

46/90

SUPREME COURT OF VICTORIA — APPEAL DIVISION

BRACKEN v O'SULLIVAN

Murphy, Fullagar and Hampel JJ

15 October, 13 November 1990

[1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91

MOTOR TRAFFIC – DRINK/DRIVING – CHARGE LAID PURSUANT TO ROAD SAFETY ACT S49(1)(f) – BREATHALYZER OPERATOR NOT CALLED AS A WITNESS – WHETHER OPERATOR'S CERTIFICATE ADMISSIBLE – WHETHER EVIDENTIARY PROVISIONS APPLY TO A CHARGE UNDER S49(1)(f): ROAD SAFETY ACT 1986, SS49(1), 58(1)(2).

Section 49(1)(f) of the *Road Safety Act 1986* ('Act') is concerned not with a person's actual blood/alcohol concentration but with the time at which a person's sample of breath is analysed and the result of such analysis as recorded by the operator. The evidentiary provisions of s58 of the Act which deal with "the question as to the presence or the concentration of alcohol in the blood of any person" do not apply to a charge laid under s49(1)(f) of the Act. Accordingly, on such a charge, a copy of the certificate of the operator is not admissible in evidence.

[Note: See now *Road Safety (Certificates) Act 1990*, proclaimed on 30 November, 1990 to operate retrospectively from 1 March 1987. Ed.]

HAMPEL J: (with whom Murphy and Fullagar JJ agreed) [1] The Court has before it a question reserved for its determination by Judge Keon-Cohen on the basis of facts stated by him pursuant to s85(1) of the *Magistrates' Courts Act 1971*. The case was referred to the Full Court by the Chief Justice under sub-section (2) of s85.

Mr Bracken, who was a driver of a motor car was intercepted by Ms O'Sullivan, a police woman, and was subsequently charged with an offence under s49(1)(f) of the *Road Safety Act 1986*. That section provided:

"49(1) A person is guilty of an offence if he or she—
(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a 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;"

Mr Bracken was convicted in his absence by the Magistrates' Court, fined \$750 with \$18.00 costs and had his driver's licence cancelled for sixteen months. He appealed to the County Court against the conviction and sentence. The facts stated by the learned Judge reveal that Mr Bracken was required by the police officer first to undergo a preliminary breath test and later a breathalyser test which was carried out within three hours of the driving. A certificate signed by the breathalyser operator was duly given to Mr Bracken. In those respects the provisions of the Act had been complied with.

During the hearing of the appeal counsel for the respondent sought, as part of the prosecution case, to tender the breathalyser operator's certificate and the relevant [2] regulations. This was objected to and the learned Judge upheld the objection.

Under the heading "Evidentiary Provisions - Breath Tests", the 1986 *Road Safety Act* by s58 provided as follows:

"58(1) If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood of any person

at any time is relevant—

- (a) on a trial for manslaughter or for negligently causing serious injury arising out of the driving of a motor vehicle; or
- (b) on a trial or hearing for an offence against section 319(1) of the *Crimes Act* 1958; or
- (c) on a hearing for an offence against section 49(1) of this Act—

then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under section 55 and the concentration of alcohol so indicated is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument.

(2) A document purporting to be a copy of a certificate given in accordance with section 55(4) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments under section 55 is admissible in evidence in any proceedings referred to in sub-section (1) and is conclusive proof of the facts and matters contained in it, unless the accused person gives notice in writing to the informant not less than 7 days before the hearing that he or she requires the person giving the certificate to be called as a witness."

The appellant had not given notice in writing within seven days before the hearing that he required the person who gave him the breath test certificate to be called [3] as a witness and the breath test operator was not called. At the conclusion of the respondent's case His Honour upheld a submission that there was no case for the appellant to answer because the certificate was not admissible evidence in the proceedings for an offence under s49(1)(f) and there was no other evidence to support the charge. It was in these circumstances that Judge Keon-Cohen, at the request of the respondent, stated the facts and formulated the question which was subsequently referred to the Full Court. It is in the following terms:

"Is a document purporting to be a copy of the certificate within the terms of s58(2) of the *Road Safety Act* 1986 admissible as conclusive proof of the facts and matters contained in it by virtue of that sub-section in proof of a charge under s49(1)(f) of the Act in the absence of a requirement by the accused in accordance with that sub-section of that Act that the person giving the certificate be called as a witness?"

Before answering this question it is necessary to refer to some of the other provisions of s49 as it then was. The section created a number of offences involving alcohol or other drugs. Sub-section (1)(a) maintained the traditional offence of driving under the influence of liquor or a drug to such an extent as to be incapable of having proper control of a motor vehicle. A conviction for that offence did not depend on the proof of any particular level of concentration of alcohol in the defendant's blood. The offence created by subsection 1(b) was that of driving or being in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in the blood. Sub-sections 1(c) (d) and (e) dealt with refusals to undergo a preliminary breath test, to stop at a breath test station and to furnish a breath [4] sample. Sub-section 1(g) was concerned with the analysis of a blood sample. Sub-section 1(f), with which this case is concerned, created an offence which was different in its nature from that created by sub-section 1(b). While the latter related, in effect, to a person having more than .05 per cent of alcohol in the blood when driving or being in charge of a motor vehicle, the former was concerned solely with having that excess recorded on a breath analysing instrument within three hours after driving. Thus the offence depended simply on a particular reading being recorded as a result of a test. (See *Meeking v Crisp & Anor* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1). The offence was concerned with the time at which the sample of breath was analysed and with the result of such an analysis as recorded by the operator. (See *Miles v Gilmore* [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149). The actual concentration of alcohol in the blood was irrelevant for the purpose of a charge under s49(1)(f). (See observations by Gray J *Addicoat v Dillon* (unreported 8/8/1989). Sub-section (6) of s49 rendered inadmissible, for the purpose of establishing a defence to the charge under sub-section 1(f), evidence as to the effect of the consumption of alcohol on the defendant. The only defence open to a defendant was specifically provided for in sub-section (4) and depended on the defendant being able to prove that the breath analysing instrument used was not, on that occasion, in proper working order or properly operated.

After considering the provisions of Part 5 of the *Road Safety Act* 1986 and the relevant authorities, some of which I have cited, His Honour concluded that the certificate [5] contemplated

by s58(2) was not admissible in proof of an offence created by s49(1)(f) despite the failure to give notice requiring the operator to attend as a witness because the offence sought to be proved was outside the ambit of s58(1). In my respectful opinion he was correct.

In my view, as an enabling evidentiary provision in respect of breath tests, s58 must be read as a whole. Subsection (1) makes admissible evidence of the concentration of alcohol in a person's blood as indicated by a breathalyser as evidence of the actual concentration present in the blood at the time when the breath is analysed by the instrument. This is however limited to cases where the question whether a person is under the influence of intoxicating liquor or the question of the concentration of alcohol in the blood is relevant to the proceedings set out in sub paragraphs (a) (b) and (c). Sub-section (2) specifically refers to the proceedings referred to in sub-section (1) and goes further by enabling a copy of a certificate given in accordance with the s55(4) to be conclusive proof of what is contained in it. Such use of the copy certificate does not extend to cases where notice is given requiring the person who gave the certificate to be called as a witness.

What then is the effect in sub-section (2) of the words "in any proceedings referred to in sub-section (1)"? It was submitted before us that this reference was merely a convenient shorthand way by which sub-section (2) encompassed all the proceedings mentioned in (a) (b) and (c) of subsection (1) without the pre-condition as to relevance imposed in the opening lines of that sub-section. It was submitted [6] therefore that as sub-paragraph (c) refers to a hearing for an offence against section 49(1) this includes an offence under 49(1)(f) and so the copy certificate is admissible as no notice was given by the appellant.

In my opinion this can not be so. Sub-section (2), as part of the structure of s58, makes it possible to prove by a copy of a certificate, that which sub-section (1) enables to be proved in the specified proceedings if and only if the question of the extent to which a person is under the influence or the question of the presence of alcohol are relevant to those proceedings. As to some offences created by s49(1) those questions are relevant, namely offences under s49(1)(a) and (b). Those questions are however not relevant to the proof of an offence under s49(1)(f) and therefore the reference in section 58(2) to "proceedings referred to in subsection (1)" can not be a reference in sub-paragraph (c) to an offence under s49(1)(f). It follows in my opinion that the question based on the facts stated must be answered in the negative.

Solicitors for the appellant: CV McKay and Co.

Solicitor for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.