

CITATION: *Police v Gibbons* [2008] NTMC 071

PARTIES: ROBERT ROLAND BURGOYNE

v

DAVID ROLAND GIBBONS

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Summary Jurisdiction – Alice Springs

FILE NO(s): 20721720

DELIVERED ON: 31 October 2008

DELIVERED AT: Alice Springs

HEARING DATE(s): 1 July, 19 August 2008

JUDGMENT OF: G Borchers SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Prosecutions: R Micairan

Defendant: T Whitlum

Solicitors:

Prosecutions: Police Prosecutions

Defendant: Morgan Buckley

Judgment category classification:

Judgment ID number: [2008] NTMC 071

Number of paragraphs: 40

IN THE COURT OF SUMMARY JURISDICTION
AT ALICE SPRINGS IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20721720

[2008] NTMC 071

BETWEEN:

ROBERT ROLAND BURGOYNE
Complainant

AND:

DAVID ROLAND GIBBONS
Defendant

REASONS FOR JUDGMENT

(Delivered 31 October 2008)

Mr G BORCHERS SM:

1. David Roland Gibbons is charged on Complaint, that on 10 August 2007 he drove a motor vehicle on Brown Street Alice Springs while having a concentration of alcohol in his blood greater than 80 milligrams of alcohol per 100 millilitres of blood, namely 92 milligrams of blood contrary to s.19(2) of the Traffic Act.
2. Evidence from witnesses called on behalf of the prosecution and defendant was heard on 1 July 2008 and 19 August 2008 and written submissions were filed on 22 October 2008.
3. The first witness called on behalf of the prosecution was Geoffrey Horwood, a systems technician employed by the Northern Territory Police, Fire and Emergency Services. His duties include calibrating breath analysis machines in accordance with the manufacture's specification and in the course of his duties he calibrated a breath analysis machine identified as a Drager 7110 MRUDA005 on 20 March 2007. He found the machine to be in good working order and exhibiting no faults. His evidence was to the effect that each machine is calibrated every six months, so that the identified machine would have been calibrated again in September 2007. The witness indicated that he was authorized by notice in the

Government Gazette to calibrate breath analysis machines and although the gazettal notice was no produced no objection was taken to his qualification.

4. Senior Constable Brendan Molloy gave evidence that in August 2007 he was attached to Southern Traffic Operations, Alice Springs and on 10 August 2007 he was rostered onto the evening shift commencing at 2pm. He was tasked to man a road side breath testing station in Brown Street. At approximately 8pm the defendant who was driving a white Toyota Landcruiser was requested to stop. The defendant was asked when he had consumed his last alcoholic drink. Senior Constable Molloy was uncertain as to the defendant's answer but thought he might have said "about 20 minutes ago". In answer to a question about his recollection of this answer, he said he was clear that the defendant's answer indicated his last drink was more than 15 minutes ago. The defendant submitted to a hand held breath test and a reading of .096 milligrams of alcohol was noted by Senior Constable Molloy in his notebook. The defendant expressed surprise at the reading. Senior Constable Molloy gave evidence that the breath testing devise was in good working order. The breath test took place at approximately 8.01pm.
5. Finally the prosecution called Sergeant Conan Robertson the officer in charge of Southern Traffic Operations in Alice Springs. On 10 August 2007 he was also working the evening shift. Sergeant Robertson was also in attendance at the breath testing station in Brown Street and after being informed at approximately 8.01pm that the defendant was under arrest for an offence under s.19 of the Traffic Act he drove the defendant to the Alice Springs Police Station. His evidence was that while the defendant smelt of liquor he did not exhibit any of the other usual indices of alcohol consumption, such as being unsteady on his feet.
6. At the Alice Springs Police Station Sergeant Robertson's evidence was that the defendant was taken to a room where a breath analysis was to be conducted. He explained the process involved in undergoing a breath analysis to the defendant and then completed the analysis. The reading was .092 milligrams of alcohol per 100 millilitres of blood and this reading was taken at 8.22pm. His evidence was that he signed the certificate printed out from the breath analysis machine of the

analysis and provided a copy of the signed certificate to the defendant¹. The printout indicated that the breath analysis was conducted at 8.19pm on 10 August 2007 and the reading was as Sergeant Robertson indicated. Sergeant Robertson denied the suggestion that after both the first and a subsequent breath analysis test he did not provide Mr Gibbons with copies of the breath analysis print out that he signed.

7. The defendant requested that the breath analysis test be repeated which it was at 9.13pm. The reading on this occasion was .083 milligrams of alcohol per 100 millilitres of blood. Again Sergeant Robertson signed the second print out document issued by the breath analysis machine and again provided a copy to defendant.
8. The breath analysis was conducted on a Drager 7110 machine bearing serial number MRUD-A005 and the last occasion on which the machine was calibrated was written on an attached sticker. The first breath analysis was conducted at a time longer than 15 minutes from the time when the defendant was breath tested in Brown Street².
9. Both Senior Constable Molloy and Sergeant Robertson were authorized to use a prescribed breath analysis instrument³.
10. Sergeant Robertson was questioned during cross-examination as to whether he had asked Mr Gibbons, after the completion of the first breath analysis test, whether he wanted to have a blood test⁴. At that particular time Mr Gibbons was in the custody of the police having been arrested for the Traffic Act offence. Sergeant Robertson's evidence was to the effect that Mr Gibbons asked him about undergoing a blood test and that Sergeant Robertson's reply was to the effect that police could organize to take him to the hospital to have a blood test. Further after the completion of the second breath analysis test, when Mr Gibbons was standing at the reception area awaiting to be processed and placed in a cell, Sergeant Robertson asked him what he wanted to do about a blood test and Mr Gibbons

¹ Regulation 58(2) and (3)

² Regulation 57(3)

³ Regulation 117 of the Traffic Act published in NT Police gazette dated 6 January 2000

⁴ Section 24(1)

replied that he did not want to pursue having a blood test. Sergeant Robertson did not deny that Mr Gibbons might have asked whether a blood test would help him but did deny responding that it “probably would not”. Sergeant Robertson’s evidence is that he would have said in response to that question “I don’t know”.

11. Ian McLean gave evidence on behalf of Mr Gibbons. He has known Mr Gibbons since 2002. On 10 August 2007 he met Mr Gibbons at Bojangles Saloon Bar at sometime between 6.15pm and 6.30pm. Mr Gibbons was already present when Mr McLean and his wife arrived. He observed Mr Gibbons to be with three men employed at Mr Gibbons’ business and he was clear that Mr Gibbons was buying a round of drinks when he first saw him and that these were the first drinks purchased by the group. He observed Mr Gibbons drink rum and coke in what is termed a “handle”. Four rounds of drinks were purchased and on each occasion Mr Gibbons drank a rum and coke. While the drink Mr McLean ordered for Mr Gibbons was a single shot of rum, he assumed that the other three drinks were the same. He did not hear the orders in respect of those drinks but made the assumption on the basis that Mr Gibbons normally drinks single shot rum and cokes. They left Bojangles Saloon Bar at around 7.30pm.
12. Jacob Adamson also gave evidence on behalf of Mr Gibbons. Mr Adamson is employed by Mr Gibbons. His evidence was to the effect that he drove a work vehicle and followed Mr Gibbons from their place of work to Bojangles Saloon Bar arriving at about 6.15pm. He did not see Mr Gibbons drink alcohol at work prior to going to Bojangles. He observed Mr Gibbons drink four rum and cokes, one of which Mr Adamson bought. He thought the rum and cokes drunk by Mr Gibbons were single shots, certainly the one he bought was. He was uncertain as to the exact time they all left Bojangles but thought it was 10 or 15 minutes after 7pm.
13. David Gibbons gave sworn evidence on his own behalf. Mr Gibbons is the managing director of Hardy Fencing. He worked on 10 August 2007 and did not drink any alcohol from the time he woke that morning until he entered Bojangles Saloon at sometime between 6.15pm and 6.20pm. He was with three men, employed by Hardy Fencing and they met Ian McLean and his wife. His evidence

was clear that he consumed four drinks of rum and coke, and that each drink was a single standard measure of alcohol. He left at approximately 7.50pm.

14. While Mr Gibbons takes medication, which is purchased over the counter at a pharmacy without a prescription for an inflammation in his stomach. No evidence was presented that this would in any way affect an analysis of alcohol in his blood.
15. In terms of a number of issues that arise from the evidence the following admissions were made by Mr Gibbons. He agreed that he:
 - 1 Drove a motor vehicle namely a Toyota Landcruiser on a public street, namely Brown Street;
 - 2 That the driving took place on 10 August 2007;
 - 3 That had his last drink of alcohol 15 minutes before the roadside breath test by Senior Constable Molloy at 8.01pm on 10 August 2007;
 - 4 That the roadside breath test returned a reading of .096mg of alcohol per 100ml of blood;
 - 5 At 8.22pm a breath analysis of his breath returned a reading of .092mg of alcohol per 100ml of blood and such reading was obtained from a Drager Alcotest 7110 Machine bearing serial number MRUD-A005 (“the first reading”);
 - 6 At 9.13pm a second breath analysis from Drager Alcotest 7110 serial number MRUD-A005 returned a reading of .083mg of alcohol per 100ml of blood (“the second reading”);
 - 7 That Constable Graham Horwood calibrated the Drager 7110 serial number MRUD-A005 on 20 March 2007; and
 - 8 That Sergeant Robertson is authorised pursuant to the Road Traffic Act regulations to operate a Drager 7110 Breath Test and was so authorised at the time of the first reading and the second reading.

16. In addition I am satisfied beyond reasonable doubt that Mr Gibbons drank four rum and cokes and that each was a single standard measure of rum. These drinks were consumed between 6.20pm and 7.50pm at the latest and that the last drink was consumed more than 15 minutes before the first blood alcohol analysis was conducted at the Alice Springs Police Station which is Exhibit P1 (copy Drager Alcotest printout) indicating that the test commenced at 8.19pm and concluded at 8.22pm.

17. **Blood Test Evidence**

Section 24 of the Traffic Act is as follows:

Section 24 (1) A person who is in custody following that person undergoing a breath analysis or after giving a sample of blood under this Act may request the person who carried out the breath analysis or who took the blood sample to permit that person to communicate with a medical practitioner for the purpose of requesting the medical practitioner to –

(a) examine that person; and

(b) take a sample of that person's blood.

(2) A person to whom a request under subsection (1) is made shall make such arrangements as are reasonable in the circumstances for the person who made the request to communicate with a medical practitioner

In examination in chief Sergeant Robertson was asked:

“Did you mention a blood test at any time in discussions with Mr Gibbons on that evening?”

He answered “No.”

In cross-examination he was asked the following questions to which he replied:

Do you say that you didn't have any discussion at all with Mr Gibbons about a blood test? No, I say that I did not recommend or advise him to have a blood test or otherwise.

Well, was there a discussion about a blood test? He asked me about blood tests.

Right, okay, and what did you tell him? I told him that we can organise for him to go to the hospital, and to have a blood test.

Right, anything else? There would have been a discussion I would assume, in which case, he said – I can't remember. At no time, I asked him, I think when we went back to the reception area, what do you want to do, and he said he didn't want to have a blood test, that was after the second blow, when he was getting processed to go into a cell.

Well, he says that in relation to the blood test, he asked you whether it was help – it would help him, and you said probably not, do you agree with that? I would have something to the effect of, I do not know. Because I do not know.

All right. So there was a discussion about the blood test, which you say, initiated by him? Would have been initiated by him, yes.

Well, you're not sure, so there was a discussion ---? I don't raise, I don't raise blood tests. I don't speak about blood tests.

I see. So somehow, there was a discussion about a blood test, and your recollection is that in the end, Mr Gibbons decided not to have a blood test, is that a fair summary? Yes, yes.

18. Mr Gibbons' evidence is that Sergeant Robertson raised the issue of a blood test after Mr Gibbons had requested a second breath analysis test but before the test was administered. The evidence of Sergeant Robertson, which I accept on this point, is that a second breath analysis test could not be conducted immediately at the time that Mr Gibbons requested it as the testing room was occupied. Mr Gibbons' evidence is that prior to the second test. Sergeant Robertson mentioned a blood test. Mr Gibbons had expressed surprise at the reading obtained from the first test at the time he was shown it. In fact his evidence was that he was shocked as he felt that the reading was too high. He requested a second test as he did not

accept the accuracy of the first reading. There was a delay in organising the second analysis but when he was being taken to the “breath analysis” room, Sergeant Robertson mentioned a blood test and that it could be organised. Mr Gibbons’ evidence is that in response he asked whether it would help and Sergeant Robertson replied “Probably not”. Mr Gibbons says he accepted that answer and did not pursue a blood test. Instead he then underwent a second breath analysis test.

19. **General Discretion To Exclude Evidence**

It is argued on behalf of Mr Gibbons, that although the two breath analysis tests were not unlawful or irregular the Court should exercise its discretion to exclude them from evidence as it would be unfair to Mr Gibbons to admit this evidence. The unfairness arises as a result of the conduct of Sergeant Robertson, in that after the first breath analysis test was completed he told Mr Gibbons that a blood test would “probably not” assist Mr Gibbons and that Mr Gibbons acted on those words thereby depriving himself of the opportunity of having a blood test and thereby challenging the accuracy of the breath analysis machine reading. This decision resulted in him losing the right to a fair hearing.

20. The discretion that this Court exercises in excluding evidence is based upon considerations of public policy [Bunning v Cross (1978) 141 CLR 54] requiring a balance to be struck between placing the Court in possession of all relevant admissible evidence and ensuring that law enforcement officers do not act unlawfully or improperly. In addition if the public policy discretion is not applicable it is argued that the interests of Mr Gibbons may nevertheless be protected by the general unfairness discretion, that is a general discretion to exclude any evidence not just confessional evidence based upon fairness to a defendant (Driscoll v The Queen (1977) 137 CLR 517, R v Swaffield (1998) 192 CLR 159 and R v Lobran (2000) 77 SASR 24).

21. I find some difficulty in accepting the two positions put by Sergeant Robertson in his evidence. In examination in chief he did not mention any conversation regarding a blood test. However he did say that after the first breath analysis test:

“There was just general conversation. He was asking questions about how he could get out quicker. He was saying that there was no one else at his business that had a rigid licence and that he needed to keep his licence and he also asked if there was anything that could be done to make it go away. And basically just continued repeating those points over and over again, irrespective of the answers that I gave him.”

On being pressed in cross-examination about this conversation Sergeant Robertson admitted there was a conversation about a blood test but could not remember what specifically was said. Instead he said in answer to a question:

“There would have been a discussion I assume, in which case, he said _ I can’t remember”.

Further Sergeant Robertson’s evidence was to the following question:

“Well he says in relation to the blood test he asked you whether it would help. Do you agree with that? I would have said something to the effect, I don’t know. Because I do not know.”

Together with his early answer there is ambiguity and uncertainty in respect of his evidence on this point.

Mr Gibbons however was very clear that the words “probably not” were used by Sergeant Robertson in answer to a question from Mr Gibbons as to whether a blood test would assist him. I find his evidence on this point to be honest and reliable.

22. I find that Sergeant Robertson did say the words that Mr Gibbons says he used. I do not go as far as finding that Sergeant Robertson intended these words in anyway to influence Mr Gibbons’ decision as to whether he should exercise his right to have a blood test. If anything they were uttered in an innocuous fashion and that is probably why Sergeant Robertson cannot recall them. However that is not the point. Mr Gibbons’ evidence is that the words did lead him into a decision not to pursue a blood test, particularly after the second breath test reading confirmed that his blood alcohol content could have been greater than 80

milligrams of alcohol per 100 millilitres of blood. Mr Gibbons said he “discounted the possibility” that the blood test would assist him.

23. I find that the defendant’s submission to exclude the breath analysis tests on the basis of a public policy discretion is not applicable in the circumstances that exist on the evidence in this case. The evidence of the breath analysis test was not brought into existence as the result of any unlawful or improper conduct on behalf of the police and there is no suggestion that the prosecution seeks to obtain a “curial advantage” by the use of evidence obtained through illegality or impropriety. However if I am wrong in not applying the public policy discretion to exclude the evidence of the breath analysis test and the decision of the South Australia Full Court in French v Scarman (1979) 20 SASR 333 clearly indicates that this discretion is available in circumstances where the impropriety of the police officers was deliberately intended to influence a defendant to make a decision against his own interest, then consideration must still be given to exercising a general unfairness discretion.
24. This Court has been referred to Director of Public Prosecutions v Moore [2003] 6 VR 430. In that decision the majority of the Victorian Supreme Court of Appeal held that where the operation of a breath analysis instrument proffered advice that a blood alcohol reading from a blood test result was likely to be higher than from the breath test analysis that this conduct was improper and effectively dissuaded the defendant from exercising his right (under the Road Traffic Act (VIC)) to a blood test. Chernov JA:

“I consider that the conduct of the operator in this case although not unlawful, was improper in the sense that it was, in the circumstances of sufficient seriousness to warrant “sacrificing the community’s desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end” (page 448)
25. In circumstances where the words of a police officer were said, without the intent to deliberately dissuade a defendant from exercising a legal right, should this Court exercise its “general unfairness” discretion to exclude otherwise admissible evidence on the basis that the police officers conduct contributed to unfairness to

the defendant? Having found that Gibbons was dissuaded from pursuing his right to have a blood test two further matters must be considered in determining the exercise of the general unfairness discretion. Firstly the evidentiary presumption in respect of the breath analysis test.

Section 29 (2) of the Traffic Act states:

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

Accordingly read together with s.29 (1) there is a presumption that the reading from the breath analysis is a true and accurate assessment and the Certificate of Performance of the Breath Analysis is prima facie evidence of the matters contained therein. Secondly there was evidence in this hearing from Professor David Thomas that the most accurate measure of the amount of alcohol present in blood is to undertake an analysis of that blood. This is of course consistent with the legislative scheme that gives a right to a defendant to request a blood test (see s.24 (1)). I accept Professor Thomas' opinion on this matter.

26. Mr Gibbons gave up his legal right to obtain evidence capable of challenging the presumption that the concentration of alcohol in his blood at the time of his driving was 0.092 milligrams of alcohol per 100 millilitres of blood. He gave up that legal right on the basis that he accepted that Sergeant Robertson had told him a blood test would "probably not" assist him. As Boland J stated in Nolan v Rhodes 1983 32 SARR 207 at page 214, a case involving similar circumstances and where it was found that the presiding Magistrate had wrongly exercised his discretion not to exclude the breath analysis reading;

"It (a decision not to have a blood test) was a decision reacted on advice which had the effect of making the Appellant avoid grasping the one chance of defecting the charge on the merits."

27. On the basis of any findings the Court will exercise a general unfairness discretion to reject the Certificate of Breath Analysis and the copies of the

printouts from the breath analysis machine taken at 8.22pm and 9.13pm on 10 August 2007.

Evidence that the Breath Analysis Instrument when in good working order and used in accordance with the Regulations does not give a true and accurate assessment of the concentration of alcohol in a person's blood.

28. Mr Gibbons called evidence from an expert Professor David Thomas for the purpose of questioning the accuracy of the reading on the Certificates of Breath Analysis in order to displace the prima facie evidence that the breath analysis instrument was in good working order and that therefore the Certificates should not be admitted.
29. The evidence of Professor Thomas was not objected to and was admitted on the basis that the defendant has the burden of proof of introducing such credible evidence. (see Michael Brennan v Debbie Benjamin [2007] NTMC 021.)
30. The evidence received from Professor Thomas was in the form of a written report together with his Curriculum Vitae dated 9 April 2008, admitted into evidence at exhibit P6 and oral evidence. Professor Thomas described himself as a chemical pathologist, but clearly his Curriculum Vitae indicates he has extensive experience as a medical biochemist and clinical pathologist. His evidence has previously been admitted in Courts in South Australia.
31. Two matters in determining the issues in this case and related to Professor Thomas' evidence are to be considered. Firstly I accept his evidence that the most accurate method of obtaining a reading of the amount of alcohol in a person's blood is by way of a blood test. Secondly at no time did Professor Thomas perform any alcohol loading studies on the defendant, as in his view it "would be impossible to reproduce accurately the conditions that applied on 10 August 2007". Accordingly Professor Thomas' evidence regarding the defendant's alcohol absorption and elimination rates from the time of his last drink (approximately 7.45pm) until the time of the roadside breath test in Brown Street (at 8.01pm) and the time of the first (at 8.22pm) and the second breath analysis (at 9.13pm), at the Alice Springs Police Station, in order to calculate his blood alcohol concentration at those three points in time is based upon:

(a) the defendant's age, weight, height, total body water and the amount of alcohol consumed and time taken to consume it; and

(b) an analysis of this specific data against a range of elimination rates observed in a population of normal social drinkers in order to arrive at an estimation which takes account of individual variances.

32. Professor Thomas' population of normal social drinkers, the "control group" consisted of seventy-five normal social drinkers tested in accordance with standard protocols. He was not able to say how the seventy-five people were constituted, that is there was no evidence as to their ages, weight or even how the group was configured between males and females.

33. For the purposes of his written opinion and in particular the table produced at page 3 of his report as to the levels of alcohol in the defendant's blood at the three points in time the Professor made the assumption in his report that all alcohol consumed prior to 7.45pm on 10 August 2007 was completely absorbed throughout the defendant's total body water by 8.22pm. However in his oral evidence he said:

"usually (it) is in the order of one and a half hours for absorption and distribution to become complete, after the cessation of drinking"

Taking this into account, the Professor notes that the defendant's actual blood alcohol concentrations before absorption was completed, that is at 8.01pm and 8.22pm "may have been slightly lower or slightly higher than the Professor's estimated values".

34. Professor Thomas' estimated blood alcohol concentration at the three relevant times is also based upon an assumption that a male social drinker eliminates alcohol at specific rates per hour. He admitted in cross-examination that there was relevant literature that suggested lower elimination rates than those he used in his calculation and that he did not:

"have a comprehensive knowledge of what has been published in terms of all alcohol elimination rate studies".

35. Professor Thomas' estimated blood alcohol concentrations at the relevant points in time are expressed as being within a range, described at the "Lower Limit", "Average" and "Upper Limit". At no time does Professor Thomas estimate that the defendant's reading could have exceeded .08 milligrams of alcohol per 100 millilitres of blood. He estimates that the highest reading was .053% and that would have been at 8.01pm.
36. There are a number of considerations that could and do cause variations to alcohol absorption rates admitted to by Professor Thomas but his evidence is that these matters as dealt with by taking statistical account of his control group tested in accordance with standard protocols. Those variations admitted to were the presence of food in the stomach, age, sex and dehydration rate of an individual, particularly if linked to physical activity. Elimination of alcohol is also affected by a number of factors including the health of a person's liver.
37. The best test of the amount of alcohol in blood is a blood test according to Professor Thomas and that predicting blood alcohol concentration is a complex task "particularly because of the variables which affect absorption".
38. The prosecution have submitted that, even when the Professor Thomas' assumptions regarding absorption and elimination rates are taken into account, his calculations are inaccurate and should not be relied upon. The cautionary approach to alcohol elimination rates noted by King CJ at page 320 in Even v Benson (1986 46 SASR 317) is cited as authority for its proposition.
39. I find that there is uncertainty regarding Professor Thomas' estimated blood alcohol concentrations and that whatever weight I give his evidence the better evidence is the readings taken at 8.22pm and 9.13pm on 10 August 2007 as shown on the Form 1 Certificates of Breath Analysis. The presumption as to the good working order of the breath analysis machine and accuracy of the readings has not been displaced by Professor Thomas' evidence.

Conclusion

40. In applying the general unfairness discretion the evidence of the readings in the Form 1 Certificates on Performance of Breath Analysis are to be excluded and therefore the prosecution case is not proved.

Dated this 31st day of October 2008.

Greg Borchers
STIPENDIARY MAGISTRATE