28/04; [2004] VSC 444

SUPREME COURT OF VICTORIA

DPP v VAA

Williams J

20 August, 5 November 2004 — (2004) 42 MVR 511

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO UNDERGO PRELIMINARY BREATH TEST – CHARGE DISMISSED – FINDING BY MAGISTRATE THAT DEFENDANT NOT MADE AWARE OF THE CONSEQUENCES OF REFUSAL – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(c), (e), 53(1)(a).

Where a person is charged with an offence pursuant to s49(1)(c) fo the *Road Safety Act* 1986 namely, refusing to undergo a preliminary breath test, it is not necessary for the prosecution to prove beyond reasonable doubt that the defendant was made aware of the consequences of refusal.

WILLIAMS J:

1. This is an appeal by the Director of Public Prosecutions ("the Director") from a decision on 27 January 2004 of the Magistrates' Court at Dandenong constituted by Mr S Raleigh M dismissing a charge against Kapenata Vaa ("Mr Vaa") under s49(1)(c) of the *Road Safety Act* 1986 ("the Act").

The reasons

2. His Worship gave the following reasons for his decision to dismiss the charge ("the reasons"):

> "Obviously, while we've been having a break, I've been considering the matter at some length as well and reading cases. In one of the cases I read there was – a Magistrate had dismissed a matter such as this on the basis it was trifling and the Supreme Court clearly spelled out that these cases are not trifling matters and they are very serious and, mindful of that, I am very conscious of the consequences of a conviction of this offence upon the defendant. It is a charge that carries with it a mandatory 2 year loss of licence. I have to be satisfied of a number of issues and I have to be satisfied beyond reasonable doubt. Having heard the evidence of the parties, I am not satisfied beyond reasonable doubt that the requirement of having the defendant be conscious of the consequences of a refusal has been met. I am buoyed in my view in relation to this by the fact that when told by the police, he initially refused to produce his licence but, when it was clearly set out to him by the police and stipulated that he must, there was no argument by him and it's agreed that he did produce his licence. That gives weight to my concerns about his knowledge of the consequences of failure to comply and, because I am unable to be convinced beyond reasonable doubt of that thankfully which is the requirement in this country, I am not satisfied and the charge will be dismissed."

The questions of law

3. On 11 March 2004 Master Wheeler made orders formulating two questions of law raised by the appeal. The second question was deleted at the beginning of the hearing before me and an order was made by consent amending the remaining question. The amended question of law the subject of the appeal was:

> "Did the learned Magistrate err in holding that it was necessary in order to establish the commission of an offence pursuant to s49(1)(c) *Road Safety Act* 1986 for the prosecution to prove beyond reasonable doubt that the requirement of having the defendant be conscious of the consequences of the refusal be met?"

The Act

4. The Act relevantly provided:

> "49. Offences involving alcohol or other drugs (1) A person is guilty of an offence if he or she— ...
> (c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; ...
> (e) refuses to comply with a requirement made under s55(1), (2), (2A) or (9A);

...

53. Preliminary breath tests

(1) A member of the police force may at any time require—

(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; ... to undergo a preliminary breath test by a prescribed device.

The parties' contentions

5. It was common ground that it was not an element of an offence under s49(1)(c) of the Act that a person required to undergo a breath test under s53 of the Act be informed or aware of the consequences of refusing to do so.

The Director

6. Counsel for the Director submitted that the Magistrate had erred by deciding that it was an element or precondition of an offence under s49(1)(c) of the Act that the person required to undergo a preliminary breath test by a police officer under s53 be aware of the consequences of a refusal to do so. He further contended that it was not a defence to a charge under s49(1)(c) that the person was unaware of the consequences of refusal. He relied upon the proposition that ignorance of the law is not an excuse, citing the Court of Appeal decision in *R v Reid*[1] which related to the interpretation of the express statutory exception to liability of "reasonable excuse" in equivalent English legislation.

7. Counsel for the Director also referred to the possibility that the Court might conclude that, whilst the Magistrate had erred in relation to the elements of the offence, he was right to dismiss the charge because there was no evidence of the other essential elements of the offence.

Mr Vaa

8. Essentially, senior counsel for Mr Vaa submitted that the Magistrate had not held that it was a separate element of the offence that Mr Vaa understood the consequences of a refusal to comply. She argued that his Worship had held no more than that the prosecution had failed to prove the elements of the offence of the making of a requirement that he undergo a breath test and the refusal by Mr Vaa to comply with the requirement. She contended that the Magistrate had found from the totality of the circumstances that the refusal, which was the nub of the offence, had not been proved.

9. Senior counsel submitted that, in construing the reasons, the Court should follow the approach prescribed by Neaves, French and Cooper JJ in *Collector of Customs v Pozzolanic Enterprises Pty Ltd*[2] in relation to the review of decisions of the Commonwealth Administrative Appeals Tribunal when they said:

> "As the Full Court said in *Repatriation Commission v Thompson* (1988) 9 AAR 199 at 204: '... the nature of the task of this Court is clear. It is to leave to the Tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law.' This translates to a practical as well as principled restraint. The Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts: *Lennell v Repatriation Commission* (1982) 4 ALN N54; [1982] FCA 7 (Northrop and Sheppard JJ): *Freeman v Defence Force Retirement and Death Benefits Authority* (1985) 5 AAR 156 at 164; (1985) 8 ALN N97 (Sheppard J); *Repatriation Commission v Bushell* [1991] FCA 185; (1991) 13 AAR 176 at 183; (1991) 23 ALD 13 (Morling and Neaves JJ). The reasons for the decision under review are not to be construed minutely and finally with an eye keenly attuned to the perception of error: *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707 at 708; 20 ATR 108; (1988) 88 ATC 5,029 (Lockhart J)."[3]

10. As to the form of the requirement under s49(1)(c), senior counsel relied upon what was said by Nettle J in *Sanzaro v County Court of Victoria*[4] when describing the necessary "requirement" under s49(1)(e):

> "... it is not necessary to use a particular form of words in order to constitute a valid requirement ... . As the judge rightly said, the test is whether the evidence as it stood was such as to prove that the plaintiff was given reasonably sufficient information to know what was required of him and why. (*Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67 at 73; (1985) 2 MVR 503 per Southwell J) Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient. (*DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at [47]; (1999) 104 A Crim R 426; (1999) 29 MVR 365) And indeed

> it is to be hoped, and in most cases may be expected, that a requirement will be made in terms of the polite request cf. (*DPP v Blyth* (1992) 16 MVR 159 at 161.37) In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear. (*DPP v Foster*, *ibid* at [73]).”

11. Senior counsel argued that the necessary refusal under s49(1)(c) would not be established unless the evidence proved that Mr Vaa had been informed of and understood the obligation to comply with a requirement to take the test. She submitted that the evidence as a whole disclosed that Mr Vaa, a man whose first language was not English, did not understand what was required of him and that the Magistrate's finding should simply be construed as one that he did not understand that he was obliged to take the test. She went further and submitted that the conclusion that he was aware that he was obliged to undergo the test was not open on the evidence to which she referred.

12. Senior counsel for Mr Vaa noted the evidence that it was police practice to use a particular form of words advising of the consequences of a refusal to take a breath test. Although in their written submissions, counsel for Mr Vaa had argued that it was common ground that police routinely informed drivers of the obligation to take the test by advising of the consequences of refusal, senior counsel said that the evidence established that there was a three stage process involved, commencing with a request. After the refusal of the request, the “magic formula,” setting out the consequences of refusal, was enunciated, followed by a further question as to whether the driver still refused and, ultimately, by the laying of a charge. Senior counsel referred to the evidence to the effect that the informant and the corroborating police officer thought that they were obliged to advise Mr Vaa of the consequences of refusal, before being in a position to charge him with an offence under s49(1)(c) of the Act. She also pointed out that Mr Vaa's counsel had questioned police on the basis that the refusal would not constitute an offence, unless its consequences were explained. She submitted that, if the parties had conducted the case before the Magistrate on such a basis, it was unsurprising that his Worship had expressed himself as he had. She argued that he had made a finding of fact that the police had not “required” Mr Vaa to take the test. She went on to submit that the Magistrate's finding was no more than an infelicitously phrased statement of the conclusion that Mr Vaa had not been told of his obligation under the Act.

13. Senior counsel relied upon the Court of Appeal's decision in *Hrysikos v Mansfield*[5] as authority for the proposition that the Magistrate had been entitled and, indeed, obliged to consider the totality of the circumstances, in order to determine whether Mr Vaa had had the necessary mental intent to constitute the requisite refusal for the proof of the offence charged. She contended that it was after taking into account the totality of the circumstances that his Worship came to the conclusion that Mr Vaa did not understand the obligation of compliance and did not have the necessary mental element to have refused within the meaning of the subsection.

The evidence before the Magistrate

14. Counsel for each party relied upon a number of passages from the transcript of the evidence in the Magistrate's Court in support of their contentions. I have taken all their submissions into account but will specifically refer only to some of the relevant passages.

15. In his examination in chief, Senior Constable Polson, the informant, gave the following description of his conversation with Mr Vaa after police had stopped their vehicle having noted what they thought was a gesture made by Mr Vaa who was standing near the bus he had been driving:

> “Senior Constable Polson: To the best of my memory I asked him if – if he had – what the problem was and he said there was no problem and what had he done wrong and I asked him if he was the driver of the bus and he said, 'Yes.' I asked him - I asked him if he had his driver's licence on him and he said, 'No. What have I done wrong?' and I said to him, 'Are you refusing to give me your driver's licence?' and he said, 'No,' and then he produced his driver's licence to me.”

16. He was asked about what he did after the conversation and the examination continued:

> “Senior Constable Polson: After that I went back to the divisional van and obtained a preliminary breath testing device and as I was walking over to him I said - when I got to him I – I told him that it was my belief that he was in charge of a motor vehicle and that I required him to undergo a preliminary breath test.

> Prosecutor: What, if anything, did he reply?
> Senior Constable Polson: He said, 'No. What have I done wrong?' and I said to him, 'If - if you refuse to undergo the preliminary breath test you may be charged with that offence and if you are found guilty, you may be fined or imprisoned and you can lose your licence for a minimum of 2 years.' And he – I think he said, 'No, I'm not doing it,' and I said to him 'What's your reason for refusing the preliminary breath test?' and he didn't answer, he just walked away and got back onto the bus."

17. Reference was made by Senior Constable Polson to Mr Vaa having mentioned that he was taking a break. The informant was asked when the break had been mentioned and he responded:

> "Senior Constable Polson: I think it was immediately after I asked him if he was the driver of the bus. Actually, it was when I- I think it was when I gave him the demand for the PBT and he said, 'No, I'm not doing it. I'm on my break.'"

18. Senior Constable Polson told the court that he had asked Mr Vaa his reason for refusing a preliminary breath test. His evidence was that Mr Vaa had not answered and had walked away and got back onto the bus.

19. Under cross-examination by counsel for the respondent, Senior Constable Polson agreed that, after he had obtained the breath testing device and had requested Mr Vaa to undergo a preliminary breath test, Mr Vaa had indicated that he was not going to take the test. He then disagreed with the proposition that, faced with Mr Vaa's "disinclination to provide that breath test," he had immediately indicated that he was going to charge him with an offence. Despite a challenge to his evidence that he had explained the consequences of refusal, he maintained that he had done so after Mr Vaa had "refused and indicated that he wasn't going to undergo a breath test." It was then put to Senior Constable Polson by counsel for Mr Vaa that he was required to explain the consequences of refusal. He agreed. The cross-examination continued as follows:

> "Mr Dann: For the request to be valid and for the refusal to be an effective refusal you need to have explained the consequences of the refusal to the motorist, don't you?
>
> Senior Constable Polson: Yes, I do and I did."

20. In re-examination the informant was asked how he knew exactly what he said or did not say to Mr Vaa. He replied:

> "Senior Constable Polson: I say the same thing all the time if somebody refuses having a preliminary breath test I worked at the Traffic Alcohol Section for a number of weeks and I'm also a breath test operator and well aware of what my obligations are to give that requirement and let them know that information."

21. The corroborating officer, Senior Constable Considine, gave evidence as to the exchanges between the informant and Mr Vaa in relation to the production of his driver's licence and the taking of the test. In examination in chief he said that the informant had requested Mr Vaa's driver's licence and the examination continued as follows:

> "Prosecutor: And what occurred after that?
>
> Senior Constable Considine: The defendant said, 'I've done nothing wrong.' He refused to produce his driver's licence and Senior Constable Polson told him that he was required to do so by law, so he produced a Victorian driver's licence in his name.
>
> Prosecutor: And after that driver's licence was produced what did you and Senior Constable Polson do?
>
> Senior Constable Considine: I recorded the - the driver's licence details in my note book. Senior Constable Polson had a further conversation with him and asked him to undergo a preliminary breath test.
>
> Prosecutor: Can you recall the conversation that Senior Constable Polson had with the defendant?
>
> Senior Constable Considine: Well, Senior Constable Polson asked him whether he was the driver of the bus and the defendant said yes, that he was and Senior Constable Polson asked him who he worked for and he said words to the effect of, 'you work it out.' Senior Constable Polson said 'I believe that you're in charge of this bus and I require you to undergo a preliminary breath test.' The

defendant said, 'I'm not doing it. I'm on my break.' Senior Constable Polson said that, 'if you refuse to undergo the preliminary breath test and you are found guilty of that offence you may be fined or imprisoned or lose your licence for up to 2 years.' The defendant said, 'I'm not doing it.'"

22. Senior Constable Considine was cross-examined by counsel for Mr Vaa who referred to his instructions as follows:

> "Mr Dann: But that- what I suggest to you occurs at the time of the request for the breath test is this; when the request was made Mr Vaa said to him, `No, I'm not going to do that.' What do you say about that? I'm putting to you the actual words that I'm instructed were said. What do you say about that? Senior Constable Considine: When the request was made for the preliminary breath test? Mr Dann: Yes. Senior Constable Considine: He said, 'I'm not doing it. I'm on my break'."

23. Counsel for Mr Vaa also cross-examined the corroborator with apparent reference to the elements of an offence under s49(1)(c):

> "Mr Dann: Now you understand that for someone to be asked to undergo a preliminary breath test there had to be a request made. Is that correct?
>
> Senior Constable Considine: That's correct.
>
> Mr Dann: As part of that request certain information has to be given to the motorist or alleged motorist. Is that correct?
>
> Senior Constable Considine: The motorist needs to be told that they are required to undergo a preliminary breath test.
>
> Mr Dann: Yeah. Yeah, go on. ... Mr Dann: You see, you understand, don't you, for- for a person to be charged with refusing a breath test and for the refusal to be an effective refusal, there has to be an explanation of the consequences of the refusal. You understand that, don't you?
>
> Senior Constable Considine: I - I understand that. It was explained.
>
> Mr Dann: So it would be pointless proceeding with a prosecution for an offence of refusing a breath test if that explanation hadn't been given to the motorist. Do you agree with that?
>
> Senior Constable Considine: Correct."

24. Mr Vaa gave the following account of events in the course of his examination in chief:

> "Kapenata Vaa: And then Simon Polson went inside the bus and he looked inside the bus inside near the dashboard part and he look at- look around inside bus. Then he came back, he went to the van and he brought the- the- the plastic equipment with him and then he asked me, `I'm going to let you do the - the breath test', and then I said, 'No, I'm not gonna do that.' That's what I said. And then he said, 'I'm gonna charge you now for refusing,' and what he said - before he finish his question I said, 'that's rubbish,' and, 'Please hurry. I have to go.' That's what I said. I was talking to the other officer who was writing my - my details at the time. I went inside the bus, I start the bus and set my destination.
>
> Mr Dann: Alright. Now, before he indicated - before he indicated that he was going to charge you for refusing a breath test had Mr Polson ... had he explained to you what would happen or what could happen to you if you did refuse to take part in the preliminary breath test.
>
> Kapenata Vaa: No he did not. He did not explain it to me. He did not tell me anything as I said, before - before he say to me, 'I will now charge you for refusing to' - before he finish his sentence I just said, 'That's rubbish,' and then I ... said, 'Please hurry up. I have to go.' And that's all I said. He did not."

25. Under cross-examination Mr Vaa agreed that police had said to him that he was required to undergo a breath test. He said he thought that it was strange that he was asked the question. He explained his view of the strangeness of the request:

> "Kapenata Vaa: Because it was early in the morning and I thought nobody in his right mind drive the bus."
> He also said: "Kapenata Vaa: I thought it doesn't make any sense to ask the question in the morning ... ... just get up in the morning and go to work. Nobody gets drunk and goes to work and drives a bus." ...

26. Mr Vaa went on to say that he would have taken the breath test if he had been told that if he did not undergo the test he might be charged and might lose his licence for two years. He subsequently confirmed his evidence that he had responded to the police request by saying: "No, I'm not gonna do that". Asked why he had given that reply, he explained:

> "Kapenata Vaa: Because I wasn't know (sic) the consequences and when the police asked I thought that the police was sort of just trying to establish their authority like that, 'I can you know we are police,' and I guess that's how I ... the police because the way they stand facing me was very much like treating me as any - as somebody criminal like where I was not expecting of that (sic), so I guess that's why. In my mind the police was not sincere, not genuine. They asked ... just wanted to get me - to get above me because they are police officers. Prosecutor: By asking you for a preliminary breath test? Kapenata Vaa: That's right."

27. Mr Vaa contended that he only became aware that the penalty for refusing a breath test might involve two years' loss of licence when that was explained to him subsequently by his employer.

28. Counsel for the respondent had addressed the Magistrate. He made submissions to the effect that the prosecution had failed to establish the elements of the offence and that it had failed to prove that the preliminary breath test had been performed by a prescribed device which had been checked. He went on to say:

> "Mr Dann: ... So I maintain the submission but obviously - obviously have a secondary submission is (sic) that for the refusal - and this is -this is really what the case in terms factually - was - which Your Worship may not have appreciated - for the refusal to be effective, there has to be communicated to the motorist the consequences of a - of a refusal to undergo the test and that's a matter factually for Your Worship to consider, given the varying evidence."

The evidence not accepted by the Magistrate

29. The evidence which would appear from the reasons not to have been accepted by his Worship was that from both the informant and the corroborator that, after Mr Vaa had refused to comply with the informant's request that he undergo a breath test, the informant had made customary statements explaining the consequences of non-compliance with the request. It is not clear whether the Magistrate accepted the balance of the police evidence, although it was arguably consistent with that given by Mr Vaa in respect of an initial request and refusal to undergo the test.

Conclusions in relation to the reasons

30. The Magistrate made no express findings as to the proof of the requirement to undergo a breath test or refusal necessary to establish the commission of an offence under s49(1)(c) of the Act.

31. I am not persuaded by the arguments of senior counsel for Mr Vaa that the reasons should be construed as no more than findings that, in all the circumstances (such as those related to Mr Vaa's English language skills), the elements of the offence had not been proven.

32. The Magistrate rather appears, in my view, to have considered that it was necessary to prove that Mr Vaa was made aware of the consequences of refusal, in order either to prove the requisite requirement or refusal necessary for the establishment of the offence or to prove a separate element of the offence that he be made so aware. In either case, in my view, his Worship would have erred in law.

33. The question should be answered: Yes.

Remission

34. In my view, there was evidence from which it would have been open to the Magistrate to have concluded that a "request in precatory or polite terms by a person clothed with apparent authority"[6] had been made to Mr Vaa, that he had refused it and that, accordingly, the elements of an offence under s49(1)(c) had been proved, without being satisfied that Mr Vaa had been made aware of the consequences of a refusal. Indeed, Mr Vaa's testimony, on its own, might have been construed as evidence of his refusal to comply with a request that he take a breath test, sufficient to prove the charge.

35. Therefore, I am not persuaded that it would be futile to remit the matter to the Magistrates' Court to be heard in accordance with law.

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[1] [1973] 3 All ER 1020.
[2] [1993] FCA 456; (1993) 115 ALR 1; (1993) 18 AAR 9; (1993) 43 FCR 280.
[3] [1993] FCA 456; (1993) 115 ALR 1; (1993) 18 AAR 9; (1993) 43 FCR 280 at 287 per Neaves, French and Cooper JJ.
[4] [2004] VSC 48; (2004) 42 MVR 279.
[5] [2002] VSCA 175; (2002) 5 VR 485 at 491 [13] per Ormiston JA, 494 [20] and [23] per Chernov JA and 499 [44] per Eames JA; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[6] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 656-7; (1999) 104 A Crim R 426; (1999) 29 MVR 365 per Winneke P.

APPEARANCES: For the appellant DPP: Mr CW Beale, counsel. Kay Robertson, Solicitor for Public Prosecutions. For the respondent Vaa: Dr KP Hanscombe and Mr D Dann, counsel. Andrew George, solicitors.
