Noll v Pryce [2000] NTSC 37

PARTIES:	DEBORAH JOY NOLL
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA9 of 2000 (9919197)
DELIVERED:	8 June 2000
HEARING DATES:	17 May 2000
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal - Justice's Appeal - statutory interpretation - open to police to believe cannot lawfully require person provide breath sample following indication person suffered from asthma.

Appeal - statutory interpretation - meaning of "is required" - legislative intent clear - not necessary to make arrangements to take accused to hospital before requiring accused to give a blood sample.

Appeal - facts of police precis agreed by parties at first instance - issues not raised at trial cannot be raised on appeal.

Legislation

1. *Traffic Act (NT)*, s20(3)(a); s23(1)(b); s23(b); s23(7); s23(11)(ii); s25; s26;s25(3)(a); s25(2); s26(1)(b); s25(6); 25(2).

Cases

1. *Scott v Dunstone* (1963) VR 579, mentioned.
2. *Hammond v Lavender* (1976) 11 ALR 371, mentioned
3. *Carlton and Others v Holcombe and Others* (1986) 65 ALR 656, applied.
4. *Meertens v Falkenberg* (1981) 82 L.S.J.S. 202, mentioned.
5. *Dyson v Daire* (1983) 106 L.S.J.S. 219, mentioned.

REPRESENTATION:

Counsel:

Appellant:	J Stirk
Respondent:	R Noble

Solicitors:

Appellant:	Povey Stirk
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Noll v Pryce [2000] NTSC 37
No. JA9 of 2000 (9919197)

BETWEEN:

DEBORAH JOY NOLL
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 June 2000)

MILDREN J*:*

[1] This is an appeal from a conviction for refusing to give a sample of blood, contrary to s20(3)(a) of the *Traffic Act*.

[2] The facts in this case were agreed and read by consent by the police prosecutor onto the transcript. The facts, as read, were that at about 12:05 am on Monday 22 August 1999, the appellant was driving a motor vehicle south bound upon a public street, Heffernan Road, Alice Springs. As she approached the intersection of Heffernan Road and Colonel Rose Drive (where Heffernan Road is a terminating carriageway) she locked up the brakes of her vehicle for about 56 metres, crossed over Colonel Rose Drive and knocked over two signs. Her vehicle came to rest at a point about seven

metres off the road. It had suffered some moderate front end damage. At 1:24 am police attended at Bojangles Nightclub and spoke to the appellant. She was asked if she knew who the driver was. She said, "Yes, I was". She was then subjected to a breath test which was positive. She was then advised that she was under arrest for the purpose of a breath analysis. She was taken to the police watch-house for that purpose.

[3] The appellant advised the police that she had asthma and did not think that she could complete a breath analysis. She was advised that, due to the fact she had asthma, she would not be required to submit to breath analysis, but that she would have to provide a sample of blood. She refused, saying, "I'll not have anyone from the hospital stick a needle into me". She was again advised of the consequence of not providing a sample and given the option of having a doctor of her own choice. She said: "No. I'm not having a needle put into me. I'll do the breath analysis". The appellant was advised that breath analysis was no longer an option, although two hours following the accident had not yet passed. She was then charged and admitted to bail.

The Grounds of Appeal

[4] The grounds of appeal, as set out in the Amended Notice of Appeal, are:

1. The Magistrate erred in law and in fact in finding the refusal of the appellant to agree to a blood sample at the Police Station constituted a breach of section 20(3)(a) of the *Traffic Act* (NT) without police taking

her to the hospital and finding a medical practitioner. The requirements of the *Traffic Act* were not met.

2. The words used by the appellant did not amount to a refusal at law or as a matter of fact by the appellant to submit the provision of a sample for breath analysis or blood sample, in breach of section 20(3)(a) of the *Traffic Act* (NT*).*

The Legislative Scheme

[5] The appellant was requested by the police at Bojangles Nightclub to undergo a breath test. This was presumably authorised by s23(1)(b) of the Act. The test having been positive, the appellant was required next to undergo breath analysis. Presumably, this was also authorised by s23(1)(b) as well as s23(6). No point was taken before the learned Magistrate about the lawfulness of the original request for a sample of breath and there is no challenge to this in the Amended Notice of Appeal. The appellant was arrested and taken to the watch-house for breath analysis. This was presumably authorised by s23(7). No point was taken about the lawfulness of the arrest. The appellant having indicated that she suffered from asthma which might prevent her completing breath analysis, it is open to conclude that the police believed that they might not lawfully require the appellant to provide a sample of breath for breath analysis because of s23(11)(ii). Mr Stirk for the appellant conceded this.

[6] The relevant provisions of s25 provide:

(2) Where a member of the Police Force does not, by reason of section 23(11)(a), require a person to submit to a breath test or breath analysis, that member or another member may, subject to subsection (6), require that person to give a sample of blood for the purposes of having a blood test carried out by an authorized analyst.

(3) Where, in pursuance of subsection (2), a person is required to give a sample of blood -

(a) a member of the Police Force shall make arrangements for the person to be taken to a hospital and for a sample of that person's blood to be taken; and

(b) subject to section 26, the person in charge of the hospital shall ensure that the sample is taken as soon as practicable.

(4) Subject to subsection (5), a blood sample which is taken in pursuance of this section is the property of the Commissioner.

(5) The person who takes a blood sample in pursuance of this section may make approximately half of the sample available to the person from whom it was taken.

(6) Where a member of the Police Force has not required a person to submit to a breath test or breath analysis by reason of section 23(11)(a)(ii), that member or another member shall not, under subsection (2), require that person to give a sample of blood for the purpose of having a blood test carried out by an authorized analyst unless the member reasonably believes that the concentration of alcohol in that person's blood is such that the person has committed an offence against this Act.

[7] It is necessary to refer also to s26 which provides:

26. Right to take blood

(1) For the purposes of section 25, a member of the staff of a hospital who is a medical practitioner or under the direct supervision of a medical practitioner may -

(a) take a sample of the blood of a person who is unconscious or apparently incapable of consenting to the giving of the sample; or

(b) require a person to give a sample of blood.

(2) A member of the staff of a hospital is not required to take a sample of a person's blood under section 25 if that member believes on reasonable grounds that -

(a) the concentration of alcohol in the person's blood is already known;

(b) the taking of the sample would be detrimental to the person's medical condition;

(c) the injuries of the person were not received in a motor vehicle accident or the motor vehicle accident happened more than 12 hours before the person entered the hospital; or

(d) a period of more than 4 hours has elapsed since the person entered the hospital.

(3) No action or proceedings for assault, whether in or outside the Territory, shall lie against a person who takes a blood sample for the purposes of this Act.

[8] Section 20(3)(a) provides:

(3) A person shall not, on being required under this Act to give a sample of blood for the purposes of having a blood test carried out to ascertain the concentration of alcohol in that person's blood, refuse or fail to -

(a) give that sample of blood;

(b) comply with an arrangement made under this Act for taking the person to a hospital or of taking samples of the person's blood; or

(c) provide, in accordance with the directions of the person taking the blood sample, a sample of blood sufficient for the completion of the blood test.

Ground 1

[9] The principal submission of Mr Stirk is that, unless and until the appellant was taken to a hospital and there required to give a sample of her blood, no offence had been committed. He submitted that, on the authority of *Scott v Dunstone* (1963) VR 579 at 581-2, there must be strict compliance with the conditions of the Act and there can be no anticipatory refusal: see also *Hammond v Lavender* (1976) 11 ALR 371 at 375.

[10] The submission of Mr Noble was that the requirement to give a blood sample occurs prior to the person being taken to the hospital and that therefore the conditions for the offence were met.

[11] I consider that on the true construction of the Act, the requirement to give a blood sample may precede the going to the hospital and it may be repeated at the hospital. Section 25(3)(a) provides that "where, in pursuance of subsection (2), a person is required to give a sample" the member shall make arrangements for the person to be taken to the hospital and for the sample to be taken. The tense of the verb "is required" suggests that the requirement has already been made and is still in force. If the requirement was yet to

take place, one would expect to see "is to be required". This is further supported by s20(3)(a) which says that:

> ...a person shall not, on being required...to give a sample of blood refuse or fail to...(b) comply with an arrangement...for taking the person to a hospital or of taking samples of the person's blood.

This even more strongly makes it clear that the legislative intent is that the requirement may precede the making of arrangements to take the person to a hospital. The fact that a second requirement is envisaged at the hospital is supported by s26(1)(b) - and in that case, the requirement is made by a medical practitioner, not by a police officer.

[12] Mr Stirk submitted that there was no evidence that the relevant police officer reasonably believed that the appellant's blood alcohol concentration was such that she had committed an offence, as required by s25(6), and that therefore the conditions for the police officer to require her to give a blood sample under s25(2) had not been met. This was not raised before Mr Wallace SM who noted that there was "no dispute about the legality of any of the police action in testing, requesting and requiring the defendant to do various things". It is not the subject of a ground of appeal; it is not mentioned in Mr Stirk's written submission and seems to have occurred to him for the first time during oral argument. No application has been made to amend the Notice of Appeal. It is true that there is no specific evidence of this. There is evidence that the blood test was positive, but that is not enough in itself to draw an inference as to what the relevant police officer

may have believed and whether or not that belief was reasonable. As I mentioned previously, the parties adopted the unusual course before Mr Wallace SM of agreeing the facts as alleged in the police *precis*, not withstanding that this was a plea of not guilty. No oral evidence was given and I draw the inference from the way the trial was run that the area of argument was known by the parties to be confined to the matters raised before Mr Wallace SM by Mr Stirk. Had Mr Stirk indicated that he intended to take the point now taken, the prosecutor could have called the relevant police officer to give evidence; even if the point was first taken during the hearing, the prosecutor might have been given leave to re-open his case.

[13] I decline to allow this point to be now raised. It is fundamental to the due administration of justice that substantial issues between the parties are ordinarily litigated at the trial, otherwise the main arena for the settlement of disputes moves to the Appeal Court, reducing the court of trial to no more than a preliminary skirmish. Issues not raised at the trial, whether deliberately or by inadvertence, will not be permitted to be raised on appeal for the first time, particularly where the issue has been identified and agreed facts put to the Court on the basis that that was the issue and additional facts may well have been able to be led if some other issue is to be raised: see *Coulton and Others v Holcombe and Others* (1986) 65 ALR 656 at 660-61.

[14] Mr Stirk submitted that assuming there had been a valid request, there was no "wilful, conscious, deliberate" refusal or failure to provide a sample: see *Meertens v Falkenberg* (1981) 92 L.S.J.S. 202 at 202-3; *Dyson v Daire*

(1983) 106 L.S.J.S. 219 at 220. This is a question of fact. The agreed facts indicate that the appellant was advised of the consequences of not providing a sample. I think there is material upon which the learned Magistrate could have drawn the inference that the appellant's refusal was wilful, conscious and deliberate, if that issue had been raised before him, although it may have been necessary to flesh out the evidence by calling further evidence as to precisely what the appellant was advised. But it was not raised and was not an issue the learned Magistrate was called upon to decide. It ought not now be permitted to be litigated in this Court.

[15] It was also contended by Mr Stirk that the words used by the appellant did not amount to a refusal, because she had indicated a willingness to supply a sample of her breath. Again this point was not raised before the learned Magistrate. In fact, Mr Stirk told the learned Magistrate that the fact that his client had subsequently indicated a willingness to undergo the breath test and the police response thereto was "a furphy". I do not consider that the point should now be permitted to be raised for the first time, but in any event, it is utterly without merit. The police were in the position that if they then administered a breath test it might be suggested that the results were inadmissible because of s23(11)(a)(ii) which provides:

> A member of the Police Force shall not require a person to submit to a breath test or breath analysis under this section -
>
> (a) if it appears to the member that the person has -

(i) (not relevant); or

(ii) a physical disability which prevents that person from providing a sample of breath for, or a sample sufficient for the completion of, a breath test or breath analysis.

[16] Mr Stirk suggested that the appellant could waive s23(11)(a)(ii) but this is a dubious proposition - certainly not one I would expect a police officer to act upon, if it had occurred to him, without clear authority from this Court. The appellant's behaviour was such that she gives me the impression of doing her best to avoid having to give either a sample of her breath or a blood sample. I consider that the police were right to tell her that it was now too late to give a sample of her breath, and that, by her conduct, she did in fact refuse to give a sample of her blood.

[17] The appeal is therefore dismissed with costs.
