53/93

SUPREME COURT OF VICTORIA

YOULA v GREEN and ANOR

Beach J

5, 18 November 1993 — [1994] VicRp 28; [1994] 1 VR 408; (1993) 18 MVR 321

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN – REQUEST FOR DOCTOR AND ANALYST TO ATTEND FOR CROSS-EXAMINATION – APPLICATION TO BE DETERMINED BY COURT – PROCEDURE TO BE FOLLOWED - WHETHER SIMILAR TO APPLICATION FOR BAIL – WHETHER COURT CAN ACT ON STATEMENTS FROM BAR TABLE – WHETHER EVIDENCE MUST BE GIVEN IN SUPPORT OF APPLICATION: *ROAD SAFETY ACT* 1986, S57.

1. Where an application is made pursuant to s57(7) of the *Road Safety Act* 1986 ('Act') to cross-examine a medical practitioner who has taken a blood sample and the person who has analysed it, a court must not grant the application unless it is satisfied that there is a reasonable possibility the blood sample was not that of the accused or it has become contaminated.

2. The procedure to be followed on the hearing of such an application is not analogous to that on an application for bail. Statements from the Bar table are not sufficient. An applicant will be required to produce evidence in support of the application to establish the matters set out in s57(7A) of the Act.

BEACH J: [1] This is the return of an originating motion, whereby the plaintiff seeks an order prohibiting the Williamstown Magistrates' Court from hearing or receiving evidence from a medical practitioner and an analyst concerning the concentration of alcohol alleged to have been in the blood of the second named defendant, Stuart William Green, at the time he was apprehended by police following an accident in which a motor car driven by him was involved on 23 August 1991.

The background to the proceeding may be summarised as follows: On 23 August 1991 a motor car driven by Green was involved in an accident in Douglas Parade, Newport. Following the accident, Green was taken to the Western Hospital at Footscray where a sample of his blood was taken by a resident medical officer at the hospital, Doctor Andrew Mark Walby. In due course the sample of blood was analysed by an approved analyst, Jodie Anne Burke. On analysis, the sample was found to contain 0.257 grams of alcohol per 100 millilitres of blood (0.257 per cent).

On 28 May 1992 Green was served with two certificates issued pursuant to the provisions of s57 of the *Road Safety Act* 1986 (the Act); one certificate signed by Dr Walby, whereby Dr Walby certified that in taking the blood sample he had complied with all regulations relating to the collection of blood samples, and one signed by Ms Burke, certifying the result of the analysis of the blood sample. On some unspecified date, presumably also 28 May 1992, Green was charged by the plaintiff, Constable Dawn **[2]** Loretta Youla, with an offence pursuant to s49(1)(g) of the Act, namely, that within three hours of driving a motor vehicle a sample of blood taken from him was found on analysis to contain more than .05 grams of alcohol per 100 millilitres of blood. He was also charged with careless driving. The charges came before the Williamstown Magistrates' Court on 7 September 1992, but were then adjourned to 30 November 1992.

On 12 September 1992 Constable Youla received the following the letter from Green's solicitors:

> "Dear Sir, re Stuart William Green. We confirm this matter has been adjourned for hearing at the Williamstown Magistrates' Court on 27 November 1992. Kindly take notice that at the hearing Application for Leave to call the person who has given the certificate herein shall be made pursuant to s57(7) of the *Road Safety Act* 1986. We also advise that in the event the application is successful we will require at the hearing of the proceedings the person who conveyed the blood sample, and also the safe keeper of the blood for cross-examination. Yours faithfully."

The relevant sub-sections of s57 of the Act are sub-ss(7) and (7A) which read:

(7) An accused who has been served with a copy of a certificate given under this section may with the leave of the court, and not otherwise, require the person who has given the certificate to attend at all subsequent proceedings for cross-examination and that person must attend accordingly.

(7A) the court must not grant leave under sub-s7 unless it is satisfied—
(a) that the informant has been given at least seven days notice of the hearing of the application for leave and has been given an opportunity to make a submission to the court; and

(b)((i) that there is a reasonable possibility that the blood referred to in a certificate given by an analyst under sub-s. 4 was not that of the accused; or **[3]**
(ii) there is a reasonable possibility that the blood referred to in a certificate given by a legally qualified medical practitioner had become contaminated in such a way that the blood alcohol concentration found on an analysis was higher than it would have been had the blood not been contaminated in that way; or
(iii) the place at which the sample was taken was not at the relevant time a designated place (within the meaning of s56) which is specified in the order under s56(1) as a designated place by which the Code of Practice for Taking Blood Samples from Road Accident Victims has been adopted; or
(iv) for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain relevant facts.

On 2 November 1992 Green's application came before the Williamstown Magistrates' Court. At the hearing no evidence was called on Green's behalf in support of the application. Counsel for Green simply stated to the magistrate that Green had only consumed four to six pots of beer prior to the accident on 23 August 1992, and given the fact that the blood analysis showed a blood alcohol content of 0.257, that indicated that Dr Walby had in some way wrongly taken the sample or confused the sample, or that the analysis had been done incorrectly. In that situation he applied to have both Dr Walby and Ms Burke attend the hearing of the charges for cross-examination.

The affidavit material before me is to the effect that at that stage of the proceedings, the prosecutor submitted to the magistrate that before such an application could be granted, the applicant would have to lead some positive evidence on oath and could not merely rely on statements from the Bar table. The view the **[4]** magistrate took of the matter was that sworn evidence was not necessary, that the procedure was analogous to a hearing under the *Bail Act* and that he did not wish to embark on an interlocutory hearing. The magistrate then proceeded to grant Green's application.

The contention of the plaintiff is that in the circumstances of this case the magistrate was precluded from granting leave to the defendant, Green, to have the doctor and the analyst called for cross-examination, unless he was satisfied there was a reasonable possibility of mistaken identity of the sample, or contamination of the sample (this was not a case in which it was suggested that there was some other reason for requiring the doctor or analyst to give evidence). The magistrate could not be so satisfied within the meaning of s57(7A) unless he was persuaded by logically probative evidence.

For the defendant, it was contended that it was unnecessary for an applicant to produce evidence in support of such an application, that the magistrate is entitled to make the appropriate order based on what he is told as to the basis of the application by either the applicant, if he appears in person, or by counsel appearing on his behalf. In that respect the application is similar to an application for bail where orders are frequently made based solely upon what the judge or magistrate is told from the Bar table by the applicant or his counsel. In my opinion there can be no analogy between applications for bail pursuant to the provisions of the *Bail Act* and applications made pursuant to the provisions of s57(7) and (7A) of the *Road Safety Act*.

[5] Section 8 of the *Bail Act* makes specific provision for the conduct of proceedings in respect of applications for bail, including the matters the court may take into consideration in determining such applications. The relevant sub-sections of the section read:

8. In any proceedings with respect to bail—
(a) the court may, subject to paragraph (b), make such inquiries on oath or otherwise of and concerning the accused as the court considers desirable;
(c) the informant, or prosecutor, or any person appearing on behalf of the Crown may, in addition to any other relevant evidence, submit evidence, whether by affidavit or otherwise—

(i) to prove that the accused has previously been convicted of a criminal offence;
(ii) to prove that the accused has been charged with or is awaiting trial on another criminal offence;
(iii) to prove that the accused has previously failed to surrender himself into custody in answer to bail; or
(iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused.
(d) the court may take into consideration any relevant matters agreed upon by the informant or prosecutor and the accused or his counsel; and
(e) the court may receive and take into account any evidence which it considers credible or trustworthy in the circumstances.

It is clear that in respect of applications for bail it may not be necessary for the court to hear sworn evidence in support of an application. The court may be quite content to determine the application based upon matters put to it which are the subject of agreement between the informant and prosecutor, and the accused or **[6]** his counsel. But there are no similar provisions in the *Road Safety Act*. Pursuant to s57(7A) the court must not grant the application unless it is satisfied that there is a reasonable possibility that the sample of blood in question was not that of the accused, or a reasonable possibility that it has become contaminated.

Some useful observations as to what is required in relation to decisions of statutory tribunals is to be found in the judgment of Deane J in *Minister for Immigration and Ethnic Affairs v Pochi* [1980] FCA 85; (1980) 44 FLR 41; (1980) 31 ALR 666; (1980) 4 ALD 139; 1A IPR 708. At ALR page 689 His Honour said:

"It is, however, of general validity in the case of a statutory tribunal which is bound to act judicially. Indeed, that conclusion, upon analysis and for present purposes, does little more than place in a proper context of the essential duty of fairness of a statutory tribunal bound to act judicially, the well established principle of law that a decision of such a statutory tribunal must ordinarily be based on evidence which is reasonably capable of sustaining it (*Allinson v General Council of Medical Education and Registration* [1894] 1 QBD 750 at 760, 763, 766; *Asbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371; [1965] 1 WLR 1320 at 1326; and see per Stephen J, *Ex parte Jordan* (1898) XIX NSWLR 25 at 29). Implicit in both Diplock LJ's conclusion, and in that well established principle are both the requirement that findings of material fact of a statutory tribunal must ordinarily be based on logically probative material and the requirement that the actual decision of such tribunal must, when relevant questions of fact are in issue, ordinarily be based upon such findings of fact and not on mere suspicion or speculation. Those requirements, like all the ordinary applicable rules of natural justice, may be modified or abolished by the expressed words or intendment of the legislation establishing the tribunal or conferring jurisdiction upon it."

If a decision of a statutory Tribunal must ordinarily be based upon evidence which is reasonably capable of sustaining it, why should that principle not apply to the decision of a court in relation to an **[7]** application made to it pursuant to s57(7) and (7A) of the *Road Safety Act*; all the more so when that court must be satisfied of one or more of the matters specified in sub-s7A of the section before it is entitled to grant the application.

In my opinion there is no reason why such a principle should not apply to decisions of a court made in relation to s57 applications, and indeed every reason why it should apply. Sub-s 7A of s57 was specifically inserted into the *Road Safety Act* by s12 of the *Road Safety (Drivers) Act* 1991. In his second reading speech on 10 April 1991 the then Minister of Transport said:

"Another important provision in the Bill is an extensive revision of the system of compulsorily taking blood samples from road accident victims which has been in force since 1974. Doctors employed in the emergency departments of the major hospitals, who are represented by the Victorian Emergency Department Association, have expressed considerable dissatisfaction with the present system and have raised a number of concerns."

The Minister continued:

"The compelling of doctors to attend court to be cross-examined about taking of the blood sample when much of this type of cross-examination has been ruled invalid by the Supreme Court."

Later again:

"The problem of doctors being compelled to give evidence unnecessarily is addressed by requiring

> the leave of the court to be obtained before the doctor can be called as a witness. The Bill provides some guidance as to the cases in which leave would be given."

(See page 946 of the *Hansard* report of the proceedings before the Legislative Assembly on Wednesday 10 April 1991). It is clear, therefore, that the new section was **[8]** designed to obviate the problem of doctors (and for that matter analysts) being compelled to give evidence unnecessarily by persons charged with drink driving offences. For that reason the legislature saw fit to provide that the court (in this instance the Magistrates' Court) must not grant leave unless it is satisfied of one or more of the matters specified in the sub-section.

In my opinion, a Court cannot be satisfied about the matters specified in the sub-section unless it has evidence before it which establishes those matters. Statements from the Bar table are not evidence and should not be construed as such. The magistrate should have required the defendant, Green, to produce evidence in support of his application before determining the application. During the course of discussion, counsel for the defendant, Green, stated that if that was the proper view of the matter, that may result in Green being required to give evidence on oath on the hearing of the application as to the quantity of liquor he had consumed on the night in question. In that situation he could be cross-examined by the prosecutor, and perhaps prejudiced insofar as his defence to the drink driving charge was concerned. I am unimpressed by that contention. If Green has a genuine challenge to the accuracy of the blood test and analysis, and I am not suggesting for one moment that he does not, he will ultimately have to give evidence concerning the quantity of alcohol he consumed on the night of the accident. I fail to see, therefore, that he would be prejudiced by being required to give that evidence upon the hearing of his s57 application.

[9] The order of the Williamstown Magistrates' Court made on 2 November 1992 is set aside. I order that the application of the defendant, Green, made pursuant to s57 of the *Road Safety Act* be remitted to either the Melbourne Magistrates' Court or the Williamstown Magistrates' Court to be heard by a magistrate other than the magistrate who made the order of 2 November 1992. I order that the plaintiff's costs of the proceeding be taxed, and when taxed, paid by the defendant, Green. I grant to Green the appropriate certificate under the *Appeal Costs Act*.

Solicitors for the plaintiff: Victorian Government Solicitor.
Solicitors for first defendant: Nanscawen Grant.
