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## SUPREME COURT OF SOUTH AUSTRALIA – (IN BANCO)

**DAIRE v ROLLINS**

King CJ, Mitchell and White JJ

23 July 1982 — (1982) 30 SASR 156

**MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REFUSED TO SUBMIT TO A BREATH ANALYSIS TEST ON THE GROUND THAT HE BELIEVED HE HAD A RIGHT TO UNDERGO A BLOOD TEST – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: ROAD TRAFFIC ACT 1961-1981 (SA), s47f(4)(b).**

A Special Magistrate dismissed a charge of a refusal to submit to a breath analysis test. The facts were that when the driver was asked to undergo the alcotest, he requested a blood test. The police officer then said, in effect, that the driver must be confused about the blood test, and that he was obliged to undergo an alcotest and then depending on the results, a breath-analysis test. The driver then submitted to the alcotest (which showed positive), and when asked to furnish a sample of his breath for analysis, he again requested a blood test, and refused to submit to the breath-analysis test. The Magistrate found that the driver's reason for not submitting to the breath analysis test was that he believed that his right to undergo a blood test was being denied to him. The Magistrate was satisfied that the driver had established a defence open to him under s47(4)(b) of the *Road Traffic Act 1961-1981* (SA) in that there was "in the circumstances of the case good cause for the refusal." On appeal—

**HELD: Appeal dismissed.**

**MITCHELL J:** (with whom King CJ and White J agreed) "... [159] Section 47f of the Act gives to a person required to submit to an alcotest or breath analysis a right to have a blood sample taken, at his expense, by a medical practitioner nominated by him. Section 47f (4) reads:

"Nothing in this section contained shall absolve a person from the obligation imposed upon him by subsection (3) of section 47e of this Act."

Sub-section (3) of s47e requires the person to comply with all reasonable requests from a member of the police force in relation to the requirement to submit to an alcotest or breath analysis and s47e(2) requires the alcotest or breath analysis to be performed within two hours after the occurrence of the behaviour or accident referred to in sub-s(1) of the section. So that ordinarily a breath analysis is likely to be taken before the blood sample, although there is nothing in the statute which specifically says in what order they are to be taken.

In *French v Scarman* (1979) 20 SASR 333 at p337, King CJ referred to the obligations under 47e of the Act in the following words:

"The legislature has recognised that by requiring the citizen to submit to those tests, it places him in a position in which his fate will be determined by the accuracy of the instrument and the honesty and reliability of the police evidence as to its results. It further recognises that the citizen has no control over either of these factors. This recognition finds expression in the provisions of s47f which provides a safeguard. This safeguard takes the form of an obligation on police officers to facilitate the taking of a blood test if the citizen requests it. The safeguard is illusory if the obligation on the part of the police to facilitate a blood test arises only if the citizen makes the request in the words of the section. The legislature cannot have supposed that a person requested to submit to a breath test would have the details of the section in his mind. It seems to me that where a person, who is requested to undergo an alcotest or a breath analysis, indicates a desire for a blood test, it is incumbent upon the police officer, not only to inform him that he may have a blood test taken by a doctor named by him and at his own expense, but also to indicate that if he desires the blood test to be taken upon that basis, arrangements will be made for that to be done."

Not only should a police officer facilitate the taking of a blood test if the person apprehended requests it but he has it duty not to mislead the person who wishes to undergo a blood test. Mr

Winter submitted that, not only was it not part of the duty of a police officer to advise a person whom he is questioning or whom he has arrested as to the law, but that it was dangerous and undesirable that he should do so.

Generally speaking this [160] is true. But in the present case it was apparent that the respondent had some hazy knowledge concerning his right to require a blood test. It would have been simple and appropriate for Constable Boileau to have told the respondent that he could require a sample of his blood to be taken and to be tested but that, in any event, he was obliged to comply with the requirement that he submit to breath analysis and that that having been done, a constable would do whatever was necessary to facilitate the taking of the blood sample. Instead of giving him that information Constable Boileau chose to tell him that he had "mixed up" the information which he had been given or that somebody else was "confused".

He told the respondent part of the law, that was that he must submit to an alcotest and that if it was positive Constable Boileau would request him to submit to a breath analysis but chose not to tell him the rest of the law, namely that he could also undergo a blood test at his own expense and that the police were obliged to facilitate the taking of that test. When Constable Schumacher directed him to exhale into the breath analysing instrument and the respondent requested a blood test, that request was ignored.

In my opinion there was evidence upon which the Special Magistrate could properly find, as he did find, that the respondent reasonably suspected that the police were denying him the right to have a blood test and that the respondent had established that he had good cause for refusing to comply with the requirement to undergo a breath analysis. The "good cause" found by the Special Magistrate was not in any way dependent upon a mistake of law on the part of the respondent but related to the attitudes and behaviour of the police officers concerning the respondent's request for a blood test. I am of the view that the grounds of appeal have not been made out. I would dismiss the appeal."

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