

PARTIES: HAMISH JOHN CHEYNE MACPHERSON
v
ALAN WILLIAM PETER THOMSON
TITLE OF COURT: SUPREME COURT
JURISDICTION: APPEAL UNDER THE JUSTICES ACT
FILE NO: 131 of 1992
DELIVERED: 15 July 1992
HEARING DATES: 26 June 1992
JUDGMENT OF: ASCHE CJ

CATCHWORDS:

Vehicle and Traffic - Offences - Certificate on Completion of Breath Analysis - Issue as to whether the police officer used the Breath Analysis Instrument Authorised by Form 7 - Common sense inference that authorised Breath Analysis Instrument was used

Traffic Act 1987 (NT), s27 and s29
Traffic Regulations 1988 (NT), regs 112, 113, 115, 117 and Form 7

Henning v Lynch [1974] 2 NSWLR 254, considered
Houston v Harwood [1975] VR 698, considered

REPRESENTATION:

Counsel:
Appellant: C. Ford
Respondent: R. Davies

Solicitors:
Appellant: Elston & Gilchrist
Respondent: Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 131 of 1992

In the matter of an Appeal under the
JUSTICES ACT

AND in the matter of an Appeal from a
decision of the Court of Summary Jurisdiction
at Darwin

BETWEEN:

HAMISH JOHN CHEYNE MACPHERSON

Appellant

AND:

ALAN WILLIAM PETER THOMSON

Respondent

CORAM: ASCHE CJ

REASONS FOR JUDGMENT

(Delivered 15 July 1992)

This appeal is from a ruling of a Magistrate in the Court of Summary Jurisdiction. It is a short point but important to the operation of breathalyser tests under the Traffic Act and Regulations.

The appellant was charged that on 2 November 1991 he drove a motor vehicle on a public street while having a concentration of alcohol in blood equal to 80

milligrams or more of alcohol for 100 millilitres of blood namely 199 milligrams of alcohol. The appellant was convicted.

The original ground of the Notice of Appeal was that "the learned Magistrate wrongly admitted into evidence a certain Certificate on Completion of Breath Analysis in Form 7 under the Traffic Act and that, in the absence of that certificate, there was no evidence of the concentration of alcohol in the defendant's blood at the time of driving".

On the appeal Mr Ford, for the appellant, sought and received leave to substitute for that ground, the following:

" That the learned Magistrate wrongly inferred from the Form 7 of the Regulations tendered that the result of the breath analysis was produced by an instrument for which the operator was authorised to use."

That states more accurately the ground of appeal because the Form itself, if signed by one of the classes of persons referred to in s27(1), could, by virtue of that section be received as prima facie evidence of the matters stated in the certificate, e.g., in this case that the appellant's breath was tested by some form of breathalyser instrument. The Form was in fact signed by "a person authorised by the Commissioner ... to use a prescribed breath analysis instrument for the purposes of this Act" - see s27(1)).

Mr Ford's point therefore was not strictly to the admissibility of the Form itself but to use which the learned Magistrate made of it; a use which, Mr Ford submits, was not authorised or permissible by the contents of the Form.

In order to understand the submission it is necessary to refer to s27 and 29 of the Act and certain of the Regulations made thereunder and to the Form itself.

S27 provides:

"EVIDENCE BY CERTIFICATE

- (1) In a prosecution for an offence against section 19 or 20, a certificate in the relevant prescribed form purporting to be signed by -
 - (a) a person authorized by the Commissioner under this Act to use a prescribed breath analysis instrument for the purposes of this Act;
 - (b) a member of the staff of a hospital; or
 - (c) an authorized analyst,

is prima facie evidence of the matters stated in the certificate and the facts on which they are based.

- (2) For the purposes of subsection (1), the Regulations may prescribe forms of certificate to be used by different persons on different occasions."

S29 provides:

"BREATH ANALYSIS INSTRUMENT

- (1) The Regulations may provide -
 - (a) that a device for the carrying out of a breath analysis is a prescribed breath analysis instrument;

(b) for the proper use of a prescribed breath analysis instrument,
for the purposes of this Act.

(2) A court shall not receive evidence that a prescribed breath analysis instrument, when it is in good working order and used in accordance with the Regulations relating to its use, does not give a true and correct assessment of the concentration of alcohol in a person's blood."

Regulation 112 provides:

"PRESCRIBED BREATH ANALYSIS INSTRUMENT

For the purposes of section 29 of the Act and these Regulations, a device for the carrying out of breath analysis, which is, or apparently is, of a type known as -

- (a) a breathalyser and manufactured, or apparently manufactured, under United States Patent Number 2824789; or
- (b) a Drager Alcotest 7110,

is a prescribed breath analysis instrument."

Regulation 115 is headed "Forms", and commences with the words:

"For the purposes of s27 of the Act, a form of certificate set out in Schedule 2 may be used by the person and on the occasion indicated in the following table."

Then follow various circumstances in which appropriate Forms may be

used. The relevant ones, for the purposes of this appeal are:

"Form 1 - May be used by a person authorized by the Commissioner under the Act to use a prescribed breath analysis instrument of a type referred to in Regulation 112(a) for the purposes of the Act after that person has completed a breath analysis using that instrument."

"Form 7 - May be used by a person authorised by the Commissioner under the Act to use a prescribed breath analysis instrument of a type referred to in Regulation 112(b) for the purposes of the Act after that person has completed a breath analysis using that instrument."

Regulation 117 provides, inter alia, that the Commissioner may authorise members of the Police Force to use a prescribed breath analysis instrument for the purposes of the Act.

In the present case a police officer completed Form 7 in the following manner:

" NORTHERN TERRITORY OF AUSTRALIA Form 7

Traffic Regulations

CERTIFICATE ON COMPLETION OF BREATH ANALYSIS

I, MICHAEL WAYNE POTTS, a member of the Police Force authorised by the Commissioner under the *Traffic Act* to use for the purposes of the *Traffic Act* a prescribed breath analysis instrument, namely the Drager Alcotest 7110, certify

that I carried out a breath analysis on Saturday 2nd November 1991 of a sample of the breath of **HAMISH JOHN CHEYNE MACPHERSON**, Gems, RAAF Base, Darwin whose occupation is Mechanic and whose age is 21 completing the analysis at the time stated beneath my signature hereunder and the result of the analysis expressed as a percentage of alcohol in blood as shown on and recorded by the breath analysis instrument was 0.199%.

AND I further certify that -

- (a) by the analysis I assessed that there was a concentration of alcohol in the blood of the person providing the sample of the number of grammes of alcohol per 100 ml of blood that is expressed as a percentage as shown on and recorded by the breath analysis instrument;
- (b) shortly before the analysis I carried out the procedure required by the regulation 113(5);
- (c) before carrying out the breath analysis I satisfied myself that the person who provided the sample had not consumed any intoxicating liquor within the 15 minutes immediately preceding the giving of the sample;
- (d) I provided an unused mouthpiece for use in providing the sample; and
- (e) within one hour after completing the breath analysis I signed and delivered to the person who provided the sample a statement as required by regulation 116(2).

Dated 2nd November 1991

M.W. Potts

9.27pm"

As can be seen from the certificate, the police officer states that he is authorized to use the Drager Alcotest 7110; which statement is, pursuant to s27(1), prima facie evidence that he was so authorized. But the rest of the statement merely claims that "he carried out a breath analysis" and the result was to show a percentage of 0.199% was "recorded by the breath analysis instrument".

Mr Ford's point is simply this, that, while the Magistrate could and indeed should, in the absence of evidence to the contrary, accept that the police officer was authorised to use the Drager Alcotest 7110, nothing in the subsequent parts of the statement say specifically that he did use that instrument. He may have used the breathalyser referred to in Regulation 112(a) ie, that described by US Patent Number 2824789; but if he did, there is no proof that he was authorised to operate that instrument; or he may have used an unauthorised instrument. In either of those cases the prosecution must fail because it is not proved that the instrument used was one recognised by the regulations and operated by a person authorized to operate it.

Proof of these matters must be found, if they are to be found at all, in the Form. The prosecution do not suggest that there was any other evidence placed before the court on these issues; as there was, for instance, in *Houston v Harwood* [1975] VR 698; or would, if necessary, have been permitted as in *Henning v Lynch* [1974] 2 NSWLR 254 at 261.

In the last mentioned case, however, Jeffrey J remarked at 260 that, "A statement does not cease to be a statement about a named subject matter by reason of its not being the most complete or exact statement on that subject matter it is possible to make ... the test for admissibility of the certificate is not concerned with the completeness (much less of course the accuracy) of any particular in it: the test is merely whether there are in it particulars answering each of the statutory categories".

In that case his Honour found that the certificate tendered did not contain all the statutory categories but had been supplemented by other evidence.

The question here is whether in the Form 7 as tendered can be found the necessary "statutory categories" as his Honour Jeffrey J calls them, even if they are not couched in terms which "make them the most complete or exact statement" it is possible

to make.

It seems to me that on any commonsense view of the matter (and accepting the onus of proof on the prosecution to prove these matters beyond reasonable doubt) there is ample material from which the inference and the only proper and reasonable inference from the Form and the Regulations, is that the police officer who operated the instrument operated the Drager Alcotest 7110 which he was authorised to operate.

While the expression "may be used", appearing in Regulation 115, indicates that the matters set out in the Forms can be proved in different ways, Form 7 is the form which, if used, is to apply when the Drager Alcotest 7110 is used; as distinct from Form 1 which applies when the instrument described by US Patent Number 2824789 is used.

The statement by the Police Officer which appears in the Form 7 is that "shortly before the analysis I carried out the procedure required by the regulation 113(5)". Pursuant to s27(1) such a statement must be accepted as prima facie evidence of the matters stated in the certificate and the facts on which they are based (emphasis added).

Regulation 113(5) specifically and only refers to regulation 112(b) which in turn specifically and only refers to the the Drager Alcotest 7110.

"113. BREATH ANALYSIS

.....

- (5) To prepare a prescribed breath analysis instrument of a type referred to in regulation 112(b) for use at a particular time, a person shall, shortly before that time, ensure that -

- (a) the instrument is turned on; and
 - (b) the words 'READY TO START' appear on the display panel of the instrument."
- (Emphasis added)

I cannot really accept that in those circumstances the court could seriously say that there still remained an inference sufficient to raise a reasonable doubt that the officer might have used an instrument other than the one he stated he was authorised to use and other than the instrument, and the only instrument to which the procedure required by Regulation 113(5) applies; particularly when the police officer states that he carried out that procedure shortly before the analysis. In stating that he "carried out the procedure required by the regulation 113(5)", the police officer cannot (because of the very terms of the regulation) be referring to any other instrument.

Without that statement the appellant may well have succeeded. It is not unreasonable to argue that merely because a person states he is authorised to operate a certain instrument, his statement that he carried out an operation which could have been done by that instrument, but could equally have been done by other instruments, without specifying what instrument he used, may be sufficiently ambiguous to raise a reasonable doubt that he used the instrument he was authorised to use; although it might suffice on the balance of probabilities.

But if he then goes on to say that he used a procedure applicable to only one type of instrument, being the one he is authorised to use, and that procedure was applied shortly before use, it requires a leap beyond common sense to accept that there is then a reasonable doubt about the nature of the instrument used.

Ultimately it is simply a matter of whether certain elements of the charge are properly proved by the certificate. Allowing that the terms of the certificate could be somewhat more precise, there remains no doubt in my view that the only inference one could properly draw from the evidence, i.e., the Form, is that the police officer

signing it used the Drager Alcotest 7110 which he was authorised to operate.

Of course there remains a possibility that the police officer used some other instrument. But in the circumstances here the possibility is in the realms of fantasy. The spectacle of a police officer, authorised to operate a particular instrument, carefully preparing the instrument for use, deciding at the last moment to use some other instrument and then completing a Form 7 without mentioning this change of plan argues a capacity for eccentricity or deviousness which nothing otherwise suggests. Ambiguities should normally be construed in favour of the defence; but that does not extend to sacrifices on the altar of common sense. Any ambiguity in one part of the Form is clarified by looking at the Form as a whole.

The learned Magistrate first admitted the certificate (Form 7) into evidence. That, in my view, was correct. His Worship then drew certain conclusions from the material in the certificate. His Worship said:

"In order to be admissible the certificate on its face must satisfy the mandatory element contained in Regulation 117(2)(b). In my opinion the certificate sought to be tendered satisfies that element.

A close examination of the certificate shows, firstly, that Michael Wayne Potts is a member of the police force duly authorised to use a breath analysis instrument, namely the Drager Alcotest 7110. Secondly, the certificate shows that Michael Wayne Potts, before carrying out a breath analysis on the defendant, carried out the procedure required by Regulation 113(5) which is tantamount to the operator preparing for use a Drager Alcotest 7110, which is a prescribed breath analysis instrument, by shortly before using that instrument, turning on the instrument and ensuring of the words 'Ready to start' appeared on the display panel of the instrument. Thirdly, the certificate on its face shows that the member, before carrying out the analysis, satisfied himself that the defendant had not consumed any liquor within the previous 15 minutes. Fourthly, the certificate shows that the member carried out a breath analysis on the defendant. And fifthly, that the member within one hour after completing the breath analysis signed and delivered to the defendant a statement as required by Regulation 116(2). That is, a statement which, amongst other things, showed the result of the analysis expressed as a percentage of alcohol in the blood as shown on the prescribed

breath analysis instrument.

In light of those matters, and indeed the other matters in the certificate, and bearing in mind that prior to the carrying out of the breath analysis a prescribed breath analysis instrument was activated and bearing in mind that after the breath analysis was conducted a statement was furnished to the defendant pursuant to Regulation 116(2), that is a statement which shows the result of the analysis as assessed by a prescribed breath analysis instrument.

In light of those matters, and indeed the other matters in the certificate, the only conclusion that can be drawn from an examination of the certificate, and I might say an irresistible conclusion, is that a prescribed breath analysis instrument was used, namely the Drager Alcotest 7110.

In my opinion the certificate implicitly addresses the mandatory element that a prescribed breath analysis instrument be used.

There is nothing on the face of the certificate which indicates that anything other than a prescribed breath analysis instrument was used. Furthermore, as a matter of logic and common sense the matters expressly stated in the certificate, when read with reference to the relevant provisions of the Act and regulations, amount to an unambiguous statement that the operator used a prescribed breath analysis instrument.

The conclusion I have drawn is one which has been arrived at on the face of the certificate and I have not ventured outside the certificate to draw the conclusion that a prescribed breath analysis instrument was used."

In my view the learned Magistrate was correct. The appeal should be dismissed and the decision confirmed.