecution to prove that the regulations had been complied with and that a conviction could not be recorded. In my opinion this view is plainly erroneous and is certainly not consistent with a number of decisions both reported and unreported of this court.

In fairness to the Stipendiary Magistrate I should point out that none of these decisions was referred to his attention either by the prosecuting sergeant or by the solicitor who appeared for the respondent. The prosecuting sergeant appears to have confined his submissions to an argument that the certificate in the form of the Sixth Schedule which related to the collection of the blood sample was wide enough to cover the subsequent disposal and maintenance of the samples in accordance with the regulations. The Stipendiary Magistrate did not accept this submission and, without deciding the point, I would be very much inclined to agree with the view that he took.

However a careful perusal of section 80D of the *Motor Car Act* shows that there is nothing in that section nor in any other section of the Act which provides that proof that the regulations relating to the safe keeping of the samples of blood taken under section 80DA shall be a condition precedent to conviction of an offence against section 81A. Having regard to the considerable amount of discussion on this point in the decisions of this Court, it is not necessary for me to enter into further discussion about it. I need only refer to *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; *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 and the following unreported decisions: *Pavlovic v Krizman* (Gowans J 29th of May, 1975): *Waters v Goode* (Nelson J 30th of August 1976) and *Collins v Mithen* (Gowans J 21st of May 1975).

It follows that the Stipendiary Magistrate was in error in holding that it was necessary for the prosecution to prove compliance with the regulations either by tendering a certificate under sub-section (3A) or otherwise. There was therefore a *prima facie* case made out before the Stipendiary Magistrate and accordingly the order nisi will be made absolute and the matter will be remitted to the Stipendiary Magistrate to deal with according to law.
