

04/06; [2006] VSC 66

SUPREME COURT OF VICTORIA

DPP v BLEAKLEY

Smith J

17 February, 2 March 2006 — (2006) 45 MVR 387

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST CONDUCTED – BAC READING OF 0.101% – CHARGE LAID – CERTIFICATE TENDERED IN EVIDENCE – REFERENCE IN CERTIFICATE TO "0.101 GRAMS OF ALCOHOL IN 210 LITRES OF BREATH" – REFERENCE IN ROAD SAFETY ACT 1986 TO "GRAMS PER 210 LITRES OF EXHALED AIR" – WHETHER EVIDENCE OF ALCOHOL LEVEL IN BREATH IS THE SAME THING AS THE LEVEL OF ALCOHOL IN EXHALED AIR – FINDING BY MAGISTRATE THAT THERE WAS A DIFFERENCE BETWEEN THE CONCEPT OF BREATH AND THE CONCEPT OF EXHALED AIR – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986 SS3, 47, 49(1)(f).

1. In the present case, it was contended that because of the material difference in the wording of the *Road Safety Act* 1986 ('Act') and the certificate, the certificate did not prove an essential element of the offence. It is clear that Parliament intended that the breath of a person is to be sampled by the person exhaling sufficient air to enable a breath analysing instrument to measure the concentration of alcohol in the breath of that person. Accordingly, Parliament did not, by referring to "exhaled air" in the definition of prescribed concentration of alcohol, intend to draw any distinction between breath and exhaled air. The whole purpose of the provisions under consideration is to provide, in the words of s47(c) of the Act, "a simple and effective means of establishing that there is present in the ... breath of a driver more than the legal limit of alcohol". The reference to "exhaled air" means nothing more, less or different than a person's breath which is exhaled into a breath analysing instrument within the meaning of the Act.

2. There is a variety of expressions that one finds in dictionaries to explain the meaning of "exhaled" and the meaning of "per" and "in" as well as the word "breath". Accepting for present purposes that there are different shades of meaning for different contexts, the word "in" has many meanings but that one of them is "as a proportionate part of". That is how the word "in" should be read in the certificate and it is absurd to give it any other meaning because it is obviously impossible for a person to continuously exhale 210 litres of breath into a breath analysing instrument.

Sirajuddin v Ziino [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21; MC33/05, followed.

SMITH J:

The proceedings

1. This is an appeal brought by the Director of Public Prosecutions under s92 of the *Magistrates' Court Act* 1989 (Vic) against the dismissal on 8 June 2005 at the Magistrates' Court of Victoria at Melbourne of charges laid against the respondent Desmond Bleakley under s49(1)(b) and 49(1)(f).

Questions of law and grounds of appeal

2. The following were the questions of law and grounds of appeal identified.

"Questions of Law

1. Did the Learned Magistrate err in law in finding that, notwithstanding the undisputed evidence that the Respondent exhaled into the breath analysing instrument and that the resulting Certificate of Analysis recorded a result of "0.101 grams of alcohol in 210 litres of breath", he could not be satisfied beyond a reasonable doubt that the "breath" referred to in the Certificate of Analysis was "exhaled air" as that term is used in the definition of "prescribed concentration of alcohol" in s3 of the *Road Safety Act*?

2. Did the Learned Magistrate err in law in dismissing the charges (brought pursuant to s49(1)(b) and s49(1)(f) *Road Safety Act* 1986) in acting against the weight of the evidence; that is, the undisputed evidence that the Respondent drove a vehicle, that within 3 hours of driving he furnished a sample of breath in accordance with s55, that the result of the analysis as recorded or shown by the breath analysing instrument indicated that more than the PCA was present in the Respondent's breath?

Grounds of Appeal

1. The Learned Magistrate erred in law in finding that, notwithstanding the undisputed evidence that the Respondent exhaled into the breath analysing instrument and that the resulting Certificate of Analysis recorded a result of "0.101 grams of alcohol in 210 litres of breath", he could not be satisfied beyond a reasonable doubt that the "breath" referred to in the Certificate of Analysis was "exhaled air" as that term is used in the definition of "prescribed concentration of alcohol" in s3 of the *Road Safety Act*.

2. The Learned Magistrate erred in law in dismissing the charges (brought pursuant to s49(1)(b) and s49(1)(f) *Road Safety Act* 1986) in acting against the weight of the evidence; that is, the undisputed evidence that the Respondent drove a vehicle, that within 3 hours of driving he furnished a sample of breath in accordance with s55, that the result of the analysis as recorded or shown by the breath analysing instrument indicated that more than the PCA was present in the Respondent's breath."

The issue

3. Mr Bleakley had provided a sample of breath by blowing into a breathalyser. This was done in accordance with the *Road Safety Act* provisions. The analysis as recorded in the certificate of analysis indicated that more than .05 grams of alcohol "in 210 litres of breath" was present in that sample. An issue was raised at the original hearing as to whether the evidence as to the reading proved beyond reasonable doubt that the defendant had exceeded the prescribed concentration of alcohol. The argument was that that concept was defined in s2 to include "a concentration of alcohol present in the breath of 0.05 grams per 210 litres of exhaled air". It was argued that evidence of alcohol level in breath was not the same thing as the level of alcohol in exhaled air. The learned Magistrate described the problem in these terms:

"There is a real difficulty, in my view, in relying upon the words used upon this certificate and then concluding or inferring that those words mean what is described in the definition section. I cannot be satisfied beyond reasonable doubt that the words 'result: 0.101 grams of alcohol in 210 litres of breath', together with the evidence that Mr Bleakley blew into the machine, demonstrate that a concentration of alcohol present in the breath of that person is 0.05 grams per 210 litres or more of exhaled air was the result."

4. It was common ground that critical to the issue, and the learned Magistrate's decision, was the view that there was a distinction to be drawn in the Act between the concept of "breath" and the concept of "exhaled air".

5. It was also common ground that that issue was considered late last year, after the hearing before the learned Magistrate in this case, by Hargrave J in *Sirajuddin v Ziino*.^[1] In that case the same argument was run but on that occasion the defendant was unsuccessful. His Honour posed the question as follows:

"Did Parliament intend there to be any difference between the concentration of alcohol in a person's breath and the concentration of alcohol in a person's exhaled air?"

His Honour expressed the view that to attribute such an intention to Parliament, when resort is had to the act as a whole, is absurd. After referring in some detail to the relevant provisions in the legislation his Honour concluded:

"35. In my view, it is clear the Parliament intended that the breath of a person is to be sampled by the person exhaling sufficient air to enable the breath analysing instrument to measure the concentration of alcohol in the breath of that person. Accordingly, I conclude that Parliament did not, by referring to 'exhaled air' in the definition of prescribed concentration of alcohol, intend to draw any distinction between breath and exhaled air. The whole purpose of the provisions under consideration is to provide, in the words of s47(c) of the Act a simple and effective means of establishing that there is present in the . . . breath of a driver more than the legal limit of alcohol."

36. In my view, the reference to 'exhaled air' means nothing more, less or different than a person's breath which is exhaled into a breath analysing instrument within the meaning of the Act."

In my view, his Honour's analysis is the correct analysis.

6. Faced with the decision, counsel for the respondent sought first to distinguish the decision and, in the alternative, attempted to argue that it was wrong.

7. Three points of distinction were raised. The first concerned the different nature of the appeals and the specific issues raised. While those distinctions may be made, they do not appear to me to be relevant distinctions which have any impact on the critical question of construction common to both proceedings and decided in *Sirajuddin*. The second point of distinction raised was that in *Sirajuddin*, no notice had been served under s58 (2) of the *Road Safety Act* so that the certificate was conclusive proof whereas in the present case, such a notice was given. Again, that distinction does not appear to me to have any bearing upon the issue which is a question of the construction of the provisions. Finally, it was put that counsel for the motorist in *Sirajuddin* had submitted that it wasn't possible for a person to continuously exhale 210 litres of breath into a breath analysing instrument but in the present case no such concession had been made. Again this appears to be another distinction which does not in fact enable the construction determined in *Sirajuddin* to be distinguished.

8. In arguing that the construction of Hargrave J should not be followed, counsel submitted that greater precision was needed for the definition of the terms than was adopted by Hargrave J. It was argued that "near enough" is not good enough in relation to the definitions. Reference was made to the decision of *Impagnatiello v Campbell*^[2] where an incomplete description of the breath analysing instrument was fatal to the Crown case and to other examples. In my view, the interpretation adopted by Hargrave J provides the necessary precision to enable the legislation to function appropriately. Reference was also made to the variety of expressions that one finds in dictionaries to explain the meaning of "exhaled" and the meaning of "per" and "in" as well as the word "breath". Accepting for present purposes that there are different shades of meaning for different contexts, I have no hesitation in coming to the same conclusion as Hargrave J as to the appropriate meaning to be attached to those expressions in the Act. In particular, his Honour noted that the word "in" has many meanings but that one of them is "as a proportionate part of". He said that that is how the word "in" should be read in the certificate and that it was absurd to give it any other meaning because, as was submitted on behalf of the appellant, it is obviously impossible for a person to continuously exhale 210 litres of breath into a breath analysing instrument.

9. The learned Magistrate did not have the benefit of the analysis of Hargrave J. I agree with that analysis and accordingly have come to the conclusion that error of law has been shown and the appeal should be allowed. I will hear further submissions as to the consequential orders that should be made.

^[1] [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21.

^[2] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.

APPEARANCES: For the appellant DPP: Mr CW Beale, counsel. Solicitor for Public Prosecutions. For the respondent Bleakley: Mr W Walsh-Buckley, counsel. Stephen Andrianakis & Associates, solicitors.
