PARTIES:	SHIRLEY JUNE McDERMOTT v ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	No. JA30 of 1994
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JUDGMENT OF:	Kearney J

CATCHWORDS:

Vehicles and traffic - offences - failing to provide a sample of breath - whether defence in s20(2) Traffic Act available - the offender must adduce credible evidence to establish the defence

Traffic Act (NT) s20(1)(b) and (2)

Urquhart v Newchurch [1976] Qd. R. 130, referred to
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1980-81) 147 CLR 297, applied

REPRESENTATION:

Counsel:

Appellant:	D. Norman
Respondent:	M. Carey

Solicitors:

Appellant:	Dennis Norman & Associates
Respondent:	Office of Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. JA30 of 1994

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against an adjudication by the Court of Summary Jurisdiction at Darwin

BETWEEN:

SHIRLEY JUNE McDERMOTT
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 14 March 1995)

The appeal

The appellant appeals pursuant to s163(1) of the Justices Act against an adjudication by the Court of Summary Jurisdiction on 16 September 1994 in the form of a findingthat a charge against the appellant under s20(1)(b) of the Traffic Act (herein "the Act") had been proved.

Section 20(1) and (2) of the Act provide, as far as material:-

> "(1) A person shall not, on being required under this Act to submit to a breath analysis, refuse or fail to
>
> (a) submit to; or
>
> (b) provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for the completion of,
>
> the breath analysis.
>
> - - -
>
> (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant satisfies the court that it would have been detrimental to the defendant's medical condition at the time when required so to do for the defendant to have submitted to a breath analysis or that the defendant had other reasonable grounds for refusing or failing to submit to a breath analysis." (emphasis mine)

The sole ground of appeal was that the learned Magistrate erred in holding that a letter from a Dr. Wake stating that the appellant suffered from chronic airway obstruction was insufficient evidence to support a Defence under s20(2) of the Traffic Act, when no objection had been taken by the Prosecutor to the tendering of the said letter. As will be seen (p9), Dr Wake's letter was in fact to the effect that when the appellant had been his patient "approximately five years ago" she had then "suffered from Chronic Airways Obstruction relative to smoking".

The background to the appeal

On 7 September 1994 the appellant had pleaded not guilty to a charge of failing to provide a sample of breath sufficient for the completion of a breath analysis, in

accordance with directions given her by a person carrying out that breath analysis. This is the offence under s20(1)(b) of the Traffic Act. On 16 September the Court found that offence proved. On 22 September, without proceeding to a conviction, the Court ordered pursuant to s4(1) of the Criminal Law (Conditional Release of Offenders) Act that the appellant be discharged on entering into a good behaviour bond. However, as a statutory consequence of the Court's finding that the offence was proved, the appellant's licence was automatically cancelled and she was disqualified from holding a licence for 12 months; see s39(1)(b) of the Act.

At the hearing the prosecution called 2 witnesses. The appellant testified, as did her daughter. Her counsel, Mr Norman, submitted that the appellant had established the defence under s20(2) of the Act. The Court published its reasons for decision, rejecting this submission, on 16 September.

The Court there made the following findings, as far as is presently relevant:-

> "The Defendant entered the RBT [a random breath testing station on the Stuart Highway] - - -
>
> - - -
>
> Senior Constable McDonagh approached the Defendant who was seated in the driver's seat of her husband's motor vehicle and required her to undergo a breath test on a Dragar unit with a fresh mouthpiece (as he was authorised to do under sections 23(2) and (4) of the Act).
>
> The Defendant complied with the requirement (as she was obliged to do under section 23(5) of the Act) and blew into the Dragar hand held unit.
>
> The Dragar unit showed a reading of .113%. (I prefer the evidence of Senior Constable McDonagh to the Defendant on this).

Senior Constable McDonagh advised the Defendant that the breath test was positive and that she was under arrest for the purpose of being conveyed to the Palmerston police station for the purpose of a breath analysis (as was permitted by sections 23(6) and (7) of the Act). (I prefer the evidence of Senior Constable McDonagh and Constable McIntyre on this to the other evidence. The Defendant was upset and confused at the time and her daughter was mistaken. [Their evidence had been to the effect that the appellant had been required to go to the Police station because the roadside Dragar unit had malfunctioned and had failed to give a reading]. Even if the breath test machine did not work (which I find that it did) there was no need to go to the Palmerston police station [for a further breath test on a Dragar unit] as there was at least one other breath test machine at the RBT which could have been used.

The Defendant was upset by these events and at some stage at the scene was crying.

Some personal details were taken from the Defendant at the scene.

The Defendant was placed into the rear of the police wagon and conveyed to the Palmerston police station.

Upon arrival at the Palmerston police station the Defendant was taken by Constable McIntyre directly into the breath analysis room.

Constable McIntyre was a member of the police force and was authorised to operate a prescribed breath analysis instrument.

Constable McIntyre conducted the breath analysis upon the Defendant.

Senior Constable McDonagh was seated a few metres away from where the Defendant was seated during the breath analysis.

Constable McIntyre started the machine and asked the Defendant a number of questions.

In answer to a question of whether the Defendant was suffering from any illness Constable McIntyre believed the Defendant replied "high blood pressure". Senior Constable McDonagh recalled the Defendant saying "a heart condition" and something else which he could not now recall. Constable

> McIntyre also recalled the Defendant telling him that she was taking antibiotics, pain killers and tablets for high blood pressure. The Defendant said that she told Constable McIntyre that she was suffering an abscess in the bowel for which she was taking antibiotics and pain killers and she had a heart problem. I prefer the evidence of the Defendant on this aspect.
>
> Constable McIntyre did not notice any injuries on the Defendant and did not believe that the Defendant was ill in any way or that the breath analysis would be detrimental to her health and accordingly he required the Defendant to submit to a breath analysis (see section 23(11) of the Act).
>
> Constable McIntyre told the Defendant to blow into the machine in one continuous breath and he would tell the Defendant when to stop.
>
> The Defendant blew into the machine.
>
> The Defendant stopped blowing before she was told to stop.
>
> No result was recorded.
>
> Constable McIntyre advised the Defendant that if she failed to provide a sufficient sample on the next occasion she would be committing an offence and explained the penalties to the Defendant.
>
> Constable McIntyre followed the same procedures again and required the Defendant to blow again (as is authorised in section 23(9) of the Act).
>
> The Defendant blew into the machine again.
>
> The Defendant stopped blowing before she was told to stop.
>
> The Defendant failed to supply a sample of her breath sufficient for the completion of the breath analysis." (emphasis mine)

Having made these findings the Court proceeded to find the offence proved, subject to consideration of any defence under s20(2) of the Act; cf., for example, the different facts in *Urquhart v Newchurch* [1976] Qd R 130, where

it was held there was no failure to provide breath for analysis. His Worship turned to consider whether a defence under s20(2) of the Act was open on a charge of an offence under s20(1)(b) as opposed to an offence under s20(1)(a) and, if so, whether the appellant had discharged the onus of establishing that defence. As to these matters the Court made the following findings and drew the following conclusions:-

> "The Defendant in her evidence stated (and I accept) that at the time she was suffering from an abscess in the bowel for which she was taking antibiotics and pain killers. The Defendant also said that she had a heart problem of some unspecified kind (unsubstantiated by any medical evidence) and she had been treated by Dr Wake some 5 years earlier for "chronic airways obstruction relative to smoking" (Ex D1). The Defendant said that her breathing problem had gotten worse over the years and she is always short of breath.
>
> I find on the balance of probabilities that the Defendant was unfamiliar with the [breath-testing and analysis] procedures; was upset and confused when told at the RBT she was being arrested; was embarrassed and further upset at being placed into the cage of the police vehicle; was anxious and nervous at the Palmerston police station; tried on two occasions to provide a sufficient sample of breath but did not do so.
>
> No medical evidence was called by the Defendant to give a possible medical explanation for why the Defendant was unable to provide a sufficient sample of her breath. Exhibit D1 does not address the issue at all and I should not guess or speculate.
>
> I am satisfied that the Defendant did not [in terms of s20(1)(b) of the Act] "refuse" to provide a sufficient sample of her breath, but rather "failed" to do so after doing the best she felt she could do at the time.
>
> Pursuant to section 51 of the Act:
>
> > "An offence against or a contravention or failure to comply with this Act (other than sections 30 or 31) is a regulatory offence."

Accordingly, [an offence against] section 20[1] of the Act is a regulatory offence. The effect of this is that, except for sections 26(1)(c) and (d) (and sections 23 and 24 to the extent necessary to give effect to section 26(1)(c) and (d)), 30(3) and 38 of the Criminal Code, Part II of the Criminal Code does not apply to section 20(1) of the Act (by virtue of section 22 of the Criminal Code).

The effect of this is that the various defences, excuses and justifications set out in sections 23 to 43 (inclusive) of the Criminal Code do not apply [to an offence under s20(1) of the Act], including the defence in section 31 of the Criminal Code.

Accordingly, in my view, upon the prosecution establishing the elements of the offence under section 20(1)(b) of the Act (which I find that they have) then the charge is proved.

Mr Norman (counsel for the Defendant) then seeks to rely upon the defence in section 20(2) of the Act, which states as follows:

> "(2) It is a defence to a prosecution for an offence against subsection (1) if the defendant satisfies the court that it would have been detrimental to the defendant's medical condition at the time when required so to do for the defendant to have submitted to a breath analysis or that the defendant had other reasonable grounds for refusing or failing to submit to a breath analysis."

I find that, although section 20(2) of the Act purports on its face to be a defence to "an offence against subsection (1)", the language of section 20(2) on its face relates to an offence against section 20(1)(a) only.

The language of section 20(2) is to be contrasted with the language of section 23(11)(a)(ii) where the Legislature has expressly provided for both of the situations contemplated in section 20(1).

It is therefore open to find that the defence afforded by section 20(2) is only applicable to an offence against section 20(1)(a) of the Act. However, such an interpretation would in my view lead to an unfair result, namely:

- that if a person who because of medical condition or other reasonable grounds [in terms of s20(2)] was [thereby] legally entitled to refuse (or fail) to submit to a breath analysis and did refuse [when required to submit under s20(1)] then the defence [under s20(2)] would be applicable

- but if the same person who was entitled to refuse [in terms of s20(2)] actually tried to comply with the police officer's direction [under s20(1)] but was unable to provide a sufficient sample due to the same reason that would have entitled him to refuse in the first place (namely due to medical condition or other reasonable grounds) then that person could be guilty of an offence [in the sense that he/she could not rely on the defence in s20(2)].

In my view, such an interpretation of section 20(2) of the Act would lead to an injustice. In my view, of the two offences created in section 20(1) of the Act, the outright refusal in section 20(1)(a) is the greater. Accordingly, the defence in section 20(2) being directly applicable to the greater of the offences should also be construed so as to apply to the lesser as well.

Accordingly, in my view, where a defendant is charged (as here) with an offence against section 20(1)(b) of the Act, it is a defence to that charge if the defendant satisfies the court on the balance of probabilities that:

(i) at the time the defendant was required to submit to a breath analysis;

(ii) it would have been detrimental to the defendant's medical condition to have "fully" submitted to the breath analysis [in the sense of providing a sufficient sample of breath] or

(iii) the defendant had other reasonable grounds for refusing to "fully" submit to the breath analysis [in the sense of failing to provide a sufficient sample of breath]."

(emphasis mine)

I should say that I respectfully agree with his Worship that the better view is that the defence in s20(2) is open on a charge under s20(1)(b) of failing to provide a

sufficient sample of breath. A contrary interpretation would give s20(2) an operation which would be "capricious and irrational", for the reasons stated by his Worship; see *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1980-81) 147 CLR 297 at p321-2. A similar position obtains as regards the defence in s20(4) to the offence against s20(3). I add that it is difficult to draw a practical distinction between "refuse" and "fail" in s20(1); and that although s20(1) distinguishes the offence of refusing or failing to submit to a breath analysis from the offence of refusing or failing to provide a sufficient sample of breath for breath analysis, it is questionable whether in reality these are separate and distinct offences.

His Worship continued:-

> "In the instant case, I am not satisfied on the balance of probabilities that the Defendant has established (ii) (supra). In my view, for a defendant to avail themselves (sic) of this defence it would be incumbent upon them to adduce credible medical evidence to establish a link between any particular medical condition (which should be specified) and the Defendant's alleged inability to provide a sufficient sample of breath.
>
> The only medical evidence was in exhibit D1 which stated that "(the Defendant) was a patient of mine (Dr Wake) approximately five years ago in Howard Springs. At that time she suffered from Chronic Airways Obstruction relative to smoking."
>
> No more recent medical opinion was forthcoming. No medical opinion was before the Court as to whether this (or any other condition) would have affected (and how) the Defendant's ability to provide a sufficient sample of breath. If this was the case, then evidence should have been introduced by the Defendant through competent expert testimony. It is in my view insufficient (as happened here) for the Defendant to say that she tried to comply but could not, without any independent expert evidence to support that.
>
> No other "reasonable grounds" were put forward by Mr Norman apart from the Defendant's medical

condition. None were in my view open on the evidence before me.

In the end result, I find that the Defendant has failed to satisfy me of the matter necessary in section 20(2) of the Act.

I therefore find the charge under section 20(1)(b) of the Act proved."

On the basis of these findings the Court made the following remarks and disposition on 22 September 1994, viz:-

"- - - I've found the charge proved on the 16th day of September 1994. In the course of the hearing I obtained some information concerning your background and circumstances, which has been confirmed today on plea, that is a 55 year old person who has been driving for a large number of years and has been in the Northern Territory for 19 years, who comes before the court with no priors alleged, of any sort.

You are a person who is clearly entitled to every sympathy the court can give and every leniency the court can give in relation to penalty. Also, your circumstances were unusual. You're charged with failing to provide a sufficient sample of breath, and as I found in my reasons, you were somewhat distressed and upset by the events on this evening and the circumstances and that your failure to provide a sufficient sample clearly falls at the lower end of the range and was not a deliberate attempt to avoid prosecution or providing a sample but may, to some extent, have been caused by your distress.

The legislation, as it stands, doesn't afford that as an excuse for reasons I set out in my decision. Given the unusual nature of this matter and your good record, I find the offence proved, but without proceeding to a conviction, I direct you be released on entering into a bond in the sum of $500, own recognisance, to be of good behaviour for a period of 12 months. I don't impose any other conditions.

You will be disqualified from holding or obtaining a licence or from driving for a period of 12 months which is the minimum period of disqualification under the legislation. I must warn you that you mustn't drive during that period of 12 months otherwise you face a term of imprisonment for up to

> 12 months, so you mustn't drive, also should you drive during the next 12 months that would be a breach of your bond, and that the matter would then come back for reconsideration."
> (emphasis mine)

The appellant's submissions

Mr Norman conceded that by virtue of s53 of the Act an offence under s20(1)(b) is a regulatory offence. However, he submitted that the strict liability thereby imposed on a defendant was "somewhat softened by ss(2) of s20". The Court had correctly held that the defence under s20(2) was open, on a charge under s20(1)(b) of the Act; I agree. Against that background Mr Norman submitted that the Court had erred in finding that the defence under s20(2) - "that it would have been detrimental to the [appellant's] medical condition at the time - - - to have submitted to a breath analysis" - had not been established, on the balance of probabilities. In particular it was erroneous to find (see p6) that -

> "No medical evidence was called by the Defendant to give a possible medical explanation for why the Defendant was unable to provide a sufficient sample of her breath. Exhibit D1 does not address the issue at all and I should not guess or speculate."

Mr Norman's argument proceeded as follows. He stressed the immediately following finding (see p6):-

> "I am satisfied that the defendant did not "refuse" to provide a sufficient sample of her breath but rather "failed" to do so after doing the best she felt she could do at the time."

He submitted that in the first passage above the Court seemed to be "saying that the medical evidence in Exhibit D1 is the only medical evidence"; this was not correct as there was further credible evidence before the Court, which was sufficient to establish the defence under s20(2). This

further evidence was the unchallenged evidence of the appellant as to her medical condition at the time.

Mr Norman observed that the contents of Exhibit D1 were admitted in evidence without objection by the respondent. He submitted that since the Act is a penal statute it must be interpreted as indicated in *Beckwith v The Queen* (1976) 135 CLR 569; and that the evidence before the Court was sufficient to have satisfied it on the balance of probabilities that the defence under s20(2) had been made out.

The respondent's submissions

Mr Carey of counsel for the respondent made 6 submissions, viz:-

(1) The offence under s20(1)(b) of the Act was a "strict liability offence". That is clear.

(2) The Court had clearly raised with the appellant's counsel on 7 September 1994 that there was a lack of up-to-date medical evidence as to the appellant's current medical condition. Yet her counsel had then adhered to his view that the appellant "did not have to call that evidence", and rested his case in that regard on Exhibit D1, a letter of 7 September 1994 which related to her medical condition 5 years before, together with her own evidence. It could not therefore be said that the appellant had been taken by surprise as to the view which the Court had expressed on 16 September in relation to that evidence.

(3) The appellant bore the onus of establishing the defence under s20(2). Accordingly, it was not relevant that the prosecutor had not objected to the tender of Exhibit D1 and did not cross-examine the appellant on her evidence as to her medical condition, when the question was whether the admitted evidence was of sufficient quality to discharge the onus.

(4) The contents of Exhibit D1 were not sufficient to establish the defence under s20(2) of the Act.

(5) No evidence had been adduced by the appellant or respondent to establish whether it is comparatively harder to provide a sample of breath on the breath analysis machine at the Police Station than on a Dragar roadside breath machine. It was to be noted that the appellant had been able to provide a sufficient breath sample on the Dragar machine.

(6) Although there was evidence that the appellant felt she was doing the best she could in the circumstances, the question was whether in fact she had shown it would have been medically detrimental for her to have provided a sufficient sample of breath.

Conclusions

In my opinion this appeal must be dismissed.

Clearly, the Court took both the evidence of the appellant and that of Dr. Wake (Exhibit D1) into account, when assessing whether the appellant had discharged the onus of establishing the defence under s20(2), on the balance of probabilities. The Court correctly held that -

> "- - - for a defendant to avail themselves (sic) of this defence [under s20(2)] it would be incumbent upon them to adduce credible medical evidence to establish a link between a particular medical condition (which should be specified) and the defendant's alleged inability to provide a sufficient sample of breath".

That is no more than commonsense. As a practical matter, to establish the defence under s20(2) of the Act, a medical opinion dealing with the defendant's current medical condition should be tendered in evidence. That was lacking here. Certainly, the Court was entitled to require better evidence than the evidence placed before it, to be satisfied that the appellant had proved that it would be detrimental to her current medical condition to have provided a sufficient breath sample. The weight which his Worship gave to the evidence before him was a matter for him. An appellate Court cannot depart from his conclusions in that regard, unless convinced he was wrong. I am far from convinced he was wrong in concluding that the evidence was inadequate to prove the defence under s20(2) of the Act.

His Worship considered all the evidence placed before him in that regard and the circumstances in which the offence had occurred, and concluded that the evidence to establish the defence under s20(2) of the Act was insufficient (see pp9-10). His Worship was entitled to take that view. Accordingly, the appeal must be dismissed; the finding and the orders made by his Worship are affirmed.

Orders accordingly.