Forrester v Nicholas [2012] NTSC 61

PARTIES:	FORRESTER, Brian Wayne v NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA37 of 2011 (21130680)
DELIVERED:	17 August 2012
HEARING DATES:	16 May 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS: APPEAL – Traffic offence – driving with a medium range blood alcohol content – operation of public policy – discretion where reg 58(2) has not been complied with – whether reg 58(2) is condition precedent to admissibility – appeal dismissed

Crimes Act (Vic) s 408A
Justices Act (NT) s 177
Traffic Act (NT) s 8D, s 22, s 29AAD,
Traffic Regulations (NT) r 58

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 14 CLR 355; applied

Assan v Meredith [2007] NTSC 12; *Bunning v Cross* (1978) 141 CLR 54; considered

Brain v Froude (1992) 16 MVR 218; *Chase Oyster Bar Bay Pty Ltd v Hamo Industries* (2010) 272 ALR 750; *Dillon v Dunstone* (1985) 2 MVR 211; *Ex parte Tasker; Re Hannan* [1971] 2 NSWLR 804; *French v Scarman* (1979) SASR 333; *Griffiths v Errington* (1981) 50 FLR 370; *Hayes v Minner* (1992) 109 FLR 339; *Halton v Beaumont* (1978) 52 ALJR 589; *Lloyd v Police* (2004) 89 SASR 383; *Nicholl v Hunter* (1994) 20 MVR 384; *PM v R* (2007) 232 CLR; *Police v Jervis, Police v Holland* (1998) 27 MVR) 396; *Ross v Smith* [1969] VR 411; *SZOFE v Minister for Immigration and Citizenship* (2010) 185 FLR 129; *Taylor v Daire* (1982) 30 SASR 453; *Tilbury & Lewis Pty Ltd v Marzorini* [1940] VLR 245; referred

Brown 'Traffic Offences and Accidents'. Lexis Nexis, Butterworths, 4th Edition.

REPRESENTATION:

Counsel:

Appellant:	Mr Lawrence SC
Respondent:	Ms Chalmers

Solicitors:

Appellant:	Michael Chin
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

Forrester v Nicholas [2012] NTSC 61
No. JA 37 of 2011 (21130680)

BETWEEN:

BRIAN WAYNE FORRESTER
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 17 August 2012)

Introduction

[1] The appellant seeks to overturn a conviction for a charge against s 22(1) of the *Traffic Act*, imposed in the Court of Summary Jurisdiction on 15 December 2011. The appellant was tried and found guilty of driving a vehicle on the Stuart Highway with a medium range blood alcohol content of 0.147%. The offending was alleged to have occurred in the early hours of 17 September 2011 at Darwin. The appellant was convicted and fined $400, ordered to pay a $40 victims levy and was disqualified from driving for 6 months.

[2] The grounds of the appeal are that the learned Magistrate erred in finding that he had a discretion to admit the relevant statutory certificate, "Certificate on Performance of Breath Analysis"[1] (the Certificate) in circumstances where reg 58(2) of the *Traffic Regulations* had not been complied with; that the learned Magistrate erred in the exercise of his perceived discretion to admit the certificate and that the appellant was deprived of a fair trial due to non compliance with s 29AAD of the *Traffic Act*. Section 29AAD relevantly provides that a person may request a further analysis be carried out on another sample of breath and a police officer must comply with such a request.

[3] All grounds of appeal are directed towards urging the conclusion that the the Certificate should have been excluded. Once admitted the Certificate becomes prima facie evidence of the matters it contains.[2]

Overview of the Proceedings before the Court of Summary Jurisdiction

[4] Three police officers were called as witnesses for the prosecution; Senior Sergeant Harrison, Constable Ball and Constable Trennery.

[5] Senior Sergeant Harrison originally apprehended the appellant after observing him speeding. He gave evidence that he followed the appellant along Tiger Brennan Drive, up Woolner Road and continued right onto the Stuart Highway. The appellant was apprehended on Ross Smith Avenue.

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1 Exhibit P2 in the proceedings in the Court of Summary Jurisdiction.
2 S 29AAU *Traffic Act*.

Senior Sergeant Harrison observed the appellant and formed the opinion that "he may be over-possibly over the limit".[3]

[6] Constable Ball and Constable Trennery subsequently attended the scene and made observations consistent with those of Senior Sergeant Harrison about the appellant's intoxication. The appellant submitted to the required roadside breath test and a positive reading was recorded. He was arrested and taken to the Darwin Watch House for further testing and processing.

[7] The appellant submitted to the Breath Analysis at 1:22am on 17 September 2011. Officers Ball and Trennery were in attendance at the Darwin Watch House. Officer Ball operated the Breath Analysis machine. In accordance with reg 58(1) he ensured a fresh mouthpiece was used.

[8] The learned Magistrate found that after administering the Breath Analysis, Constable Ball failed to comply with reg 58(2) of the *Traffic Regulations*. Regulation 58(2) provides that within one hour after completing a Breath Analysis the person carrying out the analysis *must* (my emphasis) sign and deliver to the person a statement recording the date, time, and result of the analysis.

[9] Regulation 58(3) provides that a statement printed by the Breath Analysis machine *may* (my emphasis) be used for the purposes of the statement under reg 58(2). The statement given to the appellant the next morning was of the type anticipated by reg 58(3); it was printed by the Breath Analysis

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3 T 6.5, 15/09/2011.

machine. This document was not however, delivered to the appellant within the one hour time limit set by reg 58(2). After the Breath Analysis, Constable Ball verbally informed the appellant that the result of his breath analysis was 0.147%. Officer Trennery's evidence was that Constable Ball told the appellant his reading was .144%. The appellant gave evidence that he recalled being told the reading was .14%: "that it was a reading of .14, something like that";[4] and that he was not shown the breath analysis statement until he was discharged at 9:15am.

[10] The appellant also gave evidence that on the night before his apprehension he was tired as he had not slept; that he had a particularly busy day at work; and that he had been in attendance at a professional function. He admitted to having several glasses of wine but said he could not remember how many exactly.

[11] The appellant had formed the view that he was not affected by alcohol sufficient to be in contravention of the *Traffic Act* and that he was safe to drive; he said he was surprised by the reading and as a result requested a blood sample be taken and tested. As a result of his request he was taken to the Royal Darwin Hospital where a blood sample was taken. The result of the blood test was ruled inadmissible (as irrelevant) by His Honour at the conclusion of the hearing and has not been the subject of this appeal.[5]

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4 T at 30.
5 T at 58.

[12] Upon returning to the Darwin Watch House from the hospital at approximately 3:00am, the appellant requested a second breath analysis. The question of compliance in relation to s 29AAD of the *Traffic Act* arises as the request was declined by the police officers. He spent the night in custody and was released at 9:15am the morning of 17 September 2011.

[13] Upon his release he received the statement of the details of the breath test with his personal belongings.[6]

[14] At the hearing before the Court of Summary Jurisdiction the appellant's counsel argued that the failure to comply with reg 58(2), by not giving the statement to the appellant as required, negated the prosecution's ability to rely on the Certificate as evidence of the breath analysis reading. The appellant argues that *if* the Magistrate had a discretion to allow the certificate to be tendered, under the principles outlined in *Bunning v Cross,*[7] it should have been exercised in favour of the appellant.

[15] His Honour accepted the statement under reg 58(2) was required to be in writing. His Honour concluded there was a discretion as to whether the Certificate should be admitted. In exercising the discretion he acknowledged there is general reluctance at law to require people to provide evidence against their own interests. He noted the mandatory wording of reg 58(2). He said that if something had occurred in terms of failing to comply with certain other parts of the *Traffic Act* or *Regulations* that went to

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6 Exhibit D6 in the Court of Summary Jurisdiction.
7 (1978) 141 CLR 54.

the "substance of the charge", the Court would have no hesitation in "throwing the charge out because the citizen's rights have not been adhered to sufficiently.[8] The learned Magistrate found the appellant "received the information that was required to be received".

[16] His Honour also found *Browne v Dunn* had not been complied with, in that he found police were not given the chance to agree or deny they handed the Certificate to the appellant and then took it from him, (after the test). On appeal, the respondent concedes this was an error, nevertheless argues the discretion could be properly exercised to admit the certificate and that this Court should utilize the proviso under s 177(2)(f) *Justices Act* on the basis there has been no substantial miscarriage of justice.

[17] In admitting the certificate His Honour said the appellant knew roughly the date and time; police accepted his request to have a blood test; that there was a very considerable public interest in the apprehension and proper processing of people who drive under the influence as well as the interest in the safety of the public.[9]

[18] The learned Magistrate ruled the discretion existed to admit the evidence. He exercised that discretion in favour of the respondent. Thus, the Certificate was allowed and relied on. In turn the prosecution case was proven.

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8 T 57.4.
9 T at 58.4.

Ground One

The learned Magistrate erred in finding that he had a discretion to admit the certificate of breath analysis in circumstances where regulation 58(2) had not been complied with.

[19] It was clear at the hearing reg 58(2) *Traffic Regulations* had not been complied with. The appellant argues compliance with reg 58(2) is mandatory; that non compliance with reg 58(2) must lead to the exclusion of the Certificate; and that it was an error to deal with the non-compliance by way of the public policy discretion as set out in *Bunning v Cross*.

Regulation 58 *Traffic Regulations* provides as follows:

> **58 Conduct of breath analysis**
>
> (1) A person carrying out a breath analysis must provide an unused mouthpiece for use in providing each sample of a person's breath in each breath analysis.
>
> (2) Within one hour after completing a breath analysis of a sample of a person's breath, the person carrying out the analysis must sign and deliver to the person who provided the sample a statement showing:
>
> (a) the result of the analysis; and
>
> (b) the date and time when the analysis was performed.
>
> (3) A statement printed by a prescribed breath analysis machine may be used as a statement for the purposes of subregulation (2).

[20] It is important to recognise the non-compliance issue relates to the "statement" under reg 58(2).[10] It must be distinguished from the "Certificate" that is the document "Certificate on Performance of Breath Analysis" filled out by the operator in accordance with Form 1 of the *Traffic Regulations* which in turn may be tendered to prove the reading from the breath analysis.

[21] The Certificate provides the prima facie evidence of the matters stated in it. It is the single most probative piece of evidence that may be envisaged in a prosecution of this type. Compliance with the statutory and regulatory requirements is important as the certificate permits ease of proof of matters which would otherwise be difficult to prove.

[22] The purpose of reg 58(2) is to ensure the person who has given the breath sample is provided with accurate information about the reading in the event that they wish to challenge it. For example, the person may, on being given the result of the breath analysis request a further breath test under s 29AAD *Traffic Act*, or request a blood test as the appellant did. They may seek medical advice associated with such a procedure. Police facilitated a blood test in this case on the appellant's request. Apart from allowing a person to obtain alternative evidence in a timely fashion, the regulation ensures people subject to investigation for drink driving offences can be kept appraised of

[10] In proceedings in the Court of Summary Jurisdiction, one copy was tendered with the certificate in Exhibit P2 and the appellant's copy was D6.

its progress. This is significant since the person is providing incriminating evidence by way of a breath test.

[23] As pointed out by senior counsel for the appellant, in some circumstances, police are authorised to impose an immediate license suspension prior to being found guilty by a court, hence the need for clarity in relation to the statement giving the result of the breath test.[11] The provisions relating to license suspension do however, have their own strict notice requirements. I agree with the approach taken by Southwood J in *Assan v Meredith:* for such a serious step to be taken as summarily suspending a driver's license, there must be strict compliance with the notice requirements; failure to properly comply by physically giving the documents in the prescribed sequence would invalidate that notice. The consequences of the failure of proper notice in that setting is of far greater gravity than the case here where the statement of the analysis does not impact adversely in the same way as a suspension. As pointed out, however, reg 58(2) provides a procedural safeguard should a person seek to find other proof in a timely fashion contesting the reading.

[24] By use of the term "must" in reg 58(2), (as opposed to, it is said, the use of 'may' in reg 59(3)) it is argued compliance is mandatory, rendering any resulting certificate where there has been non-compliance inadmissible. In other words, that compliance with reg 58(2) is a condition precedent to the

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[11] The previous s 20A *Traffic Act* was discussed by Southwood J in *Assan v Meredith* [2007] NTSC 12; now see Division 6 – Immediate License Suspension, s 29AAM - AAQ

admissibility of the Certificate. The use of the word 'may' in reg 58(3), in my view, when seen in context, is merely facilitative and does not bear on the question of the consequences of failure to comply with reg 58(2).

[25] I have no doubt reg 58(2) is a mandatory requirement, deliberately so, on its terms. Apart from the use of the word "must", the provision specifies the time of "one hour" in which to comply. While it must be complied with by police officers, I doubt the correctness of the construction urged on behalf of the appellant that the consequence of non compliance is inadmissibility of the Certificate. In terms of the consequences that flow from non compliance, the majority in *Project Blue Sky Inc v Australian Broadcasting Authority*[12] stated:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties holding void every act done in breach of the condition."

[26] Although expressed in mandatory terms and police officers must comply, in my view it is drawing a long bow to suggest that the legislature intended inadmissibility if there is non compliance. A number of cases consider strict compliance is not required in relation to statutory forms and procedures if strict compliance requires inconvenience that would result in injustice.[13]

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12 (1998) 14 CLR 355, McHugh, Gummow, Kirby and Hayne JJ at 388-9.

13 eg *Ex parte Tasker; Re Hannan* [1971] 2 NSWLR 804; *SZOFE v Minister for Immigration and Citizenship* (2010) 185 FLR 129.

The context here is however different, involving investigative procedures. Strict compliance would generally be expected. This is not a case of substantial compliance. One point of distinction with the cases of general principles such as *Project Blue Sky* is that most are concerned with the invalidity of subsequent acts, here the question is subsequent inadmissibility. A similar approach to the invalidity cases is justified.

[27] Even statutes laying down procedures in apparent mandatory terms must be examined to determine the intended consequences of breach of any provision. In *Halton v Beaumont*[14] Jacobs J said:

> "To say that procedural requirements are usually or prima facie mandatory in character cannot gainsay the primary necessity of examining the framework and language of the statute or regulation."

[28] Senior counsel for the appellant relied on *Chase Oyster Bar Bay Pty Ltd v Hamo Industries*[15] as supportive of a general approach to non-compliance with procedural provisions, however in my view *Chase Oyster* does not take the matter much further other than confirming that the language of the provision is paramount. Relevantly in *Chase Oyster*, the words "cannot be made unless", were said to have left no other function than necessitating full compliance.[16]

[29] Of the breath testing cases referred to this Court by both counsel and those drawn from my own researches, there are broadly two categories. The first is where the statutory requirement can be properly characterised as a

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14 (1978) 52 ALJR 589.
15 (2010) 272 ALR 750.
16 *Chase Oyster*, Spigelman CJ at 759

condition precedent to the taking of a valid reading. Non compliance in those cases will lead to exclusion of the resulting evidence. The second category, while dealing with mandatory procedural provisions, cannot be said to be cases of a condition precedent leading to inadmissibility. There is also authority to the effect that where an Act is silent on the consequences of not following the stated procedure, that may be an indication that invalidity does not follow noncompliance.[17] It is instructive (with relevant allowances and distinctions being made), to consider the approach taken in other jurisdictions to similar problems.[18]

[30] The appellant cited *Griffiths v Errington*[19] in support of his case. There the breath test was conducted beyond the two hours provided for in the statute. The section under the then s 8D(6) *Traffic Act (NT)* was:

> "A member of the Police Force shall not, by reason of the occurrence of an event referred to in sub-section (1), require a person to submit to a breath test or breath analysis – (b) at any time after the expiration of the period of 2 hours after the occurrence of the event".

[31] By use of the negative "shall not" there is an indication of an intention of invalidity as a consequence of breach.[20] Non compliance with s 8D(6) would impact on the accuracy of the reading; further, non compliance would subject a person to a process while in custody after the expiration of the statutory period. All of these reasons pointed to a conclusion that

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17 *PM v R* (2007) 232 CLR 370.

18 I have also had regard to the useful discussion in Brown, 'Traffic Offences and Accidents'. Lexis Nexis, Butterworths, 4th Edition 197 – 199.

19 (1981) 50 FLR 370.

20 As well as indicated in *Griffiths v Errington*, it has been pointed out in other cases that the negative tends to lead to invalidity. See eg: *Tilbury & Lewis Pty Ltd v Marzorini* [1940] VLR 245; *Chase Oyster Bar Bay Pty Ltd v Hanno Industries* (2010) 272 ALR 750.

contravention of the section meant the Court was unable to use the evidence as proof of the reading at the time of driving. The consequences of contravention are not as clear in relation to reg 58(2).

[32] Earlier versions of Victorian drink driving legislation were dealt with on the basis of various requirements being a condition precedent to admission of the breath analysis.[21] Compliance with the signing and delivery of the certificate 'as soon as practicable' to the person who had undertaken the breath test was a condition precedent to receiving evidence of the percentage of alcohol in the blood. In *Ross v Smith*[22] Winneke CJ had no difficulty finding the delivery of the statement was a condition precedent to receiving the evidence. There the provision specifically addressed *conditions of admissibility*.

[33] The situation was similar in earlier South Australian cases when the *Road Traffic Act* (SA) permitted admissibility of the evidence of a breath test and created a rebuttable presumption that the concentration of alcohol in the reading was present in the blood of the person at the time of driving. Admissibility relied on procedural sections, (for example advising of a blood test), "having been complied with". For example in *Taylor v Daire*[23] it was held whether the presumption could be relied on depends "exclusively upon whether it can be proved that the police officers concerned obeyed the injunction laid on them by sub s (1) of s 476 to comply with the

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21 S 408A(1) and (2) of the *Crimes Act* (Vic).
22 [1969] VR 411. See also *Nicholl v Hunter* (1994) 20 MVR 384 on "as soon as practicable".
23 (1982) 30 SASR 453.

requirements and procedures in relation to breath analysing instruments and breath analysis under the Act".[24]

[34] On close examination of most of the older cases, such as *Dillon v Dunstone* (Tasmania),[25] the then statutory regimes tended to expressly provide that certain procedural steps were to be followed as a condition of admissibility. In *Dillon v Dunstone* the Act there provided a breath test was *not* admissible "unless" certain steps such as reading over and handing a statement was complied with.[26]

[35] In *French v Scarman*,[27] a requirement in the *Road Traffic Act* (SA) directing a police officer, upon request of the person for a blood test, "shall do all things necessary to facilitate the taking of the sample" was held to correctly give rise to the *Bunning v Cross* discretion in relation to the evidence of the breath analysis. The Court did not determine the matter on the basis of being a pre-condition for admission. The section was considered a safeguard for the citizen. Non-observance by police was held to be a sufficient foundation for the discretion,[28] regardless of the fact that the breath test was cogent evidence.

[36] The trend in later authorities, (probably as a result of changes to legislation) deal with non compliance as a matter of discretion rather than admissibility.

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24 Wells J at 473.
25 (1985) 2 MVR 211 (Tas).
26 *Dillon v Dunstone* at 213.
27 (1979) SASR 333.
28 *French v Scarman* (above) at 338.

In *Brain v Froude,*[29] a reading resulting from a breath analysis unlawfully required by police was held not to be a matter going to admissibility but rather to be excluded in exercise of the *Bunning v Cross* discretion. Non compliance in relation to the regulations for taking of blood samples in South Australia is discussed with in *Police v Jervis*, *Police v Holland.*[30] Those regulations were described by Doyle CJ as "prescribed procedures" but were not "requirements and procedures" within the statute that may render the result inadmissible. A majority of the Court assumed with some hesitation, that the Court still has a discretion to exclude the certificate evidence on the basis of unfairness, but added the discretion does not arise simply because a regulation has not been complied with.

[37] There are some cases dealing with substantial compliance being sufficient, but I acknowledge that is not the case here. In *Lloyd v Police,*[31] the question arose whether a departure from 'prescribed oral advice' in the road traffic regulations could lead to exclusion of the certificate on the basis that "necessary requirements" had not been proven. Applying the reasoning of *Project Blue Sky* it was found that Parliament did not intend that a failure to read the statement with complete accuracy should result in exclusion; the stipulation was capable of degrees of non compliance without causing prejudice to the substantial object of the Act. Substantial compliance in that instance sufficed.

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29 (1992) 16 MVR 218.
30 (1998) 27 MVR 396.
31 (2004) 89 SASR 383.

[38] Dealing with the former reg 116(2) (NT) expressed then in slightly different terms from reg 58(2) in *Hayes v Minner*,[32] Martin J (as he then was) found it was the Certificate that has the evidentiary value, not whether there had been compliance with reg 116(2). Although His Honour recognised the subject regulation may provide safeguards to the suspect, compliance was "not an essential pre-requisite of conviction such as in *Paris (No 2)* or *Griffiths v Errington*".[33] I note in *Hayes v Minner* the statement was given to the appellant, however errors were identified. The printed statement did not indicate the time when the analysis was completed. The Certificate however did.

[39] In my view the position under reg 58(2) is that the provision of the statement is not a condition precedent to admissibility; it must be complied with but it is not the intention that failure to comply will result in the certificate being declared to be inadmissible. It would be expected that a provision intending such a result would provide a textual indication, either expressly or implicitly.

[40] I would not allow ground 1.

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32 (1992) 109 FLR 339.
33 Discussed above.

Ground 2

The learned Magistrate erred in the exercise of his perceived discretion in favour of the prosecution and allowed the Certificate on Performance of the Breath Analysis to be tendered and relied upon thus finding guilt.

[41] As noted, the respondent concedes the learned Magistrate misdirected himself by taking into account an irrelevant consideration, namely that Officer Ball had not been cross-examined concerning a failure to give the statement to the appellant. Police officers and the appellant gave evidence that the appellant was advised of the reading orally. I agree there was no obligation on the appellant to ask any further questions on that subject.

[42] In my view it is proper for this Court to consider whether on all of the evidence available (excluding the misdirection), the exercise of the public policy or fairness discretion should result in the exclusion of the certificate.

[43] In *Hayes v Minner*,[34] Martin J was of the view that cases bearing upon the discretion of the court to exclude evidence which has been unlawfully or improperly obtained or which may render it unfair to the accused to admit at trial were irrelevant. In *Hayes v Minner*, it must be recalled the statement was provided. It simply did not state the time. This is a point of distinction. The case under consideration concerns complete non compliance with a significant safeguard for the suspect. In my view it is appropriate to consider the exercise of the public policy and fairness discretions as the various safeguards built into the regulation are closely connected to the generation of self incriminating evidence in proof of the

[34] Above at 341.

charge. Reg 58(2) allows timely steps to be taken if there is a challenge to the reading.

[44] The exercise of the discretion to exclude evidence which is unlawfully or improperly obtained involves the weighing of a number of competing considerations.[35]

[45] There is a strong public interest in police officers complying with reg 58(2) and other safeguards so that persons suspected of committing this offence may, in a timely fashion challenge the result. Reg 58(2) is expressed in mandatory terms. It must be complied with. There is no explicit reason in the evidence offered on why it was not. The statement was generated but no attempt made to give it to the appellant. On the other hand, the appellant was told by Officer Ball of the reading (.147%), which although there was conflicting evidence about what Officer Ball said, it was sufficiently meaningful for the appellant to react by requesting a blood test. Even if the precise reading was not conveyed, that the appellant had a reading of significance that was communicated to him. That tends to negate the consequences of the appellant thinking he was told ".14".[36] .

[46] Police officers took the appellant to Royal Darwin Hospital at his request. The safeguard underlying reg 58(2) (to enable a person to gather alternative evidence) was met.

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35 *Bunning v Cross* (1978) 141 CLR 54.
36 See evidence set out in para [9] above.

[47] Although Officer Ball had a conversation with the appellant at about 3:56am back at the cells, he did not give him the statement at that time. The timing of giving him the statement is therefore, not out by an hour or two, but rather by about 8 hours. The non compliance was ongoing until then.

[48] Senior counsel for the appellant requested that I consider the conversation that took place between police and the appellant while he was in the cells, regarding this and offences as indicative of overall misconduct on the part of the police. The appellant was in protective custody and should not have been questioned about offending. In my view this aspect of alleged misconduct is not relevant to the exercise of the discretion here. It is not clear how police intended to use any details obtained from the appellant about the offending at that time. Presumably it would be inadmissible if led in any proceedings but it does not bear on my decision on this point.

[49] The appellant requested another breath analysis when police returned from hospital with him. That request was refused. Although this is the subject of Ground 3, it is relevant to the exercise of the discretion. Under s 29AAD(2) *Traffic Act* police must comply with a request that a further breath test be carried out. The request may only be made "without undue delay" after the person receives the result of the initial analysis. In my view there was no failure to comply on the part of police. Police had complied with the appellant's initial request to take a blood test after he was told (orally) of the result. The subsequent request for a breath test was not "without delay". There may have been, as suggested by senior counsel for the appellant, some

ignorance on the part of Officer Trennery about his obligations, but that is irrelevant in the circumstances. The request came at least one and a half hours after the appellant knew the result of the breath test and after he had been taken for a blood test.

[50] On the Certificate tendered in the Court of Summary Jurisdiction, Officer Ball has filled out the form indicating he complied with reg 58(2). He did not. That was an error. I do not see any evidence of him trying to deceive the appellant or the Court. I could not conclude this was deliberate or reckless. Rather, it seems to me that the usual order of procedures was not adhered to due to the hospital trip. I note in the Court of Summary Jurisdiction Officer Ball agreed with a suggestion from counsel for the appellant that things may have been done out of order that night.[37] In my view that is likely to have occurred because the officers took the appellant to hospital.

[51] The cogency of the evidence is not affected by the non compliance, however that is a marginal consideration. The public policy discretion operates in the face of cogent evidence.

[52] There was no suggestion in the hearing that there had been any deliberate disregard of the law. Reading the transcript it does not appear any mistakes in relation to compliance were made deliberately. The fact police took the appellant at his request to the hospital for a blood test means the underlying

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37 T at 21.

objects relevant to reg 58(2) were not frustrated. The appellant in this case was not deprived of an important safeguard. Had police not taken him for the blood test, the result of the balancing exercise I have undertaken may well have been different. In my view police did have regard for the appellant's rights.

[53] I am not satisfied on this occasion that the error made by police, was the "real evil,[or a] deliberate or reckless disregard of the law".[38] In terms of the broader fairness discretion, I am not satisfied there is a foundation on which to conclude the appellant was treated unfairly. I would not allow Ground 2.

Ground 3 – The Appellant was deprived of a fair trial by the Police refusing to conduct a further breath analysis as requested by the Appellant.

[54] This ground relies on section 29AAD(2) of the *Traffic Act*, I refer to my view expressed in relation to ground 2. This was not raised before the learned Magistrate however I have considered it in the overall context of the exercise of both discretions. In my view s 29AAD(2) did not apply when there was a delay of one and a half hours after the appellant had been taken to hospital.

Order

[55] The Appeal is dismissed. I will hear parties on costs.

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[38] *Bunning v Cross*, (above) at 78.