24/93

SUPREME COURT OF VICTORIA

DPP v McNAMARA

Harper J

21, 22 January 1993 — (1993) 17 MVR 286

MOTOR TRAFFIC – DRINK/DRIVING – FULL BREATH TEST CONDUCTED – WHETHER RESULT INDICATES CONCENTRATION OF ALCOHOL IN BLOOD OR ON BREATH – ALCOHOL-BASED MOUTH WASH USED BY PERSON BEFORE TEST – WHETHER DEFENCE MADE OUT: *ROAD SAFETY ACT* 1986, SS48(1)(A), 49(1)(f), (4).

1. The result of a breath analysis is an indication of the alcohol concentration not on a person's breath but in the person's blood.

2. Where, before a breath test, a person used an alcohol-based mouthwash, the fact that the breath analysing instrument may have detected the presence of alcohol in the person's mouth did not make out the defence under s49(4) of the *Road Safety Act* 1986 that the instrument was not properly operated or was not in proper working order.

HARPER J: [1] This is an appeal from a decision of the Magistrates' Court at Moonee Ponds. The appellant is the Director of Public Prosecutions (Victoria). The Respondent is a Moonee Ponds' solicitor. On 4 December 1991, the respondent was charged with an offence under s49(1)(f) of the *Road Safety Act* 1986. The charge was heard on 22 September 1992. It was dismissed. The Director of Public Prosecutions now contends that, on the facts as proved, the Magistrate had as a matter of law no option but to convict. I agree. The effect of s49(1)(f) is that a person is guilty of an offence if he or she, within three hours after driving a motor vehicle, furnishes a sample of breach for analysis by a breath analysing instrument and the result indicates a concentration of .05 per cent or above of alcohol in the blood. It is an element of the offence that the reading was not due solely to the consumption of alcohol after driving. When a test is taken, as it was in this case, at a mobile breath testing station, proof of the latter element is normally provided by the testimony of police officers who observe the accused driving the vehicle into the testing station and thereafter continue their observation until the test is performed. In other circumstances, however, strict proof of this element might be very difficult to obtain.

A solution to the problem is provided by s48(1A) of the Act. It introduces a presumption which, save for one escape clause, is irrebuttable: It must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood was not due solely to the **[2]** consumption of alcohol after driving unless the contrary is proved by the person charged. No evidence will amount to proof unless it is corroborated by another person. The significance of this is that the legislature clearly had in its contemplation the possibility that a person could be convicted under s49(1)(f), although he or she has not consumed alcohol for any relevant period before or during driving. If the result of an analysis taken under that section indicates the presence of more than the prescribed concentration of alcohol in the blood of the person charged, then it does not matter that all the alcohol involved was consumed after driving, and that therefore the person charged had no alcohol in the blood while driving, unless the evidence to establish the true facts is corroborated.

In short, the legislature contemplated the possible conviction of a person who is innocent of having driven while intoxicated. It was apparently thought, however, that the price of an occasional conviction of this kind was worth the end sought to be achieved. This end was succinctly described by the Minister for Transport in a second reading speech on the *Road Safety Bill* in the Legislative Assembly on 11 September 1986 as "designed to prevent technical defences against drink-driving charges" The Minister continued:

"Following consultation with various organisations ... the blood alcohol content offence will be

expanded to include exceeding a prescribed reading on an approved breath analysis instrument.

The only grounds on which a breath analysis reading may be challenged will be that the particular instrument was operated improperly or was defective. Motorists will need to be aware that the offence is being over the legal limit at the **[3]** time of being tested. Consequently, a motorist who drinks after being involved in an accident but before being tested cannot use this to subvert the possibility of a conviction as at present and runs the risk that the penalty may be substantially increased by a higher reading when tested. The seriousness of the offence of drink-driving is such that measures such as these are warranted": Victoria Parliamentary Debates, Spring Session 1986 vol.383 Legislative Assembly p230.

All this, of course, is consonant with the conclusion which, in my opinion, is inescapable: that breach of s49(1)(f) is established on proof of the following elements:

(i) furnishing a sample of breath for analysis within three hours after driving;

(ii) furnishing such a sample, the result of which indicates the presence of more than the prescribed concentration of alcohol in the blood; and

(iii) such indication not being solely due to the consumption of alcohol after driving.

On the uncontested evidence of the events of 4 December 1991, all but one of these elements are present in this case. The respondent left work that evening and went to the Moonee Ponds' Hotel. In a space of about 15 minutes he there consumed two 7 ounce glasses of beer. He then drove about 300 metres before being directed into a breath testing area. After an interval of more than 15 minutes, but less than three hours, thereafter, during which he consumed no alcohol, the respondent furnished a sample of his breath for analysis. The result was recorded by a breath analysing instrument. It indicated that the concentration of alcohol in the respondent's blood was 0.135 per cent. **[4]** It is at this point that the evidence is challenged. The respondent submits that the result, as recorded, was not an indication of the concentration of alcohol present in his blood. It was, he says, no more than an indication of the fact that he had alcohol on his breath as well as possibly in his blood.

The respondent supported this argument in the court below by evidence adduced on his behalf. He said, and the Magistrate accepted, that shortly before the test was conducted he applied a breath freshener to his mouth. This was alcohol-based. The expert evidence before the Magistrate, which again the Magistrate accepted, was that the effect would be to leave alcohol residue in the mouth. This residue might remain for a period which might include the time during which the test was conducted. If so, the results of the test would be distorted to the prejudice of the respondent. Accordingly, so the Magistrate found, there was reasonable doubt that the result of the test accurately reflected the actual concentration of alcohol present in the respondent's blood. The problem for the respondent is that an actual concentration of .05 per cent (or more) of alcohol in his blood is not an element in the offence. If the other elements are proved then the offence is made out on proof that the result of the analysis, as recorded by the breath analysing instrument, merely indicates the presence of more than the prescribed concentration of alcohol in the blood.

It was submitted on behalf of the respondent that the result of an analysis as recorded by a breath **[5]** analysing instrument may indicate something other than the prescribed concentration of alcohol present in the blood. Two situations were contrasted. In each, the person operating the instrument had as required by the Act signed and delivered a certificate in the prescribed form of the concentration of alcohol indicated by the analysis to be present in the accused's blood. In one case, no notice had been given by the accused pursuant to s58(2) of the Act in the other, such notice had been given. By s58(2), in the form in which it was at the time of the incident in question here, a certificate given in accordance with s55(4) was conclusive proof of the facts and matters contained in it, unless the accused person gave notice in writing to the informant not less than seven days before the hearing that he or she required the person giving the certificate to be called as a witness. It follows that, if no notice was given, then the court was obliged to accept that a certificate which specified a concentration of alcohol in the blood of more than the prescribed concentration was conclusive proof of the indication upon proof of which the offence under s49(1)(f) is made out. This may be contrasted with the position which obtains when notice is given pursuant to s58(2). In these circumstances, the prosecution will not be able to rely on conclusive proof of

any relevant fact. The case against the accused must accordingly be proved, if at all, in the usual way (generally speaking, by calling *viva vocé* evidence from, amongst others, the person operating the instrument). Thus, in this case, the operator was called. He gave oral evidence of the result of the analysis of the **[6]** respondent's breath. This evidence, so the respondent contends, was not evidence which indicated that more than the prescribed concentration of alcohol was present in the respondent's blood. Given the evidence that alcohol was then present in the respondent's mouth, and therefore in his breath, the result of the analysis as recorded by the breath analysing instrument was likewise an indication of the presence of alcohol in the respondent's breath. But the offence created by s49(1)(f) requires proof that the result of the analysis indicates that more than the prescribed concentration of alcohol is present in the blood.

Hence, so it was submitted, the respondent was properly acquitted. The difficulty with this submission is that the result of an analysis as recorded by a breath analysing instrument is always and necessarily an indication of the concentration of alcohol in the blood of the person taking the test. This is the only result which the instrument gives. Thus, a breath analysing instrument is defined by s3 of the Act as, among other things, an apparatus of a type that is approved for the purposes of s55 of the Act for ascertainment by analysis of a person's breath what concentration of alcohol is present in his or her blood. Moreover, the effect of s58(1) is that on the hearing of a charge for an offence against s49(1)(f), evidence may be given of the result of a breath test; and such evidence is evidence of the concentration of alcohol present in the blood. The respondent did not put to me any argument to the effect that a breath analysing instrument is capable of **[7]** indicating by measurement anything other than the concentration of alcohol in the blood.

In this case, the operator of the breath analysing instrument in question gave oral evidence. He said that the respondent "furnished a sample of his breath directly into an approved breath analysing instrument and at 8.50 pm I analysed the sample and obtained a reading of 0.135 per cent blood alcohol." I take this to mean that the result of the analysis as recorded by the breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in the respondent's blood. Once that fact was proved (and the reading itself was not challenged by the respondent) then an offence against s49(1)(f) is made out.

It was submitted on the respondent's behalf that a defence was open to him under s49(4). This subsection provides that it is a defence to a charge under para.(f) for the person charged to prove that the breath analysing instrument was not on the occasion in question in proper working order or properly operated. To the extent that the instrument was influenced by the presence of alcohol in the mouth, so equally to that extent (it was submitted) the machine was not properly operated.

I cannot accept this submission. A breath analysing instrument is, in my opinion, in proper working order and properly operated if the evidence discloses that it was in working order as designed and that it was operated in accordance with the relevant regulations and procedures laid down for its proper operation. In this case, there was unchallenged evidence before the Magistrate that all these conditions were fulfilled. The fact that the **[8]** instrument might have detected the presence of alcohol in the mouth does not in my opinion affect this evidence or the conclusion that the instrument was in proper working order and properly operated.

I add that I have read the three decisions of the Supreme Court of Victoria to which my attention was, yesterday, directed. These are, first, *Bakker v Boyle* [1989] VicRp 39; (1989) VR 413; 9 MVR 149, a decision of O'Bryan J. Then I was also referred to two other decisions The first of these is *Campbell v Renton* an unreported decision of Marks J delivered on 18 August 1988. The second is *Leishman v O'Connor* (1991) 13 MVR 499 a decision of Fullagar J delivered on 17 January 1991.

As I understand these judgments, in each case the judge concerned accepted the analysis. For these reasons it seems to me that the appeal must be allowed. I should perhaps add, however, that if the Magistrate's findings of fact are correct, the result will be the conviction of a person who may not have had more than the prescribed concentration of alcohol in his blood at the relevant time. The conviction by statutory fiat of persons innocent of any substantive offence is generally abhorrent. One trusts that parliament had all the consequences of this legislation clearly in view when the legislation was passed, and is satisfied that the removal of one of the foundations of a

civilised society is in this instance justified. My sympathy for the respondent is only tempered by the consideration that any solicitor of his age and experience who uses an alcohol-based mouth wash as he did on 4 December 1991 is at the very least notably foolish.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. Solicitor for the DPP. For the respondent McNamara: Mr WB Lindner, counsel. Arundell Murray & Ryan, solicitors.