**14/79**

## SUPREME COURT OF VICTORIA

# *WRIGHT v BASTIN (No 2)*

**Menhennitt J**

**19 December 1978 — [1979] VicRp 35; [1979] VR 329**

**MOTOR TRAFFIC – DRINK DRIVING – DRIVER INVOLVED IN MOTOR VEHICLE ACCIDENT – ADMITTED TO HOSPITAL – BLOOD SAMPLE TAKEN – READING OF 0.225%BAC – SAMPLE TAKEN TWO HOURS FIVE MINUTES AFTER ACCIDENT – WHETHER CERTIFICATES ADMISSIBLE – PRESUMPTION OF REGULARITY – PRESUMPTION OF CONTINUANCE – EFFECT OF POST-DRIVING CONSUMPTION OF ALCOHOL – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80DA, 80F, 80G, 81A(1).**

The applicant was convicted by a Magistrates' Court for driving whilst his blood/alcohol exceeded .05%. He had been admitted to hospital following a motor vehicle accident, where a blood sample was taken. At the hearing the certificate of analysis was tendered in evidence and showed a reading of 0.225%. The Magistrate, in finding the charge proved, found that the applicant had consumed "no less than one bottle of beer" between the time of driving and the taking of the blood sample. On review it was submitted that sub sections (3) and (4) of s80D of the *Motor Car Act* should be read down, so that certificates under Schedule 6 (taking a blood sample) and Schedule 8 (certificate of analysis) were inadmissible when such sample was not taken within 2 hours after the alleged offence. Upon appeal—

**HELD: Appeal refused.**

**1. Sub-s (3) and (4) of s80D of the *Motor Car Act* 1958 ('Act') are to be read according to their ordinary plain, natural meaning and are not to be read down in the manner contended for on behalf of the applicant defendant. On ordinary principles of statutory construction the words of sub-section (3) and (4) should be given their ordinary, plain, natural meaning unless there is some compelling reason which produces a contrary conclusion.**

**2. The reference to a sample within two hours in sub-section (1) of s80D of the Act and those words having an understandable significance of their own, they do not justify reading down the provisions of sub sections (3) and (4) so as to confine the operation of those sub-sections to samples of blood taken within two hours of the relevant driving. Accordingly, the submission for the defendant, that, by reason of the provisions of the legislation the certificates in the terms of Schedule 6 and schedule 8 were inadmissible was not accepted.**

**3. The presumption of regularity is not confined to conclusions about holding of public office or the performance of public duties, although the duty imposed on a doctor under s80DA(1) of the Act is a public duty imposed on him by Statute and a duty which obliges him to do something which would otherwise, without consent, constitute an unlawful assault. The presumption of regularity leads to the conclusion *prima facie* that the sample was regularly and lawfully taken, that the doctor who took the sample and gave the certificate should be presumed not to have acted unlawfully and should be presumed to have acted in pursuance to his statutory obligation.**
***Collins v Mithen* unrep, Gowans J, VSC, 21 May 1975; and**
***Mallock v Tabak* [1977] VicRp 7; (1977) VR 78, followed.**

**4. the presumption of continuance, and the extent to which the blood alcohol content exceeded .05 per centum five minutes after the two hour period, led to the conclusion that it was reasonably open to the Magistrate to conclude that at the time of the driving the blood alcohol content of the driver exceeded .05 per cent.**

**5. In the present case, the relevant facts were that five minutes after the two hours referred to in s80G the blood alcohol content of the defendant – the applicant – was .225 per cent, that is four and a half times the permissible limit. Having regard to the presumptions to be found in the legislation, having regard to the fact that the blood alcohol content only five minutes after the two hour period was four and a half times the permissible limit, it was clearly open to the magistrate to conclude that at the time of the driving the blood alcohol content of the defendant exceeded .05 per cent.**
***Smith v Maddison* [1967] VicRp 34; (1967) VR 307, and**
***Heywood v Robinson* [1975] VicRp 55; (1975) VR 562, followed.**

**6. Bearing in mind that the evidence established that no more than five minutes after the two-hour period the blood alcohol content of the defendant was four-and-a-half times the permissible limit, more than proof of the consumption of some alcohol after the accident was necessary to lead to the conclusion that the difference between .05 per cent and .225 per cent was brought about by the alcohol consumed by the defendant. On the evidence in this case it was open to the Magistrate to conclude that the excess above the permissible limit of .05 two hours and five minutes after the driving was such that more than evidence of consumption of some alcohol was necessary to establish that the consumption of that alcohol produced the difference at the relevant time. In other words, for the 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. Accordingly, that evidence which the Magistrate accepted was not inconsistent with his finding and it was reasonably open to him to find, as he did, that the offence had been proved.**

**MENHENNITT J:** ... The Magistrate found expressly that at the time at which the blood sample of the defendant was taken was 9.05pm. In my view it is not established beyond reasonable doubt on the evidence, nor did the Magistrate find, that the accident happened at any time after 7pm. The Magistrate by implication accepted the evidence of the accused that the accident happened between 7pm & 7.15pm; the prime significance of that finding is that the accident did not happen any earlier than 7pm. The consequence of those findings, in my view, is that this case must be approached on the basis that the accident happened at 7pm, and that the blood analysis took place at 9.05pm. – that is two hours and five minutes after the accident.

Under ground 3, it was submitted that the effect of the relevant legislation was that evidence of a blood analysis taken more than 2 hours after the happening of the relevant driving, and any certificates relating thereto, were inadmissible in evidence by reason of the terms of the relevant legislation.

The relevant section under which the information is laid is s81A(1) of the *Motor Car Act* 1958.

It is convenient to say, before proceeding to the other legislation that in my view it is clear that the necessary elements of that offence might all be established by oral evidence from an expert quite independently of any statutory provisions. If there was in the Act no more than the portion of s81A(1) to which I have referred, it would in my view be clear that it would be permissible to call as a witness a doctor who, for example, took a blood sample from a defendant and analysed it and, having been informed of the time of the driving, expressed an expert opinion that at that time the driver had a percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood that was more than .05 per centum.

With that preliminary observation, I turn to the relevant legislative provisions upon which the submissions on behalf of the defendant on this order to review were based.

*[His Honour then referred to the following provisions of the Motor Car Act: Section 80D subsections (1) (2) (3) (3A) (4) and (11), sections 80DA(1), 80F(1), 80G, and continued]* ... There were tendered in evidence and accepted in evidence two certificates one in the terms of the Sixth Schedule of the *Motor Car Act* 1958 and one in the terms of the Eighth Schedule to that Act.

I have said that the evidence establishes that the certificate of the medical practitioner of the taking of the blood sample and the finding of the Magistrate show that the blood sample was taken two hours and five minutes after the established time of the accident.

The submission for the applicant that that certificate and the certificate of the approved analyst based upon it were inadmissible was based upon the language of s80D(1) of the Act and, in particular, the words in that sub-section, 'evidence may be given of the taking of a sample of blood from that person a legally qualified medical practitioner within two hours after the alleged offence.' That section was contrasted with the provisions of s80F(1) where there is no reference to the two-hour period. Partly by reason of that contrast and by reason of the whole legislative scheme, the submission for the applicant is that the only evidence of the taking of a sample of blood which is admissible is where the sample is taken within two hours after the alleged driving

of the motor car. The language of sub-section (3), (3A) and (4) of s80D of the Act in their terms import no such limitation.

Giving sub-s(3) (of section 80D) its plain, ordinary natural meaning, that certificate is *prima facie* proof of the facts and matters therein contained, whether or not the sample was taken more or less than two hours after the alleged offence of driving.

The same is true of sub-s(4) which reads:

> A certificate purporting to be signed by a person who purports to be an approved analyst in or to the effect of Schedule Eight as to the percentage of alcohol expressed in grams per 100 millilitres of blood found in any sample of blood analysed by such analyst shall be admitted in evidence in any proceedings referred to in sub-section (1) as *prima facie* proof of the facts and matters therein contained.

The certificate in this case was headed 'Certificate of Approved Analyst blood – Blood Analysis' and it is in or to the effect of Schedule Eight. Again, reading sub-s(4) with its plain, ordinary, natural meaning, that certificate shall be admitted in evidence in any proceedings referred to in sub-s(1), which includes an offence against s81A as *prima facie* proof of the facts and matters therein contained, regardless of the fact as to whether or not the sample was taken within or beyond the two hours referred to in sub-s(1) of s80D.

In that situation, it was submitted on behalf of the applicant, the defendant, that the provisions of sub-section (3) and (4) of the section should be read down so as to be confined to samples taken within two hours of the alleged offence, having regard to the statutory scheme and the express provisions of sub-section (1).

It is surprising that this matter has, apparently, not risen previously for decision, and no decided case on this point has been cited before me. My conclusion is that sub-s(3) and (4) of s80D are to be read according to their ordinary plain, natural meaning and are not to be read down in the manner contended for on behalf of the applicant defendant. On ordinary principles of statutory construction the words of sub section (3) and (4) should be given their ordinary, plain, natural meaning unless there is some compelling reason which produces a contrary conclusion.

In my view there are significant reasons which explain the presence within sub-s(1) of s80D of the reference to a sample taken within two hours after the alleged offence. One manifest reason was because those words, in my view, were intended as a spring-board for the provisions of sub-s(2) of s80D as a mode of establishing an offence against s80B. Sub-section (2) commences, 'Where evidence of the taking and analysis of a sample of blood is given as aforesaid ...'. The words, 'as aforesaid' are an obvious reference back to sub-section (1), namely, a sample of blood taken within two hours after the alleged offence. Where that has taken place sub-section (2) goes on to provide both a *prima facie* offence and a statement of what shall constitute *prima facie* evidence of an offence within the terms of s80B. Sub-section (2)(a) does not say expressly that the analysis taken within the two hours shall be evidence that that was the blood alcohol content of the person concerned at the time, and that, in my view, was unnecessary to be stated because sub-section (1) says:

> " ... evidence may be given of the taking of a sample of blood from that person by a legally qualified medical practitioner, within two hours after the alleged offence, of the analysis of that sample of blood by a properly qualified analyst ..."

and these are the critical words:

> "and of the percentage of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis."

There was no need to state in sub-section (2)(a) and that last concluding matter because it had already been provided for in sub-section (1).

If a person were charged with an offence against s80B, then not merely would the evidence that the percentage of alcohol in the blood was .05 per cent or less be *prima facie* evidence that

the person did not commit an offence against 80B, but it would also be admissible evidence as to what the actual percentage of blood was. In addition to it establishing that it was *prima facie* evidence that the offence was not committed, it would be obvious having regard to the provisions of sub-section (1) what evidence, for example, that the percentage of blood was no more than .01 per cent would be a further important piece of evidence reinforcing the *prima facie* position brought about by the fact that the percentage was .05 or less.

The reason why, in my view, in sub-section (2)(b) there was included the words, 'if the evidence is that the percentage of alcohol expressed in grams per 100 millilitres of blood of that person was more than .05 per centum, that evidence shall be *prima facie* evidence of the quantity of alcohol in that person's blood at the time the sample was taken' was in order to state in a comprehensive way all the matters that could be taken into account including, among other things, the actual evidence of the blood alcohol content of the person. Just as in the case of sub-section (2)(a), it would be very significant evidence if it were established that the blood alcohol percentage was, for example .01 per cent, likewise, it would be very significant evidence the other way if the analysis showed that at the relevant time the percentage was .05 per cent, and that would be relevant as to whether or not it was positively established, not only *prima facie* that an offence against s80B had been committed.

In my view it was in order to avoid any possible suggestion that such evidence was not admissible that the opening words of sub-section (2)(b) were included.

I have stated what appears to me to be a manifest reason for the presence of the reference to a test taken within two hours in sub-section (1), namely, it was what I have called a spring-board to sub-section (2). Another reason why those words were included was in my view, to make it clear that in respect of the sample taken within two hours there was no discretion in the court and the court was obliged to receive the evidence. The words, 'evidence may be given of the taking of the sample of blood...' in my view mean that the court is obliged to admit the evidence. If the sample is not taken within two hours questions not merely of weight but of admissibility would arise, and if for example, the sample were taken 24 hours after the relevant driving, it would not be surprising if a court held that the sample was not merely of little weight, but so remote as to be inadmissible, evidence as not being relevant.

The absence from sub-sections (3) and (4) of the words 'as aforesaid' found in sub-s(2) reinforces these conclusions.

The reasons I have stated explain, in my view, the reference to a sample within two hours in sub-section (1) of s80D of the Act and those words having an understandable significance of their own, they do not justify in my view reading down the provisions of sub-sections (3) and (4) so as to confine the operation of those sub-sections to samples of blood taken within two hours of the relevant driving.

For all of those reasons I do not accept the submission for the applicant, the defendant, that, by reason of the provisions of the legislation the certificates in the terms of Schedule 6 and schedule 8 were inadmissible.

The submission for the defendant under this heading is that the next element necessary to make the taking of the sample permissible is that it must have been taken by the legally qualified medical practitioner immediately responsible for the examination or treatment of the person. The certificate does establish that the person who gave it was a legally qualified medical practitioner because the certificate itself is *prima facie* evidence that that doctor was immediately responsible for the examination or treatment of the defendant. It is to be noted that a legally qualified medical practitioner who was immediately responsible for either the examination or the treatment of the person is sufficient.

On behalf of the respondent, reliance was placed on the legal presumption of regularity. It was submitted that, unless with consent, the taking of a sample of blood for analysis by a doctor would be an unlawful assault unless he was not only permitted but required by law to take that sample. Section 80DA does require the legally qualified medical practitioner, immediately responsible for the examination or treatment of the person to take from the person a sample

of the person's blood for analysis. It says that the doctor shall take the sample, whether or not the person consents to the taking thereof, unless in the opinion of the legally qualified medical practitioner the taking of the sample of that person's blood would be prejudicial to the proper care and treatment of the person. For non-compliance with the section the Doctor is liable to a penalty of up to $100.

The submission for the respondent, the informant, is that the presumption of regularity leads to the conclusion *prima facie* that the sample was regularly and lawfully taken, that the doctor who took the sample and gave the certificate should be presumed not to have acted unlawfully and should be presumed to have acted in pursuance to his statutory obligation. This is a matter which has been decided on at least two occasions by judges of this court. It was decided that the presumption of regularity made the taking of the sample *prima facie* lawful by Gowans J in the unreported decision of *Collins v Mithen* delivered 21 May 1975, which decision was followed and applied by Lush J in *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78.

I am of the view those cases were correctly decided. In my view the presumption of regularity is not confined to conclusions about holding of public office or the performance of public duties, although, in my view, the duty imposed on a doctor under s80DA(1) of the *Motor Car Act* is a public duty imposed on him by Statute and a duty which obliges him to do something which would otherwise, without consent, constitute, as I have said, an unlawful assault.

Lush J in *Mallock v Tabak* referred to *Dillon v Gange* at p84 of 1977 Victorian Reports. I reiterate that having had the matter fully re-argued I am of the view that the decision of Gowans J and Lush J, to which I have referred, were correct, and I conclude that the presumption of regularity leads to the conclusion that in this case the certificate was given by Dr David Ho as he was immediately responsible for the examination or treatment of the defendant because unless that were the fact, the sample would not have been regularly taken and he would have acted unlawfully, and in my view it should be presumed, on the contrary, that he acted lawfully.

In the result, therefore, the two bases on which ground 3 of the order to Review were pursued have failed.

Ground 4 was advanced in two ways. It was submitted that even if the sample taken outside the two hours and the certificate in relation to the sample and the blood analysis were admissible they nonetheless were no basis for the conclusion of the Magistrate that the offence was committed because they did not have the benefit of the presumption provided for by s80G of the *Motor Car Act*. That presumption is confined to analyses of blood alcohol content taken within two hours of the alleged offence; and in the present case the analysis was five minutes beyond the two hour period. For this reason it was submitted that the evidence established by the certificates did not justify the magistrate reaching the conclusion that at the time of the driving the blood alcohol content of the driver was more than .05 per centum within the meaning of s81A(1) of the Act. In my view the presumption of continuance, and the extent to which the blood alcohol content exceeded .05 per centum five minutes after the two hour period, led to the conclusion that it was reasonably open to the Magistrate to conclude that at the time of the driving the blood alcohol content of the driver exceeded .05 per cent.

Such a conclusion has been applied in cases of breath analysis tests, and it appears to me that in principle those decisions are equally applicable where the analysis is of the blood. Cases where it has been applied to breath analysis tests include *Smith v Maddison* [1967] VicRp 34; (1967) VR 307; *Turner v Bunworth*, an unreported decision of my own given on 10 June 1970; and *Heywood v Robinson* [1975] VicRp 55; (1975) VR p562. In the last mentioned of those cases at p570 I referred to the presumption as stated by McInerney J in *Smith v Maddison* in the following passage:

> "However, having regard to the fact that only two hours and eight minutes had elapsed between the time of driving and the time of the analyses, the relevant presumption of continuance made the certificate and the facts it established relevant and admissible in evidence. It was so decided by McInerney J in *Smith v Maddison* [1967] VicRp 34; (1967) VR 307 and by myself in an unreported decision of *Turner v Bunworth* given on 10 June 1970. The only circumstances in which the certificate and the facts it established would not be admissible in evidence would be where the time at which the analysis was taken was so far distant from the time of driving as to make the facts irrelevant.

> The applicable presumption of continuance is stated in *Wigmore On Evidence* (3rd ed.) Vol,2 p413. pax. 437, in part of the passage cited by McInerney J in *Smith v Maddison*."

I then set out a portion of the passage which I will not repeat. At p571 I said this in relation to the presumption of continuance:

> "The starting point of this matter is I think the Parliamentary declarations to be found in ss80G and 81A of the *Motor Car Act* 1958. Section 80G is I think a Parliamentary declaration that, for the purposes of offences and legal proceedings, a person's blood alcohol content at a particular time is presumed, until the contrary is proved, as being not less than the content at any time within two hours prior thereto. By s81A Parliament has declared that a person who drives a motor car with a blood alcohol content of more than .05 per cent shall be guilty of an offence and liable in the case of a first offence to a fine of not more than $100 and to have his driving licence cancelled for not less than three months (a matter to which I shall revert). Bearing in mind these Parliamentary declarations, what conclusions can reasonably be drawn as to the blood alcohol content of a person two hours and eight minutes before the time when his blood alcohol content was established to be .13 per cent?"

After referring in other matters I continued:

> "In all of these circumstances, the fact that two hours and eight minutes after the time of driving the blood alcohol content of the defendant was 2.6 times the permissible limit was in itself, I think, some evidence from which it was reasonably open to the learned County Court Judge to conclude that the defendant's blood alcohol content at the time of driving was in excess of .05 per cent."

Applying those principles to the facts of the present case, the relevant facts are that five minutes after the two hours referred to in s80G the blood alcohol content of the defendant – the applicant – was .225 per cent, that is four and a half times the permissible limit. Having regard to the presumptions to which I have referred to be found in the legislation, having regard to the fact that the blood alcohol content only five minutes after the two hour period was four and a half times the permissible limit, in my view it was clearly open to the magistrate to conclude that at the time of the driving the blood alcohol content of the defendant exceeded .05 per cent subject to one other matter which was raised to which I shall refer.

The magistrate accepted the evidence that after the driving the defendant consumed no less than one bottle of beer. It is submitted on behalf of the defendant that once there is evidence of any consumption of alcohol after the driving that prevents any conclusion being drawn as to what the blood alcohol content was at the time of driving based upon a blood analysis subsequent to the driving. In a matter of this kind it is, in my view, not possible to disregard the realities. It is unnecessary and undesirable for me to deal with any more than the facts of the case before me.

Bearing in mind that the evidence establishes that no more than five minutes after the two-hour period the blood alcohol content of the defendant was four-and-a-half times the permissible limit, it appears to me that more than proof of the consumption of some alcohol is necessary to lead to the conclusion that the difference between .05 per cent and .225 per cent was brought about by the alcohol consumed by the defendant. I repeat that it is unnecessary and undesirable for me to deal with more than the facts of this case. Without attempting to take any judicial notice of the alcohol content of the bottle of beer, it appears to me that on the evidence in this case it was open to the Magistrate to conclude that the excess above the permissible limit of .05 two hours and five minutes after the driving was such that more than evidence of consumption of some alcohol was necessary to establish that the consumption of that alcohol produced the difference at the relevant time.

In other words, in my view for the 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. Accordingly, in my view that evidence which the Magistrate accepted was not inconsistent with his finding and it was reasonably open to him to find, as he did, that the offence had been proved.

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