2/99; [1999] VSC 88

SUPREME COURT OF VICTORIA

WILLIAMS v JACOBS

Balmford J

1, 29 March 1999 — (1999) 29 MVR 244

MOTOR TRAFFIC – DRINK/DRIVING – OPERATION OF BREATHALYSER – NOT OPERATED IN ACCORDANCE WITH MANUFACTURER'S MANUAL – EXPERT EVIDENCE GIVEN TO THE EFFECT THAT INSTRUMENT NOT OPERATED PROPERLY – DEFENCE UNDER S49(4) OF *ROAD SAFETY ACT* 1986 – NATURE OF – FINDING MADE THAT INSTRUMENT NOT PROPERLY OPERATED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(4).

Section 49(4) of the *Road Safety Act* 1986 ('Act') provides:

> It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated.

After hearing evidence from a Breathalyser operator and an expert in respect of the operation of the instrument, a magistrate found that the instrument was not properly operated on the relevant occasion. However, the magistrate found the charge proved indicating that the defendant had failed to show that the reading obtained was incorrect. Upon appeal—

HELD: Appeal allowed. Conviction quashed.
1. Having regard to s49(4) of the Act, what the defence must establish is proof of the probability or possibility, as opposed to certainty, that the result of the incorrect operation of the instrument would be unreliable – in effect, would produce a wrong finding.
***Fitzgerald v Howey* (1995) 24 MVR 369, applied.**

2. The magistrate applied the wrong test. Having found that the instrument was not properly operated and applying the appropriate test, the magistrate could have found that it was probable that the result was a wrong finding and accordingly, dismissed the charge.

BALMFORD J:

1. This is an appeal under section 92 of the *Magistrates' Court Act 1989* from an order made on 4 February 1993 by the Magistrates' Court at Broadmeadows, whereby the Magistrate ordered that the appellant be convicted of an offence under Section 49(1)(f) of the *Road Safety Act* 1986 ("the Act"), and be fined $500 with $25 statutory costs, and that all licences held by him under the Act be cancelled and he be disqualified from driving in the State of Victoria for a period of 12 months. The matter arose out of events occurring on 7 May 1992. No explanation was given of the delay which has occurred in bringing this appeal to hearing. However, I note that on 5 March 1993, Master Evans ordered that the penalties be stayed until the hearing and determination of the appeal. [*After setting out the questions of law raised on the appeal, Her Honour continued*] …

3. The relevant legislation appears in section 49 of the Act, which reads as follows, so far as relevant:

> (4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated.

4. The Magistrate found that the appellant was stopped at a preliminary breath testing station, and, following a reading there, was tested on a breathalyser instrument, when a reading of 0.190% was recorded. The defendant had argued that the breathalyser was not on that occasion properly operated, so that a defence was established under section 49(4). The Magistrate's consideration of this point is set out in the affidavit of the appellant at paragraph 43(g) and following. Ms McDaid was the police officer who operated the breathalyser and Mr Young was the expert witness called by the appellant. The relevant passages are:

> (g) The second submission is the submission in relation to the ampoule, where it is said that if the level of the liquid in the ampoule is not at the level that the manufacturer specified, a correct reading will not be obtained and if it is lower than required, the reading will be incorrectly higher. The evidence is that Ms McDaid measured the liquid at the highest of the meniscus: there has been some confusion about her evidence but I think in the final analysis I find that she was endeavouring . . . (here the magistrate paused and continue, [sic]) Her evidence is that she measured the meniscus at the highest level. She had confusion as to where that level might be. Because it is criminal matter, I must resolve that issue in favour of the Defendant. I find that when she measured the level of the ampoule, the point that she took into account was the outer edges of the meniscus. Obviously there is less volume than if the measurement was taken at a line or gauge passing just below the lowest point of the meniscus.
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> (h) Mr Young . . . says that if the meniscus was measured as shown by Ms McDaid, the calculation of the volume in the ampoule does not accord with the manufacturer's manual or good scientific principles and that the volume of chemical in the ampoule is critical to the correctness of the result. . . . (k) The third point relied upon by the Defence was the temperature. Ms McDaid basically says that the room temperature and the standard alcohol solution are always the same and in any event on this night they must have been the same because if there was any variance plus or minus two percent she would not proceed. I am aware that there is some conflict in what she was saying but accept that they were the same. I adopt what Mr Hardy says. We have heard what might occur if something went wrong but no evidence of anything going wrong. On the best view of the evidence as far as the Defendant is concerned if something did occur, I am unable to say that anything altered the reading. I find the charge proved.

5. The Magistrate was asked to clarify his finding and in paragraph 44 the appellant deposes:

> In response the learned magistrate said words to the effect that looking at it at the best from the Defence's point of view as I am required to do, I am satisfied that the operator did not operate the instrument in accordance with the requirements of the Manufacturer's manual as stated by Mr Young in his evidence or in accordance with the way that Mr Young stated would accord with his evidence as to proper operation. However, the defence has now shown that the reading was incorrect and I think that the obligation is on them to do so.

It is common ground that "now" in the last sentence of that passage should read "not".

6. Mr Hardy for the appellant submitted that it was not open on the evidence for the Magistrate to find that the standard alcohol solution used was at the correct temperature. Accordingly the Magistrate had made an error of law. He referred to Ms McDaid's affidavit in which she states that she had said in evidence "I would have checked that the room temperature and SAS temperature were the same or within point two degrees celsius before proceeding" and had not said "that she would have ensured that the temperature of the alcohol solution was within a couple of degrees of room temperature before proceeding" as deposed to by the appellant in paragraph 21(bh) of his affidavit. He submitted that the conflict between the two versions was such that the Magistrate should have had a reasonable doubt that the solution was at the correct temperature, and, this being a criminal matter, should have decided the issue in favour of the appellant.

7. That is not a submission as to one of the questions of law raised on the appeal. In any case, the police prosecutor Mr Hollis, in his affidavit, expressly agrees with the contents of the affidavit of Ms McDaid. That being so, even if that ground of appeal had been open to the appellant, it would have failed.

8. Mr Hardy referred to a possible ground of appeal relating to the operation of the control knob of the breathalyser, but indicated that there was authority binding on this Court which would render it futile to spend time here on that issue.

9. Mr Hardy's principal submission related to section 49(4) of the Act. In the passage quoted in paragraph 5 above the magistrate had found that the instrument was not properly operated, but that for the accused to establish a defence under sub-section (4), there was an obligation on the defence to show, not only that the instrument was not properly operated, but also that the reading was incorrect. Mr Hardy submitted that there was authority, established since the time of the finding by the Magistrate, that it was not necessary for the defence to show that the reading was incorrect.

10. In *Ozbinay v Crowley* (1993) 17 MVR 176, which was heard and determined in April 1993, two months after the making of the decision here under appeal, Byrne J said at 183:

> In short, the relevant question of fact entrusted to the decision of the magistrate by section 49(4) is whether the defendant has shown that the machine was not properly operated at the relevant time. This may be demonstrated . . . by showing that some act or omission in the operation of the machine occurred which would affect its proper function so as to impair its reliability. The fact that the act or omission amounted to a contravention of the manufacturer's operating instructions is doubtless relevant for the purpose of showing what instructions were given: . . . but the significance of the contravention must be established by evidence.

And at 184:

> I do not accept that the burden imposed by section 49(4) requires the person charged with an offence against section 49(1)(f) to prove the inevitability of error as a result of the contravention. From a practical point of view such a burden would be in most, if not all, cases impossible to discharge since the sample of breath and the acid which was affected by it is not retained. It would only be in the case of the most egregious departure from operating procedure that the defendant could lead evidence that error must inevitably follow. Such a conclusion would detract very much from the evident usefulness of section 49(4). It is sufficient in my view that the defendant on the balance of probabilities establish that the act or omission affecting the operation of the machine was such that the result is unreliable.

11. That position was adopted, with some refinement, by Eames J in *Fitzgerald v Howey* (1995) 24 MVR 369, who said at 382-3:

> I conclude, therefore, that insofar as improper operation is alleged to arise from a failure to comply with an instruction in the manufacturer's manual, then in order to establish a defence under section 49(4) the defendant must prove that the test result overstated his blood alcohol concentration at the time of the test. Whether the defendant must prove that the overstatement of the test result was probable or merely possible is unnecessary for me to finally decide. Proof of the probability of such error was the standard required by Byrne J and has been accepted to be the appropriate test by Harper J [in *DPP v Phung* [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157]. I have not been persuaded that the formulation of the test as requiring proof of the probability of error is wrong, or conflicts with the intention of parliament in the context of this Act in which the subsection appears, but, as I have said, I do not need to finally resolve this question because the appellant in this case did not establish the defence under section 49(4) to either standard of proof.

An appeal from that decision was dismissed in three sentences by the Court of Appeal at 383.

12. As to the first ground of appeal, it has become clear, since the time of making of the decision under appeal, that what the defence must establish is proof of the probability or possibility, as opposed to the certainty, that the result of the incorrect operation of the instrument would be unreliable – in effect, would produce a wrong finding (see the discussion by Eames J at page 379 of *Fitzgerald*). The Magistrate's decision was accordingly wrong in law, in that he applied the wrong test to the evidence before him.

13. Section 92(7) of the *Magistrates' Court Act* 1989 empowers this Court, after hearing and determining an appeal, to make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Magistrates' Court. In view of the time which has elapsed since the events giving rise to these proceedings, it is desirable that the matter be disposed of now rather than be remitted for re-hearing.

14. The Magistrate found that the instrument was not properly operated, and it can be assumed that the basis of that finding was the finding set out in paragraph 43(g) of the appellant's affidavit, cited in paragraph 4 above. Relying, as I must, on the unchallenged affidavit material before me, I find that the prosecutor expressly accepted the qualifications of Mr Young as an expert in respect of the operation of the breathalyser instrument; and that there was evidence from Mr Young from which the Magistrate could have found, had he applied what has since his decision been established as the appropriate test, that it was probable that the result of the instrument not being operated properly was a wrong finding. I refer to paragraphs 33(e), (i), (j), (n) and (o) and 35(d) of the appellant's affidavit. There is nothing in the material before me to suggest that that evidence of Mr Young was challenged before the Magistrate. The evidence is such that it is not

necessary for me to consider the question as to whether the defence must establish the probability or merely the possibility that the result is unreliable.

15. Accordingly I find that the defence under section 49(4) of the Act is established. The appeal will be allowed.

APPEARANCES: For the Plaintiff: Mr G Hardy, counsel. Melton Law Offices, Solicitors. For the Defendant: Mrs C Quin, counsel. Solicitor to the DPP.
