01/78

SUPREME COURT OF QUEENSLAND — FULL COURT

FISCHER v DOUGLAS; ex parte FISCHER

DM Campbell, Hoare and Dunn JJ

14 September, 11 November 1977 — [1978] Qd R 27

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER APPREHENDED WHILST DRIVING AND TAKEN TO POLICE STATION – DRIVER REQUIRED TO PROVIDE A SAMPLE OF HIS BREATH FOR ANALYSIS – DRIVER REFUSED TO SUBMIT TO BREATHALYSER TEST WITHOUT LEGAL ADVICE – WHETHER REASON OF A SUBSTANTIAL CHARACTER – FINDING BY MAGISTRATE THAT DRIVER HAD A REASONABLE EXPECTATION OF THE ARRIVAL OF A SOLICITOR – RIGHT TO OBTAIN LEGAL ADVICE – EXTENT OF THE RIGHT – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – WHETHER MAGISTRATE HAD REGARD TO EXTRANEOUS CONSIDERATIONS: *TRAFFIC ACT* 1949-1977 (QLD), S16A(11).

Having refused at the scene of an accident to furnish a sample of breath until he had seen his Solicitor, the respondent was conveyed to a police station. He again refused until he had seen his Solicitor for advice, and was subsequently charged with refusing to provide a specimen of breath for analysis. It was conceded by the applicant that the respondent was seeking legal representation and was not wilfully trying to frustrate the inquiry. The Stipendiary Magistrate who dealt with the matter found that the respondent had a reasonable expectation of the arrival of a Solicitor, that Solicitors did in fact arrive and that such delay would not have prejudiced the requirement that a specimen be requested within two hours of the respondent coming under notice.

The Magistrate expressed the view that defendant should be found guilty but dismissed the charge upon the basis that "the issue of a citizen's right to consult legal advice is so important" that notwithstanding the opinion as to guilt he would exclude the evidence of "the defendant's conduct consequent upon the direction to provide" as being evidence unfairly obtained. Upon appeal—

HELD: Appeal allowed. Order absolute. Remitted to the Magistrate with a direction to record a conviction and proceed according to law.
The need to maintain order in a complex society, and the need to combat social problems such as drink/driving, have caused the Legislature to enact legislation requiring instant obedience to certain administrative directions; where instant obedience is required the right to receive confidential legal advice before obeying is annihilated. At the police station, the request that a specimen of breath be provided must be made as soon as practicable; thereupon, so soon as an appropriate direction is given by the person in authority operating or who is to operate the breath analysing instrument, an immediate obligation to provide a specimen of breath arises.

DM CAMPBELL J: This case was considered in the Court below to raise the whole question of the right of a person who is suspected of having committed an offence and is at a police station to obtain legal advice. But I do not regard it as doing so. The question which is raised has to be examined in rather a narrow context — in connection with the now familiar breathalyzer legislation; and, on the facts of the particular case, the precise question is whether a person is entitled to wait until his solicitor arrives at the police station before taking a breathalyzer test. ...

After hearing the evidence for the prosecution, and the evidence of the respondent and two solicitors who were called by him, the magistrate dismissed the charge. He delivered spoken reasons in the course of which he said:

> 'In my view the issue of a citizen's right to consult legal advice is so important that notwithstanding the fact that I believe that the correct determination I should make in this case is one whereby the defendant should be found guilty by me, yet I believe that I should ensure as best I can that the opinion — the highest opinion available in Queensland — shall be brought to bear on such a fundamental point. I can ensure this best notwithstanding my personal views as a magistrate, if I uphold the views taken by the defence that in all the circumstances that exist here that the defendant had a reasonable expectation of the arrival of a solicitor.'

He went on to intimate that in the exercise of his discretion, he would exclude the evidence

of the defendant's failure to provide a specimen of breath for analysis on the ground of unfairness, as I understand him, and he concludes by saying that he exercised his discretion in this way 'not because I see fit to exercise it but in order that the issue shall be tested'.

I do not wish to appear too critical of the magistrate but he has obviously not discharged his judicial function. His function was to administer the law as he understood it to be. He should not have been influenced to acquit the respondent by the extraneous consideration that this would lead to an appeal. The undisputed evidence was that a requisition was duly made, and the reason given for not complying with the requisition would have only been a valid excuse if, in the words of s16A(11)(b), it amounted to a 'reason of a substantial character'. ...

It was argued by Mr Davies who appeared for the respondent on the hearing of the appeal that the evidence did not establish a failure by the respondent to provide a specimen of his breath when directed. The point was not taken before the magistrate, and, having excluded the evidence of the respondent's failure on the ground of unfairness, the point did not strictly arise. However, there was a refusal to provide a specimen until his solicitor arrived. The respondent, in response to the question in examination-in-chief 'If a solicitor had have been there, what would you have done', volunteered the statement, 'I think probably the answer to that is I would have acted on his advice' – this indecision clearly amounts to a failure to provide a specimen when directed.

A refusal couched in not dissimilar language was held to amount to a failure by a Divisional Court (Lord Widgery CJ, Kilner Brown and Watkins JJ) in *Pettigrew v Northumbria Police Authority* (1976) RTR 177; 120 Sol Jo 119 in the case of a prosecution under s9 of *Road Traffic Act* 1972. There, the defendant's response to a direction to provide a specimen of blood was, 'I shall provide when my solicitor is present'. The facts were unusual in that the defendant had communicated with a solicitor soon after he was brought to the police station, and before the first request for a specimen of blood was made, and both the defendant and the police sergeant were informed by the solicitor that he was on his way to the station and would arrive shortly. Widgery CJ left the question of the reasonableness of the refusal open, and said (at p193):

> 'Whether or not the refusal was justified would be another issue, and that was never raised in this case. No-one suggested that if there was a refusal it was a reasonable one, and I am satisfied for the reasons I have already given that the only possible conclusion in this case is that the conditional acceptance being tantamount to a refusal, there was a refusal here.'

There is *dicta* by Foster J in *Daly v Hammersley* (1977) 13 ALR 669 at p671 that it would not constitute 'reasonable grounds for failing or refusing to submit to a breath analysis' under s8B(10) of the *Traffic Ordinance* 1949-1976 (NT) that a person was officially refused permission to have his solicitor present or to speak to him. On the other hand, in *Nazer v Ministry of Transport* (1973) *Recent Law* 117, which was a prosecution under s58C of the *Transport Act* 1962 (NZ) for refusing to supply a blood sample, Speight J stated:

> 'Even if a person is arrested he must not be held incommunicado, and if a sensible *bona fide* request is made for a solicitor or any other appropriate person to be communicated with, then attempts should be made to facilitate this.'

The right to obtain legal advice is undoubtedly a common law right. The extent of the right is not defined but it is closely bound up with the basic liberties of the subject, that is to say, with freedom of speech and of action and free access to the courts. A ruling on the right to communicate and consult privately with a solicitor is contained in the up-dated *Judges' Rules* 1964. The ruling which is for the guidance of police is that a person investigated should be allowed such access provided no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice. There has been some recognition by appellate courts of the right of a man in custody to see his solicitor if and when he is available to be soon – for example, by the Court of Criminal Appeal of New South Wales in *R v Dugan* (1970) 92 WN (NSW) 767, and more recently by the Court of Appeal in *R v Lemsatef* (1977) 1 WLR 812 at p815 where Lawton LJ said that it is one of the principles of practice that a man in custody is entitled to consult his solicitor at an early stage of the investigation. In the United States of America and in Canada the right to legal assistance is part of the fundamental constitutional law of those countries: *Miranda v Arizona* 384 US 436; 10 ALR 3d 974; 16 L Ed 694; 16 L Ed 2; 86 SCt 1826; 10 Ohio Misc 9; 16 L Ed 2d 694; 86 SCt 1602; 427 PA 486; *Brownridge v R* (1972) 28 DLR (3rd) 1. In general practice

the common law right to obtain advice is given effect to by trial judges exercising a discretion to disallow evidence which they think was so unfairly obtained as to be oppressive: *King v R* (1969) 1 AC 304; [1968] 2 All ER 610; 1968 3 WLR 391. An admission which was secured after an accused had expressed a wish to contact a solicitor was excluded in *R v Puhipuhi* (1973) Recent Law 139.

In *Law v Stevens* (1971) RTR 171, the defendant (as was the case with the present respondent) was taken to a police station after refusing a roadside breath test. When requested to provide a specimen of blood he refused saying, 'Not without my solicitor here'. Parker CJ (with whom Widgery CJ and Bean J agreed) said:

> 'So far as asking for a solicitor to be *present* (italics mine) on the basis that he required legal advice, the Court of Appeal have held quite definitely that that cannot amount to a reasonable excuse.'

The decision of the Court of Appeal to which Parker CJ was referring was *R v Clarke* (1969) 1 WLR 1109, a case where a motorist was arrested for failing to take a breath test. When asked at the police station to supply a specimen of blood he said: 'No, I will not do anything until I've seen my solicitor'. He also gave other excuses, but none of the excuses he gave were held in the circumstances to be reasonable. In the Canadian case of *Brownridge v R* (1972) 28 DLR (3rd) 1 at p9 Ritchie J stated that he was unable to accept the view expressed by Parker CJ of *R v Clarke* and treat it 'as holding that an accused's request for legal advice when in custody is incapable of amounting to a "reasonable excuse"'. With respect, I think that this is to misconstrue the request in *R v Clarke* and *Law v Stevens*. As Lord Parker was implying the request in both cases was for a solicitor to be present. The request in *Brownridge v The Queen* was different. It was a request by an accused after his arrest for impaired driving to speak to his lawyer. The other decision of the Supreme Court of Canada to which we were referred, *Hogan v R* (1975) 18 CCC (2nd) 1975, involved permission being refused an accused to speak to his lawyer who was actually present in the Police station at the time of the request and before the test was taken. Both Canadian cases are distinguishable on their facts from the present case.

The phrase used in s16A(11)(b) is not 'reasonable excuse' but 'reason of a substantial character'. The use of the phrase does not make non-compliance with a requisition which is duly made any easier to justify or excuse. The broad intention is to make the taking of a breathalyzer test compulsory in given circumstances. Delay in undergoing a test in the prescribed manner is not contemplated. Thus, if a person's driving licence carries an endorsement that he is incapable of providing a specimen on medical grounds, he is required to produce it 'forthwith' upon being directed to provide a specimen of his breath s16A(8)(d). The reason given by the respondent that he wanted to wait until his solicitor arrived at the police station is not alone a reason of a substantial character for failing to provide a specimen.

Accordingly , the order nisi should be made absolute and the matter remitted to the magistrate with a direction to record a conviction and proceed according to law.

HOARE J: I have had the advantage of reading the reasons for judgment of DM Campbell J and Dunn J. I agree with their conclusion and agree generally with their respective reasoning. The right of the citizen to obtain legal advice is an important common law right but it is a right that can be limited or abrogated either expressly or impliedly by appropriate legislation. In the present case the police officers acted with complete propriety. I have no doubt that had the appellant sought to first consult with a solicitor who was then present he would have been allowed to do so. However it is a completely different matter for a citizen who, pursuant to the legislative requirement is required to undergo a breathalyser test, to be able to defer the test pending the arrival of his solicitor. The legislation contemplates a test taken without delay. The appellant did not establish that there was some 'reason of a substantial character for his failure to provide the (breath) specimen'. I agree with the orders proposed by my learned brothers.
