44/75

SUPREME COURT OF VICTORIA

ADAIR v DURBRIDGE

Pape J

19 July 1974

MOTOR TRAFFIC – DRINK/DRIVING – READING OF 0.16%BAC – EVIDENCE TO REBUT BREATHALYSER-READING – OPERATOR CALLED TO GIVE EVIDENCE – EFFECT OF CERTIFICATE – EFFECT OF EVIDENCE GIVEN BY OPERATOR – EVIDENCE CALLED BY DEFENCE AS TO QUANTITY OF ALCOHOL CONSUMED PRIOR TO DRIVING – SUCH EVIDENCE ACCEPTED BY MAGISTRATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(3).)

On a charge of exceeding .05, the prosecution gave evidence that the defendant's breath smelt of liquor, his eyes were bloodshot and his speech slurred. Subsequently when breathalysed the result of the test was a reading of .16%. The defendant admitted he had been drinking champagne.

The breathalyser operator was required to attend, to give evidence pursuant to receiving a notice under s80F(3) of the *Motor Car Act* 1958. He gave the usual evidence of testing including the fact that the requirements of the *Motor Car Blood & Breath Samples) Regulations* were complied with.

In cross-examination the operator said .16 was approximately ten to twelve glasses of beer, but that he had never conducted tests with champagne and could not make a comparison between the effect of champagne as against beer. He said the approximate rate at which alcohol in the bloodstream is dissipated after a person's last drink was about .20 per cent per hour and that he was not surprised to obtain a reading of .160 for a person drinking the quantity of alcohol claimed by the defendant as in his view the reading on the instrument was correct.

The defendant gave evidence on oath that he consumed two glasses of beer between 6 p.m. and 6.30pm and three glasses of champagne between 8.00pm and 8.30pm and his brother attested to this quantity of alcohol taken by the defendant.

The Magistrate dismissed the charge saying that he accepted the uncontradicted evidence of the defendant, corroborated by his brother, as to the quantity of alcohol he had consumed. Upon Order nisi to review—

HELD: Order nisi discharged.

1. The certificate tendered in evidence was not *prima facie* evidence of anything by reason of the fact that the defendant had asked for the breathalyser operator to attend. (See S80F(3)). But although the certificate had to be tendered in evidence in order to make the breathalyser operation evidence of the offence under s80F(1) it only became *prima facie* evidence if the accused person had not given notice for the breathalyser operator to attend, and he did give that notice. But the authorities showed that the operator when called was entitled to give *viva voce* evidence of the matters referred to in sub-s(5), and it was that evidence which was made *prima facie* evidence of the facts deposed to.

2. It was impossible for the Supreme Court to say that acceptance by the Magistrate of the evidence of the defendant in this case, with its consequent result, was so unreasonable that it could not be reconciled with a rational assessment of the whole case.

3. Accordingly, the order nisi was discharged.

PAPE J: ... The Magistrate was then asked for his reasons by the prosecutor, and at this stage the defendant's solicitor said that he submitted that if the learned Magistrate accepted the defendant's evidence as to the quantity of alcohol consumed, having regard to the evidence of the breathalyser operator, it would not have been possible to obtain a reading of .16 grams of alcohol per 100 millilitres of blood, and the inference was that the machine used was defective, or alternatively, defectively operated, and that, having regard to all of the facts, the defence relied upon the case of *Saxe v Kellett* [1970] VicRp 79; [1970] VR 600.

The Magistrate then stated that the reading obtained, as set out in the Schedule 7 certificate, was only *prima facie* evidence that the defendant's reading at the material time exceeded .05 per cent and that this evidence could be rebutted by other evidence and that, in this case, he was

satisfied that it had been so rebutted by the uncontradicted and corroborated evidence of the defendant regarding the amount of alcohol which he had consumed prior to being breathalysed.

That is substantially identical with what is said in the affidavit by Senior Sergeant Snell, in which it said that the written note that the Magistrate gave to the parties the day following the case was as follows:

> "In this case, I accepted the evidence given by the defendant and his witness as to the amount of alcohol consumed by them on the relevant date. He swore he consumed two glasses of beer between 6.00p.m. and 6.30 p.m, and three glasses of champagne between 3.p.m. and 8.30 p.m. I feel that the time which elapsed between his last drink and the time he was tested 12.50am, it was most unlikely that he would give a reading of .16 per cent. The evidence given is sufficient to raise a doubt in my mind. I give the defendant the benefit of the doubt. It has been suggested by defence counsel that the instrument could have been reading incorrectly or that an incorrect reading was taken by the operator. These, of course, are possibilities, but it is not for me to determine why there could have been a discrepancy, and the case will be dismissed."

In my view, what the Magistrate has said here simply is that he has was not satisfied to accept the result of the reading as showing the .16 per cent of alcohol in the blood at the stage when the test was taken, and he explained that by saying that he accepted the evidence of the defendant and his brother that he had had two beers between 6 and 6.30 and three glasses of champagne between eight o'clock and half-past eight, and nothing thereafter, and Mr Batt very fairly – as we always expect of him in these cases – has said, "Well, if that were true, then plainly enough a reading of .16 could not have been obtained at twenty-five minutes past twelve."

The Magistrate said, in effect, "Well, I accept that evidence, and that being so, I am not satisfied to accept the reading of the breathalyser, I do not have to say how this discrepancy occurred, but all I say is I am not satisfied to accept it," and since the Crown did not discharge the burden of proving that beyond reasonable doubt, the Magistrate held that he was entitled to dismiss the information. See *Saxe v Kellett* (*supra*).

It was argued by Mr Batt counsel for the informant in a very persuasive, and if I may say so, very competent argument, that that finding by the Magistrate was an unreasonable finding, and he pointed out, with some justification, that there a number of factors which supported that view. He said that the Magistrate, in the first place, said that the evidence of the defendant was uncontradicted, and he pointed out that, in reality, this was not so, for the breathalyser reading was, in itself, a contradiction of that. Be that as it may, I do not think that the Magistrate meant, when he said it was uncontradicted, to say that it had not been contradicted by the breathalyser reading.

It was then said that the Magistrate really started from the wrong end, that he first evaluated the evidence of the defendant and his brother, and having done that, said, "Well, I accept that", and then concluded that he could not consistently with that finding accept the breathalyser result as being accurate, and that, had he gone about it the right way, he would have started by saying, "Well, this breathalyser has been shown by evidence to have been tested and to have been operated in accordance with the regulations. It has produced a result which shows that this man had a quantity of alcohol in his blood which was equivalent to about ten or twelve glasses of beer. How does that, then, square with his evidence that he had only had five drinks between six o'clock and half-past eight?" And it was said that in arriving at this conclusion, His Worship did act unreasonably.

It may be that some Magistrates would have come to an entirely different conclusion. It may be that I myself would have come to a different conclusion: I do not say that I would, but the point of all this is that it was for the Magistrate to assess this evidence, and I find great difficulty in saying that there is anything unreasonable in a Magistrate saying that he accepts evidence given by a witness on his oath, he having seen and observed the demeanour of the witness.

It was also said by Mr Batt counsel for the informant that the Magistrate did not take any notice of the evidence that had been given about the defendant's demeanour when he was apprehended or about the irrational answers that he gave when he was interrogated at the police station at the time the test was administered. It is true enough that the Magistrate did not advert

to that or any of those matters, but I think it is plain that the mere fact that a Magistrate does not in his reasons for judgment, advert to all the matters that he might have adverted to, does not show that he must be deemed to have overlooked them. It is impossible, in my view, to believe that the Magistrate was unaware of the significance of the findings of the breathalyser operator, and it seems to me that the Magistrate must have evaluated the evidence given by the breathalyser operator as against the evidence given by the defendant and his brother, and although it may be that some judges, some magistrates, would not have come to the same conclusion, in my view it is quite impossible to say that the Stipendiary Magistrate who heard all he evidence was acting unreasonably in the course he took.

Once he accepted that evidence, it must have thrown considerable doubt upon the accuracy of the blood alcohol content as disclosed by the result of the test. The Magistrate spoke of the certificate as being only *prima facie* evidence. But I think that the certificate was not *prima facie* evidence of anything by reason of the fact that the defendant had asked for the breathalyser operator to attend. (See S80F(3)). But although the certificate had to be tendered in evidence in order to make the breathalyser operation evidence of the offence under s80F(1) (see *Holdsworth v Fox* [1974] VicRp 27; [1974] VR 225 per Menhennitt J at 229), under sub-s (3) it only becomes *prima facie* evidence if the accused person has not given notice for the breathalyser operator to attend, and he did give that notice. But the authorities show that the operator when called is entitled to give *viva voce* evidence of the matters referred to in sub-s (5), and it is that evidence which is made *prima facie* evidence of the facts deposed to.

For these reasons it seems to me that it is impossible for this Court to say that acceptance by the Magistrate of the evidence of the defendant in this case, with its consequent result, was so unreasonable that it cannot be reconciled with a rational assessment of the whole case, if I may use the words used by Mr Justice Sholl in *Taylor v Ellis* [1956] VicLawRp 72; (1956) VLR 457 at p465.
The order nisi will be discharged.

[Editorial Comments on this case.
It may be profitable to refer to the later decision of Mr Justice Harris of *Peeters v Holman*, unreported 26.6.1975 (MC19/1975). In that case His Honour said: "the estimation of the quantity of liquor required to produce any particular blood alcohol reading is a scientific matter which has to be proved by expert evidence."

And the further comment, "In my opinion, it is not possible to say that expert evidence is necessary in every case in which it is sought to throw a doubt on a blood alcohol reading obtained by a breathalyser test. When reviewing the decisions of Magistrates' Courts, in some cases this Court may not feel that it can say that a Magistrates' Court was not entitled to reject the *prima facie* evidence of the Seventh Schedule Certificate even though the only evidence which told against the certificate was the size of the reading and the evidence of lay witnesses. *Saxe v Kellett* [1970] VicRp 79; [1970] VR 600 was such a case....

Presumably *Adair v Durbridge* (MC44/1965) would fall into the latter category, as it is doubtful whether the operator did or could have given the necessary scientific evidence as to displace the reading, (especially in respect to the effect of champagne or any blood alcohol reading, as he stated he had never conducted tests with that beverage).

It is to be observed that one distinction between the two cases is that in the earlier decision (*Adair v Durbridge*) the operator was called as a witness and in that event the *viva voce* evidence of the operator is made *prima facie* evidence of the facts deposed to, and the contents of the 7th Schedule are not *prima facie* evidence of the facts therein.

The question of proof by expert evidence was not considered by the court because counsel agreed that a reading of .16 could not be obtained if the court accepted the defendant's evidence as to consumption of alcohol.]
