

32/11; [2011] VSC 276

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v RUKANDIN

Ashley, Weinberg and Tate JJA

6 June, 9 September 2011 — (2011) 210 A Crim R 547; (2011) 59 MVR 222

MOTOR TRAFFIC – DRINK/DRIVING CHARGE – DISMISSAL OF CHARGE UNDER S49(1)(e), ROAD SAFETY ACT 1986 (VIC) OF REFUSING TO COMPLY WITH REQUIREMENT MADE UNDER S55(1) TO ACCOMPANY POLICE OFFICER TO A MEDICAL CENTRE TO PROVIDE A SAMPLE OF BLOOD FOR ANALYSIS – NATURE OF REQUIREMENT UNDER S55(1) FOR THE PURPOSES OF S49(1)(e) – WHETHER TRIAL JUDGE ERRED IN HOLDING THAT REQUIREMENT TO ACCOMPANY AND REMAIN UNDER S55(1) INTEGRAL COMPONENTS OF A SINGLE COMPOSITE REQUIREMENT – WHETHER JUDGE ERRED IN HOLDING THAT MOTORIST MUST BE INFORMED THAT HE OR SHE IS REQUIRED TO ACCOMPANY POLICE OFFICER TO A PLACE AND TO REMAIN THERE UNTIL A SAMPLE OF BLOOD IS FURNISHED OR UNTIL 3 HOURS AFTER THE DRIVING, WHICHEVER IS SOONER – ‘TO ACCOMPANY’ AND ‘TO REMAIN’ TWO DISCRETE REQUIREMENTS WITH DIFFERENT CONTENT – APPEAL ALLOWED – MATTER REMITTED TO MAGISTRATES’ COURT FOR A CONVICTION TO BE ENTERED AND FOR DETERMINATION OF PENALTY: ROAD SAFETY ACT 1986, SS49(1)(e), 55(9A).

R. was required to undergo a PBT following his driving of a motor vehicle which was involved in an accident. A PBT was conducted which proved positive and the police officer asked R. to accompany him to a police station for the purpose of a breath test. The breath test was conducted on two occasions but did not produce a result. R. was then asked to accompany the police officer to a Medical Centre for the purpose of providing a sample of blood for analysis. R. refused to accompany the officer. The police officer did not inform R. of the period within which he would be required to remain at the Medical Centre. R. was charged with refusing a requirement under s55(1) of the *Road Safety Act* 1986 ('Act'). At the hearing, a 'no case' submission was made that the charge should be dismissed on the ground that the police officer had failed to establish all of the elements of the offence namely the temporal limitation. The Magistrate agreed and dismissed the charge. An appeal to a Judge of the Supreme Court was dismissed. Upon appeal—

HELD: Appeal allowed. Orders set aside. Matter remitted to the Magistrates' Court so that a conviction can be entered on that charge and for determination of penalty.

The power to require a person to accompany a police officer and remain conferred by s55(9A) of the Act is a statement of two component parts of a single requirement rather than a statement of two discrete powers. The making of a requirement to accompany does not require a statement of what can be called the three-hour period.

ASHLEY JA:

1. On 12 August 2009 the respondent, Ramzan Rukandin, was charged with three offences. The first charge alleged that he refused to comply with a requirement under s55(9A) of the *Road Safety Act* 1986 ('the Act') to accompany a police officer to the Monash Medical Centre for the purpose of furnishing a sample of blood, contrary to s49(1)(e) of the Act. The second charge alleged careless driving, contrary to s65 of the Act. The third charge related to his driving while unlicensed, contrary to s18(1)(a) of the Act.^[1]

2. The respondent pleaded guilty to the second charge.^[2] The first charge was heard at the Moorabbin Magistrates' Court on 18 March 2010. The Magistrate dismissed the charge on the basis that the respondent had not been informed that he would have to remain at the Monash Medical Centre until a sample of his blood was taken or until 3 hours after the driving of the relevant motor vehicle, whichever was sooner.

3. Pursuant to s272(1) of the *Criminal Procedure Act* 2009, the Director appealed against the order dismissing the first charge.

4. The appeal was heard by a judge of the Trial Division on 25 October 2010. His Honour published reasons on 12 November 2010, and dismissed the appeal. Now the Director appeals by leave against the orders made by the judge.

Grounds of Appeal

5. The grounds of appeal upon which the appellant relies^[3] are as follows:

The learned judge erred in law in holding that the requirement to accompany and the requirement to remain are not separate requirements under s55(9A) of the *Road Safety Act 1986* but are integral parts or components of a single composite requirement.

The learned judge erred in law in holding that a refusal to accompany a member of the police force to a place where a blood sample is taken, without more, would not constitute an offence under s49(1) (e) of the *Road Safety Act 1986* because the motorist has not been informed that he or she would be required to remain at the place until a sample of blood has been furnished or until three hours had elapsed after the driving, whichever was the sooner.

Circumstances

6. At about 11.45pm on 8 November 2008 a motor vehicle driven by the respondent mounted the kerb in front of a private residence in Clayton. It collided with the rear of another vehicle which was parked outside the residence.

7. The police were called by an occupant of the residence. At around 11.55pm, a police officer arrived at the scene. He conducted a preliminary breath test of the respondent. It indicated the presence of alcohol. The respondent complied with the officer's request to accompany him to the Oakleigh police station for a breath test. There, a breath test was conducted on two occasions. The first test produced the result - 'Insufficient Sample'. A second test, conducted some 20 minutes after the first, produced the result - 'Analysis Interrupted.' The police officer then asked the respondent to accompany him to Monash Medical Centre for the purpose of providing a blood sample for analysis.

8. The police officer gave *viva voce* evidence at the Magistrates' Court hearing. In his examination in chief he stated that the following conversation took place between he and the respondent:

It appears to me that you are unable to provide a sufficient sample of breath, on medical grounds or because of some physical disability. I now require you to allow an approved health professional to take a sample of your blood for analysis, pursuant to section 55(9A) of the *Road Safety Act 1986*. I asked him if he understood that, to which he said, 'Yes.'

I asked him, 'Will you accompany me to the Monash Medical Centre for the purpose of providing a sample of your blood for analysis?' to which he said, 'I go home.'

9. The witness was also asked if he had any further conversation with the respondent. He replied that he had given the following warning, and that there had been the following response: In the circumstances, you have been required to accompany me for the purpose of providing a sample of your blood for analysis, pursuant to section 55(9A) of the *Road Safety Act 1986*. If you refuse to do so, you may be charged with this offence and, if convicted, you may be fined and will lose your licence for the prescribed period. I again require you to allow an approved health professional to take a sample of your blood for analysis. Do you understand that? to which he said, 'Yes, yes.' I then asked him, 'Will you accompany me to the Monash Medical Centre for the purpose of providing a sample of your blood for analysis?' He said, 'No'. I asked him, 'What is your reason for refusing to remain here or accompanying me for the purpose of providing a sample of your blood for analysis?' He said, 'I want to go home.'

10. It is not in dispute that the police officer failed to inform the respondent that he would have to remain at the Monash Medical Centre until a sample of his blood was taken or until 3 hours after the driving of the relevant motor vehicle, whichever was sooner.

Legislation

11. Part 5 of the *Road Safety Act 1986* is concerned with offences involving alcohol or other drugs. Under s49 of the Act—

(1) A person is guilty of an offence if he or she—

...

(e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A); or

- (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 and—
- (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
- (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;

12. Section 55 of the Act 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 breath contains alcohol;

...

any member of the police force ... 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 ... to a place or vehicle 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 subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Example

A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath.

...

(9A) The person who required a sample of breath under subsection (1), (2), (2AA) or (2A) from a person may require that person to allow a registered medical practitioner or an approved health professional nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—

(a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability;

...

and for that purpose may further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

The judge's reasons

13. On the judge's analysis s55(9A), for the purposes of s49(1)(e), sets out two, rather than three requirements. His Honour's reasoning mirrored his conclusion in respect of a requirement imposed by s55(1) of the Act:^[4]

56. In my opinion, for the purposes of s49(1)(e), s55(9A) sets out two, rather than three, requirements. The first requirement is to allow a registered medical practitioner or an approved health professional to take from a motorist a sample of his or her blood. The second requirement is to accompany a police officer to a place where the sample of blood is to be taken and to remain there until the sample is taken or until three hours have elapsed since the driving, whichever is sooner. The second requirement has both an 'accompany' component and a 'remain' component. These components, however, are not separate requirements; they are integral parts of a single composite requirement.

57. The interpretation of s55(9A) that I have adopted accords with the plain meaning of the words of the section.

58. The verb 'require' (when preceded by the auxiliary verb 'may') is first used in s55(9A) to describe the power of a police officer where one of the conditions set out in paragraph (a) or (b) is satisfied. Where either condition is satisfied, the police officer 'may require [the] person to allow a registered medical practitioner or an approved health professional ... to take from him or her a sample of that person's blood for analysis'. The verb 'require' is used secondly to describe the power of a police officer to give effect to the first requirement, namely, by requiring the person to accompany the police officer to a place where the sample of blood is to be taken and to remain there until the sample has been taken or until three hours after the driving, whichever is sooner.

59. The fact that the verb 'require' (when preceded by the auxiliary verb 'may') appears in s55(9A) twice, rather than three times, clearly indicates that the section sets out only two requirements.

Logically, the nature and scope of the two requirements must be governed by the words that follow each reference to the verb 'require'. If the Parliament had intended to set out three requirements in s55(9A), one would expect it to have used the verb 'require' three times and to have separated the second and third requirements with the words 'may further require' in the same way that it has separated the first and second requirements. The fact that the Parliament did not do so reinforces the interpretation that arises from a plain reading of the section.

60. The interpretation that I have adopted also accords with common sense. The end that is sought to be achieved by the two requirements set out in s55(9A) is for a motorist to provide a sample of blood that can be analysed to determine his or her blood alcohol level. A requirement to accompany, on its own, cannot achieve this end because it would be spent once the motorist steps inside the place where the sample is to be taken. The act of stepping inside the relevant place, however, does not, of itself, result in the taking of a sample of blood. In order for a sample of blood to be taken, the motorist must also remain at that place for a period of time.

14. Regarding the issue of communication to the motorist, his Honour observed -

64. The nature of the second requirement that is set out in s55(9A) should not be confused with the manner in which it may be communicated. The cases make it clear that the requirement need not take the form of a demand in imperative terms and that no particular verbal formula needs to be used; it is enough that the intent of the police officer to issue a requirement and the obligation of the motorist to comply with that requirement have been made clear. This means that the two components of the composite requirement can be communicated sequentially: a motorist can be required to accompany a police officer to a place where a sample of blood is to be taken and, upon arrival at that place, he or she can be required to remain there until the sample has been taken or until three hours have elapsed from the driving, whichever is sooner.

65. Further, the nature of the second requirement should not be confused with the various ways in which a motorist may be held to have refused to comply with it. There are at least three ways in which a refusal may be established. First, the motorist may refuse to accompany a police officer to a place where a sample of blood is to be taken. Second, the motorist may accompany a police officer to such a place, but may refuse to remain there after his or her arrival. Third, the motorist may accompany a police officer to such a place, remain there for a period and then depart prior to the expiration of three hours from the driving without providing a sample of blood.

66. It is important to note, however, that based on my interpretation of s55(9A), irrespective of the nature of the act which is alleged to constitute a refusal to comply with a requirement under s55(9A), the refusal will not constitute an offence under s49(1)(e) unless all the components of the requirement have been communicated to him or her. ...

68. The above discussion about the different ways of communicating the second requirement and the different means of refusing to comply with that second requirement may explain why some cases loosely refer to a requirement to accompany and to a requirement to remain as if they are separate requirements under s55(9A). As I have endeavoured to explain, they are components of a single composite requirement.

15. His Honour addressed a submission concerning the application of provisions of the *Charter of Human Rights and Responsibilities Act 2006*. He expressed this conclusion:

Applying the approach set out in *R v Momcilovic* in relation to s 32 of the Charter, I have concluded that the interpretation of s55(9A) of the RS Act which I have adopted is correct and that, so interpreted, s55(9A) is compatible with the human right set out in s21(3) of the Charter. That interpretation requires that a motorist be informed of the temporal limitation in s55(9A) and thereby ensures that any deprivation of liberty that is involved in complying with a requirement that is made under s55(9A) is in accordance with the procedures that are set out in that section. By being aware of the temporal limitation, a motorist can take steps to ensure that the deprivation of his or her liberty does not exceed the maximum period permitted by s55(9A).

Submissions

16. Mindful as I am that what was here in issue was an alleged offence against s49(1)(e) of the Act constituted by a failure to accompany imposed under s55(9A), and that submissions addressed the particular language of the latter provision, it is the fact that the submissions bore a very close resemblance to the submissions advanced in *DPP v Piscopo*.^[5] I have noted the competing submissions at [23]-[29] in my reasons in that matter, and they provide an understanding of what was submitted in the present case. It is only necessary to note that, although there was no Notice

of Contention in the present case, the respondent called in aid ss21(3) and 32 of the *Charter of Human Rights and Responsibilities Act 2006*, they having been adverted to by the judge in his reasons.

Conclusions

17. In my opinion, there is no relevant difference between the language of s55(1) of the Act, which I considered in *Piscopo*, and the language of s55(9A). For the reasons which I gave in that case, I consider that the judge erred in concluding that the power to require a person to accompany and remain conferred by s55(9A) is a statement of two component parts of a single requirement rather than a statement of two discrete powers. I further consider, for reasons explained in *Piscopo*, that the making of a requirement to accompany does not require a statement of what I called, in that case, the 3 hour period. I should add, albeit that it does not affect the outcome of this appeal, that although the evidentiary provisions respecting the blood test regime somewhat differ from those relating to the regime applicable to breath and other tests, I consider that the power to make a requirement to remain does entail stating both the purpose and the temporal limit.

Order

18. I would allow the appeal and set aside the orders made below on 12 November 2010, and in the Magistrates' Court on 18 March 2010 so far as the charge alleging breach of s49(1)(e) of the *Road Safety Act 1986* is concerned. I would remit the matter to the Magistrates' Court so that a conviction can be entered on that charge, and for determination of penalty.

WEINBERG JA:

19. I agree with Ashley JA.

TATE JA:

20. I agree with Ashley JA.

^[1] It later became apparent that the respondent was in a possession of an international driver's licence. The third charge was therefore withdrawn.

^[2] He was disqualified from driving a motor vehicle for four months and the charge was otherwise adjourned for 12 months without conviction.

^[3] They were amended by leave at the hearing of the appeal in presently immaterial respects.

^[4] See *DPP v Piscopo* [2010] VSC 498; (2010) 201 A Crim R 429; (2010) 56 MVR 516.

^[5] [2011] VSCA 275; (2011) 210 A Crim R 126; (2011) 59 MVR 200.

APPEARANCES: For the appellant DPP: Dr S McNicol, counsel. Office of Public Prosecutions. For the respondent Rukandin: Mr OP Holdenson QC with Mr GM Hughs, counsel. Anthony Gerard Isaacs, solicitors.
