14/94

SUPREME COURT OF VICTORIA — FULL COURT

BARRETT v WEARNE

Tadgell, Ormiston and Cummins JJ

31 January, 1 February 1994 — (1994) 18 MVR 331

MOTOR TRAFFIC – DRINK/DRIVING - EVIDENCE GIVEN BY BREATHALYSER OPERATOR – REGULATIONS COMPLIED WITH – STANDARD ALCOHOL SOLUTION DESTROYED – WHETHER DEFENDANT DEPRIVED OF A DEFENCE – WHETHER AN ABUSE OF PROCESS: *ROAD SAFETY ACT* 1986, S49(1)(f).

Where the elements of a charge under s49(1)(f) of the *Road Safety Act* 1986 have been established, there are various ways by which a defendant might make out a defence under s49(4). The fact that the defendant cannot lead evidence of the constitution of the standard alcohol solution used because it has been destroyed, does not deprive the defendant of a defence to the charge so as to amount to an abuse of process.

TADGELL J: [1] The appellant, when driving a motor car in Dandenong Road, East Malvern at about 9:35 pm on 13 October 1990, was randomly intercepted by the respondent, a constable of police. The appellant admitted that he had had four 7-ounce glasses of wine at lunchtime on that day, but he told the respondent that he had not since then consumed any alcoholic liquor. After having been given a preliminary breath test, the appellant was asked to undergo a test by breath analysing instrument, and did so. The reading showed a blood alcohol concentration of 0.130 per cent. The appellant thereupon asseverated that something was wrong with the reading. At his request, he was given another test, which produced the same reading, and again he protested that it must be wrong. According to the respondent, the appellant smelt strongly of intoxicating liquor and had red eyes, but his behaviour was normal.

The appellant was charged with an offence under s49(1)(f) of the *Road Safety Act* 1986 expressed in the charge sheet, not altogether grammatically, as follows:

> "The defendant at Malvern on Saturday the 13th of October, 1990 did within 3 hours after driving a motor vehicle and after a requirement to undergo a preliminary breath test you were further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 55(1) of the *Road Safety Act* 1986, the result of which analysis indicated more than the prescribed concentration of alcohol present in your blood."

It was sought initially on behalf of the appellant to submit to us that the terms of the charge rendered it invalid. The attempt was, however, abandoned and I need not further advert to it. The appellant was also charged with an offence under s49(1)(b) of the Act in that he **[2]** drove a motor vehicle while more than the prescribed concentration of alcohol was present in his blood.

The charges were heard together at the Magistrates' Court at Prahran on 6 March 1992, about seventeen months after the events giving rise to them. The appellant was convicted on the charge under s49(1)(f) and the other charge was struck out. An appeal to a single judge of this Court was ordered to be dismissed and the appellant now appeals to this Court against that order.

Senior Constable White, the operator of the breath analysing instrument, was called in the Magistrates' Court at the appellant's request. So far as is now relevant, she swore in-chief that the appellant told her, before she tested him, that he was taking blood pressure tablets, sleeping tablets and pain killers, that he did not know their names, that they were provided by a medical practitioner, and that he had taken his last dose – a normal dose – three to four hours before leaving home. Senior Constable White swore that the appellant was co-operative and believed what he was telling her. She swore also that the breath analysing instrument she used was an approved instrument and that the regulations under the *Road Safety Act* governing its use were complied with.

In cross-examination Senior Constable White was asked about the standard alcohol solution against which, in accordance with the regulations, she tested the instrument with which she made the appellant's breath analysis. She swore that she was unable to say whether she made up the solution herself and that it would have been made up either by her or under the supervision of a chemist by a member of the Forensic Science Laboratory. **[3]** The correct concentration in accordance with the regulations is 4.26 millilitres of alcohol per litre of solution. White also conceded that she could not say from her own knowledge what the solution contained. She admitted that the solution in question had been the subject of a subpoena on behalf of the appellant, but that the subpoena could not be satisfied because the solution she used no longer existed. It was probably, she said, poured down the sink at the end of the night's shift in accordance with standard procedure. I should say that there was no evidence, so far as appears, of the time at which the subpoena was served.

Senior Constable White also admitted in cross-examination – and it was obvious enough – the appellant was not able to test the accuracy (by which I assume she meant the constitution or the concentration) of the standard alcohol solution which she had used. She also admitted that the appellant was tested twice on the one breath analysing instrument; that the instrument was tested against the one batch of standard alcohol solution; and that it would have been possible to have obtained a second instrument, but that that was not done. She also conceded that, occasionally, an instrument would malfunction, but said she would know if it was not working properly. She said also in cross-examination that, if the appellant had requested of her a sample of the standard alcohol solution, she would have given him some if he had had a container. It does not appear that the appellant made any such request.

The appellant gave evidence to the effect that what he had told the police upon his interception was true. He **[4]** swore that he had had four glasses of cask riesling seven or eight hours before driving, that he did not think he was "over .05" and that he would not have driven a car had he thought he was. He swore that he had a malfunctioning liver, had been diagnosed with hepatitis at the end of July 1991 and that, at the time of his interception by the respondent, he was suffering from hepatitis and was on Indocid, Diazepam and Aldomet.

In cross-examination the appellant swore that he did not believe the results of either breath test, that he did not believe he was "over .05", that he had been to a doctor to get a blood alcohol test, that there was no allegation of his having driven irregularly, and that there was no tests on his liver before June 1991. He apparently neither gave nor adduced evidence of the result of any blood alcohol test that he had that was relevant.

The Magistrate rejected several submissions made to him on behalf of the appellant of which only two aspects now require consideration. He declined to accede to a submission for the appellant that a defence to the charge under s49(1)(f) of the *Road Safety Act* had been made out under s49(4). The latter provides that

> "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 Magistrate found as fact, it seems, that the evidence before him was sufficient to prove that the breath analysing instrument had been properly operated by Senior Constable White. He had also rejected a submission made to him at the end of the informant's case that the proceeding should be stayed as an abuse of process. The **[5]** basis of that submission appears to have been in substance that, the standard alcohol solution that was used having been discarded, the appellant was deprived of the opportunity to establish a defence under s49(4) to the extent that an analysis of the solution might have demonstrated such a defence. This point was agitated before the learned judge. Before him, and before us, counsel for the appellant contended that the circumstances were such that the appellant was either deprived of, or so impeded in making out, a defence under s49(4) that the charge under s49(1)(f) should have been stayed as an abuse of process and that the Magistrate was in error not to have granted a stay. Alternatively, it was submitted for the appellant that a defence under s49(4) had been made out so that the charge under s49(1)(f) should have been dismissed on the merits.

The respondent's case in the Magistrates' Court depended, plainly enough, on his establishing beyond reasonable doubt that the result of a breath analysis of the appellant made by an approved instrument under s55(1) of the Act indicated that more than the prescribed concentration of alcohol was present in his blood at the time of the analysis: *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at p745; (1989) 9 MVR 1. That decision and the subsequent decision of the High Court 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 indicate that the correctness of the result of such an analysis is not of itself relevant for the purpose of proof of an offence under s49(1)(f).

Mr Gillespie-Jones, for the appellant, conceded to us this morning, in reply, that there was no question but that the respondent had established the elements of the **[6]** charge under s49(1)(f). Section 49(4), upon which the appellant sought to rely, describes in a general way the means by which the appellant might have defended the charge against him preferred under s49(1)(f), namely, by proving that the breath analysing instrument used was not in proper working order or was not properly operated. Such proof might, no doubt, have been variously made. The appellant might have established, if he could, that the procedure prescribed by the *Road Safety (Procedures) Regulations* 1987 as to the operation of breath analysing instruments had not been followed. That was done in *Binting v Wilson*, an unreported decision of Ormiston J delivered on 19 December 1989, and it was done by way of direct evidence adduced in the course of cross-examination of the operator of the instrument. Such proof might also be made, as I would apprehend, by the adduction of any other evidence calculated to displace or qualify evidence tending to show that the instrument was in proper working order and properly operated. As the learned judge pointed out below in this case, it would have been open to the appellant, for example, to adduce evidence to the effect that he had not consumed alcohol at all on the day in question or evidence of a blood analysis which tended to refute the evidence given against him. Such evidence, if favourable to the appellant and accepted, could have availed him in establishing a defence under s49(4). It might have availed him because it might have persuaded the Magistrate that the breath analysing instrument in question was not in proper working order or that it was not properly operated. Evidence tending to show that the standard alcohol solution used by the police was irregular **[7]** was but one means, therefore, which might have been used with a view to showing that the breath analysing instrument was not in proper working order or not properly operated. Such evidence might or might not have constituted sufficient proof for the purpose of s49(4).

Assuming or accepting that the appellant was unable to call or refer to evidence of the concentration of standard alcohol solution used, I cannot conclude for myself that he has shown any abuse of process of the Magistrates' Court. The Magistrate, in rejecting the submission for the appellant at the end of the respondent's case, indicated that he would have been inclined to accede to it but for the evidence of Senior Constable White that, had the appellant asked for a sample of the standard alcohol solution, she would have provided it had he asked for it and had he an appropriate receptacle. That evidence of White which seemed to move the Magistrate was, I am bound to say, not in my opinion relevant. An answer to the question whether the providing constituted an abuse of process could not conceivably depend on the statement of the operator at the hearing before the Magistrate as to what she would or would not have been prepared to do seventeen months earlier in circumstances which did not then arise. The submission should have been rejected in any event. So far as appears there was, in my view, no foundation for a conclusion that the proceedings against the appellant amounted to an abuse of process of the Magistrates' Court.

Counsel for the appellant submitted that the preservation of the standard alcohol solution used by the **[8]** operator of the breath analysing instrument in question was necessary in order that the appellant might have had the opportunity to mount a defence under s49(4). The argument was that, the solution having been destroyed, the chance of a successful defence under s49(4) was destroyed with it. What I have said shows that that argument must be wrong. The defence under s49(4) remained open notwithstanding the destruction of the solution.

In any event, there is no suggestion in the relevant legislation – the Act or the Regulations – that the operator of the breath analysing instrument should preserve the standard alcohol solution that was used or that a person tested is entitled to have the solution preserved so that he might make use of it in order to seek to make out a defence under s49(4). It will be convenient for a moment to postpone further reference to this matter and to consider the question whether the defence under s49(4) was made out, as counsel for the appellant alternatively contended.

Counsel sought to make something out of a perceived difference in approach by judges of this Court to the necessity for compliance by the prosecution with the procedure laid down by the regulations for breath analysis. Reference was made to *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257 and *Binting v Wilson*, an unreported judgment delivered on 19 December 1989 (both decisions of Ormiston J) on the one hand, and *Matosic v Hamilton* [1991] 13 MVR 171, a decision of Beach J, on the other hand, which were said to exemplify a divergence of view. For present purposes, I do not find it necessary to examine these decisions in any detail. All of them **[9]** proceeded on the footing that it was up to the informant, in a prosecution under s49(1)(f) of the *Road Safety Act*, to prove the case beyond reasonable doubt. The result of each of those cases depended on the evidence from which the tribunal of fact was invited, on behalf of the informant, to conclude that proof beyond reasonable doubt was made out. Plainly enough, the present case is to be approached in the same way and counsel for the appellant conceded, as I have said, that the respondent established in the first instance the ingredients of the offence charged under s49(1)(f).

There was evidence in this case from Senior Constable White that the Regulations were complied with. The submission by counsel for the appellant amounted, in effect, to one that it was not open, at the end of the case, for the Magistrate to accept that evidence. Put conversely, the submission was that non-compliance with the Regulations was proved by reason of White's concession in cross-examination that she could not say whether or not she had prepared the standard alcohol solution and could not give evidence from her own knowledge as to its content. It is sufficient to say that the Magistrate was not bound by that evidence in cross-examination of Senior Constable White to reject her evidence-in-chief that the Regulations were complied with. Much less was the Magistrate bound to conclude that the Regulations had not been complied with.

The relevant concessions made by White in cross-examination were, so far as appears from the material before us, of the baldest kind. The reason or **[10]** reasons why she was unable to say in the witness box whether or not she made up the solution or what it contained, were not investigated. At least it does not appear from the appellant's affidavit, which is all we have on which to go, that she was asked anything about that. It is to be remembered, however, that Senior Constable White was being asked about events that occurred some seventeen months earlier; and she had presumably conducted a number of breath tests in the meantime. It is by no means surprising to me that the Magistrate was evidently not prepared to give the exiguous evidence adduced in cross-examination the positive probative value claimed for it by counsel for the appellant.

It is by no means clear that the appellant's notice of appeal covers the question whether the learned primary judge erred in failing to find that a defence under s49(4) had been made out. Indeed, it does not appear from his Honour's reasons that that question was agitated before him. If, however, the question is duly raised by the notice of appeal it cannot, in my opinion, be answered favourably to the appellant. Returning to the question whether the Magistrate erred in declining to grant a permanent stay of the charge under s49(1)(f), I need add little to what I have said. Counsel for the appellant submitted, in essence, that the appellant had been prejudiced by the destruction of the standard alcohol solution, which destruction benefited only the respondent and it struck directly at the availability of a defence under s49(4). It was said to follow that any hearing at which a standard alcohol solution could not be produced was, of necessity, unfair **[11]** because the defendant could not rely upon that defence.

Counsel referred to the High Court's decision in *Jago v The District Court of New South Wales and Others* [1989] HCA 46; (1989) 168 CLR 23 especially at p57; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, in which Deane J observed:

> "Thus, it can be said, as a general proposition, that default or impropriety on the part of the prosecution in pre-trial procedures can, depending on the circumstances, be so prejudicial to an accused that the trial itself is made an unfair one."

Omitting a few words, His Honour went on the give an example:

> " ... where impropriety on the part of the prosecution has concealed from an accused important evidence which would have assisted him in his defence."

Counsel also referred to what Gaudron J said in *Jago's* case at p75, quoting a *dictum* of Wilson J in *Barton's* case [1980] HCA 48; (1980) 147 CLR 75; (1980) 32 ALR 449; 55 ALJR 31 that:

> "When there is a 'fundamental defect which goes to the root of [a criminal] trial, of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences', an accused person is denied that which the law guarantees, namely, a fair trial according to law. In such circumstances, it may fairly be said that the administration of justice demands that the proceedings be permanently stayed."

There is perhaps a question whether a court of summary jurisdiction, such as the Magistrates' Court, has an inherent jurisdiction to order the permanent stay of a proceeding being a summary hearing of a criminal charge. Mr Justice Brennan investigated the question of such a jurisdiction in the context of the District Court of New South Wales in *Jago's* case and the matter was but briefly adverted to in the course of argument before us. Because the matter was not fully debated, I shall not attempt to investigate it. Assuming, however, that there is such a **[12]** jurisdiction in the Magistrates' Court – and the case of *Holmden v Bitar* (1987) 47 SASR 509; (1987) 75 ALR 522; (1987) 27 A Crim R 255, a decision of Cox J of the Supreme Court of South Australia suggests that there may be – there was, in my opinion, no occasion to exercise it in this case.

The appellant had no necessary legitimate expectation that the standard alcohol solution would be routinely preserved until the hearing on the off-chance that it might be proved on analysis to be irregular. The appellant is not deprived of the opportunity of making out a defence under s49(4) merely because of the destruction of the solution. He was, moreover, entitled to rely on evidence of the destruction of the solution – for what that evidence was worth – in seeking to persuade the Magistrate that the informant had, at the end of the day, not proved his case beyond reasonable doubt.

There may well be cases in which a serious question is raised by evidence as to whether the breath analysing instrument was properly operated. In such a case it might be relevant – I do not say that it would necessarily be relevant – to consider that the standard alcohol solution had been destroyed, if that is what had happened to it. In this case, however, the appellant could not, in my opinion, seek to raise a serious question as to the operation of the instrument with reference to the standard alcohol solution merely by saying that the solution could not be tested by him. The solution was not part of the subject matter of the charge, and the case of *Holmden v Bitar* (*supra*), to which we were referred by counsel and on which he relied, is of no help to him for the reasons given by the learned primary judge.

[13] I observe that although, according to his affidavit, the appellant told the Magistrate somewhat enigmatically that, "I had been to a doctor to get a blood alcohol test sample," no details of any such blood test were given, so far as appears. Had evidence of a blood alcohol test been given, so as to raise a serious question as to the condition or operation of the breath analysing instrument, the absence of the standard alcohol solution might perhaps have assumed a different aspect in this case. As it was, the absence of the standard alcohol solution neither proved nor tended to prove anything. Grounds 1 and 3 of the grounds of appeal, in my opinion, are accordingly not made out.

By ground 2 exception was taken to a statement in the reasons of the learned primary judge to the effect that the request by the appellant's solicitors to have the solution examined was not *bona fide* given the finding of the Magistrate on the evidence of the appellant was honestly given that he believed the breath analysing instrument was wrong. As to this, I think it sufficient to say I do not found my judgment upon any such conclusion on that point as that expressed by the learned primary judge. There was another ground of appeal, ground 4, which was not argued and I take it to be abandoned. I would dismiss the appeal.

ORMISTON J: I agree. **CUMMINS J:** I agree.

TADGELL J: The order of the Court is that the appeal be dismissed with costs, including costs reserved.

APPEARANCES: For the appellant Barrett: Mr S Gillespie-Jones, counsel. Coadys solicitors. For the respondent Wearne: Mr SP Gebhardt, counsel. Solicitor to the DPP.