19/13; [2013] VSC 258

SUPREME COURT OF VICTORIA

DPP v SKAFIDIOTIS

Williams J

18 February, 17 May 2013

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER ASKED TO TAKE A BREATH TEST – NO SPECIFICATION WHETHER TEST WAS A PRELIMINARY OR FULL BREATH TEST – CHARGE DISMISSED BY MAGISTRATE – MAGISTRATE NOT SATISFIED THAT DRIVER UNDERSTOOD WHAT TYPE OF TEST WAS SOUGHT TO BE TAKEN – WHETHER REFUSAL OF REQUIREMENT FOR PRELIMINARY BREATH TEST UNDER S53(1) *ROAD SAFETY ACT* 1986 – WHETHER REQUIREMENT UNDER S53(1) MADE – WHETHER 'ANTICIPATORY' REFUSAL OF REQUIREMENT – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 SS49(1)(C), 53(1), 55(2).

HELD: Appeal dismissed.
1. The Magistrate did not conclude that the word 'preliminary' must be used in every case when a requirement is made under s53(1) of the *Road Safety Act* 1986.

2. Each case must be determined on its own facts. The evidence capable of establishing the offence may vary from case to case. No particular form of words must be used to make the requirement under s53(1), the refusal of which will found an offence under s49(1)(c). It may not be necessary to use the word 'preliminary' when referring to the required test. Factors such as whether or not the preliminary breath-testing device was presented to the driver and whether the driver had been stopped at a preliminary breath testing point will be relevant to the determination as to what would be reasonably sufficient to communicate the requirement in the context under consideration. Proof of the offence is not dependent upon proof of recitation of the words of the relevant provision.

3. In the present case, what the informant said was ambiguous in all the circumstances. Notwithstanding the early hour, the location, the previous exchange between the informant and the respondent's flight, the informant might reasonably have been taken to have been requiring the respondent either to undergo a preliminary breath test under s53(1) or to provide a breath sample under s55(2), (at the police car or at a police station, without having undergone a preliminary test). There was no specific mention of a preliminary breath test or of the fact that the police officer was going to the police car to obtain a preliminary breath testing device in order to administer one. Nor had the respondent been stopped at a preliminary breath testing station whilst driving.

4. In the circumstances of this case, it would not have been open on the evidence to conclude beyond reasonable doubt that the respondent was told sufficient to know that it was a preliminary breath test he was being required to undergo in all the circumstances. Such a conclusion would have involved impermissible speculation on the part of the Magistrate.

5. A refusal of a requirement under s53(1) of the Act might be proved by what the appellant characterised as 'anticipatory refusal', if the circumstances were such that it could be concluded that sufficient had already been said or done to communicate, in the circumstances, that it was that requirement which was about to be made. In relation to the insufficiency of the evidence of the necessary requirement indicated that this was not such a case, even though the Magistrate was satisfied that the informant had intended to require the respondent to undergo a preliminary breath test.

6. Section 49(1)(c) is a penal provision and courts should not take a 'near enough is good enough' approach to the application of such legislation, notwithstanding the community's interest in the promotion of the Act's stated objectives. The obligation remains upon the prosecution to prove the elements of the alleged offence. It is refusal of a requirement under s53(1) for a preliminary breath test which is a fundamental element of the s49(1)(c) offence.

7. Accordingly, the Magistrate did not err and the appeal was dismissed.

WILLIAMS J:
The appeal

1. On 17 July 2012, the respondent faced three charges in the Moorabbin Magistrates' Court. He was found guilty of driving whilst his authorisation was suspended and of failing to answer bail. He was convicted and sentenced to three months' imprisonment for the driving offence and convicted and fined $1000 for the bail breach. The learned Magistrate dismissed a third charge ('the charge') brought against him under s49(1)(c) of the *Road Safety Act* 1986 ('the Act').

2. Senior Constable Andrew John McGuinness was the informant and the appellant, on his behalf, now appeals against the dismissal of the charge.

Facts

3. There is no dispute about the facts upon which the Magistrate made her decision.

4. On 22 December 2007, at around 4.30am, the informant and Leading Senior Constable Jason Fox saw the respondent engaged in a verbal altercation with another man at the drive-through service window of the McDonald's restaurant at the corner of Warrigal Road and Centre Road in Bentleigh East. The respondent and the other man started to push one another. As the police officers approached, the respondent ran to the front of the restaurant car park, where he got into the driver's seat of a car and drove away.

5. The police officers remained at the restaurant. About ten minutes later, the respondent returned on foot. He started to argue with restaurant staff and the officers. When the informant asked the respondent his name, he replied that it was none of the informant's business. The conversation then continued as follows:

> INFORMANT: What are you doing here?
>
> RESPONDENT: None of your business.
>
> INFORMANT: You've been drinking?
>
> RESPONDENT: Yes. So what? I've got a full licence.
>
> INFORMANT: You've been driving your car, haven't you? I saw you before.
>
> RESPONDENT: So what? I have a full licence.
>
> INFORMANT: I want you to take a breath test. I don't think you should be driving.
> The respondent answered with expletives.

6. The informant and Senior Constable Fox observed the respondent to be agitated, argumentative and aggressive. He also appeared to the informant to be under the influence of alcohol, which the informant could smell on him. The informant did not have a preliminary breath-testing device in his hand when the conversation occurred. Shortly afterwards, Senior Constable Fox went to retrieve a preliminary breath-testing device from the police car, which was about five to ten metres away. Meanwhile, the respondent ran off through the car park and escaped. The informant and Senior Constable Fox pursued him.

The Act

7. The informant had power under s53(1) of the Act to require the respondent to undergo a preliminary breath test. He also had power under s55(2) to require him to undertake what is known as an 'evidentiary breath test'.

8. Section 49 of the Act created a number of relevant offences relating to refusal by drivers of police requirements that they undergo tests or do other things:

> **49 Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> (a) drives a motor vehicle or is in charge of a motor vehicle while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor vehicle; or
>
> (b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of

alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; or
(c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or
...

(e) refuses to comply with a requirement made under section 55(1), (2) , (2AA), (2A) or (9A);

9. Sections 53 and 55 contain the relevant police powers to require drivers to undergo tests:

53 Preliminary breath tests
(1) A member of the police force may at any time require—
(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; ...
to undergo a preliminary breath test by a prescribed device.

55 Breath analysis
(2) A member of the police force may require any person whom that member reasonably believes to have offended against section 49(1)(a) or (b) to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test in accordance with section 53) and for that purpose may further require the person to accompany a member of the police force to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and any further sample required to be furnished under subsection (2A) and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

10. The charge related to the respondent's alleged refusal to undergo a preliminary breath test: an offence under s49(1)(c).

The 'no-case' submission
Grounds
11. The respondent made the no-case submission on the grounds that the requirement that he undergo the breath test had not been put in imperative terms and that it did not refer to a 'preliminary' breath test, as opposed to any other type of breath test.

Reasons
12. The Magistrate upheld the submission on the second ground, stating her reasons in this way:

> The reason is that all that was said to the accused was, 'I want you to take a breath test.' It wasn't said to the accused, 'I want you to take a preliminary breath test.' And based on the observations of the informant and the corroborator and the conversation that the informant had with the accused where he indicated that he didn't think he should be driving and that he'd been drinking, it might have been the case that the – what was being asked of the accused was to provide a breath sample under section 55, subsection 2 of the Road Safety Act. Now I accept that that's not what the informant intended. In other words, what he had intended to do was to make the accused participate in a preliminary breath test, not an actual breath analysis under section 55, subsection 2. However, I can't be satisfied that the accused understood that.[1]

13. Citing *DPP v Alliston*,[2] for the proposition that a requirement under s53(1) must convey that the proposed test was a preliminary breath test conducted using a prescribed device in accordance with law, the learned Magistrate concluded that she was not satisfied that such a requirement had been made in all the circumstances. She went on to say:

> Now in this situation, where it was equally possible that what the informant may have intended the accused to do as being either undertake a preliminary breath test or to provide a breath sample under section 55, sub-section 2, I'm not satisfied that the conversation conveyed to the accused what was being required of him. I'm not of the view that I can infer that these days everyone knows – or, in particular, that the accused knew – that a preliminary breath test would be the likely test that was required as opposed to any other sort of breath test. In my view, what the accused – all that I be satisfied of at this stage is, as his Honour Justice Southwell said in *Rankin [v] O'Brien* was that the accused knew ... that it was wanted that he breathe into something, and that ... and that something would indicate whether he had more alcohol in him than the law permitted. So for those reasons, I uphold the no case submission in relation to charge 2 and I dismiss that charge.[3]

Questions of law in the appeal
14. The notice of appeal raised these questions of law:

> (1) Did the learned Magistrate err in law in failing to apply the relevant test as set out in *Sanzaro v County Court of Victoria & Sadler*[4] to the whole of the evidence?
>
> (2) Did the learned Magistrate err in law [in] failing to take into account relevant matters, namely the circumstances in which the request for a breath test was made?
>
> (3) Did the learned Magistrate err in law by taking an irrelevant matter into account, namely the respondent's possible subjective understanding contrary to the principles set out in *DPP v Serbest*[5]?

15. The appellant was granted leave to amend the grounds of appeal set out in the notice of appeal. They were re-stated as follows:

> (1) The learned Magistrate erred in failing to find that there was reasonably sufficient evidence to establish the 'requirement' under s49(1)(c) of the *Road Safety Act* 1986 in absence of the word 'preliminary' in the requirement made by the informant to the appellant, in all the circumstances of the case.
>
> (2) The learned Magistrate erred in finding that the words 'breath test' were insufficient to establish the 'requirement' under s49(1)(c) in the circumstances of the anticipatory refusal of the requirement by the appellant.

16. The appellant did not pursue a ground of appeal relating to the Magistrate's reference to the respondent's possible understanding of any requirement made.

The issue

17. The issue in relation to the 'no-case' determination is whether, on the evidence as it stood, the respondent could lawfully have been convicted.[6]

Ground 1

Reasonably sufficient evidence of the requirement for s49(1)(c)

18. The appellant argues that there was reasonably sufficient evidence of the making of the necessary requirement for the purposes of proof of an offence under s49(1)(c) of the Act, even though the informant did not require the respondent to undergo a 'preliminary breath test'. The learned Magistrate erred by failing to reach that conclusion.

19. It is common ground that the applicable test for determining whether there is sufficient evidence of the necessary requirement was stated by Nettle J (as his Honour then was) in *Sanzaro*:

> ...the test is whether the evidence as it stood was such as to prove that the plaintiff was given reasonably sufficient information to know what was required of him and why. Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient. And indeed it is to be hoped, and in most cases may be expected, that a requirement will be made in terms of a polite request. In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear.
> ...
>
> But once it is understood that the terms in which a requirement is stated need not follow any precise formula of words, and that all that is required is that the driver be told sufficient to know what it is that is being required of him or her, I see no relevant problem. Given that spoken words are an inherently imprecise means of communication, the effect of which depends as much upon the persons between whom and the context in which they are spoken as upon the words themselves, the question of whether what is spoken constitutes a requirement for the purposes of the section is necessarily a question of fact and degree. Such a question is to be decided upon the whole of the evidence, including such inferences, not inconsistent with the direct evidence, as it may be appropriate to draw.[7]

20. The appellant submits that the significance of the informant's failure to refer to a 'preliminary' breath test depends upon the extent to which it is necessary to include detail in the requirement under s53(1) of the Act in the circumstances. He maintains that the informant's words were reasonably sufficient to communicate to the respondent that it was a preliminary breath test under s53(1) which he was being required to undergo. This could reasonably have been inferred from the facts that it was 4.30am, that the respondent had run away, returned and

run away again, that he and the police officers were in the car park of a McDonald's restaurant with no police station in sight, that the previous conversation had occurred and that the public conception of a random breath test would be one involving a preliminary breath test.

21. The appellant argues that it is implicit in her Honour's reasons that, to sufficiently convey the necessary requirement under s53(1), the informant would have had to have said, 'I want you take a preliminary breath test'. The learned Magistrate erred in concluding that the more precise language was necessary. She failed to take all the contextual circumstances into account, in accordance with the correct approach described by Nettle J in *Sanzaro*.

22. I am not persuaded that the Magistrate erred as alleged.

23. First of all, I do not take her to have concluded that the word 'preliminary' must be used in every case when making a requirement under s53(1) of the Act.

24. Then, each case must be determined on its own facts. As senior counsel for the appellant submits, the evidence capable of establishing the offence may vary from case to case. No particular form of words must be used to make the requirement under s53(1), the refusal of which will found an offence under s49(1)(c). It may not be necessary to use the word 'preliminary' when referring to the required test. Factors such as whether or not the preliminary breath-testing device was presented to the driver and whether the driver had been stopped at a preliminary breath testing point will be relevant to the determination as to what would be reasonably sufficient to communicate the requirement in the context under consideration. Proof of the offence is not dependent upon proof of recitation of the words of the relevant provision.

25. I agree with the learned Magistrate and counsel for the respondent that what the informant said was ambiguous in all the circumstances. Notwithstanding the early hour, the location, the previous exchange between the informant and the respondent's flight, the informant might reasonably have been taken to have been requiring the respondent either to undergo a preliminary breath test under s53(1) or to provide a breath sample under s55(2), (at the police car or at a police station, without having undergone a preliminary test). There was no specific mention of a preliminary breath test or of the fact that Senior Constable Fox was going to the police car to obtain a preliminary breath testing device in order to administer one. Nor had the respondent been stopped at a preliminary breath testing station whilst driving. Someone in his position might reasonably have concluded that it was a potentially incriminating evidentiary sample of breath which was being required of him. I am not persuaded to the contrary by reference to authorities[8] in which community understanding of the breath-testing process has been mentioned.

26. In *Rankin v O'Brien*,[9] to which the parties refer, the issue was as to whether sufficient had been said to communicate a requirement that the respondent was to accompany the informant to a police station for the purposes of undergoing a breath test. Southwell J took into account all the circumstances and determined that it was not necessary for the precise words of the relevant section[10] to be spoken in order to found the conclusion that the respondent was guilty of refusing the requirement to accompany the informant. His Honour concluded that, in the circumstances, enough had been said to also communicate the purpose of the requirement, despite the informant's concession that it would have been possible for someone to think that the words 'breath test', which were used, referred to a preliminary breath test, as opposed to the provision of an evidentiary sample of breath.[11]

27. The appellant relies upon *Alliston*, where Osborn J (as his Honour then was) held that an offence under s49(1)(c) might be committed whether or not a prescribed breath testing device had been presented to the person to whom the requirement under s53(1) was made.[12] I note that there, however, his Honour also held that it was necessary that the purpose of the requirement be made clear, whether by reference to an identified prescribed preliminary breath testing device or otherwise.[13]

28. Concluding that there was insufficient evidence for a finding by the learned Magistrate that the necessary requirement had been made is not to give an 'artificially constricted' meaning to s53(1) or to insist upon a 'higher degree of formality' than necessary to establish the requirement to which it refers, contrary to the approach approved by Teague J in *Campbell v Saunders*.[14]

29. In the circumstances of this case, I am not satisfied that the learned Magistrate erred in determining, in effect, that it would not have been open on the evidence to conclude beyond reasonable doubt that the respondent was told sufficient to know that it was a preliminary breath test he was being required to undergo in all the circumstances. Indeed, in my view, such a conclusion would have involved impermissible speculation on her Honour's part.[15]

Ground 2 – 'Anticipatory refusal' of the requirement

30. The appellant argues, in the alternative, that, as the informant had neither the time nor the opportunity to fully 'spell out' any further details of the intended s53(1) requirement before the respondent ran off for a second time, this behaviour amounted to an 'anticipatory refusal' sufficient to establish an offence under s49(1)(c). The learned Magistrate erred in failing to find reasonably sufficient evidence to establish the anticipatory refusal of the requirement. The respondent contests this proposition, maintaining that there was insufficient evidence of the necessary requirement under s53(1).

31. In my view, a refusal of a requirement under s53(1) of the Act might be proved by what the appellant characterises as 'anticipatory refusal', if the circumstances were such that it could be concluded that sufficient had already been said or done to communicate, in the circumstances, that it was that requirement which was about to be made. My conclusion in relation to the insufficiency of the evidence of the necessary requirement indicates that I am not persuaded that this is such a case, even though the Magistrate was satisfied that the informant had intended to require the respondent to undergo a preliminary breath test.

32. The appellant cites the statutory purpose in s1(a) of the Act: 'to provide for safe, efficient and equitable road use', and argues that it should be furthered by a conclusion that there was evidence upon which the Magistrate could have found that there had been an 'anticipatory refusal' of a s53(1) requirement. I disagree.

33. Section 49(1)(c) is a penal provision and courts should not take a 'near enough is good enough' approach to the application of such legislation, notwithstanding the community's interest in the promotion of the Act's stated objectives.[16] The obligation remains upon the prosecution to prove the elements of the alleged offence.[17] I agree with the respondent that it is refusal of a requirement under s53(1) for a preliminary breath test which is a fundamental element of the s49(1)(c) offence.

34. The Magistrate did not err and the appeal should be dismissed.

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[1] Transcript of Proceedings, *McGuinness v Skafidiotis* (Moorabbin Justice Centre, Magistrate Carlin, 17 July 2012) 107-8 ('Transcript').
[2] (2006) VSC 330 ('*Alliston*'), [39] (Osborn J).
[3] Transcript, 108-9.
[4] [2004] VSC 48; (2004) 42 MVR 279 ('*Sanzaro*').
[5] [2012] VSC 35.
[6] *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, 658; [1955] ALR 671 (Dixon CJ, Webb, Fullagar , Kitto and Taylor JJ).
[7] *Sanzaro* [2004] VSC 48; [2004] 42 MVR 279, 283-5 [11], [13], citing *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67, 73; (1985) 2 MVR 503 (Southwell J), *DPP v Foster; DPP v Bajram* [1999] VSCA 73; [1999] 2 VR 643,656-7, [47] (Winneke P), 663 [73] (Ormiston JA).
[8] See *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67, 70 (Southwell J); *Alliston* [2006] VSC 330 [45]; (2006) 46 MVR 401 (Osborn J); *Uren v Neale* [2009] VSC 267 [124]-[125]; (2009) 53 MVR 57; (2009) 196 A Crim R 415 (J Forrest J).
[9] [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 ('*Rankin*').
[10] In that case, s80F(6)(b)(ii) of the *Motor Car Act* 1958, which was in relevantly similar terms to s55(2) of the Act.
[11] [1986] VicRp 7; [1986] VR 67, 72; (1985) 2 MVR 503.
[12] (2006) VSC 330, [38]; (2006) 46 MVR 401.
[13] Ibid [39]-[40].
[14] (1996) 23 MVR 515; (1996) 86 A Crim R 378, 385.
[15] See *Impagnatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416, 428 [30]; (2003) 39 MVR 486 (Eames JA (Callaway and Buchanan JJA agreeing)).
[16] [1986] VicRp 7; [1986] VR 67, 72; (1985) 2 MVR 503; this approach was endorsed by Nettle J in *Sanzaro* [2004] VSC 48; [2004] 42 MVR 279, 284 [13].
[17] *Impagnatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416, 422-3 [13]; (2003) 39 MVR 486 (Eames JA (Callaway and Buchanan JJA agreeing)).

APPEARANCES: For the appellant DPP: Dr SB McNicol SC, counsel. Mr C Hyland, Solicitor for Public Prosecutions. For the respondent Skafidiotis: Mr S Hardy, counsel. Koutsantoni & Associates, solicitors.
