33/97

SUPREME COURT OF VICTORIA — COURT OF APPEAL

THOMPSON v HIS HONOUR JUDGE BYRNE and ORS

Winneke P, Hayne and Charles JJA

14, 15 April 1997 — [1998] 2 VR 274; (1997) 93 A Crim R 69

MOTOR TRAFFIC – DRINK/DRIVING – CHARGES LAID UNDER S49(1)(b) AND (f) OF *ROAD SAFETY ACT* 1986 – CONVICTION ON ONE CHARGE DISMISSAL ON OTHER – WHETHER AN ABUSE OF PROCESS TO LAY CHARGE UNDER S49(1)(f) WHEN CIRCUMSTANCES RELEVANT FOR CHARGE UNDER S49(1)(b) – DIFFERENCE IN RESULT OF BREATHALYSER TESTS AND BLOOD TEST – CHARGE PROVED – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, SS48(1A), 49(1)(b), (f), (4), 55(4).

T. was intercepted by police whilst driving his motor car. He underwent a preliminary breath test and later, two breathalyser tests which each showed a blood/alcohol concentration of .105%. Later, a sample of blood taken from T. showed a concentration of .043%. T. was subsequently charged, *inter alia*, with offences against s49(1)(b) and (f) of the *Road Safety Act* 1986 ("Act") and on the hearing, was convicted of the charge under s49(1)(f). The charge under s49(1)(b) was dismissed. T. later unsuccessfully appealed to the County Court and subsequently sought by originating motion, an order in the nature of *certiorari* to quash the conviction on the grounds that it was an abuse of process to pursue the charge under s49(1)(f) when a charge under s49(1)(b) was "more than sufficient to deal with the circumstances of the case". The motion was later dismissed and T. lodged a notice of appeal—

HELD: Appeal dismissed.

1. Two offences of a quite different nature are created by s49(1)(b) and (f) of the Act. It is not necessary that there be an accident before para (f) is applicable. There is nothing in the Act which would require that the person be prosecuted under para (b) rather than para (f). Accordingly, there is no basis for alleging abuse of process because a decision was made to prosecute T. under para (f) rather than para (b).

***Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, followed.**

2. Whilst the evidence of the blood test could be used to show that T.'s elimination rate was improbably high, the court was not in error accepting the breathalyser results and finding that no defence under s49(4) was proved.

WINNEKE P: [1] I will invite Charles JA to deliver the first judgment in this appeal.

CHARLES JA: The appellant was convicted on 23 February 1995 in the Magistrates' Court at Ringwood of three offences, including a charge that contrary to s49(1)(f) of the *Road Safety Act* 1986 ("the Act") on 18 July 1994 he had, within three hours of driving a motor vehicle, furnished a sample of breath for analysis which indicated that more than the prescribed concentration of alcohol was present in his blood and that concentration of alcohol was not due solely to the consumption of alcohol after driving the motor vehicle. The magistrate dismissed an alternative charge laid pursuant to s49(1)(b) of the Act. *[His Honour then referred to the subsequent proceedings, the grounds of appeal outlined in the originating motion and the notice of appeal, relevant statutory provisions and the facts and continued]....*

[8] I have already set out the relevant parts of s49(1) and (4) of the Act. It is immediately apparent that two offences of a quite different nature are created by s49(1)(b) and (f). As the Full Court said, in *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 743; (1989) 9 MVR 1 —

> **[9]** "Section 49(1)(b) and s49(1)(f) create different offences. The first relates, in effect, to having more than 0.05 per cent alcohol in the blood when driving or in charge of a motor vehicle, while the second relates solely to having that excess within three hours of driving".

There are three possible defences to a charge under s49(1)(f) expressly contemplated by the Act; first, that the concentration of alcohol found to be present in the blood of the person charged was due solely to the consumption of alcohol after driving, the onus of proof of this fact being placed on the driver (s48(1A)); secondly, that the breath analysing instrument used to test

the driver was not in proper working order, and thirdly, that the instrument was not properly operated (both these defences being found in s49(4)). The s48(1A) defence was introduced after *Meeking v Crisp* was decided.

The operation of s49(1) was considered by the High Court in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, on appeal from *Meeking v Crisp.* In that case the appellant, the holder of a probationary licence, was intercepted while driving and a preliminary breath test was conducted. No accident had occurred. A breathalyser test was conducted which showed that a blood alcohol content well in excess of zero (the limit for a probationary driver), was present. The driver was convicted. At first instance in the Supreme Court, Crockett J saw par.(f) as intended to deal with those cases "in which the apparently culpable driver is not detected at the time of his driving and, although when so detected, he is then found to have more than the prescribed concentration of alcohol in his blood, he is able to claim — often without possibility of proof to the contrary — that that concentration was due to post-**[10]**accident drinking." The Full Court and a majority of the High Court, disagreed.

In the High Court, Mason CJ and Toohey J, with whom Brennan J agreed, held that it was not necessary that there be an accident before par.(f) was applicable. The provision was said to be clear and unambiguous. The operation of par.(f) could be very harsh in "the case of a sober person who is involved in a collision on the way home and in which no one is injured and then returns home and has his or her first drinks for the day and is then tested" ([1989] VR at p743). But their Honours said there was no justification for reading the section in the manner contended for by Crockett J (see 169 CLR at p222); and furthermore, there was no basis in this case for alleging abuse of process because a decision was made to prosecute the appellant under par.(f) of s49(1) rather than par.(b). As their Honours said at pp226-227,

> "There is nothing in the Act which would require that the appellant be prosecuted under par.(b) of s49(1) rather than par.(f)".

Although s49(1) has since been amended so that a person charged under par.(f) is no longer guilty of an offence if the alcohol shown to be present in his or her blood was not due solely to the consumption of alcohol after driving, and to introduce the s48(1A) defence, the reasoning in *Mills v Meeking*, in my view, clearly continues to bind this court. I should add that no question of the appellant having consumed alcohol after being intercepted while driving arises in this case. The appellant was in the company of police officers from the moment of being intercepted until he was tested and expressly stated **[11]** before Judge Byrne that he had not consumed alcohol in the relevant period. There is no issue therefore of any s48(1A) defence.

Since this appeal arises out of an application for relief in the nature of *certiorari*, brief reference should be made to *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. Brennan, Deane, Toohey, Gaudron and McHugh JJ in a joint judgment observed that *certiorari* enables the quashing of an impugned decision upon one or more of a number of distinct established grounds, such as jurisdictional error, failure to observe some applicable requirement of procedural fairness and "error of law on the face of the record" (see pp175-176). Their Honours emphasized (at pp175 and 181) that certiorari is not an appellate procedure enabling a general review of the decision in question. The court held that the distinction between jurisdictional error and error within jurisdiction had not been abolished in Australia (at p179). And insofar as error on the face of the record was alleged, the court held that, in the absence of statutory provision to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript of proceedings, exhibits or reasons for decision (see pp180-183); as to which see the trenchant criticism made by Kirby P in *Kriticos v State of New South Wales* (1996) 40 NSWLR 297 at pp299-303; 40 AILR 5-085.

In *Hansford v Judge Neesham* (31 August 1994, (1994) 7 VAR 172), affirmed at [1995] VICSC 58; [1995] VicRp 51; [1995] 2 VR 233, JD Phillips J held (at pp12-14) that the effect of s10 of the *Administrative Law Act* 1978 was that the record, for the purposes of certiorari, included any statement by an **[12]** inferior court, whether made orally or in writing, of its reasons for decision. This point was not considered in the judgments on the appeal in *Hansford's* case. See

also *Ioannidis & Anor v Guardian Holdings* (Smith J, 16 December 1994, unreported) at pp9-12; and *Flynn & Ors v DPP & Ors* (McDonald J, 13 December 1996, unreported) at pp20-26, where his Honour followed *Craig* and accepted as correct the reasoning of JD Phillips J in *Hansford.*

On the view taken in *Hansford,* when a court is considering what is the record for the purpose of establishing error, there is in Victoria statutory provision to the contrary of the general rule, the effect of which is that any statement of reasons by an inferior court becomes part of the record; and the consequence may indeed be that the availability of certiorari is substantially increased, arguably giving the writ a more general appellate operation than Parliament may have intended. JD Phillips J described his conclusion that s10 of the *Administrative Law Act* might have this effect as "at first somewhat surprising" (at p12), but I do not think, for reasons which will become apparent, that it is necessary for this Court now to decide whether s10 has this consequence. In the affidavit of Mark Regan sworn 15 June 1995, which was the principal source of the evidence before Ashley J, all that is said of Judge Byrne's reasons is that "His Honour ultimately found the s49(1)(f) charge proven and convicted the [appellant]". Before this Court the appellant also made reference to certain handwritten notes made by the prosecutor's instructing solicitor, Ms Amy Lim, of some of Judge Byrne's reasons. These notes **[13]** were not verified, were difficult to read, and were much truncated and the appellant did not identify any particular part of them as demonstrating error. I do not think these notes assist the appellant in any material respect.

The appellant's case, as I understand it, was that the coincidence of the two breathalyser readings being identical shows that the percentage of alcohol in his blood was rising when the first reading was taken at 1.32am, peaked shortly afterwards, and was declining when the second reading was taken at 1.53am. He argued, consistently with Mr Young's evidence, that the elimination rate of .03 to .036 per cent was so extreme that the breathalyser readings were too high and the instrument was therefore shown not to have been operating correctly or to have malfunctioned — in either case establishing a defence to the charge under s49(4). The blood sample test was, in any event, more accurate, he submitted. On the evidence of his drinking, which had, save for the Benedictine, finished before 10.00pm that night, his blood alcohol level shortly before 11.55pm was virtually nil. Since the rate of alcohol consumption into the bloodstream from the contents in the stomach was constant, so the argument ran, his likely blood alcohol reading at the time he was intercepted would probably have been about .043 per cent. This argument was, he submitted, confirmed by the evidence of the blood sample test. Therefore, had the appellant been charged under s49(1)(b), he would inevitably have been acquitted. There had been no accident and no question arose of his having consumed alcohol between being intercepted and tested. He **[14]** should therefore have been charged, if at all, under par.(b). Par.(f) was not, properly construed, intended by Parliament to apply in these circumstances and it was an abuse of process, so he submitted, for the prosecution to charge him under that paragraph or for the court to permit the prosecution to proceed with that charge.

It will be observed that a major plank in the appellant's argument is the evidence of Mr Young that an elimination rate of either .03 per cent or .036 per cent based on comparison of the breathalyser and blood sample tests was too high to be accepted and demonstrated that the breathalyser was malfunctioning or not operated correctly, thus establishing the s49(4) defence in one or other form. This was, of course, a question of fact on which Judge Byrne heard conflicting testimony from two expert witnesses and on which His Honour's assessment of the demeanour of the witnesses would no doubt have been important. An appellate court will not ordinarily interfere with the decision of an inferior court in such circumstances (see *Abalos v Australian Postal Commission* [1990] HCA 47; (1990) 171 CLR 167 at pp178-179; 96 ALR 354; (1990) 65 ALJR 11; [1990] Aust Torts Reports 81-049; *Devries v Australian National Railways Commission* [1993] HCA 78; 112 ALR 641; (1993) 67 ALJR 528; (1993) 177 CLR 472.

I now turn to the errors upon which the appellant relied in seeking certiorari, dealing first with the grounds alleged in the originating motion. I do so because I found, as did Ashley J, that although the appellant organised his case extremely thoroughly and argued it with conviction, it was not always easy to understand exactly how he was putting his case. Ground 1 asserts that Judge Byrne was in error in **[15]** allowing the appellant to be charged under par.(f) when par.(b) was more than sufficient in dealing with the circumstances of the case, having found that the appellant was below the legal limit of percentage blood alcohol at the time of driving. Judge Byrne in fact made no such finding. His Honour said that the appellant had made out a "plausible"

case. There was only one charge before His Honour, the s49(1)(b) alternative charge having been dismissed by the magistrate. Any claim that to pursue the charge under par.(f) was an abuse of process is disposed of by the judgment of the majority in *Mills v Meeking*. Ground 1 must fail.

Ground 2 is hopeless. No request for an order requiring witnesses to leave the court was made and no serious submission was made that any unfairness actually resulted from any witness remaining in court while the case was heard.

Ground 3 involves a claim that Judge Byrne, by allowing the prosecution to proceed, denied the appellant legitimate defence material that par.(f) was not intended by Parliament to cope with. In effect the argument is that since the appellant showed he was not guilty of an offence under par.(b), Judge Byrne should not have allowed the case to proceed under par.(f). The charge before his Honour was laid under par.(f). The facts necessary to prove the charge were established. His Honour did not find that the appellant had shown that he was not guilty of an offence under par. (b), and again the majority's reasoning in *Mills v Meeking* is applicable. None of the grounds in the appellant's originating motion was established.

[16] I turn then to the appellant's grounds of appeal before this Court. Grounds 1 and 2 assert, in effect, that it was never the intention of Parliament that the appellant should be prosecuted under s49(1)(f) in the circumstances of this case. These grounds must, I think, fail on the basis that Ashley J correctly resolved these issues against the appellant. His Honour held that the interpretation placed on s49(1)(f) by the majority in *Mills v Meeking* at pp220-226, bound him (as I have said, it also binds this court), and required the rejection of these arguments.

Grounds 3 and 4 both relate to s49(1)(f)(ii) and the circumstances in which the presumption required by s48(1A) may be displaced by sworn evidence of the person charged, enabling a good defence to be shown based on the consumption of alcohol by the driver between being intercepted and tested. No such defence was raised here. S48(1A) was not in issue. The appellant's own case was that he had drunk no alcohol in that intervening period. Grounds 3 and 4 must fail.

Ground 5, in effect, alleges that s58(4) of the Act required, in the circumstances of this case, that Judge Byrne should have found, on the basis of the contrary evidence of the blood test, that sufficient doubt was raised in the accuracy of the breathalyser. His Honour should therefore have either rejected the evidence of the breathalyser or held that the appellant had made good his defence under s49(4). This issue raised a question of fact for his Honour to decide after a consideration of the evidence of the two expert witnesses. If his Honour accepted the evidence of **[17]** Dr Ogden that an elimination rate as high as .03 per cent was not uncommon, then there was no contradiction between the breathalyser results and that of the blood test. Nor would any necessary doubt remain as to the accuracy of the breathalyser. This was an issue of fact decided by his Honour after hearing and seeing the witnesses. No error is shown in Judge Byrne's fact-finding process. The prosecution had tendered certificates as to the breathalyser having been in proper working order and having been properly operated, which, by virtue of s58(2), are conclusive proof of those facts. Nor is any error shown in Ashley J's reasoning on this issue.

Grounds 6 and 7 raise substantially the same issue that Judge Byrne should have accepted the evidence of the blood test certificate in preference to the breathalyser readings and should not have found the charge proved beyond reasonable doubt. This issue was decided by Judge Byrne after hearing and seeing the witnesses. It was open to His Honour, as the tribunal of fact, to find that a comparison of the readings produced by the breathalyser and the blood test did not make out a defence under s49(4) of the Act. Again, no error is shown either in Judge Byrne's reasoning or in Ashley J's rejection of the appellant's arguments.

It was suggested that the scheme of the Act contemplates that the taking of a blood sample under s55(10) is admissible in evidence to answer the result produced by a breathalyser test under s55(4), and that the evidence of a blood sample so taken might be used to support the setting up of a defence under s49(4). In the present case the evidence of the blood test was sought to be used to show that, having regard to Mr Young's testimony that the elimination rates so established were improbably high, the evidence given by the breathalyser results should not be accepted. But, as I have said, if the evidence of Dr Ogden was accepted, the test result given by the blood sample at 3.35am was not inconsistent with the breathalyser having given correct readings at

1.32am and 1.53am respectively. If Dr Ogden's evidence was accepted, no defence under s49(4) was proved by the appellant. This, in my view, is the proper interpretation to be given, in all the circumstances, to Judge Byrne's conclusion that the s49(1)(f) charge had been proved. Each of the grounds in the appellant's notice of appeal therefore fails.

Before this court the appellant was not confined in his oral argument to the grounds set out in his notice of appeal. I do not think that any serious attempt was made by him to assert jurisdictional error, although at one stage he submitted that Judge Byrne had exceeded his jurisdiction in not holding the s49(4) defence made out on the balance of probabilities. That argument would, in any event, founder for the same reasons as I would reject grounds 5, 6 and 7 of the notice of appeal.

In this court, as before Ashley J, the appellant sought to rely on failures to observe procedural fairness said to have occurred before Judge Byrne. These arguments related first to Judge Byrne having permitted the prosecution to pursue a charge under s49(1)(f) when the appellant had a good defence under s49(1)(b) and that he should have been charged under the latter paragraph. This **[19]** submission must fail for the reasons given in *Mills v Meeking* at pp222-226.

Three further matters of procedural unfairness were argued by the appellant. The first, the failure to order witnesses out of court, is hopeless in the absence of any request for such an order and of any suggestion that he was prejudiced by any witness remaining in Judge Byrne's court during the appeal. The next matter relates to the substitution of Dr Ogden for Dr Odell as a prosecution witness. I have already set out the circumstances in which this substitution was made. The appellant has not shown any relevant unfairness in the procedure adopted by Judge Byrne in this regard or that he was prejudiced by what occurred. If he was surprised by Dr Ogden's evidence, his own case remained to be opened and he was entitled to call answering witnesses. Ashley J was of the view that the appellant did not object to Dr Ogden giving evidence. Even if he did object, the objection should have been overruled since the prosecution was entitled to call Dr Ogden as well as Dr Odell if the prosecution so decided. The appellant did not ask for an adjournment to enable him to recall Mr Young. Finally, no unfairness was involved in the decision to interpose Mr Young during the prosecution case. This course was taken with the appellant's consent and, it would seem, partly for his own benefit. No case of procedural unfairness has been established by the appellant.

There remains the question whether any error on the face of the record is shown. The main thrust of the appellant's argument was that Parliament intended to limit **[20]** the making of a charge under s49(1)(f) to circumstances where it was appropriate, for example a driver escaping after an accident, but that a charge under par.(f) was not appropriate in the circumstances of this case where there was no possibility of the appellant consuming alcohol in the intervening period. The appellant submitted that he should not have been charged except under s49(1)(b). He submitted that the proper construction of s49(1)(f) was that, expressly or by implication, it was a good defence to a charge under that paragraph if the defendant could establish that at the time of driving he did not have a blood alcohol reading over .05 percent.

The first thing to be said about these arguments is that the appellant did not persuade Judge Byrne that, when he was intercepted, he did not have a blood alcohol reading over .05 percent. His Honour merely found, I repeat, that he had made out a "plausible" case. Secondly, there is no justification in the wording of s49(1)(b) and (f) for giving these paragraphs the construction contended for by the appellant. Thirdly, this argument is an attempt to revive the interpretation given these paragraphs or their predecessors by Crockett J at first instance, and by Dawson J in *Mills v Meeking* at pp231-236. The approach of Crockett J was, however, rejected both by the Full Court and the majority of the High Court, and the judgment of Dawson J was a dissenting one. The judgment of the majority in *Mills v Meeking* compels, I think, the rejection of these arguments.

In conclusion, the appellant invited this Court to read down s49(1) of the Act, or to amend it, and suggested a variety of methods by which this Court could **[21]** add to or subtract from portions of various relevant sections of the Act. The fact that this Court cannot accept any such invitation merely emphasizes that the appellant's major complaint in this case is with the form of the legislation which Parliament has chosen to enact rather than with the conduct of the proceeding before Judge Byrne. In my view no error on the face of the record has been established in relation

to the hearing of the charge before Judge Byrne, nor has any error been shown in Ashley J's careful and, I might add, sympathetic treatment of the appellant's arguments.

The sentence and orders imposed by Judge Byrne on 29 May 1995 were stayed, initially by Beach J on 2 June 1995, and later by Ashley J on 8 and 21 November 1995, pending the hearing and determination of the appeal. The dismissal of the appeal would have the consequence that the stay so ordered would be dissolved, the cancellation of the appellant's licence would immediately become effective, and the period of disqualification from driving imposed by Judge Byrne would commence to run. I would dismiss the appeal.

WINNEKE P: I agree with the reasons which have just been delivered by Charles JA and the conclusions to which those reasons led.

HAYNE JA: I also agree.

WINNEKE P: The formal order of the court will be that the appeal is dismissed. The court notes that the consequence of dismissal of the appeal is to remove the stay which had been made by Ashley J in respect of the cancellation of the appellant's licence. The cancellation will therefore **[22]** take effect from this date and this time, and therefore the period of disqualification, which is consequent upon the cancellation, will commence as from this time.

APPEARANCES: Appellant Thompson in person. For the Respondent: Mr D Just, counsel. PC Wood, Solicitor for Public Prosecutions.
