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SUPREME COURT OF VICTORIA

JONES v GROVES

Adam J

29 August 1969

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT INVOLVED IN A MOTOR VEHICLE ACCIDENT – TAKEN TO HOSPITAL – BREATH TEST CONDUCTED ON THE DRIVER AT THE HOSPITAL – READING OF .160BAC – CERTIFICATE DELIVERED TO DEFENDANT TEN MINUTES AFTER THE TEST – WHETHER DELIVERED "AS SOON AS PRACTICABLE" – DEFENDANT NOT NOTIFIED BY THE POLICE OFFICER THAT HE DID NOT HAVE TO UNDERGO THE TEST – WHETHER EVIDENCE WAS NOT ADMISSIBLE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Orders nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. Whatever was the precise meaning to be given to the expression 'as soon as practicable', in this context it was palpably unreasonable to treat a lapse of a mere ten minutes between the conclusion of the breath test by the instrument and the delivery of the requisite certificate as offending the statutory direction that the certificate should be signed and delivered to the person tested "as soon as practicable." As the operator of the machine had, after obtaining the breath analysis from the instrument, to complete a Schedule 7A Certificate with all necessary particulars, presumably to make a copy to be retained for evidentiary purposes, to satisfy himself that the instrument at the time was in proper working order, and sign the certificate, all before delivering it, the lapse of a mere ten minutes needed no justification from evidence, and a certificate delivered within such a short period could not reasonably be held to have been delivered otherwise than "as soon as practicable" within the meaning of the statutory provision.

2. There was nothing illegal in the Informant requesting a breath test from the defendant, merely because he could have refused it, although the police officer concerned was aware that the defendant was not compellable by law to submit to it. Furthermore there was nothing illegal in his proceeding with the test after the defendant had agreed to it, although from the answers given by the defendant, the Informant had been made aware that the defendant had a mistaken belief as to his compellability to submit to the test. There was no legal duty on the informant to advise the defendant as to the meaning of the Act, and as to his rights or privileges or duties under the general law as expressed in s408A of the *Crimes Act* 1958.

3. Accordingly, the Magistrate had no sufficient grounds for exercising the `discretion in favour of excluding the evidence of the breath test.

ADAM J: This is the return of an Order Nisi to review a decision of the Court of Petty Sessions at Geelong, whereby an information against the Defendant, Gary Robert Groves was dismissed. The information charged that the defendant did on the 7 September 1968, drive a motor car in East Geelong while the percentage of alcohol in his blood was more than .05 percent, contrary to s81A of the *Motor Car Act*.

The evidence in support of the information included, in addition to uncontradicted evidence of erratic driving by the Defendant resulting in an accident, and the Defendant's admissions of heavy drinking, the results of a breathalyser test made at the Geelong Hospital which gave a reading of .160 percent.

The Stipendiary Magistrate who constituted the court dismissed the information as he was not prepared in all the circumstances to act on the evidence provided by the breath test. It was not disputed that the police officer who operated the breath analyzing instrument was other than a person duly authorized to do so, nor that the instrument used was otherwise than an approved instrument, pursuant to s408A(6) of the *Crimes Act*, and in proper working order, nor that it had given a reading of a percentage of .160 of alcohol in the blood.

One submission made to the magistrate by the Defendant's solicitor was that the evidence did not establish that the sample of breath taken from the Defendant for analysis was taken within two hours of the alleged offence. This submission was based on the evidence of the defendant himself as to the relevant times, but there was strong evidence to the contrary. Even were the defendant's evidence in this matter to be preferred, *Smith v Madison* [1967] VicRp 34; [1967] VR 307 makes it clear that this alone would not afford a ground for rejecting the evidence of the breath test. However, suffice it for me to say that it does not appear from any of the conflicting accounts given of the magistrate's reasons for dismissing the information that his decision was affected by this particular submission.

Another submission to the magistrate, and one pressed before me by Mr Balfe who appeared for the defendant, was that the prosecution had failed to prove that the certificate of the result of the breath test had been delivered to the defendant "as soon as practicable" after the breath test, as required by s408A(2) of the *Crimes Act*. According to the affidavit filed in these proceedings on behalf of the informant, the magistrate upheld this submission as a ground for dismissing the information. However, the affidavit filed on behalf of the defendant leaves it uncertain whether this was so.

But whatever be the true position I am satisfied that this submission as a ground for rejecting evidence of the breath test lacks substance. Whatever the precise meaning to be given to the expression, 'as soon as practicable' in this context I consider it palpably unreasonable to treat a lapse of a mere ten minutes between the conclusion of the breath test by the instrument and the delivery of the requisite certificate as offending the statutory direction that the certificate should be signed and delivered to the person tested "as soon as practicable." As the operator of the machine has, after obtaining the breath analysis from the instrument, to complete a Schedule 7A Certificate with all necessary particulars, presumably to make a copy to be retained for evidentiary purposes, to satisfy himself that the instrument at the time is in proper working order, and sign the certificate, all before delivering it, the lapse of a mere ten minutes appears to me to need no justification from evidence, and a certificate delivered within such a short period could not reasonably be held to have been delivered otherwise than "as soon as practicable" within the meaning of the statutory provision.

Another submission to the magistrate, and urged before me was that under the special circumstances in which the defendant agreed to submit to a breath test, the proper conclusion was that he had been improperly induced to incriminate himself, thus entitling the magistrate in the exercise of his discretion to disregard the result of the breath test. In ruling on this submission the magistrate said in effect, according to the affidavit filed on behalf of the Defendant:

> "The evidence leads me to believe that the defendant was induced to take the test by the request of the policeman that he should take the test, and it was obvious that he believed that if he refused to take the test he would be guilty of an offence, and further, the evidence is that the police obviously knew of his belief."

I interpret this to mean that the magistrate in the exercise of his discretion treated the very relevant evidence afforded by the breath test as inadmissible. Assuming, as I think I should, for the purpose of these proceedings, that in a case of conflicting accounts of the evidence before the magistrate, I should accept the account given on behalf of the defendant as that supporting the magistrate's decision, it appears that there was evidence before the magistrate that the Informant, when he asked the defendant whether he would submit to a breath test believed that because the test was to be taken at the Geelong Hospital, the defendant was not legally obliged to submit to it, and further, that the defendant agreed to the breath test because, to the knowledge of the Informant, he mistakenly believed that he had no excuse in law for refusing and the Informant did nothing to correct such mistaken belief.

Basic to any argument that the results of the breath test obtained in such circumstances were inadmissible in evidence is, of course, the proposition that the belief was mistaken. Whether this was so or not depends on the proper interpretation of s406A(4) and (5) of the *Crimes Act* which makes it an offence to refuse to furnish a sample of breath for testing if requested under the circumstances therein specified, except in the circumstances indicated in subsection (b) of (4).

According to the evidence the circumstances believed to relieve the defendant from any obligation to co-operate in the breath test was that the test was to be made at the Geelong Hospital, and such Hospital was neither "at or in the vicinity of the place" where the alleged offence was committed or "at the nearest police station", to quote the words of subsection (4)(b) of s408A. If the Geelong hospital was a place "in the vicinity of the place" of the alleged offence which was committed in East Geelong, there was of course no mistaken belief on the part of the defendant. In the circumstances of the present case, where, on account of injuries received by the defendant, he was immediately taken by ambulance to a hospital in the vicinity for treatment, and no opportunity was afforded for taking a breath test at any place nearer to the scene of the alleged offence there would seem to be at least something to be said for the view that the Geelong Hospital was, within the meaning of the statute, "in the vicinity" of the place of the accident.

However, I will assume in favour of the defendant, without deciding this point, that this was not the case, and accordingly, the defendant would have had an excuse had he refused to submit to a breath test at the Geelong Hospital. Even so, the conclusion I have ultimately reached is that the circumstances surrounding the obtaining of the breath analysis appearing in the evidence did not justify the court in treating as inadmissible the evidence thus obtained.

The authorities draw a distinction between confessional evidence and other evidence, alleged to have been illegally or improperly obtained. We are not, in this case, concerned with confessional evidence and the rule that a confession is only admissible if given voluntarily. That this is so is made clear by the decision in *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644. We are here concerned with the exclusion of very relevant evidence not because of any possible weakness in the evidence itself, but solely because of the circumstances in which it was actually obtained. As to evidence of this non-confessional character, the general rule is clearly established. Such evidence if relevant is admissible even though obtained by illegal or improper means. The leading case is *Kuruma v R* [1954] UKPC 43; [1955] AC 197; [1955] 1 All ER 236 Others affirming this general rule are referred to in the judgment of Newton J in *Genardini v Anderton* [1969] VicRp 61; [1969] VR 502 at pp505 and 6. See in particular *R v McNamara* [1963] VicRp 56; [1963] VR 402, and also the unreported case of *Randall v Nicholson* decided by McInerney J which is referred to in *Genardini v Anderton*.

A full exposition of the law relating to evidence obtained by illegal or improper means will be found in *Cross on Evidence* 2nd edn, pp265 *et seq*. but the general rule however, is subject to the qualification that the Court has a discretion in criminal proceedings to examine evidence which it considers it would be unfair to the accused to admit, notwithstanding that such evidence is otherwise admissible. This discretion is one to be exercised judicially, and only where the circumstances of the particular case are such as to justify a departure from the general rule which treats relevant evidence as admissible notwithstanding any illegality or impropriety in obtaining it.

No doubt the reason behind the general rule is the interest of the community in the conviction of the guilty, and the importance for that purpose of admitting all evidence which is relevant to the issue of guilt. The reason behind the qualification which permits of the exclusion of relevant evidence, is a public policy which is not concerned with the truth or otherwise of that evidence. It is considered to be a matter of importance, not only to the individual concerned, but to the community, that certain abuses which may be practised by persons in authority for the obtaining of evidence should be checked, and in particular, where it would be against the Public interest to allow evidence obtained unfairly and illegally or improperly from an accused to be used against him. The court has a discretion to exclude such evidence. Whether in any particular case this discretion should be exercised will depend on all the circumstances. A relevant circumstance would appear to be the cogency of the evidence sought to be excluded. Where the evidence is of slight value the court may be the readier to exclude it on the ground of unfairness than where it is evidence of extreme cogency. There must, I consider, be substantial grounds for departing from the general rule which itself assumes illegality or impropriety in obtaining the evidence and accordingly some degree of unfairness.

Was there in this case any sound ground for the magistrate rejecting the highly relevant evidence provided by the breath test? There was I consider no element of illegality in the Informant's obtaining the breath test from the defendant. Even if the defendant was to the knowledge of the

Informant not obliged to submit to a breath test at the Geelong Hospital, the Informant was legally entitled to request him to submit to a breath test and to seek his agreement to this. This was recognised by Newton J in *Genardini v Anderton*, *supra*. At p505 when dealing with a request by a police officer to a defendant to submit to a breath test otherwise than at the nearest police station His Honour said, "In my opinion there was nothing illegal or improper in the informant asking the defendant to undergo a breath analysis test at the Warrnambool Police Station, nor in his carrying out the test at the Warrnambool Police Station without objection by the defendant." These remarks were made on the assumption that the Warrnambool Police Station was not "the nearest police station". The evidence obtained in response to such a request if the defendant complies with it, although he was not in law required to, is as also appears from the decision in *Genardini v Anderton* evidence which is admissible on the information under s81A.

Now, not only do I find nothing illegal in the Informant requesting a breath test from the defendant, merely because he could have refused it, but I can see nothing illegal about it although the police officer concerned was aware that the defendant was not compellable by law to submit to it. Furthermore I consider that there was nothing illegal in his proceeding with the test after the defendant had agreed to it, although from the answers given by the defendant, the Informant had been made aware that the defendant had a mistaken belief as to his compellability to submit to the test. There was no legal duty on the informant to advise the defendant as to the meaning of the Act, and as to his rights or privileges or duties under the general law as expressed in s408A.

The further point is whether short of any illegality in obtaining this evidence, there was no impropriety in the conduct of the police officer in obtaining this breath analysis test. The only possible impropriety appears to have been the failure of the informant to advise the defendant as to his legal right to refuse to submit to such a test.

The discretion now in question has sometimes been referred to as one to be exercised whenever it would be "unfair to the accused" to admit the evidence. The notion of unfairness, in my view, has to be applied with caution. It is not, I consider, sufficient that on some vague general appraisal of the conduct of the person obtaining the evidence, it might appear that he has not "played the game", or that he could have been fairer or franker. I do not think that is the sort of unfairness to an accused which justifies a court in excluding admissible evidence otherwise the general rule which presupposes illegality or impropriety in obtaining the evidence would have but little application in practice. I have found no case in which the discretion has been exercised to exclude relevant evidence unless the accused has been induced to provide the evidence against himself by promises or threats, or where physical coercion has been used or some trick has been played upon the accused.

Thus if, in such a case as this, the informant had told the defendant that if he submitted to the breath test then whatever the results of the test might be he would not hear any more about it there would at least be strong grounds for holding it would be unfair to use evidence of a breath test procured by such a promise. Again with threats if a police officer threatened to use physical violence on a defendant unless he submitted to a breath teat, and he was induced to submit by that threat of violence, that would accord with the policy justifying exclusion of the evidence. If one could imagine a case where a defendant, really unwilling to submit to a breath test or not having turned his mind to it, was misled by a constable into believing that he was not taking a breath test at all, but that a sample of his breath was being taken for some other purpose altogether, there would be cogent grounds for excluding the evidence provided by the breath test as unfairly obtained by a trick.

I have been unable, and counsel has not referred me to any authority, which would justify the exercise in the circumstances of this case of the discretion against admitting the evidence of the breath test on any ground of unfairness. The police officer did not procure the consent of the defendant to the test otherwise than by doing what in law he was perfectly entitled to do, namely to request the defendant to submit to a breath test and it mattered not whether the defendant was compellable by law to comply with that request or not.

It might be thought that it would have been fairer to the defendant if, when the constable realized that the defendant believed that he would be punished if he did not submit to a breath test, he had disabused his mind. But this non-disclosure on the part of the constable, when there

is no legal duty on him to advise the accused as to his legal rights in the matter, seems to me to fall far short either of illegality or such impropriety as would justify on the grounds of unfairness to the defendant the exclusion of evidence of such highly probative value. It seems quite clear that the constable who is requiring a breath test even though he knows that the defendant is not bound to submit, is not required to give any warning in the usual form as when one is seeking confessional evidence. No such duty has been recognised and indeed although this case does present some features which were not presented in the case of *Genardini v Anderton* the principles applied in that case seem to me entirely applicable to the present case.

In that case His Honour expressed his views on the assumption that the constable requiring the breath test knew that the defendant would not be guilty at an offence if he refused, and furthermore, that he may well have believed, although he was not told, that the defendant believed that he was under such a duty. That was not considered to be the sort of unfairness which would justify the exclusion of the breath test evidence in the exercise of a proper discretion. As Newton J said at p506 of that case:

> "There was in my opinion no ground upon which the evidence of the result of the breath analysis test could have been legitimately excluded in the exercise of a discretion as being unfair to the defendant. No promises, threats physical coercion or tricks were resorted to in order to obtain the breath analysis test".

This is a recognition that the word "unfairness" or "impropriety" has to be applied having regard to the context. It is not merely a question whether the evidence has been procured under circumstances where more fairness could have been shown to a defendant: this would introduce a very vague and imprecise test, and one which could nullify the well-established general rule that relevant evidence is always admissible.

In the case of *Callis v Gunn* [1964] 1 QB 495 at p501; [1963] 3 All ER 677; (1963) 3 WLR 931 there are similar observations as to the scope of the unfairness which may be a ground for excluding admissible evidence. Lord Parker CJ says:

> "As Lord Goddard CJ, points out and indeed, as is well known in every criminal case a judge has a discretion to disallow evidence even if in law relevant and therefore admissible if admissibility would operate unfairly against a defendant. I would add that in considering whether admissibility would operate unfairly against the defendant, one would certainly consider whether it had been obtained in an oppressive manner, by force, or against the wishes of an accused person. That is the general principle".

No such element appears in this case. All that can be said is that the constable might have offered something by way of advice to the defendant when he did not, but the defendant quite voluntarily submitted to the test without any pressure or force or inducement, or threats or promises. The mere fact that he was under a mistaken belief as to his obligation to submit to the breath test does not, it seems to me, give rise to a case for the exercise of a discretion to exclude the evidence.

After all the defendant was bound to know the general law, and although it may be an unusual application of the maxim *ignorantia legis haud excusat* might be invoked when considering the application of the discretion in this case. I may say that of the cases cited to the magistrate Mr Balfe relied particularly on *Baker's case* 28 Cr App R at 521. It seems to me that in a sense that case is out on a limb insofar as it tends to assimilate the rules applicable to confessional evidence to evidence of a different character, by treating evidence of a different character as though it was confessional evidence. But be that as it may the case only serves to confirm that the type of case where unfairness to a defendant could justify the exclusion of admissible evidence, is one where there is unfairness on the part of the person obtaining the evidence, in the way of some inducement as e.g. by promises. As the authorities had obtained the evidence by promises, and then broken the promises, it is not surprising that the court found grounds for rejecting that such evidence as unfairly obtained.

What I have said indicates that in my opinion the magistrate had no sufficient grounds for exercising the discretion in favour of excluding the evidence of the breath test. The exercise of a discretion is always reviewable within limits, and thus it is not for a court on review to

substitute its own discretion for that of the primary Judicial officer in whom it is vested, that is subject to this, that if there was no reasonable ground for the manner in which the discretion was exercised, then the discretion should be considered to have miscarried, it will then be interfered with. That is the conclusion with all respect that I have come to in this case, and consistently with that the order nisi must be made absolute. The Magistrate's order of dismissal must be set aside, the information must be remitted to the Court of Petty Sessions at Geelong for rehearing and if Mr Balfe had been here or someone representing the defendant, he might have sought a certificate, because I was going to make the usual order that the informant should have his costs of these proceedings. I think I should reserve to the defendant the right to apply for a certificate, as otherwise, he might be shut out by not being able to make the application today.

APPEARANCES: For the applicant/informant Jones: Mr B Cooney, counsel. Thomas F Mornane, Crown Solicitor. For the respondent/defendant Groves: Mr JR Balfe, counsel. Harwood & Pincott, solicitors.
