

POLICE v. DUNSTALL (A19/2014)

Court appealed from: Full Court, Supreme Court of South Australia
[2014] SASCFC 85

Date of judgment: 25 July 2014

Special leave granted: 13 March 2015

The respondent was driving a motor vehicle on a road in Adelaide when he was stopped by police at 12.30 a.m. on 8 January 2012. He submitted to a breath analysis test which showed a blood alcohol reading of 0.155 grams in 100 millilitres of blood. The respondent then requested a blood test kit, and was conveyed to the Noarlunga Hospital, where sometime between 1.18 a.m. and 2.24 am a doctor took two samples of blood, using the kit. Both samples of blood were later found to be denatured and unsuitable for analysis for alcohol.

The respondent was charged with driving when there was present in his blood the prescribed concentration of alcohol contrary to s 47B(1)(a) of the *Road Traffic Act 1961 (SA)* ('the RTA'). At his trial, the Magistrate excluded evidence of the breath analysis, ruling that its admission would operate unfairly. The Magistrate found on the balance of probabilities that the blood samples had denatured because of the failure of the doctor to take a sufficient sample.

An appeal by the appellant (the Police) to the Supreme Court of South Australia (Kelly J) was dismissed. In its subsequent appeal to the Full Court of the Supreme Court (Kourakis CJ dissenting, Gray and Sulan JJ), the Police contended that the Judge erred in concluding that the unfairness discretion to exclude evidence was enlivened in this case.

The majority found that the safeguards provided by the statutory regime were rendered nugatory in this case as a result of the medical practitioner taking insufficient blood. The respondent was placed in the same position as if a police officer had not informed him of his rights, or had inadequately informed him of those rights, or had provided a defective blood kit. A review of the relevant authorities allowed the conclusion that the Magistrate was entitled to consider the exercise of the general unfairness discretion when considering the admissibility of the breath analysis evidence, and the Magistrate was entitled as a matter of discretion to exclude the evidence.

Kourakis CJ (dissenting) would have allowed the appeal on the grounds that, first, reg 11 of the *Road Traffic (Miscellaneous) Regulations 1999 (SA)*, which governs the procedure for a voluntary blood test, does not confer a procedural right to adduce evidence of a blood sample analysis. Secondly, the failure to obtain a sample was not caused by any police misconduct. Thirdly, the Police carried no responsibility for the respondent's choice of doctor or that doctor's failure to obtain adequate samples. Fourthly, there was no evidence casting doubt on the breath analysis. Finally, the trial of the elements which the Police were required to prove pursuant to s 47K of the RTA had not been compromised in any relevant way.

The grounds of appeal include:

- The Full Court erred in determining that the evidence of breath analysis obtained lawfully and without any impropriety on the part of the police should be excluded in the exercise of the common law general unfairness discretion, where the respondent was denied, through no fault of his own, the sole means of challenging that analysis, namely, by adducing the results of an analysis of a sample of the blood taken from him in accordance with the requirements of the *Road Traffic Act 1961* (SA), because that sample, taken voluntarily by a medical practitioner of the respondent's choice, who was not an agent or employee of the police, was insufficient and in consequence denatured and could not be analysed.

The appellant has recently given Notice of a Constitutional Matter, but at present it is unclear if any Attorney-General intends to intervene. Notice has been given on the basis that in considering the source and rationale underpinning the general or residual unfairness discretion in a criminal trial to exclude admissible non-confessional evidence on grounds of unfairness, one of the possible sources is that it inheres in the judicial process entrenched by Ch III of the Constitution.