24/01; [2000] VSC 407

SUPREME COURT OF VICTORIA

DPP v CONNOR

O'Bryan J

3, 6 October 2000 — (2000) 32 MVR 479; (2000) 117 A Crim R 319

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED WITH A PRESCRIBED DEVICE – DISPLAY ON DEVICE SHOWED 0.00 READING PRIOR TO USE ON DEFENDANT – POLICE OFFICER UNABLE TO READ THIRD DECIMAL NUMERAL – INSTRUCTION CARD AND POLICE MANUAL REQUIRE '000' PRIOR TO USE – EFFECT OF INSTRUCTIONS – WHETHER ANY STATUTORY BASIS – FULL BREATH TEST UNDERTAKEN WITH BAC 0.088 - CHARGES UNDER *ROAD SAFETY ACT* 1986 S49(1)(b) and (f) DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 SS49(1)(b), (f), 53(1).

C. was intercepted driving a motor car. A police officer administered a preliminary breath test using a prescribed device. The officer said that the display on the device showed 0.00 prior to its use on C. The officer said he could not see the third decimal numeral because it was obscured by the leather container in which the device was housed. C. underwent a full breath test which gave a reading of 0.088BAC. C. was later charged with offences against the *Road Safety Act* 1986 ('Act'), s49(1)(b) and (f). At the hearing of the charges, the police officer said he was satisfied the prescribed device was operating correctly but admitted that the third decimal numeral could have registered above zero. The police officer was referred to two editions of the Police Drink Driving Manual for the device the first of which indicated that the device should read less than '0.005' prior to use, the second which indicated '0.00%'. The magistrate was persuaded by C. that the preliminary breath test from which the police officer formed an opinion was flawed because the prosecution did not adduce evidence that the display on the device did not show 0.000 before the test was administered. The magistrate then dismissed both charges. Upon appeal—

HELD: Appeal allowed. Orders of dismissal set aside. Convictions imposed on both charges. Remitted to the Magistrates' Court for plea and sentence.

1. Although charges laid under s49(1)(b) and (f) of the Act might depend for their proof upon the same set of facts, they are nonetheless discretely different offences which involve proof of different ingredients. A charge laid under s49(1)(b) has only two necessary ingredients: the first ingredient to be proved is that the person drove or was in charge of a motor vehicle. The second ingredient to be proved is that the person furnished a sample of breath for analysis which was more than the prescribed concentration of alcohol present in the blood. Accordingly, as the prosecution was not required to prove that a preliminary breath test had been undergone pursuant to s53(1) for the purposes of the s49(1((b) charge, the magistrate was in error in dismissing the charge.

2. There was no evidence to show that the omission by the police officer to read the third decimal point on the prescribed device affected the result of the test. No expert or scientific evidence was given enabling the magistrate to determine the consequence of a departure from the manufacturer's procedures. In any event, the manufacturer's procedures had no legislative import similar to that enjoyed by the regulations made under the Act. Had the evidence impugned the preliminary breath test, it would not follow necessarily that the charge laid under s49(1)(f) must fail. It was still necessary for the magistrate to determine why the result was unreliable. If the conduct of the member who conducted the test resulted from a mistake and not from deliberate or reckless disregard of the law, the evidence may have been admitted according to the principles in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.

O'BRYAN J:

1. This is an appeal from a final order made in the Magistrates' Court at Ringwood following a hearing in that court on 1 May 2000. The respondent was charged with two offences under s49 of the *Road Safety Act* 1986.

2. The first charge was laid under s49(1)(b):

> "That on 21 March 1999 at Mount Evelyn (he) did drive a motor vehicle while more than the prescribed concentration of alcohol being 0.05 grams per 100 millilitres of blood was present in his blood."

3. The second charge was laid under s49(1)(f):

> "That on 21 March 1999 at Mount Evelyn (he) did within 3 hours of driving a motor vehicle furnish a sample of breath for analysis by a breach analysing instrument pursuant to s55(1) of the *Road Safety Act* 1986 and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol being 0.05% grams per 100 millilitres of blood was present and the concentration of alcohol indicated by the analysis to be present in his blood was not due solely to the consumption of alcohol after driving the motor vehicle."

4. Part 5 of the Act is concerned with offences involving alcohol or other drugs. By s53(1) a member of the police force may at any time require a person to undergo a preliminary breath test by a prescribed device if the person is in one of the categories specified in sub-paragraphs (a) to (d). Sub-section (3) of s53 sets out what a person is required to do, if required to undergo a preliminary breath test.

5. By s55(1) if a person undergoes a preliminary breath test when required to do so and the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol, the member may require the person to furnish a sample of breath for analysis by a breath analysing instrument. By sub-section (4) after a sample of a person's breath is analysed, the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing prescribed particulars of the concentration of alcohol indicated by the analysis to be present in the person's blood.

6. Section 58(2) is an evidentiary provision which makes a certificate given to a person pursuant to s55(4) conclusive evidence of facts and matters contained in it for the purposes of offences against s49(1) of the Act.

7. Section 49(1) creates a number of offences involving alcohol and other drugs connected with driving a motor vehicle or being in charge of a motor vehicle.

8. The charges laid against the respondent are specified in sub-clauses (b) and (f) of sub-section 1 of s49. The two charges have different ingredients which will be referred to later.

9. Two witnesses were called for the prosecution and a statutory certificate showing that more than the prescribed concentration of alcohol was present in the respondent's blood was tendered in evidence without objection. The certificate showed .088 grams of alcohol per 100 millilitres of blood at 08.20 hours. The respondent did not give evidence or adduce evidence. He relied upon a submission by his counsel that both charges should be dismissed.

10. The magistrate upheld the submission and dismissed each charge. He ordered the Chief Commissioner of Police to pay the costs of the respondent which were fixed at $2,600.

11. On 30 May 2000 Master Wheeler made an order that the questions of law raised by the appeal are as follows:

> (a) Did the learned magistrate err in holding that there was no case to answer on the basis that the preliminary Breath Test Device had not read to the third decimal place?
>
> (b) Did the learned magistrate err in holding that there was no case to answer having received into evidence, the certificate from a Breach analysing instrument (Ex MR2)

12. When the appeal hearing commenced Mr Ryan of counsel for the appellant sought amendment of each ground of appeal. He pointed out that the submission made in the court below was made after the respondent elected not to give evidence and the hearing was completed. The questions of law were amended by deleting the words "in holding" there was no case to answer" in each question and substituting "in dismissing the charges".

13. The relevant facts are not in dispute. On 21 March 1999, two police members stationed at Lilydale police station were on duty in a police vehicle at 7.45am at a radar site in Clegg Road, Mt Evelyn, when they intercepted a car driven by the respondent to warn him about his speed. After speaking to the respondent, the members smelt intoxicating liquor and observed that the respondent's clothing was in disarray. A decision was made to require the respondent to undergo a preliminary breath test by a prescribed device pursuant to s53(1) of the *Road Safety Act*. Before

administering the preliminary breath test, the respondent was asked when he had his last drink. He replied: "at 2 or 2.30 am".

14. A prescribed device, the Lion Alcolmeter S-D2, was produced and prepared for use by Senior Constable Vains. The set button was depressed and held down for approximately 10 seconds to ensure that the liquid crystal display (LCD) readout showed 0.00 reading. When the LCD showed 0.00 the set button was released and reset. The respondent then underwent a preliminary breath test. The test, in the opinion of Senior Constable Vains, revealed that the respondent's blood contained alcohol. The concentration of alcohol was not mentioned.

15. Pursuant to s55(1) of the *Road Safety Act* 1986 the police members then requested the respondent to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose required him to accompany them to Lilydale police station. The respondent complied. At the police station he furnished a sample of his breath for analysis by a prescribed breath analysing instrument. The result of the test showed the reading of 0.088 grams of alcohol per 100 millilitres of blood referred to earlier, more than the prescribed concentration of alcohol.

16. No challenge was made to the reading of 0.088 by the breath analysing instrument at the Ringwood Court. A challenge was made to the way the prescribed device for the preliminary breath test was prepared for use at the road site where the respondent's car was intercepted. Under cross examination Senior Constable Vains conceded that when he read the LCD display he was only able to read 0.00 because a third decimal numeral was obscured by the leather container in which the device was housed. Senior Constable Vains told the court that he was satisfied the device was operating correctly from his observations, but admitted the third decimal numeral could have registered above zero.

17. He was cross-examined by Mr Lawrie who appeared for the respondent in the court below and in this court about the procedure for conducting a preliminary breath test described in the Lion Alcolmeter S-D2 instruction card and instruction manual on p227 of The Police Drink Driving Digest and Manual. The operation checklist describes three "ready check" steps:

> (a) Press 'read' button and hold down for at least 10 seconds
>
> (b) Observe display. This should read '000'. If '0005' or higher is shown depress and lock 'set' button, wait 2 minutes, repeat ready check.
>
> (c) If the first digit shows L, the battery should be replaced."

18. In re-examination the witness was asked to read the Police Drink Driving Digest and Manual - 3rd Edition September 1999 at p223 which described a "checklist for the prosecutor and informant". It included details for the operation of preliminary breath testing devices, including the Lion Alcolmeter S-D2. In paragraph 40(b)(v): "How to operate the preliminary breath testing device — a short, acceptable explanation is as follows;

> 1. Check 'set' button depressed.
> 2. Press 'read' button — hold down for 10 seconds and ensure the 0.00% reading.
> 3. Check battery not indicating low.
> 4. Re-set 'set' button.

19. The notable difference between the two pages is that the operator must ensure a reading of 0.00%, as per page 223, and a reading of less than 0.005, as per page 227.

20. Neither the instructions on p223 nor on p227 have any statutory basis. Section 95(1) provides a regulations making power to give effect to the Act including, but not limited to, the matters and things specified in Schedule 2. Schedule 2 specifies in 73 paragraphs "Subject Matter for Regulations". Under a heading: "Alcohol" paragraph 50 provides:

> "Devices for the purposes of Section 53; the handling storage, use and maintenance of those devices; the precautions to be taken and the procedure and methods to be employed in the use of those devices for ensuring that they give accurate and reliable results".

21. No regulations have been made by the Governor in Council under paragraph 50. In *Road Safety (General) Regulations* 1999 (Statutory Rule No. 27 of 1999), regulation 201 prescribes preliminary breath test devices, one of them being the Lion Alcolmeter S-D2. The regulations do not regulate procedures to be followed by the device operator in preparing the device before the device operator administers a preliminary breath test.

22. The witnesses for the prosecution were not asked to say what effect, if any, on the test result, would be produced if the LCD displayed between 0.005 and 0.009 at the check test stage.

23. The matter of importance, for the purposes of s55 is the opinion of the member in whose presence the preliminary breath test is made. If the test indicates that the person's blood contains alcohol, the member may require the person to furnish a sample of breath for analysis by a breath analysing instrument. The legislation does not prescribe how much alcohol in the blood is required before the member may require a further test, only that in the opinion of the member the person's blood contains alcohol.

24. The learned Magistrate was persuaded by counsel for the respondent that the preliminary breath test result from which Senior Constable Vains formed an opinion that the respondent's blood contained alcohol was flawed because the prosecution did not adduce evidence that the LCD did not show 0.000 before the test was administered.

25. He dismissed both charges, apparently without adverting to the fact that the charge laid under s49(1)(b) did not have the same elements as the charge laid under s49(1)(f).

26. In *Smith v Van Maanen* (1991) 14 MVR 365, at p371, Tadgell J identified necessary ingredients of a s49(1)(f) charge. The second ingredient to be proved is that a preliminary breath test has been undergone pursuant to sub-s(1) of s53. A charge laid under s49(1)(b) on the other hand, has only two necessary ingredients. The first ingredient to be proved is that a person drives a motor vehicle or is in charge of a motor vehicle. The second ingredient to be proved is that the person has furnished a sample of breath for analysis and that the result of analysis of the sample as recorded by a breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in their blood.

27. Therefore, as the prosecution was not required to prove that a preliminary breath test had been undergone pursuant to s53(1) for the purposes of the s49(1)(b) charge the Magistrate erred in dismissing that charge.

28. The charge laid under s49(1)(f) depended for its proof upon the same set of facts as the charge laid under s49(1)(b). For convenience, the two charges were heard together. Had the Magistrate found both charges proved, he would not have imposed a penalty on each charge.

29. In *DPP v Foster* and *DPP v Bajram* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, Winneke P, at VR 660 held that although charges laid under s49(1)(b) and s49(1)(f) might depend for their proof upon the same set of facts, they are nonetheless discretely different offences which involve proof of different ingredients.

30. Because of the public importance of the issue raised by this appeal in relation to a s49(1)(f) charge, I shall proceed to determine the issue although it may not be strictly necessary to do so as the respondent must be convicted on the charge laid under s49(1)(b) and will not undergo a double sanction.

31. A transcript of the reasons given by the magistrate for dismissing the charges does not reveal clearly the basis upon which he did so. Mr Ryan suggested that the Magistrate decided it is elemental to both charges that the prosecution adduces evidence as to the reading on the preliminary breath test device to three decimal places. Put another way, that proof was required that before the device was "set" the LCD read not higher than 0.004 and, in the absence of such proof, the test was flawed and the requisite opinion for the purposes of s55(1)(a) was either inadmissible or so unreliable that it could not be used to indicate that the respondent's blood contained alcohol.

32. I do not wish to put words into the learned Magistrate's mouth, but it appears to me that his reasons for dismissing the charges had to stem from the process set out above.

33. The foundation for the submission by counsel for the respondent in the court below was that the manufacturer's manual of procedures was not obeyed to the letter. On one view, Senior Constable Vains did follow the procedures in the manual at p223. Which brings me back to the important point of the argument. What was the significance of not following the manufacturer's procedures set out at p227 in the manual? The respondent did not adduce evidence that the omission to read the third decimal point, or that failure to ensure that the third decimal point did not register above the numeral 4 affected the result of the test.

34. The Magistrate appears to have drawn two inferences neither of which was reasonably open, in my opinion. First, that the third decimal point could have read as high as 9. In theory it could have, but no evidence entitled him to infer what it read. Second, that if it read 5, or above 5, the member in whose presence the test was conducted could not form an opinion that the respondent's blood contained alcohol. The leap made by the Magistrate was a quantum leap not justified by the evidence.

35. Unlike the position in *Ozbinay v Crowley* (1993) 17 MVR 176 no expert or scientific evidence was given in the present case enabling the Magistrate to determine the consequence of a departure from the manufacturer's procedures. But, in any event, the manufacturer's procedures have no legislative import similar to that enjoyed by the regulations made under the Act. The respondent did not show that the preliminary breath test result was flawed in a way that prevented Senior Constable Vains forming the requisite opinion before he required the respondent to undertake a further breath test.

36. Had the evidence impugned the preliminary breath test, it would not follow necessarily that the charge laid under s49(1)(f) must fail. It would still be necessary for the Magistrate to determine why the result was unreliable. If the conduct of the member who conducted the test resulted from a mistake and not from deliberate or reckless disregard of the law, the evidence may have been admitted according to the principles in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. In the absence of a law requiring a mandatory procedure to be followed, it would be surprising were a Magistrate not to accept the evidence. After all, the preliminary breath test requirement is preliminary to the breath analysing instrument test. The result of the first test does not have to be disclosed to the respondent, it is simply the foundation for the opinion of the member that a person's blood contains alcohol.

37. I am of the opinion that the learned Magistrate erred in dismissing the charge laid under s49(1)(f). Each question of law as amended should be answered in the affirmative.

38. The orders of the court are:

1. That the orders made in the Magistrates' Court at Ringwood on 1 May 2000 in this matter are set aside.

2. That in lieu of the order dismissing both charges the court will record a conviction against each charge, unless the informant elects to withdraw one charge.

3. That this proceeding be remitted to the Magistrates' Court at Ringwood before the same Magistrate for plea and sentence.

4. That the respondent pay the costs of the Appellant in this court.

APPEARANCES: For the appellant DPP: Mr C Ryan, counsel. Peter Wood, Solicitor for Public Prosecutions. For the respondent Connor: Mr P Lawrie, counsel. Mahonys, solicitors.
