3/98

SUPREME COURT OF VICTORIA

BLANKSBY v BARNES

Hampel J

3, 25 September 1997 — [1998] 2 VR 164; 26 MVR 471; (1997) 96 A Crim R 92

MOTOR TRAFFIC – DRINK/DRIVING – READING 0.101 – WHETHER SUCH READING IS MORE THAN 0.10 – WHETHER EXPERT EVIDENCE ADMISSIBLE ON SUCH POINT – REFERENCES IN ACT TO READINGS LIMITED TO TWO DECIMAL PLACES – WHETHER FOR PENALTY PURPOSES COURT TO CONSIDER READINGS OF MORE THAN TWO DECIMAL PLACES: *ROAD SAFETY ACT* 1986, S50(1A)(1AB).

B. pleaded guilty to an offence under the *Road Safety Act* 1986 ('Act') of exceeding the prescribed blood alcohol limit. The reading was certified to be 0.101. On the plea, B. submitted that 0.101 was not necessarily more than 0.10 and sought to call expert evidence on the point. This was not permitted and B. was then fined, his driver licence cancelled and disqualified from obtaining a licence for a period of 10 months. Upon appeal—

HELD: Appeal allowed. Remitted for further sentencing.
1. The magistrate was correct in refusing to hear expert evidence from a mathematician because the question whether 0.101 is necessarily more than 0.10 is one of arithmetic and interpretation of the Act. It is not a proper subject for expert evidence.

2. The Act describes all blood alcohol readings by reference to two decimal places. This evidences an intention so to limit the measurement of blood alcohol levels by breath testing and not be concerned with minute fractions which may be difficult to measure.

3. Accordingly, in considering whether one reading is necessarily more or less than another (for the purposes of penalty) the two decimal place measurement should be applied.

HAMPEL J: [1] This appeal from a decision of a Magistrate raises a deceptively simple question whether, in the context of the *Road Safety Act* 1986 (Vic), the measurement of blood alcohol concentration of 0.101 is necessarily more than 0.10. The appellant was breath tested by an authorised instrument and his reading certified to be 0.101 grams of alcohol per 100 millilitres of blood. He pleaded guilty to exceeding the prescribed limit of 0.05. The legislative structure for the determination of penalty is as follows. Section 50(1A) provides that:–

> "Subject to sub-section (1AB), on convicting a person, or finding a person guilty, of an offence under section 49(1)(b), (f), or (g), … the court must, if the offender holds a driver licence or permit, cancel that licence or permit…disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—
>
> (a) in the case of a first offence, the period specified in Column 2 of Schedule 1 ascertained by reference to the concentration of alcohol in the blood of the offender as specified in Column 1 of that Schedule…"

By reference to the Schedule, the penalties are graded, but subject to section 50(1AB((b), which provides:

> "If a court finds a person guilty of an offence under section 49(1)(b), (f) or (g) but does not record a conviction, the court is not required to cancel a driver licence or permit or disqualify the offender from obtaining one in accordance with sub-section (1A) if it appears to the court that at the relevant time the concentration of alcohol in the blood of the offender—
> (a) in the case of a person previously guilty of an offence…
>
> (b) in any other case, was not more than 0.10 grams per 100 millilitres of blood."

Mr S Hardy of counsel submitted to the Magistrate that 0.101 is not necessarily more than 0.10. When the Magistrate disagreed, Mr Hardy sought to call expert evidence. This was not permitted. The Magistrate then sentenced the appellant (without hearing a plea) by fining him $200 and disqualifying him from holding a licence for 10 months. **[2]** In my opinion, the

Magistrate was correct in refusing to hear expert evidence from a mathematician because the question whether 0.101 is necessarily more than 0.10 is one of arithmetic and interpretation of the *Road Safety Act*. It is not a proper subject for expert evidence. The *Road Safety Act* describes all blood alcohol readings by reference to two decimal places. This evidences an intention so to limit the measurement of blood alcohol levels by breath testing. This is amply illustrated by the fact that section 52, which is described as "Zero Blood Alcohol", in sub-section (2) relies on a concentration of 0.00. It is, I think clear that to call 0.00 zero, one must be limited to the second decimal place for, in truth, 0.001 is not zero except by the limitation of measurement by the Act. It follows, that the legislation intended to limit the measurement of blood alcohol readings to two decimal places and not be concerned with minute fractions which may be difficult to measure if taken, for example, to the fifth or tenth decimal places.

Therefore, in considering whether one reading is necessarily more or less than another (for the purposes of penalty) the two decimal place measurement should be applied. It is, therefore, not appropriate to compare a three decimal place reading of 0.101 with the two decimal place reading of 0.10 because, if those two measurements are to be compared at the same decimal place then 0.10 could, in fact, be 0.102. The fact that the particular authorised instrument was capable of showing the reading to a third decimal place could not, in my opinion, determine the standard of comparison when the Act itself is limited in all of its references to two decimal places. It could not have been the intention of the legislature that if and when a machine is designed to show readings say, to ten decimal places, even if that machine be an authorised one, that such fine fractions, would define the limits for the purpose of penalty.

[3] Mr Hillman, for the respondent, contended that the form of the Schedule contradicts this conclusion. The Schedule sets out sixteen graduations of blood alcohol levels and the respective penalties that apply, for example:–

".08 or more but less than .09	6 months...
.09 or more but less than .10	6 months...
.10 or more but less than .11	10 months..."

Mr Hillman argued that each graduation contemplates measurements to three decimal places because each graduation represents the beginning and end of a range. I do not think this is the proper construction of the Schedule when considered in the legislative and historical context in which it developed. Section 81A of the *Motor Car Act* 1958, the predecessor to the *Road Safety Act* 1986, sets out three graduations of prescribed blood alcohol levels for the purpose of penalty:–

> "...(i) where the percentage of alcohol in the blood at the time the offence was committed was more than .05 per centum but less than .10 per centum — for not less than six months:
> (ii) .10 per centum or more but less than .15 per centum — for not less than twelve months:
> (iii) .15 per centum or more — for not less than two years."

I agree with Mr Hardy's submission that the first two graduations, (i) and (ii) represented two tests which needed to be applied separately, namely. that a reading had first to exceed .05 and secondly, be less than .10. When the Schedule to the *Road Safety Act* 1986 was amended to include 16 graduations, noting was done to change the number of decimal places or the way the two tests operated. The Schedule, although not as clear as the original graduations in s81A of the *Motor Car Act* 1958, still operates effectively if readings of only two decimal places are considered. Some explanation for the amendment of the Schedule to provide for 16 graduations appears in the second reading speech of the *Road Safety Bill* 1986, *Hansard* (Mr Brown at page 3033) as follows:–

> **[4]** "there will be a sliding scale relative to penalties...That is a better proposal. There will be much less desire by people who have been charged to take very expensive counsel along to court hearings knowing they may save only 30 days with respect to the suspension they will be facing..."

There is no evidence of any intention to extend the range of readings available to the court for the purpose of penalty to readings of more than two decimal places. The purpose of the Schedule is to re-state the prescribed limits for sentencing purposes; the prescribed limits are defined in the body of the Act, to two decimal places. The Magistrate, in my opinion, erred in holding, as he did, that he was constrained in sentencing to a reading of more than 0.10. He was

therefore obliged to consider the penalty by reference to a reading of not more than 0.10 which means that he was obliged to consider whether or not to record a conviction, and whether or not to cancel the appellant's licence. I therefore allow the appeal and remit the matter of sentence to the Magistrates' Court.

APPEARANCES: For the appellant: Mr SP Hardy, counsel. Paul Vale Pty, Solicitors. For the respondent: Mr CG Hillman, counsel. Office of Public Prosecutions.
