27/10; [2010] VSCA 112

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v FOOT

Maxwell P, Nettle and Redlich JJA

10 June 2009; 11 May 2010 — (2010) 200 A Crim R 558

MOTOR TRAFFIC – DRINK/DRIVING – ROAD SAFETY – BREATH TEST AND BLOOD ALCOHOL – BLOOD ALCOHOL CONTENT EXCEEDING 0.05% – DRIVER REQUIRED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR BREATH TEST – DRIVER AGREED TO TRAVEL IN REAR OF POLICE VAN – DRIVER SUBSEQUENTLY REQUESTED TO BE RELEASED – WHETHER FAILURE TO RELEASE CONSTITUTED DETENTION – WHETHER BREATH TEST EVIDENCE INADMISSIBLE IF 'REQUIREMENT TO ACCOMPANY' INVALID – *DPP v FOSTER* MC1/1999; [1999] VSCA 73; [1999] 2 VR 643 APPLIED – MATTER REMITTED FOR REHEARING: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1).

F. was intercepted whilst driving his motor vehicle and required by a police officer to accompany the member to a place where a sample of breath could be furnished. The means of transport offered to F. to enable him to comply with the 'requirement to accompany' was travel in the lockable rear compartment of a police divisional van. F. voluntarily entered the rear compartment of the police van and the rear door was then closed behind him. When F. saw the police officers arresting his companion, F. wanted to get out of the van but the officers did not hear his request. F. was then taken to a police station, where he furnished a sample of breath which disclosed a reading of 0.187 grams of alcohol in 210 litres of breath. He was charged with an offence under s49(1)(f) of the *Road Safety Act* ('Act') on the basis that he had more than the prescribed concentration of alcohol in his breath within three hours after he had been driving a motor vehicle. At the hearing, the Magistrate dismissed the charge on the basis that a precondition for conviction had not been satisfied namely, that F. was held under detention for a short period. The Magistrate found that the requirement to accompany was invalid and the charge necessarily failed. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrate for further hearing.

1. The conclusion arrived by the Magistrate was not reasonably open on the facts as found. The entry into the police vehicle having been voluntary, F.'s change of mind did not, by itself, convert his presence in the van into involuntary detention. There would have needed to be evidence, and an affirmative finding, that the police officers had refused to release F. upon his request. The Magistrate evidently accepted that the officers did not hear his request and, in the particular circumstances of this case, it follows that there was no refusal and no detention.

2. In relation to the finding by the Magistrate that as the 'requirement to accompany' purportedly made under s55(1) was invalid (because of what was said to have been the period of involuntary detention), the charge under s49(1)(f) must necessarily fail, the premise of the argument was that, by analogy with the decision of *DPP Reference No 2 of 2001*, MC13/2001; [2001] VSCA 114; (2001) 4 VR 55 proof of the making of a valid 'requirement to accompany' was a 'necessary precondition of proof' of the offence under s49(1)(f).

3. Proof of the offence created by s49(1)(f) of the Act does not require the prosecution to establish that the informant has imposed on the driver each of the requirements to which s55(1) refers. These requirements have not been made essential ingredients of the offence but are nothing more than the machinery by which the police officer is empowered to bring the driver to the breath analysing instrument so that a sample of breath can be furnished.

***DPP v Foster* MC1/1999; [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, applied.**

4. In the present case, the question of the possible exclusion of the evidence – should it arise – would fall to be determined in accordance with the applicable provisions of the *Evidence Act* 2008 (Vic) (ss135-138). The determination of that question would affect both the charge under s49(1)(f) and the charge under s49(1)(b) of the Act.

MAXWELL P, NETTLE and REDLICH JJA:

1. Earlier today, this Court handed down judgment in *Mastwyk v Director of Public Prosecutions*.[1] This case, too, concerns the *Road Safety Act* 1986 (Vic) (the 'RSA') and, in particular, the power conferred by s55(1) of that Act, which empowers any member of the police force to require a person

to provide a sample of breath for analysis. For that purpose, the officer '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 ...'.

2. That power was exercised in this case, as in *Mastwyk*. Here, as there, the means of transport offered to the driver, to enable him to comply with the 'requirement to accompany', was travel in the lockable rear compartment of a police divisional van. It would appear that Mr Foot voluntarily entered the rear compartment of the police van, and the rear door was then closed behind him. (What occurred subsequently is discussed below.)

3. He was then taken to a police station, where he furnished a sample of breath which disclosed a reading of 0.187 grams of alcohol in 210 litres of breath. Mr Foot was charged with an offence under s49(1)(f) of the RSA, on the basis that he had more than the prescribed concentration of alcohol in his breath within three hours after he had been driving a motor vehicle.

4. At the conclusion of evidence before the Magistrate, counsel for Mr Foot argued that the charge should be dismissed because 'a precondition for conviction' under s49(1)(f) had not been satisfied. The submission involved the following steps: Mr Foot had been confined against his will for a limited period; s55(1) of the RSA did not give police officers any power of arrest; accordingly, the sample of breath had not been furnished 'under section 55' as required by s49(1)(f) of the RSA. This submission was upheld by the Magistrate, who concluded that:

> For a short period ... [Mr Foot] ... was held under detention, and to that extent, a precondition of s49(1)(f) has not been complied with and the charges should be dismissed.

5. As occurred in relation to Ms Mastwyk, the Director of Public Prosecutions (the 'Director') appealed from that decision to the Trial Division of this Court under s92(1) of the *Magistrates' Court Act* 1989 (Vic). Once Ms Mastwyk had been granted leave to appeal to this Court, however, Byrne J ordered that the Director's appeal be referred to this Court for argument, to be heard together with the Mastwyk appeal.

6. The unanimous view of the Court in *Mastwyk* is that the power conferred by s55(1) (to require the driver to accompany the officer) does not authorise the arrest or detention of a driver. Moreover, the decision of the majority (Nettle and Redlich JJA) is that the mode of travel by which the driver is required to accompany the officer must be objectively reasonable. The present appeal falls to be disposed of accordingly.

Was there detention?

7. It appears to have been common ground before the Magistrate that Mr Foot voluntarily entered the rear of the police van. It follows, for the reasons given by Redlich JA in *Mastwyk*,[2] that he was neither under arrest nor in detention at that point. The argument for Mr Foot, however, was that the position changed when, upon observing the police officers arresting his companion, he wished to get out of the van.

8. According to the Magistrate's findings, Mr Foot

> was anxious to get out of the van to go to her assistance and he shouted and he banged on the side of the walls of the van. It may be that in the commotion the police officers did not hear him. But in my opinion, having placed him in a situation where he was confined, but not under arrest, they were under an obligation in the least to observe him to such an extent that if he requested to be released from the back of the divisional van, they could comply. This did not happen.

This was the basis for his Honour's conclusion that there was a 'short period' of detention.

9. With great respect, we do not consider that the conclusion arrived at was reasonably open on the facts as found. The entry into the police vehicle having been voluntary, Mr Foot's change of mind did not, by itself, convert his presence in the van into involuntary detention. There would have needed to be evidence, and an affirmative finding, that the police officers had refused to release Mr Foot upon his request. The learned Magistrate evidently accepted that the officers did not hear his request and, in the particular circumstances of this case, we consider it follows that there was no refusal and no detention.

10. On that basis, we would allow the Director's appeal, quash the Magistrate's decision dismissing the charge under s49(1)(f) and remit the matter for rehearing according to law. For that purpose, however, it is necessary for us to address another, and more fundamental, question which was the subject of argument on this appeal. It concerns the implications for a charge under s49(1)(f) of the 'requirement to accompany' under s55(1) being held to be invalid.

The charge under s49(1)(f)

11. As noted earlier, the Magistrate accepted the defence submission that, if the 'requirement to accompany' purportedly made under s55(1) was invalid (because of what was said to have been the period of involuntary detention), the charge under s49(1)(f) must necessarily fail. The premise of the argument was that, by analogy with the decision of this Court in *DPP Reference No 2 of 2001*,[3] proof of the making of a valid 'requirement to accompany' was a 'necessary precondition of proof' of the offence under s49(1)(f).

12. With respect, the defence argument was not well-founded and should have been rejected. As counsel for the Director argued on this appeal, a contention essentially to the same effect was rejected by this Court in *Director of Public Prosecutions v Foster*.[4] The leading judgment was given by Winneke P, with whom Ormiston and Batt JJA agreed.[5] The Court in Foster overruled a series of first instance decisions which had been said to establish that the requirement to accompany the police officer was 'an essential precondition in proof of the offence under s49(1)(f)'.[6] Winneke P said:

> I do not accept the submission made on behalf of the respondents … 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 … each of the "requirements" to which s55(1) of the Act refers. … Whilst I am content to accept that a "requirement to furnish" is sufficiently interwoven with the actual furnishing [of the sample of breath] that the requirement itself becomes an integral part of the "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.
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> 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 "furnishing a sample of breath for analysis … under s55(1)". … As the case of *Webb*[7] demonstrates, 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).[8]

13. As Winneke P concluded, if the power to require the motorist to accompany the officer is abused, there is a risk that the prosecution will be unable to use the evidence obtained (as the result of the subsequent furnishing of a breath sample). The risk to which his Honour was referring was, as counsel for the Director submitted, the risk that the Court would exclude the evidence of the breath sample in the exercise of its discretion, whether on public policy grounds[9] or on fairness grounds.[10]

14. In the present case, the question of the possible exclusion of the evidence – should it arise – would fall to be determined in accordance with the applicable provisions of the *Evidence Act* 2008 (Vic).[11] The determination of that question would affect both the charge under s49(1)(f) and the charge under s49(1)(b).

15. 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.

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[1] [2010] VSCA 111 ('*Mastwyk*').
[2] Ibid [82].
[3] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[4] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365 ('*Foster*').
[5] The concurrence of Ormiston JA was subject to certain qualifications which are not relevant to the present issue.
[6] *Foster* [1999] VSCA 73; [1999] 2 VR 643, [40]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[7] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.
[8] Ibid [49]–[50] (emphasis added).
[9] *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[10] *R v Swaffield and Pavic* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5.
[11] See ss135–138.

APPEARANCES: For the appellant DPP. Mr DA Trapnell SC with Mr CB Boyce, counsel. Mr C Hyland, Solicitor for Public prosecutions. For the respondent Foot: Mr S Gillespie-Jones with Mr DJ McSteen, counsel. AB Natoli, solicitors.
