21/94

SUPREME COURT OF VICTORIA

MILLS v FEEHAN

Mandie J

19, 26 July 1994 — (1994) 20 MVR 263

MOTOR TRAFFIC – DRINK/DRIVING – COLLISION BETWEEN VEHICLES – DRIVER INTERCEPTED NEARBY – REQUIRED TO GO TO POLICE STATION FOR PRELIMINARY BREATH TEST – WHETHER SUCH DIRECTION BEYOND POWER AS BEING UNREASONABLE – WHETHER COURT CAN EXCLUDE EVIDENCE OF BREATH TEST – NO SATISFACTORY EVIDENCE THAT POLICE OFFICER REASONABLY BELIEVED DEFENDANT WAS DRIVER OF OR IN CHARGE OF VEHICLE AT RELEVANT TIME – EFFECT: *ROAD SAFETY ACT* 1986, SS49(1)(f), 53,55.

M. was the driver of a motor car which collided with another vehicle. Police later found M. nearby and one of the police officers requested M. to accompany them to a Police Station for the purpose of a preliminary breath test. At the Police Station, another police officer required M. to undergo a preliminary breath test and then a full breath test which resulted in a blood alcohol concentration of 0.12%. M. was later charged and convicted. Upon appeal—

HELD: Appeal allowed. Conviction and orders set aside. Charge dismissed.
1. The express direction given by the first police officer for M. to travel to the Police Station was a requirement beyond power because it was unreasonable and not comprehended by the power given by s53 of the *Road Safety Act* 1986. Accordingly, the Court would have had to consider in the exercise of its discretion whether the evidence of the result of the full breath test should have been excluded as being illegally obtained.
***DPP v Wood* MC 40/1992, applied.**

2. The Magistrate was in error in finding that the second police officer had made a valid requirement that M. undergo a preliminary breath test because there was no satisfactory evidence before the Court that the police officer believed on reasonable grounds that M. had been the driver of or in charge of the motor vehicle when it was involved in the collision.

MANDIE J: [1] This is an appeal pursuant to s92(1) of the *Magistrates' Court Act* 1989 from orders of the Magistrates' Court at Prahran made on 23rd March 1994 whereby the appellant was convicted of an offence under s49(1)(f) of the *Road Safety Act* 1986 ("the Act") in that he did at Balaclava on 11th March 1993 within three hours after driving or being in charge of a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument under s55(1) of the Act and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in his blood. He was fined $300 with $26 statutory costs and his driving licence was cancelled and he was disqualified from driving for a period of 12 months.

The relevant evidence before the Magistrate was as follows: At approximately 4.00 a.m. on Thursday 11th March, 1993 the appellant was driving a motor car which collided with a parked milk truck in Carlisle Street, St.Kilda. As a result of the collision the milk truck burst into flames. The appellant was told by the driver of the milk truck to get out of his car because the gas tanks might blow up. The police were called to the scene of the collision and the appellant was later found in a dazed condition in Inkerman Street, St.Kilda by Senior Sergeant Hickey and the Informant, Constable Feehan at about 4.40 a.m. Senior Sergeant Hickey had a conversation outside the police car with the appellant. Constable Feehan remained in the car. **[2]** During conversation with the appellant, Senior Sergeant Hickey noticed that the appellant had a smell of alcohol about his breath, that his speech was slurred and that his eyes were bloodshot. After ascertaining his name, Senior Sergeant Hickey said to the appellant: "Mr Mills, I have reason to believe you were the driver of a motor vehicle involved in an accident at about 4.00 a.m. this morning and I require you to accompany me to the Police Station to furnish a sample of your breath for analysis. Are you prepared to accompany me?" The appellant replied: "Yes".

The appellant said in evidence that his recollection of the conversation was very vague and

that he remembered having the feeling that he was in some sort of trouble and had to get into a police car. He further said that he could not challenge anything that Senior Sergeant Hickey had said. The cross-examination of Senior Sergeant Hickey proceeded in substance as follows:-

> "Q. Did you have a preliminary breath test device with you in your kit?
>
> A: I don't think we did have a PBT device. I would say no.
>
> Q. It is fair to say, is it not, that your requirement to accompany for the purposes of a breath analysis was a demand not an offer?
>
> A. You can assume that, yes.
>
> Q. When you made the demand that he accompany you, the purpose of such demand was, in fact, to require Mr Mills to accompany you to the Police Station for the purposes of a preliminary breath test, was it not?
>
> A. Yes, we obviously didn't have one."

[3] The appellant was conveyed to the St.Kilda Police Station. Senior Sergeant Hickey took no further part in the matter. Constable Feehan gave evidence that at about 4.10 a.m. on Thursday 11th March 1993, he was on mobile patrol in the Brighton area with Senior Sergeant Hickey. As a result of information received, they attended a motor vehicle collision at the junction of Carlisle and Westbury Streets, St.Kilda to assist units already there. At approximately 4.30 a.m., as they were patrolling along Inkerman Street, he saw a man who fitted a description given by D24 of a person who had de-camped from a vehicle involved in the earlier collision. They approached the man and Senior Sergeant Hickey had a conversation with him. As a result of this conversation the man was placed in the rear of the sedan and conveyed to St Kilda Police Station. At the police station, he interviewed the man (the appellant) and obtained his name, address and other details including the fact that he had been driving a vehicle that night, a Nissan Maxima registered number EOD 923 (there was no evidence as to whether Constable Feehan knew that this vehicle was involved in the collision). He observed that the appellant smelled of intoxicating liquor, that his eyes were bloodshot and his speech was slurred and he took an unusually long time to answer even the simplest questions. He then said:

> "I have reason to believe you were the driver of a vehicle involved in a collision this morning. I **[4]** now require you to undergo a preliminary breath test."

A preliminary breath test was conducted, the result of which was positive. After further conversation, the appellant was required by Constable Feehan to undergo a breathalyser test pursuant to s55 of the Act which showed a reading of .12%. There were a number of other charges before the Magistrates' Court not presently relevant. After all the evidence had been called, counsel for the appellant submitted to Her Worship that the appellant had been required to go in custody or quasi-custody to the St Kilda Police Station pursuant to an unequivocal demand and not voluntarily and that accordingly the preliminary breath test had not been validly conducted pursuant to s53 of the Act. As a result, an essential element in the charge under s49(1)(f) had not been established. Counsel for the appellant referred to *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.

In reply before the Magistrate, the prosecutor expressed reliance upon the evidence of Constable Feehan as proving a valid requirement to undergo a preliminary breath test under s53(1)(c) of the Act. He also submitted that the appellant had voluntarily accompanied the police to the police station for the breath test. After consideration the Magistrate said in substance:

> "I am satisfied there was a demand made pursuant to Section 53 of the *Road Safety Act*... My view is that Senior Sergeant Hickey required the Defendant to undergo a preliminary breath test pursuant to Section 53(1)(c). The Defendant did not attend against his will, even though I accept the words of demand were not clear with respect to the **[5]** requirement; it is a matter of semantics. I accordingly find the Charge proved under section 49(1)(f)."

Counsel for the appellant, with leave, then submitted to Her Worship that her findings precluded a conviction because Senior Sergeant Hickey had not made the further requirement for

a breath analysis under s55(1) of the Act. Her Worship then said: "but Constable Feehan made a demand also at the Police Station...in my view Constable Feehan can also make a valid demand under s53(1)(c)." The learned magistrate finally ruled that Constable Feehan had validly required the appellant to undergo a preliminary breath test and the appellant was convicted.

The Master's order dated 22nd April 1994 stated four questions of law of which only two were argued or relied upon, namely:

> "... (c) Was it open on the evidence for the learned magistrate to be satisfied beyond a reasonable doubt that the accompaniment to the St Kilda Police Station to undergo a preliminary breath test was a voluntary accompaniment.
>
> (d) Having found as a question of fact that Senior Sergeant Hickey made a requirement upon the Defendant to undergo a preliminary breath test and that the Defendant had voluntarily accompanied him to the St Kilda Police Station for that purpose; was it open to the learned Magistrate to rely upon the purported compliance with Sections 53 and 55(1) of the *Road Safety Act* 1986 by Constable Feehan in convicting the Defendant."

It emerged from the argument before me that there was agreement upon the following matters:

> **[6]** (i) the prosecution had to prove the making of a valid requirement to undergo a preliminary breath test under s53 of the Act in order to establish one element of the offence under s49(1)(f) – because that section refers to a breath analysis "under section 55(1)" and s55(1) refers to a preliminary breath test "under section 53" (see *DPP v Webb* (*supra*) per Ormiston J at p406 and cases there cited);
> (ii) the requirement to undergo a preliminary breath test would not be validly made under s53 if it failed to satisfy the test enunciated by Ormiston J in *DPP v Webb*;
>
> (iii) the police officer requiring the person to furnish a sample of his breath for analysis for a breath analysing machine under s55(1) had to be the same police officer who had required that person to undergo a preliminary breath test under s53 and, accordingly, any requirement by Senior Sergeant Hickey that the appellant undergo a preliminary breath test, even if valid, was of no assistance to the prosecution in proving the charge because Senior Sergeant Hickey had taken no further part in the matter.

Counsel for the appellant submitted nevertheless that the demand by Senior Sergeant Hickey that the appellant accompany him to the St.Kilda Police Station remained **[7]** relevant because it resulted in the appellant being placed in unjustified custody or quasi-custody as referred to in *DPP v Webb*. The breath analyses subsequently obtained therefore amounted to illegally or unfairly obtained evidence which should have been excluded by the Magistrate, resulting in a dismissal of the charge (although that point had not been taken before the Magistrate). Counsel for the respondent virtually conceded that if the demand by Senior Sergeant Hickey was unjustified or unreasonable, then the evidence had been illegally obtained and the prosecution had to fail. In making that concession, he no doubt had in mind the discretion of the court to exclude admissible evidence which was illegally or unfairly obtained (see *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1, 26-27; 43 ALR 619; (1983) 57 ALJR 15; *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393 and *Foster v R* [1993] HCA 80; (1993) 113 ALR 1; (1993) 66 A Crim R 112; (1993) 67 ALJR 550).

Where counsel differed was as to the test to be applied as enunciated in *DPP v Webb*. Counsel for the respondent submitted that it was sufficient for the purposes of s53 if the police demand to a person to accompany them to the police station for a breath test was "reasonable" or "justified" in the circumstances. I consider that this submission shows a misunderstanding of what was said in *DPP v Webb*. Ormiston J said (at p413) that if "the driver is directed, expressly or by implication, to travel some distance from the place where the requirement is made in order to undergo the test, then that direction will go beyond power because it would be unreasonable and it is not comprehended by the power in s53 ...". In other words, it **[8]** is not a question of the reasonableness of the direction but that a direction to travel some distance cannot reasonably be related to the power to require a breath test. In the present case, such a direction was given: "I require you to accompany me to the police station...". Counsel for the respondent argued in the alternative that it was open to the Magistrate to be satisfied that the appellant voluntarily attended the police station because he replied in the affirmative to the question: "Are you prepared

to accompany me?" In my opinion, the accompaniment could not be truly voluntary where the purpose of a preliminary breath test was not unambiguously stated (if that be relevant) but, in any event, there was an express direction to the appellant to accompany the police to the police station. I consider that it was not open to the magistrate on the evidence to make a finding other than that an express direction to travel some distance had been given and that accordingly the requirement was beyond the power given under s53 of the Act. No other justification for the direction was argued before me. Accordingly, it would follow from the virtual concession by counsel for the respondent that the prosecution had to fail.

In case I am wrong about the foregoing or in case there otherwise remains open the option of remitting the matter to the magistrate to consider in her discretion whether the analysis evidence should be excluded (having been illegally obtained), I will state my conclusion upon the other question which was argued, namely, whether it was open to the Magistrate to find that the procedures followed by Constable Feehan complied with the Act (a conclusion which **[9]** she reached, as it were, when having a "second look" at the matter).

In my opinion, it was wrong for the Magistrate to have found that Constable Feehan had made a valid requirement to the appellant to undergo a preliminary breath test because it was not open to her on the evidence to be satisfied beyond a reasonable doubt that Constable Feehan believed "on reasonable grounds" that the appellant had "within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident". (see s53(1)(c) of the Act). There was no satisfactory evidence before the Court that Constable Feehan had any information (at the time of making the second requirement) which connected the appellant with the collision or with the vehicle involved in the collision. Indeed, the only reference to a relevant connection was that Constable Feehan "saw a man who fitted a description given by D24 of a person who had de-camped from a vehicle involved in the earlier collision".

I do not think that the Magistrate was entitled to conclude on the evidence before her that an ordinarily prudent and cautious person in the position of Constable Feehan would have been reasonably led to believe that the appellant had driven or been in charge of the vehicle involved in the collision. (As to "reasonable grounds", see *Misel v Teese* [1942] VicLawRp 16; [1942] VLR 69; [1942] ALR 100; *Cotton v Ramm* (1976) 16 SASR 107; *Ladlow v Hayes* (1983) 8 A Crim R 377). It was therefore not open to the Magistrate to be satisfied that reasonable grounds existed for Constable Feehan's belief (assuming that there was sufficient evidence of the belief **[10]** itself). Indeed, it does not appear that this aspect was in fact considered by the Magistrate having regard to her late "reliance" upon the making of a second requirement by Constable Feehan.

For the foregoing reasons, the appeal is allowed. It is ordered that the orders as to the conviction, fine and other penalties be set aside and in lieu thereof that the charge under s49(1)(f) be dismissed. I will hear the parties as to any other orders and as to costs.

APPEARANCES: For the appellant Mills: Mr P Billings, counsel. Jack Sher & Associates, solicitors. For the respondent Feehan: Mr SP Gebhardt, counsel. JM Buckley, solicitor to the DPP.
