33/12; [2012] VSC 384

SUPREME COURT OF VICTORIA

DPP v BLANGO

Macaulay J

30 August, 5 September 2012

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED WITH POSITIVE RESULT – DRIVER SAID THAT HE WOULD GO TO THE POLICE STATION TO UNDERGO THE BREATH TEST AFTER HE WAS SHOWN THE READING – MAGISTRATE DISMISSED THE CHARGE – WHETHER DRIVER REFUSED A REQUIREMENT TO ACCOMPANY POLICE TO POLICE STATION FOR BREATH ANALYSIS – WHETHER INFERENCE CONSISTENT WITH INNOCENCE WAS REASONABLY OPEN ON THE ACCEPTED FACTS – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(1)(e).

B. was intercepted driving a motor vehicle and after undergoing a preliminary breath test which was positive, was asked by the police informant to accompany him to the police station for a breath test. B. said he would go to the police station when he saw the reading. He was later charged with refusing to comply with a requirement to accompany the police officer to the police station to furnish a sample of breath for analysis. The Magistrate dismissed the charge on the ground that she was not satisfied beyond reasonable doubt that B. had refused to comply with the police officer's requirement. Upon appeal—

HELD: Appeal allowed. Dismissal quashed.

1. To establish an offence under s49(1)(e) of the *Road Safety Act* 1986 ('Act'), the prosecution must prove that—

(a) a requirement was made under s55(1) of the Act; and

(b) the offender refused to comply with the requirement.

2. The only issue in the present case was whether B. refused to comply with the requirement, there being no issue as to whether the requirement was in fact made.

3. The evidence led before the magistrate, and accepted by her, showed that B.'s response to the four requests put to him by the police was, in substance: 'I will accompany you to the police station only if you show me the reading of the preliminary breath test'.

4. Section 49(1)(e) of the Act does not admit any conditions to compliance with a s55(1) requirement. And the law is clear that police are not obliged to show, and in fact may be unwise to show, the result of a preliminary breath test to drivers. Yet the magistrate seemed to conclude there was an alternative inference available on the facts, consistent with innocence – that is consistent with B. not refusing to comply with the requirement. Her Honour formulated that alternative inference as being that B. was being 'argumentative with the police', mistakenly 'asserting a right' and 'he wanted to see the [preliminary breath test] reading'.

5. Such a position cannot reasonably be seen to be consistent with innocence at all: it is entirely inconsistent with lawful compliance and consistent only with refusal.

6. The only reasonable inference available from the accepted fact that, after four requests, B. was being argumentative with police, asserting a mistaken view of the law and wanting to see the reading, as a condition of complying with the informant's requirement, was that he refused to comply with that requirement.

7. It followed that the Magistrate erred in law. The nature of that error was that her Honour wrongly treated B.'s particular reasons for not being willing to comply as supporting the inference that he had not refused to comply. In so doing, her Honour either failed to apply an objective test for assessing refusal as required, or took into account irrelevant matters, or both.

***Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, applied.**

MACAULAY J:

Introduction

1. Frank Blango (the respondent) was asked four times to accompany police to a police

station for a breath test after a preliminary breath test indicated his breath contained alcohol. In response, Mr Blango insisted upon seeing the result of the preliminary breath test, saying he would go to the police station when he saw the reading. The reading was not shown to him, but neither was there any requirement that it should.

2. A magistrate acquitted Mr Blango of the charge of refusing to comply with a requirement, made by a policeman under s55 of the *Road Safety Act* 1986 (Vic), that he accompany the officer to a police station to furnish a sample of breath for analysis. In doing so the magistrate said she was not satisfied beyond reasonable doubt that Mr Blango had refused to comply with the officer's requirement. The question in this case, the Director's appeal under s272(1) of the *Criminal Procedure Act* 2009 (Vic), is whether such a finding was open to the magistrate correctly applying the law.

The legal principles

3. Section 53 of the Act authorises a member of the police force to require any person he or she finds driving or in charge of a motor vehicle to undergo a preliminary breath test. If a person undergoes a preliminary breath test, and the result, in the opinion of the relevant member of the police, indicates that the person's breath contains alcohol, then a member of the police force may require the person to furnish a sample of breath for analysis. For that purpose they may further require the person to accompany the member to a place where the sample is to be furnished: s55(1).

4. A person is guilty of an offence if he or she refuses to comply with a requirement made under s55(1): s49(1)(e). On convicting or finding a person guilty of an offence under s49(1)(e) a court must cancel any driver's licence held by the person, in the case of a first offence, for two years: s50(1B).

5. To establish an offence under s49(1)(e) the prosecution must prove -
a requirement was made under s55(1), and
the offender refused to comply with the requirement.

6. At issue in this case is whether the evidence compelled the conclusion that Mr Blango refused to comply, there being no issue as to whether the requirement was in fact made.

7. In *Hrysikos v Mansfield*,[1] Ormiston JA made these observations about s49(1)(e):

> The penalty under paragraph (e), however, is not imposed for *failing* to undergo the necessary breath test, or to accompany the police officer, or to remain at the police station or other place; it is for *refusing* to do so. Why the paragraph was not expressed in terms of "failure" is not entirely clear, as the word "fails" appears both in section 49(1)(d) and in paragraph (b) of section 55(1) of the Act. The word "refuses" must be taken to carry with it an element of mental intent, albeit judged objectively for the purposes of an offence such as the present. The simplest way of proving a refusal would be if the subject driver said "I refuse etc" or some equivalent words, with or without expletives, connoting an unwillingness to comply. Alternatively, the prosecution might ask a court to infer that a driver has refused to comply by proving facts from which that inference may be drawn, ie by proof of the circumstantial case from which the only inference is that the driver is refusing to comply, albeit he or she is not expressly saying so. A driver who immediately turns and runs away, a driver who jumps the back fence of a police station, a driver who forcibly pushes open the door of a mobile testing unit and runs off without explanation would each be persons against whom the necessary inference could be drawn.[2]

8. It would at least be open to a magistrate to find that a motorist who imposed a condition upon complying with the requirement to undergo a breath test had refused to comply for the purposes of s49(1)(e). Such was the case in *Beardsley v Hower*,[3] where the driver said she would only undertake a breath test after she had spoken to a particular inspector of police. But a magistrate is not necessarily compelled to such a conclusion.[4] In *Beardsley*, Ashley J quoted with approval what was said by McInerney J in *Reddy v Ross*:[5]

> As has been pointed out by the Court of Criminal Appeal in New South Wales in *R v Honan* [1971] NSWLR 697 ... [at 702]:
>
> "No precise form of words or actions is required to constitute a refusal. It is a question of fact to be

inferred from all the circumstances, and in this context the remarks of Geoffrey Lane J in *R v Clark* (1969) 53 Cr App R 438 at 442; [1969] 2 All ER 1008 at 1010; [1969] 2 QB 91, dealing it is true with different words in an English Act of Parliament but one that was enacted in the same field, are pertinent. Plainly no particular formula of words is necessary from a defendant to constitute a refusal by him. It is the police, and not the defendants who are required by this legislation to adhere to formula. Any words, or indeed any actions, on the part of the defendant, which in the eyes of the jury make it clear that the defendant in all the circumstances of the particular case is declining the police officer's proper invitation, amount to a refusal within the section."

The question whether there has been a refusal is, therefore, always a question of fact to be spelt out from the circumstances. Having regard to the drastic nature of the consequences of a refusal, a magistrate, before convicting, must be satisfied that there has been a real refusal to undergo the test.[6]

The evidence of Senior Constable Savin

9. Evidence was given before the magistrate by Senior Constable James Savin of the four requests and the responses constituting the alleged refusals. After administering the preliminary breath test and forming the view there was alcohol present in Mr Blango's breath, Senior Constable Savin made the first requirement in these terms:

The result of this test indicates the presence of alcohol in your breath. I now require you to accompany me to a police station for the purposes of a breath test.[7]
Mr Blango's response was:
He – from memory, he responded that he wanted to see the reading of the PBT [Preliminary Breath Test].[8]
Senior Constable Savin gave evidence of the second requirement:
I'm not obliged to tell you what the reading – the instrument has indicated. I must inform you that you are not under arrest. However, if you fail to come with me to a police station for a breath test, then you will automatically lose your licence for two years. Do you understand that?[9]
Mr Blango's response was:
And he said, "I will go when you tell me the reading."[10]
The third requirement was in these terms:
I then said, "I'll tell you once again, I do not have to tell you that. This info - this instrument gives me an indication. Will you come with me to a police station for a breath test?"[11]
And Mr Blango's response was:
He said, "I know the law. I attend university in Tasmania. You have to tell me what I blew."[12]
Finally, the fourth requirement:
I then said, "You're incorrect Sir. I do not have to tell you any reading from this instrument. This is your final opportunity to come with me for a breath test. I will remind you again that if you do not accompany me you will lose your licence for two years."[13]
Senior Constable Savin said there was no response to that last request but that Mr Blango became verbally aggressive. Senior Constable Savin then formed the opinion that the refusal was complete.[14]

Magistrate's reasons and findings

10. After referring to Ormiston JA in *Hrysikos v Mansfield* the magistrate noted that a refusal could be something as straight out as 'I refuse' or it could be inferred from certain facts. Her Honour accepted the following to be the salient facts.[15]

- Mr Blango was driving the car.
- When pulled over, Mr Blango and the people in the vehicle were agitated and 'boisterous and arrogant'.
- The police officers were concerned matters may get out of hand and called for back up.
- Mr Blango voluntarily got out of the vehicle and voluntarily took a preliminary breath test which the magistrate thought showed a level of cooperation.
- Once the test recorded a positive reading, and a requirement was made for Mr Blango to accompany the police for a breath test, Mr Blango 'first up' wanted to see the reading.
- The informant actually put the requirement again and set out the consequences to which Mr Blango said, 'I will go with you when you tell me the reading.'
- Mr Blango was told that he did not need to be shown the reading, the machine only gave an indication but that he must accompany the police.
- Mr Blango then indicated he knew the law and he felt the informant had to show him what he blew.
- He was then told that he was incorrect and a final demand was made.
- Although the evidence from the informant was that Mr Blango was verbally aggressive in response to the final demand, Mr Blango was not so much aggressive towards the informant, but rather to passengers in Mr Blango's car with whom he was upset. Otherwise there was no response to the final requirement to attend at the police station.
- The whole conversation flowed very quickly – within a matter of minutes.

11. In her Honour's view the clear position was that Mr Blango wanted to see the reading - at no time did he say he refused to go but he gave a conditional response, 'I will go with you when you tell me the reading'. From these facts the learned magistrate drew her final conclusion as follows:

> I'm of the view that one inference that can be drawn is that he was refusing, the other inference that can be drawn is that he was being argumentative with police, he was asserting a right that he had a mistaken view of, that he was upset about the situation and that he wanted to see the reading, and I think we do need to take into account the cultural issues in terms of a person whose [sic] come, at this point, only five years – from Sierra Leone where policing is very different and – there is an inherent ... distrust of the police in those circumstances and that was Mr Blango's evidence, that he wanted to see the reading to make sure that there was cause for why he was being taken back, and I can appreciate that. And that then he was – his attention was an argument with others in the car and, of course, I can understand officer Savin forming the view that he was refusing, but I am not of the view that that's ... the only inference and there can be another inference, and therefore I must acquit, given that doubt. I do note that Mr Blango did go voluntarily. He didn't have to be handcuffed. He got into the van and that is also consistent with not having the mental element of refusing at that point. So I find him not guilty of the charges.[16]

12. The reference to Mr Blango being handcuffed needs explanation. Mr Blango was arrested after the officer formed the view he was refusing to accompany police for a breath analysis test. But the arrest was for another matter, to do with establishing identity, and not for the purpose of undertaking a breath test.

13. The Director's grounds of appeal were that the magistrate

- Failed to apply the relevant objective test for refusal as laid down in *Hrysikos v Mansfield*.
- Took into account an irrelevant matter, namely Mr Blango's subjective beliefs as to the law.
- Took into account an irrelevant matter, namely Mr Blango's suspicion of police.
- Treated Mr Blango's reasons for unwillingness to comply as evidence to support a conclusion that he had not refused.

14. Mr Blango, who appeared for himself as he had done before the learned magistrate, sought to support the decision essentially on the same basis that found favour below.

15. In my view the evidence led before the magistrate, and accepted by her, showed that Mr Blango's response to the four requests put to him by the police was, in substance: 'I will accompany you to the police station only if you show me the reading of the preliminary breath test'.

16. Section 49(1)(e) of the Act does not admit any conditions to compliance with a s55(1) requirement. And the law is clear that police are not obliged to show, and in fact may be unwise to show, the result of a preliminary breath test to drivers.[17] Yet the magistrate seemed to conclude there was an alternative inference available on the facts, consistent with innocence – that is consistent with Mr Blango not refusing to comply with the requirement. Her Honour formulated that alternative inference as being that Mr Blango was being 'argumentative with the police', mistakenly 'asserting a right' and 'he wanted to see the [preliminary breath test] reading'.

17. In my view, such a position cannot reasonably be seen to be consistent with innocence at all: it is entirely inconsistent with lawful compliance and consistent only with refusal.

18. The magistrate does not, for example, state that she inferred from the primary facts, as found, that Mr Blango had not yet reached a position of refusing to comply but was only seeking clarification, exploring the consequences, or otherwise in the process of considering and weighing up whether or not to comply. That is not surprising. On the accepted facts, Mr Blango announced his position, the requirement was then explained several more times and he, in effect, maintained his position each time. There is nothing to suggest, and the magistrate did not find, that without the preliminary breath test reading being shown to him Mr Blango was otherwise contemplating complying with the police requirement. Nor can such inference reasonably be drawn from the evidence that her Honour accepted.

19. I agree with the Director's argument that Mr Blango's mistaken assertions about what the law entitled him to, and his asserted mistrust of the police, only reinforced the conclusion

that he was in fact refusing, and explained why he was refusing. It did not tend to establish the contrary, as the magistrate appeared to reason.

20. The only reasonable inference available from the accepted fact that, after four requests, Mr Blango was being argumentative with police, asserting a mistaken view of the law and wanting to see the reading, as a condition of complying with the informant's requirement, was that he refused to comply with that requirement.

21. It follows that I accept that the magistrate erred in law. The nature of that error is that her Honour wrongly treated Mr Blango's particular reasons for not being willing to comply as supporting the inference that he had not refused to comply. In so doing, her Honour either failed to apply an objective test for assessing refusal as required by *Hrysikos*, or took into account irrelevant matters, or both.

Conclusion

22. In those circumstances I uphold the appellant's appeal. Because, as I have shown, there was only one inference reasonably open on the facts as found, namely that Mr Blango had refused to comply in contravention of s49(1)(e) of the Act, as a matter of law he must be found guilty of the offence as charged. Mr Blango has already, understandably, stated his preference for this matter to be finalised in this court, if at all possible.

23. Subject to any further submission, the orders I propose to make will include:

> (1) The appeal be allowed.
> (2) The order made on 6 February 2012 by Ms PT Spencer, Magistrate, in the Magistrates' Court at Dandenong in case number A12999720, whereby her Honour discharged charge 1, be quashed.

24. I will hear the parties as to the further orders to be made.

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[1] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[2] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485, 487 [3]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[3] *Beardsley v Hower* (1993) 19 MVR 15.
[4] Ibid 21.
[5] *Reddy v Ross* [1973] VicRp 46; [1973] VR 462.
[6] *Reddy v Ross* [1973] VicRp 46; [1973] VR 462, 470-471 as cited in *Beardsley v Hower* (1993) 19 MVR 15, 20.
[7] Transcript of Proceedings, *Savin v Blango,* (Magistrates' Court of Victoria, Magistrate Spencer, 6 February 2012) 15.
[8] Ibid 16.
[9] Ibid 16 and 20.
[10] Ibid 20.
[11] Ibid 20.
[12] Ibid 21.
[13] Ibid 21.
[14] Ibid 21-22.
[15] Ibid 128-129.
[16] Ibid 130-131.
[17] *Rowntree v Police (SA)* [2006] SASC 51; (2006) 45 MVR 361

APPEARANCES: For the appellant DPP: Dr SB McNicol, counsel. Solicitor for Public Prosecutions. The respondent Blango appeared in person.
