

40/09; [2009] VSCA 286

SUPREME COURT OF VICTORIA — COURT OF APPEAL

TERRY v JOHNSON & ANOR

Buchanan and Mandie JJA and Byrne AJA

28 October, 9 December 2009 — (2009) 198 A Crim R 128

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT BREATH TEST – INSTRUMENT MALFUNCTIONED AND FAILED TO PRINT THE CERTIFICATE AUTOMATICALLY – CERTIFICATE MANUALLY PRODUCED – READING 0.127% BAC – REQUEST BY DRIVER FOR SECOND TEST REFUSED BY OPERATOR – DRIVER INFORMED THAT HE COULD REQUEST A BLOOD TEST – DRIVER ALLEGEDLY TOLD BY OPERATOR THAT A BLOOD TEST COULD TAKE ALL NIGHT TO ARRANGE AND COULD PRODUCE A HIGHER READING – NO BLOOD TEST TAKEN – DRIVER CHARGED AND SUBSEQUENTLY CONVICTED – APPEAL TO COUNTY COURT UNSUCCESSFUL – OPERATOR NOT CALLED AS A WITNESS IN EITHER COURT PROCEEDINGS – DECISION IN *DPP v MOORE* [2003] VSCA 90; [2003] 6 VR 430; (2003) 39 MVR 323 CONSIDERED – WHETHER DRIVER PREJUDICED BY NOT REQUESTING A BLOOD TEST – WHETHER BLOOD TEST WOULD HAVE ASSISTED DRIVER IN HIS DEFENCE – WHETHER EVIDENCE OF THE BREATH ANALYSIS CERTIFICATE SHOULD HAVE BEEN EXCLUDED: ROAD SAFETY ACT 1986, S49(1)(f).

T. was intercepted whilst driving his motor vehicle and underwent a breath test. Before the results of the test were automatically printed from the instrument there was a mechanical problem and it became necessary for the instrument operator to manually produce a certificate which showed a reading of 0.127% BAC. T. claimed that he queried the malfunction with the operator and was told that he could request a blood test. T. said that the operator stated that it could take all night to arrange the blood test and that blood test results are "always higher". T. said that having a blood test would be "futile" and the operator effectively "talked him out of it". At the subsequent hearings, the certificate of the instrument was admitted into evidence, the operator was not called to give evidence and T. was convicted. Appeals to the County Court and a Judge of the Supreme Court were unsuccessful. Upon appeal to the Court of Appeal—

HELD: Appeal allowed. Conviction quashed. *Terry v Johnson* MC25/2008 overruled.

1. The authorities establish that where a defendant has suffered any unfairness or unlawfulness, a Magistrate has a discretion whether to accept or reject the breath analysis evidence. The Magistrate must consider the competing public requirements of the public need to bring to conviction those who commit criminal offences with the public interest in the protection of the individual from unlawful and unfair treatment. Where a Magistrate found that a driver had acted on advice from a police officer which denied him evidence which could possibly have defeated the charge, the subsequent conviction was "obtained at too high a price".

R v Ireland [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263;
DPP v Moore [2003] VSCA 90; [2003] 6 VR 430; (2003) 39 MVR 323; and
Nolan v Rhodes [1982] 32 SASR 207, applied.

2. The County Court judge in the present case considered that the magnitude of the breath test reading, 0.127%, in comparison to the permitted 0.05%, was such that T. could not have been assisted by a blood test reading. Implicit in this was the judge's assumptions that the blood test would have been unlikely to show a blood alcohol content to be less than 0.05% and that, further, the recorded breath test reading was accurate, or approximately so. There was in fact no evidence to support either assumption.

3. A relevant purpose of obtaining the blood test reading was to verify or not the accuracy of the breath test reading. T. was charged with an offence contrary to s49(1)(f) of the *Road Safety Act* 1986 which depended upon a result of analysis as recorded or shown by the breath analysing instrument of breath sample taken within three hours after driving. If T. had pursued his right to have a blood test it may be that the reading would have been less than 0.05%. This would have provided a powerful basis for concluding that the breath analysis instrument was not in proper working order or properly operated, giving rise to a statutory defence to the charge based on the breath test certificate.

4. The discretion to exclude evidence on the *Bunning v Cross* principle requires T. to satisfy this court that the application of the balancing exercise referred to in *Ireland's case* must favour exclusion. In the present case, the weight to be given to the fact that the misconduct of the officer caused T. to forego an important right, is established by the authorities. The County Court Judge appeared to discount the significance of this consequence by her conclusion based on assumptions which were unwarranted. Furthermore, the accuracy of the breath test reading was significant not

only for the purposes of determining whether T. was guilty of the offence charged, but also with respect to the imposition of the appropriate fine and licence suspension order in the event that he was convicted.

5. In the circumstances, a judge properly applying the *Bunning v Cross* principle to the facts in evidence, must inevitably have exercised the discretion to exclude the evidence of the breath analysis certificate. In failing to do so, the judge's discretion miscarried.

BUCHANAN JA:

1. I agree with Byrne AJA, for the reasons he has stated, that the appeal should be allowed and the conviction entered below quashed.

2. The County Court judge appears to have thought that the purpose of a blood test is to disclose the percentage of alcohol in the accused's blood more accurately than a breath test or give the accused the benefit of a slightly different reading if the result of a blood test diverges from the result of a breath test. Accordingly, a high reading resulting from a breath test meant that the appellant was not denied a potential benefit when he was dissuaded from undergoing a blood test. Her Honour's attitude could only be explained by an assumption that the breath test result was accurate.

3. In my opinion the assumption was misplaced. There was no evidence that the result of the breath test did accurately record the percentage of alcohol in the appellant's blood. Her Honour could only speculate that a blood test would produce a like result. She could not know whether the blood test might disclose a reading of less than 0.05%. In this regard, it is, I think, relevant that there was evidence that the breath test machine malfunctioned and there was no evidence that the fault was limited to the machine's printing function. There was evidence that the appellant had been drinking beer, but there was no evidence of the quantity he consumed.

4. Further, different periods of disqualification of a driver's licence are required according to whether the concentration of alcohol in the accused's blood in grams per 100 millilitres of blood is more or less than increments of 0.01%, so that a relatively small discrepancy between the results of a breath test and a blood test will determine the level of punishment.

MANDIE JA:

5. I agree for the reasons stated by Byrne AJA that this appeal should be allowed and the conviction quashed. I would also endorse the additional reasons stated by Buchanan JA.

BYRNE AJA:

6. This case comes before this court after a long journey. On 27 November 2003 the appellant, Adrian John Terry, was intercepted when driving a car in Heidelberg. After providing a preliminary sample of breath he was taken to the Heidelberg Police Station. There he furnished a sample of his breath which was analysed as showing a blood alcohol content of 0.127%. He was duly charged with two offences:

- driving with a blood alcohol content of more than 0.05%, contrary to s49(1)(b) of the *Road Safety Act 1986*;
- furnishing within three hours of driving a sample of breath which when analysed showed a blood alcohol content of more than 0.05%, contrary to s49(1)(f)

7. These charges were heard nearly 19 months later on 10 June 2005 in the Magistrates' Court at Heidelberg. Mr Terry pleaded not guilty to both charges but was convicted of the s49(1)(f) charge. The other charge was struck out. He was fined \$1,500 and ordered to pay costs. His licence was cancelled and he was disqualified from obtaining a licence for 24 months. He appealed to the County Court.

8. The appeal by way of rehearing came on for hearing in the County Court some 17 months later, on 17 November 2006. The judge dismissed the appeal. She convicted Mr Terry of the s49(1)(f) offence and imposed the same penalty and consequential orders.

9. By originating motion filed on 7 December 2006 Mr Terry sought relief in the nature of

certiorari seeking to set aside the County Court conviction. This application was heard 17 months later on 2 April 2008. The primary judge dismissed Mr Terry's application. Mr Terry appeals from this dismissal by notice of appeal filed on 21 May 2008.

10. There was only one point argued before the primary judge and before this court on the appeal. It was that the order of the County Court judge was affected by error of law on the face of the record inasmuch as her Honour declined to refuse to accept in evidence Ex G, the certificate of breath analysis made at 3.09 am on 27 November 2003. The tender was objected to on the ground that the document came into existence in circumstances of impropriety so that it should be rejected upon the application of the *Bunning v Cross*^[1] discretion or the discretion to exclude evidence obtained unfairly.

11. The circumstances giving rise to this contention, as accepted or assumed by the primary judge, may be shortly stated. In his affidavit of 22 August 2007 Mr Terry gives his account of the evidence-in-chief which he gave to the County Court. It was that he was asked by the breath test operator, Senior Constable Warr, at the police station to provide a sample of his breath some time after he was intercepted at 2.30 am in Heidelberg on Thursday, 27 November 2003. Mr Terry's affidavit continues:

(g) I then gave evidence that after I blew into the instrument for some time, Senior Constable Warr told me to stop blowing and to step away from the instrument. I did as I was instructed. The instrument made a whirring noise for some time, then all of a sudden it made a loud rasping noises like metal grinding on metal, and then I could hear what appeared to be the sound of something being crushed or crunched;

(h) I then gave certain evidence that upon hearing these sounds, Senior Constable Warr appeared to be very concerned and he commenced doing something to the instrument, I do not know what that was. However, he said words to Constable Sontag to the effect of 'something's wrong with the instrument, take him back to the interview room';

(i) I then gave evidence that Constable Sontag took me back to the interview room and left me there on my own for some time. After a period of time, Senior Constable Warr came into the interview room, told me the result of the analysis and gave me the certificate in Exhibit G. He then cautioned me, asked me one or two more questions, following which, Constable Sontag asked me one or two more questions;

(j) I then gave evidence that following the caution and the questions, I read the certificate and noticed that the certificate had "RECALL DATA" at the top of the document. I gave evidence that I asked Senior Constable Warr what that meant, and he told me that the instrument had malfunctioned and would not print out certificates automatically. He then said that the certificate was a printout from the software of the instrument, obtained by him manually;

(k) I then gave evidence that I asked Senior Constable Warr what had happened to the instrument? I gave evidence that Senior Constable Warr replied that he was unsure what had happened;

(l) I then gave evidence that I asked Senior Constable Warr that in view of the malfunction of the instrument, how could he be sure that the reading on the certificate was mine and/or was accurate? He replied that the data could be retrieved from the instrument;

(m) I then gave evidence that I told Senior Constable Warr that I was now concerned about the malfunction of the instrument and worried about the accuracy and/or identity of the result of the analysis. I asked Senior Constable Warr if he would give me a second test on another instrument? I gave evidence that Senior Constable Warr told me that he would not give me another test, but informed me that I could request a blood test;

(n) I then gave evidence that I asked Senior Constable Warr how long it would take to arrange for a blood test? He said: "It could take all night". Senior Constable Warr then said words to the effect also that there is commonly a difference between breath and blood results anyway. I then gave evidence that I asked Senior Constable Warr: "So if I have a blood test, what difference is there between the breath and the blood readings, higher or lower?" I then gave evidence that Senior Constable Warr said in reply that: "In my experience blood is always higher";

(o) I then gave evidence that after Senior Constable Warr informed me that the blood test might take all night to arrange, and furthermore that the result of analysis of a blood test would be higher than the breath analysis, I felt that having a blood test would be futile and not in my best interests to undergo. I gave evidence that I felt very disappointed after being informed of the opinion of Senior Constable Warr;

(p) I then gave evidence that I would have had a blood test if not for the advice given by Senior Constable Warr, who effectively talked me out of that option, having accepted his advice;

12. The point taken on Mr Terry's behalf before the County Court judge was that the advice given by Senior Constable Warr as described in part (o) was improper and that it caused him

not to exercise his right to have a blood test. On the authority of *DPP v Moore*^[2] and the decisions referred to in that case, such advice was improper and of sufficient seriousness to warrant the exclusion of the evidence of the breath test reading notwithstanding that that advice was given after the breath test. The court should be prepared, it was said, to sacrifice the desire of the community to see the guilty convicted in order to express its disapproval and discouragement of such unacceptable behaviour.^[3] The existence of the discretion to exclude the evidence in the circumstances of this case is well-established^[4] and was not challenged before us.

13. The issue then is whether the exercise of the discretion by the County Court judge was an error of law on the face of the record. The record in this case includes the reasons given by her Honour. These reasons were described in brief form in Mr Terry's affidavit as follows:

(a) I accept the evidence of the appellant as to the conversation that he had with Senior Constable Warr; and

(b) I accept his evidence that he was talked out of taking a blood test by Senior Constable Warr by accepting the advice of Senior Constable Warr; however

(c) The result of analysis is a high reading and I bear in mind that the conversation had with Senior Constable Warr occurred after the breath analysis;

(d) Because the result of analysis of 0.127% is significant, I am persuaded that I should not exercise my discretion in favour of refusing to admit the certificate of analysis and I thereby accept the certificate into evidence; and I find the charge against the Appellant proved;

(e) I also say that despite *Moore's* case, I do not see any unfairness suffered by the appellant in being talked out of a blood test by Senior Constable Warr.

14. I should add that there was some uncertainty as to the accuracy of this summary of her Honour's reasons. Indeed, the primary judge expressed himself as being inclined to reject the account of them in set out in paragraphs (a) and (b) above. His Honour, however, considered the case on the basis that these were in fact her Honour's reasons and I, too, proceed on that basis.

15. It was said that the circumstances of this case were such that the primary judge ought to have concluded that, in the circumstances, the County Court judge could not but exercise her discretion to reject the evidence and that his Honour's refusal so to conclude amounted to appellable error.

16. The County Court judge considered that the magnitude of the breath test reading, 0.127%, in comparison to the permitted 0.05%, were such that Mr Terry could not have been assisted by a blood test reading. Implicit in this was her Honour's assumptions that the blood test would have been unlikely to show a blood alcohol content to be less than 0.05% and that, further, the recorded breath test reading was accurate, or approximately so. There was in fact no evidence to support either assumption.

17. As pointed out by counsel for Mr Terry a relevant purpose of obtaining the blood test reading was to verify or not the accuracy of the breath test reading. His client was charged with an offence contrary to s49(1)(f) which depended upon a result of analysis as recorded or shown by the breath analysing instrument of breath sample taken within three hours after driving. If Mr Terry had pursued his right to blood test it may be that the reading would have been less than 0.05%. This would have provided a powerful basis for concluding that the breath analysis instrument was not in proper working order or properly operated, giving rise to a statutory defence to the charge based on the breath test certificate.^[5]

18. It may, of course, provide a basis for another conclusion, namely, that the blood test reading was in some way faulty. But, the charge had to be made out to the criminal standard and the prosecution had to exclude the first possibility beyond reasonable doubt.

19. The difficulty of putting to one side such a conclusion is greater in this case where there was some evidence of malfunction in the breath analysis machine. It was put on behalf of the respondent that the malfunction concerned only the printing mechanism.^[6] But there was no evidence before the court as to the nature of the malfunction. The reliability of the hearsay

statement attributed to Senior Constable Warr, if admissible as truth of the fact, is somewhat diminished by his reported concession that he was unsure what had happened.

20. The discretion to exclude evidence on the *Bunning v Cross* principle requires the appellant to satisfy this court that the application of the balancing exercise referred to in *Ireland's case*^[7] must favour exclusion. In the present case, the weight to be given to the fact that the misconduct of the officer caused the defendant to forego an important right, is established by the authorities. Her Honour appeared to discount the significance of this consequence by her conclusion based on the assumptions to which I have referred. These assumptions were, as I have observed, unwarranted.

21. Furthermore, the accuracy of the breath test reading was significant not only for the purposes of determining whether Mr Terry was guilty of the offence charged, but also with respect to the imposition of the appropriate fine and licence suspension order in the event that he was convicted.^[8]

22. In the circumstances, we are of opinion a judge properly applying the *Bunning v Cross* principle to the facts in evidence, must inevitably have exercised her discretion to exclude the evidence of the breath analysis certificate. Her discretion has miscarried. Insofar as the primary judge took a different view, his Honour, too, fell into appellable error.

23. The appeal will be allowed and the conviction quashed.

[1] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.

[2] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.

[3] [2003] VSCA 90; (2003) 6 VR 430 at 449 [45]; (2003) 39 MVR 323, per Chernov JA.

[4] *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323; *Nolan v Rhodes* (1982) 32 SASR 207; *French v Scarman* (1979) 20 SASR 333.

[5] See s49(4).

[6] See paragraph [6] (j) above.

[7] *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.

[8] See s50.

APPEARANCES: For the appellant Terry: Mr PJ Billings with Mr WJ Walsh-Buckley, counsel. MK Steele & Giammarino, solicitors. For the first respondent Johnson: Ms S Borg, counsel. Office of Public Prosecutions.
