13/93

SUPREME COURT OF VICTORIA

COLWELL v MASON

Hayne J

10, 17 December 1992 — (1992) 17 MVR 328

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST – TWO MOTOR VEHICLES TOUCHED SLIGHTLY – NO DAMAGE – "ACCIDENT" – MEANING OF – WHETHER VEHICLES INVOLVED IN AN ACCIDENT – WHETHER DRIVER REQUIRED TO UNDERGO PRELIMINARY BREATH TEST: *ROAD SAFETY ACT* 1986, SS47, 53, 61.

Section 53(1) of the *Road Safety Act* 1986 ('Act') permits a police officer to require a person to undergo a preliminary breath test when the person has driven a motor vehicle "when it was involved in an accident". On a charge laid in relation to s53(l) of the Act, a magistrate held that an "accident" occurred and the charge proved when (without causing damage) the bumpers of two vehicles touched slightly with some pressure felt by one driver. On appeal—

HELD: Appeal allowed. Conviction set aside. Charge dismissed.
For the purposes of s53(1) of the Act, an "accident" occurs when an untoward occurrence causes damage or some other adverse physical result. In the present case, whilst the touching of the vehicles may have been an untoward event, in the absence of damage, there was no "accident" within s53(l) of the Act. Accordingly, the police officer was not empowered to require the driver to undergo a preliminary breath test and the magistrate was in error in finding the charge proved.

HAYNE J: [1] Section 53(1) of the *Road Safety Act* 1986 permits a member of the Police Force to require a person to undergo a preliminary breath test if the member believes on reasonable grounds that that person has, within the last three preceding hours, driven or been in charge of a motor vehicle "when it was involved in an accident". What for the purposes of this section is an accident? On 12th September 1991 Kenneth Colwell wanted to park his motor car in Market Street, Melbourne. Seeing a car preparing to leave from a car-parking space in the centre of the road he moved up behind the car and began to follow it into the car-parking space as it left. When part of the way into the space a van entered from the opposite direction. Neither driver was prepared to give way and both edged their vehicles forward until the front bumper bars of the vehicles touched. Colwell later described feeling "a pressure similar to the pressure felt if a vehicle was 'touch parking'" by which it seems he meant driving into a car space until the vehicle actually touched the vehicle behind. In the end, Colwell gave way and left the space for the other driver. Police later interviewed Colwell and believing that he had driven a motor vehicle when it was involved in an accident required him to undergo a preliminary breath test. He refused and was charged with that offence as well as some other offences.

The Magistrate who heard the charges dismissed all of them except the charge of refusing to undergo a preliminary breath test. He found as a fact that the bumpers of each vehicle touched slightly, with some **[2]** pressure having been felt by Colwell, but he accepted that there was no damage as a result of what had happened between the two vehicles. He held that there had been an accident and that the other elements of the charge of refusing a preliminary breath test had been made out. Accordingly Colwell was convicted. He now appeals, contending that a police officer may not require a person to undergo a preliminary breath test in accordance with s53(l)(c) unless there has in fact been an accident and contending that what occurred in this case was not "an accident".

Counsel for the respondent did not dispute the first proposition put on behalf of the appellant viz that a police officer may require a person to undergo a preliminary breath test in accordance with s53(1)(c) only if there has been an accident. So much was held by Southwell J in *Peebles v Hotchin* (1988) 8 MVR 147 at 149 and by Nathan J in *Askew v Svoboda* (Unreported 14th January 1991) and no argument being addressed to the contrary I say no more about this. Debate on the hearing of the appeal centred upon the question of whether the event that occurred amounted to an accident. "Accident" is not defined in the Act. It is used as an ordinary English

word but it must take its colour from its context. Thus although counsel mentioned judicial expositions of the word's meaning in contexts as diverse as workers' compensation legislation, bills of lading and insurance policies, they focused attention, rightly if I may say so, upon its use in Part 5 of the *Road Safety Act* 1986 and in generally similar breath **[3]** testing legislation in the United Kingdom and in South Australia.

The purposes of Part 5 of the *Road Safety Act* 1986, which concerns offences involving alcohol or other drugs, are said by s47 of the Act to include "to reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause". By using the word "collisions" it may be suggested that the draftsman's later use of the word "accident" is intended to refer to some other, different class of events. So much may be accepted but I do not consider that that conclusion offers any great assistance in deciding what events are encompassed by the word "accident". Rather, some significance might be said to attach to the fact that the Part is obviously directed to prevention of events causing damage or injury. Thus, the appellant contended that the word "accident" should be construed as referring to events in which damage to property or persons occurred.

Section 61 (in Part 6 of the Act) obliges the driver of a motor vehicle to stop, render assistance and provide details of name, address and registration number "if owing to the presence of [that] motor vehicle an accident occurs whereby any person is injured or any property (including any animal) is damaged or destroyed". This language was said by the respondent to suggest that "an accident" was used by the draftsman to describe events broader than events in which a person was injured or property was damaged or destroyed. However the references to injury and damage in s61 are to be explained by reference to the nature of the obligations imposed upon the driver of the motor vehicle concerned and in my view **[4]** provide little if any assistance in construing the word "accident" when it appears in s53. In the end I do not consider that any great assistance is to be gained from other provisions of the Act in construing the word "accident" in s53(l).

Section 8(2) of the *Road Traffic Act* 1972 (UK) permits a constable in uniform to require the driver of a vehicle to provide a specimen of breath for a breath test "if an accident occurs owing to the presence of [that] motor vehicle on a road". That section (or its legislative predecessor) has been considered by the Court of Appeal in *R v Morris* (1972) 1 All ER 384; [1972] 1 WLR 228 and by Divisional Courts in *Chief Constable of West Midlands Police v Billingham* [1979] 1 WLR 747 and *Chief Constable of Staffordshire and Lees* [1981] RTR 506. In each case the Court has held that "accident" should, as far as possible, be given its ordinary rather than any technical meaning and that the word identifies an event described variously as "an unintended occurrence" or "an untoward occurrence" where there has been some adverse physical result. The word "accident" has been held in the last of the cases I have mentioned (*Lees Case*) to include an event in which a motorist caused damage by deliberately driving through a closed gate and in my view it is clear that the word "accident" is not to be restricted to events in which the participant did not intend the consequences that in fact occurred. Nor did I understand either party in the present appeal to contend that such an event fell outside the meaning of "accident" in s53. Thus the fact that the drivers intended their vehicles to meet as they did, is not to the point.

[5] At times it seemed to be assumed in argument that what had occurred in this case was properly described as a "collision". "Collision" is defined in the *Oxford English Dictionary* (2nd Ed.) as:

> "The action of colliding or forcibly striking or dashing together; violent encounter of a moving body with another: in recent use esp. of railway trains, ships, motor vehicles, aircraft etc." (Emphasis added)

Here there was no forcible striking or dashing together and no violent encounter. There was (in that sense at least) no "collision". Further, where, as here, no damage was done to the vehicles and there was no other "adverse physical result" I consider that as a matter of ordinary English usage it cannot be said that an "accident" has occurred. There may be said to have been an "untoward event" but in the absence of damage I do not consider that the event would be described in ordinary parlance as an "accident". It follows that I am of the opinion that the facts found by the Magistrate did not permit a finding that the event constituted an "accident".

I was referred also to three South Australian decisions *Lajos v Samuels* (1980) 26 SASR

514; *Cox v Crichton* (1985) 37 SASR 577; (1985) 15 A Crim R 468; (1985) 2 MVR 76 and *Ellis v Dunsmore* (1987) 5 MVR 280. In *Lajos v Samuels* there are *dicta* suggesting that not every "accident" attracts the operation of the South Australian section permitting a police officer to require a driver to submit to a breath test. Thus, it was suggested that "accident" might be restricted to cases in which the driver concerned has so acted as to indicate some impairment of an ability to drive. A contrary view appears to have been taken in *Cox* **[6]** *v Crichton* where it was held not necessary for a person to have been involved in an accident within the meaning of the South Australian legislation that there should have been some measure of fault on the part of that person. For my part I very much doubt that the word "accident" should be construed as limited in its application to events for which the driver required to submit to preliminary breath-testing can be said to have been at fault. However, given the views I have earlier expressed, this is not a matter that now falls for decision.

Finally, I should note that in *Ellis v Dunsmore*, (*supra*) Mohr J ventured "to suggest that where two vehicles actually collide it is difficult to imagine circumstances in which such a collision would not amount to an accident". If, as I take to be the case, His Honour was there referring to a "violent encounter" or "forcible striking or dashing together" of a motor vehicle and another vehicle or object then I would, with respect, agree with His Honour's tentative comments. However I do not read the comment as referring to every kind of touching between a motor vehicle and another object. Not every such touching is properly regarded as a "collision".

For these reasons I consider that the appeal should be allowed, the conviction on the charge of refusing a preliminary breath test should be set aside and in lieu thereof it should be ordered that the charge is dismissed.

APPEARANCES: For the appellant Colwell: Mr CR Northrup, counsel. Middletons Moore & Bevins, solicitors. For the respondent Mason: Mr JD McArdle, counsel. Solicitor for the DPP.
