**25/93**

## SUPREME COURT OF VICTORIA

# *DPP v DRAGE*

**Teague J**

**14 September 1992; 7 January 1993 — (1993) 17 MVR 390**

**MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST CONDUCTED – PERSON ASKED BY OPERATOR WHETHER SECOND TEST REQUIRED – TOLD BY OPERATOR THAT SECOND TEST COULD GIVE HIGHER RESULT – SECOND TEST DECLINED – MEANING OF "ADVICE" – WHETHER INCLUDES COUNSELLING – *BUNNING v CROSS* DISCRETION – WHETHER EVIDENCE OF RESULT OF TEST SHOULD BE EXCLUDED: *ROAD SAFETY ACT* 1986, SS49(1)(b),(f), 55(4)(b), 58(1).**

Section 55(4) of the *Road Safety Act* ('Act') provides (so far as relevant):

"As soon as practicable after a sample of a person's breath is analysed ... the person operating the instrument must—
(b) advise the person whose breath has been analysed that he or she may request that a second sample of his or her breath be analysed ..."

**(1) The word "advise" in s55(4)(b) of the Act is to be treated as a synonym for "inform" and not "counsel". There is no obligation on an operator to provide a measure of counselling to a person whose breath has been analysed.**

**(2) Section 58(1) of the Act does not require strict compliance by the operator with the provisions of s55(4). Where evidence is obtained in breach of s55(4), the admissibility of such evidence is a matter for the exercise of the magistrate's discretion.**
***Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, applied.**

**(3) Where an operator asked if a person whose breath had been analysed required a second test and said that such a test could give a higher result than the first, the magistrate was in error in dismissing charges under s49(1) of the Act on the ground that the requirements of s55(4)(b) had not been strictly followed.**

**TEAGUE J: [1]** These are two appeals under s92 of the *Magistrates' Court Act* from a decision of a magistrate made at a hearing at Wangaratta on 3 April 1992 dismissing two charges against the respondent. One charge was that the respondent had, in breach of s49(1)(b) of the *Road Safety Act* (the Act), driven a motor vehicle whilst he had more than the prescribed concentration of alcohol in his blood. The other charge was that the respondent had, in breach of s49(1)(f) of the Act, after driving a motor vehicle, had his breath tested, with the test revealing that he had more than the prescribed concentration of alcohol in his blood.

The relevant portions of s49 are as follows:-

"49.(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;

(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis ... and
(i) the result of the analysis ... indicates that more than the prescribed concentration of alcohol is present in his or her blood"

As to what took place at the hearing before the learned magistrate, there was before me only one affidavit, sworn by Sergeant Norris who prosecuted the charges. The respondent had been apprehended on 8 March 1991 after having been seen to drive a car in Victoria Parade, Wangaratta. He took a preliminary breath test conducted by Senior Constable Sandra Paterson. After the test showed a **[2]** positive result, Paterson went with the respondent to the Wangaratta Police Station where she introduced him to a Sergeant Caddy who was an officer authorised under the Act to conduct a breath test.

Before the learned magistrate, there was a difference in the evidence as to what was said by Caddy to the respondent after Caddy conducted the breath test. Paterson's evidence was that Caddy had offered the respondent a second breath test which was declined. Caddy's evidence was that he said to the respondent "I am required to advise you that you may request that a second sample of your breath be analysed. Do you wish to have a second sample analysed?", that the respondent said "No, what benefit would it be?", and that he (Caddy) said that it would be of no benefit as it would probably be a higher reading. The respondent's evidence was that Caddy had not asked him if he would have a second test, but had just told him that if he had a second test, it would probably show a higher reading than the first.

The learned magistrate found that Caddy had asked the respondent if he wanted a second test, that Caddy had told the respondent that a second test could give a higher reading, and that the respondent stated that he did not want a second test. The learned magistrate also found that the respondent, partly because he had consumed alcohol and partly because Caddy had read to him from a *pro forma* list of questions, had formed the mistaken belief that he had not been told that a second sample of his breath could be analysed.

A submission was put on behalf of the respondent to the learned magistrate that the charges should be dismissed on **[3]** the basis that they depended upon evidence led under s58(1) of the Act which should be held to be inadmissible, in that certain of the evidence had been obtained in non-compliance with the provisions of s55(4) of the Act.

The relevant portions of ss55 and 58 are as follows:-

> "55.(1) If a person undergoes a preliminary breath test when required by a member of the police force ... to do so ... and the test ... indicates that the person's blood contains alcohol in excess of the prescribed concentration ... the member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument ...
> (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—
> (b) advise the person whose breath has been analysed that he or she may request that a second sample of his or her breath be analysed if the certificate indicates that more than the prescribed concentration of alcohol is present in the person's blood;...
>
> 58.(1) If ... a result of a breath analysis is relevant ... on a hearing for an offence against section 49(1) of this Act—
> then ... evidence may be given of the concentration of alcohol indicated to be present ... by a breath analysing instrument ... 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 ..."

The learned magistrate accepted the submission put to him. He dismissed both charges, indicating that he found that the requirements of s55(4)(b) in the taking of the breath test had not been strictly followed. Accordingly, he concluded that the evidence relating thereto should be rejected. **[4]** The key to his conclusion lay in his construction of s55(4)(b). He construed it to mean that the breathalyser operator was obliged to do more than inform the person tested of what was stated in the paragraph, and that, under s55(4)(b), the operator was obliged to give to the person tested an explanation of the person's right to have a second sample of his breath taken and analysed. His construction of the paragraph was based on giving to the word "advise" a meaning wider than "inform". Sergeant Norris stated that the learned magistrate, when construing s55(4)(b), referred to statements made in Parliament on 12 June 1986 by Mr Roper, the then Transport Minister, and that he compared the terms of s55(4)(b) with those of s464C of the *Crimes Act*. I will come to each of those matters.

The starting point of any analysis of the learned magistrate's reasons must be the meaning of "advise" in s55(4)(b). I was directed by both counsel to what was said as to the meaning of "advise" in *The Oxford English Dictionary*. Page 192 of the 2nd edition includes as item 9 – "to give counsel to, to counsel, caution, warn" and as item 10 - "to give notice or intimation, to instruct, to inform, to apprise (a person)". The learned magistrate, who also had the opportunity to consider the dictionary definitions, clearly opted to attribute the first meaning to "advise" in the context of s55(4)(b). After hearing the submissions of counsel and after considerable reflection, my position is as it was as a matter of first impression. Put shortly, I am of the view that **[5]** "advise" in the context of s55(4)(b) is to be treated as if it was a synonym for "inform", and not for "counsel". In

making the earlier comment, I note that I share the view of Brooking J as to first impressions stated in *Neville Smith Timber Ind. Pty Ltd v Alen* [1991] VicRp 41; [1991] 2 VR 1 at pp6 and 7.

It seems to me that factors to take into account when analysing the meaning to be given to "advise" ought to include, more or less in a seeded order, the other words of the paragraph, the framework of the Act, comparable provisions in other statutes, and what was said about the provision in the course of parliamentary debates. I turn to the last two matters first because it appears that they were the subject of specific comment by the learned magistrate. He adverted to s464C of the *Crimes Act*. That section prescribes the course to be followed by an investigating official before questioning a person in custody. Under sub-s(1), the official must inform the person in custody of the person's right to communicate with others. Under sub-s(3), the official must inform the person in custody of the person's right to remain silent. Sections 464A(3) and 464B(6) also use "inform" in the context of informing of the right to remain silent. The *Crimes Act* provisions were enacted in 1988. s55(4)(b) was enacted in 1986.

I do not think that the learned magistrate was wrong to make the comparison that he made. I can accept that the absence of a consistent use of "inform" in provisions requiring officials to make rights known does add some weight to his conclusions as to the appropriate construction of "advise". I cannot accept that the weight added is substantial; **[6]** considerable caution ought always to be exercised in making any comparison between provisions in different statutes.

In the course of the submissions made to me, reference was made to three unreported decisions of the Victorian Court of Criminal Appeal in *R v Pollard* (20 September 1991), *R v Shaw* (12 November 1991) and *R v Heaney* ([1992] VicRp 85; [1992] 2 VR 531; (1992) 61 A Crim R 241 12 June 1992), where some of the *Crimes Act* provisions referred to above were examined. I have reviewed what was said in those cases without finding any assistance on the instant issue. But the exercise was of assistance in relation to the subject of the exercise of the discretion to exclude unfairly prejudicial evidence to which I will come later.

I turn next to the subject of what was said in parliamentary debates. I have taken that what the learned magistrate referred to as having been said by Mr Roper was what was said not on 12 June 1986, but on 12 November 1986. On the later date, Mr Roper is shown in the Legislative Assembly, Parliamentary Debates as having stated that clause 55 of the then Bill was amended "to require the person administering the breath test to allow the driver to undergo a second breath test, if so requested, and to have the result of that second test recorded in certificate form and given to the driver." Mr Roper went on to say:-

> "Several people and groups have expressed concern about possible errors in the operation of the breathalyser ... I am moving this amendment to enable a person to ask for a second breathalyser test ... Although the provision will cause operational inconvenience to the police, that cannot be put above the fact that a legitimate concern must be addressed."

**[7]** After studying those and related statements, I have been unable to find any passage of value in the particular exercise in construction which faced the learned magistrate. I have taken the operational inconvenience referred to by Mr Roper as being that of a general kind necessarily resulting from the obligation to carry out a second breathalyser test, and not that of a particular kind resulting from an obligation to provide advice. In coming to my conclusion that what was said by Mr Roper has no relevance, I have noted what was said in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, where the High Court was concerned with the construction of s49 of the Victorian *Road Safety Act*. Reference was made in the judgments to statements made in the Legislative Assembly, Parliamentary Debates on 11 and 12 November 1986. Dawson J at p199 said:

> "Whilst s35(b)(ii) of the *Interpretation of Legislation Act* allows consideration to be given to any matter or document that is relevant, including reports of proceedings in any House of Parliament, the relevance of those proceedings must more often than not be questionable."

I come back to a review of the words of s55(4)(b). I cannot accept that parliament intended by the words used to impose an obligation on the official breath tester to provide a measure of counselling. An obligation to advise in the sense of counselling is a very much more burdensome one than an obligation to advise in the sense of providing specified information. I consider that, if

the more onerous obligation had been intended, the parameters of the counselling to be provided would have been spelt out. I cannot accept that there is any support in the words of para. (b) of s55(4) or otherwise in the Act for the conclusion that the more onerous obligation **[8]** was being imposed. On the contrary, I consider that the words of the paragraph spell out the limited specified information (that the person may request that a second sample of his or her breath be analysed) which is to be the subject of the obligation. In short, the obligation is only to advise in the sense of providing that information.

I am unable to accept that the learned magistrate correctly construed s55(4)(b). However, that does not mean that the appeal must be allowed. Mr Tehan of counsel, who appeared before me for the respondent, contended that I ought to be satisfied that the learned magistrate had arrived at the right conclusion even though he might not have stated the right reasons. His contentions were founded to some degree on what was said by Bollen J in *Nolan v Rhodes* (1982) 32 SASR 207. That was a case which bears a remarkable similarity to the instant case. The appellant there, who had been charged with driving with more than the prescribed concentration of alcohol in his blood, had been given a breath test and was then informed of his right to have a blood test by a police officer who added the advice that the appellant should not have the blood test because in his experience the blood test result was always higher, whereupon the appellant did not ask for the blood test. The magistrate there refused to exercise in favour of the appellant his discretion to exclude the evidence. Bollen J, in concluding that the magistrate had wrongly exercised his discretion, said that he considered that the police officer had been guilty of relevant unfairness in offering what he described as bad advice, advice which should **[9]** not have been offered, advice which had the effect of making the appellant avoid grasping the one chance of defeating the charge on the merits.

Mr Gebhardt, who appeared before me for the appellant, very appropriately pointed to the differences in the statutory provisions and in the facts between *Nolan* and the instant case. But, in my view, the real significance of *Nolan* lies not in what is or is not different, but in the treatment given there to the issue of the giving of advice as relevant to the exercise of the discretions as to whether or not to admit evidence.

I have referred to "the discretions". I refer to the discretion to exclude improperly obtained evidence, and the discretion to exclude unfairly prejudicial evidence. As to the distinction, I refer to the detailed discussion in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, which is a case concerned with breathalyser test evidence. The evidence before me does not include any specific reference by the learned magistrate to the exercise of any discretion or any reference to any decided case. It appears that the learned magistrate adopted the position that there was no scope for his exercising any discretion, and that the effect of a breach of the requirements of s55(4)(b) was that the evidence had to be ruled inadmissible. It appears that he took that position for the reason that s58(1) included the words "subject to compliance with section 55(4)". I say that with some hesitation. Sergeant Norris states in his affidavit that the learned magistrate "expressed the view that Section 58(1) of the Act must be strictly complied with because it interferes **[10]** with the rights of an individual not to provide a sample of his/her breath and if provisions are not strictly followed the evidence should be rejected". I think it more likely that the view expressed was that s58(1) required that s55(4) be strictly complied with. In either event I consider such a view to be erroneous.

Put shortly, I do not accept that s58(1) is to be construed as if the word "strict" were inserted before "compliance". If that position had been intended, it could readily have been achieved by the insertion of the word "strict". I do not accept that it is appropriate to take account, as the learned magistrate did, of the legislation's potential for interference with individual rights. *Bunning*, *Nolan* and *Mills* were all cases which highlighted the special character of this, or this kind of, legislation. Where the measures are somewhat drastic in character, there is a special need for taking care to achieve the right kind of balance. Where I differ from the learned magistrate is that I take the view that the consideration of interference with individual rights does operate in other ways such as in relation to the exercise of the discretions as to whether to admit evidence. I do not accept that it operates to justify a construction which effectively removes those discretions.

Sections 464A and the following sections of the *Crimes Act*, to which I have referred above, are concerned with a comparable situation, where the legislation seeks to balance important

community interests and important individual rights. In *Pollard*, *Shaw* and *Heaney* the courts were addressing a **[11]** comparable dilemma of whether evidence obtained in breach of s464C would have to be ruled inadmissible, and concluded that it was a matter for the exercise of the discretion of the trial judge. I do not rely on any reasoning from those authorities, but I do reach the same conclusion based on my assessment of the proper construction to be placed on ss55(4) and 58(1) of the *Road Safety Act*.

It follows that I take the view that the correct legal position is that the conclusion as to whether or not there had been a breach of s55(4)(b) would only be a finding preliminary to the exercise of the learned magistrate's discretions. There was a potential for a degree of unfairness calling for the exercise of the discretion to exclude the evidence. There was also the potential for the exercise of the discretion to admit the evidence even though it had been improperly obtained. I am satisfied that, insofar as the learned magistrate has concluded that the provisions had not been strictly followed on the basis of how he construed the word "advise", he was in error. I am also satisfied that, insofar as the learned magistrate has concluded that evidence had to be ruled inadmissible because he had found that there was a breach of the statutory requirements, he was in error.

I am not satisfied that the consequence of my conclusion that the learned magistrate was in error is that I should determine these matters finally in favour of the appellant. Nor am I satisfied that it is appropriate for me to try to put myself in the shoes of the learned magistrate with a view to avoiding having to remit these matters to him, by **[12]** making my own determination as to how the discretions should be exercised. I recognise that the result of the remission could well be that both proceedings are dismissed, for example on the basis that in Caddy giving the advice to the respondent that the learned magistrate found that he gave, Caddy could reasonably have been found to have acted unfairly in depriving the respondent of his chance to get a second analysis. However, I consider that the learned magistrate is in a better position to consider all matters relevant to the exercise of the discretions, so that the most satisfactory course is to remit the proceedings for further hearing by him.

The orders that I propose to make are as follows:

1. The appeals be allowed.

2. The orders dismissing the information be set aside.

3. The proceedings be remitted to the Magistrates' Court at Wangaratta for further hearing according to law.

4. The respondent pay the appellant's costs to be taxed.

**APPEARANCES:** For the appellant DPP: Mr SP Gebhardt, counsel. Solicitor for the DPP. For the respondent Drage: Mr P Tehan, counsel. Peter J Morriss (Wangaratta), solicitor.

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