27/88

SUPREME COURT OF VICTORIA

GIANKOS v ELLISON

McDonald J

26 May 1988 — (1988) 7 MVR 104

MOTOR TRAFFIC – DRINK/DRIVING – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION WITHIN 3 HOURS AFTER DRIVING – ALCOHOL CONSUMED BY DEFENDANT BEFORE AND AFTER DRIVING – WHETHER EVIDENCE OF SUCH ADMISSIBLE – WHETHER OFFENCE RELATES TO TIME OF DRIVING OR TIME OF TEST: *ROAD SAFETY ACT* 1986 SS48(1), 49(1)(a)(b)(f), (6), 53(1)(c), 55(1).

1. Where a charge is laid pursuant to s49(1)(f) of the *Road Safety Act* 1986, the prosecution is not required to establish the defendant's blood/alcohol concentration at the time of driving but rather the concentration as shown by the breath analysing instrument.
***McDonald v Bell* (MC 62/1987), followed;**
***R v Durrant* (1970) 1 WLR 29; (1969) 3 All ER 1357, distinguished.**

2. Furthermore, a person charged with such an offence is not able to call evidence on the hearing of the charge as to that person's consumption of alcohol before and after the driving but before furnishing the sample of breath for analysis.

McDONALD J: *[His Honour set out the nature of the charge and the facts of the case which included G.'s driving his motor vehicle when it was involved in a collision. G. said he had consumed alcohol before and after the collision, and when subsequently tested within 3 hours after driving, the breath analysing instrument showed a reading of 0.150% blood/alcohol concentration. At the hearing the learned Magistrate refused to allow evidence to be called by the Defendant as to his consumption of alcohol before and after the accident, found the charge proved, imposed a fine with costs, cancelled the Defendant's driver licence and disqualified him from obtaining any further licence for 15 months. After setting out the grounds of the order nisi, His Honour continued]:* … **[6]** Before me, Mr Cashmore appeared for the applicant/defendant and Mr O'Bryan appeared for the informant/respondent. At the outset, Mr Cashmore stated that it was not in dispute that the preliminary breath test of the defendant had been taken under s52(1)(c) of the *Road Safety Act*, that the breath test had been conducted in accordance with s55(1)(a) of the Act, nor was it contended that the reading of the breath analysing instrument was wrong when the test on the defendant was taken.

In the course of his submissions, Mr Cashmore informed the Court that the purpose of seeking to call evidence of the defendant's post-accident consumption of alcohol before the Magistrate was to establish that such drinking would have affected the amount of alcohol in the defendant's blood at the time that it was analysed, that the defendant would then have rebutted the *prima facie* evidence of the analysis of the defendant's breath and that would require the prosecution to show that, at the time of the defendant's driving, his blood alcohol concentration exceeded the prescribed concentration of alcohol in the defendant's blood at that time. He submitted that to interpret s49(1)(f) of the Act otherwise would be Draconian and oppressive and, if evidence of the kind sought to be called was not permitted, it may result in a person being convicted under s49(1)(f) of the Act who had no, or less than the prescribed concentration of **[7]** alcohol in his blood at the time when he was driving and when an accident occurred but who had more than the prescribed concentration at the time when a breath analysing test was taken.

He contrasted ss49(1)(a) and (b) of the Act with s49(1)(f) and, in particular, drew attention to s48(1)(a) and the presumption contained therein with respect to the evidence of the concentration of alcohol in a person's blood at the time at which an offence under s49(1)(a) and (b) is alleged to have been committed. He further drew attention to the fact that, under s48(1)(a), the defendant to a charge had the capacity to call evidence to establish that there was a particular concentration of alcohol in a person's blood at the time of the offence, contrary to the presumption.

Mr Cashmore sought to rely upon the *Hansard* reports of debate in the Legislative Assembly and Council during the passage of the Bill, which became the *Road Safety Act* 1986 and, in particular, to the amendments made to Clause 49(6) in support of his primary contention that, in respect of a charge under s49(1)(f) of that Act, the relevant time for a person's blood alcohol content to be in excess of the prescribed concentration, to be guilty of an offence, was at the time of driving, not at the time when the breath analysis was taken, and therefore the evidence sought to be led was admissible.

Mr O'Bryan submitted that the offence provided under s49(1)(f) of the *Road Safety Act* was a new offence in the law of Victoria, whereas the offences under s49(1)(a) and (b) were in like terms contained in earlier **[8]** legislation (see s80B and s81A of the *Motor Car Act* 1958). He submitted that an offence under s49(1)(f) of the Act was a separate and distinct offence from that provided by the s49(1)(b) and whereas in respect of that latter section, the offence is committed if a person drives or is in charge of a motor vehicle when more than the prescribed concentration of alcohol is present in that person's blood, the offence under s49(1)(f) of the Act is committed if a person within three hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis under s55(1) of the Act and the result of the analysis indicated that more than the prescribed concentration of alcohol is present in that person's blood. He submitted that the relevant time for the prescribed concentration of alcohol in a person's blood to be exceeded, for an offence to be committed under s49(1)(f), was, at the time of the analysis of breath taken under s55(1) of the Act and not at the time of driving.

Mr O'Bryan relied upon the decision of Phillips J in *McDonald v Bell* (Vic SC, 4 December 1987, unreported). In *McDonald v Bell*, Phillips J had before him the return of an order nisi to review the decision of a Magistrate relating to a charge brought under s49(1)(f) of the *Road Safety Act* 1986. From the judgment, it appears that the defendant had been involved in an accident while driving a motor vehicle, that before the accident he had consumed alcohol and that he had further consumed alcohol after the accident and then later had been **[9]** requested to, and did, furnish a sample of his breath for analysis. It appears that the defendant pleaded guilty to the charge under s49(1)(f) of the Act and did not contest the percentage of alcohol in his blood as established by the breath analysis but called evidence to the extent and effect on his blood alcohol concentration by his post-accident consumption of alcohol. The Magistrate found on that evidence that the defendant's concentration of alcohol in his blood was less at the time that he was driving than when later tested and imposed a penalty on that basis rather than on the basis of the concentration shown from the later breath analysis. One of the grounds of review was that "the learned Magistrate erred in law in the construction which was placed on s49(1)(f) of the *Road Safety Act* 1986 and in particular in interpreting that section as creating an offence which was committed at the time of driving."

By his judgment, Phillips J held that the Magistrate had erred in law and upheld the order to review on all grounds including the above ground. He held at p8a of his judgment: *[His Honour referred to this passage and continued]* **[10]** Mr Cashmore sought to distinguish that decision on the ground that the defendant had pleaded guilty to the offence under s49(1)(f) of the Act and that the decision related only to the imposition of a penalty. In the alternative, he argued that the decision of Phillips J was not correct in law. I am in agreement with the decision of Phillips J in *McDonald v Bell* and I agree with the reasons and conclusions stated by His Honour in reaching the decision that he did. For the reasons hereafter stated, I am also of the view that the reasons and conclusions stated by Phillips J are relevant to the matter under consideration in this case. In the course of submissions, I was referred to *R v Durrant* (1970) 1 WLR 29; also (1969) 3 All ER 1357, a decision of the Court of Appeal, Criminal Division, by Mr Cashmore in support of his contention that the relevant time when the alcohol concentration in a person's blood must exceed the prescribed concentration for an offence to be committed under s49(1)(f) of the Act was at the time of the driving and not at the time of the taking of the breath analysis under s55(1) of the Act.

The relevant section of the *Road Safety Act* 1967 considered by the Court of Appeal provided:

> "If a person drives, or attempts to drive, a motor car on a road or other public place having consumed alcohol in such a quantity that the proportion thereof in his blood as ascertained from a laboratory test for which he subsequently provides **[11]** a specimen under s3 of this Act, exceeds the prescribed limit at the time he furnishes the specimen, he shall be liable ..."

Lord Parker CJ, who delivered the judgment of the Court, at p32 (All ER, p1358) stated:

> "As it seems to this Court, what this subsection is saying is this, that if a person drives a motor vehicle, having consumed such quantity that the proportion in his blood – and I add the words "at the time of driving" – as ascertained from a laboratory test, and so on, exceeds the prescribed limit, he is guilty of an offence."

In the further course of his judgment at p32 (All ER, p1359) Lord Parker CJ further stated:

> "Finally, it is suggested that the result of the test shall be deemed to disclose the amount of alcohol in the blood at the time of driving, however much alcohol he may have consumed thereafter. The Court cannot see any ground for reading this subsection in that way. Indeed, it would have the lamentable result that an entirely innocent man who had, as a result of being shaken up in an accident, quite properly consumed alcohol might find himself convicted and disqualified."

Whilst appreciating the weight and significance of such comments by Lord Parker CJ, when interpreting and determining the true meaning of s49(1)(f) of the *Road Safety Act* 1986, and determining what constitutes an offence under that Act, I am of the view that the wording of the section of the *Road Safety Act* 1967 considered by the Court of Appeal is distinguishable from s49(1)(f) of the *Road Safety Act* 1986. The task of this Court is to determine the true meaning of s49(1)(f) of the *Road Safety Act* 1986.

I am of the view that, when interpreting s49(1)(f) of the Act, it is significant to have regard to the provisions and offences created by s49(1)(a) and (b) of the Act. In both cases, relying upon the presumption **[12]** contained in s48(1)(a), until the contrary is proved, the Court is able to receive and rely upon evidence establishing what the concentration of alcohol in a person's blood at any time within three hours after the alleged offence as evidence of such concentration at the time that the offence was alleged to have been committed. If the relevant time factor for the commission of the offence under s49(1)(f) was the same as that under subsections (a) and (b), that is, the time of driving, one would expect the provisions of s48(1)(a) also to apply to s49(1)(f). Similarly, in my view, if the relevant time factor in relation to the commission of an offence under s49(1)(f) was at the time that a person was driving or had been in charge of a motor vehicle, it is difficult to see how a breath analysis taken after that event could be related back to such an event in the absence of a similar presumption to that contained in s48(1)(a) or unless scientific evidence was called by the prosecution to establish the same. These considerations, in my view, point to the relevant time factors in s49(1)(a) and (b) being different to that in subsection (f) of that section.

I am also of the view that, accepting as I do, with respect, the conclusions and reasonings of Phillips J in *McDonald v Bell*, a rather extraordinary situation would arise if the contention of the applicant were correct. If evidence of post-driving alcoholic consumption could be called by the defendant as relevant to determine the issue as to whether an offence had been committed which may have the effect of demonstrating **[13]** that, although the prescribed concentration of alcohol in the defendant's blood was exceeded, it was, however, less at the time of driving than at the time the analysis of breath was taken notwithstanding that, the Court would be required to enter in the records of the Court the latter concentration and impose a minimum penalty on the latter higher concentration.

It is to be noted that, under s49(7)(a), in the case of a person convicted of an offence under s49(1)(b), that which the Court is required to enter in the records of the Court is "the level of concentration of alcohol found to be present in the person's blood", as compared to an offence under s49(1)(f), in which case that to be entered is "the level of concentration of alcohol found to be recorded or shown on the breath analysing instrument". By reason of these statutory provisions, I find that, in determining the meaning of s49(1)(f), I am not assisted by the reports of the Parliamentary debate, with respect to the clause that became s49(6) for, although it was amended, no amendment was made to sections 48(1)(a), 49(1)(a) or (b), 49(7) or 50(1) and (2). I am of the opinion that the Magistrate was correct in ruling that the evidence sought to be led by the defendant as to the defendant's pre-accident consumption of alcohol and also particularly his post-accident consumption of alcohol was not admissible as the purpose for which the evidence was sought to be led could not found a defence to the charge under s49(1)(f) of the Act. **[14]**1 am of the view that the relevant time factors are different in s49(1)(a) and (b) to that in s49(1)(f).

Under s49(1)(a) and (b), a person is guilty of an offence if he or she drives, or is in charge of a motor vehicle while under the influence of intoxicating liquor to the extent stated or while more than the prescribed concentration of alcohol is present in his blood and s48(1)(a) may be availed of in establishing the concentration of alcohol in the blood of that person at the time that he or she was driving or in charge of the motor vehicle.

However, under s49(1)(f), a person is guilty of an offence if he or she within three hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and the result of the analysis as recorded on the breath analysing instrument indicates that more than the prescribed concentration of alcohol is in his or her blood. It is the concentration of alcohol in the person's blood as indicated by the breath analysing instrument as then being present and it is not part of the prosecution's task under that section to establish what was the concentration of alcohol in the blood at the time when the person was driving or in charge of a motor vehicle or when involved in an accident. Nor, in my opinion, is the defendant able to call evidence of the nature and for the purpose sought to be called before the Magistrate. In rejecting the evidence sought to be called by the defendant, the Magistrate relied upon the provisions **[15]** of s49(6) of the Act. Clearly, the evidence sought to be called by the defendant as to his post-accident consumption of alcohol in particular was evidence as to the effect of that consumption of alcohol on him directed to establishing that, either at the time of the accident or before the breath analysis was taken, the concentration of alcohol in his blood would have been less than at the time that the breath analysis was performed and would not be admissible within the plain meaning of that section.

It was submitted during the course of the argument that the meaning of s49(1)(f) and the inadmissibility of the evidence sought to be called as not being relevant to the charge, it is not necessary to decide that matter. I am of the view that the matters expressed by Phillips J in *McDonald v Bell*, when dealing with the suggestion that s49(1)(f) was Draconian in its operation, are consistent with my interpretation of the meaning of that section. His Honour stated, at p9a of his judgment:

> "Counsel for the Sergeant was content to refer to it as 'Draconian'. Every right-thinking person would support efforts by the executive to stamp out alcohol-related driving offences and, doubtless, s49(1)(f) is aimed at those drivers who, out of a sense of guilt and in an attempt to escape prosecution, give to investigating police officers false accounts as to the circumstances of when and where they consumed alcohol. If s49(1)(f) succeeds in bringing about the conviction and punishment of such drivers, so be it. But its application could also result in the conviction and punishment of completely innocent citizens, who in truth have not consumed a drop of alcohol **[16]** before driving their motor cars. It may be that the Act places an altogether too heavy burden on police officers, who must exercise a discretion to prosecute. I say at once that I have not heard, nor read, of any misuse of such direction in this connection and the present case is certainly not an instance of it. It may be, however, that, in the interests of the police, as well as the public, the discretion to prosecute in s49(1)(f) cases, should be vested, at least as a matter of practice, in the Director of Public Prosecutions."

I agree, with respect with His Honour that a person could be successfully prosecuted under s49(1)(f), who had not consumed any alcohol before or at the time of driving. It is to be noted, however, that the breath analysis relevant to s49(1)(f) is in respect of the furnishing of a sample of breath for analysis by a breath analysing instrument under s55(1) of the Act. That section, in conjunction with s53 of the Act, limits the circumstances in which a person may be required to furnish a sample of breath for analysis. I particular I draw attention to s53(1)(c).

In *Stewart v Police* (1970) NZLR 560 the New Zealand Full Court considered legislation generally similar to that under consideration in this case and specifically considered a section of the *Transport Act*, providing that where a specimen of blood had been provided for analysis as to the proportion of alcohol in the same, it was to be presumed that the proportion at analysis was the same as at the time of the offence. The Court held by majority that the presumption was irrebuttable. Wild CJ, at p565, stated:

> **[17]** "It is true, as was pointed out in argument, that the legislation stipulates no period of time within which the specimen of blood must be taken from a driver suspected of an offence. It is also true (as was observed by the English Court of Appeal in *R v Durrant* decided on the comparable but differently worded s1 of the *Road Safety Act* 1967), that a driver who has had no alcohol may quite properly take some to steady himself after an accident. That being so, it was suggested in argument

> that if the presumption under s59C(8) is absolute an innocent man may be convicted by reason of its operation in that the blood alcohol concentration in the specimen might relate to alcohol taken only after the alleged offence. But before the presumption can operate at all each one of the procedural steps as to the taking of breath and blood tests laid down in ss59B and 59C must be complied with in precise detail. Thus, before a constable or traffic officer may require any person to undergo a breath test under s59B(1) he must first have a good cause to suspect "that the person has committed an offence involving the use of a vehicle while affected by drink. Provision is made for a second breath test under s59B(4). That is followed by the taking of a specimen of blood by a registered medical practitioner under s59C(1), and that, in turn, by a decision to initiate proceedings. It is to be noted that the Legislature has been careful to stipulate that the suspected person is to remain (under pain of penalty and arrest without warrant) in the company of a constable or traffic officer from the time he is suspected of committing an offence down to the time when the specimen of blood is taken. For myself I have more faith in the ability and sense of fairness of law enforcement officers in New Zealand and in the integrity of prosecuting authorities than to believe that a person would be prosecuted if the reports and inquiries made showed that in fact his blood-alcohol concentration might have been brought beyond the defined limits only by the consumption of alcohol after the occurrence of the incident that caused him to be suspected. But even if there is a stronger possibility of injustice than I think in fact exists the authorities show that the Court is bound to give effect to a statutory provision if its meaning and purpose is clear (*Maxwell on Interpretation of Statutes* 11th ed.5). Here I think the view that its meaning and purpose is clear is further reinforced by an examination of the scheme of the legislation."

I am of the view and hold that the Magistrate was correct in ruling that the evidence sought to be led by the defendant for the purpose stated was inadmissible. I discharge the order to review and confirm the conviction and penalty imposed by the Magistrate.
