CITATION: *Police v George Ioannou* [2010] NTMC 016

PARTIES:	STUART AXTELL DAVIS
	v
	GEORGE IOANNOU
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20833154
DELIVERED ON:	15 March 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	10 August 2009 & 2 March 2010
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – drink driving – breath analysis tests - blood tests - *Bunning v Cross* discretion.

Traffic Act ss 29AAD; 29AAE

REPRESENTATION:

Counsel:

Complainant:	DPP
Defendant:	Woodcock Solicitors

Solicitors:

Complainant:	Georgia McMaster
Defendant:	Alan Woodcock

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 016
Number of paragraphs:	16

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

No. 20833154

[2010] NTMC 016

BETWEEN:

POLICE
Complainant

AND:

GEORGE IOANNOU
Defendant

REASONS FOR DECISION

(Delivered 15 March 2010)

Ms Sue Oliver SM:

1. The defendant is charged with two drink driving offences under the *Traffic Act*. At the conclusion of the prosecution evidence, the prosecution elected to proceed only on count 2, that is, driving a motor vehicle with a high range blood alcohol content namely, 0.150%. I declined to exercise what is commonly referred to as the *Bunning v Cross* discretion to exclude evidence of the blood alcohol reading which was sought to be given by way of certificates pursuant to s 29AAU of the *Traffic Act*. The exercise of the discretion was sought on the basis that the evidence disclosed that the defendant was given three opportunities to provide a sample of breath for analysis at the Darwin Watch House comprising an initial failure to provide a sufficient sample and then two successful analyses.

2. The evidence of the two police officers present in the breath analysis room was at variance as to what occurred following the initial failure. Constable Fowler, who was the breath analysis operator, said that he asked the defendant to supply another sample. That sample returned a result of .165%.

Constable Fowler said that the defendant then asked if he could provide another sample and that as he was "well within his rights to ask for that", a further opportunity was provided. The second reading was .150% and it is this reading and the certificate of that result pursuant to s 29AAU on which count 2 relies. Constable Burns' evidence on the other hand was that it was the defendant who asked for a second opportunity following his initial failure and that Constable Fowler allowed him to have the second go. Constable Burns said that he disagreed with Constable Fowler's decision.

3. The *Bunning v Cross* discretion was submitted to arise because there was no power under the *Traffic Act* to allow the defendant to provide a second sample of breath for analysis once he had failed to provide a sufficient sample. Section 29AAD provides for the giving of a further breath analysis. Section 29AAD(1) gives power to a police officer to **require** a second breath analysis when a person has provided a sufficient sample of breath for analysis. Section 29AAD(2) provides that a person who has submitted to a breath analysis may, after receiving the result of the initial analysis, request that a further analysis be carried out and a police officer who carried out the initial analysis must carry out the analysis on one further sample. There is a clear distinction between the circumstances referred to in subsection (1) and those of subsection (2). Subsection (1) refers to a circumstance where a person has provided a sufficient sample of breath for breath analysis, whereas subsection (2) refers to a circumstance where a person who has **submitted** to a breath analysis may request a further analysis. In my view, subsection (2) is broad enough to include circumstances both where a person has submitted to a breath analysis and failed to provide a sufficient sample of breath and to where a sufficient sample has been provided and the person seeks a further analysis. On a person's request, in my view, police would be required to allow the further test.

4. Subsection (1) however provides power to police to require a further breath analysis only in circumstances where the initial submission to breath

analysis has been successful. I accepted Constable Fowler's account of how the second sample came about as being the more reliable and accurate recollection. Constable Fowler's evidence was given in August 2009 whereas Constable Burns' evidence was not given until March 2010. Constable Fowler was the breath analysis operator and is therefore, in my view, more likely to have the more accurate recollection of his own actions on the analyses. He was very clear that it was he who asked the defendant to provide a second sample.

5. I agree that there is no power of police to require a second sample of breath for analysis once a person has failed to provide an initial sufficient sample. However, the fact that the Officer lacked power to require a second sample of breathe, does not in my view necessarily render improper or illegal that request so as to give rise to the exercise of the *Bunning v Cross* discretion. The discretion is one to be exercised on public policy grounds. It is directed at excluding evidence procured or obtained by illegal, improper or unfair means. A finding that the evidence is the product of such conduct will not automatically give rise to exercise of the discretion. It requires balancing the need to preserve the proper processes of the administration of justice against the need to bring wrongdoers to justice.

6. In my view Constable Fowler's conduct in asking the defendant to provide a further sample of breath, whilst not authorised by the *Traffic Act,* in no way disadvantaged the defendant's legal position. If Constable Fowler had not given him a second go, he could have immediately charged the defendant with the offence of failing to provide a sufficient sample of breath for analysis pursuant to s 29AAE. That offence carries the same penalty as the offence of driving with a high range blood alcohol content. The defendant had told the officers that he had only six drinks. Providing him with the opportunity to provide a sufficient sample of breath would not result in the defendant being placed in a more serious position in terms of an offence with which he could be charged. Potentially, it provided him with the

opportunity to show that his blood alcohol content was lower than high range including that he was not over the limit at all. There may not have been power to request the second try but there was nothing unfair or improper in my view in the approach taken by Constable Fowler.

7. I therefore declined to exercise a discretion to exclude the evidence and found that there was a case to answer.

8. The defendant gave evidence of the events that evening. He had dinner at Yots restaurant where he consumed beer and spirits and then travelled to a city nightclub where he said he had one further drink before driving a friend home. It was on this journey that he was pulled over for a random breath test. He was arrested and taken to the Darwin Watchhouse for the purpose of breath analysis. He said that on the first test he didn't blow hard enough and then he gave a second test, but was not told the result. He asked for a third test and that produced a reading of .150%. He said that he then asked if he could have a blood test. He said that Constable Burns said that blood tests don't stand up in Court and that they had two readings. He said that he was told it would be wasting his time and their time and that there was no mention of who was to pay for the test or anything else. He said that he was talked out of obtaining a blood test because he was told that it doesn't stand up in Court and there was no point in having it. He agreed in cross-examination that his main conversations were with Constable Fowler until the questions about the blood test. He said that Constable Fowler did not say much at all about the blood test and that it was Constable Burns who was doing the talking about it, standing in the corner.

9. Constable Fowler's evidence was that when the defendant asked if he could have a blood sample taken, he informed the defendant that under the *Traffic Act* he had "provided a sufficient sample and that the sample is known of blood alcohol concentrate, so a medical practitioner is not under any obligation to take a blood sample". He also said that there was some

conversation about who would pay for the blood test, but could not remember whether it was himself or Constable Burns, but thought that the defendant had asked and was told that the cost of the analysis would be at his expense. He said that the defendant then said not to bother about it, although he could not remember the exact words used. In cross-examination, it was suggested to Constable Fowler that the conversation about the giving of blood was with Constable Burns not him. Constable Fowler said "I'm the operator, so he asked me. He was sitting directly across from me, so he was looking at me when he asked the question". He later agreed that the defendant might have asked some questions of Constable Burns as well but that they gave him the same answers. He denied telling the defendant that blood sample evidence does not stand up in Court.

10. Constable Burns' evidence of the conversation in relation to the blood sample was that he told the defendant that he was entitled to have a blood test and that he would be taken to the Royal Darwin Hospital and introduced to the triage nurse and it would then be up to her as to whether she would take blood. He said that he also informed the defendant that if he had a personal doctor, he could arrange for the doctor to be phoned. He said the defendant asked who would pay for the test and was told that it was up to him. He said that the defendant then said "fuck it, don't worry about it". He was then taken from the room and processed. Constable Burns produced his notebook and copies of the relevant pages, 66 through to 69, were tendered. The first two pages reflect the defendant's details and the conversation with the defendant as to where he had been and what drinks he had consumed. Those notes are consistent with the defendant's evidence. Page 68 records the two successful breath sample analyses. The bottom of page 68 and page 69 record a conversation in relation to the request for a blood sample. The note is in terms consistent with the evidence of Constable Burns, excluding any reference to contacting a personal doctor.

11. The notes have a time indication as commencing at 01:12 hours. That time is consistent with the time entered on the operator's book by Constable Fowler as the time that the defendant was apprehended at Stuart Park. The certificate on performance of breath analysis which produced a reading of .165% shows that the test was conducted at 01.43 and the second test conducted at 01.52 hours. The CCTV footage shows that the defendant was in the breath analysis room for 29 minutes from just before 1.37am to 2.05am. In cross-examination, Constable Burns was asked whether there was a subsequent entry in his notebook and the length of that entry which he said showed a further record at 3.00am which ran to 2 to 3 pages. That being the case, even if the entry in the notebook was not written contemporaneously with the conversation had with the defendant in the breath analysis room, it must have been entered very soon thereafter and quite probably, as Constable Burns thought, whilst the defendant was being processed at the Watch House counter. In my view then, the entry is highly corroborative of the conversation which the officers say occurred in relation to the giving of a blood sample and I accept their evidence as entirely reliable on this point. Neither attempted to give a verbatim account of that conversation and the variation in their evidence on other matters points away from any suggestion that they have attempted to collude on this point.

12. In my view the defendant's evidence is not reliable. It is not the case as he said in his evidence that he was not told the result of the second test. The CCTV footage very clearly shows Constable Fowler giving the defendant the readout from the second analysis and going through it with him using his pen to point out the individual items. The defendant picks it up. The defendant is left alone in the breath analysis room. When the constables return, Constable Burns likewise is seen to go through the contents of that readout with the defendant.

13. In any event, the defendant's evidence that he was not told the reading of the second test is not credible. If he did not know what that reading was

then why would he request a third attempt? He did not dispute in evidence that he requested the third try and there would be no good reason why Constable Fowler would take it upon himself to give him a third try unless he was asked to do so.

14. At the start of the footage, the defendant appears to be making or reading text messages and to have been asked to put his phone down on the desk. The defendant failed to mention in his evidence that when the constables left the room, he picked up his mobile phone from where it had been placed on the desk. He appears to make a phone call and to be speaking to someone. He terminates the call when the officers return. This is contrary to the impression that he tried to create in his evidence that the officers were somewhat unreasonable when speaking with him about whether he could make a phone call. If he was told that he had no right to a call as he said then he appears to have disregarded that advice. If he disregarded that advice, there is no reason to suppose he accepted what he says was the constables' advice not to bother with a blood test. Again, this affects the credibility of his evidence.

15. In my view, the evidence does not support any improper or unfair conduct by either of the officers in relation to the taking of a blood sample for analysis. On the contrary, the breath analysis operator Constable Fowler appears on the CCTV footage to have been very patient with the conduct of the tests taking over half an hour in all. The footage shows that the defendant took a lengthy time responding at each stage of the testing. Certainly, Constable Burns appears impatient particularly towards the end but in the circumstances given the length of time it was taking to process the defendant that is not surprising. The occasion for consideration of the exercise of a *Bunning v Cross* discretion in relation to the certificate of analysis does not arise. That evidence is admitted and I am satisfied beyond a reasonable doubt that the defendant had, at the relevant time, a blood alcohol reading of .150%.

16. I find the defendant guilty of count 2 on the complaint.

Dated this 15th day of March 2010.

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Sue Oliver
STIPENDIARY MAGISTRATE