21/09; [2009] VSC 356

SUPREME COURT OF VICTORIA

HINNEBERG v BRANNAGHAN

Cavanough J

17 August 2009 — (2009) 53 MVR 354

EVIDENCE – MOTOR TRAFFIC – DRINK-DRIVING OFFENCE – DISCRETION TO EXCLUDE UNLAWFULLY OBTAINED EVIDENCE – POLICE ENTER ACCUSED'S DWELLING AND ADMINISTER PRELIMINARY BREATH TEST – CONFLICT OF EVIDENCE AS TO WHETHER POLICE INVITED IN – ONUS AND STANDARD OF PROOF OF FACTS RELEVANT TO DISCRETIONARY EXCLUSION OF EVIDENCE – WHETHER "*BUNNING v CROSS* FACTORS" APPROPRIATELY TAKEN INTO ACCOUNT – APPEAL AGAINST CONVICTION ALLOWED AND MATTER REMITTED FOR REHEARING.

H. was charged with a drink/driving offence. At the hearing of the charge, there was a dispute on the evidence as to whether the police informant was invited into H's home or not in order to conduct a preliminary breath test on H. The informant said that he was invited to "Go inside". The evidence for H. was that a witness told the informant "I'll just go and get him. I won't be a minute." The magistrate took the view that the onus was on the prosecution to prove that an invitation was issued to the informant by the witness to enter the house and that it had to be proved beyond reasonable doubt. However, the magistrate found that the evidence of the subsequent BAC was admissible and the charge proved on the basis that the public interest in a conviction outweighed any unfairness to H. Upon appeal—

HELD: Appeal allowed. Decision set aside. Remitted to the Magistrates' Court for further hearing and determination by another Magistrate.

1. The Magistrate applied an erroneous test in assessing the conflict between the evidence of the police informant and the witness. The Magistrate took the view that the onus was on the prosecution to prove that an invitation was issued to the police informant by the witness to enter the house, and to prove it beyond reasonable doubt. However that was not the appropriate test. The onus was on the defence to establish, on the balance of probabilities, the facts on which the defence relied in order to justify the exclusion of the evidence on the *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretionary ground.

2. Whilst there is an obligation on the Crown to satisfy the court, beyond reasonable doubt, that the elements or ingredients of the offence have been made out, the position is quite different in relation to a submission that admissible evidence should be excluded as a matter of discretion on fairness or public policy grounds. In the present case, the Magistrate had to identify with clarity whether H's entry to the house was to be classified as an (honest or understandable) mistake or accident, or as reckless, or as deliberate. Such an analysis or classification needed to be done in this case under the *Bunning v Cross* principles.

CAVANOUGH J:

1. This is an appeal on questions of law under s92 of the *Magistrates' Court Act* 1989 against a decision of the Chief Magistrate to convict the appellant of a drink-driving offence under s49(1)(f) of *Road Safety Act* 1986 ("the Act").

2. There were really only two issues below, namely whether evidence sought to be adduced by the informant by way of a certificate under s55 of the Act of the result of an analysis of the appellant's breath was obtained illegally by trespass by the police into the appellant's home; and, if so, whether the certificate should be excluded in the exercise of the public policy discretion referred to in *Bunning v Cross*.[1] The Chief Magistrate ruled in favour of the appellant on the first point but against him on the second.

3. I am satisfied that both aspects of the decision below were vitiated by errors of law and that the matter should be reheard afresh.

4. For several hours on the evening of Thursday 26 June 2008 the appellant and his partner, Ms Lahogue, were at a hotel in Korumburra, drinking wine. At about 10 pm they left the hotel, crossed a road, entered a car park and got into the appellant's utility van. The appellant drove

the van towards their home at the corner of Queen Street and Lapin Lane, Korumburra, a journey of a few hundred metres. Two police officers on mobile patrol, namely the respondent/informant Senior Constable Brannaghan and Senior Constable Smith, had observed the couple cross the road and head toward the car park. Shortly afterwards the police car followed the appellant's vehicle along Lapin Lane, which was dimly lit. The van pulled up in Lapin Lane at the side of the building in which the appellant and Ms Lahogue lived. The appellant alighted quickly from the van and disappeared from the police officers' view. It transpired that he had gone into the house through a side door.[2] He had left the van door open, his partner in the passenger seat and the side door of the house open. Very soon after, Brannaghan alighted from the police vehicle and approached Ms Lahogue, who was still seated in the passenger seat of the van. There was then a conversation between Brannaghan and Ms Lahogue. So far, all of this was common ground before the Chief Magistrate. However the content of part of the conversation was in hot dispute.

5. Brannaghan gave evidence about the conversation and its aftermath as follows: He asked Ms Lahogue where the appellant was. She told him that the appellant had gone inside. He then asked her to get him to come back outside. She replied: "Go inside. He's just being silly". Brannaghan took up Ms Lahogue's invitation and went into the house through the side door. He did so before Ms Lahogue entered the house. The side door opened into a large hall where Brannaghan remained throughout the period in question. He called for the appellant and the appellant emerged from a doorway at the far side of the hall. Brannaghan smelt alcohol on the appellant's breath and conducted a preliminary breath test, still in the large hall. As a result, he required the appellant to accompany him to the police station for the purpose of a breath test. The appellant cooperated. A breath test was conducted at the police station and a reading of 0.115% was obtained.

6. Ms Lahogue's evidence was quite different. She agreed that Brannaghan had approached her and asked where the driver was, and that she had told him that the appellant had gone inside. However, according to Ms Lahogue, she then got out of the car, went to the doorway, called out for the appellant, got no response and then said to Brannaghan: "I'll just go and get him. I won't be a minute", or words to that effect. She then went inside and called for the appellant again. She heard him responding from further inside the house. She went beyond the large hall, through a doorway and into a smaller hallway. The appellant came into the smaller hallway, saying that he had been to the toilet. In the meantime Brannaghan had apparently entered the house uninvited and gone through to the smaller hallway where he was standing behind her.

7. The appellant's evidence was consistent with Ms Lahogue's evidence generally, and in particular as to Brannaghan having entered the house after, not before, Ms Lahogue and as to the encounter with Brannaghan having occurred in the small inner hallway, not the large outer hall.

8. Apart from Brannaghan and Ms Lahogue, there were no witnesses who claimed to have heard the relevant part of the conversation which took place between them outside the house.

9. On the factual issues, Mr Andrighetto, counsel for Mr Hinneberg, submitted to the Chief Magistrate that, in the circumstances, there being a direct conflict between Brannaghan and Ms Lahogue, the prosecution was required to satisfy the Court, beyond reasonable doubt, that Ms Lahogue had invited Brannaghan to enter the house as claimed by Brannaghan in his evidence.[3] Failing that, he submitted, the *Bunning v Cross* discretion arose. He referred to s48(4) of the Act, which provides:

> "(4) For the avoidance of doubt it is declared that nothing in this Part requires a person who is in a dwelling to allow a member of the police force or an officer of the Corporation to enter that dwelling without a warrant."

He submitted that the discretion should be exercised in favour of Mr Hinneberg.

10. The police prosecutor did not dispute counsel's submission about the burden and standard of proof.

11. The Chief Magistrate's oral reasons for his decision, as recorded[4], were as follows:

> "Now, turning then to the charge of drink driving. I am dealing with this question now as a question

of the admissibility of the evidence of the breath test which was administered at the Korumburra Police Station after Mr Hinneberg had been taken there, and willingly gone there, with Senior Constable Brannaghan and Senior Constable Smith, after the conversation at the home at about 10 pm on 26 June.

I am not going to review of course all of the evidence by any means. The question is whether I should admit the certificate which would prove the amount of the alcohol in his blood when it was tested. There is no conflict of course – he concedes, as does Ms Lahogue, that he and she together had been drinking. There is no dispute about that. It is of course common ground also that after that he drove the car a short distance home. So there is no dispute about either the drinking or the driving in this case.

The question is whether the certificate should be excluded. There is a discretion to either exclude it or include it, whether it should be excluded, because to include it would bring the administration of justice into disrepute or would be excessively unfair to the defendant. That is the question.

The conflict of course revolves around whether Senior Constable Brannaghan was lawfully in the house when he made the first request for the preliminary breath test. There is disputation and conflict in the evidence as to which hall, either the big hall or the smaller hall type passage, that various conversations took place in.

It is clear and it is agreed, and common ground, that he and a police officer – no police officer in general, nor Senior Constable Brannaghan in this case, has permission to go into a private home or premises without invitation or without a warrant. Of course that legal proposition is given emphatic recognition by s48(4) of the *Road Safety Act* 1986. That has been highlighted this afternoon. That serves to emphasise that point.

There is a conflict explicitly between the evidence of Ms Lahogue and Senior Constable Brannaghan in relation to whether or not before she went into the house she said words to this effect, 'Go in. He is being silly,' or 'Just go in. He is being silly,' or 'Go in. He is just being silly.' He says, and he repeated under cross-examination, that in his opinion and his memory and on his account that is what she said before he went in. She denies that she did. She was categorical, equally adamant that she did not say that.

In assessing and measuring their evidence, he is a police officer working on the evening, she had been drinking. She had three glasses of wine, and although that might affect memory and often does affect memory, and often fatally affects memory, I am not satisfied that her three glasses or even four, if it was four, but I am satisfied that – she was adamant that it was several, meaning three, and I am prepared to find that it was three, perhaps no more than four, but several can describe either two, three or four – I am satisfied that she was not affected by alcohol to the extent that – or in such a way that her evidence on this point should be rejected just for that reason.

She comes to court as a woman of good character and that was elicited in evidence. She of course does wish to defend Mr Hinneberg to a point, and she gave evidence candidly about things she said in the police car about other things she was dissatisfied about. That is marginally relevant, but I am not prepared to find that she had an agenda against Victoria Police such that she would wish to give evidence here of an untrue nature just for the purposes of supporting Mr Hinneberg, particularly when she quite candidly said that in her opinion, in essence, he shouldn't have been driving because he had been drinking. To that extent I think her credibility was enhanced.

That is not to say that Senior Constable Brannaghan was not a credible witness. He was a generally credible witness in my opinion, as was Senior Constable Smith, but I am dealing now with a direct conflict on a central piece of evidence, a narrow point. It is true of course, as Mr Andrighetto pointed out, on my view that has to be resolved by application of a 'beyond reasonable doubt' test, and can I be satisfied beyond reasonable doubt that the evidence of Senior Constable Brannaghan on this point – and Senior Constable Smith can't help on this point because she didn't hear the whole conversation between them – should I accept beyond reasonable doubt that Ms Lahogue invited Senior Constable Brannaghan into the house in the way that he says she did, and she denies she did.
I am not satisfied beyond reasonable doubt that she gave the invitation in the way that Senior Constable Brannaghan says she did, but which she denies. Applying that very high test I am not satisfied that she invited him in that way at that time. In saying that I do not imply a general criticism or non-acceptance of Senior Constable Brannaghan's evidence generally, because I do accept it generally, and much of it is not in dispute with the evidence of the other witnesses in the case, but on that point, applying that test in the light of all of the facts and circumstances and the witnesses in this case, I am not satisfied that the invitation was issued in that way.

I should simply refer to the fact that Ms Lahogue was adamant in her evidence and consistent both

in evidence-in-chief and cross-examination that she said, 'I'll go and get him,' or words that effect. That is the finding that I make in respect of that central piece of evidence.

So in relation to the authorities that were referred to I now turn to the larger issue of whether I include or exclude the certificate. So on that analysis it follows that Senior Constable Brannaghan's entry into the property without warrant and without invitation was not a lawful entry in that sense, although I have no doubt at all that he believed he was, generally speaking, doing the job he believed he had to do and was acting generally conscientious as a police officer.

That is the general conclusion I would reach about his approach to his work on the night. But on that analysis he is, strictly speaking, unlawfully inside the house when he makes the initial request for the preliminary breath test. The argument is that everything that follows from that ought to be excluded on the application of the principles in Bunning v Cross, Ireland and Moore. The proposition is that at the end of the day the evidence obtained at the police station, which was uncontroversial, obtained by the normal procedures and routines applicable to obtaining a breath test by a licensed analysis operation – should that be excluded?

Ultimately in my opinion it should not be for these reasons: the authorities talk about evidence that can be admitted even though strictly or technically unlawfully obtained. This in my opinion is towards the more technical end of the spectrum. It is unlawfully obtained in a strict somewhat technical sense. That is not to – I emphasise – that is not to minimise the importance of the sanctity of people's homes and the importance of s48(4), but every case turns on its particular facts. In this case, of course, the police officers had seen Mr Hinneberg and Ms Lahogue walking over to the car from the police station on their own. On their own evidence they'd been drinking, he chose to drive and there is a question as to whether justice and the administration of justice would be brought into disrepute, if this evidence is to be admitted.

Given that the procedures conducted at the police station were routine, normal, lawful and produced a result – the result of which I've not yet seen, but which I don't believe is in dispute as a result. Given that that is the case, given that Mr Hinneberg had on his own admission being [sic] drinking, and drove his car, then in my opinion to admit the evidence which flows from the non-invitation into the home would not and could not sensibly be said to bring the administration of justice into disrepute. That is why I say it falls more at the technical end of the illegality spectrum than at the substantive end, it's for that reason. Obtaining the sample at the police station by a lawful, proper means – he having gone there after the technically unlawful entry – cannot be said to be so tainted; that is, the obtaining of the sample cannot, in my opinion in this case, be said to be so tainted or compromised by the uninvited entry that it should be excluded on the Bunning and Cross grounds.

In my opinion, ultimately the public interest in a conviction in the circumstances of a case such as this and in this case outweighs either any unfairness of such a conviction to the accused and, as I've said, more importantly would not bring the administration of justice into disrepute for the reasons that I've given. They are really short-form summary reasons of the conclusion that I have reached that the evidence obtained at the police station relating to the blood alcohol reading applicable to Mr Hinneberg on the night, provable by certificate, should be admissible, will be admissible and the certificate will be admitted for that reason and that combination of reasons.

I express my gratitude to both of you for these submissions on the authorities which had been usefully referred to and I won't spend longer referring to them. That being the case, the certificate can now be tendered. I take it to be tendered by consent. It won't require the informant to give evidence again on it. It will be tendered by consent in the light of that finding and that now becomes the last exhibit in the case."

The certificates were tendered accordingly. The charge under s49(1)(f) was found proved. On that basis the alternative charge under s49(1)(b) was struck out. The appellant was fined $400 with $40 statutory costs and his licence was cancelled. He was disqualified from obtaining another licence for the mandatory minimum period of 11 months.

12. In my opinion the Chief Magistrate applied an erroneous test in assessing the conflict between the evidence of Brannaghan and that of Ms Lahogue. The Chief Magistrate took the view, accepting submissions made to him on behalf of the defence that were not contradicted by the police prosecutor, that the onus was on the prosecution to prove that an invitation was issued to Brannaghan by Ms Lahogue to enter the house, and to prove it beyond reasonable doubt. However it is now common ground or virtually common ground that that was not the appropriate test, and that in fact the onus was on the defence to establish, on the balance of probabilities, the facts on which the defence relied in order to justify the exclusion of the evidence on the *Bunning*

v Cross discretionary ground. Mr Tehan QC sought for a time to support the Chief Magistrate's contrary approach by reliance on *Liberato v R*[5] but the relevant statements in that case relate to the obligation of the Crown to satisfy the court, beyond reasonable doubt, that the elements or ingredients of the offence have been made out. The position is quite different in relation to a submission that admissible evidence should be excluded as a matter of discretion on fairness or public policy grounds. I think that, in the end, Mr Tehan QC did not seriously contest that proposition.[6]

13. Although the errors made as to the burden and standard of proof might be thought to have favoured the accused (and were not referred to in the notice of appeal), they seem to have led to a situation where one cannot discern with any confidence whether or not the principles in *Bunning v Cross* were appropriately applied by the Chief Magistrate in the remainder of his reasoning. However, on balance, I am persuaded by Mr Tehan that there is sufficient indication that the principles were not appropriately applied.[7] The Chief Magistrate found an unlawful entry, and yet he did not identify in any clear way whether that entry was to be classified as an (honest or understandable) mistake or accident, or as reckless, or as deliberate. Such an analysis and classification, at least, needed to be done in this case under the *Bunning v Cross* principles.[8]

14. The respondent seeks to defend the decision by submitting that what the Chief Magistrate said sufficiently indicates a finding of innocent mistake. In particular, the respondent refers to the Chief Magistrate's comment: "This, in my opinion, is towards the more technical end of the spectrum". However, in this criminal matter, it seems to me that that does not indicate sufficiently clearly that the Chief Magistrate was satisfied that the entry was as a result of a mistaken belief on the part of Senior Constable Brannaghan[9] that he had an invitation. Moreover, the case for the prosecution below was quite starkly different from that. There was little or no room on the prosecution case for a mistake. The Senior Constable said clearly and repeatedly in his evidence that he had had an express invitation from Ms Lahogue.

15. It is true, as Mr Ryan SC says, that a magistrate can accept parts of the evidence of one side and parts of the evidence of the other side, but, if that is what the Chief Magistrate intended to do in this case, I think it behoved him to spell that out with more precision than he did.

16. One simply finds that there is insufficient explanation in the reasons for the use of the phrase "the technical end of the spectrum". It is somewhat ambiguous in itself and, as Mr Tehan submitted, where the evidence of Senior Constable Brannaghan was not accepted as to the invitation, *prima facie* one would expect a finding of either deliberate or reckless entry, although it remains possible that the facts did not appear that way to the Chief Magistrate.

17. So, although the analysis that I would apply is perhaps not completely in line with the submissions of either side, it seems to me that this is a case where it would be wrong to let the decision stand. The decision seems to have been arrived at from a fundamentally unsound original basis, namely the application of the beyond reasonable doubt test to the evidence in question. The application of that test was inapposite in the circumstances and it is not so surprising that it has led to the failure of the Chief Magistrate to make the findings that needed to be made in relation to the *Bunning v Cross* principles.

18. The decision should be set aside and the matter remitted to the Magistrates' Court. I think that, this being a credibility case, it is better that it be heard afresh by someone other than the Chief Magistrate. That is the usual order that the Court would make in such a case.[10] It is no reflection on the Chief Magistrate. In any event, the matter was heard in November last year. It is now August. It is unlikely that the Chief Magistrate would have any great recollection of it now. So there would probably be no great saving in terms of time or cost if it were to be re-heard by the Chief Magistrate himself.

19. There being no opposition to the appellant's claim for costs, the Court will order that the orders of the Magistrates' Court in question be set aside, that the Chief Commissioner of Police pay the appellant's costs, and that the matter be remitted to the Magistrates' Court (differently constituted) for re-hearing.

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[1] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. *R v Ireland* [1970] HCA 21; (1970) 126

CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 and *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323 were also referred to and relied upon below by counsel for the appellant.

[2] There has been no suggestion that this was not a case within s53(1)(a) of the Act, ie a case where a member of the police force requires a person he or she "finds driving" a motor vehicle or "in charge of" a motor vehicle to undergo a preliminary breath test: cf *Mills v Meeking* [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; *Maitland v Swinden* [2006] VSC 467 (Hansen J) at [23]; (2006) 46 MVR 507; application for leave to appeal dismissed: *Maitland v Swinden* [2007] VSCA 44; (2007) 48 MVR 27.

[3] Transcript 81-82. He cited *Liberato v R* [1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792.

[4] A transcript of the oral reasons was made and no issue has been raised as to its accuracy.

[5] [1985] HCA 66; (1985) 159 CLR 507; 61 ALR 623; 59 ALJR 792.

[6] In any event, it is clearly correct: see *R v Grassby* (1988) 15 NSWLR 109 at 119; 38 A Crim R 67 (CCA) (judgment affirmed on other grounds: [1989] HCA 30; (1989) 169 CLR 1; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134); *R v Coulstock*, NSWCCA, (1998) 99 A Crim R 143, 10 March 1998, BC 9800597 at 6 and cases there cited; *R v Turner (No 14)* [2001] TASSC 124 (Blow J) at [154]; *Cross on Evidence* Service, Australian Edition at [33680]; Australian Law Reform Commission, (Interim) Report No 26, Evidence, Vol 1 para 964. Correspondingly, the highest authority supports the proposition that, at common law, the burden of proving facts revealing unfairness or impropriety sufficient to cause the court to exclude a voluntary (and otherwise admissible) confession in its discretion is on the accused: *MacPherson v R* [1981] HCA 46; (1981) 147 CLR 512 at 519-520; (1981) 37 ALR 81; (1981) 55 ALJR 594; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1 at 19; 43 ALR 619; (1983) 57 ALJR 15; *Cross on Evidence Service*, Australian Edition, at [11075] and [33765]. As to the position under the Uniform Evidence Acts, see Odgers, *Uniform Evidence Law*, eighth edition at [1.3.15000].

[7] Cf *XYZ v State Trustees Ltd* [2006] VSC 444; (2006) 25 VAR 402 at 415 [31]; *State of Victoria v Subramanian* [2008] VSC 9; (2008) 19 VR 335 at 340 [14]-[16] and cases there referred to.

[8] See and compare *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 55 at 78-80; 19 ALR 641; 52 ALJR 561 per Stephen and Aickin JJ (with whom Barwick CJ agreed); *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177 at 203-204; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393; *Ridgeway v R* [1995] HCA 66; (1995) 184 CLR 19 at 38 (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1; (per Mason CJ, Deane and Dawson JJ) and at CLR 51 (per Brennan J); *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159 at 212-213 [135]; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5 per Kirby J; 151 ALR 98; 72 ALJR 339; *Tofilau v R* [2007] HCA 39; (2007) 231 CLR 396 at 527-528 [410]- [411]; (2007) 238 ALR 650; (2007) 81 ALJR 1688; 174 A Crim R 183; *Cross on Evidence Service*, Australian Edition, at [27295] and cases there referred to, especially *Zanet v Henschke* (1988) 33 A Crim R 51 (SA FC) and *Rowell v Larter* (1986) 6 NSWLR 21 at 25, 30. It is unnecessary to determine whether, in certain other respects identified by the appellant, the Chief Magistrate's reasoning did not take proper account of the "*Bunning v Cross* factors" (to adopt the expression used in *Tofilau* at [410]-[411]).

[9] Senior Constable Brannaghan was a police officer of some 30 years experience who acknowledged in evidence that he knew at the time that he could not enter the premises without an invitation: transcript, 23.

[10] *Wilson v County Court of Victoria* [2006] VSC 322; (2006) 14 VR 461 at 474 [55]; (2006) 164 A Crim R 525; (2006) 46 MVR 117 and cases there cited.

APPEARANCES: For the appellant Hinneberg: Mr PF Tehan QC and Mr F Andrighetto, counsel. Wakefield & Vogrig Lawyers. For the respondent Brannaghan: Mr C Ryan SC, counsel. Office of Public Prosecutions.