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SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

WALKER v DPP

Fullagar, Brooking and McDonald JJ

13 May 1993 — (1993) 17 MVR 194

MOTOR TRAFFIC – DRINK/DRIVING – PBT DEVICE MISPRONOUNCED – EFFECT OF – NO FORMAL REQUIREMENT FOR TEST MADE – NO EVIDENCE THAT BREATHALYSER SET UP READY FOR USE – ELEMENTS OF S49(1)(f) OFFENCE – WHETHER TESTS UNDERGONE "UNDER SECTION 55(1)" – MEANING OF "REQUIRE" IN S55(1): *ROAD SAFETY ACT* 1986, SS49(1)(f), 53, 55, 58(2).

1. It should not be submitted to a court that because a police officer describes a preliminary breath test device as a Lion Alcometer (instead of Lion Alcolmeter) there is no evidence that the device used was one prescribed by the Regulations.

2. Where a person who had been intercepted driving a motor car agreed to undergo a preliminary breath test and later a full breath test, a *prima facie* case established that both tests were undergone by the person "under section 55(1)" of the *Road Safety Act* 1986 ('Act').

3. The requirement to undergo a full breath test is not an element of an offence against s49(1)(f) of the Act. Accordingly, it is not necessary for the informant to give evidence that a formal demand was made and that the breath analysing instrument was then and there ready for use in the presence of the defendant.

***Scott v Dunstone* [1963] VicRp 77; (1963) VR 579, distinguished.**

***DPP v Walker* MC 20/1992, affirmed.**

FULLAGAR J: [1] This is an appeal from a judgment by Nathan J which was delivered on appeal from the decision of a Magistrate whereby he acquitted Katherine Leonie Walker (whom I shall call "the defendant") of an offence against s49(1)(f) of the *Road Safety Act* 1986. His Honour upheld the appeal of the Director of Public Prosecutions, acting for the informant, and the defendant has appealed as of right to this Court. As I say, the defendant was charged with an offence against s49(1)(f) of the *Road Safety Act*: that is to say, that, in substance, within three hours after driving or being in charge of a motor vehicle, she furnished a sample of breath for analysis by a breath analysing instrument under sec55(1) of the Act, and that the result of the analysis as recorded or shown by the instrument indicated that more than the prescribed concentration of alcohol was present in her blood.

The facts of the case may be very simply stated. At about 5 a.m. on Sunday, 11 December 1988, Mr Watt, a member of the Victoria Police Force with the rank of Senior Constable, was on patrol duties in the Carlton area in company with a Sergeant. He observed the vehicle driven by the defendant travelling along a street in Carlton with its headlights off and he intercepted the vehicle. It was dark at the time. He spoke to the defendant and ascertained her name, age and date of birth, and he asked her whether she had had anything to drink and she said she had been drinking some Beaujolais. He said to her, "Are you prepared to undergo a preliminary breath test?" and she said, "Yes". In evidence, Mr Watt said the defendant was then given a preliminary breath test **[2]** using what is phonetically rendered in the transcript as the "Lion Alcometer". He said the result of the test "was positive" and that the defendant agreed to accompany him back to the Carlton police station in order to undergo a breathalyser test. At the police station he asked her, "Are you prepared to furnish a sample of your breath for analysis?" and she said, "Yes". He then introduced her to the authorised operator of a breath analysing machine, who conducted a breathalysing test on the defendant, and a certificate was produced to him showing the quantity of alcohol to be 0.140 percent. At the conclusion of the hearing a no-case submission was made by counsel for the defendant, which was upheld. As I say, the learned Judge upheld an appeal from that decision and remitted the matter for trial.

Before this Court, counsel for the defendant contended, first, that because the policeman

referred in his evidence to what can be phonetically reproduced as "Lion Alcometer", and not to what is prescribed in the regulation by the word "Lion Alcolmeter", there was no evidence that the breathalyser machine used was a prescribed instrument. (It is common ground that the regulations described Lion Alcolmeter as a prescribed instrument). The learned primary Judge categorised this submission as absurd, and I entirely agree. It should not have been submitted by counsel to the Magistrate, as it is patently untenable.

The second contention was that there was no evidence that the defendant was "required" to take a preliminary test or that she was later "required" to furnish a sample of breath for analysis within the meaning of the word where it **[3]** twice appears in s55 of the Act. As I have said, the evidence was that the policeman asked the defendant, "Are you willing to undergo a preliminary breath test?" She replied "Yes", and she was then given on the spot a preliminary breath test, using a device the name of which may be pronounced in numerous different ways but is spelt in the regulations "Lion Alcolmeter". That name appears in the regulations, which it was conceded were properly before the Magistrate, as a prescribed instrument.

In my opinion, in all the surrounding circumstances it would have been clear to the policeman that the defendant was indicating that she would take the preliminary test, whether it was officially or officiously demanded or not, and indicating that any more specific requirement was a mere waste of words. It is important to note that the defendant was not charged with refusing to take a preliminary breath test when required to do so, or with refusing to comply with a requirement made under sec.55(1) or 55(2), those being charges where an element is the making of a requirement. The policeman swore in his evidence that the result of this test was "positive" and that the defendant "agreed to accompany me back to the Carlton police station in order to undergo a breathalyser test".

[4] In my opinion, contrary to another contention made below for the appellant but not persisted in here, a statement of the policeman that the preliminary result was "positive" was in all the surrounding circumstances *prima facie* evidence that in the policeman's opinion the test indicated that the defendant's blood contained alcohol in excess of the prescribed concentration of 0.05 per cent.

In my opinion the evidence that "the defendant agreed to accompany me back to Carlton" in order to undergo a breathalyser test is, in all the circumstances, evidence of the fact that the defendant was willing to undergo a breathalyser test as well as willing to go to the police station for that purpose, and of the fact that a request or demand was unnecessary. Again I point out that the defendant was not charged with refusing to undergo a test when required to undergo one.

At the police station a third consent was obtained when the defendant was asked "Are you prepared to furnish a sample of your breath for analysis?" and she replied "Yes" and then undertook the test. In my opinion the above evidence in the surrounding circumstances was sufficient to establish a *prima facie* case that both the preliminary test and the breathalyser test were furnished by the defendant "under section 55(1)", and the second contention made to this Court should be rejected. I should point out that the decision of Sholl J in *Scott v Dunstone* [1963] VicRp 77; (1963) VR 579 was given upon different legislation and upon a charge of refusing to furnish a sample. His Honour there stated his opinion as to the requirements which a police officer must satisfy or the **[5]** things he must do in order to establish a requirement and a refusal upon the legislation then before the Court. I would distinguish that case upon the ground that it was a refusal case where a requirement was an element of the offence charged, and where the legislation was not identical to the present. But if his Honour should be understood as laying down what kind of requirement must be made in order to make a test one which was "under" the section, then I would decline to follow the test laid down.

Mr Billings, for the appellant, further argued upon the foundation of *Scott v Dunstone* that it must be established that a breathalyser unit was set up ready for use in the presence of the defendant at the time of the requirement to undertake a breathalyser test. In my opinion this contention too should be rejected in a case where a requirement is not an element of the offence charged.

It should be noted that it was contended before the magistrate that a certificate purportedly pursuant to ss54 and 55 was never properly tendered to the magistrate, and it was before him contended that, in any event, the certificate was not admissible to prove the necessary elements of an offence against s49(1)(f). As to the argument about the tender, it is, in my opinion, clear from the evidence that the prosecutor did "tender" the certificate, in the sense that he attempted to hand it up with the intention that it become part of the evidence, but he was stopped by Counsel for the defendant who said that he had a submission later to make about that.

The submission was not ruled upon at the time it was **[6]** made, and the matter was as it were left in abeyance still at the time when the prosecution closed its case. In those circumstances I do not think it lay in the mouth of the defendant's Counsel to say at the end of the trial that the document was not in evidence. If Counsel did raise that contention at the end of the trial, the proper course for the court to follow would then be to allow the prosecution to re-open its case and complete what should be classified as an interrupted tender of the certificate.

As to the effectiveness of the certificate once in evidence, the contention was that the certificate was not adequate to establish the elements of the offence of s49(1)(f). It will be noted that the earlier form of s58 opened with the words:

> "If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood of any person at any time is relevant:
> (c) upon a hearing for an offence against s49(1) of this Act"—

and stated that in these circumstances evidence was admissible of the concentration of alcohol indicated to be present in the blood of the person by a breath-analysing instrument and a document purporting to be a certificate given in accordance with s55(4) was admissible and was conclusive proof of the facts and matters contained in it.

In the case of *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91 it was pointed out that when a person was charged with an offence against s49(1)(f) it could not be said that the question whether the person was or was not under the influence of intoxicating liquor was relevant, and that it could not be said that the question as to the presence or **[7]** the concentration of alcohol in the blood of any person at any time was relevant, for s49(1)(f) was concerned with the result of an analysis as recorded by the breath-analysing instrument and not with a state of being intoxicated and not with the presence, or with the actual concentration, of alcohol in the blood of the person. It followed that a certificate was not there admissible.

As a result of that decision the legislature by Act No. 66 of 1990 amended, retrospectively to cover the present case, the opening words of s58 by adding to the opening words, following the words "alcohol in the blood of any person at any time", the following words, "or if a result of a breath analysis". Following upon that amendment the material words of s58 were: "If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence of the concentration of alcohol in the blood of any person at any time or if a result of a breath analysis is relevant", and it was in these widened circumstances that sub-section (1) would ensue, and sub-section (2) would be construed accordingly. In my opinion that amendment of which I have spoken was effective to make admissible a copy certificate which falls within s58(2) to prove the result of the analysis which is referred to in section 49(1)(f). If it were not so effective the amendment made by Act No. 66 of 1990 would be totally ineffective to achieve anything at all. The Act which made that amendment contains the following section:

> "(1) Purpose. The purpose of this Act is to make sure that certificate evidence is available in all drink-driving cases."

[8] Sub-section 2 provided that section 3 must be taken to have come into operation on 1 March 1987; section 3 inserted the words which I have indicated; and section 4 provided as follows:

> "The amendments made to the *Road Safety Act* 1986 by s30 do not affect the rights of the parties in the proceeding known as *Bracken v O'Sullivan* No. 82848 of 1990 in the Supreme Court of Victoria."

Nothing could be plainer, in my opinion, than that the intention of the legislature by inserting the additional words in s58(1) was to cover the *lacuna* exposed in the case of *Bracken v O'Sullivan*. In my opinion that amounts virtually to a legislative command that the sections must be construed so that that end is met.

I do not think it is strictly necessary to say anything else in order to dispose of the present appeal. However, I wish to say, and not for the first time, that it is in my opinion unsatisfactory in the extreme that appeals can be brought under s92 of the *Magistrates' Court Act* as of right with no discretion in the Supreme Court as existed for very many years under the old proceeding to decline to issue an *order nisi* in proper circumstances. It is also extremely unsatisfactory that appeals can be taken as of right further to the Full Court, whereas under the old proceeding the Full Court could not be reached unless the *order nisi* was made returnable before the Full Court after careful consideration by a judge or a Master or was referred later by a judge or a Master to the Full Court. For the reasons I have given, I would dismiss this appeal and I would dismiss it with costs.

BROOKING J: I agree with the learned presiding Judge that the appeal must be dismissed and wish only to add something about one of the points argued on behalf of the appellant. I am prepared to assume in favour of the appellant, without expressing any opinion on the point, that the word "require", where it appears in s53(1) and where it twice appears in s55(1), has some such meaning as "to order or call upon to do something". In *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at p219; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, Mason CJ and Toohey J spoke of "a demand" in referring to the power given by s53(1) to require the undergoing of a preliminary test and the power given by s55(1) to require the furnishing of a breath sample, and in *R v Clarke* (1969) 2 All ER 1008 at p1010, the Court of Appeal took the view that the power to require a specimen of breath for a breath test, under similar but by no means identical English legislation, could be exercised by "a request in words which it is clear to the defendant is being made as of right". The actual words used in that case were, "I wish to give you a breath test owing to the manner in which you have been driving this vehicle, as I believe you are driving with more than the prescribed level of alcohol in your blood". Those words were held to the capable of being viewed as a requirement. It may be noted that in *Alderson v Booth* (1969) 2 QB 216; 53 Cr App R 301; (1969) 2 All ER 271, a Divisional Court, in considering a different but not unrelated question, described as (in their context) words of command the following: "I shall have to ask you to come to the police station for further tests". These two decisions might be thought to suggest that the requirement of words **[10]** of command or of a request made as of right is not a difficult one to satisfy.

In the present case the evidence is that the informant said this at the scene: "Are you prepared to undergo a preliminary breath test? and received the answer, "Yes". The evidence is that the appellant was then given the preliminary breath test and, its result being positive, she agreed to accompany the informant to the Carlton police station in order to undergo a breathalyser test. The Informant further swore that at the station he said to the appellant, "Are you prepared to furnish a sample of your breath for analysis?", to which she replied, "Yes". I am prepared to assume, without expressing any opinion on the question, that it would not have been open to a magistrate to find that there had been a requirement for the purposes of either s53(1) or s55(1) so as to support a charge under s49(1)(c) or (e) in the event that the defendant had answered "No" to either of the questions put to her and nothing more of relevance had been shown to the court. Those two provisions create the offence of refusing or failing to undergo a preliminary breath test when required under s53 to do so and refusing or failing to comply with a requirement made under s55(1), but, as the learned presiding Judge has emphasised, in the present case the offence alleged was against s49(1)(f), and in my view it is not an element of this offence that there should have been a requirement made under s53 or that there should have been a requirement made under s55(1).

As regards the latter suggested element of the offence, para.(f) of s49(1) does not speak in terms of a requirement under **[11]** s55(1). It speaks of the furnishing of a sample of breath analysis by a breath analysing instrument "under section 55(1)", and in my opinion a sample is furnished for analysis "under" s55(1) if the defendant, so to speak, dispenses with the "requirement" which is that by means of which the furnishing of a sample is made compulsory in the sense that, by the combined operation of s49(1)(e) and s55(1), the refusal or failure to furnish the sample is

made an offence. During argument, the Court, by giving examples of the willing or over-anxious defendant, drew attention to the absurd results which would follow if the contrary view were to be taken.

As regards the first suggested absent element of the offence, by which I mean the suggested element said not to have been established in this case – that is, the making of a requirement under s53 – the examples given by the Court during argument again drew attention to the absurd results which would follow if the appellant's contention were to be upheld. Section 55(1) does, it is true, begin with words, "If a person undergoes a preliminary breath test when required ... under s53 to do so", but again, while the making of a requirement under s53 may be a condition of the exercise of the power to make a requirement under s55(1), if the defendant has, as it were, dispensed with the requirement for the purposes of s53, the sample of breath furnished for analysis by a breath analysing instrument is still, in my view, furnished for analysis "under" s55(1).

Examples might readily be given of cases in which something has been held to have been done "under" an enactment, notwithstanding that what has been done was done in all respects in **[12]** accordance with the enactment. Here, the appellant chose to dispense with the performance of conditions upon which the arising of a duty to undergo a breathalyser test depended, and, on the assumption which I have made about the meaning of "require" near the outset of these reasons, that duty did not arise. But she was not charged with non-performance of that duty and, when the breath test was undergone with her consent, the sample was, in my view, furnished for analysis "under section 55(1)" within the meaning of s49(1)(f). I agree with the order proposed.

McDONALD J: I agree also that the appeal should be dismissed for the reasons stated by the learned presiding judge. I agree also with the terms of the order proposed.

FULLAGAR J: It has been drawn to our attention that the magistrate to whom the "No case" submission was made has now retired and, accordingly, we all consider that a slight variation ought to be made to the order of the learned primary judge. The orders of the court are as follows:

> 1. That the order of Nathan J made 7th May 1992 be varied by deleting the paragraph 1 thereof all the words following the expression, "the appeal be upheld", and substituting for the deleted words the following words: "and the orders of the Magistrate made 15 October 1991 be set aside and the case remitted to the Magistrates' Court for re-hearing in accordance with law".
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> 2. Subject to the foregoing, the appeal to the Full Court is dismissed with costs, including all costs reserved.

APPEARANCES: For the appellant/defendant Walker: Mr P Billings, counsel. Jack Sher & Associates, solicitors. For the respondent/appellant DPP: Mr SP Gebhardt, counsel. JM Buckley, Solicitor to the DPP.
