18/05; [2005] VSC 213

SUPREME COURT OF VICTORIA

BLAIR v COUNTY COURT of VICTORIA & ANOR

Mandie J

9, 21 June 2005

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INTERCEPTED AND GIVEN PBT WHICH WAS POSITIVE – DRIVER REQUESTED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR BREATH TEST – DRIVER DID NOT RESPOND AND LEFT SCENE – LATER CHARGED WITH OFFENCE – CHARGE CONTAINED ELEMENTS OF OFFENCE PLUS SURPLUS VERBIAGE – DRIVER FOUND GUILTY – WHETHER COURT IN ERROR – AT END OF HEARING COUNSEL SUBMITTED THAT NO EVIDENCE WAS LED TO PROVE THAT A PRESCRIBED DEVICE WAS USED FOR THE PBT – PROSECUTION PERMITTED TO REOPEN ITS CASE – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1).

B. was intercepted by a police officer whilst driving a motor car and underwent a PBT which was positive. B. was then required to accompany the officer to a police station for the purposes of a full breath test. B. left the scene and was later charged with a breach of s55(1) of the *Road Safety Act* 1986 (Act) in that "a requirement was made for him to accompany the member of the police force to a Police Station such requirement he did refuse to comply with." B. was convicted of the charge and appealed to the County Court. On the appeal, B.'s counsel said that the crux of the case was that the requirement to accompany was not made. The prosecution led evidence to say that it was and after B. closed his case, B.'s counsel submitted that there was no evidence that the instrument used for the PBT was a prescribed device. The judge allowed the prosecution to reopen its case to prove this point and B. was subsequently convicted of the charge. Upon application for review—

HELD: Application dismissed.

1. It was common ground that the offence charged was that of refusing to comply with a requirement to accompany a member of the police force to a police station for the purpose of furnishing a sample of breath for analysis, contrary to ss49(1)(e) and 55(1) of the Act. It is established that proof of the "requirement" under that section does not require proof of a formal demand in relation to each element. It is sufficient if a demand or requirement is made in substance and in comprehensible terms. However, the element to which B.'s counsel referred was not one which was necessary to proof of the charge and simply arose from inelegant drafting of the charge. The language used in the charge did not turn it into a *different* charge. There was surplus verbiage in the charge and it is not suggested that this was in any way misleading or prejudicial to B. Instead of the charge alleging that a requirement was made for B. to accompany a member of the police force to the police station for the purpose of furnishing a sample of breath for analysis, the charge alleged that the defendant was required to furnish a sample of breath for analysis [etc] *and for that purpose* such requirement was made. It was not a necessary part of the charge, nor was there any reason to think that it was so understood, that the member of the police force should have required the defendant to furnish a sample of breath for analysis at the time of requiring the defendant to accompany him to a police station.

2. The prosecution should be permitted to reopen its case only in special or exceptional circumstances. No lack of procedural fairness or any unfairness to the defence has been shown. In the circumstances described, and having regard to the explicit statements made by the defence about what were and were not issues, justice required that the prosecution be permitted to reopen its case in order to lead evidence as to a matter which it was reasonably entitled to assume was not in issue. There was no apparent prejudice or risk of prejudice to the defence in relation to this discrete issue which, in the forensic circumstances of this case, was a matter of formal proof only. No injustice was thereby done to B.

MANDIE J:

1. This proceeding arises out of events which occurred as long ago as 9 November 1998, in respect of which a charge was filed against the plaintiff (for convenience hereinafter referred to as "Mr Blair") on 30 December 1998 to be heard in the Magistrates' Court of Victoria at Bendigo on 1 February 1999.

2. By originating motion, Mr Blair seeks judicial review of his conviction on 5 August 2004, by the County Court of Victoria sitting at Bendigo, of a charge brought against him by the second defendant herein (as informant) of an offence against s49(1)(e) of the *Road Safety Act* 1986.

3. There were two independent grounds for judicial review relied upon before this Court, to which I shall return, but in essence they are that the learned County Court Judge should not have convicted Mr Blair because the evidence did not support one essential element of the charge and that the learned County Court Judge should not have permitted the informant to reopen his case in order to permit him to prove another essential element of the charge.

4. The relevant offence was the refusal by Mr Blair to comply with a requirement pursuant to s55(1) of the *Road Safety Act* to accompany a member of the police force to a police station for the purpose of furnishing a sample of breath for analysis by a breath analysing instrument under that section. Section 55(1) provides, so far as material:

> "(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 or 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 further require the person to accompany a member of the police force ... to a place or vehicle where the sample of breath is to be furnished "

5. Mr Blair was convicted in the following relevant circumstances.

6. The details of the charge contained in the charge and summons dated 30 December 1998 read as follows:

> "The defendant at Charlton on 9/11/1998 being the driver of a motor vehicle and after having been required to have a preliminary breath test, he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 55(1) of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a Police Station such requirement he did refuse to comply with."

7. It seems that the charge and summons was filed but subsequently lost or mislaid. It is not clear whether this circumstance caused any delay but what did happen was that on 13 October 2000 a Magistrate decided, notwithstanding a submission on behalf of Mr Blair that the Court had no jurisdiction due to the loss of the file or part thereof, that the Court had jurisdiction to hear the charge. The Magistrate then adjourned the proceeding to a date to be fixed due to a "defence request for further time". However, Mr Blair then commenced a proceeding for judicial review in this Court which was dismissed by Pagone J on 19 June 2002.[1] Subsequently Mr Blair, who pleaded not guilty, was convicted of the charge in the Magistrates' Court at Bendigo and it was ordered that his licence be cancelled and he was disqualified from driving in the State of Victoria for a period of 24 months effective from 28 May 2003 and was fined $600 plus statutory costs of $34.

8. By notice of appeal dated 30 July 2003 Mr Blair appealed to the County Court pursuant to s83(1) of the *Magistrates' Court Act* 1989. On 5 August 2004 the appeal (by way of rehearing of the charge) came on for hearing in the County Court of Victoria sitting at Bendigo. Mr Billings of Counsel appeared to defend the charge on behalf of Mr Blair. At the outset Counsel who then appeared for the informant suggested to the trial judge that they could perhaps find out what the issues were. After some discussion, Mr Billings said in substance that the crux of the case was that his client said that the requirement to accompany the policeman to the police station was not made whereas the police said that it was – "that's really the issue". After some further discussion the following exchange occurred:

> "MR BILLINGS: There's been a preliminary breath test.
> HIS HONOUR: And then ---
> MR BILLINGS: That's not in issue."

9. Shortly thereafter the following further exchange occurred:

> "HIS HONOUR: ... So he gets PBT'd and then disappears?
> MR BILLINGS: Yes, that's right. The issue is whether if he's walked away, run away or whatever and taken up by an alien spaceship before the requirement is made he's committed no offence.
> HIS HONOUR: That may be so. So it's all going to revolve around the interpretation of that section?

> MR BILLINGS: Well, in one sense but it's more simple than that. The requirement[2] ... if it hasn't been made the charge has got to fail. ...
>
> MR BILLINGS: Ultimately it's really a question of fact for Your Honour, whether you're satisfied beyond a reasonable doubt the requirement was made. If you're not then the appellant in my submission must win."

10. Counsel for the informant, in the course of further discussion with the trial judge, indicated that the informant (who had not yet arrived at Court) would give evidence that, after the preliminary breath test was done, the informant said:

> "In my opinion the test indicates that your blood contains alcohol. I now require you to accompany me to the police station for the purpose of a breath test and remain [t]here until you have furnished a sample of your breath and been given a certificate or until three hours (etc)"

11. Counsel for the informant said that the informant would then give evidence that the defendant did not respond and ran off into the rear of a house. Mr Billings then concurred with the trial judge that the defence case was "that wasn't said".

12. The discussion continued a little later when the following exchange occurred:

> "HIS HONOUR: Yes. They can require him to have a PBT but that's happened here, hasn't it?
> MR BILLINGS: Yes, it's not in issue that he was found driving and a clinical test was given.
> HIS HONOUR: So there's been a PBT given.
> MR BILLINGS: Yes."

13. The discussion continued and reference was made to *DPP v Blyth*[3]. Mr Billings conceded that the requirement did not have to be made in formal terms providing that it was made – "[t]he issue here is was it made, not in what terms it was made ... [s]o that providing a police member conveys in whatever language to a person that they're required to accompany, formal or informal, that's sufficient---".

14. Eventually the informant (the second defendant in the present proceeding) arrived and gave evidence. After giving introductory evidence the informant testified as to the administration of a preliminary breath test and of the result and that he had then said to Mr Blair:

> "In my opinion your blood contains alcohol. I now require you to accompany me to the police station for the purposes of a breath test and remain there until the test is complete and you have received a certificate or until three hours after the driving of a motor vehicle."

15. The informant then gave evidence of Mr Blair's flight from the scene. He was then cross-examined by Mr Billings about the order of events and as to various other matters affecting the informant's version. Mr Billings in due course suggested to the informant that no requirement was made by him before Mr Blair left the scene and the informant said that that was not true.

16. A little later Mr Billings put to the informant that his evidence was that he did not make a requirement upon Mr Blair to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) [of the *Road Safety Act*] to which the informant replied "That's correct". The following exchange then occurred:

> "Q: You did not, after making such a requirement, require [Mr Blair] to accompany you for the purpose of undergoing that breath test which you'd required. Correct?
>
> A: Well, I believe I did make the requirement to accompany as stated earlier."

17. Counsel for the informant closed his case and Mr Billings made a no case submission which now forms the basis for his first ground for judicial review. Mr Billings submitted to the trial judge that there was no evidence to support an essential element of the offence contained in the charge. Mr Billings said:

> "It's a very simple submission, Your Honour. The charge and summons contains the particulars and the essential elements of the offence as alleged. It says that "At Charlton on 9 November 1998, the driver of a motor vehicle" – that's not in issue – "and after having been required to have a preliminary

> breath test" – there's evidence of that – "he was then further required to furnish a sample of breath analysis by breath analysing instrument pursuant to s55(1) of the *Road Safety Act 1986*" – that's in issue... Now, the charge as framed alleges – the essential elements are time and place, driver and motor vehicle, a preliminary breath test, and then the Crown case is that [Mr Blair] was required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1). That requirement having been made a requirement was then made to accompany for the purpose of that requirement. That's the way that the Crown case has been framed. That essential element has not been proved. That direct question asked and direct answer given. Therefore the charge must fail."

18. There followed extended debate between Mr Billings and the trial judge at the conclusion of which his Honour rejected Mr Billings' submission. His Honour ruled[4] as follows:

> "Mr Billings, on behalf of the appellant, submits that the information filed in this matter discloses or alleges an offence of refusing to furnish a sample of breath for analysis. Essentially that is what the submission he made to me amounts to. In my view, proper construction of the information alleges quite clearly an allegation that the appellant failed to comply with the request that he accompany the member of the police force to a police station for the purposes of furnishing a sample of breath pursuant to s55(1), and the submission made in relation to that, for the reasons which I have developed in argument with Mr Billings, fail."

19. It appears that His Honour to some extent misunderstood Mr Billings' submission but he concluded that the specific charge was clearly identified (and subsequently found that there was evidence to support all elements of that charge).

20. Mr Billings then called Mr Blair to give evidence and after his evidence had been given, Mr Billings closed his case.

21. Having closed his case, Mr Billings immediately submitted that there was no evidence that the instrument in which Mr Blair furnished a sample of his breath as a preliminary breath test was an instrument which was a prescribed device. The prosecutor then said that no such evidence was led because "it was indicated that there was no issue about the preliminary breath test" and he applied to reopen his case to lead that evidence. Mr Billings then said (correctly) that he had not indicated that he would not take that point and that he was entitled to remain silent and ask the Crown to prove its case. The trial judge said that he got the impression from the discussion before the informant had arrived that there was one real issue and that was a question of fact as to whether the requirement had been made. Debate followed between the trial judge and Mr Billings as to whether any prejudice would be suffered by the reopening of the case and as to whether proof of a prescribed device was a "formal proof" or "an essential element of the charge". After some further debate the trial judge decided to exercise his discretion to permit the prosecution to reopen its case so as to identify the preliminary breath testing device and prove that it was a prescribed device. His Honour, while recognising that the discretion to permit the prosecution's case to be reopened should rarely be exercised, said in substance that his grounds for doing so were that the prosecution had in the circumstances considered that this element of proof was not an issue and that it was irrelevant to the real issue for decision. The informant was then called and gave the relevant evidence.

22. The County Court convicted Mr Blair, ordered that his licence be cancelled and that he be disqualified from driving in the State of Victoria for a period of 24 months, effective from 3 June 2004. Further, Mr Blair was fined $600 together with statutory costs of $34.

23. As I have said, Mr Billings of Counsel for Mr Blair advanced two grounds for the setting aside of the conviction. The first and primary ground relied upon was that there was a lack or excess of jurisdiction, or an error of law on the face of the record, in that the evidence did not support that element of the charge which alleged that "he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 55(1) of the *Road Safety Act* 1986". The second ground was that the conviction should be set aside because there was a failure to accord procedural fairness to Mr Blair, or a breach of the rules of natural justice, by permitting the prosecution to reopen its case to prove that the preliminary breath test device was a prescribed device. However, Mr Billings conceded that it was open to a reasonable judge to exercise the discretion to permit the prosecution to reopen its case in all the circumstances and he said that he did not contend that the Court had acted beyond jurisdiction in so exercising its discretion.

24. Whatever else might be said against the first ground advanced on behalf of Mr Blair, I am satisfied that it should be rejected because the prosecution did not fail to prove all elements of the charge. It was common ground that the offence charged was that of refusing to comply with a requirement to accompany a member of the police force to a police station for the purpose of furnishing a sample of breath for analysis, contrary to ss49(1)(e) and 55(1) of the *Road Safety Act* 1986. It is established that proof of the "requirement" under that section does not require proof of a formal demand in relation to each element.[5] It is sufficient if a demand or requirement is made in substance and in comprehensible terms. Indeed, Mr Billings did not contend to the contrary[6] – his contention was that the charge as framed contained an element which was not proved. However, the element to which he referred was not one which was necessary to proof of the charge and simply arose from what I would regard as an inelegant drafting of the charge. The language used in the charge did not turn it into a *different* charge. There was surplus verbiage in the charge and it is not suggested that this was in any way misleading or prejudicial to the defence. Instead of the charge alleging that a requirement was made for the defendant to accompany a member of the police force to the police station for the purpose of furnishing a sample of breath for analysis, the charge alleged that the defendant was required to furnish a sample of breath for analysis [etc] *and for that purpose* such requirement was made. It was not a necessary part of the charge, nor was there any reason to think that it was so understood, that the member of the police force should have required the defendant to furnish a sample of breath for analysis at the time of requiring the defendant to accompany him to a police station.

25. Thus, although the charge was inelegantly drafted, it was not so confusing or obscure that it did not amount to a charge of the offence with which it was intended to deal.[7] A fair reading of the charge in the light of the statutory provisions shows that the so-called "element" which was not proved was not an essential ingredient of the charge but simply "arose" from the way that the charge was framed.

26. I conclude that all the essential elements of the charge were proved and that the defence was not misled or confused by the way the charge was framed. There was no jurisdictional error by the trial judge. Insofar as there was any error in the reasoning of the trial judge[8] his conclusion was correct in law.

27. Turning to the second ground, it was accepted that the prosecution should be permitted to reopen its case only in special or exceptional circumstances.[9] I note that Mr Billing's concession mentioned above[10] necessarily involves a concession that it was open to a reasonable judge to consider in the present case that such special or exceptional circumstances existed. How then could there have been any lack of procedural fairness? In any event I am satisfied that no lack of procedural fairness or any unfairness to the defence has been shown. In the circumstances described, in paras [8]-[9] and [11]-[13] above, and having regard to the explicit statements made by the defence about what were and were not issues, justice required that the prosecution be permitted to reopen its case[11] in order to lead evidence as to a matter which it was reasonably entitled to assume was not in issue. There was no apparent prejudice or risk of prejudice to the defence in relation to this discrete issue which, in the forensic circumstances of this case, was a matter of formal proof only. No injustice was thereby done to Mr Blair.

28. For the foregoing reasons this proceeding should be dismissed. I will hear Counsel on the question of what other orders should be made and as to costs.

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[1] See *Blair v Magistrates' Court* [2002] VSC 242.
[2] The transcript is incomplete and possibly inaccurate at this point but this is what I gather to be the gist of what was being said.
[3] (1992) 16 MVR 159 (Coldrey J).
[4] His Honour's revised rulings were not available at the time of the hearing but have since been provided to me by the solicitors for Mr Blair.
[5] See *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[6] See para [13] above.
[7] Compare *Smith v Van Maanen* (1991) 14 MVR 365, 371-2 per Tadgell J.
[8] See the ruling set out at para [18] above.
[9] See *R v Chin* [1985] HCA 35; (1985) 157 CLR 671, 676; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[10] See para [23] above.
[11] Compare *Hansford v McMillan* [1976] VicRp 80; [1976] VR 743 and *Kurzbock v Hallett* [2001] VSC 459; (2001) 126 A Crim R 125.

APPEARANCES: For the plaintiff Blair: Mr PJ Billings, counsel. CD Traill Lawyers. For the second defendant Free: Mr RA Elston SC. Office of Public Prosecutions.