47/83

SUPREME COURT OF VICTORIA

SCOLLARY v REGAN

Lush J

15 July 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD ALCOHOL EXCEEDING .05% – BLOOD SAMPLE TAKEN OUTSIDE 2-HOUR LIMIT – DEFENDANT LATER TESTED BY EXPERT – EVIDENCE GIVEN BY EXPERT DISCUSSED: *MOTOR CAR ACT* 1958, S81A.

R. was the driver of a motor car which was involved in a collision between 12:30 and 1:00 a.m. R. was conveyed to hospital and at about 3:00 a.m., a blood sample was taken from him, which later showed a blood/alcohol content of .179%. At the subsequent hearing of a charge against R. of driving whilst exceeding .05%, three witnesses who were present at the scene of the accident, gave evidence; however, none of this evidence was significant evidence of R.'s intoxication. R. gave evidence that he had consumed a possible maximum of ten glasses of beer between 7:30 and 9:00 p.m., and between 9:30 p.m. and 12:30 a.m. An expert also gave evidence of submitting R. to certain tests in his laboratory. After hearing submissions, the magistrate dismissed the charge. On order nisi to review—

HELD: Order nisi discharged.
The circumstances that a blood/alcohol content exceeding the limit can possibly be deduced from the evidence by a process not openly canvassed at the hearing before the Magistrate is not a reason for granting an order to review the Magistrate's dismissal of the charge.

LUSH J: *[After setting out the facts and the grounds of the order nisi, His Honour continued]:* … **[5]** A submission that there was no case to answer was made and rejected and the defence then entered upon evidence. The defendant gave evidence along the lines of MacGregor's evidence, but maintaining that he had only eight glasses of beer, although he admitted in cross-examination that there was a possible maximum of ten glasses.

On behalf of the defence there was also called a man named Russell whose technical qualifications are not set out in the affidavit in support of the order nisi for the reason that his qualifications as an expert on the subject in hand were accepted by the prosecutor, the defending solicitor and by the Court. Russell said that about six weeks before the hearing at Kyabram he had submitted the defendant to certain tests in his laboratory. I quote the description of those tests from the affidavit in support.

> **[6]** "The tests consisted of Mr Regan drinking five seven-ounce glasses of beer between 8:30 am and 10:00 am. At 10:15 am he was tested on a breathalyser and had a reading of .035 per cent. He was further tested at 10:35 am and showed a reading of .030 per cent. Tested at 11:30 am he showed a reading of .025 per cent. From those figures Mr Russell said that on the defendant's evidence he would not have a reading in excess of .03 per cent, and if the amount was ten beers his reading would have been .036 per cent."

It may be quoted in this last passage that the .03 per cent reference is coupled with a reference to the defendant's evidence and is thus linked with the consumption of eight glasses of beer. I quote a further passage from the affidavit describing the cross-examination of Russell.

> "Mr. Russell said Mr. Regan had a glass equivalent of about .015 per cent with a rate of elimination of .011 per cent."

This passage occurred in a discussion of the tests conducted in the laboratory and appears to have been put as an inference from the result of those tests. That being the evidence for the defence, the learned Magistrate then heard the argument and according to the affidavit in support appears to have given judgment in the following terms:-

> "As continuity was not contested, he was left with a certificate showing .179 per cent and oral evidence of Mr Regan, Mr MacGregor and Mr Russell. Given the fact that Mr Regan had ten beers, on the

> evidence of Mr Russell this would have only increased the reading to .036 per cent. To convict on the .05 per cent charge would mean rejecting the evidence of Mr Regan, Mr MacGregor and Mr Russell, and he was not prepared to do that. He then dismissed the .05 per cent charge."

[7] A short affidavit in answer was filed by the defendant, the relevant paragraph of which reads as follows: -

> "That the S.M. stated that to convict Mr Regan of the charge of exceeding .05 per cent blood alcohol would mean that he would have to reject the evidence of Mr MacGregor, Mr Russell and Mr Regan, together with the supporting evidence of the other prosecution witnesses and he was unable to do that. He then dismissed the charge against Mr Regan for exceeding .05 per cent blood alcohol."

Mr Lenczner, who appeared for the informant to move the order absolute, contended that on Russell's evidence of an absorption rate of .015 per cent of alcohol from each glass of beer, coupled with an elimination rate of .011 per cent every hour one necessarily reached the result on the various figures given that the blood alcohol reading of the defendant between half past twelve and one o'clock in the morning on the relevant night would have been above .05 per cent. He argued that there was no justification on the evidence for accepting the instrument used in Russell's tests as a scientific instrument and that, as a result, the whole of Russell's evidence was without any sound foundation and should be given no weight at all. He did not specifically argue any point relating to onus of proof, such as is envisaged by Ground 2 of the Order Nisi to Review. The thrust of his argument first of all related to the matter of the breathalyser used by Russell **[8]** as a scientific instrument and otherwise was that all the evidence in the case, both the prosecution and defence, pointed to blood alcohol content at the relevant time exceeding .05 per cent and there should have been a conviction.

Mr Perkins, who appeared for the defendant, contended that the evidence given by Russell was unclear. He was not able to indicate how the absorption and elimination figures were derived from the results of the laboratory test any more than Mr Lenczner was able to do so. He argued that the nature of these proceedings did not really permit of the kind of re-examination of the evidence which was sought by the informant in moving the order absolute.

Proceeding by way of order to review is available only where there is some error of law disclosed, and there can be an error of law if, where one party bears the onus of proof, there is no evidence to support a finding in that party's favour. There is, however, in my opinion, no error of law disclosed in the decision now before me. The evidence of Russell was not the subject of any objection at the hearing. The challenge which is now made, based on the lack of proof of the nature of the instrument which he used, was not made at the Kyabram hearing and if it had been made **[9]** it might conceivably have been then and there answered. In those circumstances it cannot be made now. The related challenge that the whole of the evidence given by Russell rested upon an unsound basis in the absence of proof, that his breathalyser was a scientific instrument, must be the subject of the same comment.

On the face of the figures in the evidence relating to the consumption of beer by the defendant, the rate of absorption and the rate of elimination it does appear that it is correct to say that if all that evidence were accepted the proper deduction was that at the relevant time the defendant had a blood content exceeding .05 per cent. It is not, however, clear on the face of the evidence as it is set out in the affidavit in support how the absorption and elimination figures were derived from the test carried out by Russell and it does not appear ever to have been put to Russell that in fact the result of what he was saying was that there was a breach of s81(A) at the relevant time. It may be that this was not put because Russell's figures of .03 per cent and .036 per cent were understood at the hearing to be relevant to the time of the accident.

I doubt if the Stipendiary Magistrate understood them in this way, and for myself, I think they were really directed to the time at which the blood test was taken, 3:00 a.m. In fact, it appears **[10]** to be within the bounds of possibility that Russell was not really called with the aim of obtaining a dismissal of this charge, but with an eye to the progressive penalties provided for in s81(A)(3). However that may be, the total effect of the lay and expert evidence appears to have brought the Stipendiary Magistrate's mind to the point at which there was no evidence of blood alcohol at the time of the accident on which he was prepared to convict. It may be that he misunderstood part of Russell's evidence, but I do not think he really went beyond treating it

as doing more than casting doubt on the result shown in the certificate. No other specific figure was put by any witness, nor was evidence directly given that the alcohol content must have been above .05 per cent, whether the certificate was accepted or not.

The circumstance that a blood content exceeding the limit of s81(A) can possibly be deduced from the evidence by a process not openly canvassed at the hearing is not in my view a reason for granting an order to review the dismissal of a charge of this kind. It must be borne in mind that the limited nature of appeal given by the order to review process, while open to the criticism that it offers no relief from certain forms of error, is aimed at a fundamental policy of establishing finality in Magistrates' decisions. It is a plainly and long **[11]** accepted policy of this legislation that matters appropriate to Magistrates' Courts are not to be re-tried on the evidence in the Supreme Court.

Accordingly, in my opinion the order nisi must be discharged and there will be an order accordingly. The order nisi is discharged. The applicant pay the respondent's taxed costs.

APPEARANCES: For the applicant Scollary: Mr J Lenczner, counsel. Crown Solicitor. For the respondent Regan: Mr D Perkins, counsel.
