18/94

SUPREME COURT OF VICTORIA

DPP v RYAN

Mandie J

6, 13 July 1994 — (1994) 19 MVR 574

MOTOR TRAFFIC – DRINK/DRIVING – REQUEST TO FURNISH SAMPLE MADE INFORMALLY – WHETHER SUFFICIENT COMPLIANCE WITH ACT – 'NO CASE' SUBMISSION – TEST TO BE APPLIED – WHETHER TEST CORRECTLY APPLIED – AMENDMENT OF CHARGE – 12-MONTH LIMITATION PERIOD EXPIRED – WHETHER AMENDMENT SHOULD BE MADE: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1).

1. Section 55(1) of the *Road Safety Act* 1986 ('Act') which empowers a police officer to require a person to furnish a sample of breath for analysis is sufficiently complied with if the person is given reasonably sufficient information to know precisely what is required and why.
***Walker v DPP* (1993) 17 MVR 194; (MC 2/94); and**
***DPP v Blyth* (MC 22/92) applied.**

2. Where there was evidence that a police officer asked a person "to step out of the car and come back to the booze bus for a breath test":
(a) S55(1) of the Act was complied with; and
(b) the magistrate was in error in deciding there was no case to answer.

3. *Obiter*. Where the charge omitted words to the effect that the concentration of alcohol was not due solely to the consumption of alcohol after driving, it was open to the magistrate to amend the charge notwithstanding the expiration of the 12-month limitation period.
***Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43, distinguished.**

MANDIE J: [1] This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 from orders of the Magistrates' Court at Frankston made on 30th June 1992. The appeal is brought by the Director of Public Prosecutions acting for the informant, Peter John Koger against the dismissal of a charge against the defendant, Mark Bernard Ryan ("the respondent"). The charge was that the respondent did at Seaford on 24th July 1990 commit a breach of s49(1)(f) of the *Road Safety Act* 1986 ("the Act") namely within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysis instrument pursuant to s55(1) of the Act, the result of which analysis indicated more than the prescribed concentration of alcohol present in the defendant's blood.

I will now briefly refer to the relevant evidence which was given in the Magistrates' Court. The informant gave evidence that he had administered a preliminary breath test to the respondent and then said "I told him that he had shown positive and asked him to step out of the car and come back to the booze bus for a breath test". In cross-examination it was put to the informant: "At the conclusion of the preliminary breath test you didn't say to my client come back to the bus for a breath test" to which the informant replied: "I asked him to come back to the bus". On re-examination the informant was asked" "Did you in fact ask him anything else when you asked to come back to the bus?" to which he replied: "No". He was then asked: "During your evidence in chief you stated that you required the defendant **[2]** to accompany you to the bus for the purpose of a breath test, is that correct? And he replied: "Yes". He was then asked: "When did you say this" and he replied: "As he was alighting from his car".

Other evidence not relevant for present purposes was called for the prosecution and then the case for the prosecution was closed. Counsel for the respondent submitted at that stage that there was no case to answer because the prosecution had failed to prove the formal demand referred to in s55(1) of the *Road Safety Act* which he submitted was part of the proof necessary for a charge under s49(1)(f) to succeed.

The magistrate ruled that there was no case to answer and dismissed the charge with

costs fixed in the sum of $1,750. However, a conflict arises on the affidavits as to precisely what was said by the magistrate when dismissing the charge. According to the prosecutor's affidavit, the magistrate refused to make a finding as to whether a formal demand had been made but dismissed the information on the basis of cases cited to him. On the other hand the respondent's affidavit says that "the magistrate found as a question of fact, that no demand had been made and he made this finding upon the cross-examination of the witness". From the final orders of the Magistrates' Court, the appellant appealed and the Master's order dated 28th July 1992 identifies the following questions of law to be raised by the appeal:

> "1. Whether or not the prosecution must in respect of a charge made under Section 49(1)(f) of the *Road Safety Act* 1986 prove the making by formal **[3]** expression of a request to furnish a sample of breath for analysis by a breath analysing instrument.
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> 2. Whether or not the prosecution must in respect of a charge made under Section 49(1)(f) of the *Road Safety Act* 1986 prove the making by formal expression of a request to accompany to a police station or other place where the sample of breath is to be furnished.
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> 3. Whether or not the prosecution must in respect of a charge made under Section 49(1)(f) of the *Road Safety Act* 1986 prove a request to furnish a sample of breath for analysis by a breath analysing instrument to have been made by the member of the police force requiring the preliminary breath test under Section 53 of the said Act.
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> 4. Whether any reasonable Magistrate could have failed to be satisfied that there was a case to answer."

The relevant provisions of the Act are as follows:

> "49(1) A person is guilty of an offence if he or she—
> (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; …."
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> "55(1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation under section 53 to do so and—
> (a) the test in the opinion of the member or officer in whose presence it is **[4]** made indicates that the person's blood contains alcohol; or
> (b) the person, in the opinion of the member or officer, refuses or fails to carry out the test in the manner specified in section 53(3)—
> the member of the police force or officer of the Corporation 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 or an officer of the Corporation authorised in writing by the Corporation for the purposes of section 53 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 or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

The magistrate was asked to rule upon a submission that there was no case to answer. Accordingly, he had to be satisfied as to a question not of fact but of law, namely, whether on the evidence the defendant could lawfully be convicted not whether he ought to be convicted (see *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, 658; [1955] ALR 671; *Downard v Babington* [1975] VicRp 85; [1975] VR 872, 875; (1975) 31 LGRA 314). The question is "whether the defendant could lawfully be convicted on the evidence as it stands, – whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred" (per Kitto J in *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433, 442; [1963] ALR 165; 36 ALJR 276; see, too, *Attorney-General's Reference (No. 1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410, 414-5). Accordingly, the magistrate must at that stage consider the evidence of primary fact at its strongest from the point of **[5]** view of the case for the prosecution (see *Myers v Claudianos* (1990) 95 ACTR 1; (1990) 2 ACSR 73; (1990) 100 FLR 362, 369).

The magistrate was obliged to consider the no case submission on the basis of the strongest evidence for the prosecution – namely, that the informant had said to the respondent that he had

shown positive and that he asked him "to step out of the car and come back to the booze bus for a breath test". If the magistrate did consider the no case submission on this basis, he was in my opinion in error as a matter of law in deciding that there was no case to answer for the following reasons.

Section 55(1) of the Act empowers a member of the police force to "require the person to furnish a sample of breath for analysis by a breath analysing instrument" and for that purpose to "require the person to accompany a member of the police force to a police station or other place". In my opinion there is sufficient compliance with s55(1) (as imported by s49(1)(f)):

> (a) if the member of the police force makes "a request in words which it is clear to the defendant is being made as of right" (see per Brooking J at pp9-10 in *Walker v DPP* (1994) 19 MVR 574, Supreme Court of Victoria Full Court, 13 May 1993); and
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> (b) if the request or requests is or are made in words which clearly convey (whether formally or informally) to the defendant that he is **[6]** required to furnish a sample of breath for analysis and that he is required to accompany the member of the police force to a police station or other place for that purpose. The test is whether a defendant was given reasonably sufficient information to know precisely what was required of him and why (see p5 of the unreported decision of Coldrey, J. in *DPP (on behalf of Morewood) v Blyth* (Supreme Court of Victoria, unreported, 28 April 1992).

In my view if a defendant is asked "to step out of the car and come back to the booze bus for a breath test", the above tests are clearly satisfied and there is compliance with the section. Indeed, I did not understand counsel for the respondent to seriously contend otherwise. Rather, counsel for the respondent submitted that the magistrate had found that "no demand had been made" by which the magistrate should be understood to have found as a fact that the informant had said nothing more than: "Come back to the bus". Counsel for the appellant submitted that these words were sufficient of themselves in all the surrounding circumstances. It is unnecessary for me to decide whether that is so because I am satisfied that the magistrate was not entitled to make that finding of fact or treat the evidence in that way at the stage of a no case submission (if indeed that was what he did).

[7] Accordingly, I have concluded that it was not open to the learned magistrate to decide that there was no case to answer.

Counsel for the respondent said that there was an alternative basis upon which the magistrate's dismissal of the charge should not be disturbed. He submitted that the charge was "not known to the law", alternatively that a fundamental element of the charge had not been alleged. The basis of this argument was that the charge had been framed in terms of s49(1)(f) as it stood prior to 19 June 1989 when it was amended by Act No. 53 of 1989 to add the additional element "(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". That element had not been alleged.

I am unable to discern any basis for the argument that the charge was not known to the law. The only questions which arise, it seems to me, do so under the argument as to whether the charge was defective. In *Ozbinay v Crowley* (Supreme Court of Victoria, (1993) 17 MVR 176, 16 April 1993), Byrne J considered that the charge was bad if it did not allege the ingredient added by paragraph (ii) of s49(1)(f). His Honour went on to say that if the matter had been raised before the magistrate he would have had power to amend the charge and would have done so without hesitation. In my opinion, it may well be the case that paragraph (ii) raises a matter of defence only and does not add an essential ingredient to the offence (see *Collins v Black*, Full Court **[8]** of Supreme Court of Victoria, [1995] VicRp 26; [1995] 1 VR 409, 28 June 1994, per JD Phillips and Hansen JJ at p3). In any event I agree that it is a matter most appropriate for amendment, if that be necessary.

Counsel for the respondent argued that a court either could not or would not make such an amendment once the 12 month limitation period for the commencement of proceedings for a summary offence under s26(4) of the *Magistrates' Court Act* 1989 had expired and he referred to *Kerr v Hannon* [1992] VicRp 3; [1992] 1 VR 43. In my opinion, the envisaged amendment would be one which (if required) a magistrate would clearly have a discretion to allow under s50(1) of the

Magistrates' Court Act notwithstanding the expiration of the said time limit. It does not involve a new charge and would not appear to prejudice the respondent in any way. I therefore reject the respondent's submission.

The appeal is allowed. In the circumstances, it is in my opinion inappropriate for the same magistrate to continue hearing the charge and the matter should begin afresh. It is ordered that the orders of the Magistrates' Court made on 30 June 1992 be set aside. It is further ordered that the matter be remitted to the Magistrates' Court at Frankston for a new hearing and determination by another magistrate in accordance with these reasons and in accordance with law. It is ordered that the respondent pay the appellant's costs of the appeal including reserved costs.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. Solicitor for the DPP. For the respondent Ryan: Mr P Billings, counsel. EA Einsiedel, solicitor.
