39/00; [2000] VSC 458

SUPREME COURT OF VICTORIA

DPP v MURPHY

Balmford J

24 October, 3 November 2000

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE OF BREATH ANALYSIS – POLICE OFFICER NO LONGER IN POLICE FORCE AT TIME OF HEARING – CERTIFICATE NOT ADMITTED INTO EVIDENCE – WHETHER MAGISTRATE HAS DISCRETION TO EXCLUDE CERTIFICATE ON GROUNDS OF UNFAIRNESS – CASE SAID TO BE "RATHER UNUSUAL" – ADMISSION OF CERTIFICATE COULD CAUSE CONVICTION – SAID TO BE UNFAIR RESULT – EXPRESS PURPOSE OF LEGISLATION NOT TAKEN INTO ACCOUNT – WHETHER MAGISTRATE ERRED IN EXERCISE OF DISCRETION: *ROAD SAFETY ACT* 1986, SS47, 58(2), (2C).

Whilst driving his motor vehicle, M. was involved in a collision with another vehicle. After exchanging names and addresses, M. – who had consumed alcohol before the accident – waited at the scene for some time and then walked home where he consumed a further quantity of alcohol. Subsequently M. was subjected to a full breath test which showed a reading of 0.131% BAC. M. was later charged with drink/driving offences pursuant to section 49(1)(b) and (f) of the *Road Safety Act* 1986 ("Act") and careless driving. Prior to the hearing, M. gave notice under s58(2) of the Act that he required the police officer giving the certificate to be called to give evidence. However, on the hearing, the police officer was no longer a member of the police force and had left the State of Victoria. In those circumstances, s58(2C) of the Act required the court to order that s58(2) had effect as if notice had not been given and accordingly the certificate, if admitted into evidence, would have been conclusive proof of the matters set out in s58(2)(a-f) of the Act. Following a submission from M.'s counsel, the magistrate excluded the evidence of the certificate with the result that both drink/driving charges failed. The magistrate based his ruling on the fact that the facts of the case were "rather unusual" or "peculiar and particular", that M. "did all the right things at the accident scene" and that admission of the certificate would cause "a very significant unfairness" to M. Upon appeal—

HELD: Appeal allowed.

(1) There is a discretion in a criminal case to reject any evidence on the ground that to receive it would be unfair to the accused in the sense that the trial would be unfair. Accordingly, the magistrate had a discretion to exclude from evidence the certificate of analysis of breath issued pursuant to s55(4) of the Act which had been lawfully and properly obtained. Given the existence of the discretion, the question was whether it was properly exercised in the circumstances.

***Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533; (1994) 126 ALR 481; 8 VAR 1, applied.**

2. The unfairness which the magistrate perceived was not any unfairness in the conduct of the trial itself but rather if the certificate were admitted into evidence M. would be convicted and that would be an unfair result. The admission into evidence of the certificate would have had the effect that the legislation was operating as it was intended to operate and any unfairness to M. was an unfairness intended by the legislation.

3. The magistrate acted on wrong principles, was guided by irrelevant matters and did not take into account the express purpose of the legislation. For those reasons, the magistrate erred in the exercise of the magistrate's discretion.

BALMFORD J:

Introduction

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 from an order made on 21 June 2000 in the Magistrates' Court at Sunshine dismissing charges against the respondent under paragraphs 49(1)(b) and (f) of the *Road Safety Act* 1986 ("the Act").

2. The relevant provisions of the Act are sections 47, 48, 49, 53, 55 and 58, all of which appear in Part 5 of the Act, and the relevant portions of which read as follows:

> **47. Purposes of this Part**
> The purposes of this Part are to—
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and

(c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol.

48. Interpretative provisions
(1) For the purposes of this Part—
(a) if it is established that at any time within 3 hours after an alleged offence against paragraph (a) or (b) of section 49(1), a certain concentration of alcohol was present in the blood of the person charged with the offence it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed;
. . .
(1A) For the purposes of an alleged offence against paragraph (f) or (g) of section 49(1) it must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood of the person charged or found by an analyst to be present in the sample of blood taken from the person charged (as the case requires) was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities by sworn evidence given by him or her which is corroborated by the material evidence of another person.

49. Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she— …
(b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood; or …
(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—
(i) 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; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;

53. Preliminary breath tests
(1) A member of the police force may at any time require— …
(c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; …
to undergo a preliminary breath test by a prescribed device.

55. Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force … under section 53 to do so and—
(a) the test in the opinion of the member … in whose presence it is made indicates that the person's blood contains alcohol; …
any member of the police force … may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force … to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner. …
(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing the prescribed particulars produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood.

58. Evidentiary provisions — breath tests
(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 or if a result of a breath analysis is relevant— …
(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 certificate containing the prescribed particulars produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood of a person and purporting to be signed by the person who operated the instrument is

admissible in evidence in any proceedings referred to in sub-section (1) and … is conclusive proof of—
(a) the facts and matters contained in it; and
(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and
(c) the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under section 55; and
(d) the fact that all relevant regulations relating to the operation of the instrument were complied with; and
(e) the fact that the instrument was in proper working order and properly operated; and
(f) the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath and that it was signed by the person who operated the instrument and given to the accused person as soon as practicable after the sample of breath was analysed—
unless the accused person gives notice in writing to the informant not less than 28 days before the hearing, or any shorter period ordered by the court or agreed to by the informant, that he or she requires the person giving the certificate to be called as a witness or that he or she intends to adduce evidence in rebuttal of any such fact or matter. …
(2C) If an accused person gives notice to the informant in accordance with sub-section (2) that he or she requires the person giving a certificate to be called as a witness and the court is satisfied that that person—
(a) is dead; or
(b) is unfit by reason of his or her bodily or mental condition to testify as a witness; or
(c) has ceased to be a member of the police force or is out of Victoria and it is not reasonably practicable to secure his or her attendance; or
(d) cannot with reasonable diligence be found -
the court must order that sub-section (2) has effect as if the notice had not been given.

3. On 21 July 2000 Master Wheeler ordered that the questions of law raised by this appeal were:

> 1. Did the Magistrate have a discretion to exclude from evidence the certificate of analysis of breath issued pursuant to section 55(4) [of the Act] which had been lawfully and properly obtained?
>
> 2. If yes, in circumstances where the Magistrate had held that the said certificate had been properly and lawfully obtained and had not been obtained unfairly did he err in the exercise of his discretion?

The Facts

4. On 1 June 1998 at about 5pm in Melbourne Road, Spotswood, the respondent was driving a car which collided with a vehicle driven by one Ms Hicks. The only damage was to property. The police were called. Ms Hicks and the respondent exchanged names and addresses and waited for the police, but when they had not come after some twenty or thirty minutes the respondent walked to his home which was nearby. Ms Hicks smelt alcohol on the respondent's breath and he told her that he had been drinking.

5. Senior Constable Callcott and Constable Hinchen attended at the respondent's home at 6.56pm and Senior Constable Callcott conducted a preliminary breath test. The respondent agreed to accompany the police officers to Altona North Police Station for a breath test pursuant to sub-section 55(1) of the Act. A breath test was conducted by Constable Hinchen. The sample of breath was analysed and the certificate showed a reading of 0.131% blood alcohol concentration. It is not in issue that that is "more than the prescribed concentration of alcohol" in terms of paragraphs 49(1)(b) and (f) of the Act.

6. The respondent was charged with offences under both of those provisions, and pleaded not guilty to both charges. He pleaded guilty to a charge of careless driving under section 65 of the Act and was convicted on that charge and fined $350 with $33 statutory costs, and was suspended from driving in Victoria for a period of one month.

7. The legal representatives of the respondent gave notice within the prescribed time pursuant to sub-section 58(2) of the Act requiring that Constable Hinchen, the person giving the certificate, be called to give evidence before the Magistrates' Court. However, when the matter came on for hearing, Constable Hinchen was no longer a member of the police force, she had left the State of Victoria and it was not reasonably practicable to secure her attendance. That being so, sub-section 58(2C) of the Act required the Court to order that sub-section 58(2) had effect as if the notice had not been given. Accordingly, the certificate, if admitted into evidence, would be conclusive proof of the matters set out in paragraphs (a) to (f) of that sub-section.

8. The respondent said in evidence that he had consumed two cans of full strength beer between 4pm and 4.50pm (i.e. before the accident) and a further four to five cans of full strength beer at home after the accident. His evidence as to the drinks before the accident, but not his evidence as to the drinks after the accident, was corroborated.

The Decision of the Magistrate

9. Counsel for the respondent submitted that the Magistrate should exercise his discretion to exclude the evidence of the certificate. A transcript of the Magistrate's reasons for his decision on this point, the accuracy of which was not challenged, was before the Court. The Magistrate found that the certificate had been legally and properly obtained, and accordingly he had no discretion to exclude it under the principle in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. He then considered whether a discretion existed "in the circumstances, to exclude this certificate because of the rather unusual facts of this case". He took into account the fact that the respondent "did all the right things at the accident scene". He found that the effect of his post-accident drinking was:

> … because of the way this legislation works, that he is placed in a very onerous, perhaps even impossible, position of establishing that the reading of the certificate, which is objected to … has to be now shown by him to be solely – solely, exclusively, as I understand the law, due to post driving drinking.

He found, apparently on the basis of judicial notice, that the two cans consumed before the accident

> would necessarily have a result in the final analysis of his blood. But he's not able by reason of the law to show what the result is, because then he would not be able to establish to the satisfaction of a court that the reading is due solely to the alcohol consumed after the driving.

10. He then expressed the view that this was, particularly in the case of the charge under paragraph 49(1)(f):

> a very significant unfairness, and not one that I think the legislature could have intended to deal with. Clearly the legislation was designed to avoid the situation where people fled accident scenes and went to the nearest pub or the nearest alcohol, whether it be in a pub or at home, and started drinking from it before the police could test them. And there were people who did that. But each case depends on its own facts and the facts of this case are, of course, very different from that.

11. His Worship then indicated that it was conceded by the prosecution that he had a general discretion to exclude the certificate on the ground of unfairness. He proceeded to exclude it in relation to the charge under paragraph 49(1)(f), "because of the peculiar and particular factual circumstances of this case". He then considered separately the position under paragraph 49(1)(b) and concluded:

> … the reality of the matter is that the defendant would be put to great cost and be subjected to great personal jeopardy in the course of attempting to defend himself in terms of showing just what his pre accident drinking was and the effect or particularly — or most particularly it had on his blood alcohol concentration as has demonstrated by the breathalyser instrument. For that reason I see no reason to distinguish the discretion of the exercise of it in relation to that section. I propose to exclude the certificate absolutely.

Without the certificate, both charges failed.

Question 1

12. In *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533; (1994) 126 ALR 481; 8 VAR 1, at 549 Brooking, McDonald and Hansen JJ said:

> The proposition must be accepted that there is a discretion in a criminal case to reject any evidence, whether or not a confession, on the ground that to receive it would be unfair to the accused in the sense that the trial would be unfair. So much must be accepted both on principle and by reason of the authorities. It would be wrong to regard as exhaustive the two particular discretions (that relating to probative value and prejudicial effect and that established by *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561) put forward by the Attorney-General in *McLean and Funk* [[1991] Qd R 231] as the only discretions available for the exclusion of evidence other than confessional evidence. But while the existence of a residual discretion must be accepted, it is not easy

> to think of circumstances in which grounds might exist for the exercise of that residual discretion in relation to any evidence — we are not speaking of confessions — which would not bring the case within the more specific principle whereby evidence is not to be admitted where its prejudicial effect is out of proportion to its probative value. (It may be that the admissibility of a written statement and the unavailability of its maker for cross-examination could in an appropriate case be treated as an example of such circumstances: we return to this question later.)

At CLR 557 their Honours referred to admissible written statements by deceased makers, and said:

> This … is not an example of the discretionary rejection of evidence on the ground of its unreliability, for there is no greater than usual danger that the statement is inaccurate. It is the inability to cross-examine that may in all the circumstances of a given case cause the statement to be excluded in the interests of a fair trial. It may be possible to bring the example, as Pattendon would, [in *Judicial Discretion and Criminal Litigation 2nd edition*] within the prejudice outweighing probative value" principle, but we are disposed to think it is better to say that, if such a statement is excluded, this is done to secure a fair trial.

13. In *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 at 77; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, Gaudron J said:

> Another feature attending criminal proceedings and relevant to the grant of a permanent stay thereof is that a trial judge, by reason of the duty to ensure the fairness of a trial, has a number of discretionary powers which may be exercised in the course of a trial, including the power to reject evidence which is technically admissible but which would operate unfairly against the accused. … The exercise of the power to reject evidence, either alone or in combination with a trial judge's other powers to control criminal proceedings, will often suffice to remedy any feature of the proceedings which might otherwise render them unjust or unfair.

14. On the basis of those passages it would be difficult to maintain that there is not a residual discretion to exclude evidence on the ground that to receive it "would be unfair to the accused in the sense that the trial would be unfair". The answer to the first question accordingly should be Yes.

Question 2

15. Given the existence of that discretion, it is necessary to consider whether it was properly exercised in all the circumstances of this case. In *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202, Dixon, Evatt and McTiernan JJ said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

16. To begin with, it should be noted that the court in *Rozenes* gave, as an example of evidence as to which the discretion is available, a written statement the maker of which is unavailable for cross-examination; and that the certificate which the Magistrate excluded in the present case was such a written statement, the person who gave that certificate being unavailable as set out in paragraph 7 above. However, it cannot be said that the Magistrate had, on the basis of the second passage quoted above from *Rozenes*, a discretion to exclude the certificate on that ground. Sub-section 58(2C) provides expressly that the effect of such unavailability is to restore the operation of sub-section 58(2) as to the admissibility of the certificate and the proof of the matters set out in that sub-section. It cannot be said that the intention of the legislature was, in those circumstances, to confer a discretion to exclude the certificate, when the effect of the unavailability of the maker of the certificate is so precisely set out.

17. That, of course, was not the basis upon which the Magistrate excluded the certificate. There seem to be three matters which he took into account. The first was his finding that the facts of the case were "rather unusual" or "peculiar and particular". The second was his finding that the respondent "had done all the right things at the accident scene". And the third, it would seem

from the passages cited above, was a view that the effect conferred upon the certificate by the presumptions set out in paragraph 48(1)(a) (relating to the charge under paragraph 49(1)(b)) and sub-section 48(1A) (relating to the charge under paragraph 49(1)(f)) was unfair to the respondent.

18. There are a number of things which can be said about the exercise of the Magistrate's discretion on those grounds.

> 1. The unfairness which His Worship perceived was not any unfairness in the conduct of the trial itself, which is the kind of unfairness said in the authorities to ground the discretion; his perception was that if the certificate were admitted the respondent would be convicted and that would be an unfair result.
>
> 2. It is not clear to me what he perceived as unusual or peculiar about the facts of the case, unless it was the responsible behaviour of the respondent.
>
> 3. He seems to suggest that an accused person who "did all the right things at the accident scene" — that is, complied with the law as to the exchange of names and addresses and generally behaved like a responsible citizen — should be rewarded by an acquittal.
>
> 4. The distinction drawn in the passage cited in paragraph 10 above is not clear to me. It does not appear to me that there is any difference between the facts of this case and the situation which His Worship suggests that the legislation was designed to avoid. The respondent went to his home, which was near the accident scene, in the knowledge that the police had been called, and started drinking before the police could test him. His Worship seems to have held the view that the intention of the legislature was to take into account post-accident drinking only where the purpose of that drinking was to obfuscate the result of any breath test; and that the post-accident drinking by the respondent did not have that purpose. There is no material before me to indicate that there was any evidence on that point. Further, I would find it difficult to attribute to the legislature the intention suggested; clearly the legislation could not operate effectively to achieve its purpose without some provisions such as paragraph 48(1)(a) and sub-section 48(1A).
>
> 5. The admission into evidence of the certificate would have the effect that the legislation was operating as it was intended to operate; any unfairness to the respondent is an unfairness intended by the legislature and fundamental to the purpose of Part 5 of the Act, as appearing from section 47. The background of the legislation is set out at some length by Gleeson CJ, Gummow, Kirby and Callinan JJ in *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at 155 to 157; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 and need not be repeated here.

19. In *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, the Court of Appeal was concerned with the purpose of section 55 of the Act. Winneke P, with whom Ormiston and Batt JJ A agreed, said at 658-9, after referring to earlier decisions:

> The process of reasoning which seems to underlie those decisions stems not so much from an interpretation of the words "furnish a sample of breath for analysis … under s55(1)" but rather from an assumption that the legislative intent which lies behind s55(1) is to protect the interests of the motorist. This assumption has led the courts to construe more strictly the discretionary powers of "requirement" and to convert them into obligations, as distinct from powers. Thus it is said that the legislative purpose behind s55(1) is not to invest the police with a power to facilitate the objects of the statute, but rather to impose a "duty to inform" the motorist of the reason why his or her liberty is being curtailed: see, for example, *Dalzotto v Lowell*, above, at 8-9; *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517 at 522-3; (1994) 20 MVR 275.
>
> Of course the investiture of increased police power has, as its necessary corollary, an increased incursion into civil liberties. However, whilst any invasion of personal liberty is bound to provoke disquiet, the courts cannot afford to lose sight of the fact that the undisputed aim of Pt 5 of the Act is to combat and reduce a recognized social evil in a manner which can only be achieved by empowering the police, in the overriding community interest, to intrude upon personal liberties, albeit not in a necessarily hostile or coercive way. If, as I think, the underlying purpose of s55(1) is to invest the police with facilitative powers in order that these objects can be achieved, it cannot be correct to judicially convert that purpose from "a power to require" into a "duty to inform". Yet, as it seems to me, that is what his Honour has done in these cases by accepting the process of reasoning adopted in *Dalzotto* and *McCardy*.

20. Similarly, in *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27, where the High Court was

concerned with a charge under paragraph 49(1)(f) of the Act, Gleeson CJ, Gummow, Kirby and Callinan JJ said at CLR 149-50:

> The language of the Act is clear and unambiguous. The duty of a court is to give effect to the purpose of Parliament as expressed in that language. That obligation is not altered because the Act is penal in character.
>
> … even accepting that the offence provided by paragraph (f) is a far-reaching one, it is clearly enacted, as the stated purposes of the Part of the Act in which it appears make plain, to deal with a major social problem. The provision of the offence in such terms is the means by which Parliament has sought to achieve those generally stated purposes, viz to reduce the number of motor vehicle collisions to which alcohol or other drugs are causally related, to reduce the number of drivers whose driving is impaired by such causes and to provide a simple and effective means of establishing the presence in the blood of a driver of more than the legal limit of alcohol.

21. Considering the exercise of the discretion by the Magistrate in the light of the authorities to which I have referred, I am satisfied that he acted on wrong principles, and was guided by irrelevant matters, and did not take into account the express purpose of the legislation. For those reasons, his exercise of the discretion should not be allowed to stand. The answer to the second question must therefore be Yes.

22. Mr Halse, for the respondent, submitted that the material placed before the Court by the Crown was inadequate, and cited authority as to the need for an appellate court to be fully informed. However, it was open to his client to supplement that material by an answering affidavit, and this was done. Given the narrow point raised by the order of Master Wheeler, I am satisfied that the material was sufficient to enable a proper consideration of the relevant issues.

23. I invite submissions from counsel as to the orders to be made consequent on the findings of the Court.

APPEARANCES: For the appellant DPP: Miss R Carlin, counsel. Peter Wood, Solicitor for Public Prosecutions. For the respondent Murphy: Mr A Halse, counsel. McNamaras, solicitors.
