19/94

SUPREME COURT OF VICTORIA

McCARDY v McCORMACK

Eames J

9 May, 1 June 1994 — [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST POSITIVE – DRIVER TOLD "COME WITH ME" – NO REASON GIVEN – WHETHER SUFFICIENT REQUEST TO SATISFY ACT – EVIDENCE GIVEN BY OPERATOR – NO DIRECT EVIDENCE GIVEN THAT BREATH ANALYSING INSTRUMENT WITHIN DEFINITION – WHETHER OPEN TO INFER THAT INSTRUMENT WAS APPROVED: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1), 58(4).

1. It is an essential ingredient of an offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act') that the instrument used on the relevant occasion was of an approved type. The operator must describe the instrument in a way which enables the Court to ascertain whether the instrument complies with the definition in the Act.

***Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257, applied.**

***Reeves v Beaman* MC 32/91, explained.**

2. Where, in cross-examination, a Breathalyser operator made reference to the instrument used on the relevant occasion as a breath analysing instrument, there was no evidence – direct or inferential – from which a Magistrate could conclude that the instrument used came within the definition in the Act.

3. It is an essential ingredient of a charge under s49(1)(f) of the Act that a requirement be made of a person to accompany a police officer and the purpose stated.

4. Where a police officer said to a driver "come with me" but did not tell the driver the reason or purpose of the requirement, it was not open to a Magistrate to conclude that s49(1)(f) had been complied with, notwithstanding the finding that the driver knew the purpose for the making of the request.

***Dalzotto v Lowell* MC 6/93, applied.**

EAMES J: [1] This is an appeal on questions of law pursuant to s92 of the *Magistrates' Court Act* 1989. The appellant appeals from a decision of the Magistrates' Court at Broadmeadows on 1 November 1993. The Magistrate convicted the appellant on a charge brought pursuant to s49(1)(f) of the *Road Safety Act* 1986 ("The Act") and fined the appellant $500.00 with $42.00 statutory costs and cancelled her licence and disqualified her from obtaining a further licence for a period of 14 months.

The facts giving rise to the appeal may be briefly stated. On the evening of Wednesday 21 October 1992 the appellant attended at a Thai Restaurant in Fitzroy with five work colleagues The appellant gave evidence that she consumed approximately four glasses of wine between the hours of 6:30 p.m. to 10:30 p.m. On the way home, the appellant travelled down Ballarat Road, Braybrook. In Ballarat Road there was a preliminary breath testing station set up in accordance with the *Road Safety Act* 1986 ("the Act"). On duty at that site was a Constable Newton performing preliminary breath test activities. At about 10:45 p.m., the appellant's vehicle was directed into the preliminary breath test line. Constable Newton gave the appellant a preliminary breath test which proved positive. Constable Newton believed that reading to be as a result of mouth alcohol and directed the appellant to park her vehicle **[2]** and wait. Approximately 20 minutes later, Constable Newton accompanied by the Informant Sergeant McCormack attended at the appellant's vehicle where a second preliminary breath test was conducted by Constable Newton. Before the preliminary breath test device gave a final reading, Constable Newton was told by Sergeant McCormack to bring the appellant to the "booze bus", or words to that effect. Constable Newton then switched off the device and said to the appellant, "Come with me". The purpose for which Constable Newton required the appellant to accompany him was not disclosed.

The appellant underwent a breath test and a result of 0.140% obtained. A charge was filed pursuant to s49(1)(f) of the Act. The appellant gave notice under s58(2) of the Act requiring the breathalyser operator, Sergeant McCormack, who had given a Certificate under s55(4) of the Act, to attend Court as a witness.

The questions of law raised by the appellant are five in number as follows:

"1. Was there any evidence to support the finding that the instrument upon which the Defendant was tested was a breath analysing instrument within the meaning of Part 5 of the *Road Safety Act* 1986?

2. If yes to (1); was there any evidence to support the finding that:
(a) in the absence of oral evidence or averments the breath analysing instrument was on the occasion in proper working order and/or properly operated?
(b) in the absence of oral evidence of averment that **[3]** in relation to the breath analysing instrument, all regulations made under Part 5 of the *Road Safety Act* 1986 with respect to breath analysing instruments were complied with?

3. Was it open to the learned Magistrate:
(i) to rely, if she did so rely, upon a Certificate of Authorised Operator of Breath Analysing Instrument as proof of the facts and matters stated therein in circumstances where a Notice under Section 58(2) of the *Road Safety Act* 1986 has been served?
(ii) in receiving the said Certificate tendered for the purposes of identity only to rely, if she did so rely, upon the said Certificate as proof of the facts and matters stated therein?

4. Was it open to the learned Magistrate to find that the breath analysing instrument was properly operated and/or in proper working order:
(a) in view of the admission of the witness McCormack that he had failed to flush the sample chamber twice for both standard alcohol solution tests in contradiction of proper procedure, wherein such procedure was required where the standard alcohol solution was below 19 Centigrade; and/or
(b) in view of the admission of the witness McCormack that he had not properly operated the instrument on the relevant occasion; and/or

5(a) Was it open to the learned Magistrate to find there was evidence at the **[4]** conclusion of the prosecution case that the requirement to undergo a test by means of a breath analysing instrument had been communicated to the Defendant, and that there was a case to answer on that essential element of the charge;
(b) If yes to (a) then; the charge proven having found as a question of a fact that the relevant requirement had not been communicated to the Defendant?"

GROUND 1

The definition of types of approved "breath analysing instruments" comprises two paragraphs, (a) and (b), to be found in s3 of the Act. There are two categories, either an apparatus known as a "breathalyser", with a specific patent number, or any other apparatus of a type approved by the Minister by notice published in the *Government Gazette*.

By s58(4) evidence given by an operator that the instrument was, firstly, an approved type, secondly, that it was in proper working order and was properly operated, and, thirdly, that it was operated in compliance with all relevant regulations, was proof of those facts unless the contrary was proved. S58(5) further relates to the facilitation of proof, by oral evidence, that the apparatus was of the “breathalyser” type. The affidavits before me disclosed an apparent dispute as to whether the operator had given evidence of all or any of those matters. Her Worship held, with respect to the questions of the instrument being an approved type and that the regulations were complied with, that it would have been preferable that such **[5]** evidence had been given in clear and unequivocal terms. In rejecting a submission that each of the three matters to which sub-section (4) related had not been proved because no evidence had been given in “precisely” the words of the section, Her Worship held that “I am satisfied on the evidence that the Sergeant was authorised and the instrument was a breath analysing instrument”. That finding did not expressly deal with two of the matters to which sub-section (4) related, but I take it that Her Worship was intending to indicate that she was satisfied on the evidence that all such matters had been proved. No challenge is made as to the finding that the operator was authorised to conduct the test.

In the answering affidavit sworn by the prosecutor in the proceedings before the Magistrate,

he deposed that in cross-examination the respondent "made reference to the instrument being a breath analysing instrument and operating it as per the Act and Regulations". In his submissions to the Magistrate the prosecutor had argued that although the witness had not expressly given evidence that the instrument bore the appropriate patent number, Her Worship would be entitled to infer that it was of the approved type. Notwithstanding the somewhat vague, and yet sweeping, description of the evidence given in cross-examination, as related in the answering affidavit, I will adopt the accepted practice of relying upon the answering affidavit where there is a dispute as to the facts on appeal: *Larkin v Penfold* [1906] VicLawRp 90; [1906] VLR 535; 12 ALR 337; 28 ALT 42; *Thompson v Lee* **[6]** [1935] VicLawRp 65; [1935] VLR 360; [1935] ALR 458; *Lindgran v Lindgran* [1956] VicLawRp 34; [1956] VLR 215; [1956] ALR 731; *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121. Her Worship's findings are consistent with there having been such general evidence given, although the particular passage does not appear in the notes of evidence of the Magistrate.

The question, then, is whether that general evidence, coupled with other evidence, or of itself, would be sufficient proof that the instrument was one which was authorised. It is an essential ingredient of the offence under s49(1)(f) that the instrument was of an approved type: *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at p407; (1992) 16 MVR 367, per Ormiston J; *Smith v Van Maanen* (1991) 14 MVR 365.

In *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257 Ormiston J was concerned with a case where the operator who gave evidence called the machine a "breathalyzer" and also said that he used an "approved instrument", but gave no further details as to that. The witness had not said which type of instrument under s3 it was, nor did he refer to the patent number. Ormiston J held, at VR pp916-7, that it was essential that evidence be given that the breath analysis machine was one authorised under the Act. His Honour held that "language substantially identical" to that employed in s58(4)(a) had to be employed by the witness, and that it was insufficient for the witness merely to describe the instrument as "an approved instrument". His Honour held that the evidence of the witness had failed to describe the instrument in any way **[7]** which would enable the court to ascertain whether the instrument was one which complied with either definition in the Act.

Ormiston J at p916, rejected the suggestion that evidence given by the operator that he had complied with all regulations relating to the operation of breathalyzers, necessarily implied that the instrument was one approved under the Act. In *Reeves v Beaman*, unreported judgment 15 August, 1991, O'Bryan J, held that such words must have been understood to contain an averment that the instrument was one defined in s3. His Honour took the view that there was an obligation on the defence, if it was to dispute that the instrument was an authorised one, to raise the issue, expressly, in cross-examination. O'Bryan J did not refer to authority in so deciding and, before me, counsel for the respondent conceded that insofar as the judgment of O'Bryan J suggested that there was an onus on the accused person to prove that the instrument was not authorised, that would not be a proposition which he would seek to advance. In my view, O'Bryan J was not suggesting that there be a reversal of the onus of proof on this matter, but rather he should be taken as having been referring to factors which might give greater strength to any inference which might be drawn on the available evidence. Mr Just, counsel for the respondent sought to rely upon the decision of O'Bryan J in that way, adding that where the charge arose out of the use of a random breath test **[8]** station: "There is a kind of presumption of regularity" which might apply.

Given the fact that these are criminal proceedings, and concern matters on which, as I later indicate, the courts have repeatedly expressed the view that strict proof is required as to the essential elements of the offence, I would, respectfully, prefer to adopt the view expressed by Ormiston J as to the proof of the instrument being an authorised one. In my opinion there was no evidence, direct or inferential, from which Her Worship could have concluded that the instrument used here was one which met the definition in s3. Accordingly, on this ground, the appeal must succeed.

I turn to consider grounds 3 and 5. **Ground 3** was not argued before me, it being conceded by counsel for the respondent that the certificate could not have been relied upon as proof of the facts stated within it once notice had been given by the Appellant under s58(2) that the operator

was required to be called to give evidence. The concession, it was agreed between counsel, did not determine the outcome of the appeal.

Ground 5. Upon completion of the first preliminary breath analysis, the Appellant was told by Constable Newton to park her vehicle and wait by it. Approximately 20 minutes later the respondent attended the scene and a **[9]** second preliminary test was commenced by Constable Newton. Her Worship made no finding as to whether the Appellant was told the result of the second test but she found that upon its completion Sergeant McCormack said to Constable Newton words, to the effect, "(A)sk her to come back to the booze bus". Although no specific finding was made as to this, the answering affidavit filed in these proceedings did not dispute that Constable Newton then merely said to the Appellant: "Come with me". The Respondent did not dispute the suggestion that there was no reason given to the Appellant for the request that she accompany Constable Newton.

Section 55(1) provides that where a police officer is satisfied of certain matters, after a preliminary test has been conducted, he "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 or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath or until 3 hours after the driving...".

It has been held that it is an essential element of the charge under s49(1)(f) that the requirement of Section 55(1) be complied with: *Mills v Meeking & Anor* [1990] HCA 6; (1990) 169 CLR 214 at p224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257. The requirement involves more than a mere request to accompany the officer and the purpose for which the requirement is made must also be stated to the driver **[10]** concerned: *DPP v Blyth*, unreported decision of Coldrey J, 28 April, 1992; *Dalzotto v Lowell*, unreported judgment of Ashley J, 18 December, 1992. The terms in which the requirement is stated need not follow any precise formula of words: *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503. The driver must, however, be told sufficient to know what it is that is being required of him or her: *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579. Whether a requirement had been made within the terms of the section need not be proved by direct evidence, but may be a matter on which an inference may be drawn from the whole of the evidence: *Blyth*, *supra*, at p6.

The Magistrate made the following findings in her reasons for judgment:

> "It was never put fairly and squarely to Mr Newton that he did not tell Mrs Macardy why she was required to accompany him from the vehicle to the breath testing station to undergo the test; clearly no words were said to Mrs Macardy as to why she was to accompany Mr Newton, however on all the evidence there could have been no doubt in Mrs Macardy's mind as to what was to happen."

Her Worship added some additional comments about the suggested disfavour with which the courts view technical defences in these cases, and commented that any challenges to the evidence of the police witnesses should be put squarely.

In view of the fact that it was found that no words were used by the police officer in explanation of his request, the question is whether it was open to the **[11]** Magistrate to conclude that the section had been complied with. Put another way, does a conclusion that the driver knew why she was being required to accompany the police officer remove the obligation that she be told the reason?

In *Dalzotto* Ashley J was concerned with a case where a driver had been intercepted on a country highway some distance from Ballarat. The driver, having failed a preliminary test, but not having been told that he had so failed, was required to accompany the police officer in the police car to the Ballarat police station. He was given no reason why he was being asked to do so. His Honour held that the conviction could not be sustained in view of the failure to state the reason. His Honour so decided notwithstanding his acceptance that the driver had understood why the request had been made. In the course of his reasons his Honour referred to the policy behind the imposition of an obligation that the requirement convey the reason for its imposition. His Honour held, at p7:

> "The member of the public is effectively being deprived of his or her liberty, albeit in a transitory way. In these circumstances the legislature has required the police officer to convey to a member of the public the purpose for which the requirement to attend the police station is being imposed."

Counsel for the respondent sought to distinguish *Dalzotto* on the basis that the policy considerations to which Ashley J adverted did not arise where, as here, the requirement was imposed in the **[12]** context of a road-side breath testing station. The appellant had been one of many drivers randomly required to submit to a preliminary breath test. The "booze bus" was, no doubt, dauntingly obvious in the vicinity. To enter the bus was unlike the entry into a police station; its sole function might reasonably have been inferred to have been connected with the conduct of breath analysis tests. The driver was taken a very short distance from her car to the bus; she was not asked to travel many miles in a police vehicle.

Those factors are all of significance, but no one of them seems to me to provide a basis for distinguishing the judgment of Ashley J. Whilst Her Worship concluded that the Appellant must have known the purpose behind the requirement, so too did Mr Dalzotto. If the citizen is entitled to know the reason why, when not under arrest, she is being deprived of her liberty, it seems to me that that is an entitlement which must apply in all circumstances, not merely in those where the incidents accompanying the deprivation of liberty may be thought to be less transitory, or less intimidating, than in other circumstances. The citizen is entitled to know why such an event is happening, and what is entailed in the requirement that she be deprived of her liberty. Whilst I understand why it might be inferred that the Appellant knew the purpose of the requirement, it was more than a request (as Coldrey J observed in *Blyth*), it was a command. The conclusions reached by a citizen as to the purpose of such a requirement may be quite wrong. **[13]** The absence of a clearly stated reason for the requirement may lead to unnecessary disputation, perhaps even to an arrest on other grounds. There is good reason why the requirement should pertain at all times, and in all contexts. There is no justification for imposing any lesser obligation when the requirement is to accompany a police officer to an "other place", than there is when the requirement relates to a police station. Certainly, once inside a "booze bus", the citizen is no less confined and under the control of police officers than would be so in the case of removal to a police station, or even to a police car. In my opinion this ground is also made out, and the conviction can not stand.

Conclusion

Having concluded that the appeal must succeed on two of the grounds argued, it becomes unnecessary to deal with the remaining grounds. Ormiston J in *Bogdanovski v Buckingham*, *supra*, at p917, considered whether, in the absence of strict proof that the breath analysing instrument was one authorised under s3, the appropriate order would be to remit the case for rehearing in the Magistrates' Court. He declined to adopt that course, and I take a similar view as to the present case. I am strengthened in that conclusion by the fact that the failure to comply with the obligation to inform the Appellant of the reason for the requirement under **[14]** Section 55(1) is one which could not be cured if the matter was remitted. My orders will be that the appeal will be allowed and the Magistrate's order convicting the Appellant will be set aside. In lieu of the order below, it will be ordered that the information be dismissed.

Solicitors for the appellant: Wilkins and Roche.
Solicitor for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.
