

CITATION: *Police v Whitlam* [2010] NTMC 012

PARTIES: Brett Justin Verity
v
Adam Russell Whitlam

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20923786

DELIVERED ON: 25th February 2010

DELIVERED AT: Darwin

HEARING DATE(s): 18th December 2009

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal law – Voir Dire - Breath analysis certificate – failure to sign certificate – failure to give copy of certificate to the Defendant within prescribed time – Traffic Regulations 58 & 59 – admissibility of certificate.

Thomson v Andrews [1992] 84 NTR 20 - distinguished
Project Blue Sky v ABA [1998] 194 CLR 355 – applied
Lloyd v Police [2004]89 SASR 383 - considered

REPRESENTATION:

Counsel:

Plaintiff: Mr Ledek
Defendant: Mr P Maley

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: Maleys

Judgment category classification: C
Judgment ID number: [2010] NTMC 012
Number of paragraphs: 43

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20923786

BETWEEN:

Brett Justin Verity
Plaintiff

AND:

Adam Russell Whitlam
Defendant

REASONS FOR JUDGMENT

(Delivered 25th February 2010)

Ms FONG LIM SM:

1. Mr Whitlam was arrested for driving under the influence of alcohol and failure to provide a sufficient sample for breath analysis. The arresting officer Acting Sergeant Kidney attended the Beachfront hotel at closing time on the day in question as part of his duties as shift supervisor. He was talking to the security officer at one of the doors of the premises when the defendant and another walked passed him into the carpark. He observed the defendant and his friend both to be unsteady on their feet. A little while later he observed the defendant driving out of the carpark.
2. Kidney followed the Defendant's vehicle and says he noticed it swerving across the centre line of the road. He followed the vehicle activated his lights and the Defendant turned into Rossiter street to pull over to the kerb.
3. When Kidney approached the vehicle and requested that the defendant participate in a roadside breath test he was not satisfied with the defendant's

effort to provide a sample. Kidney arrested the Defendant and handed him over to the other two officers who had arrived at the scene in a Police wagon. Those officers Krepapas and Garland then transported the defendant to the Police station where Krepapas required the Defendant to undergo a breath analysis. The result was the Defendant failed to supply sufficient sample and was charged accordingly.

4. Counsel for the Defendant requested a ruling on a voir dire whether the procedure undertaken at the time in the breath analysis room was in contravention of the Traffic Regulations particularly regulations 58 and 59 and consequently the breath analysis certificate and any of Krepapas' evidence about the breath analysis be ruled inadmissible.
5. The issues to be decided are:
 - (a) Did Krepapas follow proper procedure in her instruction to the Defendant on how to provide a sample.
 - (b) Did Krepapas sign a copy of the certificate printed from the breath analysis machine and give a copy to the Defendant within an hour.
 - (c) If Krepapas failed to give proper instruction or to give a signed copy of the breath analysis certificate should that certificate be admitted into evidence.
 - (d) If the breath analysis certificate is inadmissible is the operator precluded from giving evidence as to the operation of the breath analysis and the results of that analysis?
6. **What instructions were given to the defendant on how to give a sample?**

Constable Krepapas was the officer in charge of administering the breath analysis test. I was shown CCTV footage of the proceedings in the breath analysis room. The footage was video only with no audio and some 35 minutes in length. It is clear from the video that there was some conversation between Krepapas and the Defendant before he was given the

apparatus to blow into and further conversation before he was given the apparatus the second time.

7. Krepapas was sure she would have given the usual instructions but accepted that she could not remember the specific instructions given. She does remember that the explanation took some time as the defendant was constantly talking over her and interrupting her. The footage shows the defendant speaking frequently sometimes towards Krepapas and sometimes to Kidney and Garland. At no time in the breath analysis room did Krepapas give a copy of the readout to the defendant and she confirmed that to be the case in her evidence. She says the readout would have been put into the defendant's personal property to be given to him when he was bailed although she can't remember doing that either.
8. Garland remembers Krepapas attempting to explain the procedure to the defendant and the defendant being obstructive by interrupting her while she was giving the explanation.
9. Kidney had no independent memory of being in the breath analysis room however did confirm it was himself shown on the footage.
10. The footage also shows Kidney giving the defendant further instructions on how to blow into the machine after his second attempt however subsequent to that the defendant was not given a further opportunity to blow.
11. The defendant was clearly given two opportunities to provide a sample and failed on both occasions. All of the police officers concerned were of the opinion that even with proper instruction the defendant did not make a proper attempt to provide a sample and was at all times had a "*smart Alec*" attitude towards the whole process.
12. I have no reason to disbelieve the evidence of the police officers involved they all clearly gave evidence as best their memory served them and made

the appropriate concessions about not being able to remember the exact words of instruction.

13. I am satisfied beyond a reasonable doubt the Defendant was provided with sufficient instruction on how to provide a sample and he failed to do so.
14. **Did Krepapas give the defendant a copy of a signed certificate within one hour as is required by regulation 58(2) of the Traffic regulations?** It is clear from the evidence of Krepapas that she does not remember giving the defendant a copy of the signed readout in the breath analysis room. Krepapas stated that if not handed to the Defendant in the breath analysis room the readout would have been placed in the Defendant's property to be given to him upon his release. She could not remember placing the readout in the Defendant's property and there is no evidence that was what actually happened, in any event what is clear is that the Defendant was not released within an hour and if the readout had been in his property it would not have been given to him within the hour prescribed by the legislation.
15. Krepapas also produced a Form 2 Certificate of Refusal or Failure to Submit to or Provide a Sample of Breath Sufficient for Completion of Breath Analysis however she was certain that document was not given to the Defendant.
16. Given the above I am not satisfied beyond a reasonable doubt that regulation 58(2) was complied with by Krepapas. It is clear no statement indicating date time and result of the test was given to the Defendant within an hour of the test.
17. **Does Krepapas' failure of giving the Defendant a copy of the signed certificate make the breath analysis certificate inadmissible?** It is submitted by the Defendant that the operation of regulation 59(2)(d) means the failure to comply with the regulations makes the certificate inadmissible.

18. He relies on the observations of Angel J in the Thomson v Andrews (1992) 84 NTR 20 where His honour considered the relevant Traffic regulations and stated where some legislative requirements are directory only others were mandatory. Failure to comply with directory requirements enlivens the Court's discretion whether or not to exclude the evidence on a fairness basis and failure to comply with mandatory requirements would make the breath analysis obtained evidentially worthless.
19. His Honour characterised regulation 117 (2) (d) of the Traffic regulations (as they then were) was one such mandatory requirement and consequently so too was regulation 116 (2) which required the operator to provide a signed copy of the certificate to the person tested within one hour. His Honour was of the opinion that if these provisions were not complied with then the breath analysis certificate would be "evidentially worthless".
20. If his Honour had been required to decide this issue then I would have been bound by his reasoning, as observations his Honour's reasoning would have been persuasive authority. It is important to note his Honour was not asked to consider this issue in detail and it is clear his Honour did not turn his mind to the distinction between the statement issued under Regulation 116(2) and a certificate issued under section 27 of the Traffic Act (as it then was).
21. In any event his Honour's reasoning has limited application in present times. In Project Blue Sky inc & ors v Australian Broadcasting Authority [1998] 194 CLR 355 their Honours McHugh, Gummow, Kirby and Hayne JJ found that the continued use of the distinction between mandatory and directory legislative requirements is no longer of use because the real issue is whether the act done is invalid under the relevant Act. At page 390 their Honours held a better test is:

"to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid", and

“in determining the question of purpose, regard must be had to “the language of the relevant provision and the scope and object of the whole statute.””

22. The High Court’s decision in Project Blue case was adopted by the full court of the Supreme Court of South Australia in Lloyd v Police [2004] 89 SASR 383 in relation to compliance with traffic regulations. The Road Traffic Act (SA) creates a presumption that the breathalyser accurately indicated the blood alcohol level at the time of reading and for preceding two hours for the defendant (section 47). Regulation 9(1) of the Road Traffic (Miscellaneous) regulations provides that an operator must give a written and oral advice to the defendant in certain terms. In Lloyd’s case the oral advice was not in the same terms as required under the regulations and the court considered whether the non compliance had the effect of making the certificate inadmissible. Adopting the reasoning in Project Blue case the full court in Lloyds’ case found that the requirement to provide the oral advice was a prerequisite for the prosecution to maintain the benefit of the presumption and the purpose of that requirement was to ensure that the defendant was aware of all of his rights to challenge the certificate and rebut the presumption. The Court found that in the circumstances of the case the minor difference with the form of oral advice did not result in the defendant not being made aware of all of his rights and therefore the certificate was admissible.
23. I respectfully agree with their honours reasoning in the application of the reasoning in Project Blue case.
24. In the present case the relevant regulations are 59(2)(d) and 58(2). Regulation 59(d)(2) requires the operator to operate the breath analysis machine in a way that

“(d) complies with these Regulations relating to the proper use of the instrument for the purposes of the Act.”

25. Regulation 58(2) requires a signed statement showing the date and time of the analysis and the result to be given to the person providing the sample within one hour of completing the breath analysis. A copy of the readout from the machine signed by the operator is sufficient.
26. Adopting the reasoning in the Project Blue case I have to ask myself what is the purpose of this requirement is it a prerequisite to the admissibility of the certificate or something else? It is clear that the regulation is part of the process designed to provide safeguards to defendants in a process over which they have little control and that safeguard must be protected.
27. It is important to note that the statement referred to in regulation 58(2) is not the same document as the “certificate” referred to in section 29AAU. Clearly to satisfy the requirements of regulation 58(2) the authorised operator of the breath analysis machine only has to provide to a signed copy of the printout from the machine. Regulation 61 prescribes the form to be used for the purposes of section 29AAU. There is no requirement for that certificate to be served on the defendant.
28. Prosecution relies on the Form 2 certificate and submits that the readout from the machine is merely corroborative of that evidence.
29. If a defendant is given a statement in compliance with Regulation 58 then he has in his possession the information which may form the basis of charges issued against him. With that signed certificate the defendant has the ability to challenge the information in that certificate and has access to the name of the relevant operator should they wish to call that person. Without that information the defendant has to make a less informed decision as to whether to challenge the process undertaken, the accuracy of the reading of the machine or the authorisation of the operator.
30. The failure to provide this information to the defendant in the proper form does not affect the possible accuracy or otherwise of the analysis machine.

The clear purpose of this regulation is to ensure the Defendant has that information before him within an hour.

31. Defendant submits because the process was not properly followed then Officer Krqepapas was not “authorised” I do not accept that argument.
32. Prosecutions submit that Regulation 58 does not prescribe the “proper use of” the analysis machine it prescribes a process to be followed after the machine has been used. I agree with that submission.
33. A person can only operate a breath analysis machine if that person:
 - “(a) is a member of the Police Force;
 - (b) uses a prescribed breath analysis instrument;
 - (c) is authorised by the Commissioner under subregulation (1) to use the instrument; and
 - (d) complies with these Regulations relating to the proper use of the instrument for the purposes of the Act.”
34. The only issue is whether “proper use of the instrument” includes the issue of the statement after the analysis is done. “Proper use” would not in ordinary meaning of the words include processes after the taking of the sample by the instrument. “Proper use” of the instrument would include, switching the machine on, waiting for it to be ready, providing a new mouthpiece and providing adequate directions to the person of how to provide a sample .
35. The ordinary meaning of the words would not include the signing of a statement as to the time and date of the analysis and result of the analysis and the giving of that statement to the person giving the sample. If a separate statement were produced by the operator, not being the readout of the machine, how could the production of that statement be part of the “proper use” of the machine.

36. I find that the failure to provide a statement as required by Regulation 58 not a breach of regulation 59(2) and therefore the “authorisation” of the operator is not nullified.
37. Prosecution submits that Regulation 58 does not apply to a situation where there has been a failure to provide a sufficient sample only to a situation where there has been an actual “sample of a person’s breath”. That submission cannot be sustained. It is clear that there was a sample of breath provided just not sufficient for the machine to analyse.
38. A broader question is whether the failure to provide the statement pursuant to Regulation 58(2) results in the whole breath analysis process in being unlawful and therefore any evidence that arises from that process must be inadmissible. While Regulation 58(2) does not apply to the “proper use” of the instrument it is part of the procedure for the conduct of a breath analysis it is one of the safeguards available to a person undertaking such a test while under arrest. It has not been complied with in this instance. Therefore the process must be characterised as unlawful and I must now considered if I should disallow the admission of any evidence arising out of that process.
39. Applying the principles in Bunning v Cross [1974] 141 CLR 54, which was a case involving the taking of a breath analysis, I must consider the effect of the unlawful conduct on the cogency of the evidence provided when weighing up the public policy issues. The competing public policy issues in this case and in Bunning v Cross are the public need to bring to justice those who drink alcohol and drive and protection of the individual’s right to fair process.
40. The unlawful conduct in the present case is the failure to provide the defendant with the statement as to the details required under Regulation 58(2). That unlawful conduct does not affect the cogency of the evidence regarding the defendant’s failure to provide an insufficient sample. The unlawful conduct has the effect that the Defendant did not, within an hour,

have the results of his test in writing. In the circumstances where the defendant has not challenged the accuracy of the instrument then public policy would demand that evidence of the breath analysis certificate (created pursuant to section 29AAU) and the process by which it was produced should be before the court. The certificate was produced contemporaneously by Officer Krepapas and records her observations of the defendant in his effort regarding the provision of a sample.

41. **Should Krepapas be allowed to give evidence of the procedure undertaken in the breath analysis room?** If I am wrong in the exercise of my discretion to allow the certificate to be admitted into evidence I must decide if Officer Krepapas should be allowed to give evidence about that process in any event.
42. The Defendant submits because the process was unlawful then Officer Krepapas' evidence regarding what took place in the breath analysis room and the results should be disallowed. This argument also relies on the application of the reasoning in Bunning v Cross and considering the competing public policy issues I come to the same conclusion in relation to this evidence as I have regarding the certificate. The cogency of the evidence of Officer Krepapas has not been affected by the unlawful process, she was honest and open about her recollection of giving the required statement to the Defendant. Her conduct of the breath analysis process cannot be faulted except in that last requirement and given that failure does not have an effect on the accuracy of the use of the breath analysis machine the scales tip in favour of allowing her evidence to be admitted.
43. **Conclusion** – 1. The breach of regulation 58(2) is not a breach of Regulation 59(2) and therefore does not cause the process to be unlawful.

2. If I am wrong in relation to 1 the unlawfulness of the process arising out of the breach of Regulation 58(2) enlivens the issue of the exercise of

judicial discretion as to whether to allow the breath analysis certificate in as evidence and/or the evidence of Officer Krepapas.

3. The discretion should be exercised in favour of allowing both the certificate and Officer Krepapas's evidence in its entirety into evidence.

Dated this 25th day of February 2010

Tanya Fong Lim
STIPENDIARY MAGISTRATE