13/91

SUPREME COURT OF VICTORIA

LEISHMAN v O'CONNOR

Fullagar J

16, 17 January 1991 — (1991) 13 MVR 499

MOTOR TRAFFIC – DRINK/DRIVING – CASE BOOKED IN FOR A CONTEST – ANALYTICAL CHEMIST UNAVAILABLE ON DATE OF HEARING – REQUEST FOR ADJOURNMENT – BREATHALYSER OPERATOR NOT CALLED AS A WITNESS – EFFECT OF CERTIFICATE BEING ADMITTED INTO EVIDENCE – CHEMIST'S EVIDENCE OF NO EFFECT – REQUEST FOR ADJOURNMENT REFUSED – DEFENDANT CONVICTED – WHETHER PREJUDICE SUFFERED BY REFUSAL OF ADJOURNMENT: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), (4), (6), 58(2).

L. was charged with drink/driving offences pursuant to s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). The matters came on for mention in April and adjourned for a contested hearing in the following August. In the meantime, L. underwent a profile test conducted by an analytical chemist. 3 days before the hearing date, the chemist indicated (without giving reasons) that he was unavailable to attend on the date fixed for hearing. Accordingly, on the return date, L.'s legal practitioner sought an adjournment of the charges which was refused and L. was convicted of the charge under s49(1)(f) of the Act; the other charge being struck out. Upon order nisi to review—

HELD: Order nisi discharged.
1. Having regard to the deeming provisions of s58(2) of the Act which provide conclusive proof as to the breath analysing instrument's being in proper working order and properly operated at the relevant time together with the fact that the instrument operator had not been required to attend the court, the evidence proposed to be given by the analytical chemist could have had no effect upon the result of the case. Accordingly, no prejudice was suffered by L. as a result of the refusal of the request for an adjournment.

2. In view of the provisions of s49(6) of the Act, the lapse of time between the mention date and the date of hearing and the fact that no reason was advanced to explain the chemist's absence, the learned magistrate was not in error in asking whether the evidence of the absent witness was arguably admissible.
***Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, distinguished.**

FULLAGAR J: [1] This is the return of an order nisi to review the order of a Magistrates' Court at Prahran made 9th August 1990 whereby the applicant was convicted of an offence committed on 10th February 1990 under s49(1)(f) of the *Road Safety Act* 1986. The numerous grounds of the order nisi, save for ground (11) which was abandoned, complain in substance that the Magistrate erred in law in refusing to grant an adjournment immediately before the hearing of the trial on 9th August 1990.

The affidavits in support of the order nisi do not condescend to any indication of the prosecution case or how it was alleged the offence was committed. All that is said in this regard is that in the witness box the respondent/informant related "the circumstances during which the appellant was apprehended". What these circumstances were does not appear.

The applicant was charged with two offences: one under s49(1)(b) of the Act and one under s49(1)(f). The preliminary hearing took place on 24th April 1990 when the matter was "adjourned to 9th August for a contest of two hours". It appears that on 5th July 1990 the applicant "underwent a profile test" at the laboratories of an analytical chemist who reported to the applicant's solicitors as follows:

> "From results obtained it is calculated that, had Mr Leishman consumed 1 x 330 ml. of the beer between 8 p.m. and 8.35 p.m. and 1.5 x 330 ml. of the beer between 1.10 a.m. and 1.40 a.m., his expected blood alcohol level at 2.15 a.m. (time of apprehension) would be 0.038%, and 0.032% at 3 a.m. (time of breath testing)."

[2] It is alleged that (and the applicant later gave sworn evidence to this effect) within 15 minutes of the breath test being made the applicant requested the operator of the analysis machine to be allowed to go to the toilet, that he was accompanied to the door of but not inside the toilet room, that he entered the toilet and closed the door and then vomited, that his vomit contained a cough mixture containing alcohol, and that (according to the analytical chemist) some of that alcohol by reason of these alleged facts would have been in the applicant's mouth at the time of testing some ten minutes later and would have caused the machine to have given a higher reading (meaning, presumably, a reading of alcohol content in the blood).

On 6th August the chemist informed the applicant's practitioner that he could not attend court on 9th August and it does not appear that he gave any reason. The practitioner on that day asked the respondent/informant personally for his consent to an adjournment on the stated ground (it seems) that the applicant "intended to call an analytical chemist" and that the latter could not attend on 9th August. The respondent said he agreed to the adjournment. On the same day the practitioner spoke to the prosecuting Senior Constable who said that he would not accede to the request for adjournment and would oppose it in court, apparently on the ground that any such evidence would be inadmissible.

At the outset of the hearing on 9th August the practitioner sought an adjournment on the ground that "a crucial witness" – identified by the prosecutor to the Magistrate as being an analytical chemist – "was not able to attend court on that day." **[3]** The Magistrate said that the practitioner must satisfy the court "that the evidence of a chemist is admissible and, secondly, that there is a valid reason for the chemist not coming today", and at one stage he reminded the practitioner that the case had been fixed on 24th April 1990 for 9th August with two hours set aside for it. The practitioner then made submissions of a legal character about the right to adjournments in general, without saying anything which went at all to either of the requirements of the Magistrate, who then refused the adjournment. The trial went on without the analytical chemist and at the end the Magistrate convicted the applicant of the offence against s49(1)(f), whereupon the Prosecutor applied to have the information under s49(1)(b) struck out, "and it was then struck out by the learned Magistrate", and it was not contested before me that the information under s49(1)(b) now stands dismissed.

In my opinion the applicant fails to make out that he is a "person who feels aggrieved by a summary conviction or order" within the meaning of s88 of the *Magistrates' Courts Act* 1971. It is in my opinion quite clear that, if the analytical chemist had been called, and had been allowed to give all the evidence which he was capable of giving, his evidence could have had no effect whatsoever upon the actual result of the trial which in fact ensued. This is because the applicant was not convicted of the alleged offence against s49(1)(b) and because the whole of the chemist's evidence was inadmissible upon the trial of the offence against s49(1)(f).

[4] Section 49(6) provides that, in proceedings for an offence against sub-s.(1)(f) "evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge". It is true that by sub-s.(4), it is a defence to prove that the analysing machine was not in proper working order or not properly operated. I think the better view is that the chemist's evidence about the effect of alcohol on the applicant was not relevant to the matters referred to in s49(4). However, even if that view were wrong, it is clear that s58(2) of the Act, as made retrospectively operative by Act No.66 of 1990, made the certificate to which s58(2) refers conclusive proof of the matters referred to in it and, by the certificate in the present case, it is certified, *inter alia*, that the breath analysing instrument used in the present case "was in proper working order and properly operated by me in accordance with the regulations".

The seven days' notice in writing referred to in s58(2) was never given, so s58(2) is fully operative. Act No.66 of 1990 was passed in order to destroy, retrospectively, the effect of the decision of the Full Court in *Bracken v O'Sullivan* (unreported) 3rd November 1990. Similarly any evidence to the effect that Regulation 303 of the *Road Safety (Procedures) Regulations* 1988 (SR 1988 No.28) was not complied with – in that the operator was not "satisfied" that the applicant had not consumed any intoxicating liquor in the 15 minutes preceding the breath analysis – is rendered inadmissible by s58(2) and the certificate. In passing, I should point out that Regulation 303 – made under s95(1) of the Act and paragraph 50 of Schedule 2 to the Act – does not require that the operator must **[5]** ensure that there be no alcohol consumed in the critical period, but

only that he be satisfied, after taking all reasonable steps, that there was no such consumption in the critical period.

It was, in my opinion, not required by the implied requirement of reasonableness that he should have accompanied into the toilet, and kept watch over, a person whom he believed to be going there in order to relieve himself, the watching being in order to see whether he vomited up any alcohol into his mouth. Nor was he required to interrogate as to possible regurgitation of alcohol. Further, even if everything happened in the toilet as deposed to by the applicant and as explained by the analytical chemist, I do not think that any regurgitating of alcohol from the stomach to the mouth is "consuming" alcohol for the purposes of the regulation, nor is the re-swallowing of infinitesimal quantities of alcohol.

I find it sufficient to decide this case upon the ground that the applicant has not shown that he has suffered any prejudice whatsoever by the refusal of the adjournment, having regard to the conclusiveness worked by s58(2) of the Act, as a consequence of the failure of the applicant to give the written notice referred to in the sub-section. However, I am not to be taken as finding that the Magistrate exceeded his discretionary power in refusing the adjournment, quite apart from the effect now of s58(2). I was referred by Dr Thomson to the decision of Kaye J in *Humphrey v Wills* [1989] VicRp 42; (1989) VR 439, and I should say that the headnote appears adequately to summarize what His Honour actually decided. Dr Thomson however relied heavily on the *obiter dicta* of His Honour appearing at p443 of the report, lines 20-42. These observations of Kaye J must, in my opinion, be considered in the light of the case before him, and His Honour was careful to distinguish that case, where the **[6]** application was made during the course of the trial and at the end of the prosecution case, from cases like the present where the application for adjournment is made before the trial commences. Compare *R v Jones* [1971] VicRp 7; [1971] VR 72 at p78, to which Kaye J expressly referred. In such cases, as was said by Lush J in another case cited by Kaye J "each case of this kind must depend on its own facts".

In the present case, having regard to s49(6) and to the fact that the Magistrate knew that the absent witness was an analytical chemist, and to the fact that the trial had been fixed on 24th April for 9th August, and to the fact that no reason whatever was given for the absence of the witness, I think the Magistrate was justified in asking for some indication at least that the proposed evidence was arguably admissible.

It has been in the past, I think, a not uncommon practice for persons charged with these offences to attempt to put off the evil day for as long as possible, first by seeking adjournments of the trial and later, in the event of a conviction, by orders to review coupled with a stay, and the Magistrate had a wide discretion of exercise, and it was proper for him to consider the convenience of the court and the ordering of its busy affairs, and I am not satisfied in the circumstances of the present case that he erred in the exercise of that discretion. I emphasise again, however, that each case of this kind must depend on its circumstances.

For the reasons I have given the orders of the court will be in accordance with the following minutes:-

> Order nisi discharged. Order that the applicant, Malcolm John Leishman, pay the costs of the respondent of the proceeding in the Supreme Court including any costs reserved.

APPEARANCES: For the applicant Leishman: Dr DM Thomson, counsel. Gabriel Kuek, solicitor. For the respondent O'Connor: Mr RM Downing, counsel. Mr K Rivett (DPP).
