

5/97

SUPREME COURT OF VICTORIA

BUZZARD v WALSH

Beach J

21 August, 5 September 1996 — (1996) 24 MVR 568

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE OF ANALYSIS DELIVERED IN PRESCRIBED FORM – NO REFERENCE IN S58(2) TO SUCH CERTIFICATE – WHETHER NEXUS BETWEEN S55(4) AND S58(2) BROKEN – WHETHER CERTIFICATE ADMISSIBLE: ROAD SAFETY ACT 1986, SS55(4), 58(2).

1. There is a clear nexus between s55(4) and s58(2) of the *Road Safety Act 1986* ('Act'). The certificate in the prescribed form referred to in s55(4) of the Act is the very same certificate referred to in the opening words of s58(2) of the Act.

2. Where a certificate of analysis was tendered in evidence, the certificate established all the matters required to be established by the prosecution and it was open to a magistrate to conclude that the charge had been proved beyond reasonable doubt.

BEACH J: [1] At approximately 12.35 am on Sunday 17 September 1995 the appellant Gaye Lorraine Buzzard was apprehended by Constable Christopher Walsh whilst driving her motor car along St Kilda Road, Melbourne. Constable Walsh was a member of a team of police officers who were operating a breath testing vehicle in St Kilda Road that morning. In answer to certain questions put to her by Walsh, Buzzard stated that she had consumed two tumblers of wine since 4 pm the previous day, her last drink being some two hours prior to her apprehension. Walsh then took Buzzard to the breath testing vehicle where he introduced her to Senior Constable P. Ewart who, at the time, was operating the breath analysing instrument in the vehicle. Following a conversation with Ewart, Buzzard furnished a sample of her breath into the breath analysing instrument operated by Ewart. The certificate of analysis produced by the machine showed a blood alcohol concentration of 0.144 per cent. Buzzard was asked if she had any comment to make concerning the reading, to which she replied no. In due course Buzzard was charged with the following offences: [*His Honour set out the charges pursuant to s49(1)(f) and (b) of the Road Safety Act 1986 and continued*]... [2] The charges came before the Prahran Magistrates' Court on 3 June 1996. Buzzard was represented by counsel and pleaded not guilty to both charges. At the conclusion of the hearing Buzzard was convicted of the first charge, was fined the sum of \$300, and was disqualified from driving for a period of fourteen months. Although the certified extract from the Court Register is silent on the matter, I assume that the second charge was withdrawn. At all events Buzzard now appeals to this court against her conviction.

On 17 June 1996 a Master of the court granted Buzzard's application for an order for review on the following grounds:

"1. Was there any admissible evidence to support the finding that the instrument upon which the Defendant was tested was a 'breath analysing instrument' within the definition of Section 3, *Road Safety Act 1986* and in particular was it open to the Magistrate to find that the Firstnamed Respondent (Informant):

- (a) was qualified to give evidence that the instrument used was a 'breath analysing instrument'? and
- (b) was qualified to give evidence that the instrument used was authorised by Section 3, *Road Safety Act 1986*? and
- (c) gave any evidence (sic) as to which instrument was used pursuant to Section 3, *Road Safety Act 1986*?

2. Was it open to the Learned Magistrate to find that the document relied upon by the prosecution as a certificate of analysis was 'produced by a breath analysing instrument'?

3. Was it open to the Learned Magistrate to find that the document tendered was 'in the prescribed form' pursuant to Section 58(2) *Road Safety Act 1986*?

4. Could a reasonable Magistrate properly instructed on the evidence before him conclude [3] that the charge had been proved beyond reasonable doubt?"

It is convenient to consider what are said to be the first three questions of law, together. They require a consideration of the certificate of analysis which was tendered in evidence before the Magistrate and a consideration of the relevant legislative provisions. The certificate reads:

VICTORIA POLICE ROAD SAFETY Act 1986 DRAGER ALCOTEST 7110 SERIAL-NO.: MRFL-0015
SAMPLE-NO.: 00796 LOCATION OF TEST: PBTS ST KILDA ROAD MELBOURNE SUBJECT'S NAME:
BUZZARD SUBJECT'S GIVEN NAMES: GAYE LORRAINE DOB: 14-11-47 INFORMANT'S SURNAME
WALSH INFORMANT'S NUMBER 30688 OPERATOR'S SURNAME: EWART OPERATOR'S NUMBER:
27868 ** SELFTEST CORRECT ** ** ZERO TEST CORRECT** SUFFICIENT SAMPLE SUBJECT'S
ANALYSIS DATE: 17-09-95 TEST-TIME: 00:57 HRS EST RESULT: 0.144 GRAMS OF ALCOHOL PER
100 MILLILITRES OF BLOOD ** ZERO TEST CORRECT** ** SELFTEST CORRECT

[4] Section 55(4) of the *Road Safety Act* 1986 ("the Act") reads:

"55(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and deliver to the person whose breath has been analysed a certificate in the prescribed form produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood."

Regulation 314 of the *Road Safety (Procedures) Regulations* 1988 reads:

"314. A certificate given in accordance with section 55(4) is in the prescribed form if it includes -
(a) the serial number of the instrument; and
(b) the sample number; and
(c) the location of the test; and
(d) the name and date of birth of the person tested; and
(e) the surname of the operator; and
(f) the results of the self tests conducted before and after the analysis of the sample provided; and
(g) the results of zero tests conducted before and after the analysis of the sample provided; and
(h) the date and time the test was taken; and
(i) the concentration of alcohol in grams per 100 millilitres of blood indicated by the analysis to be present in the blood of the person tested."

In my opinion it is clear that the certificate of analysis includes the matters specified in Regulation 314. Prior to the coming into operation of the *Miscellaneous Acts (Omnibus Amendments) Act* 1995, Section 58(2) of the *Road Safety Act* read:

"58(2): A document purporting to be a certificate given in accordance with section 55(4) and [5] purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments under section 55 is admissible in evidence in any proceedings referred to in sub-section (1) and, subject to sub-section (2E) is conclusive proof of—
(a) the facts and matters contained in it; and
(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and
(c) the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under section 55; and
(d) the fact that all relevant regulations relating to the operation of the instrument were complied with; and
(e) the fact that the instrument was in proper working order and properly operated; and
(f) the fact that the certificate was given to the accused person—
unless the accused person gives notice in writing to the informant not less than 28 days before the hearing, or any shorter period ordered by the court or agreed to by the informant, that he or she requires the person giving the certificate to be called as a witness or that he or she intends to adduce evidence in rebuttal of any such fact or matter."

By the provisions of s51 of the *Miscellaneous Acts (Omnibus Amendments) Act*, the words "in the prescribed form produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood of a person and purporting to be signed by the person who operated the instrument" were substituted for the words "given in accordance with section 55(4) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments under section 55" where appearing in Sec58(2) of

the *Road Safety Act* so that the opening words of the sub-section now read:- [6]

"58(2) A document purporting to be a certificate in the prescribed form produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceeding referred to in sub-section (1) and subject to sub-section (2E) is conclusive proof of - ";

and the following sub-section was substituted for the original sub-section 2(f):

"(f) the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath and that it was signed by the person who operated the instrument and given to the accused person as soon as practical after the sample of breath was analysed."

I should say at this stage of my reasons for judgment that the appellant did not give notice in writing that she required the person giving the certificate of analysis to be called as a witness.

What is said on the appellant's behalf is that the effect of the amendment to the opening words of S58(2) is to break the nexus between S58(2) and Section 55(4) of the Act; that there is no longer a requirement that the document referred to in S58(2) be the document purporting to be a certificate given in accordance with Section 55(4). It is said further that as a consequence of the amendment, whilst there may be a prescribed form for a certificate given in accordance with Section 55(4), namely that which complies with Regulation 314, there is no prescribed form for the certificate referred to in S58(2). In that situation the Magistrate should not have accepted in evidence the so-called certificate of analysis tendered by the prosecution and both charges should have been dismissed. I am unable to accept any of those propositions.

[7] There are four sub-sections in the Act which refer to prescribed forms, namely sections 55(4), 57(3), 57(4) and 58(2). Sec57(3) refers to a certificate in the prescribed form purporting to be signed by a registered medical practitioner. Sec57(4) refers to a certificate in the prescribed form purporting to be signed by an approved analyst as to the quantity of alcohol found in any sample of blood. Sec55(4), on the other hand, refers to a certificate in the prescribed form produced by the breath analysing instrument. In my opinion that is the very same certificate referred to in the opening words of S58(2). The references in S55(4) and S58(2) to certificates in the prescribed form produced by a breath analysing instrument can only be references to the same certificates. In my opinion there is a clear nexus between Section 55(4) and 58(2) and the submissions to the contrary must fail.

The remaining question asks whether a reasonable Magistrate properly instructed on the evidence before him could conclude that the charge had been proved beyond reasonable doubt. The short answer to the question posed is yes. The certificate in question established all matters required to be established by the prosecution. The appeal will be dismissed with costs to be taxed, including any reserved costs, and paid by the appellant.

APPEARANCES: For the Appellant: B Lindner, counsel. Solicitors: Mallesons Stephen Jaques. For the Respondent: B Schultz, counsel. Victorian Government Solicitor.