

AUSTRALIA / JUDGMENT

Jones v R [2024] NSWDC 448

COURT

District Court

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District Court

New South Wales

Medium Neutral Citation: Jones v R [2024] NSWDC 448

Hearing dates: 10 September 2024

Date of orders: 25 September 2024

Decision date: 25 September 2024

Jurisdiction: Criminal

Before: Scotting DCJ

Decision: (1) The appeal against conviction is allowed.

(2) I set aside the penalty imposed by the magistrate.

Catchwords: CRIME — Appeal and review — Appeal from Local Court to District Court — By person convicted against conviction

Legislation Cited: Crimes (Appeal and Review) Act 2001

Evidence Act 1995

Road Transport Act 2013

Cases Cited: AG v Director of Public Prosecutions [2015] NSWCA 218

Charara v R [2006] NSWCCA 244

Fox v Percy (2003) 214 CLR 118

Gianoutsas v Glykis [2006] NSWCCA 137

Lumney v Director of Public Prosecutions [2021] NSWCA 186

McNab v Director of Public Prosecutions [2021] NSWCA 298

R v Sopher Em [2003] NSWCCA 374

Category: Principal judgment

Parties: Christopher Jones (Appellant)

Rex (Respondent)

Representation: Counsel:

P Macarounas (Appellant)

Solicitors: Daniel Hakim & Associates (Appellant)
Office of the Director of Public Prosecutions (Respondent)
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Jurisdiction: Local Court
Date of Decision: 18 October 2023
Before: Magistrate Boulos
File Number(s): 2021/278131

JUDGMENT

Introduction

1. On 18 October 2023, Christopher Raymond Jones (the appellant) was convicted of an offence of driving a motor vehicle with an illicit substance, delta-9-tetrahydrocannabinol (THC), present in his oral fluid contrary to s 111(1)(a) Road Transport Act 2013 by her Honour Magistrate Boulos (the magistrate) in the Burwood Local Court. The appellant brings this appeal as of right against the conviction.
2. The following matters were not in dispute in the hearing before the magistrate.
3. On 27 April 2021, the appellant was driving a white Bunnings Warehouse motor vehicle which was towing a boat on a boat trailer. At approximately 11:00am, he was stopped by police as the boat trailer was not displaying a registration plate. The Officer in Charge, Senior Constable James Logan, spoke with the appellant, who stated that he was heading to the RMS to have the trailer inspected and produced his driver's licence. After a roadside breath test returned a negative result, he was asked by the Officer in Charge, Senior Constable Logan, whether he had consumed any illicit drugs within the last week. The appellant said, "I do use THC products. Nothing this morning and nothing in the last 12 hours". The appellant was then subjected to a roadside oral fluid drug test, which returned a positive result for cannabis.
4. The appellant was placed under arrest for the purpose of a secondary test at Ryde Police Station. The appellant requested that his motor vehicle and trailer be parked properly. Senior Constable Logan parked the appellant's vehicle while his offsider, Senior Constable Joel Campbell, escorted the appellant to the highway patrol vehicle. All of this interaction was captured on car video footage.
5. At Ryde Police Station, the appellant was escorted to the breath analysis room where the Draeger DrugTest 5000 (Draeger Drug Test) machine was stored. The Draeger Drug Test was then conducted by Senior Constable Logan, while Senior Constable Campbell was also present in the room. This test returned a positive result for THC.

6. The appellant had been a regular user of cannabis, having consumed cannabis daily or every other day since December 2019 when it was medically prescribed to treat his osteoporosis and anxiety. The appellant had smoked a small joint of cannabis containing THC between 5:00pm and 6:00pm on 26 April 2021, which was the last time he had consumed cannabis prior to being stopped by police.
7. The appellant contends that the evidence of the Draeger Drug Test ought to have been excluded and the charge dismissed for the following reasons:
 1. the evidence available did not exclude, beyond reasonable doubt, the reasonable possibility that the test conducted was contaminated;
 2. the evidence available did not exclude, beyond reasonable doubt, the reasonable possibility that the test conducted was improperly obtained and the results thereon rejected;
 3. the magistrate took judicial notice of facts where it was impermissible to do so;
 4. the state of the oral evidence did not permit adverse findings as to credit to be made by the magistrate;
 5. the magistrate interceded with the examination in chief of the accused and cross examination of Senior Constable Logan and his offsider, Senior Constable Campbell in a manner that materially affected the appellant's ability to properly advance his case.

Evidence of the Draeger Drug Test

Evidence of Senior Constable Logan

1. The Crown tendered the following documents during the evidence of Senior Constable Logan, which form exhibit 1 of the Crown Bundle in the appeal:
 1. statement of James Logan dated 1 November 2022;
 2. three photographs of Driver Licence of Accused and Securetec Drug Test;
 3. document outlining Standard Operating Procedures used by NSW Police when Conducting Random Oral Fluid Testing (Standard Operating Procedures);
 4. first page of Oral Fluid Testing Certificate;
 5. second Page of Print Out of Drug Testing Machine and Preliminary Testing Certificate; and
 6. Certificate by FASS Health Pathology.
1. Senior Constable Logan gave evidence to the effect that he is an authorised operator of the Draeger Drug Test and conducted the test in this case on 27 April 2021 in accordance with the Standard Operating Procedures, as set out in his Statement. He confirmed that the print out from the Draeger Drug Testing machine and preliminary test certificate showed the sample taken from the appellant at Ryde Police Station to be positive for THC. In his evidence, Senior Constable Logan further confirmed that the appellant's sample was

submitted to the Forensic and Analytical Science Service (FASS) at Lidcombe for analysis and returned with a certificate. The FAAS Health Pathology certificate dated 24 May 2024 establishes that a sample of the appellant's oral fluid was received by FASS on 11 May 2021 in a sealed container and that, following analysis, was found to contain THC.

2. Senior Constable Logan's Statement included reference to the effect that when preparing the statement he refreshed his memory of the matter by reviewing the charge number and the car footage. When cross examined on this, he accepted that he had also referred to the COPS system and that his statement was inaccurate.
3. During cross examination, Senior Constable Logan denied that there were any abnormalities in the conduct of the Draeger Drug Test procedure. He confirmed that if the STK, the stick component of the Draeger Drug Test equipment, had detached during the test, as put to him by the appellant he, "would have classed the sample as invalid and [he] would have just binned it and started a new one". He agreed that this course was required by the Standard Operating Procedures.
4. Senior Constable Logan accepted during cross examination that he had conducted countless Draeger Drug Tests. He stated the following in relation to his recollection of this particular test:

Q. Well I'm asking you the question whether you accept that because you've done the same process so often between April 2021 and November 2022 that that might have affected your recollection of this event in terms of the test you administered on this occasion?

A. I'd say it's – I can't say for certain, you're asking me to say whether my memory is not correct, how would I know that.

HER HONOUR: Yes just specifically do you recall this particular second Drager or is it clouded somehow?

A. I don't believe it's clouded, I would absolutely remember that occurring.

1. He stated that he specifically remembered this matter for following three reasons:
 1. It was the only drug test he had conducted at Ryde Police Station;
 2. He had to reverse the Bunnings Warehouse motor vehicle and trailer the appellant had been driving; and
 3. The appellant had made a comment in relation to a s 10 dismissal.

Evidence of Senior Constable Campbell

1. Senior Constable Campbell gave evidence to the effect that he had no recollection of the Draeger Drug Test being conducted in this matter and did not participate in the administration of the test.

Evidence of the Appellant

1. In his evidence, the appellant confirmed that he has been prescribed cannabis for anxiety and osteoporosis and consumed cannabis every day or every other day. The appellant stated that he had previously received a s 10 bond without conviction in 2017 for a drug driving offence that occurred in 2013, and that this finding of guilt without conviction resulted in a suspension of his security licence.
2. In relation to the Draeger Drug Test procedure itself, the appellant accepted during his evidence that Senior Constable Logan explained to him the operation of the test. The appellant stated that he put the sponge into his mouth, wiped it on both sides and then placed it underneath his tongue as instructed. After a couple of minutes, he stated that he felt the sponge detach in his mouth. He stated that he opened his mouth and the stick fell straight out, and that he then put his hands up in the air and looked at the police officers. Senior Constable Campbell stated, "I've never seen that before". He stated that Senior Constable Logan asked the appellant to put the sponge to his lips, Senior Constable Logan then took the test tube, placed it to the sponge and pushed it down with the lid of the tube. He stated that Senior Constable Campbell determined the sample was good because of the presence of blue indicators on the STK.
3. During cross examination, the appellant confirmed that he had consumed THC within approximately 15 hours of the test being conducted, and that he was concerned about receiving a conviction for the offence because that would affect his employment. The appellant denied when it was put to him during cross examination that the Draeger Drug Test was conducted correctly, the piece did not fall out of his mouth and that he was suggesting these things happened to avoid a penalty.

Relevant Law

1. The applicable principles to be applied in determination of the appeal are as follows.

Nature of the appeal pursuant to s 18 Crimes (Appeal and Review) Act 2001

1. Section 18(1) Crimes (Appeal and Review) Act 2001 provides that the appeal is a rehearing on the certified transcripts of evidence, obviously as supplemented by reference to the exhibits tendered in the Local Court and is not an appeal de novo: *Gianoutsas v Glykis* [2006] NSWCCA 137 at [24]-[31].
2. The principles governing appeals from judges sitting without a jury apply in that the appellate judge is to form his or her own judgement of the facts while recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called and observing the natural limitations stemming from proceeding wholly or substantially on the transcript record: *Charara v R* [2006] NSWCCA 244 at [17]-[22].

3. Whilst the magistrate's reasons are not part of the certified transcripts referred to in s 18(1), recourse may be had to them since the appellate function could not properly take place without reference to them: *Charara* [23]-[24].
4. The Court is obliged to give the judgment which, in its opinion, ought to have been given in the first instance: *Fox v Percy* (2003) 214 CLR 118 at [23].
5. An appeal to the District Court under s 18 requires the demonstration of factual, legal or discretionary error to succeed: *McNab v Director of Public Prosecutions* [2021] NSWCA 298 at [24] (Bell P) and [83]-[90] (Basten and McCallum JJA).
6. The term "error" has no precise meaning. It refers broadly to the satisfaction of the appellate judge that the trial judge was wrong and should be corrected. Put negatively, it means that the judgment of the trial judge will not be set aside unless the appellate judge is satisfied that the judgment is wrong. How that state of satisfaction is achieved will depend on a range of factors. A miscarriage of justice warranting intervention may occur in the absence of "error" in the ordinary meaning of that term: *AG v Director of Public Prosecutions* [2015] NSWCA 218 at [34] (Basten JA) and *McNab* at [88] (Basten and McCallum JJA).
7. The requirement that the appellant demonstrate error does not reverse the onus of proof in that the prosecution, at all material times, bears the onus of establishing guilt beyond reasonable doubt: *McNab* at [26] (Bell P) and [91] (Basten and McCallum JA).
8. An appeal under s 18 does not require the District Court to undertake a complete review of the whole of the evidence and form its own view as to the appellant's guilt regardless of the issues raised by the appellant. The extent of the review will depend on the circumstances of the case and the kind of error alleged: *Lumney v Director of Public Prosecutions* [2021] NSWCA 186 at [44] (McCallum JA).

The offence

1. Section 111(1)(a) of the Road Traffic Act 2013 relevantly provides:
 - (1) Presence of prescribed illicit drug in person's oral fluid, blood or urine A person must not, while there is present in the person's oral fluid, blood or urine any prescribed illicit drug—
 - (a) drive a motor vehicle

....

Maximum penalty—20 penalty units (in the case of a first offence)

1. A conviction for an offence under s 111(1) also carries with it an automatic period of disqualification of 6 months reducible to a minimum period of 3 months: s 205 Road Transport Act 2013.

The relevant provisions of the Evidence Act

1. Section 138 Evidence Act 1995 provides:

(1) Evidence that was obtained—

- (a) improperly or in contravention of an Australian law, or
- (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

(2) Without limiting subsection (1), evidence of an admission that was made during or in consequence of questioning, and evidence obtained in consequence of the admission, is taken to have been obtained improperly if the person conducting the questioning—

- (a) did, or omitted to do, an act in the course of the questioning even though he or she knew or ought reasonably to have known that the act or omission was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or
- (b) made a false statement in the course of the questioning even though he or she knew or ought reasonably to have known that the statement was false and that making the false statement was likely to cause the person who was being questioned to make an admission.

(3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account—

- (a) the probative value of the evidence, and
- (b) the importance of the evidence in the proceeding, and
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
- (d) the gravity of the impropriety or contravention, and
- (e) whether the impropriety or contravention was deliberate or reckless, and
- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

1. The appellant relied on *R v Sopher Em* [2003] NSWCCA 374 at [88]-[97] to support the proposition that a breach of internal Police guidelines can satisfy the test of impropriety under s 138 Evidence Act 1995.

2. Section 137 Evidence Act 1995 provides:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

1. Section 135 Evidence Act 1995 provides:

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

1. Section 144 Evidence Act 1995 provides:

- (1) Proof is not required about knowledge that is not reasonably open to question and is—
 - (a) common knowledge in the locality in which the proceeding is being held or generally, or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
- (3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

The Draeger DrugTest 5000 testing procedure

1. Clause 4 of the Standard Operating Procedures relevantly provides:

4-6 Assemble the STK placing the drug collection head onto the cassette as instructed during training. Ensure the drug collection head is firmly seated. DO NOT touch the collection head.

The drug collection head if not properly seated on the STK may present a choking hazard to the subject if it becomes dislodged.

4-7 If the drug collection head comes into contact with any other surfaces prior to administration of the test, or at any other time, discard and replace it before proceeding.

4-8 Give the oral test collector and test cassette to the subject of the test and direct them to provide a sample. Direct the subject not to chew or suck on the drug collection head. DO NOT place the oral test collector in the subjects mouth or obtain the sample through use of force.

4-9 Maintain observation of the subject and the oral test collect throughout the procedure. Record the subjects particulars in the Oral Fluid Data Record Book.

If the drug collection head becomes detached in the subject's mouth have them remove the head from their mouth and dispose of it in a waste bag. Commence a new test using a new kit.

Summary of the Magistrate's Reasons

Credibility findings

1. While the magistrate noted Senior Constable Campbell's evidence that he had no recollection of the event, her Honour found that it was clear from his evidence that Senior Constable Logan was the one responsible for administering the Draeger Drug Test.
2. The magistrate found Senior Constable Logan to be a "reliable, honest, consistent and very impressive witness" and accepted his evidence that the Draeger Drug Test was conducted in accordance with the operating procedure. Her Honour rejected the submission that the two versions by the police officers were diametrically opposed, as while Senior Constable Campbell had no recollection, Senior Constable Logan had a clear recollection, was consistent in his evidence and was unshaken during cross examination. The magistrate further rejected the defence submission that Senior Constable Logan was taken by surprise during cross examination when it was put to him that the sponge had fallen into the accused's mouth and the stick had fallen onto the floor for similar reasons.
3. The magistrate rejected the appellant's evidence in relation to the alleged impropriety of the Draeger Drug Test. Her Honour considered the appellant's evidence to be "fanciful" and "self-servicing", having regard to the appellant's admission during cross examination that even if he received a finding of guilt with no conviction, he was at risk of losing his security licence.
4. Accepting Senior Constable Logan's evidence, the magistrate found that there was no credible evidence to suggest that the Draeger Drug Test was conducted improperly. It follows that the magistrate found the test result to be valid and the appellant's guilt to be established beyond a reasonable doubt.

Judicial notice

1. The magistrate took judicial notice of the length of time that THC could stay in an individual's system. Her Honour took the view that she could take judicial notice of the fact that THC products ingested the night before would, beyond reasonable doubt, remain in the system when tested 15 or 16 hours later.

Consideration

1. Having conducted an independent review of the evidence, I am left with a reasonable doubt as to the appellant's guilt for the reasons that follow.

2. First, the magistrate was not entitled to take judicial notice of the fact that on the basis that the appellant had smoked cannabis on the night before that the THC would still be in his system. Further, the way the magistrate interjected the notion of judicial notice into the appellant's evidence gave rise to a reasonable apprehension of bias to a fair-minded lay observer. The magistrate could have taken the appellant's evidence into account against him when determining the case, but she did not wait to do that. Instead, she elevated the appellant's evidence to a fact that could not be questioned, when in fact the prosecution could not succeed without the admission of expert evidence.
3. Second, I do not accept Senior Constable Logan's evidence that he had a precise recollection of the test conducted on the appellant. His evidence was couched in terms that he remembered the particular event, notwithstanding that he had conducted at least 50 similar tests in the intervening period. His evidence was not evidence of his usual practice, but evidence of that test. The three reasons that he gave for having a specific recollection of the matter did not relate to the testing procedure itself. I do not accept his evidence that the appellant told him that he would apply for a s 10 dismissal of the charge and on that basis he would not lose his security licence, because there was no credible reason for the appellant to say that. On the prior occasion when the appellant received a s 10 bond, he still lost his licence for a period. I accept that the appellant told Senior Constable Logan that he had been dealt with pursuant to s 10, but in my view Senior Constable Logan interpolated the rest of the statement and his evidence was demonstrably unreliable on the crucial point, being his memory of the testing procedure. Having regard to the length of time that had elapsed between the test and when Senior Constable Logan gave evidence and bearing in mind that he did not prepare a statement until almost two years after the test, I am not satisfied that his evidence was reliable as to what occurred in the testing procedure. In all the circumstances, I am satisfied that the magistrate's credit findings relating to Senior Constable Logan's evidence are not sustainable and should be put to one side.
4. Third, I do not agree with the magistrate's finding that the appellant's evidence of the sponge detaching from the stick was "fanciful". The fact that the sponge could become detached from the stick was a matter expressly provided for in the testing procedure. It was a matter that was clearly foreseeable and because it was expressly provided for in the testing procedure and required the test to be discarded and for the procedure to be started again. The magistrate's credit findings against the appellant were affected by this error and her statement about taking judicial notice and I am satisfied that I should put them to one side.
5. Fourth, I am satisfied that there is evidence, which I cannot discount on credit, that the test was affected by an irregularity for which the testing procedure required the test to be discarded.
6. Finally, I am satisfied that the evidence of the test was improperly obtained and I should now consider whether or not to exclude it pursuant to s 138 Evidence Act 1995. The evidence was crucial to the prosecution case, but its probative value is unknown because the testing procedure required the sample to be discarded, I infer because it was likely to be unreliable.

The offence is a relatively minor offence, but the testing procedure involves some deprivation of liberty to conduct. The test is capable of being conducted in accordance with the testing guidelines with little inconvenience to the police. In all of the circumstances, I am satisfied that the results of the test should be excluded.

7. It follows that there is no evidence to support the charge and that the appeal should be upheld.

Orders

1. The orders I make are as follows:
 1. The appeal against conviction is allowed.
 2. I set aside the penalty imposed by the magistrate.

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Decision last updated: 25 September 2024

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