4/96

SUPREME COURT OF VICTORIA

FITZGERALD v HOWEY

Eames J

5 July, 10 August 1995 — (1996) 24 MVR 369

MOTOR TRAFFIC – DRINK/DRIVING – OPERATION OF BREATHALYSER – SAID BY EXPERT NOT TO HAVE BEEN OPERATED PROPERLY – NATURE OF BURDEN ON DEFENDANT – NO POSITIVE EVIDENCE THAT TEST RESULT WAS PROBABLY INACCURATE – WHETHER DEFENCE MADE OUT – WHETHER OPEN TO MAGISTRATE TO CONVICT: *ROAD SAFETY ACT* 1986, S49(1)(f).

1. Under s49(1)(f) of the *Road Safety Act* 1986 ('Act'), the general burden of proof remains on the prosecution to prove the elements of the offence beyond reasonable doubt. However, s49(4) of the Act imposes a legal onus on the defendant to prove that the breath analysing instrument was not in proper working order or properly operated at the relevant time. This evidential burden is not satisfied merely by pointing to some departure from the manufacturer's instruction in the operator's manual. It requires proof that by virtue of the departure from proper operation the test result would have overstated the driver's blood alcohol concentration.

***Ozbinay v Crowley* (1993) 17 MVR 176; (1993) MC26/93, considered.**

2. Where an expert witness gave no positive evidence that the test result was probably an overstatement or inaccurate, it was open to a magistrate to conclude that the defence under s49(4) of the Act had not been made out and convict the defendant.

EAMES J: *[After setting out the facts, the evidence given by the prosecution and for and on behalf of the defence (including the expert's evidence as to the "suck back" effect which may be caused when the Breathalyser switch is left in the "off" position, the magistrate's reasons and findings, the grounds of appeal, relevant provisions of the Act, the parties' arguments and decided cases, His Honour continued]*...**[16]** Smith J held, at p255, in *DPP v Martell [1992] VicRp 64; [1992] 2 VR 249; (1992) 15 MVR 397*, that s49(4) places not merely an evidentiary onus on the defendant, to provide some *prima facie* proof that proper operation did not occur (thus rebutting the correctness of the facts asserted in the certificate of the operator), but also imposes a legal onus on the defendant to prove that the machine was not in proper order or properly operated. Byrne J held in *Ozbinay v Crowley* (1993) 17 MVR 176 that the standard of proof was on the balance of probabilities, with which I agree. If, on the balance of probabilities, the defendant proved that the machine was not operated properly then he must be acquitted, because s49(4) makes proof of that matter a defence to the charge. The question remains, what constitutes improper operation? Must it be demonstrated that an inaccurate result did occur, or probably occurred? Or is it sufficient if the defendant established that error was merely possible?

In *Verbaken v Dowie* (1992) 16 MVR 461 Hedigan J upheld the entitlement of a magistrate to dismiss a charge when it was established that the operator had failed to comply with a **[17]** manufacturer's instruction as to the period of delay which should occur between the flushing of the instrument with air and the conducting of the test upon the driver. Once again, Mr Young was the expert defence witness. He gave evidence that the omission "might" cause an error in the reading. In that case the prosecution conceded that the instruction was a necessary procedure to be followed, but it was disputed whether it had not been followed. Hedigan J held that it was open to the magistrate to conclude, on the balance of probabilities, that the machine had not been properly operated. There was no issue raised in that case as to whether the expert evidence had established that an inaccurate reading was a mere possibility, or was a probability. Although his Honour reported the evidence of the expert as having been "that an error might occur", by virtue of the departure from the instructions, his Honour held, at p13, that the departure from the instructions was "not a mere technical omission, but positive evidence that he failed to perform one of the steps that it was conceded in the course of the hearing was necessary to be performed." The conclusion reached by his Honour was therefore consistent with the omission having a probable effect upon the accuracy of the test result in that case.

As I have said, in my view it is an error to describe s49(4) as imposing merely an evidential burden of proof upon the defendant, which is satisfied merely by pointing to some departure from the instructions. If the burden of proof cast by the sub-section is met, that will provide a complete defence to the charge, but even if the **[18]** defendant fails to establish the defence under that section the general burden of proof of the offence under s49(1)(f) remains upon the Crown at all times; that being a burden of proof beyond reasonable doubt: *Binting v Wilson*, unrep. 19 December 1989 at p18; *Barrett v Wearne* (1994) 18 MVR 331 *supra*, at p12.

Byrne J, in *Ozbinay*, was concerned with a case where precisely the same departure from the manual was identified as occurred in the present case. His Honour held that that departure was, in itself, insufficient to establish the defence under s49(4). I agree with that conclusion as to the requirement imposed by the section. His Honour held that more was required to be established if the defence was to succeed, but he concluded that no evidence had been led which satisfied him, on the balance of probabilities, that the machine had not been properly operated. His Honour held, at p13:

> "It will be seen that the assumption which lies behind the appellant's argument is that the manufacturer's instructions must be adhered to in order for there to be a proper operation of the machine. I am not prepared to adopt this assumption as applicable in every case. Its validity is a matter of evidence in relation to the instructions in question. To my mind the word "proper" in the expression "properly operated" requires an examination of the purpose of the machine's operation. Any other conclusion would confer upon the manufacturer's instructions a legislative import similar to that enjoyed by the regulations. See *Bogdanovich v Buckingham* [1989] VicRp 80; [1989] VR 897 at p892; (1988) 9 MVR 257. Such a conclusion too would be inconsistent with the decision of Ashley J in *Dalzotto v Lowell* (unreported, SC (Vic) 8283/1992 18 December 1992) at p21." (My emphasis.)

Byrne J then discussed what the content of the evidence needed to be if the defence was to be established, **[19]** ie. that the machine had not been properly operated. His Honour held, at p16:

> "I do not accept that the burden imposed by s49(4) requires the person charged with an offence against s49(1)(f) to prove the inevitability of error as a result of the contravention. From a practical point of view such a burden would be in most, if not all, cases impossible to discharge since the sample of breath and the acid which was affected by it is not retained. It would only be in the case of the most egregious departure from operating procedure that the defendant could lead evidence that error must inevitably follow. Such a conclusion would detract very much from the evident usefulness of s49(4). It is sufficient in my view that the defendant on the balance of probabilities establish that the act or omission affecting the operation of the machine was such that the result is unreliable". (My emphasis.)

Byrne J held that the evidence in the case before him did not establish that the result of the test was unreliable. The deficiency identified at p14-15, was that the omission of the operator in using the breathalyser was not proved to have been one which "would affect its proper function so as to impair its reliability". Byrne J noted that there may be some instructions of the manufacturer which were essential to the production of accurate results, but others might merely be issued out of an abundance of caution. As to the latter category, if they were ignored, the test result would probably still be accurate. His Honour observed, at p12, that whether the instruction fell into one or other category was a matter for expert evidence. Byrne J held that such evidence was not given in the case before him.

In the light of the judgment of Byrne J Mr Hardy was faced with a task of either satisfying me that the decision should not be followed, or else that, in the present **[20]** case, evidence of the requisite weight and pertinence had been given. He chose to argue both propositions. Mr Hardy submitted that the test imposed by Byrne J required the defendant to establish on the balance of probabilities not merely that the operator had failed to comply with the maker's instructions so that an inaccurate result may be possible, but that the defendant had to prove that the unreliability of the test result was a probability. I agree that this is the effect of the ruling of Byrne J.

Mr Hardy submitted that Parliament evidenced its intention that s49(4) did not require positive proof that the test result was, in fact, unreliable; merely positive proof that the operator had failed to properly operate the machine. Mr Hardy accepted that it was necessary that the instruction have some potential bearing upon reliability of the test result, if the defence was to be established. Nonetheless, it would still be sufficient to constitute proof of improper operation to prove that as a result of the omission, the possibility of unreliability had arisen. That this was all

that Parliament required to be proved may be seen, Mr Hardy submitted, by reference to s49(5). That section deals with blood tests, not breath tests.

To establish a defence under s49(5) it was necessary to prove on the balance of probabilities, that the blood analysis "was not a correct result". Where Parliament had used different words elsewhere in the same section, then, Mr Hardy submitted, Parliament must have intended a different effect, ie, that the correctness of the breath test result was not at issue under s49(4). He relied on *Scott v Commercial* **[21]** *Hotel Merbein Pty Ltd* [1930] VicLawRp 4; [1930] VLR 25 at p30; 35 ALR 297.

In my opinion, however, the different use of language in the two sub-sections is readily explained by the fact that positive proof of an error in the result of a blood test is possible, because the driver had been given his own sample of blood, which he could have analysed. In those circumstances, given the clear public safety considerations which motivate this legislation, it would be absurd to allow a defence to a charge based on the possibility, or even probability, of error when the defence was in a position to establish actual error, and where, if they chose not to disclose the results of their independent test on the blood sample, it could reasonably be concluded that it confirmed the accuracy of the original test result.

In the case of breath tests the sample of breath is not retained, and it would therefore be equally absurd to require positive proof that the reading taken at the time of the test was actually wrong. It would be impossible to prove that. The best that could be done would be to demonstrate with greater or lesser degrees of certainty, that the test result was likely to have been incorrect. A conclusion that s49(4) requires proof of unreliability of the test result (by virtue of the manner of operation), is not rendered less likely by reference to the words used in s49(5).

It is true that words requiring that there be evidence of unreliability in the test result do not appear in s49(4). But the framework of this important social legislation into which s49(4) is placed, must be taken into account. It may be thought that the clear intention of **[22]** Parliament in this legislation is to render the evidence of a breath test conclusive unless the defendant proves otherwise. Byrne J discussed that legislative purpose, in *Ozbinay*, at p15. As his Honour observed, the accuracy of a breath analysis reading is presumed by the legislation, thus, the operator is not obliged to prove that the result obtained was accurate: see *Smith v Van Maanen* (1991) 14 MVR 365, Tadgell J 5 July 1991. It is assumed that the machine is reliable, notwithstanding the fact that it is a scientific instrument. It would be at odds with that intention and approach for it to be the case that a defence would be constituted by any omission or action which was contrary to the manual but which was not proven to have had any effect upon the reliability of the test. Mr Hardy conceded that instructions as to mere "cosmetic" matters could not provide a defence under the sub-section. I understood that concession to extend to such matters, perhaps, as the ergonomics of operation of the machine; directions aimed at avoiding wear and tear; matters relating to efficiency, rather than accuracy.

The word "properly" as defined in the *Oxford English Dictionary*, 2nd Ed. carries meanings, on the one hand, of something done "perfectly", or, "strictly accurately" or, on the other hand, something done "suitably" or "appropriately". In my opinion, in the framework of this legislation, it is likely that Parliament intended that the word would carry a meaning such that the machine would only fail to be properly operated if by virtue of what the operator did, or failed to do, the reliability of the test result had been compromised. The onus of proof, on the balance of probabilities, then, **[23]** might be expected to impose an obligation to prove that the unreliability was probable. The question at issue is this. If, as was eventually conceded, improper operation would not be established where there was no possibility of an incorrect result being obtained, does the sub-section require proof that the unreliability of the test result was merely <u>possible</u>, or does it require proof that the unreliability of the test result was <u>probable</u>? Byrne J opted for the latter view, and Harper J agreed with him.

It needs to be noted that proof that the test was probably unreliable is not the same thing as proof that it was probably wrong. Byrne J expressed the test in terms of proof that the test was probably "unreliable", rather than probably erroneous. A test might be unreliable, so that its result could not be taken to be accurate and yet, in fact, it may have produced an accurate result notwithstanding the factors which might have combined to produce an inaccurate result, and

which make it impossible to rely on the result which was produced. For all practical purposes, however, the distinction may be ignored, since, for the reasons earlier stated, it will be impossible to determine whether the test result was "true".

In support of the more liberal interpretation of the sub-section which the appellant would have me adopt, and which Byrne J did not adopt, this might be said. Here we have a scientific instrument used in a manner contrary to the directions of its manufacturer, and in circumstances, so it is said, where the variation is capable of producing an incorrect test result. No explanation has been offered by the operator **[24]** for ignoring the manufacturer's instructions. The operator had not even read the instruction manual. Furthermore, the removal of the test ampoule, after the driver's breath test was conducted, greatly reduced the possibility of detection of the "suck-back" effect having occurred. Can it be said that in those circumstances what occurred here was "proper operation" of the scientific instrument?

The appellant submits that if the words "properly operated" are to have meaning, they must not apply to the conduct of the operator in this case. The onus, of course, is upon the appellant to prove that it was not properly operated. Mr Hardy submits that if a defendant has shown such a departure from appropriate scientific practice as to produce a result which was possibly wrong, that should be more than sufficient to establish that the machine was not properly operated. The matter requiring proof, on the balance of probabilities, relates to the propriety of the process of operation of the machine, not the integrity of the result, he submits. Why, Mr Hardy would ask, impose an additional obligation to prove on the balance of probabilities that the result was, in fact, wrong, or even probably unreliable?

Mr Hardy submitted that it would impose an impossible burden to require the defence to prove that the result was probably wrong, since the defence did not have access to the breath sample, nor could the test ampoule be examined to see if any of its acid had been sucked out of it. In my opinion, Mr Hardy overstates the burden which the test, as formulated by Byrne J, would impose. The test which Byrne J formulated was not one which required proof that the **[25]** reading which was obtained was actually wrong. The test required proof that it was probably wrong. That could be established in many ways. It may be established by evidence as to the probabilities of a breach of that particular instruction producing an incorrect reading. That would require evidence as to the significance of the instruction and its importance to the production of an accurate reading. There may be other ways to establish the defence. Proof may be established, for example, by evidence of the appearance of the driver and of his non-consumption of alcohol, those facts being so inconsistent with the reading as to demonstrate positively that either the test was probably not operated properly or the machine was not in proper working order.

Whether or not the test was couched in the terms suggested by Byrne J, so that the onus upon the defence is to prove that the test result was probably unreliable/inaccurate, rather than possibly so, a careful reading of the evidence in this case would suggest that the outcome of the case would have been the same. In my opinion, the evidence produced here did not establish that the test results were either probably or possibly unreliable. It is necessary that I return to some of the passages of evidence which I earlier noted.

It is to be noted, firstly, that the manufacturer's instruction, itself, did not suggest that the requirement of the instruction related to the accuracy of the test reading, rather than to the maintenance of the machine. As emerged in the evidence of Mr Young, the expert defence witness, the danger to be guarded against was that acid from the test **[26]** ampoule would be drawn into the sample chamber of the machine where, the witness said, "it would be likely to cause some damage". The acid might also be drawn into the neoprene tubing of the machine, but the witness conceded that this was resilient and was unlikely to be damaged thereby. The witness then said that: "if acid was drawn out of the test ampoule...(this) could have a direct effect on the accuracy of the result obtained in a test performed using the test ampoule as the ampoule through which the alcohol or alcohol laden breath was bubbled".

This is remarkably coy evidence which, closely analysed, says almost nothing as to the likelihood that error did, or even might have occurred, and says nothing at all as to whether any perceived error would be one of overstatement or understatement of the test result. The evidence also offers no explanation at all as to why, were the instruction ignored, the omission might

render the result inaccurate rather than, as the instruction implied, merely result in damage to the machine. The very limited nature of the evidence was evident in the following passage of Mr Young's evidence (as summarised in the affidavit of the appellant):

> "...he presumed that the manufacturer had a reason based upon the manufacturer's own experience in placing the instruction in the instruction manual particularly as there was a danger that if suction occurred then as a matter of scientific logic one would expect that the manufacturer may have feared some damage to have occurred or evidence of damage occurring to a lesser or greater degree."

Later, and following the above evidence, the witness said that if the breath analysis occurred after the control knob had been in the "off" position "for a period of time", **[27]** and if, also, the volume of the test ampoule had been depleted, then: "the accuracy of the test obtained with that test ampoule could not be relied upon." Later, the witness said that leaving the control knob in the "off" position:

> "...for any period of time which was contrary to the manufacturer's instruction manual, and contrary to good scientific principle, was a facet of operation which amounted to improper operation of the instrument. In the face of that he could not be satisfied that the instrument was operated correctly."

Once again, the very limited nature of the evidence is apparent. The witness gave no positive evidence, at all, that the test result was probably an overstatement, nor even inaccurate. Insofar as he suggested overstatement was possible (which I doubt he did say), then his evidence was consistent with it being only a remote possibility. He ventured no better opinion, and the onus rested with the party calling him. When his evidence is taken in totality it may be seen that the witness did not depose that the machine was not properly operated. He gave evidence that he was not satisfied that it <u>was</u> properly operated: a very different proposition, having regard to the onus of proof. When challenged by the prosecutor that his evidence addressed theoretical possibilities only, he denied it, but given the shallowness of his evidence, and its patently narrow ambit, that denial was entitled to be rejected, as it was rejected by the magistrate.

In my opinion, the expert witness said no more than that failing to comply with the instruction could produce an unreliable result, but, on his evidence, such a result was merely a remote possibility. He ventured no opinion of the probability of error, nor did he suggest that the **[28]** unreliability would produce a reading which was too high, rather than too low. Although Byrne J posed the test in terms of unreliability, (whether the proof must be of probable, rather than possible unreliability is a separate question) I would more narrowly confine it. What must be established for there to be a defence under s49(4) is proof that, by virtue of the departure from proper operation, the test result would have overstated the driver's blood alcohol concentration.

It would be curious were the defendant to establish his defence by proving that the machine was operated in a manner which <u>understated</u> his blood alcohol concentration! If accuracy and reliability are to be presumed components of the notion of "proper operation" then in my opinion it is reliability and accuracy insofar as the driver's interests are prejudiced, not advanced, by the test result. That assumption was made by Smith J in *Martell*, *supra* and as I shall show, was also made by Lord Diplock, in *DPP v Carey, post*, and by the Court of Appeal in *Watkinson v Barley* [1975] 1 All ER 316 at p319.

The failure of the evidence of the defence witness to deal more fully and explicitly with the issues raised by the defence emphasises the fundamental weakness of that evidence. I might add, that the inadequacy of the evidence was not exposed by adept cross-examination, but emerges of itself, when closely analysed. In fairness to the police prosecutor, he, no doubt, had no idea what particular scientific issue was about to confront him in the case.

In my opinion, therefore, the evidence here did not prove that the chance of error in the reading was anything **[29]** more than fanciful or remote. Proof on the balance of probabilities that a machine was not properly operated is not established, in my opinion, by demonstrating that unreliability is not so much a reasonable possibility as a remote or fanciful chance. The evidence here demonstrated only the latter proposition. Use of the words "good scientific practice" was nothing more than a meaningless gloss on the evidence. The witness was, in effect, unable to say that there was any realistic possibility that the test result would have been in error. Thus, as I have said, whether the defendant was obliged to prove that the test result was probably an

overstatement, rather than merely possibly so, neither standard of proof was attained by the appellant in this case.

I turn, finally, to a case cited by Mr Hardy in support of his submission that a mere departure from instructional manual procedures was of itself evidence that proper operation was not conducted. Mr Hardy referred to *DPP v Carey* [1970] AC 1072; [1969] 3 All ER 1662, a decision not referred to in any of the judgments of this Court to which I have earlier referred. That case concerned the failure of a police officer to comply with instructions provided by the manufacturer of a preliminary breath test instrument, not of a breathalyser. The legislative requirement was that a preliminary test "be carried out by means of a device of a type approved for the purpose..." Viscount Dilhorne, at p1669, with whom Lord Hodson agreed, having noted that the Minister's approval of the device said nothing as to the manufacturer's instructions, **[30]** observed that the instructions for the use of the device "have to be followed if the device is to be used properly".

In my opinion, those remarks cannot be transposed into the context of legislation in this State where the very issue is the interpretation of the word "properly". Lord Dilhorne was not addressing such a question in *Carey.* In fact, Lord Diplock, with whom Lords Wilberforce and Pearson agreed, in the same case, observed that the maker's instructions fell into three categories - instructions as to how the instrument should be assembled; instructions as to how the test should be physically performed, and instructions as to steps which had to be taken in the event that the driver had, for example, consumed alcohol shortly before the test was to take place, or had used a mouth wash. It was only the first category of instruction which had to be strictly followed, his Lordship held. Were the instrument not assembled according to the manufacturer's instructions, then the instrument could not be said to be that of the type which had been approved for use by the minister.

As to the second category of instructions, those concerning the manner of use, the effect of non-compliance depended upon evidence, Lord Diplock held, at p1679, "as to what would be the effect on the indication given by the device of a departure from this instruction...". His Lordship made it clear, also, that the relevant issue was whether non-compliance would increase the reading taken in the test, not reduce it. This case does not assist the appellant.

[31] CONCLUSION

I conclude, therefore, that insofar as improper operation is alleged to arise from a failure to comply with an instruction in the manufacturer's manual, then in order to establish a defence under s49(4) the defendant must prove that the test result overstated his blood alcohol concentration at the time of the test. Whether the defendant must prove that the overstatement of the test result was probable or merely possible is unnecessary for me to finally decide.

Proof of the probability of such error was the standard required by Byrne J and has been accepted to be the appropriate test by Harper J. I have not been persuaded that the formulation of the test as requiring proof of the probability of error is wrong, or conflicts with the intention of Parliament in the context of this Act in which the sub-section appears, but, as I have said, I do not need to finally resolve this question because the appellant in this case did not establish the defence under s49(4) to either standard of proof.

In the result, this appeal will be dismissed, with costs.

APPEARANCES: For the Appellant: Mr G Hardy with Mr SP Hardy, counsel. Solicitors: Keogh Crisp & Co. For the Respondent: Mr O Holdenson, counsel. Solicitor: Director for Public Prosecutions.
