

CITATION: *Verity v CBC [2009] NTMC 069*

PARTIES: BRETT JUSTIN VERITY

V

CBC

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20924175

DELIVERED ON: 31st December 2009

DELIVERED AT: Darwin

HEARING DATE(s): 14th December 2009

JUDGMENT OF: Ms Fong Lim SM

CATCHWORDS:

Criminal Law – Breath Analysis Certificate – request for blood test – obligations on the police – Section 29AAL *Traffic Act*
Words and Phrases – “reasonable in all the circumstances”

French v Scarman [1979] 20 SASR 333 – considered - applied
Rigby v Driver [2008] NTMC 053 - considered
Burgoyne v Gibbons [2008] 071 - considered

REPRESENTATION:

Counsel:

Plaintiff: Mr Cassells
Defendant: Mr Peter Maley

Solicitors:

Plaintiff: Director Public Prosecutions
Defendant: Maleys

Judgment category classification: B
Judgment ID number: [2009] NTMC 069
Number of paragraphs: 27

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

No. 20924175

[2009] NTMC 069

BETWEEN:

BRETT JUSTIN VERITY
Plaintiff

AND:

CBC
Defendant

REASONS FOR JUDGMENT

(Delivered 31st December 2009)

Ms FONG LIM SM:

1. CBC is charged with drive a motor vehicle with a high range blood alcohol content namely 0.158%. It is agreed that CBC drove the relevant motor vehicle on the day in question, he was stopped at a random breath testing station, he was arrested and taken back to Darwin Police Station for a breath analysis, that analysis took place and he requested a blood test.
2. I heard the evidence for the prosecution and then I was asked to decide, on voire dire, whether a breath analysis certificate should be admitted into evidence.
3. The issues to be decided are:
 - (a) whether after CBC requested a blood test the police officers complied with section 29AAL of the Traffic Act and “make arrangements that are reasonable in the circumstances for the person to communicate with a medical practitioner.”
 - (b) If the police officers did not comply with section 29AAL

whether the breath analysis certificate should be accepted into evidence.

4. **Did the police officers make arrangements that are reasonable in the circumstances?** The evidence received from both police officers involved is that they conducted a breath analysis which showed the defendant to have a high level of alcohol in his blood and it was after that test the defendant requested a blood test.
5. After the request was made Officer McKinlay called the Royal Darwin Hospital for CBC and allowed CBC to speak with a person who identified herself a Dr Jolly. After that telephone conversation it was clear that the hospital had refused to take the blood sample from CBC and he was still requesting a blood sample be taken. CBC was then placed back in the cells and processed later that morning. Nothing further was done to assist him in communicating with a medical practitioner after the first phone call.
6. I was referred to the decision in *French v Scarman* [1979] 20 SASR 333 where the full court of the Supreme Court of South Australia found that the request for a blood test by a defendant is the only safeguard for a member of the public who is at the mercy of the accuracy of the analysis machine and the reliability of the police evidence. It is clear that should the requirements under the relevant legislation regarding such a request not be complied with, then the court has the discretion not to admit the breath analysis certificate into evidence.
7. In *French v Scarman*, the section considered was different to section 29AAL of the *Traffic Act* (NT). Section 47f of the *Road Traffic Act* placed different obligations on the police once a request for a blood test was made by a person who had been required to submit to an alcotest. The police were required to do “all things necessary to facilitate the taking of the sample and if the sample is taken by the medical practitioner (nominated by the defendant) it shall be taken in the presence of the police” Clearly that

section is much more prescriptive than the section 29AAL. Section 29AAL only requires to the police to make such arrangements as are reasonable in all the circumstances for the person to communicate with a medical practitioner. There is no requirement that the medical practitioner is one nominated by the defendant as is set out in section 47f of the *Road Traffic Act* (SA) and there is no requirement that police must facilitate the taking of the sample.

8. I was also referred to two Northern Territory authorities which considered the application of section 24 of the *Traffic Act* as it then was. Section 24 provided that a person in custody who had been required to undergo a breath analysis or taking of a blood sample could request that he be allowed to communicate with a medical practitioner for an examination or a further blood test to be undertaken. Once the request was made the person to whom the request was made must make such arrangements which are reasonable in the circumstances for the person to communicate with a medical practitioner.
9. It is clear from the wording of section 24 that the obligations on the police officer under that section are not as prescriptive as that under section 47f of the *Road Traffic Act* (SA). In *Burgoyne v Gibbons* [2008] NTMC 071 the request to have a blood test was met with a comment by the police officer that discouraged the defendant from requesting a blood test, he was told it would “probably not” assist him and the defendant decided not to have a blood test. His Honour Mr Borchers SM found that the police officer did not comply with his obligations under section 24, instead of complying with his obligations to make arrangements to allow the defendant to communicate with a medical practitioner the police officer had a conversation with the defendant which led to discouraging the defendant from getting a blood test. In those circumstances the breath analysis certificate was disallowed as evidence on the grounds of fairness.

10. In *Rigby v Driver* [2008] NTMC 053 Mr Trigg SM also considered the requirements of section 24 of the *Traffic Act*. In this matter the defendant requested a blood test, the police officers took him to the Royal Darwin Hospital and left him there to organise his own blood test. His Honour found when a person is in custody they do not have the freedom to make their own arrangements, therefore the police are responsible to give them the choice to make their own arrangements by giving them the opportunity to communicate with a medical practitioner to make those arrangements. In His Honour's view, the police officers had not complied with their obligation to arrange for the defendant to communicate with a medical practitioner by taking him to the hospital. His Honour was not of the view that the police officer's were required to arrange for the blood test to be done or even to escort the defendant into the hospital for the test. He was also of the view that if the medical practitioner chose not to take the blood test, then so be it. It was His Honour's view that the only obligation was to make arrangements to allow the defendant to communicate with a medical practitioner. His Honour found that while Mr Driver was in custody he should have been given the opportunity to communicate with a medical practitioner of his choice and he was not given that choice. He found that by transporting the defendant to the hospital was taking the choice away from the defendant. His Honour found that once the defendant made the request, they ought to have asked the defendant to nominate one or two practitioners and then make arrangements for the defendant to communicate with that medical practitioner eg give him the opportunity to speak with the medical practitioner at that time.
11. Importantly while His Honour found that the obligations of s 24 had not been discharged by the police officers in question, he then exercised his discretion against the defendant and allowed the breath analysis certificate to be admitted into evidence because the public policy, to stop drivers from driving with a level of alcohol in their blood outweighed any possible

prejudice to the defendant because all of the evidence supported the accuracy of the breath analysis certificate. There was no evidence that supported a contrary view.

12. There are some similarities in the facts of *Rigby v Driver* and the present case. In both matters the defendant's apprehension for breath analysis was in the early hours of the morning, about 1:00am for Driver and 5:00am for CBC and the police put the defendant in touch with the Royal Darwin Hospital to request a blood test and neither defendant had the test. In both cases the defendant had the opportunity to pursue a blood test with other medical practitioners upon his release from custody and in both cases the defendant chose not to pursue that option.
13. In the present case the defendant was not given the choice as to which medical practitioner he could speak to and having spoken to the hospital he was not given a further opportunity to call another medical practitioner of his choice. He was placed back into the cells and not bailed until about 10:00am that morning some 5 hours later.
14. The wording in s 29AAL(2) is, in the main, the same as in s 24(2) and the obligations on the police officer is the same, "to make such arrangements as or reasonable in the circumstances for the person who made the request to communicate with a medical practitioner". So what is reasonable in the circumstances? What are the relevant circumstances?
15. The relevant circumstances in this case are the defendant was in custody and his ability to communicate with anyone was in the control of the police officers, it was 5:24am, the police officer's knowledge was that the only place open to take blood tests at that time of the morning was the hospital, the arresting officers went off duty at 7:00am and the defendant was released on bail at 10:00am.

16. Defence counsel submitted that I could take judicial notice that there are some general practices in Darwin open day and night and I accept that to be the case. However I do not know and therefore cannot take judicial notice of the opening hours of those practices nor whether those practices took blood samples. The only evidence I have about the availability of medical services at that time of day is the evidence of Constable MacMahon who could not think of anywhere else operating at that time of the day.
17. Could the police officers have done more to assist the defendant to communicate with a medical practitioner? Yes they could have asked him to nominate a medical practitioner of his choice and allowed him to try and contact them on the phone, they could have given him a phone book and access to a phone for a reasonable time to try and contact a medical practitioner, they could have ensured that the next shift were aware of CBC's request for a blood test and within normal business hours allowed him access to a phone to contact a medical practitioner. Would it be reasonable in the circumstances for the police officers to make these arrangements? Yes in my view it is reasonable to expect the police officers to allow the person in custody to nominate a medical practitioner of his choice and if the hour does not allow communication with that practitioner and the person is to remain in custody into business hours, then it is also reasonable to expect the police to make it possible for the person in custody to call that practitioner as soon as practicable.
18. Any delay, because of the circumstances, in the taking of the blood sample is not the concern of the police officers, they are only required to ensure they facilitate communication with a medical practitioner. They are not required to transport the person in custody to the medical practitioner to take the blood sample nor are they required to release the person in custody any earlier than normal processes require because the person has requested a blood test.

19. Given the circumstances, I find that that the police officers concerned did not comply with the requirements under s 29AAL. I have no doubt they thought what they did was reasonable, however the test must be applied objectively.
20. **Should the breath analysis certificate be excluded?** Having found that s 29AAL was not complied with, I now have to decide whether I exercise my discretion and exclude the breath analysis certificate.
21. It is clear that the court does have a discretion to exclude evidence on the basis that it was illegally obtained (See *Bunning v Cross* [1978] 19 ALR 641) and in the exercise of that discretion, the court should only consider the cogency of the evidence if the illegality was not intentional or reckless.
22. It is also clear that if the evidence is obtained unfairly or improperly or illegally obtained, then the court should weigh up the competing public interest when considering how to exercise its discretion (see *R v Ireland* [1970] 126 CLR 321 Barwick CJ at pages 334-335).
23. There is no submission by the defendant that the breath analysis certificate was obtained improperly, unfairly or illegally rather than to allow the admission of the certificate would be unfair to the defendant.
24. The breath certificate was not illegally, improperly or unfairly obtained, however the lack of compliance with s 29AAL, as the only safeguard for the defendant, requires me to consider whether that evidence should be excluded on the grounds that it to allow it would be unfair to the defendant and the public policy issues are part of that consideration.
25. There are clearly competing public policy issues in the present case. The rights of a person in custody should be protected and in this case his right to communicate with a medical practitioner of his choice. The defendant's right to challenge the breath analysis certificate with a subsequent blood sample test should be protected. On the other hand to ensure those who are

incapable of driving on safely on our roads answer for their offending is also important. The public should be able to expect that the court will have before it all relevant evidence gathered by the police to ensure those who have offended are dealt with accordingly by the court.

26. I heard no evidence as to the accuracy of the breath analysis certificate, how much alcohol the defendant had consumed that night, what effect on the blood test any delay would have had and why the defendant did not undertake a test after he was released from custody. I have not heard any evidence that would suggest that the police officers concerned deliberately discouraged the defendant from obtaining a blood sample as was the case in *Burgoyne v Gibbons* (supra). Given the time of day the police officers in the present case thought that the hospital was the only medical practice open and therefore thought putting the defendant in touch with a doctor at the hospital was a reasonable arrangement in the circumstances. There was no deliberate or reckless disregard for the defendant's rights to communicate with a medical practitioner.
27. In those circumstances, I find that there is no evidence that would support the proposition that it would be unfair to the defendant to allow the admission of the breath analysis certificate and therefore I exercise my discretion to admit that certificate into evidence.

Dated this 31st day of December 2009

Tanya Fong Lim
STIPENDIARY MAGISTRATE