05/02; [2002] VSC 246

SUPREME COURT OF VICTORIA

GOODEY v CLARKE

Bongiorno J

12 June 2002 — (2002) 37 MVR 121

MOTOR TRAFFIC – DRINK-DRIVING – SAMPLE OF BREATH PROVIDED BY DEFENDANT – NO RESULT PRODUCED – FURTHER SAMPLE REQUIRED – REFUSAL BY DEFENDANT TO PROVIDE FURTHER SAMPLE – DEFENDANT CHARGED WITH REFUSING TO COMPLY UNDER S55(1) OF *ROAD SAFETY ACT* 1986 – SHOULD HAVE BEEN CHARGED UNDER S55(2A) – NO CASE SUBMISSION REJECTED – AT END OF CASE APPLICATION BY PROSECUTOR TO AMEND CHARGE TO SUBSTITUTE "S55(2A)" FOR "S55(1)" – APPLICATION GRANTED – DEFENDANT CONVICTED – WHETHER S55(2A) CREATES A SEPARATE OFFENCE – WHETHER MAGISTRATE IN ERROR IN AMENDING INFORMATION: *ROAD SAFETY ACT* 1986, S55(1), (2A); *MAGISTRATES' COURT ACT* 1989, S50.

G. provided a sample of breath for analysis by a breath analysing instrument however, the sample did not produce a result. The police officer proceeded to use the procedure authorised by s55(2A) of the *Road Safety Act* 1986 ('Act') which permits a breath analysis operator to seek further samples of breath when the initial sample does not produce a sample capable of being measured or a measurement is not obtained. G. was charged with a failure to comply with s55(1) of the Act notwithstanding the fact that he provided the initial sample of breath. At the end of the prosecution case, a 'no case' submission was made but rejected despite the fact that G. had complied with s55(1). At the end of the case, the prosecutor applied to amend the charge to substitute s55(2A) for s55(1). The magistrate granted the application, made the amendment and convicted G. Upon appeal—

HELD: Appeal upheld. Order quashed.

1. Section 49(1)(e) of the Act provides that a person is guilty of an offence if he or she refuses to comply with a requirement made under s55(1), (2), (2A) or (9A). S55(1) and s55(2A) create separate offences: in the first, a failure to provide a breath sample *simpliciter* and, in the second, a failure to provide further samples in the circumstances provided by s55(2A). This conclusion is reinforced when one looks at the elements of those offences which would have to be proved under s55(1) and then under s55(2A).

2. Accordingly, the magistrate was in error in holding that an offence under s55(1) was a cognate offence with that of refusing to comply with a requirement under s55(2A).

3. In order to support a conviction for an offence it is necessary either that the information upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence. It is necessary that the court be informed of the identity of the offence with which it is required to deal and to provide the defendant with the substance of the charge which he or she has been called upon to meet.

***Ex Parte Lovell; Re Buckley and Anor* (1948) 38 SR (NSW) 153; 55 WN (NSW) 63; and**

***John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228, applied.**

4. After the amendment was made by the magistrate, the charge simply referred to the section without reference to the way in which it was said the section was breached. Further, the charge was amended at a time when a new charge under s55(2A) could not have been laid. It would have been out of time. In those circumstances, the making of the amendment was an error of law.

BONGIORNO J:

1. On 17 January 2001, David Francis Goodey was charged that on 4 October 2000, after having been required to undergo a preliminary breath test in accordance with s53 of the *Road Safety Act* 1986 and the test in the opinion of the member of the police force in whose presence it was made indicated that his blood contained alcohol he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act, did refuse to comply with such requirement prior to three hours elapsing from the driving of a motor vehicle.

2. The charge was heard before the Magistrates' Court on 6 December 2001 by Mr Barberio,

Magistrate. The evidence disclosed, and the magistrate accepted, that in fact Mr Goodey had complied with s55(1) of the *Road Safety Act* in that he had provided a sample of breath for analysis when requested to do so, but that the police officer had proceeded to use the procedure authorised by s55(2A) of the Act when the initial sample of breath did not produce a result.

3. Section 55(2A) is a section, which was inserted by amendment, to permit the breath analysis operator to seek further samples of the breath of a person who is being tested when the initial sample does not produce the desired result; that is to say, does not produce a sample capable of being measured or, for some other reason, a measurement is not obtained. The reasons which can give rise to the use of s55(2A) are set out in that sub-section, and they are that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample, or each of the samples, previously furnished in grams per 100 millilitres of blood because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever. In essence, the section is designed to prevent someone being able to produce an inconclusive or inadequate sample and then claim to have complied with the Act.

4. The problem the prosecution faced in this case was that it charged Mr Goodey with a failure to comply with s55(1). It is not contested that in fact he did provide the initial sample. The prosecution's complaint is that he did not comply with the further requirements which were, in this particular case, required of him by s55(2A). Counsel for Mr Goodey made a "no case" submission at the end of the prosecution case. That submission was rejected, despite the fact that at that stage he had complied, and there was no contest that he had complied, with s55(1).

5. The basis of the prosecution's assertion that that compliance did not mean that he was not guilty of the offence is, as Mr Gyorffy submits, that s55(2A) does not create a separate offence at all but simply provides a method of complying with or, alternatively, not complying with s55(1). He points to the offence section of the Act in support of that submission. The offence section is s49(1). In this case it is s49(1)(e), which provides that a person is guilty of an offence if he or she refuses to comply with a requirement made under s55(1), (2), (2A) or (9A). On its face, therefore, it would seem that the section is referring to four separate offences, that is to say, refusing to comply with one or other of those four requirements in those four statutory provisions.

6. Mr Gyorffy, however, says that, if that was so, s49(1)(f), which provides that the result of an analysis performed under s55 provides evidence for use in a prosecution, would fall to the ground if the sample was provided under s55(2A) and not s55(1).

7. Notwithstanding Mr Gyorffy's submission, I have concluded that s55(1) and s55(2A) do in fact create separate offences: in the first, a failure to provide a breath sample *simpliciter* and, in the second, a failure to provide further samples in the circumstances provided by s55(2A). Having regard to the preliminary words of s55(2A), it would not be open, in my view, to argue that s49(1)(f) was rendered inoperative where a sample is provided pursuant to s55(2A). Section 55(2A) commences with reference to the person who required a sample of breath under s55(1) or (2) being entitled to require the person who furnished the breath sample to provide further samples. That is sufficient, in my opinion, to interpret s49(1)(f) as applying to a sample of breath and its analysis whether the sample was provided under s55(2A) or s55(1). That legal analysis does not mean that the two sections create the same offence or that there is only one offence. Section 49(1)(e) makes it clear that there is more than one offence, and when one looks at the elements of those offences which would have to be proved under s55(1) and then under s55(2A) that conclusion is reinforced.

8. Following the rejection of the "no case" submission, the case proceeded with the defendant giving evidence, at the end of which, after some discussion and at the invitation of the magistrate, the prosecution applied to amend the charge to substitute s55(2A) for s55(1) in its formulation. This seems to have been a recognition that there was a different offence created, otherwise the amendment would have been unnecessary. However, whether that was such a recognition or not, the question then is whether such an application to amend should have been entertained by the magistrate and, if entertained, should have been granted. In the event, the magistrate granted the application and proceeded to convict the now appellant.

9. The question of amendment is dealt with in the *Magistrates' Court Act* 1989, s50, which provides that:

> "On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error."

10. Mr Gyorffy pointed to what he calls the winds of change blowing through this part of the law as exemplified by a statement in a recent decision of the Court of Appeal, *Director of Public Prosecutions v Foster*[1], where the President referred to the purpose of this legislation as being formulated "to deal with a major social problem". His Honour was, of course, referring to the problem of drunk driving. That is no doubt true. That major social problem is one which the legislature has addressed and in respect of which the court should be careful to ensure that its decisions reflect the intention of the legislature in proscribing such conduct and ensuring that those who commit it are properly dealt with. But that is not to say that the ordinary rules of criminal pleading or those safeguards which exist for the protection of all with respect to criminal matters should be thrown out. In *Ex Parte Lovell; Re Buckley and Anor.*[2], Sir Frederick Jordan dealt with the question of the way in which a person should be charged with a summary offence and said[3]:

> "Hence in order to support a conviction for an offence it is necessary either that the information and summons upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence, or else, if they do not, that the accused person should have been accurately charged orally before the magistrate and should have raised no objection to the absence of information or summons."

In referring to an oral charge His Honour was speaking of a particular provision in the New South Wales *Justices Act*. He went on to further say that:

> "If the magistrate convicts on an information or charge which discloses no offence or for an offence with which the accused has not been duly charged, then the conviction is bad. The power of amendment in cases of statutory prohibition conferred by s113 does not extend to a conviction which goes beyond the charges nor to a conviction upon a charge which discloses no offence, even if the evidence supplies the missing ingredient, although if the offence has been accurately charged an omission in the form of conviction may be supplied. These propositions appear to be established by the cases of *Ex parte Price*, *Ex parte Croudace*, *Ex parte Palmer*, *Ex parte Dunsmore*, *R. v Duff*, *Ex parte Bellamy*, *Ex parte Stanton*, *Shiel v. Crothers.*"[4]

Again, more recently in *Walsh v Tattersall*[5], speaking about the question of precision in criminal pleading, Kirby J laid down a number of reasons as to why a strict approach should be taken to resolving questions in relation to criminal pleading. Two of those are apposite. The first is that compliance with the rule of strictness is a correct practice to require of prosecutors and the second is that the rule of strictness is also desirable for the fair trial of the accused. His Honour referred to *Johnson v Miller*[6] and *S v R*[7].

11. Mr Hardy, who appeared for the appellant in this court, referred to a number of cases including *John L. Pty Ltd v Attorney-General (NSW)*[8]; and *Alwer v McLean*, a decision of Smith J of this court[9], in which His Honour referred to the High Court case to which I have just referred and quoted a passage from the majority judgment in these terms:

> "The old authorities established that an information should be quashed as insufficient in law and invalid if it failed to inform the justice before whom it was laid the nature of the offence and the manner in which it had been committed. The rationale of that requirement has, in more recent times, commonly been seen as lying both in the necessity of informing the court of the identity of the offence with which it is required to deal and in providing the accused with the substance of the charge which he has been called upon to meet: 'an accused person could not be required to defend the charge if the information did not supply the particulars necessary to enable him to prepare his defence'."[10]

Mr Hardy also referred to *Woolworths (Victoria) Pty Ltd v Marsh*[11], to a passage from Pauls *Justices of the Peace* and to *Flanagan v Remick*[12], *Gigante v Hickson*[13] and *Director of Public Prosecutions v Holden*[14], in which Hedigan J dealt with the question of the extent to which a charge under s55(2A) was required to specify the basis upon which the offence was said to have occurred.

12. In this case, after amendment allowed by the magistrate, the charge simply referred to the section without reference to the way in which it was said the section was breached. Further, the charge was amended at a time when a new charge under s55(2A) could not have been laid. It would have been out of time. The amendment should not have been allowed. To have allowed it was an error of law.

13. This appeal comes to this court under s92 of the *Magistrates' Court Act* 1989 on a question of law, the questions of law having been isolated by a Master as having been three in number, namely —

> (a) whether the magistrate erred in holding that an offence under s55(1) was a cognate offence with that of refusing to comply with a requirement under s55(2A);
>
> (b) whether the learned magistrate erred in allowing the charge laid under s49(1)(e) to be amended after more than 12 months had passed since the date of the offence and
>
> (c) whether the learned magistrate erred in refusing to allow counsel for the defendant to cross-examine the informant on the question of whether or not the breath analysing machine used on the occasion was capable of measuring the concentration of alcohol present in the defendant's breath.

14. Having reached the conclusion that the appellant succeeds on grounds (a) and (b), it is unnecessary to consider further ground (c), and I do not do so.

15. The appeal will be upheld. The order of the magistrate convicting the appellant will be quashed and in lieu thereof the information dated 17 January 2001 to which I have referred will be dismissed.

16. I will order that the Chief Commissioner of Police pay the costs of the appellant in the Magistrates' Court in so far as they relate to the charge which has now been dismissed and that the Chief Commissioner of Police pay the appellant's costs in this court.

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[1] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[2] (1938) 38 SR (NSW) 153; 55 WN (NSW) 63.
[3] ibid at 173.
[4] ibid at 173-4.
[5] [1996] HCA 26; (1996) 188 CLR 77; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[6] [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104.
[7] [1989] HCA 66; (1989) 168 CLR 266; 89 ALR 321; 45 A Crim R 221; 64 ALJR 126.
[8] (1987) 163 CLR 508.
[9] [2000] VSC 396; (2000) 116 A Crim R 364; (2000) 32 MVR 125.
[10] *John L. Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508 at 519; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[11] Supreme Court of Victoria, Ormiston J, 12.6.86, unreported.
[12] [2001] VSC 507; (2001) 35 MVR 289; (2001) 127 A Crim R 534.
[13] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51.
[14] [1999] VSC 14; (1999) 28 MVR 315.

APPEARANCES: For the Appellant Goodey: Mr SP Hardy, counsel. Dibbs Barker Gosling, solicitors. For the Respondent: Mr T Gyorffy, counsel. K Robertson, Solicitor for Public Prosecutions.
