

19/07; [2007] VSCA 44

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MAITLAND v SWINDEN

Maxwell P and Redlich JA

9 March 2007 — (2007) 48 MVR 27

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER FOUND DRIVING BY POLICE OFFICER – POLICE OFFICER STANDING IN THE MIDDLE OF THE ROAD HOLDING A TORCH – DRIVER REQUIRED TO UNDERGO PRELIMINARY BREATH TEST – NOT A PRELIMINARY TESTING STATION – POWER VALIDLY EXERCISED BY POLICE OFFICER – FINDING BY MAGISTRATE THAT CHARGE PROVED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986 SS49(1)(f), 53(1).

1. The four sub-paragraphs of sub-s (1) of s53 of the *Road Safety Act* 1986 ('Act') create separate sets of conditions in which a member of the police force may require a person (identified under the relevant sub-paragraph) to undergo a preliminary breath test. The first sub-paragraph entitles the police officer to make the requirement of "any person he or she finds driving a motor vehicle or in charge of a motor vehicle" to "undergo a preliminary breath test". Paragraph (b) empowers the police officer to make the requirement of "the driver of a motor vehicle that has been required to stop and remain stopped at a preliminary testing station under s54(3)."

2. Where a police officer standing in the middle of the road holding a torch found a person driving a motor vehicle and required that person to undergo a preliminary breath test, it was open to a magistrate to find that the officer had exercised his power under para (a) of s53(1) of the Act rather than under para (b) and to convict the person of an offence under s49(1)(f) of the Act.

Maitland v Swinden [2006] VSC 467; (2006) 46 MVR 507; MC40/06, approved.

3. Per Redlich JA: Evidence of compliance with s53 is not an essential element of the offence under s49(1)(f), nor need it be particularised in the charge. It is sufficient that there be evidence which enables the Court to be satisfied that there has been a lawful request pursuant to s53(1). So long as the prosecution adduces evidence which establishes that the requirement to furnish a sample of breath fell within one or more of the sub-paras (a) to (d) of s53(1), the prosecution will have established the necessary precondition to proof of an offence under s49(1)(f).

MAXWELL P:

1. This application for leave to appeal raises two related questions. The first is whether, in order to prove a charge under paragraph 49(1)(f) of the *Road Safety Act*, the prosecution must identify – not in the charge, but in its case before the Magistrate – under which paragraph of sub-s 53(1) the power to require the preliminary breath test was exercised, and then establish that the power was validly exercised pursuant to that paragraph. The second question is whether paragraphs 53(1)(a) and (b) have a mutually exclusive operation.

2. In my opinion, the application for leave should be refused. There is, in my respectful opinion, no reason to doubt the correctness of the decision arrived at by Hansen, J in dismissing the appeal from the Magistrate's decision convicting the applicant of an offence under 49(1)(f).

3. As Mr Billings properly conceded, while proof of an offence under s49(1)(f) requires the establishment of the fact that a motorist has been required to furnish a sample of breath for analysis under s53, the essential elements of the offence under that paragraph are prescribed by the section itself and do not, by direct or indirect reference, incorporate any other allegation of fact necessary to exist in order to create the offence.^[1]

4. The offence of which the applicant was convicted was in substance that, within three hours after driving a motor vehicle, he furnished a sample of breath for analysis by a breath analysing instrument under s55, the result of which analysis showed that he had greater than the prescribed concentration of alcohol in his breath.

5. The provisions of sub-s (1) of s53 are, in my opinion, unambiguously clear. The four sub-paragraphs create separate sets of conditions in which a member of the police force may require a person (identified under the relevant sub-paragraph) to undergo a preliminary breath test. The first sub-paragraph entitles the police officer to make the requirement of "any person he or she finds driving a motor vehicle or in charge of a motor vehicle" to "undergo a preliminary breath test". Paragraph (b) empowers the police officer to make the requirement of "the driver of a motor vehicle that has been required to stop and remain stopped at a preliminary testing station under s54(3)."

6. The uncontested evidence before the Magistrate was that the applicant was a person found driving a motor vehicle by a member of the police force. The police officer, on the evidence, was standing in the middle of the road holding a torch. Mr Billings submits that what was happening in substance was that there was an exercise of power under paragraph (b) of s53(1), not under paragraph (a) – that is, his client's vehicle had been required to stop and had remained stopped at a preliminary breath testing station – and the prosecution had not established that it was a station which complied with the requirements of s54.

7. There is, it would seem, some scope for overlap between paragraphs (a) and (b), in that a person whose vehicle is "required to stop and remain stopped at a preliminary testing station" may also be described as a person "found driving a motor vehicle". In my opinion, however, it was clearly open to the Magistrate to conclude that this was an exercise of power under paragraph (a) of s53(1) rather than under paragraph (b).

8. The learned Judge gave a very clear analysis of s53(1), in the following terms:

"Then the structure of s53(1) is to be observed. What it does is specify four situations in which a member of the police force may at any time require a person in the circumstances therein specified to undergo a preliminary breath test. In any case the power to require is attracted if any of the circumstances specified in paras (a) to (d) exist. That is a question of fact. It is immediately to be observed about para (a) that the only condition for its application is that the person is found driving a motor vehicle. There is no specification of the circumstances of that finding. It is thus open that the police officer making the finding was on foot, riding a bicycle, driving a vehicle or in some other form of conveyance or circumstance. It must be open that the police officer was standing on the roadway, even in or towards the centre of the road as was the informant in this case. Nor is the presence of other police officers or vehicles, or whatever also may be present at the scene, referred to as a fact relevant to the exercise of the power in para (a). In short, para (a) says nothing as to the circumstances in which a police officer may find a person driving and require a preliminary breath test. There is no reason to doubt, and every reason to accept, that Parliament intended the power in para (a) to be exercisable in the widest range of circumstances. Certainly, at least, for the purposes of the present case, there is no basis upon which para (a), having regard to the natural and ordinary meaning of its language and considered in the context of the Act as a whole, can be read down so as to exclude its operation in circumstances found by the Magistrate."

9. Mr Billings suggested that this application raised an important public policy issue, as to why provision was made (under (b)) for the requirement to be issued at a preliminary breath testing station if there was such a wide power under paragraph (a). In my opinion, no such public policy issue arises. The public policy which informs the drink-driving provisions has often been explained in this Court and elsewhere. In short, Parliament has enacted stringent provisions designed to prevent the public evil of drink-driving.

10. The only public policy issue which arises here is the undesirability of unmeritorious technical points being argued, in an endeavour to achieve an acquittal or somebody who was found driving a motor vehicle and was required to take a breath test which, so the Magistrate found, gave a reading over the prescribed limit.

11. I would dismiss the application.

REDLICH JA:

12. The appellant contends that for proof of an offence contrary to s49(1)(f) of the *Road Safety Act* the prosecution must establish the preliminary breath test was validly required pursuant to s53 of that Act and so must show under what sub-section of s53(1) the preliminary breath test was required. Reliance is placed by the applicant upon the judgment of Ormiston J, as he then was, in the *DPP v Webb*^[2] that such proof was an essential part of the prosecution case. His Honour

repeated those views in the *DPP v Foster*.^[3]

13. In the *DPP Reference No. 2 of 2001*,^[4] Charles JA, with whom Winneke P agreed, stated that the prosecution must prove in support of a charge under s49(1)(f) that a motorist has been required to furnish a sample of breath for analysis under and in accordance with s53. This was to be done by the leading of evidence which showed that the requirement that a sample of breath be furnished had been made in accordance with that section. Evidence of compliance with the section is not an essential element of the offence, nor need it be particularised in the charge. Mr Billings correctly conceded that that was so. Such proof is only a necessary precondition to proof of the relevant offence.

14. The appellant's outline of submission, relied upon before Hansen J and on this application, wrongly elevates the need for proof of compliance with s53 to an obligation resting upon the prosecution to identify, either in the charge or in the course of proceedings, which specific subsection of s53(1) it relies upon to establish that the requirement was lawfully made under s53(1). In my view, no such obligation exists. It is sufficient that there be evidence which enables the Court to be satisfied that there has been a lawful request pursuant to s53(1).

15. I see no error in the conclusion reached by Hansen J that it was open to the Magistrate to conclude that the informant was not conducting a preliminary breath testing station within the meaning of s53(1)(b) and that the requirement of the respondent that the appellant furnish sample of his breath was made pursuant to s53(1)(a), as he found the appellant driving his motor vehicle. So long as the prosecution adduces evidence which establishes that the requirement to furnish a sample of breath fell within one or more of sub-paragraphs (a) to (d) of s53(1), the prosecution will have established the necessary precondition to proof of an offence under s49(1)(f). Neither Hansen J's conclusion or the observations that his Honour made concerning s53 are, in my view, attended by any doubt.

16. I agree with the President that leave to appeal should be refused.

MAXWELL P:

17. There will be an order for costs. The costs of the application will be paid by the applicant.

^[1] *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55 at 64 [23]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.

^[2] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.

^[3] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.

^[4] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.

APPEARANCES: For the applicant Maitland: Mr PJ Billings and Mr PJ Berman, counsel. Macedon Ranges Law Group, solicitors. For the respondent Swinden: Mr D Trapnell, counsel. Office of Public Prosecutions.
