40/92

SUPREME COURT OF VICTORIA

DPP v WEBB

Ormiston J

2, 18 November 1992— [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367

MOTOR TRAFFIC – DRINK DRIVING – PRELIMINARY BREATH TEST – NOT CONDUCTED AT SCENE BUT AT POLICE STATION – WHETHER COMPLIANCE WITH S53 AN INGREDIENT OF OFFENCE – WHETHER NON-COMPLIANCE INVOLVES EXERCISE OF COURT'S DISCRETION – WHETHER TEST MAY BE CONDUCTED OTHER THAN AT PLACE OF DRIVING – WHETHER REQUIREMENT MUST BE REASONABLE – ERROR IN PLACE OF OFFENCE IN INFORMATION – VARIANCE – CAPABLE OF AMENDMENT: *ROAD SAFETY ACT* 1986, SS49(1)(c)(f), 53, 55; *MAGISTRATES' COURT ACT* 1989, S50.

W., was found driving by a police officer who did not have a prescribed breath test device in her possession. An attempt was made, unsuccessfully, to have a device brought to the scene. W. was given a choice as to whether or not he wished to accompany the police officer to a nearby Police Station. W. agreed to accompany the police officer, underwent a preliminary breath test which proved positive and later a full breath test at another Police Station; as a result a charge under s49(1)(f) of the *Road Safety Act* 1986 ('Act') was laid. On the hearing, a magistrate dismissed the charge on the basis that s53 of the Act had not been complied with in that the preliminary breath test was not taken in the general area where W. was found driving. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further hearing.

1. One of the elements of an offence under s49(1)(f) of the Act which must be proved by the prosecution as a necessary pre-condition for a conviction is that a person has undergone a preliminary breath test in accordance with the provisions of s53 of the Act. Non-compliance with s53 does not involve the exercise of the court's discretion as to whether evidence of the full breath test is admissible or not.

***Smith v Van Maanen* (1991) 14 MVR 365; MC 35/1991, applied.**

2. Section 53 of the Act does not authorise a police officer to detain a driver unnecessarily or compel a driver to go to some other place to undergo a preliminary breath test. The requirement under s53 should be a reasonable one. However, there is no basis for reading into s53 that the preliminary breath test must be carried out in the general area where the person was found driving or where the requirement was made. Accordingly, as there was no evidence that the requirement made of W. was unreasonable or beyond power, the magistrate was in error in dismissing the charge.

3. The insertion in the information by the police informant of the place of driving rather than the place of the final test was a mere variance capable of amendment.

4. Observations as to the effect which certain circumstances may have on a charge of refusing to undergo a preliminary breath test under s49(1)(c) of the Act.

ORMISTON J: [1] This appeal is brought by the Director of Public Prosecutions on behalf of the informant against the dismissal of a charge under s49(1)(f) of the *Road Safety Act* 1986 by the Magistrates' Court at Prahran on 31st January, 1992.

The facts are simple. At 10.57 p.m. on 15th February, 1991 the informant Constable West saw the respondent Peter James Webb driving his Ford sedan from Barkly Street, St. Kilda into Mitford Street, Elwood. He failed to give way to Constable West's police vehicle and was therefore intercepted in Mitford Street. During the conversation with Mr Webb Constable West noticed the smell of intoxicating liquor and asked if he had been drinking. He admitted to having recently finished drinking some seven glasses of beer and wine. Constable West wished to conduct a preliminary breath test pursuant to s53 of the *Road Safety Act* ("the Act") on the respondent but discovered that she did not have a prescribed preliminary breath test device with her in her car. The affidavits do not reveal when she first required the respondent to undergo a test nor where and how he was required to do so. She tried to get another police vehicle to bring the required device to her but was unsuccessful. Having explained the situation to Mr Webb she requested him to

accompany her to the St. Kilda Police Station and she gave evidence that the defendant "voluntarily accompanied her" there for that purpose. In cross-examination Constable West expanded this by saying that she gave the defendant the choice as to whether or not he wished to accompany her. The Magistrate's reasons set out in the customary bare way in the supporting affidavits, suggest that either he accepted **[2]** this version or at the least it would have been open to him to accept it on the evidence adduced to that stage, as there was no evidence to the contrary.

The preliminary breath test was conducted with a Lion Alcolmeter and the result indicated what is called a "positive blood alcohol concentration", by which I understood her to mean that the test showed that the respondent's blood contained alcohol in excess of the prescribed concentration of alcohol, as was required at that time by s55(1)(a) of the Act. Constable West then said that as a result of the test she required Mr Webb to accompany her to the Prahran Police Station to conduct a further breath test pursuant to s55, to which he agreed. After some questioning there of no great consequence for present purposes, a test was conducted under that section by Senior Constable Homan which produced a reading of 0.195 per cent. At his request Mr Webb was then given a further breath test which produced a reading of 0.200 per cent. Both tests were completed well within the three-hour time limit prescribed by s55(6), the first being concluded by 12.09 a.m. and the second by 12.22 a.m. on the following morning.

The respondent was then charged with two offences, (i) failing to give way to a vehicle turning right and (ii) 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).

At the hearing the respondent pleaded guilty to the first charge and the argument concentrated only on the charge under s49(1)(f). The evidence led by the prosecution has **[3]** been summarised and set out above at the end of which counsel for Mr Webb made a no case submission. In substance counsel contended that when a person is found driving or in charge of a vehicle a requirement under s53(1)(a) to undergo a preliminary breath test and the test itself should be coincidental with the driving. As the test had taken place at the St. Kilda Police Station it was said that that test was not conducted in accordance with the requirements of the section. Moreover it was argued that the evidence of that test should have been excluded on the grounds of unfairness. I should add that certificates in the customary form had been tendered as part of the informant's case.

The learned Magistrate held that there was no case to answer. In his reasons, briefly set out in one of the supporting affidavits, he summed up counsel's submissions and the evidence and then summarised the general purposes of the legislation as set out in s47. The concluding and relevant parts of his findings were set out in the affidavit in the following way.

> "The Magistrate found that he had to determine whether the fact that the preliminary breath test had been conducted at the police station was satisfactory and in accordance with s53 of the *Road Safety Act*. It was his belief that the preliminary breath test should be taken in the general area of where the defendant was found driving and as that was not what occurred then the offence of s49(1)(f) was not available to the prosecution. He ruled that it was immaterial whether the defendant had accompanied the police voluntarily or otherwise and accordingly dismissed the charge."

The appellant appealed to this Court and the questions of law raised by the appeal were stated by a Master as follows: **[4]**

> "(1) whether a preliminary breath test taken pursuant to s53 of the *Road Safety Act* 1986 should be taken in the general area where the offence occurred;
> "(2) whether such a test could be taken at another place if the person tested accompanied the police voluntarily to that place for that purpose."

I might add that ground (i) did not accurately reflect the Magistrate's reasoning in that he held that the test should be taken in the area where the defendant was found driving, for the offence comprehended by s49(1)(f) is committed by the furnishing of a sample of breath for analysis and the indication of a concentration of alcohol in the blood as recorded or shown on the breath analysing instrument. The argument in this court proceeded upon the basis that the ground should be amended by substituting for the words "where the offence occurred" the words "where the defendant was found driving". To determine the questions raised by this appeal it is

necessary to look to the terms of s53 as a whole and they read at the relevant time: [*His Honour set out the relevant provisions of ss53, 55 and 49(1) and continued*] ... **[6]**

It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in **[7]** that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1). This is implicit in the judgment of Mason CJ and Toohey J (in which Brennan J concurred) in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, see esp. CLR at pp219, 222 and 223-224, apparently approving what was said by the Full Court *sub nom. Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at p743; (1989) 9 MVR 1. The same conclusion was clearly expressed by Tadgell J in *Smith v Van Maanen* (1991) 14 MVR 365, 5th July 1991 where he said (at p14):

> "It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-s. (1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis: and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood."

Consequently compliance with these sub-sections is not merely a question as to the admissibility of the evidence of the tests which may be rejected on a discretionary basis if they have been illegally required: it is an essential part of the case which the prosecution must make out. By s49(1)(f) the first element of the offence to be established is whether the accused has furnished a sample of breath "under" s55(1).

No question is raised on this appeal as to the manner in which the s55 test itself was conducted. The only issue was whether one of the conditions for requiring that **[8]** test was fulfilled, namely whether Mr Webb had duly undergone a preliminary breath test when required by a member of the police force under s53(1)(a), which had indicated that his blood contained alcohol in excess of the prescribed concentration. Counsel for the Director of Public Prosecutions conceded that a proper requirement under that paragraph was a necessary condition to a conviction in the present case.

For the appellant it was contended that no conditions should be placed on the making of a requirement other than those appearing in the section, whereas counsel for the respondent said the section should be read down so as to invalidate the preliminary breath test required of Mr Webb in the circumstances described above. Putting the case at its lowest he said that s53(1) did not entitle a member of the police force to request any person to attend a police station for the purpose of undergoing a preliminary breath test. Furthermore counsel submitted that the tests required must be conducted at or about the scene where the person was found driving and within a reasonable time of the requirement. In the course of argument he appeared to concede that the Magistrate's holding that the test should be conducted "in the general area where the defendant was found driving" was too narrow and he then concentrated his argument upon the need to show that the test should be conducted within a reasonable time of the requirement. In substance he said the section required some promptitude on the part of the police officer for it did not authorize any form of detention **[9]** or arrest for the purpose of undergoing a preliminary breath test.

I was informed that there was no relevant authority upon or discussion in the decided cases on the proper construction of s53(1)(a), nor had the offence created under s49(1)(c) been the subject of appeal or review, whereby it had been an offence to refuse or fail to undergo a preliminary breath test. I would add that for reasons which were not examined the words "or fails" have been subsequently omitted from the latter sub-section: see s10 of Act No. 89 of 1991, which came into effect as from 1st January 1992. Furthermore I was not asked to look at the Parliamentary Debates and I have refrained from doing so, largely because of the criticism of their usefulness by the majority of the High Court in *Mills v Meeking*: see esp. at p226.

The problem posed by the Magistrate's reasons and the arguments on behalf of the respondent is that the words of s53 are not apparently qualified in any of the ways suggested. Indeed, as to time, there is express provision entitling the requirement to be made "at any time"

(see the opening words of s53(1) and also s53(2)) and the obligation to undergo a preliminary breath test is expressly limited by sub-s.(4) to a period of no greater than three hours since the person "last drove or was in charge of a motor vehicle", as the section then stood. As to these provisions counsel for the Director of Public Prosecutions argued that a person could be required to undergo at any time a preliminary breath test, so long as that would occur not more than three hours from the last driving etc. By the plain terms of the section **[10]** it would appear that the words "at any time" qualify the verb "require", not the verb "undergo". On the other hand counsel for the respondent argued that sub-s.(4) could only qualify the requirement permitted by sub-s.(1)(c) directed to any person believed to have been involved in an accident. It seems impossible to accept that submission as; (a) paragraph (c) of sub-s.(1) has a three-hour limit already included as to the time of the accident and (b), more importantly, there would seem no logical reason for inserting the time limit in a separate sub-section as sub-s.(4) if it were not intended to qualify the obligation to undergo the test under each of the three paragraphs of sub-s.(1) and under sub-s.(2). The respondent's difficulty is that the legislature appears to have deliberately chosen that period for the carrying out of the preliminary breath test. So at first sight any implication in s53(1) of the words "within a reasonable time" after the word "undergo" would seem to be contrary to Parliament's expressed intention.

Counsel for the respondent then put a number of hypothetical situations which on the surface would appear to pose unnecessary hardship on the average driver required to undergo such a test which might be thought to be unintended. For example he said that the idea of persons waiting for up to three hours at the breath testing station set up under s54 appeared to run counter to the requirements of that section. Sub-section (2)(a) of s54 requires those breath testing facilities to be such as would enable the tests to be made "in quick succession" and sub-s.(4) requires that the police "must ensure that no person is detained [at a breath **[11]** testing station] any longer than is necessary". Again it was contended that, where the police did not suspect the driver of any infringement of the law, it would be unreasonable to require that driver to wait any extended time to undergo a preliminary breath test or to travel some distance from the place where that driver had been stopped or the requirement imposed in order to undergo the test.

It must be said, notwithstanding each of these matters, that it is conceivable that sub-s.(4) of s53 was inserted to ensure the reliability of the preliminary test so as to put a limit on the time for undergoing the test, whatever be the circumstances under which it was required. It can be given a sensible meaning in a number of circumstances, especially if one has regard to the fact that the requirement may be imposed "at any time". Thus in argument the example was given of a driver running off and not being caught up with for some time after he last drove his car. As the requirement may be administered "at any time" the driver could then be required to undergo the breath test, though the obligation to undergo the test would cease three hours after driving. Paragraph (c) of s53(1) clearly also contemplates a driver being required at any time to undergo a breath test some time after he last drove his car but with the same temporal restriction upon the obligation to undergo the test. So in practical terms sub-s.(4) also restricts the time within which the requirement may be made in both these cases. Moreover in circumstances not unlike the first example a member of the police force could first make a requirement before the driver ran off but the driver **[12]** could be tracked down and would still be obliged to undergo the test, so long as the three-hour period had not expired.

Other circumstances were discussed closer to the facts in the present case which might also lead to the conclusion that there could be a continuing obligation to undergo the preliminary breath test within the three-hour period. For example a driver might prefer to have such a test carried out at a police station when he is stopped for the purpose outside his home or in the presence of neighbours or friends. It is hard to believe that in those circumstances the driver could later complain that the test was not carried out at the scene or within a few minutes of the requirement. Again it might be suggested that the weather, the state of the traffic or some other circumstance may make it more convenient for the preliminary breath test to be carried out, simple though it be, at some place not in the immediate vicinity of the place where the requirement was made. This might occur at the suggestion of either the police officer or the driver but it is hard to see why the fact that the test was undergone at some place other than the point at which the car had stopped should invalidate the test. It may be that all that the Magistrate meant by requiring the test to be conducted "in the general area" where the defendant was found driving was that he considered that the test should be conducted in some place close to the point at which the

requirement was made. However if the choice to have a preliminary breath test administered is one predicated on convenience, then it is hard to see why there **[13]** should be any limit in area or time, subject only to the three-hour limit.

Perhaps I have not expressed the variety of situations which may occur with sufficient clarity; perhaps I have chosen circumstances which to some may seem exceptional. However the plain words of the statute must be capable of reasonable operation in a variety of circumstances which need not be spelt out so long as they satisfy the provisions of s53. After all the making of the requirement and the undergoing of the test is ordinarily a short and simple procedure. There have been from time to time some four or five devices prescribed but it has not been thought necessary to make any other regulations under s95 and the second Schedule (para 50) in order to lay down the manner in which such tests should be carried out.

Under paragraph (a) of s53(1) the only condition which had at the time to be satisfied was that the member of the police force should find a person driving or in charge of a motor vehicle. The other paragraphs and sub-s.(2) have similarly simple conditions for their operation. The section then explicitly contemplates that a requirement may be made "at any time" and equally clearly lays down by sub-s.(4) that the person is not obliged to undergo the test outside the three-hour time limit. To read words into what otherwise seem relatively simple provisions might appear to do precisely what the High Court said in *Mills v Meeking* should not be done. In the absence of a clear need for any implication and in the absence of any ambiguity or uncertainty the words of the section should be given their **[14]** natural and plain meaning. Implying some restriction as to area would seem to go beyond what accepted principles of statutory construction would authorize. In this respect one may compare the new section with the former s80E(2) of the *Motor Car Act* 1958 which had explicit restrictions as to the undergoing of a preliminary breath test which could not be required except in certain places including "at or in the vicinity of the place where the driving or being in charge of the motor car occurred or at a police station or the grounds or precincts thereof". The omission of those words would point to the conclusion that the obligations imposed by s53 are now less restrictive.

Nevertheless circumstances not unlike the present case could occur which would suggest that the authority given to members of the police force and officers of the Roads Corporation may miscarry. Section 53 gives those persons the right to require citizens to undergo a compulsory breath test in circumstances where the officer need hold no suspicion whatsoever as to the commission of an offence. It is a section designed to authorize what have been called "random" breath tests and is clearly intended to support other stringent provisions designed to promote road safety, as is stated in s47. But a s53 test is the first stage only and there are other provisions designed to authorize the exercise of different powers where an offence is suspected: cf. s55(2). Indeed a test under s53 may itself provide the evidence for the equivalent of such a suspicion and the basis for setting in train the provisions of s55(1).

[15] It is what s53 does not authorize which may have led the learned Magistrate into error, albeit indirectly. It permits a police or Roads Corporation officer to require only that a driver *undergo* a preliminary breath test. Subject to s54(4) (discussed later), it does not authorize the arrest or detention of the driver; it does not authorize an officer to require a person to travel to some testing station, police station or other place merely because it suits that officer to conduct tests away from the place where a requirement under s53 is made. The absence of any provision based on suspicion or belief as to the committal of an offence shows the limits of the section, if only by implication. One may contrast s55(1) which authorizes not only a requirement that a breathalyser test be conducted but also that the driver go to and remain at a police station or other testing station for that purpose. Likewise sub-s.(2) of s55 authorizes a requirement that a driver attend a police or other such station to undergo a test. Each is based either on a suspicion or upon belief in circumstances which indicate that it is possible that an offence has been committed. Section 53 omits any reference to a requirement that a driver accompany an officer to a police station. From a comparison of the two sections I 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. Moreover I consider that a police or other officer can only require that which is necessary to enable the driver to undergo such a test. In the absence of any condition based upon suspicion as to the **[16]** commission of an offence or the like then s53 should be held not to authorize an officer to detain a driver except so far as is necessary to

undergo the test or to compel a driver to travel to some place outside the area where he has been duly required to undergo the test pursuant to the section.

It may be argued that these conclusions would in some way defeat the objects of Part 5 of the *Road Safety Act* as set out in s47 and relied upon by the majority of the High Court in *Mills v Meeking* (at p217). I am conscious of the significance of these purposes but they cannot defeat accepted principles of statutory construction unless there is express warrant to the contrary. The principle which most clearly supports these conclusions has been recently expressed by Brennan J in *Re Bolton; ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at p523; (1987) 70 ALR 225; 61 ALJR 190; 25 A Crim R 90:

> "The law of this country is very jealous of any infringement of personal liberty (*Cox v Hakes* (1890) 15 AC 506 at p527) and a statute or statutory instrument which purports to impair a right to personal liberty is interpreted, if possible, so as to respect that right: *R v Cannon Row Police Station (Inspector)* (1922) 91 LJKB 98 at p106."

See also per Mason CJ and Wilson and Dawson JJ at p520; per Deane J at pp528-529 and per Gaudron J at p547; and cf. *Great Fingall Consolidated Ltd v Sheehan* [1905] HCA 43; (1905) 3 CLR 176 at p186 per Griffith CJ. This is but a particular example of the more general principle "that a statute will not be construed to take away a common law right unless the legislative intent to do so clearly emerges, whether by express words or by necessary implication": per Mason ACJ, Wilson and Dawson JJ in *Pyneboard Pty Ltd* **[17]** *v Trade Practices Commission* [1983] HCA 9; (1982) 152 CLR 328 at p341; 45 ALR 609; (1983) 57 ALJR 236; [1983] ATPR 40-341; 5 TPR 75. See also the examination of authority in *Bennion on Statutory Interpretation* (2nd ed.) s273 pp578-580 and in *Pearce and Geddes on Statutory Interpretation* (3rd ed.) para. 5.15.

Perhaps the most instructive of the many cases on this subject is *Collins v Wilcock* [1984] 3 All ER 374; [1984] 1 WLR 1172; [1984] Crim LR 481; (1984) 79 Cr App R 229; (1984) 148 JP 692 (CA), followed by the Appeal Division of this court in *Myer Stores Ltd v Soo* [1991] VicRp 97; [1991] 2 VR 597; [1991] Aust Torts Reports 81-077. *Collins v Wilcock* dealt with a procedure which police are authorized in England to carry out by way of caution but which does not permit any form of detention. In considering the procedure for warning women under the *Street Offences Act* 1959 Robert Goff LJ for the Court said (at p1180):

> "The fact that the statute recognizes the practice of cautioning by providing a review procedure does not, in our judgment, carry with it an implication that police officers have the power to stop and detain women for the purpose of implementing the system of cautioning. If it had been intended to confer any such power on police officers that power could and should, in our judgment, have been expressly conferred by the statute."

On the same page His Lordship considered the concept of detention in the absence of any express power to detain:

> "Furthermore, the word 'detaining' can be used in more than one sense. For example, it is a commonplace of ordinary life that one person may request another to stop and speak to him; if the latter complies with the request, he may be said to do so willingly or unwillingly, and in either event the first person may be said to be 'stopping and detaining' the latter. There is nothing unlawful in such an act. If a police officer so 'stops and detains' another person, he in our opinion commits no unlawful act, despite the fact that his uniform may give his request a certain authority and so render it more likely to be complied with. But if a police officer, not exercising his power of arrest, nevertheless reinforces his request with the actual use of **[18]** force, or with the threat, actual or implicit, to use force if the other person does not comply, then his act in thereby detaining the other person will be unlawful."

See also *R v Banner* [1970] VicRp 31; [1970] VR 240 at p249 per Winneke CJ, Smith and Gowans JJ. However, to say that s53 authorizes 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. The Magistrate sought to do so by confining the area in which the test could be conducted and counsel for the respondent sought to do so by restricting the time during which it could be conducted. Is either approach justified?

In practical terms neither limitation, as so expressed, would appear to be essential or appropriate. The problems posed by this appeal should be resolved by looking at what an officer may require a driver to do. That is confined to a very short and simple procedure, undergoing a preliminary breath test, which as can be seen from sub-s.(3) and s54, involves little more than exhaling continuously into a small breath-testing device "to the satisfaction" of an officer. Although its duration is short, it is a test which should be carried out under the supervision of an officer. Moreover, at least in cases where drivers are required to stop at breath testing stations, a limited form of detention appears to be contemplated by sub-s.(4) of s54 which provides that police officers at those stations "must **[19]** ensure that no person is detained there any longer than is necessary" (emphasis added). But although that sub-section may lead to an inference that persons may be detained to some extent, I would doubt that it was intended that drivers should be treated as under some form of arrest. One dictionary definition of "Detain" is "to keep from proceeding or going on; to keep waiting; to stop (The ordinary current sense)" (*Oxford English Dictionary* vol. IV p543) and it may be given an even looser meaning roughly equivalent to "hold up" or "delay". In the context, consistent with *Beane's Case* and *Collins v Wilcock*, the restriction on the liberty of the subject should be the minimum necessary to enable the test to be carried out. It is, however, unnecessary to express a final view on s54(4) as it cannot determine this appeal.

If a driver refuses to undergo the test then he is liable to prosecution under s49(1)(c). Refusal may be inferred from immediate departure from the scene when a requirement is made, but each case will depend on its own circumstances. Thus I see no right in the police to keep a driver in custody for the purpose of undergoing a test, although I am not to be taken as saying anything as to the procedure thereafter to be adopted if a driver in fact commits an offence under s49(1)(c). In short a police or other officer has only a right to require the driver to undergo the test. How the driver carries out the test must depend upon the facilities made available at the time for taking preliminary breath tests but the inference I would draw from the section is that the police or other officer ought ordinarily to have the breath testing device available **[20]** in order to require the driver to undergo a test. That is not to say that the officer need have the testing device in his hand at the time of the requirement but as his power is limited to requiring the driver to undergo a test the device must be readily available, either in the near vicinity or capable of being brought to the scene in a minimal time. It is not desirable to discuss further on this appeal the proper procedure for conducting such test.

It is therefore necessary to return to the question of what implied restrictions may be read into the requirement which an officer may impose under s53. As to the place where the test should be carried out, then, subject to what appears later in this judgment, I can see no basis for reading in a term that the test must be carried out "in the general area" where the defendant was found driving or, for that matter, where the requirement was made. If a driver is willing to go elsewhere to undergo the test, 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: cf *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24 at pp240-42; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109 and *Chan v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at p392; (1989) 87 ALR 412; (1990) 21 ALD 139; (1989) 63 ALJR 561. Nevertheless on the **[21]** prosecution evidence in the present case no such direction was given. The only evidence is that the respondent was given a choice and went voluntarily to the St. Kilda Police Station. If the matter is remitted to the Magistrates' Court, however, then it is possible other evidence may be given which would show that the respondent was required to go to that police station. If so, then that requirement would go beyond that which is authorized by s53 and the prosecution will not then be able to establish that a duly conducted preliminary breath test had been required or held. Nevertheless on the material before me the learned Magistrate erred in his holding as to the place where the test shall be held and on that ground the matter must be remitted for rehearing. The first question, as amended, should therefore be answered: "No, it is not necessary that a preliminary breath test under s53 should be taken either in the area where the defendant was found driving or in the area where a requirement is made under the section."

The second question should be answered along similar lines, as follows: "Yes, a preliminary

breath test under s53 may be taken at another place, including a police station, if the person tested was not directed, explicitly or implicitly, by a police or other officer to go to that place for the purpose of undergoing the test." The answer to that question would also result in the appeal being allowed, as the Magistrate dismissed the charge on the ground that it was immaterial whether the respondent had accompanied the police officer voluntarily or otherwise to the St. Kilda Police Station. **[22]** I should, however, also deal with the respondent's alternative argument as to time as it was clearly raised by the appeal and was the principal matter argued before me. In effect the respondent said that the Magistrate's decision could be justified by reference to the argument. This alternative contention rested on the basis that the preliminary breath test must be conducted within a reasonable time and that any test conducted at the St. Kilda Police Station over one hour and ten minutes after the requirement was made unreasonably delayed and therefore was not authorized by s53. So it was said that even if the Magistrate erred on the issues raised by the Master's questions (being the only bases relied on by the Magistrate), nevertheless the order of dismissal could be upheld because of the unreasonable delay from the time the requirement was made. As counsel for the respondent had argued before the Magistrate, these submissions were originally based on the proposition that both requirement and test should be coincidental with the driving, at least in the case of a requirement pursuant to s53(1)(a). This would not merely import a temporal test of reasonableness but would also confine a reasonable time to a very short period from the time the driver was found driving or in charge of a vehicle.

I confess I have some sympathy for this view. The circumstances authorizing a requirement to undergo a preliminary breath test each suggests that the driver would be required to undergo the relatively simple test "then and there", rather than at some later time. It does not, however, necessarily follow that the words "within a **[23]** reasonable time" should be inserted or that those words should be construed as requiring that the test be undergone virtually simultaneously with the requirement. As I have already mentioned sub-s.(4) already imposes an outer time limit upon the obligation to undergo a preliminary breath test; but it may be said that that limit is designed to ensure the reliability of the reading and says nothing as to the delay, if any, which might occur between a requirement and the undergoing of the test. In 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. Of course, if a driver were prosecuted under s49(1)(c) an extended delay in undergoing the test may have a bearing on whether the driver had refused or failed to undergo the test. The difficulty is that usually an implication of a reasonable time to do an act is an implication to enable a person to carry out that act. It has been expressed in two ways in the authorities. In the first place Wallace P in *R v Skurray* [1967] 2 NSWR 611; (1967) 86 WN (Pt.l) (NSW) 1 at p3 said:

> "It is well settled, and good sense, that where a penal provision requires an act to be done either without a time being stipulated, or even where the act must be done 'forthwith' a reasonable time is implied sufficient to enable performance to be effected."

In the same case Asprey JA approached the matter in a slightly different way when he said (at p8):

> "I do not think that it is necessary to go to the length of actually reading into the sub-section any additional words for the reason that, in the absence of the immediate announcement of a **[24]** refusal to perform, the word 'fails' itself bears the connotation of a lapse of time to enable compliance with the obligation of performance; it imports the passage of some period of time which will vary with the nature of the act to be performed and the circumstances in which it is to be performed."

As a result, in considering a provision which required estate agents to pay in moneys received on behalf of clients and under which failure to pay in was a criminal offence, His Honour concluded that "no failure to perform any one of such acts can be said to have occurred until a reasonable period of time in all the relevant circumstances has elapsed to enable the act in question, according to its quality, to be performed" (at p8). That case was later followed by the Full Court of New South Wales in relation to a failure to comply with a "requirement" to furnish the Tax Commissioner with information pursuant to s264 of the *Income Tax Assessment Act* 1936, without the Court being required to choose between the two approaches: *Deputy Commissioner of Taxation v Ganke* (1975) 25 FLR 98; [1975] 1 NSWLR 252 esp. at p258; 5 ATR 292. A similar approach was taken in relation to a demand for production of documents under the *Customs Act*

1914 in *Ace Custom Services Pty Ltd v Collector of Customs (NSW)* (1991) 31 FCR 576 at p583; (1991) 104 ALR 463. See also *Re O'Reilly; ex parte Australena Investments Pty Ltd* (1983) 50 ALR 577; (1983) 58 ALJR 36; (1983) 15 ATR 162. There could be little doubt that for the purpose of a prosecution under s49(1)(c) some such implication would have to be made in favour of drivers. But the respondent is not seeking to make any such implication, for there is no charge that he failed to undergo the test. Nor could there have been in the light of the circumstances. Moreover, **[25]** whenever a police officer extends the time for undergoing the test there could be no doubt that the driver would not offend against s49(1)(c).

What the respondent is in fact seeking to read in is a restriction on the power of a police or other officer to require a driver to undergo a test by implying that no test can be required if it is to take place after an unreasonable time has expired from the requirement. In other words the argument did not maintain that a requirement should take the form: "I require you to undergo a preliminary breath test within a reasonable time", or words to that effect. Rather it insisted that the police or other officer conduct the test within a reasonable, i.e. a limited, time from the making of the requirement. Whatever other qualification as to reasonableness is appropriate, I am afraid I am unable to interpret the section in that way even if it were grammatically possible to insert words having that operation. Once the requirement is made then, assuming that the requirement is made validly, the legal obligation rests on the driver to undergo the test, not upon the police officer to conduct the test. Of course, in order that the prosecution might sustain any charge of refusing or failing to undergo a test it would have to show that it had reasonably provided the means for undergoing that test. If it did not then there would again be a proper basis for saying that it had not made out a case that a driver had "refused" or "failed" to undergo the required test: see the cases cited above and also *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at pp608-609 and 619-621.

[26] It might be said that by merely reading in the proposed qualification, as follows: "to undergo *within a reasonable time* a preliminary breath test ...", a limit would be imposed both upon the power of the officer to conduct, and upon the driver to undergo, the required test. Thereby the requirement would place a limit in both directions on the obligation to undergo that test. Accordingly the driver must be given a reasonable time to carry out the requirement, i.e some extension of time from the moment of requirement, but the police or other officer must not require the test to be undergone beyond a reasonable time from the making of the requirement, thereby restricting the time in which the test must be conducted. However valid the first implication may be, the second would be harder to sustain as a matter of construction.

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. As to the place of undergoing the test such an implication would, for the reasons already given, not necessarily limit the area in which the test must be conducted, although the consequences may be the same in effect. If a police or other officer requires that the driver travel any extensive distance from the place of the requirement it would be a requirement beyond the simple terms of the section, as it would implicitly and unjustifiably place a restriction on his liberty. Likewise as to time, if the person was required to stay at the scene **[27]** of the requirement for a specified or unspecified time, beyond what was necessary to undergo the test, then the requirement would also be beyond the terms of the section. Such a requirement would import an unjustified detention or, alternatively, an unjustified requirement to return to that or some other place at another time to undergo the test, again placing an unjustified restriction on the driver's liberty. In a sense, therefore, the test should be undergone "then and there" after a requirement has been made, but it is unnecessary to restrict the words in that way, for the convenience of both police officer and driver may dictate some other place or time for the undergoing of the test. 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.

Again, on the evidence before the Magistrates' Court as revealed by the affidavits, no requirement beyond power was made by Constable West, for there was no demand, wrongful or otherwise, that the test be undergone at a later time, whether in Mitford Street or at the St. Kilda Police Station. The respondent chose to wait while the police officer sought to obtain a testing

device, and the evidence is unclear as to how long that took, and he also chose to take the test later at the police station. In any event, on these facts, the requirement was not unreasonable although the test took place about one and a quarter hours later. **[28]** What the evidence may be when the matter is re-heard is not for me to speculate upon, but no invalidity has been shown as to the requirement in this case. The dismissal of the charge cannot be justified on this alternative basis.

Finally it was argued that the charge contained in the information was defective in that there was a variance between it and the evidence presented in the proceeding of such a kind as would invalidate the whole of the proceedings which were at this stage incapable of remedy. It was said that the charge stated that the offence was committed "at Elwood", whereas by reason of the language of s49(1)(f) the offence must have taken place where the sample of breath was furnished and the result of the analysis was indicated. So in the present case the offence took place at the Prahran Police Station where the test pursuant to s55 was carried out and thus the allegation in the information was inaccurate. Of course no point was taken as to this defect in the Court below, nor was any ground or question raised on this appeal until counsel for the respondent made a submission at the end of his argument to that effect. A number of decisions were relied upon the most recent of which was *Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43. That case, and the authorities cited therein, were essentially cases where no time or place of commission was alleged in the information so that it was held that there was a fundamental defect in the charge. Whatever may be said to flow from those decisions, there was a simple, and understandable, error in the present case in that the informant chose the place of driving rather than the place of the final test. The original information **[29]** was not defective. There was a mere variance. That variance was and is capable of correction pursuant to s50 of the *Magistrates' Court Act* 1989 and the point is wholly without merit: cf. *Warner v Sunnybrook Ice Cream Pty Ltd* [1968] VicRp 11; [1968] VR 102; (1967) 15 LGRA 135.

CONCLUSION

As this information must be remitted for re-hearing in the Magistrates' Court it is desirable that I summarise my conclusions, although what follows must be read subject to the reasons appearing above. For the purposes of a prosecution under s49(1)(f) the informant must establish that a preliminary breath test was validly conducted pursuant to s53. The duty of a driver required to undergo a preliminary breath test under that section is limited to the obligation to undergo the test. The section gives a police or other officer the power to require such a test but does not give that officer power to detain a driver for any longer than is necessary to carry out the test. Ordinarily the officer ought to have available the necessary device to enable the driver to fulfil his or her obligation. The section gives no general or indefinite power of detention, nor any power to require the driver to go in custody or quasi-custody to a police station or any other place for the purpose of conducting the test. On the other hand the convenience of an officer or driver may dictate that the test not be carried out instantaneously or at the place where the requirement is made.

[30] For the reasons already stated, the only implication which needs to be read into s53 is that the requirement should be reasonable. If the driver agrees to wait or agrees to go elsewhere, such as to a police station, for the purpose of undergoing the test, that does not invalidate the test. If he refuses to do so then, in the ordinary case, any requirement which would have the effect of obliging the driver to wait more than a few minutes or to travel any significant distance to undergo the test would be unreasonable and a refusal to undergo the test in those circumstances would not be an offence under s49(1)(c). But in this case the evidence before the Magistrates' Court did not establish that any unreasonable requirement had been made or that the respondent was compelled to go to the St. Kilda Police Station. The limits placed by the Magistrate as to the area in which the test must be conducted cannot be implied into the section and he erred in requiring the test to be carried out in the "general area" where the driving occurred. The result is that this appeal must be allowed, the Magistrate's order dismissing the charge must be set aside and the information remitted for hearing at the Magistrates' Court at Prahran in accordance with these reasons and otherwise according law.

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