05/90

HIGH COURT OF AUSTRALIA

MILLS v MEEKING

Mason CJ, Brennan, Dawson, Toohey and McHugh JJ

10 November 1989; 27 February 1990

[1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257; noted 14 Crim LJ 375

MOTOR TRAFFIC – DRINK/DRIVING – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION – CHARGE LAID UNDER S49(1)(f) OF *ROAD SAFETY ACT* 1986 – ACCUSED NOT INVOLVED IN AN ACCIDENT – WHETHER S49(1)(f) CONFINED TO CASES WHERE VEHICLE INVOLVED IN AN ACCIDENT – ABUSE OF PROCESS: *ROAD SAFETY ACT* 1986, SS47, 49, 53, 55.

HELD: (per Mason CJ, Brennan and Toohey JJ (Dawson and McHugh JJ dissenting) Section 49(1)(f) of the *Road Safety Act* 1986 is not confined to cases where a vehicle has been involved in an accident. Accordingly, where a person was liable to be prosecuted under either s49(1)(b) or 49(1)(f) of the Act, it was not an abuse of process to lay a charge under s49(1)(f) rather than s49(1)(b).

***Meeking v Crisp* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1, affirmed.**

MASON CJ and TOOHEY J: [*After setting out relevant parts of the Act, and referring to previous decisions in this particular case, their Honours continued*] ... **[ALR 20; ALJR 193]** Before us, the appellant challenged the Full Court's construction of s49(1)(f) and argued for a restoration of the construction placed on the provision by Crockett J. He also contended, as he had in earlier **[21]** proceedings, that it was in the circumstances, an abuse of process for him to be charged under s49(1)(f) when it was equally open for the respondent to charge him under s49(1)(b). The argument was that a deliberate choice had been made by the respondent to charge the appellant under para (f) so as to withhold from him any possible defence based on the effect of the consumption of alcohol on him.

This court was furnished by counsel for the appellant and the respondent with material relating to the history of the relevant legislation and statements made at the time s49(1)(f) was introduced. Section 35(a) of the *Interpretation of Legislation Act* 1984 (Vic) requires a construction "that would promote the purpose or object underlying the Act". Section 35(b) permits consideration to be given "to any matter or document that is relevant: including, but not limited to, reports of parliamentary proceedings and explanatory memoranda or other documents laid before or otherwise presented to Parliament.

The purpose of Pt 5 of the *Road Safety Act* is of course expressly identified in the statute. By way of background to Pt 5, the Full Court of the Supreme Court of Victoria had, on 20 February 1986, delivered judgment in *Lamb v Morrow* [1986] VicRp 61; [1986] VR 623; (1986) 3 MVR 175 . The court held, in relation to the *Motor Car Act* 1958 (Vic), that there was no statutory presumption in favour of the accuracy of breathalysers. It was therefore open to a defendant to show, by evidence, that breathalysers in general do not always show accurately the percentage of alcohol in the blood. In his second reading speech after the *Road Safety Bill* 1986 had been introduced in the Legislative Assembly, the Minister referred to that decision and to the determination of the Government to "tidy up" the situation. The Minister stated: "The Bill ... contains provisions designed to prevent technical defences against drink-driving charges": Victorian Legislative Assembly, Parliamentary Debates, 11 September 1986, p230.

Later, reference is made to the difficulties associated with an argument which relies upon discerning the intention of Parliament with respect to the operation of the provisions in issue other than that which may be inferred from the statute itself. For the present, there is no need to have resort to extrinsic material; the provisions may be given their ordinary grammatical meaning. If the language of a statute is ambiguous or uncertain, a risk of injustice will bear upon

the construction to be given to words used. But, if the language is not ambiguous or uncertain, a court will apply its ordinary and grammatical meaning unless to do so will give the statute an operation which obviously was not intended: see generally *Cooper Brookes (Wollongong) Pty Ltd v FCT* [1981] HCA 26; (1981) 147 CLR 297 at 304-5, 320-1; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434; also *Catlow v Accident Compensation Commission* [1989] HCA 43; (1989) 167 CLR 543; 87 ALR 663 at 668; (1989) 63 ALJR 619 at 622. This legislation is not relevantly ambiguous or uncertain.

As it stands, s49(1)(f) relates to s55(1) and s55(1) relates, not to a portion of s53, but to the section generally. Section 53, as already noted, identifies four situations in which a person may be required to undergo a preliminary breath test. Three of these situations relate to persons intercepted while driving (s53(1)(a), (b), s53(2)); the other relates to a person believed to have been the driver of a motor vehicle which was involved in an accident: s53(1)(c). There is no particular reason for singling out para (c) of s53 (1) and no particular reason for reading down s49(1)(f) **[22]** as if it contemplated only a preliminary breath test required under para (c) of s53(1). Equally, there is no particular reason for treating s49(1)(b) as if it contemplated only a preliminary breath test required under para (a) of s53(1). As a matter of plain language, there is no justification for reading the various provisions that way.

Nor is there any justification for so doing because the provisions cannot otherwise be "intelligibly applied": see *Cooper Brookes* (CLR at 305). Section 49(1)(f) only applies to persons who, within three hours of driving, have furnished a sample of breath in accordance with s55(1) resulting in a reading above the prescribed concentration. Therefore, apart from those believed to have been involved in a motor vehicle accident, the provision is confined to persons who, while driving, have been intercepted by a member of the police force or by an officer of the Road Traffic Authority. One would expect such a person to remain in the company of the member or officer until he or she has furnished a sample of breath for analysis, as indeed occurred in this case. In that circumstance, a defence based on post-driving consumption of alcohol could at best be regarded as fanciful and, at worst, evidence of a deliberate attempt to frustrate the breath analysis. The withholding of such a defence in that circumstance cannot be said to be unintelligible.

However, it is the very non-feasibility of a defence based on post-driving alcohol consumption in the present cases that is the basis for the appellant's alternative submission based on abuse of process. He contends that, where such a defence is not reasonably open on the facts, there is no justification for having resort to s49(1)(f), that paragraph having "as an aim, if not on this argument the sole aim, the stamping out of a social mischief, that is to say, the tricksters' defence [of] post accident drink, that confounds the purposes of the Act". To continue the submission, because a charge under s49(1)(f) also deprives the defendant of any defence based on "the effect of the consumption of alcohol" on him or her (s49(6)), a prosecutor should only rely on para (f) when to do so would be to serve the "particular social purposes" of the Act.

On the appellant's own argument, he must first establish that in spite of the terminology adopted, s49(1)(f) was intended to be confined to defences based on post-accident consumption of alcohol. [*After setting out passages from* Hansard *their Honours continued*]... **[23]** By omitting any reference to s55(2), the scope of s49(1)(f) was correspondingly reduced. However, it is apparent that, at that stage, s49(1)(f) was not intended to be confined to the situation where there had been an accident. But what has been omitted from the legislative material so far cited is that, by the time the Bill became law, the provisions in question were thought to have been substantially altered by further amendments that had been initiated in the Legislative Council: Legislative Council, Parliamentary Debates, 5 December 1986, pp1672, 1677; Legislative Assembly, Parliamentary Debates, 5 December 1986, p3033. Of particular significance is the amendment to s49(6) which in its original form had expressly excluded defences to s49(1)(f) based on evidence as to "the consumption or nonconsumption of alcohol by the defendant at any time before furnishing the sample of breath for analysis" (cl 49(6)(a)), and "the general inaccuracy of breath analysing instruments of the type used" (cl 49(6)(c)), as well as a defence based on evidence of "the effect of the consumption of alcohol of the defendant" (cl 49(6)(b)).

It would seem that, by deleting paras (a) and (c) from cl 49(6), Parliament contemplated that defences based on post-driving alcohol consumption and the general unreliability of breath analysis instruments would be available to anyone charged under s49(1)(f). What appears to

have been overlooked is that, because of the terms of para (f), evidence of such matters remained irrelevant to a charge under that paragraph except to the extent it might go to prove that the instrument used "was not on that occasion in proper working order or properly operated": s49(4).

The elements of an offence under para (f) as it then stood concerned only the concentration of alcohol at the time a breath sample is furnished and the result recorded by the instrument in question. Therefore, evidence referred to in cl 49(6)(a), (b) and (c) could in any event be only of limited assistance to a person charged under s49(1)(f). (As a matter of history, subsequent amendments to the Act make proof of post-driving consumption of alcohol a defence to a charge under s49(1)(f): see *Road Safety (Miscellaneous Amendments) Act* 1989 (Vic) s7.)

[24] If one could be confident of discerning "the intention of Parliament" in these circumstances, rather than assisting the appellant, it might be said that at the very least it was agreed that no defence based on the effect of the consumption of alcohol would be available to a defendant prosecuted under s49(1)(f). However, any inferences to be drawn from the parliamentary debates must in all the circumstances be unreliable. We prefer to rest our decision on the inferences to be drawn from the Act itself. We therefore leave for another day any comments as to the relevance of "the intention of Parliament" to a charge of abuse of process, where that intention is not discernible in the legislation itself.

There is nothing express in the Act which would require that the appellant be prosecuted under para (b) of s49(1) rather than para (f). In accordance with s51(1) of the *Interpretation of Legislation Act*, therefore, the appellant was liable to be prosecuted under either of these provisions. In the present case there can be no basis for alleging abuse of process because a decision was made to prosecute the appellant under para (f) of s49(1) rather than para (b). The appeal should be dismissed with costs.

BRENNAN J: I agree with the construction placed upon s49(1)(f) of the *Road Safety Act* 1986 (Vic) by Mason CJ and Toohey J. As the facts alleged against the appellant would, if proved, establish a *prima facie* case of an offence under s49(1)(f), and there is nothing to suggest that the charge was preferred for any purpose other than the application of s49(1)(f) to the facts of the case, there is no abuse of process in prosecuting the appellant on that charge.

I refer without repeating to what I said on abuse of criminal process in *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307. For these reasons I agree with the joint judgment of Mason CJ and Toohey J that the appeal should be dismissed.
