

*Wride v Cunnah* [2012] NTSC 63

PARTIES: WRIDE, Susan  
v  
CUNNAH, Trefor Lloyd

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 42 of 2012 (21144523)

DELIVERED: 24 August 2012

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JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: MORRIS SM

**CATCHWORDS:**

PROSECUTION APPEAL – EVIDENCE – Traffic offence – drive motor vehicle with a medium range blood alcohol content – admissibility of erroneous certificate on performance analysis – erroneous statement of the result of the breath analysis – certificate on performance of breath analysis did not substantially comply with the prescribed form – appeal dismissed

*Interpretation Act* s 68

*Justices Act* s 163(3), s 163(5)

*Traffic Act* s 22(1), s 29 AAD, s 29AAU

*Traffic Regulations* r 61, Schedule 2, Form 1

**REPRESENTATION:**

*Counsel:*

Appellant: M J McColm  
Respondent: P J Maley

*Solicitors:*

Appellant: Maleys  
Respondent: Office of the Director of Public  
Prosecutions

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

*Wride v Cunnah* [2012] NTSC 63  
No. JA 42 of 2012 (21144523)

BETWEEN:

**SUSAN WRIDE**  
Appellant

AND:

**TREFOR LLOYD CUNNAH**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 24 August 2012)

**Introduction**

- [1] This is a police prosecution appeal against the dismissal of a complaint against the respondent for the charge of drive a motor vehicle while having medium range breath alcohol content contrary to s 22(1) of the *Traffic Act*. The appeal is brought under s 163(3) of the *Justices Act*. An appeal against an order of the Court of Summary Jurisdiction dismissing a complaint is confined to a matter or question of law alone or a matter or question of both fact and law<sup>1</sup>.
- [2] The only ground of appeal is that the magistrate erred in law in excluding the certificate on performance of breath analysis from evidence. The

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<sup>1</sup> s 163(5) *Justices Act*.

appellant seeks the following orders. (1) The adjudication and orders of the Court of Summary Jurisdiction acquitting the respondent and dismissing the complaint are set aside. (2) The order of the Court of Summary Jurisdiction that the appellant pay the respondents costs is set aside. (3) The proceeding is remitted back to the Court of Summary Jurisdiction for summary hearing.

- [3] I dismissed the appeal on 24 August 2012 and I ordered the appellant to pay the respondent's costs of the appeal. Following are my reasons for doing so.

### **Background**

- [4] On 30 December 2011 Constable David Melhuish who was stationed at the Palmerston Police Station was rostered on evening shift on general duties. At about 7.40 pm he set up a static roadside breath testing station on Roystonia Avenue in Palmerston. During the course of the evening the respondent, who was driving a black Musso sports utility along Roystonia Avenue, was pulled over by Constable Melhuish and his senior partner for a random roadside breath test. He underwent the breath test and he produced a positive result for breath alcohol. He was arrested and taken to the Palmerston Police Station for the purpose of a breath analysis.
- [5] At 8.53 pm a breath analysis was conducted of the respondent's breath which the appellant alleges returned a reading of 0.085 grams of alcohol per 210 litres of exhaled breath. After being advised of that result the respondent requested another breath analysis which the appellant alleges returned a reading of 0.080 grams of alcohol per 210 litres of exhaled

breath. At 8.55 pm, after the second breath analysis was conducted, a certificate on performance of breath analysis was completed by police.

[6] The relevant part of par 5 of the certificate on performance of breath analysis which was sought to be tendered by the prosecution in the Court of Summary Jurisdiction states:

5. The result of the analysis shown on and recorded by the breath analysis instrument was

0.080 %

- grams of alcohol per 210 litres of exhaled breath (BrAC)

[7] Counsel for the appellant, Mr McColm, informed the Court that the certificate which was relied on by the prosecution in this case was a pro forma certificate then in use by the police.

[8] A complaint charging the respondent with driving a motor vehicle with a medium range breath alcohol content namely 0.08 grams of alcohol per 210 litres of exhaled breath contrary to s 22(1) of the *Traffic Act* was filed in the Court of Summary Jurisdiction on 23 January 2012, and the matter came on for summary hearing before Morris SM on 24 May 2012. The charge was read and the respondent pleaded not guilty. During the summary hearing Constable David Melhuish gave evidence and the police prosecutor sought to tender the certificate on performance of breath analysis under s 29AAU of the *Traffic Act*. The defence objected to the tender on the basis that the certificate did not comply with the form of certificate on

performance of breath analysis prescribed by the *Traffic Regulations*.

Constable Melhuish completed his evidence and a voir dire as to the admissibility of the certificate was then conducted. Prior to the voir dire the police prosecutor informed the Court of Summary Jurisdiction that apart from the tender of the certificate the prosecution did not propose to call any further evidence; nor did the prosecution propose call any evidence in the voir dire.

[9] The respondent gave evidence during the voir dire. He gave evidence that he was a qualified mechanical engineer and that the readings or results of all machines including Drager Alcotest machines have a tolerance for error range which was not specified in this case. The error range of the Drager Alcotest machine that was used in this case was not reported and was not transposed onto the certificate on performance of breath analysis.

[10] Mr Maley, who appeared for the respondent in the Court of Summary Jurisdiction and on the appeal, asked the presiding Magistrate to exercise her discretion and exclude the certificate on performance of breath analysis. He relied on two primary grounds on which he said the certificate should be ruled inadmissible. First, there was an error in the certificate which affected the reading and made the certificate unreliable. The result which the Drager Alcotest machine returned was not properly recorded in the certificate. A result of “0.080 % grams of alcohol per 210 litres of exhaled breath” was not a result the Drager Alcotest machine can give. The tolerance for error range of the Drager machine that was used in this case was not reported and

was not transposed onto the certificate. Second, the police had used part of the old prescribed form instead of the currently prescribed form under the *Traffic Regulations* for the certificate on performance of breath analysis, and the form used on this occasion did not comply with the Regulations.

[11] After reserving her decision for two hours, Morris SM ruled that the certificate on performance of breath analysis was inadmissible. Her Honour gave the following reasons for doing so.

I have got an application before me to exercise my discretion to exclude the key piece of evidence which is the certificate on performance of breath analysis. In considering whether or not to exercise my discretion in that way I have considered the following factors.

It is clear that the form 1 [used in this case] is not exactly as provided in the regulations under the *Traffic Act*. There is the addition of a percentage symbol at the end of the dotted line in paragraph 5 of the certificate. Paragraph 5 is the most important paragraph in the entire form. In strict mathematical terms, as I understand it, [what is written on the dotted line in paragraph 5] means, if one applies the percentage symbol, that the reading is in fact .0008 grams of alcohol.

Is the addition of the percentage symbol an inconsequential error as submitted by the prosecution or is it something more than that? There is no rule or regulation that I could find, or which has been brought to my attention, about errors on the face of these particular documents. In some legislation in relation to some documents, for example, under the *Justices Act*, there are slip rules where it is legislated that should there be an error on the face of a warrant or summons or something of that nature then it does not mean that the document itself is not valid. However, there is no slip rule that I could find in relation to the *Traffic Act*.

Of course, the Form 1 is evidence of an offence. The legislation has set up a scheme of guilt or liability by production of this form. It is a deeming form. It is very important then, given the [potential]

consequence [of admitting the form in evidence], that the form be correct. The form is used to convict somebody of an offence. The provisions of the *Traffic Act* and regulations mean that the form is evidence of an offence. As I said it is a deeming form. If what the form says is correct then you are guilty of an offence and there are very few, if any, defences left to you.

In considering the addition of the percentage [symbol], I have also considered what it is not. It is not a misspelt word. For example, 'breath' has not been misspelt with the 'e' and the 'a' reversed. It is not a case of a non-dotted 'i'.

A percentage is a numerical symbol of some historic significance. Prior to 1425, there was no evidence of a special symbol being used for percentage. The Italian term, 'per cento', for a hundred was used as well as several different abbreviations. At some point, a scribe of some sort used the abbreviation, pc, with a tiny loop, a small circle used in Italian numeration for primo secondo. This started appearing in pages that are recorded about the year 1425 and 1435. The pc with the loop eventually evolved a horizontal fraction sign by the year 1650 and thereafter lost the 'per'. So the percentage symbol, it would seem, has been part of our lexicon in relation to written numeracy and written literacy for a considerable period of time.

I do not find that it is an inconsequential addition in relation to this form. Numbers and symbols and decimal points are very important in relation to this particular form, particularly in relation to paragraph 5 [of the form].

I also consider in determining whether to exercise my discretion or not, the nature of the charge. This is not as serious a matter as many that come before the Court under the *Criminal Code* but it is a matter that can have serious consequences for some, including loss of livelihood as well as financial penalty.

Having considered all of those matters, I have determined that it is appropriate to exercise my discretion to exclude the certificate on performance of breath analysis from evidence for the reasons outlined. So I am going to exclude the certificate of performance on breath analysis because of the addition of the percentage symbol which is not on the form that is prescribed by the *Traffic Regulations*.



[12] Ms Morris SM did not accept the other submissions made by Mr Maley.

Further, there being no other evidence tendered by the prosecution, her Honour found the respondent not guilty, discharged him and ordered that the appellant pay his costs in the sum of \$710. Her Honour appears to have obtained the information about the percent sign in her reasons for decision from Wikipedia.

### **Section 29AAU of the Traffic Act**

[13] Section 29AAU of the *Traffic Act* states:

- (1) In any proceedings in a court, a certificate in the relevant prescribed form purporting to be signed by:
  - (a) a person authorised by the Commissioner under this Act to use a prescribed breath analysis instrument for this Act; or
  - (b) a member of the staff of a hospital or health centre; or
  - (c) an authorised analyst or a person employed by an authorised analyst;

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

- (1A) If evidence is given by a certificate as mentioned in subsection (1), it is not necessary to prove:
  - (a) the signature of the person who signed the certificate; or
  - (b) the person holds the capacity in which the person purported to act in signing the certificate.

- (2) For subsection (1), the Regulations may prescribe forms of certificate to be used by different persons on different occasions.
- (3) If the Regulations do not prescribe a form for a specific situation, the Registrar may approve a form for use in that situation.

[14] Section 29AAU of the *Traffic Act* enables proof of a person's breath alcohol content by tender of a **certificate** [emphasis added] in the relevant prescribed form. Both the certificate sought to be tendered in the Court of Summary Jurisdiction in this case and the prescribed form state:

I, ..., a police officer authorised by the Commissioner to use a prescribed breath analysis instrument known as a Drager Alcotest 7110 for the Traffic Act, **certify** [emphasis added] as follows: ...

The Macquarie Dictionary states that 'certify' means "1. to guarantee as certain; give reliable information of; 2. to testify to or vouch for in writing; 4. to assure or inform with certainty; to guarantee; endorse reliably". The Australian Oxford Dictionary states that 'certify' means "1 make a formal statement of; attest, attest to". Subsection 29AAU(1) states that the certificate is prima facie evidence of **the matters stated in the certificate** [emphasis added] and the facts on which they are based.

[15] Regulation 61 of the *Traffic Regulations* provides that for the purposes of s 29AAU of the *Traffic Act*, Form 1 under Schedule 2 to the regulations may be used by a person authorised by the Commissioner to use a prescribed breath analysis instrument for the purposes of the Act after that person has

performed a breath analysis using that instrument. Paragraph 5 of Form 1 states:

The result of the analysis shown on and recorded by the breath analysis instrument was (strike out whichever is not applicable): ....

- grams of alcohol per 210 litres of exhaled breath (BrAC)
- grams of alcohol per 100 ml of blood (BAC)
- % BAC

[16] Paragraph 5 of the prescribed Form 1 does not have the additional % sign which appears in the certificate on performance of breath analysis which was completed after the respondent's breath analysis was conducted.

### **Submissions of the appellant**

[17] Mr McColm submitted that the extra percentage sign that appears in the certificate that was sought to be tendered in the Court of Summary Jurisdiction had clearly been added in error by the drafter of that form. This is apparent because if you try and read the pro forma with the third dot point in paragraph 5 it reads, "the result of the analysis shown and recorded by the breath analysis instrument is % % BAC". The error is obvious. Further, he stated that this is not a case where there needs to be strict compliance with the form prescribed by the *Traffic Act*. In support of the latter proposition he relied on s 68 of the *Interpretation Act*.

[18] Section 68 of the *Interpretation Act* states:

Strict compliance with the forms prescribed by or under an Act is not necessary and substantial compliance, or such compliance as the circumstances of a particular case allow, is sufficient.

[19] Mr McColm said that the certificate that was sought to be tendered in the Court of Summary Jurisdiction substantially complied with the prescribed form, and the presiding Magistrate erred in law when she disallowed the tender of the certificate. He submitted that the departure from the prescribed form is trivial, and that a literal reading of the certificate would lead to an unreal and impractical result which would be at odds with both the charge on the complaint and the purpose of the certificate.

### **Consideration**

[20] Ably and valiantly as they were put, I do not accept Mr McColm's submissions.

[21] The result of the analysis stated in the certificate on performance of breath analysis of "0.080% grams of alcohol per 210 litres of exhaled breath (BrAC)" is, as Mr McColm fairly conceded, a meaningless result and therefore the certificate is prima facie evidence of a meaningless result. Subsection 29AAU(1) of the *Traffic Act* states that the certificate is prima facie evidence of the matters stated in the certificate and the facts on which they are based. That is, it is prima facie evidence of the result of the analysis which is stated in the certificate. As the result stated in the certificate on this occasion is meaningless, it does not logically tend to prove or disprove any elements of the charge against the respondent. The

contents of the certificate are therefore irrelevant and inadmissible in evidence. Even if the certificate had been allowed into evidence it could not have proven the charge against the respondent.

[22] As the primary purpose of the certificate on performance of breath analysis is to certify the result of the analysis shown on and recorded by the breath analysis instrument there has not been substantial compliance with the prescribed form nor has there been such compliance as the circumstances of the case allow. The certifying police officer should have crossed out the percent sign when he completed the certificate. He was not simply filling in a form. He was attesting to the reliability and accuracy of the information contained in the certificate. He was guaranteeing that the result of the analysis shown on and recorded by the breath analysis instrument was as stated in the certificate on performance of breath analysis.

[23] In my opinion, the presiding Magistrate did not err in law in disallowing the tender of the certificate on performance of breath analysis.

### **Police conduct**

[24] Prior to hearing this appeal I had the benefit of reading Blokland J's reasons for decision in *Forrester v Nicholas*<sup>2</sup> which involves yet another recent instance of police officers failing to comply with the relevant provisions of the *Traffic Regulations* dealing with the conduct of a breath analysis of a person. I also note that the evidence in the Court of Summary Jurisdiction

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<sup>2</sup> [2012] NTSC 61.

in this case reveals that Constable Melhuish's senior partner did not comply with s 29AAD(2) of the *Traffic Act* as he was not prepared to conduct the second breath analysis that was requested by the respondent.

[25] I have asked Mr McColm to bring these matters to the attention of the relevant senior police officer as it seems to me that further training of police officers may be required in this important area of their work. All police officers should ensure that they comply with the requirements of both the *Traffic Act* and the *Traffic Regulations* when they are conducting a breath analysis of a person.

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