Peter Phillip Brown v Dean Edward Lowe [2013] NTSC 14

PARTIES:	Peter Phillip Brown v Dean Edward Lowe
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	132 of 2012 (21247669)
DELIVERED:	26 March 2013
HEARING DATES:	8 March 2013
JUDGMENT OF:	HILEY J

CATCHWORDS:

TRAFFIC LAW – Interpretation – *Traffic Act* s 29AAD(2) – Stated case – Whether a person who has provided a sample of his breath that was not sufficient for analysis is entitled to request that a further analysis be carried out.

Justices Act s 162
Traffic Act s 29AAD(2)

Police v Ioannou (2010) NTMC 16, approved

REPRESENTATION:

Counsel:

Applicant:	David Morters
Respondent:	John Moore

Solicitors:

Applicant:	Director of Public Prosecutions
Respondent:	NAAJA

Judgment category classification:	B
Judgment ID Number:	HIL1301
Number of pages:	9

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

Peter Phillip Brown v Dean Edward Lowe [2013] NTSC 14
No. 132 of 2012 (21247669)

BETWEEN:

Peter Phillip Brown
Applicant

AND:

Dean Edward Lowe
Respondent

CORAM: HILEY J

REASONS FOR DECISION

(Delivered 26 March 2013)

[1] By a special case dated 15 November 2012 under s 162 of the *Justices Act*, this Court has been asked to provide its opinion on a question of law arising out of the hearing of a complaint made by the applicant against the respondent concerning an alleged traffic offence on 5 April 2012.

[2] The question on which the Court's opinion is sought is:

> "Whether, on a true construction of section 29AAD(2) of the *Traffic Act*, the phrases 'a person who has submitted to a breath analysis' and 'after receiving the result of the initial analysis' include, respectively, a person who has not supplied a sufficient sample of breath for an analysis to be obtained; and a result which is that there has not been an analysis."

[3] Set out here are the main facts provided by the learned Magistrate in the special case stated:

" I. The above-named complainant made a complaint against the above-named defendant for that the said defendant did, on 5th day of April 2012 at Katherine in the Northern Territory of Australia, fail to provide a sufficient sample of breath for analysis contrary to section 29AAE of the Traffic Act (and other charges, about which no question arises).

II. The said complaint came on for hearing before me on 25th day of October 2012 and the result of such hearing was as follows:

III. At the hearing, the following facts were either proved, or admitted, by the parties:

1. On the 5th day of April 2012, the said defendant, having been the driver of a motor vehicle on a road, was properly arrested for the purpose of a breath analysis and taken to the Katherine Police Station.

2. At Katherine Police Station, Senior Constable Anthony Charles Jones, an authorised operator, required the said defendant to submit to a breath analysis, having properly prepared a prescribed breath analysis instrument.

3. The said defendant blew into that said instrument for a time, then ceased to blow before a sample sufficient for the machine to analyse has been provided. The said defendant had blown long enough to light up about 40 percent of the 14 lights which serially illuminate as the machine receives breath; all 14 must light up for a sufficient sample.

4. Senior Constable Jones then uttered words "Test Repeat" more than once, while remonstrating with the said defendant for ceasing to blow, and asking him why he had stopped (contrary to Jones's continuing instructions). Jones seemed inclined to offer the said defendant a second opportunity to supply a sufficient sample, and the said defendant seemed inclined, indeed keen, to take up that opportunity. Jones then consulted a colleague, Constable Ian Wilson, who advised Jones to the effect that suspects "only get one chance now". Jones accepted that advice. The said defendant was not given a second opportunity.

IV. Upon these facts, I was persuaded on the balance of probabilities that the said defendant had impliedly, if not expressly, made clear his desire to try a second time to provide a sufficient sample."

Relevant Legislative Provisions

[4] Section 29AAC provides that a police officer may, in certain circumstances, "require a person to submit to a breath test or a breath analysis (or both) to determine if the person's breath contains alcohol".

[5] Section 29AAD provides as follows:

> "**Further breath analyses**
>
> (1) A person who has submitted to a breath analysis (whether or not the sample provided was sufficient) may be required by a police officer to submit to another breath analysis on the same occasion and the person must provide a sufficient sample of breath for that analysis.
>
> (2) A person who has submitted to a breath analysis may, after receiving the result of the initial analysis, request that a further analysis be carried out on one other sample of the person's breath, and the police officer who carried out the initial analysis (or another officer) must carry out an analysis on one further sample of the person's breath provided the sample of breath is sufficient.
>
> (3) A request under subsection (2) must be made without undue delay after the person receives the result of the initial analysis."

[6] Section 29AAE(1) provides as follows,

> "A person who is required under section 29AAC or 29AAD to submit to a breath analysis must not fail to provide a sample of breath sufficient for the analysis to be carried out."

[7] That section then provides a wide range of penalties for breach of that provision.

[8] Section 29AAE(8) provides a defence in circumstances where the defendant satisfies the Court that it would have been detrimental to his/her medical condition to have submitted to a breath analysis, or that he/she had other reasonable grounds for failing to submit to a breath analysis. The application of that defence in the present matter is not intended to be within the scope of the stated case.

[9] Section 29AAE(7) says that a person is taken to have failed to provide a sufficient sample of breath for breath analysis "if the person's actions (or inactions) in any

way prevent a police officer *from requiring* the person to submit to breath analysis" – (italics added by me). I do not consider that provision to be relevant here, as there is no suggestion that the defendant did anything to prevent the police officers from requiring him to submit to the breath analysis.

[10] "Breath analysis" is defined in s 3(1) to mean "an analysis of a sample of a person's breath carried out for the purpose of assessing a concentration of alcohol in that person's breath".

[11] It may also be relevant to note that s 19(4) provides that "in this Part, a reference to a failure to submit to a breath test or breath analysis" is to be taken to be a reference to "a refusal or failure to submit to a breath test or breath analysis, or to provide a sufficient sample of breath for a breath test or breath analysis".

Consideration

[12] Counsel for both parties provided helpful submissions both written and oral, and both have submitted that the answer to the stated question should be "Yes". I agree, subject to a small qualification.

[13] The critical words in s 29AAD(2) for present purposes are the words:

(a) "[a] person who has submitted to a breath analysis"; and

(b) "after receiving the result of the initial analysis", following the words in a) above.

[14] As to (a), I can see no basis for a contention that a person who does make some attempt to provide a sample of his or her breath, following a requirement by a police officer under s 29AAC that he or she "submit to" a breath analysis, does

not in fact "submit" until and unless he or she does something in addition, namely "provide[s] a sample sufficient for the analysis to be carried out".

[15] There is no reason to so limit the normal meaning of the word "submit". In fact, despite the heading to s 29AAE ("offence of failing to submit to breath analysis") the offence is not failing to submit to a breath analysis. Rather, the offence is the failure "to provide a sample of breath sufficient for the analysis to be carried out."

[16] This important distinction is recognised by the fact that the respondent in the present matter has been charged with failing to provide a sufficient sample of breath for analysis, not with failing to submit to a breath analysis.

[17] On the facts stated, the respondent was a "person who has submitted to a breath analysis" for the purposes of s 29AAD(2).

[18] As to b), the question is whether the "result of the initial analysis" (i) is confined to the actual "breath alcohol content" – ie the "BrAC" - recorded (after the initial breath analysis has been sufficient to enable a reading to be obtained), or whether it (ii) also includes other situations where the initial breath analysis has or can not be completed and is simply unsuccessful? A breath analysis (from a person who has submitted to a breath analysis) might be unsuccessful for any number of reasons, including an inability or other failure to provide a sufficient sample.

[19] I consider that there is no justification for construing the words "result of the initial analysis" as narrowly as in the first of the above senses.

[20] As previously noted, there are a number of other "deeming" provisions which would not apply to a situation such as that here: namely where a person has

actually *failed to submit* to a breath analysis (cf ss 29AAE(8) & (9)) or where a person has prevented a police officer from requiring the person to submit (cf s 29AAE(7)). But the present matter involves a person who *has* submitted to a breath analysis, and who desires to have a second chance to have his or her breath analysed after receiving the "result" of the first "analysis" (provided that he or she has requested the further analysis "without undue delay" – s 29AAD(3)).

[21] I consider that the "breath analysis" begins when a person provides a sample of his or her breath, and that the term is not confined to the final recording of a person's actual breath alcohol content. The term relates to the process of analysing the person's breath: see the definition in s 3(1). If at any stage of that process something happens as a result of which a breath alcohol content will not be recorded, I would have thought that a "result" has occurred. This would be a "result" of the kind contemplated by s 29AAD(2), after which the person could request a further breath analysis.

[22] Consequently, I do consider that a person who has provided a sample of breath for the purposes of, and as part of the process of, a breath analysis, is entitled to request a further analysis irrespective of the "result" of the initial analysis.

[23] The above conclusions are also consistent with the opinion expressed by Oliver SM in *Police v Ioannou*[1] that:

> "In my view, subsection (2) is broad enough to include circumstances both where a person has submitted to a breath analysis and failed to provide a sufficient sample of breath and to where a sufficient sample has been provided and the person seeks a further analysis. On a person's request, in my view, police would be required to allow the further test."

[1] *Police v Ioannou* (2010) NTMC 16 at para [3].

[24] Subsequent to the decision in *Ioannou* (but not necessarily as a consequence of it) s 29AAD(1) was amended, but s 29AAD(2) was not. Under the earlier version of s 29AAD(1), only a person who had provided "a sufficient sample of breath for a breath analysis" could be required to undergo another breath analysis. However, the effect of the amendment was to expand the power of a police officer so that it could be applied to a person who has submitted to breath analysis *whether or not* the sample provided was sufficient. In other words, the amended s 29AAD(1) provided the police with a power to require a person to submit to a further breath analysis in circumstances similar to those that pertained here, namely where the sample provided was not sufficient for the machine to analyse (for example, where all 14 lights did not illuminate).

[25] At the same time, Parliament could have made a similar amendment to subsection (2) by adding the words "whether or not the sample provided was sufficient", consistently with the views expressed by Oliver SM in *Ioannou*'s case, and thus remove any doubt. Conversely, absent clear wording to the contrary, I see no reason why subsection (2) should be construed so narrowly as to be limited to circumstances where an actual reading was successfully obtained.

[26] I am reminded of the rule that an ambiguity in a provision which creates an offence "may be resolved in favour of the subject",[2] subject of course to the overriding need to have regard to "the purpose or object underlying the Act".[3]

[27] Just as a person who has failed to provide a sufficient sample can, under the amended s 29AAD(1), be required to submit to another breath analysis, I consider that s 29AAD(2) provides such a person with a co-relative right, namely to have a

[2] *Beckwith v R* (1976) 135 CLR 569 at 576, followed subsequently in other High Court decisions.
[3] Section 62A *Interpretation Act 1987*.

second opportunity to provide an appropriate sample to be analysed. In both cases, the reason for requesting a second breath analysis could be that the first result was or was thought to be unsatisfactory (by either party), for example because of the actual reading obtained or because the sample provided was not sufficient.

[28] I see no reason for construing the wording of s 29AAD(2) so narrowly as to deprive a person from having a second opportunity to provide an adequate sample of his or her breath, in further compliance with the requirement to submit to a breath analysis (under s 29AAC), and thus to attempt to avoid committing the offence created by s 29AAE(1), namely of failing "to provide a sample of breath sufficient for the analysis to be carried out."

Disposition

[29] I have no hesitation in answering "yes" to the first part of the question stated, namely that a "person who has submitted to a breath analysis" does include "a person who has not supplied a sufficient sample of breath for an analysis to be obtained".

[30] The second part is difficult to answer without qualification, as it asks whether "the result of the initial analysis" includes "a result which is that there has not been an analysis". I don't think this is exactly what the question intended, because it would seem to go without saying that if "there has not been an analysis" there could not have been an "initial analysis". I think that the latter part of the question should be understood (or if necessary amended to read) as if the words "a completed analysis" (or "an analysis resulting in the recording of a breath analysis content") were used instead of the words "an analysis". So

understood, the answer to the second part of the question stated would also be "yes".

[31] I note that this Court has the power to send any special case back to the Court of Summary Jurisdiction for amendment, or to amend the stated case itself.[4] Whilst I am prepared to amend the second part of the question in order to better define it, if requested by the learned magistrate or the parties, I hope that will not be considered necessary in light of my expressed understanding of what was intended by it.

[32] For that purpose, I give liberty to apply within 28 days.

[4] Section 162(3) *Justices Act*.