2/00; [2000] VSC 221

SUPREME COURT OF VICTORIA

COOPER-BAKER v HIS HONOUR JUDGE ROSS and ANOR

Balmford J

15, 31 May 2000 — (2000) 31 MVR 235; (2000) 114 A Crim R 40

MOTOR TRAFFIC – DRINK/DRIVING - CHARGE ALLEGING FAILURE TO ACCOMPANY POLICE OFFICER – STATUTORY PROVISION ONLY PROVIDES FOR REFUSAL TO COMPLY – "SIMILAR WORDS" – MEANING OF "SIMILAR" – WHETHER WORDS "FAIL" AND "REFUSE" ARE SIMILAR – NO STATEMENT IN CHARGE THAT POLICE OFFICER FORMED REQUISITE OPINION – CHARGE FOUND PROVED – WHETHER ERROR DISCLOSED: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55; *MAGISTRATES' COURT ACT* 1989 S27(1).

Section 49(1)(e) of the *Road Safety Act* 1986 ('Act') provides:

> "A person is guilty of an offence if he or she—
> (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A);"

A charge laid under s49(1)(e) of the Act failed to state that the police informant formed an opinion pursuant to s55(1) of the Act. Further, the charge alleged that the defendant "did fail" to comply with a requirement to accompany a member of the police force to a police station for the purposes of a breath test. At the hearing, the defendant submitted that a "refusal" rather than a "failure" was an essential element of the offence and that without the allegation of a refusal to accompany, the charge did not disclose an offence known to the law. The magistrate rejected this submission and convicted C-B. On appeal to the County Court, the learned judge in dismissing the appeal, found that the words "fail" and "refusal" were similar words within the meaning of s27(1) of the *Magistrates' Court Act* 1989. Upon a summons on originating motion for an order in the nature of *certiorari*—

HELD: Summons dismissed.

1. Section 27(1) of the *Magistrates' Court Act* 1989 provides that in a charge a description of the offence in "similar words" to the words of the Act is sufficient. The relevant meaning of "similar" is defined in the *Oxford English Dictionary*, (2nd ed) as "Having a marked resemblance or likeness; of a like nature or kind". The word "fail" is sufficiently similar to the word "refuse" to enable the defendant to be aware of the nature of the charge. The charge was sufficient to allow the defendant to realise that the test to be applied was that the defendant had allegedly refused to comply with a requirement made.

2. The omission of any recital in the charge to the effect that the police informant had formed the required opinion does not invalidate the charge. The defendant would not have been in any doubt, on that ground, of what was being alleged. The formation of the opinion could be dealt with as a matter of evidence.

BALMFORD J:

1. This is a summons on originating motion under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 1996, whereby the plaintiff seeks an order in the nature of *certiorari* that the order of His Honour Judge Ross sitting in the County Court at Melbourne on 22 May 1998, dismissing the appeal before him and convicting her of a charge under section 49(1)(e) of the *Road Safety Act* 1986 ("the Road Safety Act"), be removed into this Court and be quashed. The facts are set out in the affidavits of the plaintiff and of Mr Regan, who appeared for the respondent in the proceeding before His Honour. There are differences between the two accounts, and where that is so I have preferred the evidence of Mr Regan, that being the version supporting the decision of the court below. (See *Buzatu v Vournazos* [1970] VicRp 63; [1970] VR 476 at 478.) By an order made on 1 June 1998, Mr Justice Mandie granted a stay of the order of Judge Ross until the hearing and determination of the present proceeding or further order.

2. On 4 June 1997, the plaintiff was convicted in the Magistrates' Court at Dandenong of an offence under section 49(1)(e) of the *Road Safety Act* and fined the sum of $500 with statutory costs of $48.50. All licences and permits held by her were cancelled and she was disqualified from obtaining any such licence for a period of two years. She was given leave to drive pending her appeal.

3. The charge pursuant to which the plaintiff was convicted reads as follows:

> The defendant at Gembrook on the 15/11/95 being the driver of a motor vehicle and after having been required to have a preliminary breath test and when further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Road Safety Act and for that purpose a requirement was made for you to accompany a member of the police force to a police station such requirement you did fail to comply with.

4. Section 49(1)(e) of the *Road Safety Act* reads:

> **49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A);

5. It is apparent from the terms of the charge that it relates to a failure to accompany a member of a police force to a police station. The relevant obligation arises under section 55(1) of the *Road Safety Act*, which reads, so far as relevant:

> **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 blood contains alcohol; or
> (b) the person, in the opinion of the member … refuses or fails to carry out the test in the manner specified in section 53(3)—
>
> 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 … for the purposes of section 53 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 and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Sub-section 55(4) reads:

> (4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing the prescribed particulars produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood.

6. The relevant provisions of the *Magistrates' Court Act* 1989 ("the Act") are sections 26, 27 and 50, which read, so far as relevant:

> **26. How criminal proceeding commenced**
> (1) A criminal proceeding must be commenced by filing a charge—
> (a) with a registrar;…
> (4) A proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed, except where otherwise provided by or under any other Act.
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> **27. Descriptions in charge**
> (1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.
> (2) A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed.
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> **50. Power to amend where there is a defect or error**
> (1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error.
> (2) An order must not be set aside or quashed only because of a defect or error in form but the Court may amend the order to correct the defect or error.

7. At the outset of the hearing before the Magistrate, counsel for the plaintiff submitted that the charge was defective in that it alleged that the plaintiff had "failed" to accompany a member of the police force to a police station, but did not allege that she had "refused" to do so. It was put that a "refusal", rather than a "failure" was an essential element of the offence, and that without the allegation of a refusal to accompany, the charge did not disclose an offence known to the law. The prosecutor applied to amend the charge to delete the word "fail" and replace it with the word "refuse". Counsel for the plaintiff submitted that as the twelve month limitation period under section 26(4) of the Act had long expired, it was not possible to amend the charge because that would have the effect of creating a new charge and would be out of time. The Magistrate rejected that submission, but did not allow the amendment and proceeded to convict and sentence the plaintiff, as set out in paragraph 2 above, on the basis of the charge as it stood.

8. The plaintiff appealed to the County Court under section 83 of the Act, which provides for an appeal to that court against a "sentencing order" as defined in section 3 of the Act. The appeal was heard by His Honour Judge Ross on 21 and 22 May 1998. Section 86(1) of the Act provides that on an appeal under section 83, the County Court:

> (a) must set aside the order of the Magistrates' Court; and
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> (b) may make any order which the County Court thinks just and which the Magistrates' Court made or could have made; and
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> (c) may exercise any power which the Magistrates' Court exercised or could have exercised.

9. Similar arguments to those which had been put before the Magistrate were put before Judge Ross. His Honour found the words "fail" and "refuse" to be "similar words" in terms of section 27(1) of the Act and, accordingly, did not allow the amendment, on the basis that the charge was properly framed. The evidence of Mr Regan is that His Honour ruled in the following terms:

> Having regard to the provision of section 27 the word "fail" is sufficiently similar to the word "refuse" to enable the appellant to be aware of what she had been charged with. In my view the charge was sufficient to allow anyone to realise that the test to be applied was that she had allegedly refused to comply with a requirement made of her, and that the appellant was not embarrassed as to her defence.

10. His Honour dismissed the appeal, set aside the decision of the Magistrates' Court and made orders similar to those which the Magistrate had made. The record of the orders, in the form of a Notice to Certain Officials of a County Court's Appeal Decision (being Form number 135 in the County Court Appeals Rules) reads, so far as relevant:

> Order/Conviction Appealed Against:
> Fail to accompany to station for breath test.
> Sentence Appealed Against:
> With conviction fined $500.00. Statutory costs $48.50. Order defendant's licence be cancelled. Disqualified from driving in the State of Victoria for a period of 2 years. Effective from 4/6/97.
> Result of Appeal
> Appeal dismissed. With conviction fined $500.00. Statutory costs $48.50. Order licence be cancelled. Disqualified from driving in the State of Victoria for a period of 2 years from 14 April 1998. Stay of 1 month granted.

11. The submission of Mr Billings, for the plaintiff, was that the charge on which his client had been convicted on the rehearing in the County Court was defective on three grounds:

> * that it did not disclose an offence known to the law, in that it alleged that the plaintiff had "failed" rather than "refused" to accompany a member of the police force to a police station;
>
> * that it did not allege that the member of the police force had formed an opinion under section 55(1)(a); and
>
> * that it was imprecise, ambiguous, duplex, incomprehensible and otherwise bad in law.

12. He referred obliquely to certain of the classic cases on the drafting of an information or charge, including *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104 where Latham CJ said at CLR 479:

> The complaint must show upon its face that what is charged is an offence according to law, and it is sufficient if it sets forth the acts which are relied upon as constituting the offence with such a reference to time and place as identifies those acts.

and at CLR 489-90 Dixon J said:

> ... a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence.

That passage is cited by Ormiston J in *Woolworths (Victoria) Limited v Fred Marsh* (unreported; delivered on 12 June 1986) where His Honour said at page 6 of 10:

> ... the informant cannot rely on a defective information which is so uncertain that the defendant cannot identify the charge brought against him. As Salter J said in *Pointon v Cox* (1927) 136 LT 506 at p509-510:
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> > "In my opinion, an accused person is entitled to information in two respects: he is entitled first of all to be told what law, statutory or other, he is alleged to have broken; and in addition he is entitled to be told with reasonable particularity how he is alleged to have broken that law."

After an extensive consideration of the history of informations and the statutory provisions enabling technical defects to be overcome, Jordan CJ of the Supreme Court of New South Wales concluded in *Ex parte Lovell; re Buckley* (1938) 38 SR (NSW) 153 at 173; 55 WN (NSW) 63, in a passage also cited by Ormiston J in *Woolworths*:

> A magistrate has no jurisdiction to convict a person except for a statutory offence; and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged. Hence, in order to support a conviction for an offence, it is necessary either that the information and summons upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence, or else, if they do not, that the accused person should have been accurately charged orally before the magistrate and should have raised no objection to the absence of information or summons [there referring to the relevant legislation of New South Wales which is not applicable in Victoria] ... If the magistrate convicts upon an information or charge which discloses no offence, or for an offence with which the accused has not been duly charged, the conviction is bad.

13. JD Phillips J in *Hansford v Judge Neesham* (1994) 7 VAR 172 considered the authorities and found, at 179, that relief in the nature of *certiorari* in proceedings instituted pursuant to Order 56 might go to correct an error of law on the face of the record of the County Court, or a jurisdictional error of the County Court, in the exercise of its jurisdiction pursuant to section 84 of the Act. There is no significant difference for this purpose between section 84 and section 83, the latter being the section under which the matter with which I am concerned came before Judge Ross. See also the judgment of McDonald J in *Flynn v DPP* [1998] 1 VR 322 at 336.

14. In *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 the High Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) said:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

15. As to error of law on the face of the record, their Honours at 182 approved the following passage from the judgment of Wilson J in *Hockey v Yelland* [1984] HCA 72; (1984) 157 CLR 124

at 143; (1984) 56 ALR 215; (1985) 59 ALJR 66:

> Ordinarily, in the absence of statutory prescription, the record will comprise no more than the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication.

16. The ruling of Judge Ross, set out in paragraph 9 above, thus does not form part of the "record" for this purpose. Even if it were possible, in this proceeding, to consider that ruling as part of the record, it does not constitute a finding on a matter of law. The words "fail" and "refuse" are ordinary non-technical English words, and the determination of their meaning involves a question of fact, and not a question of law. See the discussion of the authorities on this point by Tadgell J in *Franceschini v Melbourne & Metropolitan Board of Works & Ors* (1980) 57 LGRA 284 at 294 and following; [1980] 1 PABR 276;. The other two grounds relied on by Mr Billings were not put before his Honour and thus he made no finding thereon.

17. As to jurisdictional error, the High Court in *Craig v South Australia* said at CLR 177:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision ... which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature of limits of jurisdiction.

18. Thus, if the charge, as Mr Billings submitted, does not disclose an offence known to the law, or is otherwise bad, then the County Court had no jurisdiction to convict the plaintiff, and should have done no more than set aside the conviction in the Magistrates' Court, as it was required to do by section 86(1) of the Act, and as it did. If that is the case, then *certiorari* will lie on the ground of jurisdictional error. The charge is the document initiating the proceeding on the rehearing in the County Court, and thus forms part of the "record" in terms of the passage cited from *Hockey v Yelland* in paragraph 15 above which was approved in *Craig v South Australia*. However, it is not necessary for me to consider whether the ground of error of law on the face of the record is also available to the plaintiff.

19. I now turn to consider the validity of the charge. Mr Billings submitted that the words "fail" and "refuse" and their congeners had sufficiently different meanings that a charge of failure to accompany, rather than refusal to accompany, did not disclose an offence known to the law. He pointed out that section 49(1)(e) of the *Road Safety Act* as originally enacted in 1986 provided that a person was guilty of an offence if he or she "refuses or fails" to comply with a requirement made under section 55(1), and the words "or fails" had been omitted by section 7(a) of the *Road Safety (Amendment) Act* 1994. He submitted that while a failure might constitute a refusal, it did not necessarily do so.

20. Mr Billings referred to a number of cases in which courts have interpreted legislation corresponding to sections 49(1) and 55(1), and in particular have considered the distinction between the meaning of "refuse" and "fail". The cases in question were: *Lambert v McIntyre* [1975] Qd R 349 (Supreme Court of Queensland); *Hammond v Lavender* (1976) 11 ALR 371; (1976) 50 ALJR 728 (High Court; Queensland legislation); *Adair v Gough* (1990) 10 MVR 558 (Supreme Court of Western Australia); *Rejman v Dunsmore* (1983) 32 SASR 151 (Supreme Court of South Australia); and *Maher v Horton* (1993) 17 MVR 362; (1993) 2 Tas R 362 (Supreme Court of Tasmania). With one exception, none of those authorities was directly on point; in particular, in none of them was the court concerned with the drafting of the charge, information or complaint. Thus no provision corresponding to section 27(1) of the Act was relevant to their consideration of the issue before them. In *Rejman v Dunsmore*, there is a brief reference to the charge, but not to any provision corresponding to section 27(1).

21. That section provides that in a charge, a description of the offence in "similar words" to the words of the Act is sufficient (see paragraph 6 above). The relevant meaning of "similar" is defined in the second edition of the *Oxford English Dictionary* as "Having a marked resemblance or likeness; of a like nature or kind." I would agree with the view of Judge Ross, expressed in his

ruling set out in paragraph 9 above, both as to the relevance of the word "similar" and, in the light of the authorities cited in paragraph 12 above, as to the sufficiency of the charge for its purpose.

22. As Mr Ryan pointed out, the second and third grounds on which Mr Billings submitted that the charge was invalid were not raised before either the Magistrate or his Honour. However, as this is not an appeal but a proceeding under Order 56, the issues are not the same as those which were before the County Court, although the matters to be considered in determining the issues may overlap.

23. As to Mr Billings's second submission, he emphasised that section 55(1) has the effect of empowering a member of the police force to deprive a person of liberty, and submitted that that deprivation could not be effective without the formation of the relevant opinion. However, the omission of any recital to the effect that the member of the police force had formed the required opinion does not, in my view, invalidate the charge. The plaintiff would not have been in any doubt, on that ground, of what was alleged against her. The formation of the opinion could be dealt with as a matter of evidence.

24. Section 35 of the *Interpretation of Legislation Act* 1984 provides:

> In the interpretation of a provision of an Act or subordinate instrument—
> (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object;

25. In *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365 Winneke P, with whom Ormiston and Batt JJ A agreed, said at VSCA [52] and [53], after referring to earlier decisions:

> [52] ...The process of reasoning which seems to underlie those decisions stems not so much from an interpretation of the words "furnish a sample of breath for analysis ... under s55(1)" but rather from an assumption that the legislative intent which lies behind s55(1) is to protect the interests of the motorist. This assumption has led the courts to construe more strictly the discretionary powers of "requirement" and to convert them into obligations, as distinct from powers. Thus it is said that the legislative purpose behind s55(1) is not to invest the police with a power to facilitate the objects of the statute, but rather to impose a "duty to inform" the motorist of the reason why his or her liberty is being curtailed (see, for example, *Dalzotto v Lowell*, supra, at pp8-9; *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275, *supra*, at VR pp522-3).
>
> [53] Of course the investiture of increased police power has, as its necessary corollary, an increased incursion into civil liberties. However, 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 Part 5 of the Act is to combat and reduce a recognized 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. If, as I think, the underlying purpose of s55(1) is to invest the police with facilitative powers in order that these objects can be achieved, it cannot be correct to judicially convert that purpose from "a power to require" into a "duty to inform". Yet, as it seems to me, that is what his Honour has done in these cases by accepting the process of reasoning adopted in *Dalzotto* and *McCardy*.

Section 55(1) is thus to be interpreted in accordance with its purpose as there set out.

26. As to the third submission of Mr Billings, while the drafting of the charge cannot be described as elegant, I do not find it to be imprecise, ambiguous, duplex, incomprehensible or otherwise bad in law. The plaintiff would have been well aware of what was alleged against her, in terms of both section 27 and the authorities cited in paragraph 12 above.

27. For the reasons given, I find the charge to be valid and, accordingly, I find that the decision of Judge Ross was not vitiated by jurisdictional error or by error on the face of the record. That being so, the claim of the plaintiff fails. Counsel may wish to make submissions as to costs.

APPEARANCES: For the plaintiff Cooper-Baker: Mr P Billings, counsel. David Tonkin & Associates, solicitors. For the second-named defendant (Cove): Mr CJ Ryan, counsel. Peter Wood, Solicitor for Public Prosecutions.