02/93

SUPREME COURT OF VICTORIA

DPP v PAUL

Smith J

11, 18 December 1992 — (1992) 16 MVR 435

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST NOT CONDUCTED AT PLACE OF DRIVING – CONDUCTED AT POLICE STATION – WHETHER FATAL TO CHARGE – NO EVIDENCE OF REQUISITE OPINION FORMED OR THAT DRIVER REQUIRED TO FURNISH SAMPLE OF BREATH – WHETHER FATAL TO CHARGE – WHETHER OPEN TO COURT TO EXCLUDE EVIDENCE IMPROPERLY OBTAINED: *ROAD SAFETY ACT* 1986, SS49(1)(f), 53(1), 55.

P. was intercepted driving a motor vehicle. He was taken to a police station where a preliminary breath test was administered, followed by a full breath test which resulted in a BAC of .220%. At the hearing of a charge laid under s49(1)(f) of the *Road Safety Act* 1986 ('Act'), the magistrate found that there was no evidence that the police informant had formed the requisite opinion under s55(1) of the Act or that he required the driver to furnish a sample of breath for analysis. The magistrate upheld a 'no case' submission and dismissed the charge on the basis that the preliminary breath test had not been administered at the place of driving and that in the exercise of his discretion and as a matter of fairness, the evidence of the result of the breath test should be excluded in view of the finding that relevant requirements of s55(1) of the Act had not been satisfied. Upon appeal—

HELD: Appeal dismissed.
(1) The magistrate was in error in ruling that the preliminary breath test had to be administered at the place of driving.
***DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367; MC 40/92, followed.**

(2) In view of the finding that not all of the relevant requirements of s55(1) of the Act had been satisfied, it was open to the magistrate in the exercise of his discretion to exclude the evidence of the breath test and dismiss the charge.

SMITH J: [1] By information dated 24 March 1988, Richard Neil Paul was charged with breach of s49(1)(f) of the *Road Safety Act* 1986 (the Act). It seems that on 29 January 1988 he was driving his motor vehicle in Mooroolbark when he was stopped by two police officers. They took him to the Mooroolbark Police Station where a preliminary breath test was administered under s53 of the Act. Following that test a breathalyser test was administered pursuant to s55(1) of the Act. The result of that test was a reading of .220 grams of alcohol per 100 millilitres of blood. The information was heard at the Magistrates' Court at Ferntree Gully on 28 May 1992. At the conclusion of the informant's case, counsel representing Mr Paul submitted that there was no case to answer. The learned Magistrate upheld these submissions and dismissed the information. The Director of Public Prosecutions has brought an appeal from this decision. In the order referring the appeal for trial by a Judge of this Court made on 6 July 1992, the following questions of law were identified as having been raised by the appellant:

> (a) The Magistrate erred in holding that for the proof of an offence under s49(1)(f) of the *Road Safety Act* 1986 the preliminary breath test referred to in s55(1) must have been administered at or near the place of driving.
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> (b) The Magistrate should have held that in providing an offence under s49(1)(f) of the Act the place where a preliminary breath test was administered is not material.
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> (c) The Magistrate erred in holding that the result of the breathalyser test under the said Act may be excluded from evidence by reason of unfairness if the preliminary breath **[2]** test has not been administered at or near the place of driving.
>
> (d) The Magistrate erred in excluding evidence of a breathalyser reading by reason of unfairness.

Relevant statutory provisions that have to be considered are ss49(1)(f), 53 and 55 of the *Road Safety Act* 1986. They are in the following terms. *[His Honour set out the statutory provisions and*

continued] ... **[4]** In his submissions to the learned Magistrate, counsel for Mr Paul made a number of points.

> (a) He submitted that s49(1)(f), because it incorporated by reference s55, also incorporated the requirements of s53. He argued that it was necessary that the preliminary breath test be conducted and the informant have formed the opinion referred to in s55(1) before the defendant could lawfully be required to go back to the police station for the purpose of breath analysis.
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> (b) He argued that on the police evidence the defendant had been required to go back to the police station when no preliminary breath test had been conducted and that this was fatal to a case brought under s49(1)(f) because it means that requirements of s55(1) and s53 had not been satisfied.
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> (c) He further submitted that the informant had not formed the requisite opinion required under s55(1)(a) before he could require Mr Paul to submit to a breathalyser. He submitted that because the opinion had not been formed the requirement to furnish the sample for breath analysis was itself improper and was again fatal to a charge under s49(1)(f).
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> (d) He further submitted that contrary to s55(1) the informant had not made the demand or requirement that the defendant furnish a sample of breath for analysis but on the evidence it was the operator himself who had made that requirement. This also was fatal to a charge brought under s49(1)(f).

He then made submissions challenging the correctness of the operation of the breathalyser. It is not necessary to refer to these submissions in detail because the learned Magistrate found as **[5]** a fact that the readings were accurate and that the regulations had been complied with. In his reasons the learned Magistrate, *inter alia*, stated the following conclusions:

> (a) The provisions of s49(1)(f) required that everything that had to be done in order to render admissible a breath analysis reading must be complied with. He stated that he was of the view that it was contemplated that the preliminary breath test would be administered at the place of driving.
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> (b) The police had not arrested the defendant for the purpose of taking him to the police station but had required him to attend at the police station for the purpose of s49(1)(f).
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> (c) He concluded that even if there was not a mandatory requirement that the preliminary breath test be administered at the place of driving, s49(1)(f) of the Act "imposes onerous requirements which demanded strict compliance to justify the requirement for the driver to attend at a police station and submit to a breath analysis."

Continuing the quotation from the respondent's affidavit, the learned Magistrate then stated:

> "(e) The informant had failed to comply with that requirement (sic) and that the informant having chosen to proceed under sub-para.(f) of s49(1) in preference to sub-para.(b) was obliged to bring the case within the requirements of sub-para.(1)(f).
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> (f) If that conclusion was wrong and the giving of a preliminary test at or near the place of driving was not a mandatory requirement then the exclusion of the result of the subsequent breathalyser test was warranted upon the whole of the evidence in the exercise of my discretion and as a matter of fairness."

[6] The respondent's account of the Magistrate's reasons quoted above is in my view to be preferred to that of the appellant in that it is more direct and comprehensive. They are difficult to analyse, but a fair interpretation of them is that the learned Magistrate reached the following conclusions.

> (a) The requirements of ss55 and 53 had to be satisfied before a conviction could be obtained under s49(1)(f).
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> (b) Those requirements included a requirement that the preliminary breath test be administered at the place of driving. This had not been done and was therefore fatal to the prosecution.
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> (c) If he was incorrect in that view, nonetheless the requirements of s49(1)(f) (incorporating the requirements of s53 and 55 of the Act) had to be complied with and had not been. For that reason also the information must fail.

> (d) If he was wrong in those conclusions, then the evidence of the breathalyser test should be excluded in the exercise of his "discretion and as a matter of fairness".

The learned Magistrate's view that it was necessary for the informant to establish compliance with both s53 and s55(1) is supported by a substantial body of authority. The issue was recently considered by Ormiston J in a matter of *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367. His Honour stated (at p6 of the judgment):

> "It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1). This is implicit in the judgment of Mason CJ and Toohey J (in which Brennan J concurred) in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, see CLR esp. at pp219, 222 and 223-224, apparently approving what was said by the Full Court *sub nom. Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at p743; (1989) 9 MVR 13.

[7] The same conclusion was clearly expressed by Tadgell J in *Smith v Van Maanen* ((1991) 14 MVR 365, 5th July 1991) where he said (at p14):

> 'It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-s. (1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis; and that the result of analysis of the sample as recorded by the breath-analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood.' Consequently compliance with these sub-sections is not merely a question as to the admissibility of the evidence of the tests which may be rejected on a discretionary basis if they have been illegally required: it is an essential part of the case which the prosecution must make out. By s49(1)(f) the first element of the offence to be established is whether the accused has furnished a sample of breath "under" s55(1)."

That decision, however, also considered the issue raised in the first ground of appeal – whether a preliminary breath test must be administered at or near the place of driving. The conclusion reached by His Honour was that while a limitation of reasonableness should be implied in s53 in relation to the requirement, the statute did not require that the preliminary breath test be administered in the vicinity of the place of the driving in all cases. His Honour's conclusions were as follows:

> "For the purposes of a prosecution under s49(1)(f) the informant must establish that a preliminary breath test was validly conducted pursuant to s53. The duty of a driver required to undergo a preliminary breath test under the section is limited to the obligation to undergo the test. The section gives a police or other officer the power to require such a test but does not give that officer power to detain a driver for any longer than is necessary to carry out the test. Ordinarily the officer ought to have available the necessary device to enable the driver to fulfil his or her obligation. The section gives no general or indefinite power of detention, nor any power to require **[8]** the driver to go in custody or quasi-custody to a police station or any other place for the purpose of conducting the test. On the other hand the convenience of an officer or driver may dictate that the test not be carried out instantaneously or at the place where the requirement is made. For the reasons already stated, the only implication which needs to be read into s53 is that the requirement should be reasonable. If the driver agrees to wait or agrees to go elsewhere, such as to a police station, for the purpose of undergoing the test, that does not invalidate the test. If he refuses to do so then, in the ordinary case, any requirement which would have the effect of obliging the driver to wait more than a few minutes or to travel any significant distance to undergo the test in those circumstances would not be an offence under s49(1)(c). But in this case the evidence before the Magistrates' Court did not establish that any unreasonable requirement had been made or that the respondent was compelled to go to the St. Kilda Police Station. The limits placed by the Magistrate as to the area in which the test must be conducted cannot be implied into the section and he erred in requiring the test to be carried out in the "general area" where the driving occurred".

In light of His Honour's analysis I must conclude that the learned Magistrate was in error in his ruling that a preliminary breath test had to be administered at or near the place of driving. The learned Magistrate, however, indicated two other alternative bases for his decision. One was that in his view the requirements of the relevant sections had not been satisfied. His Worship did not elaborate on what other requirements had not been satisfied but there was evidence that the informant:

- had not formed the necessary opinion about the respondent's blood alcohol level;

- did not make the demand that the respondent submit to the breath tests

as required by s55(1) of the Act. It was, therefore, open to the learned Magistrate to find that the requirements of s55(1) of the **[9]** Act had not been satisfied. Such a finding would support the decision by him to dismiss the information applying the first alternative basis. The s53 procedure empowers the police to require people to submit to a preliminary breath test in circumstances where they may not have broken the law. This is a departure from the protection the law usually provides to citizens. But s53 does not authorise the police to arrest a driver or require a person to travel to a testing station. It is significant in my view that Parliament required, before the further requirement of a breath test could be made, that the officer who did the preliminary test must form the requisite opinion and make the request for the breath test. They are not mere technicalities in my view but are intended to provide safeguards for the proper administration of the law.

The other basis for the learned Magistrate's decision was the exclusion of the evidence of the breathalyser reading. The appellant argued that the Magistrate purported to exercise a discretion to exclude evidence on the grounds that it would be unfair to admit it against the defendant and that such a discretion applied only to evidence of confessions (*R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15. The learned Magistrate did not, however, in my view limit himself to that unfairness discretion. He referred in broad terms to his discretionary powers which included the power to exclude evidence obtained illegally or improperly. It was open to the learned Magistrate to exercise that discretion on the basis that the requirements of s55(1)(a) had not been satisfied and therefore, whether it was open to him to exclude the evidence on the grounds **[10]** of unfairness, it was open to him to exclude the evidence in the manner in which he purported to do so.

While the appellant has succeeded on the first question the decision of the Magistrate should in any event be upheld because I am satisfied that he found, and it was open to him to find, that not all the relevant requirements of s55(1) of the Act had been satisfied and, therefore, the information had to be dismissed. He also ruled, and it was open to him to do so, that the evidence of the breathalyser should be excluded in the exercise of his discretion. With that evidence excluded, the informant's case had to fail. For the foregoing reasons, the appeal should therefore be dismissed.

APPEARANCES: For the appellant DPP: Mr JD McArdle, counsel. JM Buckley, Solicitor for DPP. For the respondent Paul: Mr G Hardy, counsel. Toth & Gauld, solicitors.
