50/89

SUPREME COURT OF VICTORIA

HAZELDINE v GRINTER

Hampel J

21 July 1989 — (1989) 9 MVR 419

MOTOR TRAFFIC – DRINK/DRIVING – PERSON CHARGED NOT FOUND DRIVING BY POLICE OFFICER – BREATH TEST CONDUCTED – WHETHER LAWFUL PRELIMINARY BREATH TEST A CONDITION PRECEDENT TO A FULL BREATH TEST – WHETHER COURT HAS DISCRETION TO EXCLUDE EVIDENCE OF RESULT OF FULL BREATH TEST: *ROAD SAFETY ACT* 1986, SS49(1)(b), 53(1), 55.

G. was taken by two civilians to a place where the police were in attendance. G. underwent a preliminary breath test, later a breathalyzer test and subsequently, was charged with the driving of a motor vehicle whilst in excess of the prescribed concentration of alcohol contrary to s49(1)(b) of the *Road Safety Act* 1986 ('Act'). At the hearing, it was submitted that as the informant had not found G. driving, there was no power to require G. to undergo a preliminary breath test. Accordingly, the breath test conducted pursuant to s55 of the Act was not lawful and evidence of the result of the breath test was not admissible. The magistrate accepted the submission and dismissed the charge. Upon order nisi to review—

HELD: Order nisi discharged.
The magistrate undoubtedly had a discretion to exclude evidence of the result of the breath test, and it was not possible to conclude that the exercise of the magistrate's discretion miscarried.
[Note also *Peebles v Hotchin* [1988] 8 MVR 147; MC 61/1988 per Southwell J. Ed.]

HAMPEL J: [1] This is the return of an order nisi to review a decision of the Magistrate sitting at Mansfield who on 16 February 1989 dismissed an information laid by Colin Hazeldine, who is the applicant in these proceedings, against Rodney Maxwell Grinter, who is the respondent, charging Grinter with an offence of driving in excess of the prescribed alcohol level contrary to s49(1)(b) of the *Road Safety Act* 1986.

The facts in the case and the events at the hearing at the Magistrates' Court are set out in the affidavit filed on behalf of the applicant and sworn by Sergeant Nicholls who was the prosecutor at the hearing before the Magistrate. Mr Bourke of counsel appeared before the Magistrate and has appeared before me for the respondent today, and Mr Downing has appeared for the applicant.

The circumstances as set out in the affidavit are as follows insofar as they are relevant to the matter before me. On the day in question there were a number of incidents which relate to other unrelated offences. The result of all that was that two civilians brought the respondent to an address at 33 Ailsa Street, Mansfield where the Mansfield police were in attendance. The affidavit then recites that the defendant underwent a preliminary breath test and was then conveyed to the Mansfield police station. At 0400 hours and 52 minutes the defendant underwent a breathalyser test and was subsequently charged.

The Court apparently dealt with the other charges in various ways, and it is not necessary to refer to those matters. In relation to the charge under s49(1)(b) the respondent pleaded not guilty, whereupon the facts were **[2]** outlined to the Magistrate by the prosecutor and submissions were made. So far as the preliminary breath test is concerned and the breath test itself there are no further facts outlined other than what I have already referred to in para. 11 of the affidavit.

The Magistrate then heard submissions from Mr Bourke and those submissions are set out in the affidavit of Mr Nicholls. In substance they were that s53 of the *Road Safety Act* which deals with the preliminary breath test was not complied with in any of the three conditions (a), (b) or (c) because it was not a member of the Police force who found the defendant driving, nor were the other two conditions complied with and therefore there was no requirement to undergo a preliminary test. The defendant was simply brought to the police station by two civilians.

It is of some significance generally in this case that there are no circumstances setting out precisely what occurred just prior to the taking of this preliminary breath test. However, Mr Bourke's submission was that because there was no compliance with s53(1) there could be no lawful breath test in the sense that it could not be a breath test which would then, if the reading were over the limit, amount to an offence pursuant to s49(1)(b), because s55 is predicated on there having been a lawful preliminary breath test. The section in its relevant part reads: "if a person undergoes a preliminary breath test when required by a member of the Police Force or an officer of the Authority under the s53 to do so and" then, if the test **[3]** contains an excessive amount of concentration of blood, that breath test can be the basis of a conviction under s49(1)(b).

So in effect Mr Bourke submitted that there was no lawful exercise of the police powers under either s53 or s55 and, therefore, either because the *Road Safety Act* provides a code in respect to the circumstances under which such testing can be done, or because there was impropriety or illegality in the sense he submitted, the evidence ought not to be admitted and the information should be dismissed.

The prosecutor answered those submissions, as appears in paragraph 14 of the affidavit, by putting to the Magistrate that if it were held that the preliminary breath tests were not conducted in accordance with the Act the evidence of the breath test would still be admissible in circumstances where the defendant had voluntarily submitted to such a breath analysis test. Now apart from the use of the word "voluntary" in that proposition, or that submission, there are no details or circumstances outlined in the material before me as to what the circumstances of the taking of a breath test were. In any event, as I have indicated, the Magistrate upheld the submissions and dismissed the information. It is against that dismissal that the order nisi was granted.

It seems to me that the Magistrate had before him two basic issues. The first was whether because there was no compliance by the police with s53 there could be no lawfully obtained breath test for the purposes of a conviction under s49(1)(b). And, secondly, whether the evidence of the breath test, or the result of the breath **[4]** test, which was in fact undertaken should, as a matter of discretion be admitted in the circumstances which were before the Magistrate.

Before me Mr Downing for the applicant submitted that ss53 and 55 were merely enabling provisions and so applied only to permit or enable the police officers to require tests to be performed. But they were not a code in the sense that they had to be complied with in all circumstances as a pre-requisite to admissibility. He further argued that where, as in this case, the test had in fact been undertaken, the evidence of the result was admissible by virtue of s58(1) of the Act, even if there had not been compliance with ss53 and 55. That being so, Mr Downing submitted that this was not a case for a discretionary exclusion of this evidence even if ss53 and 55 had not been complied with, and even though the evidence was not simply relevant to an offence under s49 but it constituted the offence itself.

Mr Bourke, on the other hand, reiterated the submissions which he made to the Magistrate and argued that s58 did not apply in these circumstances because it dealt with admissibility of what is relevant as evidence to other charges including possibly charges under s49(1), but not when it constituted the very offence with which the respondent was charged. Both counsel put arguments before me on the question of the discretionary exclusion and referred me to the relevant authorities such as *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, and the decision of the High Court in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 86 FLR 388; 19 ALR 641; 52 ALJR 561. In my opinion there may well be some substance in the **[5]** submissions made by Mr Bourke in relation to the operation of s53 and s55. However, in my opinion for the purposes of this case it is not necessary for me to form a concluded view on that because I have come to the conclusion that on the material before me I am unable to say, in any event, that the Magistrate did not exercise his discretion to exclude which he undoubtedly had, correctly.

The question of the discretion to exclude this evidence must have been adverted to by the Magistrate. Firstly, because Mr Bourke's submissions as appears from the affidavit, necessarily raised the question of the illegality in the sense that he has referred to that is of non-compliance with s53 and 55. And, secondly, because the prosecutor, as he set out in paragraph 14, made submissions that, even if the tests were conducted unlawfully in that sense, the evidence ought

still to be admissible because the defendant had voluntarily submitted to the test. All that would have raised before the Magistrate, who was an experienced magistrate, not only the issue of the technical application of the sections of the Act but the question of the discretion resulting from the circumstances in which this matter came about.

Nor is it possible for me on the material which I have to say that the mere result, namely a discretionary exclusion resulting in the dismissal of the information, is in itself so obviously wrong as to call for the conclusion that there must have been a mis-exercise of his discretion. This is not a case on the circumstances *which* I have observed from the material in which it is possible to say that such a decision must inevitably lead to the conclusion that there was a mis-exercise of discretion.

In all, therefore, I am unable to say that the Magistrate has erred in law on the material that has been presented before me and, therefore, in my opinion the order must be discharged. There will be an order for costs in favour of the respondent.

APPEARANCES: For the applicant Hazeldine: Mr R Downing, counsel. Gordon Lewis, Victorian Government Solicitor. For the defendant Grinter: Mr B Bourke, counsel. Home Wilkinson & Lowry, solicitors.
