9/98

SUPREME COURT OF VICTORIA

DPP v CONSTANTINOU and NICHOLSON

Hedigan J

28 November, 19 December 1997 — (1997) 27 MVR 120; (1997) 98 A Crim R 558

1. MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED – OPINION FORMED BY POLICE OFFICER THAT DRIVER'S BLOOD CONTAINED ALCOHOL – DRIVER NOT INFORMED OF THE RESULT OF THE PRELIMINARY BREATH TEST – WHETHER ANY STATUTORY REQUIREMENT FOR POLICE OFFICER TO INFORM DRIVER OF RESULT OF TEST – WHETHER MAGISTRATE IN ERROR IN DISMISSING CHARGES FOR FAILURE TO INFORM RESULT OF TEST.

2. MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED – RESULT POSITIVE – STATUTORY REQUIREMENT TO INFORM DRIVER THE PURPOSE OF BEING REQUIRED TO ACCOMPANY – MAGISTRATE NOT SATISFIED THAT DRIVER INFORMED OF SUCH PURPOSE –- HETHER SUCH REQUIREMENT IS AN ELEMENT OR PRE-CONDITION OF AN OFFENCE AGAINST S49(1) (b) AND (f) OF THE *ROAD SAFETY ACT* 1986 – WHETHER MAGISTRATE IN ERROR IN DISMISSING CHARGES: *ROAD SAFETY ACT* 1986 SS49(1)(b), (f), 53(1), 55(2).

1. *DPP v Constantinou*
Where a person undergoes a preliminary breath test when required by a police officer to do so under s53(1) of the *Road Safety Act* 1986 ("Act"), there is no requirement in s55(1) of the Act for the police officer to show to or inform the person tested of the result of the test. Accordingly, a magistrate was in error in dismissing charges under s49(1)(b) and (f) of the Act after concluding that it was a necessary element in the proof of those charges that the result of the preliminary breath test had to be notified to the person tested.

2. *DPP v Nicholson*
On the hearing of charges laid against N. under s49(1)(b) and (f) of the Act, the magistrate was not satisfied that after N. had undergone a preliminary breath test, the police officer had told N. the purpose for accompanying the police officer to the police station. The magistrate concluded that it was a necessary element of both offences that the requirement to accompany for the purpose of a breath test be established. As this element was not established, the magistrate dismissed both charges. Upon appeal—

HELD: Appeal dismissed.
Where a person has undergone a preliminary breath test, it is a necessary element or pre-condition of proof of an offence under s49(1)(b) and (f) of the Act that the requirements of s55(1) be complied with. One of the requirements of s55(1) is that the relevant police officer is obliged to state to the person tested the purpose of the requirement to accompany namely, to undergo a breath test. In the present case, as the magistrate was not satisfied that this requirement had been complied with, it was open to the magistrate to dismiss both charges.
***Dalzotto v Lowell* MC6/93; and**
***McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275, applied.**

HEDIGAN J: [1] I have for determination by me two appeals by the Director of Public Prosecutions (hereinafter called "the Director", "the prosecution" or "the Crown") pursuant to s92 of the *Magistrates' Court Act* 1989 against the dismissal by Magistrates' Courts of charges brought against the respective respondents Michael Constantinou and Anthony John Nicholson under sub-ss49(1)(b) and (f) of the *Road Safety Act* 1986 ("the Act").

The facts in each case were different although there has been a substantial congruity in the legal submissions made, so much so that counsel for the respondent Nicholson, Mr K Oderberg, substantially adopted the submissions made by Mr P Holdenson, who appeared for the respondent Constantinou, in respect of arguments advanced by him concerning sub-ss49(1) (b) and (f). The appeals of the Director, for whom Mr C Ryan appeared, were called on together but heard separately, the appeal of Nicholson immediately following the Constantinou matter. Therefore I will deal with them separately in order to deal with differences in fact and applicable law, although much of my consideration of legal issues applies to both.

DPP v CONSTANTINOU

[*After setting out the facts, the evidence called for the prosecution and relevant statutory provisions, his Honour continued*]...**[6]** The questions of law raised by the Master's order of 3 July 1997 are as follows:

> **[7]** (a) whether the requirement to accompany under s55(1) of the Act must include an express statement of the result of the preliminary breath test?
>
> (b) whether for the offence defined by s49(1)(b) of the Act the proof of a requirement to accompany is a necessary element of the offence?

The second of these questions seems to me to be otiose and irrelevant on the facts, as the police officer clearly stated the requirement to accompany and the purpose for which it was made. No suggestion was made to the contrary by any counsel. I will be dealing at some length with the issues raised by this question in the appeal *DPP v Nicholson,* but, as will appear, it becomes unnecessary to address it in Constantinou. I now turn to counsel's submissions and the way in which the cases were respectively formulated. [*After referring to Counsels' arguments in some detail, his Honour continued*]...**[11]** I will deal first with the matter raised by the first question of law raised by the order of Master Wheeler of 3rd July 1997 namely whether the requirement to accompany under s55(1) must include an express statement of the result of the preliminary breath test. There is no doubt that s55(1) does not contain language requiring a member of the police force, in a case where a person undergoes a preliminary breath test when required by a member of the police force to do so, to show to or inform the tested person of the result of the test.

The only specific pre-condition to requiring a person to furnish a sample of breath for analysis by breath analysing instrument is for that purpose to require the person to accompany the officer in whose presence the preliminary breath test was carried out and to form an opinion that the test indicates that the person's blood contains alcohol. There is no provision in the Act for the opinion, much less on what the opinion was based, to be communicated. The carrying out of the test and the opinion based upon it is a first step to enable other steps to be taken to procure a breath analysis by a breath analysing instrument. One might speculate that the Act does not make any provision for notification of what the reason for the requirement and request to accompany because it will be self-evident, in most cases, that the reason for that is that the result or reading obtained from the preliminary breath test is positive.

The argument advanced by the respondent on this issue (the result of the preliminary breath test) is, in my opinion, based upon a misunderstanding or misconception of what was decided in *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275 and *Dalzotto v Lowell* (Ashley J unreported, 18 December 1992). In *McCardy*, a s49(1)(f) **[12]** case, no reason was given to the appellant who had performed a preliminary breath test for the request that she accompany the constable. Also, in that case, there was no evidence that the breath analysis instrument was recognized under the Act and that was the first ground on which the appeal was upheld. Eames J stated: (at 521)

> "It has been held that it is an essential element of the charge under s49(1)(f) that the requirement of s55(1) be complied with: *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at p224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257. The requirement involves more than a mere request to accompany the officer, and the purpose for which the requirement is made must also be stated to the driver concerned: *DPP v Blyth* (unreported, Coldrey J 28 April 1992); *Dalzotto v Lowell* (unreported, Ashley J, 18 December 1992). The terms in which the requirement is stated need not follow any precise formula of words: *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503. The driver must, however, be told sufficient to know what it is that is being required of him or her: *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579."

This passage indicates that his Honour took the view that the driver had to be told what it is that is being required of him or her, that is an explanation that there will be an analysis of a sample of breath by a breathalyser. This is concerned with what is to occur in the future, not what has already happened, namely, the result of the preliminary breath test. I respectfully concur in this view. Eames J went on: (at 522)

> "In *Dalzotto's Case* Ashley J was concerned with a case where a driver had been intercepted on a country highway, some distance from Ballarat. The driver, having failed a preliminary test, but not

> having been told that he had so failed, was required to accompany the police officer in the police car to the Ballarat police station. He was given no reason why he was being asked to do so. His Honour held that the conviction could not be sustained in view of the failure to state the reason. His Honour so decided notwithstanding his acceptance that the driver had understood why the request had been made. In the course of his reasons his Honour referred to the policy behind the imposition of an obligation that the requirement convey the reason for its imposition. His Honour held, at p7: 'The member of the public is effectively being deprived of his or her liberty, albeit in a transitory way. In these circumstances the legislature has required the police officer to convey to a member of the public the purpose for which the requirement to attend the police station is being imposed."'

After dealing with and rejecting a basis for distinguishing *Dalzotto's Case* that was advanced (namely that there was knowledge in the driver of the reason for **[13]** being asked to go to the police station, even though it had not been articulated), Eames J went on to say: (at522)

> "If the citizen is entitled to know the reason why, when not under arrest, she is being deprived of her liberty, it seems to me that this is an entitlement which must apply in all circumstances, not merely in those where the incidents accompanying the deprivation of liberty may be thought to be less transitory, or more intimidating, than in other circumstances. The citizen is entitled to know why such an event is happening, and what is entailed in the requirement that she be deprived of her liberty."

In my opinion these cases are emphasizing what the Act itself states, namely that the person has to be told the purpose for which they are being asked to accompany the police officer, namely to have a breath test at the police station or breath testing station. The Act says nothing about "why" and, if those statements were meant to convey that there had to be communicated the reason why the next step is being taken, I would be unable to agree with them. But in my view neither judgment so decides. The purpose for which the request to accompany is being made is to enable a breath test to be carried out. The reason for the request is the same. The introduction of phrases such as "why the request is being made" instead of, as the Act requires, focussing on the purpose for which the person is being asked to accompany the police officer, is an aberration and distracts from a correct consideration of the Act's requirements. The "deprivation of liberty aspect" emphasizes that in both of those cases the concern is that the citizen should be informed what it is that was going to occur and the purpose of it occurring. It focusses on the future, not past events. That is why such phrases as "Come with me", whether said politely or peremptorily, do not constitute a legal requirement to accompany because they convey nothing to the citizen as to what is next to occur.

The absence of any language in s55(1) that the police officer has to state to the person taking the preliminary breath test either the a result of the test or the opinion held, surely a simple piece of drafting, points strongly to the absence of any legislative intent that it should occur. The statement of the request to accompany and the necessity to undergo a further breath test is prompted by the result of the **[14]** preliminary breath test. The purpose of requiring to accompany (for the purpose of having a breath test) and the reason that prompted the requirement are different concepts. I note also that there are no words in s55(2) (reasonable belief, without the aid of a preliminary breath testing device) that require the officer to state the grounds of his belief. For these reasons in my view the magistrate was wrong in concluding that it was a necessary element in the proof of breach of s49(1)(f) of the Act that the result of the preliminary had to be notified to the person tested.

In my view, this conclusion is sufficient to dispose of this appeal in favour of the appellant on the s49(1)(f) charge. It must also dispose as a matter of substance of the appeal against the dismissal of the charge laid under s49(1)(b). The question of the applicability of the s55 requirement to s49(1)(b) is not necessary to be decided since there was no breach of it. The only aspect argued was failure to notify the result of the test, an obligation which the Act does not impose. The evidence plainly shows that Senior Constable Rogers complied with the 'requirement to accompany' conditions in s55(1) in all other respects. Accordingly, it is not necessary for me to consider the question of law raised in para.(b), although I will ultimately have to address it in the appeal of Nicholson. Therefore, the DPP's appeal against the dismissal of the second charge, namely the charge under s49(1)(b) is also allowed.

[His Honour then dealt with a matter not relevant to this report, referred to several cases and continued]...
[21] Not without some doubt about the matter, I have reached the conclusion that in circumstances

where a s49(1)(b) charge is "annexed" to a s49(1)(f) charge in a case in which the police procedure commenced with a requirement under s53(1) to undergo a preliminary breath test, the elements or pre-conditions are the same as those for the s49(1)(f) offence. In that respect, I respectfully adopt the statement of the decision by Tadgell J in *Smith v Van Maanen* (1991) 14 MVR 365, interpreting for my purposes that the phrase "duly" means making known the purposes of the requirement (cf. *Dalzotto* and *McCardy*). I also note the observations of the majority in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at 222; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257), referring to a statement of the Full Court in *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1 that a test under s55(2) cannot lead to a prosecution under s49(1)(f) because that depends for its proof on tests having been administered under s55(1), "The latter assertion is no doubt correct, for par.(f) is expressly geared to s55(1) which in turn depends upon a preliminary breath test under s53. Section 55(2) authorizes a breath analysis without the need for a preliminary breath test. A breath analysis recorded in those circumstances is not an analysis for a sample furnished under s55(1)." In my view, a sample of breath furnished and analysed as a consequence of a preliminary breath test is not a sample of breath furnished and analysed for analysis under s49(1)(b). I turn now to the circumstances in Nicholson.

DPP v Nicholson.

The facts in Nicholson are as follows. Like Constantinou, Nicholson was charged under ss49(1)(b) and 49(1)(f) of the *Road Safety Act* 1986. The police evidence. through the affidavit of Brian William Donnelly of 17th July 1997, showed that on 23rd March 1997 Senior Constable McInnes and Constable O'Toole were on mobile patrol duty. A vehicle driven by Nicholson was intercepted, according to police evidence, for a routine check. Senior Constable McInnes spoke to the driver. There was a dispute as to whether another police vehicle was called to the scene or was there at all times. Nicholson was placed in the back of the police vehicle and taken to St. Kilda Police Station.

[22] There was considerable conflict in the evidence as to what demand was made and in what terms the so-called requirement to accompany was articulated. The principal witness for the prosecution in the Magistrates' Court was Constable McInnes. He administered the preliminary breath test and gave evidence about the requirement. Another police witness had not heard the demand for the test, nor the result of the test (which was not given), nor the requirement or demand to accompany. Senior Constable McInnes gave evidence of explaining to Nicholson the requirements of preliminary breath tests, conducting one and the formation of his opinion that the result of the test indicated that the respondent Nicholson's blood contained alcohol. His evidence was that he said "the test in my opinion indicates your blood contains alcohol. I now require you to accompany me back to St Kilda Police Station for the purpose of conducting a breath test. Are you prepared to accompany me?" He said, "Sure". It appeared in cross-examination that the statement prepared by McInnes was not done until 13th May, some months later. There was another vehicle involved and McInnes had interrogated the driver of that vehicle. He admitted to using a statement made by him in relation to that driver to compile his statement in connection with Nicholson. He firmly maintained that he informed Nicholson of the purpose for returning to the police station.

Some doubt was thrown upon that matter by calling of evidence for the defence. According to the defendant-respondent, he had been to a party and was intercepted by police (two vehicles). He was asked to and undertook a preliminary breath test through Senior Constable McInnes. His evidence was that McInnes said, "You're positive. You'll have to come back to the St. Kilda Road Police Station" and motioned him to get into the car. He denied that McInnes's statement was in the formal mode that the Act required, saying that "all he said was what I referred to" and motioned him to get into the car. Another witness was called for the defence, one Rudd, who was in the other vehicle, not Nicholson's. He essentially corroborated the respondent's evidence. Another witness, Westaway, gave evidence which at the end of the day was rejected by the magistrate who nevertheless regarded it as being of **[23]** importance as indicating that the defence witnesses had not pre-agreed the same version. *[After referring to submissions made on the hearing, his Honour continued]*...The magistrate accepted the honesty of Senior Constable McInnes but accepted the defence evidence of Nicholson and Rudd. He concluded that the prosecution had not established that the procedures had been adhered to and that he had a reasonable doubt. He dismissed the charges with costs.

The fundamental feature of the defence in this case was that the prosecution had failed to prove beyond reasonable doubt that McInnes had informed Nicholson of the purpose for which he was required to accompany him to the police station. The magistrate accepted the defence evidence about what passed between McInnes and Nicholson which left a gap in the Crown case on s49(1)(f), namely the requirement to accompany.

The first ground of the questions of law raised by the order of Master Evans of 18th July 1997 is whether the requirement to accompany under the *Road Safety Act* s55(1) must include an express statement as to the result of the preliminary breath test. Why this was raised is a mystery to me because of the statement of the defence witnesses, accepted by the magistrate, that the respondent was told that the result was positive. Accordingly, if a duty to disclose the result existed (which I have **[24]** already ruled to be incorrect in Constantinou) the duty was fulfilled anyway. This was accepted by both counsel.

The second question on this appeal is whether the offence under s49(1)(b) requires proof of the requirement to accompany under s55(1), that is that it is a necessary element of the offence. I have referred to this issue earlier in these reasons. Whilst it may be, and indeed the evidence appeared to establish that it was so, that no member of the police force complied with the necessary elements of the requirement to accompany (that is, to accompany for the purposes of having a breath test), this is not one of the questions of law raised under the order, the only objection with respect to which is founded upon the failure to make an express statement as a result of the preliminary breath test, a matter in effect accepted.

The affidavits show that counsel for Nicholson in the lower court submitted that the charges (plural) should be dismissed as the procedural requirements had not been complied with. This submission was based on the contention that the Court could not be satisfied that McInnes had informed Nicholson of the purpose of the requirement to accompany the police officer. This appears to amount to a submission that the s55(1) requirement applied to both charges although it is not certain that that was what was intended, as no reference to s49(1)(b) was made.

The prosecutor however, did not advance any argument that the s55 requirement applied to s49(1)(f) but not to s49(1)(b). His submission was that the Court should be satisfied, as a matter of fact, that the requirements had been complied with; that is, he argued that McInnes's evidence and not the defence evidence should be accepted. It was then submitted by the prosecutor that if the Court was of the view that the procedural requirements had not been met, then the admissibility of the evidence was a matter of discretion, arguing the applicability of *Bunning v Cross*. The magistrate, it must be said rather cursorily, dismissed the applicability of *Bunning v Cross* in this situation. It is not possible from the affidavit material to form any confident opinion as to the basis upon which he so found. No one ever referred to the elements of the respective offences comprehended by the two charges laid.

The **[25]** magistrate clearly concluded that he was not satisfied that the procedural requirements had been fulfilled, which in this case can only mean that he was not satisfied that the appropriate language of the requirement to accompany had been articulated. It is, I daresay, possibly to be implied from the dismissal of both charges, that he decided that it was incumbent on the prosecution to establish that the proper requirement to accompany had been made, if it were to obtain a conviction under s49(1)(b). Equally, it is possible that he did not analyse the matter at all in that way, and did not address his mind to the issue to which I have had to address mine. He may simply have taken the view that if the prosecution was seeking to prove the blood alcohol concentration over the prescribed limit through breathalyser analysis, called for as a consequence of a preliminary breath test, then the police had to comply with s55(1), even though they laid an alternative charge under s49(1)(b).

I have already expressed my view that, if these sections in combination are to work intelligibly and justly, compliance with s55(1)(a) is a necessary element or, to use Ormiston J's words "pre-condition", a description that I favour, to the establishment of the offence under s49(1)(b), in a preliminary breath test case assuming for present purposes that there is no evidence other than the breathalyser that could establish the impermissible blood alcohol level. *[His Honour then considered the applicability of* Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 *and continued]...***[27]** It is not necessary to decide the *Bunning v Cross* point but if it were

necessary to do so I would take the view that the matter should be remitted to the magistrate for determination in accordance with these reasons overall, that is, to consider the exercise of his discretion.

However, notwithstanding all this, none of it matters if the requirement to accompany is an element or pre-condition that has to be established for the purpose of the offence created by s49(1)(b) in a case where the full breath test was obtained as a consequence of a requirement to accompany made pursuant to s55(1) (in the case, as here of a preliminary breath test) or s55(2). I have already expressed my opinion that it is. This is enough to dispose of the appeal of Nicholson against the appellant on both charges and makes it unnecessary for me to decide the *Bunning v Cross* point. If I were incorrect in my view concerning the application of the s49(1)(f) necessities to s49(1)(b) in a preliminary breath test case, then it would seem that a conviction on s49(1)(b) would have to be recorded as all the other necessary elements were established. For the reasons given, the appeal in the case of Nicholson is dismissed. I will hear counsel on the form of orders and costs.

APPEARANCES: For the DPP: Mr CJ Ryan, counsel. PC Wood, solicitor for Public Prosecutions. For the Respondent Constantinou: Mr OP Holdenson, counsel. T Danos, Solicitor. For the Respondent Nicholson: Mr KJ Oderberg, counsel. C Bunnett, Solicitor.
