

MELDRUM'S LIST

DRINK-DRIVING DEFENCES FOR THE 21ST CENTURY

BY

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INTRODUCTION

A number of decisions of the Victorian Supreme Court and Court of Appeal over the last several years may indicate certain patterns in relation to defences argued by those barristers briefed to defend motorists accused of drink-driving and related offences under s 49(1) of the *Road Safety Act* 1986 (“the RSA”) in 21st Century Victoria. A tiny selection of some recent superior court decisions which were resolved favourably to the defendant motorist are as follows.

EXCEED PRESCRIBED CONCENTRATION OF ALCOHOL OFFENCES

***DPP v Moore* [2003] 6 VR 430; [2003] VSCA 90 - Police advising against blood test**

In *DPP v Moore* the Court of Appeal dismissed a Crown appeal from the Supreme Court in *DPP v Moore* (2002) 35 MVR 357; 129 A Crim R 95; [2002] VSC 29. Balmford J had heard that a magistrate accepted a defendant’s evidence that, after a test on the breath analysing instrument in 1998 revealed a reading of .074%, the defendant then requested a blood test under s 55(10) of the RSA, however, he took the operator’s advice that his blood alcohol level would probably be higher than .07 when the doctor arrived, the operator also stating to the defendant “...if I was you, I’d cop the .07 and forget about the

blood". Her Honour held that the Crown had not shown that the magistrate erred in exercising a judicial discretion to exclude the certificate of analysis and then dismissing the s 49(1)(b) charge.

Batt JA held at [32] that the learned magistrate actually erred in exercising a *Bunning v Cross* 'public policy' discretion as that discretion was not available because the impugned police conduct occurred after the evidence was obtained, not before. However, Batt JA held at [35] that the general unfairness discretion discussed by the High Court in *Dietrich v The Queen* (1992) 177 CLR 292; (1992) 64 A Crim R 176 enlivened to exclude the certificate because the magistrate found that the operator's conduct caused the respondent not to seek a blood test thus losing a possibility of him being able to lead evidence of a lower blood alcohol concentration than 0.074% and dismissed the Crown appeal on that reasoning.

Chernov JA held at [51] at [57] that the *Bunning v Cross* 'public policy' discretion did arise in the circumstances. There was no error by the magistrate in exercising it. His Honour further held at [61] that the general fairness discretion discussed in *Lobban* (2000) 77 SASR 24 also enlivened to exclude the certificate in the circumstances and it would have been appropriate for the magistrate to have exercised it as the motorist was divested of an opportunity to obtain blood test, thereby challenging the accuracy of breath analysis and thus depriving him a trial which was not unfair.

Eames JA held at [93] that there was no reason why the *Bunning v Cross* 'public policy' discretion should be unavailable simply because the police conduct followed immediately after the procuring of the evidence rather than before. His Honour further held at [94] that the general unfairness discretion was open to be applied by the magistrate in addition to the public policy discretion. His Honour also stated at [95] and [96] that one additional factor in determining whether the respondent was denied a fair trial was the fact that the operator did not give evidence - the absence of the operator was a forensic advantage operating unfairly against the prosecution as no s 58(2) notice was given by the defence nor any warning as to the defendant's allegation. The question whether there

was any relevant unfairness to justify exercise of the general unfairness discretion could not be answered in absence of a response from the operator as to the allegation.

It is worth noting the passage of this particular litigation over a summary offence not only involved two separate Crown appeals, from the Magistrates' Court to the Supreme Court under s 92 of the *Magistrates' Court Act* 1989 and then from the Supreme Court to the Court of Appeal, but covered a time frame of almost five years from date of the alleged offence (where the reading was a relatively low 0.074%) in September 1998 to the date of the Court of Appeal's judgment on 29 July 2003.

For a number of reasons contained in the lengthy judgment, the Court of Appeal's decision in *Moore* has potential to be a paramount case in the 'defence armory' to defeat charges where a motorist furnished a sample into a breath analysing instrument allegedly revealing blood alcohol in excess of the prescribed concentration.

***Impagnatiello v Campbell* [2002-2003] 6 VR 416; [2003] VSCA 154 – No proof of instrument as defined**

In *Impagnatiello v Campbell* the Court of Appeal, reversed Balmford J's decision in *Impagnatiello v Campbell* (2001) 35 MVR 181; [2001] VSC 425. Eames JA, with whom Callaway and Buchanan JJA agreed, held that Balmford J had erred in dismissing the motorist's appeal against conviction by a magistrate on a charge of exceeding the prescribed alcohol concentration within three hours of driving under s 49(1)(f) of the RSA

At the Magistrates' Court hearing when asked the relevant question by the prosecutor under s 58(5) of the RSA (to prove the apparatus was a breath analysing instrument within the meaning of the RSA), namely, whether the instrument had any identifying serial number or mark on it, the informant said it did and that it had the serial number 0032. The prosecutor did not take the matter further by asking additional questions about any markings on the machine. Furthermore, the informant was not asked whether

the instrument was a breath analysing instrument within the meaning of the RSA, nor did he volunteer that to be so. Thus the approach under s 58(4)(a) to prove that an instrument used was that as defined in the RSA was also not adopted. Eames JA held, the remainder of the Court agreeing, at [15] “It is clear...that the absence of the relevant evidence was fatal to the prosecution case.”

In relation to a Crown submission that the presumption of regularity assisted the prosecution in its assertion that it had proven that the instrument was that contemplated in s 3, Eames JA held at [32] , “Even assuming that the respondent was acting under a public duty when conducting the breath test on the appellant a presumption of regularity would not establish that the instrument he used in purported performance of his duty was one which duly complied with the definition in the Act. That is an element of the offence and a matter on which strict proof was required.”

In relation to Crown submissions that inferences could be drawn to prove the instrument was that within the meaning of s 3, Eames JA held at [34] that “...none of the suggested inferences were...capable of being drawn and their individual incapacity in that respect was not overcome when they were combined...the conclusions sought to be drawn amounted to mere speculation, and were not properly drawn inferences. The conclusions drawn...could certainly not establish beyond reasonable doubt, either as discrete inferences or as a final conclusion when all are drawn together, that the instrument was compliant with s 3.” At [35] Eames JA also held “The conclusion is inescapable, therefore, that there was no proof of an essential element of the offence. The charge ought to have been dismissed.”

Eames JA, Callaway and Buchanan JJA agreeing, observed at [40] that “The requirement of notice under s 58(2) and (2A) is...to oblige the defence to spell out any technical or substantive defence which was to be taken in answer to the certificate. Sub-section 2(A) requires there be notice of “any fact or matter with which issue is taken”...the notice under sub-s (2) must state what matters addressed by s 58(2)(a) to (f) are challenged, and as to what fact or matter.”

***Platz v Barmby* (2002) 135 A Crim R 571; [2002] VSC 531 – Breach service requirements**

In *Platz v Barmby* Byrne J allowed a motorist's appeal on a question of law (s 92 of the *Magistrates' Court Act* 1989 ("the MCA")) against conviction for an offence under s 49(1)(g) which provides that a person is guilty of an offence if they have, "...had a sample of blood taken...in accordance with ss 55 or 56 within 3 hours after driving or being in charge of a motor vehicle" and a careless driving charge. This was because the motorist was served the charge and summons less than 14 days prior to the mention date as required by s 34(1)(a)(ii) of the MCA. His Honour adopted a strict approach.

He further held that the minimum 10 day period for personal service of a certificate provided for in s 57(5) of the RSA had not been complied with. Compliance with the service requirement was pre-condition to admissibility. The underlying policy was that defendants should have opportunity to consider the certificate's content well before trial. A certificate short-served in terms of date of tender into evidence was inadmissible.

***Day v County Court of Victoria* (2002) 37 MVR 319; [2002] VSC 426 – Informed consent re blood**

In *Day v County Court of Victoria and Hanson* Smith J allowed a motorist's application for judicial review of a County Court Appeal judge's decision to convict on a s 49(1)(b) offence. He held that s 57(9) of the RSA was intended by the Parliament that a driver have a choice to provide a blood sample or not and the driver should express consent before blood is taken or the evidence of the result could be tendered.

It was not open to a County Court appeal judge to find consent was made following exercise of a choice (in circumstances where more than 3 hours had passed since the time of driving) because the driver remained under the impression that he had no choice thus, when asked by the doctor, his assent amounted to no more than allowing a doctor to take the sample and not the giving of consent. Smith J held that he did not accept that it

would be Parliament's intent that anything short of informed consent would suffice to enable a blood sample to be taken and given in evidence where ss 57(9) and (10) apply.

REFUSAL OFFENCES

***Halepovic v Sangston* (2003) 40 MVR 415; [2003] VSC 464 – Doctor not present when blood required**

In a motorist's appeal on a question of law against conviction for a charge under s 49(1)(e) of the RSA of refusing to allow a doctor to take his blood in accordance with s 55(9A) of the RSA following unsuccessful attempts to obtain a breath sample, Bongiorno J held in *Halepovic v Sangston* [2003] VSC 464 at [35(a)(ii)] read with [9(a)(ii)] that a requirement for the taking of blood made pursuant to s 55(9A) needs to be made in the presence of either a registered medical practitioner or approved health professional. As neither of those people were present when the requirement was made then no lawful requirement could have arisen.

It should be noted that, in relation to charges under s 49(1)(e) of refusing to comply with a requirement for a breath sample, Buchanan JA at the Court of Appeal in *DPP v Greelish* (2002) 128 A Crim R 144 stated at [14] "If a person refuses to accompany a member...to a police station...that person does not fail to comply with a requirement to furnish a sample of breath...for that requirement can only be made where the...instrument is...found..."

Previously, in *DPP v Foster* [1999] 2 VR 643 at 658 Winneke P held, "if the motorist refuses to accompany the police officer to the station...where a sample can be furnished...he or she is not at risk of being charged with... 'refusing to furnish a sample, when required'; but only at risk of being charged with the offence of 'refusing to accompany...'".

It should also be noted that 41 years ago, in *Scott v Dunstone* [1963] VR 579 at 582, Sholl J had held "...Parliament contemplated that the instrument must be there and available for operation at the time the requirement is made...I have rejected any notion of applying to this legislation the concept of anticipatory breach or refusal...it can be said that police may be put to inconvenience in having an instrument brought to a police station in order to make a request for a sample, whereupon the suspect may refuse...; or...says, "It is no use bringing a breath analyser, I will not take a test under any circumstances," it is a useless labour to have one brought. That is a matter for police administration; but if the correct instrument is not there at the time, it merely means that no offence can be committed..." Bongiorno J, in *Halepovic*, applied those earlier decisions to the instant case.

It would appear that s 34 of the *Transport Legislation (Miscellaneous Amendments) Act* No 49/2004 (Vic), which received Royal Assent on 16 June 2004, and commenced operation by virtue of s 5 on 17 June 2004, is dedicated to, amongst other things, removing the affect of *Halepovic*, with its amendment to s 49 by the addition of sub-s (1A) and the explanatory memorandum to the Bill supports this.

***DPP v Skinner* (2004) 40 MVR 427; [2004] VSC 32 – Reasonable doubt as to belief instrument incapable**

In *DPP v Skinner* [2004] VSC 32 Nettle J heard an attempt by the prosecution to revisit the correctness of Hedigan J's decision in *DPP v Holden* (1999) 28 MVR 315; [1999] VSC 14 through a Crown appeal against the dismissal by a magistrate of a s 49(1)(e) refusal charge constituted by a motorist refusing to allow a doctor to take his blood following alleged incapability of a breath analysing instrument to measure blood alcohol concentration through breath.

Nettle J stated at [7] that the Magistrate was bound to follow the decision in *Holden*. His Honour also held at [16] that Hedigan J was right to hold that it was incumbent on the prosecution to adduce evidence sufficient to establish beyond reasonable doubt that the police officer requiring the accused to furnish a breath sample believed on reasonable grounds that the breath analysing instrument was incapable of measuring the accused's blood alcohol concentration in grams per 100 ml. Nettle J further held at [18] and [22] that it was open to the Magistrate not to be satisfied beyond reasonable doubt of the existence of reasonable grounds for the belief. He dismissed this Crown appeal.

It should be pointed out, however, that at [19] Nettle J stated that he did not accept that it was incumbent on the prosecution to prove that the apparent inability of the machine to produce a reading in gms/100 ml was due to defect or malfunction, or that the inability to obtain a reading was due or not due to inadequate or excessive volume of breath supplied, or to establish any reason why the machine would not work, or even to establish that there might or might not have been some chance of obtaining a reading if further tests had been attempted. His Honour disagreed with some of the observations made by Hedigan J in *Holden* which may have suggested a different conclusion.

A Crown application for leave to further appeal to the Court of Appeal was dismissed on 2 April 2004.

***Hryzikos v Mansfield* [2002] 5 VR 485; [2002] VSCA 175 - Reasonableness**

(i) Unreasonable requirement to remain

In *Hryzikos v Mansfield* the Court of Appeal dismissed a Crown appeal, against Smith J's decision in *Mansfield v Hryzikos* (2001) 32 MVR 491; [2000] VSC 474. Smith J held that an implication of reasonableness should be read into all police requirements under s 55(1), including requirements to remain for a test on a breath analysing instrument. He allowed the motorist's appeal against a conviction on a s 49(1)(e) of the RSA offence of refusing to remain for a test on two bases.

The Court of Appeal heard that after the motorist furnished one breath sample the breath analysing instrument produced a certificate “alcohol in mouth”. The operator told her that she would have to wait another 15 minutes for a second breath test. The motorist said she wished to go outside the bus to smoke. She was told if she left the booze bus she may lose her licence for 2 years and receive a fine. She left the bus, was followed by police and again warned. She had a cigarette, remained close to the bus and in company of the two police. Outside the informant said to her that she was required to furnish a breath sample and if she refused she may be fined and lose her licence for 2 years.

At no time did she say would not give a further sample nor that she would leave the site. At all times she was close to the bus and police. She went back inside to get her handbag and when she came out for the second time a dispute broke out between police and the her partner leading to her and her partner’s arrest. She was also charged with refusing to remain under s 49(1)(e).

Smith J applied to s 55(1) requirements Ormiston J’s observations in *DPP v Webb* [1993] 2 VR 403 at 408 who had stated that the only requirement which needs to be read into s 53 (power of police to require a preliminary breath test) is one of reasonableness – if a requirement to undergo a preliminary breath test is unreasonable it is no offence to refuse it. Smith J held the requirement to remain must be reasonable and that there is no unlawful refusal if the requirement to remain is unreasonable.

The Court of Appeal in *Hrysikos* held it was unnecessary to consider whether once the person accompanied police to the bus, it was unreasonable not to let the person leave the interior to have a cigarette although Eames JA discussed some examples of reasonable and unreasonable requirements. Accordingly, Smith J’s decision was not reversed.

This is an arguable new defence to charges of refusing to remain for a test on a breath analysing instrument under s 49(1)(e), ie, a defence of ‘unreasonable requirement’.

(ii) Remaining in proximity

In *Hryzikos* the Court of Appeal confirmed the correctness of Smith J's second reason for allowing the appeal, ie., the motorist did in fact "remain there" within the meaning of s 55(1) of the RSA notwithstanding she left the booze bus against directions of police to stay in the bus until the instrument was ready to receive her second breath sample. This is because a requirement to remain simply means a requirement to remain linked to a place where the test is to be conducted. What is critical is the proximity to the place. A person can remain at the place notwithstanding that the person may be outside its four walls.

Thus, the Court of Appeal's decision in *Hryzikos v Mansfield* confirms Smith J on this point. This is another arguable new defence to charges of refusing to remain for a test on the instrument, ie, remaining in proximity to the place where testing is to occur.

(iii) Requirement to accompany to be reasonable

It should be noted that Eames JA stated in obiter dictum at [58] that requirements to accompany must also be reasonable. Accordingly, there may be another arguable new defence to charges of refusing to accompany for a test on a breath analysing instrument, ie, the defence of unreasonable requirement to accompany.

***Goodey v Clarke* (2002) 37 MVR 121 [2002] VSC 246; *Clarke v Goodey* [2002] VSCA 23/8/02 – Pleadings Defect**

In *Goodey v Clarke* the Supreme Court dismissed a refusal charge after allowing a motorist's appeal under s 92 of the MCA against conviction for an offence under s 49(1)(e) of refusing to furnish a sample of breath for analysis by a breath analysing instrument. The evidence revealed that the motorist complied with the first police requirement but refused to comply with the second requirement to provide a further sample.

Bongiorno J held that a magistrate erred in holding that an offence of refusing to furnish a sample of breath for analysis by a breath analysing instrument in response to a s 55(1) requirement was cognate with refusing to comply with a requirement under s 55(2A) to furnish a further breath sample. The magistrate erred in allowing the charge laid under s 49(1)(e) (pleading the requirement alleged to have been refused was under s 55(1)) to be amended after 12 months had passed since the commission of the offence. An application for leave to appeal by the Crown was refused by the Court of Appeal on the basis that Bongiorno J's decision was "not attendant with sufficient doubt" to warrant leave being granted.

Conclusion

The above selection of superior court decisions reveals some recent trends in drink-driving defences argued by barristers practising in this unique speciality in the criminal law. They also reveal the complexity of some of the legal issues involved and the fact that sometimes litigation in this area of the law reaches the highest courts in this State.

With continual efforts by the Parliament of Victoria to fetter the sentencing discretion of the Courts in imposing punishment upon findings of guilt and tougher penalties being imposed (including alcohol ignition interlock conditioning upon re-licensing) vigorously fought contests over drink-driving and related charges in Victoria are likely to continue unabated as the 21st Century progresses.

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