12/75

SUPREME COURT OF VICTORIA

COLLINS v MITHEN

Gowans J

21 May 1975

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN BY MEDICAL PRACTITIONER – SAMPLE GIVEN TO POLICE OFFICER – SAMPLE CONVEYED FOR ANALYSIS – AT HEARING CERTIFICATES TENDERED TO PROVE COMPLIANCE WITH REGULATIONS – SUBMISSION THAT NO EVIDENCE TO SHOW THAT SAMPLE WAS NOT TAMPERED WITH – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – PRESUMPTIONS OF REGULARITY AND CONTINUANCE: *MOTOR CAR ACT* 1958, SS81A, 80D, 80DA.

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. The presumption of regularity should apply to justify the inference that the doctor who took the sample and gave that certificate was a doctor answering the description in sub-section (i) of s80DA which authorised the taking of a blood sample, as otherwise an unlawful assault would have been committed by the doctor on the defendant and it is to be presumed that that was not the case.

2. There were two presumptions of fact which ought to come into operation in relation to this matter. One was a presumption of continuance, that is to say, that it ought to be presumed as a matter of fact that during this short time between the Friday evening and the Monday, the blood in the container preserved its identity, that is to say that it continued to be the same blood as was in the container on the Friday night. The same presumption operated to justify an inference that the condition of that blood did not change of itself during that time. In addition, there was a presumption of regularity in relation to the custody of the sample; or to put it perhaps in a way which was more pertinent for present purposes, there was a presumption against irregularity with respect to the custody of the sample – a presumption against the occurrence of any fraud against the law.

3. When these two presumptions were put together, the effect was that there was evidence that the blood in the container on Friday was the same blood and in the same condition as the blood in the container on the Monday, and that no person had wrongly interfered with the blood itself or with its condition. These presumptions were such as ought to be used for the purpose of proceedings of this kind where they were properly applicable.

4. Accordingly, the Magistrate was in error in dismissing the information.

GOWANS J: This is the return of an order nisi to revisit an order of the Magistrates' Court at Carlton on the 15th October 1974 with respect to the dismissal of an Information. The Information was one brought by Constable Robert John Collins against the defendant David Mithen charging him with driving a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood exceeded .05 per centum, contrary to the *Motor Car Act*, s81A. In the result the information was dismissed.

The relevant provisions of the *Motor Car Act* are as follows:

> s81A. (1) Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood is more than .05 per centum shall be guilty of an offence ...
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> 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.
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> S80D. (1) Where the question whether any person was or was not under the influence of intoxicating

liquor or where the question as to the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant—
(a) ... (b) ... (c) upon any hearing for an offence against ... s81A ... of this act—
then without the admissibility of any evidence which might be given apart from the provisions of this section, 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 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 tine of analysis.

(2) Where evidence of the taking and analysis of a sample of blood is given as aforesaid and accepted by the jury or court (as the case may be) then—
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

(3) A certificate purporting to be signed by a person who purports to be a legally qualified medical practitioner in or to the effect of Schedule Six 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.

(4) 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 thereto contained.

(11) Save as provided in section 80DA and sub-section (9) of section 80F no such blood sample shall be taken and no evidence of the result of any analysis of such a sample shall be tendered unless the person from whom the blood had been collected has expressed his consent to the collection of the blood and the onus of proving such expression of consent shall be on the prosecution.

80DA(1) Where a person of or over the age of 15 years enters or is brought into a hospital for examination or treatment in consequence of an accident involving a motor car, the legally qualified medical practitioner immediately responsible for the examination or treatment of the person shall take from the person a sample of the person's blood for analysis, whether or not the person consents to the taking thereof unless in the opinion of the legally qualified medical practitioner the taking of a sample of the persona blood would be prejudicial to the proper care and treatment of the person.

(5) Where a sample of a person's blood is taken in accordance with this section evidence of the taking thereof, the analysis thereof or the results of the analysis thereof, shall not be used in evidence in any legal proceedings except for the purposes of section 80D.

There is one other matter that might need to be mentioned, and that is that there are certain regulations with respect to the taking of blood. But there is nothing in the provisions of the Statute itself to make it obligatory for the medical practitioner to comply with those regulations as a condition of establishing an offence or of evidence being given with respect to the analysis of blood; nor is there any obligation on the part of a police officer to comply with any part of the regulations with respect to the keeping of blood.

The point that arose in this case was as to whether there was evidence that a certain sample of blood which was analysed was a sample of blood taken from the defendant.

The course of events with respect to the proceedings down below as related by the informant was this. One Nino Colluraffi, a tram driver, gave evidence that he was driving a tram south along Royal Parade, Parkville, about 9.20 p.m. on Friday, 10th May 1974, when an oncoming car turning right hit the front of his tram head on. The Informant himself arrived in the location shortly after about 9.30 p.m. He related what he saw on the scene with respect to damage done to the car and the tram. He said that a short time later he went to the Casualty section of the Royal Melbourne Hospital where he met a Doctor Ian Nixon who was treating a male person whom he now knew to be the defendant. At 9.50 pm he was present when Dr Nixon took a sample of blood from the defendant. He went on to say that about 10.05 pm Dr Nixon handed him a sample of blood and an original and carbon copy of a certificate as set out in the Sixth Schedule of the *Motor Car Act* which he later served upon the defendant.

He had a conversation with the defendant which it is unnecessary to set out but towards

the end of that conversation he asked the defendant whether he had consumed any liquor that day and the defendant said that be had had a few beers, about ten pots, having started drinking at about 4 o'clock in the afternoon. After this conversation, according to his evidence, the informant left the hospital, taking with him the sample of the defendant's blood which had been given to him by Dr Nixon and delivering it to the Norman McCallum Forensic Science Laboratory at 193 Spring Street, Melbourne for analysis He there placed the sample of blood in a locked refrigerated receptacle provided for that purpose at the laboratory. At a later date he received two completed copies of a certificate in the form of the Eighth Schedule from the Norman McCallum Forensic Science Laboratory.

On Friday, 16th August he had a conversation with the defendant in which he told him that a blood test had been taken after his accident which had been analysed by an approved analyst and the result was that his blood alcohol content was 0.237 per centum. He asked the defendant whether be had any reason for driving a motor car while his blood content was in excess of .05 per centum. The defendant replied that he did not think that he was that bad and that he had been to a 'break-up'.

The informant was cross-examined on this evidence and in the course of cross-examination the following questions and answers were asked or given:

"Q. Did you see Dr Nixon actually treat the defendant for his injuries?
A. No.
Q. Did you see any other doctor treat Mr Mithen for his injuries?
A. No.
Q. How do you know it was Dr Nixon who was treating Mr Mithen for his injuries?
A. The sister in charge at the Casualty desk told me so. When I arrived at the hospital she directed me to the Casualty Treatment Room and I there saw Dr Nixon at the defendant's bedside.
Q. Did you see Dr Nixon take a sample of blood from the defendant?
A. Yes.
Q. Did he comply with the regulations which relate to the taking of blood?
A. Yes, he did.
Q. How do you know that?
A. It states on the Sixth Schedule that the doctor signed that he did comply with the regulations.
Q. What became of the sample bottle of blood which Dr Nixon gave you?
A. I delivered it later that evening to the Forensic Science Laboratory at 193 Spring Street, Melbourne, I placed it in a locked, refrigerated receptacle which is provided there for that purpose.
Q. The analyst's Eighth Schedule states that he took charge of the blood sample on Monday, 13th May. Were you present when he removed it from that locked receptacle?
A. No.
Q. Were you present when the analyst opened the blood sample and analysed it on 30th May?
A. No.
Q. Do you know what happened to that blood sample from the time you left it at the Laboratory until the time it was analysed?
A. No."

The informant's case was then closed and a number of submissions were made on behalf of the defendant by counsel. As to these it is only necessary to set out two. They were:

"(c) that the legally qualified medical practitioner who took the sample of blood has not been proven to be the doctor immediately responsible for the treatment of the defendant as is required by the *Motor Car Act* 1958 as amended and *Regulations*.

(d) that no evidence has been given either by the Constable or by the analyst on the Eighth Schedule of the safekeeping of the defendant's sample of blood from when it was left at the laboratory and 10th May until it was finally analysed on 30th May."

The certificate signed by the medical practitioner was headed "Certificate of Medical Practitioner of the Taking of Blood Sample". It purported to be in accordance with the Sixth Schedule. It read:

"I, Ian Kenneth Nixon, of Royal Melbourne Hospital, a legally qualified medical practitioner, hereby certify that I collected a sample of the blood of David Mithen 50 Bolden Street, North Fitzroy, at 21.50 on 10.5.74 and that all the regulations relating to the collection of such sample were complied with and that such sample was placed in two containers labelled 'David Mithen 21.50 10.5.74'.

Signature: Ian Nixon
Qualifications : M.B, B.S. Date: 10.5.74."

In my view the presumption of regularity should apply to justify the inference that the doctor who took the sample and gave that certificate was a doctor answering the description in sub-section (i) of s80DA which authorised the taking of a blood sample, as otherwise an unlawful assault would have been committed by the doctor on the defendant and it is to be presumed that that was not the case.

The second certificate was headed "Certificate of Approved Analyst - Blood Analysis". It purported to be in the form of the Eighth Schedule. It reads:

> "I, John Campbell Low of the Forensic Science Laboratory, 193 Spring Street, Melbourne, an approved analyst under s80D of the *Motor Car Act* 1958, hereby certify that I did on 30th May, 1974 analyse by a prescribed method a sample of blood labelled 'David Mithen 10.5.74, 21.50 Ian Nixon', such sample having been received by me on 13th May 1974, and such sample was found on analysis to contain 0.237 grams of alcohol per one hundred millilitres of blood. (0.237%)
> Signature: J. Campbell Low
> Date: 27th June, 1974."

In dealing with the submission with respect to the safekeeping of the defendant's sample of blood the learned Stipendiary Magistrate gave reasons as follows:

> "The prosecution has not shown that in the interim period no tampering took place with the sample of blood. There is no firm evidence that proper safekeeping took place or that the sample was sealed against tampering or foreign matter. I feel that a 'tight-fitting cap or plug' as required by the Regulations is not sufficient. There is a need for the analyst to state that there was a proper seal on the bottle which had to be broken. I feel it is necessary to dismiss the charge of exceeding .05%."

The learned Magistrate then dismissed that charge. He went on, however, to convict the defendant of failing to give way to oncoming traffic when turning right at an intersection and imposed a penalty.

An order nisi was obtained calling upon the defendant to show cause why the order of dismissal should not be reviewed and the grounds relied upon were as follows:

> "(1) There was no evidence before the learned Stipendiary Magistrate upon which he could find that the *prima facie* case established by the informant's evidence and by the certificates tendered pursuant to the provisions of the *Motor Car Act* 1958 had been displaced;
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> (2) The learned Stipendiary Magistrate was wrong in holding that the informant was required to prove any of the following matters —
> (a) that there was proper safekeeping of the blood sample;
> (b) that the said sample was sealed against tampering or foreign matter
> (c) that the said sample had not been tampered with;
> (d) that the analyst had verified that the said sample had a proper seal which seal had to be broken on the bottle;
>
> (3) On the evidence before the learned Stipendiary Magistrate he ought not to have dismissed the said information."

There was evidence that a sample had been taken of the defendant's blood in due conformity with the requirements of the statute and there was evidence that that sample had been placed in a container bearing certain identifying markings. That was on May 10th. There was evidence also that on that date that container bearing those markings had been taken to the Forensic Science Laboratory and placed in a locked refrigerated receptacle kept for the purpose.

The next evidence as to what occurred in relation to the sample analysed comes from the analyst's certificate. In that certificate he said that he had received a sample bearing the same identifying markings, on 13th May, 1974 and he described himself as being of the Forensic Science Laboratory, 193 Spring Street, Melbourne, and an approved analyst.

It was that sample of blood which he analysed on 30th May and which produced the results which are set out in his certificate. That certificate was *prima facie* evidence of what it contained

and was, therefore, *prima facie* evidence of the fact that on 13th May – that is the Monday after the accident, the accident having occurred on Friday – a container bearing the identifying marks described had been received by the analyst. On the presumption of regularity it may be assumed that as between 13th May and 30th May the sample in the custody of the analyst was preserved with due regularity.

The matter that raises the difficulty is as to the absence of any direct evidence as to what happened to the container between Friday, May 10th and Monday, May 13th. The suggestion which appealed to the Magistrate was as to the possibility of the contents of the container being tampered with in some way.

But in my opinion there are two presumptions which ought to come into operation in relation to this matter. They are both presumptions of fact. One is a presumption of continuance, that is to say, that it ought to be presumed as a matter of fact that during this short time between the Friday evening and the Monday, the blood in the container preserved its identity, that is to say that it continued to be the same blood as was in the container on the Friday night. The same presumption operates to justify an inference that the condition of that blood did not change of itself during that time.

In addition, there is a presumption of regularity in relation to the custody of the sample; or to put it perhaps in a way which is more pertinent for present purposes, there is a presumption against irregularity with respect to the custody of the sample – a presumption against the occurrence of any fraud against the law.

When these two presumptions are put together, I think the effect is that there was evidence that the blood in the container on Friday was the same blood and in the same condition as the blood in the container on the Monday, and that no person had wrongly interfered with the blood itself or with its condition. These presumptions are such as ought to be used for the purpose of proceedings of this kind where they are properly applicable.

In dealing with the application of presumptions such as these, in *Hardess v Beaumont* [1953] VicLawRp 46; (1953) VLR 315 at 320; [1953] ALR 656, Dean J said:

> "I would add that the presumptions to which I have referred are founded on obvious good sense and that the courts should be ready to apply them in cases of this kind. Very large numbers of these prosecutions are heard in Courts of Petty Sessions. It would add greatly to the time and expense if the informant had to be prepared in every case to prove matters as to which there can very rarely be any controversy. It is always open to a defendant to rebut the presumption, but in the absence of some reason for supposing that there is some irregularity, legal practitioners should be discouraged from taking points based on the supposed defects in the informant's proof. A judicious use of such presumptions is abundantly warranted by authority and should serve to prevent excessive insistence on formal requirements of proof."

At the end of the informant's case there was, I think, a *prima facie* case for the defendant to answer. As the High Court has pointed out in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654 at p658; [1955] ALR 671, the question at that point of time is whether there is evidence upon which the defendant could be convicted; it is not a question as to whether on the evidence the defendant should be convicted. In relation to that latter question, of course, the onus of proof lies upon the complainant to prove the guilt of the defendant beyond reasonable doubt.

In the circumstances, I am of opinion that Ground (3) of the order nisi is made out, that is to say that on the evidence before the learned Stipendiary Magistrate he ought not to have dismissed the said information. It is unnecessary to go through the other grounds of the order nisi. The order nisi should therefore be made absolute, but since the defendant gave no evidence in relation to this charge the information should be remitted to the Magistrates' Court to be dealt with in accordance with law. ORDER: The formal order will therefore be: Order nisi absolute with costs; order of dismissal set aside; information remitted to the Magistrates' Court to be dealt with in accordance with the law.
