31/06; [2006] VSC 330

SUPREME COURT OF VICTORIA

DPP v ALLISTON

Osborn J

18 August, 13 September 2006 — (2006) 46 MVR 401

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUESTED TO UNDERGO PRELIMINARY BREATH TEST – PBT DEVICE NOT IMMEDIATELY AVAILABLE – REQUEST MADE BY POLICE OFFICER FOR DEVICE TO BE BROUGHT TO SCENE – PBT TEST KIT DELIVERED SOON AFTER – DRIVER REQUESTED TO UNDERGO PBT – DRIVER REFUSED – DRIVER LATER CHARGED WITH OFFENCE – NO DIRECT EVIDENCE CALLED AT HEARING THAT PBT DEVICE WAS IN FACT A PRESCRIBED DEVICE – NO CASE SUBMISSION UPHELD – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(c), (1A), 53.

Section 49(1A) of the *Road Safety Act* 1986 ('Act') provides:

"(1A) A person may be convicted or found guilty of an offence ... even if
(a) in the case of an offence under paragraph (c), a prescribed device was not presented to the person at the time of the making of the requirement; ..."

A. was intercepted whilst driving his motor vehicle and asked to remain in the area while they waited for a police van to convey a breath testing device to the scene. When the device arrived, the police informant asked A. to blow into the device but he refused. A. was subsequently charged with offences and at the hearing no direct evidence was called to establish that the PBT device was in fact a prescribed device. At the close of the prosecution case A. submitted that the prosecution had not proved an essential element of the offence under s49(1)(c) of the Act that the device A. was asked to blow into was a prescribed breath analysing device under the Act. The magistrate concluded that the prosecution had not proved a relevant element of the offence and dismissed the charge under the Act. Upon appeal—

HELD: Appeal upheld. Dismissal set aside. Remitted for further consideration in accordance with law.
1. The authorities lead to the conclusion that prior to the enactment of s49(1A), it was necessary for the purpose of the offence here in issue, that the prosecution prove *inter alia* that a prescribed device was presented to the alleged offender at the time of the relevant requirement, and that an element of such proof was proof beyond reasonable doubt that the device was a prescribed device.

2. The effect of s49(1A) is to remove the element of a valid requirement to undertake a test as expressed by Sholl J in *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579. It follows that the Magistrate erred in finding that there was no case to answer because in his view the prosecution must prove as an element of the offence that a prescribed device was presented at the time of the making of the relevant requirement (evidence having been led that a device of some sort was presented), and that it followed there was no case to answer because there was no evidence that the device presented to the respondent was in fact a prescribed device. The offence may now be committed whether or not a prescribed device is proved to have been presented to the suspect.

3. It follows that whereas proof of the results of a test still requires proof that a prescribed instrument was utilised, the essential elements of a requirement giving rise to an offence of refusal have been radically reduced. Such a requirement must still, however, convey to the suspect the purpose of the proposed test namely the conduct of a preliminary breath test in accordance with law i.e. by a prescribed device.

4. If the prosecution cannot establish that the suspect was presented with a prescribed device, this may limit the modes of proof of an adequate request. To adapt the words of Sholl J the officer must clearly ask the suspect "to furnish a sample of his breath for the stated purpose of preliminary test by a prescribed device." Such a request may be clear in its own terms alone or may be made by reference to an identified device which is proved to be a prescribed device. In the absence of a device proved to be prescribed, however, the fact that the requirement is directed to the relevant purpose must be otherwise established.

5. In the present case it was open to the Magistrate to conclude that in all the circumstances a sufficient requirement had been made to undertake a preliminary breath test utilising a prescribed device. The sense of such request was to be evaluated in part by reference to the fact that a "preliminary

breath test" is "a common enough term well understood in the community." We now live in the age of booze buses (a term used in the examples now inserted in the legislation) and widespread random preliminary breath testing. It was open to the Magistrate to conclude that given all the relevant circumstances the suspect would understand the term "preliminary breath test" in the sense now generally understood by the public, namely a breath test on an approved device providing a test preliminary to and indicative of the need for a subsequent breath test providing a reading of the suspect's breath alcohol level. It is not the intention of the Act as amended that the requirement contemplated by s53(1) if made absent the presentation of a device proved to be prescribed, must be constituted by a request which expressly requires a suspect to furnish breath for the purposes of a preliminary breath test "upon a prescribed device."

6. The failure to prove that the device presented to A. was a prescribed device was not fatal to the prosecution case. Accordingly, the Magistrate was in error in concluding on the facts that there was no case to answer.

OSBORN J:

Introduction

1. This is an appeal pursuant to s92 of the *Magistrates' Court Act* 1989 against the order of a Magistrate dismissing a charge on the ground that there was no case to answer.

2. On 25 April the respondent's vehicle was intercepted in Crib Point by two police officers, Senior Constable Mellor (Mellor), and the informant. The officers requested that the respondent remain in the area while they waited for a police van to arrive with a testing device. The respondent then started a scuffle with the informant. When the device arrived, the informant asked the respondent to blow into it but he refused. The respondent was subsequently arrested and charged with three offences arising out of the incident: refusing to take a preliminary breath test (charge 1), assaulting police (charge 2), and being drunk in a public place (charge 3). The matter was heard in the Frankston Magistrates' Court on 21 November 2005. The Magistrate dismissed charge 1, and found charges 2 and 3 proven. The Director of Public Prosecutions seeks to appeal against the Magistrate's dismissal of charge 1.

The Legislation

3. The respondent was charged under s49(1)(c) of the *Road Safety Act* 1986 ("the Act"):

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

4. Section 53 provides police with the relevant power to require an individual to undergo a preliminary breath test:

> "(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 ...
> to undergo a preliminary breath test by a prescribed device.

5. A list of devices that are prescribed for the purposes of s53 is contained in regulation 201 of the *Road Safety (General) Regulations* 1999:

> "201. The devices prescribed for the purposes of section 53 of the Act are the breath testing devices known as—
> (a) the Alcotest 80/A; and
> (b) the Lion Alcolmeter also known as the lion alcolmeter S-D2; and
> (c) the lion alcolmeter SD-400PA.

6. Also relevant is s49(1A) which provides that:

> (1A) A person may be convicted or found guilty of an offence ... even if
> (a) in the case of an offence under paragraph (c), a prescribed device was not presented to the person at the time of the making of the requirement; ...

The Police Case

7. The police case was constituted by evidence given by Mellor, the informant, and Acting Sergeant Sigge (Sigge). On 25 April 2005 Mellor and the informant were driving in a police sedan

along Stony Point Road in Crib Point. They observed a Ford vehicle pull out of Governors Road and turn right into Stony Point Road. The vehicle, which was being driven by the respondent, was swerving from side to side along the road. The police followed the driver and intercepted the vehicle.

8. The informant got out of the police vehicle and walked towards the respondent's vehicle. The respondent then got out of his vehicle and supported himself on the door of his car before unsuccessfully attempting to enter the driver's side of the police car. In the opinion of both officers he appeared to be affected by alcohol. Mellor then asked the respondent for his licence which he produced. The respondent told the police that he was with the Taxi Inspectorate and asked if the police "could do anything for him?". The informant then said to the respondent "I require to you to undergo a preliminary breath test."

9. The informant made inquiries over the police radio in order to locate the police van which had the only preliminary breath test device available to police in the area. Both officers gave evidence that having overheard these radio conversations the respondent started laughing and said words to the effect of "You don't have one [a device] on you so you can't do anything." The respondent then grabbed hold of the informant and refused to let go. Mellor gave evidence that the scuffle between the informant and the respondent was not "overly threatening."

10. During the altercation a Senior Constable Lycett arrived in a police van and provided the preliminary breath test kit to Mellor. Mellor gave evidence that she prepared the kit for operation. She put the straw in the machine, looked at the machine, waited for it to ready itself and then handed the machine to the informant, who was still entangled with the respondent. The informant gave evidence that he "double-checked" the device before pointing the device towards the respondent's mouth, and asking him to undergo a preliminary breath test, on at least two occasions. The informant gave evidence that he said to the respondent "This preliminary breath test device is set up, ready for use and I require you to undergo a preliminary breath test." The respondent refused to undergo the test on each occasion. On the final occasion the informant's evidence corroborated by Mellor was that the informant said to the respondent "I require you to undergo a preliminary breath test and failure to do so could cause you to lose your licence for a period of 2 years." The respondent and the informant then separated and the respondent was placed under arrest.

11. No direct evidence was called to establish that the preliminary breath test device was in fact a prescribed device, although as the affidavit in support of this appeal makes clear a statement to this effect formed part of the informant's police statement.

Decision in the Magistrates' Court

12. After the close of the prosecution case in the Magistrates' Court, counsel for the respondent made a no-case submission in relation to the first charge. Counsel submitted that the prosecution had not proved beyond reasonable doubt an essential element of the offence under s49(1)(c) namely that the device the respondent was asked to blow into by the informant was a prescribed breath analysing device under the Act.

13. The Magistrate accepted that it was an essential element of the offence that the device presented to the respondent was proven to be a prescribed device. In reaching this conclusion his Honour relied on *Impagnatiello v Campbell*[2] and *Sirajuddin v Ziino*[3], stating that these:

> "two cases ... make it quite clear that the onus is on the prosecution to prove beyond reasonable doubt that ... any device that is used in relation to breath testing under s49 or under s55 or under s53 or any other section that relates to breath testing, has to be proved to be a prescribed device."

14. His Honour noted that the prosecution had not adduced any evidence proving that the relevant device was a prescribed device:

> "I have not had any description other than it [the device] is a preliminary breath testing kit or preliminary breath testing device. No-one has said that it is a device that falls within section 53(1) of the *Road Safety Act* and is a prescribed device. No-one has said that it is a line alcohol meter (scil. lion) or some other device that might well be prescribed. No-one has given any serial numbers and I have absolutely no evidence that it is a prescribed device."

Accordingly, his Honour concluded that the prosecution had not proved a relevant element of the offence.

15. His Honour then turned to the operation of s49(1A) of the Act, which the prosecution submitted removed the requirement that it prove that the device the respondent was asked to blow into was a prescribed device. His Honour commented that this section appeared to cut across the line of authority including *Impagnatiello, Sirajuddin,* and *Halepovic v Sangston*[4]. His Honour stated that he was unsure as to the operation of s49(1A). He observed, however, that in this case no demand to undergo a preliminary test had been made until the device had been produced. His Honour concluded that under such circumstances he was bound by authority requiring the prosecution to prove beyond reasonable doubt that the breath test kit shown to the respondent was a prescribed device. Having already concluded that no such evidence had been presented his Honour dismissed the first charge.

Grounds of Appeal

16. The appellant appeals against the Magistrate's decision on the following grounds:

> (1) The Learned Magistrate erred in law in finding that there was no evidence that the device presented to the respondent, for the purpose of a preliminary breath test was a prescribed device.
>
> (2) The Learned Magistrate erred in law in finding that in a charge under s49(1)(c) of the *Road Safety Act,* the prosecution must prove as an element of the offence, that a prescribed device was presented to the person at the time of making the requirement.
>
> (3) The Learned Magistrate erred in law in finding, notwithstanding the provisions of s49(1A)(a) of the *Road Safety Act* 1986, that there was no case to answer because he found there was no evidence that the device presented to the respondent was a prescribed device.

Law Prior to s49(1A): Elements of the Offence

17. Prior to the introduction of s49(1A) the authorities supported the view that in order to establish an offence of refusing to undertake a breath test (whether a preliminary or full test), it was necessary for the prescribed device or the approved breath analysis instrument (as relevant) to be present at the time the request to take the test was made.

18. In *Scott v Dunstone*[5] Sholl J held that for a person to commit an offence of refusing to blow into an approved instrument under the then s408A of the *Crimes Act*, the police were required to establish two elements:

> "I propose to construe the language in the way in which I think common sense requires, having due regard to the principle that one is not to cut down a person's common law rights against self-incrimination without clear language.[6] In my opinion –
>
> > (1) The officer, having the necessary belief on reasonable grounds referred to in sub-s.4(a) must clearly ask the suspect to furnish a sample of his breath for the stated purpose of analysis by an approved breath analysing instrument. For example, he may say expressly, 'I require you to furnish a sample of your breath for analysis by an approved breath analysing instrument', or he may point to such an instrument and say, 'I require you to furnish a sample of your breath for analysis by this instrument', provided it is in fact so approved.
> >
> > (2) There must be an approved instrument present at the time of the requirement, into which the suspect can exhale at once if he consents to the test. That is to say, the appropriate operator must be there and available. …
>
> I have construed the words 'for analysis by a breath analysing instrument' as stating what the requirement by the officer must express to the suspect. And if he does not expressly say that the analysis is to be by an approved instrument, he must at least point out such an instrument as that by which the analysis (is) to be done." [7]

19. It is to be noted that the proof of presence of an approved instrument was regarded not only as a separate element of the offence but also as a potential circumstance assisting in proving that a satisfactory request to furnish a sample of breath had been made. In practice the critical element of proof of a valid request has thus (until the introduction of s49(1A)) become whether a prescribed device or approved instrument was presented to the suspect at the time of the relevant requirement.

20. Nevertheless the examples proffered of a valid request were clearly *obiter*[8], and should not be regarded as somehow codifying the terms necessary for an adequate request. Further, the second example accepts that the relevant purpose of the test may be stated in part implicitly without express reference to an "approved" or "prescribed" device. His Honour goes on to make this clear in the last passage which I have quoted above.

21. Sholl J rejected the notion of anticipatory breach or refusal – that a person could commit the offence of refusing to take a breath test, when an approved instrument was not present. His Honour stated that even if the driver had stated that "I will not take a test under any circumstances" the police still had to produce an approved instrument for all of the elements of the offence charged to be made out.[9] Sholl J held that the offence had not been proven in *Scott v Dunstone* because there was no evidence that the device present was an approved instrument.[10]

22. Sholl J's decision that an approved device must be presented to someone before they can be said to have refused to take a test upon an approved instrument, was upheld in *DPP v Foster*[11]. Winneke P (with whom Batt JA agreed) stated:

> "It is, to my mind, abundantly plain from a reading of s55(1) [12] that the requirement to furnish a sample of breath for analysis by a breath analysing instrument can only sensibly be made at the time when the device is presented to the motorist at the police station (or other place)."[13]

The judgment of Sholl J was also cited with approval in this regard in *DPP v Greelish*[14], and *Halepovic*[15].

23. In *DPP v Webb*[16] Ormiston J, following the decision of Tadgell J in *Smith v Van Maanen*[17], held that proof of the conduct of a preliminary test under s53 was also a necessary element of proof of compliance with s55(1) of the Act:

> "It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1)."[18]

24. In *Chisholm v Mathews*[19] Hayne J accepted that a test under s53 was required to be administered for an individual to be convicted under s55(1) and s49(1)(f), but expressed doubt as to whether the prosecution needed to prove that a prescribed device had been used.

25. In *Sirajuddin* the appellant was convicted under s55(1) and s49(1)(f) and appealed against the conviction on the ground that there was no evidence that a prescribed device had been used to conduct the preliminary test under s53. Hargrave J upheld the appeal, stating that the doubts expressed by Hayne J had been resolved by the judgment of Ormiston J in *Webb*. His Honour held that as it is necessary to prove that a valid test was administered under s53, then it was also necessary to prove that that test was conducted using a validly prescribed device, in order to prove an individual guilty of an offence under s49(1)(f)[20], consequent upon a breath test conducted under s55(1).

26. The appellant has placed reliance on the decision of Marks J in *Hewitt v Harms*[21]. In that case his Honour made the following comments with respect to evidence of refusal to undertake a preliminary breath test:

> "The offence was refusal to undergo a test by a prescribed device. The evidence was that the plaintiff refused. If not, the evidence entitled the inference that the plaintiff refused to undergo a test by any device at all, which must be taken to include a prescribed device.
> The prosecution was not in my opinion, although it is perhaps unnecessary for my decision to say so, required to prove that a prescribed device was produced to the plaintiff and that the plaintiff specifically refused to be tested by it."[22]

Marks J's latter comments, while on point, were made in *obiter* and are inconsistent with the authority of *Scott v Dunstone*, which was approved by the Court of Appeal in *Foster* and cited with approval in *Greelish* and *Halepovic*.

27. This Court has also considered what is necessary to prove that a device is a prescribed

device beyond reasonable doubt. In *Bogdanovski v Buckingham*[23] Ormiston J carefully considered what was necessary to prove that an instrument was approved under the Act for the purposes of proving a sample of breath indicated more than the prescribed concentration of alcohol in the blood.

28. The decision of Ormiston J was cited with approval by the Court of Appeal in *Impagnatiello* in which the appellant was convicted of an offence under s49(1)(f) consequent upon a breath test under s55(1). It was held that in addition to proof by way of certificate, the legislation provided two ways for the prosecution to establish that a breath analysing instrument was valid under the Act:

> (1) the operator of the machine may simply give evidence that the machine was a breath analysing instrument within the meaning of the Act; or,
>
> (2) the operator may give evidence that the instrument used had written inscribed or impressed on it the expressions "Alcotest 7110" and "3530791".

29. In *Impagnatiello* the officer who operated the machine had only identified the breath analysing instrument used in the s55(1) test by reference to its serial number 0032. Nonetheless the trial judge upheld the conviction, commenting that recent Court of Appeal decisions indicated that it was important to give effect to the legislation and to discourage technical defences.[24]

30. On appeal it was argued that the prosecution had not proved that the instrument used was approved for the purposes of the Act. It was submitted for the prosecution that it was open to infer that the officer had used an approved instrument from a series of facts. These included *inter alia*:

> (a) The fact that the officer told the appellant that he was required to undergo a breath test "pursuant to s55 of the Act" entitled the Magistrate to infer that only an instrument which was compliant with the Act would have been used;
>
> (b) The fact that the officer identified the device as "our machine" implied that the machine was one used at the police station and it could be inferred that the police would not use an instrument that failed to comply with the Act; and
> (c) The officer was authorised under the Act to operate a breath analysing instrument and it could be inferred he would only use an appropriate device.

It was submitted that similar inferential reasoning had previously been relied upon by Hayne J in *Chisholm v Mathews* in finding that it was open to conclude a device used for a test under s53 was a prescribed device.[25] It was also submitted that as the officer was performing a public duty the Court could rely on the presumption of regularity to infer that he discharged his responsibility.

31. Eames JA (with whom Callaway and Buchanan JJA agreed) stated:

> "Nothing said by the Court of Appeal as to the purpose of the legislation and the desirability of discouraging merely technical defences over-rode the continuing requirement that the prosecution was obliged to prove the elements of the offence."[26]

32. His Honour found that the facts relied on by the prosecution (see (a)–(c) above) did not prove beyond reasonable doubt that the device was an approved instrument. His Honour characterised the reasoning from facts (a)–(c) as in some instances circular, and as providing no positive evidence as to the nature of the device used.[27] Further, his Honour held that the presumption of regularity was not applicable to offences under s49(1)(f), and concluded by stating that whether or not an instrument was approved was "an element of the offence a matter on which strict proof was required."[28]

33. It can be seen like reasoning would confront ground 1 of appeal in the present case with serious difficulty. Given the conclusion I have reached with respect to grounds 2 and 3, however, it is not necessary to form a concluded view on this aspect of the matter.

34. In summary the above authorities lead to the conclusion that prior to s49(1A), it was necessary for the purpose of the offence here in issue, that the prosecution prove *inter alia* that

a prescribed device was presented to the alleged offender at the time of the relevant requirement, and that an element of such proof was proof beyond reasonable doubt that the device was a prescribed device.

Construction of Section 49(1A)

35. The appellant submits that s49(1A) removes the requirement for the prosecution to prove that at the time the respondent was asked to undergo a preliminary breath test he was presented with a prescribed device. It is submitted that the legislation removes the second element of a valid requirement to undertake a test as expressed by Sholl J and thus, all that is required for an offence to be committed is for an officer to clearly ask the motorist to undertake a preliminary breath test, and for the motorist to refuse.

36. The appellant relied on the second reading speech relating to s49(1A) in support of this contention:

> "The Bill also makes changes to the drink-driving ... provisions of the *Road Safety Act*. One of the most important of these is to address a recent court ruling[29] by making it clear that a person who refuses to provide a blood sample required under this act has committed an offence even if he or she is not in the presence of a person who can actually take that sample, or at the place where the sample can be taken.

For consistency, the proposed amendments cover the other refusal offences within part 5 of the *Road Safety Act* ... In all these [refusal] cases police will be able to accept that when the driver says 'No', he or she means 'No'. This avoids the need to call out a doctor, set up testing equipment or make similar arrangements when it is clear from the outset that this will be a waste of time and resources because the person to be tested has made it clear that he or she will not cooperate."[30]

37. In my opinion the effect of s49(1A) is to remove the second element of a valid requirement to undertake a test as expressed by Sholl J in *Scott v Dunstone*. It follows that the learned Magistrate did err in finding that there was no case to answer because in his view the prosecution must prove as an element of the offence that a prescribed device was presented at the time of the making of the relevant requirement (evidence having been led that a device of some sort was presented), and that it followed there was no case to answer because there was no evidence that the device presented to the respondent was in fact a prescribed device.[31]

38. The offence may now be committed whether or not a prescribed device is proved to have been presented to the suspect.

39. It follows that whereas proof of the results of a test still requires proof that a prescribed instrument was utilised, the essential elements of a requirement giving rise to an offence of refusal have been radically reduced. Such a requirement must still, however, convey to the suspect the purpose of the proposed test namely the conduct of a preliminary breath test in accordance with law i.e. by a prescribed device.

40. If the prosecution can not establish that the suspect was presented with a prescribed device, this may limit the modes of proof of an adequate request. To adapt the words of Sholl J the officer must clearly ask the suspect "to furnish a sample of his breath for the stated purpose of preliminary test by a prescribed device." Such a request may be clear in its own terms alone or may be made by reference to an identified device which is proved to be a prescribed device. In the absence of a device proved to be prescribed, however, the fact that the requirement is directed to the relevant purpose must be otherwise established.

41. In the present case the appellant submits that the suspect must necessarily have inferred that the requirement was being made with respect to a prescribed device:

> (a) He was required to wait while police obtained the device and discussed its absence with them;
>
> (b) The instrument was readied for use in accordance with a fixed procedure;
>
> (c) The suspect was told "this preliminary breath test device is set up, ready for use and I require you to undergo a preliminary breath test";
>
> (d) After the initial refusals the suspect was advised that refusal to undertake the test was an offence.

42. In *Rankin v O'Brien* Southwell J held that words used by the informant were sufficient to give reasonable information to the respondent as to the purpose of a request to return to a police station, namely to undergo a breath test[32] that being "a common enough term well understood in the community."[33]

43. In *Foster* Winneke P dealing with the terms of s55(1) referred *inter alia* to *Rankin v O'Brien* with approval and stated[34]:

> "However, it is not in my view necessary that a 'demand' in imperative terms should have been made as a prerequisite to proof of a 'requirement'. A request in precatory or polite terms by a person clothed with apparent authority will be sufficient to satisfy the requirement to 'furnish a breath test', if indeed such a requirement is an element of the offence under 49(1)(f) ... "

44. In the present case it was in my view open to the Magistrate to conclude that in all the circumstances a sufficient requirement had been made to undertake a preliminary breath test utilising a prescribed device.

45. The sense of such request was to be evaluated in part by reference to the fact that a "preliminary breath test" is "a common enough term well understood in the community." We now live in the age of booze buses (a term used in the examples now inserted in the legislation) and widespread random preliminary breath testing. It was open to the Magistrate to conclude that given all the relevant circumstances the respondent would understand the term "preliminary breath test" in the sense now generally understood by the public, namely a breath test on an approved device providing a test preliminary to and indicative of the need for a subsequent breath test providing a reading of the suspect's breath alcohol level.

46. In my view it is not the intention of the Act as amended that the requirement contemplated by s53(1) if made absent the presentation of a device proved to be prescribed, must be constituted by a request which expressly requires a suspect to furnish breath for the purposes of a preliminary breath test "upon a prescribed device."

47. As the second example of an appropriate request given by Sholl J in *Scott v Dunstone* indicates, the adequacy of the words used is to be gauged in all the circumstances of the case and need not be constituted by a recitation of the words of the section. I am not persuaded that it is now the case when requesting a preliminary breath test that:

> "If (an officer) does not expressly say that the analysis is to be by an approved instrument, he must at least point out such an instrument as that by which the analysis (is) to be done."[35]

48. Accordingly, the matter should be remitted to the learned Magistrate for further consideration in accordance with law. The failure to prove that the device presented to the respondent was a prescribed device was not fatal to the prosecution case and it was open to the Magistrate to conclude on the facts that there was a case to answer.

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[1] Section 49 sub-sections (1)(a), (b) and (f) of the Act provide a context to which I will make some further reference:
(1) A person is guilty of an offence if he or she—
(a) drives a motor vehicle or is in charge of a motor vehicle while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor vehicle; or
(b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; 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; ..."

[2] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.

[3] [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21.

[4] [2003] VSC 464; (2003) 40 MVR 203.

[5] [1963] VicRp 77; [1963] VR 579.

[6] The breadth of this introductory remark was the subject of comment by the Full Court in *King v McLellan*

[1974] VicRp 92; [1974] VR 773 at 777.
[7] at 581 – 582.
[8] Cf *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67 at 70; (1985) 2 MVR 503.
[9] at 582.
[10] Ibid.
[11] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[12] Section 55(1) is now expressed as follows:

"**55. Breath analysis**

(1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation or of the Department of Infrastructure under section 53 to do so and—

(a) the test in the opinion of the member or officer in whose presence it is made indicates that the person's breath contains alcohol; or

(b) the person, in the opinion of the member or officer, refuses or fails to carry out the test in the manner specified in section 53(3)—

any member of the police force or, if the requirement for the preliminary breath test was made by an officer of the Corporation or of the Department of Infrastructure, any member of the police force or any officer of the Corporation or of the Department of Infrastructure 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 or an officer of the Corporation or of the Department of Infrastructure authorised in writing by the Corporation or the Secretary of the Department of Infrastructure, as the case requires, for the purposes of section 53 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 any further sample required to be furnished under sub-section (2A) and been given the certificate referred to in sub-section (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."

[13] at 657.
[14] [2002] VSCA 49; (2002) 4 VR 220 at [12] - [13]; (2002) 128 A Crim R 144; (2002) 35 MVR 466 per Buchanan JA.
[15] at [21] – [22] per Bongiorno J.
[16] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.
[17] (1991) 14 MVR 365.
[18] at 407.
[19] (1992) 16 MVR 447 at 451.
[20] at [50].
[21] (1989) 10 MVR 63.
[22] at 340.
[23] [1989] VicRp 80; [1989] VR 897 at 904 and 916; (1988) 9 MVR 257.
[24] at 422 – 423.
[25] at 451.
[26] at 422 – 423.
[27] at [30]-[31].
[28] at [29].
[29] The decision referred to above regarding blood samples is that of Bongiorno J in *Halepovic*.
[30] *Hansard*, 6 May 2004, p1042.
[31] See Grounds 2 and 3 of appeal set out above.
[32] A request in equivalent circumstances is now comprehended by s55(2).
[33] at 70.
[34] at 656.
[35] Cf *Scott v Dunstone* at 582.

APPEARANCES: For the appellant DPP: Mr G Hughan, counsel. Director of Public Prosecutions. No appearance on behalf of the respondent Alliston.
