08/07; [2006] VSCA 263

SUPREME COURT OF VICTORIA — COURT OF APPEAL

R v CIANTAR

Warren CJ, Chernov, Nettle, Neave and Redlich JJ A

11 September, 3, 30 November 2006

(2006) 16 VR 26; (2006) 167 A Crim R 504; (2006) 46 MVR 461

CRIMINAL LAW – EVIDENCE – SCIENTIFIC MATTERS AND INSTRUMENTS – PBT AND BREATH ANALYSING INSTRUMENT – USED TO ASCERTAIN BLOOD ALCOHOL CONCENTRATION – EVIDENCE GIVEN BY EXPERTS AS TO ACCURACY OF INSTRUMENT – WHETHER READING OBTAINED FROM PBT DEVICE ADMISSIBLE AS EVIDENCE OF BLOOD ALCOHOL CONCENTRATION: *ROAD SAFETY ACT* 1986 SS53, 55, 58.

1. The provisions of S58 of the *Road Safety Act* 1986 are facultative. They do not purport to exclude nor do they have the effect of rendering inadmissible proof *aliunde* of blood alcohol concentration. Like any other bodily condition, blood alcohol concentration may be proved by any recognised and reliable scientific technique. A court may admit results of a test conducted with a scientific instrument on the basis of evidence from a witness expert in its use. It is sufficient if it is established that it is a scientifically accepted instrument for its avowed purpose and that the particular instrument was handled properly and read accurately.

***Mehesz v Redman (No 2)* (1980) 26 SASR 244, followed.**

***Porter v Kolodzeij* [1962] VicRp 11; (1962) VR 75, doubted.**

2. Where evidence was given by expert witnesses that the PBT is within a class of instrument generally accepted by experts as accurate for its particular purpose and that if handled properly produces accurate results and there was evidence to show that the PBT was handled properly and read accurately by the operator on the relevant occasion, a court was not in error in admitting evidence of the PBT result.

WARREN CJ, CHERNOV, NETTLE, NEAVE and REDLICH JJ A:

1. On 18 October 2005 the applicant was arraigned before the County Court at Melbourne on one count of culpable driving, one count of failing to stop after a motor accident and one count of failing to render assistance. He pleaded not guilty to the count of culpable driving although guilty to the other two offences. After a trial which lasted 10 days, he was convicted of the count of culpable driving and, following a plea in mitigation of penalty, the judge sentenced him on that count to a term of imprisonment of four years and on each of the other counts to a term of imprisonment of three months, with one month of the sentence imposed on count 2 to be served cumulatively on the sentence imposed on count 1. The total effective sentence was therefore four years and one month imprisonment, of which the judge ordered that the applicant serve not less than 19 months before being eligible for parole. The applicant now appeals against his conviction of the count of culpable driving and the Director of Public Prosecutions appeals against the sentence.

Ground 1: Preliminary Breath Test

2. The collision that caused the death of the deceased occurred on the night of Saturday 11 October 2003. Evidence given at the trial established that the applicant had earlier that day gone with friends to the races at the Caulfield Race Course and while at the races had drunk beer and champagne. After leaving after the last race, at between 5.00 and 6.00 p.m., he returned home and then later in the evening went with friends to dinner at a restaurant in St Kilda. He there drank wine with the meal and also some shots of Baileys and Tia Maria. He walked home from the restaurant but later went out in the car to drive some of his friends to their homes. On the return trip to his own home, at approximately 11.00 p.m., he struck a pedestrian in Inkerman Street St Kilda near to the intersection with Chapel Street, causing the victim mortal injuries. Instead of stopping and rendering assistance, however, he drove immediately to his father's home nearby and told him what he had done. His father telephoned police almost immediately and later went with him to the police station.

3. Approximately 20 minutes after the applicant's father first spoke to police by telephone, he and the applicant arrived at the police station and a few moments later, at approximately 11.38 p.m., the applicant was subjected to a preliminary breath test using a Lion Alcolmeter preliminary breath test device. It showed that the appellant had a blood alcohol concentration of 0.159%. When asked by police when he had last had anything to drink, he said that he had consumed approximately one third of a bottle of Black Douglas scotch whisky at his father's home, while his father was speaking by telephone to the police. After a preliminary interview, at 12.29 a.m. the applicant was subjected to a breath test using a prescribed breath analysing instrument, which showed that his blood alcohol concentration at that time was 0.136%.

4. Subsequent investigations showed that at the time of collision, the applicant's car was travelling at between 55 kph and 68 kph and that the victim had a blood alcohol concentration of 0.260%. The conditions were dry and well lit and the car was in order.

5. Over objection at the trial, the Crown tendered evidence of both the preliminary breath test and the subsequent breath test and called expert testimony from Dr Morris Odell as to the conclusions which could be drawn from the results. Dr Odell opined that, if the applicant had in truth drunk one third of a bottle of whisky after the accident as he claimed, it would have increased his blood alcohol concentration by between 0.145 and 0.218%, and thus the fact that his blood alcohol concentration declined from 0.159% at 11.38 p.m. to 0.136% at 12.29 a.m. meant that he had not drunk whisky as he claimed. Assuming, on that basis that the alcohol found to be in the applicant's blood at 12.29 a.m. was wholly due to alcohol consumed before the accident, Dr Odell calculated that the applicant's blood alcohol concentration at the time of the accident was between 0.128% and 0.166%.

6. Under ground 1 of the appeal against conviction, the applicant submits that the judge erred in admitting the evidence of the preliminary breath test, on the basis that the results of a preliminary breath test are not evidence of anything other than that the applicant had some alcohol in his blood at the time of the test. In the applicant's submission, the effect of ss53, 55 and 58 of the *Road Safety Act* 1986 is that evidence of blood alcohol concentration is only admissible if obtained by analysis by a prescribed breath analysing instrument, and even then only subject to strict statutory controls, and that, by implication, those provisions exclude as inadmissible evidence of blood alcohol concentration obtained by means of a preliminary breath testing device.

7. We do not accept that submission. No doubt the results of the preliminary breath test were not admissible as such under s58 of the *Road Safety Act* 1986. But the provisions of that section are facultative. As was in the end conceded, they do not purport to exclude nor do they have the effect of rendering inadmissible proof *aliunde* of blood alcohol concentration. And like any other bodily condition, blood alcohol concentration may be proved by any recognised and reliable scientific technique.

8. It was submitted on behalf of the applicant that a preliminary breath test device is not within that class of notorious scientific instruments of which the accuracy is presumed at common law and, consequently, that in order for evidence of the preliminary breath test results to be admissible at common law, it was necessary for the Crown to establish the scientific character and operation of the preliminary breath test device. It was contended that it failed to do so.

9. We do not accept that contention either. It was held in *Porter v Kolodzeij*[1] that the common law presumption of accuracy of scientific instruments does not apply to a breath-analysis instrument. But even assuming that *Porter v Kolodzeij* is still good law, a court may admit the results of a test conducted with a scientific instrument on the basis of evidence from a witness expert in its use. It is sufficient if it is established that it is a scientifically accepted instrument for its avowed purpose and that the particular instrument was handled properly and read accurately.[2] As White J put it in *Mehesz v Redman (No. 2)*:[3]

> "If the instrument is *not* a notorious scientific instrument, its accuracy can be established by evidence: (a) that the instrument is within a class of instrument generally accepted by experts as accurate for its particular purpose; (b) that the instrument, if handled properly, does produce accurate results: ((a) and (b) must be established by expert testimony, that is, by experts with sufficient knowledge of that kind of instrument; and upon proof of (a) and (b), a latent *presumption of accuracy* arises which allows the court to infer accuracy on the particular occasion if it is proved) – (c) that the particular

instrument was handled properly and read accurately by the operator on the particular occasion; ((c) can be established by a trained competent person familiar with the operation of the instrument, not necessarily the type of expert who proves (a) and (b)). Where the actual accuracy of the measurement can be inferred from all of the proved circumstances, it is not necessary to rely upon the presumption arising from (a) and (b), proof of which is superfluous."

10. In our opinion the evidence adduced in this case met those tests. Tibor Ducza, a forensic officer with the Technical Services Laboratory of the Traffic Alcohol Section of the Victoria Police, gave evidence that he had undertaken training in the service, maintenance and calibration of the Lion Alcolmeters (known as PBT's) which are in service with the Victoria Police, and also in the service, calibration and maintenance of the Draeger Alcotest 7110 which is the prescribed breath analysing instrument used by the Victoria Police, and that he was authorised by Lion Laboratories of the United Kingdom and Draeger Australia to undertake service and maintenance work on their instruments on their behalf. He had previously been employed by Draeger Australia in the manufacture of breath analysing instruments for Victoria and other states and territories. He deposed that based upon his experience in the Victoria Police, he had found the Lion Alcolmeter very reliable as a reflection of blood alcohol levels. Following the accident, he had conducted a test on the PBT used to conduct the preliminary breath test on the applicant, using standard calibration techniques which he described, and he found the machine to be accurate. He was also able to say from the computer readout from the machine that it had not been used after the test conducted on the applicant, and he deposed to the electronic security device with which each such machine is fitted to prevent tampering with its operation. In cross-examination he added that he had previously carried out a comparison of the readings which one obtains using a PBT and the readings produced by a Draeger breath analysing instrument, and found that the latter are set at a level of 10% lower, in effect as an inbuilt safety margin, but otherwise they are comparable.

11. Dr Morris Odell, who is a forensic physician at the Victorian Institute of Forensic Medicine, Southbank, was called as an expert in the field of alcohol and drink driving. He had studied widely and published many papers in the area and taught in the subject in the post-graduate programme in the Monash University Medical School. In addition to the opinion evidence to which we have already referred, Dr Odell deposed that breath testing has been used since the introduction of the first breathalysers in the 1950's as an accepted means of establishing blood alcohol concentration and that both the Lion Alcolmeter and the Draeger breath analysing instrument are now accepted as reliable instruments for the purposes of measuring breath alcohol levels and that breath alcohol levels are an accurate reflection of blood alcohol concentration. He accepted in cross-examination that, in this state, PBT's are generally used as preliminary screening devices, as it were to give a "yes" or "no" answer to the question of whether there is any alcohol present in a subject's blood, but he explained that that was largely historical. He said that, originally, preliminary breath testing devices simply used a change in the colour of crystals to detect the presence of breath alcohol, but that the machines are now so developed that they are capable of generating accurate scientific readings of breath alcohol.

12. Constable Walter Larkin of the Regional Licensing Unit gave evidence that he had been trained in the use of the PBT and was experienced in its use, and that he had conducted the PBT test on the applicant on the night of 11 October 2003.

13. In our view, Dr Odell's testimony established that the PBT is within a class of instrument generally accepted by experts as accurate for its particular purpose. Mr Ducza's testimony established that the instrument, if handled properly, does produce accurate results and, moreover, that when tested subsequently it was producing accurate results. And Constable Larkin's testimony established that the PBT was handled properly and read accurately by the operator on the particular occasion it was used to test the applicant.

14. The applicant criticises Dr Odell's opinion concerning the general acceptance of PBT's in the relevant area of the scientific community, as in effect being based upon Dr Odell's reading of the literature. We do not regard that as a valid criticism. The law allows an expert to express an opinion based upon his reading and research and the body of his acquired knowledge.[4] The applicant also criticised Mr Ducza's evidence on the basis that he was not a scientist but a technician. But we do not think that that is a legitimate basis of criticism either. Mr Ducza was highly skilled and experienced in the service and testing of the machines and well able to say on the basis of his training and experience that the PBT is generally very accurate as a test of blood alcohol.[5]

15. The applicant further complains that, while at one point in the trial the judge contemplated that he would give the jury specific directions that they were not to confuse the PBT with the Draeger breath analysing instrument, and that it was open to them to accept or reject as they saw fit the evidence which had been given as to the accuracy of the PBT, in the end his Honour did not give any directions of that kind. Thus in the applicant's submission, there remained a real risk that the jury would confuse the PBT with the Draeger device and fail to comprehend that the reliability of the PBT results was dependent on the reliability of the evidence of Dr Odell and Mr Ducza.

16. There is some force in that submission. With respect, we think that it would have been preferable if the judge had given a detailed direction of the kind which he appears to have contemplated giving. His Honour's decision not to do so created a risk that might have been avoided. But in the events which occurred, the risk was effectively countered. The judge directed the jury that they were free to accept or reject the expert evidence given by Dr Odell and Mr Ducza and that it was for them to give such weight to the opinions of those witnesses as they thought fit. His Honour also summarised at some length the submissions made by defence counsel as to the inherent limitations of the evidence about the PBT's. Looking at the charge as a whole, we consider that the jury would have been left in no doubt as to the distinction between the Draeger and the PBT machines and the arguments each way, and, significantly in a matter of this kind, no exception was taken.

17. In our view, Ground 1 fails.

[The Court then dealt with other matters not relevant to this Report.]

---

[1] [1962] VR 75.
[2] *Philpott v Boon* [1968] Tas SR 97 at 99-100.
[3] *Mehesz v Redman (No. 2)* (1980) 26 SASR 244 at 252.
[4] *Borowski v Quayle* [1966] VicRp 54; [1966] VR 382 at 386; *R v Noll* [1999] VSCA 164; [1999] 3 VR 704 at [3]; *Cross on Evidence*, Aust Ed. at [29 150].

APPEARANCES: For the Crown: Mr JD McArdle QC with Mr DA Trapnell, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the accused Ciantar: Mr PG Priest QC with Ms S Leighfield, counsel. Galbally & O'Bryan, solicitors.
