35/12; [2012] VSC 397

SUPREME COURT OF VICTORIA

DPP v NOVAKOVIC

Williams J

18 June, 7 September 2012

MOTOR TRAFFIC – DRINK/DRIVING – ALLEGED REFUSAL OF REQUIREMENT TO ALLOW A BLOOD SAMPLE TO BE TAKEN – WHETHER NECESSARY TO REFER TO TEMPORAL LIMITATION ON POWER TO MAKE REQUIREMENTS WHEN MAKING REQUIREMENT TO ALLOW A BLOOD SAMPLE TO BE TAKEN – WHETHER NECESSARY TO REFER TO THE THREE-HOUR PERIOD DURING WHICH A PERSON MAY BE REQUIRED TO REMAIN FOR THE PURPOSES OF ALLOWING A BLOOD SAMPLE TO BE TAKEN WHEN MAKING REQUIREMENT TO ALLOW A BLOOD SAMPLE TO BE TAKEN – WHETHER NECESSARY TO REFER TO REGISTERED MEDICAL PRACTITIONER OR AUTHORISED HEALTH PROFESSIONAL WHEN MAKING REQUIREMENT TO ALLOW BLOOD SAMPLE TO BE TAKEN – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(e), 49(1A), 55(1), 55(9A).

N. was charged with refusing to allow a blood sample to be taken from him within three hours of driving. N. accompanied the police informant to the police station and underwent two breath tests which resulted in an "insufficient sample". The informant then said to N.: "You have given two insufficient samples of breath into the breathalyser instrument and, as such, I now require you to undergo a blood test. Do you understand?" N. responded: "No, I'm allergic to needles, I am not having a blood test." N. was subsequently charged and the Magistrate dismissed the charge on the ground that the informant did not comply with the requirements of s55(9A) of the *Road Safety Act* 1986 ('Act'). Upon appeal—

HELD: Appeal dismissed.

1. From the authorities the following principles can be distilled:

(a) the statutory purpose of Part 5 of the Act is to combat a recognised social evil, necessitating the provision of powers to police and others to make requirements including those under ss55 (1) and (9A);

(b) the Act, nevertheless, is of a penal nature, requiring a person to provide potentially incriminating material, and must be strictly construed and ambiguity resolved in favour of that person;

(c) the powers to require a sample of breath or of blood under s55 are subject to a temporal limit of three hours from driving;

(d) the requirement for a sample of breath or blood to be furnished need not be expressed in any particular form of words, so long as what is required is made clear;

(e) the requirement to furnish a sample of breath under s55(1) need not be expressed in imperative terms;

(f) the powers to make requirements in relation to breath samples under s55(1) are permissive;

(g) the powers under s55(1) to require a person 'to furnish a sample of breath', 'to accompany' and 'to remain' are discrete and need only be exercised where the circumstances dictate;

(h) a requirement 'to remain' made under s55(1) must specify its purpose and the applicable temporal limit in relation to its exercise;

(i) when exercising the power to require a person to furnish a breath sample under s55(1), there is no general duty or obligation to inform the person about the further subsidiary (or machinery) powers under sub-s (1) to require the person 'to accompany' or 'to remain' for the purpose of satisfying the requirement to provide the sample of breath.

2. The Magistrate's decision to dismiss the charge was correct, because the informant had failed to communicate to N. the essential fact that he was only required to allow a registered medical practitioner or approved health professional to take a sample of his blood.

3. N. would only have offended under s49(1)(e) of the Act if he had refused such a requirement. When his refusal could have constituted a criminal offence, it was critical that the informant should have conveyed to him exactly what was being required of him.

4. Under s55(9A), the informant could not have been required to allow anyone other than a registered medical practitioner or an approved health professional to take a blood sample. Yet, what the informant said gave no indication that the requirement was limited to allowing such a person to take his blood. This was in circumstances where the informant himself had conducted the two unsuccessful breath tests in the presence of another officer.

5. The fact that the requirement was one to allow a sample to be taken only by a registered medical practitioner or an approved health professional was not an ancillary logistical detail that could be communicated to a driver at some later stage. As an essential part of the permissible requirement, it should have been communicated to N. at the time he was asked to undergo a blood test. This was not to prescribe a form of words that must be used, but rather to insist that the requirement under s55(9A) was properly made.

WILLIAMS J:

The appeal

1. The Director of Public Prosecutions, acting on behalf of the informant, Leading Senior Constable Jeffrey Charles Smith, appeals against a 14 December 2011 order of the Geelong Magistrates' Court dismissing a charge against the respondent, Mr Novakovic under s49(1)(e) of the *Road Safety Act* 1986 ('the Act').

2. The charge was in these terms:

> The accused at geelong [sic] on 14th March 2011 after having been required by a member of the Police Force to allow a sample of blood to be taken from him pursuant to Section 55(9A) of the *Road Safety Act* 1986, did refuse to allow such blood sample to be taken within three hours of the driving of a motor vehicle.

3. Mr Novakovic was convicted by the same Magistrate, on the same day, of a second offence of driving at excessive speed, in contravention of r20 of the *Road Safety Rules* 2009.

The issues

4. The notice of appeal contains a number of questions. However, the appeal essentially raises two questions of law.

5. The first is as to whether it was necessary to proof of the charged offence to establish that the informant making the requirement for a blood sample under s55(9A) referred to the three hour period during which the requirement might be made and during which Mr Novakovic might be required to remain for the purpose of allowing a blood sample to be taken.

6. The second issue, raised by a notice of contention, is as to whether it was essential to that proof to establish that the police officer making the requirement had stated that the requirement was to allow a registered medical practitioner or authorised health professional to take the blood sample.

The facts

7. There is no dispute as to the facts upon which the learned Magistrate reached her decision in relation to the charge she dismissed.

8. The informant had intercepted Mr Novakovic, who had been driving his motorcycle at the excessive speed. A preliminary breath test indicated that there was alcohol in his blood. The informant advised Mr Novakovic of that fact. Reading from a card, he then said:

> I now require you to accompany me to a police station in Geelong for the purpose of a breath test and to remain there until you have received a certificate of analysis or for a period of three hours, whichever is sooner. Are you prepared to accompany me?

9. Mr Novakovic asked whether he could go to see a cat he was looking after. The informant told him that they could only go straight to the Geelong Police Station. When Mr Novakovic asked whether he had a choice, the informant replied:

> Actually, you have two choices, sir. You can accompany me to the police station or refuse to accompany me but if you refuse, you will lose your licence for a minimum of two - minimum two year period and receive a substantial fine of the court.

10. Mr Novakovic went with the informant to Geelong Police Station. There, he said that he had drunk one glass of whiskey with water, about five minutes before being intercepted.

11. The informant said that he required him to undergo a breath test pursuant to s55 of the Act. Mr Novakovic started to blow into the mouthpiece of the breath analysing machine and stopped. The machine printed out four certificates referring to an 'insufficient sample'. One was signed by the informant before he gave it to Mr Novakovic.

12. The informant then required Mr Novakovic, under s55(2A), to provide another sample of breath for analysis. Again, he started to blow into the mouthpiece and stopped. Once again, the machine produced four 'insufficient sample' certificates, one of which was handed to him.

13. The informant then said this to Mr Novakovic:

> You have given two insufficient samples of breath into the breathalyser instrument and, as such, I now require you to undergo a blood test. Do you understand?

14. Mr Novakovic responded:

> No, I'm allergic to needles, I am not having a blood test.

15. The informant asked:

> ... are you aware if you refuse the blood test, having given two insufficient samples of breath into the breathalyser instrument, you will lose your licence for a minimum of two years and receive a substantial fine at the court?

16. When Mr Novakovic failed to respond, the informant said to him:

> You have given, as I indicated, two insufficient samples of breath into the breathalyser instrument, and, as such, I now again require you to undergo a blood test. Do you understand?

Mr Novakovic answered:

> No, I'm not. I don't have needles. I'm allergic to them.

17. The informant told him that the matter would be reported. Mr Novakovic denied that he had been speeding and left the police station.

18. In the Magistrates' Court, Mr Novakovic argued that the charged offence under s49(1)(e) could not be proved because the informant had failed to refer again to the three hour period he had mentioned when requiring him to remain for a breath test. In those circumstances, he had not refused a requirement under s55(9A).

The Act

19. Mr Novakovic was charged with an offence under s49(1)(e) in Part 5 of the Act which relates to offences involving alcohol or other drugs. Part 5 contains the following relevant provisions:

> **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; ...
>
> **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), (2AA), (2A) or (9A);

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 ... for the purposes of section 53 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 any further sample required to be furnished under subsection (2A) 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.

(2A) The person who required a sample of breath under subsection (1) ... may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample, or each of the samples, previously furnished in grams per 210 litres of exhaled air because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever.

(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.

(9A) The person who required a sample of breath under subsection (1), (2), (2AA) or (2A) from a person may require that person to allow a registered medical practitioner or an approved health professional nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—

(a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or

(b) the breath analysing instrument is incapable of measuring in grams per 210 litres of exhaled air the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever—

and for that purpose may further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

The Magistrate's decision

20. The learned Magistrate was referred to decisions of the Court in *Uren v Neale*[1] and the Court of Appeal in *DPP v Piscopo*[2] and *DPP v Rukandin.*[3]

21. Counsel for Mr Novakovic argued that those authorities established that it was critical that 'the three hour rule' be stipulated when making a requirement that a person allow a blood sample to be taken. The prosecutor maintained that the relevant refusal was established when the requirement concerning the taking of the blood sample was refused.

22. The learned magistrate dismissed the charge, saying:

> In my view, the ... breath test requirement was fully complied with and once it was – the opinion of the informant that the person was unable to furnish the required sample of breath, that is when the further requirement under Section 9A (sic) kicks in. And in line with the authorities, all elements must be made known to the alleged offender and that means another three hours needs to be relayed to him that he might be taken to a hospital and is required to stay there within three hours after the driving or the blood sample being taken. He wasn't. He was simply advised that a blood sample would be needed and he said, "No, I'm allergic to needles and I'm not having a blood test." He was then advised that the penalties for refusing but he wasn't given the information that is required to be given under Section 9A [sic] being a discreet and separate offence, from failure to accompany under Section 55(1) – (2). So, for that reason, I am satisfied that the requirements to comply with the information to be given to the – Mr Novakovic wasn't complied with and, accordingly, that charge is dismissed.

Notice of appeal

23. The Director stated the questions of law as follows in the notice of appeal:

> 1. Did the learned Magistrate err in law in finding that the Defendant should have been informed again that he was required to remain for three hours or until a blood sample was taken?
>
> 2. Did the learned Magistrate err in law in failing to recognise that the "three hour period" under the *Road Safety Act* 1986 is a fixed period, irrespective of what type of sample (whether breath, blood, urine or oral fluid) is to be provided?
>
> 3. Did the learned Magistrate err in law in failing to recognise that a requirement to remain is a discreet requirement from other requirements under the *Road Safety Act* 1986?
>
> 4. Did the learned Magistrate err in law in failing to recognise that only one "requirement to remain" arose in this case and that such requirement had already been communicated to the motorist?
>
> 5. Did the learned Magistrate err in law in failing to recognise that the charge was a "refusal to furnish" charge, and not a charge relating to a "refusal to accompany" nor a charge relating to a "refusal to remain"?

24. The Director argues that the Court should answer each question in the affirmative and conclude that her Honour erred in law. As I said earlier, the appeal itself essentially raises the issues as to whether it was necessary for proof of the alleged offence to establish that the informant referred to the three hour period during which he could make the requirement to allow a sample of blood to be taken or require Mr Novakovic to remain at a place for that purpose.

Notice of contention

25. Mr Novakovic resists the Director's argument that the Magistrate erred as he alleges and, in the alternative, seeks to support the decision on the following single ground stated in a Notice of Contention dated 15 June 2012:

> Ground 1: If the learned Magistrate erred in finding that the Defendant should have been informed that he was required to remain for three hours or until a blood sample was taken (which is not conceded), then in any event the defendant should have been informed that he was required to allow a registered medical practitioner or an approved health professional to take a blood sample from him, and the failure to so inform means the requirements of s55(9A) were not complied with and the charge was properly dismissed.

Submissions

26. The parties cite *Uren*, *Piscopo* and *Rukandin*, amongst other authorities, in support of their submissions. *Uren* and *Rukandin* involved alleged refusals of requirements made under s55(9A) to allow a blood sample to be taken and to accompany for that purpose, respectively. *Piscopo* concerned an alleged refusal of a requirement to accompany for the purpose of furnishing a sample of breath under s55(1).

27. The Director refers to the statutory scheme. He notes the presumption in s48(1) of the Act that, if a certain concentration of alcohol was present in the alleged offender's breath or blood within three hours of the alleged offence, not less than the concentration of alcohol was present in that person's breath or blood at the time of the alleged offence.

28. The Director relies upon Ashley JA's conclusions in *Piscopo* that the power to require a person to provide a sample of breath, blood, urine or oral fluid is subject to a three hour temporal limit and that there is no obligation to provide a sample outside that period.[4] He also relies upon his Honour's acceptance of *Uren* as authority for the proposition that the statement of a requirement to remain under s55(1) must refer to the three hour limit and his rejection of the notion that there is a duty to inform more generally under the sub-section.[5]

29. The Director starts by challenging the reasons on the basis that the learned Magistrate concluded that the three hour period relevant to a requirement to remain under sub-s(9A) commenced at the point the requirement for a blood sample was made or, at least, at some point after that at which Mr Novakovic last drove. This challenge can be disposed of shortly. It is common ground that the Magistrate would have erred had she reached that conclusion. I am

not persuaded that she did, given that, immediately afterwards, she correctly described the three hour period relevant to the sub-s(9A) requirement to remain. Question 2 should be answered in the negative.

30. The Director correctly characterises the charge faced by Mr Novakovic, under sub-s(9A), as one of a 'refusal to furnish', rather than a 'refusal to accompany'. He cites *DPP v Foster*[6] as authority for the proposition that a refusal to furnish a sample of breath is the primary requirement under s55(1) and that the requirements to accompany and remain are subsidiary[7] and submits that the reasoning behind the decision in *Foster* is equally applicable in the case of sub-s(9A). The Director then relies upon *Piscopo*[8] and *Rukandin* to argue that the three hour limit is only grafted on to the requirement to remain, and not the discrete requirement to accompany found in sub-ss55 (1) and (9A).

31. Accordingly, the Director argues that s55(9A) gave the informant a discretionary power to make three separate requirements of Mr Novakovic. The first was that he allow a sample of blood to be taken. The second was that he accompany him, for that purpose, to a place where the sample was to be taken. The third was a requirement that he remain at that place for the relevant period. There was no need to refer to the requirement to remain for the relevant time when making the requirement to allow a blood sample to be taken. Nor was the informant obliged to inform Mr Novakovic more generally about the content of his discretionary powers to make further requirements.

32. The Director relies on *Piscopo* and *Sanzaro v County Court of Victoria*[9] to submit that, just as no particular form was words need be used to make the requirement under sub-s(1) of s55, there was no formula to be employed for the requirement under sub-s(9A).

33. Mr Novakovic responds that advice as to the three hour time limit is of great importance and that he should have been informed that it would apply in relation to the taking of a blood sample, rather than it being left to chance as to whether he was aware that this was the case. By leaving it to chance whether he understood the operation of the three hour limit, it was also left to chance whether he would have allowed a sample to be taken within or outside the three hour period during which he could be required to provide it. He refers to Ashley JA's recognition in *Piscopo* of the danger of a person unwittingly providing incriminating evidence of an offence outside the three hour period admissible under Part 5 of the Act, if they were unaware of the temporal limit.[10]

34. Mr Novakovic maintains that, when he was told that he was required to undergo a blood test, he was effectively being asked to remain at the police station for a further period to do so. The informant should also have stated that he was required to allow a sample of blood to be taken within that three hour period. Otherwise, the elements of the offence with which he was charged, as they were stated in the Charge-Sheet and Summons, would not be made out.

35. The Director makes the alternative argument that, even if it had been necessary to refer to the relevant period during which Mr Novakovic could be required to remain at a place where the blood sample was to be taken, the informant's earlier statement of the requirement that he remain at the police station for the purposes of furnishing a breath sample would have sufficed.

36. Mr Novakovic disputes that proposition, submitting that the requirements under sub-ss(1) and (9A) of s55 are discrete, and he relies upon the fact that the informant made no reference to a blood test when he required him to furnish a breath sample.

37. Mr Novakovic finally contends, as noted above, that, even if the learned Magistrate had erred for the reasons advanced by the Director, her Honour's conclusion was correct because the informant should have told him that he was required to allow a registered medical practitioner or an approved health professional (as opposed to someone else) to take a blood sample.

38. The Director first responds that the Act does not create any obligation to 'inform'. Then, he argues that it was only essential to convey to Mr Novakovic that he was required to allow a blood sample to be taken. No particular form of words was required to make that essential requirement.

39. The Director refers to Winneke P's description, in *Foster*,[11] of the police powers under s55(1) as facilitative. At para [29], the learned President said:

> The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to exercise them, let alone in the manner of a ritual incantation of the type which counsel for the respondents suggests. Rather, as I see it they are powers which a police officer 'may' exercise as and when circumstances dictate. If the motorist refuses to accompany the police officer to a police station for the purposes of a breath test, then the police officer may require him or her to do so; if he or she refuses to furnish a sample of breath into the instrument, then he or she may be required to do so; if he or she refuses to remain at the police station before the test has been administered, the police officer may require him or her to remain- at least until the relevant time has elapsed. If the motorist persists in the refusal, in the face of any such requirement, he or she is at risk of being charged with the offence under s 49(1)(e), in which case, proof of the relevant requirement will become an essential element of the offence.[12]

40. The Director then cites Ashley JA's conclusions in relation to this passage, in *Piscopo*, where his Honour said:

> Two points may be made about his Honour's reasons: (1) they involved rejection of single judge decisions upon which counsel for the respondents had relied, those decisions focussing upon there being a duty to inform motorists of the content of the various requirements; and (2), it is clear that his Honour treated the requirements to accompany and to remain as discrete.[13]

41. The Director submits that the Court should not effectively prescribe a form of words to be used. He cites the legislative purposes of Part 5 of the Act and, in particular, s47(c), arguing that the statutory objective of providing a simple and effective means of establishing the presence of alcohol is better able to be achieved if the focus is upon communicating the essential requirement of allowing a sample to be taken.

42. The Director further contends that this is a case of 'anticipatory' breach or refusal of the requirement under s55(9A). He refers to the amendments to s49(1) after Bongiorno J's decision in *Halepovic v Sangston*.[14] After that case, s49(1A) was inserted to provide that a person may be found guilty of an offence of refusal of a requirement to allow a sample to be taken, even if a medical practitioner or health professional has not been nominated to take the sample or that person is not present. He refers to the explanatory memorandum to the amending *Transport Legislation (Miscellaneous Amendments) Act* 2004, arguing that this makes it clear that such 'anticipatory refusal' is now permissible and can constitute an offence under the Act. The explanatory memorandum states that if the motorist has made it clear 'from the outset' that 'he or she will not co-operate', then such anticipatory refusal will constitute the offence and it will not be necessary to detain the person, call out a medical practitioner or health professional or set up testing equipment or make similar arrangements.[15]

43. The Director argues that it would bring the law into disrepute to suggest that a motorist in the position of Mr Novakovic, who has been informed of the requirement to allow a sample to be taken and has made it clear that he would not allow it to happen, would not be found guilty of an offence under s55(9A). That would be a case of allowing 'form to prevail over substance' and would overlook the importance of the purpose of the Act and in particular Part 5. An interpretation of the sub-section which would promote the statutory purpose or object is to be preferred.[16]

44. Mr Novakovic responds it is neither helpful nor relevant to characterise his alleged offence as one of anticipatory refusal. He does not complain that no medical practitioner or health professional had been nominated or was present when the requirement was made. Rather, his complaint is that the informant did not notify him that the blood sample would be taken by such a person. He cannot be said to have refused to comply with a requirement made under s55(9A) when an essential component of the requirement was not communicated to him.

Conclusions

45. The Court was referred to a number of authorities which establish that:

(a) the statutory purpose of Part 5 of the Act is to combat a recognised social evil, necessitating the provision of powers to police and others to make requirements including those under ss55(1) and (9A);[17]

(b) the Act, nevertheless, is of a penal nature, requiring a person to provide potentially incriminating material, and must be strictly construed and ambiguity resolved in favour of that person;[18]

(c) the powers to require a sample of breath or of blood under s55 are subject to a temporal limit of three hours from driving;[19]

(d) the requirement for a sample of breath[20] or blood[21] to be furnished need not be expressed in any particular form of words, so long as what is required is made clear;

(e) the requirement to furnish a sample of breath under s55(1) need not be expressed in imperative terms;[22]

(f) the powers to make requirements in relation to breath samples under s55(1) are permissive;[23]

(g) the powers under s55(1) to require a person 'to furnish a sample of breath', 'to accompany' and 'to remain' are discrete and need only be exercised where the circumstances dictate;[24]

(h) a requirement 'to remain' made under s55(1) must specify its purpose and the applicable temporal limit in relation to its exercise;[25]

(i) when exercising the power to require a person to furnish a breath sample under s55(1), there is no general duty or obligation to inform the person about the further subsidiary (or machinery) powers under sub-s (1) to require the person 'to accompany' or 'to remain' for the purpose of satisfying the requirement to provide the sample of breath.[26]

46. There is no relevant difference between the language of s55(1) and that of s55(9A).[27] In light of the authorities, and attempting both to give effect to the recognised statutory purpose and to adopt the requisite approach to the interpretation of this penal legislation, I conclude as follows:

1. If it had appeared to the informant that Mr Novakovic was unable to furnish a sample of breath or that the breath analyser machine was unable to measure a sample, he would have had the power under s55(9A) to make one or more of the following three discrete requirements of Mr Novakovic:

(a) to allow a registered medical practitioner or an approved health professional to take a blood sample for analysis;

(b) for that purpose, to accompany him to the place where the sample would be taken, and

(c) again for that purpose, to remain at that place until the sample had been taken or until three hours had elapsed since he last drove.

2. The informant was not obliged to use any particular form of words or to make any of the requirements in imperative terms, but he was obliged to give Mr Novakovic reasonably sufficient information to convey what he was being required to do, and why.

3. When conveying to Mr Novakovic that he required him to allow a blood sample to be taken, the informant was not obliged to generally inform him about his additional subsidiary powers to require Mr Novakovic, for that purpose, to accompany him to a place or to remain at a place for the three hour period.

4. Even though it is possible that Mr Novakovic might have provided admissible self-incriminating evidence, if required to provide a blood sample outside the three hour period, the informant making the requirement within that time was not required to advise Mr Novakovic of the irrelevant fact that he would not have had the power to make it if the three hour period had elapsed.

5. Accordingly, the learned Magistrate erred in law by concluding that the informant had been obliged to make the discrete requirement that Mr Novakovic allow a blood sample to be taken in terms which included a reference to the three hour period during which he could be required to remain at a place for that purpose.

6. Further, if the learned Magistrate concluded that the informant had been obliged to make the requirement that Mr Novakovic allow a blood sample to be taken in terms which included a reference to the three hour period during which the requirement could be made, she erred in law.

7. The questions in the notice of appeal should be answered as follows:

1. Did the learned Magistrate err in law in finding that the Defendant should have been informed again that he was required to remain for three hours or until a blood sample was taken?
Yes

2. Did the learned Magistrate err in law in failing to recognise that the "three hour period" under the *Road Safety Act* 1986 is a fixed period, irrespective of what type of sample (whether breath, blood, urine or oral fluid) is to be provided?
No, as I am not persuaded that she did fail as alleged.

3. Did the learned Magistrate err in law in failing to recognise that a requirement to remain is a discreet requirement from other requirements under the *Road Safety Act* 1986?
Yes.

4. Did the learned Magistrate err in law in failing to recognise that only one "requirement to remain" arose in this case and that such requirement had already been communicated to the motorist?
No, because the question is unclear and would seem to include a challenge to an asserted factual conclusion as to the communication of a requirement to remain under s55(1) which was not contested in the appeal.

5. Did the learned Magistrate err in law in failing to recognise that the charge was a "refusal to furnish" charge, and not a charge relating to a "refusal to accompany" nor a charge relating to a "refusal to remain"?
Yes, if the issue raised by this question involves those articulated in questions 1 and 3.

47. I am, however, persuaded by Mr Novakovic's contention that the Magistrate's decision was, in the event, correct, because the informant had failed to communicate to him the essential fact that he was only required to allow a registered medical practitioner or approved health professional to take a sample of his blood.

48. Mr Novakovic would only have offended under s49(1)(e) of the Act if he had refused such a requirement. When his refusal could constitute a criminal offence, it was critical that the informant should convey to him exactly what was being required of him.

49. Under s55(9A), he could not be required to allow anyone other than a registered medical practitioner or an approved health professional to take a blood sample. Yet, what the informant said gave no indication that the requirement was limited to allowing such a person take his blood. This was in circumstances where the informant himself, according to the evidence in the Magistrates' Court, had conducted the two unsuccessful breath tests in the presence of another officer. Mr Novakovic may also have known that police might be involved in taking other bodily samples by use of a swab.

50. As J Forrest J said in *Uren*:

> To establish the offence, it was necessary to prove the requirement.[28] The refusal can only become relevant provided the requirement has been properly stated, at least so that the driver knows his or her basic obligations.[29]

51. The fact that the requirement is one to allow a sample to be taken only by a registered medical practitioner or an approved health professional is not an ancillary logistical detail that can be communicated to a driver at some later stage. As an essential part of the permissible requirement, it should have been communicated to Mr Novakovic at the time he was asked to undergo a blood test. This is not to prescribe a form of words that must be used, but rather to insist that the requirement under s55(9A) is properly made.

52. The appeal should be dismissed.

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[1] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415 ('*Uren*').
[2] [2011] VSCA 275 ('*Piscopo*').
[3] [2011] VSCA 276 ('*Rukandin*').
[4] *Piscopo* [64] (Weinberg and Tate JJA agreeing).
[5] Ibid [66].
[6] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365 *(Foster).*
[7] Ibid [48] (Winneke P (Ormiston and Batt JJA agreeing).
[8] Ibid [71].
[9] [2004] VSC 48; (2004) 42 MVR 279, [11] (Nettle J) (*'Sanzaro').*
[10] (2011) 210 A Crim R 126, 147 [64].
[11] *Foster* [29].
[12] Ibid.
[13] *Piscopo* [50].
[14] [2003] VSC 464.
[15] Explanatory Memorandum, Transport Legislation (Miscellaneous Amendments) Bill 2004 (Vic) 20.
[16] Citing *Sher v DPP* [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585 and *DPP v Jamieson* [2001] VSC 366; (2001) 34 MVR 464.
[17] *Foster*, 658, [53] (Winneke P (Ormiston and Batt JJA agreeing)); *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220, 227, [39]; (2002) 128 A Crim R 144; (2002) 35 MVR 466 (O'Bryan AJA) (*'Greelish').*
[18] *Greelish*, 224, [17] (Buchanan JA (Phillips JA and O'Bryan AJA agreeing).
[19] *Piscopo*, 147, [64] (Ashley JA (Weinberg and Tate JJA agreeing)).
[20] *Foster*, 664 [75] (Ormiston JA); *Sanzaro* [11] (Nettle J); *Uren*, 80 [126] (J Forrest J).
[21] *Uren,* 78-80, [118]-[124] (J Forrest J).
[22] *Foster,* 656-7, [47]-[48] (Winneke P (Batt JA agreeing)).
[23] Ibid, 664 [75] (Ormiston JA).
[24] Ibid, 659 [56] (Batt JA agreeing).
[25] *Piscopo*, 147, [66] (Ashley JA (Weinberg and Tate JJA agreeing)); *Uren*, 80, [125]-[126] (J Forrest J).
[26] *Foster*, 656-60 [47]-[57] (Winneke P (Ormiston and Batt JJA agreeing); *Piscopo*, 147, [66] (Ashley JA (Weinberg and Tate JJA agreeing)).
[27] See *Rukandin* [17] (Ashley JA (Weinberg and Tate JJA agreeing)*).*
[28] Citing *Foster* [75], *Sanzaro* [11].
[29] *Uren* [127].

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