SUPREME COURT OF QUEENSLAND

CITATION:	*R v Anderson* [2005] QCA 304
PARTIES:	**R** **v** **ANDERSON, Annabelle Ruth** (appellant/applicant)
FILE NO/S:	CA No 71 of 2005 DC No 19 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Goondiwindi
DELIVERED ON:	23 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2005
JUDGES:	Williams, Jerrard and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal against conviction dismissed** **2. Application for leave to appeal against sentence dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE APPEAL DISMISSED - - where the appellant had been consuming alcohol at a party before deciding to drive home - where the motor vehicle being driven by the appellant veered onto the wrong side of the road and collided with a motor vehicle travelling in the other direction - where one passenger travelling in the other motor vehicle was killed while another passenger sustained serious injuries - where breath test taken soon after the accident showed the appellant had a blood alcohol concentration of 71mg/100ml - where blood test taken several hours later showed the appellant had a blood alcohol concentration level of 138mg/100ml - where legal limit of blood alcohol concentration for the purposes of drink driving is 50 mg/100ml - where appellant was convicted after trial by jury of causing death and grievous bodily harm through dangerous operation of a motor vehicle - where the jury also found that the appellant had been adversely affected by

alcohol at the time that the offences were committed - where expert evidence was led as to the appellant's likely blood alcohol concentration at the time of the accident by working backwards from the results of the two tests conducted after the accident - where the thrust of this evidence on behalf of the appellant was that her blood alcohol concentration at the time of the accident was less than 50mg/100ml - where further unchallenged expert evidence was given that a person's ability to drive a motor vehicle could be impaired with a blood alcohol concentration of less that 50 mg/100ml - where trial judge directed jury that it was a matter for them what weight they attributed to the expert evidence - whether blood alcohol concentration is decisive as to whether or not a person was adversely affected by alcohol or is only one piece of evidence to be considered by the jury

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - WHERE APPEAL DISMISSED - where the behaviour and physical appearance of the appellant had been observed by witnesses both before and soon after the accident - where these witnesses gave evidence that the appellant's behaviour and physical appearance appeared to be consistent with that of a person under the influence of alcohol - where the trial judge directed the jury that evidence that a person appeared to be under the influence of alcohol at a time just before that person drove a motor vehicle could, if accepted, be relied upon to conclude that the person driving the motor vehicle was adversely affected by alcohol - whether it was open to the jury to rely on such evidence to support a conclusion that the appellant was adversely affected by alcohol

CRIMINAL LAW - EVIDENCE - MISCELLANEOUS MATTERS - EVIDENCE OF BLOOD ALCOHOL - GENERALLY - where the blood test to determine the appellant's blood alcohol concentration was taken within two hours of the time of the accident - where the certificate containing the result of this blood test showed the appellant had a blood alcohol concentration level of 138mg/100ml - where s 80(16F) *Transport Operations (Road Use Management) Act* 1995 (Qld) deems such a certificate to be conclusive evidence of a person's blood alcohol concentration for a period of up to two hours prior to the time of the test - where s 80(24A)(c) *Transport Operations (Road Use Management) Act* 1995 (Qld) deems a person with a blood alcohol concentration of more than 150mg/100ml to have been adversely affected by alcohol - whether a certificate showing a blood alcohol concentration of less than 150mg/100ml, while conclusive evidence of the level of

alcohol in the blood, was only one piece of evidence for the jury to consider when determining whether or not the appellant was adversely affected by alcohol - whether the deeming function of s 80(16F) *Transport Operations (Road Use Management) Act* 1995 (Qld) truncates the fact finding function of the courts - whether the directions given by the trial judge drew the appropriate distinction for the jury between treating the blood test certificate as conclusive evidence of the appellant's blood alcohol concentration and treating the certificate as conclusive evidence that the appellant was adversely affected by alcohol

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - APPEAL AGAINST SENTENCE - APPEAL BY CONVICTED PERSONS - APPLICATIONS TO REDUCE SENTENCE - WHEN REFUSED - GENERALLY - where appellant was convicted after trial by jury of causing death and grievous bodily harm through dangerous operation of a motor vehicle - where the jury also found that the appellant had been adversely affected by alcohol at the time that the offences were committed - where the appellant was sentenced to three and a half years imprisonment - where appellant had no criminal history and was of good character but had displayed no remorse - where application to reduce sentence was founded on contention that the verdict of the jury that the appellant had not been adversely affected by alcohol was unsound - whether sentence imposed on the appellant was manifestly excessive

Criminal Code 1899 (Qld), s 328A
Transport Operations (Road Use Management) Act 1995 (Qld), s 79, s 79A, s 80(16B), s 80(16F), s 80(16G), s 80(24), s 80(24A)

Chapman v Rogers, ex parte Chapman [1984] 1 Qd R 542, cited
Nicholas v The Queen [1998] HCA 9; (1998) 193 CLR 173, considered
Silbert v DPP (WA) [2004] HCA 9; (2004) 217 CLR 181, cited
Williamson v Ah On (1926) 39 CLR 95, cited

COUNSEL: B W Walker SC, with A J Kimmins, for the appellant/applicant
G P Long for the respondent

SOLICITORS: Ryan & Bosscher for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **WILLIAMS JA:** The facts relevant to this appeal are fully set out in the reasons for judgment of Keane JA which I have had the advantage of reading.

[2] In the experience of most judges even honest witnesses generally give unreliable evidence as to the quantity of alcohol consumed by the witness over a given time. Part of that unreliability is undoubtedly due to the common misconception as to what constitutes a standard drink. As one of the doctors who gave evidence at this trial said in evidence, a restaurant patron would reject a glass of wine containing only 100ml, a standard drink.

[3] The appellant's case at trial was largely conducted on the basis that she had consumed over a period of about two hours only three standard drinks, two of wine and one of vodka.

[4] Consumption of that quantity could well have been regarded by the jury as inconsistent with the other evidence indicating the consumption of alcohol. Ms Osborn, an experienced nurse, was driving home when she came on the scene of the incident at about 12.35 am. There she spoke to the appellant and her evidence was that she "could smell alcohol". Sergeant Rutherford arrived at the scene at about 12.35 am. His evidence was that when Senior Constable Baldock was speaking to the appellant he "was able to smell liquor about the person of" the appellant. Senior Constable Baldock gave evidence that she observed that the appellant "smelled strongly of liquor and that she had slightly bloodshot eyes". It was she who administered the alcolmeter test recording a reading of .071. In addition to that the jury had before it the result of the blood test showing a reading of .138, and the evidence from Mr and Mrs McKenzie which is detailed in the reasons for judgment of Keane JA.

[5] In the light of that evidence, and in the light of the evidence of the experts, the jury were entitled to conclude that the appellant had consumed more alcohol than three standard drinks. They were also entitled, particularly on the evidence of Dr Mahoney, to conclude that her blood-alcohol level was still rising at the time of the accident; that would mean that she had consumed a quantity of alcohol shortly before commencing the drive.

[6] None of the evidence I have referred to, including the blood alcohol concentration of .138 referred to in the certificate admissible pursuant to s 80(24) of the *Transport Operations (Road Use Management) Act* 1995 (Qld), was conclusive of the fact that at the time the appellant drove dangerously she was "adversely affected by alcohol". That was a question of fact to be determined by the jury in the light of the evidence before it relevant to that issue. That included the evidence to which I have referred, and in particular the evidence of Dr Mahoney and the other experts called by the appellant at trial. The jury was entitled to act on the evidence of Dr Mahoney, which is set out in some detail in the reasons for judgment of Keane JA, and if that was accepted then they were clearly entitled to be satisfied beyond reasonable doubt that at the material time the appellant was "adversely affected by alcohol". As is pointed out by Keane JA there was no error in the summing up on the issue of whether the appellant was adversely affected by alcohol which was unfavourable to her.

[7] I agree with all that has been said by Keane JA in his reasons. The appeal against conviction should be dismissed and the application for leave to appeal against sentence should be refused.

[8] **JERRARD JA:** In this appeal against conviction and application for leave to appeal against sentence I have had the advantage of reading the reasons for judgment of each of Williams JA and Keane JA, and I agree with the orders proposed by their Honours, and with their reasons, except where I indicate disagreement. I agree with Keane JA that the issue for the jury on the circumstance of aggravation alleged by the prosecution was not whether Annabelle Anderson had a blood alcohol concentration ("BAC") of .05, or less or more, at the time of the collision. Instead, it was whether having drunk, she said, only two glasses of red wine and a glass of vodka in the previous two and a half hours, she was adversely affected by alcohol.

[9] Evidence in support of that conclusion included:

- that she admitted having consumed that much alcohol and, as Williams JA remarks, each of the glasses from which she consumed the alcohol may have contained more than the standard drink upon which expert opinion about probable levels of BAC are based;
- she drove her vehicle on the wrong side of the road, at speed, into another car;
- her breath smelt strongly of alcohol at the scene of the collision;
- her eyes were slightly bloodshot at that time;
- she had a BAC measured at .071 some 20 minutes after the accident; and
- she appeared adversely affected by alcohol earlier that night, at the party she had been attending.

[10] Section 328A(4) of the *Criminal Code* does not require proof that at the time of committing an offence of dangerous operation of a motor vehicle the person offending was adversely affected in the person's ability to control a motor vehicle, or in the person's driving. The section requires proof only that the person was adversely affected by an intoxicating substance. That accords with the direction the learned trial judge gave to the jury, quoted by Keane JA. If what His Honour has written is intended to support the argument of senior counsel for the appellant, namely that the expression "adversely affected by an intoxicating substance" means influenced to a material degree which detracts from the capacity to control a motor vehicle, then I respectfully disagree with that submission and with Keane JA's approval of it. What the prosecution must establish is that the defendant was adversely affected, and while proof of that condition will almost always necessarily establish a condition materially detracting from a person's ability to control a motor vehicle, it is not specifically necessary to prove that second proposition.

[11] I agree with Keane JA that evidence of a person's BAC is relevant to the issue of whether that person was adversely affected by alcohol, and also to the separate issue of whether that person had operated the motor vehicle dangerously. I also agree that other relevant evidence on each issue can include evidence of the extent to which the person charged was likely to be affected in fact by the alcohol which that person

had actually consumed. In addition to those matters, I consider that other relevant evidence can also include, as it did in this case, evidence of what in fact was likely to be the BAC of the defendant at the time of the relevant collision. It should be appreciated that the appellant in this case did not challenge the accuracy of either the results of the breath test of the appellant taken at 12.50 am pursuant to s 80(2A) of the TORUM,[1] nor the accuracy, pursuant to s 80(16G) of that Act, of the certificate evidencing the result of the blood test taken at 1.30 am. The appellant in fact relied on the accuracy of both of those results at the time each was taken to establish that her BAC was increasing continuously from the time she left the party until 1.30 am, when the sample of blood was taken for analysis. Her witnesses and counsel contended that that evidence showed that in truth her BAC was lower than .071 at the time of the accident, and probably or possibly below .05.

[12] The prosecution had established both of those results, the first by calling the officer who performed the breath test,[2] and the second by putting the analyst's certificate into evidence.[3] Despite that, the Crown argued on the appeal that it had been impermissible for the appellant to call the witnesses whose evidence is described by Keane JA. That evidence assumed the correctness of both tests, and relied on those for opinion evidence as to her BAC at the time of the collision. But it would have been obvious to the jury in any event that there was a difference between the two readings, that one was higher than the other, and that a commonsense view consistent with them was that her BAC had been rising since the consumption of her last alcoholic drink. That view was supported by all three expert witnesses, and by common experience. Evidence as to the likely BAC at the time of the accident was relevant to, but not decisive of, the issue of whether Ms Anderson was adversely affected by alcohol at that time. But the Crown contended that calling Ms Anderson's witnesses impermissibly challenged the conclusiveness of the analyst's certificate as to her BAC.

[13] Whether Ms Anderson was adversely affected by alcohol was a matter of fact for the jury, which was not conclusively determined by the certificate and s 80(16F). That section provides:

> "Evidence by an analyst or by a certificate referred to in subsection (16B) of the concentration of alcohol indicated to be present in, or of the drug or metabolite of the drug indicated to be present in, the blood of a person by a laboratory test of a specimen of the blood of that person shall, subject to subsection (16G), be conclusive evidence of the presence of the concentration of alcohol in, or the drug or the metabolite of the drug in, the blood of that person at the time (being in the case of such certificate the date and time stated therein) when the person provided the specimen and at a material time in any proceedings if the specimen was provided not more than 2 hours after such material time, and at all material times between those times."

Section 80(16G) provides:

---

1 The *Transport Operations (Road Use Management) Act* 1995 (Qld); I adopt Keane JA's acronym.

2 At AR 115.

3 As exhibit 11, reproduced at AR 441.

> "The defendant may negative such evidence as aforesaid if the defendant proves that the result of the laboratory test of that specimen of blood was not a correct result."

[14] In my opinion it is permissible to understand s 80(16G) and s 80(16F) to provide that a defendant may negative the otherwise conclusive evidence of the presence of the concentration of alcohol in the defendant's blood if the defendant proves that the concentration of alcohol indicated to be present in the person's blood by the laboratory test was not a correct indication of the concentration of alcohol in the blood of that person:

(a) at the time when the person provided the specimen; *and*
(b) at a material time in the proceedings; *and*
(c) at all material times between those times.

Usually that will be extremely difficult, although rare cases will occur, such as the facts in *Chapman v Rogers ex parte Chapman* [1984] 1 Qd R 542, and in this case, where there are quite different results whose accuracy was not challenged, taken within one hour of each other and of the collision. It was open to the jury to be satisfied Ms Anderson had established that the concentration of alcohol indicated by the result of the laboratory test of her blood sample taken at 1.30 am was not a correct indication of the concentration of alcohol in her blood at either the time of the accident at 12.30 am or thereabouts, (a material time), or at the time the breath test was performed at 12.50 am, and perhaps therefore not even at the time the sample was taken.

[15] It follows that I go further than Keane JA does. I regard it as quite permissible for Ms Anderson to attempt to establish her likely BAC at the time of the accident, and not simply the likely effect upon her of the amount of alcohol that she swore to having actually consumed. Establishing her likely BAC at the time of the collision supported her evidence as to how much alcohol she had taken. For that reason I respectfully disagree with Keane JA that the learned sentencing judge gave directions as to the law to which Ms Anderson was not entitled, in so far as the directions allowed the jury to question the efficacy of the certificate as proof of Ms Anderson's BAC, and both in relation to the issue of dangerous driving and to the issue whether her driving was adversely affected by alcohol. I consider the learned judge put the issues fairly and squarely to the jury, particularly in the passages cited by Keane JA. I add that had the evidence of her other readings, and opinion evidence as to her likely BAC at the time of the collision, been excluded, or had the learned trial judge not allowed Ms Anderson to establish by cross-examination that her BAC was around .05 at the time of the collision, then the jury would not have heard evidence which was relevant to the issue of whether she was in truth adversely affected, particularly because the prosecution led evidence of the effect of various different concentrations of alcohol. That evidence would have been positively misleading – as to the significance of a concentration of alcohol of .138 – if the true reading was far lower, and if the jurors were not made aware of that fact. The directions the learned trial judge gave allowed the jurors to consider the case against Ms Anderson by ascertaining the real position, despite the conclusiveness of the certificate. Doing that was a considerable achievement.

[16] Other than those matters I have indicated, I agree with the reasoning of Keane JA.

[17] **KEANE JA:** On 28 February 2005, the appellant was convicted after a trial of causing the death of Mr Barry Noble, and grievous bodily harm to Mr Campbell

Hill, by her dangerous operation of a motor vehicle. The jury also found that at the time of committing the offences she was adversely affected by alcohol. The appellant was sentenced to three and a half years imprisonment and was also disqualified from holding or obtaining a driver licence for three years pursuant to s 187 of the *Penalties and Sentences Act* 1992 (Qld).

[18] The appellant's original ground of appeal against the conviction was that "there has been a miscarriage of justice in that the conviction … was against the weight of the evidence and was unsafe and unsatisfactory". To this ground the appellant added (by leave) the following grounds:

> "(A) The verdict of the jury that the Appellant was adversely affected by alcohol was against the weight of the evidence and/or otherwise unsafe or unsatisfactory.
>
> …
>
> (B) The learned trial Judge misdirected the jury:
>
> (i) as to the effect that the evidence of alcohol to [sic] the issue of dangerous driving; and
>
> (ii) the definition of adversely affected by alcohol."

[19] The appellant also seeks leave to appeal against the sentence on the ground that it was "manifestly excessive". It was made clear by the appellant's counsel that the application for leave to appeal against sentence depended upon the appellant's success in challenging the jury's verdict that she was affected by alcohol at the time of committing the offences. In that event, so it was submitted, the appellant should be sentenced on a basis different from that on which the learned judge below proceeded.

The Crown case

[20] The Crown case was that on 13 July 2003 at about 12.30 am the appellant was driving a white Falcon utility owned by Mr Campbell Hill in a southerly direction on the Cunningham Highway towards Goondiwindi. Mr Campbell Hill was travelling as a passenger in the vehicle. The appellant drove onto the incorrect side of the Cunningham Highway and collided with a Ford Maverick four wheel drive vehicle then being driven in the opposite direction by Mrs Susan Noble. As a result of the collision Mrs Noble's husband, Mr Barry Noble, who was travelling in the front passenger seat of the Ford was killed, while Mr Hill suffered a fractured skull, a shattered left eye socket and a fractured jaw.

[21] Mrs Noble gave evidence that she was travelling at a little less than the speed limit of 100 kilometres per hour on her correct side of the road which curved gently to her right. She saw the car driven by the appellant approaching but it was only at the last moment that she realized that the appellant's vehicle had crossed the white centre line markings and was on her side of the road.

[22] There was evidence from investigating police officers of gouge marks on the side of the road on which Mrs Noble was travelling. Mrs Noble's evidence was that it was raining lightly at the time but that visibility was clear. The road markings on the road were clear. She said they were "beautiful". Mrs Noble's evidence in relation to the road conditions was supported by that of Rebecca Atkins who was also a passenger in the Ford.

[23] Other witnesses gave varying evidence as to the heaviness of the rain at various times. One witness, a Mr David Brennan, gave evidence that, as he was driving into Goondiwindi at about 12.30 am, the rain was quite heavy. It was common ground that the road was wet.

[24] The Crown case was that the appellant was adversely affected by alcohol. She was breath-tested at the scene at about 12.50 am at which time the breathalyser showed a reading of .071, ie 71 milligrams of alcohol per 100 millilitres of blood.[4] The appellant was then taken to hospital where she provided a sample of her blood for further tests. The analyst's certificate records that at 1.30 am on 13 July 2003 the appellant had a blood alcohol concentration of .138. The certificate was admissible pursuant to s 80(24) of the *Transport Operations (Road Use Management) Act* 1995 (Qld) ("TORUM").

[25] It may be noted that, in determining whether a vehicle has been operated dangerously, s 328A(5) of the *Criminal Code* 1899 (Qld) provides that regard is to be had to:

> "(d) the concentration of alcohol in the operator's blood or breath".

[26] Section 80(16F) of the TORUM has the effect that the certificate was conclusive evidence of the appellant's blood alcohol concentration at the time of the offence. It seems that the time on the certificate is arguably erroneous in that there is evidence which suggests that the taking of the sample concluded at 1.50 am; but nothing was said to turn on this.

[27] Dr Mahoney, a forensic medical officer, gave evidence for the Crown. He said that at the certified level of alcohol concentration in the blood a person would be adversely affected by alcohol when driving a motor vehicle. He also gave evidence that a person's ability safely to control a motor vehicle may be adversely affected in significant respects, at much lower levels, and indeed, at levels below .05. Especially is this so in relation to the impairment of judgment and information processing, the ability to react to the unexpected and the exercise of the skill necessary safely to control a motor vehicle. He also said that reaction time and reflexes are impaired at blood alcohol levels equal to or greater than .05. In cross-examination he said that he could not say one way or the other whether the appellant's blood alcohol level would have been below .05 at 12.30 am by working backwards from the reading of .071 at 12.50 am. Dr Mahoney was not cross-examined in relation to his evidence that a person's ability safely to control a motor vehicle may be impaired at blood alcohol levels below .05.

[28] It is necessary to explain the emphasis in Dr Mahoney's evidence as to whether or not the appellant had a blood alcohol concentration above or below .05 at the time of the accident. A blood alcohol concentration of .05 is defined by the TORUM as being the "general alcohol limit".[5] A person who drives a motor vehicle with a blood alcohol concentration over this limit commits an offence.[6] It has become reasonably well known in the community at large that .05 is the blood alcohol level above which liability may attach for what is commonly referred to colloquially as "drink driving". Of course, it should be pointed out immediately that there is

---

4 All future references to blood alcohol levels in these reasons use this same scale of measurement.

5 *Transport Operations (Road Use Management) Act* 1995 (Qld), s 79A(2).

6 See, eg, *Transport Operations (Road Use Management) Act* 1995 (Qld), s 79(2).

nothing in TORUM that suggests a person cannot be taken to be "adversely affected by alcohol" despite having a blood alcohol concentration below .05. This is a matter to which I shall return.

[29] Mr Robert McKenzie, the host at the party from which the appellant was driving when the accident occurred, gave evidence that at the party the appellant was slightly intoxicated in that her eyes were "glassy glazed" and that she stumbled "a couple of times", although he acknowledged that other ladies were also stumbling because they were wearing high heels on the lawn. His wife, Mrs Stacey McKenzie, also gave evidence that the appellant was stumbling and making odd remarks.

[30] Senior Constable Baldock gave evidence that, when she spoke to the appellant at the scene of the accident at about 12.50 am, the appellant smelled strongly of liquor and had bloodshot eyes.

[31] Mrs Osborn, a nursing sister who attended the appellant at the accident scene immediately after the accident, also gave evidence that the appellant smelt of alcohol. Mrs Osborn had no connection with the police or the appellant. She was on her way home from work when she was waved down at the accident site. Mrs Osborn's evidence was that, while the rain was heavy, visibility was clear and there was no fog.

[32] The appellant was interviewed by the police on 29 July 2003. In that interview she said that she had been to a party at a property outside Goondiwindi. She arrived at the party at about 10.00 pm. She said she had two glasses of red wine and a vodka and orange juice. She left the party shortly after midnight. She said that it was foggy and raining. She said that she could not remember the accident.

The appellant's case at trial

[33] The appellant gave evidence in terms similar to her police interview. She could not remember the collision itself although she could remember the circumstances which preceded the accident The case which was put to the jury on her behalf was that, in the circumstances of the rain and the rapid approach of the vehicles on a dark night, if the appellant crossed the centre line, that was a matter of momentary inattention.

[34] The principal argument advanced on the appellant's behalf at trial was that, having regard to the appellant's evidence of the alcohol she had consumed and the time between her last drink and the occurrence of the accident, the likelihood was that her blood alcohol content was less than .05 at the time of the accident. This argument was supported by expert evidence.

[35] The appellant gave evidence that she drank two glasses of red wine while at the party and that just before she left she drank a vodka and orange juice, which she assumed had the alcohol content of one standard drink.

[36] Dr Coyle, a psychologist who holds a doctorate in psychopharmacology, gave evidence that, despite the alcohol concentration of .071 obtained by the breath test of the appellant at 12.50 am, it was quite possible that her blood alcohol concentration at 12.30 am when the accident occurred was less than .05. He expressed the opinion that the difference between the appellant's blood alcohol readings between 12.50 am and 1.30 am was explicable on the basis that her last drink before leaving the party could have had a substantial amount of alcohol in it.

[37] Professor Starmer, a consultant pharmacologist who holds a doctorate in the effects of alcohol and other drugs on driving, also expressed the opinion that at the time of the collision there was a strong possibility that the appellant's blood alcohol concentration was below .05.

[38] Mr Brennan gave evidence that it would usually take approximately 20 minutes to drive from the property where the party was held to the scene of the accident.

[39] A number of witnesses were called to give evidence of the appellant's good character.

The appeal

[40] On the basis of the uncontradicted evidence of Mrs Noble and the evidence of the gouge marks at the site of the accident, it was plainly open to the jury safely to conclude beyond reasonable doubt that the appellant was driving dangerously at the time of the accident in that she was not driving with sufficient care and attention to ensure that the vehicle she was driving remained on its correct side of the road. The appellant did not seek to contend otherwise.

[41] Further, the appellant did not seek to advance an argument that the effects of rain and fog were such as to explain the occurrence of the accident in a way consistent with driving which was not dangerous. In my view this approach was sound. To emphasize the evidence of rain and fog which was relied upon by the appellant at trial is merely to emphasize that the care and attention objectively required of the appellant to ensure that her management of her vehicle was not dangerous in the prevailing circumstances. The appellant admitted in cross-examination that she had maintained a speed of between 80 and 90 kilometres an hour despite the rain, fog and the fact that the stretch of road was unfamiliar.

[42] In support of the ground of appeal that the verdict of the jury that the appellant was adversely affected by alcohol was against the weight of the evidence or otherwise unsafe or unsatisfactory the appellant contended that:

(a) the learned trial judge misdirected the jury as to the expert evidence; and

(b) the learned trial judge misdirected the jury as to the effect of the evidence of Mr and Mrs McKenzie.

The expert evidence

[43] The learned trial judge directed the jury that they were entitled to assess the expert evidence and accept or reject it as they saw fit. His Honour said:

> "It is up to you to give such weight to the opinions of the expert witnesses as you think they should be given having regard in each case to the qualifications of the witness and whether you thought them impartial or partial to either side, and the extent to which their opinion accords with whatever other facts you find proved.
>
> This is a trial by jury, not a trial by expert, so it is up to you to decide what weight or importance you give to their opinions or, indeed, whether you accept their opinion at all. It is also important to remember that an expert's opinion is based on what the expert witness has been told of the facts. If those facts have not been established to your satisfaction, the expert's opinion may be of little value."

[44] The first submission made in the appellant's written submissions was that the expert evidence as to the rate of absorption of alcohol into the system was all one way and, there being no challenge to the factual basis on which the experts proceeded, should have been accepted by the jury. Accordingly, it was submitted, the learned trial judge's direction was misleading and the jury's verdict necessarily erroneous as a result.

[45] The first difficulty with this submission is that it proceeds on the assumption that Dr Mahoney was *ad idem* with Dr Coyle and Professor Starmer in relation to the rate of absorption of alcohol into the system. That is not so. Dr Mahoney's agnosticism in relation to the precise concentration of alcohol in the appellant's blood at the time of the accident, given it had to be derived by working backwards from the later blood alcohol readings, cannot be treated as concurrence with the opinions of Dr Coyle and Professor Starmer. Rather, Dr Mahoney's evidence is consistent with the view that the conclusions reached by Dr Coyle and Professor Starmer are not reliable. His Honour's direction was appropriate because the resolution of the conflict in the expert testimony was indeed a matter for the jury.

[46] There is a further difficulty with the first submission of the appellant. The end point of this submission is that if the jury could not have been safely satisfied beyond reasonable doubt that the appellant's blood alcohol level at the time of the accident was in excess of .05 then neither could it be satisfied that her driving was adversely affected by alcohol. This conclusion, which was also the thrust of the appellant's case at trial, does not follow from the premise.

[47] The submissions advanced on behalf of the appellant made a compelling argument that the certificate showing a blood alcohol content of .138 does not establish that the appellant was in fact adversely affected by alcohol at the time of the accident, that being a matter of fact for determination by the jury. By a parity of reasoning, however, establishing that the appellant's blood alcohol level at the time of the accident was less than .05 does not establish, ipso facto as the appellant's argument would have it, that she was in fact not adversely affected by alcohol. Nor does it necessarily create a reasonable doubt about that fact. That the appellant's driving did not contravene the TORUM does not mean that, in the circumstances of the case, her driving was not adversely affected by her consumption of alcohol.

[48] It needs to be made clear that to focus on whether or not the appellant's blood alcohol concentration was above or below .05 is, at least in this case, to chase a red herring. As the appellant submitted, correctly in my view, when evidence is given by way of a certificate as to the concentration of alcohol in a person's blood then, so long as this concentration is not high enough to engage the operation of s 80(24A)(c) of the TORUM,[7] this blood alcohol level is simply one additional factor for the jury to consider when it comes time for them to determine whether or not a person was adversely affected by alcohol. It follows that any argument that the appellant should be "deemed" not to have been adversely affected because her blood alcohol level may well have been below .05 must fail because it is inconsistent with the proposition, which was endorsed by the appellant, that, subject to the one exception detailed above, blood alcohol readings are not decisive of the issue as to whether or not the appellant's driving was affected by alcohol. In the

---

[7] This provision deems a person with a blood alcohol concentration higher than 0.150 to have been adversely affected by alcohol at all material times.

absence of any statutory direction to the contrary, the issue is one of fact to be determined by a jury based on the evidence that is placed before them.

[49] The uncontradicted and unchallenged evidence of Dr Mahoney was that human faculties associated with the driving of a motor car may be adversely affected at blood alcohol levels less than .05, especially in relation to the impairment of judgment and information processing, the ability to react to the unexpected and the exercise of the skill necessary safely to control a motor vehicle.

[50] Further, as the respondent submitted, the exercise whereby Dr Coyle and Professor Starmer sought to establish that it was possible that the appellant's blood alcohol concentration at the relevant time was no more than .05 per cent depended upon acceptance of the appellant's evidence as to what she had drunk prior to driving, and the jury were entitled to regard that evidence with scepticism. There is force in this submission. The appellant's evidence as to the amount of alcohol she had consumed was uncorroborated. Its credibility was undermined by the certificate of analysis (even if it could not be regarded as conclusive evidence of her blood alcohol content at the time of the accident), the evidence of Mr and Mrs McKenzie, the evidence of Mrs Osborn and Senior Constable Baldock and the absence of any satisfactory explanation as to how the appellant came to be on the wrong side of the road when she collided with the vehicle being driven by Mrs Noble.

[51] In any event, the failure by the appellant to attack Dr Mahoney's evidence that a person **could** be adversely affected by alcohol with a blood alcohol concentration of less than .05 meant that the jury was entitled to proceed on the basis that, regardless of the precise level of alcohol in the appellant's blood, it was possible that the appellant had ingested enough alcohol for it to have adversely affected her ability to control a motor vehicle. The conclusion that the alcohol ingested by the appellant was, in fact, apt adversely to affect her ability to drive was supported by the evidence given by the other witnesses, particularly Mr and Mrs McKenzie. It is necessary at this point to consider the challenges made by the appellant to that evidence.

The evidence of Mr and Mrs McKenzie

[52] The appellant abandoned the submission made in her written outline that the evidence of Mr and Mrs McKenzie should have been excluded as inadmissible. This concession was well made. There was no apparent legal basis for holding that the evidence of the observations of the appellant by Mr and Mrs McKenzie was inadmissible. Evidence of the commonly recognized indicia of the influence of alcohol is plainly relevant.

[53] The appellant did submit, however, that the evidence of Mr and Mrs McKenzie was unreliable, principally because of their friendship with Mr Hill. But their reliability as witnesses, and the weight to be accorded to their evidence of the observations of the appellant, were matters for the jury.

[54] In relation to the evidence of Mr and Mrs McKenzie, the learned trial judge commented as follows:

> "… and the Prosecution also rely upon Mr and Mrs McKenzie and their evidence, if you accept it, the Prosecution says would lead you to conclude that the defendant was adversely affected by alcohol and that would be a correct inference to draw on the evidence from the

> McKenzies and from the blood analyst [sic] certificate and on all of the circumstances that you heard in this trial."

[55] The appellant submits that this was not a proper direction in that it would be unsafe for a jury to rely on the evidence of Mr and Mrs McKenzie to find that the appellant was, at the time of the accident, affected by alcohol. But, as is apparent from the terms of the learned trial judge's observations, his Honour was commenting upon the prosecution's submission, and doing so by reference to the evidence of the McKenzies as one aspect of the evidence from which the inference that the appellant was adversely affected by alcohol might be drawn.

[56] In my opinion, on the evidence of the certificate of analysis of the appellant's blood and the evidence of Dr Mahoney, Mr and Mrs McKenzie, Mrs Osborn and Senior Constable Baldock, it was open to the jury safely to conclude that the appellant's driving was adversely affected by her consumption of alcohol.

Blood alcohol concentration

[57] The principal ground of appeal argued orally by the appellant was that the learned trial judge misdirected the jury as to the effect of the certificate evidence of the appellant's blood alcohol concentration in relation to the issue of dangerous driving, and particularly in relation to the issue whether the appellant was adversely affected by alcohol.

[58] At this point it is necessary to refer to the relevant provisions of the TORUM, which shorn of immaterial verbiage, may be summarized as follows:

(i) section 79A(3) provides:

> "For this Act, a person is over the *high alcohol limit* if -
>
> (a) the concentration of alcohol in the person's blood is, or is more than, 150mg of alcohol in 100mL of blood … ";

(ii) section 80(16B) provides:

> "A certificate purporting to be signed by an analyst and stating -
>
> (a) …
>
> (b) …
>
> (c) that -
>
> (i) the concentration of alcohol in the person's blood indicated by the laboratory test was a specified number of milligrams of alcohol in the blood per 100mL of blood …
>
> shall be evidence of those matters and until the contrary is proved shall be conclusive such evidence.";

(iii) section 80(16F) provides:

> "Evidence … by a certificate referred to in subsection (16B) of the concentration of alcohol indicated to be present in … the blood of a person by a laboratory test of a specimen of the blood of that person shall, subject to subsection (16G), be conclusive evidence of the presence of the concentration of alcohol in … the blood of that person

at the time (being in the case of such certificate the date and time stated therein) when the person provided the specimen and at a material time in any proceedings if the specimen was provided not more than 2 hours after such material time, and at all material times between those times.";

(iv) section 80(16G) provides:
"The defendant may negative such evidence as aforesaid if the defendant proves that the result of the laboratory test of that specimen of blood was not a correct result.";

(v) section 80(24) provides:
"Evidence of the presence of the concentration of alcohol in the blood or breath of a person …, at a time material to the time of an offence as hereinafter mentioned obtained in accordance with any of the provisions of this section is admissible upon the trial upon indictment of that person of any offence in connection with or arising out of the driving of a motor vehicle by the person … against any provision of the Criminal Code, section 328A, … ";

(vi) section 80(24A) provides:
"Evidence admissible pursuant to subsection (24) -
(a) may be given in the same manner … as it may be given … in respect of an offence against this Act; and
(b) …, subject to paragraph (c), shall have the same evidentiary value in relation to the same matters and times as are provided for by the provisions of this section, …
(c) where such evidence indicates a person was over the high alcohol limit, shall be conclusive evidence that the person was adversely affected by alcohol at all times in relation to which such evidence has evidentiary value pursuant to this section."

[59] The clear effect of the provisions of the TORUM as they relate to a prosecution for a contravention of s 328A(4) of the *Criminal Code* is that generally a certificate under s 80(16F) of the TORUM is conclusive evidence of an accused person's blood alcohol concentration at the time of the accident, but that it is not conclusive evidence that the accused was adversely affected by alcohol. It is only in the case of a certificate showing a blood alcohol concentration of, or of more than, .15 per cent that s 80(24A)(c) operates to deem the person to have been adversely affected by alcohol. In other cases the certificate of blood alcohol concentration under s 80(16F) does not resolve the issue whether the accused was, in fact, adversely affected by alcohol. It permits proof of the person's blood alcohol concentration as a fact relevant to the issue of dangerous driving and provides for that proof to be conclusive subject to s 80(16G).

[60] The submissions made orally on behalf of the appellant advanced the proposition that the learned trial judge's directions to the jury as to the effect of the certificate

erroneously confused issues of statutory fiction with issues of fact in relation to whether the appellant was adversely affected by alcohol at the time of the accident.

[61] This submission must be considered in light of the relationship between the relevant provisions of the TORUM and s 328A(4) and s 328A(5) of the *Criminal Code*. This relationship is such as to require a complicated direction to the jury. In my opinion, the combined affect of these provisions is such as to require a direction to the jury that the effect of s 80(16F) and s 80(24) is that the certificate of analysis is conclusive evidence of the appellant's blood alcohol concentration at the time of the accident. The person's blood alcohol concentration is a matter to which reference must be made by the jury in relation to the issue whether the vehicle has been operated dangerously. The extent to which that consideration, ie the person's blood alcohol concentration affects the determination of the issue whether the person operated the motor vehicle dangerously is a question of fact in relation to which evidence other than the certificate may be relevant. Other relevant evidence may include evidence of the extent to which the accused person was likely to be affected, in fact, by the alcohol which that person had consumed. The question whether the appellant was adversely affected by alcohol is also a question of fact for the jury in relation to which the certificate is relevant, but not conclusive, evidence subject, of course, to s 80(24A)(c). In relation to that question of fact the jury may have regard to the appellant's blood alcohol concentration, but the weight of that consideration may also be diminished by evidence of the likely effect upon the accused person of the amount of alcohol actually consumed by the person at the time of the accident irrespective of the terms of the certificate.

[62] After the conclusion of the hearing, the appellant's counsel, with the consent of counsel for the respondent, drew the Court's attention to observations in *Williamson v Ah On*[8] and *Nicholas v The Queen*[9] to the effect that a statutory provision, which is in form a rule of evidence, may be in substance an usurpation of the judicial power to determine the factual elements of an offence. Such a law would be invalid, at least where it is the judicial power of the Commonwealth which is being usurped.

[63] The appellant does not seek to contend that s 80(16F) of the TORUM (or, for that matter, s 80(24A) of the TORUM) is invalid because it is inconsistent with the separation of powers effected by the *Commonwealth Constitution*. There is, of course, no suggestion that the judicial power of the Commonwealth is in any way involved in or affected by the determination of this case. Rather, as I understand the appellant's submission on this point, the appellant's purpose in referring to *Williamson v Ah On* and *Nicholas v The Queen* is to support the argument that the Court should be wary of statutory fictions, and so should be astute to read down statutory provisions which are apt to truncate the fact finding function and authority of the courts. The first point to be made in relation to this submission is that, as I have already explained in the course of these reasons, s 80(16F) of the TORUM does not make a certificate conclusive proof of any element of the offence contained in s 328A(4) of the *Criminal Code*. This cannot be characterised as a case involving either the "legislative determination of guilt of an offence" or the "legislative conviction of a person accused of crime".[10]

---

8 (1926) 39 CLR 95 at 108.

9 [1998] HCA 9 at [24]; (1998) 193 CLR 173 at 189 - 190.

10 *Silbert v DPP (WA)* [2004] HCA 9 at [13]; (2004) 217 CLR 181 at 187.

[64] Further, in *Nicholas v The Queen*,[11] Brennan CJ said: "The reversal of an onus of proof affects the manner in which a court approaches the finding of facts but is not open to constitutional objection provided it prescribes a reasonable approach to the assessment of the kind of evidence to which it relates." Section 80(16F) of the TORUM makes provision for the assessment of the blood alcohol concentration of a subject at a particular time to be conclusive evidence, subject to s 80(16G), of that fact. The earlier provisions of s 80 are directed to the achievement of a reliable objective assessment of a state of fact about which human observation is often apt to be subjective and less reliable. That s 80(16F) erects a presumption that the outcome of that objective assessment is to be taken to reflect the state of affairs for a period of two hours before the test does not mean that the provision is not a "reasonable approach to the assessment of evidence of that kind", i.e. the subject's blood alcohol concentration at a material time during that two hour period.

[65] Finally, the language of the relevant provisions of the TORUM and the *Criminal Code* is clear. A different conclusion as to the proper construction of these provisions does not emerge from the adoption of a "strict approach" to that task.

[66] It is necessary now to turn to consider the directions which the learned trial judge gave to the jury in relation to these issues.

[67] The learned trial judge gave the jury the following directions:

(a) "Members of the jury, regarding that element that the defendant thereby, as a result of the dangerous driving caused the death of the deceased or grievous bodily harm to Mr Hill, it is not necessary for the prosecution to prove that the dangerous operation of a motor vehicle was the sole cause of the deceased's death or the grievous bodily harm suffered by Mr Hill. It is sufficient for the prosecution to show that the dangerous driving was a substantial or significant cause of that death, or in the case of Mr Hill, the grievous bodily harm. The other element, members of the jury, that I referred you to, namely, the element that the defendant was adversely affected by alcohol, the law provides that a certificate of blood alcohol analysis is conclusive evidence as to the blood alcohol concentration of the defendant at the time the sample of blood was taken and at the time of the offence is said to have occurred.

You will have before you Exhibit 11, which is a certificate by an analyst, and that analyst obtained a specimen of blood at 1.30 on the 13th day of July 2003 and concluded that the concentration of alcohol in the blood of the defendant indicated by the laboratory test was 138 milligrams of alcohol per 100 millilitres of blood."

(b) "If an accused is adversely affected by liquor, that fact is a circumstance relevant to the issue as to whether the accused operated the vehicle dangerously. The sample of blood taken from the accused shows a blood alcohol concentration of .138, as I've said, by reference to Exhibit 11. That certificate is conclusive evidence, as I've said, as to the blood alcohol reading of the defendant at the time the sample of blood was taken and at the time of the accident unless

---

[11] [1998] HCA 9 at [24]; (1998) 193 CLR 173 at 190.

the defendant proves to you that the blood alcohol reading and the certificate was not the correct result."

(c) "The defence says, members of the jury, when you consider the whole of the evidence, including that of the expert witnesses here, you could not come to a conclusion that the defendant was adversely affected by alcohol and you would have some reason to have some doubt about the alcohol concentration because of the evidence of the experts indicating that there's a real case here for her alcohol content in her blood being less than .05 which is less than the legal limit at the time the accident happened, and therefore you'd be persuaded on the standard that the defence has to go to on the blood alcohol concentration that there must be - it must be an incorrect result, the .138.

So, members of the jury, there are so many features the defence says, including the rain, including that the both vehicles were approaching each other at a fast rate of speed on a dark night, that any crossing over of the centre line by the defendant was momentary and that you'd have doubts about what her concentration of alcohol in her blood was at the material time. All of these features would leave you to not be satisfied beyond reasonable doubt of each and every element of the offence."

[68] It is apparent from these passages that the learned sentencing judge directed the jury that they might doubt the efficacy of the certificate as proof of the appellant's blood alcohol concentration both in relation to the issue of dangerous driving and to the issue whether the appellant's driving was adversely affected by alcohol, and that they might give effect to that doubt in relation to each issue. That was a direction as to the law to which the appellant was not entitled insofar as it was apt to deny the effect of the certificate as conclusive evidence of the appellant's blood alcohol concentration at the time of the accident. It was common ground on the appeal that in s 80(16G) of the TORUM the reference to an "incorrect result" is to a flawed analysis in the laboratory, not to an incorrect indication of the person's blood alcohol concentration at an earlier point in time.

[69] To the extent that the jury were instructed in terms which focussed upon whether the appellant's blood alcohol concentration at the time of the accident was .05 or less, this reflected the way in which the appellant's case was conducted on her behalf. The appellant's counsel at trial was astute to focus upon the propositions that the appellant's blood alcohol concentration at the time of the accident was less than .05 and, therefore, the jury could not be satisfied beyond reasonable doubt that the appellant was driving dangerously or that she was adversely affected by alcohol. The problem for the appellant, and the point to which she advanced no answer, was the unchallenged and uncontradicted evidence of Dr Mahoney as to the likely effects of blood alcohol concentrations of .05 and less. To the extent that the learned trial judge's summing up permitted the jury to entertain the appellant's argument that her blood alcohol concentration at the time of the accident may have been less than .05, the appellant cannot complain that she was denied the chance of an acquittal fairly open to her. If anything, her chances of an acquittal were enhanced by the directions which made the effect of the certificate as evidence of her blood alcohol concentration contestable. The important points are, however, that the jury were not instructed that the certificate was conclusive evidence that the appellant was adversely affected by alcohol at the time of the accident, and that the

jury were instructed in terms which allowed them to consider all the evidence relevant to the question whether the appellant operated the vehicle dangerously at the time of the accident.

[70] The appellant also criticized the learned trial judge's direction in relation to the meaning of the phrase "adversely affected by alcohol". In this regard, the learned trial judge said:

> "… the defendant was adversely affected by alcohol that fact is a circumstance relevant to the issue as to whether the defendant operated the vehicle dangerously.
>
> Members of the jury, that expression 'adversely affected by alcohol', those words are given their common everyday meaning. 'Adverse' means the opposite to not being affected, and 'affected' means to influence, make a material impression. So material impression on. Therefore, in the context of this matter, it means some material influence upon the person from the consumption of alcohol."

[71] It is clear in the context of the evidence and the summing up considered as a whole that, in referring to a "material influence upon the person from the consumption of alcohol", his Honour was referring to a material detraction from the appellant's ability to control her vehicle in consequence of her consumption of alcohol. That is the understanding which would have been conveyed to the jury; and it is a correct understanding of the words.

[72] It is also submitted by the appellant that the words "some material influence" provides too vague a test. I would reject that submission. In my view the learned trial judge's direction provides an accurate paraphrase, which is no more vague than the word "affected".

[73] Further, there was no error, in my respectful opinion, in directing the jury that they might consider the evidence that tended to suggest that the appellant was adversely affected by alcohol in considering whether her manner of driving the vehicle was dangerous. The effects of alcohol consumption might well be thought to explain why the appellant was driving on the incorrect side of the road at the time of the collision. Evidence was given that the appellant was acting erratically and was experiencing difficulty maintaining her balance prior to leaving the party. It was common ground between the parties in this appeal that the level of alcohol in her blood could only have increased between the time the appellant was observed at the party and the time when the appellant's vehicle collided with that being driven by Mrs Noble. In those circumstances it cannot be said that it was not open to the jury to find that the appellant's difficulty in controlling her own person translated, at least to some extent, to the control she was able to exercise while driving.

[74] In my opinion, the conviction of the appellant did not involve a miscarriage of justice. None of the submissions made on her behalf establish that any of the circumstances about which she complains resulted in the appellant losing a chance of acquittal that was reasonably open to her. The appeal against conviction should be dismissed.

Sentence

[75] The appellant was born on 6 December 1976. She was 26 years of age at the date of the offences and 28 years of age at the date of sentence.

[76] The appellant had no criminal history and the learned sentencing judge accepted that she was of good character.

[77] The learned sentencing judge recognized, correctly, that the consequences of the appellant's dangerous driving were very serious indeed. His Honour also took into account, as he was bound to do, the especially strong claims of deterrence where the offender has shown no remorse. He said:

> "There is a need for general deterrence, and there is a need for people to understand that even momentary lapses of driving can lead to horrendous results for others. In this case there has been a death. His wife is without him, and his daughters are without the deceased, as well as a granddaughter who gave evidence here, plainly seems to me to have been affected by these events.
>
> The passenger in your vehicle has also been affected in many ways from what's been a momentary lapse, but by a person who had consumed alcohol. The community does not tolerate this anymore. Therefore, for this offence, I sentence you, as you've shown no remorse, to three and a half years imprisonment … "

[78] It should not be thought from these remarks that the learned sentencing judge was characterizing the appellant's offence as one which involved only a momentary lapse in concentration. It is clear that the involvement of alcohol in the accident and the circumstance that the appellant had been driving for some time while adversely affected by alcohol meant that the appellant's offence could not accurately be characterized as one of momentary inattention.

[79] The learned sentencing judge referred specifically to the absence of remorse on the appellant's part. It was, in my respectful opinion, open to the learned sentencing judge to proceed on that footing.

[80] The application for leave to appeal against sentence was argued on the footing that the appeal against the verdict that the appellant was adversely affected by alcohol should be quashed. For the reasons given above, I do not regard that verdict as unsound. There is, therefore, no reason shown for concluding that the sentence imposed was excessive or was in any way affected by error.

[81] I would dismiss the application for leave to appeal against sentence.

Conclusion and Orders

[82] I would dismiss both appeal against conviction and the application for leave to appeal against sentence.