1/99; [1999] VSCA 73

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v FOSTER; DPP v BAJRAM

Winneke P, Ormiston and Batt JJ A

21, 22 April, 28 May 1999

[1999] 2 VR 643; (1999) 104 A Crim R; (1999) 29 MVR 365)

MOTOR TRAFFIC – DRINK/DRIVING – OFFENCE AGAINST S49(1)(f) OF *ROAD SAFETY ACT* 1986 – ELEMENTS OF – "UNDER S.55(1)" – WHETHER "REQUIREMENTS" SPECIFIED IN S55(1) ARE ELEMENTS OF THE OFFENCE – WHETHER PROSECUTION REQUIRED TO PROVE THAT EACH OF THE "REQUIREMENTS" WERE IMPOSED ON THE MOTORIST – OFFENCE AGAINST S49(1)(b) – WHETHER COMPLIANCE WITH S55(1) AN ELEMENT OF THE OFFENCE: *ROAD SAFETY ACT* 1986, SS47, 48(1)(a), 49(1)(b), (e), (f), 55(1), 58.

Section 49(1)(f) of the *Road Safety Act* 1986 ('Act') provides:

"A person is guilty of an offence if he or she— ... within 3 hours after driving ... furnishes a sample of breath for analysis by a breath analysing instrument under section 55(1) ..."

Section 55(1) of the Act provides that where a person undergoes a preliminary breath test when required and the test is positive a police officer may **require** the person to —
• furnish a sample of breath
• accompany the officer to a police station
• remain there until the sample has been furnished or 3 hours have elapsed.

HELD: By the Court:
1. Proof of the offence created by s49(1)(f) of the Act does not require the prosecution to establish that the informant has, following the administration of the preliminary breath test, imposed on the motorist, in compendious and imperative terms, each of the "requirements" to which s55(1) of the Act refers.
***DPP v Foster & Bajram* [1999] VSC 91, Hampel J, 29 March 1999, reversed.**

2. Accordingly, magistrates were in error in dismissing charges because of a failure by the informants to tell the motorists at the outset not only that they were required to accompany police to the police station but that they were required to remain at the police station until the sample of breath had been furnished or 3 hours had elapsed from the time of driving, whichever was the sooner.

Per Winneke P and Batt JA:
3. None of the "requirements" referred to in s55(1) of the Act is an indispensable pre-condition of, or ingredient in, the proof of the offence created by s49(1)(f). They are powers which the legislature has invested in police officers in order to effectuate the purpose and policies of the Act and may be exercised as and when the circumstances dictate.
***Walker v DPP* (1993) 17 MVR 194, followed.**
***Dalzotto v Lowell* (1993) *Magistrates Cases* 37; and**
***McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275, disapproved.**

The Court:
4. Charges laid under s49(1)(b) and (f) of the Act are discretely different offences which involve proof of different ingredients. Compliance with s55(1) is not an element of the offence created by s49(1)(a) or s49(1)(b) or the other offences in respect of which a certificate of analysis, obtained after a preliminary breath test, might be admissible.
***DPP v Nicholson* (1997) 98 A Crim R 558; (1997) 27 MVR 120, disapproved.**

WINNEKE P:
1. These two appeals raise similar issues. They are appeals brought by the Director of Public Prosecutions for the State of Victoria (whom I shall call either "the appellant" or "the Director") against orders made by Hampel J on 29 March 1999 ([1999] VSC 91), by which his Honour dismissed two appeals brought by the appellant against orders made respectively by the Magistrates' Court

at Geelong on 2 November 1998 and the Magistrates' Court at Melbourne on 4 November 1998. In each instance the Magistrates' Court had dismissed charges brought against the respective respondents alleging breaches of s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986 ("the Act").

2. The appellant appealed to the Supreme Court against each of the orders made by the Magistrates' Court pursuant to s92 of the *Magistrates' Court Act* 1989, which gives the right to a party to criminal proceedings in that court to appeal from a final order in those proceedings to the Supreme Court on a question of law. Section 92(2) provides that the appeal to the Supreme Court is to be brought by the Director of Public Prosecutions where the informant who wishes to appeal is a member of the police force. That was the case in each of the proceedings with which this Court is concerned.

3. As I have indicated, in each proceeding the respondent had been charged with offences against s49(1)(b) and (f) of the Act. Insofar as relevant, those provisions are as follows:

> "(1) A person is guilty of an offence if he …
> (b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his … blood; or
>
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 (1) and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his … blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;

The "prescribed concentration of alcohol" is defined, relevantly, to be 0.05%.

4. Because the offence prescribed by s49(1)(f) requires that the relevant sample of breath be one furnished "under s55(1)" and because the ambit of that term is relevant to the arguments on this appeal, it is desirable to set out the terms of that sub-section, insofar as they appear to be relevant to the issues raised on these appeals:

> "55(1) If a person undergoes a preliminary breath test when required by a member of the police force … to do so and—
> (a) the test in the opinion of the member … in whose presence it is made indicates that the person's blood contains alcohol; or
>
> (b) the person, in the opinion of the member …, refuses or fails to carry out the test in the manner specified in section 53(3)—
> any member of the police force … *may require* the 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 other place where the sample of breath is to be furnished *and to remain there* until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving … whichever is the sooner." (emphasis added)

5. The provisions to which I have referred find themselves in Part 5 of the Act which is intituled: "Offences Involving Alcohol or other Drugs". The offences contained in this Part of the Act are strict and the consequences are severe and far-reaching. However the policy behind the provisions is stated in the "purposes" described in s47, namely to:

> "(a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
>
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
>
> (c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol."

As the majority of the High Court has recently said in *Thompson v His Honour Judge Byrne of the County Court Melbourne & Ors* [1999] HCA 16 (at [20]; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27), these purposes make it plain that these strictly formulated offences are designed "to deal with a major social problem".

6. **The Facts**

Before turning to the issues of law which have arisen in these appeals, it is necessary to briefly state the facts upon which the decisions of the magistrates were based. Although the two offences are discretely different (cf *Thompson's* case, supra, at [24]), we were informed, contrary to what the High Court appears to have been told in *Thompson's* case (*supra* at [4]), that it is the practice in this State to allege both offences, and to try them together but, in the event of a finding of guilt, to seek a conviction and penalty on one offence only. As it happened, in each of these cases, that practice was not invoked because the magistrate, in the event, dismissed both charges laid.

(a) The case against Foster

Foster was apprehended at 2:51pm on Sunday 28 June 1998 by police in Station Lake Road, Lara. He was driving a BMW sedan. Senior Constable Delaforce, the informant, conducted a preliminary breath test using a "Lion Alcolmeter", which is a "prescribed device" under the Act. The test indicated that the respondent's blood contained alcohol. The respondent told the informant that he had recently drunk two glasses of champagne and the informant then asked the respondent to wait before conducting a further preliminary breath test at 3:06pm That test, too, was positive. The informant then said to the respondent:

> "In my opinion the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to the Corio Police Station for the purpose of a breath test. Are you prepared to accompany me?" The respondent answered: "Yeah."

At the police station, the informant introduced Foster to Senior Constable Mighall, an authorized operator of an approved breath analysing instrument. Following a conversation between Mighall and the respondent, which it is unnecessary to repeat, the informant requested the respondent to furnish a sample of his breath, whereupon Foster blew directly into the instrument. At 3:44pm the sample was analysed and a reading of .208% blood alcohol was recorded. Mighall then signed the certificate, in quadruplicate, which is printed out by the instrument and gave one to Foster and one to the informant. This was the certificate referred to in s55(4) of the Act. One of the certificates was produced in evidence. The informant, when cross examined by counsel for Foster, was asked:

> "You did not tell Mr Foster he had to stay at the police station for up to 3 hours, did you?"; to which the informant replied: "No, there was no reason to."

(b) The case against Bajram

The respondent Bajram was intercepted on 29 December 1997 at about 1:10am by Constables Gatty and Thompson in Coventry Street, South Melbourne. He was driving a Mercedes Benz sedan.

Gatty conducted a preliminary breath test using a "Lion Alcolmeter", a "prescribed device" under the Act. This test indicated that the respondent's blood contained alcohol. Gatty said to Bajram: "I am of the opinion that your blood contains alcohol."

There was a dispute as to what Gatty then said to the respondent. Gatty contended that he used words contained in his typed statement prepared in March 1998. These words were different from those contained in a "pro forma" document which he filled in at the police station. It was contended, on Bajram's behalf, that the Magistrate should not be satisfied that Gatty had used the words in the typed statement, but rather had used the words set out in the "pro forma" document. The magistrate resolved that dispute by finding as a fact that Gatty used the words in the pro-forma. This finding was that Gatty had said to Bajram, following the preliminary breath test:

> "In my opinion the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to the South Melbourne Police Station for the purpose of a breath test. Are you prepared to accompany me?" The respondent replied: "Yes."

At the police station, the respondent was introduced to Senior Constable Gaff-Larsen, an officer authorized to operate an approved breath analysing instrument. Following a conversation between Gaff-Larsen and the respondent, Gatty then required the respondent to furnish a sample

of his breath which he did by blowing directly into the instrument. The sample, when analysed, recorded 0.123% alcohol concentration in the blood. Gaff-Larsen signed the four certificates printed out by the instrument, gave one to Gatty and one to the respondent.

7. **The Magistrates' Decisions**

In each of the cases the respondent gave no evidence, but counsel representing him submitted at the close of the informant's case that there was insufficient evidence upon which the magistrate could find the charges proven.

The submissions were, however, made in differing circumstances. In the case of Foster, counsel made his submission of "no case" whilst reserving his client's defence. In the case of Bajram, counsel made his submission after announcing that his client would call no evidence. The differences will have an effect on the orders to be pronounced should the appeals be successful.

The submission made, in each case, was substantially similar. It was that, in order to prove the commission of the offences prescribed by paragraphs (b) and (f) of s49(1) of the Act, it was necessary for the informant to have "required" the person furnishing the breath sample to "remain at the police station until the sample was furnished or for a period of up to 3 hours from the time of driving, whichever was the sooner". This, it was said, was a "requirement" provided for by s55(1) of the Act and was a necessary ingredient of the offences charged.

In each case counsel directed the magistrate's attention to reported decisions of judges of the Supreme Court which had involved related, but not the same, issues. In each case the magistrate upheld the submission, to which I have referred in the preceding paragraph, and held that the making of the "requirement to remain" was an essential pre-condition of the proof of each offence. Because, in each case, the requirement had not been, in terms, imposed upon the respondent, the magistrate found that the offences had not been proven and, accordingly, had dismissed the charges and ordered costs to be paid by the informant.

The Appeal to the Trial Division

8. It was against these decisions that the appellant availed himself of the provisions of s92 of the *Magistrates' Court Act* to appeal to the Supreme Court.to Rule 58.09 of the *General Rules of Procedure in Civil Proceedings*, Master Evans, on 1 December 1998, stated a number of questions of law to be determined by the Supreme Court in each of the cases. [*After setting out the questions, His Honour continued*] …

9. The appeals were heard before Hampel J in March of this year. In the event, and for reasons given, his Honour dismissed the appeal in each case. His Honour found that, unless the motorist "dispenses with the requirement", proof of the offences contained in s49(1)(b) and (f) "depends upon compliance with s55(1)". It was his Honour's view that the sub-section "defines the circumstances in which a police officer … may require the motorist to furnish a sample for analysis by a breath analysing instrument". That requirement, according to his Honour, is a composite requirement "to attend a police station … for that purpose [that is, furnishing a sample of breath] and to remain there until the test is concluded and a certificate given or for up to 3 hours after the driving". In his Honour's opinion there is "nothing in the section [that is, s55(1)] which justifies a distinction between the obligation to inform the motorist of the purpose of his being required to go to the police station and the circumstances in which the motorist is required to remain there". In this respect his Honour adopted statements made in earlier decisions of the Court to the effect that the reason underlying the requirement that the motorist undergo a breath test was to inform the citizen as to why his or her liberty was being curtailed (*Dalzotto v Lowell* (Supreme Court, unreported, 18 December 1992, Ashley J); *DPP v Blyth* (1992) 16 MVR 159, Coldrey J; and *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275, per Eames J). That reasoning, so his Honour said, "supports the view that the motorist must be informed at the outset of the *requirement to remain* as well as being informed of the purpose for which he or she is required to accompany the police officer".

His Honour rejected the contention made on behalf of the appellant that it was unnecessary and inappropriate for the relevant police officer to inform the motorist "at the outset" of the requirement that he or she was to remain at the police station until the test was completed or, alternatively, until 3 hours had elapsed from the time of driving. His Honour said:

> "The mere statement of the purpose of being required to accompany the police officer does nothing to inform the motorist what is in fact required once the person has agreed to go to the police station. Mr Hillman's suggested construction creates difficulties. A motorist who agrees to accompany the police officer for the purpose of a breath test would be in a police station without knowing how long he or she may have to remain before the purpose for which the motorist agreed to attend is achieved. If he or she decided to leave before the breath analyzing instrument was made available, and within three hours after driving, and were able to do so before the requirement to remain was made by a police officer, Mr Hillman suggested no offence is committed. This result is, I think, neither intended nor desirable. The construction which treats the requirement which has to be communicated at the outset as one to *accompany and remain* avoids any such difficulties and ensures that the person is fully informed of what is required of them." (my emphasis)

His Honour, accordingly, concluded that proof of the offences under both s49(1)(b) and (f) depended upon compliance, in the manner in which he had described it, with s55(1). In reaching this conclusion his Honour adopted a statement made by Hedigan J in *DPP v Constantinou and Nicholson* (1997) 98 A Crim R 558; (1997) 27 MVR 120, where is Honour had said (at ACR 572):

> "This does not diminish the position that the making of a requirement is an element of the offence under s49(1)(f). The element is either established in another way or, in effect, agreed to have been satisfied."

(I interpolate that, in this passage, Hedigan J was seeking to distinguish a decision of the Appeal Division of the Supreme Court in *Walker v DPP* (1993) 17 MVR 194, where the Court had concluded that the motorist had dispensed with the "requirements" referred to in s55(1) of the Act.) Hampel J continued:

> "On the facts of the present cases, the motorists' agreement to accompany the police officer when only part of the requirement was stated, that is the purpose of accompanying the police officer, but not the part of the requirement to remain at the police station until the test was conducted or three hours after driving, does not in my opinion amount to dispensation."

The Present Appeal

10. The appeal by the Director to this Court against his Honour's orders was conducted against the background of accepted facts:

> (a) that in each case a preliminary breath test had been properly performed in accordance with s53 of the Act;
>
> (b) that in each case the officer in whose presence the preliminary breath test had been performed had formed, and had communicated to the respondent, the opinion that the test indicated that the respondent's blood contained alcohol;
>
> (c) that in each case the relevant police officer had required the respondent to accompany him to a police station for the purpose of conducting a breath test;
>
> (d) that in each case the police officer had, at the police station, required or requested the respondent to furnish a sample of breath for analysis by the approved instrument;
>
> (e) that in neither case had the police officer informed the respondent that he (that is, the respondent) was required to remain at the police station until he had furnished a sample of his breath and had been given a certificate in the prescribed form or until 3 hours had elapsed from the time of driving, whichever was the sooner;
>
> (f) that these were the first cases in which it had been held that the requirement referred to in (e) was an essential pre-condition compliance with which was necessary in proof of the offences contained in s49(1)(b) or s49(1)(f).

11. The arguments advanced on the appeal thus centred largely upon the meaning of the opening words creating the offence described in s49(1)(f) of the offence, namely:

> "A person is guilty of an offence if he …
> (f) within 3 hours after driving … *furnishes a sample of breath for analysis by a breath analysing instrument under s55(1)* …" (emphasis added).

The arguments also addressed the further question of whether a finding that the sample had not been furnished "under s55 (1)" necessarily led to the conclusion that the offence charged under s49(1)(b) had not been proved. The magistrate in each case appears to have assumed that this was so, and it would seem from his Honour's reasons that he, too, made that assumption. Although his Honour concluded that a successful prosecution of the offence created by s49(1)(b) depended upon compliance with s55(1), there appears to be no specific reason advanced to support that conclusion.

12. Mr Hillman submitted that his Honour was wrong to conclude that the informant in a prosecution of the offence created by s49(1)(f), was required to prove that, at the conclusion of the preliminary breath test, the relevant police officer had told the motorist that he was required to remain at the police station until he had furnished the sample of breath or until 3 hours had elapsed from the time of driving, whichever was the sooner. Indeed it was Mr Hillman's submission that none of the "requirements" referred to in s55(1) was an indispensable pre-condition of, or ingredient in, proof of the offence created by s49(1)(f). He submitted that the words "under s.55 (1)" were there to point up the fact that the offence could only be committed where the breath test had been administered following a "positive" preliminary breath test and that the words only imported an obligation upon the prosecution to prove the essential ingredients necessary to show that the test was one carried out in conformity with s55(1); namely that a preliminary breath test had been conducted pursuant to s53; that the police officer present had formed the opinion required by s55(1)(a) and that the subsequent breath test had been properly conducted in accordance with the section. He contended that the "requirements" contained within s55(1) were not essential ingredients of the "breath test" contemplated by the section, but rather were powers which the legislature had invested in police officers for the purpose of ensuring, where it became necessary, that such test could be carried out in pursuit of the objectives of the statute. There was nothing in the structure or content of the Act, he submitted, which suggested that the police officers "powers to require" were to be exercised "willy-nilly". Rather the Act demonstrated that the powers were to be exercised only if and when the occasion arose. That occasion would only arise, he submitted, if the motorist displayed an inclination not to co-operate, in which case it would be necessary for the officer to exercise his "power to require" in order to establish the commission of an offence under s49(1)(e) of the Act; namely the offence of "refusing to comply with a requirement made under s55 (1) ...". Mr Hillman contended that it would be, in any event, a nonsense for a police officer, having formed the required opinion after the administration of a preliminary breath test, to require a motorist to remain at a police station until he had furnished a sample of breath or for 3 hours after the driving when the occasion for such a requirement had not arisen and might never arise.

13. In response to the submissions made on behalf of the Director, Mr Holdenson, who appeared for the respondents, submitted that the conclusions reached by the judge below were correct. He submitted that the words "under s55(1)", where contained in the offence created by s49(1)(f), mean "in compliance with s55(1)" and that they clearly imposed the obligation upon the prosecution to prove that the breath test administered "under s55(1)" was one preceded by the relevant requirements. He submitted that it had consistently been held by the High Court and judges of the Supreme Court that the requirement to "furnish a sample of breath for analysis" was a necessary pre-condition or ingredient of the offence created by s49(1)(f) and that it was logical to conclude that, if the fulfilment of that requirement was an "element" of the offence, then the requirement "to remain" was likewise "an element". Mr Holdenson sought to distinguish what he called the "dispensation cases" as cases decided on their own facts, submitting that the courts must have been satisfied that the motorists, being "fully informed" of their rights, had waived them. In any event, he contended, those decisions were incompatible with decisions of the High Court and that, accordingly, we should not follow them. Alternatively he contended that they were wrong and that this Court should be prepared to overturn them (*R v Tait* [1996] VicRp 48; [1996] 1 VR 662 at 666; (1995) 80 A Crim R 374, per Callaway JA). It was Mr Holdenson's submission that Part 5 of the Act empowered police to make substantial intrusions into the liberty of the subject and that, in that context, the "requirements" contained in s55(1) were designed to impose a duty to inform motorists of the reasons why their liberty was being interfered with and the length of time for which such interference would, or might, occur. It was not enough, he contended, for the "requirements" to be made "as and when the occasion arose". The information was to be conveyed "at the outset" through words of command. It was not good enough, he contended, for police officers to use precatory terms, or terms of "request". He submitted that, although it was not

necessary to couch the requirements precisely in the terms of the statute, words to the following effect should be used:

> "I require you to accompany me to the police station for the purposes of a breath test and to remain there until you have furnished a sample of your breath and been given a certificate in the prescribed form or until 3 hours has elapsed from the time of your driving, whichever comes first."

This was a simple formula, he said, and easy to use. Indeed, said Mr Holdenson, such words were now being used by the police. He conceded that this was no doubt so because of the decision now under appeal and its potential ramifications.

14. Unaided or, perhaps more importantly, unimpeded by authority, I would have had no doubt that the submissions of Mr Hillman on behalf of the Director were correct; namely that it is not an essential element in the proof of the offence under s49(1)(f) of the *Road Safety Act* 1986 that the requirements, referred to in s55(1), have been made by a police officer in a compendious and coercive form. Likewise I would have had no doubt that it is unnecessary, in proof of that offence, for the prosecution to establish that the relevant police officer who had formed the opinion under s55(1)(a) had, then and there, required the motorist to "remain" at a police station where he was not at that time, and might never be. S49(1)(f) requires for its proof, *inter alia*, that the motorist has "within 3 hours after driving ... furnish[ed] a sample of breath ... under s55(1)."

It seems to me to be reading a lot into the words "under s55 (1)" if they are to comprehend proof that the panoply of discretionary "requirements" to which the sub-section refers, have been made of the motorist, and made in the street following the completion of the preliminary breath test. I would have thought, again unaided by authority, that the opening words of s49(1)(f) are fulfilled by proof that the police officer formed the opinion described in s55(1)(a) following the administration of a preliminary breath test (which is undoubtedly a pre-condition of the offence), and that, thereafter, the motorist furnished a sample of his breath for analysis by the approved instrument within 3 hours of driving (cf *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 743; (1989) 9 MVR 1). It is the fact of furnishing the sample of breath to which s49(1)(f) specifically refers; not the fact that the person has been *required to furnish* the sample. Granted that an element of compulsion may be readily inferred from the fact that a person furnishes a sample of his or her breath into an approved instrument, it is not easy to see why a sample furnished by a willing and co-operative motorist after the administration of a "positive" preliminary breath is not as much a sample furnished "under s55(1)" as is a sample furnished by an unco-operative motorist who has only been prepared to do so after a specific requirement, in terms of s55(1), has been imposed (cf *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 per Barwick CJ at 58, 63-4; 19 ALR 641; 52 ALJR 561).

15. The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to exercise them, let alone in the manner of a ritual incantation of the type which counsel for respondents suggests. Rather, as I see it, they are powers which a police officer "may" exercise as and when circumstances dictate. If the motorist refuses to accompany the police officer to a police station for the purposes of a breath test, the police officer may require him or her to do so; if he or she refuses to furnish a sample of breath into the instrument, then he or she may be required to do so; if he or she refuses to remain at the police station before the test has been administered, the police officer may require him or her to remain — at least until the relevant time has elapsed. If the motorist persists in the refusal, in the face of any such requirement, he or she is at risk of being charged with the offence under s49(1)(e), in which case proof of the relevant requirement will become an essential element of that offence.

If the nature and purpose of the "powers to require", invested in the police officer by s55(1), are as I perceive them to be, then the exercise of the power could not be an essential "pre-condition" to the proof of, nor an element or ingredient in, the offence created by s49(1)(f).

16. However, my views as to the proper construction of ss49(1)(f) and 55(1) of the Act will be of

no consequence if, as Mr Holdenson contends, this Court is bound by authority to construe them in the manner for which he contends. He submitted that, subject to what he calls "dispensation cases", the High Court's decision in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 compels this Court to accept the proposition that the words "under s55(1)", where used in describing the offence under s49(1)(f), make it an indispensable pre-condition of the proof of that offence that the relevant member of the police force has imposed a requirement on the motorist to furnish a sample of breath for analysis. He referred in particular to the passage (at CLR p219) in the judgment of Mason CJ and Toohey J (concurred in by Brennan J) that:

> "In its terms par (f) [*scil* s49(1)(f)] operates whenever a person, within three hours after driving, furnishes a sample of breath for analysis by a breath analysing instrument *as a result of a demand* made following a preliminary breath test, *in exercise of the power in s55(1)* read with s53." (emphasis added)

Mr Holdenson submitted that this passage, read in conjunction with the further passage (at 224) that:

> "Section 49(1)(f) only applies to persons who, within three hours of driving, have furnished a sample of breath *in accordance with* s55(1) resulting in a reading above the prescribed concentration."

ineluctably leads to the conclusion that compliance with the requirements set out in s55(1) is a necessary pre-condition of the offence described by par (f).

17. Notwithstanding that the primary issue considered by the High Court in *Mills v Meeking*, supra, was whether the offence described in s49(1)(f) of the Act was applicable only to circumstances where the driver furnishing the sample had been "involved in an accident", it is true, as Mr Holdenson submitted, that a number of single judges of this Court have accepted *Mills v Meeking* (*supra*) as authority for the proposition that, in order to establish the offence created by s49(1)(f), the prosecution must prove, at least, that the motorist has been required by the police officer to furnish a sample of his breath for analysis.

18. Thus, in *Smith v Van Maanen* (1991) 14 MVR 365, Tadgell J said (at 371):

> "It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last 3 hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-s(1) of s53; that the defendant has been duly required to furnish and has furnished a sample of breath for analysis; and that the result of analysis of the sample as recorded by the breath analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood. The furnishing of the sample has to be proved to be one for analysis by a breath analysing instrument, as defined, and, of course the requirement must be one to furnish under s55(1)."

19. Mr Holdenson submitted that the necessary ingredients of proof of the offence as described by Tadgell J were emphasized by Ormiston J in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367. Although his Honour in that case was principally concerned with whether the preliminary breath test had been validly administered under s53 of the Act, his Honour (having referred to the relevant terms of ss49, 53 and 55) said (at 407):

> "It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1). This is implicit in the judgment of Mason CJ and Toohey J in *Mills v Meeking*, see especially at pp219, 222 and 223-4, apparently approving what was said by the Full Court *sub nom Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 743; (1989) 9 MVR 1. The same conclusion was clearly expressed by Tadgell J in *Smith v Van Maanen* ... . (His Honour then referred to the passage in that case to which I have previously made mention.)
>
> Consequently compliance with these sub-sections is not merely a question as to the admissibility of the evidence of the tests which may be rejected on a discretionary basis if they have been illegally required: it is an essential part of the case which the prosecution must make out. By s49(1)(f) the first element of the offence to be established is whether the accused has furnished a sample of breath "*under*" s55(1)."

20. The proposition that, in proof of the offence under s49(1)(f), the prosecution must establish as an element of the offence that the defendant has been "required" to furnish a sample of his breath for analysis has been followed in a number of subsequent decisions (*Dalzotto v Lowell*, supra; *McCardy v McCormack*, supra; *DPP v Constantinou & Anor*, supra). Indeed it seems to me that, in these cases, the courts have taken the "element of requirement" considerably further than previously suggested and to have incorporated within the necessary element to be proved the requirement to "accompany the member of the police force to a police station or other place" and a statement of the reason or purpose for such requirement.

In *Dalzotto's* case, Ashley J held (pp7-8) that it was incumbent upon the police officer to articulate the purpose for which he was requiring the motorist to accompany him "to a police station or other place" because the motorist was effectively being deprived of his or her liberty; and that "in these circumstances the legislature has required the police officer to convey to a member of the public the purpose for which the requirement to attend the police station is being imposed." His Honour said (p8) that:

> "[T]he likely circumstance that the appellant was aware why he was being required to accompany the informant to the police station does not stand in substitution for the *duty to inform* imposed by s55(1)." (my emphasis)

These reasons were followed by Eames J in *McCardy v McCormack*, *supra*, at pp522-3. That was a case where the motorist had been required by a police officer to "come with me" to a "booze bus" only metres away from the preliminary breath testing station and the magistrate had found that the motorist "could have been in no doubt" as to purpose of the requirement. Having referred to *Dalzotto's* case, his Honour said:

> "If the citizen is entitled to know the reason why, when not under arrest, she is being deprived of her liberty, it seems to me that this is an entitlement which must apply in all circumstances, not merely in those where the incidents accompanying the deprivation of liberty may be thought to be less transitory, or more intimidating, than in other circumstances. The citizen is entitled to know why such an event is happening, and what is entailed in the requirement that she be deprived of her liberty."

It would seem that Hedigan J in *Constantinou's* case, *supra* at 572-3, was content to adopt this line of reasoning.

21. These cases, Mr Holdenson submitted, erect a formidable barrier of binding authority from which this Court cannot retreat. They bind this Court to conclude, he submits, that not only is the requirement to furnish a sample of breath for analysis an essential pre-condition in proof of the offence under s49(1)(f), but so is the requirement to accompany the police officer "to a police station or other place" as well as the obligation to inform the motorist of the reason for the latter requirement.

22. In making this submission Mr Holdenson recognized that the decision of this Court's predecessor in *Walker v DPP (Vic)* (1993) 17 MVR 194 needed to be distinguished. In that case the motorist, who had been charged under s49(1)(f), had been "found driving" by police and subjected to a preliminary breath test, which proved positive. The evidence disclosed that the motorist had then "agreed to accompany the police officer to the Carlton police station to undergo a breath test". At the station she was asked:

> "Are you prepared to furnish a sample of your breath for analysis?"
> to which the motorist replied: "Yes".

It was contended that there was no evidence, *inter alia*, that the motorist was "required" to furnish a sample of her breath within the meaning of s55(1). The Appeal Division of this Court held that the evidence established sufficient compliance with s55(1) to make good the offence under s49(1)(f). Fullagar J (with whom McDonald J concurred) said (at 196):

> "In my opinion the evidence that 'the defendant agreed to accompany me back to Carlton' in order to undergo a breathalyser test is, in all the circumstances, evidence of the fact that the defendant was willing to go to the police station for that purpose, and of the fact that a request or demand was unnecessary. Again I point out that the defendant was not charged with refusing to undergo a test when required to undergo one.

> At the police station a third consent was obtained when the defendant was asked 'Are you prepared to furnish a sample of your breath for analysis?' and she replied 'Yes' and then undertook the test. In my opinion the above evidence in the surrounding circumstances was sufficient to establish a *prima facie* case that both the preliminary test and the breathalyser test were furnished by the defendant 'under s55 (1)' ...".

Fullagar J further rejected a contention (196) that it must be established that a breathalyser unit was set up and ready for use in the presence of the defendant at the time of the requirement to undertake a breathalyser test. His Honour said:

> "In my opinion this contention too should be rejected in a case where a requirement is not an element of the offence charged."

Brooking J, having referred to the evidence in the case, said (at 199):

> "I am prepared to assume, without expressing any opinion on the question, that it would not have been open to a magistrate to find that there had been a requirement for the purposes of s53 (1) or s55(1) so as to support a charge under s49(1)(c) or (e) [that is offences of 'refus[ing] to undergo a preliminary breath test ... when required' and 'refus[ing] to comply with a requirement made under section 55(1)'] in the event that the defendant had answered 'No' to either of the questions put to her and nothing more of relevance had been shown to the court ... . [B]ut, as the learned presiding judge has emphasised, in the present case the offence alleged was against s49(1)(f), and in my view it is not an element of this offence that there should have been a requirement made under s53 or that there should have been a requirement made under s55(1). As against the latter suggested element of the offence, para (f) of s49(1) does not speak in terms of a requirement under s55(1). It speaks of the furnishing of a sample of breath for analysis by a breath analysing instrument 'under s55(1)' and, in my opinion, a sample is furnished for analysis 'under' s55(1) if the defendant, so to speak, dispenses with the 'requirement' which is that by means of which the furnishing of the sample is made compulsory in the sense that, by the combined operation of s49(1)(e) and s55(1), the refusal ... to furnish the sample is made an offence."

His Honour later said (199):

> "Examples might readily be given of cases in which something has been held to have been done 'under' an enactment, notwithstanding that what has been done was not done in all respects in accordance with the enactment. Here the appellant chose to dispense with the performance of conditions upon which the arising of a duty to undergo a breathalyser test depended, and, on the assumption which I have made about the meaning of 'require' near the outset of these reasons, that duty did not arise. But she was not charged with non-performance of that duty and, when the breath test was undergone with her consent, the sample was, in my view, furnished for analysis 'under s.55 (1)' within the meaning of s49(1)(f)."

23. Mr Holdenson submitted that *Walker's* case was a special case which did not detract from the force of the authorities, previously referred to, which bound this Court to find that, at least, a "requirement" to furnish a sample of breath for analysis was an essential pre-condition to the proof of the offence under s49(1)(f). His contention was that *Walker's* case should be regarded as a "dispensation" case which required what he called "fully informed" consent on the part of the motorist before the "requirement" lost its status as an essential pre-requisite in proof of the offence. Alternatively, he argued that this Court should decline to follow *Walker's* case because it is inconsistent with the binding authority of *Mills v Meeking*.

24. For my own part, I do not find either of these arguments compelling. The very experienced judges who decided *Walker's* case were well aware of the authority of *Mills v Meeking*. Indeed the learned presiding judge had also presided at the appeal of *Meeking v Crisp*, *supra*, the decision in which was upheld by the High Court in *Mills v Meeking*.

In my view, *Walker's* case is clear authority for the proposition that a sample of breath said to be furnished "under" s55(1) is such a sample notwithstanding that it has been furnished willingly and without a formal demand. In my own view, as I have said previously, it would be an affront to common sense if the contrary view were to prevail.

25. The learned judges who decided *Walker's* case did not regard themselves as being constrained by *Mills v Meeking* from forming the views which they did. Their conclusion can, I

think, be explained consistently with the statements in *Mills v Meeking* to which reference has been made. If the circumstances show that the motorist has furnished a sample of breath into the breath analysing instrument willingly, and apparently with an awareness of his or her rights and obligations, the court should readily infer that the necessary requirement has been made. This, as I would understand it, was the view adopted by Coldrey J in *DPP v Blyth* (1992) MVR 159 at 162-3, and by Mandie J in *DPP v Ryan* (1994) 19 MVR 574 at 576-7. It would also seem to be implicit in the remarks made by Barwick CJ in *Bunning v Cross*, supra (at 64), when **[20]** considering similar provisions contained in the *Road Traffic Act* 1974 (WA). It would, in any event, be difficult to conceive of circumstances where a motorist has furnished a sample of breath into an analysing machine without some request, formal or informal, having been made. However, it is not in my view necessary that a "demand" in imperative terms should have been made as a pre-requisite to proof of a "requirement". A request in precatory or polite terms by a person clothed with apparent authority will be sufficient to satisfy the requirement to "furnish a breath test", if indeed such a requirement is an element of the offence under s49(1)(f). (*R v Clarke* [1969] 2 All ER 1008; [1969] 2 QB 91; *Cullen v Huffa* [1970] SASR 155; *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503.)

26. I am prepared to accept, for present purposes, that the authorities to which Mr Holdenson refers oblige the Court to find that the prosecutor must prove that the motorist has been "required" to furnish a sample of breath for analysis as a necessary pre-condition of proof of the offence created by s49(1)(f). But, for the reasons already given, I do not accept that the "requirement" must be made in terms of an imperative demand. Nor do I accept that any such requirement is to be made "at the outset" in the sense that it must be made at the scene of the preliminary breath test. It is, to my mind, abundantly plain from a reading of s55(1) that the requirement to furnish a sample of breath for analysis by a breath analysing instrument can only sensibly be made at the time when the device is presented to the motorist at the police station (or other place). That, as I see it, was the view taken by Southwell J in *Rankin v O'Brien* (supra, at 73) when considering different, but for present purposes, similar legislation which existed in s80F of the *Motor Car Act* 1958. Indeed, in my view, the words of s55(1) themselves imply that the requirement to "furnish a sample of breath" is to be made when the instrument is presented to the motorist because it is stated that the relevant member of the police force "may require the person to furnish a sample of breath for analysis *and for that purpose* may further require the person to accompany a member of the police force … to a police station …" (my emphasis). In other words, the section itself makes it plain, as I see it, that the power to make the latter requirement is to facilitate the purpose for which the power to make the primary requirement is given, which can only sensibly be exercised when the motorist is confronted with the machine.

27. It is apparent from the view which I have expressed in the preceding paragraph that I do not accept the submission made on behalf of the respondents, which found favour with the judge below, 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, in compendious and imperative terms, each of the "requirements" to which s55(1) of the Act refers. In my view the authority of *Mills v Meeking* does not go that far. The offence is described in terms of "furnish[ing] a sample of breath for analysis … under s.55 (1)". Whether the words "under s55(1)" are to be interpreted as meaning "in accordance with s55(1)" or as meaning "pursuant to s55(1)", it would, I think, be stretching their meaning beyond their context to suggest that they require proof of the imposition, in compulsory form, of each of the requirements to which the sub-section refers. Whilst I am content to accept that a "requirement to furnish" is sufficiently interwoven with the actual furnishing that the requirement itself becomes an integral part of that "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.

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)". After all, if the motorist refuses to accompany the police officer to the station or other place where a sample can be furnished for analysis, he or she is not at risk of being charged with the offence of "refusing to furnish a sample, when required"; but only at risk of being charged with the offence of "refusing to accompany a police officer to the station, when required" (cf. *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67 at 73; (1985) 2 MVR 503, per Southwell J). In any event, as the case of *Webb* (*supra*) 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 pre-condition to the establishment of the offence described by s49(1)(f).

28. I am conscious of the fact that, since the decision of the High Court in *Mills v Meeking* (*supra*), single judges of this Court have used its authority to expand the parameters of the words "under s55(1)" beyond the limits, as I see them, for which that authority can legitimately stand. I have already referred to the decisions of *Dalzotto v Lowell*, *McCardy v McCormack* and *Constantinou's* case. Those decisions proceeded on the basis that the decision in *Mills v Meeking* compelled the court to conclude that it was an essential ingredient of the offence under s49(1)(f) that the police officer should have required the motorist, following a "positive" preliminary breath test, to accompany the officer to a police station (or other place) and to have stated the reason or purpose for doing so.

29. With due respect to the experienced judges who decided those cases, I cannot agree, for the reasons which I have already stated, that the authority of *Mills v Meeking* compels such a construction of the offence. The process of reasoning which seems to underlie those decisions stems not so much from an interpretation of the words "furnish a sample of breath for analysis … under s55(1)" but rather from an assumption that the legislative intent which lies behind s55(1) is to protect the interests of the motorist. This assumption has led the courts to construe more strictly the discretionary powers of "requirement" and to convert them into obligations, as distinct from powers. Thus it is said that the legislative purpose behind s55(1) is not to invest the police with a power to facilitate the objects of the statute, but rather to impose a "duty to inform" the motorist of the reason why his or her liberty is being curtailed (see, for example, *Dalzotto v Lowell*, supra, at pp8-9; *McCardy v McCormack*, supra, at pp522-3).

Of course the investiture of increased police power has, as its necessary corollary, an increased incursion into civil liberties. However, whilst any invasion of personal liberty is bound to provoke disquiet, the courts cannot afford to lose sight of the fact that the undisputed aim of Part 5 of the Act is to combat and reduce a recognized social evil in a manner which can only be achieved by empowering the police, in the overriding community interest, to intrude upon personal liberties, albeit not in a necessarily hostile or coercive way. If, as I think, the underlying purpose of s55(1) is to invest the police with facilitative powers in order that these objects can be achieved, it cannot be correct to judicially convert that purpose from "a power to require" into a "duty to inform". Yet, as it seems to me, that is what his Honour has done in these cases by accepting the process of reasoning adopted in *Dalzotto* and *McCardy*.

30. It should not be forgotten that the issue which his Honour had to determine in these cases did not depend upon the proposition that the prosecution had failed to prove that the motorist had been required to accompany the police to the police station, or that the motorist had not been informed of the reason for that requirement, or that the motorist had not been required to furnish a sample of his breath for analysis. The major issue was whether the charges against each respondent were correctly dismissed by the respective magistrates because of a failure by the informant to tell the respondent "at the outset" not only that he was required to accompany police to the police station but that he was required *to remain at the police station until the sample of breath for analysis had been furnished or until 3 hours had elapsed from the time of driving, whichever was the sooner* (emphasis added).

31. The fact that this was the major issue which his Honour had to decide does not render redundant what I have already said, not only because the issues which I have addressed were

contained in the "questions of law" referred to his Honour for decision pursuant to s92 of the *Magistrates' Court Act* but also because, as his Honour noted, the process of reasoning adopted in the earlier decisions of *McCardy* and *Dalzotto* supported the view, which the magistrates had formed, that proof of the "requirement to remain" should be established before the offence under s49(1)(f) could be made out. Although his Honour acknowledged, as had the magistrates, that no court had previously decided that proof of the offence under s49(1)(f) obliged the prosecution to establish that the "requirement to remain" had been made following the preliminary breath test, he was none the less satisfied that all the "requirements" referred to in s55(1) were inseverable and that, because authority obliged him to find that there was an indefeasible obligation upon a police officer to require the motorist to furnish a sample of his breath for analysis and to *inform* the motorist of the purpose for which he or she was required to accompany the officer to the police station, it necessarily followed that the officer "must inform the motorist, *at the outset* of the requirement to remain ..." (my emphasis). Unless this was established, then, in his Honour's view, the prosecution could not prove that the sample of breath was furnished "under s55(1)".

32. It follows from what I have already said that this proposition, in my opinion, is unsound. Not only are the requirements "to accompany" and "to remain" not elements of the offence created by s49(1)(f) but they are severable in the sense that each power need only be exercised where the circumstances dictate. As I have previously noted, it would, in my view, be patently absurd for a police officer to require a motorist who had tested "positive" to a preliminary breath test in the street, "to remain at a police station" to which he had not yet agreed to go and at which he might never be. Furthermore, in my opinion, it is irrational to contemplate that a sample of breath furnished by a motorist at a police station ceases to be a sample furnished "under s55(1)" for want of a requirement that the motorist "remain at the police station until the sample has been furnished". If the motorist has been required or requested to accompany the police officer to the station for the purposes of furnishing a sample of breath, as the respondents here were, it is to be implied that he or she is to remain there until the sample has been furnished. Once it has been furnished the need to exercise any power to require the motorist to "remain" has been spent. I agree with Mr Hillman that the exercise of that power will only arise if and when the motorist exhibits a disinclination to remain at the station before the test is taken and before the 3 hours has elapsed. For my own part, I do not share his Honour's view that such an interpretation of the power creates difficulty.

33. That is enough to dispose of these appeals. The failure to inform the respondents "at the outset" that they were "required" to remain at a police station until the sample of breath had been furnished or for 3 hours from the time of driving could not lead to the conclusion that the samples of breath furnished were not furnished "under s55(1)".

34. There was, however, one further matter argued before this Court, which requires comment. His Honour concluded that the offence charged under s49(1)(b) also depended for its proof "upon compliance with s55(1)".

Mr Hillman, for the Director, submitted that this is incorrect. He submitted that, although the charges laid under s49(1)(b) and s49(1)(f) might depend for their proof upon the same set of facts, they are nonetheless discretely different offences which involve proof of different ingredients. This is undoubtedly correct, as the High Court has recently pointed out in *Thompson v His Honour Judge Byrne*, *supra*, at [24]. Mr Hillman contended that, although it is the practice not to proceed to conviction on each charge and although it might not be open to a court to penalize the defendant on each charge (cf. s51 *Interpretation of Legislation Act* 1984), it was nevertheless open to the prosecution to allege each charge in the charge sheet and to seek to prove each by admissible evidence (*Pearce v R* [1998] HCA 57; (1998) 194 CLR 610 (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1). He further submitted that proof of the offence contained in s49(1)(b) did not, in terms, require compliance with s55(1) and that s58(1) and (2) of the Act made the certificate of analysis, provided pursuant to s58(2), admissible in evidence as proof of the alcohol concentration required by s49(1)(b).

35. Mr Holdenson submitted that his Honour was correct to conclude that a failure to prove that a sample of breath was furnished "under s55(1)", thus leading to the dismissal of the charge under s49(1)(f), necessarily leads to a dismissal of the charge under s49(1)(b). He relied upon the decision of Hedigan J in *DPP v Constantinou & Anor*, supra, (at 572-3) where his Honour said:

> "Not without some doubt about the matter, I have reached the conclusion that, in the circumstances where a s49(1)(b) charge is 'annexed' to a s49(1)(f) charge in a case in which the police procedure commenced with a requirement under s53(1) to undergo a preliminary breath test, the elements or pre-conditions are the same as those for the s49(1)(f) offence."

After discussing the nature of the "pre-conditions" required for proof of the offence under s49(1)(f) his Honour continued:

> "In my view, a sample of breath furnished and analysed as a consequence of a preliminary breath test is not a sample of breath furnished ... for analysis under s49(1)(b)."

Mr Holdenson submitted that his Honour had used the word "annexed" advisedly because he had in mind the provisions of s48(1)(a) of the Act which provides that:

> "(1) For the purposes of this Part—
> (a) if it is established that at any time within 3 hours after an alleged offence against paragraph (a) or (b) of s49(1), a certain concentration of alcohol was present in the blood of the person charged with the offence, it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed."

This presumption can only be applied, so Mr Holdenson contended, in the event that the relevant "concentration" has been "validly" established. If it cannot be so established, because of a failure to comply with s55(1) "requirements", then the presumption cannot apply in proof of the s49(1)(b) offence. This, according to Mr Holdenson, was what his Honour meant when he referred to the s49(1)(b) offence being "annexed" to the s49(1)(f) offence.

36. In my view, there a number of fallacies in Mr Holdenson's argument. Quite apart from the fact that I do not think that Hedigan J had in mind anything so elaborate when he referred to the charges being "annexed", I am not able to accept that s48(1)(a) precludes the prosecution from relying upon the presumption contained in it for want of compliance with the s55(1) "requirements". Pursuant to s58 it is the certificate of analysis, referred to in sub-s(2), which constitutes the evidence of concentration of blood alcohol not only for offences alleged against s49(1) but other offences created by the *Crimes Act* 1958. Such other offences include "negligently causing serious injury", "culpable driving", manslaughter and murder (see s58(1)). If the offence under s49(1)(f) cannot be made out because it cannot be shown that the breath sample was furnished "under s55(1)", for want of an appropriate "requirement", that does not mean, in my view, that evidence of the relevant certificate cannot be used in proof of these other offences, including the offences under s49(1)(a) and (b), where it is not necessary to prove that the breath sample has been furnished "under s55(1)".

It seems to me that Hedigan J regarded the s49(1)(b) offence as being "annexed" to the s49(1)(f) offence because the breath-testing procedure had been initiated by the conduct of a preliminary breath test which was the only basis upon which the offence under s49(1)(f) could be charged. It was for this reason, as I understand it, that his Honour concluded that a sample of breath analysed "as a consequence of a preliminary breath test" is not a sample of breath "furnished and analysed ... under s49(1)(b)". Indeed it was his Honour's view (570) that:

> "To hold that the result of a breath test which has been obtained without compliance with the legal requirements, so that at least as a first step, the results of the breath test might be regarded as being evidence unlawfully obtained, ought to be admissible on another charge under s49(1)(b) would not only diminish confidence in the justice dispensed by the courts but would render non-compliance with the procedures required largely irrelevant."

The trouble that I have in accepting this view is that it seems to overlook the fact that it is only the offence created by s49(1)(f) that is said to require "compliance" with s55(1). Such compliance is not an element of the offence created by s49(1)(a) or s49(1)(b) or the other offences in respect of which a certificate of analysis, obtained after a preliminary breath test, might be admissible. Nor, in my view, can it be said that the want of compliance, which results in the inability to prove that the sample was furnished "under s55(1)", leads in any real sense to a conclusion that the sample, as analysed, is unreliable for other purposes. If his Honour's observations are pushed to their limits such certificates would not be admissible in offences other than against s49(1)(b) even though the lack of compliance with procedure was merely technical.

For these reasons I cannot accept that a sample of breath furnished and analysed as a consequence of a preliminary breath test is not a sample "furnished and analysed … under s49(1) (b)". In my opinion, the prosecution would still be entitled to rely upon the certificate of analysis under s58, even if, contrary to my view, the offence under s49(1)(f) cannot be established for want of proof that the sample was furnished "under s55(1)".

37. For these reasons, the appeals should be allowed. In each case, the magistrate was wrong to have dismissed the charges under s49(1)(b) and (f) of the Act for want of proof that the informant had, following the administration of the preliminary breath test, advised the respondent that he was to remain at the police station until he had furnished a sample of his breath and had been given the certificate under s55(4) or until 3 hours had elapsed from the driving, whichever was the sooner. Furthermore, in my opinion, Hampel J was in error in concluding that the magistrates were correct, for this reason, in dismissing the charges.

In the case of Foster, the matter will have to be remitted to the Magistrates' Court at Geelong to be further heard and determined according to law. In the case of Bajram, the matter should be remitted to the Magistrates' Court at Melbourne for the imposition of the appropriate penalty.

ORMISTON JA:

38. I have had the benefit of reading the judgment of the President in draft form and I agree in the conclusions he has reached in relation to these two appeals. Subject to what follows, I also agree with the reasons he has given for allowing those appeals.

39. The President in his judgment (at para 26) has stated that he is "prepared to accept, for present purposes, that the authorities to which Mr Holdenson refers obliged the Court to find that the prosecutor must prove that the motorist has been 'required' to furnish a sample of breath for analysis as a necessary precondition of proof of the offence created by s49(1)(f)". He has then stated, correctly in my respectful opinion, that he does not accept that the requirement must be expressed in terms of an "imperative demand", or that it should be made at the outset or that each of the requirements to which s55(1) of the *Road Safety Act* 1986 Act") refers must be incorporated in a valid requirement for the purposes of a prosecution under s49(1)(f). However, if and insofar as the learned President has suggested that some requirement to furnish a sample of breath for analysis is not a necessary precondition for a successful prosecution under s49(1)(f) of the Act, then I would, with due respect, maintain the view that I expressed in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403 at 407; (1992) 16 MVR 367.

In other words I consider that the necessary conditions for a prosecution under para (f) include: (1) the undergoing by the accused of a preliminary breath test when so required under s53, (2) either a test producing a result that the accused's blood contained alcohol or a refusal or failure to carry out a test in accordance with s53(3) and (3) a requirement by a police officer (or other official named in the section) that the person "furnish a sample of breath for analysis by breath analysing instrument". Then, as now, I would reach that conclusion by following what Tadgell J said in *Smith v Van Maanen* (1991) 14 MVR 365 at 371 and in particular what had been said by Mason CJ and Toohey J in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at 219, 222 and 223-224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, a judgment which was confirmed in all essentials by the High Court this year in *Thompson v His Honour Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27. A necessary precondition for a successful prosecution under s49(1)(f) is that it has been shown that within three hours after driving or being in charge of a motor vehicle the accused has furnished a sample of breach for analysis "under s55(1)" of the Act. Having regard to the penalty imposed one would not lightly assume that the furnishing of a sample of breath required to be demonstrated was a mere casual breathing into a breath analysing instrument. Thus the paragraph requires the furnishing to take place "under s55(1)".

40. The difficulty of giving a meaning to the word "under" is notorious. Recently the Court had to give consideration to its use in a statute which had both criminal and civil consequences, namely the *Credit Act* 1984: see *Australia and New Zealand Banking Group Ltd. v Bollas* [1999] VSCA 50; [1999] ASC 155-031. A contrast is frequently drawn between its meaning "pursuant to" and "in accordance with". *Australian Legal Words and Phrases* (1996) gives something over fifty examples of the word "under" used or misused in a wide variety of circumstances. To my way of

thinking the furnishing of a sample of breath referred to in paragraph (f) of s49(1) must be one which is made in accordance with ss(1) of s55.

41. The connection with s55(1) provides a problem in itself in that ss(1) does not contain any obligation to undergo a second breath test for the purpose of analysis by breath analysing instrument; it only refers to the power of the police to require a furnishing of a sample of breath. That appears to be so unless ss(5) contains in itself such an obligation, but that reads:

> "A person who furnishes a sample of breath under this section must do so by exhaling continuously into the instrument to the satisfaction of the person operating it."

With this section may be contrasted s53 which states explicitly in ss(3) that "a person required to undergo a preliminary breath test must do so by exhaling continuously … ". Likewise s56(2) contains a direct obligation on persons to "allow a doctor to take from that person … a sample of that person's blood for analysis". Sub-section (3) of s55 assumes that a person is furnishing a sample of breath but then such a person is required to do so by exhaling continuously etc. Other sub-sections such as (6) and (7) deal with reasons why persons shall not be obliged to provide samples of breath. The solution may be that there is an explicit offence contained in paragraph (e) of s49(1) which makes a person guilty if he or she "refuses or fails to comply with a requirement made under s55(1) or (2)". Whatever conclusion one reaches as to the obligations of persons to provide or furnish samples of breath for analysis, certainly ss(1) of s55 does not in its own terms appear to impose the obligation.

42. In my opinion, therefore, the appropriate interpretation of s49(1)(f), which explicitly makes reference only to ss(1) of s55, is to treat the furnishing of a sample under s55(1) as one furnished in compliance with a requirement made under that sub-section. Indeed the expression "furnish a sample of breath for analysis by a breath analysing instrument" appears immediately after the words "any member of the police force … may require the person". Thus it seems to me that compliance with such a requirement identifies the condition or the circumstance under which a person has furnished a sample of breath for analysis, so as to characterise it as having been furnished "under s55(1)". It follows that it is only where such a requirement has been made, that one can identify an analysis consequential upon the furnishing of a sample of breath which satisfies the paragraph.

43. On the other hand, however, there is nothing either in paragraph (f) s49(1) or in s55(1) which would compel a conclusion that a requirement under the latter sub-section must be expressed in precise or unvarying terms, so long as the intent of the police officer and the obligation of the person required have been made clear. The requirement, as the learned President has pointed out, need only be sufficient to ensure that the person furnishes such a sample. It would be unusual if some request were not made, but it is not unknown for persons anxious to clear their names to seek such an analysis. But most people understand the working of the system these days and it is obvious that the police will seek this analysis if the result of the preliminary test is unfavourable to the person tested, so that that person will be fully aware what is likely to be the next stage in the process. It seems to me to be of little consequence how the requirement is expressed or whether as a formal requirement it may be waived. In either case it will be assumed that what is being done is being done in accordance with the statutory procedure but the only basis upon which an analysis of a sample of breath may commence is upon satisfaction with the requirements of ss(1) of s55.

44. Nevertheless the powers given to the police under that paragraph are permissive. They do not have to require a person to furnish a sample of breath nor do they have to require the person to go to the police station or to stay there for three hours if that is not desired or if that is not necessary. I see nothing in the section which would require a recitation on all occasions of all requirements. To that extent each of the decisions to which the President has referred which suggest to the contrary ought not to be followed.

45. I would therefore allow each of these appeals.

BATT JA:

46. I agree with Winneke P in all respects.

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