

04/02; [2002] VSCA 49

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

***DPP v GREELISH***

**JH Phillips CJ and Buchanan JA and O'Bryan AJA**

**27 March 2002 — (2002) 4 VR 220; (2002) 35 MVR 466; (2002) 128 A Crim R 144**

**MOTOR TRAFFIC – DRINK-DRIVING – DEFENDANT REQUIRED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR BREATH TEST – STATEMENT BY DEFENDANT THAT HE WANTED TO TAKE CHILD TO HIS PARENTS' HOME NEARBY – DEFENDANT SUBSEQUENTLY CHARGED WITH REFUSING TO ACCOMPANY POLICE OFFICER TO POLICE STATION – DEFENCE OF “SOME REASON OF A SUBSTANTIAL CHARACTER” – DEFENCE UPHOLD BY MAGISTRATE – WHETHER DEFENCE APPLIES TO CHARGE OF REFUSING TO ACCOMPANY: ROAD SAFETY ACT 1986, SS49(1)(e), 55(1), 55(9).**

Section 55(9) of the *Road Safety Act* 1986 ('Act') provides:

“A person must not be convicted or found guilty of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal ...”

**If a person refuses to accompany a member of the police force to a police station or other place, that person does not fail to comply with a requirement to furnish a sample of breath for analysis, for that requirement can only be made where the breath analysing instrument is to be found. The phrase “for that purpose” in s55(1) of the Act is intended to limit the circumstances in which a requirement to accompany a member of the police force can be made. The fact that the requirement to accompany a member of the police force is described in the sub-section as a “further” requirement emphasises that it is a requirement separate from one to furnish a sample of breath for analysis. Accordingly, s55(9) of the Act does not provide a defence to a charge under s49(1)(e) of the Act arising out of a refusal to comply with a requirement to accompany pursuant to s55(1) of the Act.**

***DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, applied.**

***DPP v Greelish* MC22/01; [2000] VSC 364; (2000) 115 A Crim R 178; (2000) 32 MVR 271, reversed.**

**PHILLIPS JA:**

1. I will ask Mr Justice Buchanan to deliver the first judgment.

**BUCHANAN JA:**

2. On the first day of spring 1999, police officers saw the respondent drive away from an RSL club. He was accompanied by his 8-year-old daughter whom he intended to take to his parents' house. When he was 500 yards from his destination, the respondent was intercepted by the police. The respondent underwent a preliminary breath test. The policeman who administered the test said to the respondent in the stilted manner of one following a statutory formula:

“In my opinion the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to the Altona North police station for the purpose of a breath test and to remain there until you have furnished a sample of your breath or have been given a certificate or until three hours after the time you were driving and in charge of this motor vehicle, whichever is the sooner. Are you prepared to accompany me?”

3. The respondent told the police that he would not allow anyone else to take his daughter to his parents' house. He refused an offer by the police to take the child to his parents' house in a police vehicle while the respondent followed in a divisional van. The respondent walked with his daughter to his parents' house and returned to the police officers, who informed him that he was too late and he would be charged.

4. Section 49(1)(e) of the *Road Safety Act* 1986 ("the Act") provides:

“A person is guilty of an offence if he or she .... refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A) ... ”

5. Section 55(1) provides, so far as is presently relevant:

"If a person undergoes a preliminary breath test when required by a member of the police force ... to do so and - (a) the test in the opinion of the member ... in whose presence it is made indicates that the person's blood contains alcohol; ... any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-s.(4) or until three hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

A magistrate dismissed a charge that the respondent,

"being a person who has undergone a preliminary breath test under s53 of the *Road Safety Act* 1986, and the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol, was then required by that member to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act, did refuse to accompany a member of the police force to a police station namely Altona North where a sample of breath was to be furnished prior to three hours elapsing from driving a motor vehicle."

6. The charge was treated by the parties and a judge as alleging that the respondent had refused to comply with a requirement to accompany a member of the police force to a police station. The parties who appeared before us agreed that, if the proceeding is remitted to the Magistrates' Court, the charge should be further amended by adding after the words "did refuse to" the words "comply with the requirement to".

7. The magistrate found that the defence provided by s55(9) of the Act had been established. The sub-section provides:

"A person must not be convicted or found guilty of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her."

The magistrate said:

"I could understand a parent being most concerned that the removal of a child ... even for a short time, might be a traumatic experience for the child",

and concluded:

"I am satisfied at the end that he had a genuine concern about the removal of the child. I therefore propose to dismiss the charge".

8. The appellant appealed to the Supreme Court pursuant to the provisions of s92 of the *Magistrates' Court Act* 1989 on a question of law, which was formulated by a Master of the Court as:

"Does s55(9) of the *Road Safety Act* 1986 provide a defence to all charges arising from s.49(1)(e) of the *Road Safety Act* 1986?"

9. That question required a negative answer, for s55(9A) is concerned with a requirement to allow a blood sample to be taken. The parties and the judge who heard the appeal, however, treated the question as whether s55(9) afforded a defence to one who refused to accompany a member of the police force to a police station or other place where a sample of breath could be furnished, or was available only to a person who refused to furnish a sample of breath for analysis. An additional question of law was formulated by counsel for the appellant at the invitation of the judge to reflect the parties' understanding. The question was further refined in the course of the hearing of this appeal and became:

"Does s55(9) of the *Road Safety Act* 1986 provide a defence to a charge under s49(1)(e) of the *Road Safety Act* 1986 arising out of a refusal to comply with a requirement to accompany pursuant to s55(1) of the *Road Safety Act* 1986?"

10. The judge who heard the appeal upheld the magistrate's decision. Although he doubted whether the facts found by the magistrate amounted to a "reason of a substantial character" to refuse to accompany a policeman to a police station, his Honour saw the only question to be determined as whether s55(9) was capable of affording a defence to a charge of refusing to accompany a member of the police force to a police station. He said:

"[T]he exculpatory provisions of sub-s(9) relate to all the component steps of the taking of a sample of breath for analysis. That includes accompanying a member of the police force to a police station, as much as it does any of the other events envisaged in the section."

11. In my opinion, the essential question posed by this appeal is whether s55(1) creates one or more offences. If there is one offence, namely, refusing to comply with a requirement to furnish a sample of breath for analysis, and refusal to accompany a police officer to a police station or remain at a police station are but different means of exemplifying a refusal to furnish a sample of breath, in my view s55(9) did afford a defence to the respondent. On the other hand, if there are as many potential offences as there are requirements which may be made under s55(1), sub-s(9) applies to the only requirement which the sub-section identifies.

12. The expression in s55(9) – "refusing to furnish ... a sample of breath for analysis" – adopts the words of one requirement found in s55(1). It can only encompass what is expressed as another requirement if the apparently separate requirements are parts of one whole. In my opinion, they are not. The requirement to furnish a sample of breath for analysis and the requirement to accompany a police officer to a police station or other place where the sample is to be furnished and remain there until the sample is given or a period of three hours expires are separate requirements. As Winneke P said in *DPP v Foster*<sup>[1]</sup>:

"It is, to my mind, abundantly plain from a reading of s55(1) that the requirement to furnish a sample of breath for analysis by a breath analysing instrument can only sensibly be made at the time when the device is presented to the motorist at the police station (or other place)."

13. Later, his Honour said:

"[I]f the motorist refuses to accompany the police officer to the station or other place where a sample can be furnished for analysis, he or she is not at risk of being charged with the offence of 'refusing to furnish a sample, when required'; but only at risk of being charged with the offence of 'refusing to accompany a police officer to the station, when required': cf *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67 at 73; (1985) 2 MVR 503, per Southwell, J."<sup>[2]</sup>

14. If a person refuses to accompany a member of the police force to a police station or other place, that person does not fail to comply with a requirement to furnish a sample of breath for analysis, for that requirement can only be made where the breath analysing instrument is to be found, and unless the refusal to accompany constitutes an offence, the purpose of s55(1) will be frustrated.

15. Counsel for the respondent submitted that the fact that a requirement to accompany a member of the police force to a police station or other place was to be made "for that purpose", that is, the purpose of furnishing a sample of breath for analysis, showed that the requirement was incidental to and part of the mechanism of obtaining a sample of breath for analysis. He said that the requirement to accompany a member of the police force was an integral, essential and indivisible component of a composite requirement to accompany a member of the police force to a police station and there to furnish a sample of breath for analysis. I do not agree. As I have said, a refusal to accompany a member of the police force is not tantamount to a refusal to furnish a sample of breath for analysis. In my view, the phrase "for that purpose" was intended to limit the circumstances in which a requirement to accompany a member of the police force could be made. I am also of the view that the fact that the requirement to accompany a member of the police force is described in the sub-section as a "further" requirement emphasises that it is a requirement separate from one to furnish a sample of breath for analysis.

16. Until the enactment of the *Motor Car (Miscellaneous Provisions) Act* 1980, s80F(6) of the *Motor Car Act* provided for a requirement to furnish a sample of breath for analysis but did not provide for a requirement to accompany a member of the police force to a police station or other

place for that purpose. Sub-section (11)(a) provided that it was an offence to refuse or fail to furnish a sample of breath when required to do so. The Act introduced the requirement "to accompany a member of a police force to a police station or the grounds or precincts thereof", and amended s80F(11)(a) by adding the words which I italicize, so that it read:

"Any person who, when required by a member of the police force pursuant to the provisions of sub-section (6) to furnish a sample of his breath for analysis *or when further required to accompany a member of the police force to a police station or the grounds or precincts thereof*, refuses or fail to do so shall be guilty of an offence against the sub-section."

17. If, by refusing to accompany a member of the police force to a police station, a person thereby refused to furnish a sample of breath for analysis, the amendment to s80F(11)(a) was otiose.

18. I am mindful that the legislation is penal in nature and requires persons to provide potentially incriminating material. Consequently, the provisions are to be construed strictly and any ambiguity should be resolved in favour of the respondent.<sup>[3]</sup> Nevertheless, in my opinion, the words found in the Act are clear. In terms, s55(9) refers to one only of several requirements found in s55(1).

19. I would allow the appeal and remit the matter to the Magistrates' Court to be determined in accordance with law.

**JH PHILLIPS CJ:**

20. I agree.

**O'BRYAN AJA:**

21. Having heard the reasons this afternoon of Buchanan JA, I am of the opinion that subject to the following comments the appeal should be allowed for the reasons he gives.

22. The charge against the respondent was amended by consent in the Magistrates' Court to read:

"The defendant (respondent) at Altona on the 1st day of September 1999, being a person who has undergone a preliminary breath test under s53 of the *Road Safety Act* 1986, and the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol, was then required by that member to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act, did refuse to accompany a member of the police force to a police station namely Altona North where a sample of breath was to be furnished prior to three hours elapsing from driving a motor vehicle."

23. In this court Mr Holdenson accepted that should the court order that the charge be reheard in the Magistrates' Court, a further amendment to the charge would be appropriate. The further proposed amendment has been detailed this afternoon by Buchanan JA.

24. The charge was laid pursuant to s49(1)(e) of the Act which creates an offence if a person refuses to comply with a requirement made under s55(1), (2), (2A) or (9A).

25. Under s55(1), if a person undergoes a preliminary breath test and the test in the opinion of a member of the police in whose presence it is made indicates that the person's blood contains alcohol, the member may require the person to furnish a sample of breath for analysis by a breath analysing instrument (BAI) and for that purpose may further require the person to accompany the member to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate of analysis or until three hours after the driving.

26. There are, in my view, possibly four separate requirements under s55(1), which could be separately charged as breaches of s49(1)(e), were the requirement to be refused by a person who has undergone a preliminary breath test under s53 of the Act:

(i) a requirement to furnish a sample of breath for analysis by a BAI;

- (ii) a requirement to accompany the member to a police station or other place for the purpose of furnishing a sample of breath by a BAI.
- (iii) a requirement to remain at the police station or other place until the sample of breath has been furnished and a certificate has been given; or.
- (iv) a requirement to remain there until three hours after the driving.

27. This appeal is concerned with requirement (ii), the charge in essence being that on 1 September 1999, following a preliminary breath test, the respondent was required to accompany a member of the police force to Altona North police station for the purpose of furnishing a sample of breath for analysis by a BAI and he refused to do so.

28. I too am of the opinion that s55(1) allows more than one charge against s49(1)(e) of the Act to be laid. The charge in *Rankin v O'Brien*<sup>[4]</sup> and the charge in *DPP v Ellison*<sup>[5]</sup> was for an offence against s49(1)(e) of the Act by a person refusing to accompany a police constable to a police station for the purpose of furnishing a sample of breath for analysis by a BAI, following a request to do so, a preliminary breath test having indicated in the constable's opinion that the defendant's breath contained alcohol.

29. The offence of refusing to accompany has been regularly charged and punished in this State since 1980 when Act No. 9477 was enacted. The essential elements of the charge of refusing a requirement to furnish a sample of breath for analysis by a BAI are discretely different to the elements of a charge of refusing a requirement to furnish a sample of breath for analysis. The requirement to furnish a sample of breath is different in form and substance to a requirement to accompany. An exercise of the power to require a motorist to accompany a member of the police force to a police station or other place is not an essential element of the offence of failing to furnish a breath sample after request.

30. Mr Coghlan is unaware of any instance, save in the Magistrates' Court, where a court has ruled that only one offence is created by s55(1). My researches have not revealed any such authority.

31. No point was taken in *Rankin* or in *Ellison*, or in the present case, that a charge of refusing a requirement to accompany is incompetent. Indeed, since Act No. 9477 in 1980, when the words now found in s55(1) of the Act "and for that purpose may further require the person to accompany a member of the police force to a police station" were inserted, in appropriate circumstances a refusal to accompany charge is commonly laid. A charge of refusing to furnish a sample of breath for analysis by a BAI following a preliminary breath test is less common and the elements of the charge will not be complete until the person has arrived at the police station "or other place" where the BAI is presented to the person and refusal is made: cf. *DPP v Foster*; *DPP v Bajram*<sup>[6]</sup>. The initial requirement following a preliminary breath test will be to accompany a police constable to a police station or other place for the purpose of furnishing a sample of breath for analysis. Refusal to comply with that requirement will complete the elements of the charge. A further requirement to furnish a sample of breath will be made at the police station or other place where the sample of breath is to be furnished. Similarly that refusal will complete the elements of that charge.

32. I am, therefore, satisfied that Mr Holdenson's first argument is unsound. Section 55(1) does create at least two offences, one being the subject of this appeal.

33. This appeal is concerned with the scope of s55(9) the history of which has been sufficiently set out in the judgment of Buchanan JA. By sub-s(9) of s55, a person must not be convicted or found guilty of refusing to furnish under s55 a sample of breath if he or she satisfies the court that there was some reason of a substantial character for the refusal other than a desire to avoid providing information which might be used against him or her.

34. The magistrate and the judge below were both of the opinion that s55(9) provided a defence to the charge of refusing to accompany.

35. The question of law initially raised by this appeal is as follows:



"Does s55(9) *Road Safety Act* 1986 provide a defence to all charges arising from s49(1)(e) *Road Safety Act* 1986?"

A more narrow question of law was raised by the appellant by way of a written submission at the close of argument. The amendment proposed today by the presiding judge, Phillips JA, identifies more precisely the real point in the appeal, whether the defence afforded by s55(9) of the Act applies to a charge arising out of a refusal to comply with a requirement to accompany pursuant to s55(1) of the Act.

The original question was too wide and inappropriate to meet the ruling of the magistrate, which was upheld by the trial judge, that s55(9) was available as a defence in proceedings for an offence against s49(1)(e) when the charge is refusing to comply with a requirement to accompany a police constable to a police station or other place. The magistrate said:

"You can't supply a sample of breath unless you go to the police station. You refuse to go to the police station, you're effectively refusing to provide a sample of breath ... then s55(9) applies."

36. This reasoning was approved by his Honour for, after adverting to police stations and "booze buses", he said:

"Obviously, a refusal to walk those few paces would be regarded as a refusal to submit for breath analysis. Likewise, a refusal to accompany a member of the police force to a police station could also be regarded as a refusal to submit breath for analysis. They are of like character. Accordingly, I consider that the word 'section' in sub-s(9) must be given its ordinary and natural meaning and that it is to relate to all the events encompassed by s55, including the refusal or failure to submit to a test as well as to accompany a member of the police force to a police station where a test could be carried out."

It seems likely that the reference to s55 in that passage was meant to be a reference to s55(1).

37. In my view, there could be no basis for holding that the word "section" in sub-s9 must mean that it is to relate to all the events encompassed by s55. A refusal to furnish a sample of breath after a request may arise under sub-ss(1), (2) and (2A), but it clearly does not arise under sub-s(9A) because (9A) is concerned with requiring a sample of blood for analysis.

38. I consider that his Honour failed to give full effect to the separate requirements specified in s55(1), a refusal of any requirement being capable of a charge under s49(1)(e) of the Act. The decision tends to ignore the separate and distinct charge of "refusing to accompany".

39. The genesis of s55(9) in the Act is Act No. 8143 (*Motor Car (Driving Offences) Act* 1971) s7 whereby s80F(12) was inserted in the *Motor Car Act* 1958. It has remained unchanged since 1971, notwithstanding the amendment to s80F(6) in 1980 whereby the words "and for that purpose may further require the person to accompany a member of a police force to a police station or the grounds or precincts thereof" were inserted. The obvious purpose of s55(9) was to ameliorate the harsh consequences of persons being required to furnish a sample of breath for analysis under s55. It is important to keep in mind that if there is no reason of a substantial character for a refusal, the strictly formulated offence is designed to deal with a major social evil: cf *Thompson v His Honour Judge Byrne*<sup>[7]</sup>. It was not extended to provide a defence to a charge of refusing to accompany probably because the act of accompanying a police member to a police station or other place is not incriminating (see *Rankin v O'Brien*<sup>[8]</sup>), but is preparatory to being requested to furnish a sample of breath for analysis, an act by which the person could incriminate himself.

40. The judge below adverted to the legislative history of s55, but made nothing of the circumstance that s55(9) has remained unchanged since 1971, notwithstanding the significant changes made to what is now s55(1), (2) and (2A) in the *Road Safety Act* 1989 by s9 in Act No 9477 in 1980 whereby the requirement to accompany was introduced. I consider that the omission of the legislature to extend the defence provided by what is now s55(9) of the Act to include refusing to accompany is significant. The sub-section is limited by its language to a request to furnish a sample of breath. I do not find any ambiguity or doubt or absurdity in s55(1) of the Act.

41. For these reasons, I, too, would allow the appeal and order remission of the matter to the

Magistrates' Court for re-hearing before another magistrate according to law.

**JH PHILLIPS CJ:**

42. The appeal will be allowed and the following orders will be made accordingly:

1. Appeal allowed with costs.
2. Set aside the orders made in the trial division on 13 September 2000 and order in lieu:
  - (i) that the appeal from the Magistrates' Court commenced by order of Master Wheeler on 14 June 2000 be allowed with costs;
  - (ii) set aside the order of dismissal made in the Magistrates' Court on 15 May 2000 and remit the matter to the Magistrates' Court for hearing and determination by a different magistrate according to law.

[1] [1999] VSCA 73; [1999] 2 VR 643 at 657; (1999) 104 A Crim R 426; (1999) 29 MVR 365. See also *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 at 580-1 per Sholl J.

[2] At 658.

[3] *Smith v Corrective Services Commission (NSW)* [1980] HCA 49; (1980) 147 CLR 134 at 139; (1980) 33 ALR 25; 55 ALJR 68; *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 at 580-581; *DPP v Williams* [1998] VSC 119; (1998) 104 A Crim R 65 at 74-75; (1998) 28 MVR 521; *Re Bolton; ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514 at 523; (1987) 70 ALR 225; 61 ALJR 190; 25 A Crim R 90; *Beckwith v R* [1976] HCA 55; (1976) 135 CLR 569 at 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39.

[4] [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503.

[5] (1995) 21 MVR 444.

[6] [1999] VSCA 73; [1999] 2 VR 643 at 657; (1999) 104 A Crim R 426; (1999) 29 MVR 365.

[7] [1999] HCA 16; (1999) 196 CLR 141 at 150; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.

[8] [1986] VicRp 7; [1986] VR 67 at 70; (1985) 2 MVR 503.

**APPEARANCES:** For the Crown: Mr PA Coghlan QC with Mr CJ Ryan, counsel. K Robertson, Solicitor for Public Prosecutions. For the respondent: Mr OP Holdenson QC, counsel. Mahonys, solicitors.