IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A5 of 2015

HIGH COURT OF AUSTRALIA
FILED
29 APR 2015
THE REGISTRY ADELAIDE

B E T W E E N:

POLICE
Appellant

-and-

JASON ANDREW DUNSTALL
Respondent

APPELLANT'S ANNOTATED REPLY

Filed by:

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Part I: Certification

1. The Appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Submissions in Reply

2. First, the Respondent cites four elements[1] in this matter in support of its contention that there was unfairness in the relevant sense, such that the Court's discretion to exclude the breath analysis evidence was enlivened. Below, the Appellant addresses in turn why these elements provide insufficient grounds to enliven the discretion.

10 3. Second, the Respondent purports to set out the contentions which must be accepted in order for the Appellant to succeed on its appeal.[2] The Appellant rejects that these properly represent the propositions advanced by the Appellant, and that these are the propositions necessary to be established for the appeal to succeed.

4. Finally, the Appellant rejects the Respondent's assertion[3] that the appropriate remedy in the present case, if relevant unfairness is established, is the exclusion of the breath analysis evidence.

Elements claimed to give rise to unfairness

The statutory scheme and its "artificial series of presumptions"

20 5. On the assumption that the Respondent's bases for unfairness are proposed as conjunctive elements giving rise, in combination, to unfairness, it can be noted that the first of these elements, as to the "artificial series of presumptions" established by the legislative scheme, is no more than a summary of the operation of the scheme. Any contention that this alone might amount to unfairness would be, in effect, a contention that the legislative scheme itself is incompatible with the requirement for a fair trial. The Appellant does not understand the Respondent to contend that the legislative provisions are invalid on this basis, or that they must otherwise be read down.

6. It should also be noted that the provisions at s 47K(1) and (1a) are evidentiary provisions; they are matters of procedure.[4] It is within the Legislature's power to establish a statutory presumption,
30 and stipulate that a particular type of evidence, subject to particular conditions (in the present case, conditions which serve to ensure that the reliability of that evidence can be cross-checked with a control sample), is the only evidence permissible to be adduced to rebut that presumption.[5]

The purpose and role of reg 11 and the medical practitioner

7. As to the Respondent's submissions regarding the purpose and role of reg 11 and any medical practitioner who takes a blood sample for the purposes of s 47K(1a), the Appellant rejects the claim that reg 11 imposes obligations on medical practitioners so as to ensure the "efficacy" of a

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1 At [3.3] of the Respondent's Amended Submissions ("RS").
2 At [29]-[30] RS, see also [3.5] RS.
3 At [3.2] RS.
4 *Williamson v Ah On* (1926) 39 CLR 95 at 108 (Isaacs J), 122 (Higgins J), 127 (Rich and Starke JJ); *The Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254.
5 *The Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 (Dixon J); *Williamson v Ah On* (1926) 39 CLR 95 at 122 (Higgins J). See also *Nicholas v The Queen* (1998) 193 CLR 173 at [23]-[24] (Brennan CJ), [123] (McHugh J).

safeguard regime.[6] Absent reg 11, a defendant adducing evidence of a blood test analysis would have to establish the provenance and relevance of that evidence, and whilst the prosecution could challenge those matters, it could not itself adduce blood test analysis evidence. The purpose of the stipulations in reg 11 is to prescribe the preconditions to the admissibility of evidence adduced by a defendant pursuant to s 47K(1a). They are designed to safeguard the *prosecution*, not the defendant. In this regard the Appellant embraces the observations of Kourakis CJ at [27]-[37] in the Court below.[7] AB 89-92

8. Further, any suggestion that the medical practitioner chosen and approached by a defendant to obtain evidence for use in his or her own defence under s 47K(1a) is able to be characterised as a "functionary of the State"[8] should be rejected. The role of the medical practitioner in the context of the statutory framework is no such thing. They are a third party, who is privately sought out by a defendant (with no requirement for law enforcement agencies to facilitate that process), who's services are engaged by a defendant, for the end solely of possibly assisting a defendant to rebut a statutory presumption which will operate against him. In this sense, the medical practitioner becomes, at most an agent of the *defendant*,[9] but certainly in no sense a functionary of the State.

9. Insofar as the Respondent contends that s 47K(1a) and reg 11 confer on a defendant some form of procedural "right" (however labelled)[10] or impose some sort of duty on a medical practitioner,[11] the Appellant relies on its submissions-in-chief[12] in denying the conferral of any such right or imposition of any such duty.

An inability to test the prosecution evidence

10. To the submission at [21] RS, any "inability" does not mean that the evidence of breath analysis *will* carry weight it does not naturally bear. To state to the contrary is to overstate the nature of the "inability". The evidence of breath analysis will support a conviction. In this it carries weight, determined by the Legislature, to be sufficient to support a conviction. Absent evidence to the contrary, no reason arises to think otherwise. In this regard it operates no differently from any other rebuttable presumption. Commonly courts convict on the basis of such presumptions. Also, commonly courts convict where not all relevant evidence is available.[13] That a source of evidence which *might possibly* assist a defendant is lost does not deny the probative value of the evidence adduced that the evidence lost might possibly, but might not, undermine.[14]

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6 See [3.3](b) RS

7 *Police v Dunstall* (2014) 120 SASR 88 ("***Dunstall***"). AB 72

8 [27] and [42] RS.

9 *Dunstall* at [53] (Kourakis CJ). AB 97

10 See [39] RS.

11 See third sentence of [42] RS and the reference therein to the "mandatory terms" of reg 11.

12 Particularly, [47](a) of the Appellant's Submissions ("**AS**") and the passages of Kourakis CJ in *Dunstall* referred to therein. AB 89-91

13 "The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair"; *R v Edwards* (2009) 83 ALJR 717 at [31]. See also *Police v Sherlock* (2009) 103 SASR 147 at [76].

14 On the assumption that it would be admissible on an application for a stay (but not in support of an application to exclude evidence), the Respondent's evidence of his consumption of alcohol in the hours before he submitted to breath analysis does not undermine the probative value of the breath analysis. There is no evidence that consumption of that amount of

A "patent possibility of reasonable doubt" and the risk of a miscarriage of justice

11. The Respondent's alleged "patent possibility of a reasonable doubt",[15] "requirement that the evidence be given a weight exceeding that which it may naturally bear"[16] and "inherent risk"[17] in relation to evidence of breath analysis is no different in the present case than in all other cases where no blood test evidence is adduced, for whatever reason. On this, the Appellant relies on its submissions-in-chief[18] and the examples postulated by Kourakis CJ in *Dunstall* at [52]-[53].[19] AB 97 However, it should be noted that the Respondent's contention in fact amounts to a claim that in all cases where there is no blood test analysis evidence adduced, and the prosecution seeks to rely on the s 47K(1) presumption, there will necessarily be a "reasonable doubt" such that a conviction cannot be supported. Such submission fails to acknowledge the statutory framework and that the Legislature has directly contemplated and sanctioned convictions on the basis of breath analysis evidence in circumstances where no blood test analysis evidence is available.[20]

Impropriety or unfairness on the part of the prosecution

12. Insofar as [3.4] and [27] RS suggest, so as to bolster any claim of unfairness, that there has been some sort of improper or unfair conduct on the part of the prosecution, by virtue of its attempt to rely on the s 47K(1) presumption rather than pursuing an alternative means of proving its case,[21] it is readily apparent that there can be no justification for such a complaint. The prosecution's decision to run its case in a manner directly contemplated, in fact authorised, by the legislative scheme simply cannot amount to any form of relevant improper or unfair conduct on its part.

Characterisation of the Appellant's position

13. Much of the Respondent's submissions are founded on several mischaracterisations of the Appellant's position. The Respondent purports to re-state the Appellant's contentions but in so doing oversimplifies the Appellant's position.[22] The Appellant does not contend that unreliability in the evidence is a *necessary* condition for the enlivening of the discretion. It does not contend that infringement of a right is a *necessary* condition for the enlivening of the discretion. And it does not contend that impropriety on the part of the law enforcement agencies is a *necessary* condition for the enlivening of the discretion. Rather, the case law instructs that these are relevant circumstances, and pertinent questions to ask, when considering whether there is unfairness in the

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alcohol could not give rise to the breath analysis result obtained. Further, that the breath analysis equipment was properly operated, properly maintained and in good working order was not challenged.

15 [3.3](d) RS.

16 [3.4] RS.

17 [17] RS.

18 [46] AS.

19 Despite the Respondent's submission at [47] RS, it remains of assistance in analysing the sustainability of the Respondent's contentions to consider how, if correct, they would seem to operate in other circumstances not relevantly different.

20 This recognition by the Legislature must overlay any recognition of the "fallibility" of the breath analysis evidence alleged at [18] RS.

21 The possibility of an alternative mode of prosecution suggests, however, that the remedy of excluding the breath analysis evidence, with the consequence that the Respondent is acquitted, is inappropriate (for further discussion as to the appropriate remedy, see [18]-[20] below). Indeed, any alleged risk of a miscarriage of justice would likely attach only to a risk that the Respondent might be improperly convicted of a "category 3" offence, rather than a "category 2" offence. The possibility that the Respondent in fact committed no offence against s 47B(1)(a) is remote.

22 See, for example, [3.5](a)-(d), [29]-[30], [38] RS.

relevant sense. Indeed, it is perhaps difficult to envisage much occasion for the exercise of the discretion where *all* of these circumstances are absent.[23]

14. Similarly, it is wrong to say that the "appeal can only succeed" if one or more of the absolute propositions – set out disjunctively by the Respondent at [29] RS – can be established. The appeal will succeed if, on a composite consideration of the factors relevant to whether the residual unfairness discretion might be enlivened, the circumstances in the present case cannot be seen to amount to unfairness in any more than the broadest or most general sense.

15. The Respondent's endeavours to distance the consideration of "unfairness" from these specific relevant considerations is symptomatic of the challenge in identifying specific unfairness in the present case that goes beyond unfairness in a merely general sense. The Respondent seeks to invoke general statements regarding the breadth and indefinability of the concept of "unfairness",[24] ultimately succumbing to the dangers which result from engaging in "top-down" reasoning in this context; here, by invoking a notion of unfairness at large or in the broadest sense.[25] The eschewing of posing an "intermediate question"[26] is similarly indicative.

16. Ultimately, the Respondent avoids engagement with the specific enquiries prompted by the authorities as to circumstances which might be seen to give rise to unfairness *in the relevant sense* (for example, where there has been an infringement of rights or impropriety by law enforcement agencies, or where the reliability of the evidence in question has been impugned), because such enquiries unavoidably expose the absence of a relevant unfairness in the present case.

17. The majority decision in *Police v Hall*,[27] the facts of which are inescapably pertinent, provides an exemplar of the application of the relevant specific enquiries. The brief attention given to *Hall* by the Respondent[28] involves an attempt to distinguish it on a basis which is in fact illusory.[29] In the present case, as in *Hall*, the defendant chose his hospital (and thus, in this case, his medical practitioner). The onus remaining with the defendant to have his test conducted in compliance with the Regulations,[30] it was no more or less the defendant's "fault" in the present case than it was in *Hall*, that he was rendered unable to adduce evidence of a blood test analysis. It should also be noted that the Respondent's submission made in the first sentence of [21] RS is directly contradictory to the finding of the majority in *Hall*. If that submission is accepted, the legislative intent implicit in the ability to convict upon evidence of breath analysis alone is set at nought.

The appropriate remedy (were unfairness to be made out)

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23 See *Harriman v The Queen* (1989) 167 CLR 590 at 594-595 (Brennan J); *Rozenes v Beljajev* [1995] 1 VR 533 at 549 (the Court).
24 [31]-[33] RS.
25 *Police v Hall* (2006) 95 SASR 482 at [58] (Doyle CJ); *Police v Jervis; Police v Holland* (1998) 70 SASR 429 at 446.
26 At [38.6] RS.
27 *Police v Hall* (2006) 95 SASR 482.
28 [43] RS.
29 The same basis for distinction relied upon by Kelly J in *Police v Dunstall* (2013) 118 SASR 233 at [43].
30 See [47](c) AS for the Appellant's submissions as to the burdening of the defendant.

18. In the present case, assuming the Respondent to be correct in contending that there is unfairness in the relevant sense arising from the inability to obtain blood test evidence that might possibly, or might not, found a case that the breath analysis is exaggerated, the proper remedy is not to exclude the breath analysis evidence but to stay the prosecution.[31] In other words, if the mode of prosecution provides relevant unfairness the prosecution should be stayed. This is so because even on the Respondent's contention, the unfairness does not arise from, or attach to, the breath analysis evidence itself. It (assuming the Respondent's contentions to be correct) arises from the inability to adduce blood test analysis evidence in the context of the operation of the particular statutory framework. Thus, the breath analysis evidence itself remains untainted, making it quite
10 inappropriate to remedy any unfairness by excluding that evidence.

19. The position can be contrasted with confessional cases like *R v Swaffield*,[32] where the unfairness attaches directly to the evidence of the confession, such that exclusion of the evidence is the appropriate remedy. In contrast, in the present case, the breath analysis evidence remains unaffected by the alleged unfairness. The proper course would be for the Respondent to make an application for a stay of the prosecution. If a stay were ordered, it being temporary,[33] the prosecution could apply for it to be lifted in the event that it subsequently chose to adopt the alternative mode of prosecuting the offence charged.

20 20. Thus, if the Respondent were to establish successfully that a relevant unfairness exists, the appropriate orders of this Court would be to allow the appeal, set aside the orders of the Full Court and in lieu thereof allow the Appellant's appeal, and remit the matter to the Magistrate's Court to be heard and decided according to law. Once remitted to the Magistrates Court, the Respondent could make any stay application. That application would proceed in the normal way, with both parties at liberty to call any evidence relevant to the balancing exercise to be undertaken.[34] Evidence of the nature referred to at [6.1]-[6.2] RS,[35] whilst not admissible at the trial to rebut the s 47K(1) presumption, would presumably be admissible on such application.

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31 Cf [3.2] RS.

32 *R v Swaffield* (1998) 192 CLR 159.

33 *Director of Public Prosecutions v Polyukovich (No 2)*, Unreported, Supreme Court of South Australia (Cox J), 4 March 1993.

34 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 33; *Walton v Gardiner* (1993) 177 CLR 378 at 395-6; *Subramaniam v The Queen* (1993) 177 CLR 378 at [33] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).

35 As to [6.2] RS, the Respondent's evidence is unclear as to the time he began consuming alcohol. His evidence was that once he arrived home on 7 January 2012, he consumed two beers and had dinner. He had dinner at around 8:30-9:00pm; Tx 29, L21-26. Sometime after this, he had three more alcoholic drinks; Tx 29, L35-37, finishing his last drink at approximately 12:05am on 8 January 2012. AB 33