The Queen v McConnell [2013] NTSC 81

PARTIES:	The Queen
	v
	McCONNELL, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	21307889
DELIVERED:	29 November 2013
HEARING DATES:	29 November 2013
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

CRIMINAL LAW – Evidence – Voir dire – Admissibility of Certificate on Performance of Breath Analysis – Prejudice – Discretion to exclude.

Jones v The Queen (1986) 19 A Crim R 236*; King v McLellan; Kerley v Farrell* [1974] VR 773*; R v Leaf-Milham* (1987) 47 SASR 499; *McBride* [1962] 2 QB 167; *Owens v The Queen* (1987) 30 A Crim R 59*; R v Williams* [1992] 1 VR 374; *R v Barnsley* [1972] 2 NSWLR 220*; R v Cottee* (1970) 92 WN (NSW) 457, applied.

Second reading speech of Mr Vatskalis (Traffic Amendment Bill (No 2) (serial 145)) 17 June 2003, considered.

Criminal Code ss 174F(2), 174F(3)(a), 174F(3)(c)
Evidence (National Uniform Legislation) Act (NT) ss 55, 56, 135, 137
Justices Act (NT) Part 5
Traffic Act (NT) ss 29AA, 29AAT(2), 29AAU, 29AAX, 29 AAY, 46, 48
Misuse of Drugs Act (NT)

REPRESENTATION:

Counsel:

Applicant:	R Anderson
Respondent:	R Micairan

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v McConnell [2013] NTSC 81
(21307889)

BETWEEN:

THE QUEEN

AND:

ANDREW McCONNELL

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 29 November 2013)

[1] The accused, Andrew McConnell, stands charged with the offence that, on 20 February 2013 at Alice Springs, he drove a motor vehicle dangerously and caused serious harm to Lois Sharpe.

[2] The Crown case is that, at about 6:45 am on the date in question, Lois Sharpe was one of four persons riding bicycles, as a group, in an easterly direction along the Ross Highway, about 2 km east of the Palm Circuit roundabout. They were riding two abreast and Ms Sharpe was in the right rear position in the peloton.

[3] It is common ground that, at the same time, a white truck driven by the accused in the same direction closed up on the peloton from behind it.

[4] The truck collided with the bicycle ridden by Ms Sharpe and she sustained multiple injuries.

[5] The accused was subjected to a roadside breath test at 7:58 am and this returned a positive result. He was placed under arrest for the purposes of breath analysis.

[6] A breath analysis was conducted at 8:13 am and this indicated that, at that time, the accused had a breath alcohol concentration of 0.060%.

[7] The Crown proposes to tender the relevant "Certificate on Performance of Breath Analysis" and call expert medical evidence to establish that, on a count back basis, the accused would have had a blood alcohol concentration of between 0.076 and 0.092%, as at the time of the collision.

[8] It further proposes to lead expert evidence to the effect that such a concentration would have caused the accused's driving skills to have been adversely affected by the effects of the alcohol in his system.

[9] The charge against the accused is brought pursuant to the provisions of s 174F(2) and (3)(c) of the Criminal Code.

[10] The Crown does not seek to invoke subsection (3)(a) of that section, but will contend that the adverse effect of alcohol on the accused's driving skills was, in all the circumstances, one of the factors going to establish that he drove in a manner dangerous to another person. Other factors relied upon are

failing to keep a proper lookout and driving when the accused's vision was impaired due to sun glare.

[11] Mr Anderson, of counsel for the accused, argues that the relevant breath analysis certificate is inadmissible in the present proceedings and that, accordingly, there is no basis for leading expert evidence as to any impact of alcohol on the driving skills of the accused.

[12] That submission has two prongs. First, it is said that the certificate is only relevant to proceedings under the *Traffic Act* (NT). Second, he argues that the tender of the certificate in the present proceedings raises the issue of self-incrimination.

[13] In the alternative, Mr Anderson submits that the certificate ought to be excluded on the basis that the prejudicial effect of its admission outweighs any probative value properly attributable to it.

[14] I first turn to Mr Anderson's primary argument.

[15] Section 29AAU of the *Traffic Act* stipulates that "In any proceedings in a court" a certificate in the prescribed form as to the performance of a breath alcohol concentration analysis, signed in conformity with that section, "is prima facie evidence of the matters stated in the certificate and the facts on which they are based".

[16] Section 29AAT(2) provides that, if a breath analysis is carried out in conformity with the provisions of the *Traffic Act*, the alcohol concentration indicated by the analysis is taken to be the concentration of the person at "the relevant time" i.e. the time of the alleged commission of an offence under the *Traffic Act*.

[17] Whilst conceding what appears to be the prima facie unequivocal and unrestricted expression of the phrase "In any proceedings in a court", Mr Anderson directs attention to s 46 of the *Traffic Act* which, separately, stipulates that "Nothing in this Act affects the liability of a person by virtue of any other law (including the common law) in force in the Territory". The title of that section reads "**Liability at common law and by statute**".

[18] The language used in s 46 may usefully be contrasted with that contained in s 48, which directs attention to the liability of insurers where a person has undergone a breath test.

[19] Mr Anderson contends that the effect of s 46 is to limit the use of a breath analysis concentration certificate on a question of liability under any other law and that, accordingly – as he put it – "the question of culpability or liability for the offence charged under the Criminal Code cannot be adjudged on the materials obtained under the *Traffic Act*". There is, he said, thus a limitation on the evidential use to which a breath analysis certificate can be used. It may only be tendered in proceedings under the *Traffic Act*.

[20] In my opinion s 46 does not have that effect. When viewed in its context and construed according to normal meaning of the language employed, the word "liability" as used in that section is plainly referring to civil liability and not exposure to any potential criminal prosecution based on legislation other than the *Traffic Act*. The purpose of the section is plainly to do no more than render it clear that the provisions of the *Traffic Act* are not intended to affect or limit a person's liability under the general law.

[21] Not only is there nothing in the *Traffic Act* to qualify the general expression used in s 29AAU but also, as is pointed out by Mr Micairan, in his excellent written submissions, s 29AAX specifically disallows the use of a blood sample taken under the *Traffic Act* for the purpose of any proceeding under the *Misuse of Drugs Act*. The very existence of that limiting provision reinforces the obvious intention that, absent it, materials procured under the *Traffic Act* can be utilised for wider purposes.

[22] Mr Micairan further invited attention to the provisions of s 29AAY of the *Traffic Act* which render it clear that a reference to proceedings in court in the statute is intended to include a reference to a preliminary examination under Part 5 of the *Justices Act* and to a justice conducting a preliminary examination under that statute.

[23] As he fairly points out, the legislature would scarcely have expressed s 29AAY in its present form had the intention been to restrict usage of the evidence of a breath analysis to offences created only in the *Traffic Act*.

These are all simple offences that do not involve the conduct of a preliminary examination.

[24] There is also force in his point that s 29AAY reproduces the wording of the previous s 29AA, which was introduced into the statute in 2004 with the express aim of addressing the limitations of the legislation that then prevented evidentiary certificates being used in respect of other than offences created by the *Traffic Act*.[1]

[25] As Mr Micairan further stressed, it has long been established that, absent some specific statutory provision to the contrary, evidence of breath or blood analysis results are admissible in relation to relevant criminal charges of offences other than those created by the *Traffic Act*.[2]

[26] I agree with him that the dicta in the case of *Williams*[3] make it clear that the introduction of a certificate showing the result of a breath analysis as a basis for founding expert evidence of a back calculation of the level of alcohol at the time of commission of an alleged offence is both appropriate and proper. The reasoning in *Williams* renders it clear that the fact that a certificate is conclusive proof of a concentration at the "relevant time" as referred to in s 29AAT(2) of the *Traffic Act* does not prohibit its use in proceedings under the Criminal Code as a basis for establishing an actual concentration level at the time of an alleged offence under that Code.

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[1] See second reading speech of Mr Vatskalis (Traffic Amendment Bill (No 2) (serial 145)) 17 June 2003.
[2] *Jones v The Queen* (1986) 19 A Crim R 236; *R v Barnsley* [1972] 2 NSWLR 220.
[3] *R v Williams* [1992] 1 VR 374.

[27] Particularly when coupled with the relevant expert evidence, the content of a certificate as to the result of breath analysis is plainly relevant to the issues arising in the present proceedings and is thus admissible pursuant to sections 55 and 56 of the *Evidence (National Uniform Legislation) Act*.[4]

[28] All that need be said concerning any issue of self-incrimination is that it simply does not arise in a situation such as that now before me. As Mr Anderson himself concedes, a breath analysis reading concerns itself with the existence of a fact, rather than any statement of self-incrimination.[5]

[29] As to my general discretion, pursuant to sections 135 and 137 of the *Evidence (National Uniform Legislation) Act*, to exclude on the basis that the prejudicial effect of the relevant certificate outweighs any probative value, Mr Anderson argues that a breath alcohol concentration reading of 0.060% is minimal and that to seek to extrapolate on the basis of it is highly prejudicial and likely to confuse the jury – particularly because the result gives rise to a range of possible prior concentrations.

[30] I do not consider this to be so because appropriate directions can be given to the jury depending on how the evidence finally comes out. It may eventually be necessary to point out to the jury that the evidence does not enable them to speculate about any possible reading above the bottom of the range.

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[4] See also *R v Cottee* (1970) 92 WN (NSW) 457 at 459.
[5] Cf the reasoning in *King v McLellan; Kerley v Farrell* [1974] VR 773.

[31] Mr Anderson also submits that, if the relevant certificate and the proposed expert evidence based on it go before a jury, this is likely to lead to an inference that, because the accused was over the legal limit of 0.050%, he was unable to drive properly and the accident was an inevitable result *per se* i.e. drink drivers cause accidents. It is said that the subtleties of the issue of control could well be lost.

[32] The short riposte to those propositions is that, if the evidence in question is admitted, clear directions in the charge to the jury would soon render it clear as to how the relevant evidence ought to be approached.

[33] Assuming that the proposed expert evidence as to the impact of a relevant breath analysis concentration on driving is as the Crown contemplates, then such evidence is plainly relevant and significantly probative, particularly when considered with the other evidence proposed to be led at trial.[6]

[34] I perceive no basis upon which I may properly exclude the impugned proposed evidence.

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[6] See *McBride* [1962] 2 QB 167 at 172, referred to in *Owens v The Queen* (1987) 30 A Crim R 59 at 65; see also *R v Leaf-Milham* (1987) 47 SASR 499 at 500-501.