

19/01; [2001] VSC 260

SUPREME COURT OF VICTORIA

DPP v LUFF

Balmford J

16, 17 July, 2 August 2001 — (2001) 34 MVR 78

MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE GIVEN BY OPERATOR OF BREATH ANALYSING INSTRUMENT – STATEMENT THAT OPERATOR NOT FAMILIAR WITH RELEVANT REGULATIONS – UNABLE TO SAY WHETHER REGULATIONS COMPLIED WITH – CHARGES DISMISSED BY MAGISTRATE – MAGISTRATE NOT SATISFIED THAT RESULT OBTAINED BY PROPER OPERATION OF INSTRUMENT – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, SS49(1)(b), (f); 55, 58(4).

L. was charged with offences of drink/driving under s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). At the hearing, the operator of the breath analysing instrument was called to give evidence. In cross-examination when asked what regulations he complied with he said: "I don't know the exact regulations and what they say." When asked whether he complied with the regulations in conducting the breath test, the operator said: "I can't say." In dismissing both charges, the magistrate said: "...the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorised officer and those .05 charges will be dismissed accordingly." Upon appeal—

HELD: Appeal allowed. Dismissal set aside.

In relation to the charge under s49(1)(f) of the Act, it was no part of the prosecution case to prove that on the relevant occasion the breath analysing instrument was either in proper working order or properly operated. The correct onus of proof which is clearly enunciated in s49(4) of the Act is that it was a matter for the defence to prove that the instrument was not properly operated on the relevant occasion. Accordingly, the magistrate's lack of satisfaction was irrelevant to the issues to be determined. It was not an element of either offence that the instrument be properly operated. In dismissing both charges on the same ground, the magistrate took into account an irrelevant matter.

Furze v Nixon [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547; MC 04/01, applied.

BALMFORD J:

Introduction

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") from an order made on 6 September 2000 in the Magistrates' Court at Melbourne dismissing two charges against the respondent under paragraphs 49(1)(b) and (f) respectively of the *Road Safety Act* 1986 ("the Act").

2. The relevant provisions of the Act are sections 49, 53, 55 and 58, all of which appear in Part 5 of the Act, and the relevant portions of which read as follows at the time of the events giving rise to this proceeding:

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;

...

(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.

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 ... for the purposes of section 53 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 in the prescribed form 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 in the prescribed form 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.

(2A) A notice under sub-section (2) must specify any fact or matter with which issue is taken and

indicate the nature of any expert evidence which the accused person intends to have adduced at the hearing.

...

(2D) A certificate referred to in sub-section (2) remains admissible in evidence even if the accused person gives a notice under that sub-section but, in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section.

...

(4) Evidence by a person authorised to operate a breath analysing instrument under section 55—

(a) that an apparatus used by him or her on any occasion under that section was a breath analysing instrument within the meaning of this Part;

(b) that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her;

(c) that, in relation to the breath analysing instrument, all regulations made under this Part with respect to breath analysing instruments were complied with—

is, in the absence of evidence to the contrary, proof of those facts.

3. It is common ground that the "regulations made under this Part with respect to breath analysing instruments" are Regulations 303, 304 and 314, of the *Road Safety (Procedures) Regulations* 1988, which at the relevant time read as follows:

Interval before taking of sample

303. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator does not require a person to undertake a breath analysis until the operator is satisfied that the person has not consumed any intoxicating liquor for a period of at least fifteen minutes before the analysis.

Mouthpiece

304. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator—

(a) provide a fresh mouthpiece for use by each person submitted to breath analysis; and

(b) use only a mouthpiece which has been kept in a sealed container until required for carrying out the analysis.

Certificate under section 55(4)

314. A certificate given in accordance with section 55(4) is in the prescribed form if it includes—

(a) the serial number of the instrument; and

(b) the sample number; and

(c) the location of the test; and

(d) the name and date of birth of the person tested; and

(e) the surname of the operator; and

(f) the results of the self tests conducted before and after the analysis of the sample provided; and

(g) the results of zero tests conducted before and after the analysis of the sample provided; and

(h) the date and time the test was taken; and

(i) the concentration of alcohol in grams per 100 millilitres of blood indicated by the analysis to be present in the blood of the person tested.

4. On 6 October 2000 Master Wheeler ordered that the questions of law raised by this appeal were:

Did the Magistrate misdirect herself as to:

(a) the onus of proof as to the operation of and the result obtained from the breath analysing instrument; and

(b) the circumstances in which the "conclusiveness" of a certificate given pursuant to section 55 of [the Act] can be disregarded?

5. The lapse of time between the hearing on 24-26 May 2000 and the determination on 6 September 2000 of the proceeding in the Magistrates' Court was such that in accordance with routine procedures the tape of the hearing was destroyed before the decision of the Magistrate was handed down. That being so, the evidence as to what was said at the hearing is contained in the affidavits of the prosecutor, Senior Constable Higginbotham, and two representatives of the solicitors for the respondent who attended the hearing on different occasions. Transcript of a tape of the occasion of the delivery of the decision is exhibited to the affidavit of Senior Constable Higginbotham.

6. The events giving rise to this proceeding occurred at about 12.30am on 5 December 1997, when a car driven by the respondent in Osborne Street South Yarra left the road and caused property damage. Constable (now Senior Constable) Cole conducted a preliminary breath test of the respondent, who then accompanied police officers to the Prahran police station. Senior Constable Charlesworth, an authorised operator of a breath analysing instrument, was introduced to the respondent at 2.43am and asked him a number of questions. At 3.07am a breath analysis was conducted by Senior Constable Charlesworth. Certificates were printed out which showed a blood alcohol concentration of 0.189%, which is more than the prescribed concentration. It is not suggested that that reading was due solely to the consumption of alcohol after driving the vehicle in terms of sub-paragraph 49(1)(f)(ii) of the Act, and that provision may be ignored.

7. As well as the charges under paragraphs 49(1)(b) and 49(1)(f) of the Act, which were dismissed, the respondent was also charged with careless driving, failing to stop after an accident, failing to give his name and address and failing to report an accident. He was convicted on the four latter charges and ordered to pay an aggregate fine of \$500 and statutory costs of \$53.

Jurisdiction

[After dealing with this matter which is not relevant for the purposes of this Report, Her Honour continued]

Ground (a)

16. As has been said, certificates showing the respondent's blood alcohol concentration were printed out in the morning of 5 December 1997 by a breath analysing instrument operated by Senior Constable Charlesworth. By virtue of paragraph 58(1)(c) of the Act each of those certificates is, on the hearing of the two charges under sub-section 49(1) to which this appeal relates, and subject to compliance with sub-section 55(4), evidence of the concentration shown, namely 0.189%. Senior Constable Charlesworth complied with sub-section 55(4) by giving one of those certificates to the respondent.

17. By virtue of sub-section 58(2) the certificate, if purporting to be signed by the operator, is conclusive proof of the matters set out in that sub-section, unless the accused person gives a notice in accordance with that sub-section requiring the person giving the certificate to be called as a witness. It is not suggested that the certificates were not signed by Senior Constable Charlesworth. A notice in accordance with the sub-section was given in this case and accordingly, by virtue of sub-section 58(2D), the certificate, while remaining admissible, ceased to be conclusive proof of those matters.

18. The dispute in this case arises from the fact that sub-section 49(4) effectively enables the questions of whether the breath analysing instrument was, when the sample of the respondent's breath was analysed, "in proper working order or properly operated" to be put in issue. It is not suggested here that the instrument was not in proper working order; which leaves for consideration the question of whether it was "properly operated". Since the service of the notice under sub-section 58(2) the certificate is no longer conclusive evidence on the point. However, by virtue of sub-section 58(4), evidence of a person authorised to operate a breath analysing instrument (as was Senior Constable Charlesworth) is proof, in the absence of evidence to the contrary, that the instrument was properly operated and the relevant regulations (see paragraph 3 above) complied with. There was no evidence to the contrary.

19. Each of regulations 303 and 304 sets out a "requirement for the proper operation" of the instrument, so that evidence of compliance with those regulations is necessary for a finding that the instrument was properly operated.

20. Senior Constable Charlesworth, in evidence in chief, was given leave to refer to notes made by him at the relevant time on a pro forma supplied by the Traffic Alcohol Section of the Victoria Police. With assistance from those notes he gave evidence that (*inter alia*) the breath analysing instrument was properly operated by him and all regulations with respect to breath tests were complied with.

21. In cross-examination he was asked what regulations he had complied with and replied, "I don't know the exact regulations and what they say". Later he was asked, "You didn't comply with the regulations, did you?" to which he replied "I can't say". In re-examination he was asked,

"Can you tell the Court what you actually did immediately prior to the breath test to conform with the regulations?" and replied, "I can't say".

22. The Magistrate, in her reasons for decision, referred to that evidence and said of the respondent at page 5 of the transcript:

I am perfectly satisfied that he is the driver. I am not however perfectly satisfied that he had a breath alcohol reading of .189.

She then set out the relevant evidence of Senior Constable Charlesworth and the circumstances of his giving that evidence and continued:

... the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorised officer and those .05 charges will be dismissed accordingly. ... I have no difficulty in finding that the defendant was the driver on the night and the remaining charges are found proved.

23. The submission of the appellant was that there was no onus on the prosecution to prove that the breath analysing instrument used was properly operated. Sub-section 49(4) placed the onus on the defendant to prove that the instrument was not properly operated if he was to establish a defence under that section. By in effect requiring compliance with the regulations (as a component of proper operation) to be proved by the prosecution, the Magistrate had misdirected herself as to the onus of proof regarding the operation of the instrument and this was an error of law. The defence had not established that the regulations were not complied with, and accordingly the defence to the charge under paragraph 49(1)(f) provided for in sub-section 49(4) had not been established.

24. In support of this submission, Ms Pullen relied on the judgment of the Court of Appeal (JD Phillips, Batt and Buchanan JJ A) in *Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547. That judgment was delivered after the conclusion of the hearing of the present matter in the Magistrates' Court, but before the delivery of the decision, and it would seem likely that it was not brought to the attention of the Magistrate. At 556 the Court said:

... in our opinion it was no part of the prosecution case to prove that on the relevant occasion the breath analysing instrument was either in proper working order or properly operated. ... [After setting out sub-section 49(4)] This seems to be a plain legislative prescription casting upon the person charged the onus of proving that the breath analysing instrument was not, on the relevant occasion, in proper working order or properly operated. We have said why, in our opinion, the certificate which was tendered in evidence was not ... even *prima facie* evidence that the machine was properly operated; but in the light of s58(4), if the contrary was to be proved, it was a matter for the appellant.

25. Similarly, in *DPP v Hart* (1992) 16 MVR 433 at 434 Hampel J said:

Dismissing the information [the magistrate] held that the breath analysis instrument had not been shown by the prosecution to have been operated properly within the requirements of s49(4) of [the Act].

It is clear ... that the magistrate did not apply the correct onus of proof which is clearly enunciated in subs (4). It was not for the prosecution to establish that the instrument was properly operated, but for the defence to prove that it was not.

26. In the present case there was evidence from the operator that the instrument was properly operated (see paragraph 20 above). The fact that in May 2000 the operator did not know the terms of the regulations which he swore that he had complied with in December 1997 does not demonstrate that in December 1997 he was not aware of what he was doing by way of compliance. Indeed, as O'Bryan J said in *Hess v Clarebrough* (unreported, decided on 3 November 1982) at 11 of a slightly different situation:

... there is no basis for concluding that because a person has not read the regulations he has not complied with them.

27. Ormiston J said in *Binting v Wilson* (unreported, decided on 19 December 1989) at 9-10, on an analogous point:

In my opinion the averment by each of the operators retained its validity unless and until the defence has established evidence to the contrary to the satisfaction of the Magistrate. It is not sufficient that the defence elicits or calls contrary evidence, unless that evidence has sufficient relevance, cogency and weight to satisfy a Magistrates' Court, on the balance of probabilities, that the apparatus was not a "breath analysing instrument" as defined.

And see to similar effect the judgment of Ashley J in *Dalzotto v Lowell* (unreported, decided on 18 December 1992) at 16-19 and the judgment of Beach J in *Matosic v Hamilton* (1991) 13 MVR 171 at 181 adopting *Binting v Wilson*. There was not, in this case, evidence upon which the Magistrate could find, on the balance of probabilities, that the instrument was not properly operated so as to establish, under sub-section 49(4), a defence to the charge under paragraph 49(1)(f).

28. The submission of the respondent was that this was a simple case, where the Magistrate, having heard the evidence and observed the demeanour of Senior Constable Charlesworth, had not been satisfied beyond reasonable doubt that the elements of the offences had been made out. In terms of the well-known passage from the judgment of the Full Court (Gavan Duffy, Sholl and Adam JJ) in *Taylor v Armour* [1962] VicRp 48; [1962] VR 346 at 351; (1961) 19 LGRA 232, "there was evidence upon which the magistrate might, as a reasonable [person], come to the conclusion to which [she] did come". However, be that as it may, it is clear from the authorities cited above that the matter as to which the Magistrate was not satisfied was not a matter which was required to be proved by the prosecution. Her lack of satisfaction was therefore irrelevant to the issues before her. It was not an element of either offence that the machine be properly operated.

29. Mr Billings also submitted, as a preliminary question, that ground (a) in the Order of Master Wheeler did not specify whether it applied to either or both of the charges. He properly drew attention to the passage in *Furze v Nixon* at 559-560 distinguishing between the two offences.

30. Ms Pullen submitted in reply that because of the specificity of the penalty provisions in section 49 and Schedule 1 of the Act, it was necessary, on a charge under paragraph 49(1)(b), to be able to prove the precise concentration of alcohol in the blood of the defendant, although the paragraph required only a finding of "more than the prescribed concentration of alcohol". That was the connection between the two provisions; evidence of the facts relevant to a finding of guilt under paragraph (f) was, for that reason, necessary to a finding of guilt under paragraph (b).

31. In any case, it is clear from the passages cited above from the reasons for decision of the Magistrate that both charges were dismissed on the same ground. The proper operation of the instrument could have been relevant only to a defence under paragraph (f). That being so, it does not appear to me that that matter was relevant to the Magistrate's consideration of the charge under paragraph (b). Relevant or not, she took it into account in the consideration of that charge, and dismissed both charges on the same ground. That being so, the question in ground (a) can be seen, in the circumstances of this case, as relevant to the consideration of both charges.

32. For the reasons given, I find that the Magistrate misdirected herself as to the onus of proof regarding the operation of the breath analysing instrument. Counsel may wish to make submissions as to the orders to be made consequent upon that finding. It is not necessary to consider the second question of law raised in the Master's Order.

APPEARANCES: For the appellant DPP: Ms S Pullen, counsel. Solicitor for Public Prosecutions. For the respondent Luff: Mr P Billings, counsel. Wilmoth Field & Warne, solicitors.