**04/04; [2004] VSC 32**

**SUPREME COURT OF VICTORIA**

# *DPP v SKINNER*

**Nettle J**

**9, 17 February 2004 — (2004) 40 MVR 427**

**MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT THREE ATTEMPTS TO PROVIDE A SAMPLE OF BREATH FOR ANALYSIS – BREATH ANALYSING INSTRUMENT INDICATED ON EACH OCCASION "ALCOHOL IN MOUTH" – DRIVER REQUESTED TO UNDERGO A BLOOD TEST – REFUSAL BY DRIVER TO UNDERGO TEST – CHARGED WITH REFUSING A REQUIREMENT TO ALLOW A MEDICAL PRACTITIONER TO TAKE A SAMPLE OF BLOOD FOR ANALYSIS – FINDING BY MAGISTRATE THAT PROSECUTION MUST PROVE THE POLICE OFFICER BELIEVED ON REASONABLE GROUNDS THAT THE INSTRUMENT WAS INCAPABLE OF MEASURING THE DRIVER'S BAC – FINDING BY MAGISTRATE THAT HE WAS NOT SATISFIED BEYOND REASONABLE DOUBT OF THE EXISTENCE OF REASONABLE GROUNDS – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(9A).**

**According to ordinary principles, an exercise of statutory discretionary power is invalid if lacking in *bona fides* or if not based upon reasonable grounds. Since the existence of a valid requirement is an essential element of any offence of refusing to comply with a requirement, it follows that it is incumbent upon the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the police officer requiring the accused to provide a blood sample believed on reasonable grounds that the breath analysing instrument was incapable of measuring the accused's blood alcohol concentration in grams per 100ml. Where a magistrate found that the evidence adduced was insufficient to establish beyond reasonable doubt that the police informant held the necessary belief, the magistrate was not in error in dismissing the charge.**

**NETTLE J:**

1. This is an appeal from a final order made by the Magistrates' Court at Melbourne on 3 April 2003, dismissing a charge under s49(1)(e) of the *Road Safety Act* 1986 that the respondent had refused a requirement pursuant to s55(9A)(b) of the Act to allow a registered medical practitioner to take a sample of the respondent's blood for analysis.

2. Section 55(9A) provides that:

> "(9A) The person who required a sample of breath under sub-section (1), (2), (2AA) or (2A) from a person may require that person to allow a registered medical practitioner or an approved health professional nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> (a) ...; or
>
> (b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood or 210 litres of exhausted air the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever—
> and for that purpose may further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

3. The Magistrate based his decision on the judgment of Hedigan J in *DPP v Holden*[1]. Consistently with that decision, his Worship held that in order to succeed it was incumbent upon the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the person requiring the accused to provide a blood sample believed on reasonable grounds that the breath analysing instrument was incapable of measuring the accused's blood alcohol concentration in gms per 100 ml. In the Magistrate's view, the evidence adduced was insufficient to establish beyond reasonable doubt that the informant had such reasonable grounds.

4. The evidence before the Magistrate consisted largely of the uncontested testimony of two police officers. In substance they deposed that:

> • They had apprehended the accused at approximately 3.30 am on the morning of Sunday 24 February 2002 in Leith Road, Montrose after the vehicle which the accused was driving changed lanes without first indicating an intention to change.
> • Upon apprehension the accused smelt of drink and had blood-shot eyes. As a result he had been required to undergo a preliminary breath test and that test had indicated the presence of alcohol in his blood.
> • He had then been required to accompany the police officers to the Montrose Police Station for the purposes of a breath test and while at the police station and before undergoing any breath test he admitted to having consumed at least eight 375 ml stubbies of full strength beer since 6.00 pm the previous evening, the last of them only shortly before beginning to drive, and that he thought himself to be "teetering on the limit".
> • At 4.10 am the accused furnished a sample of his breath directly into a prescribed breath analysing instrument, but the only reading which the machine produced was: "Alcohol In Mouth".
> • The accused was then required to provide a second sample and after arguing for some time in emphatic and profane terms that he should not be required to do so, at 4.27 am the accused furnished a second sample of his breath directly into the machine. Again, however, the only reading produced by the machine was: "Alcohol in Mouth".
> • The accused was then required to provide a third sample and again he argued, in similar fashion to before, that he should not be required to provide any further sample. Ultimately, at 4.46 am he furnished a third sample directly into the machine. But once more the only reading produced by the machine was: "Alcohol in Mouth".
> • Both police officers thereupon formed the view that the machine was not going to be capable of providing a reading in gms/100 ml and consequently that there was no point in attempting any further tests.
> • One of the police officers then said to the accused that it appeared to the police officer that the accused was unable to provide a sufficient sample of breath and that the breath analysing instrument was incapable of measuring the concentration of alcohol present in the accused's breath, and that the police officer required the accused to allow a registered medical practitioner or approved health professional to take a sample of the accused's blood for analysis.
> • The accused replied in emphatic terms that he refused a blood test under any circumstances and, despite being warned that if he refused the test he may be charged, he walked out of the police station.

Certificates were also tendered which showed the readings of "Alcohol in Mouth" produced by the breath analysing instrument on each of the three occasions on which the accused's breath was tested.

5. As stated in the Master's order of 23 September 2003 the question of law raised by this appeal is: "must the Magistrate be satisfied that it must appear to the police officer requesting a blood sample pursuant to section 55(A) *Road Safety Act* 1989 that the relevant factors in sub-paragraphs (a) and (b) exist, or whether such belief should be held on reasonable grounds?"

6. Having regard to the basis of the Magistrate's decision, and the way in which the appeal has been argued, I am of the view that the question might profitably be re-stated thus:

> (a) whether the Magistrate was right to hold that it was incumbent upon the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the police officer requiring the accused to provide a blood sample believed on reasonable grounds that the breath analysing instrument was incapable of measuring the accused's blood alcohol concentration in gms per 100 ml; and
>
> (b) if he were right so to hold, was it open to the Magistrate on the evidence before him to find that he was not satisfied beyond reasonable doubt of the existence of reasonable grounds.

**(a) Reasonable grounds**

7. It goes without saying that the Magistrate was bound to follow the decision in *Holden* and, in that sense, there is no criticism to be made of his Worship's decision. The principal question for appeal is whether the decision in *Holden* was correct.

8. In *Holden* Hedigan J based his conclusion in part upon a concession which he attributed to counsel for the prosecution but his Honour also came independently to the view that the concession was properly made. Thus as his Honour put it:

> "[15] The question appears to arise as to whether or not the opinion or assessment made by the person requiring the sample to be furnished (`appears to him or her') must be an opinion or assessment formed upon reasonable grounds or whether or not making the mere assessment of the forming of the opinion was the only precondition to the further requirement. (Counsel) for the appellant... conceded that there must be evidence of a kind from which the formation of the opinion or making of the assessment might reasonably be made; that is, there would have to be reasonable grounds for it. *In my view, this concession was correctly made.*" (Emphasis added).

9. In this appeal the appellant argues that if such a concession were made, it was not properly made, and in any event that his Honour's conclusion was wrong. The appellant submits that according to the plain and ordinary meaning of the terms of s55(9A)(b), the only condition to its operation is that it appear to the person requiring the blood sample that the breath analysing instrument is incapable of rendering a reading of alcohol concentration in gms/100 ml and, consequently, that the question of reasonable grounds is nothing to the point. It is enough, it is said, that the person have come honestly to the opinion that it appears that the instrument is incapable of providing a reading. So, while the existence or absence of reasonable grounds might prove to be of forensic significance in any contest as to the honesty of the person's opinion, it would not be incumbent upon the prosecution to establish the existence of reasonable grounds.

10. In my judgment Hedigan J was correct in holding that it is not only necessary that it appear to the person requiring the blood sample that the instrument be incapable of providing a reading in gms/100ml but also that the person's opinion be based on reasonable grounds.

11. The appellant submitted and I accept that the words "if it appears to him or her" were put into the section for the purpose of making that person the judge of whether it appears that the instrument is incapable of providing a reading in gms/100 ml. The effect of the section is to make the issue of appearance depend upon the opinion of the person[2] and not upon the fact of appearance. Thus upon a prosecution it is not for the court to decide whether it appeared in fact that the instrument was incapable of providing the required reading. The question for the court is whether the person held the opinion that it so appeared[3].

12. But that does not mean that there need not be reasonable grounds for the opinion. According to ordinary principles, an exercise of statutory discretionary power is invalid if lacking in *bona fides* or if not based upon reasonable grounds[4]. And despite the extraordinary nature of the investigative powers warranted by the need to deter and detect drink driving[5], I see no reason to think that those principles do not apply to s55(9A).

13. The principles were recently examined at length by the Full Court of the Federal Court, albeit in another context, in *Australian Securities Commission v Deloitte Touche Tohmatsu*[6]. And with respect I adopt their Honours' reasoning. Adapting it to the question with which I am concerned, I conclude that although s55(9A) leaves to the person concerned the task of deciding a question which is essentially one of fact and degree: namely, did it appear that the machine was incapable of providing a reading in gms/100 ml, such a decision is susceptible to review and, if upon review it is found not to have been reasonably based, it is liable to be held invalid.

14. Putting it another way, it cannot be supposed that Parliament intended to empower police officers arbitrarily and capriciously to impose a requirement to undergo a blood test[7]. Consequently, a requirement based upon an opinion that was not *bona fide* or not reasonably grounded would be beyond the power contemplated by the section[8] and therefore it would be invalid.

15. It is true, as the appellant argued, that in other provisions of the Act the need for reasonable grounds has been denoted by means of an express requirement to that effect[9] and that according to the maxim *expressio unius est exclusio alterius*[10] the absence of a similar express requirement from s55(9A) might be taken as an indication that reasonable grounds are not necessary for the puposes of sub-s55(9A). But I do not regard that argument as persuasive. The nature and history of the *Road Safety Act* is such as to show that there has been very little consistency in the drafting styles and practices employed in the many amendments made to it from time to time, and in any event the law's jealousy of attempts to detract from the rights of the individual means that it would take a good deal more than an *expressio unius* implication of the kind contended for in order to conclude that s55(9A) confers upon a police officer power arbitrarily and capriciously to

require the provision of a blood sample for analysis.[11]

16. That being so, and since the existence of a valid requirement is an essential element of any offence of refusing to comply with a requirement[12], it follows that Hedigan J in *Holden*, and thus too the Magistrate below were right to hold that it was incumbent upon the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the police officer requiring the accused to provide a blood sample believed on reasonable grounds that the breath analysing instrument was incapable of measuring the accused's blood alcohol concentration in gms per 100 ml.

**(b) Reasonable doubt**

17. It remains to determine whether it was open[13] to the Magistrate *not* to be satisfied beyond reasonable doubt of the existence of reasonable grounds.

18. The answer to that question is surely that it was. The question of whether there are reasonable grounds for an opinion that a machine appears incapable of providing a reading is unarguably a question of fact and degree about which views may legitimately differ. Consequently, in the great majority of cases, of which I think this to be one, it will be impossible to say that only one or other view was open and necessary to concede that either view was permissible according to the perceptions of the tribunal of fact.

19. That said, however, I do not accept that it was incumbent upon the prosecution to prove that the apparent inability of the machine to produce a reading in gms/100 ml was due to defect or malfunction in or of the machine, or that the inability to obtain a reading was or was not due to an inadequate or excessive volume of the breath sample supplied, or indeed to establish any reason at all why the machine would not work, or even to establish that there might or might not have been some chance of obtaining a reading if and after further tests had been attempted. And to the extent that some of the observations made in *Holden* may suggest a different conclusion, I respectfully disagree with them.

20. In my view the fact that the informant carried out three separate tests in close succession, and the fact that each test failed to produce any reading other than "Alcohol in Mouth", constituted powerful evidence that the machine was incapable in the particular circumstances of the case of producing a measure of concentration in gms/100 ml. I take to be self evident that a prescribed breath analysing instrument is designed to measure alcohol concentration in gms/100 ml and, consequently, if such a machine fails to do so on each of three consecutive occasions when a measurement is attempted, logic and every-day experience of things mechanical suggest that the machine was incapable of producing the reading.

21. Moreover, and as has been seen, the Magistrate had before him evidence not only of the way in which the machine performed but also of the accused's condition upon apprehension, and of the admissions which the accused had made as to the amount of alcohol he consumed. As it appears to me, the latter increased the likelihood that the machine was incapable of producing a reading. If a man has consumed the amount of alcohol to which the accused admitted, one expects a significant reading. The fact that none was forthcoming bespoke a high probability that the machine was incapable of producing a reading. In the result, in my opinion, it was open to the Magistrate to be satisfied on the evidence before him of the existence of reasonable grounds.

22. The question, however, is not whether it was open to the Magistrate to find that there were reasonable grounds but rather whether it was open to his Worship to find that he was *not* so persuaded. And, for the reasons already given, I consider that it was.

**Conclusion**

23. It follows that the appeal must be dismissed. I shall hear counsel on the form of orders.

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[1] [1999] VSC 14; (1999) 28 MVR 315.

[2] Or perhaps upon his or her "assessment": see *DPP v Sanders* (1996) 86 A Crim R 378; (1996) 23 MVR 515.

[3] *Robinson v Sunderland Corporation* [1899] 1 QB 751 at p757, per Channell J; *Smith v Browne* [1974] VicRp 99 [1974] VR 842 at p847, per Kaye J.

[4] *Avon Downs v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353 at 360, per Dixon CJ; [1949] ALR 792; 9 ATD 5; 4 AITR 195; *Minister for Aboriginal Affairs v Peko Wallsend* [1986] HCA 40; (1986)

162 CLR 24 at 40-2; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109; *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at p413; (1992) 16 MVR 367, per Ormiston J.
[5] *DPP v Webb*, ibid at p411; *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365, per Winneke P.
[6] (1996) 70 FCR 93 at pp120 to 123; (1996) 136 ALR 453; 14 ACLC 604; 20 ACSR 120.
[7] cf *Hrysikos v Mansfield* [2002] VSCA 175 at [58]; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, per Eames JA.
[8] *DPP v Webb* ibid; *DPP v Sanders* (1996) 23 MVR 515 at 518; (1996) 86 A Crim R 378, per Teague J.
[9] For example, in s3AA(1)(b) the circumstances in which a person is to be taken to be in charge of a motor vehicle are expressly conditioned upon the existence of reasonable grounds for a belief that they intend to start or drive the vehicle; in s53(1)(c), the power of a police officer to require a person to undergo a breath test is expressly conditioned upon the existence of reasonable grounds for a belief that the person has been driving within the last three hours; in s55(2) the power to require a person to provide a further sample is expressly conditioned upon a reasonable belief of contravention of s49(1)(b); and in s55(9E) the defence to civil suit which is afforded to a medical practitioner is expressly conditioned upon the practitioner having had a reasonable grounds for acting as they did.
[10] See Pearce & Geddes, *Statutory Interpretation in Australia*, 5th Ed. at [4.26] and [4.27].
[11] See and compare *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at p575; (1992) 106 ALR 11; (1992) 66 ALJR 271; 59 A Crim R 255; *Coco v R* [1994] HCA 15; (1994) 179 CLR 427 esp. at p436; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[12] *DPP Ref No 2 of 2001 (Collicoat v DPP; Bell v DPP)* [2001] VSCA 114; (2001) 4 VR 55; (2001) 34 MVR 164; (2001) 122 A Crim R 251 at p265 [34], per Charles JA.
[13] In the sense discussed in *Transport Accident Commission v Hoffman* [1989] VicRp 18; [1989] VR 197 at p199; (1988) 7 MVR 193.

**APPEARANCES:** For the appellant DPP: Mr MG Perry, counsel. Solicitor for Public Prosecutions. For the respondent Skinner: Mr WJ Walsh-Buckley, counsel.

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