16/04; [2004] VSCA 36

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MITCHELL v DPP

JD Phillips, Callaway and Buchanan, JJ A

13 November 2003; 24 March 2004 — (2004) 8 VR 192; (2004) 40 MVR 358

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER OF MOTOR VEHICLE INTERCEPTED WHEN OUTSIDE HIS VEHICLE – BELIEF BY POLICE OFFICER THAT DRIVER HAD BEEN DRIVING HIS VEHICLE A SHORT TIME BEFORE INTERCEPTION – DRIVER REQUESTED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR A BREATH TEST – DRIVER REFUSED – SUBSEQUENTLY CHARGED WITH REFUSING TO COMPLY WITH OFFICER'S REQUIREMENT – CHARGE DISMISSED BY MAGISTRATE ON GROUND THAT OFFICER DID NOT HAVE REASONABLE BELIEF THAT DRIVER HAD AN INTENTION TO START OR DRIVE THE MOTOR VEHICLE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS48(1)(b), 49(1)(b),(e), 55(2).

1. A police officer who requires a person to accompany the member pursuant to s55(2) of the *Road Safety Act* 1986 ('Act'), is obliged to state the purpose of the requirement namely, to obtain a sample of breath for analysis by a breath analysing instrument and to disclose the circumstances which justify the requirement namely, that the person has offended against s49(1)(a) or (b) of the Act.

2. Where there was ample evidence that a driver had been driving a motor vehicle within a relatively short period of time prior to his being questioned by a police officer, the formation of the belief was reasonable and the magistrate was in error in holding otherwise. The prosecution was not obliged to establish beyond reasonable doubt that the driver was in charge of his motor vehicle at the time he was required to accompany the police officer.

***DPP v Mitchell* [2002] VSC 326; (2002) 37 MVR 142; MC22/02, approved.**

JD PHILLIPS JA:

1. I agree that this appeal fails and for the reasons given by Buchanan JA I would only add that, while the argument proceeded on the footing that s49(1)(b) created two offences not one (one dependent upon driving and the other upon being "in charge"), I am not yet clear (even if that be the correct construction of s49(1)(b)) that it is the same under s55(2). In terms, the latter depends upon a reasonable belief that an offence has been committed against s49(1)(a) or (b) and so I should have thought it enough, in order to call s55(2) into play where s49(1)(b) is in issue, for the member of the police force to have had a belief, on reasonable grounds, that the person apprehended had either driven or been in charge of the motor vehicle (as dictated by s49(1)(b)) with more than the prescribed concentration of alcohol present in the blood; for whether driving or in charge an offence is committed against s49(1)(b). That describes this case. At the time of apprehension, the appellant was clearly believed "to have offended against s49(1)(b)" (to use the very words of s55(2)) and it cannot be that the prosecution was not entitled to prove that case. Anyway, the argument that dwelt on the precise words used by Senior Constable Fleming at the time of the appellant's apprehension had no force, given not only the terms of the ground of appeal but also the way in which what was said was so plainly understood by the appellant.

CALLAWAY JA:

2. I have had the advantage of reading in draft the reasons for judgment prepared by Buchanan JA. I agree in them and in his Honour's conclusion that the appeal should be dismissed.

3. In particular I agree that -

(a) the belief required by s55(2) of the *Road Safety Act* 1986 is a belief that a person has offended against s49(1)(a) or (b) and is not confined to a belief that there was more than the prescribed concentration of alcohol present in his or her blood;

(b) the prosecution has to prove that the person drove, or was in charge of, the vehicle within the last three hours only where that is in issue, as for example where the person does accompany the

> member of the police force to a police station and it is alleged that he or she did not remain there until three hours after the driving or being in charge;
> (c) the words in parentheses in s55(2) do no more than show that a sample of a person's breath may be taken for analysis without his or her first undergoing a preliminary breath test and do not mean that the circumstances in which a preliminary breath test might be required have to be established; and
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> (d) a member of the police force who requires a person to accompany him or her pursuant to s55(2) must assert the belief which is the condition precedent to the exercise of that power, although not necessarily in the statutory language.

BUCHANAN JA:

4. In the early hours of 24 June 2000 Senior Constable Fleming and another member of the police force patrolling in a police car saw a motor car parked in a street in Kangaroo Flat. The driver's door was open and the appellant stood between the door and the door sill. It was a cold night, but the appellant's shirt was undone and he was barefoot. The police car parked behind the appellant's car. The appellant locked the driver's door. He walked around the back of the car with his back to the police, carrying a half full bottle of beer, dropped the car keys, kicked them under the car and walked off.

5. The police intercepted the appellant. Senior Constable Fleming asked the appellant how the car came to be in Kangaroo Flat. The appellant said that it had been there since the previous night. Mr Fleming formed the opinion that the car had been driven there half an hour earlier. The engine bay and exhaust pipe were warm and no dew had formed on the car. The appellant's eyes were glazed and he was unsteady on his feet. Mr Fleming thought that the appellant was under the influence of alcohol. A magistrate subsequently found that Mr Fleming requested the appellant to undergo a preliminary breath test because he was in charge of a vehicle. The appellant refused, saying that the police had not seen him driving. The magistrate found that Mr Fleming told the appellant that he believed on reasonable grounds that "you are" in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in his blood and requested him to accompany the policeman to the Bendigo police station. The appellant refused and reiterated that the police had not caught him driving.

6. The appellant was charged with an offence under s49(1)(e) of the *Road Safety Act* 1986 ("the Act") in that he refused to comply with a request to accompany a member of the police force to a police station for the purpose of furnishing a sample of his breath for analysis and the refusal was made "prior to three hours elapsing from being in charge of a motor vehicle".

7. The evidence at the hearing of the charge consisted of the testimony of the two policemen. Senior Constable Fleming said that he formed the belief that the appellant was in charge of his motor car on the basis of the following facts:

> • Mr Fleming had received information over the radio that the appellant was driving a car to the Windermere Hotel;
> • He observed the motor car;
> • The appellant gave false answers to questions posed to him by Mr Fleming; and
> • The defendant was standing at the car with the driver's door open and holding the car keys.

Mr Fleming said that it was his belief that the appellant was in charge of the vehicle when Mr Fleming saw him and had been in charge of the motor car in the street in Bendigo in which he lived within half an hour of the police speaking to him at Kangaroo Flat and that he drove the motor car to Kangaroo Flat. He said, in answer to the question, "What was the exact nature of your belief that he was in charge?",

> "That he was in charge at 18 Bayne Street (the address at which the appellant resided), prior to driving the car, that he was in charge in Station Street, Kangaroo Flat when I saw him."

In the course of cross-examination Mr Fleming said that " … he's got to be in charge before he can be driving the car".

8. Section 49(1)(e) of the Act provided that a person committed an offence if he refused to comply with a requirement made under s55(1), (2), 2(AA), 2(A) or 9(A). The requirement in this case was one made under s55(2), which provided:

> "(2) A member of the police force may require any person whom that member reasonably believes to have offended against s49(1)(a) or (b) to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test in accordance with s53) and for that purpose may further require the person to accompany a member of the Police Force to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-s(4) or until three hours after the driving, being an occupant of or being in charge of a motor vehicle, whichever is the sooner."

Senior Constable Fleming believed that the appellant had offended against s49(1)(b), which provided that a person is guilty of an offence if he –

> "(b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood …"

Section 48(1)(b) provided:

> "(1) For the purposes of this Part— … (b) a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

9. The magistrate dismissed the charge. She said in her reasons that she was required to be satisfied beyond reasonable doubt that the appellant was in charge of the vehicle at the time the informant required him to furnish a sample of breath. The magistrate, however, did not proceed to determine whether that element had been proved, but instead dealt with the question of Mr Fleming's belief, concluding:

> "I cannot be satisfied that there were reasonable grounds for a belief that he had a present intention to start or drive that motor vehicle. That being the case, not all the elements of the charge have been made out and accordingly, the charge before the Court will be dismissed."

10. The respondent appealed against the dismissal of the charge pursuant to s92(2) of the *Magistrates' Court Act* 1989, which provides for an appeal to the Supreme Court from a final order of a Magistrates' Court in a criminal proceeding on a question of law.

11. The judge who heard the appeal held that the elements which the prosecution was required to establish in the present case were:

> "(i) That a member of the police force reasonably believed that the (appellant) had committed an offence against s49(1)(b) of the Act, that is, that the (appellant) had been in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in his blood; (ii) (a) that the member of the police force required the (appellant) to furnish a sample of breath for analysis, by a breath analysing instrument; or (b) that the member of the police force required the (appellant) to furnish a sample of breath for analysis by a breath analysing instrument and required the (appellant) to accompany the member to a police station for that purpose and required him to remain there until he had furnished a sample of breath and had been given the necessary certificate under the legislation or until three hours after driving, being the occupier occupant or being in charge of the motor vehicle, whichever was sooner; (iii) that the (appellant) refused the request."

12. His Honour held that it was not incumbent upon the prosecution to establish that the appellant had in fact driven or had been in charge of a motor vehicle within three hours of being required to accompany the member of the police force to a police station for the purpose of furnishing a sample of breath for analysis. It was sufficient that the member of the police force who made the requirement believed on reasonable grounds that the appellant had been in charge of a motor vehicle within the last three hours. The magistrate erred, his Honour said, in holding that the prosecution was required to prove that the appellant had been in charge of his motor car when requested to accompany Mr Fleming to the police station or that the informant had reasonable grounds for so believing.

13. His Honour said:

> "The question was whether the informant, on reasonable grounds, believed at the time he made the request, that the respondent had been in charge of the motor vehicle, at some point prior to the request, with more than the prescribed concentration of alcohol present in his blood, but no greater than three hours prior to being requested to furnish a sample."

His Honour answered that question in the affirmative. He said that Mr Fleming gave evidence that he believed that the appellant had driven from his home to the point at which Mr Fleming intercepted him and that prior to the commencement of his driving the appellant was in charge of his motor car. Mr Fleming had reasonable grounds for his belief. Accordingly, the magistrate should have found the charge proven. The matter was remitted to the Magistrates' Court "to further deal with the charge in accordance with the law".

14. The principal contention of the appellant was that the prosecution was obliged to establish beyond reasonable doubt that the appellant was in charge of his motor car either at the time he was required to accompany the police officer or at an earlier time. Counsel for the appellant submitted that the reasonable belief of a member of the police force referred in s55(2) in connection with an offence against s49(1)(b) was limited to a belief that there was more than the prescribed concentration of alcohol present in the blood of the person driving or in charge of a motor vehicle: the other elements of an offence against s49(1)(b) were to be established by evidence of the facts.

15. Counsel relied upon the concluding words of s55(2) dealing with the period of time for which a person is required to remain in the place where the sample of breath is to be furnished. The time is not to exceed three hours from the driving or being in charge of the motor vehicle in any event. The time may expire earlier, but then only if a sample of breath has been furnished and a certificate showing the results of the analysis of the sample has been given. It was submitted that a member of the police force could not require a person to accompany the member to the place where the sample of breath was to be furnished more than three hours after the driving or being in charge of a vehicle, for that would be a pointless exercise. As soon as the person arrived at the place, he or she would be entitled to leave. Accordingly, in every case it was necessary to prove the driving or being in charge in order to establish that the requirement met the criteria of the sub-section.

16. It is necessary to place a gloss upon the words found in s55(2) to produce the result for which the appellant's counsel contended. The sub-section in terms does not provide that the requirement is to be made within three hours of driving or being in charge of a vehicle, and it is only a pointless exercise to require a person who drove or was in charge of the vehicle more than three hours ago to accompany a member of the police force to a place to furnish a sample of breath if that person refuses to stay because the driving or being in charge is more than three hours old. Section 55(2) is predicated upon a belief by a member of the police force that an offence has been committed, which in my view is incompatible with a belief that some only of the elements of the offence exist. In my view it would run counter to the clear purpose of the provision if members of the police force only made requirements when they were in a position to prove all but one of the elements of a charge under s49(1)(a) or (b).

17. Accordingly, I am of the opinion that it is only necessary for the prosecution to establish that a person required to furnish a sample of breath for analysis drove or was in charge of a motor vehicle less than three hours earlier in a case where the person, having arrived at the place or vehicle where the sample of breath was to be furnished, fails to remain for what the prosecution contends is the time limited by the sub-section.[1] In the present case no question arose as to the obligation of the appellant to remain for three hours as the appellant refused to accompany Senior Constable Fleming to the police station.[2]

18. Another attempt to achieve the result that the prosecution was required to establish more than Senior Constable Fleming's belief that the appellant was in charge of his motor car while more than the prescribed concentration of alcohol was present in his blood was the submission that the words in parenthesis in s55(2), "(instead of undergoing a preliminary breath test in accordance with section 53)", meant that a person could only be required to accompany a member of the police force to a police station if that person could also be required to undergo a preliminary breath test. Section 53 prescribed the circumstances in which a person might be required to undergo a preliminary breath test. The only circumstances that might have applied to the appellant were those set out in s53(1)(a), which provided:

> "(1) A member of the police may at any time require— (a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; ... to undergo a preliminary breath test by a prescribed device".

Accordingly, so it was said, the prosecution was obliged to prove that when the appellant was first seen by Senior Constable Fleming the appellant was in charge of his motor car.

19. In my view the words in parenthesis in s55(2) do not add another element to the offence created by s49(1)(e), but were intended merely to make it clear that, even if s53 might be thought to apply, a sample of a person's breath could be taken for analysis by a breath analysing instrument without that person first undergoing a preliminary breath test.

20. It might be said that the appellant's construction of s55(2) gains support from the presence of the words "being an occupant of" in s55(2). The expression is derived from s53(1)(d), which provides that a member of the police force may require any person who he or she believes on reasonable grounds was, within the last three preceding hours, an occupant of a motor vehicle when it was involved in an accident, and 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. If, in the opinion of the member of the police force, the preliminary breath test indicates the presence of alcohol in a person's blood, that person can be required to furnish a sample of breath for analysis by a breath analysing instrument: s55(1). An occupant of a vehicle involved in an accident, where the police are uncertain who was driving or in charge of the vehicle, can be required to furnish a sample of breath for analysis by a breath analysing instrument if he or she has first undergone a preliminary breath test. I understood counsel for the appellant to argue that the presence of the expression "being an occupant of" in s55(2) meant that no person was to be required to furnish a sample of breath for analysis by a breath analysing instrument unless that a person had undergone a preliminary breath test or could have been legally required to undergo a preliminary breath test.

21. The words "being an occupant of" were introduced into s55(2) by Act No. 19 of 1991, which amended s53(1) to add paragraph (d). Like words were also inserted in other provisions of Part 5 of the Act, which covers ss47 to 58A and deals with offences involving alcohol and other drugs. As s55(2) is concerned exclusively with those who drive or are in charge of vehicles, the inclusion of the words "being an occupant of" in the sub-section probably serves no purpose and in my view throws no light upon the meaning of the provision.

22. To construe s55(2) so that the belief of the member of the police force extends to all the elements of an offence against s49(1)(a) or (b) has the consequence, which appears to me to be desirable, that at the time he makes the requirement the member must do more than form the belief that more than the prescribed concentration of alcohol is present in the defendant's blood. The member should form a belief on reasonable grounds as to all the elements of the offence, and not leave all but one element to proof in court by evidence which might be unknown to the member when the requirement is made.

23. On another tack, counsel for the appellant submitted that the prosecution was bound to establish that Senior Constable Fleming had reasonable grounds to believe that the appellant was in charge of his motor car when he was encountered by the police, the ground upon which the magistrate dismissed the charge. The magistrate found that Mr Fleming told the appellant to accompany him to the police station because he believed that the appellant (when Mr Fleming spoke to him) was in charge of his motor car while more than the prescribed concentration of alcohol was present in his blood. As the magistrate said, there were no reasonable grounds for that belief, for the circumstances described by Mr Fleming in his evidence suggested that the appellant had completed driving his motor car rather than that he intended to start or drive the car.[3] The judge held that it was nonetheless open to the prosecution to prove a reasonable belief that the appellant had been in charge of his motor car shortly before he was apprehended.

24. The submission was made pursuant to ground 7 in the notice of appeal, which stated:

> "7. The Honourable Justice erred in law in ruling that the prosecution could prove its case on the basis other than the basis on which the prosecution case was first put. That is, in ruling that the prosecution could prove its case on the basis that the [appellant] may have been in charge of a motor vehicle at a location other than that where the [appellant] was found by the police informant on 24 June 2000."

25. In my opinion a member of the police force who requires a person to accompany the member

pursuant to s55(2) is obliged to state the purpose of the requirement, namely, to obtain a sample of breath for analysis by a breath analysing instrument, and to disclose the circumstances which by law justify the requirement. Parliament has not said that a person is obliged to accompany a member of the police force whenever the latter desires to obtain a sample of breath for analysis but only where the member reasonably believes the person to have offended against s49(1)(a) or (b). The belief which is the condition precedent to the exercise of the power should be asserted, although not necessarily in the statutory language.[4]

26. Nevertheless in my view the ground as drafted and as argued on appeal was not made out.

27. The prosecution case was not "first put" when Mr Fleming spoke to the appellant, but when the case was advanced in the Magistrates' Court. The charge and the prosecution case presented in the Court were consistent with Mr Fleming's having reasonably believed that the appellant had been in charge of his vehicle at a different place and at an earlier time. The argument on appeal did concentrate upon what happened when Mr Fleming intercepted the appellant and required him to accompany Mr Fleming to the police station. The essence of the argument, however, was that it was unfair to find the appellant guilty on a basis other than that which was put to him at the time the requirement was made. I do not accept the submission. Fairness only arises in relation to the charge and the conduct of the prosecution. The only question, as far as the requirement is concerned, is whether it was valid, and it was not contended that the requirement was invalid.

28. In the end, I am of the opinion that none of the grounds of appeal have been established. I would dismiss the appeal.

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[1] Or when a defendant presents or points to evidence that suggests a reasonable possibility that the requirement to furnish a sample of breath for analysis by a breath analysing instrument was made more than three hours after the defendant drove or was in charge of a motor vehicle. See s55(6) of the Act and s130 of the *Magistrates' Court Act* 1989.
[2] Cf. *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[3] Cf. *Woods v Gamble* (1991) 13 MVR 153.
[4] This view relies not only upon the decision of Eames J in *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517 at 522-523; (1994) 20 MVR 275, but also on what I conceive to be the general law on the subject.

APPEARANCES: For the appellant Mitchell: Mr IC Alger, counsel. Stuthridge Leach & Associates, solicitors. For the respondent: Ms KE Judd, counsel. Ms Kay Robertson, Solicitor for Public Prosecutions.
