

17/06; [2006] VSC 232

SUPREME COURT OF VICTORIA

SAWYER v FORAI

Hansen J

23 June, 5 July 2006 — (2006) 13 VR 309; (2006) 163 A Crim R 313

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT CHARGED WITH REFUSAL TO UNDERGO BREATH TEST WITHIN 3 HOURS OF BEING THE DRIVER OF A MOTOR VEHICLE INVOLVED IN AN ACCIDENT – MATTERS TO BE PROVED – WHETHER OCCURRENCE OF AN ACCIDENT MUST BE ESTABLISHED BEYOND REASONABLE DOUBT – "BELIEVES ON REASONABLE GROUNDS" – MEANING OF – FINDING BY MAGISTRATE THAT REASONABLE GROUNDS EXISTED FOR POLICE OFFICER TO FORM THE BELIEF THAT DEFENDANT DROVE A MOTOR VEHICLE WITHIN 3 HOURS WHEN IT WAS INVOLVED IN AN ACCIDENT – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, SS49(1)(c), 53(1)(c).

Section 53(1)(c) of the *Road Safety Act* 1986 ('Act') provides that:

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

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

Section 53(1)(c) of the Act should be construed according to its terms. There is no punctuation or language to suggest that Parliament intended a separation between the two elements of driving or being in charge of a motor vehicle within the last preceding three hours on the one hand, and the vehicle being involved in an accident on the other hand. There is no word or other indication of disjunction. It is one composite statement of that as to which the member of the police force must have a belief on reasonable grounds. The offence under s49(1)(c) of the Act does not require the prosecution to prove beyond reasonable doubt that the police officer requiring the person to undergo a PBT believed on reasonable grounds that the person drove the motor vehicle when it was involved in an accident. Accordingly, a magistrate was correct in holding that reasonable grounds existed for the police informant to form the belief referred to in s53(1)(c) of the Act.

HANSEN J:

1. This appeal is brought pursuant to 92 of the *Magistrates' Court Act* 1989 by the appellant, Brett Sawyer, from a conviction and orders made against him by the Magistrates' Court at Moe on 9 September 2005. On that day he pleaded not guilty to two charges, namely that at Moe on 29 September 2004:

(a) having been required to undergo a preliminary breath test in accordance with s53(1) of the *Road Safety Act* 1986 he refused to undergo such test within three hours of being the driver of a motor vehicle involved in an accident;

(b) he drove a motor vehicle on a highway namely Margaret Street during a period of disqualification from obtaining an authorisation to drive a motor vehicle.

2. The charge of driving while disqualified was dismissed on the ground that it was not established that the appellant did drive a motor vehicle as alleged. However, on the charge of refusing to undergo a preliminary breath test the appellant was convicted and the following orders were made, namely he was disqualified from driving in the State of Victoria for four years, he was placed on a community based order for a period of four months for which purpose he was to attend the Morwell Community Correctional Services by 4.00 pm on 13 September 2005 and perform 60 hours of unpaid community work over four months, and he was ordered to pay costs of \$105.60. There was a stay until 7 October 2005.

3. By his notice of appeal the appellant identified two questions of law as arising, namely whether the learned Magistrate erred:

(a) In convicting the appellant of refusing a preliminary breath test after finding that he was not satisfied beyond reasonable doubt that an accident had occurred;

(b) In dismissing the charge of driving while disqualified while, on the same facts, convicting the appellant of the charge of refusing to undergo a preliminary breath test following an accident.

4. At the outset of the hearing counsel for the appellant abandoned the second question of law. The appeal concerns only the correctness in law of the conviction on the charge of refusing to undergo a preliminary breath test. No question is raised as to the correctness of the decision on the charge of driving while disqualified. The second question of law was simply inapposite.

5. That leaves as the sole question raised on the appeal whether it was open to the learned Magistrate to find the charge of refusing to undergo a preliminary breath test proved in the circumstance that he found, on the charge of driving while disqualified, that it was not established that an accident had occurred. To understand how the point is put it is necessary to refer to the relevant legislation, the facts and the reasoning of the learned Magistrate.

6. The offence of refusing a preliminary breath test is contained in s49(1)(c) which provides that a person is guilty of an offence if he or she refuses to undergo a preliminary breath test in accordance with s53 when required under that section to do so. Section 53, which I set out in full in view of the argument, provides as follows:

"53. Preliminary breath tests

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

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

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

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

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

(2) An officer of the Corporation or of the Department of Infrastructure who is authorised in writing by the Corporation or the Secretary of the Department of Infrastructure, as the case requires, for the purposes of this section may at any time require any person he or she finds driving a commercial motor vehicle or in charge of a commercial motor vehicle to undergo a preliminary breath test by a prescribed device.

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

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

In this section the expression "motor vehicle" includes a motor cycle; see the definitions in s3.

7. I now refer to the evidence that was before the learned Magistrate.

8. The first person to give evidence for the prosecution was Joanne Michelle Hicks. On 29 September 2004 at about 4.30 pm she came home from work, parked her car in the front yard, checked mail in the letter box and as she turned to go to her house heard a motor bike "revving up really loud and then all of a sudden it stopped revving and I noticed that the motor bike had fallen over". It was about 30 metres from King Street, in Margaret Street. Referring again to what she saw, the motor bike had fallen over "and I saw the guy, he was ... laying down with the bike ah it looked as though the bike was on the right hand side of the road. I've gone in to call an ambulance". By the time she went outside to have a look the motor bike had disappeared. It looked as though it was a green Kawasaki motor bike. She said that there was also "a lady out there ... near the bike after it had fallen over". Ms Hicks did not know the rider of the motor bike.

9. In cross-examination Ms Hicks said that she did not hear a crash or a skid, she heard

revving and it stopped. She did not see the motor bike approach. She just saw it on its side. She did not see it moving. She did not see any smashed item.

10. The next witness was the informant Senior Constable Veronika Forai, the respondent to the appeal. On 29 September 2004 she was on mobile patrol duty with Senior Constable Hatswell when at approximately 4.37 pm they received information from Police Communications to attend at the intersection of King and Margaret Streets, Moe as a result of a motor cycle collision at that location. They duly attended at the location. There was no sign of a motor bike. There were however "scrap" marks on the road and at the location she had a conversation with a person she now knew to be Rose Saunders. Rose told her that her ex-lover Brett Sawyer was involved in the motor cycle collision, and she handed Senior Constable Forai a dark coloured wallet which she said fell out of his pocket at the time. Senior Constable Forai said that she looked inside the wallet which contained personal cards and a birth extract belonging to Brett Sawyer. As a result of the conversation with Rose Saunders and the information gained from the wallet she believed that the rider of the motor cycle at the time it was involved in a collision was Brett Sawyer. She then went to 60 King Street which was diagonally across from the collision scene.

11. I interpolate that in my view the word "scrap" in reference to marks on the road should be read as "scrape". That accords with later evidence. The error has occurred in a typing up of the tape recording of the hearing.

12. Senior Constable Forai and Senior Constable Hatswell knocked on the front door of the premises but, not being answered and hearing voices from the rear of the property, walked to the side gate where a male gave them access. Senior Constable Forai said that she approached a male who identified himself as Brett Sawyer. She observed blood on his left arm and fingers. She said to him that he had been observed riding his motor bike on King and Margaret Streets and to have had an accident. He replied that he did not know what she was talking about and asked "do you see a bike here?". He was becoming "sort of agitated and angry, there was also a female who was yelling and screaming in the background in the back yard of the premises". She asked how he injured his hand and he said there was nothing wrong with it. She said that "there is an ambulance here to treat you" and he said he did not need an ambulance, "I'm just having a drink". Senior Constable Forai then said to him that she believed on reasonable grounds that he was the driver of a motor vehicle involved in an accident within the last three hours and required him to undergo a preliminary breath test on a prescribed device to her satisfaction. He refused. He was warned of the penalty if he refused and was found guilty to which he said "it's 4 years, I know it's my second time". Senior Constable Forai again required him to undergo a preliminary breath test and again he refused. When asked for a reason for doing so he said that he was having a quiet barbecue. Finally, Senior Constable Forai said that she attended at Sawyer's premises at 4.45 pm.

13. In cross-examination Senior Constable Forai said that she saw a scrape on the road. She did not know if it was there before. She did not see any plastic, smashed glass, oil or anything. In reference to the blood on Sawyer's hand, it looked like blood, she did not believe it was juice from meat but could not say definitely it was human blood. It could have been blood from meat or anything. She did not see an injury, and did not find the motor cycle. She had no evidence of damage to the motor cycle or that there was an injury to his arm.

14. The final witness for the prosecution was Senior Constable John Edward Hatswell. He confirmed being on mobile duty and following a call about a motor vehicle accident attending at the intersection of King and Margaret Streets, Moe. A small group of people were at the intersection. There were "scrap" marks on the road a short distance up Margaret Street and on the left hand side. (I repeat that I read "scrap" as "scrape".) Senior Constable Forai spoke with Rose Saunders who handed her a wallet. Senior Constable Hatswell confirmed that Saunders said that the rider of the motor cycle had dropped the wallet, and left it there. He believed that Saunders did not identify the rider of the motor bike. Then, after seeing papers in the wallet that belonged to the defendant they walked across the road to 60 King Street where he knew that the defendant lived. Then, after going around the back of the house, Senior Constable Forai spoke to the defendant who appeared extremely intoxicated. He had an injury to his left arm "like grazes and looked like fairly decent graze or cuts to his hand and he was bleeding". The defendant was leaning on the fence and his speech was slurred. When they spoke to him he held up his hand and seemed to indicate that

nothing had happened. An ambulance arrived but he declined treatment. Senior Constable Forai then stated her belief on reasonable grounds that he was the driver of a motor vehicle involved in an accident in the last three hours and that he was required to undergo a preliminary breath test, which the defendant refused. Senior Constable Forai explained the consequence of a refusal and he again refused arguing that the loss of licence was four years. He gave his reason for his refusing that he was having a quiet barbecue.

15. Senior Constable Hatswell then tendered an extract from Vic Roads stating that the defendant was a disqualified driver at the time of the offence.

16. Senior Constable Hatswell was then cross-examined. He said that the scrapes on the road were fresh, made within a short time. He did not recall any oil or water stain. There was no smashed plastic or glass, and the motor cycle was not found. As to his evidence of seeing abrasions, he said that he was looking for an injury so as to relate it back to the accident.

17. That concluded the prosecution evidence.

18. The appellant did not give evidence and no evidence was called on his behalf.

19. Counsel for the defendant then addressed submissions as to why the charges should be dismissed. As I have already said, the learned Magistrate dismissed the charge of driving while disqualified on the ground that the prosecution had not established beyond reasonable doubt that the appellant was the driver of the motor cycle in the incident the subject of the evidence. That left the charge of refusing to undergo a preliminary breath test and it was to that charge that the greater part of counsel's submissions were directed.

20. As counsel's submission was developed it came down to this. The expression (in s53(1)(c)) "has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident" could be read "conjunctively or disjunctively" in the sense that the element of involvement in an accident could be read disjunctively from the preceding element (or elements if driving or being in charge are regarded separately). It was submitted that a disjunctive reading was correct, and that, so read, the prosecution was required to establish the element of involvement in an accident beyond reasonable doubt.

21. That a disjunctive reading was intended was indicated by the structure and operation of other provisions in s53. Paragraphs (a) and (b) of s53(1) required proof of an actual state of affairs. It was submitted that para (d) seemed to imply a heavier onus than just a reasonable belief that there had been an accident; it required proof of the occurrence of "the accident". It was submitted, in effect, that it could not have been intended that the charge under s49(1)(c) could be established merely on proof of a belief on reasonable grounds of the matters specified in s53(1)(c). It was submitted that the word "reasonable" connoted proof on the civil standard. If that were so a criminal charge would be established on a civil burden of proof.

22. It was further submitted that if s53(1)(c) required only a belief on reasonable grounds of all of the specified elements, an inconsistency in operation of the legislation would be produced. This supported the construction contended for. The inconsistency was this. If the defendant had undergone the preliminary breath test and exceeded the permitted concentration of alcohol in the blood, a charge under s49(1)(b) must have failed if the prosecution did not establish beyond reasonable doubt that he had driven or been in charge of a motor vehicle. That was seen to have occurred here although on the different offence of driving while disqualified, the charge being dismissed for failure to establish that the defendant was the rider of the motor cycle at the relevant time. The inconsistency was in being convicted of refusing to undergo a preliminary breath test when the prosecution could not prove the ultimate charge. The inconsistency was avoided if s53(1)(c) was read disjunctively and the prosecution was required to establish the fact of the accident.

23. The learned Magistrate rejected the submission. He held that the belief on reasonable grounds applied to each of the matters specified in para (c), and found the charge proved. It is clear from the transcript overall that the learned Magistrate found that reasonable grounds existed upon which the informant, Senior Constable Forai, might and did form the belief that within the last three preceding hours the defendant had driven a motor vehicle when it was involved in an

accident. It is also apparent that he approached the case on the basis that having so concluded he was satisfied that the charge was proved beyond reasonable doubt. Having so concluded the learned Magistrate convicted the defendant on the charge of refusing to undergo a preliminary breath test and made the orders referred to earlier.

24. In essence, counsel for the appellant sought to support the appeal on the same basis put to the learned Magistrate. Before referring to his submission I should say something about the question of law in the notice of appeal. As it is expressed the question of law does not explicitly state the point, which is one of construction of s53(1)(c).

25. Before me counsel's submissions were admirably brief.

26. Counsel for the appellant at once conceded that, objectively considered, reasonable grounds existed on which it was open to the informant, Senior Constable Forai, to form the belief required by s53(1)(c). This being so, counsel said that there was no need to refer to authority on the meaning of the expression "believes on reasonable grounds". The sole contention of counsel for the appellant was that on its proper construction s53(1)(c) required that the occurrence of an accident be established beyond reasonable doubt. He submitted to me, as he had below, that it was open to read the section as meaning that the belief as to reasonable grounds applied to each element. However, the words "when it was involved in an accident" established that the accident must be proved beyond reasonable doubt. Although there was no punctuation or disjunctive word between "motor vehicle" and "when" it was submitted that the above construction was correct and that it was indicated by the following provisions in s53(1). First, para (a) required the prosecution to prove that the person was found driving or in charge of a motor vehicle. Secondly, para (b) required proof that the driver had been required to stop and remain stopped. Thirdly, it was submitted that para (d) required that "the accident" be proved. As I understood it, the argument relied on the final reference to "the accident". Fourthly, sub-s (2) required proof that the person was found driving or in charge of a commercial motor vehicle. Fifthly, sub-s (4) contemplates proving driving more than three hours before being required to undergo a preliminary breath test. Counsel submitted, having regard to the structure and operation of these provisions of s53, that to interpret para (c) so as to only require a belief on reasonable grounds of all of the matters specified therein would make the offence of refusing to undergo a preliminary breath test a different type of offence from the others. The difference would be that para (c) would not require proof beyond reasonable doubt of one or other of the elements in para (c).

27. Notwithstanding the approach of counsel for the appellant it is important to keep in mind a proper understanding of the meaning and effect of a statutory requirement that a member of the police force hold a belief on a stated matter on reasonable grounds. The statutory contexts vary and sometimes rather than a belief the state of mind required is a suspicion. In all cases, of course, the expression adopted is to be construed according to its terms in the subject context. I was referred by counsel for the respondent to the following cases which although arising in different statutory contexts indicate the approach taken to such provisions. In short, he said, they indicate that such statutory provisions set out to cure a social ill or need for the law to achieve a certain result by the use of this technique. That is to say, the statutory provisions allow a person such as a police officer to do something when they have a reasonable belief or suspicion and without establishing proof of the requisite fact or matter. The cases referred to were *George v Rockett*^[1], *Walsh v Loughnan*^[2], *Director of Public Prosecutions (Vic) v Mitchell*^[3] and *Director of Public Prosecutions (Vic) v Bodoulouh*^[4].

28. In *George* the High Court considered s679 of The Criminal Code (Q) which in relation to the power of a justice to issue a warrant to a police officer authorising search and seizure, stipulated that the justice have "reasonable grounds for suspecting" and "reasonable grounds for believing". In the joint judgment of the High Court their Honours said (at 112) that:

"When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. ... Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist."

Later in the judgment the High Court discussed what was required to establish a suspicion and a belief. After referring to the case of suspicion their Honours said as to belief (at 116) that:

"The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

29. In holding that reasonable grounds existed on which it was open to Senior Constable Forai to form the belief provided for in s53(1)(c) the learned Magistrate accepted the evidence as hearsay. That is, the evidence established what was before Senior Constable Forai and thus the grounds on which she formed her belief under s53(1)(c). It is clear from the transcript that he distinguished the evidentiary issue in proof of the charge under s49(1)(c) and the charge of driving while disqualified.

30. In my view the learned Magistrate was plainly correct in holding, and counsel for the appellant was correct in conceding, that reasonable grounds existed on which it was open to Senior Constable Forai to form the belief referred to in s53(1)(c).

31. With this background I turn to the question of construction. The starting point is to construe s53(1)(c) according to its terms. There is not, as I have observed, any punctuation or language that would suggest that Parliament intended a separation between the two elements of driving or being in charge of a motor vehicle within the last preceding three hours on the one hand, and the vehicle being involved in an accident on the other hand. There is no word or other indication of disjunction. It is one composite statement of that as to which the member of the police force must have a belief on reasonable grounds.

32. I do not consider that the contrary construction is indicated, let alone required, by the provisions of s53 relied on by counsel for the appellant or s53 read as a whole. In my view it is readily seen that what Parliament has done in s53(1) and (2) is provide for a series of factual situations in which a preliminary breath test may be required. Each situation is different. Each operates without any reference to the other. It is true that on a charge under s49(1)(c) of refusing to undergo a preliminary breath test in the situations described in s53(1)(a) and (b) the prosecution would have to prove the fact of having been found driving or in charge of a motor vehicle or of being a driver required to stop and remain stopped. The situation is the same on a charge based on a refusal under sub-s (2). The remaining provision relied on by counsel for the appellant was sub-s (1)(d). I am I think required by the submission to express my view on that part of the submission, although I would prefer to confine myself to the point strictly in issue. The view I favour of the provision is that it does not require proof of "the accident". That expression refers to the earlier expression "an accident" which, with an immaterial difference in structure, is part of the same composite expression that appears in para (c). Even if I were wrong in that view, the operation and effect of para (c) is clear to the point that it could not be affected thereby.

33. It is useful in considering s53 to bear in mind the social purpose of the legislation. It is part of the provisions concerned to deal with the problem of drink driving and the danger to the public of drivers affected by alcohol. The statutory provisions represent policy decisions by Parliament as to where the line is to be drawn. The obvious situation is where a person is found driving a motor vehicle with an excess concentration of alcohol in their blood. But there may be other situations, and that in s53(1)(c) is one identified by and adopted by Parliament for the purpose of the operation of the preliminary breath test provisions. But the operation of para (c) is not open ended. It is limited in its application to the circumstances it specifies. The language of para (c) defines and limits the circumstances in which a preliminary breath test can be required under it. That is Parliament's prescription of the operation of the legislation in that situation.

34. In my view there is nothing in the language of para (c) or of s53 considered overall that indicates, let alone requires, that the belief on reasonable grounds applies only to the first element of having driven or been in charge of a motor vehicle within the last three preceding hours. That would be to separate the driving from the second element of involvement in an accident in the sense of requiring a different standard of proof to its satisfaction namely proof beyond reasonable doubt. It seems to me that such a reading is not merely contrary to the natural and ordinary meaning of the words in para (c) but it defies common sense and logic. The subject matter or

situation that para (c) deals with is a person who within the last three hours has driven a motor vehicle when it was involved in an accident.

35. I have not overlooked in this analysis the appellant's contention that the construction adopted by the learned Magistrate produced an inconsistency in the result on the two charges. In my view there is no inconsistency when regard is had to the purpose of the legislation. Section 53 addresses situations in which a member of the police force may require a person to undergo a preliminary breath test. In the situations in which s53(1)(a) and (b) and (2) apply the request is made to the person found driving or in charge of a motor vehicle. That is one thing, but s53(1)(c), and (d) in my view, comprehend circumstances in which the person is not found driving or in charge of a motor vehicle. Those provisions are to be understood as stating a policy decision of Parliament that in the circumstances specified in them a person may be required to undergo a preliminary breath test. That is understandable as a matter of policy in the area of drink driving.

36. The next step in understanding the operation of the statutory provisions is this. If the person requested refuses to undergo the test he or she may be charged with an offence under s49(1)(c), as the appellant was. If, however, the test was undertaken and the concentration of alcohol in the blood was found to be less than the prescribed maximum there would be no offence under s49(1)(b) and, axiomatically, no offence under s49(1)(c). It is possible that there may be a charge for some driving offence other than drink driving but that is another matter. If, on the other hand, the concentration of alcohol in the blood was found to exceed the maximum permitted the person may be charged with an offence under s49(1)(b). That charge will fail if the prosecution cannot prove beyond reasonable doubt that the defendant was the driver of a motor vehicle. That would have been the situation in this case, and there is what counsel called an inconsistency.

37. In my view however, what counsel described as an inconsistency is not an inconsistency at all but rather the consequence of Parliament's intention that in the circumstances specified in s53(1)(c) the subject person submit to a preliminary breath test on pain of committing an offence if he or she refuses to do so. The statutory provision reflects the importance that the legislature has placed on persons submitting to a preliminary breath test in the defined circumstances. It was necessary to make refusal to undergo the test an offence as otherwise there would be an absence of constraint on a person requested to do so.

38. It remains to refer to the submission of counsel for the appellant that to interpret s53(1)(c) as I have indicated would render the offence of refusing to undergo a preliminary breath test an offence different from those contained in s53(1) because under para (c) it would not be necessary for the prosecution to prove a fact beyond reasonable doubt. In my view this is not correct, as the offence under s49(1)(c) does require the prosecution to prove a fact beyond reasonable doubt, namely that the member of the police force requiring the defendant to undergo a preliminary breath test *did* believe on reasonable grounds that the matters in s53(1)(c) were satisfied. But more fundamentally, the answer to counsel's submission is to be found in a proper understanding of the operation of the several provisions in s53. For the reasons I have discussed, para (c) has a clear and understandable operation according to its terms. Further, to construe para (c) as counsel submits would be to place a judicial gloss on the provision and confine its operation in a way that the words do not bear. Indeed, if the second element was to be interpreted as having to be established as a fact beyond reasonable doubt, it may be asked why the same should not apply to the first element. Why one and not the other? Furthermore, once such a requirement is read into the provision it is hard to see what is left of para (c) as it appears in the legislation. What would be left is that a member of the police force who holds a belief on reasonable grounds of the existence of the matters specified in para (c) could require a person to undergo a preliminary breath test but, in the event of a refusal, on a charge under s49(1)(c) would have to prove the existence of the specified matter or matters as a fact beyond reasonable doubt. In my view para (c) does not bear that interpretation or, to put it another way, to place that interpretation upon para (c) would be to significantly and impermissibly change its meaning and intended operation.

39. For these reasons the appeal will be dismissed with costs including reserved costs.

^[1] [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.

^[2] [1991] VicRp 75; [1991] 2 VR 351.

^[3] [2002] VSC 326; (2002) 37 MVR 142 and on appeal at [2004] VSCA 36; (2004) 8 VR 192; (2004) 40 MVR 358.

^[4] [2003] VSC 501.

APPEARANCES: For the appellant Sawyer: Mr NA Hutton, counsel. Tyler Tipping & Woods, solicitors. For the respondent Forai: Mr N Papas, counsel. Stephen Carisbrooke, Acting Solicitor for Public Prosecutions.