28/80

SUPREME COURT OF VICTORIA

LARCHIN v TRAYNOR

Fullagar J

24, 25 March 1980

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INTERCEPTED – PBT POSITIVE – FULL BREATH TEST INDICATED A READING OF 0.17% BAC – DRIVER SAID HE CONSUMED 7 7-OZ GLASSES OF BEER – EXPERT EVIDENCE CALLED AT HEARING – OPINION GIVEN BY EXPERT THAT DRIVER'S BAC AT THE RELEVANT TIME WOULD HAVE BEEN 0.04% – CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT HE WAS UNABLE TO ESTABLISH WHAT THE ACTUAL READING WOULD HAVE BEEN – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80F(3), 80G.

T. was intercepted whilst driving his motor car. A PBT showed a BAC exceeding .05. When L. later underwent a full breath test he recorded a reading of .17% BAC. T. was charged with a breach of the *Motor Car Act* 1958 s80F and at the hearing he gave evidence that consumed 7 7-oz glasses of beer prior to being apprehended. Expert evidence was called to say that that amount of alcohol would have produced a reading of .04%. The magistrate dismissed the information on the ground that he was unable to establish what the actual reading should or could have been. Upon appeal—

HELD: Order absolute. Dismissal set aside. Remitted for hearing and determination before another Magistrate.

1. The Schedule 7 certificate was produced at the hearing and no notice was given to the operator, pursuant to s80F(3) and accordingly pursuant to that subsection the Schedule 7 certificate became "*prima facie* evidence ... of the facts and matters stated therein".

2. The only evidence adduced which went towards the destruction of the *prima facie* position established by the certificate and the Act was the evidence of L. himself, that he had had only seven seven ounce glasses of beer, one of which was of low alcohol beer, between 8.00 pm and 9.15 pm, and "cooked my tea", in the relevant period, and the evidence of the barman at the hotel that although he was not able to say how much the respondent had drunk at the hotel, at the time when the respondent finished drinking there he saw the respondent leave the hotel at 9.15 pm, "and he was not affected by liquor and was perfectly normal", and the evidence of Mr Roberts. None of this evidence was evidence which could be regarded by the Magistrate as sufficient to rebut the statutory presumptions in the certificate and s80G of the Act.

3. A Magistrate cannot take judicial notice of the fact that seven drinks in 105 minutes will "not produce a blood alcohol content of .17 or anything like it". Such a conclusion must be a matter for scientific evidence. Judicial notice cannot be taken of facts known only to or believed only by some few cognoscenti in a particular jurisdiction and not known to or believed by very many others, and there are dangers in extending the field of judicial knowledge in this precise field where, once allowed, prosecutors as well may seek to rely upon them like anybody else.
***Caughey v McClaer* (unreported) O'Bryan J, VSC, 9 March 1977; and**
***Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225, followed.**

4. It was not reasonably open upon the evidence for the Magistrate in the present case to conclude that the presumption raised by s80F(3) and s80G had been rebutted, and accordingly he should have convicted upon the evidence before him. The order nisi must, accordingly, be made absolute.

FULLAGAR J: This is the return of an order nisi to review the decision of a Magistrate sitting in the Magistrates' Court at Eltham on 26 April 1979 when he dismissed an information brought by Graham John Larchin against the respondent, Raymond John Traynor. The information alleged that on 5 April 1979 near Bundoora the respondent did drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was in excess of .05 per centum.

By a curious coincidence, the prosecuting sergeant of police has the same surname as the respondent. There are therefore before the court two affidavits by gentlemen named Traynor, the prosecuting sergeant being Arthur Robert Traynor, and the respondent being Raymond John

Traynor. The evidence of the informant, Mr Larchin, was that at about 10.45 pm on Thursday 5 April he was on duty in a marked police vehicle at Greensborough when he observed the car in question travelling behind him at a very slow speed. The vehicle continued to travel behind him for some distance and the police vehicle stopped and let this other vehicle go past at about 45 kilometres per hour. The informant drew the police vehicle alongside and sounded the horn and activated the blue lights of the police vehicle, and then got behind the respondent's car but the respondent continued to travel on. The informant repeated this conduct, and the respondent then dropped behind and braked the car to the kerb.

A conversation then ensued in which the respondent admitted that he had been drinking that evening, at Diamond Creek and said he was off to Reservoir to see his girlfriend, and when the informant asked him to undergo a preliminary breath test, the respondent said "I'm dead. You'll take away my job, and I'm dead".

At a further conversation at the Greensborough Police Station the respondent said that he had his first drink of the day at 8.00 pm and the last drink at 8.50 pm; that he consumed beer; that he suffered from blood pressure; that he took tablets for the blood pressure; and that he last took one that morning. I should have said that at the place where the car was first stopped by the police the informant administered a preliminary breath test to the respondent, which showed a blood alcohol content exceeding .05. At the police station at 11.55 pm a test was done on a breathalyser instrument and a Schedule 7 certificate was prepared, a copy was handed to the respondent and the instrument showed a reading of .17%.

The Schedule 7 certificate was produced at the hearing and no notice was given to the operator, pursuant to s80F(3) and accordingly pursuant to that subsection the Schedule 7 certificate became "*prima facie* evidence ... of the facts and matters stated therein". In the conversation at the police station, the informant asked the respondent "What is your reason for exceeding .05?" And the respondent replied "I don't know, it happens so easy." The affidavits leave it unclear whether or not the following was said by the informant, and I refer to para 13 of the affidavit of the police sergeant which is not specifically denied by the respondent, although earlier references to some of the matter therein contained, when dealt with in an earlier paragraph, are denied.

> "When I intercepted the defendant and requested him to alight from the vehicle, he said he was very unsteady on his feet. He appeared to be very slow with his movements. His eyes were glassy ... When we arrived back at Greensborough Police Station the defendant was spoken to. He was rational for a while but on occasions he would become very irrational. ... In my opinion he was drunk. ... I have been a member of the police for almost five years and during this time I have had considerable experience in the handling of all types of people in various degrees of sobriety. ... Although the defendant was drunk he did not seem to be incapable of having the control of the vehicle."

The defendant/respondent gave evidence on oath and said that between 7.30 pm and 9.15 pm he consumed seven seven ounce glasses of beer, one of which contained low alcohol content beer; that he then left the hotel and "I went home and cooked my tea. I left home within about ten minutes prior to the interception of my car by the police. ... I had nothing to drink on the relevant night, except for seven seven ounce glasses of beer at the Diamond Creek Hotel." He said that he did not think he was affected by any drink but that he did not question any of the members of the force at the time of the test on the high reading recorded by by the instrument. He said in re-examination that he was sure that he did not have anything like seventeen to 23 beers, in response to a question by his own counsel, and said that there were reasons why he was not capable of drinking that amount.

On the defendant's behalf a Mr Henry Giles was called who was a part time barman at the Diamond Creek Hotel and who knew the respondent. He said that he had seen the respondent in the hotel on the relevant night; that he had arrived there at about 7.30 pm and departed about 9.15 pm. "I saw Mr Traynor leave the hotel at 9.15 pm and he was not affected by liquor and was perfectly normal." He said that he only knew Mr Traynor as a patron of the hotel; that he was not serving him that night but was serving at another table; and that he was not in a position to tell the court how much liquor the defendant drank at the hotel on that night.

The respondent also called a Mr Roberts who gave his occupation as a consulting analytical chemist, and he said he had built a breath analysing instrument from the same specifications as

those used by the Victoria Police Force, and counsel for the respondent then asked this witness:

> "If a man of the weight and size of Mr Traynor, namely 14 stone 10 pounds and six foot, and given that he had a substantial meal of steak at about 10.00 pm and consumed seven seven ounce glasses of beer between the hours of 7.30 pm and 9.15 pm and was given a breath test at 11.55 pm, what would you expect his reading to be?" Mr Roberts replied: ".04 per centum".

Under cross-examination Mr Roberts said that he had not carried out any test on the respondent; that he had not met the respondent at any time before that day in court; and then the prosecuting policeman asked him this question: "The assessment of the blood alcohol reading that you have given today is based only on the amount of liquor that the defendant stated he had consumed on the material night?" And this question was answered "Yes."

Various submissions were then made which are set out in the affidavits and following these submissions, according to the affidavit of the police sergeant, the Magistrate said this:

> "I am unable to establish what the actual reading of the alcohol level should or could have been. I am unable to make a decision. I therefore dismiss the information."

The affidavit of the respondent, which I should prefer, whenever I see a conflict between them, says that the deponent believes that following on the submissions the Magistrate said, "I accept the defendant's evidence and dismiss the information".

The record of the court shows an acquittal. This is therefore a case where the evidence of the informant included evidence that a preliminary breath test showed a blood alcohol content exceeding .05, and included production of a Schedule 7 certificate showing *inter alia* that the respondent's blood alcohol content was .17. In passing, it may be observed, s81A(3) shows that this reading, if established, would make applicable the highest of the three levels of penalty by way of disqualification from obtaining a driver's licence. By virtue of s80F(3) this certificate was *prima facie* evidence of the facts and matters stated therein. Section 80G provides as follows:

> "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 grounds of the order nisi, which is dated 20th July 1979, are as follows:

> "1. That there was no evidence adduced which proved the contrary to the presumption contained in s80G of the *Motor Car Act* 1958.
>
> 2. That the learned Magistrate should have decided on a specific figure of blood alcohol level, or at the very least a level lower than that required by law to dismiss the information.
>
> 3. That the decision of the learned Magistrate was contrary to the evidence or the weight of the evidence."

In my opinion, the only evidence adduced which went towards the destruction of the *prima facie* position established by the certificate and the Act was the evidence of the respondent himself, that he had had only seven seven ounce glasses of beer, one of which was of low alcohol beer, between 8.00 pm and 9.15 pm, and "cooked my tea", in the relevant period, and the evidence of the barman at the hotel that although he was not able to say how much the respondent had drunk at the hotel, at the time when the respondent finished drinking there he saw the respondent leave the hotel at 9.15 pm, "and he was not affected by liquor and was perfectly normal", and the evidence of Mr Roberts.

This case has caused me considerable anxiety, but I have, in the end, concluded that none of this evidence was evidence which could be regarded by the Stipendiary Magistrate as sufficient to rebut the statutory presumptions, to which I have referred. As to Mr Roberts, his evidence was that if a man of 14 stone 10 pounds in weight and six feet in height consumed seven seven ounce glasses of beer between 7.30 and 9,15 pm, and then had a substantial meal of steak at about 10.00 pm, his breath test reading on a breathalyser machine at 11.55 pm would be expected by the witness to be .04. There was, however, no evidence as to the weight of the respondent, who

gave evidence; or as to the height of the respondent, or that he ate a substantial or any other kind of meal other than the mere fact that he cooked his tea, or that his meal was of steak, or that it was a substantial meal of steak.

In my opinion it was or would have been quite unsafe and quite unreasonable for the Stipendiary Magistrate to have inferred from this evidence, either alone or in combination with any other evidence in the case, that the respondent at 11.55 pm, or at the time of his being intercepted could not have had a breathalyser reading of .17 or a blood alcohol content of .17 respectively. It is quite true that the Stipendiary Magistrate must have seen the respondent, and from seeing him, may perhaps have been able to make some guess at his weight, and might perhaps have essayed a guess at say between 14 and 15½ stone, and may have been able to make some estimate of his height, perhaps within two inches of six feet, but when all is said done it is in my opinion a matter of expert evidence, what difference seven pounds of weight and/or two inches of height, as well as a substantial meal, as well as the meal being of steak, can make to the figure of .04 which it is to be observed is already 80% of the way towards the critical figure.

The question arises whether the Stipendiary Magistrate could reasonably have inferred from a finding that the respondent had drunk only seven seven ounce glasses of beer, one of which was "low alcohol beer", that the respondent's blood alcohol content at 11.55 must have been substantially less than .17 or that it must have been substantially less than .17 at the time of the alleged offence, so that the *prima facie* evidence of the certificate and the *prima facie* evidence referred to in s80G were rebutted. If he had legitimately reached such a conclusion, he would have had to decide on the whole of the evidence, whether he was satisfied beyond reasonable doubt that at 10.45 pm the respondent's blood alcohol content exceeded .05 as the s80E preliminary testing machine, unless the policeman was disbelieved, showed that it was.

In order to reach the first conclusion that the certificate was not correct, the Magistrate must first have found, in substance, that no person who drinks only the seven glasses in 105 minutes followed by possibly a meal could possibly have had an alcohol content of .17. In my opinion this conclusion was not reasonably open to him on the evidence. It was certainly open to him on the evidence to reject the policeman's oral evidence about the showing of the preliminary machine, although I observe that there was no cross-examination of the policeman upon this inherently probable piece of evidence, and the evidence of Mr Roberts which was apparently accepted, was that even a very big man who followed, what the respondent says he drank, by a substantial meal, moreover of steak, would have a content of .04. I bear in mind that in the case of *Vaughan v Bechman* (unreported) 31 July 1979, Beach J said that:

> "It is now a matter of notoriety that the consumption of approximately five seven ounce glasses of beer could not produce a percentage of alcohol in a person's blood as high as .25 or anything like that figure. ... The fact is now so generally known as to give rise to the presumption that all persons are aware of it."

Assuming the correctness of this ruling, however, it was clearly based on His Honour's view that it is now public knowledge that "the consumption of five standard alcoholic drinks, (*scilicet*, in one hour), will produce a blood alcohol content of about .05%". Even if this last fact is indeed public knowledge, it would, in my opinion, be very difficult indeed for the Magistrate in the present case to be unsatisfied that the consumption of a further two standard drinks over the next 45 minutes would certainly not raise the blood alcohol content above .05%, but I do not need to rely upon that consideration. The reality of the matter in my opinion is that a Stipendiary Magistrate still cannot take judicial notice of the fact that seven drinks in 105 minutes will "not produce a blood alcohol content of .17 or anything like it".

I would agree with O'Bryan J in *Caughey v McClaer* (unreported) 9 March 1977 that such a conclusion must be a matter for scientific evidence. Judicial notice cannot be taken of facts known only to or believed only by some few cognoscenti in a particular jurisdiction and not known to or believed by very many others, and there are I think dangers in extending the field of judicial knowledge in this precise field where, once allowed, prosecutors as well may seek to rely upon them like anybody else.

In the case of *Caughey v McClaer*, His Honour O'Bryan J cited with approval the judgment of Menhennitt J in *Holdsworth v Fox* [1974] VicRp 27; (1974) VR 225 – a case in which a defendant

was convicted by a Magistrate for an offence against s81A(1) of the *Motor Car Act* 1958. The defendant there satisfied the Magistrate that between the time he stopped driving and the time he undertook a breath test, he consumed a small can of beer. He argued, unsuccessfully, before the Magistrate that the presumption contained in s80G was rebutted and there was not sufficient evidence that at the time of the driving the percentage of alcohol in his blood was more than .05%. The defendant was unsuccessful in the review proceedings before Menhennitt J.

In the course of his judgment, Menhennitt J said that once the necessary elements of s80G are established, namely proof of the percentage of alcohol present in the blood of a person within two hours after the alleged offence, there is then a presumption that that was the percentage of alcohol present in the person's blood at the time at which the offence is alleged to have been committed until the contrary in the sense of proof of a lesser percentage is given, and by "lesser" it appeared to His Honour that "the contrary" meant proof either that the blood alcohol content at the time of the driving was a specific figure, different from that at the time within two hours later or at the very least was a percentage lower than is significant for any relevant purpose. His Honour held that if, in a particular case, it is established that within two hours after the driving the percentage of alcohol present in the blood of a person was in excess of .05% the onus is then thrown onto that person to establish that at the time of the driving, the percentage of alcohol in his blood was not more than .05%.

As I am not prepared to accept the arguments put before me by Mr O'Callaghan based on judicial notice, I take the view that the whole of that part of the judgment of Menhennitt J to which I referred is here applicable. Menhennitt J, after those words, said that he had considered whether this construction placed upon defendants an undue burden is a factor which might point against the construction to be put on the section. His Honour went on:

> "However it appears to me that if a person is able to establish the amount of alcohol he consumed after the driving and before the test, it should not be difficult for him to obtain expert evidence from a doctor or some other expert as to the effect that amount of alcohol would at the relevant time have on that particular person and in that way he would, I think, be able to show whether or not the percentage of alcohol present in his blood was or was not below permissible limits. The fact that in s81A different percentages are significant for different purposes, in my view reinforces the conclusion I have reached."

In my opinion it was not reasonably open upon the evidence for the Magistrate in the present case to conclude that the presumption raised by s80F(3) had been rebutted or that the presumption raised by s80G had been rebutted, and accordingly he should have convicted upon the evidence before him. The order nisi must, accordingly, be made absolute. It would be open to me to remit the case to the Magistrate with a direction to convict, but there are I think special circumstances in this case. It may well have been by oversight, caused by some confusion, that the evidence of Mr Roberts was not properly connected on oath with the respondent. Further, this seems to me to be a case where there is some confusion as to the precise findings which the Magistrate made. As I have pointed out the prosecuting sergeant swears, without reservation, that the Magistrate said as follows:

> "I am unable to establish what the actual reading of the alcohol level should or could have been. I am unable to make a decision. I therefore dismiss the information."

The respondent swears:

> I believe the learned Magistrate then (and this seems to mean at the end of the submissions of counsel) said 'I accept the defendant's evidence and dismiss the information'."

The words in parenthesis have been added by me. Whatever the Magistrate said, he should I think have expressed his findings in the circumstances of this case with greater precision. The affidavits strongly suggest that he accepted and relied upon the whole of the evidence of Mr Roberts and treated it as directly referable to the respondent and also treated it as decisive. In all the circumstances, I think the proper course is to remit the case to the Magistrates' Court at Eltham for rehearing before a different Magistrate from the gentleman who constituted the court on the hearing now reviewed. (Compare the judgment of Lush J from which I have derived much assistance, in the case of *Van Elst v Tanner* (unreported) 7 September 1978 (MC56/78), especially

at pp15-16 of His Honour's typed reasons.)

The grounds of the order nisi are perhaps not expressed with perfection, but I uphold ground 1, that there was no evidence adduced which proved the contrary to the presumption contained in s80G of the *Motor Car Act* 1958. Ground 2 is, I think, imperfectly expressed, but I construe that ground as indicating in substance an allegation that the tests laid down by Menhennitt J in the passages to which I have referred, were not complied with, and so construed it is only really no more than particulars of the first ground. If I am wrong in my construction of ground 2 of the order nisi, and it is to be treated as purely literal, then I would reject it. Ground 3 is also made out because I am convinced that the decision of the magistrate, upon the precise evidence which was before him, was clearly wrong. I think I should summarise my reasoning in this case as follows —

(a) By virtue of the Schedule 7 certificate and s80F(3), there was *prima facie* evidence that (*inter alia*) the breath analysing instrument was properly constructed and in proper working order and that it indicated a blood alcohol content in the respondent at 11.55 pm of .17%.

(b) The evidence of Mr Roberts was ineffective to rebut these presumptions because it was not sufficiently connected with the respondent.

(c) The evidence of the respondent himself was ineffective to rebut those presumptions because—
(i) it contained no evidence to show what the respondent's blood alcohol content was in fact, or that it was below .05%, and

(ii) the Magistrate was not entitled either to take judicial notice that any person who had drunk only what the respondent said he had drunk would have a blood alcohol content so far below .17 as to make it clear that at least one of the things presumed was not so, or to take judicial notice that a person who had drunk only that quantity would have a blood alcohol content less than .05.

(d) Therefore, by s80G, the effect of the evidence was that the respondent's blood alcohol content at the time of the alleged offence was .17.

The orders of the court will be as follows:

1. Order absolute.

2. Verdict of acquittal set aside.

3. Order that the respondent be retried at the Magistrates' Court at Eltham before a different Magistrate from the one who gave the decision now reviewed.

4. Order that the costs of the applicant of this application, including all costs reserved, all of which costs are fixed at the sum of $200 be paid by the respondent.

APPEARANCES: For the applicant Larchin: Mr C Bayliss, counsel. State Crown Solicitor. For the respondent Traynor: Mr D O'Callaghan, counsel. McNab and McNab, solicitors.
