37/05; [2005] VSCA 237

SUPREME COURT OF VICTORIA — COURT OF APPEAL

BLAIR v COUNTY COURT of VICTORIA and FREE

Ormiston, Chernov JJ A and Harper AJ A

20 September 2005

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO COMPLY WITH A REQUIREMENT TO ACCOMPANY POLICE OFFICER TO A POLICE STATION FOR THE PURPOSES OF A BREATH TEST – CHARGE FOUND PROVED: *ROAD SAFETY ACT* 1986 SS49(1)(e), 55(1).

Where the evidence clearly established that a driver of a motor vehicle had undergone a preliminary breath test; that in the opinion of the police officer the test indicated that the driver's blood contained alcohol; and that the officer then required the driver to accompany the officer to the police station for the purposes of a breath test and the driver refused to comply with that requirement, the evidence demonstrated that all the elements of an offence under s49(1) of the *Road Safety Act* had been established. Where the charge on which the driver was subsequently convicted referred unequivocally to the driver's refusal to comply with the requirement that he accompany a member of the Police Force to a police station for the purpose of a breath test, there was, therefore, a coincidence between the elements of the offence, the charge and the evidence.

***Blair v County Court of Victoria & Anor* MC18/05; [2005] VSC 213, approved.**

ORMISTON JA:

1. I will ask Harper AJA to deliver the judgment of the Court.

HARPER AJA: (for the Court consisting of Ormiston JA, Chernov JA and Harper AJA):

2. This is an appeal from a judgment of Mandie J delivered on 21 June 2005[1]. It has its origins in an incident that occurred on 9 November 1998 when the second respondent, then a Senior Constable of Police, intercepted a vehicle driven by the appellant.

3. A preliminary breath test was conducted. It indicated that the appellant's blood contained alcohol. According to the relevant portion of the second respondent's evidence-in-chief in the County Court at Bendigo on 5 August 2004 the second respondent then required the appellant "to accompany me to the police station for the purposes of a breath test." It was after that, again according to the second respondent's evidence-in-chief, that the appellant "ran off ... down a driveway."

4. The requirement that the appellant attend at the police station was one which the second respondent was lawfully entitled to impose. At that time s55(1) of the *Road Safety Act* 1986 provided, so far as is presently relevant, that if a person underwent a preliminary breath test which indicated that the person's blood contained alcohol, then:

> "any member of the Police Force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the Police Force ... to a police station."

5. Penalties for disobedience were (and are) set out in the Act. By s49(1)(e) a person is guilty of an offence if he or she refuses to comply with a requirement made under, *inter alia*, s55(1).

6. The appellant was charged with such an offence. By summons issued on 30 December 1998 the second respondent alleged that the appellant:

> "At Charlton on 9 November 1998, being the driver of a motor vehicle and after having been required to have a preliminary breath test, he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the Police Force to a police station, such requirement he did refuse to comply with."

7. The appellant was convicted on 5 August 2004 by the County Court sitting at Bendigo of this charge. By originating motion he then sought judicial review of that conviction.

8. The matter came before Mandie J on 9 June 2005. The first and primary ground then relied upon was that there was a lack or excess of jurisdiction or an error of law on the face of the record in the evidence, in that the evidence did not support the element of the charge which alleged that "he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the ... Act."

9. It is true, as the second respondent conceded under cross-examination in the County Court, that he "did not make a requirement upon the appellant to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1)." He simply required the appellant to accompany him to the police station for the purposes of a breath test. It is also true that the charge itself alleges that the appellant "was ... further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* 1986". But as Mandie J correctly observed:

> "It was not a necessary part of the charge, nor was there any reason to think that it was understood, that the member of the Police Force should have required the [appellant] to furnish a sample of breath for analysis at the time of requiring the [appellant] to accompany him to a police station."

10. The evidence before the County Court, if accepted (as it was) by the County Court judge, clearly established that the appellant had undergone a preliminary breath test; that in the opinion of the second respondent, a police officer, the test indicated that the appellant's blood contained alcohol; and that the second respondent then required the appellant to accompany the second respondent to the police station for the purposes of a breath test. The evidence also clearly established that the appellant refused to comply with that requirement. Accordingly, the evidence demonstrated that all the elements of an offence under s49(1) of the *Road Safety Act* had been established.

11. The charge on which the appellant was subsequently convicted referred unequivocally to the appellant's refusal to comply with the requirement that he accompany a member of the Police Force to a police station for the purpose of a breath test. There was, therefore, a coincidence between the elements of the offence, the charge and the evidence. In our opinion Mandie J was clearly correct to conclude that:

> "Although the charge was inelegantly drafted, it was not so confusing or obscure that it did not amount to a charge of the offence with which it was intended to deal."

12. Moreover, we agree with the reasons His Honour gave for reaching that conclusion and for dismissing the proceeding. All five grounds of appeal attack his Honour's finding. In our opinion, none of them have any substance. The appeal must, therefore, be dismissed.

ORMISTON JA:

13. That being the judgment of the Court, the order of the Court, therefore, is that the appeal be dismissed. (Discussion ensued re costs.)

14. There will be a further order that the appellant pay the respondent's costs fixed in the sum of $1,925.

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[1] [2005] VSC 213.

APPEARANCES: For the appellant Blair: Mr PJ Billings, counsel. CD Traill Lawyers. For the second respondent Free: Mr MG Perry, counsel. S Carisbrooke, Acting Solicitor for Public Prosecutions.
