

IN THE SUPREME COURT OF QUEENSLAND    O.S.C. No. 30 of 1975

DUDLEY KEITH FRANKLIN BAKER

v.

GEORGE BODO WILLHELM ERTEL

Ex parte: DUDLEY KEITH FRANKLIN BAKER

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The Chief Justice

D.M. Campbell J.

Andrews J.

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Judgment delivered by the Chief Justice and D.M. Campbell J. on the 26th March 1976 with Andrews J. concurring with both reasons.

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"THE APPEAL SHOULD BE ALLOWED WITH COSTS. THE ORDER OF THE MAGISTRATE SHOULD BE SET ASIDE AND THE MATTER SHOULD BE REMITTED TO THE MAGISTRATE WITH A DIRECTION TO ENTER ANY NECESSARY ADJOURNMENTS AND TO PROCEED ACCORDING TO LAW."

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JUDGMENT - THE CHIEF JUSTICE

In this case a charge was laid pursuant to s. 16(1) of The Traffic Acts, that Ertel while under the influence of liquor or a drug was in charge of a motor vehicle on a road, namely Tilley Road, Gumdale. When the matter came on for hearing, the charge was amended to allege that the offence occurred "elsewhere than on a road, namely on land at 288 Tilley Road, Gumdale, situated off and adjoining Tilley Road, Gumdale." The Magistrate dismissed the charge, being of the opinion that "without the breathalyser certificate evidence, the other evidence is not sufficient for me to call upon the defendant to provide an answer to this charge." The complainant has obtained an order to review the Magistrate's decision.

Baker went to the intersection of New Cleveland Road and Tilley Road at 11 p.m. on 28th June, 1975; he saw that an electric light pole had been knocked over and wires were on the footpath; the ambulance was there. In the back yard of a house at 288 Tilley Road was an International Truck which had apparently entered the yard after going over two fences. The respondent was sitting at the wheel of the truck. When spoken to by Baker, this person at first denied that he had been driving the truck but there was evidence that later he admitted that he had. Baker noticed that the respondent's breath smelt of liquor; that he was unsteady on his feet; that his movements were sluggish; that his eyes were not open at times, and that he leant against the side of the truck for support. Baker said that, in response to questions, the respondent said he had been drinking at the Wellington Point Hotel; that he did not know how many beers he had had. Baker secured from Constable Wilson a breath-testing device and asked the respondent to blow into it and inflate the bag in one breath in between 10 and 20 seconds. When the respondent did this, the crystals in the device turned green over the prescribed line. Baker told the respondent this indicated an alcohol blood content above .08 per cent; and that he required him, to go to the Wynnum Police Station to provide a specimen of breath in a

breath analysing instrument. This was carried out, the result disclosing .19 per cent as shown by the certificate.

The only submission made for the respondent was in substance, that the legislation required various preliminaries to be proved to have been gone through before the certificate issued pursuant to s. 16A (8) and s. 16A(15) could be given effect. The case is, on this question, the same as in other cases before this Court at the present sittings; but in this case, the Magistrate held that there was no case to answer and the defendant was therefore not obliged to elect whether to call evidence or not.

The appeal should be allowed with costs; the order of the Magistrate should be set aside; the matter should be remitted to the Magistrate with a direction to enter any necessary adjournment and proceed according to law.

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JUDGMENT - D.M. CAMPBELL J.

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The Magistrate here declined to place any reliance on a certificate issued under s. 16A.(15)(a) of the Traffic Act 1949-1974 in support of a charge under s. 16(1) because the constable who administered a breath test did not depose to the fact that he entertained the suspicion referred to in s. 16A. (2) (a) or in s. 16A.(3) (a).

In dismissing the complaint following a submission that there was no case to answer, the Magistrate said:

"Now, this suspicion, if it exists, to my mind, should be spelt out for the benefit of the court. It may well be that the constable who spoke to the defendant, observed him in the condition in which he was, who saw him unsteady on his feet, movements sluggish, eyelids down and leaning on the vehicle for support, with a smell of liquor on his breath, certainly suspected that he had alcohol or drug in his body. He has not told me in so many words, that he so suspected."

For the reasons I have briefly stated in Newell v. Adams (O.S.C. No. 23 of 1975), I am of the opinion that the Magistrate acted wrongly.

Even if, as was argued, the evidence did not establish that the constable could have entertained a suspicion that the defendant had alcohol in his body, having regard to his behaviour "in relation to the motor vehicle" in the language of s. 16A.(2)(a)(A), it does not necessarily mean that the certificate ought to have been disregarded. Moreover, I see no reason for interpreting the words "an offence against this Act" in subparagraph (B) to exclude an offence under s. 16. But apart altogether from these matters, the motor vehicle was involved in damage to property, and there was strong evidence to support a suspicion that the defendant was driving at the time as would justify a request under s. 16A.(3) that the defendant provide a specimen of breath for a breath test.

In short, there was no suggestion that the breath test was administered capriciously, or in some unlawful manner, and the Magistrate had no discretion to reject the certificate at the close of the prosecution's case. I agree with the order proposed by the Chief Justice.