27/05; [2005] VSC 341

SUPREME COURT OF VICTORIA

NEILL v COUNTY COURT of VICTORIA & ANOR

Byrne J

18, 26 August 2005

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER MADE TWO ATTEMPTS AT PROVIDING A SAMPLE OF BREATH FOR ANALYSIS – BREATH ANALYSING INSTRUMENT INDICATED ON FIRST OCCASION "INSUFFICIENT SAMPLE" – FURTHER SAMPLE TAKEN WHICH RECORDED A BAC OF 0.168% – DRIVER CHARGED WITH DRINK/DRIVING OFFENCE – CHARGE FOUND PROVED – DRIVER FINED AND DRIVER LICENCE CANCELLED – WHETHER COURT IN ERROR – WHETHER EVIDENCE SUPPORTED FINDING THAT POLICE OFFICER WAS OF OPINION THAT THE PBT INDICATED PRESENCE OF ALCOHOL IN DRIVER'S BLOOD – WHETHER EVIDENCE SUPPORTED FINDING THAT POLICE OFFICER WAS SATISFIED THAT BREATH ANALYSING INSTRUMENT ON THE FIRST OCCASION WAS INCAPABLE OF MEASURING THE DRIVER'S BLOOD/ALCOHOL CONCENTRATION: *ROAD SAFETY ACT* 1986, SS49(1)(b), 55(1), (2A).

N. was intercepted driving a motor vehicle. He underwent a PBT which indicated the presence of alcohol in his blood and he was then accompanied to a police station for the purpose of furnishing a sample of breath. When the first sample was taken, the instrument printout indicated "insufficient sample". A second test was conducted which recorded a BAC of 0.168%. N. was charged with offences under the *Road Safety Act* 1986 ('Act') and was convicted and fined, his licence was cancelled and he was disqualified from obtaining another one for a period of 23 months. Upon appeal—

HELD: Appeal dismissed.

1. The statutory purpose of the PBT is to provide an indication of the concentration of alcohol present in the person's blood. S55(1) of the Act requires the police officer to form an opinion upon reasonable grounds that the test indicates the presence of alcohol in the blood. The positive reading reported by the PBT provided a sufficient basis for the officer's opinion and was evidence upon which the court could properly have concluded that the officer held the relevant opinion on reasonable grounds.

2. The police officer gave formal evidence of making a requirement that N. provide a sample for analysis. He said that the sample was insufficient so he asked N. to provide a further sample, which was done. The court said that the reading which the instrument returned after the first sample entitled the court to infer that the breath sample furnished was such that the instrument was incapable of analysing it to measure the blood alcohol of the subject within the meaning of sub-section (2A). A report "insufficient sample" invites the question as to the nature and significance of the insufficiency. The court was entitled to conclude that the printout and the impact of this upon the police officer's state of mind provided a sufficient basis for the making of the request for a second breath sample which he said was made pursuant to s55 of the Act.

BYRNE J:

1. At approximately 10.30 pm on the evening of Wednesday 1 July 1998 the plaintiff, Bruce Graeme Neill, was driving a grey BMW motor vehicle registered RAW470 in a southerly direction along Mt Alexander Road, Ascot Vale. He was there intercepted by police and required to undergo a preliminary breath test pursuant to s53 of the *Road Safety Act* 1986.

2. This he did at 10.35 pm, and the result indicated the presence of alcohol in his blood. The police officer in charge of this incident, the secondnamed defendant, Mark Peter Rogers, required Mr Neill to accompany him to Flemington Police Station for the purpose of furnishing a sample of his breath for analysis by a breath analysing instrument pursuant to s55(1).

3. After some demur, Mr Neill agreed to this and, at that police station, he was interviewed. In the course of this he admitted having drunk "maybe six or seven glasses of chardonnay" at the Medway Golf Club in Ascot Vale. He said that this consumption commenced about 7 pm and concluded about 10.30 pm.

4. A sample of his breath was taken at 11.11 pm but it was reported as being insufficient and so a further sample was taken at 11.30 pm. This second sample recorded a blood alcohol content of 0.168 percent.

5. Mr Neill was accordingly charged with two offences:

> (a) driving a motor vehicle while more than the prescribed concentration of alcohol was present in his blood contrary to s49(1)(b); and
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> (b) furnishing a sample of breath for analysis within three hours of driving a motor vehicle where the analysis showed that more than the prescribed concentration of alcohol was present in his blood, contrary to s49(1)(f).

6. For a reason which is not clear the matter did not come on for hearing until 10 September 2001. On that day the Magistrate convicted Mr Neill of both charges. In respect of the s49(1)(b) offence he was fined $700, his licence was cancelled and he was disqualified from obtaining a licence for 23 months effective from 10 September 2001. In respect of the other charge he was discharged.

7. On the same day, Mr Neill lodged the Notice of Appeal and obtained from the Magistrate an order permitting him to drive pending appeal.

8. In due course the appeal came on for hearing and a preliminary application to strike out the s49(1)(f) charge made on behalf of Mr Neill was rejected. He applied for review under Order 56 and this was heard and determined by Redlich J on 8 September 2003[1]. The matter was then returned to the County Court where the appeal was heard in August 2004 before her Honour Judge Gaynor. Her Honour ordered that the s49(1)(f) charge be permanently stayed and then conducted and determined the rehearing of the other charge. She upheld the conviction and the Magistrate's orders with respect to the licence cancellation and disqualification. The fine, however, was reduced to $100.

9. By originating motion filed on 26 September 2004 Mr Neill commenced this proceeding against the County Court and Mr Rogers seeking prerogative relief pursuant to Order 56 with respect to the conviction order. The originating motion sets out six grounds of complaint, all but two of which appear to be inappropriate to the relief sought. All, including those which were technically appropriate, namely unparticularised allegations of a denial of natural justice and a want of procedural fairness, were abandoned before me.

10. Counsel for Mr Neill said he wanted to argue two points only:

> (a) There was no evidence to support the judge's finding that, at the time the informant, Mr Rogers, required Mr Neill to provide a sample for breath analysis he was of opinion that the preliminary breath test indicated that Mr Neill's blood contained alcohol. Accordingly, the requirement and all that followed it were vitiated.
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> (b) There was no evidence to support the judge's finding that, following the provision of the first breath sample for analysis, it appeared to Mr Rogers that the breath analysing instrument was incapable of measuring the concentration of alcohol present in the sample. Accordingly, the requirement that he provide a second breath sample and all that followed it, including the incriminating analysis reading, were vitiated.

11. I very much doubt that these complaints, if made out, are properly described as errors of law in the face of the record, as the plaintiff concluded, and that they could therefore be relied upon as grounds for prerogative relief. It was put, again I think a little optimistically, that the record comprised, not only the formal order of the County Court and her Honour's reasons for convicting, but also her rulings in the course of the trial and the transcript upon which they depended. But it is not necessary to enter upon this as counsel for the secondnamed defendant said he was content to conduct the proceeding upon this. I would not, however, like it to be thought that, by entering upon these submissions, I accept that Order 56 can be used in this way.

The s55(1) point

12. The relevant provisions of s55(1) are as follows:

> "(1) If a person undergoes a preliminary breath test when required by a member of the police force ... to do so and—
> (a) the test in the opinion of the member or officer in whose presence it is made indicates that the person's blood contains alcohol, or ...
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> may require the person to furnish a sample of breath for analysis by a breath analysing instrument ... ."

13. The submission put in support of this ground was twofold: There was cogent evidence such that the Judge must have concluded that the preliminary breath analysis was flawed and that an opinion based upon a flawed analysis was itself flawed.

14. Counsel for Mr Neill pointed to passages in the evidence which he said led to the conclusion that the reading of the preliminary breath test was unreliable. An expert, called by the appellant below, Graham Barry Young, said that if mouth alcohol were present in the subject, a breath analysis reading would not necessarily be indicative of the actual blood alcohol level. It could possibly produce a massive reading depending upon the amount of mouth alcohol contamination. The witness said he would not place credence on a reading which was the result of a sample furnished within five minutes after the subject's last drink. The operating manual for this reason requires the person administering the test to be satisfied that the subject has not consumed alcohol for at least 15 minutes prior to the taking of the sample. It will be recalled that Mr Neill had had his last drink only five minutes before the preliminary breath test.

15. This point is entirely without substance for any of a number of reasons.

> (1) The question is not whether the evidence in support of the conviction was challenged by credible evidence; it is whether there was no evidence upon which the Judge could properly have concluded that the police officer held the relevant opinion on reasonable grounds.
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> (2) In any event, the fact that the test might have produced an excessive reading does not necessarily lead to the conclusion that a positive reading is consistent with the absence of any alcohol in the subject's blood. The statutory purpose of the preliminary breath test in a case such as the present is to provide an indication of the presence of some alcohol in the blood of the subject. It is not to provide an indication of the concentration of the alcohol present. Her Honour quickly identified this flaw and, correctly, if I may say so, rejected the submission in her reasons.
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> (3) Mr Rogers was not aware that Mr Neill had so recently consumed alcohol. Section 55(1) requires the police officer to form an opinion upon reasonable grounds that the test indicates the presence of alcohol in the blood. Absent some particular circumstance, which were not suggested here, his opinion can not be affected by matters of which he had no knowledge.
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> (4) Mr Rogers said in evidence in chief that he formed the relevant opinion. The positive reading reported by the preliminary breath test instrument provides a sufficient basis for it. This evidence could support her Honour's finding.
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> (5) The contrary position was never put to Mr Rogers in cross-examination. If it had, the witness may have referred to p. 2.19 of the Manufacturers Operating Manual where it states that 90 percent of breath alcohol is dispersed within only eight minutes of drinking.

The s55(2A) point

16. The relevant parts of s55(2A) are as follows:

> "(2A) The person who required a sample of breath under sub-section (1) or (2) may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample ... because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever."

17. This point was taken and rejected on the no-case submission. As a ground for relief it, too, is without substance for there was evidence to support Her Honour's finding.

18. Having regard to the submissions founded upon the decisions of this Court in *Holden*[2] and *Skinner*[3], I shall venture some further observations. At the close of the prosecution case counsel for Mr Neill made a no-case submission. This was predicated upon the requirement, which

I accept, that the prosecution must prove to the criminal standard that it appeared to Mr Rogers at the time he required Mr Neill to provide a second sample, that the instrument was incapable of measuring the first sample and, further, that he had this state of mind upon reasonable grounds[4].

19. It was common ground before me that Mr Rogers did not in terms assert that he was of that state of mind. The evidence of the instrument operator, Dale Ashley Johnstone, was that the first sample was shown to be an insufficient sample and he provided Mr Neill with a signed copy of the printout showing this. This and, indeed all printouts, were in evidence before the judge, but not before me. The argument, however, proceeded on the basis that the printout contained a report indicating "insufficient sample"[5]. Mr Rogers gave formal evidence of making first a requirement that Mr Neill provide a sample for analysis. He said that the sample was insufficient so he asked him to provide a further sample, and this was done. It was not put to him that he lacked the state of mind or that there were insufficient grounds for his state of mind.

20. Her Honour in her reasons for rejecting the submission, said that the reading which the instrument returned after the first sample entitled her to infer that the breath sample furnished was such that the instrument was incapable of analysing it to measure the blood alcohol of the subject within the meaning of sub-section (2A).

21. It was argued before me that, absent expert evidence as to the meaning of the report and any evidence of what, if anything, Mr Johnstone, the operator, said to Mr Rogers, her Honour could not be satisfied that Mr Rogers at the time of the requirement for the second breath sample had the required state of mind or did so on reasonable grounds.

22. I interrupt myself to note that, so expressed, her Honour was reaching a factual rather than a legal conclusion, so that the supposed error of law is not easy to see.

23. In considering the two cases upon which reliance was placed, it is necessary to bear in mind that they were concerned with an argument that the Magistrate erred in acquitting the defendant of the charge of refusing to provide a sample of blood following an unsatisfactory breath analysis. In each case, the point at issue was whether the printout made by the breath analysing instrument following its analysis of a breath sample provided under s55(1), showed that the instrument was incapable of measuring the concentration of alcohol present in the sample. The reading in each case was "alcohol in mouth". The Magistrate in each case was not satisfied that the prosecution had established such an incapacity from the text of the printout. The prosecutor, in order to make good the suggested error of law had to satisfy the appellate judge that the Magistrate, faced with the printout, could not fail to be satisfied beyond reasonable doubt that the pre-condition to the requirement of a blood sample had been met.

24. In *Holden*, Hedigan J said of the cryptic report "alcohol in mouth" that it might mean many things and that, while the certificate may be proof of the facts stated in it, no interpretation of the meaning of the words appears on its face. His Honour went on to say:

> "For all that the Magistrate knew, or I know, the words 'alcohol in mouth' might mean that there is alcohol in the mouth but not the blood, or it might mean there is more alcohol in the mouth than there is in the blood or that, as a consequence, some further step should be taken or adjustment made to the instrument."[6]

Moreover, the fact that the informant who, as here, was not a trained operator, stated that it appeared to her that the instrument was incapable of the prescribed task, did not cure the matter. His Honour pointed out that there was no evidence of the grounds her having the state of mind. In these circumstances, it was open to the Magistrate not to be satisfied of this ingredient beyond reasonable doubt.

25. *Skinner*[7] was a more difficult case, for there was a good deal of evidence both from the repeated reports of the breath analysis instrument that there was "alcohol in mouth" and from the evidence of the condition of the driver, that the instrument was in fact incapable of performing the relevant tasks. But, as his Honour pointed out, the question on a prosecution appeal was, not whether it was open to the Magistrate to find that there were reasonable grounds for the police officer believing the instrument to lack the necessary capacity, but rather whether it was open to the Magistrate to find that he was not so persuaded[8].

26. The present case, where it is the defendant who appeals, falls into the first category mentioned in the last sentence. It is clear enough from the evidence that it was open to her Honour to be satisfied that Mr Rogers had the required state of mind and had this on reasonable grounds. Unlike the report "alcohol in mouth", a report "insufficient sample" invites the question as to the nature and significance of the insufficiency. The judge was entitled to conclude, as she did, that the printout and the impact of this upon Mr Rogers' state of mind provided a sufficient basis for the making of the request for a second breath sample which he said was made pursuant to s55. Accordingly, the ground must fail.

27. I have already made mention of my doubts that most of the grounds specified in the originating motion and those which were in fact argued before me were proper grounds for prerogative relief. I say nothing further. I simply wish to add that the grant of prerogative relief is discretionary. If it be permitted to raise in an application under Order 56 grounds other than true jurisdictional grounds or those relating to some procedural unfairness, the applicant must satisfy the Court that the error is in truth one of law, and that this error appears from an examination of the face of the record, as that expression is properly understood. If the application, even so, is nothing more than an appeal dressed up as a judicial review, then it may be that the applicant will have to show some injustice in the order of the County Court before the order may be quashed. This point does not arise, given my rejection of the grounds argued; it was not argued before me and I would prefer not to express my view upon it in this application.

28. It is sufficient that I conclude, as I do, that the argued grounds have not been made out so that the application should be dismissed. I have been told by counsel that following such a decision it will be for the relevant authority concerned with licensing to adjust her Honour's order with respect to the cancellation of Mr Neill's licence and the period of his disqualification. If there be some concern about this, I will hear counsel further and, if necessary, give liberty to apply. For present purposes I propose simply that the application be dismissed with costs.

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[1] [2003] VSC 328; (2003) 40 MVR 265.
[2] [1999] VSC 14; (1999) 28 MVR 315.
[3] [2004] VSC 32; (2004) 40 MVR 427.
[4] *Skinner* [2004] VSC 32; (2004) 40 MVR 427 at [12] 430, per Nettle J.
[5] Test discontinued.
[6] *Holden* [1999] VSC 14; (1999) 28 MVR 315 at [8], 318.
[7] [2004] VSC 32; (2004) 40 MVR 427.
[8] [2004] VSC 32; (2004) 40 MVR 427 at [21] 432.

APPEARANCES: For the plaintiff Neill: Mr P Billings, counsel. Battley & Co Pty Ltd, Solicitors. For the second-named defendant Rogers: Mr J Kelly, counsel. Office of Public Prosecutions.
