27/93

SUPREME COURT OF VICTORIA

DPP v PHUNG

Harper J

11 May, 15 June 1993 — [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157

MOTOR TRAFFIC – DRINK/DRIVING – TWO BREATH TESTS CONDUCTED – SECOND RESULT HIGHER THAN FIRST – WHETHER EVIDENCE ADMISSIBLE TO MAKE OUT DEFENCE – "EVIDENCE AS TO THE EFFECT": *ROAD SAFETY ACT* 1986, S49(1)(f), (4).

1. Where a person undergoes two breath tests and the results show a marked divergence, evidence in support of the defence under s49(4) of the *Road Safety Act* 1986 ("Act") is admissible to prove that the breath analysing instrument used was not in proper working order or properly operated.
***Campbell v Renton* MC39A/88, followed.**

2. Where a magistrate accepted—
(a) evidence that a person ceased drinking 3.5 hours before undergoing a breath test (result .120%) and 4 hours before a second test (result .135%) and

(b) expert evidence as to the effect on the person of the consumption of alcohol, the magistrate was not in error in:
(i) admitting this evidence;
(ii) concluding that the breath analysing instrument on the occasion in question was either not in proper working order or properly operated; and
(iii) dismissing the charge laid under s49(1)(f) of the Act.

HARPER J: [1] By a summons issued on 15 August 1991, David Phung was charged with an offence under s49(1)(f) of the *Road Safety Act* 1986 ("the Act"). The legislature there provided (in effect) that a person is guilty of an offence if:

> (a) within three hours of driving a motor vehicle he or she furnishes a sample of breath for analysis by a breath analysing instrument, and the result indicates that more than the prescribed concentration of alcohol (0.05%) is present in his or her blood; and
>
> (b) that concentration was not due solely to alcohol consumed after drinking.

The precise form of words used in the charge, although breaking several grammatical rules, was not the subject of challenge by Mr Phung, at least not before me. I quote from the summons itself:

> "The defendant at Burnley on 11 June 1991 did within three hours after driving a motor vehicle and after a requirement to undergo a preliminary breath test you were further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* 1986, the result of which analysis indicated more than the prescribed concentration of alcohol was present in your blood."

The Summons was heard at the Magistrates' Court at Prahran on 5 May 1992, 25 September 1992 and 30 September 1992. On the last of those days, the Magistrate (Mr PT Power, M.) dismissed the charge. The Director of Public Prosecutions appeals to this Court against that decision. The Magistrate accepted much of the evidence of Mr Phung. He found, accordingly, that between 8:30pm and 10:30pm on Monday 10 June 1991, Mr Phung consumed **(2)** slightly less than two bottles of light beer. Mr Phung then slept for several hours; according to him, until 1:30am on Tuesday 11 June. According to the evidence called by the prosecution, however, Mr Phung was intercepted whilst driving a motor vehicle in Barkly Avenue, Burnley at 1:13am. Be that as it may, his Worship accepted that Mr Phung consumed no alcohol after 10:30pm the previous evening.

At 2:04am on 11 June, a sample of Mr Phung's breath was analysed at Richmond Police Station by a breathalyser of the kind referred to in s3 of the Act. The instrument indicated that

the quantity of alcohol present in Mr Phung's blood was then 0.120 grams of alcohol per 100 millilitres of blood (0.120%). A second sample was similarly analysed at 2:30am on this occasion, the instrument indicated that the quantity of alcohol present in Mr Phung's blood was 0.135 grams per 100 millilitres (0.135%).

Expert evidence was called on behalf of Mr Phung. The accuracy of that evidence is not presently under challenge by the Director. The expert, Mr Michael Crewdson, was asked (in effect) to assume that Mr Phung's account of his consumption of alcohol as given earlier in this judgment was true. He was then asked whether, in those circumstances, any alcohol would remain in the blood three and a half hours after drinking ceased. According to an affidavit filed on behalf of the Director, his answer was that, in the circumstances postulated, all alcohol would by then have been eliminated from the blood of "the respondent" (i.e. Mr Phung). **[3]** Mr Crewdson was also asked whether, in the circumstances postulated, "the person's blood alcohol content should be rising or falling at 2:04am": see the affidavit of Mr Phung sworn 7 May 1993 and filed in this proceeding. According to Mr Phung, Mr Crewdson replied that it "would have to have been falling". Indeed, Mr Crewdson also gave evidence that, in general, the percentage of alcohol in the blood reaches its maximum 40 minutes after cessation of drinking. The longest period taken to attain this maximum by anyone in Mr Crewdson's experience was slightly under two hours. The Magistrate accepted this evidence. He therefore concluded that the breathalyser was, on the occasion in question, either not in proper working order or not properly operated.

On the basis of these findings, the Magistrate upheld Mr Phung's submission that a defence had been made out under s49(4) of the Act. That sub-section is in the following form:

> "(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated."

It is impossible to argue with the logic of his Worship's reasoning. If one accepts Mr Phung's facts and Mr Crewdson's opinions, then it must follow that the result of the analysis of Mr Phung's breath as recorded or shown by the breath analysing instrument was wrong. It also follows, in these circumstances, that the instrument was on that occasion either not in proper working order or not properly operated. **[4]** The Director of Public Prosecutions does not argue otherwise. He does submit, however, that the Magistrate was prevented by law from receiving, let alone accepting, the evidence of Mr Crewdson – and possibly also (at least on the question of guilt) Mr Phung.

The provision principally relied upon by the Director of Public Prosecutions in support of this proposition is s49(6) of the Act. So far as is relevant, it states that, in any proceedings for an offence under s49(1)(f), evidence concerning the effect of the consumption of alcohol on a defendant is inadmissible – with one exception. That exception applies when the evidence is called for the purpose of rebutting the presumption referred to in s49(1A). By that sub-section, it must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood was not due solely to the consumption of alcohol after driving. The presumption can only be rebutted by proof to the contrary based upon the corroborated evidence of the person charged.

Mr Crewdson's evidence was not tendered in rebuttal of the presumption referred to in s49(1A). Accordingly, it was inadmissible in this proceeding if, to use the words of s49(6), it is properly characterised as "evidence as to the effect of the consumption of alcohol on the defendant". The Director of Public Prosecutions submits that it should be so characterised. He points out that even if (despite indications to the contrary in the affidavit material filed on his behalf) Mr Crewdson's evidence does not include evidence of any tests done on Mr Phung himself, **[5]** nevertheless it could not be relevant unless it was applicable to someone with Mr Phung's personal characteristics. Mr Crewdson's evidence may have been about the effect of the consumption of alcohol on the concentration of that substance in the blood of the generality of consumers, but unless Mr Phung was in that class, then the evidence would have no point. It was for this reason (it was submitted) properly characterised as "evidence as to the effect of the consumption of alcohol on the defendant".

This submission has its superficial attraction. Evidence concerning the effect of the consumption of liquor on the concentration of alcohol in the blood of the average consumer is

in this case irrelevant unless it can be linked to Mr Phung. Here, the link was two-fold. First, there was the assumption that the effect on Mr Phung of the consumption of alcohol would not be significantly beyond (and indeed would be within) the normal range. Secondly, there was the fact that Mr Crewdson was asked, in effect, to assume the truth of Mr Phung's evidence about his consumption of alcohol on the occasion in question.

The submission is nevertheless fundamentally unattractive. If accepted, it will result in the conviction of persons for an offence against s49(1)(f) although the tribunal of fact is satisfied that those charged had nowhere near the prescribed concentration of alcohol in their blood. In this case it will, if accepted, result in the conviction of Mr Phung although the Magistrate was (as I understand his reasons for judgment) satisfied not only that the breath analysing instrument used to analyse his blood was either not in proper working order or was not properly operated, but **[6]** also that the relevant defect resulted in an inaccurate analysis.

Given the presence in the Act of s49(4), this would be a very strange result indeed. Clearly, injustice might be done if someone could be convicted on the basis of an analysis of his or her breath where that analysis had been performed by a malfunctioning machine. Equally clearly, the legislature wished to avoid such injustice. Hence, s49(4). But the construction of s49(6) for which the Director of Public Prosecutions contends would deprive s49(4) of nearly all its practical effect: a person charged with an offence against s49(1)(f) would rarely be in a position "to prove that the breath analysing instrument used was not ... in proper working order or properly operated" unless evidence of the kind tendered through Mr Crewdson in this case were admissible.

There are two means by which a machine might be shown to be not in proper working order or not properly operated. One, of course, is the direct approach: a defendant might demonstrate that the operating procedure was flawed, or might establish that the machine itself was defective. But it would not necessarily follow that the fault thus revealed had resulted in an inaccurate analysis: *Ozbinay v Crowley* ((1993) 17 MVR 176, 16 April 1993, Byrne J). Before one can properly reach that conclusion, it is, as his Honour there pointed out, necessary to show not merely a fault in procedure or in the instrument itself, but also that the result of the analysis was unreliable.

It is also possible to demonstrate fault in the operation of a breath analysing instrument, or a fault in the **[7]** instrument itself, by examining the results of an analysis against the known or established facts concerning the consumption of alcohol by the person whose breath is analysed. Such an approach will not, of course, accord with strict scientific method. As a check on the accuracy of the analysis performed by the instrument, it would only be of use where the divergence between the results of the analysis and the evidence of consumption is so marked that either the defendant is an abnormal human being in relation to the absorption and elimination of alcohol, or the machine must have produced a wrong result. It follows that there is, in principle, good reason why s49(6) should not be construed in a way which would prevent a defendant from calling expert evidence to the effect of that given by Mr Crewdson in this case. Authority also supports this view. In *Campbell v Renton* (unreported, 18 August 1988, Marks, J) the defendant (Campbell) had been convicted of an offence against s49(1)(f). The evidence as set out at pp3-5 of his Honour's reasons for judgment was that the defendant -

> "had consumed a great deal of intoxicating liquor throughout the previous night [11 September - 12 September 1987] but had consumed [no] alcohol since getting up at about 9:30 that morning. A preliminary breath test proved positive and after being requested to do so he furnished a sample of his breath directly into an approved breath analysing instrument at 12:14 pm. This resulted in a reading of .090% blood alcohol. He was given a signed certificate in the prescribed form and after being informed of his right to do so requested a second sample. This was taken at 12:36 pm and resulted in a reading of .095% blood alcohol ...
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> The applicant gave evidence that he did not consume any alcohol after waking up on the day in question. He was supported by four **[8]** witnesses, one or more of which had been in his company for the greater portion of that period. Their evidence apparently was not challenged and no objection was taken to its admissibility."

Mr Campbell also called evidence from a person with expertise in the operation of breath analysing instruments. He gave evidence that an ascending blood alcohol reading on the second of two analyses taken 22 minutes apart would indicate that the person whose breath had been

analysed had consumed something to affect the reading within the last hour or so. The alternative was that something was amiss with the instrument. The expert also said that two hours was the longest time to his knowledge between the cessation of consumption of liquor and the attainment of a maximum reading. Objection was, at that point, taken to the evidence of the expert. After hearing argument, the Magistrate ruled that the evidence was inadmissible. His Honour disagreed. The evidence was relevant to the question whether the instrument was defective or not properly operated. Furthermore, it was not, in his Honour's opinion (at p8) "precluded ... by s49(6) as going to the effect of the consumption of alcohol on the [defendant]". His Honour continued (at p9):

> "In a highly literal sense, it might be said that the attainment of a peak level of blood alcohol content is an 'effect' on the defendant of his consumption of alcohol. Of course it is no more so than the deposit in the blood of any alcohol after drinking. If this kind of interpretation were accepted it would mean that s49(6) precludes evidence that the consumption of alcohol has the effect of lodging alcohol in the blood, a fact which is the very foundation, if not the assumption, of the legislation."

[9] Consistently with this view, his Honour concluded (at p10) that even if (contrary to his Honour's opinion) evidence of the time taken for alcohol to reach its peak level of concentration in the blood, and evidence of the time taken to eliminate that alcohol, was evidence "of the effect of the consumption of alcohol on [the defendant]", he "would read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4)". By providing the defence under s49(4) "Parliament must have intended ... an accused to adduce all evidence going to its establishment".

I agree with his Honour's conclusions. If they are correct, however, they raise a difficulty for the Director in the case before me. Counsel for the Director therefore sought to avoid them by distinguishing *Campbell v Renton*. The facts, he said, are relevantly different. It does not seem to me that they are; in particular, the Magistrate, on the material before me, was entitled to find that Mr Crewdson's evidence was limited in its particularity in the same way as was the expert's evidence in *Campbell's* case. Secondly, counsel for the Director pointed out that s49(6) has been amended since the judgment in *Campbell's* case was pronounced. It then read:

> "In proceedings for an offence under paragraph (f) ... of ss(1) evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge."

The amendments to this sub-section, which took effect in 1989, sought to avoid an anomaly. Someone who had driven while having no alcohol in the blood, but who thereafter consumed a quantity of liquor within three hours before being tested, could under the legislation as it **(10)** previously stood have been guilty of an offence. The amendments sought to permit such persons to establish, over a presumption raised against them, that the reading given by the breathalyser was entirely due to consumption after driving. That defence has no relevance in this case, but counsel for the Director relied upon the amendments to s49(6) which permitted evidence of the effect of consumption of alcohol upon the defendant to be led to help rebut the presumption inserted by s48(1A).

A reading of *Hansard* (at vol. 392, p508) introduces only ambiguity into the question of Parliament's intention. In introducing the amending Bill, the then Minister for Transport (Mr Kennan) stated that "evidence of drinking alcohol after an accident will be admissible in cases where the Court is satisfied there was no blood alcohol present at the time of driving. However, the onus will be on the defendant to satisfy the Court of this." This, of course, is not what the Bill in fact did. Instead, it amended the offence to require proof that the reading was not due to subsequent drinking, imposed a presumption that it was not, and then permitted the calling of evidence concerning the effect of alcohol consumption on the defendant. None of the provisions inserted by the amending Act provided for the admissibility of "evidence of drinking alcohol after an accident": that became admissible as soon as the content of the offence was altered.

I refer to these matters only to show that, whatever purpose Parliament had in making these amendments, it was not intended to, nor did it, alter the Act in any way material to the decision in *Campbell's case*. The fact is **[11]** that, far from altering the law in this respect when it had the opportunity to do so, Parliament chose to allow a further defence. It is thus, in my opinion, impossible to distinguish *Campbell's case* on the basis of the later amendments to the relevant legislation.

For these reasons, the Director's appeal in this case should in my opinion be dismissed.

Solicitor for the appellant: J M Buckley, solicitor to the Director of Public Prosecutions.
Solicitors for the respondent: Ken Smith and Associates.
