03/93

SUPREME COURT OF VICTORIA

DPP v PHILLIPS

Ashley J

20 January, 23 December 1992

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO UNDERGO PRELIMINARY BREATH TEST – REQUIREMENT FOR NOT CONTEMPORANEOUS WITH DRIVING – TIME LAPSE OF NINETY MINUTES – WHETHER DRIVER MUST REMAIN IN COMPANY OF POLICE UNTIL TEST ADMINISTERED: *ROAD SAFETY ACT* 1986, SS49(1)(c), 53(1), (4), 55.

1. There is no requirement that a motorist found driving or in charge of a motor vehicle must be forthwith intercepted and remain in the company of the police officer until the preliminary breath test is completed.

***Mills v Meeking and Anor* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, referred to.**

***DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367; MC40/92, applied.**

2. Where a motorist failed to stop when flagged down by a police officer and refused, when intercepted 90 minutes later to undergo a preliminary breath test, a magistrate was in error in dismissing a charge under s49(1)(c) of the *Road Safety Act* ('Act') 1986 on the basis that s53(1)(a) of the Act only applies where a motorist is intercepted on being found driving or in charge of a motor vehicle and remains in the company of the police officer until the preliminary breath test is completed.

ASHLEY J: [1] This is an appeal by the Director of Public Prosecutions pursuant to s92 of the *Magistrates' Court Act* 1989 against the decision of a Magistrate on 13 September 1991 to dismiss a charge laid against the respondent, Peter Phillips. The charge was laid under s49(1)(c) of the *Road Safety Act* 1986 (the Act) arising out of events which occurred on 23-24 March 1991. Section 49(1)(c) is in these terms:

> "S.49(1) a person is guilty of an offence if he or she—
> (c) refuses or fails to undergo a preliminary breath test in accordance with section 53 when required under that section to do so;"

Had the respondent been convicted there would have been automatic cancellation of his driver's licence and disqualification from obtaining a licence for a period (in the case of a first offence) of not less than two years; see s50(1B). The respondent would also have been liable to monetary penalty. Section 49(1)(c) refers the reader to s53 of the Act. Sub-section (1) of s53 is in the following terms:

> "53(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 at a preliminary breath testing station under section 54(3); or **[2]**
> (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—
> to undergo a preliminary breath test by a prescribed device."

Exhibit "A" to the affidavit of the informant, Murray John Coates, sworn 8 October 1991 is a copy of the Charge and Summons laid against the respondent. Plainly the charge sought to rely upon a requirement imposed upon the respondent by s53(1)(a). This is confirmed by para. 11 of Coates' affidavit, which mistakenly refers to s52(1)(a). Coates' affidavit essentially deposes to the following facts:

> • On 23 March 1991 at Panton Hills, at about 11.30 p.m. he and another police officer, in uniform, attempted to flag down a Holden station wagon.

• The vehicle did not stop.
• As it passed by he got a very good look at the driver.
• The vehicle's registration number having been observed, the police ascertained the name of the registered owner (it was the respondent) and attended at his premises.
• At about 1 a.m. another vehicle arrived at the premises; the respondent alighted. Coates identified him as the person he had been driving the vehicle which had not stopped some one and a half hours earlier. **[3]**
• The respondent denied he had been driving the vehicle which had not stopped.
• The respondent was required to undergo a preliminary breath test. He refused.
• When the requirement was made, a breath testing device was available and ready for immediate use.
• The respondent admitted to the Magistrate that he had been driving the vehicle which had been requested to stop, and which had failed to do so.

The Magistrate dismissed the charge. There appears to be two paragraphs of Coates' affidavit that are of particular reference. They are as follows:

> "12. The Magistrate indicated that as a three hour time limit was given in section 53(1)(c), but not in section 53(1)(a) of the *Road Safety Act* 1986 that could indicate that the request for a preliminary breath test and any driving by the defendant would have to be contemporaneous, where section 53(1)(a) was relied on.'
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> 19. The Magistrate stated that although section 53(4) of the *Road Safety Act* supported the prosecution submission, section 53(1)(a) is worded in the present tense and accordingly he found that there was a requirement of contemporaneity between driving and the requirement to undergo a preliminary breath test. The Magistrate found that the defendant had been driving at 11.30 p.m. on the 23rd day of March 1991, and had refused a preliminary breath test one and a half hours later at 1.00 a.m. on the 24th day of March 1991, but that the informant had no power to demand a preliminary breath test at that stage. The Magistrate indicated that if there was power to demand a preliminary breath test up to three hours after a person having been found driving, it was open to abuse or harsh consequences. He then dismissed the charge of refusing a preliminary breath test."

[4] An appeal under s92 of the *Magistrates' Court Act* 1989 must be upon a question of law. The question of law framed in the present case is contained in the order of Master Wheeler made 10 October 1991. It is as follows:

> "Apart from Section 53(4) of the *Road Safety Act*, is there any time limited in which a person found driving or in charge of a motor vehicle may be required to undergo a preliminary breath test pursuant to Sub-Section 1(a)?"

Section 53(4) is in the terms following:

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

Although the matter is not absolutely clear it appears that the Magistrate dismissed the charge on the basis that s53(4) did not apply to the situation comprehended by s53(1)(a), that sub-section requiring, in his opinion, contemporaneity between a person being found driving and the requirement that he or she undergo a preliminary breath test. Assuming that this was the approach that the Magistrate took he was at least partly in error. Section 53(4) imposes an outer time limit upon a person's obligation to undergo a preliminary breath test in any of the three situations set out in s53(1). So much was conceded by counsel for the respondent, Mr Salek. It is consistent with this interpretation that s55, which deals with breath analysis required after a preliminary breath test has been undertaken pursuant to s53, contains a mirror of s53(4) – see s55(6). It is **[5]** also to be noted that each of s49(1)(f) – which relates to s55(1), and s49(1)(g) – which relates to s56, create offences where the sample of breath or sample of blood (as the case may be) is taken within three hours after driving or being in charge of a motor vehicle. The importance in Pt. 5 of the Act of the 3 hour period (although in a different context) is also evidenced by s48(1)(a) which erects a presumption in respect of alleged offences against s49(1)(a)(b). Overall, it seems to me inescapable that s53(4) has operation in each of the situations comprehended by s53(1).

The question of law framed by the Master in fact proceeds upon an assumption that s53(4) is applicable to a requirement imposed under s53(1)(a), which, as I have said, it appears that the Magistrate considered was not the case. The real issue between the parties was whether some

other temporal obligation is unstated but implicit in s53(1)(a). In dismissing the charge against the respondent the Magistrate concluded that such a temporal obligation did exist. It was, in substance, contended for the respondent that s53(1)(a) obliges a member of the police force to apprehend the motorist upon him being found driving and to impose the requirement there referred to reasonably contemporaneously with such apprehension. As a corollary, it was submitted that a test which was required after the person "found driving" had been out of the presence of the police officer for **[6]** some period would not be a test authorised by the words of the sub-section.

For the appellant, contrarily, it was submitted that the only temporal limit was that imposed by s53(4). It is perhaps clear from what I have already said that Mr Salek did not contend that the requirement authorized by s53(1)(a) was necessarily to be imposed simultaneously with a motorist being found driving or in charge of a motor vehicle. Indeed, in the case of a motorist found driving, such requirement could not as a matter of logic be imposed simultaneously. Rather Mr Salek framed his submission in terms of reasonable contemporaneity. What was reasonable, he submitted, was to be determined according to the facts of the particular case. But a constant requirement was that, for s53(1)(a) to apply, the motorist must be intercepted when found driving or in charge of a motor vehicle and must remain in the company of the police officer pending the preliminary breath test being undergone.

Some very strange results would flow from the interpretation of s53(1)(a) advanced by Mr Salek. One may rightly be concerned at the prospect of a person observed (found) driving, being located at his home hours later and then being required to undergo a preliminary breath test – he having innocently had a drink with his evening meal in the intervening period. On the other hand, what of the motorist who has been drinking, who is observed driving and is flagged down, **[7]** but who deliberately drives past the police officer; or who stops his motor vehicle but then alights and runs away. If that motorist is later apprehended, he not having been in the company of the police since he was found driving, on Mr Salek's analysis s53(1)(a) would not apply. Neither would s53(1)(c) on the assumption that there had been no accident.

Again, in the case of the motorist who simply drove by, there would not on Mr Salek's analysis be interception at the time when that motorist was found driving; and that would provide a further reason why s53(1)(a) would not authorize the police officer to require the motorist to undergo a preliminary breath test. It may also be noted that as Mr Salek framed the limitation on the operation of s53(1)(a) it would matter not whether the period during which the motorist avoided apprehension was a matter of minutes or hours (subject always to the overriding operation of s53(4)).

It can be seen that the limitation suggested on the operation of s53(1)(a), insofar as it relates to continuity of apprehension, is only temporal in the sense that interruption would bring the relevant time period to an end. On Mr Salek's submission s53(1)(a) would not itself provide a basis for objection to a test being conducted up to three hours after the motorist last drove or was in charge of a motor vehicle provided that the motorist was, in that period, in the company of the police officer.

[8] It was argued for the appellant, of course, that s53(1)(a) imposes no temporal inhibition as to when a preliminary breath test may be required of a motorist found driving or in charge of a motor vehicle; the only limiting factor being the operation of s53(4). The question, then, is whether s53(1)(a) is to be read as applying only where a motorist:

- is intercepted on being found driving or in charge of a motor vehicle;
- remains in the company of the police officer until he is required to undergo (and undergoes) a preliminary breath test.

In my opinion the language of s53(1)(a) does not achieve either of those consequences; nor does giving the provision its literal meaning produce an absurdity such as to justify departure from that meaning. It was submitted by Mr Salek that s53(1)(a) is expressed in the present tense; and that this was to be contrasted with s53(1)(c). Noting the reference in the case of the latter sub-section to a period of three hours, he submitted that the combination of this fact and the use of the present tense in sub-section (1)(a) showed that contemporaneity of interception and imposition at that time of a requirement that a test be undergone was required. In my opinion this argument is not correct.

Section 53(1)(a) is expressed in the present tense because it does require a member of the police force to **[9]** find a person driving or in charge of a motor vehicle. The need for present and personal observation found in s53(1)(a) and (2) is to be contrasted with the factual situation contemplated by s53(1)(c). There, belief as to a past occurrence triggers the right of a police officer to require a preliminary breath test to be undergone. Section 53(1)(a) is concerned not to establish the time when a test may be required in consequence of a presently observed fact, but rather to establish the condition whose satisfaction grounds the right to require a test.

It follows from what I have said in the preceding paragraph that, once the condition is satisfied, a police officer is not authorized by s53(1)(a) only to require a test to be undergone if the motorist is forthwith intercepted; nor, *a fortiori*, only to require a test so long as the motorist thereafter remains in the company of the police officer. Consistently with what I have said thus far, s53(1)(a) will only apply, where a motorist is not intercepted at the time of his being found driving or in charge of the motor vehicle, in the event that a member of the police force observes the motorist driving or in charge of the vehicle. It will not be enough, in my opinion, that the police officer holds a belief as to who was driving the motor vehicle at the earlier time. Such a belief might be founded, for example, upon no more than the registration certificate applicable to a motor vehicle whose number plate details were observed. The **[10]** judgment of Southwell J in *Peebles v Hotchin* [1988] 8 MVR 147 is relevant in this context.

It was, I think, suggested for the respondent that the operation of s53(1)(a) is, by implication, temporally limited because s53(1)(c) covers the 'field' in respect of past occurring matters (which it was said must depend upon 'belief'). But that is clearly not so. The distinction in the sub-sections is between presently and personally observed fact and reasonable belief as to the past event which may not have been a matter of personal observation at all. I was referred to *Mills v Meeking & Anor* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 as bearing upon the meaning to be given to s53(1)(a). The effect of that decision is that a person subjected to breath analysis within three hours of driving or being in charge of a motor vehicle may be charged with an offence against either of s49(1)(b) or (f) of the Act.

As the Act then stood a person charged under s49(1)(b) had available a potential defence (albeit requiring positive proof) under s48(1)(a). There was not, however, as ss49(1)(f) and 49(6) then stood, any corresponding defence available where a person was charged under s49(1)(f). It was submitted for the motorist that a capricious result obtained if the statute was read so as to permit an informant to deprive a defendant of a potential defence simply by choosing to lay a charge under s49(1)(f) rather than under s49(1)(b).

The majority opinion in the High Court was **[11]** that the literal meaning of the provisions was clear and that departure from such meaning was not authorized by reason of any absurdity of resulting consequences. In the course of their joint judgment Mason CJ and Toohey J made it clear that there was no prospect of injustice in fact in the case before them. They said, at p220:

> "The appellant was in 'custody' from the time of interception of his vehicle until he submitted to a breath analysis. There was, therefore, no question that the result of the breath analysis was in any way influenced by alcohol consumed after the appellant had been driving."

Their Honours also dealt with the theoretical risk of a motorist being deprived of a defence of substance by the informant's choice of the sub-section under which a charge was laid. They referred to what had been said in the Full Court (see [1989] VicRp 65; [1989] VR 740 at p743; (1989) 9 MVR 1) in this passage at pp221-222:

> "Thus, the Court said, if there were no accident and no reasonable belief that one had occurred, a preliminary test must have been administered under s53(1)(a) or (b). That is, the person concerned must have been found driving – s53(1)(a), or have been required to stop at a breath testing station – s53(1)(b). 'This provides some safeguard, for example, against a person being intercepted after drinking with dinner at home and being required to undergo a breath test within three hours of having driven home without incident from work'".

Their Honours also said this, at p224:

> "Section 49(1)(f) only applies to persons who within three hours of driving, have furnished a sample of

> breath in accordance with s55(1) resulting in a reading above the prescribed concentration. Therefore, apart from those believed to have been involved in a motor vehicle accident, the provision is confined to persons who, while driving, have been intercepted by a member of the police force or by an officer of the Road Traffic Authority. One would expect such a **[12]** person to remain in the company of the member or officer until he or she has furnished a sample of breath for analysis, as indeed occurred in this case. In that circumstance, a defence based on post-driving consumption of alcohol could at best be regarded as fanciful and, at worst, evidence of a deliberate attempt to frustrate the breath analysis. The withholding of such a defence in that circumstance cannot be said to be unintelligible."

Brennan J agreed with the construction placed upon s49(1)(f) by the Chief Justice and Toohey J. Dawson J dissented. In the course of his dissent he said this, at pp 231-232:

> "Section 53(1)(a) enables a member of the police force to require a person found driving a motor vehicle to undergo a preliminary breath test. The motor vehicle does not have to be involved in an accident. Nor does the test have to be administered at the time the person is found driving the motor vehicle. The test may be required 'at any time', provided the person to be tested has been found driving a vehicle. No doubt there must be, as a matter of proper interpretation, a degree of contemporaneity between finding a person driving and administering a preliminary breath test to him, but it is clear that the two things need not be simultaneous. The degree of contemporaneity required is indicated by the Act itself. There is an overall time limit within which a person can be required to undergo a preliminary breath test under s53(4). It is a period of three hours after the driving of a motor vehicle. But that means that a person found – that is, observed – driving a motor vehicle may be required to undergo a preliminary breath test some hours after having ceased to drive and, subsequently, be required to accompany a police officer to a police station to furnish a sample of breath for analysis within three hours of the driving: s55(1). It is quite conceivable that such a person may have imbibed no alcohol at the time of driving but may have consumed sufficient alcohol after the driving to take his blood alcohol concentration above the prescribed limit. And he may have imbibed that alcohol without any thought of frustrating the proof of his blood alcohol level, there having been no accident or other incident to warn him that the police may wish to ascertain it. The question is whether in that situation, if the person's blood alcohol **[13]** concentration is at the time of analysis above the prescribed limit, he has committed an offence under s49(1)(f), or whether s49(1)(f) should be read as subject to the limitation which, having regard to s53(1), was evidently intended, namely, that the motor vehicle driven should have been involved in an accident."

and

> "But if s49(1)(f) is to be given a construction which extends its ambit beyond circumstances where a person has driven a motor vehicle which has been involved in an accident, persons may be guilty of the offence created whose only fault is the consumption of alcohol entirely unconnected with their driving. Yet, having regard to its expressed purposes, Pt 5 of the Act is only directed against the consumption of alcohol in conjunction with the driving of a motor vehicle."

McHugh J also dissented. Relevantly for present purposes he said at pp240-241:

> "Indeed, at first sight it would be surprising if some cases, in which persons were required to undergo a preliminary test under s53(1)(a), did not fall within s49(1)(f). Take the case of a person who is 'found' driving a motor vehicle at high speed or in a dangerous manner but who eludes immediate apprehension. By reason of s53(4), it is clear that such a driver can be required to undergo a preliminary breath test at any time within three hours since he last drove the motor vehicle. At first sight it seems unlikely, having regard to s47(a) and the policy behind the enactment of ss49(1)(f) and 49(6), that Parliament intended that such a driver should be able to lead evidence that he had consumed alcohol during the period since he last drove. Yet, if the absconding driver is charged under s49(1)(b), as he could be, s48(1)(a) would permit him to lead evidence to rebut the presumption arising from the admission of evidence concerning the breath analysis result. This example suggests that it is unlikely that Parliament intended that a person, required to undergo a preliminary breath test under s53(1)(a), could only be charged under s49(1)(b). On the other hand, since the Act permits such a person to be charged under s49(1)(b), it is evident that, even in the case of the absconding driver, Parliament had no general policy of excluding evidence of post-driving alcohol consumption or evidence as to the effect of the consumption of alcohol on the defendant."

[14] That enabled His Honour to conclude (at p244) that s49(1)(f) was only intended to apply in cases where the motor vehicle there referred to had been involved in an accident. It is evident that Dawson and McHugh JJ considered that s53(1)(a) would apply even though a motorist observed (found) driving eluded immediate apprehension; in such cases an obligation to undergo a preliminary breath test could be imposed within three hours of the motorist last driving the vehicle. On the other hand, the danger that a motorist not immediately apprehended could be charged under s49(1)(f), thereby depriving him or her of the defence available under s48(1)(a) led

to a reading down of s49(1)(f). The breadth of operation that their Honours attributed to s53(1)(a) was important to their conclusion that s49(1)(f) was limited in its scope. Mason CJ and Toohey J gave s49(1)(f) broader application. But they considered that this produced no unsatisfactory outcome because of an assumption that persons charged following a preliminary breath test conducted in pursuance of ss53(1)(a), 53(1)(b) or s53(2) would have been intercepted and have been expected to remain in the company of the police officer until tested.

The statutory construction preferred by the minority and the operation of s53(1)(a) described by the Chief Justice and Toohey J in *Mills* would each yield the result that an informant would be unable to **[15]** manufacture an 'unfair' result. But, as indicated, underlying the common outcome was a differing interpretation or assumption as to the operation of s53(1)(a). Section 49(1)(f) and (6) have been amended and s48(1A) has been introduced since the decision in *Mills*. The consequence is that a very limited defence to a charge under s49(1)(f) is now available in respect of after-imbibed alcohol. The defence must surely be more difficult to maintain than a defence under s48(1)(a). Nonetheless, it removes the risk, if the construction of s53(1)(a) preferred by Dawson and McHugh JJ in *Mills* is correct, that a person observed driving who thereafter innocently consumes alcohol prior to undergoing breath analysis will thereafter necessarily be convicted of an offence against s49(1)(f) if the test proves positive.

I do not read *Mills* as determining the interpretation of s53(1)(a). The Chief Justice and Toohey J applied a meaning to the provision simply to check whether s49(1)(f) could, literally read, be intelligibly applied. The majority judgments did not, I think, necessarily involve rejection of the interpretation of s53(1)(a) advanced by Dawson and McHugh JJ. Certainly it is clear that Mason CJ and Toohey J did not conclude that s53(1)(a) could only apply where a motorist remained in the company of a member of the force from interception until a preliminary breath test was conducted. **[16]** Mr Salek referred me to a passage in *Mills* when the matter was before the Full Court *sub nom Meeking v Crisp & Anor* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1. The Court said, at VR p743:

> "Thus, if there were no accident and no reasonable belief that one had occurred the preliminary test must have been administered under s53(1)(a) or (b). This provides some safeguard, for example, against a person being intercepted after drinking with dinner at home and being required to undergo a breath test within three hours of having driven home without incident from work."

That passage was referred to by Mason CJ and Toohey J in their joint judgment at pp221-222. It certainly provides inferential support for the respondent's contention that s53(1)(a) requires apprehension and preliminary testing at the time when the motorist is found driving or in charge of a motor vehicle. But their Honours were not confronted directly with the issue now before me. There is no indication of what argument, if any, was put before the Court as to the operation of s53(1)(a). It remains for me to solve the problem.

Since I heard this matter Ormiston J has given judgment in a matter which concerned the operation of s53; see *DPP v Webb* ([1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367, judgment 18 November 1992). There the motorist was intercepted in the course of driving his vehicle; but he was not subjected to preliminary breath testing until some time had elapsed, during which time he had been conveyed to a police station. It was argued before his Honour that:

> **[17]** "... the tests required must be conducted at or about the scene where the person was found driving and within a reasonable time of the requirement."

The matter thus involved a question of delay not in the imposition of the requirement, but of delay between that imposition and the test being undergone. The argument advanced for the motorist was that the test must be undergone within a reasonable time of the requirement being imposed. As to the requirement itself, His Honour was apparently unwilling to imply any limitation as to time; see at pp9-14. Later discussion in His Honour's judgment (see at pp22-27) is directed to whether it should be implied that the test must be conducted within a reasonable time of the requirement being imposed.

In the earlier passages His Honour placed considerable significance upon the words 'at any time', attaching as they do in the opening passage of s53(1) to the verb 'require'. I am not confident that the words 'at any time' were not intended simply to convey the right of police officers to require preliminary breath tests at random, rather than there being necessary cause; compare s55(2).

But, literally, those words aid the appellant's case; and, more generally, His Honour's approach to the operation of s53(1)(a) is in relevant respects in harmony with the operation I would give to the provision.

In the result, the construction of s53(1)(a) contended for by the respondent should be rejected. There is no requirement that a motorist found driving or **[18]** in charge of a motor vehicle must be forthwith intercepted and remain in the company of the police officer until a required test is conducted. A motorist found driving or in charge of a motor vehicle is obliged to undergo preliminary breath testing within three hours of last driving or being in charge of the vehicle, if required to do so.

The appeal must be allowed, the Magistrate's order dismissing the charge be set aside and the information remitted for re-hearing at the Magistrates' Court at Heidelberg in accordance with these reasons and otherwise according to law.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. JM Buckley, Solicitor for the DPP. For the respondent Phillips: Mr DM Salek, counsel. Piesse Clarebrough, solicitors.
