01/02; [2001] VSC 367

SUPREME COURT OF VICTORIA

DPP v BERMAN

Ashley J

25, 26 September 2001

MOTOR TRAFFIC – DRINK-DRIVING – BAC READING .068 – ADMINISTRATIVE DISCRETION EXISTED WHETHER TO LAY CHARGE – DISCUSSION AT SCENE AS TO WHETHER CHARGES WOULD BE LAID – DEFENDANT AWARE OF RIGHT TO HAVE BLOOD TEST – CHOSE NOT TO DO SO IN LIGHT OF CONVERSATION – AT HEARING MAGISTRATE INVITED TO EXCLUDE CERTIFICATE OF OPERATOR – MAGISTRATE DISMISSED CHARGES ON "ISSUE OF UNFAIRNESS" – WHETHER DISMISSAL OF CHARGES INVOLVED THE EXERCISE OF A DISCRETION KNOWN TO LAW.

B. underwent a breath test which disclosed a reading of .068. At the scene, a discussion occurred between B. and the informant and operator which involved the exercise of an administrative discretion whether to lay charges or not. Charges were subsequently laid and at the hearing, the certificate of the operator was admitted into evidence. B. gave evidence at the hearing that if he was going to be charged he would have sought a blood test. B. submitted to the magistrate that the evidence of the certificate should be excluded in the exercise of the fairness discretion. The magistrate found that there was an unfairness to B. which operated in relation to the charges laid and dismissed both charges. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for further consideration.
The dismissal of the charges in reliance upon an assumed discretion that was not put by either party involved the exercise of a discretion unknown to the law and was insupportable.

ASHLEY J:

1. This is an appeal under s92 of the *Magistrates' Court Act* 1989 from a final order of the Magistrates' Court made 8 February 2001 by which that court dismissed charges laid against the respondent under s49(1)(b) and (f) of the *Road Safety Act* 1986 (the Act).

2. The proceedings themselves involved no great complexity. The respondent Peter James Berman was charged with the two offences arising out of events which occurred on the early evening of Saturday 11 April 1998. At that time the respondent was subjected to a random preliminary breath test. Thereafter, in light of what that test disclosed, he was required to undergo a breath test. The reading disclosed by the latter test was, colloquially, .068. The respondent was served with a certificate under s58(2) of the Act to that effect.

3. Months later charges were laid. In due course they led on to the hearing which took place in February this year. Just why there was such a long period of delay in the matter coming on for hearing is not apparent.

4. When the proceeding came on in the Magistrates' Court the certificate was tendered without objection. I add that notice had not been given for the attendance of the operator under s58(2) of the Act.

5. On the hearing the evidence given by the informant and by Mr Berman centred upon a conversation which had taken place on the evening of 11 April 1998. It was common ground that at the pertinent time the police had an administrative discretion whether to lay a charge when a breath analysis showed a reading greater than .05 but no more than .07. That discretion, it seems, was one that as a matter of practice, at least, was exercised in favour of a driver unless he or she had been involved in an accident or unless there was a past history of traffic offences. Just what was meant by the latter term was perhaps a matter of some debate.

6. Mr Berman gave evidence that he was told in conversation with the informant and the breath analysis machine operator on the evening of 11 April that he would not be prosecuted. That puts his evidence at its very highest. Other evidence, given by the informant but in effect

rejected by the magistrate, was that Mr Berman had not been given an unqualified assurance on the evening of 11 April that he would not be charged. That was because he had disclosed a past occasion on which he had been charged with refusing to take a breath test, that charge leading not to conviction but to adjournment by the court.

7. The way in which Mr Berman sought to use the evidence of the conversation was this: he gave evidence that he was at the time an experienced legal practitioner well aware of his right to have a blood test performed in the event that a breath test disclosed a reading above .05. Had there been any reason to believe, on 11 April 1998, that he would be charged, then he would have had a blood test performed. By his understanding of a medical condition from which he said that he suffered, it was possible or probable that a breath test would give an unduly elevated reading.

8. Counsel for the respondent perhaps submitted below that the certificate which had been admitted into evidence should be excluded. He at least submitted that the evidence it conveyed by way of a recitation of the analysis should be excluded. In either case, he contended, the evidence should be excluded in the exercise of the fairness discretion often associated with *Bunning v Cross*[1], a discretion exemplified in the present context by *Nolan v Rhodes*[2] and *DPP Drage*[3].

9. For the prosecution it was contended, as I understand it, that the fairness discretion had no part to play in respect of the charge laid under s49(1)(f) of the Act. That was because a blood test could not have been relevant to that charge, it depending upon the analysis recorded by the breath analysing instrument. Reliance was placed upon the decision of the Court of Appeal in *Furze v Nixon*[4]. The further submission for the prosecution, as I understand it, was that the discretion to exclude on the ground of unfairness should not in any event be exercised in the circumstances revealed by the evidence.

10. According to the order of a Master made 9 March 2001 *ex parte* on the application of the appellant, the questions of law raised by this appeal were as follows;

> "1.1: Did the magistrate have a discretion to exclude from evidence the certificate produced by the breath analysing instrument in circumstances where no notice under s58(2) of the *Road Safety Act* 1986 had been served on the informant;
>
> 1.2: If 'Yes' did the magistrate have a discretion to exclude from evidence the certificate in circumstances where it was not suggested that the police had acted unlawfully of improperly;
>
> 1.3: If 'Yes' did the magistrate err in the exercise of that discretion."

Those questions were no doubt, framed having regard to the way in which part at least of the argument had proceeding in the Magistrates' Court. They assumed, I imagine, that the learned magistrate had decided the case in accordance with those submissions. A reading of the transcript of her Worship's reasons[5], shows, however, I think clearly, that the learned magistrate did not decide the case on the footing that had been argued.

11. Her Worship said in the first place that she was satisfied that the decision in *Furze* did not displace a defence pursuant to s49(4) of the Act so as to make irrelevant a blood test requested pursuant to s55(10). Presumably she had in mind in that connection what was said by the High Court in *Thompson v His Honour Judge Byrne & Ors*.[6]

12. She went on to say that the issue of unfairness in those circumstances operated equally in relation to both of the offences with which the present respondent was charged.

13. Her Worship described the submission made for the respondent this way (I have recast it to correct an obvious typographical error):

> "The result of the test was evidenced by a certificate indicating a reading of .068 or .6 at law and the issue of the reading was not in dispute. It was urged on behalf of the defendant to exercise my discretion to exclude the evidence of the analysis on the basis that it was unfairly obtained in view of the circumstances, circumstances which led to the defendant choosing not to request the taking of a sample of his blood for analysis pursuant to s55(10)."

14. Her Worship concluded that although there was no deliberate unfairness or improper

conduct on the part of the police nonetheless there was an unfairness to the defendant which operated in his mind so that he did not request a blood test which would otherwise have been open to him and which may have formed the basis of a defence.

Her Worship went on:

> "In reaching that conclusion I rely on the case of *Nolan v Rhodes* and other authorities that I have been referred to by Mr Billings with regard to that issue which takes me back to the decision of *Furze v Nixon* and I find that the issue of unfairness does operate in relation to s49(1)(f) and s49(1)(b) and I dismiss both charges."

Her Worship thereafter made an order for costs in favour of the respondent.

15. It seems to me that what was correctly noted at the outset by Her Worship as an invitation to exercise a discretion to exclude evidence, whether the certificate that had been tendered without objection or the evidence conveyed by the analysis set out therein, somehow turned into a discretion to find that charges laid against the respondent could be dismissed by reason of "the issue of unfairness." It might be argued that so to read her Worship's reasons would reflect only what she said; not what she meant. The conventional approach to considering the reasons given by a judge or magistrate, however, is to look at what they say. I see no reason to depart from that approach in this case.

16. It follows that the learned magistrate dismissed the charges in reliance upon an assumed discretion that was not put to her and which neither counsel sought to persuade me was a basis for dismissal known to the law.

17. The problem which then arises is this: the questions of law stated by the Master's order do not relate to the basis upon which the magistrate made her decision. On the other hand, the decision was in truth insupportable. What should be done?

18. The Act, both in s92 concerning criminal cases and in s109 concerning civil cases, provides that any appeal must be instituted not later than 30 days after the day on which the order complained of was made. That time limit is subject only to this court having power to grant leave to a party to proceed with an appeal commenced out of time if it is of opinion that failure to institute the appeal within time was due to exceptional circumstances; and if it is satisfied that the case of any other party to the appeal would not be materially prejudiced because of the delay.

19. Miss Cannon, for the appellant, in effect invited me to grant leave to the appellant to appeal out of time in order to raise complaint about the way in which the learned magistrate decided the case.

20. It may be that leave to appeal out of time can be sought notwithstanding that an appeal within time has been commenced. That was the type of application made in *Kenneth Ayres (Australia) Pty Limited v Dennis M. Goldenberg & Associates*[7]. In that case McDonald J did not grant the leave sought but he did not say that leave might not be sought and granted in such circumstances. He did, however, observe that in that case the grounds sought to be relied upon by the applicant as exceptional circumstances came down to this: that the point sought to be raised was not seen by either counsel or the solicitor for the appellant before the hearing of the appeal. His Honour was plainly of the view that such a matter did not constitute exceptional circumstances. I respectfully agree.

21. In consequence, insofar as Miss Cannon's submission today was that I should grant leave to the appellant to bring an appeal out of time so as to raise the matter of the basis upon which the magistrate resolved the prosecution, I reject it.

22. That was not the only way in which Miss Cannon submitted I should approach the matter. She contended that whilst it might be the case that only rarely would a different question be framed and considered by the court on a s92 appeal, yet this was such a case. There would be no prejudice to the respondent if the question was dealt with. The respondent would not lose his opportunity to have the matter determined according to law because the matter would have to return to the Magistrates' Court. Moreover, the respondent had in effect contributed to what went

wrong in the Magistrates' Court. The certificate had gone in without objection. In some way this had led the learned magistrate to misapprehend what submissions had been made.

23. A further submission made by Miss Cannon was that it would be open to me to adjourn the matter so as to permit the appellant to return to the Master seeking the statement of a new question. She relied on R 58.11 of Chapter 1 of the Rules in that connection. She pointed out that it imposes no time limit upon seeking a variation of an order made by the Master.

24. Mr Billings for the respondent submitted that I should not permit a fresh question to be stated which was dramatically different to the questions set out in the Master's order. He submitted that in the criminal field there were several cases which show that if amendment is to be allowed at all it will only be where its effect is not to state a new ground or question but rather to re-state an original ground. He cited *DPP v Boer*[8], and *Nutting v Ryder*[9].

25. The submissions made by Miss Cannon and Mr Billings undoubtedly highlight in context a quite difficult problem.

26. I do not accept that R58.11 could be a vehicle at this very late stage for the matter returning to the Master so that a new question might be formulated to accord with the basis upon which the learned magistrate dismissed the charges. It is unnecessary in the circumstances to offer any opinion, and I do not do so, whether R 58.11 is available to an appellant as well as to a respondent.

27. Next, I take the view, as have other judges of this court, that in the present context a judge is not authorised to amend an order made by a Master, it being an order of the court.

28. But that is not the end of the matter, for more than one judge has expressed the view and acted upon the principle that in some circumstances it may be appropriate, by recourse to R 58.13, to direct that an issue that was alive and ventilated below may be entertained on appeal notwithstanding that it is not the subject of a question framed by a Master's order made under R 58.09.

29. This present situation has analogous features to the type of situation to which I have just referred. Whilst I am conscious that it would be wrong for a defendant to face double jeopardy, and whilst there must certainly be a reluctance to entertain matters not raised by a prospective appellant in the application made to a Master, to dismiss the appeal despite the matter having been decided below on a footing that was not put to the learned magistrate by either prosecution or defendant, a footing that neither counsel submitted before me was legally supportable, would be far from satisfactory. I consider that the court has power to deal with the issue thus arising, and to make whatever order that might then be required.

30. For reasons that I have attempted to explain the proper course is that I should consider, on the appeal, whether the exercise of the purported discretion by the magistrate to dismiss the charges against the respondent in fact involved the exercise of a discretion unknown to the law; and, if not, what order should be made.

31. I had noted already that it was not argued by either side that the discretion as the magistrate exercised it was supportable. I have no doubt that no such discretion existed. The question that then arises is what must be done? Mr Billings has submitted that I should not return the matter to the magistrate for reconsideration because it was stale, the events giving rise to the prosecution having occurred some three-and-a-half years ago.

32. Assuming for the moment that such matter should weigh in my consideration, I do not regard it as persuasive why the matter should not be returned to the magistrate. I have no idea why the matter did not come on for trial for nearly three years after the incident occurred. I will not speculate.

33. There are, I think, powerful reasons why the matter ought be returned to the magistrate for further consideration. Whatever be the reason, the result arrived at came about by resort to a principle that was misconceived. It would not be right, in the ordinary sense of the word, for the dismissal of the charges to stand. Returning the matter to the magistrate for further consideration does not condemn the respondent to conviction. The arguments pursued on his behalf are equally

available, and the respondent already has findings of fact by the magistrate which are to his advantage.

34. All in all then, I consider that the proper course is to allow the appeal, set aside the magistrate's order, and remit the matter for further consideration by the magistrate on the evidence already adduced.

35. Before parting with the matter, I should say that I was urged by both counsel to pass opinion upon the three questions framed by the Master. I think it would be quite wrong for me to do so. Any answers would have an advisory content. The learned magistrate did not make or express an exercise of discretion in circumstances that give rise to any of the three questions.

36. It is, no doubt, very unfortunate that this matter has proceeded in the way that it has. That does not however, relieve the court of its obligation to decide, according to proper principle, what must be done.

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[1] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[2] (1982) 32 SASR 207.
[3] (1993) 17 MVR 390.
[4] [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[5] Exhibit CA3 to the affidavit of Colin Almond sworn 7 March 2001.
[6] [1999] HCA 16; (1999) 196 CLR 141, particularly at [31]; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[7] McDonald J, 9 June 1994, unreported.
[8] (1992) 15 MVR 11 at p14-15 per Smith J.
[9] (1994) 20 MVR 294 at p296-297 per Batt J.

APPEARANCES: For the appellant DPP: Miss G Cannon, counsel. Solicitor for Public Prosecutions. For the Respondent Berman: Mr P Billings, counsel. TF Grundy & Co, solicitors.
