30/98; [1998] VSC 119

SUPREME COURT OF VICTORIA

DPP v WILLIAMS

Smith J

9, 23 October 1998 — (1998) 104 A Crim R 65; (1998) 28 MVR 521

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST HELD IN POLICE CAR – "POLICE STATION OR OTHER PLACE" – MEANING OF – WHETHER "OTHER PLACE" INCLUDES A POLICE CAR: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), 55(1).

1. The expression "police station or other place" in s55(1) of the *Road Safety Act* 1986 ("Act") must be construed in its legislative context and to serve the purposes of the legislation. In addition to the considerations which support a narrower construction of the expression, to apply the phrase "other place" to a police car requires "other place" to mean "any place" and renders the reference to "police station" superfluous. Parliament must have intended that the phrase "or other place" should limit the operation of the section.

2. Construction of the phrase "or other place" requires at least a defined structure or space of some substance (not necessarily attached to land) but when in use having a connection to a location of some permanence giving it a degree of localisation. A "booze bus" is like a mobile police station and can serve a similar purposes. A police car is not and cannot serve such a purpose.

3. Accordingly, a magistrate was not in error in dismissing charges under s49(1)(b) and (f) of the Act where the breath test on the defendant had been conducted in a police car.

SMITH J: [1] The Proceedings

1. This is an appeal by the Director of Public Prosecutions from an order dismissing two charges brought against the respondent in the Magistrates' Court at Heidelberg on 28 May 1998. The charges were the following:

> 1. Driving or being in charge of motor vehicle while more than the prescribed concentration of alcohol was present in her blood contrary to s49(1)(b) of the *Road Safety Act* 1986.
>
> 2. Within three hours after driving or being in charge of a motor vehicle, furnishing a sample of breath for analysis by a breath analysing instrument under s55(1) of the *Road Safety Act* 1986 and the result of the analysis recorded or shown by the breath analysing instrument indicated more than the prescribed concentration of alcohol was present in her blood contrary to s49(1)(f) of the *Road Safety Act* 1986.

The Proceedings In The Magistrates' Court

2. *[His Honour then set out the facts which included the fact that the defendant underwent a breath test in a police car and returned a reading of 0.093%BAC. At the subsequent hearing, defendant's counsel made a 'no case' submission to the effect that there was no power to demand that a person accompany a member of the police force to a police vehicle for the purpose of a breath test and therefore the demand was unlawful and the evidence of the breath test should be excluded. His Honour continued]* ...**[3]**

8. The learned Magistrate upheld the submission made on behalf of the respondent and gave the following reasons. He said that breath tests should be conducted in privacy both for the welfare of the defendant and police members. He stated that it was obvious that Parliament had in amending section 55(1) intended to broaden the places where breath tests could be conducted but it was his opinion that it had never been intended to include a police car in the class of suitable places. He said that the reference to "booze buses" in Hansard indicated that the place need not have a permanent structure but must have the appearance of serving the purpose of being **[4]** an official breath testing station by displaying appropriate lights and signs. The learned Magistrate dismissed the charges and ordered the Chief Commissioner of Police to pay costs in the sum of $4,500.

This Appeal

9. In the order giving directions in this Appeal the following questions of law were identified as being raised by the appeal.

> 1.1 Whether or not for the purposes of Section 55(1) of the *Road Safety Act* 1986 the expression 'or other place' includes
> (a) police motor car; or
> (b) a motor car
> which is in the vicinity of the place where a requirement pursuant to the said section is made?
>
> 1.2 Whether or not a requirement made pursuant to Section 55(1) of the *Road Safety* Act 1986 that a person accompany a member of the Police Force to:
> (a) a police motor car; or
> (b) a motor car
> which is in the vicinity of the place where a requirement is made is lawful?
>
> 1.3 Whether or not evidence of the taking of a sample of breath and the analysis of such sample pursuant to Section 55 of the *Road Safety Act* 1986 should be excluded on the ground that the sample was unlawfully obtained solely because the sample was taken and the analysis made in:
> (a) a police motor car; or
> (b) a motor car following a requirement made pursuant to the said section?
>
> 1.4 Whether or not there is any requirement that samples of breath furnished pursuant to Section 55 of the *Road Safety Act* 1986 be furnished in circumstances affording the greatest practicable privacy?
>
> 1.5 Whether any reasonable Magistrate could have failed to be satisfied that there was a case to answer in respect of the charges under Section 49(1)(b) and 49(1)(f) of the *Road Safety Act* 1986?"

The Act

10. The relevant provisions from the *Road Safety Act* 1986 are as follows: *[After setting out these provisions, his Honour continued]* ... **[7]**

The Issues

11. Counsel for the respondent has made preliminary submissions concerning the above questions. He submitted, firstly, that in the first three questions the reference to the issue whether the expression "or other place" includes a "motor car" raises a question that did not arise from the learned Magistrate's decision. In my view, this is **[8]** correct although the question of construction may be tested by reference to motor vehicles other than police motor cars. He next submitted that the question stated in question 1.4 did not arise in that it was not part of the Magistrate's reasoning that s55 required the furnishing of samples of breath in circumstances affording the greatest practicable privacy. In my view, this too is correct in that, while His Worship referred to privacy as a policy issue underlying and supporting his construction, he did not in terms say the section required privacy for breath testing. Counsel further submitted that question 1.5 did not arise. Counsel for the appellant indicated that he did not rely upon any argument in addition to that which was raised by the first three questions and accordingly that, strictly speaking, that question is superfluous.

12. As to the third question, it raises an issue as to whether evidence of the breath analysis should be excluded on the grounds that it was unlawfully obtained. Counsel for the appellant sought to pursue this matter. The argument advanced below for the defendant was that the demand made by the police was unlawful and that evidence of the breath test should be excluded. Objection was not taken, however, to the admissibility of the evidence when it was adduced and it is common ground that what occurred at the conclusion of the prosecution case was that counsel for the defendant made a no case submission. In all the circumstances, I am satisfied the issue of admissibility of the evidence did not arise in the proceedings. Rather, the issue whether or not the expression "or other place" applied to a police vehicle arose in the context of whether an offence had been committed.

13. In light of the above I propose to deal with this appeal on the basis that the questions to be answered are questions 1.1 (a) and 1.2(a).

Submissions of the Parties

14. Counsel for the respondent made submissions about the elements of s55(1) constituting part of the elements of the offence referred to in s49(1)(f) and s49(1)(b). He referred to the decision of Ormiston J, (as he then was) in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367 and the decision of Hedigan J, in *DPP v Constantinou* (1997) 98 A Crim R 558; (1997) 27 MVR 120. **[9]** Counsel for the appellant did not place argument before me to challenge the submissions put. I proceed therefore on the basis that the prosecution, to succeed in charges brought under both s49(1)(b) & (f), must establish compliance with s55(1) of the Act.

15. Counsel for the appellant drew my attention to the fact that breathalyser machines are now carried in approximately 25 police patrol vehicles. To facilitate the use of this equipment, more police officers have been qualified by training to operate the equipment. I have also been informed that a number of prosecutions have been adjourned pending the outcome of this appeal.

16. Counsel for the appellant submitted that the learned Magistrate was in error in applying the *ejusdem generis* rule in interpreting the words "other place". This would appear to be a correct submission in that there is not a reference to two or more specifics before the general expression "other place" (*R v Perry* (No 3) (1981) 28 SASR 112, 116; *Quazi v Quazi* [1980] AC 744, 807-8, *Allen v Emmerson* (1944) KB 362, Gifford *Statutory Interpretation* (1990) p70 *et seq*, Pearce and Geddes *Statutory Interpretation* Australia 4th ed. Para [4.8]). Counsel referred to the cases of *Plummer and Adams v Needham* (1954) 56 WALR 1, *Lake Macquarie Shire Council v Ades* [1977] 1 NSWLR 126; (1977) 35 LGRA 90; where the phrase "building or place" was considered. He submitted that "place" was not read down in those cases. In those cases, the word "place" was treated as an alternative to building. The Courts in those cases construed the expression to mean a "more or less definite position where business activities are localised though possibly in a wider open space". (*Plummer* at 5). A roof, however, was not required. These cases, however, do not assist the appellant because the phrases in question did not include the word "other". The inclusion of that word in the Act indicates that the drafter regarded a police station as a place for the purpose of the section and, therefore, was treating the word "place" as having some sort of similarity with a police station. While "other" implies something additional (Erle CJ, *Ayrton v Abbott* [1849] EngR 809; (1849) 14 QB 1; 117 ER 1), it also points to "some relation between the classes of things" (North J, *Re Miller* 61 LT 397).

[10] 17. Counsel then drew my attention to the statement in the second reading speech (Legislative Assembly, 3 Nov 1988, 508) which explained that the words "grounds or precincts" had been replaced by "other place" to "take account of the way in which booze buses operate".

18. He submitted that the *Interpretation of Legislation Act* 1984 requires the interpretation to be adopted which promotes the purpose of the legislation and further submitted that that purpose would best be served with a wide interpretation so that the words "other place" were not read down in any way and were interpreted literally to mean in effect "any place". He indicated that he did not, as the prosecuting officer had below, rely upon the case "*O'Toole v Bennett* [1917] VicLawRp 57; [1917] VLR 351; 23 ALR 145; 39 ALT 5." He argued that a very large number of people submit to breath analysis each year and that it greatly reduces the inconvenience, particularly for the innocent, if breath analysis can be done on the spot.

19. Counsel for the respondent referred to the changes that have occurred in the relevant legislation over time. The original provisions were to be found in s408A of the *Crimes Act* 1958 s408A(4)(b). They required a person to furnish a sample of breath "at or in the vicinity of the place where he was driving ... or at the police station nearest to that place". In *Mintern-Lane v Kercher* [1968] VicRp 71; (1968) VR 552, Newton J, held that the expression "at the police station" did not extend to a motor car parked at the kerb outside the nearest police station. As a result of that decision the relevant legislation was amended to refer to "police station ... or grounds or precincts thereof". (Act No 7782 s2). A provision was also inserted to afford some privacy to the testing done within the grounds or precincts of a police station (s408A(4)(c)). Subsequently, the provisions were placed in the *Motor Car Act* 1958 - in particular s80F(6),(8) and (11)(a). The privacy provision was repeated in s80F(10). The legislation appeared to continue to permit the police officer to require the suspect to submit to a breath test at the vicinity of the place where the driving occurred (s80F(8)). These provisions were considered in *Bolton v Glover* (unreported, Tadgell J, (as he then was) 27 August 1986). The head note is reported at (1986) 4 MVR 463. **[11]** His Honour referred in that case to the intention to afford a measure of privacy to both the

police, and the person tested but only where testing was done in the grounds or precincts of the nearest police station. The privacy protection did not apply at or in the vicinity of the place of the driving or at the police station. Subsequently the provisions, but not the privacy provision, were placed in the *Road Safety Act* (above).

20. Turning to the critical phrase, counsel referred to the discussion by Lord Diplock in *Quazi* (above at 808) where His Lordship considered a phrase of a similar structure to that in question.

> "The fact that the *ejusdem generis* rule is not applicable does not, however, necessarily mean that where the expression "other" appears in a statute preceded by only one expression of greater specificity its generality may not be cut down if to give it its wide *prima facie* meaning would lead to results that would be contrary to the manifest policy of the Act looked at as a whole, or would conflict with the evident purpose for which it was enacted."

He submitted that the words “or other" confine "place" to locations like a police station. He submitted that the phrase "other place" is coloured by that which precedes it. He submitted that as a result "other place" requires a permanent, stable structure fixed to the ground. He said it must be clearly identified and identifiable with the police. It must be definite or set. It also requires a structure of some space including rooms.

21. His primary submission, therefore, was that "other place" does not in terms apply to a "booze bus". Alternatively, bearing in mind what was said in the second reading speech, he submitted that what is required is something large and capable of being set in place by reason of its size and content. He submitted that the interpretation advanced by the appellant required reading the phrase "or other place" as meaning "a place". He submits that the phrase "police station or other place" must be given work to do and if the phrase "or other place" is interpreted to mean "a place" it applies to any place and the phrase in the legislation is superfluous. He submitted further that we are concerned here with a penal statute which should be construed **[12]** strictly. He submitted that the legislation authorises intrusions into the lives of people going about their business. He submitted that it is, therefore, unreasonable to permit people to be detained on dark nights in lonely places in police cars by a number of officers. He argued that there are real protections and advantages to the citizen to be taken to the police station where other people are present and, in particular, other officers to whom complaints can be made. As to the "booze bus", it is usually well lit, in a prominent position with a large number of police in attendance. Counsel also pointed out that under s55(1) a person is required to remain at the police station or other place until the sample has been furnished and a certificate given to that person or until three hours have elapsed after driving whichever happens the sooner. He argued that it could not have been intended that the person giving the sample of breath might be required to remain in the back seat of the police car for three hours. He submitted that the intention was that the suspect could be detained in the police station or a mobile police station like a "Booze Bus" or some structure of some stability and permanence which would provide the facilities associated with a police station.

22. Counsel for the respondent also attempted to mount an argument based on the need to imply a requirement of reasonableness in the legislation. Counsel relied on *DPP v Webb* (above) which dealt with s53. In my view, implying a requirement of reasonableness does not supply a basis to resolve the issues in this case.

23. In construing the provisions, it must be remembered that they are privative provisions which require persons to provide evidence incriminating them. They involve a curtailment of citizens' rights and immunities. They should therefore be construed in favour of a defendant to the extent of any ambiguity, (*Scott v Dunstone* [1963] VicRp 77 [1963] VR 579, 580-1, cited by Tadgell J (as he then was) in *Bolton v Glover*, above at 7; see also *R v Coco* [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270).

24. The word "place" has been considered in a variety of contexts. It has been given a broad construction in the area of industrial safety (*Ganion v Roche Products Ltd* [1995] SLT 38, 39). It has been narrowly construed in legislation authorising the issue **[13]** of search warrants to require "a part of space of definite situation" and held not to include a motor vehicle: *Coward & Ors v Allen & Ors* [1984] FCA 53; (1984) 52 ALR 320. In legislation controlling betting or retail

trading, a degree of permanence has been required. Thus in retail trading legislation, the boot of a car has been held not to be a "place" unless it is used on a regular basis in the same location. (*Maby & Others v Warwick* Corporation [1972] 2 QB 242, 247; *Jarmain v. Weatherall* (1977) 75 LGR 537; *Palmer v Bugler* (1988) 87 LGR 382.)

25. The expression "other place" must be construed in its legislative context and to serve the purposes of the legislation. To apply the phrase "other place" to a police car, however, requires "other place" to mean "any place" and renders the reference to "police station" superfluous. Parliament did not use the expression "any place". It could easily have done so if that was its intention. Parliament intended that the phrase "or other place" should limit the operation of the section.

26. Construing the language of the section without the assistance of *Hansard*, I would have concluded that the words "other place" required at least a defined structure or space of some substance either attached to land or having a connection to a location of some permanence giving it a degree of localisation. It would also need to be a space capable of substantially serving the purposes of a police station.

27. With the assistance of *Hansard*, it would seem that Parliament had the above in mind but not necessarily attached to land in that it wanted the words to cover a "booze bus" and thus a mobile location but one with a connection to a particular location of some permanence when in use. A "booze bus" is like a mobile police station and can serve similar purposes. A police car is not and cannot.

28. The legislative history also supports the narrower construction. To demonstrate the point it is necessary to refer to the legislation in some detail. *[After referring to the legislation, his Honour continued] ...* **[14]** The *Road Safety Act* 1986 No 127 of 1986 repealed the *Motor Car Act* 1958 provisions and enacted, *inter alia* s55(1) (above). There was no provision **[15]** regarding privacy equivalent to those in the earlier Acts.

29. The sections originally expressly permitted breath analysis at or in the vicinity of the driving or at the nearest police station. They were then extended to permit breath analysis at the grounds or precincts of such police station. This approach was repeated in the subsequent amendment and in the *Motor Car Act* 1958. Under the *Road Safety Act* 1986, however, the breath analysis is to be done not at the place [where] the driving occurred and not at the nearest police station. The provision contemplates taking the suspect away from the place of the driving to "a police station or other place".

30. I am persuaded, therefore, that the expression "police station or other place" was not intended to include police cars. At best for the appellant, the provision is ambiguous and should, therefore, be construed in a manner favourable to the defendant.

31. I am also encouraged to construe the provision not to include police cars by the following considerations:

> (a) In view of the obligation on the part of suspects to remain at the "place" for up to three hours, I think it unlikely that it was intended that the suspect would be required to submit to a breath test in the open air or in the back seat of a police car.
>
> (b) Bearing in mind that citizens are compelled to provide evidence that may be used against them, the significance of the evidence produced by breath analysis machines and the significant evidentiary advantages given to the prosecution by the legislation, I think it unlikely that the parliament would have intended that a breath analysis could be required in such an informal fashion. There is a lot to be said for requiring a degree of formality and regularity of procedure and the use of standard procedures where what is involved is the obtaining of evidence from persons which may be used to convict them of criminal offences where such evidence is given extensive presumptive effect.
>
> **[16]** (c) I am also troubled by the possibility that the equipment, however robust, may run the risk of being adversely affected by excessive heat or cold or movement in the police car while kept in it and think it would be surprising in all the circumstances if the parliament had in mind that equipment producing evidence capable of being used conclusively against accused persons might be exposed to any such risk.

32 I appreciate the convenience for the police, and innocent suspects, in having on the spot breath analysis carried out. Against that must be weighed the desirability of avoiding the risk of error and minimising the potential for dispute and false allegations against the police inherent in the testing of suspects in the back seat of a police car. It is also desirable to have adequate facilities available for all concerned where they are engaged in an exercise that could take three hours. 33 In all the circumstances, a cautious approach should be taken. For the foregoing reasons, I have come to the conclusion that the alleged errors of law have not been made out and, therefore, that the appeal should be dismissed with costs.

APPEARANCES: For the Appellant: Mr J McArdle, counsel. P Wood, Solicitor for DPP. For the Respondent: Mr OP Holdenson, counsel. Mahonys, solicitors.
