31/08; [2008] VSC 192

SUPREME COURT OF VICTORIA

DPP v MASTWYK

Kyrou J

4, 13 June 2008 — (2008) 185 A Crim R 285

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT A PBT WHICH INDICATED THAT DRIVER'S BREATH CONTAINED ALCOHOL – DRIVER THEN REQUIRED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR A FULL BREATH TEST – DRIVER AGREED TO ACCOMPANY POLICE OFFICER – WHEN DRIVER SAW THAT SHE WOULD HAVE TO TRAVEL IN THE REAR OF A DIVISIONAL VAN SHE WITHDREW CONSENT – DRIVER LATER CHARGED WITH REFUSING TO COMPLY WITH THE REQUIREMENT TO ACCOMPANY THE POLICE OFFICER – FINDING BY MAGISTRATE THAT THE REAR OF A DIVISIONAL VAN WAS A FORM OF IMPRISONMENT – FINDING THAT THE REQUIREMENT WAS NOT A VALID ONE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1).

1. A requirement made under s55(1) of the *Road Safety Act* 1986 ('Act') to accompany a police officer or other authorised person to a place for the purpose of furnishing a sample of breath must be objectively reasonable at the time that it is made.

***DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367, distinguished;**

***Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, *obiter* comments of Eames J adopted.**

2. It is neither necessary nor desirable to seek to define "reasonableness" for the purposes of a requirement to accompany made under s55(1). The issue must be determined objectively in the circumstances of each case at the time the requirement is made. A relevant circumstance is the mode of accompanying that is proposed. If a requirement is unreasonable, it would not be a valid requirement and therefore refusal to comply with the requirement would not be an offence under s49(1) of the Act.

3. A requirement made under s55(1) for a person to accompany the police to a place of testing in the rear compartment of a police divisional van will not always constitute imprisonment so as to always render such a requirement invalid. Where a person tests positively to a preliminary breath test and is required by the police to accompany them to a place of testing in the rear compartment of a police divisional van, that person is informed that he or she cannot be compelled to comply with the request but that if he or she refuses to do so, he or she may be charged with an offence and may be convicted and fined and lose his or her licence for at least two years, and the person, with that knowledge, voluntarily enters the rear compartment of the police divisional van, there is no imprisonment and the requirement made under s55(1) is not invalid on that basis. On the other hand, if the individual enters the rear compartment of a police divisional van after being misinformed by the police that he or she can be forced against his or her will to do so, or if he or she is physically forced into the rear of the police divisional van, then that person will be imprisoned and the requirement made under s55(1) will be invalid.

4. However, the individual concerned must have the ability at all stages of the journey to communicate to the police his or her desire to leave the vehicle and the police must be willing to comply with such a request. If the position is that a person in the rear compartment of a police divisional van is not able to effectively communicate to the police officers in the front compartment a request that they stop the vehicle and allow the person to leave the vehicle, or if the police are not willing to comply with such a request, then the use of the police divisional van as a means of accompanying would constitute a form of imprisonment which would invalidate a requirement made under s55(1).

5. The learned Magistrate should have determined whether, on the basis of the evidence before him, including the proposed transport in the rear compartment of the police divisional van, the requirement that was made under s55(1) was reasonable. A relevant consideration was whether the police officers informed the driver that she could not be forced to enter the rear compartment of the police divisional van against her will and of the consequences of not accompanying the police, and the reasons given by the driver for declining to enter the rear compartment of the police divisional van. Another relevant consideration was whether the police divisional van in question provided an

effective means by which a person in the rear compartment could at any time request the police officers in the front compartment to stop the vehicle to allow the person to leave the vehicle. It follows that the learned Magistrate erred in law in dismissing the charge under s49(1)(e).

KYROU J:

Introduction and summary

1. This is an appeal under s92(1) of the *Magistrates' Court Act* 1989 (Vic) ("MC Act") from a final order made on 17 September 2007 by the Magistrates' Court at Latrobe Valley, dismissing a charge against the respondent, Judy Mastwyk, under s49(1)(e) of the *Road Safety Act* 1986 (Vic) ("RS Act") of refusing to comply with a requirement made under s55(1) to accompany a police officer to a place where a sample of breath is to be furnished for analysis by a breath analysing instrument. The appellant is the Director of Public Prosecutions ("DPP"), who has brought the appeal on behalf of the police informant, Philip James Hollyoak.

2. The learned Magistrate dismissed the charge on the ground that the police officers required Ms Mastwyk to accompany them to the police station in the rear compartment of a police divisional van, that this constituted a form of imprisonment, that the police did not have the power to imprison Ms Mastwyk under s55(1) of the RS Act and that therefore the requirement to accompany them was not a valid requirement under s55(1).

3. For the reasons set out in this judgment, I have concluded that the learned Magistrate erred in law and that the appeal should be allowed.

4. In this judgment, after setting out the facts, the relevant statutory provisions and the nature of an appeal under s92(1) of the MC Act, I deal with the following issues in turn:

(a) Must a requirement to accompany made under s55(1) of the RS Act be reasonable?

(b) Is transportation in the rear compartment of a police divisional van a form of imprisonment which invalidates a requirement to accompany made under s55(1) of the RS Act?

(c) Did the learned Magistrate err in law?

Facts

5. The material facts were not in dispute. The following statement of the facts is adopted from the submissions of Mr Trapnell, who appeared for the DPP:

(a) On 10 June 2005, some time between 3.00pm and 3.30pm, Ms Mastwyk was driving her motor vehicle when it was involved in a collision with another motor vehicle on the Korumburra/Inverloch Road at Wattle Bank.

(b) An hour and a half to two hours later, the informant and another police officer attended at Ms Mastwyk's residence and required that she undergo a preliminary breath test pursuant to s53(1)(c) of the RS Act.

(c) The learned Magistrate rejected a submission made on behalf of Ms Mastwyk that the prosecution had failed to prove that at the time of making the requirement under s53(1)(c), the informant did not believe, on reasonable grounds, that Ms Mastwyk had, within the last three preceding hours, driven a motor vehicle when it was involved in an accident.

(d) After some discussion in which Ms Mastwyk initially denied being involved in a motor vehicle collision, she complied with the requirement and underwent the preliminary breath test by a prescribed device.

(e) The preliminary breath test, in the informant's opinion, indicated that Ms Mastwyk's breath contained alcohol.

(f) The informant then required Ms Mastwyk to accompany him to the Wonthaggi police station for the purpose of her furnishing a sample of breath for analysis by a breath analysing instrument.

(g) The requirement was made at the front door of Ms Mastwyk's home.

(h) After initial reluctance, Ms Mastwyk agreed to accompany the informant to the police station for the purpose of conducting the breath analysis test. She collected her belongings and walked out to the police vehicle which was parked in front of her premises.

(i) The police vehicle was a divisional van. When it was indicated to Ms Mastwyk that she would have to travel to the police station inside the rear compartment of the divisional van, she withdrew her initial consent and refused to accompany the informant to the police station.

6. Ms Mastwyk was charged under s49(1)(e) of the RS Act for refusing to comply with a requirement made under s55(1) of the RS Act to accompany a police officer to a place where a sample of breath is to be furnished for analysis by a breath analysing instrument.

7. The charge was heard on 17 September 2007. The learned Magistrate did not deliver written reasons for his order dismissing the charge. The critical passage from the Magistrate's oral reasons, given during the hearing on 17 September 2007 and recorded in the transcript of that hearing, is as follows:[1]

> I believe that what I should do, and will do, is try and put the emotional arguments to one side and look at the matter as to what, in fact, the powers were and are, and whether they were properly complied with by the request being made to accompany in the back of a police van. In this respect I am persuaded by the decision of Judge Kimm, I think it is, in the matter of *Salton v Wigg*, who goes into this matter in a great deal of detail. He states at page 12 of his unreported decision:
>
> *In my opinion the subsection –*
> and he's talking about section 55 –
>
> *authorises the member of the police force to demand a person to go with him or her to a police station or other place to furnish the sample of breath. If the person fails to comply with that demand, or requirement, then the person is guilty of an offence under section 49(1)(e). The very fact that the Act expressly provides a sanction for failure to comply with such requirement clearly, in my mind, implies that the person is not restrained or in any form of custody merely by reason of the making of the requirement.*
>
> His Honour goes on and expresses the opinion:
> *In my opinion the words of section 55(1) of the Act do not authorise a member of the police force to require a person to accompany him or her to a police station by a form of transport that would imprison that person.*
>
> His Honour had previously discussed the meaning of the term "imprisonment" and what it implies, and he formed the opinion as a matter of fact that the back of a divisional van was, in fact, a form of imprisonment. Given what his Honour says, I now turn to the question that falls to me to determine, it seems, as to whether the requirement in this case, as a question of fact, would have amounted to a form of imprisonment, and I must say I form that impression.
>
> It is quite clear that a divisional van is a place not only of transport, but of incarcerating a person during the form of transport to a given place. This decision that I have made may cause some inconvenience to the police force but, nonetheless, the argument of Judge Kimm is compelling when he states that the police do not have the power to imprison, and that this really is an imprisonment to do that. I don't think that I should ... any further on that, other than that I endorse his Honour's reasons for decision, and for that reason I find that the offence on this occasion is not made out.

8. The notice of appeal from the learned Magistrate's order is dated 12 October 2007 and lists the following questions of law upon which the appeal is brought:

> 1. Did the learned Magistrate err in finding that the back of a divisional van was "a form of imprisonment" in the circumstances of this case?
>
> 2. Did the learned Magistrate err in holding, if he did so hold, that the requirement made of the Respondent to accompany the Informant to a police station in the back of a police divisional van was not a valid requirement under the *Road Safety Act* 1986?
>
> 3. Did the learned Magistrate err in law in dismissing the charge preferred pursuant to Section 49(1)(e) *Road Safety Act* 1986?

Relevant statutory provisions

9. The relevant provisions of the RS Act are in Part 5, which is headed "Offences involving alcohol or other drugs".

10. Section 47 of the RS Act provides as follows:

47 Purposes of this Part
The purposes of this Part are to—
(a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and

(b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and

(c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol; and

(d) provide a simple and effective means of establishing the presence of a drug in the blood, urine or oral fluid of a driver.

11. Section 49 of the RS Act provides as follows:

49 Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she— ...
(c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or ...

(e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A); or ...

(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ...

(3) A person who is guilty of an offence under paragraph (ba), (c), (ca), (d), (e) or (ea) of subsection (1), other than an accompanying driver offence, is liable—
(a) in the case of a first offence, to a fine of not more than 12 penalty units; and
(b) in the case of a second offence, to a fine of not more than 120 penalty units or to imprisonment for a term of not more than 12 months; and
(c) in the case of any other subsequent offence, to a fine of not more than 180 penalty units or to imprisonment for a term of not more than 18 months.

12. Section 50(1B) of the RS Act provides as follows:

On convicting a person, or finding a person guilty, of an offence under section 49(1)(a), (c), (d) or (e) the court must, if the offender holds a driver licence or permit, cancel that licence or permit and, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—

(a) in the case of a first offence, 2 years; and

(b) in the case of a subsequent offence, 4 years.

13. Section 53 of the RS Act provides as follows:

53 Preliminary breath tests
(1) A member of the police force may at any time require—
(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; or
(b) the driver of a motor vehicle that has been required to stop, and remain stopped at a preliminary testing station under section 54(3); or
(c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; or
(d) any person who he or she believes on reasonable grounds was, within the last 3 preceding hours, an occupant of a motor vehicle when it was involved in an accident, if it has not been established to the satisfaction of the member of the police force which of the occupants was driving or in charge of the motor vehicle when it was involved in the accident—
to undergo a preliminary breath test by a prescribed device. ...

(3) A person required to undergo a preliminary breath test must do so by exhaling continuously into the device to the satisfaction of the member of the police force ...

(4) A person is not obliged to undergo a preliminary breath test if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

14. Section 55 of the RS Act provides as follows:

55 Breath analysis

(1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—

(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; ... 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 place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath ... and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Example

A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath. ...

(6) A person is not obliged to furnish a sample of breath under this section if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

* * * * *

(9) A person must not be convicted or found guilty of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her.

Appeal under s92(1) of the MC Act

15. A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to this Court on a question of law, from a final order of the Magistrates' Court in that proceeding.[2]

16. Where, as in the present case, an informant who is a member of the police force wishes to appeal, the appeal must be brought by the DPP on behalf of the informant.[3]

Must a requirement to accompany made under s55(1) of the RS Act be reasonable?

17. Mr Dann, who appeared for Ms Mastwyk, submitted that a requirement made under s55(1) of the RS Act must be "reasonable". He relied on *DPP v Webb*[4] and *Hrysikos v Mansfield*[5] in making this submission. He submitted that, in this case, the requirement that Ms Mastwyk accompany the police officers to a police station in the rear compartment of the police divisional van was not reasonable, due to a combination of the physical characteristics of the mode of transport, the lack of consent by Ms Mastwyk and an element of compulsion arising from the emphasis placed by the informant on the serious penalties that would be suffered by Ms Mastwyk if she refused to comply with the requirement.

18. Mr Dann conceded that *Webb* is not binding on me in the current proceeding, as that case was concerned with s53 of the RS Act rather than with s55(1). He also conceded that the relevant comments in *Hrysikos* on which he relied were, strictly speaking, made in *obiter*, as that case was decided on the basis that the accused had not refused to comply with a requirement made under s55(1), rather than on the basis of whether there had been an unreasonable requirement under that section. However, Mr Dann submitted that I should be loath to depart from comments made by judges in the Court of Appeal even if those comments were made in *obiter*.

19. Mr Trapnell submitted that *Webb* and *Hrysikos* are not binding on me in the current proceeding. He also submitted that, properly analysed, those cases do not, in any event, support the proposition that a requirement to accompany a member of the police force to a place where a sample of breath is to be furnished must be reasonable.

20. Mr Trapnell relied on *DPP v Greelish*[6] in submitting that s55(1) creates three types of requirement that may be made, namely that a person furnish a sample of breath for analysis, that a person accompany a member of the police force (or other authorised person) to a place or

vehicle where the sample is to be furnished, and that a person remain at that place for a certain time. Mr Trapnell submitted that the "excuse" provided by s55(9) of the RS Act only applies to a requirement to furnish a breath sample, and does not apply to a requirement to accompany.[7] He submitted that, given that the statutory "excuse" in s55(9) does not apply to a requirement to accompany, it would be odd if such a requirement needed to be "reasonable", which would not only have the same effect as s55(9), but also shift the onus of proof from the defendant (as is the case where s55(9) is invoked by a defendant) to the prosecution (which would be the case if the requirement to accompany must be reasonable).

21. In considering the issues described above, it is necessary to look closely at *Webb* and *Hrysikos* and to consider how each relates to the present case.

Webb

22. In *Webb*, the accused was intercepted while driving by a police officer who did not have a prescribed preliminary breath test device with her at the time and so was unable to immediately conduct a preliminary breath test under s53 of the RS Act. The police officer requested the accused to accompany her to the St Kilda police station and he did so voluntarily. A preliminary breath test was then conducted at the police station under s53, and following a positive result from that test, the accused voluntarily accompanied the police officer to the Prahran police station where he was required to furnish a sample of breath for analysis under s55 of the RS Act. The accused was subsequently charged with furnishing a sample of breath for analysis, the result of which indicated more than the prescribed concentration of alcohol in his blood, in terms required by s49(1)(f) of the RS Act. The Magistrates' Court held that there was no case to answer because one of the preconditions to a conviction for such an offence, the conduct of a preliminary breath test which complied with s53 of the RS Act, had not been satisfied.

23. On appeal in the Supreme Court, Ormiston J (as his Honour then was) noted 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)".[8] In the appeal, no question was raised as to the manner in which the s55 test was conducted. The only issue was whether one of the conditions for requiring that test, namely a valid preliminary breath test under s53, was fulfilled. The relevant question of law raised by the appeal was "whether a preliminary breath test taken pursuant to s53 of the *Road Safety Act* 1986 should be taken in the general area where the defendant was found driving". During argument before Ormiston J, counsel for the accused also argued that such a breath test must be taken within a reasonable time of the requirement to take that test.

24. Ormiston J emphasised the difficulties facing any attempt to argue that such qualifications or restrictions should be implied into a statutory provision where that provision is unambiguous, plain and in relatively simple terms.[9] His Honour contrasted s53 with s55(1) of the RSA. He noted that s55(1) authorises a police officer to require a driver to accompany the police officer to a place and remain at that place for the purposes of a breath test, and that s55(1), like s55(2), "is based either on a suspicion or upon belief in circumstances which indicate that it is possible that an offence has been committed",[10] whereas s53 does not require any suspicion or belief that an offence has been committed and does not authorise police officers to make such additional requirements. From a comparison of ss53 and 55(1) and (2), his Honour said that he "would infer, at the least, that Parliament did not intend to compel persons to go in quasi-custody to a police station or other testing station for the purpose of a preliminary breath test".[11] His Honour concluded that a police officer can only require that which is necessary to enable the driver to undergo a preliminary breath test.[12]

25. Ormiston J then went on to consider whether the words of s53 could be read down or qualified by the insertion of words relating to reasonableness. His Honour said:[13]

> to say that s53 authorises no more than a requirement to undergo a preliminary breath test does not in itself justify any implication that the words of the statute should be read down or qualified, by the insertion of words relating to reasonableness, unless there be some uncertainty or ambiguity in the provisions or unless it is otherwise necessary for the proper operation of the section ...

In relation to the two postulated qualifications, relating to the area in which the test could be conducted and the time during which it could be conducted, his Honour held that neither limitation

"as so expressed" was essential or appropriate.[14] In relation to the argument about the area, he held that:[15] If a driver is willing to go elsewhere to undergo the tests, whether to a police station or some other place, the fact that the test is undergone some distance away from the place of driving or from the place where the officer made the requirement, is irrelevant. If, however, the driver is directed, expressly or by implication, to travel some distance from the place where the requirement is made in order to undergo the test, then that direction will go beyond power because it would be unreasonable and it is not comprehended by the power in s53 to require that a driver undergo a breath test.

26. In relation to the argument about time limits, his Honour said that "[i]n a sense it is the requirement which must be reasonable rather than the time at which the test be taken, for if the driver is willing to undergo the test at some later time there would on the face of it be no apparent objection to that course being taken".[16] He rejected the argument that the power could be restricted so that no test can be required if it is to take place after an unreasonable time has expired from the requirement.[17] He held:[18]

> If a qualification is to be read into the requirement, it should be by reading the section as confined to an obligation to comply only with a reasonable requirement. To that limited extent an implication modifying the terms of the section is necessary. ... So long as the requirement does not import an unjustified detention of the driver or an unjustified demand that he go to some other place to the extent that he would be wrongfully deprived of his liberty, no implication is otherwise necessary restricting the time or place where the test must be conducted.

27. Although his Honour reached these conclusions about whether an element of "reasonableness" can be implied into s53 in the course of dismissing the arguments of counsel for the accused in *Webb* about alternative formulations of such an implication (which would have been more restrictive in their effect on the powers of police and other authorised persons under s53), it seems clear that his Honour did hold, as a general proposition, that any requirement made under s53 must be reasonable. This reading of *Webb* is strengthened by Ormiston J's conclusionary comment that "[f]or the reasons already stated, the only implication which needs to be read into s53 is that the requirement should be reasonable".[19] However, it is equally clear that *Webb* is authority only for the proposition that a requirement made under s53 must be reasonable. It does not stand for the proposition that a requirement made under s55(1) must be reasonable.

Hrysikos

28. The question of whether a requirement made under s55(1) must be reasonable was subsequently raised before the Court of Appeal in *Hrysikos*. That case concerned a charge under s49(1)(e) of the RS Act of refusing to comply with a requirement made under s55(1) of the RS Act to remain at a mobile breath-testing station (commonly known as a "booze bus") for the purpose of furnishing a sample of breath for analysis. The accused entered the bus as requested and furnished a sample of breath. She was told she would have to wait 15 minutes for a second breath test. The accused asked if she could go outside for a cigarette. A police officer informed the accused that if she left the bus, she might lose her licence and be fined. The accused nonetheless went out of the bus for a brief period in order to smoke a cigarette. At no time did she say she would not give a further sample or that she wanted to leave the site. On the basis of this brief departure, she was charged with refusing to remain under s49(1)(e) and convicted of that offence in the Magistrates' Court.

29. On appeal by the accused at first instance in the Supreme Court, Smith J held that it was not open to the Magistrate to find that the accused refused to remain. His Honour went on to consider whether it was open to the Magistrate to find that a requirement that the accused remain within the confines of the bus was not reasonable and made without authority, in case his primary conclusion was incorrect. His Honour relied on *Webb* in concluding that on the facts of the case it was not open to the Magistrate to find that a requirement that the accused remain within the confines of the bus was a reasonable requirement. He concluded it was an unreasonable requirement and not authorised by the RS Act.[20]

30. The informant then appealed to the Court of Appeal constituted by Ormiston, Chernov and Eames JJA.[21] Their Honours decided the appeal on the basis that, by temporarily leaving the bus, the accused had not refused to comply with a requirement to remain made under s55(1) of the RS Act. Only Eames JA expressly dealt with the alternative basis that the requirement

to remain was unreasonable, and his Honour's comments on this question were strictly *obiter*. After referring to Smith J's conclusion that importing an obligation of reasonableness in s55 was consistent with the introduction of such a requirement in s53 by Ormiston J in *Webb*, Eames JA stated:[22]

> With respect to the view of Smith J, I do not accept that the situation here was analogous to that in *Webb*. In that case the requirement of reasonableness was held to attach to the requirement to undergo a preliminary breath test pursuant to s53. Ormiston J held that there being no power to place the driver in custody or to detain the person indefinitely, it should be implied into the terms of the section that the requirement to undergo the test be reasonable, thus, if the requirement imposed an obligation that the person be delayed unduly or be obliged to travel a significant distance for the preliminary test, then it might not be a reasonable request.
>
> In the present case, consistent with *Webb,* a requirement under s55(1) to accompany an officer to a place for the purpose of testing by a breath analysing machine would also need to be reasonable. It would not be difficult to postulate circumstances where the requirement might be unreasonably imposed. It was in a different situation, however, that Smith J introduced the notion of reasonableness. If the notion of reasonableness, as discussed in *Webb,* was sought to be applied to the present case, then it would be implied at the time of the making of the requirement to accompany to a place. Thus, a requirement to accompany and remain in a police car for up to three hours might very well be unreasonable. A requirement to accompany "to the police car" would not (assuming, for this example, there is no other factor making the request unreasonable). Likewise, a requirement to remain within the four walls of the bus for up to three hours would be unreasonable; a requirement to accompany "to the breath testing vehicle" would not. The last instance imposes an obligation that the person "remain there" – that is at the place – until he has completed the furnishing of a valid sample of breath and received a certificate. It does not impose an obligation to remain within the bus, at all times, until that result is achieved.
>
> In this case, however, it was unnecessary to consider whether at a later stage, once the person had accompanied the officer to the bus, it was unreasonable not to let the person leave the interior of the bus to have a cigarette. The person had complied and continued to comply with the requirement to remain at the bus, even though she stepped outside the bus, and she intended to perform such further tests as were required of her.

31. It appears from the above passage that Eames JA accepted that a requirement to accompany (as well as a requirement to remain) made under s55(1) must be reasonable.

32. Ormiston JA agreed, subject to what he expressly stated in his judgment, with the conclusions and reasons in Eames JA's judgment. Ormiston JA's judgment is largely concerned with whether it was open to the Magistrate to find that the accused refused to remain. In the course of that discussion, Ormiston JA referred to "reasonableness" in two places. The first reference is at paragraph 13, where Ormiston JA stated:[23]

> If one could not infer a refusal to remain for the purpose of the test, then the precise place to which the respondent moved was of little consequence, so long as in practical terms she would have been able to comply with a request for the testing of her breath within a very short but reasonable time having regard to all the circumstances. There cannot be an obligation to remain seated or standing next to the table at which the test is to be carried out for a period of up to three hours, for that is not what a requirement under s55(1) should state. The subsection describes a practical but reasonable requirement.

33. The second reference to "reasonableness" in Ormiston JA's judgment is at paragraph 15, where his Honour, in construing the meaning of a requirement to remain "there" at a vehicle, commented:[24]

> Common sense dictates that a requirement to remain "there" at a vehicle, with such confined space as is revealed by a description of the relevant compartments [of the bus], could not be treated as requiring a driver to remain within a compartment for a period of up to three hours for the purpose of having a test. What is fairly required must depend on the nature of the place to which a driver is directed, but in each case it should not be assumed that an obligation to "remain there" involves an obligation to remain confined within the outer four walls, or the like, of the designated place. One might observe, considering the terms of the presently amended section, that it would be equally unreasonable to require a driver to remain inside a car at which a test was being conducted, if the test could not be immediately carried out for some reason or other, and so as to require a driver on a hot day to remain seated in the car for up to three hours.

34. The above comments on reasonableness were made in the course of Ormiston JA's discussion of whether it was open to the Magistrate to find that there was a refusal to comply with a requirement to remain, rather than in relation to the discrete issue of whether a requirement to remain must be reasonable, and must be understood in that context. This view is supported by Ormiston JA's comment at paragraph 18 that "[i]t is unnecessary for me to say anything as to the other basis considered by the learned judge [Smith J] for reaching a conclusion as to the commission of the offence".[25] That "other basis" is presumably the argument that an offence was not committed if it was unreasonable to require the person to remain in the bus. Given that Ormiston JA expressly stated that he did not consider that other basis, it would be odd if the earlier references to reasonableness in paragraphs 13 and 15 of his judgment were taken to be dealing with that other basis. Further, given that his Honour expressly did not consider that other basis, it is possible that his general agreement with Eames JA does not extend to Eames JA's *obiter* comments about that other basis.

35. Nevertheless, although Ormiston JA's comments about reasonableness were made in the course of discussing whether there was a refusal to remain, it is clear that his Honour considered that there are circumstances in which a requirement to remain could be unreasonable, and that in such circumstances, no offence would be committed if the person did not comply with the requirement to the extent that it was unreasonable. It follows that his Honour's judgment does support the view that a requirement to remain made under s55(1) must be reasonable. However, the judgment is silent on whether a requirement to accompany made under s55(1) must be reasonable.

36. Chernov JA agreed, substantially for the reasons given by Eames JA, that the appeal should be dismissed.[26] In his brief additional comments, his Honour found it unnecessary to deal with the issue of whether a requirement to remain made under s55(1) must be reasonable.[27]

Parties' submissions and my conclusion on reasonableness

37. It was common ground before me that I am not bound by either *Webb* or *Hrysikos* to conclude that a requirement to accompany made under s55(1) must be reasonable. The only statements in either case which directly deal with whether a requirement to accompany made under s55(1) must be reasonable are comments made by Eames JA in *Hrysikos*. Those comments were *obiter dicta* for the purposes of *Hrysikos*.

38. Mr Trapnell submitted that I should not interpret s55(1) as requiring that a requirement to accompany must be reasonable. He submitted that if Parliament had wished to include an element of reasonableness in s55(1), it would have been a simple matter to include words in the provision to that effect. Section 55(1) contains no such words. He also submitted that the existence of s55(9) of the RS Act, which provides a statutory "excuse" only for refusing to furnish a sample of breath for analysis, indicates that a requirement to accompany made under s55(1) was not intended to be qualified. He submitted that s55, read as a whole and in the context of Part 5 of the RS Act, on its plain words reflects the balance struck by Parliament between the competing considerations of personal liberty and the "recognised social evil" that Part 5 and s55(1) in particular are designed to combat. He submitted that in this context, it is not for a court to imply a further restriction, such as that any requirement must be reasonable. He also submitted that, adopting a purposive approach to the interpretation of s55(1), the implication of an element of reasonableness which any requirement to accompany made under that provision must satisfy would be unnecessary and contrary to the purposes of Part 5 of the RS Act as set out in section 47.[28]

39. Mr Trapnell also submitted that s55(1) is not relevantly analogous to s53 such that it would necessarily be consistent with Ormiston J's comments on that latter provision in *Webb* to imply a reasonableness requirement into s55(1). In support of this submission, he referred to Ormiston J's comments that unlike s55(1), s53 was not based either on a suspicion or upon belief in circumstances which indicate the possibility of the commission of an offence. He submitted that implying a requirement of reasonableness can be justified in the context of s53 but not in the context of s55(1).

40. Mr Dann submitted that the observations about reasonableness in both *Webb* and *Hrysikos* reflect the balance that needs to be struck between the express purposes of Part 5 of the RS Act and fundamental concepts such as rights to liberty, and that those observations in relation to

s55(1) must be understood in that context. He submitted that these considerations, along with the persuasive nature of the *obiter* comments made in *Webb* and *Hrysikos*, should lead me to follow those cases in the current case.

41. Although the comments about reasonableness made by Eames JA in *Hrysikos* were made in *obiter*, I am persuaded that I should adopt them in this case. Accordingly, I find that a requirement made under s55(1) to accompany a police officer or other authorised person to a place for the purpose of furnishing a sample of breath must be objectively reasonable at the time that it is made. I am fortified in this conclusion by the reliance placed by Nettle J (as his Honour then was) on the comments of Eames JA in relation to reasonableness in concluding that "it cannot be supposed that Parliament intended to empower police officers arbitrarily and capriciously to impose a requirement to undergo a blood test" under s55(9A) of the RS Act in *DPP v Skinner*.[29] In my opinion, the same principle is applicable to implying that a requirement to accompany made under s55(1) must be reasonable. For the reasons given by Nettle J in *Skinner*, relating to the lack of consistency in the drafting styles and practices employed in amending the RS Act from time to time and the law's jealousy of attempts to detract from the rights of the individual, the fact that s55(9) does not apply to a requirement to accompany made under s55(1) does not dissuade me from holding that such a requirement must be reasonable.[30] Although there are differences between ss53 and 55(1), neither section authorises the arrest of a person who refuses to comply with a requirement made under that section and therefore the underlying considerations which persuaded Ormiston J in *Webb* to imply a requirement of reasonableness in s53 also apply to s55(1). The approach I have adopted is not inconsistent with the purposes of Part 5 of the RS Act.[31]

42. It is neither necessary nor desirable to seek to define "reasonableness" for the purposes of a requirement to accompany made under s55(1). The issue must be determined objectively in the circumstances of each case at the time the requirement is made. A relevant circumstance is the mode of accompanying that is proposed. If the police vehicle that would normally be used to convey a motorist to a place of testing breaks down and the police officer requires the motorist to accompany him or her on foot to the nearest place of testing which is several kilometres away, it may be an unreasonable requirement if it is obvious that the motorist is physically disabled. Even if the motorist does not suffer a physical disability, it may be unreasonable to require the motorist to walk to the nearest place of testing if, objectively, it is not possible to walk the relevant distance within 3 hours.

43. Where a person who tests positive to a preliminary breath test is required to accompany the police to a place of testing in a police vehicle, it may be an unreasonable requirement for the police to direct that person to wait by the side of the road until such time as two other motorists test positive to a preliminary breath test so that the police could transport three motorists in the back seat of the police vehicle, thus avoiding separate trips. This would be all the more so, if the first person is directed to wait in the rear compartment of a police divisional van with the rear door closed. This is because a person who tests positive to a preliminary breath test should be conveyed to the nearest place of testing, if they consent to do so, promptly rather than having to wait for events unconnected with them to take place.

44. Another example of a requirement that may be unreasonable would be where, following an accident, the police visit the driver at his or her home and, notwithstanding that the driver has physically collapsed and is about to be placed in an ambulance, the police require the driver to accompany them to a place of testing.

45. The above examples illustrate some types of situations where a requirement to accompany may be unreasonable. If it is unreasonable, it would not be a valid requirement and therefore refusal to comply with the requirement would not be an offence under s49(1)(e). The examples I have given are not intended to form any particular categories or to limit in any way the types of factual situations where a requirement made under s55(1) may be unreasonable.

46. Where the form of accompanying proposed is the rear compartment of a police divisional van, that is a relevant consideration in determining whether a requirement made under s55(1) is reasonable. This is particularly so if, in the circumstances of the case, the rear compartment of a police divisional van constitutes imprisonment.

47. In this case, the learned Magistrate did not in terms make any finding in relation to reasonableness. Rather, his Honour's decision was based on a finding that the rear compartment of a police divisional van was a form of imprisonment, which, in his view, rendered the requirement to accompany made under s55(1) invalid. I now discuss whether a requirement made under s55(1) to accompany the police in the rear compartment of a police divisional van necessarily renders the requirement invalid.

Is transportation in the rear compartment of a police divisional van a form of imprisonment which invalidates a requirement to accompany made under s55(1) of the RS Act?

48. As appears from the extract from the transcript in the proceeding before the learned Magistrate in this case,[32] the learned Magistrate relied on the decision of Judge Kimm in *Salton v Wigg*[33] in deciding that transport in the rear compartment of a police divisional van amounted to imprisonment and therefore the requirement made to Ms Mastwyk to accompany the police was invalid.

49. In *Salton*, the accused declined to enter the rear compartment of a police divisional van for the purpose of being taken to the Springvale police station for a breath test, following a positive preliminary breath test, because she was not given an opportunity to make a telephone call before being required to enter the van and because she felt apprehensive. She was charged with an offence under s49(1)(e) for refusing to comply with a requirement made under s55(1). Judge Kimm held that the charge had not been proved on the ground that s55(1) does not authorise a member of the police force to require a person to accompany him or her to a police station by a form of transport which would imprison that person and that, in the circumstances of the case before him, transport in the rear compartment of the police divisional van would constitute imprisonment. His Honour referred to *R v Banner*[34] and *Myer Stores Ltd v Soo*[35] on the meaning of "imprisonment" and concluded:[36]

> Whether a person is imprisoned is a question of fact. I am of opinion, and I so find, that had the appellant entered the rear compartment of the divisional van at the request of Senior Constable Wigg she would have been, once confined in that compartment by the closing of the door, imprisoned.

50. After referring to *Webb*,[37] his Honour concluded:[38]

> In my opinion, the words of s55(1) of the Act do not authorize a member of the police force to require a person to accompany him or her to a police station by a form of transport which would imprison that person. I have concluded, therefore, that Senior Constable Wigg who, after requiring the appellant to accompany him to Springvale Police Station to furnish a sample of breath, requested that she enter the rear compartment of the divisional van, and was not prepared to allow and did not suggest any other manner by which she could accompany him, did not make a requirement within the meaning of the subsection. Accordingly I do not find that this offence charged has been proved.

51. It was common ground before me that the power to require a person to accompany a police officer to a place or vehicle where a sample of breath is to be furnished for analysis does not include the power to arrest or to physically force him or her to comply with such a requirement.[39]

52. Mr Dann submitted that s55(1) of the RS Act does not confer the power to imprison a person. He submitted that the rear compartment of a police divisional van is equivalent to a police cell. He drew an analogy between, on the one hand, the relationship of a rear compartment of a police divisional van and the back seat of an ordinary police sedan, and on the other hand, the relationship of a police cell and a waiting room in a police station. Mr Dann conceded that if a person freely consented to travelling in the rear compartment of a police divisional van, that would not be imprisonment. He submitted that it is a question of degree whether imprisonment occurs and that in this case, the combination of the physical characteristics of the mode of transport, the lack of consent and an element of compulsion arising from the emphasis placed by the informant on the serious penalties that would be suffered by Ms Mastwyk if she refused to comply with the requirement made under s55(1) amounted to imprisonment.

53. Mr Trapnell submitted that a person who enters the rear compartment of a police divisional van in order to comply with a requirement made under s55(1) is consensually confined and not imprisoned. Here, Ms Mastwyk was free to consent to enter the police divisional van or to

refuse to do so as she considered appropriate. He also submitted that, since a person who is being transported in the rear compartment of a police divisional van can withdraw their consent to being so transported at any time, and the police officers would be required to give effect to such a withdrawal of consent by stopping the van and allowing the motorist to leave, there is no imprisonment. Further, he submitted that there is no relevant difference between the rear compartment of a police divisional van and the back seat of an ordinary police sedan, as it is not practically possible for a person to depart any moving vehicle.

54. Mr Trapnell conceded that travel in the rear compartment of a police divisional van involves some deprivation of liberty. However, he submitted that s55(1) reflects the balance struck by the legislature between that deprivation of liberty and what has been described in the cases as "a major social problem"[40] and "a recognised social evil"[41] – namely, collisions, impairment and other consequences resulting from persons driving while affected by alcohol or other drugs – and that it is clear from the purposes of Part 5 of the RS Act[42] that the offences created by the Part are designed to deal with that social ill. He relied on the following comments of Winneke P in *DPP v Foster*:[43]

> whilst any invasion of personal liberty is bound to provoke disquiet, the courts cannot afford to lose sight of the fact that the undisputed aim of Pt 5 of the Act is to combat and reduce a recognised social evil in a manner which can only be achieved by empowering the police, in the overriding community interest, to intrude upon personal liberties, albeit not in a necessarily hostile or coercive way. ... the underlying purpose of s55(1) is to invest the police with facilitative powers in order that these objects can be achieved ...

55. In my opinion, a person in Ms Mastwyk's position has a choice, albeit an unpalatable one given that the alternative to complying with a requirement made under s55(1) is the probable commission of an offence resulting in a fine and loss of driver licence. Ms Mastwyk could not have been compelled to enter the rear compartment of the police divisional van. While being conveyed in the rear compartment of a police divisional van involves a partial deprivation of liberty, the travel is for the limited purpose of being conveyed from one place to another for the purpose of a breath analysis test.

56. Although it is not apparent whether there was any evidence before the learned Magistrate on this point and there was none before me, I was informed by Mr Trapnell during argument that it is possible for a person who is in the rear compartment of a police divisional van to communicate with the police officers sitting in the front of the van, including to communicate a withdrawal of consent and a request that the van be stopped so the person can leave the van. If, as a matter of fact, the information provided to me by Mr Trapnell is correct, then in my opinion, travel in the rear compartment of a police divisional van does not necessarily involve imprisonment. The person concerned has decided to comply with a requirement to accompany the police and is then being conveyed to a place of testing, and may at any time change the decision and communicate that change of decision to the police officer, who would be obliged to give effect to that change of decision by permitting the person to leave the vehicle.

57. Moreover, I am not persuaded that the authorities cited in *Salton* lead necessarily to the view that confinement in the rear compartment of a police divisional van for the purpose of complying with a requirement made under s55(1) would amount to imprisonment. The passage from *Banner* which is cited in *Salton* provides: "Every restraint of the liberty of one person under the custody of another is in law an imprisonment whether or not there has been a formal arrest".[44] This statement was made in a case dealing with detention of an accused by police without lawful authority and is simply inapplicable to a requirement made under s55(1), as a person who is subject to such a requirement is not in the custody of the police. Such a person can choose whether to accompany the police and can cease doing so at any time, assuming that there is an effective means by which the person can convey his or her choice to cease doing so to the police.

58. *Myer Stores*, which is also relied on in *Salton*, adopted the following definition of imprisonment, which was accepted by Duke and Atkin LJJ in *Meering v Grahame-White Aviation Co Ltd*:[45]

> Imprisonment is no other thing, but the restraint of a man's liberty, whether it bee in the open field, or in the stocks, or in the cage in the streets or in a man's owne house, as well as in the common

> gaole; and in all the places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to goe at all times to all places whither he will without baile or main, prise or otherwise.

59. *Myer Stores* involved a civil action for false imprisonment by a customer who, while in a department store, was actively escorted by two police officers and a store employee to a security office. It was passively made known to the customer by those escorting him that they intended to ask him about shoplifting and that he had no option but to follow. It was found as a fact that the customer's freedom of movement was totally restrained. This situation differs from a requirement made under s55(1).

60. I respectfully agree with Judge Kimm's statement in *Salton* that s55(1) does not authorise the police to require a person who has tested positive to a preliminary breath test to accompany them to a place of testing by a means that constitutes imprisonment. This follows logically from the fact that s55(1) does not confer a power on the police to arrest such a person. I also respectfully agree with Judge Kimm's statement that whether a person is imprisoned is a question of fact. However, before one considers whether particular conduct in fact constitutes imprisonment, one needs to determine the legal meaning of imprisonment and whether the relevant conduct is capable in law of constituting imprisonment.[46]

61. With respect, I cannot accept the proposition that a requirement made under s55(1) for a person to accompany the police to a place of testing in the rear compartment of a police divisional van will always constitute imprisonment so as to always render such a requirement invalid. Subject to the qualification in the next paragraph of this judgment, where a person tests positively to a preliminary breath test and is required by the police to accompany them to a place of testing in the rear compartment of a police divisional van, that person is informed that he or she cannot be compelled to comply with the request but that if he or she refuses to do so, he or she may be charged with an offence and may be convicted and fined and lose his or her licence for at least two years, and the person, with that knowledge, voluntarily enters the rear compartment of the police divisional van, there is no imprisonment and the requirement made under s55(1) is not invalid on that basis. On the other hand, if the individual enters the rear compartment of a police divisional van after being misinformed by the police that he or she can be forced against his or her will to do so, or if he or she is physically forced into the rear of the police divisional van, then that person will be imprisoned and the requirement made under s55(1) will be invalid.

62. The qualification referred to in the preceding paragraph of this judgment is that the individual concerned must have the ability at all stages of the journey to communicate to the police his or her desire to leave the vehicle and the police must be willing to comply with such a request. If the position is that a person in the rear compartment of a police divisional van is not able to effectively communicate to the police officers in the front compartment a request that they stop the vehicle and allow the person to leave the vehicle, or if the police are not willing to comply with such a request, then the use of the police divisional van as a means of accompanying would constitute a form of imprisonment which would invalidate a requirement made under s55(1).

63. As I noted in paragraph 42 of this judgment, the requirement of reasonableness must be judged objectively in all the circumstances of the case applying at the time the requirement under s55(1) is made, including the means of accompanying that is proposed. For example, if a person who tests positive to a preliminary breath test suffers from a particular medical condition and his or her life will be placed at risk if he or she is required to accompany the police officers in the rear compartment of a police divisional van, that is a relevant consideration in determining whether the requirement is unreasonable.

Did the learned Magistrate err in law?

64. In this case, following *Salton*, the learned Magistrate held that the requirement by the informant that Ms Mastwyk accompany the informant to the Wonthaggi police station in the rear compartment of the police divisional van constituted a form of imprisonment which was not authorised by s55(1). In my opinion, for the reasons already discussed, the learned Magistrate erred in law in so finding.

65. The learned Magistrate should have determined whether, on the basis of the evidence before him, including the proposed transport in the rear compartment of the police divisional van, the

requirement that was made under s55(1) was reasonable. A relevant consideration was whether the police officers informed Ms Mastwyk that she could not be forced to enter the rear compartment of the police divisional van against her will and of the consequences of not accompanying the police, and the reasons given by Ms Mastwyk for declining to enter the rear compartment of the police divisional van. Another relevant consideration was whether the police divisional van in question provided an effective means by which a person in the rear compartment could at any time request the police officers in the front compartment to stop the vehicle to allow the person to leave the vehicle.

66. It follows that the learned Magistrate erred in law in dismissing the charge under s49(1)(e). I answer the second and third questions of law upon which the appeal is brought "Yes".[47] In relation to the first question, in my opinion, the learned Magistrate erred in purporting to make a finding of fact without first considering what constitutes imprisonment as a matter of law.

Proposed orders

67. Subject to any submissions from the parties, I propose to make the following orders:

(a) The appeal is allowed.

(b) The orders made on 17 September 2007 by his Honour Mr WP White, Magistrate, in the Latrobe Valley Magistrates' Court in case number T01926051 whereby his Honour dismissed a charge contrary to s49(1)(e) *Road Safety Act* 1986 (Charge 1) and ordered that the Chief Commissioner of Police pay costs in the sum of $2,000.00, be set aside.

(c) Charge 1 in case number T01926051 is remitted to the Magistrates' Court at Latrobe Valley, to be reheard and determined according to law.

68. I will hear the parties on costs.

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[1] Transcript of Proceedings, *Victoria Police v Mastwyk* (Magistrates' Court of Victoria, 17 September 2007) 17-18.
[2] MC Act, s92(1).
[3] MC Act, s92(2).
[4] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367 ("*Webb*").
[5] [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408 ("*Hrysikos*").
[6] (2002) 4 VR 220, 223-4 [12]-[17].
[7] *DPP v Greelish* (2002) 4 VR 220, 224 [17].
[8] *Webb* [1993] 2 VR 403, 407.
[9] [1993] VicRp 82; [1993] 2 VR 403 esp at 408, 410; (1992) 16 MVR 367.
[10] [1993] VicRp 82; [1993] 2 VR 403, 411; (1992) 16 MVR 367.
[11] [1993] VicRp 82; [1993] 2 VR 403, 411; (1992) 16 MVR 367.
[12] [1993] VicRp 82; [1993] 2 VR 403, 411; (1992) 16 MVR 367.
[13] [1993] VicRp 82; [1993] 2 VR 403, 412; (1992) 16 MVR 367.
[14] [1993] VicRp 82; [1993] 2 VR 403, 412; (1992) 16 MVR 367.
[15] [1993] VicRp 82; [1993] 2 VR 403, 413; (1992) 16 MVR 367.
[16] [1993] VicRp 82; [1993] 2 VR 403, 414-415; (1992) 16 MVR 367.
[17] [1993] VicRp 82; [1993] 2 VR 403, 415; (1992) 16 MVR 367.
[18] [1993] VicRp 82; [1993] 2 VR 403, 416; (1992) 16 MVR 367.
[19] [1993] VicRp 82; [1993] 2 VR 403, 418; (1992) 16 MVR 367.
[20] *Mansfield v Hrysikos* (2000) 32 MVR 491; [2000] VSC 474, [36]-[38].
[21] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[22] [2002] VSCA 175; (2002) 5 VR 485, 502 [57]-[59]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[23] [2002] VSCA 175; (2002) 5 VR 485, 491-2 [13]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[24] [2002] VSCA 175; (2002) 5 VR 485, 493 [15]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[25] [2002] VSCA 175; (2002) 5 VR 485, 493 [18]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[26] [2002] VSCA 175; (2002) 5 VR 485, 494 [20]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[27] [2002] VSCA 175; (2002) 5 VR 485, 495 [26]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[28] See *Interpretation of Legislation Act 1984* (Vic) s35(a) and paragraph 10 of this judgment.
[29] [2004] VSC 32, [14]; (2004) 40 MVR 427.
[30] *DPP v Skinner* [2004] VSC 32, [15]; (2004) 40 MVR 427.
[31] See paragraph 10 of this judgment.
[32] See paragraph 7 of this judgment.
[33] (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998) ("*Salton*").
[34] [1970] VicRp 31; [1970] VR 240 ("*Banner*").
[35] [1991] VicRp 97; [1991] 2 VR 597; [1991] Aust Torts Reports 81-077 ("*Myer Stores*").

[36] (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998) 8.
[37] [1993] VicRp 82; [1993] 2 VR 403, 411-12; (1992) 16 MVR 367.
[38] (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998) 14-15.
[39] In relation to the absence of power to arrest, see *Hrysikos* [2002] VSCA 175; (2002) 5 VR 485 487 [2], 488 [5], 491-2 [13], 500-1 [51], 495 [26]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[40] *Thompson v His Honour Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141, 150 [20]; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[41] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643, 658 [53]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[42] See paragraph 10 of this judgment.
[43] [1999] VSCA 73; [1999] 2 VR 643, 658-9 [53]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[44] [1970] VicRp 31; [1970] VR 240, 249; cited at *Salton* (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998) 7.
[45] (1919) 122 LT 44, 51, 53; accepted in *Myer Stores* [1991] VicRp 97; [1991] 2 VR 597, 599; [1991] Aust Torts Reports 81-077; cited at *Salton* (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998) 7.
[46] *S v Crimes Compensation Tribunal* [1998] 1 VR 83, 86-93.
[47] See paragraph 8 of this judgment.

APPEARANCES: For the appellant DPP (on behalf of Philip James Holyoak): Mr DA Trapnell, counsel. Solicitor for Public Prosecutions. For the respondent Mastwyk: Mr DA Dann, counsel. C Marshall & Associates, solicitors.
