62/87

SUPREME COURT OF VICTORIA

McDONALD v BELL

JH Phillips J

25 November 1987 — (1987) 6 MVR 113

MOTOR TRAFFIC – DRINK/DRIVING – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION RECORDED WITHIN THREE HOURS AFTER DRIVING – COURT REQUIRED TO ENTER IN REGISTER BLOOD/ ALCOHOL CONCENTRATION RECORDED – SUCH CONCENTRATION TO DETERMINE MINIMUM PERIOD OF DISQUALIFICATION – WHETHER COURT MAY ENTER A LESSER CONCENTRATION – WHETHER COURT MAY FIX A LESSER PERIOD OF DISQUALIFICATION – WHETHER COURT MAY RECEIVE EVIDENCE AS TO OVER-ESTIMATION BY BREATH ANALYSING INSTRUMENTS: *ROAD SAFETY ACT* 1986, SS49(1)(f), (4), (6), (7), 50(1), 53(1)(c), 55(1).

1. Where a court fixes the minimum period of disqualification for an offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act') the court is only to have regard to the blood/alcohol level as recorded by the breath analysing instrument. Accordingly, where a person's blood/alcohol level within three hours after driving was recorded by the breath analysing instrument as 0.145%, the court was in error in fixing a period of disqualification of 10 months. The minimum period should have been fixed at 14 months.

2. *Obiter*. In view of the statutory format and plain language of sections 49(5), (7) and 50 of the Act, a court in hearing a charge under s49(1)(f) should not receive evidence designed to show that the authorised breath analysing instruments used by the police habitually over-estimate to a degree.

JH PHILLIPS J: **[1]** This is the return of an order nisi, granted on 26 June 1987, to review a decision of the Magistrates' Court at Beechworth, with respect to an information in which the applicant was the informant and the respondent was the defendant. This information charged that the defendant at Beechworth on 31 March 1987, did, within three hours of driving a motor vehicle, furnish a sample of breath for analysis by breath analysing instrument pursuant to s55(1), the result of which analysis indicated a blood alcohol concentration expressed in grams per 100 millilitres of blood that was in excess of 0.05 per centum.

This information was laid pursuant to s49(1)(f) of the *Road Safety Act* 1986, which section provides—

> "A person is guilty of an offence if he or she within 3 hours after driving ... a motor vehicle furnishes a sample of breath for analysis by a **[2]** breath analysing instrument under section 55(1) and the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood."

After the laying of this information on 31 March 1987, notice was served on the applicant on 8 May 1987 in these terms—

> "Re Ronald Walter Bell. We refer to the certificate of operator of breath test of the abovenamed, No. 2602. Charges against the above-named are listed for hearing at the Magistrates' Court at Beechworth on the 21st day of May 1987 and we give you notice and request that you be present at the Court hearing of this matter."

It appears that this notice should have referred to Keith McDonald, rather than Ronald Walter Bell, but in any event, Sergeant Bell did give evidence on the last-mentioned date in the proceedings, the respondent having entered a plea of guilty to the afore-mentioned information, and to informations that, at Beechworth on 31 March 1987, 'being a driver of a vehicle on a carriageway, to wit, High Street, did drive such vehicle in reverse when it was unsafe to do so' and that, at Beechworth on 31 March 1987, 'being the driver of a motor car on a highway, to wit, High Street and where, owing to the presence of such motor car, an accident occurred whereby property

was damaged, did fail as soon as possible after the accident to give his name and address and the identifying-number of the motor car to the owner of such damaged property or some person representing such owner.'

[3] Sergeant Bell's evidence, as to the conduct of a breath analysis test on the respondent and as to the conduct of a breath analysis test on the respondent and as to the result being a reading of 0.145 per cent blood alcohol content, was not contested by the solicitor who appeared for the respondent. After the close of the prosecution case, the learned Magistrate allowed the respondent's solicitor to call him to give sworn evidence that, on 31 March 1987, he had been drinking at the Empire Hotel in Beechworth. He left the hotel at 7.10 pm. and arrived home at 7.20 pm. Apparently it was during this period that the respondent's vehicle was involved in an accident. After his arrival home, the respondent swore he had two stubbies of standard beer, a meal and a shower and had gone to bed at 8.00 pm., to be awakened by the arrival of the police at 9.15 pm. whereupon he was taken to the police station and the relevant breath test was conducted at 9.35 pm.

The learned Magistrate also allowed a Mr Keith James Munday, a pharmacist, to give evidence. After detailing his qualifications and experience – which were considerable – Mr Munday deposed that the consumption of the two stubbies of beer after the respondent had returned home would, in effect, reduce the respondent's reading at the time of his driving to 0.096 per cent blood alcohol content. Upon the conclusion of this evidence, it was submitted to the learned Magistrate that he was entitled to take into consideration, on the question of penalty, the blood alcohol content of the respondent at the time of his driving, rather than the result of analysis shown in the certificate (Exhibit 'A') being 0.145 per cent as **[4]** at 9.35 pm. The learned Magistrate agreed to do so but indicated that he would not be prepared to conclude by this process, that the respondent's blood alcohol content was lower than 0.1 per cent at the earlier time.

After a further plea for leniency, the learned Magistrate convicted the respondent on the information. He imposed a fine of $120 and ordered that all driver licences held by the respondent be cancelled and disqualified him from obtaining any licence for 10 months, whereupon the applicant obtained an order nisi to review upon the following grounds—

> "(A) The learned Magistrate erred in law in the construction which he placed on s49(1)(f) of the *Road Safety Act* 1986 and, in particular, in interpreting the section as creating an offence which was committed at the time of driving.
>
> (B) The learned Magistrate erred in law in that, on the evidence, no reasonable Magistrate could have concluded that the concentration of alcohol present in the blood of the defendant at the tine of testing was other than 0.146 per centum;
> (ii) as shown by the breath analysing instrument.
>
> (C) The learned Magistrate erred in law in failing to apply the provisions of s49(1)(f) of the *Road Safety Act* 1986 to the offence charged before him."

In this proceeding, Mr Nash of Queen's Counsel, for the applicant has submitted that, in effect, s49(1)(f) creates an offence of furnishing a sample of breath in circumstances where a method of analysis permitted under the Act shows that **[5]** more than the prescribed concentration of alcohol is present in the blood of the person tested. Mr Nash drew my attention to the provisions of s53(1)(c) of the Act, which read—

> "A member of the Police Force may at any time require any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident to undergo a preliminary breath test by a prescribed device."

Mr Nash also referred to s55(1)—

> "(1) If a person undergoes a preliminary breath test when required by a member of the police force under section 53 to do so and—
> the test in the opinion of the member or officer in whose presence it is made indicates that the person's blood contains alcohol in excess of the prescribed concentration of alcohol, the member of the police force ... may require the person (a) to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member

of the police force .... for the purpose of section 53 to a police station .... and to remain there until the person has furnished the sample of breath or until 3 hours after the driving or being in charge of the motor vehicle, whichever is sooner."

I infer that the procedure under those sections occurred in the instant case. **[6]** Mr Nash submitted that the evidence given by and on behalf of the respondent, as to his consumption of alcohol after he had driven and its effect, was inadmissible. He submitted further that, even if it could be calculated, the respondent's blood alcohol content reading at the time he drove was irrelevant to any issue before the Court, the only relevant reading being that at the time he took the test.

Mr Nash referred to s50(1)(b), which reads -

"(1) On conviction for an offence under section 49(1) the court—
(b) must, if the offender holds a driver licence, cancel that licence and,
whether or not the offender holds a driver licence, disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—
(c) in the case of a first offence against a section specified in column 1 of Schedule 1,"

(I interpolate here, the relevant offence is so specified)

"the period specified in column 3 of that Schedule in relation to that section; and

(2) For the purpose of subsection (1), in the case of an offence against section 49(1)(f)—
(a) the relevant period of disqualification for a first offence is to be ascertained by reference to the concentration of alcohol in the blood of the offender as specified in column 2 of Schedule 1."

(I again interpolate, this was a case of a first offence)

[7] The section allowed no discretion, so Mr Nash submitted, to the learned Magistrate in the matter of penalty so far as a period of disqualification was concerned and he contended the Magistrate should have by reference to the Schedule and having regard to the result of the test, fixed at least 14 months as the appropriate period of disqualification.

Mr Robertson, for the respondent, whose persistence on behalf of his client commends him to me, submitted that the evidence given by, and on behalf of, his client was both admissible and relevant and was not shut out by s49(6), which section renders inadmissible during the hearing of an information laid under s49(1), evidence as to the effect of consumption of alcohol on the respondent "for the purpose of establishing a defence to the charge". This evidence was led, Mr Robertson argued, not by way of "defence" but by way of mitigation of penalty. Mr Robertson further submitted that what he called the "time of culpability" for an offence under s49(1)(f) was the time when the respondent drove and it was open to the Magistrate to hear and act upon evidence which would establish the respondent's blood alcohol content at that time.

I note that s49(7)(b) requires a Court, on convicting a person for an offence under s49(1)(f), to cause to be entered in the records of the Court "the level of concentration of alcohol found to be recorded or shown by the breath analysing instrument". This subsection picks up the phrase "recorded or shown by the breath **[8]** analysing instrument" in s49(1)(f). It appears from the certificate of summary conviction or order filed herein that the learned Magistrate did not do this but, rather, he recorded "Finding, blood alcohol concentration 0.100 per cent at the time of driving at 7.15 pm." This finding is plainly reflected in the period of disqualification he imposed.

It should be noted that the provisions relating to cancellation of licence and disqualification in the Act follow directly after s49(7) and commence with the phrase "Section 50(1) on conviction for an offence under s49(1), the Court ..." *et cetera*. This statutory format and the plain language used persuade me that it is the intention of Parliament that, in fixing penalty the Court is only to have regard, so far as the minimum period of disqualification is concerned, to the "level of concentration of alcohol found to be recorded or shown by the breath analysing instrument" referred to in s49(7)(b), although a large variety of other considerations may be relevant as to the amount of a monetary penalty and to the extent, if any, the disqualification is to operate beyond the minimum term prescribed. Accordingly, I am satisfied the learned Magistrate erred in law and that the grounds of the order nisi are made out and that the order nisi should be made absolute.

Mr Robertson has submitted that, in the event of me reaching this view, I should remit the matter back to the Beechworth Magistrates' Court and Mr Nash did not really oppose this

suggestion. Mr Robertson wishes to argue, in that event, that the Magistrate should receive **[9]** evidence, assuming that it is available, that the authorised breath analysing instruments used by the police habitually over-estimate to a degree and that some allowance should be made by the learned Magistrate for this in assessing the "true level", as he put it, of concentration of alcohol at the time the respondent was tested. I am not minded to accede to this. It is a defence under the Act to the relevant charge for a defendant to prove that "the breath analysing instrument used was not on that occasion in proper working order or properly operated" (see s49(4)) and thus the whole basis for the result of an individual test might be overturned. But there is nothing in the Act which would expressly permit the receipt of the sort of evidence proposed and, in my opinion, the plain wording of s49(7)(b) conveys that such evidence should not be received.

For these reasons, I will vary the order of the Magistrates' Court at Beechworth, so that the period of disqualification of the respondent upon the information on which he was convicted and which is the subject of these proceedings is fixed at 14 months, this being the minimum period by the Act. I feel I should conclude this judgment by making the following observations. According to the affidavit of Sergeant Bell, the learned Magistrate in the court below described the relevant section of the Act as 'ludicrous'. Counsel for the Sergeant was content to refer to it as 'Draconian'. Every right-thinking person would support efforts by the Executive to stamp out alcohol-related driving offences and, doubtless, s49(1)(f) is aimed at **[10]** those drivers who, out of a sense of guilt and in an attempt to escape prosecution, give to investigating police officers false accounts as to the circumstances of when and where they have consumed alcohol. If s49(1)(f) succeeds in bringing about the conviction and punishment of such drivers, so be it. But its application could also result in the conviction and punishment of completely innocent citizens, who in truth have not consumed a drop of alcohol before driving their motor cars. It may be that the Act places an altogether too heavy burden on police officers who must exercise a discretion to prosecute. I say at once that I have not heard, nor read, of any misuse of such discretion in this connection and the present case is certainly not an instance of it. It may be, however, that, in the interests of the police, as well as the public, the discretion to prosecute in s49(1)(f) cases, should be vested, at least as a matter of practice, in the Director of Public Prosecutions.
