

40/06; [2006] VSC 467

## SUPREME COURT OF VICTORIA

**MAITLAND v SWINDEN**

Hansen J

14 November, 5 December 2006 — (2006) 46 MVR 507

**MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST – DRIVER WAVED OVER BY A POLICE OFFICER WHO WAS STANDING WITH A TORCH IN THE MIDDLE OF THE ROAD – DRIVER UNDERWENT A PRELIMINARY BREATH TEST WHICH SHOWED DRIVER'S BREATH CONTAINED ALCOHOL – DRIVER CONVEYED TO POLICE STATION FOR FULL BREATH TEST WHICH PRODUCED A READING OF 0.07% – DRIVER CHARGED WITH OFFENCES – AT HEARING POLICE OFFICERS GAVE EVIDENCE THAT THE SCENE WAS NOT A PRELIMINARY BREATH TESTING SITE BUT A ROAD BLOCK TO CONDUCT PBTs AND CHECK LICENCES AND REGISTRATIONS – SUBMITTED BY DRIVER THAT A PRELIMINARY BREATH TESTING STATION HAD BEEN SET UP – SUCH STATION NOT IDENTIFIED BY SUITABLE SIGNS OR LIGHTS AS REQUIRED BY STATUTE – IN CONSEQUENCE THERE WAS NO POWER TO CONDUCT A PBT – SUBMISSION OVERRULED – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, SS49(1)(f), 53(1)(a), (b).**

Whilst driving his motor vehicle, M. was waved over by a police officer who was standing with a torch in the middle of the road. The police officer (in company with two others) had been randomly stopping vehicles on both sides of the road for preliminary breath tests and licence and registration checks. There were no signs relating to a preliminary breath testing station site set up nor any witches hats. M. was subsequently breath tested which produced a reading of 0.07%. M. was subsequently charged with offences under s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). At the hearing the police informant said that he and the other police officers were randomly testing drivers travelling along the road and that a preliminary breath testing station had not been set up but rather a road block in order to conduct preliminary breath tests and check licences and registrations. M. submitted that the police had set up a preliminary breath testing station within the meaning of s54 of the Act. As the station was not identified by suitable signs, lights or other devices as required by s54(2)(b), it had not been set up within the meaning of s54 and accordingly, there was no power to conduct a preliminary breath test or to request M. to furnish a sample of breath for analysis. The magistrate rejected this submission and found the charges proved. Upon appeal—

**HELD: Appeal dismissed.**

1. It was open on the evidence for the magistrate to find that the manner in which the police were operating at the time did not constitute a preliminary breath testing station as contemplated by the Act and that the police had exercised their power under s53(1)(a) of the Act.

2. [Observation] The only condition for the application of s53(1)(a) is that the person is found driving a motor vehicle. There is no specification of the circumstances of that finding. There is no doubt that Parliament intended the power in para (a) to be exercisable in the widest range of circumstances. For the purposes of the present case, there is no basis upon which para (a), having regard to the natural and ordinary meaning of its language and considered in the context of the Act as a whole, can be read down so as to exclude its operation in the circumstances found by the magistrate.

**HANSEN J:**

1. This appeal under s92 of the *Magistrates' Court Act* 1989 is brought by Edward John Maitland ("the appellant") against his conviction on a charge under s49(1)(f) of the *Road Safety Act* 1986 and orders made by the Magistrates' Court at Sunshine on 22 November 2005. According to the certified extract of the orders the appellant was "suspended from driving" for six months, fined \$300 and ordered to pay \$36.80 costs with a stay on payment until 20 December 2005. Nothing turns on whether the appellant's licence was suspended or, as the appellant has deposed, cancelled. On either basis the loss of the right to drive was for six months. The appellant has been permitted to drive pending determination of the appeal.

2. The hearing before the Magistrates' Court occurred on 27 and 28 October 2005. In fact he faced two charges, one under para (b) and the other under para (f) of s49(1). The essence of each charge was that at Gisborne on 6 May 2004 the appellant had driven a motor car while more than the prescribed concentration of alcohol was present in his breath. Following a preliminary breath

test the appellant was requested to and did provide a sample of his breath for analysis which produced a reading of 0.07%. Following conviction on the charge under s49(1)(f) the Magistrate struck out the charge under s49(1)(b).

3. An appeal under s92 is limited to a question of law. The question of law that is raised concerns the interpretation and operation of s53(1)(a) and (b) of the *Road Safety Act*, in particular whether those paragraphs have a mutually exclusive operation in the sense that one or the other but not both may apply in any given fact situation. The appellant submits that the section is to be so construed. But that is not the only point. The appellant also attacks the finding of the Magistrate that he was not stopped and required to undergo a preliminary breath test at a preliminary testing station as referred to in s53(1)(b).

4. It is convenient to commence by referring to the relevant legislative provisions.

5. Section 49(1)(f) provides (so far as is relevant) that a person is guilty of an offence if he, within three hours after driving a motor vehicle, furnishes a sample of breath for analysis by a breath analysing instrument under s55 and the result shown exceeds the prescribed concentration of alcohol in his breath.

6. Then, s53 provides for preliminary breath tests, as follows:

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

(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; or

(b) the driver of a motor vehicle that has been required to stop, and remain stopped at a preliminary testing station under section 54(3); or

(c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; or

(d) any person who he or she believes on reasonable grounds was, within the last 3 preceding hours, an occupant of a motor vehicle when it was involved in an accident, if it has not been established to the satisfaction of the member of the police force which of the occupants was driving or in charge of the motor vehicle when it was involved in the accident—

to undergo a preliminary breath test by a prescribed device.

(2) ...

(3) A person required to undergo a preliminary breath test must do so by exhaling continuously into the device to the satisfaction of the member of the police force ...

(4) A person is not obliged to undergo a preliminary breath test if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle."

7. Section 54 provides for preliminary testing stations referred to in s53(1)(b), as follows:

"54. Preliminary testing stations

(1) A member of the police force may set up a preliminary testing station on or in the vicinity of any highway.

(2) A preliminary testing station—

(a) consists of such facilities as are necessary to enable the making of preliminary breath tests or preliminary oral fluid tests; and

(b) must be identified by suitable signs, lights or other devices.

(3) A member of the police force who is on duty and wearing uniform at a preliminary testing station may request or signal any person driving a motor vehicle to stop the motor vehicle and remain stopped until a member of the police force on duty at the station indicates that the driver may proceed.

(4) Members of the police force who are on duty at a preliminary testing station must ensure that no person is detained there any longer than is necessary."

8. Section 55 provides for the taking of a breath analysis following a preliminary breath test. It is sufficient for present purposes to refer to s55(1)(a) which provides, in summary, that if a person undergoes a preliminary breath test when required by a member of the police force and the test in the opinion of that member in whose presence it is made indicates that the person's breath contains alcohol 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 require the person to accompany a member of the police force to a place where the sample of breath is to be furnished and to remain there until that is done and until given the certificate referred to in s55(4) or three hours after the driving whichever is the sooner.

9. The case arose in the following circumstances. Having dined with his partner the appellant was driving home in Station Road, Gisborne when he noticed the flashing light of a police vehicle to the right of a service station. He was waved over by a police officer who was standing with a torch in the middle of the road; that was the respondent, Senior Constable Darren Robert Swinden. The respondent spoke to the appellant saying that it was "just a preliminary breath test" and asked him if he had drunk anything alcoholic. The appellant advised he had just finished a glass of wine and the respondent allowed him 10 minutes before taking the test. In that time the respondent checked the appellant's licence details as the appellant was unable to produce his licence. The checks revealed that he held a full Victorian licence. After the elapse of approximately 10 minutes the appellant underwent a preliminary breath test conducted by the respondent which showed, in the respondent's opinion, that the appellant's breath contained alcohol. On the respondent requiring that the appellant furnish a sample of breath for analysis, the appellant was, for that purpose, conveyed to the Gisborne Police Station by two other police officers present at the scene, Senior Constable Ellen and Constable Taylor. The respondent travelled to the police station in his vehicle where he joined the appellant and the other police officers and the appellant underwent a breath test conducted by Senior Constable Ellen which produced the reading of 0.07%.

10. None of these matters is contentious. For the purpose of the question of law it is necessary to refer to other evidence which more particularly describes how the police went about their activity in Station Road.

11. The respondent was stationed at the Macedon Ranges Traffic Management Unit performing traffic duties in the Gisborne Area. On the evening in question he was in Station Road where his sedan car was parked, randomly stopping vehicles for preliminary breath tests and licence and registration checks. Senior Constable Ellen and Constable Taylor were at the same location doing the same kind of work. They were working, and their respective vehicles were parked, on opposite sides of the road. The respondent intercepted the appellant's vehicle and spoke to him. (I pass over the conversation, the licence check, the preliminary breath test and subsequent test.) The respondent could not remember if his vehicle was marked or unmarked as a police vehicle.

12. In cross-examination the respondent said, among other things, that he was working both sides of the road depending where the car was coming from. He was one unit and the other two police members were another unit working independently of each other. He was asked if it was a "planned site between the three of" them and said it was "only last minute type stuff". They used the site because there was plenty of visibility and lighting. Vehicles were intercepted with hand signals and a torch. He thought his vehicle was "an unmarked ute" which was why the other police had to take the appellant and his friend to the police station. The other vehicle was a marked sedan. He did not recall if police lights were operating on his vehicle but they were on the other car. He did not recall how the other police members waved vehicles in. He used a torch possibly with a cone on the end of it. He did not recall that witches hats were set up. Signs relating to a preliminary breath testing site were not set up. He disagreed that he behaved as a preliminary breath testing station stating that "it was just a road block where we conducted some preliminary breath tests and we checked licences and registrations". He did not call it a preliminary breath testing site but a road block. The difference was this, that at preliminary breath testing sites there are lights and signs to show that it is a preliminary breath testing site and generally they are primarily involved with just preliminary breath tests whereas "we tend to just stop cars randomly to check for licences and registrations and see who's driving what and we have a bit of a closer look at the people in the car. Just about every stop involves a preliminary breath test".

13. Following the respondent, Senior Constable Raymond John Ellen gave evidence. He was a leading Senior Constable of police at the time stationed at the Gisborne Police Station. He agreed with the respondent's evidence. He was operating a random breath testing site in company with Constable Taylor and the respondent. In cross-examination he gave the following evidence as to the circumstances in which the police operated in Station Road. He was working the Gisborne Divisional Van with Constable Taylor who was under his supervision. The respondent was with the Traffic Management Unit and it was common practice when a random breath test site was conducted to have the two units working together for safety purposes. He was writing down the numbers of the vehicles being tested. He recalled that Constable Taylor and the respondent were standing in the middle of the road pulling up motorists travelling in both directions. Vehicles pulled in were kept there only as long as was necessary for the preliminary breath test. He was

asked if they were operating a preliminary breath testing site as such and responded that they were randomly testing drivers travelling along.

14. The appellant gave evidence describing the scene as follows. He saw one set of flashing lights on top of the police vehicle at the service station and towards which he was driving. There was only one set of lights, a little bit on one side and he saw a policeman with what looked like a torch and he waved him over. That was the respondent. There were no signs and no witches hats that he recalled.

15. The appellant's partner, Christine Diane Ager also gave evidence, relevantly for present purposes stating as to indications of the site where the police were that she thought there were only flashing lights. She did not remember any witches hats or anything on the road.

16. It is not necessary to refer to other evidence that was given that does not relate to the issue or issues raised on this appeal. Nor is it necessary to refer to the full scope of the submissions made to the Magistrate by counsel for the appellant. It is necessary only to identify the submission that relates to the issue raised on the appeal.

17. The relevant submission proceeded along these lines. First, as a matter of fact, that which the police had set up on the evening had been a preliminary testing station within the meaning of s54. In consequence the power to require the appellant to undertake a preliminary breath test was derived from, and only from, the power in para (b) of s53(1). Thus the power in para (a) of s53(1) could not be relied upon. However the power in s53(1)(b) was conditioned upon the preliminary testing station having been established in accordance with the requirements of s54. On the evidence those requirements were not satisfied as the preliminary testing station was not "identified by suitable signs, lights or other devices" in accordance with s54(2)(b). That being so there had not been power to conduct the preliminary breath test or to request the appellant to furnish a sample of breath for analysis under s55(1). For this reason the certificate of analysis was not admissible. Thus the charge could not be established as the prosecution under s49(1)(f) rested upon establishment of a preliminary breath test as provided in s53 and s55.

18. In his reasons for decision the Magistrate, noting the submission of counsel for the defendant (appellant) that Parliament must have intended a distinction be made between paras (a) and (b) of s53(1), as there would be no need for (b) if the power in (a) could apply in the circumstances referred to in (b), referred to the evidence of Senior Constable Swinden and Senior Constable Ellen. Senior Constable Swinden described the operation as a "road block" for the purpose of intercepting motorists for preliminary breath tests and for licence and registration checks, the evidence distinguishing between a road block and a preliminary testing station. Senior Constable Ellen spoke of operating a random breath testing site and made no mention of licence and registration checks being conducted save for the noting of the registration plates of vehicles.

The Magistrate then concluded as follows:

"I am of the view that this was not a preliminary breath testing station as contemplated by the Act, nor was it intended to be by the members concerned. I find that, amongst their other duties, the officers concerned exercised the power given to them under section 53(1)(a) of the Act, namely to require any driver to undergo a preliminary breath test via the prescribed device. For these reasons I will not exclude the certificate of analysis from my consideration ... ."

The Magistrate then proceeded to findings that the charges were proved. It is unnecessary to refer to that part of his reasons.

19. As stated in the notice of appeal and by counsel for the appellant the attack upon the Magistrate's reasoning is that it was not open on the evidence to find, as he did, that the manner in which the police were operating at the time did not constitute a preliminary testing station as contemplated by the Act and that the police had exercised their power under s53(1)(a). It was submitted, as it had been before the Magistrate, that the evidence showed, and the Magistrate should have held, that what the police were engaged in was not a case of a random request to a driver under s53(1)(a) but a request in the context of a preliminary testing station. As however the testing station did not comply with the requirements of s54(2)(b) the preliminary breath test was not lawfully required and obtained, which meant that the subsequent breath analysis was



not lawfully undertaken. Hence the breath analysis certificate could not be relied upon and the charge under s49(1)(f) must fail for want of proof of an essential element.

20. The premise underlying this submission was the contention of counsel that paras (a) and (b) in s53(1) had a mutually exclusive operation. This meant that in a prosecution under s49(1)(f) (that being the relevant provision in this case) the informant must rely on either para (a) or (b) and establish that the paragraph relied upon was applicable in the circumstances. Error in choice of para (a) or (b) meant failure to prove an essential element of the offence.

21. It was submitted that Parliament had created two distinct situations and could not have intended an overlapping or concurrent operation of paras (a) and (b). If an overlapping or concurrent operation were intended the informant could rely on either or both powers to require a preliminary breath test in a charge, which could give rise to duplicity and unfairness in terms of particulars. Further, if para (a) were held to cover the ground of para (b) the latter would very much be rendered otiose. Counsel speculated that Parliament may have intended that the power to require a preliminary breath test under para (a) related to individual random one-off testing of a driver as opposed to breath testing stations at which tests may be conducted over an extended period. I was informed that Hansard provided no explanation for the distinction. Nevertheless, it was submitted, paras (a) and (b) were distinct and were intended to be different for the purposes of prosecution. In aid of these submissions counsel referred to several authorities concerned with the approach to the interpretation of a penal statute.

22. The short answer to these submissions is that it was open to the Magistrate to conclude as he did in his reasons quoted above. I do not accept that it was "perverse in terms of the evidence" for the Magistrate to so decide. That is how counsel for the appellant described the finding. I disagree. The Magistrate was faced with a question of fact on which he determined, upon a consideration of the evidence, that the police officers acted under s53(1)(a). That finding was open and cannot be disturbed. The consequence is that the appeal must fail.

23. This conclusion renders it unnecessary to deal with all of the submissions of counsel. That includes, in particular, submissions as to the interpretation and operation of paras (a) and (b) of s53(1). I venture only the following observations. The interpretation of the legislation is to be approached bearing in mind its social and public safety purposes which are expressed in s47 of the *Road Safety Act* and acknowledged in numerous authorities. The *Interpretation of Legislation Act* 1984 requires, in s35(a), that in the interpretation of an Act a construction that would promote the purpose or object underlying the Act is to be preferred to a contrary construction. Then the structure of s53(1) is to be observed. What it does is specify four situations in which a member of the police force may at any time require a person in the circumstances therein specified to undergo a preliminary breath test. In any case the power to require is attracted if any of the circumstances specified in paras (a) to (d) exist. That is a question of fact. It is immediately to be observed about para (a) that the only condition for its application is that the person is found driving a motor vehicle. There is no specification of the circumstances of that finding. It is thus open that the police officer making the finding was on foot, riding a bicycle, driving a vehicle or in some other form of conveyance or circumstance. It must be open that the police officer was standing on the roadway, even in or towards the centre of the road as was the informant in this case. Nor is the presence of other police officers or vehicles, or whatever also may be present at the scene, referred to as a fact relevant to the exercise of the power in para (a). In short, para (a) says nothing as to the circumstances in which a police officer may find a person driving and require a preliminary breath test. There is no reason to doubt, and every reason to accept, that Parliament intended the power in para (a) to be exercisable in the widest range of circumstances. Certainly, at the least, for the purposes of the present case, there is no basis upon which para (a), having regard to the natural and ordinary meaning of its language and considered in the context of the Act as a whole, can be read down so as to exclude its operation in the circumstances found by the Magistrate. There is no reason to doubt that considerations such as I have mentioned were apprehended by the Magistrate in arriving at the conclusion he expressed.

24. These observations rather concentrate on the power in para (a). Counsel for the respondent addressed paras (a) to (d). He submitted that they were not mutually exclusive in their operation. With reference to examples he pointed out how they might overlap or be coterminous in operation. It is unnecessary to set out what he said, which referred to the legislative history and proper

interpretation of the provisions. I would add only as to para (b) that there is an evident public safety issue involved in the imposition of the requirements in s54(2)(b) and (4) bearing in mind that s54(1) permits a preliminary testing station to be located on or in the vicinity of a highway and the size of a testing station and all that is involved in its conduct. Paragraph (b) may have been added to s53(1) out of an excess of caution to put the legislative authority to require a test beyond argument. It may also have been considered that the police officer who waves a person over, as distinct from the police officer who requires the test, might be said to be the police officer who "finds" the driver. On the other hand, as counsel for the respondent pointed out, the power in para (b) would seem applicable to the police officer who requires the test as he or she may be said to "find" the driver when the latter stops adjacent to that police officer.

25. In the circumstances it is not necessary to take these observations further. Nor is it necessary to deal with the submissions as to the essential elements of a charge under s49(1)(f), or the question whether the certificate of analysis might properly have been admitted even if the police had been conducting a preliminary testing station; see *Bunning v Cross*<sup>[1]</sup>.

26. For the reasons stated the appeal will be dismissed with costs including reserved costs.

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<sup>[1]</sup> [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.

**APPEARANCES:** For the appellant Maitland: Mr PJ Billings, counsel. Macedon Ranges Law Group, solicitors. For the respondent Swinden: Mr DA Trapnell, counsel. Angela Cannon, Solicitor for Public Prosecutions.

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