20/85

SUPREME COURT OF VICTORIA

RANKIN v O'BRIEN

Southwell J

17, 20 May 1985 — [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUESTED TO ACCOMPANY INFORMANT TO POLICE STATION FOR A BREATH TEST – FORMAL DEMAND NOT RECITED PRECISELY WITH WORDING IN SECTION – WHETHER PRECISE WORDS NECESSARY – ELEMENTS NECESSARY TO ESTABLISH CASE: *MOTOR CAR ACT* 1958, S80F(6).

R., a police officer, believing on reasonable grounds from his own observations and from his previous enquiries that O'B. had been driving a motor car and that his ability to drive had been impaired by the consumption of intoxicating liquor said to O'B.: "I believe your ability to drive has been impaired by liquor and I require you to come with me to Ballarat for a breath test". O'B. said: "No way". He was subsequently charged under S80F(6)(b)(ii) of the *Motor Car Act* 1958 ('Act') in that he refused to accompany the informant to a police station for the purpose of undergoing a breath test. When the matter came on for hearing, it was submitted at the close of the case for the prosecution that as the formal demand did not use the words of the section "to furnish a sample of breath for analysis by a breath analysing instrument" and to accompany the police officer to a named police station, there was no case to answer. The Magistrate agreed with this submission and dismissed the charge. On order nisi to review—

HELD: Order nisi absolute.
(1) At the close of the prosecution case, the Magistrate was required to consider whether the evidence disclosed that the police officer had given the defendant/driver reasonably sufficient information to know what was required of him and why it was required. It was not necessary for the police officer to recite precisely the words of the relevant section of the Act.
***Scott v Dunstone* [1963] VicRp 77; [1963] VR 579, distinguished.**
***King v McLellan* [1974] VicRp 92; [1974] VR 773, referred to.**

(2) The phrase "breath test" is a common enough term well understood in the community, and was sufficient to give reasonable information to the defendant/driver as to the purpose of the request, as was the request to go to the police station. Accordingly, the Magistrate should have held that there was a case to answer.

SOUTHWELL J: [1] This is the return of an order nisi to review a decision of the Magistrates' Court at Ballarat made 3 July 1984 whereby the learned Stipendiary Magistrate dismissed an information purportedly laid under s80F(6)(b)(ii) of the *Motor Car Act* ("the Act"), an offence which may shortly be described as refusing to accompany the informant to a police station for the purpose of undergoing a breath test.

[2] Section 80F(6)(b)(ii) reads:

> "Where a member of the police force ... believes on reasonable grounds from his own observations or from information received by him or both that a person has been driving a motor car or in charge of a motor car within the meaning of section 82 — and such person behaves in a manner which, in the reasonable belief of such member, indicates that such person's ability to drive a motor car is or was impaired (as the case requires) by the consumption of intoxicating liquor the member of the police force may, instead of requiring such person to undergo a preliminary breath test require such 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 police station or the grounds of precincts thereof."

The information, as it appears to me, should have been laid under s80F(11)(a), which in substance states that a person who, when required to accompany a member of the police force to a police station, refuses or fails to do so shall be guilty of an offence. However, nothing now turns upon that misdescription in the information. The order nisi was granted by Master Barker on 16 August 1984 on the following ground:

> "The learned Magistrate ought to have found that on the evidence before him, the defendant refused to accompany a member of the Police Force to a Police Station or the grounds or precincts thereof for the purpose of furnishing a sample of his breath for analysis by a breath analysing instrument and that he ought to have convicted the defendant accordingly."

That ground was incorrectly stated. It should have read in substance that there was a case to answer and the Stipendiary Magistrate should have so ruled. During discussion Mr Downing, who appeared for the informant, applied to amend the ground pursuant to s91 of the *Magistrates' Courts Act* 1971 and, there being no objection from Mr Tobin, who appeared for the respondent, I granted leave to amend so that the ground reads:

> "The learned Stipendiary Magistrate ought to have found on the evidence before him that the respondent had a case to answer.'

[3] After Mr Downing had made his submissions in support of the motion, Mr Tobin, for the respondent, commenced by submitting that the order to review was bad in that it referred to an offence against s80E of the *Motor Car Act* rather than, as was correct, s80F. In the event, after some lively discussion I did not understand Mr Tobin seriously to pursue the matter. He conceded there was power to amend or correct either under the slip rule or upon the authority of *Christie v Newson* [1894] VicLawRp 10; [1894] 20 VLR 28. If it were thought necessary to do so, I would grant leave to amend or correct. I turn now to the point of substance.

On 27 March 1984 at about 6.30 pm a person was seen to be driving a car in Beaufort in an erratic manner: it collided with the fence of the Beaufort Sports Oval, causing considerable damage. The driver drove away. Shortly afterwards the informant saw the car involved. His enquiries established to his satisfaction that the respondent was the driver – a fact which is not now in issue. Shortly afterwards the informant saw the respondent in a street in Beaufort: the latter at first denied having been involved in a collision.

The informant from his previous enquiries and from his own observations of the respondent at the scene reasonably believed that the respondent had been the driver and that his ability to drive a car had been impaired by the consumption of intoxicating liquor; in other words, the informant held the beliefs referred to in s80F(6)(b). That he held such beliefs and held them reasonably is not in issue. After the conversation in which the respondent denied driving the car, the informant **[4]** then said to the respondent, "Look, you are well under the weather and your attitude leaves me no choice; you will have to come with me for a breath test". The respondent replied, "No way. I didn't do nothing", and walked away. The informant said, "Where do you think you are going? I have just told you we are going for a breath test. Now, I believe your ability to drive has been impaired by liquor and I require you to come with me to Ballarat for a breath test". The respondent said, "No way" and again commenced to walk away, whereupon the informant told him that he was under arrest, and said, "You are coming back to the station whether you like it or not".

The respondent did not appear to like it at all. Then began a violent struggle in the early part of which the informant told the respondent he could make "at the station" the phone call he wished to make at the scene. The struggle, interspersed with shouted and abusive obscenities, went on for some minutes and eventually the respondent appeared to calm down, and was again told he was to be taken to Ballarat for a breath test, and that he could make a phone call from the station. However, the peace was short-lived and not long afterwards the respondent escaped from the police car. He was apprehended more than two hours after the alleged driving and could not then be required to undergo a breath test. In cross-examination the informant agreed that at the time of the request he had not specifically told the informant what police station he was to be taken to. (As will be seen from the above summary of the evidence, the **[5]** informant had told the respondent he was to be taken to "Ballarat for a breath test", and separately told him that he was going "to the station", and separately again referred to "the police station", but at no time did he use the expression "Ballarat Police Station"). Returning to the cross-examination of the informant, he agreed that he did not in his request use the words "to furnish a sample of your breath", and agreed that the term "breath test" does not denote the distinction between a "puff bag" test and a breathalyzer test. He agreed with the proposition that it was possible for someone to believe from the words used that he meant a preliminary breath test.

Since it may come as something of a surprise to read that in those circumstances the

learned Stipendiary Magistrate held there was no case to answer, it is better that I first refer to the submissions of Mr Tobin, which were successful before the court below and in substance were repeated before me. He submitted that the validity of the informant's requirement that the respondent accompany him to a police station depends upon -

1. A formal demand in precise language being made requiring the respondent to undergo the test, and

2. There being another formal demand in precise language to accompany the police officer to a named police station.

As I understood Mr Tobin, he submitted in effect the demand should be put in these or similar words: "I require you to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose I require you to accompany **[6]** me to the (Ballarat) police station". In other words, it was submitted that the latter portion of s80F(6)(b) had to be recited more or less word for word. Authority for this proposition was said to be found in the judgment of Sholl J in *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579. In that case His Honour held that the requirement of a person to undergo a breath test must be made in specific language closely following the words of the Act. Sholl J, *obiter*, as I believe, expressed views concerning the phraseology which a police officer should use in requiring a driver to undergo what has for long commonly been known as a "breath test". It is to be observed that His Honour was there concerned with a requirement compliance with which was or may have been incriminating. The case before me is, in my opinion, distinguishable, because the requirement in question was not to undergo a breath test, but to accompany the informant to a police station for the purpose of undergoing a breath test. Merely by acceding to that request, the respondent could not incriminate himself. In any event, in my respectful opinion, the authority of the observations of Sholl J must be weighed in the light of the remarks of the Full Court in *King v McLellan* [1974] VicRp 92; [1974] VR 773 at 777.

Mr Tobin went on to submit that unless the requirement is made in such a way as to leave no room for doubt, there cannot be proof of a refusal. He submitted that there had to be two stated requirements; that the section itself referred to two requirements, the second one being preceded by the word "further", showing that there should first be one requirement and then another, although **[7]** he conceded in discussion that the word "further" did not necessarily mean that the police officer had to put the two requirements in the order in which they are referred to in sub-s6(b). **[8]** In other words Mr Tobin, as I understood him, conceded that if the informant had said, "I require you to accompany me to the Ballarat police station for the purposes of your furnishing a sample of your breath for analysis on a breath analysing instrument", the section would have been complied with.

Mr Tobin went on to submit that the person had to be shown to be "certain" of what was required of him. He submitted that the words used before the first refusal were not even precise as to the place in which the informant intended to take the respondent, and that the subsequent conversation and conduct could not be relied upon by the informant. Mr Downing, to move the order absolute, while not specifically requesting me to say that *Scott v Dunstone* was wrongly decided submitted that some of the *dicta* of Sholl J were *obiter* and were wrong, and he referred to portions of the judgment in *King v McLellan* (*supra*), to one of which I have already referred. I do not believe it necessary to comment further on that submission. I shall later refer to the nature and objects of this part of the Act. Mr Downing went on to submit that it was relevant to consider that the words of sub-s6(b) here under consideration, namely the words, "and for that purpose may further require the person to accompany a member of the police force to a police station or the grounds or precincts thereof" were added in 1980 by Act number 9477 s9(i) – that is long after *Scott v Dunstone* was decided.

It was submitted that it was neither necessary nor desirable to extend the interpretation of Sholl J to the **[9]** later requirement and that to do so would be to help defeat the whole purpose of the section. It was said that the transaction lasted for some minutes before and after formal arrest, that there could be no doubt that the respondent knew that he was requested to go to Ballarat police station for a breath test – which I should interpolate seems to me to be a common enough term well understood in the community. In the first place it should be observed that at the stage the proceedings had reached the learned Stipendiary Magistrate was called upon to do no more than rule on a submission that there was no case to answer. The principle then to be applied may shortly be stated by quoting the well known passage from *May v O'Sullivan* [1955]

HCA 38; [1955] 92 CLR 654 at 658; [1955] ALR 671 where the judgment of the court of five judges said:

> "When, at the close of the case for the prosecution, a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is really a question of law."

The affidavit of the informant as to the words of the Stipendiary Magistrate in dismissing the information reads:

> "15. The learned Magistrate then ruled that on the strict interpretation of the section there were two conditions which needed to be met before the offence was complete. It was my understanding that His Worship had accepted the submissions made by Mr Tobin. His Worship said that he was satisfied that the Defendant had to be made aware of what he was being requested to do but was not satisfied that the request made by the Informant of the Defendant had discharged this obligation. His Worship also said that he was satisfied that there was evidence of refusal but it was a question of what was refused. His Worship then dismissed this charge."

[10] The learned Magistrate must be taken to have decided that if the evidence stood as it was it would not have been open to him to convict.

This case does not involve a theoretical situation in which some possibly mentally deficient person having no English is involved, where the question arises as to whether such a person could have had sufficient understanding of the informant's request to go through the mental operation of "refusing" the request made of him. The evidence establishes that the respondent well understood the English language; he must be presumed to be both sane and sober – the latter because it cannot be the law that it would be a good defence for a person so charged to plead that he was so affected by liquor as not properly to understand the nature of the request made to him, and accordingly he could not be held to have "refused". Mr Tobin in discussion submitted that it was relevant, in considering whether there was proof that the respondent had been given sufficient information of the request, to consider also his level of understanding affected as it was by the consumption of liquor. He referred to *Alderson v Booth* [1969] 2 QB 216 at p221 where Donaldson J said (see also (1969) 2 WLR 1252; [1969] 2 All ER 271; 53 Cr App R 301):

> "I agree in particular that courtesy is to be encouraged and that police officers in these circumstances are faced with a difficult decision. Nevertheless it is particularly desirable that clear words should be used in circumstances in which, as a result of the effect of drink, a person's understanding may be dulled."

That was a case where the point at issue was whether when a policeman said to a suspect, "I shall have to ask you to come to the police station for further tests", sufficient had been said to indicate to the defendant that **[11]** he was in fact under arrest. I do not interpret His Honour as stating that the insobriety of a suspect is relevant to the question of a refusal such as is now under consideration. I think His Honour was doing little more than giving some advice to members of the police force in those and similar circumstances. In relation to the understanding of a suspect of a request made of him see also *Smith v McGirr*, unreported, per Dunn J, 8 November 1976 (MC Case 26/1977).

In the present case the respondent was told of the allegations – namely, that he had been driving a motor car whilst he was affected by intoxicating liquor. He was then told that he was required to accompany the informant to Ballarat for a breath test. Even if, contrary to the view I hold, it were to be held that any conduct after the arrest was irrelevant (and if it be so held the question might then arise as to whether on such a ruling the informant should have been permitted to amend the information to plead a "failure" to comply with the request, and whether in that circumstance the argument for its admissibility may well be thought to be strengthened) the question is whether at that stage the respondent had been given sufficient information as to what was required of him and why it was required. Nowhere in the evidence is to be found any basis for a belief that the respondent harboured any doubt as to what was being required of him, nor for that matter why it was required. Counsel suggested in cross-examination that it was possible for someone to believe that a preliminary breath test was intended. However the fertile imagination of counsel in cross-examination, and the concession of the informant that such a

belief was possible, does not constitute any evidence that this respondent ever entertained that possibility. **[12]** The informant said nothing to indicate that he had in mind only a preliminary breath test. The only reasonable inference is that the respondent knew at least that he was to undergo a test whereby he had to breathe into "something" and that "something" would indicate whether he had more alcohol in him than the law permitted.

At the time of the ruling the stage had not been reached where the defence had been called upon to decide whether to call evidence. If there was a case to answer the Magistrate would have had to consider any evidence called or consider what inferences, if any, should be drawn from the respondent's failure to give evidence, and in that regard I refer again to *May v O'Sullivan* (*supra*) where, also at page 658, the Court said, in quoting the judgment of the Full Court of South Australia in *Wilson v Buttery* [1926] SASR 150:

> "When this stage has passed, and the defendant has been called upon for his explanation or answer, and no evidence has been forthcoming, the Court or jury is entitled to take into consideration the probable means of knowledge on either side. If the truth is not easily ascertainable by the prosecution, but is probably well known to the defendant, then the fact that no explanation or answer is forthcoming as might be expected if the truth were consistent with innocence, is a matter which the Court or jury may properly consider. They have, then, to say whether in this state of the evidence they have any reasonable doubt of the guilt of the accused."

This a penal Statute. The Court must beware of taking a "near enough is good enough" approach. In that regard see the observations of McInerney J in *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 at p469. In a case such as this it is fundamental that the suspect be given sufficient information in the request to know what is required of him and why. On the other hand the purpose of this legislation and the **[13]** community's interest in its application must be considered. There may at times be a fine line to draw between the interests of the suspect and the interests of the community. **[14]** In *King v McLellan* (*supra*) the Full Court said at p779 that the purposes of this part of the Act were:

> "To combat the evil of motorists driving vehicles while likely to be affected by alcohol. This is apparent from the contents of the sections and the history of this legislation during the past several years since legislation relating to the taking of breath tests was first introduced in 1961. These sections form a set of provisions which over the years have become increasingly stringent. They are designed to facilitate the apprehension and punishment of inconsiderate motorists who when driving under the influence of alcohol are a serious menace to themselves and the rest of the community."

That was said in 1974. It is notorious that each year since then hundreds of people have been killed or seriously injured in motor car accidents which are caused by the partial intoxication of drivers. The community has an abiding interest in the deterrence of such driving, and it cannot be doubted that the deterrence is greater as the chance of detection and conviction is seen as being increased. In attempting to reach the proper balance between the interests of the suspect and the community the courts should not be astute to uphold fine or technical points which would be seen by right-thinking citizens as demonstrating a thorough lack of good common sense.

In this case it is said, in effect, that there should have been a precise recital of the words of the Act at the scene, and again before the administration of the test itself at the police station. I do not agree. I have said that the test is: Was the evidence as it stood such as to prove that the respondent was given reasonably sufficient information to know what was required of him, and why. **[15]** There can be little room for doubt that the respondent was aware at the scene of what was there and then being required of him: namely, to accompany the informant to the Ballarat Police Station. The informant's case below foundered on the second limb – why, or for what purpose, was he so required. The Magistrate seemed to harbour some doubt as to what the respondent was refusing. I do not believe the evidence left room for such a doubt – the respondent refused the request to accompany the informant to Ballarat – verbally, and his immediately subsequent conduct provided further proof of that refusal. The state had not been reached when the respondent could have refused to undergo the test itself. That refusal cannot occur until the breathalyzer machine is present – *Scott v Dunstone* (*supra*). In my opinion, the words used by the informant were sufficient to give reasonable information to the respondent as to the purpose of the request, namely, to undergo a breath test. To adopt Sholl J's words in *Scott v Dunstone*, the stated purpose of the request to accompany was made known, that is that he was to undergo

a breath test, which I have earlier labelled as a common enough term well understood in the community. The stage had not been reached where the respondent was required to incriminate himself by breathing into a breathalyzer. In my opinion, the learned Stipendiary Magistrate should have held that there was a case to answer. Accordingly, the order nisi will be made absolute.

Solicitor for the applicant: RJ Lambert, Crown Solicitor.
Solicitors for the respondent: Webb Stagg and Tonkin.
