13/92

SUPREME COURT OF VICTORIA — APPEAL DIVISION

STILES v LAMONT

Fullagar, Brooking and Marks JJ

2, 3 March 1992 — (1992) 15 MVR 557

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED – RESULT "INDICATED THE POSSIBLE PRESENCE OF ALCOHOL" OR "MAY BE OVER .05 PER CENT" – REQUISITE OPINION NOT AFFIRMATIVELY PROVED – WHETHER EVIDENCE OF FULL BREATH TEST ILLEGALLY OBTAINED – WHETHER SUCH EVIDENCE INADMISSIBLE: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1)(a).

Whilst driving a motor car, L. collided with a light pole. When interviewed later he said he had consumed "heaps" of alcohol over a period of approx. 9 hours. L. underwent a preliminary breath test the result of which (as stated by S., a police officer, upon the subsequent hearing) "indicated the possible presence of alcohol" and "may be over .05 per cent." The result of the full breath test was .185 blood/alcohol concentration. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charge on the basis that S. had not held the opinion as required by s55(1)(a) of the *Road Safety Act* 1986 ('Act') and accordingly, the evidence of the result of the full breath test was unlawfully obtained and thereby inadmissible. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further hearing.
The word "indicates" in s55(1)(a) of the Act means "suggests" and accordingly, it was not necessary that the preliminary breath test establish or prove positively that the driver's blood contained alcohol in excess of the prescribed concentration. In any event, whilst there may have been some doubt as to whether the requisite intention had been formed, there was no evidence to show that the police officer did not hold it. However, even if it were said that the requisite opinion was not held and the result of the breath test was illegally obtained, it was not open to the magistrate (having regard to *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and the whole of the evidence) to exclude the result of the full breath test.

***Hunter v Pearce*, unrep., Vic.Sup.Ct., 12 May 1982, followed.**

FULLAGAR J: [1] Mr Justice Brooking will deliver the first judgment.

BROOKING J: In an accident which happened as long ago as 13th September 1989 an Alfa Romeo car ran off the road and crashed into a light pole in Victoria Crescent, Abbotsford. When police officers reached the scene at 10.35 p.m. and spoke to the driver, a man named Lamont, he appeared to have been drinking, and on being questioned said that, while he did not know how much he had had to drink, he had drunk "heaps" of alcohol. He said he was on his way home from the Glasshouse Hotel in Collingwood at the time of the accident, and in the prosecution which ensued evidence was given showing that he had been at the hotel since lunchtime, having gone there for farewell drinks, and that he had left the hotel very shortly before the accident. Of the three charges laid against Lamont only one need concern us, that of furnishing a sample of breath for analysis within three hours after driving a motor vehicle, the result of the analysis indicating that more than the prescribed concentration of alcohol was present in his blood. This offence was created by s49(1)(f) of the *Road Safety Act* 1986. The laying of this charge was, of course, in consequence of the furnishing by the defendant of a breath sample for analysis under s55(1) of that Act. This sample, taken at 11.37 p.m. at Collingwood Police Station, gave a reading of 0.185 grams of alcohol per 100 millilitres of blood. The breath analysis followed a preliminary breath test at the scene of the accident with a portable breath alcohol analyser known as the Lion Alcolmeter, which, it is common grounds, is a device which displays a digital reading of **[2]** blood alcohol level. What reading was given is not known, but according to the evidence of the police officer who conducted the preliminary test its result "indicated the possible presence of alcohol." She said that after the test she had this conversation with Lamont:

"I said: 'This test indicates that your blood alcohol concentration may be over .05 per cent. I require you to accompany us to the Collingwood Police Station where you will undergo a formal breath test. Do you understand that?'

He said: 'Yes. Whatever you want me to do, I will. Anything as long as Bernie will be all right.'"

I interpolate that "Bernie" was Lamont's passenger and drinking companion, who had been injured in the accident.

"I said: Do you feel up to accompanying us to the police station or would you prefer to be taken to hospital? At the hospital a blood test will be taken in any case.'

He said: 'No. I'm fine. Let's get it over with.'"

It was the diffident or, it may be, polite tenor of this evidence which led to the submission that was made to the learned Magistrate. After the close of the prosecution case, counsel for the defendant submitted that the charge should be dismissed on the basis that s55(1) of the *Road Safety Act* 1986 authorised a member of the police force to require the furnishing of a sample of breath only where the preliminary breath test had in the opinion of the officer making it indicated that the blood contained alcohol in excess of the prescribed concentration. It was not shown, he argued, that the necessary opinion had been formed. The learned Magistrate upheld this submission and dismissed the charge, being of the view that the informant (who had administered the preliminary test) had not held the opinion required by paragraph (a) of s55(1) and that the evidence of the breath analysis made at the police **[3]** station should not be admitted since it had been unlawfully obtained. Reference was made to *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.

The informant wished to appeal from the order of dismissal and an application was made to Master Evans on 5th April 1991 accordingly, the order of dismissal having been made on 6th March 1991. For some unexplained reason, although the incident occurred in September 1989 and the information was laid in the following month, the summons being returnable in November 1989, the hearing at the Magistrates' Court was not until March 1991. The appeal came on for hearing on 19th September 1991, when it was dismissed by the learned Judge, not on the merits, but on a preliminary point taken by the respondent/defendant, who successfully contended that the result of s92(2) of the *Magistrates' Court Act* 1989 was that the appeal should have been brought by the Director of Public Prosecutions.

The question so raised is of some importance, because the procedure adopted in the present case has been adopted in many other cases on appeals under s92, so that if the present appeal is incompetent so too were many other appeals. [*After referring to the provisions of s92 and holding that an appeal may be brought in the informant's or Director's name, His Honour continued*] .... **[7]** The merits of the appeal from the order of the Magistrates' Court can be dealt with quite shortly. Both sides invited us to consider the merits, if we thought that the preliminary objection had been wrongly upheld by his Honour, and I consider that we may properly do so, at all events if the proper outcome of that appeal is so clear as to make it idle to require that it be considered on the merits by the learned Judge or some other primary Judge.

I therefore turn to consider whether the learned Magistrate erred in excluding the evidence of the breath test at the police station. I am afraid it is plain that he did. It may be that there was evidence that the informant held the opinion referred to in paragraph (a) of **[8]** s55(1) of the *Road Safety Act* 1986; I would adopt the view of Starke J that in that paragraph "indicates" means "suggests". (*Hunter v Pearce*, unreported, 12th May 1982.) Be that as it may, at worst from the informant's point of view there was a failure on her part to prove affirmatively that she held the requisite opinion. It was not shown that she did not hold it. The evidence of the breath test at the police station was not shown to have been illegally obtained. At best there was doubt as to whether the opinion mentioned in paragraph (a) of s55(1) had been formed. And even if it could have been said that the evidence was in the present case illegally obtained, it was not open to the magistrate, directing himself in accordance with *Bunning v Cross* (1978) 141 CLR 54 and having regard to the whole of the evidence, to conclude that it was right to exclude the result of the police station breath test. I would propose orders in accordance with these minutes:

1. Appeal allowed with costs.

2. Set aside order of Nathan J made 19th September 1991. In lieu thereof order that the appeal

be allowed and that the order of the Magistrates' Court at Melbourne made on 6th March 1991 dismissing the charge laid under s49(1)(f) of the *Road Safety Act* 1986 be set aside and that the case be remitted to the said court to be heard and determined according to law.

FULLAGAR J: I agree in the judgment of Mr Justice Brooking.

MARKS J: I agree.

FULLAGAR J: The order of the Court will be in accordance with the minutes announced by Mr Justice Brooking.

APPEARANCES: For the appellant Stiles: Mr BD Bongiorno QC with Mr RM Downing, counsel. JM Buckley, Solicitor to the DPP. For the respondent Lamont: Mr B Lindner, counsel. Cleary Ross, solicitors.
