51/10; [2010] VSC 498

SUPREME COURT OF VICTORIA

DPP v PISCOPO

Kyrou J

25 October, 12 November 2010 — (2010) 201 A Crim R 429; (2010) 56 MVR 516

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO COMPLY WITH A REQUIREMENT TO ACCOMPANY A POLICE OFFICER TO A PLACE TO FURNISH A SAMPLE OF BREATH – NATURE OF REQUIREMENT – WHETHER A DRIVER MUST BE INFORMED THAT HE OR SHE IS REQUIRED TO ACCOMPANY A POLICE OFFICER TO A PLACE AND TO REMAIN THERE UNTIL A SAMPLE OF BREATH IS FURNISHED AND A CERTIFICATE IS GIVEN OR UNTIL THREE HOURS AFTER THE DRIVING, WHICHEVER IS SOONER – TEMPORAL LIMITATION NOT MENTIONED TO DRIVER – WHETHER ELEMENT OF OFFENCE – "REQUIRE" – NO CASE SUBMISSION UPHELD BY MAGISTRATE AND CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(1)(e), 55(1).

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES – HUMAN RIGHT TO LIBERTY AND SECURITY – WHETHER COMPLIANCE WITH A REQUIREMENT UNDER S55(1) OF THE *ROAD SAFETY ACT* 1986 (VIC) INVOLVES DETENTION OR DEPRIVATION OF LIBERTY – INTERPRETATION OF LEGISLATION IN A WAY THAT IS COMPATIBLE WITH HUMAN RIGHTS: *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006 (VIC) SS21(1), (2), (3), (4), 32.

P. was intercepted whilst driving a motor vehicle. A PBT was conducted which proved positive and the police officer asked P. to accompany him to a police station for the purpose of a breath test. The police officer did not inform P. of the period within which he would be required to remain at the police station. P. was charged with refusing a requirement under s55(1) of the *Road Safety Act* 1986 ('Act'). At the hearing, a 'no case' submission was made that the charge should be dismissed on the ground that the police officer had failed to establish all of the elements of the offence namely the temporal limitation. The Magistrate agreed and dismissed the charge. Upon appeal—

HELD: Appeal dismissed.

1. The issue for determination on this appeal was the meaning of the expression 'refuses to comply with a requirement made under section 55(1)' in s49(1)(e) of the Act. It was not concerned with the types of requirement 'under section 55' that are sufficient to support a charge under any other provision of the Act.

2. For the purposes of s49(1)(e), s55(1) sets out two, rather than three, requirements. The first requirement is to furnish a sample of breath. The second requirement is to accompany a police officer to a police station where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours have elapsed since the driving, whichever is sooner. The second requirement has both an 'accompany' component and a 'remain' component. These components, however, are not separate requirements; they are integral parts of a single composite requirement. This interpretation of s55(1) accords with the plain meaning of the words of the section.

3. The fact that the verb 'require' (when preceded by the auxiliary verb 'may') appears in s55(1) twice, rather than three times, clearly indicates that the section sets out only two requirements. Logically, the nature and scope of the two requirements must be governed by the words that follow each reference to the verb 'require'. If the Parliament had intended to set out three requirements in s55(1), one would expect it to have used the verb 'require' three times and to have separated the second and third requirements with the words 'may further require' in the same way that it has separated the first and second requirements. The fact that the Parliament did not do so reinforces the interpretation that arises from a plain reading of the section.

4. This interpretation of s49(1)(e) is consistent with the proposition that the Act contemplates that a motorist who is subject to a 'requirement made under s55(1)' is presented with the choice of compliance or refusal, with the penalty for refusal being the risk that he or she will be convicted of an offence under s49(1)(e). In conferring such a choice, the Parliament must be taken to have intended that the motorist would be placed in a position to exercise his or her rights in an informed manner. Plainly, a motorist who is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath without being told the maximum period for which he or she will be required to remain at the police station for that purpose would not be in a position to make an informed choice.

5. The nature of the second requirement that is set out in s55(1) should not be confused with the manner in which it may be communicated. The cases make it clear that the requirement need not take the form of a demand in imperative terms and that no particular verbal formula needs to be used; it is enough that the intent of the police officer to issue a requirement and the obligation of the motorist to comply with that requirement have been made clear. This means that the two components of the composite requirement can be communicated sequentially: a motorist can be required to accompany a police officer to a police station for the purpose of furnishing a sample of breath and, once he or she arrives there, he or she can be required to remain until a sample of breath is furnished and a certificate is given or until three hours have elapsed from the driving, whichever is sooner.

6. It follows that, where a motorist is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath, without more, the motorist would not commit an offence under s49(1)(e) if he or she refused to accompany the police officer. Likewise, where such a requirement is made, a motorist would not commit an offence under s49(1)(e) if, after accompanying the police officer to the police station, he or she refused to remain there for the purpose of furnishing a sample of breath. This is because a requirement that does not inform the motorist that he or she would be required to remain at the police station until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner, is not 'a requirement made under section 55(1)' within the meaning of s49(1)(e).

***Uren v Neale* [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415; MC 17/2009, followed;**

***DPP v Foster; DPP v Bajram* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 425; (1999) 29 MVR 365; MC1/1999, distinguished.**

7. In relation to s32 of the *Charter of Human Rights and Responsibilities Act* 2006, the interpretation of s55(1) of the Act is correct and that, so interpreted, s55(1) is compatible with the human right set out in s21(3) of the *Charter*. That interpretation requires that a motorist be informed of the temporal limitation in s55(1) and thereby ensures that any deprivation of liberty that is involved in complying with a requirement under s55(1) is in accordance with the procedures that are set out in that section. By being aware of the temporal limitation, a motorist can take steps to ensure that the deprivation of his or her liberty does not exceed the maximum period permitted by s55(1).

8. The submission that in the circumstances of the case the requirement that was communicated to P. was invalid because it was objectively unreasonable fails at the threshold. It cannot be the case that a requirement that is made under s55(1) of the Act will be invalid unless and until the police officer disabuses the individual of each and every irrational fear that he or she raises. In the present case, there was no rational basis for P. to be concerned that he would be locked up.

KYROU J:

Introduction and summary

1. This is an appeal under s92(1) of the *Magistrates' Court Act* 1989 (Vic) from a final order made on 13 July 2009 by Hardy M at the Sunshine Magistrates' Court. The appeal has been brought by the Director of Public Prosecutions ('DPP') on behalf of the informant, Senior Constable Christopher Barker.

2. Hardy M dismissed a charge laid against the respondent, Joseph Piscopo, under s49(1)(e) of the *Road Safety Act* 1986 (Vic) ('RS Act') of refusing to comply with a requirement made under s55(1) of the RS Act to accompany officer Barker to the Keilor Downs police station for the purpose of furnishing a sample of breath for analysis by a breath analysing instrument.

3. Hardy M dismissed the charge on the basis that the requirement that had been communicated to Mr Piscopo – namely, to accompany officer Barker to the police station for the purpose of a breath test – did not comply with s55(1) of the RS Act. His Honour held that, in order to comply with s55(1), the requirement had to inform Mr Piscopo that he would have to remain at the police station until he had furnished a sample of breath and had been given a certificate setting out the results of the analysis or until three hours after the driving of the relevant motor vehicle, whichever was sooner.

4. For the reasons that follow, I have concluded that Hardy M was correct in dismissing the charge under s49(1)(e) and that the appeal should be dismissed.

5. As this appeal raised issues that were similar to those in the appeal in *Director of Public Prosecutions (Vic) v Rukandin*,[1] I heard both appeals consecutively on the same day. These reasons for judgment overlap with the reasons for judgment in *Rukandin*.

Facts

6. The material facts were not in dispute and may be summarised briefly.

7. At about 7.37pm on 13 September 2008, officer Barker intercepted a vehicle which was driven by Mr Piscopo along Kings Road, Delahey. When officer Barker requested Mr Piscopo to produce his driver's licence, Mr Piscopo replied that he did not have one.

8. As officer Barker formed the opinion that Mr Piscopo had consumed alcohol, he conducted a preliminary breath test. The test result was positive. Officer Barker told Mr Piscopo that the test indicated the presence of alcohol in his breath and asked Mr Piscopo to 'accompany [him] back to the Keilor Downs Police Station for the purpose of a breath test'. Officer Barker did not inform Mr Piscopo of the period within which he would be required to remain at the police station.

9. In response to officer Barker's request, Mr Piscopo said, 'Nuh.' The following conversation then took place:[2]

> [Officer Barker:] The device indicated that you have alcohol in your breath. I asked you to come back for the purpose of a breath test, correct?
> [Mr Piscopo:] Yeah.
> [Officer Barker:] You said you don't want to come back for a breath test?
> [Mr Piscopo:] Yes, that [is] right.
> [Officer Barker:] Again as I said, I require you to come back but you don't want to do that. I'll inform you that you could face a longer licence loss by not coming back. Do you understand this?
> [Mr Piscopo:] Yeah. I am not coming back cause youse lock me up. Been there with that shit before, I know what youse do.
> [Officer Barker:] Well, I've never met you before. I don't know you, don't know your history. Again, are you prepared to come back for a breath test?
> [Mr Piscopo:] No, cause you're going to lock me up anyway.
> [Officer Barker:] What is your reason for driving whilst disqualified?
> [Mr Piscopo:] There is no reason.
> [Officer Barker:] What is your reason for refusing to accompany me for the purpose of a breath test?
> [Mr Piscopo:] Cause you're going to lock me up anyway.

10. Mr Piscopo was charged with two offences. The first charge was that of driving a motor vehicle on a highway while disqualified, contrary to s30(1) of the RS Act. The second charge was that of refusing a requirement under s55(1) of the RS Act to accompany a member of the police force to a police station for the purpose of furnishing a sample of breath, contrary to s49(1)(e) of the RS Act.

Decision of the Magistrates' Court

11. The charges were heard on 13 July 2009 before Hardy M at the Sunshine Magistrates' Court. Mr Piscopo pleaded guilty to the first charge and not guilty to the second charge.

12. The prosecution adduced evidence in relation to the second charge. At the close of the prosecution's case, Mr Walsh, who appeared for Mr Piscopo, made a 'no case to answer' submission. Hardy M accepted the submission and dismissed the second charge.

13. In essence, Hardy M held that, in accordance with *Uren v Neale*,[3] the informant had failed to establish all of the elements of the offence under s49(1)(e) of the RS Act because Mr Piscopo had not been informed that he would be required to remain at the Keilor Downs police station until he had furnished a sample of breath or until three hours after the driving, whichever was sooner.

14. Hardy M distinguished the cases of *DPP (Vic) v Foster and DPP (Vic) v Bajram*, which are reported together as *Director of Public Prosecutions (Vic) v Foster*.[4] His Honour did so on the basis that, in those cases, the motorists had accompanied the police to the relevant police station – notwithstanding that the police had not informed them of the period within which they would be required to remain there – and had furnished a sample of breath. As will be seen shortly, the concentration of alcohol in the breath of each motorist exceeded the prescribed concentration and each motorist was charged under s49(1)(f) of the RS Act rather than under than s49(1)(e).

15. Mr Piscopo was convicted in relation to the first charge.

Issues on the appeal

16. The DPP's notice of appeal sets out the following grounds of appeal:

> 1. The learned Magistrate [erred] in law in holding, in all the circumstances of the case, that it was a necessary element of a valid requirement under Section 55(1) [of the] *Road Safety Act 1986* for the defendant driver to accompany the informant to the Keilor Downs police station for a breath analysis test that the informant inform the defendant that he may be required to remain at the police station until he had furnished a sample of breath for analysis or until three hours had elapsed after the driving whichever was the sooner.
>
> 2. The Magistrate erred in law in dismissing the charge laid under Section 49(1)(e) [of the] *Road Safety Act* 1986 at the no-case stage.

17. The issue for determination on the appeal is the meaning of the expression 'refuses to comply with a requirement made under section 55(1)' in s49(1)(e) of the RS Act. This depends on which of two competing interpretations of s55(1) is correct.

18. The first interpretation was that a requirement that merely required a motorist to accompany a police officer to a police station for the purpose of furnishing a sample of breath was sufficient to support a charge under s49(1)(e) if the motorist refused to comply with it. This interpretation was advanced before me by Dr McNicol who appeared for the DPP.

19. The second interpretation was that, in order for a requirement under s55(1) to support a charge under s49(1)(e), it must not only require the motorist to accompany a police officer to a police station for the purpose of furnishing a sample of breath, but must also inform the motorist that he or she will be required to remain at the police station until a sample of breath has been furnished or until three hours after the driving, whichever was sooner. This interpretation was adopted by Hardy M and was pressed before me by Mr Walsh-Buckley, who appeared for Mr Piscopo.

Relevant statutory provisions

20. The relevant provisions of the RS Act are contained in Part 5, which is headed, 'Offences involving alcohol or other drugs'. The purposes of Part 5 are set out in s47, which provides:

> **47 Purposes of this Part**
> The purposes of this Part are to—
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
> (c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol; and
> (d) provide a simple and effective means of establishing the presence of a drug in the blood, urine or oral fluid of a driver.

21. Section 49(1) of the RS Act relevantly provides:

> **49 Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she— ...
> (e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A); or ...
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ...

22. Section 53(1) of the RS Act relevantly provides:

> **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; or ...
> to undergo a preliminary breath test by a prescribed device.

23. Section 55 of the RS Act relevantly provides:

> **55 Breath analysis**
> (1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—
> (a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; or
> (b) the person, in the opinion of the member ..., refuses or fails to carry out the test in the manner specified in section 53(3)—
> 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 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 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.
>
> **Example**
> A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath. ...
> (9A) The person who required a sample of breath under subsection (1), (2), (2AA) or (2A) from a person may require that person to allow a registered medical practitioner or an approved health professional nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> (a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or
> (b) the breath analysing instrument is incapable of measuring in grams per 210 litres of exhaled air the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever—
> and for that purpose may further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Key authorities

24. As stated at [13] and [14] above, Hardy M applied *Uren v Neale*[5] and distinguished *Foster*[6]. On the appeal, both Dr McNicol and Mr Walsh-Buckley relied on particular features of *Foster* in support of their respective interpretations of s55(1) of the RS Act. Different submissions were made by counsel in relation to *Uren v Neale*, which is not binding on me. Mr Walsh-Buckley submitted that I should follow *Uren v Neale*, while Dr McNicol submitted that I should not follow it.

25. In the light of the prominence of *Foster* and *Uren v Neale* before Hardy M and in counsel's submissions on the appeal, it is necessary for me to consider those decisions in detail.

Foster

26. As mentioned at [14], Foster dealt with two separate appeals by the DPP. One of the appeals related to a driver named Mr Foster and the other appeal related to a driver named Mr Bajram. The facts in both appeals were similar. Mr Foster and Mr Bajram underwent preliminary breath tests which indicated the presence of alcohol in their breath. Each of them subsequently complied with a requirement to accompany a police officer to a police station for the purpose of a breath test. Neither of them was informed that he would be required to remain at the police station for up to three hours after the driving of the relevant vehicle. At the police stations, Mr Foster and Mr Bajram furnished samples of breath which, according to the certificates issued under s55(4) of the RS Act, contained more than the prescribed concentration of alcohol. Mr Foster and Mr Bajram were charged with offences under s49(1)(f) of the RS Act.[7]

27. The magistrates who heard the charges dismissed them on the basis that neither Mr Foster nor Mr Bajram had a case to answer. The magistrates held that, in order to prove the commission of an offence under s49(1)(f), it was necessary for the informant to have required the person furnishing the breath sample to remain at the police station until the sample was furnished or for a period of up to three hours from the time of driving, whichever was sooner. Given that, in each case, a requirement in these terms had not been made, the magistrates found that a necessary element of the offences charged had not been proven.

28. In each case, the DPP appealed to the trial division of this Court. Both appeals were heard by Hampel J, who dismissed them. His Honour held that the requirement in s55(1) was a composite requirement to attend a police station and to remain there until the test was concluded and a certificate was given or for up to three hours after the driving. According to his Honour, in order for a motorist to be found guilty of an offence under s49(1)(f), a police officer must have required the motorist, under s55(1), not only to accompany him or her to a police station but also to remain there until the breath test was completed or three hours had elapsed from the driving, whichever was sooner.

29. In each case, the DPP appealed to the Court of Appeal from the decision of Hampel J. The critical issue in the appeals was the proper construction of the words 'furnishes a sample of breath for analysis by a breath analysis instrument under section 55(1)' in s49(1)(f).[8] The Court of Appeal held that, while proof of the making of a requirement to furnish a sample of breath for analysis was a necessary precondition for an offence under s49(1)(f), proof of the making of a requirement to accompany the police officer to the police station and to remain there until a sample of breath was furnished and a certificate was given or until three hours after the driving, whichever was sooner, was not a necessary precondition.

30. Winneke P delivered the leading judgment. Batt JA agreed with Winneke P, while Ormiston JA delivered a separate concurring judgment.

31. Winneke P said that, unaided by authority, he would have thought that

> the opening words of s49(1)(f) are fulfilled by proof that the police officer formed the opinion described in s55(1)(a) following the administration of a preliminary breath test (which is undoubtedly a precondition of the offence), and that, thereafter, the motorist furnished a sample of his breath for analysis by the approved instrument within three hours of driving.[9]

32. After referring to numerous authorities, however, his Honour said:

> I am prepared to accept, for present purposes, that the authorities ... oblige the court to find that the prosecutor must prove that the motorist has been 'required' to furnish a sample of breath for analysis as a necessary precondition of proof of the offence created by s49(1)(f). But, for the reasons already given, I do not accept that the 'requirement' must be made in terms of an imperative demand. Nor do I accept that any such requirement is to be made 'at the outset' in the sense that it must be made at the scene of the preliminary breath test. 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). ... Indeed, in my view, the words of s55(1) themselves imply that the requirement to 'furnish a sample of breath' is to be made when the instrument is presented to the motorist because it is stated that the relevant member of the police force 'may require the person to furnish a sample of breath for analysis ... *and for that purpose* may further require the person to accompany a member of the police force ... to a police station ... ' (emphasis added). In other words, the section itself makes it plain, as I see it, that the power to make the latter requirement is to facilitate the purpose for which the power to make the primary requirement is given, which can only sensibly be exercised when the motorist is confronted with the machine.
>
> It is apparent from the view which I have expressed in the preceding paragraph that I do not accept the submission made on behalf of the respondents, which found favour with the judge below, that proof of the offence created by s49(1)(f) requires the prosecution to establish that the informant has, following the administration of the preliminary breath test, imposed upon the motorist, in compendious and imperative terms, each of the 'requirements' to which s55(1) of the Act refers. In my view the authority of *Mills v Meeking* does not go that far. The offence is described in terms of 'furnish[ing] a sample of breath for analysis ... under section 55(1)'. Whether the words 'under section 55(1)' are to be interpreted as meaning 'in accordance with s55(1)' or as meaning 'pursuant to s55(1)', it would, I think, be stretching their meaning beyond their context to suggest that they require proof of the imposition, in compulsory form, of each of the requirements to which the subsection refers. Whilst I am content to accept that a 'requirement to furnish' is sufficiently interwoven with the actual furnishing that the requirement itself becomes an integral part of that 'furnishing', it does not seem to me that the subsidiary requirements are so closely interwoven with the furnishing of the breath sample to render proof of the fact that they have been made an essential ingredient of the offence. They are, as I see them, nothing more than the machinery by which the police officer is empowered, if the circumstances dictate, to bring the motorist to the instrument so that he or she can be required to furnish the sample of which the offence speaks.[10]

33. His Honour continued:

> It is, of course, eminently desirable that a motorist should be informed, as no doubt the motorist invariably will be, after the administration of the preliminary breath test, that he or she must accompany an officer to a police station to furnish a sample of breath for analysis. That, however, occurs in the exercise of the power invested in the officer. If the power is abused, the officer will risk losing the evidence which the exercise of the power is designed to obtain. But it is quite another thing to suggest that an exercise of the power to require a motorist to accompany the officer to a police station is an essential element of the offence of 'furnish[ing] a sample of breath for analysis ... under s55(1)'. After all, if 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' ... In any event, ... there will be occasions where the preliminary breath test itself is lawfully administered at the police station. In such a case it would be pointless for the officer to exercise the power of requiring the motorist to accompany an officer to the place where he already is. The fact that circumstances will exist where the exercise of the power will be unnecessary only serves, in my view, to demonstrate that proof of its exercise is not an essential precondition to the establishment of the offence described by s49(1)(f).[11]

34. His Honour concluded his analysis as follows:

> Not only are the requirements 'to accompany' and 'to remain' not elements of the offence created by s49(1)(f) but they are severable in the sense that each power need only be exercised where the circumstances dictate. ... [I]t would, in my view, be patently absurd for a police officer to require a motorist who had tested 'positive' to a preliminary breath test in the street, 'to remain at a police station' to which he had not yet agreed to go and at which he might never be. Furthermore, in my opinion, it is irrational to contemplate that a sample of breath furnished by a motorist at a police station ceases to be a sample furnished 'under section 55(1)' for want of a requirement that the motorist 'remain at the police station until the sample has been furnished'. If the motorist has been required or requested to accompany the police officer to the station for the purposes of furnishing a sample of breath, as the respondents here were, it is to be implied that he or she is to remain there until the sample has been furnished. Once it has been furnished the need to exercise any power to require the motorist to 'remain' has been spent. I agree with [counsel for the DPP] that the exercise of that power will only arise if and when the motorist exhibits a disinclination to remain at the station before the test is taken and before the three hours has elapsed. For my own part, I do not share his Honour's view that such an interpretation of the power creates difficulty.
>
> That is enough to dispose of these appeals. The failure to inform the respondents 'at the outset' that they were 'required' to remain at a police station until the sample of breath had been furnished or for three hours from the time of driving could not lead to the conclusion that the samples of breath furnished were not furnished 'under section 55(1)'.[12]

35. Although *Foster* dealt with an offence under s49(1)(f), rather than with an offence under s49(1)(e), Winneke P made some observations that suggest that the nature of the requirement that must be made under s55(1) to support a charge under s49(1)(e) will depend on the circumstances of each case. Those observations were as follows:

> The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to exercise them, let alone in the manner of a ritual incantation of the type which counsel for the respondents suggests. Rather, as I see it, they are powers which a police officer 'may' exercise as and when circumstances dictate. If the motorist refuses to accompany the police officer to a police station for the purposes of a breath test, the police officer may require him or her to do so; if he or she refuses to furnish a sample of breath into the instrument, then he or she may be required to do so; if he or she refuses to remain at the police station before the test has been administered, the police officer may require him or her to remain – at least until the relevant time has elapsed. If the motorist persists in the refusal, in the face of any such requirement, he or she is at risk of being charged with the offence under s49(1)(e), in which case proof of the relevant requirement will become an essential element of that offence.[13]

36. Ormiston JA held that the making of a requirement to furnish a sample of breath for analysis was a necessary precondition for a successful prosecution under s49(1)(f) of the RS Act.

[14] His Honour went on to say:

> On the other hand, however, there is nothing either in para (f) s49(1) or in s55(1) which would compel a conclusion that a requirement under the latter subsection must be expressed in precise or unvarying terms, so long as the intent of the police officer and the obligation of the person required have been made clear. The requirement, as the learned President has pointed out, need only be sufficient to ensure that the person furnishes such a sample. It would be unusual if some request were not made, but it is not unknown for persons anxious to clear their names to seek such an analysis. But most people understand the working of the system these days and it is obvious that the police will seek this analysis if the result of the preliminary test is unfavourable to the person tested, so that that person will be fully aware what is likely to be the next stage in the process. It seems to me to be of little consequence how the requirement is expressed or whether as a formal requirement it may be waived. In either case it will be assumed that what is being done is being done in accordance with the statutory procedure but the only basis upon which an analysis of a sample of breath may commence is upon satisfaction with the requirements of subs (1) of s55.
>
> Nevertheless the powers given to the police under that paragraph are permissive. They do not have to require a person to furnish a sample of breath nor do they have to require the person to go to the police station or to stay there for three hours if that is not desired or if that is not necessary. I see nothing in the section which would require a recitation on all occasions of all requirements.[15]

37. The above comments make it clear that, for the purposes of a charge under s49(1)(f), there is considerable flexibility in the manner in which the precondition that a sample of breath be furnished 'under section 55(1)' can be satisfied.

38. The impact of *Foster* on the issues in the present appeal will be discussed below.

Uren v Neale

39. *Uren v Neale*[16] concerned a motorist, Mr Uren, who was charged with various offences, including an offence under s49(1)(e) of the RS Act for refusing to remain at a police station to enable a sample of his blood to be taken. After Mr Uren had been intercepted driving a motor vehicle and had tested positive to a preliminary breath test, he complied with a requirement to accompany a police officer to a police station. At the police station, he was either unable or unwilling to furnish a sample of breath. Acting Sergeant Neale, the informant, required Mr Uren to remain at the police station to await the arrival of a medical practitioner who would take a sample of his blood, without informing him of the three-hour temporal limitation in s55(9A) of the RS Act.[17] Mr Uren refused to do so and left the police station.

40. Following his conviction of an offence under s49(1)(e) at the Frankston Magistrates' Court, Mr Uren appealed to the trial division of this Court. The appeal was heard by Forrest J. After considering various authorities, including *Foster*, his Honour upheld the appeal and quashed the conviction. His Honour's reasons were as follows:

> I turn now to charge four, the remain at the police station charge, and whether the words used by Ms Neale made it clear as to the obligation of Mr Uren of the terms of the requirement to remain at the police station. In my view, they did not. A common thread in the decisions in both *Foster* and *Sanzaro* was that in this day and age most members of the community understand the working of the breath analysis system and are aware of the manner in which breath tests are conducted, either in the form of a preliminary breath test or at what is described as an 'evidentiary' breath tes[t]: s55(2). … I think most members of the community are also aware of the further potential obligation to provide a blood sample whether at a hospital or police station. However, I doubt very much whether anyone, unless highly familiar with the provisions of the RSA, is aware … of the temporal requirements as to remaining at 'a place' for the taking of a blood sample. No doubt the sunset provision of 3 hours as a maximum period was inserted to ensure that what would otherwise be an unlawful detention was limited to a reasonable time. This maximum duration of the statutory requirement was not conveyed to Mr Uren.
>
> … It was incumbent upon the prosecution to prove at least in a basic sense that the terms of the requirement were communicated to Mr Uren: critical to this is that 3 hours 'after the driving' was the maximum period over … which he could be detained. … The request was made at approximately 1.15am at the Frankston Police Station. When the medical practitioner might arrive, if at all, was 'open ended' to use the magistrate's words, whereas the section was not. Mr Uren was entitled to know what was required of him. What he was not told was the most basic proposition required by the section, namely that he did not have to stay at the station once the 3 hour period after the subject driving

> had expired. He was not given reasonably sufficient information to know what was required of him – indeed, he could have been detained interminably on the basis of Constable Neale's requirement.
>
> ... To establish the offence, it was necessary to prove the requirement. The refusal can only become relevant provided that the requirement has been properly stated, at least so that the driver knows his or her basic obligations. This was not done and therefore an essential element of the offence was not made out.[18]

41. Forrest J's comments were made in the context of a charge under s49(1)(e) for failure to comply with a requirement made under s55(9A) that a motorist remain at a police station to enable a sample of blood to be taken. Apart from the fact that s55(9A) deals with the taking of a sample of blood and s55(1) deals with the furnishing of a sample of breath, the wording of both provisions is very similar. It will be noted that his Honour did not need to refer to Mr Uren's obligation to accompany officer Neale to the police station because Mr Uren had already done so.

42. The impact of *Uren v Neale* on the issues in the present appeal will be discussed below.

Meaning of 'a requirement made under section s55(1) [of the RS Act]'
Parties' submissions

43. Dr McNicol submitted that, on its proper construction, s55(1) of the RS Act authorised police officers to communicate three distinct requirements to motorists, each having a different temporal and practical operation. The first requirement was for a motorist to furnish a sample of breath for analysis by a breath analysing instrument. The second requirement was for the motorist to accompany the police officer to a police station for the purpose of furnishing a sample of breath. The third requirement was for the motorist to remain at the police station until he or she had furnished the sample of breath or until three hours after the driving, whichever was sooner.

44. Dr McNicol referred to the statements of Winneke P in *Foster* that are set out at [32] above in support of the proposition that the first of these requirements was the 'primary' requirement and that the second and third requirements facilitated this primary requirement. She said that Winneke P's statement that 'the requirements "to accompany" and "to remain" ... are severable'[19] recognised that the three requirements in s55(1) were distinct.

45. Dr McNicol submitted that the words 'may further require' in s55(1) made it clear that the second requirement to accompany a member of the police force to a police station was separate from the first requirement to furnish a sample of breath for analysis. It followed, so it was said, that a motorist who refused to comply with a requirement to accompany a police officer to a police station for the purpose of furnishing a sample of breath would commit an offence under s49(1)(e) irrespective of whether the police officer had communicated to the motorist that he or she would be required to remain at the police station until a sample of breath had been furnished or three hours had elapsed since the driving, whichever was sooner. This is because, according to Dr McNicol, at the time that the requirement to accompany is communicated, no obligation to remain could arise; such an obligation could only arise if and when the motorist accompanied the police officer to the police station.

46. Dr McNicol submitted that *Uren v Neale* was distinguishable because the motorist in that case had refused to comply with a requirement to remain, rather than with a requirement to accompany. She contended that Forrest J's statement that a person who complies with a requirement under s55(9A) is being detained was contrary to decisions of the Court of Appeal which have consistently held that such a person is not being detained.[20]

47. Mr Walsh-Buckley submitted that the expression, 'may further require the person to accompany a member of the police force ... and to remain ... until the person has furnished the sample of breath ... or until 3 hours after the driving, ... whichever is sooner' in s55(1) sets out a single requirement and that all its elements must be communicated to a motorist. He contended that a requirement to accompany without any reference to the obligation to remain or to the temporal limitation to which that obligation was subject would not be a valid requirement under s55(1) and that a failure to comply with such a requirement would not constitute an offence under s49(1)(e). Foster was distinguished, so it was said, because it dealt with an offence under s49(1)(f) of furnishing a sample of breath which contained more than the prescribed concentration of alcohol, rather than with an offence under s49(1)(e) of refusing to comply with a requirement made under s55(1).

48. Unsurprisingly, Mr Walsh-Buckley submitted that *Uren v Neale* was correctly decided and that, as the wording of s55(1) and s55(9A) was very similar, I should adopt the reasoning in that case.

Court's decision

49. This appeal is concerned solely with the question of whether Mr Piscopo has 'refuse[d] to comply with a requirement made under section 55(1) [of the RS Act]' within the meaning of s49(1)(e) of that Act. It is not concerned with the types of requirement 'under section 55' that are sufficient to support a charge under any other provision of the RS Act.

50. In my opinion, for the purposes of s49(1)(e), s55(1) sets out two, rather than three, requirements. The first requirement is to furnish a sample of breath. The second requirement is to accompany a police officer to a police station where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours have elapsed since the driving, whichever is sooner. The second requirement has both an 'accompany' component and a 'remain' component. These components, however, are not separate requirements; they are integral parts of a single composite requirement.

51. The interpretation of s55(1) that I have adopted accords with the plain meaning of the words of the section.

52. The verb 'require' (when preceded by the auxiliary verb 'may') is first used in s55(1) to describe the power of a police officer where one of the conditions set out in paragraph (a) or (b) is satisfied. Where either condition is satisfied, the police officer 'may require the person to furnish a sample of breath for analysis by a breath analysing instrument'. The verb 'require' is used secondly to describe the power of a police officer to give effect to the first requirement, namely, by requiring the person to accompany the police officer to a place or vehicle where the sample of breath is to be furnished and to remain there until the sample is furnished and a certificate is given or until three hours after the driving, whichever is sooner.

53. The fact that the verb 'require' (when preceded by the auxiliary verb 'may') appears in s55(1) twice, rather than three times, clearly indicates that the section sets out only two requirements. Logically, the nature and scope of the two requirements must be governed by the words that follow each reference to the verb 'require'. If the Parliament had intended to set out three requirements in s55(1), one would expect it to have used the verb 'require' three times and to have separated the second and third requirements with the words 'may further require' in the same way that it has separated the first and second requirements. The fact that the Parliament did not do so reinforces the interpretation that arises from a plain reading of the section.

54. The interpretation that I have adopted also accords with common sense. The end that is sought to be achieved by the two requirements set out in s55(1) is for a motorist to furnish a sample of breath that can be analysed to determine his or her concentration of alcohol. A requirement to accompany, on its own, cannot achieve this end because it would be spent once the motorist steps inside the police station. The act of stepping inside the police station, however, does not, of itself, result in the furnishing of a sample of breath. In order for a sample of breath to be furnished, the motorist must also remain at the police station for a period of time.

55. I have considered the purposes of Part 5 of the RS Act, which are set out at [20] above, and the Act as a whole. With respect, I agree with Winneke P's observation in *Foster* that the aim of Part 5 is to combat and reduce a recognised social evil: the driving of motor vehicles by persons who are affected by alcohol or other drugs.[21] I also agree with his Honour that that aim is sought to be achieved by the conferral of powers on police officers which necessarily affect the civil liberties of motorists. The purposes set out in s47, however, are given effect by the mechanisms that are set out in the RS Act, some of which contain limitations on police powers and safeguards to protect civil liberties. Those limitations and safeguards cannot be ignored.

56. In my opinion, the interpretation of s49(1)(e) that I have adopted is consistent with the purposes of Part 5 of the RS Act and with the Act as a whole.[22]

57. My interpretation of s49(1)(e) is consistent with the proposition that the RS Act contemplates

that a motorist who is subject to a 'requirement made under s55(1)' is presented with the choice of compliance or refusal, with the penalty for refusal being the risk that he or she will be convicted of an offence under s49(1)(e).[23] In conferring such a choice, the Parliament must be taken to have intended that the motorist would be placed in a position to exercise his or her rights in an informed manner. Plainly, a motorist who is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath without being told the maximum period for which he or she will be required to remain at the police station for that purpose would not be in a position to make an informed choice.

58. The nature of the second requirement that is set out in s55(1) should not be confused with the manner in which it may be communicated. The cases make it clear that the requirement need not take the form of a demand in imperative terms and that no particular verbal formula needs to be used; it is enough that the intent of the police officer to issue a requirement and the obligation of the motorist to comply with that requirement have been made clear.[24] This means that the two components of the composite requirement can be communicated sequentially: a motorist can be required to accompany a police officer to a police station for the purpose of furnishing a sample of breath and, once he or she arrives there, he or she can be required to remain until a sample of breath is furnished and a certificate is given or until three hours have elapsed from the driving, whichever is sooner.

59. Further, the nature of the second requirement should not be confused with the various ways in which a motorist may be held to have refused to comply with it. There are at least three ways in which a refusal may be established. First, the motorist may refuse to accompany a police officer to a police station. Second, the motorist may accompany a police officer to a police station, but may refuse to remain there after his or her arrival. Third, the motorist may accompany a police officer to a police station, remain there for a period and then depart prior to the expiration of three hours from the driving without furnishing a sample of breath.

60. It is important to note, however, that based on my interpretation of s55(1), irrespective of the nature of the act which is alleged to constitute a refusal to comply with a requirement under s55(1), the refusal will not constitute an offence under s49(1)(e) unless all the components of the requirement have been communicated to him or her.

61. Thus, if the motorist is accused of refusing to accompany a police officer, he or she would need to have been required to accompany the police officer to a police station for the purpose of furnishing a sample of breath and to remain there until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner. If the motorist, after accompanying a police officer to a police station for the purpose of furnishing a sample of breath, is accused of refusing to remain there for that purpose, he or she would need to have been required to remain at the police station until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner.

62. The above discussion about the different ways of communicating the second requirement and the different means of refusing to comply with that second requirement may explain why some cases loosely refer to a requirement to accompany and to a requirement to remain as if they are separate requirements under s55(1). As I have endeavoured to explain, they are components of a single composite requirement.

63. It follows that, where a motorist is required to accompany a police officer to a police station for the purpose of furnishing a sample of breath, without more, the motorist would not commit an offence under s49(1)(e) if he or she refused to accompany the police officer. Likewise, where such a requirement is made, a motorist would not commit an offence under s49(1)(e) if, after accompanying the police officer to the police station, he or she refused to remain there for the purpose of furnishing a sample of breath. This is because a requirement that does not inform the motorist that he or she would be required to remain at the police station until a sample of breath is furnished and a certificate is given or three hours have elapsed since the driving, whichever is sooner, is not 'a requirement made under section 55(1)' within the meaning of s49(1)(e).

64. My interpretation of the expression 'refuses to comply with a requirement made under section 55(1)' in s49(1)(e) is consistent with Forrest J's decision in *Uren v Neale*,[25] which also

concerned a charge under s49(1)(e). Although his Honour dealt with a refusal to comply with a requirement made under s55(9A), rather than under s55(1), the wording of those provisions is relevantly very similar. In both *Uren v Neale* and the present case, the police officers failed to inform the motorist of the temporal limitation in s55(1) and s55(9A), respectively. In my opinion, the fact that Mr Uren had accompanied officer Neale to the police station and had refused to remain there, whereas Mr Piscopo refused to accompany officer Barker to the police station, is not a sufficient basis for distinguishing *Uren v Neale*.

65. Although I am not bound to follow *Uren v Neale*, I should do so as a matter of judicial comity unless I am persuaded that it was wrongly decided. Far from being so persuaded, for the reasons I have given, I am of the opinion that *Uren v Neale* is correct. However, I respectfully disagree with Forrest J's statement that a motorist who complies with a requirement under s55(9A) is being detained. I will return to this issue below when I discuss the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ('*Charter*').

Does any authority require a different interpretation?

66. The critical issue that remains for me to consider is whether my interpretation of the words 'refuses to comply with a requirement made under section 55(1)' in s49(1)(e) of the RS Act is precluded by any authority and, in particular, by *Foster*.[26] It is to be noted that Forrest J in *Uren v Neale*[27] did not discuss *Foster* in any detail.

67. In my opinion, my interpretation of s49(1)(e) is not inconsistent with *Foster* and is not precluded by that decision. *Foster* dealt with the meaning of the words 'furnishes a sample of breath ... under section 55(1)' in s49(1)(f) in circumstances where a motorist had accompanied a police officer to a police station, had remained there and had furnished a sample of breath. By their very nature, those words require a review of the circumstances in which a sample of breath was furnished. They are to be contrasted with the words in s49(1)(e), which require a review of the nature of the requirement with which the motorist is said to have refused to comply.

68. The above distinction was recognised by Winneke P in *Foster*. His Honour said that, where a motorist refuses to comply with a requirement, 'he or she is at risk of being charged with an offence under s49(1)(e), in which case proof of the relevant requirement will become an essential element of that offence.'[28] The distinction was also recognised by Maxwell P and Nettle and Redlich JJA in their joint judgment in *Director of Public Prosecutions (Vic) v Foot*.[29] Their Honours rejected an argument that the making of a valid requirement to accompany was a necessary precondition of proof of the offence under s49(1)(f) of the RS Act.[30] After referring to Winneke P's decision in *Foster*,[31] their Honours concluded:

> The position is quite different when a charge is brought under s49(1)(e), as in *Mastwyk*, alleging a refusal by the driver to comply with a requirement to accompany. As the reasons in *Mastwyk* make clear, if no valid requirement was made it follows necessarily that there can be no question of non-compliance. There was nothing with which the driver was obliged to comply.[32]

69. The crux of the judgments of Winneke P and Ormiston JA in *Foster* is that, in determining whether a sample of breath was furnished 'under section 55(1)' within the meaning of s49(1)(f), the courts need to adopt a flexible and pragmatic approach, rather than a formulaic approach. This is because the furnishing of a sample of breath 'under section 55(1)' can be effected in a variety of ways. Compliance with a requirement which literally repeats the words of s55(1) is not necessary. Similarly, a sample of breath can be furnished 'under section 55(1)' following the making of sequential requirements; that is, by making a requirement to accompany and a subsequent requirement to remain.

70. By way of contrast, in relation to a charge under s49(1)(e), the key questions are whether 'a requirement [was] made under section 55(1)' and whether the motorist has refused to comply with it. The first question depends on the nature of the requirement that must be made, which, in turn, is governed by the language of s55(1), the purposes of Part 5 of the RS Act, and the context of s55(1) and the Act as a whole. As I have already demonstrated, these considerations lead inexorably to the conclusion set out at [50] above.

71. My interpretation of s49(1)(e) is consistent with the manner in which the requirement 'made under section 55(1)' was formulated by Buchanan JA in *Director of Public Prosecutions (Vic) v Greelish*[33] and by Ormiston JA in *Hrysikos v Mansfield*.[34]

72. Dr McNicol submitted that the judgments of Maxwell P and Nettle and Redlich JJA in *Mastwyk v Director of Public Prosecutions (Vic)*,[35] assume that the requirement to accompany is separate and distinct from the requirement to remain. As discussed below, however, the key issue in that case was whether a motorist who refused to comply with a requirement to accompany a police officer to a police station by a mode of travel that was objectively unreasonable could be found guilty of an offence under s49(1)(e).[36] The issue that I need to decide did not arise for consideration in *Mastwyk* and there is nothing in the judgments of their Honours which precludes my interpretation of the expression 'a requirement made under section 55(1)' in s49(1)(e).

73. Dr McNicol also relied on a statement made by O'Bryan AJA in *Greelish* that refusal to comply with a requirement 'to accompany a police constable to a police station or other place for the purpose of furnishing a sample of breath for analysis' will 'complete the elements of [a] charge [under s49(1)(e)]'.[37] I decline to adopt his Honour's statement for two reasons. First, the requirement that was made in that case recited fully the words of s55(1).[38] Second, the other members of the Court, Buchanan and Phillips JJA, did not adopt his Honour's statement.

74. At first blush, my interpretation of s49(1)(e) is inconsistent with the result in *Sanzaro*.[39] In that case, Mr Sanzaro complied with a requirement to accompany a police officer to a 'booze bus' for the purpose of a breath test. When Mr Sanzaro and the police officer arrived at the rear of the bus, the police officer asked Mr Sanzaro for his licence and said that, after he completed some checks, he would require Mr Sanzaro to accompany him on board the bus for the purpose of the breath test. It does not appear that Mr Sanzaro was informed of the temporal limitation in s55(1). Mr Sanzaro said that he understood and would go on board the bus with the police officer. After the police officer went inside the bus, however, Mr Sanzaro went home. Mr Sanzaro was convicted under s49(1)(e) for refusing to comply with a requirement under s55(1) to remain at the bus for the purpose of furnishing a sample of breath.

75. The matter came before Nettle J by way of an application for an order in the nature of *certiorari* to quash the conviction. The relevant ground of review, for present purposes, was that the police officer had not communicated to Mr Sanzaro a requirement under s55(1) that he remain at the bus. After reviewing the evidence, his Honour concluded that the ground of review had not been established because the words used by the police officer had left Mr Sanzaro in no doubt that he was required to remain at the bus.[40]

76. As the ground of review in *Sanzaro* did not raise for consideration the legal effect of a police officer's failure to refer to the temporal limitation in s55(1) on a charge laid under s49(1)(e), Nettle J did not consider that issue. Nothing that his Honour said, therefore, requires me to depart from the interpretation of s49(1)(e) that I have adopted.

77. It follows that Hardy M did not err in law in dismissing the second charge.

Charter

78. In his written submissions, Mr Walsh-Buckley relied on s32 of the *Charter* in support of his interpretation of s55(1) of the RS Act. Section 32(1) of the *Charter* provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

79. Mr Walsh-Buckley submitted that s32 of the *Charter* required that s55(1) of the RS Act be interpreted in a way that is compatible with the human right to liberty and security which is set out in s21 of the *Charter*. That section relevantly provides:

> **21 Right to liberty and security of person**
> (1) Every person has the right to liberty and security.
> (2) A person must not be subjected to arbitrary arrest or detention.
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.
> (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her. ...

80. At the hearing of the appeal, Dr McNicol submitted that the human rights set out in s21 of the *Charter* are not engaged by s55(1) of the RS Act because the latter section does not confer any powers of arrest or detention. She referred to *Hrysikos v Mansfield*[41] and *Mastwyk*,[42] in which the Court of Appeal held that a person who complies with a requirement under s55(1) to accompany a police officer to a police station and to remain there for the purpose of furnishing a sample of breath is neither under arrest nor being detained.

81. In response to Dr McNicol's submissions, Mr Walsh-Buckley appeared to concede that s21 of the *Charter* was not applicable. He did not, however, formally abandon reliance on the *Charter*.

82. As I have stated at [5] above, this appeal was heard on the same day as the appeal *Rukandin*,[43] in which Dr McNicol appeared for the DPP and Mr Hughan appeared with Mr Smith for Mr Rukandin. At the hearing of the appeal in *Rukandin*, Mr Hughan drew my attention to the decision of the Supreme Court of Canada in *R v Therens*.[44] In that case, Le Dain J, with whom the other members of the Court agreed on this point, said:

> In addition to the case of deprivation of liberty by physical constraint, there is ... a detention within s10 of the [*Canadian Charter of Rights and Freedoms*] when a police officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel.[45]

83. I am unable to accept the definition of detention that was adopted by the Supreme Court of Canada in relation to the Canadian *Charter of Rights and Freedoms*, as I am bound by the Court of Appeal authorities to which I have referred on the question of whether a person who complies with a requirement under s55(1) of the RS Act is being detained.

84. On the other hand, the Court of Appeal has accepted that compliance with a requirement under s55(1) involves a deprivation of liberty.

85. In *Hrysikos v Mansfield*,[46] Ormiston JA stated that, although a person who is the subject of a requirement under s55(1) is not under arrest and is subject only to a direction, 'there is a deprivation of liberty implicit in the whole of the relevant provision which derives from the fact that non-compliance has certain penal consequences if [that non-compliance] can be characterised as a refusal'.[47]

86. These observations were adopted by Nettle JA in *Mastwyk*.[48] His Honour said that s55(1) 'is limited to restricting the liberty of the subject to the extent that is necessary and reasonable.'[49] Redlich JA also recognised that a requirement made under s55(1) may, in some circumstances, be 'indistinguishable in substance from an arrest because of the manner in which it affects the driver's liberty.'[50]

87. It follows that s32 of the *Charter* is engaged by virtue of the human right that is set out in s21(3) of the *Charter*.

88. Applying the approach set out in *R v Momcilovic*[51] in relation to s32 of the *Charter*, I have concluded that the interpretation of s55(1) of the RS Act which I have adopted is correct and that, so interpreted, s55(1) is compatible with the human right set out in s21(3) of the *Charter*. That interpretation requires that a motorist be informed of the temporal limitation in s55(1) and thereby ensures that any deprivation of liberty that is involved in complying with a requirement under s55(1) is in accordance with the procedures that are set out in that section. By being aware of the temporal limitation, a motorist can take steps to ensure that the deprivation of his or her liberty does not exceed the maximum period permitted by s55(1).

Was the requirement in this case objectively unreasonable?

89. In addition to his primary submission about the interpretation of s55(1) of the RS Act, Mr Walsh-Buckley relied on *Mastwyk*[52] for an alternative submission that, in the circumstances of this case, the requirement that was communicated to Mr Piscopo was invalid because it was objectively unreasonable.

90. As I have held that the requirement that was communicated to Mr Piscopo was not 'made under section 55(1)' for the purposes of s49(1)(e) of the RS Act, it is not necessary for me to deal

with Mr Walsh-Buckley's alternative submission. However, as the alternative submission was canvassed at some length before me, I will briefly set out my reasons for rejecting it.

91. In *Mastwyk*, Nettle and Redlich JJA held that a motorist who does not comply with a requirement made under s55(1) to accompany a police officer because the proposed manner of compliance is objectively unreasonable is not guilty of an offence under s49(1)(e).[53] In *Foot*,[54] Maxwell P and Nettle and Redlich JJA, in a joint judgment, said that 'the decision of the majority (Nettle and Redlich JJA) [in *Mastwyk*] is that the mode of travel by which the driver is required to accompany the [police] officer must be objectively reasonable.'[55]

92. Mr Walsh-Buckley submitted that the requirement that Mr Piscopo accompany officer Barker to the Oakleigh police station was objectively unreasonable because officer Barker did not take any steps to disabuse Mr Piscopo of his fear that, if he complied with the requirement, he would be locked up.

93. Mr Walsh-Buckley contended that where a motorist responds to a requirement under s55(1) with concerns about the consequences of his or her compliance with the requirement, the requirement would be objectively unreasonable unless and until the police officer allayed the motorist's concerns. He said that, in the present case, in order for the requirement to become objectively reasonable, officer Barker needed to reassure Mr Piscopo that he would not be locked up if he accompanied officer Barker to the Oakleigh police station.

94. In response to a question from me, Mr Walsh-Buckley acknowledged that, if his submission were accepted, the nature of the reassuring statements that a police officer would need to make to a motorist to render the requirement objectively reasonable would expand or contract depending on the kinds of concerns that are raised by the motorist.

95. Mr Walsh-Buckley's submission fails at the threshold because the principle of objective unreasonableness that was adopted in *Mastwyk* is confined to the unreasonableness of the proposed manner of compliance with a requirement made under s55(1) of the RS Act.[56]

96. Even if the principle were not so confined, Mr Walsh-Buckley's submission must be rejected. In my opinion, it would be absurd to apply the requirement of objective unreasonableness in the manner suggested by Mr Walsh-Buckley. Intoxicated individuals who are intercepted by a police officer may raise all sorts of irrational fears. It cannot be the case that a requirement that is made under s55(1) will be invalid unless and until the police officer disabuses the individual of each and every irrational fear that he or she raises.

97. In this case, there was no rational basis for Mr Piscopo to be concerned that he would be locked up. Moreover, officer Barker could not properly give Mr Piscopo a commitment that, irrespective of what may transpire at the Oakleigh police station, Mr Piscopo would not be locked up.

Proposed order

98. As I have concluded that Hardy M did not err in law in dismissing the second charge, the appeal will be dismissed.

99. I will hear from the parties on the precise form of the order to be made by the Court and on the question of costs.

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[1] [2010] VSC 499 (12 November 2010) ('*Rukandin*').
[2] The dialogue that follows is set out in an affidavit of Adrian Castle of the Office of Public Prosecutions. All errors are original
[3] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[4] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365 ('*Foster*').
[5] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[6] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[7] Mr Foster and Mr Bajram were also charged with an offence under s49(1)(b) of the RS Act. As the charge under s49(1)(b) does not affect the legal issues, I will not refer to it.
[8] At the time that *Foster* was decided, s49(1)(f) referred to s55(1), whereas it now refers to s55. Nothing turns on this legislative change.

[9] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 652 [28]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[10] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 657 [48], [49]; (1999) 104 A Crim R 426; (1999) 29 MVR 365 (emphasis in original).
[11] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 657-8 [50]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[12] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 659-60 [56], [57]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[13] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[14] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 662 [71], 663-4 [74]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[15] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 664 [75], [76]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[16] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[17] Section 55(9A) of the RS Act is set out above at [23].
[18] [2009] VSC 267; (2009) 53 MVR 57, 80 [125]-[127] (citation omitted); (2009) 196 A Crim R 415.
[19] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 659 [56]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[20] See below [80].
[21] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 658-9 [53]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[22] Cf *Interpretation of Legislation Act* 1984 (Vic) s35(a).
[23] See *Mastwyk v DPP (Vic)* [2010] VSCA 111 (11 May 2010) [63], [81] ('*Mastwyk*').
[24] *Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279, 283-4 [11] ('*Sanzaro*').
[25] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[26] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[27] [2009] VSC 267; (2009) 53 MVR 57; (2009) 196 A Crim R 415.
[28] *Foster* [1999] VSCA 73; [1999] 2 VR 643, 652 [29]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[29] [2010] VSCA 112 (11 May 2010) ('*Foot*').
[30] *Foot* [2010] VSCA 112 (11 May 2010) [11], [12].
[31] [1999] VSCA 73; [1999] 2 VR 643, 657-8 [49], [50]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[32] *Foot* [2010] VSCA 112 (11 May 2010) [15].
[33] [2002] VSCA 49; (2002) 4 VR 220, 223 [12]; (2002) 128 A Crim R 144; (2002) 35 MVR 466 ('*Greelish*'). Phillips JA agreed with Buchanan JA. Cf O'Bryan AJA's reasons for judgment: at 225 [25], 226 [30].
[34] [2002] VSCA 175; (2002) 5 VR 485, 487 [2], 490 [9], 491 [12]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[35] [2010] VSCA 111 (11 May 2010).
[36] See below [91].
[37] [2002] VSCA 49; (2002) 4 VR 220, 226 [30]; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[38] The words that the informant had used in *Greelish* [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466 were set out by Buchanan JA at 221 [2] as follows:
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?
Similar words were used by the informant in *Hrysikos v Mansfield* (2002) 5 VR 485 at 490 [9]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[39] [2004] VSC 48; (2004) 42 MVR 279.
[40] *Sanzaro* [2004] VSC 48; (2004) 42 MVR 279, 284 [12].
[41] [2002] VSCA 175; (2002) 5 VR 485, 487 [2], 488 [5], 500-1 [51]; (2002) 135 A Crim R 179; (2002) 37 MVR 408
[42] [2010] VSCA 111 (11 May 2010) [50], [63]. See also *Foot* [2010] VSCA 112 (11 May 2010) [6].
[43] [2010] VSC 499 (12 November 2010).
[44] [1985] 1 SCR 613.
[45] *R v Therens* [1985] 1 SCR 613, 642.
[46] [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[47] [2002] VSCA 175; (2002) 5 VR 485, 488 [5]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[48] [2010] VSCA 111 (11 May 2010).
[49] *Mastwyk* [2010] VSCA 111 (11 May 2010) [50].
[50] *Mastwyk* [2010] VSCA 111 (11 May 2010) [64].
[51] [2010] VSCA 50 (17 March 2010) [35].
[52] [2010] VSCA 111 (11 May 2010) [38], [46], [51], [54], [74], [75].
[53] [2010] VSCA 111 (11 May 2010) [38], [46], [51], [54], [74], [75].
[54] [2010] VSCA 112 (11 May 2010).
[55] [2010] VSCA 112 (11 May 2010) [6].
[56] See above [91].

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