

SUPREME COURT OF QUEENSLAND

CITATION: *Morrison v Russell & Anor* [2003] QCA 86

PARTIES: **FRANCIS JAMES MORRISON**
(appellant/applicant)
v
AMANDA RUSSELL
(first respondent)
G A LUTZ
(second respondent)

FILE NO/S: Appeal No 209 of 2002
DC No 1457 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for leave s 118 DCA (Criminal)

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 7 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 14 February 2002

JUDGES: Williams and Jerrard JJA and Mullins J
Separate reasons for judgment of each member of the Court;
each concurring as to the orders made

ORDER: **1. Application for leave to appeal dismissed**
2. Applicant to pay the respondents' costs of the appeal, assessed on the standard basis

CATCHWORDS: JURISDICTION, PRACTICE AND PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS – IDENTIFICATION AND EXAMINATION OF THE PERSON – where police officer requested the applicant to provide blood specimen – where applicant submits this was not done in accordance with s 80(8C) *Transport Operations (Road Use Management) Act* 1995 (Qld) – where provision allows blood samples to be taken only with the approval of a doctor who is familiar with the person's injuries and apparent state of health at the time – where taking of blood approved by a doctor who had not actually treated the applicant – whether doctor was “familiar with” the applicant's injuries for the purposes of s 80(8C)

Traffic Act 1949-1978 (Qld), s 16A(8)(c)
Transport Operations (Road Use Management) Act 1995 (Qld), s 79(1), s 80(8C)

McMahon v Casey [1980] 1 Qd R 230, followed

COUNSEL: M J Byrne QC for the appellant/applicant
M J Copley for the respondents

SOLICITORS: Legal Aid Queensland for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondents

- [1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA and I agree with what he has said and the order proposed.
- [2] **JERRARD JA:** On 23 February 2001 the applicant was convicted by a Magistrate at Maroochydore of two offences, and fined a total \$800.00. One offence was that of obstructing a police officer named Grant Andrew Lutz in the performance of that officer's duties on 15 August 2000 at Yandina¹, and the other was an offence against s 79(1) of the *Transport Operations (Road Use Management) Act* 1995 ("the Act") on 15 August 2000 at Nambour. The particulars of that offence were that Mr Morrison failed to provide as prescribed a specimen of his blood for a laboratory test upon a requisition duly made under s 80(8C) of that Act by Amanda Russell, a police officer². On 4 June 2002 Mr Morrison succeeded upon an appeal to the District Court at Brisbane against his conviction for the first offence. He now applies pursuant to s 118(3) of the *District Court Act* 1967 for leave to appeal against the decision of the District Court dismissing his appeal against the second conviction. That application relies upon the argument that when police officer Russell requested Mr Morrison to provide a specimen of his blood at the Nambour Hospital on 15 August 2000, she did not do so, as s 80(8C) requires:
"subject to the approval of a doctor who is familiar with the person's injuries and apparent state of health at the time".

The Background Events

- [3] Mr Morrison had been seen riding a motor cycle in Yandina by Constables Russell and Lutz at about 5.15 p.m. on 15 August 2000. They decided to stop him and request a random breath test. Mr Morrison arrived at his residence at 12 Old Gympie Road Yandina before the police officers could intercept him, and they then gained entry to that residence for the purpose of making that request. Mr Morrison, who may have been unaware of the police presence, and when in his kitchen, went to drink from a can containing what police officer Lutz (who was entering the kitchen) believed to be an alcoholic drink; and Mr Morrison was requested by Lutz not to drink from the can. Some force was used by Lutz, perhaps only upon the can, to obtain possession of it, and Mr Morrison fell backwards. The back of his head struck a cupboard underneath the sink. Thereupon, Mr Morrison, Ms Catherine Rowlands, who was also present in the residence, (and perhaps also a young boy then present), yelled words at the police officers; and Ms Rowlands physically urged police officer Lutz from the premises through the door. The police officers deemed the situation too volatile to remain, and they returned to the Nambour Police Station.

¹ Made an offence by s 444(1) of the *Police Powers and Responsibilities Act* 2000 (Qld).
² Section 80(11) of the Act makes that failure a deemed offence against s 79(1).

- [4] Meanwhile Catherine Rowlands had telephoned for an ambulance, and she also rang the police station and advised that Mr Morrison had been taken to the Nambour Hospital. The two police had actually seen the ambulance go past them and towards Yandina. A decision was made at the Police Station that Mr Morrison should be required to supply a specimen of blood for analysis at the hospital, and acting Inspector Sang, Constable Broeren, and Constables Russell and Lutz went there for that purpose, arriving shortly after 6.00 p.m.
- [5] Constable Lutz had been aware when he left Mr Morrison's home that Mr Morrison was loudly requesting that an ambulance be called, and loudly asserting that he had been assaulted by Constable Lutz. The ambulance officer who attended at the home noted that Mr Morrison was fully conscious, sitting up and alert, and "talking to us comprehensively". That officer observed a slightly reddened area on Mr Morrison's right cheek, and Mr Morrison indicated that he had a pain on the back of his head, in his neck, and in his lower back. The ambulance officer did not record any observable signs of Mr Morrison having consumed alcohol to excess. As a precaution, a cervical collar was placed around his neck, and Mr Morrison was offered and declined what analgesia the ambulance officer had for pain relief. The officer's evidence was that Mr Morrison "said he was ok".

Events at the Hospital

- [6] The apparently calm demeanour demonstrated to the ambulance officer was different from that demonstrated at the hospital, at least once the police arrived there. It was common ground on the appeal that when at the Nambour General Hospital Mr Morrison was:
- firstly on a trolley opposite the accident emergency desk;
 - then moved into an observation area which contained other patients;
 - then moved into a small corridor away from other patients;
 - then moved into a small room, apparently within the Department of Emergency Medicine in that hospital ("DEM").
- [7] Mr Morrison was described as "ranting and raving" by Constable Russell when first seen at the hospital on that trolley opposite the accident emergency desk. Acting Inspector Sang spoke with Mr Morrison at that time. When Mr Morrison was moved to the observation area, Constable Russell observed that he appeared agitated and his face was flushed. At this time Constable Lutz spoke with a Dr Rebecca Gray, and with Mr Morrison; and Dr Gray spoke with Mr Morrison.
- [8] Dr Gray's evidence was that she then told Mr Morrison that she had been asked by the police to assist them in taking blood from him. Mr Morrison responded by stating that no blood would be taken from him. Dr Gray's evidence was that "He then continued to shout and swear and in a very aggressive manner at the three police officers who were present", and Mr Morrison was then moved out of the observation area and into the corridor. While he was in that corridor, Constable Russell made her first request for the supply of the specimen of blood, the refusal of which was the basis of the conviction now challenged. Mr Morrison "again became loud and abusive", and he was then moved to that small emergency room. There he was again asked by officer Russell for a specimen of his blood, and again spoken to

by Dr Gray. Mr Morrison got off the trolley and to his feet, threw a chair across the room, and fell to the ground. He was returned by hospital staff to the bed, and issued with a notice by the police asserting a failure to supply a specimen; and the police withdrew.

- [9] Mr Morrison appears to have then calmed himself again. He was examined by Dr Gray in the DEM, and complained to her of lower back pain, mild neck pain, a headache, and a bump on the back of his head. That examination was at about 6.30 p.m., and the doctor's notes were that "He became calm and coherent, and behaved in an entirely appropriate manner. He gave a full account of himself." He also consented to a specimen of blood being taken by Dr Gray for medical purposes, and that sample was taken at about 7.43 p.m. Mr Morrison led evidence that upon analysis, that sample showed that his blood alcohol concentration at 7.43 p.m. was .015. His evidence to the Magistrate was that he had two or three stubbies of "gold" between 1.00 p.m. and 2.30 p.m. that afternoon.
- [10] His evidence was that he could recall hearing Catherine Rowlands say "come in" at his home that afternoon, and then a police officer grabbing his left hand. Something was said, and Mr Morrison could not recall what happened after that. He had either slipped, fallen, or been knocked down. He vaguely recalled an ambulance being present, and had no recall of being asked by police to provide a sample of blood to the doctor.

Issues Raised at the Trial

- [11] A number of issues were raised on that evidence in the submissions made on Mr Morrison's behalf to the Magistrate. Challenge was made to the lawfulness of the police entry to Mr Morrison's residence; to whether the request for a specimen of blood was made "as soon as practicable" after the police had seen Mr Morrison riding his motor cycle³; and it was argued there "was some other reason of a substantial character for (Mr Morrison's) failure to provide the specimen, other than a desire to avoid providing information that might be used in evidence."⁴ However, contrary to the position advanced in written submissions before the District Court, and written and oral submissions to this court, counsel then appearing for Mr Morrison specifically advised the Magistrate that no point was being taken that "the doctor wasn't in a proper position in this particular instance" to give the necessary approval under s 80(8C) (AR 200).
- [12] The Magistrate had listened to tapes produced by the police officers of the events at Mr Morrison's home and at the hospital. The Magistrate considered that Constables Russell and Lutz were credible and honest witnesses, but that Mr Morrison had a "very selective memory in the witness box". The Magistrate declared he was not at all impressed by Mr Morrison's honesty, that he was confident "in relation to the hospital" that Mr Morrison was aware of what was happening, and of what he was being requested to do by Constable Russell. The Magistrate found further that Mr Morrison's motivation for taking the stance that he did was a desire to avoid providing information that might be used in evidence.

³ Section 80(8D) provides that a requisition shall not be made under subsection (8C) unless it is made as soon as it is practicable, and within two hours (relevantly, of observing the person requested operating a motor vehicle).

⁴ Section 80(11A) provides that a person failing to supply a specimen is not guilty of an offence, if the person satisfies the Magistrate that there was some such "other reason".

- [13] The Magistrate also found that Mr Morrison was aggressive to the police, and accepted that Mr Morrison was of the opinion that the police had no right to enter his home, or to make a request for a specimen of blood at the hospital. He accepted that Mr Morrison held that opinion because the police had not found him driving, and he had not been involved in any accident.
- [14] Mr Morrison's views on the law are incorrect. Section 80(2) entitles a police officer who suspects on reasonable grounds that a person had driven a motor vehicle during the last preceding two hours to provide a specimen of breath for a breath test; and s 80(8C) provides that where any person whom a police officer may require under subsection (2) to provide a specimen of breath for a breath test by the person is at a hospital for treatment, that person may be required by any police officer to provide at the hospital a specimen of the person's blood for a laboratory test ("subject to the approval of a doctor familiar with the person's injuries and apparent state of health").
- [15] The Magistrate also correctly held that Mr Morrison's mistaken views of the law did not establish the necessary "other reason of a substantial character". I note that in any event what those views led to **was** a desire to avoid providing information, whether helpful to the police or not, that might be used in evidence. He convicted the appellant. However, he dismissed a charge of driving under the influence of liquor or a drug.

On Appeal

- [16] The argument on the application to this court was confined to the narrow point abandoned before the Magistrate. The evidence before the Magistrate had included Dr Gray's evidence that at the time she had been introduced to Mr Morrison by the police, which had occurred when Mr Morrison was in the observation area, she had understood she was being asked if Mr Morrison was physiologically stable enough to have specimen of blood taken. Her medical opinion was that giving up to 20 millilitres of blood would have made no difference to Mr Morrison's then physiological state, and she had so advised. At that time she had not conducted the medical examination performed in the DEM. She agreed in cross examination that accordingly she had not actually treated Mr Morrison herself at the time she approved taking a specimen of blood from him, (when in the observation area) and "to that extent" was not familiar with his injuries at all.
- [17] Mr Byrne QC, Senior Counsel for Mr Morrison submitted that Dr Gray's evidence established the absence of the necessary familiarity with Mr Morrison's injuries and apparent state of health at the time she approved taking a specimen. Mr Byrne's submissions accepted as accurate the construction placed on the identical wording of s 16A(8)(c) of the *Traffic Act* 1949-1978, (the legislation preceding the Act) in *McMahon v Casey* [1980] Qd R 230. In that decision W.B. Campbell J, with whom Wanstall CJ agreed, held that the term "familiar with" should be construed as meaning "acquainted with" or "having knowledge of". He held further that the degree of familiarity with the person's injuries and apparent state of health, required for a medical practitioner to form an opinion or to make a diagnosis, was one that would depend on the circumstances, and vary with the nature and complexity of the injuries and the doctor's knowledge obtained by visual observation or clinical examination of those injuries, and the patient's general condition. I respectfully agree with that construction.

- [18] At the time Mr Morrison was spoken to by Dr Gray in the observation area he was on a trolley and at least the anterior part of his body would have been visible, but not necessarily any part of the back of the body. It was not suggested he had any bleeding at all, or any actual or apparent restriction of movement. His response to her statement to him showed that he understood what was being asked of him. Mr Morrison accepted, when being cross examined, that the tape recording of his statements at the hospital recorded his complaining on ten separate occasions that he had been assaulted by the police, and three of those statements made clear that he said this had happened at his house; and in one of those he declared, inter alia, “I’m in a bloody hospital.....how the heck can I calm down when one of your officers punched me in the face in my own house....” (this last statement seems most likely to have been made to Acting Inspector Sang, and therefore before Mr Morrison was in the observation area and before the time of the doctor’s conversation with Mr Morrison). Those recorded statements indicate that Mr Morrison had a good grasp of the then circumstances and the capacity to speak, recall, and express appropriate emotions.
- [19] In those circumstances Dr Gray was entitled to regard herself as, and was shown to be, familiar with Mr Morrison’s apparent state of health. In essence, that was a state of distress, agitation, and anger at an assault he alleged upon him, and about which he made very vocal complaint. The only issue requiring any real consideration is whether she was also familiar with his injuries.
- [20] Mr Byrne’s carefully developed submission emphasised that Dr Gray approved the taking of blood before she had learnt any of Mr Morrison’s pre admission history, and when she did not know that he had received a blow to the head. It appeared common ground before the Magistrate, and on the appeal, that Mr Morrison had been rendered unconscious for a brief period by that blow; and the fact that that had occurred was not known to Dr Gray when she approved the request. It was submitted that the answers herein quoted from her evidence, and the fact of her subsequent examination of Mr Morrison, establishes that she was not familiar with his injuries when the request was approved.
- [21] There is force in the submission that knowledge of a blow to the head followed, by some period of lack of consciousness, was relevant to, if not necessary for, “having knowledge of” or familiarity with the injuries to a person seen by doctor in the outpatient or emergency ward of a hospital. The problem with the appellant’s submission is that the final step is missing. There was no evidence in the Appeal Record suggesting that Mr Morrison actually **had** any injuries at all at that time, as distinct from his complaints of specific discomfort made shortly after to Dr Gray. There was no description of Mr Morrison receiving any medication or other treatment for any condition as a result of that hospital visit, let alone even being admitted as a patient for observation, even for a brief period; or being admitted for any treatment. Recognising this difficulty, Mr Byrne QC sought leave during the argument on appeal to adduce evidence on the application, apparently to indicate or suggest the presence of “injuries”; but that application faced a number of difficulties. A critical one was that counsel for the respondent had been advised before the hearing that that evidence, whatever it was, would not be relied upon by the applicant. Counsel had therefore not considered it. In those circumstances, this being a “second tier” appeal, that application was refused, and the matter was considered on the same evidence as that apparently before the Magistrate and the District Court.

- [22] That evidence did not show that the applicant had any injuries with which Dr Gray could ever have become familiar. It was not suggested to Dr Gray in cross examination that there were in fact any physical injuries which should or may have caused her to consider that Mr Morrison was not physiologically stable enough to have 20 millilitres of blood taken from him, (probably because she requested a sample herself). Likewise, there was no argument, evidence or finding of the existence of any psychiatric or physiological harm that might have resulted to Mr Morrison from taking a sample of blood, or of any psychiatric or psychological condition, the existence of which Dr Gray had not been appraised, or with which she was not sufficiently familiar, by reason of the limited opportunity she had had to assess Mr Morrison.
- [23] The learned District Court judge before whom Mr Morrison appeared in person on his appeal recorded in his judgment that Mr Morrison had a burning sense of injustice arising from these particular proceedings. His resentment at what happened in his home may be understandable, but that does not mean that his appeal can succeed on the merits of the argument raised under s 80(8C).
- [24] I would order that the application for leave to appeal be dismissed, and order that the applicant pay the respondent's costs of the appeal, assessed on the standard basis.
- [25] **MULLINS J:** I agree with the reasons for judgment of Jerrard JA and the proposed orders.