

C0/2863/2003

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 24 October 2003

B E F O R E:

LORD JUSTICE KENNEDY

MR JUSTICE ROYCE

DIRECTOR OF PUBLIC PROSECUTIONS

(CLAIMANT)

-v-

KENNEDY

(DEFENDANT)

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MR S NEALE (instructed by Crown Prosecution Service) appeared on behalf of the CLAIMANT
MR S EVERETT (instructed by Messrs Freeman & Co, Rhodesia House, 52 Princess Street,
Manchester M16JX) appeared on behalf of the DEFENDANT

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1. LORD JUSTICE KENNEDY: This is a prosecutor's appeal by way of case stated from a decision of justices for Greater Manchester sitting at Trafford, who on 2nd April of this year dismissed an information which alleged that on 8th August 2002 the respondent had driven a Porsche motor car on a road in Sale, Greater Manchester, after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit contrary to section 5(1)(a) of the Road Traffic Act 1988 and Schedule 2 of the Road Traffic Offenders Act 1988.
2. At about 12.45am on 8th August 2002 the respondent was stopped by a police officer, PC Tolan, who was of the opinion that the respondent had exceeded the speed limit. When the officer approached the respondent, he smelt intoxicants on the respondent's breath. He required the respondent to provide a specimen of breath at the roadside, as he was entitled to by section 6(1) of the 1988 Act. The officer's colleagues were summoned and they attended with the equipment, a Lion Alcometer SL400A.
3. As the justices found, the respondent blew into the device on at least two occasions, the earlier attempt or attempts providing, it seems, insufficient breath for a sample:

"The officer admitted in cross-examination that he did not change the mouthpiece between the first and second attempt, and he accepted that he should have changed it if the indicator was illuminated in the first test, as it indeed was".
4. Eventually, the respondent was informed that he had provided a positive breath test. He was arrested and taken to a police station where he provided two more samples of breath, both of which were positive.
5. In the magistrates' court, after all of the evidence had been heard, the advocate for the respondent drew the attention of the court to paragraph 4.92 in Volume 1 of Wilkinson's Road Traffic Offences (20th Edition) which sets out the operating instructions for the Alcometer SL400 (and the prosecution accepted that the same instructions apply to the SL400A, as indeed the textbook makes clear). The paragraph in Wilkinson quotes what is an instruction card supplied with the device. The case stated refers only to step 7 set out on the card but, to set it in context, I begin at step 4:

"4. Instruct the Subject

Tell the subject he will have to take in a deep breath, place the mouthpiece in his mouth, seal his mouth around it and blow continuously through the mouthpiece until you tell him to stop.

Tell him to keep his *hands* down: if he holds unit he may obstruct your view of the lights.

5. Take Breath Sample

The subject must now blow as instructed: *strongly* enough to bring on 'Flow' and sound continuous beep - and *long* enough to bring on 'Analysing' and sounds the double beep.

If he does not bring on 'Analysing' he has *failed to provide* a suitable sample of breath for analysis.

6. Note Alcohol Reading

When 'Analysing' goes off and 'Wait' comes back on, note subject's breath alcohol level. The display clears automatically after a preset time.

The display light readings are to be interpreted as follows: ...

7. Discard mouthpiece

Remove mouthpiece and dispose of properly. *Do not reuse*, on either the same or different subjects.

8. Switch off, or Wait

If you wish to test another subject straight away, wait for 'Ready' to come back on: then proceed from '3'. If no other subject is to be tested straight away, switch unit off."

6. The advocate for the respondent then referred to some authorities in support of his submission that, first of all, the failure to change the mouthpiece constituted incorrect assembly of the device and invalidated the test. It was conceded that no authority was directly in point. Secondly, that because there was no valid roadside test the power of arrest in section 6(5) of the 1988 Act did not arise. Thirdly, that evidence as to what happened thereafter should be excluded by the exercise of the court's discretion pursuant to section 78 of the Police and Criminal Evidence Act 1984.

7. The justices found "as a matter of law" that failure to change the device constituted incorrect assembly of the device and that there was no roadside breath test and "the arrest was as a result unlawful." In paragraph 11, the case stated continues as follows:

"We were satisfied that the failure to change the mouthpiece was more than a mere technicality, and went to the heart of the procedure for dealing with motorists suspected of driving with alcohol above the prescribed limit. We considered that the evidence of the roadside breath test and the subsequent police station procedure would have such an adverse effect on the fairness of proceedings that we ought not to admit it. To find otherwise would result in a conviction arising from a procedure tainted by a fundamental error in its execution. As a result, we had no evidence to consider regarding the alcohol content of the respondent's breath, and we therefore reached a verdict of not guilty."

8. Two questions are posed for the consideration of this court. First: whether the justices were correct in deciding as a matter of law a fresh mouthpiece should be used for each breath test administered when using the Lion Alcometer SL400A device for the provision of a breath test pursuant to section 6(1)(a) of the Road Traffic Act 1988; second, whether there was any basis on which a Bench of justices properly directed on the facts and the law could have exercised a discretion under section 78 of the Police and Criminal Evidence Act 1984 to exclude the evidence of the specimens of breath provided for analysis pursuant to section 7(1) of the Road Traffic Act 1988.

9. The question of whether there was a failure to comply with the manufacturer's instructions and, if so, what, if any, effect that had on the accuracy and reliability of the test result, was never raised, as it should have been, as it seems to me, at a pretrial review, or by service of a defence case statement. It was only raised by cross-examination of the police officer, during the course of the hearing and at the end of the case. That inevitably put the advocate who appeared on the behalf the prosecution at something of a disadvantage. And, as Mr Neale for

the appellant has pointed out this morning, had that advocate not been at such a disadvantage he or she would no doubt have been able to draw the attention of the magistrates to what appears in the handbook relating to this particular machine, which we have now in the bundle before us.

10. At paragraph 4.6 in the handbook there appears this passage:

"If the subject stops blowing before ANALYSING has come on, no sample will have been taken for analysis: this will be indicated by a beep warning. In such a case, depending on the circumstances, the subject may be offered a second attempt, using either the same or a fresh mouthpiece. When WAIT goes off and READY has come back on you may proceed by telling the subject to blow again."

And to the same effect, at paragraph 4.10, the handbook says:

"If the operator decides to allow the subject to repeat the attempt, it is only necessary to wait until READY comes back on; there is no need to change the mouthpiece."

11. Even though the police officer who administered the roadside breath test accepted in cross-examination that he did not change the mouthpiece between the first and the second attempt, and he accepted that he should have changed it if the indicator was illuminated on the first test, as indeed it was, that part of the officer's evidence, as recorded, is, as it seems to me, of limited assistance because, first of all, it does not explain which indicator was illuminated in the first test. The paragraph from the instructions card, which I have already quoted, show that there are number of possibilities. It may be that the suspect breathes strongly enough to bring on 'Flow' but not long enough to bring on 'Analysing', and for present purposes it seems appropriate to proceed on that basis.
12. Secondly, the officer did not explain why he accepted that after the first test the mouthpiece should have been changed; presumably it was because he was confronted with paragraph 7 of the instructions card. But read in context, that paragraph does not clearly indicate that a mouthpiece must be disposed of after a suspect has failed to provide sufficient breath for analysis. Even without reference to the handbook (or for that matter to the statement of Dr Williams to which our attention was invited but which we have not considered it appropriate to admit into evidence) it seems surely obvious that, first of all, where the mouthpiece is used for a second time by the same suspect there is no danger of disease transmission and, secondly, if the second attempt to provide a sample is made straight after the first there is no realistic possibility that any residue will distort the result because the device is measuring concentrate.
13. So there was no sound basis for the magistrates' conclusion that the device was not correctly assembled and, therefore, the roadside test was not properly carried out. To that extent, they should simply have not regarded the evidence of the police officer as reliable.

Even if the roadside test was not properly performed, so that the right to arrest arose pursuant to section 6(5) of the Road Traffic Act, that is not a condition precedent to the admission of evidence as to what happened at the police station; that evidence, if admitted, proved the offence charged. As to that, it is necessary, in the submission of the appellant, to look at R v Fox (1985) RTR 337. That was appreciated by the magistrates' court but, in the submission of the appellant, what does not seem to have been appreciated was that the discretion to exclude such evidence, which is granted to the court by section 78 of the 1984 Act, must be

exercised judicially, and can only be exercised when the defendant is able to point to something more than an improperly administered roadside test and a wrongful arrest; otherwise the court will be re-instating the position which the House of Lords said in Fox was wrong in law, and indeed which Parliament changed the statute to overcome, because it will be making a correct administration of procedures at the roadside a condition precedent to a conviction under section 5. It may not be necessary to demonstrate bad faith or oppression by the police officers, but simple maladministration of the roadside test will, it is contended, not do. In this case, on any view, there was no more than that.

Mr Everett, on behalf of the respondent, submits that as to improper administration of the test, the officer conceded that the mouthpiece should have been changed and, secondly, it was agreed evidence that the manufacturer's instructions indicated that the mouthpiece should not be reused on either the same or different subjects. Therefore, the justices were entitled to conclude that the test was not properly administered and the suspect was not validly arrested pursuant to section 6 (5). Secondly, as to the exclusion of the evidence as to what happened at the police station pursuant to section 78, he reminds us of the decision in DPP v Carey (1970) AC 1072, decided at a time when a valid arrest was still a condition precedent to a conviction under what is now section 5. In that case, the House of Lords held that failure to comply in full with the manufacturer's instructions in relation to a roadside breath test did not invalidate the test or render the result inadmissible. The case really turned on whether the duty of a police officer to ask a suspect if he had taken alcohol within the last 20 minutes before administering the test was itself a part of the procedure. At page 1096A Lord Diplock said:

"The instructions dealing with the method of assembly of the three parts [of in that case the Alcotest R80] must be complied with strictly for unless this is done the product of the assembly is not a device of a type approved by the Secretary of State."

14. So, it is submitted by Mr Everett, we have here a situation in which it was open to the justices to find that what was being used was not a device of the approved type. In Director of Public Prosecutions v Kay [1999] RTR 109, decided after the change in the law and despite what had been said in Carey, the justices accepted that the roadside breath test was vitiated because the police officer did not ask the suspect when he had last taken alcohol, and the police officer did not know that the test should not be administered for at least 20 minutes after the last drink. The justices then excluded the remainder of the evidence in reliance on section 78 of the 1984 Act.

15. In this court it was held in Kay that both the decision in relation to the roadside breath test and the exclusion of the remainder of evidence were unjustified, but at page 121G of the report, Roch LJ went on to say, obiter, that there were many other cases where:

"... although the police officer has not acted in the bad faith, the justices may still be justified in exercising the discretion under section 78 of the Act of 1984 to exclude evidence. One such case might be where the breath test equipment had been wrongly assembled; another might be when the officer had had no ground for suspecting that the motorist had alcohol in his body."

Of course, what Roch LJ seems to have had in mind was the equipment at the police station, reading the judgment as a whole, not that at the roadside because, after the change in the law, the decision in Fox made any mistake in the assembly of the roadside equipment not a material consideration in relation to a charge under section 5 of the 1988 Act.

16. Mr Everett submits that as an example of the width of the magistrates' powers under section 78 of the 1984 Act to exclude evidence where things have gone wrong at the roadside one can

look at the decision of this court in of DPP v Godwin [1991] RTR 303. That case was decided long before Kay, and Fox does not seem to have been cited. The justices in Godwin gave no reasons for their reliance on section 78, that can be seen at page 308C, but this court felt able to discern why the justices decided to exercise their discretion as they did. The Divisional Court rejected the submission that there must be evidence of bad faith or oppression by the police or the prosecuting authorities, and at page 308H, Bingham LJ (as he then was) said:

"The prosecutor's argument here has to be that on the facts found no justices properly directing themselves could reasonably have decided to exclude this evidence. I am not, for my part, prepared to accept that argument. The justices were entitled to conclude that the substantial breach by the constable of the protection afforded to members of the public by section 6 was denied to the defendant, that as a result the prosecutor obtained evidence which he would not otherwise have obtained, and that as a result the defendant was prejudiced in a significant manner in resisting the charge against him."

The case does seem to turn in the end on the fact that the justices gave no reasons for the exercise of their discretion, and therefore it could not be shown that that exercise of discretion was wrong. In substance, Mr Everett submits that in the present case, for the reasons they did give, the justices were entitled to exercise their power under section 78 as they did.

In my judgment, the justices were mistaken in their reading of the manufacturer's instructions. The fact that they had before them only the instructions and the evidence of the police officer, makes their mistake understandable. But on a careful reading of those instructions, they do not require that the mouthpiece be changed after the suspect's first attempt to provide a sample. No one reading the card carefully and properly, in my judgment, could come to that conclusion and, of course, I accept that I am fortified in that view by what appears in the handbook.

Even if the justices were not mistaken, they patently failed to consider whether the failure to change the mouthpiece could have had any significant effect upon the test result. Mr Everett is prepared to concede as much. If they had considered that question, they would inevitably have concluded that it could not have done so, for the reasons which I have already explained. That is sufficient to dispose of the case. It means that the first question posed by the justices should be answered in the negative, but it is a badly formulated question. It is not a matter of law whether a fresh mouthpiece should be used for each breath test. What the justices were really asking, as both counsel agree, was whether they were entitled to conclude that because no fresh mouthpiece was fitted after the defendant made his first effort to provide a sample, there was a failure to comply with the manufacturer's instructions and, if so, whether it was of such significance as to render the test invalid. To that question, I would, as I have indicated, give the answer "no".

However, I do propose to go on to consider the use of section 78, and I start by repeating the warning most recently given by Roch LJ in Kay. At page 122, he said:

"In approaching an application on behalf of a defendant to exclude evidence of the taking of a specimen under section 7 of the Act of 1988, justices must be aware that Parliament altered the form of the original Act of 1972 deliberately to remove, as a precondition for the valid taking of a specimen at a police station or hospital, the taking of a roadside breath test correct in every detail. If the police officers at the roadside and at the police station or hospital are conducting in good faith a genuine inquiry into whether an offence under section 3A, 4 or 5 of the Act of 1988 has been committed, justices should be slow to exclude evidence of the taking of the specimen of breath, blood or urine because of a technical shortcoming in the procedure carried out at the roadside. The justices

must weigh the defect in the roadside procedure and consider its effect on the evidence of the police officer who has taken the specimen of breath, blood or urine by following the correct procedures at the police station or hospital. It is only if the admission of the second police officer's evidence in the light of what had gone wrong at the roadside would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it that the second officer's evidence may be excluded. The justices must have in mind, when weighing the failure to follow the correct procedure at the roadside and its effect on the fairness of the proceedings, that Parliament enacted the provisions in the Act of 1988 in their present form precisely to avoid motorists who were over the permitted limit escaping responsibility on technicalities."

17. In my judgment, it is clear from the authorities that if effect is to be given to the change in the law which made proof of lawful arrest no longer a condition precedent to the admission of evidence as to tests administered at a police station, there must be something more than simply proof of unlawful arrest before a court is entitled to rely on section 78 to exclude that evidence, that is to say the evidence of what took place at the police station. It may be proof of bad faith or oppression, the list is not closed, but it is clear from the case stated in the present case that what was accepted here was simple proof of unlawful arrest; that was all there was. I would, therefore, answer the second question posed in the negative. I would remit the matter to the magistrates' court with a direction to convict.
18. MR JUSTICE ROYCE: I agree.
19. MR NEALE: My Lords, in relation to costs, may I ask that the appellant's costs be met by the respondent?
20. MR EVERETT: I do not think there is anything I can say about that.
21. LORD JUSTICE KENNEDY: Thank you both.