39A/88

SUPREME COURT OF VICTORIA

CAMPBELL v RENTON

Marks J

18 August 1988

MOTOR VEHICLES – DRINK/DRIVING – TESTED TWICE WITHIN THREE HOURS AFTER DRIVING – DIFFERENT READINGS OBTAINED – INSTRUMENT DEFENCE BASED ON DISPARITY SOUGHT TO BE ESTABLISHED – WHETHER EXPERT EVIDENCE ADMISSIBLE AS TO PEAK BLOOD/ALCOHOL LEVEL: *ROAD SAFETY ACT* 1986, S49(1)(f), (4) (6), 58(2).

Where a person is charged with an offence under s49(1)(f) of the *Road Safety Act* 1986 and seeks to establish a defence under s49(4) by reference to the fact that two different readings were obtained, expert evidence as to the peak level of alcohol content in the blood after cessation of drinking is admissible as evidence going to the establishment of the defence.

***McDonald v Bell* (MC 62/1987);**

***Giankos v Ellison* (1988) 7 MVR 104; (MC 27/1988); and**

***Bakker v Boyle* [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149; (MC 39/1988), referred to.**

MARKS J: **[1]** This is the return of an order nisi granted by Master Evans, 9th March 1988 to review an order of the Magistrates' Court at Hamilton the 10th day of February 1988 whereby the applicant was convicted of an offence under s49(1)(f) of the *Road Safety Act* 1986 ("the Act") and fined $400 with $15 costs and his driving licence cancelled for 18 months. The magistrate constituting the said court was Mr JP Hanrahan.

[2] The information against the applicant alleged that he "on the 12th day of September 1987 at Hamilton in the said State did within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1), the result of which analysis indicated more than the prescribed concentration of alcohol is present in his blood."

Section 55(4) of the Act provides (so far as relevant) that an authorised person operating a breath analysing instrument must sign and deliver to the person whose breath has been analysed a certificate in the prescribed form of the concentration of alcohol indicated by the analysis to be present in his or her blood. Section 58(2) makes the certificate conclusive proof of the facts and matters contained in it unless the accused person gives notice in writing in a specified time before the hearing that he or she requires the person giving the certificate to be called as a witness.

It is common ground that in this case such a notice was given and when the hearing commenced the applicant by his counsel informed the Court that he relied upon the defence provided by s49(4) of the Act. Section 49(4) provides:-

> "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."

The applicant, as I have said, was charged under s49(1)(f). **[3]** The point for decision here arises cut of the ruling by the magistrate that certain evidence sought to be called on behalf of the applicant was inadmissible by virtue of s49(6) which reads:-

> "In any proceedings for an offence under paragraph (f) or (g) of sub-section (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 ground mentioned in the order nisi is that "the learned magistrate erred in excluding the evidence of Mr Young, set out in paragraph 8 of the (applicant's) affidavit."

The relevant facts can be shortly stated. The respondent (informant) gave evidence that on 12th September 1987 he was on mobile patrol in the Hamilton area with another police office when at about 11.10 a.m. he saw a white Ford Fairlane sedan travelling south in the service lane of Coleraine Road, Hamilton. They followed this vehicle for a short distance when it entered the area beside petrol pumps outside Homes Pitstop, Coleraine Road, Hamilton. They saw the applicant get out of the vehicle and walk over to the petrol pumps. Shortly after, the applicant made admissions to the effect that he had consumed a great deal of intoxicating liquor throughout the previous night but denied that he had consumed any 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 p.m. This resulted in a reading of 0.090% blood alcohol. He was given a signed certificate in the prescribed form and after being informed **[4]** of his right to do, requested a second sample. This was taken at 12.36 p.m. and resulted in a reading of .095% blood alcohol. The applicant was furnished with a further certificate. Evidence was also given by Acting Sergeant Graham William Petering who operated the breath analysing instrument and was called as a result of the s58(2) notice having been given. He gave the same evidence as to the readings and the times they were recorded.

The applicant gave evidence that he did not consume any alcohol after waking up on the day in question. He was supported by four 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. Counsel for the applicant called a Mr G Young, an expert with qualifications and experience in the use of breath analysing instruments. The evidence of the two readings taken 22 minutes apart were put to Mr Young and he was asked to comment on the significance he attributed to the variation. According to the affidavit of the respondent (on which I rely in accordance with the established practice), Mr Young gave evidence as follows.

Mr Young answered that an ascending blood alcohol would indicate that the person had consumed something to affect the reading within the last hour or so. He said most persons attained their maximum reading within 40 to 45 minutes, and that thereafter it decreases by .012% per hour. He said a rise shows something is amiss or something has been consumed. Mr Lindner of counsel for the applicant **[5]** then asked Mr Young whether different people take different amounts of time to reach their maximum reading, and whether he had experience of persons reaching their maximum reading after two hours. Mr Young replied: "yes". Mr Lindner then asked Mr Young what was the longest time he had come across and Mr Young replied two hours. Mr Lindner asked whether Mr Young would expect a certain reading where evidence had been given that a person had been in the company of the police for 60 minutes prior to the first breathalyser test.

At this point objection was taken to the evidence of Mr Young on the basis that it was inadmissible under s49(6) of the Act. After hearing argument the magistrate ruled that the evidence was inadmissible. According to the affidavit of the respondent the magistrate ruled "that while s49(4) of the Act provides a defence, s49(6) of the Act precludes certain evidence, and that where the evidence given is as to the time taken for the blood alcohol level to reach its peak after consumption, that is evidence of consumption and is inadmissible under s49(6)."

Apparently there were discussions between counsel and the magistrate and further argument. Affidavit material shows that the magistrate said that "where evidence was led as to any person, that must include this defendant, and that evidence of 'any person' included the applicant and was inadmissible in the case." It is also said that the magistrate ruled that s49(4) of the Act only applied so long as s49(6) was not contravened.

[6] The magistrate stated that his ruling was only on the evidence of the time taken for blood alcohol to reach its peak and that the evidence of Young "had been sought to establish consumption and relates to the defendant. If it didn't apply to the defendant then it would not be relevant, therefore he considered it applied to this particular defendant." The magistrate observed that "evidence of consumption after interception is no longer relevant."

In the upshot, it appears that as a result of the ruling of the magistrate Mr Young did not complete his evidence about the significance of the disparity in the readings. It was finally deposed that the magistrate ruled "that although the defendant had endeavoured to raise a defence under s49(4) of the Act that the breathalyser had not been properly operated he was prepared to find that the instrument had been operated correctly."

It is to be noted that according to the affidavit of the applicant (which was not contradicted on this aspect) his counsel had indicated a defence under s49(4) which must be taken to have included both limbs. The affidavits manifest a degree of confusion about what precise evidence relating to the disparity of readings was admitted. I am satisfied, however, that the proper view of the material is that by his ruling the magistrate excluded as inadmissible the evidence sought to be led from the expert Young about peak levels of alcohol content in the blood after cessation of consumption of alcohol.

[7] It is clear enough, as recent unreported decisions testify, that as the law now stands it is what the breath analysing instrument records to be the alcohol content at a particular time which may found a conviction. (*McDonald v Bell* (unreported 25th November 1987) JH Phillips J; *Giankos v Ellison* ((1988) 7 MVR 104, 26th May 1988) McDonald J))

In *Bakker v Boyle*; *Ladgrove v Wayne*; *Miles v Gilmore* [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149 –17th June 1988) O'Bryan J in all three cases which raised the same question held that in the absence of a challenge to the proper operation or proper working order of the instrument of breath analysis, the certificate of the operator is conclusive. These cases are the consequences of amending legislation which followed the decision of the Full Court in *Lamb v Morrow* [1986] VicRp 61; (1986) VR 623; (1986) 3 MVR 175. So the drinking (perhaps even non-drinking) motorist is now dependent for his or her fate on what a breath analysing instrument reads on a test. Neither the quantity (no matter if none) nor the effect of alcohol consumed has relevance. But an accused can challenge its operation or proper working order. (s49(4)).

In the instant case, notice pursuant to s58(2) requiring the attendance of the operator made such a defence clearly available and destroyed the conclusiveness of the certificate for which s58(2) otherwise provides. Thus this case is different from those with which O'Bryan J was concerned in *Bakker v Boyle* (where no notice had been given).

The applicant sought to establish his defence by reference to the disparate readings and what in the opinion **[8]** of an expert witness that meant. It must be assumed for present purposes that the time when the peak level of alcohol in the applicant's blood would have been reached after drinking stopped plus the period of non-consumption prior to the tests were essential to the expert opinion about any significance in the disparity between the readings. It must also be assumed that the applicant proposed to adduce evidence that given these facts the only proper inference was that the instrument was defective or not properly operated. It is not to the point for present purposes what precisely was still to be given in evidence, what its weight or how persuasive the Court was to find it. The question here is solely one of admissibility.

I think the evidence on which the applicant sought to rely, if conforming to the above assumptions, was admissible. It is not precluded in my opinion by s49(6) as going to the effect of the consumption of alcohol on the applicant. It was evidence of what the breath analysing instrument might be expected to record if properly operated and in proper working order given certain facts about the rise and fall of alcohol content in the human being. The magistrate was undoubtedly right in concluding that any evidence about human beings in general included the applicant. But that observation was not to the point.

The evidence about peak level of blood alcohol content on cessation of drinking was relevant (and therefore admissible) to the significance of the instrument having recorded a rise when it did. If it were accepted that the peak level must have been reached long before the first test the expert was entitled to express an opinion which the **[9]** Court was obliged to consider (not necessarily to accept) in determining the cogency of the defence under s49(4). Of course, the time the peak level was reached in the applicant depended on evaluation of his evidence and that of his witnesses about non-consumption of alcohol during the morning. This latter evidence was admitted apparently without objection. Evidence about the time taken for alcohol to reach

a peak level in the blood is not in my opinion evidence of the effect of consumption of alcohol on the applicant within the meaning of s49(6).

The Act, it would seem, is a product of the new "plain English" movement in the law, one which it is feared may bring its own cargo of problems. In turn these will be exacerbated if lawyers apply to plain English the exquisite literality of meaning from which the movement boasts liberation. Regrettably, I suspect that this is what the magistrate did. 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 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.

I do not accept that the adoption of "plain English" was intended by Parliament to produce such a result. As I understand it the new drafting technique known as "plain English" is a modern attempt to couch statutes in **[10]** language as near as possible to the way in which it is commonly spoken and understood. If that is so, emphasis and efficacy is to be given the words by reference to the way in which they might ordinarily be understood.

In any event, the statute expressly provides the applicant the defence referred to in s49(4). It cannot be supposed that Parliament intended, particularly in a penal statute, to give with one hand and take away with the other. Even if by some stretch of meaning which I would not adopt, evidence of times of peak level and commencement of the elimination process reasonably to be expected to apply to the applicant is of "the effect of the consumption of alcohol on him" (which I do not think it is), I would read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4). This is because Parliament must have intended by providing the defence under s49(4) to entitle an accused to adduce all evidence going to its establishment.

For these reasons, the order nisi is made absolute with costs. The conviction, penalty and cancellation of licence are set aside. The information is remitted to the Magistrates' Court at Hamilton for rehearing according to law.
