8/98

SUPREME COURT OF VICTORIA

DPP v DRUCKER

Gillard J

5, 10 December 1997 — (1997) 98 A Crim R 142; (1997) 27 MVR 248

MOTOR TRAFFIC – DRINK/DRIVING – READING OF 0.113%BAC – CHARGE LAID UNDER S49(1)(f) OF *ROAD SAFETY ACT* 1986 – PLEA OF GUILTY ENTERED – READING DISPUTED FOR PURPOSE OF SENTENCE – EXPERT EVIDENCE CALLED – WHETHER MAGISTRATE IN ERROR IN ALLOWING SUCH EVIDENCE TO BE GIVEN – POST-DRIVING CONSUMPTION OF ALCOHOL – RESULT OF TEST CONFIRMED BY EXPERT – "RELEVANT TIME" – WHETHER RELEVANT TIME IS TIME OF DRIVING OR TIME OF TEST – RESULT OF ANALYSIS READ DOWN – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS48(1A), 49(1)(f), (6), 50(1AB)(b).

Whilst driving his motor vehicle, D. collided with a number of vehicles; a breath test later resulted in a reading of 0.113%BAC. On the hearing, D. pleaded guilty, *inter alia*, to a charge under s49(1)(f) of the *Road Safety Act* 1986 ("Act"). In seeking to prove that at the relevant time his blood alcohol concentration was not more than 0.10%, D. gave evidence that prior to and after the accident he had consumed a quantity of alcohol. D. was then allowed to call expert evidence to the effect that although the reading at the time of the test was correct, the relevant time for the purposes of the Act was his blood alcohol concentration at the time of the accident. The magistrate found that at the relevant time D.'s blood alcohol concentration was not more than 0.10%. Upon appeal—

HELD: Appeal allowed. Orders set aside. Remitted for further hearing.
1. By pleading guilty, it was not open to D. to seek to rebut the presumption in s48(1A) of the Act to the effect that his blood alcohol concentration was not due solely to the consumption of alcohol after driving. However, in relation to the question of sentence under s50(1AB), the Act does not preclude expert evidence being called on the question of sentence provided that such evidence is relevant to the issues and in admissible form. Accordingly, the magistrate was not in error in granting leave to D. to call expert evidence on the sentencing exercise.

2. In the present case, having regard to the relevant provisions of s50(1AB)(b), the issue was whether "at the relevant time the concentration of alcohol in the blood of the offender ... was not more than 0.10grams per 100 millilitres of blood". The "relevant time" for the purposes of s49(1)(f) and s50(1AB)(b) of the Act is the time when the result of the analysis of the sample of breath as recorded was shown by the breath analysing instrument. What D.'s blood alcohol reading might have been at the time of the accident was not a relevant issue. In those circumstances, the expert evidence when called was not relevant to any issue under s49(1)(f) nor to sentencing under s50(1AB). Accordingly, it was not open to the magistrate to find that D.'s blood alcohol concentration at the time of the test was not more than 0.10 per cent.

GILLARD J: [1] This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 against an order dated 24 July 1997 which dealt with two charges made by a magistrate sitting at Prahran. The parties to the appeal are the Director of Public Prosecutions who brings this appeal pursuant to s92(2) of the said Act on behalf of Constable Theo Nassiokas and Geoffrey Charles Drucker, who is the respondent. Mr Drucker, who is aged 48 years, was residing at 10 Kasouka Road, Camberwell on 6 June 1996 ("the said date"). On the said date Mr Drucker was driving his motor vehicle in Kasouka Road, Camberwell, at about 11.20 pm, when he collided with a number of motor vehicles. He was subsequently breath tested and the result was an alcohol concentration of 0.113 grams per hundred millilitres of blood. Mr Drucker was subsequently charged with five offences by Constable Nassiokas [*After setting out the charges, his Honour continued*]...**[2]** On 24 July 1997 the charges came on for hearing at the Magistrates' Court at Prahran. Acting Senior Sergeant Coulson prosecuted on behalf of the informant and Mr Steven Russell of counsel appeared for Mr Drucker. Discussions occurred between the senior sergeant and counsel and as a result it was agreed that Mr Drucker would plead guilty to charges 2, 3 and 5 and the informant would withdraw charges 1 and 4. Mr Drucker pleaded guilty to charges 2, 3 and 5 and charges 1 and 4 were withdrawn. As a result of the pleas, the acting sergeant read a summary of the circumstances of the offences to the court and tendered **[3]** in evidence a photocopy of the certificate of analysis printed by the breath analysing instrument, which showed that the test took place on 7 June 1996

at 35 minutes past midnight and the result was 0.113 grams of alcohol per hundred millilitres of blood. The facts as read out were not challenged. [*After setting out the facts, his Honour continued*]… The magistrate stated that he found the charges were proven and no prior conviction was alleged.

Mr Russell on behalf of Mr Drucker stated that he would call evidence in mitigation and Mr Drucker gave **[4]** evidence of the circumstances of the accident and the events leading up to it. He stated he had consumed a quantity of white wine and champagne prior to the accident and that he had consumed two glasses of Scotch whisky after the accident, prior to being breath tested. It was put to him in cross-examination that he told the informant and the breath test operator that he had not consumed any alcohol after the accident. He stated he could not remember being asked the question but agreed that if he had told informant he had not consumed any alcohol, the answer was incorrect. Mr Drucker's wife also gave evidence which was to much the same effect as Mr Drucker's evidence. Mr Russell then called Graham Young, an analytical chemist. Objection was taken to his evidence on the ground that it was irrelevant and therefore inadmissible. The senior sergeant submitted that the evidence could not be given as Mr Drucker had pleaded guilty to the charge pursuant to s49(1)(f) of the Act. Argument then took place. Reference was made to various sections of the Act. Cases were referred to and the magistrate stood the matter down to read the cases. Upon resumption, the magistrate said that he had found a case called *Skase v Holmes and Wilkinson*, an unreported decision of Vincent J of this court, delivered 11 October 1995. The magistrate ruled that as a result of that case he would permit Mr Young to give evidence. Mr Young gave evidence and his report was tendered without objection.

Mr Young's evidence was to the effect that on 20 February 1997, Mr Drucker underwent a test wherein he consumed **[5]** 6 x 90 millilitres of champagne, evenly spaced over 1 hour, and samples were taken of his breath and his blood for analysis. According to Mr Young, Mr Drucker claimed to have had no food prior to the testing. Results indicated that Mr Drucker obtained a maximum blood alcohol level of 0.0144 per cent per 8g (sic) alcohol, 40 minutes from the cessation of drinking, with an elimination rate of 0.013 per cent per hour. He then opined the view that if Mr Drucker consumed one glass of champagne, two glasses of white wine between 5.40 pm and 7.15 pm and one glass of champagne and two glasses of white wine between 7.40 pm and 11.30 pm, his expected blood alcohol level at 11.20 pm, being the time of the accident, was less than 0.02 per cent. He also opined the view that the consumption of two glasses of 100 millilitres of whisky after the accident would contribute up to 0.11 per cent to Mr Drucker's blood alcohol level found at the time of the test. Mr Young also stated that he had assumed that each glass of wine and champagne was 90 millilitres.

The affidavit material before me does not indicate whether Mr Drucker gave any evidence as to the precise consumption of his alcohol on the night in question, however, nothing was made of it on this appeal. Mr Young, in cross-examination, said that Mr Drucker would have had a blood alcohol concentration at the time of the accident which was small. The affidavit in support of this appeal records the following question and answer –

> "The magistrate asked Mr Young what the reading of the respondent at the time of the breath test would have been in his expert opinion. **[6]** Mr Young stated that the result obtained by the police would have been a correct result."

Mr Russell submitted to the magistrate that the court should find his client had a blood alcohol concentration of less than 0.1 per cent and the court should exercise the power under s50(1AB) of the Act and neither record a conviction, nor cancel Mr Drucker's licence. According to the affidavit in support of the appeal, the magistrate said words to the effect -

> "I'm going to exercise my discretion in favour of the defendant. I can't be satisfied what the reading is. However, I find that it is somewhere between 0.5 and 0.1 per cent."

The magistrate then ordered with respect to charge 2 that the proceeding be adjourned for a period of 12 months and Mr Drucker be released upon an undertaking to be of good behaviour and to appear, if called upon, during the period of the adjournment. Mr Drucker was directed to pay $400 to the court fund. The same order was made with respect to charge 3, that is the careless driving charge, and on charge 5, Mr Drucker was convicted and fined $75 with $30 costs.

By order dated 25 August 1997, Master Wheeler stated two questions of law for decision of the court pursuant to Rule 58.09 of the Rules of Court. The questions of law are —

> (i) Did the magistrate err in applying s50(1AB) in the *Road Safety Act* 1986 to s49(1)(f) of the Act, to hold that at the relevant time (namely the time of the furnishing of a sample of breath for analysis) the concentration of alcohol in the blood of the respondent was less than **[7]** 0.1 per cent?
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> (ii) Did the magistrate err in granting leave to the respondent to call expert evidence?

On the appeal the appellant was represented by Mr Chris Ryan of counsel who relied upon the affidavit of John Thomas Coulson, sworn 25 August 1997. The respondent relied upon his affidavit sworn 23 September 1997 and I granted him leave to rely upon an affidavit of his solicitor, Bernard William Balmer, sworn 4 December 1997. Mr P Billings of counsel appeared for the respondent. According to the order of Master Wheeler, the final order appealed against in fact relates to charges 2 and 3. However, the grounds of appeal only relate to charge 2. The reason why it is necessary to appeal the order in relation to both charges is that the one undertaking was entered into with respect to both charges.

At the outset it is to be noted that Mr Drucker pleaded guilty to the charge No. 2 brought under s49(1)(f) of the Act. [*After setting out the provisions of s49(1)(f) and 48(1A) of the Act, his Honour continued*]...**[8]** As a result of pleading guilty, Mr Drucker admits each element of the charge. Charge 2 alleged that he had a concentration of alcohol being 0.113 grams per hundred millilitres of blood which was the analysis recorded by the breath analysing instrument. In *R v Inglis* [1917] VicLawRp 99; [1917] VLR 672; 23 ALR 378, the accused was charged with larceny as a bailee and pleaded guilty. Madden CJ, apparently speaking for the Full Court in respect of the plea said -

> "The prisoner was made aware of the charge, and being aware pleaded guilty, which an admission, according to every principle of pleading, of all the essential facts necessary to constitute the offence with which the prisoner is charged."

In *R v Murphy* [1965] VicRp 26; [1965] VR 187, Herring CJ and Adam J said -

> "A plea of guilty duly recorded provides the strongest evidence of guilt."

Mr Drucker was represented by a barrister at the hearing. No application was made to withdraw his plea of guilty. The topic was not raised by anybody in the court. It is clear that the plea of guilty is a formal **[9]** confession to the existence of every ingredient constituting the offence. By reason of the plea of guilty it was not open to Mr Drucker to seek to rebut the presumption which is found in s48(1A) of the Act. It is clear from s50(1A) that once a person is convicted or found guilty of an offence under s49(1)(f), the court must cancel the driving licence of that person for a period depending on the concentration of alcohol in the blood of the offender. However, s50(lA) is made subject to sub-s(lAB). S50(1AB) provides -

> "(1AB) If a court finds a person guilty of an offence under section 49(1)(b), (f) or (g) but does not record a conviction, the court is not required to cancel a driver licence or permit or disqualify the offender from obtaining one in accordance with sub-section (1A) if it appears to the court that at the relevant time the concentration of alcohol in the blood of the offender—
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> (a) in the case of a person previously found guilty of an offence against any one of the paragraphs of section 49(1) or any previous enactment corresponding to any of those paragraphs or any corresponding law, was not more than 0.05 grams per 100 millilitres of blood; or
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> (b) in any other case, was not more than 0.10 grams per 100 millilitres of blood."

Section 50(1AB)(b) is relevant for the present matter. The court has a power not to record a conviction pursuant to the provisions of the *Sentencing Act* 1991, but is required to cancel a licence unless it appears to the court that at the relevant time the concentration of alcohol in the blood was not more than 0.10 grams per hundred millilitres of blood. Mr Ryan dealt with ground (ii) first. He submitted that: **[10]** (a) The Act precluded the respondent calling any evidence on sentence; (b) Alternatively, because the respondent had pleaded guilty, he was precluded from calling any evidence contesting the reading of 0.113 per cent at the relevant time. (c) Alternatively, the evidence that was called was not relevant to any issue on sentence.

In the hearing of a criminal charge the proceeding is divided up into two stages. The first stage concludes with a finding that the charge is proven, the accused is guilty or he is acquitted. If he is not acquitted, the second stage is concerned with sentence. Like the first stage, the offender must be given an opportunity to be heard on the question of sentence. Whilst the issues on the trial stage are invariably relevant to the issues on sentence, there are issues which are peculiar to the sentencing process. If the law is to preclude an accused from calling evidence which is relevant to any issue on sentencing, the exclusion of the right would have to be expressed in clear and unequivocal language. What Mr Drucker sought to prove during the sentence stage was that at the relevant time his blood alcohol reading was not more than 0.10 grams per hundred millilitres of blood. It was argued on his behalf that the court was not bound, pursuant to s50(1AB) of the Act to cancel his licence.

Mr Ryan referred to and relied upon s49(6) of the Act which provides –

> "(6) In any proceedings for an offence under paragraph (f) or (g) of **[11]** sub-s(1) the evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by s48(1A), but is otherwise inadmissible. (My emphasis)

Mr Ryan submitted that this was a blanket prohibition to evidence being called for any purpose, other than to rebut the presumption created by s48(1A). As Mr Drucker had pleaded guilty to the charge there was no question of any expert evidence being called to rebut that presumption.

In my opinion the subsection does not preclude the calling of any evidence which is relevant to an issue on sentence and in admissible form. The subsection excludes evidence "as to the effect of the consumption of alcohol on the defendant" save for rebutting the presumption. Whether such evidence could ever be relevant to an issue on sentence for an offence under s49(1)(f) is extremely doubtful but I do not have to decide that issue as the evidence which in fact was called, in my opinion, was not relevant to any issue on sentence. There may also be an argument that the subsection is confined to evidence on the trial stage and does not impinge in any way upon the sentencing stage. Again, I do not have to decide that question. In my opinion, the Legislation does not preclude evidence of an expert being called on the sentencing exercise. However, as I have already emphasised, the evidence must be relevant to the issues on sentencing and be in admissible form.

Mr Ryan then submitted that the evidence could not have been called because Mr Drucker had pleaded guilty. Mr Drucker pleaded guilty to an offence under s49(1((f), **[12]** which means that he admits that within 3 hours of driving his motor vehicle a sample of his breath was analysed by a breath analysing instrument and the results recorded show that he had more than the prescribed concentration of alcohol in his blood. The prescribed concentration is 0.5 per cent. However, it is noted that the charge as pleaded asserted that his reading was .113 per cent. Strictly as a matter of pleading, he has admitted that reading at the relevant time, and the relevant time is the time of analysis as shown by the breath analysing instrument. However, at some point during the proceeding it was made quite clear that Mr Drucker was going to contest the reading of 0.113 per cent during the sentencing stage. The affidavit material is somewhat unclear as to what point in time the issue was raised. It would always be wise for an accused person pleading guilty to an offence to make it quite clear at the time of the plea that although the offence is admitted, nevertheless there is an aspect concerning sentence which is in issue. In my opinion, in an appropriate case, the presiding judicial officer would permit the accused to resile from his plea if justice demanded it and any prejudice to the prosecution could be overcome. In most cases, any prejudice to the prosecution could be overcome by granting leave to the prosecution to reopen its case if it was necessary.

For present purposes I will assume that the plea of guilty admitted a blood alcohol concentration greater than 0.5 per cent, but it was made clear that Mr Drucker was contesting a reading of 0.113 per cent. It follows that in my opinion the magistrate did **[13]** err in granting leave to the respondent to call expert evidence. I will deal with Mr Ryan's third argument under ground (i). That now brings me to ground (i). Although I have held that the magistrate did not err in granting leave to the respondent to call expert evidence, the question is whether the magistrate was correct in his finding, that the concentration of alcohol in the blood of Mr Drucker was not more than 0.10 grams per hundred millilitres of blood at the relevant time. The issue under

s50(1AB) is whether at "the relevant time the concentration of alcohol in the blood of the offender ... was more than 0.10 per cent."

"The relevant time" for the purposes of s50(1AB) varies according to the particular offence. The magistrate was concerned with an offence under section 49(1)(f) of the Act. In my opinion, "the relevant time" under that paragraph refers to the time when the result of the analysis of the sample of breath as recorded was shown by the breath analysing instrument. In the present case the evidence clearly established that at the hour of 35 minutes past midnight on 7 June 1996 the reading was 0.113 grams per of alcohol per hundred millilitres of blood. That was the relevant time and that was the blood alcohol reading. Evidence which disputed that result would be relevant under s50(1AB). The evidence called on behalf of Mr Drucker did not address the issues at all and indeed in cross-examination of the expert, Mr Young, it was elicited that at the relevant time, namely, 35 minutes past midnight, the reading recorded by the breath **[14]** analysing instrument was "a correct result".

Mr P Billings of counsel, who appeared before me but not below, submitted that s50(1AB) was concerned with "the concentration of alcohol in the blood of the offender" whereas s49(1)(f) was concerned with furnishing "a sample of breath for analysis by a breath analysing instrument" and he drew my attention to a number of authorities which drew the distinction between a sample of breath and the concentration of alcohol in the blood. He submitted that it followed that it was open in the sentencing stage to call evidence of the level of alcohol in the blood at an earlier time, and this, for the purposes of the section, was the relevant time. However, in my opinion, s49(l)(f) is concerned with a recording by the breath analysing instrument and that recording indicates a concentration of alcohol present in the blood of the alleged offender. That is the offence. S50(1AB) is dealing with the same concept.

In my opinion, Mr Billings' argument is incorrect. Mr Billings submitted that on all the evidence it was open to the magistrate to make the finding he did. I accept that on an appeal such as this it is open to the respondent to support the decision on any ground and, secondly, that any finding of fact by the magistrate must be viewed as a finding by a jury and can only be set aside if it was not open on all the evidence. Nevertheless, I am satisfied that the finding of the magistrate was not relevant to the issue under s49(1)(f) or s50(1AB). What Mr Drucker's blood alcohol reading might have been at the time of the accident is not a relevant issue, either in respect of an offence under **[15]** s49(1)(f) or in relation to sentencing under s50(1AB). The relevant time is the time when the instrument recorded or showed the result of the analysis of the sample of breath. It was not open to the magistrate to find that at that point in time the concentration of alcohol in the blood of Mr Drucker was not more than 0.10 per cent.

In my opinion, the magistrate was wrong in his decision and should have found that the prosecution had proven beyond reasonable doubt that, "at the relevant time the concentration of alcohol in the blood of Mr Drucker was more than 0.10 grams per hundred millilitres of blood." He should have accepted on the evidence that the reading was 0.113 grams per hundred millilitres of blood. Following on from the submission put by Mr Ryan in relation to ground 2, even though the evidence was called and even though, in my view, it was open to the magistrate to permit the evidence to be called, the evidence when called was not relevant to any issue on the sentencing and indeed, as I have already pointed out, provided some evidence in support of the case for the informant. It follows that the appellant has succeeded on the question of law (i). Accordingly, I will order that the appeal be allowed, that the orders made on charges 2 and 3 be set aside, that the proceeding in respect of both these charges be remitted to the magistrate to impose the correct penalties in accordance with these reasons.

As I have already stated, it is necessary to set aside the orders with respect to charges 2 and 3, **[16]** because the respondent was released on the one undertaking in respect of both those charges and was ordered to pay $400 to the court fund in respect of both charges The appeal, however, only relates to charge 2 and the penalty that should have been imposed in relation to that particular charge. [*His Honour then made an order remitting the matter to the magistrate to be heard and determined in accordance with these reasons.*]

APPEARANCES: For the Appellant (DPP): Mr C Ryan, counsel. DPP (Vic), solicitor. For the respondent (Drucker): Mr P Billings, counsel. Balmer & Associates, solicitors.