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SUPREME COURT OF VICTORIA — APPEAL DIVISION

DOIDGE v CRAIG

Brooking, JD Phillips and Hansen JJ

31 May 1994 — (1994) 19 MVR 508

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INTERCEPTED AT 11:35 P.M. – BREATH TEST SUBSEQUENTLY CONDUCTED – CERTIFICATE OF ANALYSIS GIVEN TO DRIVER – INDICATED BREATH TEST CONDUCTED AT "12 A.M." – AMBIGUITY – WHETHER EVIDENCE RESOLVED AMBIGUITY: *ROAD SAFETY ACT* 1986, S49(1)(f).

***Obiter:* Where a driver was intercepted at about 11:35 p.m. on 26 March 1992, underwent a Breathalyser test, and was given a certificate which showed that the sample of breath was analysed on 27 March 1992 at 12 a.m., and that the certificate was delivered on 27 March 1992 at 12:14 a.m., it was open to conclude from the evidence that the test was conducted not at 12 noon on 27 March 1992 but 12 midnight on the night of the 26 - 27 March, 1992.**

BROOKING J: [1] Phillips J will deliver the first judgment.

JD PHILLIPS J: This matter comes before the Court purportedly by way of s446 *Crimes Act* 1958. Under that section, when in certain proceedings "any question of difficulty in point of law has arisen, the court may in its discretion reserve such question of law for the consideration and determination of the Full Court". Under s447 the court "by which such question of law has been so reserved shall thereupon state a case setting forth the question or questions of law which has or have been so reserved with the special circumstances upon which the same has arisen".

In this case there has been transmitted to this Court a document headed "Case Stated", which is further described in the heading as "a special case for the opinion of the Full Court stated by " a judge of the County Court "pursuant to s446 of the *Crimes Act* 1958". The document states (among other things) what we were told was the purport of evidence led through the first witness called on behalf of the prosecution in the course of a criminal proceeding before his Honour. (As to this inclusion of the evidence in a case stated, see and compare what was said by Dixon CJ, in *Potts v Thomson* 22 October 1958, as set out in the judgment of Young CJ in *Clissold v Country Roads Board* [1981] VicRp 29; [1981] VR 259 at pp262-263.) But the nature of the proceeding in the County Court is not itself disclosed in the case stated. We were told from the Bar table that it was an appeal by Raymond James Doidge ("the appellant") under s83 of the *Magistrates' Court Act* 1989 against a conviction in the Magistrates' Court.

[2] We were further told that the conviction had been recorded in consequence of the hearing in the Magistrates' Court of two charges against the appellant laid under the *Road Safety Act* 1986. The first charged an offence against s49(1)(b) in that the appellant drove a motor vehicle while more than the prescribed concentration of alcohol was present in his blood. The second charged an offence against s49(1)(f), in that within three hours after driving or being in charge of a motor vehicle the appellant furnished a sample of breath for analysis and the result of the analysis indicated more than the prescribed concentration of alcohol was present in his blood, and the concentration of alcohol indicated by the analysis was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle. Both offences were charged as having occurred "at Malvern on 27 March 1992".

We were further told that the first of these two charges had been struck out by the magistrate as in truth an alternative to the charge laid under s49(1)(f), but that in relation to the latter, the appellant had been convicted, fined and ordered to pay costs and his licence cancelled. He was further disqualified from seeking a licence for a period of sixteen months. It was against this conviction and these orders that the appellant had appealed to the County Court under s83 of the *Magistrates' Court Act* 1989. That appeal had come before the learned County Court judge on

2 June 1993, and on that day the prosecution opened its case and called the informant, Lauren Michelle Craig ("the respondent") to give evidence first.**[3]**

All this we were told from the Bar table and the parties were agreed that we might proceed upon that statement of the circumstances giving rise to the proceeding now before us. It is in that context that I read now from the Case Stated what may be taken to be the purport of the evidence which was led from the respondent on the appeal:-

> "At approximately 11.35 p.m. on 26 March 1992, Constable Lauren Michelle Craig was performing duty at a preliminary breath testing station in Dandenong Road, Malvern between Station Street and Tooronga Road. She had a conversation with the driver of a blue station wagon whom she now knows to be the defendant in these proceedings, Raymond James Doidge. She conducted a preliminary breath test on Mr Doidge and the result indicated that he had exceeded the prescribed concentration of alcohol. She then asked him to accompany her to a breath testing vehicle. When at the breath testing vehicle, she asked him, *inter alia*, what he had had to drink and when. He replied he had had his first drink at 5.00 p.m. and his last drink at 11.30 p.m. She then introduced Mr Doidge to Constable McDavid, a person authorised to operate a breath analysing instrument, who asked Mr Doidge, *inter alia*: 'What type of liquor did you consume yesterday or today?' Mr Doidge replied that he had consumed about 6 light and one heavy. Some at the pub and some at work. The first at 4 p.m. and the last at 11.30 p.m. He was also asked by Constable McDavid whether he was driving the vehicle, and he replied yes He was also asked what time it was about when he was driving, and he said 11.40 p.m.
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> Constable Craig said that at 12.00 a.m. on 27 March, 1992, Constable McDavid said to Mr Doidge, 'I now require you to undergo a test'. Constable Craig said that after the breath analysis was conducted, she saw the operator complete a Certificate of Analysis and check it. There were three copies. The operator handed the original **[4]** to Mr Doidge, a copy to Constable Craig, and retained the third copy. The Certificate of Analysis was numbered 183633. It was dated 27 March 1992 and showed that the quantity of alcohol present in the blood of the person providing the sample of breath for analysis at the time and place referred to was 0.085 grams of alcohol per 100 millilitres of blood which, expressed as a percentage, is 0.085 per centum. The operator then said to Mr Doidge, 'You have a concentration of alcohol in excess of the limit.' She said to him that he was not obliged to say anything. She said, 'My analysis shows you are in excess of .05, have you anything to say?' and he said "No'. She asked him whether he wanted to have a second sample taken, and he said, 'No'."

According to the Case Stated the Breath Analysis Certificate was then tendered in evidence and a copy of that certificate is before this Court, as an annexure to the Case Stated. In that certificate the time at which the breath analysis was made is given as "12 a.m." on 27 March 1992. As the Case Stated discloses, after the certificate was tendered in evidence counsel sought as part of the prosecution case to ask Constable Craig at precisely what time the breath analysis took place. The question was objected to and, after submissions about the ambiguity inherent in the expression "12 a.m." and the conclusive nature of the breath analysis certificate under s58 of the *Road Safety Act*, the learned County Court judge ruled that there was ambiguity as to the time at which the breath analysis had taken place, that the term 12 a.m. "really had no meaning at all" and that the respondent might accordingly lead other extraneous evidence, if available, to resolve the ambiguity.

According to the Case Stated, counsel for the appellant then submitted that the question whether his Honour could entertain such further evidence was a matter **[5]** appropriate for reference to the Full Court by way of case stated. The respondent apparently consented to this course and the Case Stated concludes by setting out the question now reserved for the consideration and determination of this Court under s446 of the *Crimes Act*. That question is as follows:

> "In the above circumstances, may the trial judge hear evidence as to the time at which the breathalyser test was administered or is he bound by and limited to what is written in the certificate of the breath analysis?"

Pending the determination of that question, the proceeding in the County Court stands adjourned. As I have indicated, the certificate which records the result of the breath analysis, once admitted into evidence, is conclusive proof of the facts and matters contained in it, and that is by virtue of s58 of the *Road Safety Act*. The operation of that section and the conclusive nature of the certificate were further explained by this Court in *R v Williams* [1992] VicRp 24; [1992] 1 VR 374;

(1991) 13 MVR 271; (1991) 52 A Crim R 267. In the County Court, both sides were agreed that there was ambiguity inherent in the certificate in this case, inasmuch as the time was described as "12 a.m."; for that designation was said to be as consistent with noon as it was with midnight. It was on the basis that such ambiguity existed, that the question was reserved for decision.

Under s49(1)(f) of the *Road Safety Act* it must be shown, as already indicated, that the sample of breath for analysis was furnished within three hours after the alleged offender's driving or being in charge of the motor vehicle. For the appellant it was submitted below that the **[6]** certificate was conclusive evidence that the breath analysis was made at "12 a.m." on 27 March; that the ambiguity about the time "12 a.m." must be resolved in favour of the appellant; and that therefore the certificate was conclusive evidence that the breath sample had been furnished at noon on 27 March, which was more than twelve hours after the driving and thus outside the permitted time frame under s49(1)(f). *[His Honour then dealt with the question whether the Full Court had jurisdiction to entertain the question of law reserved and continued].*

[9] (W)ith the introduction of the amending words into s446 I think that the conclusion is plain that the power now conferred by **[10]** that section on the County Court on the hearing of an appeal from the Magistrates' Court is a power which is not exercisable until after conviction. It follows that, when the learned County Court Judge purported to reserve a question of law under s446 during the leading of the evidence on the appeal before him, the power to do so had not yet become exercisable – and that is why I think that this Court lacks jurisdiction to entertain the case which was stated and to answer the question contained within it.

This is, perhaps, unfortunate in the present case because of the very clear view I have formed about the merits of the question of law. The appellant's submission that "12 a.m." in the certificate of analysis must be taken, in favour of the appellant, to be 12 noon on 27 March 1992 is a submission that cannot be sustained. I think it has no substance at all, and this for two reasons.

First, there are the full terms of the certificate itself. Para.2 states that a sample of the appellant's breath was analysed "on the 27th day of March 1992 at 12 a.m.", which is the supposed ambiguity. But in para.5 it is said that "as soon as practicable after the sample was analysed, namely at 12.14 a.m. on the said day", the certificate was delivered to the appellant. The reference to 12.14 a.m. on 27 March is not equivocal and, in my view, it makes it plain that the earlier reference to 12 a.m. was not a reference to 12 noon on 27 March but to 12 midnight on the night of 26-27 March. Secondly, there was already evidence, as revealed by the Case Stated, sufficient to resolve any doubt about the reference in the certificate to 12 a.m.

The evidence to **[11]** which I refer was the evidence of the appellant's having been intercepted at about 11.35 p.m. on 26 March and of a series of steps then and there taken which led to the breath analysis being made and the certificate being handed over. The certificate itself was conclusive evidence, by virtue of the statute, that the analysis was made at 12 o'clock. The only question raised by the appellant's submission was whether it was 12 midnight on 26-27 March or 12 noon on 27 March, and the evidence of interception and events following close by made plain that it was 12 midnight.

I have expressed the foregoing opinion shortly in order to assist, if I can, the final resolution of the appeal which stands adjourned in the County Court. What I have said must, strictly speaking, be *obiter dicta* because the power to refer the question of law to this court cannot be exercised until the appellant is first convicted. But the power can be exercised if and when the appellant is convicted on the appeal, and so I have expressed my opinion on the question at issue lest the appellant, if and when convicted, be minded to submit again that the County Court should reserve for the opinion of this court the question of law already identified. For the reasons I have given, I would decline to answer the question reserved and which was referred to this Court under s446.

BROOKING J: I agree. I would only add that, in my opinion, the point taken in the County Court was a perfectly idle one.

HANSEN J: I agree with both Phillips J and Brooking J.

[12] BROOKING J: The Court does not determine the question reserved, being of opinion that the court below had no power to reserve the question for the determination of this Court before conviction and that this Court has no power to determine it. Accordingly, the court makes no order.

APPEARANCES: For the appellant Doidge: Mr GW Robertson, counsel. Sly & Weigall, solicitors. For the respondent Craig: Mr D Just, counsel. JM Buckley, Victorian Government Solicitor.
