13/01; [2001] VSCA 114

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP REFERENCE No 2 of 2001

Winneke P, Charles and Chernov JJ A

18 July, 8 August 2001

(2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164

MOTOR TRAFFIC – DRINK/DRIVING – CHARGES LAID – NATURE OF OFFENCES NOT FULLY DESCRIBED IN CHARGES – WHETHER OMISSIONS ESSENTIAL ELEMENTS OF OFFENCES – WHETHER CHARGES SUFFICIENTLY DESCRIBED*: ROAD SAFETY ACT* 1986, SS49(1)(e), (f), 53(1), 55(1).

1. It is necessary that a charge identify sufficiently the essential ingredients of an alleged offence; however, it is necessary to distinguish between the essential ingredients of the alleged offence and other facts which the prosecution is obliged to establish.

2. In relation to an offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act') whilst there must be evidence led as to the practical operation of ss53 and 55 as a necessary precondition of proof of the relevant offence, these matters do not constitute essential elements of the offence so as to require individual particularisation in the charge. Accordingly, where a charge failed to state that the defendant had been "required to undergo a preliminary breath test under s53" but referred to each of the matters capable of identification as an essential element in a charge under s49(1)(f) the charge was neither defective nor a nullity.

3. In relation to an offence under s49(1)e) of the Act, there must be evidence led by the prosecution of the conduct which led to the preliminary breath test. However, such a fact is not an essential ingredient for the purposes of identifying the offence. Accordingly, where the charge failed to include words such as "being the driver of a motor vehicle" or other words descriptive of the conduct which led to the preliminary breath test, the charge was neither defective nor a nullity because of the absence of those words.

4. In relation to a charge under s49(1)(e) of the Act, the making of a requirement to accompany a police officer is an essential ingredient or element of the charge which is required to be included in the charge itself. However, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge in their context. Where the charge failed to include the words "having been required by a member of the police force to accompany a member to the police station" before the words "did refuse to accompany" the use of the word "refuse" in the charge conveyed sufficiently to the defendant that his alleged refusal must have followed some requirement or request to accompany, made as of right. The defendant was perfectly capable of reaching a correct conclusion as to the nature of the subject matter of the charge and its essential ingredients. Accordingly, The charge sufficiently identified the offence and was neither defective nor a nullity.

WINNEKE P:

1. For the reasons given by Charles JA, I agree that the questions raised in the Director of Public Prosecutions Reference No.2 of 2001 should be answered in the manner proposed by his Honour, and that the two appeals should be dismissed.

CHARLES JA:

2. The Court has before it three matters, which were argued together, each of which concerns a summons relating to an offence alleged under Part 5 of the *Road Safety Act* 1986. In each case the defendant claimed that the charge was defective in that it failed properly to allege the offence in question, and that the defect could not be cured by amendment. In each case like issues were therefore raised as to the form of the charge and the specificity with which the elements of the charge must be alleged, and the power of amendment contained in s50 of the *Magistrates' Court Act* 1989.

DPP Reference No. 2 of 2001

3. This is a Reference by the Director of Public Prosecutions pursuant to s450A of the *Crimes Act* 1958 on points of law arising in an appeal to the County Court from the Magistrates' Court, which resulted in the acquittal of the defendant, Silvano Callegher.

4. Callegher was convicted in the Magistrates' Court on 19 January 2001 on a charge of having committed an offence against the provisions of s49(1)(f) of the *Road Safety Act*. The charge was in the following form –

> "The defendant at Port Melbourne on 20/03/1999 did within 3 hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act*, 1986, and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol, being 0.05 grams per 100 millilitres of blood was present and 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 the motor vehicle. (Actual Reading 0.094%)."

The defendant was also convicted on a second charge of driving a motor vehicle while his licence was suspended.

5. On 21 May 2001, an appeal by Callegher to the County Court against these convictions came on for hearing, and his counsel at the outset raised a point of law concerning the wording of both charges. It is unnecessary to consider the argument in relation to the second charge. As to the charge under s49(1)(f), it was submitted that a crucial element of the offence was missing, namely the need for a preliminary breath test to be conducted pursuant to s53(1) of the *Road Safety Act*, before being required pursuant to s55(1) of the Act to accompany the police officer and furnish a sample of breath for analysis. Counsel submitted that if this submission was accepted, it was not open to the prosecution to seek leave to have the charge amended, more than 12 months having elapsed since the time of the offence[1]. The prosecutor relied on s27(1) of the *Magistrates' Court Act* and submitted that it was not necessary to include the allegations claimed by defence counsel to have been omitted in the wording of a charge under s49(1)(f). It was submitted that the wording of s49(1)(f) did not include a reference to s53(1) and that, accordingly, s27(1) rendered it unnecessary to refer either to s53(1) or s55(1) of the *Road Safety Act*. It was submitted that these were matters of procedure, and not elements of the offence.

6. The prosecutor also made application to the judge to amend the charge by replacing the words "pursuant to" with the word "under" and by inserting the words "having undergone a preliminary breath test pursuant to s53(1) *Road Safety Act* 1986 which indicated the presence of alcohol".

7. The County Court judge held that for a charge to be valid, it must set out in words understandable by a reasonable defendant all those matters which are the essential ingredients or elements of the offence charged. His Honour said that the present charge did not do so, since it made no reference at all to a preliminary breath test having been undertaken. Accordingly, his Honour found that the charge was a nullity since it did not contain an allegation of an offence known to the law, and furthermore this was not a case where it would be appropriate to consider an amendment of the charge, having regard to the fact that the charge was, in his Honour's view, a nullity.

8. In these circumstances the points of law referred by the Director pursuant to s450A of the *Crimes Act* are the following –

> A. In a prosecution for an offence contrary to s49(1)(f) of the *Road Safety Act* 1986 is a charge expressed in the manner set out in [4] above a nullity?
>
> B. Is a charge for an offence contrary to s49(1)(f) of the *Road Safety Act* 1986 in which the words 'pursuant to s55(1) of the *Road Safety Act* 1986' instead of the words 'under s55(1) of the *Road Safety Act* 1986', 'sufficient' within the meaning of s27(1) of the *Magistrates' Court Act* 1989?
>
> C. If a charge expressed as in [4] is a nullity or otherwise deficient may it be rectified by amendment?
>
> D. Is the undergoing of a preliminary breath test an element of an offence contrary to s49(1)(f) of the *Road Safety Act* 1986?

> E. If the undergoing of a preliminary breath test is an element is it necessary for words to the effect that the defendant has undergone a preliminary breath test to be included in the charge?
>
> F. If the undergoing of a preliminary breath test is not an element is it necessary for words to the effect that the defendant has undergone a preliminary breath test to be included in the charge?

Eric Collicoat v Director of Public Prosecutions

9. Eric Collicoat was charged with an offence against s49(1)(e) of the *Road Safety Act*, the charge being in the following form –

> "The defendant at Mount Macedon on 11/6/98 After having been required to have a preliminary breath test under Section 53 of the *Road Safety Act* 1986, and the test in the opinion of the member of the Police Force in whose presence it was made indicated that your blood contained alcohol, you were then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 55(1) of the said Act and for that purpose a requirement was made for you to accompany a member of the Police Force to a Police Station such requirement, you did refuse to comply with."

Immediately above the place on the summons in which details of the charge were set out there appeared a box entitled Registration Number, in which the letters "NEG 432" appeared, below which was a further box entitled Licence Number in which the numbers "20458294" appeared. The charge was listed for hearing before the Magistrates' Court at Broadmeadows on 27 April 2000. At the outset counsel for Collicoat relied upon a preliminary point that the charge was defective, submitting that the charge must contain each and every element of the offence, and that in this case the charge was defective because it failed to allege that the defendant was in one of the four categories of persons referred to in s53(1) of the *Road Safety Act*, and thereby failed to identify one of the elements of the offence. It was submitted that s50 of the *Magistrates' Court Act* had no application where the information disclosed no offence.

10. The prosecutor submitted that there was no need for the words "was a driver of a motor vehicle" to be included in the charge itself and that in any event the charge was amendable, notwithstanding that it was outside the 12 month period.

11. On 8 May 2000 the magistrate dismissed the charge holding that it did not disclose an offence known to the law. His Worship took the view that it was necessary for a charge under s49(1)(e) of the *Road Safety Act* "for the informant to allege what category the defendant was in regards to s53 of that Act, that is which of the four categories mentioned in that section pertained to the defendant." In his Worship's view the charge was fundamentally defective, and, as such, the defect could not be cured by amendment.

12. The Director appealed against this decision on questions of law pursuant to s92 of the *Magistrates' Court Act*, and on 6 June 2000 a master made an order setting out the questions of law raised by the appeal. On 14 September 2000 the appeal was allowed, O'Bryan J holding that the charge was not defective in that the inclusion of the car registration number and licence number in the summons conveyed to a reasonable person charged with an offence under s49(1)(e) that the requirement to have a preliminary breath test under s53 of the *Road Safety Act* resulted from his being the driver of a motor vehicle, and that the charge and summons sheet should be read as a whole, thus enabling the defendant to identify all the necessary ingredients of the offence. Accordingly, the charge and summons were not defective or uncertain and the case was in any event one fit for amendment, and the magistrate had power to amend the charge and summons. From this decision Collicoat now appeals to this Court.

Brett Bell v Stuart Dawson

13. Brett Bell was charged with an offence against s49(1)(e) of the *Road Safety Act*, the charge being in the following form –

> "The defendant at Altona North on 28/08/1998 after having been required to have a preliminary breath test in accordance with Section 53 of the Act, and the test in the opinion of the meber [sic] of the police force, in whose presence it was made indicated that his blood contained alcohol, and he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act did refuse to accompany a member of the police force to a police station where a ample [sic] of breath was to be furnished prior to 3 hours elapsing from the driving of a motor vehicle. REFUSE/FAILED TO ACCOMPANY."

Bell's name and address were not fully visible on the summons but no point was made of this during the appeal. As with Collicoat, immediately above the details of the charge on the summons there were boxes for the registration number and licence number, in the first of which appeared "BYI-927" and in the second, "3460 1268".

14. The information came before the Magistrates' Court at Sunshine on 19 October 1999, and Bell's counsel made a submission at the outset that the charge was invalid in that it failed to allege an offence known to the law, and that it failed to allege a lawful requirement and a refusal to comply with that requirement. The magistrate, however, permitted the charge to be amended by adding after the word "Act", the following phrase "having been required by a member of the police force to accompany a member of the police force or a member to a police station".

15. The prosecution then opened its case and called witnesses who gave evidence that the appellant was found driving his motor vehicle on 28 August 1998, had undergone a preliminary breath test, that the test in the opinion of the police member indicated alcohol was in Bell's blood, that Bell had been required to accompany the police member to a police station for the purpose of a breath test, and that Bell had refused to accompany the member. No evidence was led that Bell had been required to furnish a sample of breath for analysis. No evidence was called for the defence and the charge, as amended, was found proved, and Bell was convicted and fined and his licence was cancelled.

16. Bell appealed to the Supreme Court, again pursuant to s92 of the *Magistrates' Court Act* on questions of law, and on 18 November 1999 a master settled the relevant questions. On 9 May 2000 Balmford J dismissed the appeal, holding that the charge was not defective by reason of its failure to allege a requirement to accompany, and stating that such a requirement could be implied from the use of the word "refuse" in the charge. From this decision Bell now appeals to this Court.

The relevant statutory provisions

17. Section 53(1) of the *Road Safety Act* provides 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 at a preliminary breath 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."

Section 55(1) of the Act then provides that if a person undergoes a preliminary breath test when required by a member of the police force under s53 to do so, and the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol, or a person in the opinion of the member refuses or fails to carry out the test in the manner specified in s53(3), then the 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 the member to a police station or other place and to remain there until the person has furnished the sample of breath. Section 49(1) of the Act provides –

> "A person is guilty of an offence if he or she—
> ... (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A); 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 or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ... ".

Section 27 of the *Magistrates' Court Act* provides –

> "(1) A charge must describe the offence which the defendant is alleged to have committed and a description of an offence in the words of the Act or subordinate instrument creating it, or in similar words, is sufficient.
>
> (2) A charge must identify the provision of the Act or subordinate instrument (if any) that creates the offence which the defendant is alleged to have committed."

Section 50 of the Act provides a power of amendment where there is a defect or error, in the following terms -

> "(1) On the hearing of a proceeding the Court must not allow an objection to a charge, summons or warrant on account of any defect or error in it in substance or in form or for any variance between it and the evidence presented in the proceeding but the Court may amend the charge, summons or warrant to correct the defect or error."

The necessity sufficiently to specify the charge

18. The necessity for a charge to identify sufficiently the essential ingredients of an alleged offence has been stated on many occasions and in various ways. For example in *Johnson v Miller*[2] Dixon J said that the prosecutor –

> "clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge. The court hearing a complaint or information for an offence must have before it a means of identifying with the matter or transaction alleged in the document the matter or transaction appearing in evidence."

In the same case Latham CJ said[3] –

> "The complaint must show upon its face that what is charged is an offence according to law, and it is sufficient if it sets forth the acts which are relied upon as constituting the offence with such a reference to time and place as identifies those acts."

In *Ex parte Lovell; Re Buckley*[4] Jordan CJ said in a much-cited passage –

> "A magistrate has no jurisdiction to convict a person except for a statutory offence; and it is contrary to natural justice to convict a person of a statutory offence with which he has not been charged. Hence, in order to support a conviction for an offence, it is necessary either that the information and summons upon which it is based should accurately state the acts necessary to constitute all the ingredients of that offence, or else, if they do not, that the accused person should have been accurately charged orally before the magistrate and should have raised no objection to the absence of information or summons [a reference to procedure not applicable in Victoria] ... If the magistrate convicts upon an information or charge which discloses no offence, or for an offence with which the accused has not been duly charged, the conviction is bad."

19. It is, however, necessary to distinguish between what have been called the "essential ingredients of the alleged offence" (*John L. Pty Ltd v Attorney-General (NSW)*[5]) which must be sufficiently identified, and other facts which the prosecution is obliged to establish but which are not so described. In *DeRomanis v Sibraa*[6] Mahoney JA said –

> "In *Johnson v Miller* Dixon J saw the decision in *Smith v Moody*[7] as requiring the information to specify 'the time, place and manner of the defendant's acts or omissions': McTiernan J referred to 'fair information and reasonable particularity as to the nature of the offence charged'. The rule does not require that the information contain all such material as a defendant may require, upon an application for particulars, for the preparation of his defence: ... These cases establish that it may not be sufficient for an information to state the offence charged: it may be required to condescend to particulars. But, ... they do not indicate that the information must go beyond a statement of the offence and proper particularisation of it."

These paragraphs were quoted by Mason CJ, Deane and Dawson JJ in *John L Pty Ltd*[8], their Honours saying that Mahoney JA had correctly pointed out that "there was no technical verbal formula which could be applied to determine whether an information sufficiently identified the essential ingredients of the alleged offence". Their Honours then stated that –

> "If an information is invalid for the reason that it fails sufficiently to identify the ingredients of the actual offence, it will be inadequate to satisfy a statutory requirement, such as that contained in s56(4) of the *Consumer Protection Act*, that proceedings be commenced by information since, as a matter of ordinary construction, such a requirement can only be satisfied by a valid information. As has been seen, the information in the present case failed to identify an essential factual ingredient of the actual offence, namely, the 'material particular' in which the statement, which the appellant was alleged to have caused to be published, was false or misleading. That failure was not a merely technical one. It was fundamental."

See also *Woolworths (Victoria) Ltd v Fred Marsh*[9]. In *DPP v Foster and Bajram*[10] this Court considered the question whether proof of an offence under s49(1)(b) of the *Road Safety Act* depended for its proof upon establishing that a member of the police force had formally required the accused to furnish a sample of breath even where the charge was "annexed" to a charge under s49(1)(f), and held that it did not. Winneke P (with whom Ormiston and Batt JJ A agreed), in a passage[11] which is too lengthy to be quoted here, demonstrated that although 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), that fact is not an essential ingredient of the offence.

The power to amend under s.50

20. The power to amend given by s50(1) is wide-ranging, covering any defect in a charge whether in substance or in form, as well as answering any objection to a variance between the charge and the evidence presented in the proceeding. In *McMahon v DPP*[12], the Court was concerned with the question whether the *Road Safety Act* had been sufficiently identified in a charge by a reference under the abbreviation "R.S.A.". Brooking JA with whom Callaway JA and I agreed, said that –

> "I have no doubt that these charges were capable of amendment. Defects or errors both in substance and in form are comprehended by s50(1). There has never been any doubt about the criminal conduct with which the appellant was charged. The offence would remain the same notwithstanding the amendment and the Magistrate's reliance on the running of time under s26(4) was erroneous. The only right exercise of discretion was to amend these charges, assuming them to be defective in the respect suggested. The Magistrate erred in law in concluding that the date of the offences meant that the amendment could not be made."

21. A question remains whether this power of amendment can be exercised in circumstances where an essential ingredient of an offence has been omitted from the charge, and no offence was, accordingly, disclosed in the summons where, as here, more than 12 months has elapsed since the date of the offence. It is, for reasons which will appear later, not, I think, necessary to decide this question in the present cases, but one would commence any examination of this issue by reference to what was said by Dixon J in *Broome v Chenoweth*[13] –

> "Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. Some Victorian cases will be found discussed by Cussen J in *Knox v Bible*[14], and the matter is very fully examined by Clarke J in *Davies v Andrews*[15] where cases from other jurisdictions are collected. Probably it is necessary to deal with the question as a matter of degree and not by a firmly logical distinction. An offence may be clearly indicated in an information, but, in its statement, there may be some slip or clumsiness, which, upon a strict analysis results in an ingredient in the offence being the subject of no proper averment. Logically it may be said in such a case that no offence is disclosed and yet it would seem to be a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charge with any offence known to the law. Such a case may not be covered by the power of amendment."

The submissions in DPP Reference No. 2 of 2001

22. Counsel for Callegher submitted in this Court that the charge as framed alleging an offence under s49(1)(f) of the *Road Safety Act* was a nullity and could not be rectified by amendment. His submission was that it was an essential element of a charge under s49(1)(f) that the defendant had been "required to undergo a preliminary breath test under s53", relying on *Mills v Meeking*[16];

Thompson v His Honour Judge Byrne[17]; *Smith v Van Maanen*[18]; and *DPP v Foster and Bajram*[19]. Counsel's submission was that unless these words were substituted for the words "pursuant to s55(1)" presently appearing in the charge, the wording of the charge would be unfair to the accused and that as a matter of fairness the defendant needed to be told all the elements of the offence, including that he had been required to take a preliminary breath test under s53. Furthermore, he submitted that a proper exercise of discretion by the court under s50 would have been to refuse an amendment because the charge in its present form was a nullity, and the limitation period provided by s26(4) of the *Magistrates' Court Act* had expired and the making of an amendment would amount to the laying of a new information out of time.

Was the charge against Callegher a nullity, and was it capable of amendment?

23. A breath test under s55(1) is, no doubt, based upon the operation of s53, since s55 empowers a police officer to require a person to furnish a sample of breath for analysis by a breath analysing instrument only if there has been a preliminary breath test under s53. I agree with the County Court judge, with respect, that a fact which must therefore be established in the proof of an offence under s49(1)(f) is that a motorist has been "required" to furnish a sample of breath for analysis under s53, having regard to what was said in *Mills v Meeking*, and the authorities previously quoted in paragraph [22] above, and in particular the remarks of both Winneke P[20] and Ormiston JA[21] in *DPP v Foster and Bajram*. But there are a number of facts which must be established as part of the proof of such an offence, such as for example that the instrument used was a breath analysing instrument within the meaning of the Act and that the person who operated the instrument was duly authorised to do so.

Of course it does not follow that all such facts, necessary though they may be to proof of the offence under s49(1)(f), must be alleged in the charge. In my view the essential elements of the offence under s49(1)(f) are prescribed by the section itself and do not by direct or indirect reference incorporate any other allegation of fact necessary to exist in order to create the offence. In my view this Court, indeed, decided to the contrary in *Foster and Bajram*, in the passages last cited. It follows that while there must be evidence led as to the practical operation of ss53 and 55 in circumstances of a prosecution under s49(1)(f), as a necessary precondition of proof of the relevant offence, these matters do not constitute essential elements of the offence so as to require individual particularisation in the charge. I conclude, therefore, that the charge as drawn referred to each of the matters capable of identification as an essential element in a charge under s49(1)(f), and was therefore neither defective nor a nullity.

24. As to the use of the words "pursuant to" s55(1) of the *Road Safety Act*, rather than "under", I note the observations of Ormiston JA in *Foster and Bajram*[22] as to the difficulty of giving a meaning to the word "under" in this context. But I do not think that the prosecution is obliged to follow slavishly the wording of the section in the formulation of the charge in this respect. The defendant cannot, I think, have been left in any doubt as to the nature of the offence alleged against him simply because the expression "pursuant to" was used. In the event that the terminology was considered by the magistrate to be of any moment, an amendment should have been made so as to give effect to s50(1) of the *Magistrates' Court Act*.

Answers to questions in DPP Reference No. 2 of 2001

25. It follows that the questions in this Reference should, in my view, be answered as follows-

A. No.
B. Yes.
C. The charge was capable of amendment.
D. The undergoing of a preliminary breath test under s53 was a prerequisite to requiring a sample of breath for the purposes of analysis by a breath analysing instrument under s55, and thus a fact necessary to be proved in a prosecution under s49(1)(f), but not an essential element of such an offence required to be alleged in the charge itself.
E. No.
F. Unnecessary to answer.

The appellant's submissions in the Collicoat appeal

26. Collicoat's notice of appeal included some ten grounds which it is unnecessary to set out in full. The grounds themselves are highly repetitious, and the arguments in support of them were not only repetitious but, if I may say so, included repeated statements of, and much citation of

authority for, the obvious. I summarise these arguments as follows. The principal submission was that the charge as alleged was a nullity for two reasons. In the first place it was said not to allege an offence at all, because a person does not commit an offence in refusing to have a preliminary breath test unless what was described as a "vehicle nexus" is established. If, for example, a pedestrian were required to have a preliminary breath test, no offence would be committed by a refusal to take that test. Secondly, it was submitted that the charge failed to specify which of the four alternatives in s53(1) of the *Road Safety Act* was the basis for the requirement to take a preliminary breath test. Accordingly, so it was submitted, in the present case Collicoat (and the magistrate) would not have known whether it was alleged that the defendant had been found driving, or required to stop at a preliminary breath testing station, or had been the driver of a car involved in an accident, or was sitting in the back seat of a car, before being required by a member of the police force to take the preliminary breath test.

Accordingly, Collicoat did not know what charge he had to meet, or what case the prosecution intended to prove. The charge alleged was, it was argued, therefore a nullity, and the Magistrates' Court accordingly had no jurisdiction to hear it, an essential element necessary to be included in the charge not having been alleged. The argument continued that an essential element could not be supplied by inference, and in so far as Tadgell J had held to the contrary in *Smith v Van Maanen*, his Honour had erred. It was argued that simply to word the offence in terms of s49(1)(e) told the defendant nothing and the deficiency was fatally defective. Collicoat's counsel submitted that O'Bryan J had been in error in failing to hold that it was an essential ingredient in the charge that the defendant was administered a preliminary breath test having regard to one or other of the limbs of s53(1), and in not holding that it was incumbent on the Crown to allege the "vehicle nexus" in some form and stating which of them was relied on. Reliance was placed on a large number of cases, to some of which reference has already been made, particular emphasis being placed on what was said by Kirby J in *Walsh v Tattersall*[23] as to the need for the application of a strict approach to the pleading of criminal charges, so that prosecutors are obliged at the outset to define with accuracy each criminal charge intended to be prosecuted, and to identify, in respect of each, the elements of the offence necessary to secure a conviction.

27. Accordingly it was submitted that the present charge was fundamentally defective, and, being therefore a nullity, was incapable of amendment (not least since more than 12 months had elapsed since the date of the offence at the time of the hearing) under s50 of the *Magistrates' Court Act*.

Was the charge against Collicoat a nullity?

28. Counsel for the Crown conceded in his submissions in the Collicoat appeal that words to the effect "having been a driver" should have been included in the charge. He submitted, however, that there would not have been any prejudice in this case to the appellant, since the form of the summons made it perfectly clear that the requirement for a preliminary breath test was relevant to Collicoat's driving of a motor vehicle. Nor could this have seriously embarrassed his defence to the proceedings. Collicoat either was, or was not, the driver of the vehicle, the registered number of which appeared in the summons. The Crown's submission was that in so far as there was any deficiency in the charge, the case cried out for amendment.

29. O'Bryan J said of a charge under s49(1)(e) that the five ingredients necessary to be proved were these —

> "that the defendant had been found driving a motor vehicle or in charge of a motor vehicle; that a preliminary breath test by a prescribed device has been undergone pursuant to sub-section (1) of s53; that a member of the police force has formed an opinion the test made in his presence indicates that the defendant's blood contains alcohol; that the defendant has been required to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose required to accompany a member of the police force to a police station; and that the defendant has refused to comply with the requirement."

As his Honour then put it –

> "The draftsman of the Charge and Summons in the present case has clearly omitted the first necessary ingredient or, as was argued by the appellant, telescoped into one ingredient the first two ingredients identified above. The reference to s53 in the Charge and Summons clearly indicated to the defendant that he was required to have a breath test under s53 and not for any other reason. Whilst it is true

> that the requirement under s53(1) may be under (a) found driving a motor vehicle or in charge of a motor vehicle, or (b) whilst driving a motor vehicle being required to stop at a preliminary breath testing station, or (c) being suspected of having driven or been in charge of a motor vehicle within the last three preceding hours when it was involved in an accident, or (d) being suspected of being an occupant of a motor vehicle within the last three preceding hours when it was involved in an accident and it is uncertain which occupant was the driver, each of the four circumstances specified in s55(1) focus on driving a motor vehicle or being in charge of a motor vehicle or being an occupant of a motor vehicle. In my opinion, the Charge and Summons sheet, read as a whole, enabled the defendant to identify all of the necessary ingredients of the offence under s49(1)(e) to be proved by the prosecution. The Charge and Summons was not defective or so uncertain that the defendant could not identify the charge brought against him."

I agree with all the above observations.

30. As was the case with the charge against Callegher under s49(1)(f), in my view the charge in the Collicoat appeal included all the essential ingredients of a charge under s49(1)(e). I agree with O'Bryan J that it would have been preferable if the charge had included words such as "being the driver of a motor vehicle", or other words descriptive of the conduct which led to the preliminary breath test. But this, although a fact necessary to be proved in the prosecution, was not an essential ingredient for the purposes of identifying the offence, and I do not think that the charge was defective or a nullity because of the absence of these words.

31. As to the question of amendment, O'Bryan J said, later in his reasons, that –

> "the present case was a fit case for amendment, if justice is not to be defeated, and the Magistrate had power to amend the Charge and Summons. His refusal to do so was an error of law. All that was required was to add after s53 the sub-section number and sub-clause: (1)(a) or (b) or (c) as the circumstances required. Alternatively the words ... `being the driver of a motor vehicle' would have sufficed."

Again I agree.

32. The Collicoat appeal should, in my view, be dismissed.

The appellant's submissions in the Bell appeal

33. Bell's counsel made succinct submissions, supported by authority, that the charge against Bell was defective, and a nullity, on three separate bases. In the first place it was submitted that the charge alleged a requirement to furnish a sample of breath, but did not allege any refusal to comply with that requirement. This submission had not, I think, been made either to the magistrate or the judge and, although included in Bell's written submissions, was not pressed in this Court. There is, I think, nothing in the submission. The second argument was that the charge was defective, or even duplicitous, because, as with the Collicoat charge, it did not specify which sub-section of s53(1) had been the basis of the requirement to take a preliminary breath test. This submission in my view fails for the same reasons as did the Collicoat appeal, in that although proof of the facts indicating which sub-section of s53(1) was the basis of the requirement to take a preliminary breath test was necessary in proof of the offence, this was not an essential ingredient of the charge required to be specified in it.

The charge was not, therefore, defective by reason of the failure to include mention of this matter. The third and principal argument was, however, that the charge alleged a failure to accompany the police officer, but did not allege the making of any requirement that Bell accompany the police officer, and consequently upon any interpretation of the charge it did not describe any offence and failed to allege any offence known to the law. The argument continued that the judge fell into error in saying that it was not necessary to allege in the charge that the requirement had been made and the charge should have alleged that Bell refused to comply with a requirement under s55(1). The magistrate had dealt with this objection at the hearing by describing the omission as not an essential element of the charge, but a matter that could be dealt with either by the supply of particulars or by amendment. Bell's argument in this Court was that the magistrate had erred in this respect, that the making of a requirement to accompany was an essential element of the charge, and to permit the gap to be filled by supplying particulars of the requirement, or by amendment, was, in effect, to allow a fresh charge to be laid.

Was the charge against Bell a nullity?

34. The argument that the charge against Bell was defective is, I think, of more substance than was the case with the charges against Callegher and Collicoat. For my part I would accept that the making of a requirement to accompany was an essential ingredient or element of the charge which was required to be included in the charge itself. This was the view taken on appeal by Balmford J.[24] In the absence of an allegation and proof of the making of a requirement that Bell accompany the police officer, Bell's conduct was not unlawful. The submission was, then, that not only could the gap not be filled by particulars, but the charge was not capable of amendment under s50 of the *Magistrates' Court Act*.

35. Balmford J did not accept these submissions. Her Honour drew attention to the *Oxford English Dictionary* definition of the meaning of the verb "refuse" as "to decline to accept or submit to (a command, rule, instruction etc.) or to undergo (pain or penalty)". In her Honour's view, interpreting the charge according to the ordinary meaning of the words used, the allegation that the defendant "did refuse to accompany ..." must necessarily imply an allegation of a requirement or request to accompany, although not necessarily a formal requirement.

36. In *DPP v Foster and Bajram*, Winneke P[25] said of s55(1) of the *Road Safety Act* that —

> "... 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)."

See also *R v Clarke*[26]; *Walker v DPP*[27].

37. In *Foster and Bajram*, the charge was laid under s49(1)(f), a sub-section which makes no express reference to any "requirement". It is the use of the words "under section 55(1)" in s49(1)(f) which has led the courts to conclude that a necessary precondition to the proof of that offence is that a member of the police force has imposed a requirement on the motorist to furnish a sample of breath for analysis.[28] On the other hand, s49(1)(e) is in very different terms, since the offence provided in that sub-section arises only if a person "refuses to comply with a requirement" made under various sub-sections of s55. It is for this reason that the making of the relevant requirement is clearly a necessary ingredient of the offence. But the difference between the wording of the offences created by sub-sections (e) and (f) of s49(1) is not, I think, relevant to the question here at issue. To my mind the use of the verb "refuse" in the charge conveyed sufficiently to the defendant that his alleged refusal must have followed some requirement or request to accompany, made as of right.

38. Her Honour's conclusion on this aspect of Bell's submission was expressed as follows –

> "Given what I have found to be the effect of the verb 'refuse', I find that by the use of that word, as required by s49(1)(e), the charge 'sets forth the acts which are relied upon as constituting the offence' (LathamCJ in *Johnson v Miller*); apprises the defendant of 'the particular act, matter or thing alleged as the foundation of the charge' (Dixon J in *Johnson v Miller*); tells the accused 'what law, statutory or other, he is alleged to have broken; and ... with reasonable particularity how he is alleged to have broken that law' (Salter J in *Pointon v Cox*[29]); and, finally, 'describes the offence' as required by s27 of the *Magistrates' Court Act*."

39. I entirely agree, with respect, with the reasoning which led her Honour to reject Bell's principal argument.

40. In *Smith v Van Maanen*, Tadgell J said[30] that "it is necessary to strive conscientiously to read any information in a sense that gives it the meaning that the draughtsman intended". Notwithstanding the rule of strictness required of prosecutors in drafting criminal charges, a charge should be interpreted in the manner a reasonable defendant would understand it, giving reasonable consideration to the words of the charge, in their context. In *Smith v Moody*[31] Lord Alverstone LCJ, referred to "the old rule of criminal practice which requires that fair information and reasonable particularity as to the nature of the offence must be given in indictments and convictions". As Jacobs J said in the Full Court of the Supreme Court of South Australia in *R v Jiri Fiala: Ex parte GJ Coles & Co Ltd*[32] –

> "In the context of the present case, to read this complaint, as drawn, as though counts 2 to 9 disclosed no offence is to allow a literal technicality and an obvious mistake to defeat the ends of justice. In my opinion the learned special magistrate did not err in deciding that he had power to correct that mistake."

41. Reading the charge against Bell as a reasonable defendant should, I think the defendant would be perfectly capable of reaching a correct conclusion as to the nature of the subject matter of the charge and its essential ingredients. The offence is therefore sufficiently identified to comply with s27 of the *Magistrates' Court Act*, and it follows that the submission that the charge in Bell's appeal was defective and a nullity should be rejected.

42. It would, I think, have been preferable if the charge had in the first instance included the words "having been required by a member of the police force to accompany a member to the police station" before the words "did refuse to accompany", an amendment which was sought before the magistrate and permitted by his Worship to be made. Such an amendment was, in my view, clearly a correct exercise of the magistrate's discretion; *McMahon v DPP*; *Gigante v Hickson*[33]. As Mann CJ said in *Thomson v Lee*[34], of the power of amendment in s200 of the *Justices Act* 1958 (a predecessor of s50 of the *Magistrates' Court Act*) —

> "it is not part of the duty of the Bench to regard the matter as a sporting contest; it must use its powers in a proper way to uphold the law; ...".

See also *Kennett v Holt*[35].

43. I would also dismiss Bell's appeal.

CHERNOV JA:

44. I agree that, for the reasons given by Charles JA, the questions raised in the DPP Reference No. 2 of 2001 should be answered as his Honour proposes and that the two appeals should be dismissed.

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[1] Section 26(4) of the *Magistrates' Court Act* 1989.
[2] [1937] HCA 77; (1937) 59 CLR 467 at 489-490; [1938] ALR 104.
[3] At 479.
[4] (1938) 38 SR (NSW) 153 at 173; 55 WN (NSW) 63.
[5] [1987] HCA 42; (1987) 163 CLR 508 at 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[6] [1977] 2 NSWLR 264 at 291.
[7] [1903] 1 KB 56; [1900-3] All ER Rep Ext 1274.
[8] [1987] HCA 42; (1987) 163 CLR 508 at 520; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[9] Ormiston J unreported, 12 June 1986, at 9-11.
[10] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[11] At 657-659.
[12] Unreported, Court of Appeal, 20 June 1995 at [5].
[13] [1946] HCA 53; (1946) 73 CLR 583, esp. at 601; [1947] ALR 27.
[14] [1907] VicLawRp 87; [1907] VLR 485 at 498-500; 13 ALR 352; 29 ALT 23.
[15] (1930) 25 Tas LR 84 at 91-110.
[16] [1990] HCA 6; (1990) 169 CLR 214, esp. at 219, 222 and 224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.
[17] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[18] [1991] 14 MVR 365 at 371.
[19] [1999] VSCA 73; [1999] 2 VR 643 at 657-658; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[20] At 657-658.
[21] At 662-663.
[22] At 663-664.
[23] [1996] HCA 26; (1996) 188 CLR 77 at 110-112; (1996) 139 ALR 27; (1996) 70 ALJR 884; (1996) 88 A Crim R 496; (1996) 15 Leg Rep C4.
[24] Reasons at [11].
[25] [1999] VSCA 73; [1999] 2 VR 643 at [47]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[26] [1969] 2 All ER 1008 at 1010; [1969] 2 QB 91.
[27] (1993) 17 MVR 194 at 198 per Brooking JA.
[28] See, e.g. *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214 at 219, 224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.
[29] (1927) 136 LT 506 at 509-510.

[30] (1991) 14 MVR 365 at 369.
[31] [1903] 1 KB 56 at 60; [1900-3] All ER Rep Ext 1274.
[32] (1986) 46 SASR 47, at 60.
[33] [2001] VSCA 4; (2001) 3 VR 296; (2001) 120 A Crim R 483; (2001) 33 MVR 51, Court of Appeal, 23 February 2001.
[34] [1935] VicLawRp 65; [1935] VLR 360 at 364; [1935] ALR 458.
[35] [1974] VicRp 79; [1974] VR 644, at 647-648.

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