HIGH COURT OF AUSTRALIA

5 August 2015

POLICE v JASON ANDREW DUNSTALL

[2015] HCA 26

Today the High Court unanimously allowed an appeal from a decision of the Full Court of the Supreme Court of South Australia. The High Court held that, in dismissing a charge of drink-driving against the respondent, the Magistrates Court of South Australia had erroneously excluded evidence of the respondent's breath analysis reading, and the Supreme Court of South Australia and the Full Court had erred in upholding that decision on appeal.

Section 47B(1)(a) of the *Road Traffic Act* 1961 (SA) makes it an offence for a person to drive a motor vehicle while the prescribed concentration of alcohol is present in his or her blood. Under certain conditions, the Act creates a presumption that the concentration of alcohol indicated by a breath analysing instrument as being present in the driver's blood was the concentration of alcohol in the driver's blood at the time of the breath analysis ("the presumption"). The presumption may only be rebutted if the defendant arranges for a sample of his or her blood to be taken by a medical practitioner in accordance with prescribed procedures and adduces evidence that analysis of the blood demonstrates that the breath analysing instrument gave an exaggerated reading.

The respondent was stopped by police while driving a motor vehicle. A breath analysing instrument recorded that the concentration of alcohol in his blood was 0.155 grams of alcohol per 100 millilitres, which was above the prescribed concentration. The respondent was supplied with a blood test kit and arranged for a sample of his blood to be taken by a medical practitioner. It was not possible to analyse the sample because the medical practitioner failed to take a sufficient quantity of blood.

The respondent was charged with an offence against s 47B(1)(a) of the Act, to which he pleaded not guilty in the Magistrates Court. The magistrate held that the breath analysis reading should be disregarded because the respondent, through no fault of his own, had lost his only opportunity to adduce evidence which may have rebutted the presumption. His Honour dismissed the charge.

The police appealed unsuccessfully to the Supreme Court and subsequently, by leave, to the Full Court. Both Courts held that it had been open to the magistrate to exclude the evidence of the breath analysis reading in the exercise of a "general unfairness discretion" to exclude probative evidence untainted by illegality, impropriety or risk of prejudice where its admission would be unfair to the defendant in that it would make the trial unfair.

By grant of special leave, the police appealed to the High Court. In unanimously allowing the appeal, the Court held that admission of the evidence of the breath analysis reading would not make the respondent's trial unfair in the relevant sense. The respondent did not have a statutory right to have a sample of blood taken and dealt with in accordance with the prescribed procedures; rather, the onus was upon him to bring himself within the confines of the rule allowing for rebuttal of the presumption. Having determined that the magistrate erred in excluding the evidence of the breath analysis reading, the Court held the appropriate course was to remit the matter for further hearing before the Magistrates Court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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