24/92

SUPREME COURT OF VICTORIA

DPP v BOER

Smith J

5, 11 May, 3 June 1992 — (1992) 15 MVR 11

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED – OPINION OF INFORMANT FORMED – NOT EXPRESSED IN SAME TERMS AS STATUTORY PROVISION – COPY CERTIFICATES ADMITTED INTO EVIDENCE – WHETHER EVIDENCE OF CERTIFICATES INVALID: *ROAD SAFETY ACT* 1986, SS49(1)(b), 55.

At the hearing of a charge under s49(1)(b) of the *Road Safety Act* 1986 ('Act') the informant gave evidence that as a result of conducting a preliminary breath test with B., he formed the opinion that B. had consumed intoxicating liquor. The informant did not say (as required by s55(1) of the Act) that he formed the opinion that B's blood contained alcohol in excess of the prescribed concentration. The Magistrate admitted into evidence two certificates of the result of full breath tests conducted on B., but upheld a 'no case' submission and dismissed the charge on the ground that the evidence of the certificates was invalid due to the informant's failure to give evidence whether he formed the opinion as required by s55(1) of the Act. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further determination.
(1) If there was an illegality in the way the result of the Breathalyser test was obtained, the magistrate was required to determine whether the evidence so obtained should be excluded under the *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretion.
***Stiles v Lamont* (1992) 15 MVR 557; MC 13/1992, applied.**

(2) As the magistrate failed to exercise such a discretion he was in error in ruling that the evidence of the certificates was invalid and dismissing the charge.

SMITH J: [1] Cornelius Johannes Boer was charged under section 49(1)(b) of the *Road Safety Act* 1986, that he, at Dandenong in the State of Victoria, on Friday, 21 March 1990, drove a motor vehicle while more than the prescribed concentration of alcohol was present in his blood. He was also charged with other offences but it is not necessary to consider them for the purposes of this proceeding. The charge came on for hearing on 28 November 1990 at the Dandenong Magistrates' Court. The case was adjourned part-heard to 29 April 1991. It was further adjourned to 9 September 1991. In the course of the hearing the informant led evidence, *inter alia*, of breathalyser readings produced by the defendant. At the conclusion of the informant's case, counsel for the defendant submitted to the learned magistrate that there was no case to answer.

An argument put by Counsel for the defendant was that section 55(1)(a) of the *Road Safety Act* 1986 provides that, before the police officer may require the defendant to accompany him to the police station for the purpose of furnishing a breath analysis, he must be of the opinion that the preliminary breath test which he has given the defendant indicates a blood alcohol level in excess of the prescribed concentration of alcohol. He argued that the relevant police officer required to form the opinion was the informant, Constable Knight, and not the other police officer involved, Constable Jung. **[2]** Constable Knight had said in his evidence – "from indications given to me by the device (the preliminary breath testing device) I formed the opinion that the defendant had consumed intoxicating liquor". Constable Knight did not state in his evidence that he formed the opinion that the preliminary breath test indicated the defendant's blood contained alcohol in excess of the prescribed concentration of alcohol. It was further argued that as Constable Knight had not given evidence to that effect, the breathalyser test was invalid and accordingly all actions and evidence after the preliminary breath test were inadmissible. In reply to counsel's argument the informant submitted that the Magistrate could draw from the totality of the evidence the inference that Constable Knight in fact formed the necessary opinion at the scene and accordingly had complied with the Act.

The learned Magistrate delivered his decision on 7 October 1991. A hand-written copy of

his reasons was produced before me. This was apparently handed to the parties by the learned Magistrate. In the course of his reasons the learned Magistrate referred to the evidence given about the opinions formed following the preliminary breath test. In particular he referred to Constable Knight who administered that test. He said that Constable Knight said:

> "From indications given to me by the device, I formed the opinion that he had consumed intoxicating liquor."

He went on,

> **[3]** "No reference was made at any stage of his evidence as to whether he formed the opinion required by section 55(1)(a). It is worthy of note that he stated that his colleague did not check the PBT reading, that he recalled. On the second day of the hearing (9-9-91), Constable Young (sic) gave evidence that he did see the result of the PBT, which indicated an excess of the prescribed concentration of alcohol. Mr Murphy drew attention to the disparity of evidence in this regard, and further submitted that at any rate the question as to whether Constable Young (sic) drew any conclusion from the PBT, if in fact he did observe it, is irrelevant. It is the opinion of Knight which must concern me. In reply, Sergeant Richardson submitted that the only conclusion I could draw from the totality of the evidence was that Constable Knight did in fact draw the necessary opinion at the scene."

Later in his reasons, the learned Magistrate dealt with these submissions in the following way:

> "The fact that Constable Knight did not give evidence that it was his opinion that the PBT indicated that the defendant's blood contained alcohol in excess of the prescribed concentration of alcohol is a fatal flaw, in my view, in this case. The whole of the proceeding consequent on the PBT and Constable Knight's evidence as to it becomes invalidated because I have no evidence that he formed the necessary opinion. One must have some doubt as to whether Constable Young (sic) did actually view the result of the PBT, based on Constable Knight's evidence. But, even if he did, I agree with Mr Murphy's submission that his evidence is irrelevant. I am not prepared to find on the evidence before me, that Constable Knight formed the necessary opinion. Although that finding disposes of the matter in the defendant's favour, I intend to make findings on the other submissions."

The appellant obtained an order from a Master of this Court pursuant to section 92 of the *Magistrates' Court Act* 1989 which raises two questions of law for consideration by me. Those questions are whether:

> (i) It is a necessary condition of the admissibility of a certificate given under section 58 of the *Road Safety Act* 1986 that **[4]** evidence or direct evidence be given of the formation of the opinion referred to in section 55.
>
> (ii) The formation of that opinion may be the subject of inference from other evidence.

Section 55(1)(a) *Road Safety Act* 1986 (the Act) authorises a member of the police force to require a person to furnish a sample of breath for analysis by a breath analysing instrument where a person has undergone a preliminary breath test when required to do so by a member of the police force and "the (preliminary breath) test in the opinion of the member ... in whose presence it is made indicates that the person's blood contains alcohol in excess of the prescribed concentration of alcohol;".

The sub-section has since been amended to delete the words "in excess of ... alcohol". Another relevant provision is section 58 of the Act. It contains evidentiary provisions relating to the admissibility of evidence about readings taken by breath analysing instruments and the conclusiveness of certificates unless notice is given.

I will deal first with question (i) relating to the admissibility of the evidence of the certificate. For that purpose it is necessary to establish what precisely took place before the learned magistrate. As to that there is some doubt. It is said in the affidavit of Sergeant Richardson, who appeared on behalf of the informant, that Constable Knight gave evidence "in accordance with his statement". That statement, exhibit B to his affidavit, stated that the informant gave evidence of the taking of the breathalyser **[5]** reading. He referred to the certificate, the original of which was given to the defendant. The witness "produced" to the learned magistrate the copy stating that it showed a blood alcohol concentration of 0.240 per cent. A second sample, he said was taken, and similar evidence was given and he "produced" the certificate to the Court, it showing a concentration of 0.235 per cent. Senior Constable Clifford, the breathalyser operator, was also called and gave

evidence about the result of the breath analysis tests. He gave evidence about the readings he obtained. Senior Constable Clifford produced the two certificates of authorised operator of breath analysing instrument which recorded the readings obtained against the defendant.

While the material before me refers to the certificates being "produced" to the learned Magistrate, and does not refer to them as having been tendered and admitted into evidence, it seems reasonably clear to me that that is what occurred. The affidavit in opposition to the appeal takes no point about that matter and there is nothing in the material to suggest that any objection was taken. It seems to me that the expression "produced" was being used by the police witnesses in the layman's sense of being presented to the Magistrate. I am strengthened in this view by the fact that counsel for the defendant raised a number of issues in the course of making the no case submission. It would be surprising if he had not based an argument on the absence of evidence of the breathalyser reading if there was no such evidence before the learned Magistrate. Further one of the submissions made by counsel for the defendant was that **[6]** Constable Clifford in recording a reading took the figure back to a reading which represented two figures after the decimal point. The argument appears to be based upon an analysis of what the recorded reading was. For that argument to be put, the record of the reading had to be in evidence before the learned Magistrate. I conclude therefore that the learned Magistrate admitted into evidence the results of the breath analysis testing.

In his reasons, the learned Magistrate did not in terms say that the evidence was inadmissible, but said that it and the steps taken in obtaining the breathalyser test result were "invalid". It seems to me that the learned Magistrate was accepting that the evidence was admissible but took the view that he could not act upon it because the failure to comply with the requirements of section 55 rendered it "invalid". In reaching that conclusion it appears to me that the learned magistrate erred. Assuming there was an illegality in obtaining the breathalyser test result, the task for the Magistrate was to determine whether the evidence so obtained should be excluded by him under the *Bunning v Cross* discretion ([1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; see also *Stiles v Lamont* (1992) 15 MVR 557; Full Court Supreme Court 3.3.1992). If it was admissible then he had to consider it. It appears to me that the learned Magistrate applied the wrong test. A problem for the appellant, however, is that the relevant question of law in the order proceeds on the incorrect assumption that the learned Magistrate ruled the evidence of the breathalyser certificate to be inadmissible where **[7]** evidence direct or indirect is not given of the formation of the opinion referred to in section 55. Counsel for the appellant sought from me leave to raise a further question:

> "(iii) Whether the learned magistrate erred in ruling that, in the absence of the formation of the opinion referred to in section 55 *Road Safety Act* 1986, the whole of the consequent evidence becomes invalidated."

Counsel originally based his application on Order 36 of the Rules and sought to obtain an order amending the Master's order. On closer analysis, however, he abandoned that application because it is only in relation to slips and errors in orders that the Court has power to amend orders and he did not take the view that what was involved was the correction of a slip or error. Instead he based his application upon Rule 58.13. This rule appears in the Rules dealing with appeals on questions of law which include appeals under section 92 of the *Magistrates' Court Act* 1989 (order 48.06). Rule 58.13 provides:

> "A master or the judge hearing the appeal may give any further or other directions as may be conducive to the effective, complete, prompt, and economic determination of the appeal".

It is unnecessary for me to decide whether this rule authorises the amendment of orders of the kind with which we are concerned. For the rule at least authorises leave to be given to raise a further question where to do so would be "conducive to the effective, complete, prompt and economic determination of the appeal". Having sought and heard further submissions from counsel, I am persuaded that **[8]** the appellant should be permitted to raise the further question. It will enable the issue which the appellant sought to raise in the first question to be determined. The respondent can point to no procedural unfairness if I allow the issue to be restated in this way. The respondent argued that in exercising the discretion in the rule I should have regard to s92(6) of the *Magistrates' Court Act* 1989 which permits an appeal out of time in exceptional circumstances only. The appellant, however, is not seeking to raise a new question of law but

is seeking to reformulate the question to enable the point of law rising from the material to be determined. Accordingly, it is not necessary to rule on that argument. I propose in due course to make orders formalising the grant of that leave. It will also be necessary to order that compliance with Rule 58.09 be dispensed with (rule 2.04). I will deal with the issue of substance on the basis that those orders will be made.

Returning to the original question (i), I have come to the conclusion, for the reasons given above, that the question of law did not arise because the learned magistrate did not rule the evidence of the certificate to be inadmissible. The new question, however, did arise. For the reasons outlined above I have come to the conclusion that the learned magistrate was in error in concluding that the evidence of the certificate was invalid. It was not invalidated. A question arose as to its admissibility and to rule on that question the learned magistrate had to apply the *Bunning v Cross* discretion. This he did not do.

[9] The second question stated in the order requires a view to be formed about the approach taken by the learned Magistrate in the course of reaching his conclusion that he was not prepared to find on the evidence before him that Constable Knight formed the necessary opinion. The appellant referred to evidence which he argued would indirectly support a finding that the informant had formed the necessary opinion. Among other things the informant gave evidence that he noticed that the defendant's breath smelt strongly of intoxicating liquor, his speech was slurred, his eyes glazed and he was unsteady on his feet. He gave evidence that the defendant had admitted to consuming intoxicating liquor and that his last drink had been 10 minutes before he was pulled up by the police. He said he conducted a preliminary breath test on the defendant. It indicated a positive blood alcohol concentration. He then gave evidence that at the Dandenong Police Station, the defendant said that he had had two Crown lagers at lunch and three to four glasses of Bollinger Champagne at the hospital. The first drink was taken at about 12:30 p.m. and the last at about 8:40 p.m.

It is necessary for the appellant to demonstrate that the learned magistrate believed that he was confined to direct evidence about the matter and could not have regard to inferences to be drawn from other evidence. It is true that he stated that Constable Knight did not give evidence of an opinion being held about the required matters and that that was a "fatal flaw". That conclusion, however, does not necessarily lead to the further conclusion **[10]** that the learned Magistrate ignored the possibility of inferences that might be drawn from other evidence. It is clear from the material that he was invited by the prosecutor Sergeant Richardson to conclude that the opinion had been formed and to do so from the totality of the evidence. The learned Magistrate also referred to that argument in his reasons. The explanation for the fatal flaw comment probably lies in the fact that Constable Knight had given evidence about the opinion he had formed. That opinion fell short of what the legislation required. His evidence was given during evidence-in-chief. If the evidence had been available of the existence of an opinion in the form required by the legislation it was reasonable to expect that that opinion would be referred to in his evidence. The failure to do so raised the inference that he had not formed that opinion. It seems to me that it was open to the learned Magistrate to rule as he did that he "was not prepared to find on the evidence before" him that Constable Knight formed the necessary opinion. I am not persuaded that he restricted himself to direct evidence on the point.

For the above reasons, I have come to the conclusion that the second question of law did not in fact arise in the decision of the learned magistrate and should therefore not be answered. Accordingly, I conclude that the two questions of law referred to in the Master's order did not arise from the learned magistrate's reasons for decision. The additional question, however, did and the argument of the appellant is made out in respect of that question. The result is that the **[11]** order dismissing the charge under s49(1)(b) should be set aside and the case should be remitted to the Magistrates' Court at Dandenong for further hearing and determination.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. JM Buckley, Solicitor for the Director of Public Prosecutions. For the respondent Boer: Mr B Lindner, counsel. Keogh Crisp & Co, solicitors.