20/75

SUPREME COURT OF VICTORIA

ALTMAN v FOLEY

Young CJ

3 February 1975

MOTOR TRAFFIC – DRINK/DRIVING – EXCEEDING .05% – BREATHALYSER – APPROVED INSTRUMENT – PROPER OPERATION – EXPERT – EVIDENCE OF DISCREPANCY IN READINGS – EVIDENCE LED BY DEFENDANT IN RELATION TO BREATHALYZER ERROR – MAGISTRATE FOUND CHARGE PROVED – MAGISTRATE STATED THAT HE PREFERRED OTHER EXPERT EVIDENCE WHICH HE HAD HEARD IN OTHER CASES – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

On a charge of exceeding .05% the informant/operator gave oral evidence of a reading of .125%; that the Certificate and copy were compared; that the machine was in proper working order; that it complied with the regulations; that it was an approved instrument within s80F; and that he tested it as correct afterwards. Cross-examination indicated that he could not remember the machine nor its markings, nor even the occasion in question: there was no defending evidence on this point. The Magistrate found the charge proved. Upon Order nisi to review—

HELD: Order absolute. Order of the Magistrate set aside. Remitted to the Magistrates' Court for hearing and determination according to law.

1. It was impossible to say that there was no evidence upon which the Magistrate as a reasonable person could have found that the instrument in question was an approved instrument. The cross-examination could not have been regarded as so destroying the evidence-in-chief as to lead to a situation where the Magistrate could not have been satisfied that the instrument was an approved instrument. Whether it was or not was a question of fact to be determined by the Magistrate and the Court was unable to say that as a reasonable person the Magistrate could not have reached the decision he did. Ground 1 of the order nisi therefore failed.

2. In relation to Ground 2, there was nothing in the material to suggest that the Magistrate misdirected himself as to what constituted proof that the instrument was an approved instrument or as to where the onus of proof lay. The Magistrate's observation that there had been no evidence by the defendant to indicate that it was not an approved instrument was entirely accurate and did not reveal any misunderstanding of where the onus of proof lay. Ground 2 therefore failed.

3. In relation to the written articles which were tendered in evidence, the article by these authors ought not to have been received as evidence upon the basis upon which they was tendered, but since they were received in evidence their reception could not be ignored. The Magistrate was entitled to say that he would not act upon it but he was not entitled to say that he would not act upon it because he preferred certain other expert evidence which he had learnt about either in other cases which he had himself heard or about which he had read.

4. The taking into account of evidence which had not been given in the particular case was too fundamental an error to permit the Supreme Court to uphold the conviction.

5. Accordingly, the order nisi was made absolute upon ground numbered 7.

GROUND 1:
"Because the cross-examination had rebutted the *prima facie* value of that evidence, the Magistrate could not be satisfied beyond reasonable doubt that the instrument was an approved one; that the Magistrate should not have accepted that evidence as being evidence of a trained expert; should not have accepted that the operator would thus be fully aware if the machine was not an approved one and should not have cast the onus of rebuttal on the defence.

YOUNG CJ: ... The fact that evidence-in-chief provides evidence upon which a person could lawfully be convicted does not mean that the effect of that evidence cannot be destroyed or weakened by cross-examination: *McArthur v McRae* [1974] VicRp 43; [1974] VR 353. To read the cross-examination of the senior constable now does not necessarily suggest that it was directed to casting doubt upon whether the instrument was an approved instrument. But the question

asked by way of re-examination strongly suggests that it was so understood at the time. But when all the evidence had been given the task for the Court was to decide whether on the whole of that evidence it was satisfied beyond reasonable doubt that the defendant was guilty. That is a question of fact: *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671. This Court will not interfere on an order to review such a decision, in respect of findings of fact if there was evidence upon which the Magistrate might, as a reasonable man, have come to the conclusion that he did: *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346, especially at pp351-2; (1961) 19 LGRA 232.

Adopting this approach I find it impossible to say that there was no evidence upon which the Magistrate as a reasonable man could find that the instrument in question was an approved instrument. Indeed, as already stated, Dr Pannam conceded that apart from the cross-examination, such evidence did exist. I cannot regard the cross-examination as so destroying the evidence-in-chief as to lead to a situation where the Magistrate could not be satisfied that the instrument was an approved instrument. Whether it was or not was a question of fact to be determined by the Magistrate and I am unable to say that as a reasonable man he could not have reached the decision he did. Ground 1 of the order nisi therefore fails.

GROUND 2:
That there was insufficient proof of the proper operation of the machine, other than the informant stating that he complied with the regulations. (There was no evidence by him that the instrument was properly operated).

YOUNG CJ: I see no support for Ground 2. There is nothing in the material to suggest that the Magistrate misdirected himself as to what constituted proof that the instrument was an approved instrument or as to where the onus of proof lay. The Magistrate's observation that there had been no evidence by the defendant to indicate that it was not an approved instrument was of course entirely accurate and did not reveal any misunderstanding of where the onus of proof lay. Ground 2 therefore fails.

The relevant regulations are Regulations 225 to 229 of the *Motor Car (Blood and Breath Samples) Regulations* 1971 (S.R. No. 169 of 1971). Some of these regulations relate to the operation of the instrument. Accordingly, I think it was open to the Magistrate to conclude on the evidence if it were necessary to do so, that it was a reasonable inference that the instrument was in proper working order.

But it is unnecessary to resolve that question finally because no issue as to the proper operation of the instrument was raised at the hearing of the information and it is not a necessary part of the informant's proof that the instrument was properly operated.

Section 80F(1) enables evidence to be given of the percentage of alcohol indicated to be present in the blood of a person by an approved breath analysing instrument operated by a person authorised in that behalf by the Chief Commissioner of Police. Thus it is a necessary part of the informant's proof that the instrument is an approved instrument and for this purpose he may avail himself of the provisions of s80F(5)(i) but it is not a necessary part of the informant's proof to establish the matters dealt with in s80F(5)(ii) and (iii). These paragraphs appear to be designed to enable an informant readily to rebut any suggestion that a doubt might be raised as to the validity of the results obtained by reference to the operation of the instrument. See *Hindson v Monahan* [1970] VicRp 12; [1970] VR 84 at pp95-6. No doubt an informant will usually avail himself of the provisions of those paragraphs in giving his evidence-in-chief but if he should fail to do so and if no issue is raised as to the matters dealt with in those paragraphs his proof will not thereby be rendered defective. Here no issue was raised as to the proper operation of the apparatus by the operator and this ground also fails. Cf. *Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596 at p605.

GROUND 7
That the Magistrate rebut on expert evidence which was not called at the hearing and could not be tested by cross-examination, and declined to accept some expert defence evidence. The defence called Zentner, an approved analyst under the *Health Act*, who gave evidence that he had carried out numerous blood tests as to alcohol content, and that he accepted the opinions of Doctors McCallum and Scroggie as experts in an article which indicated a discrepancy of .028 by under or

over estimation in comparison between blood and breathalyser tests. The article was then tendered. The Magistrate held that the defendant must prove the reading incorrect; that other experts have previously disagreed; and the legislation does not take cognizance of such alleged discrepancy.

YOUNG CJ: The difficulty in this part of the case seems to have been caused simply by the reception of inadmissible evidence. The article by McCallum and Scroggie was clearly not admissible in the manner in which it was tendered. Much of Mr Zentner's evidence was inadmissible too but, if he be regarded as an expert for relevant purposes, it may be said that there was some evidence that the machine could over-estimate.

Although the reception of the inadmissible evidence may be said to have caused the difficulty before the Magistrate, what has caused a difficulty so far as I am concerned is that the Magistrate appears to have decided the case upon the basis of evidence which was not given at the hearing This of course he cannot do: cf. *McArthur v McRae* (*supra*) at p357. The Magistrate was quite right in saying that it was not necessary to accept the evidence which had been given and his remark 'There are other experts,' might be taken to have meant no more than it actually says, but having regard to his statement, 'I know of other expert evidence given in other cases,' and to his recognition of counsel's problem when he drew attention to the fact that the Magistrate was accepting evidence which he had not been given the opportunity of testing by cross-examination, I consider that the Magistrate did act upon evidence which was not given at the hearing. This is in substance Ground 7 of the order nisi which in my opinion is made out.

But a question arises as to what course should now be taken. There is something to be said for the view that since the Magistrate rejected the 'expert evidence' as he was entitled to do, there was simply no evidence in the case which could rebut the statutory presumption contained in Section 80G. That section reads:

> "80G. For the purposes of this Division if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence 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."

The effect of this provision was recently considered by Menhennitt J in *Holdsworthy v Fox* [1974] VicRp 27; [1974] VR 225. Once it is established, as in this case by the evidence of the Senior Constable, that there was present in the blood of the driver of the car at the relevant time a percentage of alcohol expressed in grams per one hundred millilitres in excess of .05 per centum the onus is upon the driver, to establish that the true percentage was not in excess of .05 per centum. If the so-called expert evidence here were rejected the defendant had clearly not discharged that onus. The evidence of Kurt Zentner that any machine could over-estimate and that Doctors McCallum and Scroggie found that the machine could over-estimate by 0.023 per centum and it could also under-estimate would not discharge this onus even on the balance of probabilities. The position was that there was evidence that there was present in the blood of the defendant as the relevant time a percentage of alcohol in excess of .05 per centum. The defendant did not seek to show that the true percentage was some other figure but rather to cast doubt upon the accuracy of the informant's figure. He sought to do this by tendering the article by Doctors McCallum and Scroggie and by obtaining evidence from others that they were experts. In my view the article by these authors ought not to have been received as evidence upon the basis upon which it was tendered, but since it was received in evidence its reception cannot be ignored. The Magistrate was entitled to say that he would not act upon it but he was not entitled to say that he would not act upon it because he preferred certain other expert evidence which he had learnt about either in other cases which he had himself heard or about which he had read.

In these circumstances I do not think that I should simply uphold the conviction upon the ground that upon the evidence properly admitted the defendant should clearly have been convicted: cf. *Krummel v Kidd* [1905] VicLawRp 29; (1905) VLR 193; 10 ALR 264; 26 ALT 131: *Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485; 13 ALR 352; 29 ALT 23; *MacManamny v King* [1907] VicLawRp 93; (1907) VLR 535; 13 ALR 258; 28 ALT 250. The taking into account of evidence which had not been given in the particular case is too fundamental an error to permit this course. Cf. *Reidy v Herry* [1898] VicLawRp 108; (1898) 23 VLR 508. Accordingly I think that the order nisi should be made absolute upon ground numbered 7. It is not necessary to discuss

in any more detail Grounds 6, 8, and 9.

The point in the hearing at which the expert evidence as to the accuracy of the breathalyser apparatus became relevant was, in a sense, at the point where consideration of the penalty arose. It was not in substance contested that the defendant's blood alcohol percentage exceeded .05 per cent but it was submitted that the Magistrate should not be satisfied that it exceeded .10 per centum so that the disqualification of the defendant's licence should be for not less than three months rather than for not less than six months. But it would not, I think, be possible to leave the conviction undisturbed and merely remit the case to the Magistrate to fix the appropriate penalty. The fixing of the appropriate penalty would necessarily involve, if the defendant wished to lead evidence, consideration of the blood alcohol percentage and to leave the present figure of .028 per centum stand as the basis of the conviction but to determine perhaps a different figure for the disqualification would not be in accordance with the legislation.

The legislation contemplates that by the operation of Sections 80F and 80G and any admissible evidence a certain percentage of alcohol in the blood of the person charged will be established and upon the percentage so ascertained the disqualifications in s81A(3) operate. The Magistrate was correct in saying that the legislation does not take into account any discrepancy if he was referring to s81A(3) but it remains necessary to make a positive determination of the extent to which the blood alcohol percentage exceeds .05 per cent.
