22/96

SUPREME COURT OF VICTORIA

DPP v SANDERS

Teague J

30 April, 20 May 1996 — (1996) 23 MVR 515; (1996) 86 A Crim R 378

MOTOR TRAFFIC – DRINK/DRIVING – BREATH SAMPLES – INSUFFICIENT FOR ANALYSIS BY BREATHALYSER – REQUIREMENT FOR BLOOD SAMPLE – MUST BE REASONABLE – "NOMINATED BY" – MEANING OF – WHETHER PARTICULAR DOCTOR TO BE SPECIFIED: *ROAD SAFETY ACT* 1986, SS49(1)(b),(g), 55(9A).

Section 55(9A) of the *Road Safety Act* 1986 ('Act') provides (so far as relevant):

> "(9A) The person who required a sample of breath under sub-section (1) or (2) from a person may require that person to allow a legally qualified medical practitioner nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> ...
>
> (b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever."

1. Section 55(9A)(b) of the Act should be construed to relate not only to the operation of the breath analysing instrument but also to the person who it is sought to test.

2. The requirement to allow a blood sample to be taken must be reasonable in the circumstances. Where a person's consent followed a police officer's decision to require a blood sample be taken and the delay between interception and the taking of the blood sample was not unreasonable, it would not have been open to a magistrate to find that the requirement was unreasonable.
***DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367, applied.**

3. The words "nominated by" in s55(9A) of the Act do not require the express naming of a specified doctor and if a particular doctor is named, a particular formula of words is not needed. Accordingly, a magistrate was in error in dismissing two charges under s49(1) of the Act on the ground that the police informant had failed to nominate a specific medical practitioner.

TEAGUE J: [1] This is an appeal brought under s92 of the *Magistrates' Court Act* 1989 by the Director of Public Prosecutions on behalf of the informant against the dismissal of two charges under the *Road Safety Act* ("the Act") by the Magistrates' Court at Shepparton on 2 February 1996. In an order made on 4 March 1996, Master Wheeler framed the question for determination by this court on this appeal in these terms:

> "Whether the learned Magistrate erred in finding that s55(9A) *Road Safety Act* 1986 requires 'the person requiring the sample' to ask for by name or nominate the legally qualified medical practitioner who is to take the blood sample."

For reasons which I will come to later, it is necessary to address two further questions. The informant brought three charges against the respondent arising out of events which occurred on 7 and 8 July 1995. At the hearing in the Magistrates' Court, the respondent pleaded guilty to one of the three charges, that of failing to comply with the instructions of a traffic control signal. He pleaded not guilty to two charges under the Act. One, under s49(1)(b), was of driving a motor vehicle while more than the prescribed concentration of alcohol was present in his blood. The other, under s49(1)(g), was of providing a blood sample found to contain more than the prescribed concentration of alcohol within 3 hours of driving a motor vehicle. There were before me two affidavits as to what took place at the hearing. The Director relied on the affidavit of Senior Constable Oroszvary ("the prosecutor") who had appeared to prosecute before the learned Magistrate. There was also an affidavit sworn by Mr Birrell, who appeared for the respondent **[2]** before the learned Magistrate and before me. There were no major discrepancies in the accounts given in the affidavits.

The informant was driving along a street in Mooroopna on 7 July 1995 in a car following that driven by the respondent. The informant saw the respondent's car pass through an intersection while red traffic signals were operating, and required the respondent to stop his vehicle. He spoke to the respondent, and conducted a preliminary breath test which proved positive. That was done at 10.45 p.m. The two men went to the Mooroopna Police Station. A second preliminary breath test was performed there at 11 p.m. It proved positive. The two men then went to the Shepparton Police Station. There, Senior Constable Wilson, a policeman authorised to operate a breath analysing instrument, attempted to conduct breath tests. He made three such attempts in all. After the third attempt, Senior Constable Wilson said that the breath samples were insufficient. The informant decided to require that a blood sample be taken. He asked the defendant to go to the Goulburn Valley Base Hospital to allow a blood sample to be taken for analysis. The respondent agreed to go to the hospital. The two men left the Shepparton Police Station at 11.45 p.m. and went to the Goulburn Valley Base Hospital. At the hospital the informant spoke with a Doctor Colin Howard. The informant had not previously met Dr Howard. A blank consent form provided by the hospital was filled out and signed by the respondent. Dr Howard's name was one of the items added before the form was signed. Dr Howard took a sample of blood from the respondent at 00.10 a.m. The sample was later tested and found to have an alcohol level of .112%.

[3] When the hearing commenced before the learned Magistrate on 2 February 1996, Mr Birrell applied for the proceedings to be recorded and transcribed for reasons that included that there was an issue of statutory interpretation to be considered, that the hearing might be reviewed, and that facilities for the recording of the proceedings were available. The prosecutor said that he supported the application by Mr Birrell. On Mr Birrell's account, the learned Magistrate ruled that he would not order that the hearing be recorded because: "the case was not such that it was appropriate". It is clear that a Magistrate has a discretion to accede to or refuse such an application, and that that discretion is to be exercised "in order to secure or promote convenience, expedition and efficiency". See Tadgell J at p3, *Stefanovski v Murphy & Anor* ([1996] VicRp 78; [1996] 2 VR 442 Full Court, 5 May 1995). While the ruling against permitting the hearing to be recorded is not under review on this appeal, I would have to note that I find it disquieting that inappropriateness was given as the only reason for not granting an unopposed application when adequate facilities were available.

After evidence was given by the informant and a corroborating policeman, Mr Birrell made submissions to the learned Magistrate on three different bases as to why the two charges under the Act should be dismissed. Those submissions focused on the terms of s55(9A) of the Act. Section 55 is a long section which provides various procedures to be followed as to, and consequent upon, the undergoing of a preliminary breath test. Sub-section 9A reads:

> "(9A) The person who required a sample of breath under sub-section (1) or (2) from a person may require that **[4]** person to allow a legally qualified medical practitioner nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> (a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or
>
> (b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever."

The prosecutor's affidavit gave this summary, not challenged by Mr Birrell, as to what the Magistrate said after hearing the three submissions of Mr Birrell and the prosecutor in reply:

> "The failure of the Informant to nominate appropriately the medical practitioner as required under s55(9A) was the only argument of merit advanced for the defendant ... where sanctions and heavy penalties apply against a defendant should he be found guilty for non-observance of the law, then strict compliance with the requirements of the section must be adhered to ... it was clear that at the time Dr Howard attended to conduct the procedure he was not known to the informant and had not been asked for by name by the informant ... on this basis ... Dr Howard was not an appropriately 'nominated doctor' ... upon the evidence ... strict compliance did not occur ... in these circumstances a form should be available for Police to complete or a deeming provision enacted in the legislation."

The learned Magistrate then dismissed the two charges under the Act. As I noted above, I must

address all three issues raised by Mr Birrell, for the same reasons that Smith J. addressed alternative bases for rulings given by the Magistrate in *DPP v Paul* (1992) 16 MVR 435, 18 December 1992). The appellant must satisfy me not only that the Magistrate erred in the ruling **[5]** which is the subject of the Master's question, but also that the Magistrate would have erred if he had ruled in favour of the respondent on either of the two other matters not ruled upon. If the appellant cannot do so, the appeal must be dismissed.

I turn to the first of those two matters, which is as to whether the informant failed to satisfy a pre-condition for requiring the respondent to be subjected to the taking of a blood sample, in that he did not make the assessment spelt out in the second part of s55(9A), that is of one of alternatives (a) or (b). I use the word "assessment" rather that "opinion" only because it seems to me that the use of the words "if it appears to him or her" suggests that Parliament contemplated a state of mind of somewhat less certitude than would have been the case if the words had been "if he or she is of the opinion".

Section 55 was significantly amended in 1994. While sub-s(9A) was introduced as part of those amendments, it does have marked similarities to s55(10), which was amended at the same time. I will turn later to the terms of the old s55(10). By virtue of s55(9A), the police were provided with some additional power, in circumstances as prescribed, to compel the taking of a blood sample to be tested for the level of alcohol present. Nevertheless, Parliament clearly contemplated that a police officer should not be able to make a purely arbitrary decision to have a blood test carried out.

The informant's evidence was that, after he had been told by Senior Constable Wilson that the third breath test attempting to use the breath analysing instrument was insufficient, the informant said to the respondent: "Due to not (sic) being able to supply a suitable sample of breath I require **[6]** you to attend at the Goulburn Valley Base Hospital and to allow a sample of your blood to be taken for analysis. Will you accompany me?", to which the respondent replied: "Yes, let's get this over and done with." It was properly conceded by Mr Just that there was no scope for the making of an assessment of alternative (a) in the light of the evidence.

I turn to Mr Birrell's submissions. First he put to me that I should infer that the word "you" had been omitted from the account of what the informant had said to the respondent. I accept that that inference is properly drawn. He then put to me that, as the informant had spoken of the respondent's inability to supply a sufficient sample of his breath, his focus was at least partly on the respondent, and not wholly on the measuring capability of the breath analysing instrument. He argued that, on the proper construction of s55(9A), the focus of alternative (a) was entirely on the person, and the focus of alternative (b) was entirely on the instrument and not at all on the person; in other words, alternative (b) was concerned with a reason which related solely to some defect in the instrument or its operation. He argued that the inclusion of the words "any reason whatsoever" was not enough to change the focus of alternative (b). I accept that those words cannot be used as a justification for including any matter other than one properly to be included having regard to the whole of the context. However, I do not accept that in alternative (b) the reason cannot be in part related to the person who it is sought to test, provided that that reason is related as well to the operation of the instrument.

[7] Mr Birrell conceded that the interpretation which he was asking me to put upon the sub-section was such that it would mean that there was a hiatus in the legislation of a somewhat extraordinary kind. The hiatus would be that if the assessment made by the police officer was that the person apparently blowing into the instrument was contriving to avoid permitting sufficient breath to enter the instrument, that would not be an assessment which would satisfy either of alternatives (a) or (b).

It is difficult to believe that Parliament would have contemplated that the taking of a blood sample could be avoided by the simple expedient of a contrived blowing. I am satisfied that alternative (b) ought not to be construed so narrowly as to cover only reasons solely related to deficiencies arising out the functioning of the instrument, but that it should be construed to cover at least such reasons and any other reason which is related to the capacity of the instrument, albeit that that reason may also involve a further ingredient, namely the sufficiency of the sample of breath introduced into the instrument by a person whom it was intended to test. Accordingly,

I am satisfied that the learned Magistrate would have erred if he had ruled as he was requested to rule by Mr Birrell on this submission.

I turn to the second of Mr Birrell's submissions, which related to the place where, and the time when, the blood sample was taken. It appears that that submission was put somewhat differently by Mr Birrell before the learned Magistrate than before me. **[8]** Mr Birrell said, in his affidavit, that he put to the learned Magistrate that the informant's requirement that the respondent submit to the taking of a blood sample:

> "was defective in that ... it required the suspect to accompany the Police to another place, no power for which is contained in the Section as contrasted with Section 55(1) which contains such a power in circumstances where a positive preliminary breath test has been obtained. As a matter of fairness the suspect should have been advised that he did not have to leave the Police Station for a blood test but could do so voluntarily. Failure to so advise involved a procedural unfairness rendering the requirement invalid."

Mr Just anticipated that Mr Birrell's primary argument would be that there should be imported into s55(9A) a requirement that the blood sample could not be taken elsewhere than at the place where the requirement was made. In the instant case, that would mean only at the police station, and not at the hospital. He argued that it would be quite inappropriate to so construe the provision, that it would be unreasonable from the perspective of the community generally to expect doctors to come to police stations. He put to me that there was more at stake than the personal inconvenience to the doctors. Consideration had to be given to the potential for prejudice to patients requiring attention by the doctor at the hospital. Moreover, medical procedures are most appropriately carried out at hospitals. Those propositions seemed to me to be compelling, but it was not necessary to address them. That was because Mr Birrell did not argue for such an extreme position. He argued only that it was appropriate to read into s55(9A) an implication, as in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367 as to s53 of the Act, that the requirement to submit to allowing a blood sample to be taken must be reasonable, with **[9]** the matters of the time and place at which the sample was required to be taken having to be measured against the standard of what was reasonable in the circumstances. He then argued that, in the instant case, the requirement that the sample be taken at the hospital was unreasonable, given that the respondent was in a position of quasi-custody, particularly having regard to the delay between the time of the first preliminary blood test at 10.45 p.m., and the time of the taking of the blood sample at 00.10 a.m.

I have no difficulty in agreeing with Mr Birrell, as did Mr Just, that what was said by Ormiston J in *DPP v Webb* as to s53, is appropriately applied to s55(9A). However, I am unable to accept that the learned Magistrate would have erred unless he found that the requirement to allow a blood sample to be taken at the hospital, which requirement was made known to the respondent by the informant at 11.45 p.m., was unreasonable. Mr Birrell conceded that the position was tempered by the circumstance that the respondent had consented to go to the hospital. The position as against the respondent in this case is not as strong as against the respondent in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367, given that the consent followed the taking of the decision to require the taking of the sample at the hospital, and Mr Just conceded as much. Nevertheless, it seems to me that the consent was given readily, and that is consistent with the request being reasonable.

Apart from the matter of consent, it appears that within a period of about an hour, between when the respondent was first questioned to the time of the stating of the requirement, there was the time taken by two preliminary breath tests and three instrument tests, in addition to time taken **[10]** travelling from the place where the respondent was first questioned to the Mooroopna Police Station and then the Shepparton Police Station. Approximately twenty-five minutes elapsed from when the two men left the Shepparton Police Station until the blood sample was taken by Dr Howard. The times involved scarcely seem unreasonable. It appears that that was what the learned Magistrate thought when he referred dismissively to the submissions other than the one to which he acceded. I could not conclude that the learned Magistrate had no alternative but to find that the requirement was unreasonable.

I turn finally to the ruling of the learned Magistrate on the submission of Mr Birrell as to the construction to be placed upon the words "nominated by" in s55(9A). What is available to

me, as set out above, as to the Magistrate's reasons for ruling as he did, is somewhat limited. It appears that he was affected in coming to his conclusion by his recognition of the legal principle that the section had to be construed strictly, and by his finding of fact that the informant did not know Dr Howard before he attended at the hospital, and so was not in a position to ask for the doctor by name. Mr Birrell argued that, to satisfy the sub-section, a police officer's nomination of a doctor had to be express. While he conceded that the nomination did not have to be in writing, but could be made orally, he contended that it could not be implied and could not be made as to a member of a group, as a doctor at a named hospital. He submitted that it was essential that a particular doctor be named by the police **[11]** officer, and that that naming be made at the time that the decision to require the sampling was made by the police officer. He contended that Parliament was concerned with the whole process and not just with the matter of who made the decision.

Mr Just argued that the proper construction of the words "nominated by" in s55(9A) was not concerned with the process or method or degree of formality of the decision as to who would take the sample, but only with the question of who would make the decision. He submitted that the reason for using the words was solely to make it clear that only a police officer, and not a person in the position that the respondent was in, could make the decision as to which doctor would take the sample. He argued that the words did not require the naming of a specific person, and that it was enough to satisfy the "nominated by" requirement that a doctor be designated, chosen, selected or pointed out, whether or not any particular name was used. Mr Birrell argued that if Parliament had intended that "nominated by" was to be used interchangeably with "chosen by", the latter words would have been used in the sub-section.

I return to Mr Birrell's argument as to the matter of the time of the nomination. He submitted that the words should be construed on the basis that the time at which the nominating had to be done was at the time that the decision to take the blood test was made, and that it was therefore not appropriate to take the decision to test at one point of time, and the decision as to which doctor would carry out the test at a later point of time. One of the reasons advanced for taking that position as to time was that the person might want to object to the named doctor for reasons of one kind or another. I think **[12]** that the matter of potential objection to the nomination of a doctor seen either objectively or subjectively to be inappropriate could adequately be addressed in other ways. Another reason advanced was by reference to s55(10) to which I referred above, and to which both counsel took me to support their arguments. The sub-section, before amendment in 1994, read:

> "55(10) A person who is required under this section to furnish a sample of breath for analysis may request the person making the requirement to arrange for the taking in the presence of a member of the police force of a sample of that person's blood for analysis at that person's own expense by a legally qualified medical practitioner nominated by that person or the member of the police force at the request of that person."

Sub-section 55(10), before and after amendment, has contained the words "nominated by". After amendment, the only words appearing after "nominated by" were: "the member of the police force". Mr Birrell argued that, looking at the application of the sub-section before amendment, if the words "nominated by" carried no obligation to name a particular doctor, that would have left the police officer who was asked by a person to arrange for a sample to be taken by any doctor in an invidious position. Such a police officer may have no desire to see a blood sample taken, but is called on to choose a doctor, but without being given a name. On the other hand, as Mr Just pointed out, under s55(10) before amendment, there could be seen to be a potential for substantial prejudice for a person having to consider his position on whether to have a blood test if he was required to name the doctor at the time he decided to have a blood test by his own doctor upon pain of losing the right if he did not do so at that time. I do not find Mr **[13]** Birrell's submissions as to time at all persuasive, and I reject them.

Mr Birrell argued that, as the provisions required a person to provide self-incriminatory evidence, they should be interpreted strictly. He pointed to what was said in *Scott v Dunstone* [1963] VicRp 77; (1963) VR 579 at p581 by Sholl J, that: "... such provisions cut across the ordinary common law principle against self-incrimination, and should be strictly construed." I accept that position without question. However, giving a strict construction does not mean giving an artificially constricted meaning. I also accept that it is important to have regard to liberty or

fairness concerns which can and cannot be addressed by other safeguards in the system. Both counsel indicated that they were unable to find any case which appeared to bear closely on the question. Mr Birrell argued that Parliament ought to be taken to have had regard to the only previous decisions on the subject of what was meant by "nominated" which he was able to locate. He took me to what was said in *Tew v Harris* [1847] EngR 817; (1847) 11 QB 7; 116 ER 376, a decision quoted with approval by the High Court in *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* [1983] HCA 38; (1983) 153 CLR 455; (1983) 49 ALR 135; (1983) 57 ALJR 711 at p716. However, it seems to me that the word "nomination" was used there in the sense of "appointment" and in a context not at all similar to the context of concern to me. Both counsel took me to dictionary definitions. Mr Birrell argued that, given that they showed that the words nominate, nominated and the like were seen to have been derived from the Latin word "nominate" - to name, there was no justification in construing a statute for giving the words a broad meaning as a kind of synonym for "choose" without naming **[14]** the person chosen, as argued for by Mr Just. That submission is not without weight, but much depends on the context, a matter to which I will return.

I am of the opinion that it is important to have regard to the use of "nominated by" in s55(10). I was taken to what is recorded in *Hansard* as having been said at the time of the introduction of Act No 17 of 1994, when s55(10) was amended and s55(9A) was added. Counsel suggested that what was said in *Hansard* was not of any assistance, and I agree. Nevertheless, it is apparent that Parliament intended to change the position as to the important matter of who could make the decision as to the use of a doctor to take a sample.

Quite a different matter, and one to which quite a different level of importance attaches, is the matter of which doctor is to take the sample. I take the view that that matter is, in the scheme of these provisions, a relatively unimportant one. I am quite unable to accept that it was serious enough to require the degree of formality that Mr Birrell urged me to attach to that part of the process. I think that it would suffice if the police officer were to decide to use say the first doctor available at a hospital to take a sample. I think that that is particularly so, where there would usually be, as there was in the instant case, a relatively high degree of urgency associated with the obtaining of a sample. I am of the opinion that a high level of formality is not required in the making of a nomination, and that the making of a nomination can be implied from the circumstances. My view is that there is no need for the express naming of a specified doctor, and that, if a particular doctor is named, a particular formula of words is not needed. **[15]** It is clear from the sort of search which is made readily by computer that the words "nominated by" are used hundreds of times in the Victorian statutes. In some circumstances the nominating by one person of another, or by the person himself or herself can be merely the starting point in a process, as where a person is nominated as a candidate for an election. In other circumstances the process is short, and the nominating of one person by another is a decision which concludes the process. In the latter category the words "nominated by" are usually likely to be used interchangeably with "chosen by". The words "chosen by" are used dozens of times in the Victorian statutes, in circumstances which are not patently distinguishable from "nominated by".

Even if I am wrong in the view that I take on the construction of s55(9A), there is a further factor in the instant case which warrants the conclusion that, if a higher degree of formality is required than I have stated to be necessary, that higher degree has been satisfied in the instant case. That is because of the signing by the respondent of the consent form before the blood sample was taken. The clear inference from the evidence is that Dr Howard's name was in the form at the time that the respondent signed it. I do not accept Mr Birrell's argument that the consent form was irrelevant, because it was a form required by the hospital, and was not in any way related to the investigation and prosecution of the respondent.

I am satisfied that the learned Magistrate erred in construing s55(9A) as he did, and that that led to his erring in concluding that the nomination of Dr Howard by the informant was not carried out as required by the sub-section, and in dismissing the two charges. The appeal must be allowed. The order of the learned Magistrate must be set aside. The informations must be remitted for hearing at the Magistrates' Court at Shepparton in accordance with these reasons and otherwise according to law.

APPEARANCES: For the Appellant: Mr D Just, counsel. Solicitors: DPP. For the Respondent: Mr B Birrell. Solicitors: B Birrell, Shepparton.