22/92

SUPREME COURT OF VICTORIA

DPP v BLYTH

Coldrey J

2, 28 April 1992 — (1992) 16 MVR 159

MOTOR TRAFFIC – DRINK/DRIVING – PERSON TAKEN TO POLICE STATION – UNDERWENT BREATH TEST – EVIDENCE NOT ADDUCED THAT DRIVER WAS REQUESTED TO UNDERGO TEST – WHETHER COMMUNICATION OF REQUIREMENT AN ELEMENT OF THE OFFENCE – WHETHER REQUIREMENT MAY BE INFERRED FROM THE CIRCUMSTANCES: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(1).

Following a driving incident involving B., a police officer conducted a preliminary breath test on B (which proved positive) who was then conveyed to a police station where he underwent a full breath test the result of which was in excess of the prescribed concentration. Upon the hearing of a charge under s49(1)(f) of the *Road Safety Act* 1986, the police officer was not cross-examined upon any of his evidence. At the end of the prosecution case a 'no case' submission was made on the basis that the prosecution had not proved that the police officer had formally requested B. to accompany him to the police station to undergo a breath test. The magistrate upheld the submission and dismissed the charge. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted to the magistrate for further hearing.
1. An element of the s49(1)(f) offence which must be proved is the communication to the person to be tested of the requirement to undergo a test by means of a breath analysing instrument and, where appropriate, the need to accompany a police officer to a police station for that purpose.

2. Whilst in the present case there was no explicit evidence led by the prosecution of any specific communication of what was being required of the defendant, it could have been reasonably inferred from the circumstances that B. underwent the full breath test as a result of the police officer's requirement to do so having been communicated to him.

COLDREY J: [1] This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989 against an order by the learned magistrate at Preston Magistrates' Court, whereby he dismissed an information charging Ian Thomas Blyth ("the respondent") with a breach of s49(1)(f) of the *Road Safety Act* 1986 ("the Act") and further ordered that Mark Russell Morewood ("the informant") pay the costs of the respondent fixed at $2,100. (A stay of three months was granted for the payment of costs).

Section 49(1) of the Act, in so far as it is relevant, reads as follows:

> "(1) A person is guilty of an offence if he or she—
> (f) within 3 hours after driving ... a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and 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."

Section 55(1) referred to in the above sub-section provides that:

> "(1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 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 contains alcohol in excess of the prescribed concentration of alcohol; ...
> the member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument [defined in s3(1) of the Act] and for that purpose may further require the person to accompany a member of the police force ... to a police station ... and to remain there until the person has furnished a sample of breath ..."

[2] Both of the above sections have since been the subject of amendment but were applicable at the date upon which the offence the subject of this appeal was alleged to have been committed. The evidence adduced on behalf of the prosecution is contained in the affidavit of Thomas Arthur

Wilkinson dated the 13th of November 1991. In brief it sets out the evidence of the informant that, following a driving incident in the Preston area on the 22nd day of December 1988, in which the respondent had been involved, the informant conducted a preliminary breath test which proved positive for alcohol. I interpolate that no complaint is made about the administration of this test.

In paragraph 11(f) of the affidavit, reference is made to the evidence of the informant that:

> "He then conveyed Blyth to the Preston Police Station for the purpose of conducting a breath test."

Thereafter a conversation occurred between the informant and the respondent about the latter's drinking activities on that day. The respondent was subsequently introduced to Senior Constable David Ian Kay of the Broadmeadows Branch of the Traffic Alcohol Section of the Victoria Police who subjected him to a breath test in the presence of the informant. Evidence was also given by the informant as to the procedures involved in the conduct of the test. Again, it is not suggested that, in the administration of the test, there was any failure to comply with the legislative requirement.

[3] The informant was not cross-examined upon any of his evidence. The breathalyser operator, Senior Constable Kay, then gave evidence of conducting the test in accordance with the relevant *Road Safety (Procedures) Regulations* (1987 and 1988). No other evidence was called on behalf of the prosecution. At the end of the prosecution case, it appears that the solicitor appearing on behalf of the respondent, successfully submitted that there was no case to answer. The basis for that submission is set out in paragraph 18 of the aforementioned affidavit:

> "(i) S55(1) of the *Road Safety Act* 1986 requires that where a preliminary breath test has proven positive, the operator of that test must (sic) require the person tested to accompany him or another member of the police force to a police station for the purpose of providing a sample of breath for testing by a breath analysing instrument.
>
> (ii) That the prosecution had not adduced evidence of the Informant having formally requested the defendant to accompany him to a police station for the purpose of providing a sample of breath for testing by a breath analysing instrument, nor, once at the police station, of asking the Defendant to undergo the further test."

Inherent in that submission is the proposition that the provisions of s55(1) of the Act (to which I have already referred) are imported into s49(1)(f). This was conceded by Mr Just, who appeared on behalf of the appellant, on the basis of the authority of *Mills v Meeking & Anor* [1990] HCA 6; (1990) 169 CLR 214 at 224; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257. Accordingly an element of the s49(1)(f) offence which must be proved is the communication to the person to be tested of the requirement to undergo a test by means of a **[4]** breath analysing instrument and, where appropriate, the need to accompany a police officer to a police station for that purpose.

It is to be noted that s55(1) is couched in terms of requiring which has the sense of ordering, commanding or directing rather than requesting. Moreover, there would appear to be no necessity, in terms of the section, for the requirement to undergo a breath test to be communicated both prior to, and after, arrival at a police station.

In any event the gist of the submission made by the respondent solicitor, as it appears in the affidavit material, was to the effect that a formal request of the respondent to accompany the informant to a police station for the purpose of providing a sample of breath for testing by a breath analysing instrument was required by s55(1) of the Act and, no evidence of such a formal request had been adduced by the prosecution.

In advancing this proposition the respondent's solicitor apparently relied on that part of the decision of Sholl J in *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 (which dealt with s408A of the *Crimes Act* 1958 arguably a forerunner of s55(1) in combination with s49(1)(e) of the Act) that precise language must be used in requesting a suspect to furnish a sample of breath for analysis.

It was submitted by Mr Just that if, indeed, any such requirement could be spelt out

from the decision in *Scott v Dunstone*, it did not accurately represent the law. In support of this argument he referred to the case of *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 in which the need for a formal request pursuant to s80F(6)(b)(ii), which section sets **[5]** out the same requirements as those obtaining under s55(1) of the Act, was considered by Southwell J.

In that case which involved a refusal to accompany a police officer to a police station for a breath test, his Honour concluded that proof of a demand by a precise recital of the words of the Act was not required. The test was whether the evidence as it stood was such as to prove that the respondent was given reasonably sufficient information to know what was required of him and why.

With respect I regard his Honour's conclusion as correct. Indeed, an informal explanation of what is required of a putative defendant may well constitute a fairer approach to informing such a person of the legislative requirements. It is, however, essential, as Sholl J recognised, that where self incriminating legislation is concerned, a defendant know precisely what is required of him or her. This point was made, and properly made, by the respondent who appeared before me on his own behalf. I turn to the core issue raised for determination by this appeal namely whether specific evidence of communication to the respondent of the requirements of s55(1) of the Act was necessary before an offence under s49(1)(f) could be proved.

It was conceded by Mr Just, on behalf of the appellant, that there was no explicit evidence led by the prosecution of any specific communication by the informant to the respondent of what was required pursuant to s55(1) of the Act. However, Mr Just submitted that compliance with such requirements could be inferred from the circumstantial evidence.

[6] As authority for this proposition, if authority be needed, Mr Just cited the case of *Lisiecki v Grigg* (1990) 10 MVR 336. *Lisiecki's Case* involved a refusal to furnish a sample of breath analysis when required to do so pursuant to the *Road Safety Act* 1986 s55(1) and consequently, the alleged infringement of s49(1)(e) of the Act. In the course of his judgment, Marks J was of the view that proof of compliance with a s55(1) requirement (and indeed a s49(1)(e) refusal) could be proved by inference drawn from the whole of the evidence. This would appear, with respect, to be correct in principle.

In the instant case, although there is no evidence of any specific conversation in which the respondent was informed of the requirement to go to the Preston Police Station for the purpose of providing a sample of his breath for analysis by a breath analysing instrument, what the learned magistrate had before him was evidence from the informant that:

(a) The respondent had been the subject of a positive preliminary breath test,

(b) Thereafter the respondent had been conveyed to the Preston Police Station for the purpose of conducting a breath test, and

(c) That the respondent had undergone a breath test at the Preston Police Station.

In my view the only reasonable inference open on this evidence was that the respondent had undergone the breath test as a consequence of compliance with the procedures laid down in s55(1) of the Act. In particular, that the respondent had undergone the test at the Preston Police Station as a result of **[7]** the requirement of the police officer that he do so, having been communicated to him.

Certainly, applying the relevant principles to determine whether there was a case for the respondent to answer (those principles being set down in *Attorney-General's Reference (No. 1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410 and the cases referred to therein, and *Doney v R* [1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416), the learned magistrate should have found that there was evidence upon which the accused could lawfully have been convicted.

Each case must necessarily turn upon its individual facts and it is unnecessary for me to determine the nature of evidence required to support charges based upon a refusal to comply

with the requirements of s55(1) of the Act or whether, where the alleged refusal is to exhale into a breath analysing instrument, the appropriate machine must be present at the time of the refusal. (The latter issue appears to be one upon which divergent views are expressed in the cases).

The questions of law for determination formulated by Master Evans in his order of the 14th of November, 1991 were as follows:

> (i) Whether or not the prosecution must, in respect of a charge made under s49(1)(f) of the *Road Safety Act* 1986 prove –
> (a) The making of a request to accompany a member of the police force to a police station in the terms of s55(1) of that Act or at all;
>
> **[8]** (b) The giving of the advice referred to in s55(4)(b) of that Act in the terms of that sub-section or at all;
> (ii) Whether the hearing of such a charge the prosecution may prove that matters referred to in (i)(a) and (b) by means of circumstantial evidence;
>
> (iii) Whether any reasonable magistrate could have failed to be satisfied;
>
> (a) That there was a case to answer;
>
> (b) Beyond reasonable doubt the respondent was guilty of the offence charge.

Relating those questions to the conclusions I have reached upon this appeal, the answers are as follows:

> (i) (a) The prosecution must prove that the relevant requirement has been communicated to the person from whom the breath sample is sought but no formal expression of the requirement is necessary.
>
> (b) This is not an issue in these proceedings.
>
> (ii) The matters referred to in (i)(a) may be proved by inferences drawn from the whole of the evidence.
>
> (iii)(a) No.
>
> (b) This question was not raised for determination on the affidavit material.

In the circumstances the order of the learned magistrate made on the 18th of October, 1991 dismissing the information laid under s49(1)(f) of the Act and ordering costs **[9]** against the appellant should be set aside pursuant to s92(7) of the *Magistrates' Court Act* 1989. The matter is remitted to the learned magistrate for further hearing according to law.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. Director of Public Prosecutions. For the respondent Blyth: Mr I Blyth (in person).
