03/86

SUPREME COURT OF VICTORIA

FITZGERALD v BROWNING

Murphy J

29 November 1985 — [1986] VicRp 50; [1986] VR 493; (1985) 3 MVR 222

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST – SCHEDULE 7 CERTIFICATE ADMITTED INTO EVIDENCE – EVIDENCE OF QUANTITY OF ALCOHOL CONSUMED AND EXPERT EVIDENCE LED IN REPLY – ACCEPTED BY MAGISTRATE – WHETHER *PRIMA FACIE* EVIDENCE COUNTERED: *MOTOR CAR ACT* 1958, SS80F(3), 80G, 81A.

F. was intercepted whilst driving his motor car, breathalysed within 2 hours thereof, and his blood/alcohol reading was .110%. At the subsequent hearing the copy Schedule 7 Certificate was tendered in evidence and F. then led evidence as to the precise amount of alcohol he had consumed prior to driving. Expert evidence was called by F. to the effect that F.'s blood/ alcohol concentration at the time of the test would not have exceeded .06% and that the breathalyser instrument may be inaccurate. Before convicting F., the Magistrate stated that he accepted the evidence as to the quantity of alcohol consumed by F. and also the opinion expressed by the expert. Nevertheless, the Magistrate sentenced F. on the basis that his blood/alcohol percentage was .110. On order nisi to review—

HELD: Order absolute. Remitted for sentence on the basis of the finding that the blood/alcohol percentage at the time of the commission of the offence was between .05 and .10.
(1) Section 80G of the *Motor Car Act* 1958 does not establish a person's blood/alcohol concentration at the time of the test; this must be established by evidence such as a copy Schedule 7 Certificate. As such copy certificate is only *prima facie* evidence of the facts and matters stated therein, it may be countered by any evidence which throws doubt on its accuracy or reliability.
***Reeves v McWilliams* [1986] VicRp 31; [1986] VR 321; (1985) 3 MVR 81; MC 40/1985, applied.**

(2) Bearing in mind that the Magistrate accepted that the amount of alcohol consumed by the defendant could give a maximum reading of .06%, and that Breathalyser instruments can be inaccurate in their readings, he ought to have entertained a reasonable doubt whether the *prima facie* evidence established beyond reasonable doubt that the defendant's blood/alcohol percentage was in fact .110 at the time of the test.

MURPHY J: [1] This was the return of an Order Nisi to Review the decision of the Stipendiary Magistrate sitting at Bendigo on the 9th August 1984 whereby the defendant was convicted of an offence against s81A of the *Motor Car Act* 1958 in that he drove a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum.

In the Magistrates' Court it was common ground that the defendant was driving a motor car in the early hours of the 26th November 1983, that he was breathalysed within two hours thereof and that his blood alcohol reading was .110, as the Certificate issued in accordance with Schedule Seven of the *Motor Car Act* 1958 stated. **[2]** During the hearing of the information laid against the defendant, the informant tendered this certificate pursuant to s80F(3). Accordingly the certificate became *prima facie* evidence in the proceedings of the facts and matters stated therein.

Whilst the defendant did not give notice that he required the person giving the certificate to be called as a witness, he did lead evidence both of the precise amount of alcohol that he had drunk and by way of expert opinion evidence of the maximum blood/alcohol percentage that the intake of such an amount of alcohol could cause. He gave evidence himself and called his wife and also two other persons with whom he had spent the evening. They all deposed that between 8 pm during a meal until shortly before 2 am the following morning, the defendant drank seven bottles of Crown lager, each bottle being 375 millilitres in size. An expert witness, a consulting chemist named Arnold Brian Russell gave evidence that he had conducted tests upon the defendant and that taking into account the personal characteristics of the defendant, the food consumed during his meal, and having regard to the amount of liquor drunk, the defendant's blood/alcohol percentage would not have exceeded .06 per centum at the time of the test. He also gave evidence

that a breathalyser test reading may and frequently does contain a systematic error of plus or minus .03 – greater errors can occur in certain circumstances. In cross-examination he again stated,

> "I think that the maximum level of alcohol in Mr Fitzgerald's blood would have been .06. It is lower if you put his last drink at shortly before 2 am".

[3] Before me, Mr R Lewis of counsel, who appeared to move the order absolute, did not seek to argue that the learned Magistrate should not have convicted the defendant. What he submitted was that the Magistrate should not have proceeded to sentence the defendant on the basis that his blood/alcohol percentage was in fact .110. The Act provides certain different penalties by way of minima for an offence against s81A, depending upon whether the defendant's blood/alcohol percentage at the relevant time was more than .05 but less than .10 per centum, or was more than .10 but less than .15 per centum, or was more than .15 per centum. Disqualification from obtaining a licence to drive a motor car for differing periods attends each particular category. See s81A(3)(a)).

Mr Lewis was encouraged to make this submission because in giving his reasons for judgment, the learned Magistrate stated (more than once) that he accepted the evidence led from the defendant and his witnesses as to the amount of alcohol which the defendant had had to drink that night and also the evidence of the expert witness Mr Russell that, "consumption of that nature would give rise to a blood/alcohol content not in excess of .06". Having made these findings, the learned Magistrate continued:

> "On the other hand, I have a certificate which says the test was correctly administered in accordance with the regulations. There is no evidence that the tests were not properly conducted. I accept that certificate and find the charge proven".

When asked by counsel whether he had accepted the evidence of the defendant and his witnesses, the Magistrate replied that that was correct. Counsel then submitted that **[4]** there was authority of the Supreme Court directly in point, but the Magistrate said that counsel could not bring in additional material at this late stage (whatever that may mean), that he had made his findings and that the defendant must be convicted with a reading of .110 per centum. When being addressed on the question of penalty, the Magistrate cut counsel short saying he intended to impose the minimum sentence. He then proceeded to fine the defendant $200 and disqualified him from obtaining a licence for 12 months, a disqualification appropriate to a blood/alcohol percentage of between .100 and .150.

Mr Lewis relied before me on several decisions of single judges of this court and in particular *Sachse v Emms* an Order to Review No. 7150, an unreported decision of Starke J delivered 8th November 1976 (MC 20/1977), *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260 at 262, a decision of Crockett J and *Reeves v McWilliams* [1986] VicRp 31; [1986] VR 321; (1985) 3 MVR 81 an Order to Review 1984 No. 88, a decision of Tadgell J delivered on 25th September 1985.

In *Sachse v Emms* the applicant sought to review his conviction under S81A of the *Motor Car Act* 1958, and the consequent fine and disqualification from obtaining a licence to drive for a period of 12 months. The informant relied in the Magistrates' Court on the Schedule Seven Certificate which stated that the defendant's blood/alcohol percentage at the time of test was .110 per centum. The informant relied upon section s80G of the Act which states:

> "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 **[5]** 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."

Starke J pointed out that taken in conjunction with S80F(3), the effect of s80G was that if the only evidence relating to blood/alcohol content of the defendant was the tendering of a schedule Seven Certificate showing a blood/alcohol reading of above .05, the defendant would have to be convicted. The evidentiary onus of proving to the contrary of the *prima facie* evidence of the certificate which established what percentage of alcohol was present in the defendant's blood at the time he was tested, would not have been satisfied and it would be established within the

meaning of s80G that that was the percentage of blood at the time of the test and the presumption would then apply. His Honour pointed to several ways that the evidentiary onus could be satisfied by the defendant. The method adopted in *Sachse's case* was the calling of evidence concerning the amount of alcohol and the calling of expert evidence as to the maximum blood/alcohol percentage that could result in the circumstances from the defendant's intake of that amount of alcohol.

Thus the case appears to have been on all fours with the present case, for the Magistrate stated in *Sachse's case* that he accepted the defendant's evidence as to the quantity of alcohol he had consumed and also accepted the expert witness' opinion evidence as to the blood/alcohol percentage that could result from it.

Starke J found that on these findings by the Magistrate, it was "impossible for him to come to the conclusion **[6]** beyond reasonable doubt that the applicant had had more than .05 per centum at the relevant time in his blood stream". Again, he said, "the only inference from the findings must be that the presumption in the legislation is rebutted and in these circumstances a conviction was not warranted". I do not know that these last words precisely express my understanding of the meaning of the relevant sections of the Act and I would prefer to understand that the leading of the relevant evidence satisfied the evidentiary onus that rested upon the defendant to displace the *prima facie* evidence of the certificate. In these circumstances, it would have not been established that at the time of the test the defendant's blood/alcohol was as the reading stated in the Seventh Schedule Certificate.

In *Francis v Stevens* [1983] VicRp 21; [1983] 1 VR 260 an Order to Review was taken out by an informant against the dismissal of an information under s81A. The Seventh Schedule Certificate stated that the defendant had .07 per centum blood/alcohol in his bloodstream at the relevant time of the test. The defendant had called an expert, who gave evidence to the effect that the breathalyser was capable of an over estimation of up to .028 per centum and that his tests, which numbered hundreds, confirmed this when he compared breathalyser readings with blood tests conducted at the same time. He was not cross-examined. The Magistrate dismissed the information, not being satisfied that the defendant's blood/alcohol percentage exceeded .05 at the relevant time.

Here, again Crockett J found that once the defendant raises the question of the blood/alcohol percentage **[7]** as a disputed issue, as he did in that case, the onus of proving that the relevant blood/alcohol percentage at the time of driving exceeded .05 (and proving it beyond reasonable doubt) rested on the informant. (See [1983] 1 VR at 262.)

[8] If there is oral evidence led on this issue by the defendant then its weight of course must be assessed bearing in mind that the Seventh Schedule Certificate tendered by the informant is *prima facie* evidence only of the facts and matters stated therein, and also that in the absence of evidence to the contrary the statutory presumption of s80G would operate, if once it is seen that the certificate alone established that a certain percentage of alcohol was present in the blood of the defendant at the time that the test was performed.

In *Reeves v McWilliams* [1986] VicRp 31; [1986] VR 321; (1985) 3 MVR 81 delivered on 25th September 1985 by Tadgell J, His Honour refused to make absolute an order nisi taken out by an informant seeking to challenge a Magistrate's decision to sentence a defendant on the basis of a blood/alcohol percentage whilst driving of .100 to .15, notwithstanding that the Seventh Schedule Certificate which was tendered stated that the Breathalyser reading at the relevant time of the test was .170. In doing so His Honour analysed the operation of s80F(3) giving to the Seventh Schedule Certificate the status of *prima facie* evidence, and the operation of s80G in raising the presumption until the contrary is proved – once it is first established that at any time within two hours of the alleged offence a certain percentage of alcohol was then present in the blood of the defendant.

As I read s80G it is a section designed simply to avoid the difficulty of proving that a person who had a certain blood/alcohol percentage at any time within two hours of the alleged driving offence had at least the same blood/alcohol percentage at the time of the offence. In other words, it only operates after it is first established what the blood/alcohol percentage of the defendant's blood was at some time within two hours of the alleged offence **[9]** in which case it is presumed

that at the time of the alleged offence the blood/alcohol of the defendant was at least the same. It is not a section which assists in any way to "establish" what blood/alcohol percentage of the defendant was when he was tested. This must be "established" by evidence, such evidence usually being a Seventh Schedule Certificate stating what the Breathalyser reading was.

But the Seventh Schedule Certificate is only *prima facie* evidence of "the facts and matters stated therein". (See 80F(3)). It may be countered by any evidence which throws doubt on its accuracy or reliability. If, however, the Magistrate has no reasonable doubt that it is accurate and reliable, one would expect him to find that it has been established that at the time stated in the certificate the defendant's blood/alcohol was as stated in the certificate. Then, unless for some reason such as evidence that the defendant had drunk alcohol during the time between the alleged offence and the time of the Breathalyser test, s80G would come into operation, and the statutory presumption requires the Magistrate to conclude that at the time of the alleged offence the defendant's blood had at least the same blood/alcohol percentage as it has been established that he had at the time of the test.

The essence then of the issue raised in the present case is whether the *prima facie* evidentiary effect of the certificate could suffice to enable the Magistrate to find that it was "established" beyond reasonable doubt that the defendant had in fact a blood/alcohol percentage of .110 at the time of the Breathalyser test, bearing in mind that the Magistrate "accepted" the evidence of the defendant and his witnesses as to the amount of alcohol he had consumed, and also that he "accepted" the **[10]** evidence of the expert as to the maximum blood alcohol percentage that could result from the consumption, and also his evidence as to inaccuracies inherent in Breathalyser readings.

Starke J in *Sachse v Emms* (above) was, as I have said, of the opinion that it was "impossible" for the Magistrate to find that it was established that the defendant's blood-alcohol percentage at the time of the test was in fact as it read, in the circumstances of that case, which I find difficult to distinguish from the present case.

It may be that the Magistrate in the present case, in stating that he accepted the evidence given on behalf of the defendant, meant only to convey that he accepted the witnesses as truthful, whilst leaving open the question of their reliability. But he did not say this.

Mr Downing of Counsel, who appeared for the informant to show cause, submitted that the real issue was a matter of the weight to be given to the evidence that was accepted and that the Magistrate weighed the *prima facie* evidence of the certificate against the weight of the evidence given orally by the defendant and his witnesses. He submitted that it could not be said that, weighing the evidence in this way, the Magistrate could not have been satisfied beyond reasonable doubt that the defendant's blood/alcohol percentage was "established" to be .110 at the time of the test.

Reading what appears in the affidavit material filed before me, it appears to me that once the Magistrate accepted as a fact that Breathalyser machines can be, and often are, inaccurate in their readings, and that the amount of alcohol in fact consumed by the defendant could give only a maximum reading of .06, and that that amount was an amount of alcohol that he **[11]** accepted, then he must have entertained a reasonable doubt whether the reading provided by the Breathalyser test as evidenced by the Seventh Schedule Certificate "established" beyond reasonable doubt that the defendant's blood/alcohol percentage was in fact .110 at the time of the test. At the same time all of the evidence was consistent with the view that the defendant's blood/alcohol percentage exceeded .05 at the time of the test, and the statutory presumption (s80G) would apply.

The defendant ought to have been given the benefit of the doubt as to the actual percentage by which his blood/alcohol exceeded .05. Accordingly, I would make the order nisi absolute.

Solicitors for the applicant: Kenna Croxford and Co., as agents for Cahills, Bendigo.
Solicitors for the respondent: RJ Lambert, Crown Solicitor.