22/02; [2002] VSC 326

SUPREME COURT OF VICTORIA

DPP v MITCHELL

Gillard J

7, 14 August 2002 — (2002) 37 MVR 142

MOTOR TRAFFIC – DRINK-DRIVING – PERSON FOUND BY POLICE OFFICER NEXT TO HIS MOTOR VEHICLE – PERSON APPEARED TO BE UNDER THE INFLUENCE OF ALCOHOL – REQUESTED BY POLICE OFFICER TO ACCOMPANY OFFICER TO POLICE STATION FOR A BREATH TEST – REQUEST REFUSED – CHARGE SUBSEQUENTLY LAID – DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS48(1)(b), 49(1)(b), (e), 55(1).

M., who had been consuming intoxicating liquor, was found by a police officer next to the driver's door of his motor vehicle. M. locked his vehicle, dropped the keys to the ground and walked off. M., was holding a half-consumed stubby of beer in his hand, his eyes were glazed and was unsteady on his feet. M. was requested to accompany the officer to a police station for the purposes of a breath test because he was found in charge of the vehicle, but refused on the basis that the police did not find him driving. M. was charged with an offence under s49(1)(e) of the *Road Safety Act* 1986 ('Act') in that he refused to comply with a requirement to accompany the informant to a police station for the purposes of a breath test. At the hearing, no evidence was called on M.'s behalf. After submissions were made, the magistrate held that the charge was not proven and dismissed it. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted to the magistrate for further consideration.

1. For a charge under s49(1)(e) of the Act, the informant has to prove beyond reasonable doubt each of the following elements:

(a) That a police officer reasonably believed that the defendant had driven or was in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in the blood

(b) That the member required the defendant to furnish a sample of breath for analysis; and

(c) That the defendant refused the request.

2. The police officer was required to form the belief that M. had committed an offence and the belief must be reasonably based. In forming that belief, the officer was entitled to rely upon any information available to him. There was ample evidence pointing to M. driving the vehicle within a relatively short period prior to his being questioned by the informant. Accordingly, there was sufficient evidence to conclude that M. had been in charge of the vehicle within the three hour period prior to the time when the request to provide a sample was made. In the circumstances the formation of the belief by the informant was reasonable and the magistrate was in error in holding otherwise.

3. If M. had not been in charge of his motor vehicle within a period of three hours prior to the request being made to furnish the sample, then that factual information was within his knowledge and he could have given evidence and called other evidence to establish that the ground of the informant's belief was non-existent. He failed to do so.

***Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23, applied.**

GILLARD J:

1. This is an appeal from an order made by the Magistrates' Court of Victoria sitting at Bendigo on 18 January 2002, whereby a charge brought under s49(1)(e) of the *Road Safety Act* 1986 was dismissed.

Parties

2. The appellant, the Director of Public Prosecutions ("DPP"), brings the appeal on behalf of the informant, Senior Constable William Finlay Fleming ("the informant"), pursuant to s92(2) of the *Magistrates' Court Act* 1989.

3. The respondent to the appeal, Glenn William Mitchell ("the respondent"), was charged

initially with five offences arising out of a series of incidents which occurred at Kangaroo Flat near Bendigo on 24 June 2000. Four out of the five charges were withdrawn, leaving a charge which alleged that the respondent breached s49(1)(e) of the *Road Safety Act* 1986.

4. The documents were served on the Magistrates' Court of Victoria and this Court received correspondence from the Court acknowledging receipt. The Court did not place any material before this Court.

The proceeding in the Magistrates' Court

5. The respondent was charged with the following offence –

> "At Kangaroo Flat on 24 June 2000 he being a person whom a member of the police force believed on reasonable grounds to have offended against s.49.1.b of the *Road Safety Act* 1986 and having been further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s.55(2) of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a police station he did refuse to comply with such requirement to accompany prior to three hours elapsing from being in charge of a motor vehicle." (Emphases added).

6. The offence with which the respondent was charged in fact is an offence against s49(1)(e) of the Act. It provides –

> "(1) A person is guilty of an offence if he or she—
> ... (a) refuses to comply with a requirement made under s.55(1), (2), (2A) or (9A); or"

7. It was alleged that the respondent breached s55(2), in that he was requested to accompany a policeman to a police station to furnish a sample of breath for analysis by a breath analysing instrument and he refused to do so.

8. Section 55(2) provides –

> "(2) A member of the police force may require any person whom that member reasonably believes to have offended against s.49(1)(a) or (b) to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test in accordance with s.53) and for that purpose may further require the person to accompany a member of the police force to a police station or other place 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 sub-s. (4) or until three hours after the driving, being an occupant of or being in charge of a motor vehicle, whichever is sooner."

9. It is necessary to refer to s49(1)(b), which was the relevant paragraph and which provides –

> "(1) A person is guilty of an offence if he or she— ...
> (b) drives a motor vehicle or is in charge of motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood; or"

10. The charge was heard by the Magistrates' Court at Bendigo on 13 December 2001. The respondent pleaded not guilty to the charge. Sergeant Brett Sheppard appeared to prosecute on behalf of the informant and Mr I. Alger of Counsel appeared on behalf of the respondent.

11. At the hearing the informant, Senior Constable Fleming and another member of the police force, Senior Constable Keegan, gave evidence. They were cross-examined.

12. After the informants' case was closed, counsel for the respondent submitted there was no case to answer and after hearing and considering submissions, the learned magistrate ruled that there was a case to answer. The respondent's counsel informed the Court that no evidence would be called on his behalf and he submitted that the Court could not be satisfied beyond reasonable doubt that the charge had been proven. The magistrate reserved her decision. On 18 January 2002, she delivered her reasons and held that the charge was not proven and ordered that it be dismissed. She ordered the Chief Commission of Police to pay costs in the sum of $3,200.

13. The magistrate made findings of fact and for the purposes of the appeal, they are the facts

to be considered. Affidavits sworn by the prosecuting Sergeant Sheppard and a solicitor from the Office of Public Prosecutions set out a summary of the facts. These are not the facts on the appeal. What the magistrate found are the facts.

14. The magistrate noted that the evidence of the two police officers was not disputed. She stated –

> "Sworn evidence was given by the 2 police officers, Senior Constable Fleming and Senior Constable Keegan, and that evidence was not disputed. Senior Constable Fleming gave evidence that he and Senior Constable Keegan were on mobile patrol in a marked police car at about 2.45 am – on Saturday, the 24th of June, 2000 and drove to the Windermere Hotel as a result of information received from D-24. There they saw a Magna sedan parked in Station Street about 10 metres from High Street. 2 males stood by the car, one at each of the front doors to the car. The driver's door was open and the defendant stood between the open door and the door sill. Senior Constable Fleming said he did not know if the defendant had just got in or – or out of the car. Apparently the passenger side door was locked and the passenger was holding a bottle of rum. Senior Constable Fleming said the police car did a u-turn and pulled in behind the Magna. The defendant locked the car with the car keys. He walked around the back of the car, between that car and the police car, with his back to the police. He was bare foot and had a half-consumed long neck stubby of beer in his hand. Senior Constable Fleming said this aroused his suspicions and he watched as the 2 men stood close together with their backs to the police. He observed the defendant drop the car keys onto the ground and slowly kick them under the car, then walk off with his friend. The police spoke to the 2 men and separated them. When asked by Senior Constable Fleming, in Senior Constable Keegan's presence, for his name and address the defendant gave a false address. He stated he'd been drinking beer and wine at the Botanical Hotel with friends. Senior Constable Fleming told the defendant that as registered owner of the Magna he was obliged to say how the car had come to be in Kangaroo Flat. The defendant said it had been there since the previous, night. Senior Constable Fleming gave evidence that there was no dew on that car, unlike the police car, and that the Magna was warm around the engine bay and exhaust pipe. In his opinion, the car had only been there half an hour. Senior Constable Fleming said it was a cold night and the defendant's shirt was undone and he was bare foot. There was a wet patch on his shirt, his eyes were glazed and he was unsteady on his feet. Senior Constable Fleming thought that the defendant was under the influence of alcohol. Using a white card which set out the demands, Senior Constable Fleming requested the defendant undergo a preliminary breath test because he was in charge of the vehicle. He said the defendant refused on the basis that the police did not find him driving. After Senior Constable Fleming made the defendant aware of the consequence of refusal, the defendant again refused on the same grounds. Senior Constable Fleming then told the defendant that he believed on reasonable grounds that, `You', that is the defendant, `are' in charge of a motor vehicle whilst more than the prescribed concentration of alcohol was in his blood. Senior Constable Fleming then required the defendant to accompany him to the Bendigo Police Station. The defendant stated words to the effect, 'I'm not going to blow, you didn't catch me driving.' Senior Constable Keegan gave evidence in similar terms. He also stated that as he slowly drove the police vehicle past the stationary Magna and observed the defendant standing in the open front door on the driver's side, he noticed the defendant look at the police vehicle. Senior Constable Fleming described the defendant's position at the car at that time as him standing - and I'm about to quote something, this is from my notes as distinct from the tape of the proceedings, `Between the open door and door sill. I didn't know if he just go t in or out.' Senior Constable Keegan said that when he first saw the defendant, he was, `Standing in the open car door. I can't say how long he was there. He was already in the door when we saw him.' Senior Constable Keegan said the only physical movement he saw from the defendant was when the defendant the moved around to the passenger side of the car. Senior Constable Fleming said he formed the belief that the defendant was in charge of the vehicle from the following factors.
> (i) Information received via police radio that the defendant was driving a Magna sedan to the Windermere Hotel;
> (ii) Senior Constable Fleming's observations of the Magna;
> (iii) the false answers from the defendant, and
> (iv) the fact that the defendant was standing at the car with the driver's door open and holding the car keys when the police drove up.
> Senior Constable Fleming said it was his belief that the defendant had been in charge of the car in Bayne Street in Bendigo within half an hour of the police speaking to him at Kangaroo Flat and that he drove it to Kangaroo Flat where the police then spoke with him."

15. Later, the magistrate said that she was satisfied that Senior Constable Fleming came to the belief that the respondent had offended pursuant to s49(1)(b) of the Act, and he did then require the respondent to furnish a sample of breath for analysis pursuant to s55(2) of the Act. Further, that a requirement was made for the respondent to accompany a member of the police force to a

police station and that the respondent refused to comply with such requirement to accompany prior to three hours elapsing from being in charge of the motor vehicle. The magistrate also said that she was satisfied that the date and place alleged in the charge were made out.

16. The informant sought to adduce evidence that some four or five days after the offence, the respondent admitted to him that he had been driving the vehicle and a statement was taken from him. Objection was taken by counsel for the respondent, and it was upheld that it was irrelevant to the question of the state of mind of the informant at the relevant time.

17. In her reasons, the magistrate said –

> "As I have indicated, the defendant's subsequent admission as to driving cannot be taken into account here, even though it does confirm Senior Constable Fleming's belief at the time he saw the defendant by the car that the defendant had driven the car previously that morning."

Magistrate's Reasons

18. Ms K. Judd of Counsel, for the appellant, submitted that the reasons of the learned magistrate dismissing the charge are not entirely clear and that some statements made by her were inconsistent.

19. The magistrate's reasons appear to be as follows –

- Having listed the elements of the charge (to which I will refer later) she found as facts that the informant came to the belief that the respondent had offended against s49(1)(b), that he required the respondent to provide a sample of breath for analysis, that he required him to go to the police station and the respondent refused both requests and "to comply with such requirement to accompany prior to three hours elapsing from being in charge of a motor vehicle."

- She stated that the issue was –

"Whether or not the informant believed on reasonable grounds that the defendant was in charge of the vehicle while under the influence of intoxicating liquor".

- It was the informant's belief at the time he made the requirement which is relevant.

[Hence a later admission by the respondent that he was the driver was irrelevant.]

- The Court needs to be satisfied beyond reasonable doubt that the respondent was in charge of the vehicle at the time the informant required him to furnish a sample of breath.

[Two observations have to be made –
(a) When stating the elements of the offence earlier, this was not an element stated by the magistrate;

(b) She did not state the reasons for that conclusion, but said that having considered the submissions, the legislation and the authorities, that was her conclusion.]

- Further, she made an additional observation in support of that conclusion that if the respondent had given a sample and had breached s49(1)(b) on the basis that he was in charge of the vehicle, the police would have to prove beyond reasonable doubt that he had been in charge pursuant to s48(1)(b) and the magistrate observed that she could not accept that Parliament intended anything less in relation to a charge laid under s49(1)(e).

[This reasoning is difficult to follow and is fallacious. What has to be proven on one charge does not mean the same in respect to another charge.]

- Turning to the factors which grounded the informant's belief; first the evidence given by the police of the report over the radio that the respondent was driving was hearsay and secondly, the heat of the engine and exhaust of the car did not satisfy her beyond reasonable doubt that the defendant "had <u>driven</u> the car in the three hours prior to being spoken to by the police".

(Emphasis added).

- That the conduct of the respondent, namely, his demeanour, dropping keys, kicking

them under the car when he saw the police car go past, his false answers together with his position at the driver's door with keys in his hands, are all factors which are highly suspicious.

- The decisions of the Supreme Court concerning the interpretation of s48(1)(b) have restricted the definition of "in charge".

[I interpolate to set out s48(1)(b) which provides –

"(1) For the purposes of this Part—
(a) ... (b) A person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for belief that that person intends to start or drive the motor vehicle."]

- The magistrate concluded that having read two cases, "to satisfy the Court that there are reasonable grounds for the informant's belief that the defendant intended to start or drive the motor vehicle, the police must establish that, at the time Senior Constables Fleming and Keegan observed the defendant at the Magna sedan, he intended to and was about to start or drive that vehicle."

(Emphasis added).

- Having considered the evidence of what the police observed the magistrate said - "I cannot be satisfied that there were reasonable grounds for a belief that he had a present intention to start or drive that motor vehicle. That being the case, not all of the elements of the charge have been made out and accordingly, the charge before the Court will be dismissed." (Emphasis added).

20. Earlier in her reasons, the magistrate stated the elements of the charge as follows -

> "The elements of the charge are that the defendant was at - at Kangaroo Flat when the offence was committed, that it was on 24 June 2000, that Senior Constable Fleming believed on reasonable grounds that the defendant had offended against s49(1)(b) of the Act. Next, that the defendant was further required to furnish a sample of breath for analysis, pursuant to s55(2) of the Act, next that - for that purpose a requirement was made to him to accompany Senior Constable Fleming to a police station and finally, that the defendant refused to comply with the requirement to accompany prior to three hours elapsing from being in charge of a vehicle."

21. In her later reasons, the magistrate seems to have added two additional elements, namely, proof beyond reasonable doubt that the respondent was in charge of the vehicle at the time the informant required him to furnish a sample of breath for analysis, and that to satisfy the Court that there were reasonable grounds for the belief, it must be established that the defendant intended to and was about to start or drive the vehicle by reason of s48(1)(b) of the Act at the time the request was made.

22. The magistrate appears to have concluded that the Court had to be satisfied beyond reasonable doubt that the respondent was in charge of the vehicle at the time the informant required him to furnish a sample of breath, but at the end of her reasons, she stated she was not satisfied that the informant had reasonable grounds for a belief that the respondent had a present intention to start or drive his motor vehicle. The first requirement deals with a factual matter whereas the second relates to a state of belief and the reasonableness of it.

23. However, it would appear in her concluding remarks that the magistrate was of the opinion that there had to be reasonable grounds for the informant's belief that the respondent, at the time when the request was made, was in charge of the vehicle within the meaning of s48(1)(b). The magistrate was of the opinion that the evidence had to establish that at the time of the request, the respondent had a present intention to start or drive his vehicle.

24. It is clear that the outcome of this appeal depends upon what the elements of the charge were, which the informant had to prove beyond reasonable doubt.

Grounds of Appeal

25. In accordance with the Rules in Part 3 of Order 58 of the Rules of Court, application was

made to the Master for an order pursuant to Rule 58.09. It was necessary for the appellant to show the Master that he had a *prima facie* case for relief. Master Wheeler was so satisfied on 4 March 2002. He made the usual orders and stated the questions of law as follows –

> "(i) Did the learned magistrate err in holding that it was necessary in order to establish the commission of an offence pursuant to s49(1)(e) of the *Road Safety Act* 1986, for the prosecution to prove beyond reasonable doubt that the defendant was in charge of or driving a motor vehicle –
> (a) at the time which the defendant was questioned; or
> (b) within three hours of the request being made to undergo a breath test?
>
> (ii) Having found as a fact that:
> (a) a member of the police force who reasonably believed that the driver had offended against s49(1)
> (b) of the *Road Safety Act* 1986;
> (b) requested that driver to accompany him to a police station where a sample of his breath is to be furnished; and
> (c) the driver when so requested refused to do so;
> did the learned magistrate err in failing to record a conviction?

26. Mr Alger of Counsel, who appeared for the respondent, submitted that ground (i) expressed the question of law too widely, in that the issue at trial was whether the defendant was in charge of the motor vehicle as distinct to driving a motor vehicle and accordingly, to ask the question whether the informant had to prove "that the defendant was in charge of or driving a motor vehicle" was contrary to the way the case had been conducted.

27. He drew attention to the form of the charge, where it is noted that the belief formed by the informant was that the defendant had offended "against s49(1)(b) of the *Road Safety Act* 1986" but concluded by referring to a three hour period "elapsing from being in charge of a motor vehicle". It is clear that the evidence was presented by the police witnesses to the effect that, what was being put against the respondent was that he was in charge of the vehicle. He was asked questions at the scene, according to the evidence, as to whether he was in charge of the vehicle. It is also apparent from the reasons given by the magistrate, that the focus was on whether he was in charge of the vehicle at the relevant time.

28. It is unnecessary, in my view, to amend the ground because the reasons will make clear what the prosecution must prove and whether it is confined to the issue of the respondent being in charge of or whether it also covers driving, a motor vehicle.

The Informant's Proof

29. At the outset, it is necessary to consider the provisions of the Act and determine what the informant had to prove beyond reasonable doubt in order to establish the charge.

30. The first question to consider is the conduct which constitutes the charge.

31. The charge is created by s49(1)(e).

32. I have already set out the paragraph and it is noted that it is a refusal to comply with a requirement made under, *inter alia*, s55(2) of the Act.

33. It is noted that it is the refusal to comply with any one of the requirements set out in that sub-section. There are two requirements, namely, furnishing a sample of breath and accompanying the member of the force to a place where the sample is to be taken.

34. It is clear from s55(2) that the statutory right to require the suspect to do something which must be complied with, depends upon establishing a state of belief.

35. In my opinion, the informant has to prove beyond reasonable doubt each of the following elements –

> "(i) That a member of the police force reasonably believed that the defendant had offended against s.49(1)(b) of the Act namely that the member reasonably believed that the respondent had driven or was in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in the blood;

> (ii) (a) that the member of the force required the respondent to furnish a sample of breath for analysis by a breath analysing instrument;
>
> OR
> (b) that the member of the force required the respondent to furnish a sample of breath for analysis by a breath analysing instrument and required the defendant to accompany the member to a police station for that purpose, and required him to remain there until he had furnished a sample of breath and had been given the necessary certificate under the legislation, OR until three hours after driving being the occupier or being in charge of the motor vehicle, whichever is sooner
> (iii) that the respondent refused the request."

36. I note that if the breath analysing machine was at the place where the request to furnish a sample was made, the refusal would be complete and the offence made out, even though the suspect driver was not requested to go to a police station.

37. The evidence of refusal was that the respondent was requested to accompany the member to a police station and he refused.

38. The case was conducted on the basis that the respondent was in charge of the motor vehicle.

39. State of belief is a state of mind and the only person who can provide that evidence is the particular member of the force who formed the belief. He would have to give evidence not only of his state of belief just prior to making a request, but he would also have to state the facts upon which he relied to ground that belief. It would be necessary for the prosecution to persuade the tribunal of fact, namely, the magistrate, that his state of belief was reasonable, taking into account all the circumstances.

40. In considering the elements of proof, there are two sub-sections in Part 5 of the Act, which is the part concerned with offences involving alcohol, which must be considered. First, s48(1)(b), which I have set out above and which apparently influenced the magistrate in reaching her conclusions.

41. The paragraph defines in a restrictive way what is meant by being "in charge of a motor vehicle". It applies in the present tense and the evidence would have to establish at the point of apprehension whether a person was in charge of a motor vehicle. He would not be in charge of a motor vehicle unless he was attempting to start or drive the motor vehicle, or there were reasonable grounds for so concluding. This paragraph sits uncomfortably with s55(2) because the belief that is formed by the member of the force is that the suspect has committed an offence in the past.

42. In addition to this difficulty, there is s55(6), which provides –

> "(6) A person is not obliged to furnish a sample of breath under this section if more than three hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle."

43. In considering that sub-section, I agree with Mr Alger that the reference to being "an occupant of" is irrelevant because that refers to a situation where there has been an accident and there is some doubt about who was the driver. See s53(1)(d). That is not this case.

44. Nevertheless, that sub-section makes it clear that it would be a defence to a charge under s49(1)(e) that the refusal to comply with the requirement was because the suspect was not obliged to furnish a sample of breath, because he had not driven or was in charge of a motor vehicle within the three hour period up to the time of the request.

45. In my opinion, it is not part of the informant's proof that the suspect driver had in fact driven or was in charge of the motor vehicle within the three hour period. It is a defence that would have to be properly raised by the defendant by adducing evidence to support the fact that he had not driven or was not in charge of a motor vehicle within the three hour period.

46. The question is, whether the prosecution has to establish that at the time when the request was made by the member of the force, the member had reasonable grounds for the belief that the

suspect intended to start or drive his motor vehicle within the meaning of s48(1)(b) of the Act.

47. With respect to the first element of proof, what does the member of the force have to believe? The answer is that he has to believe that a person has offended against s49(1)(a) or (b).

48. Belief is something more than suspicion. The belief is formed by the member based on the facts known to him at the time. Some of the facts may be hearsay. But they are facts upon which he relied and upon which he is entitled to take into account in forming his belief. The facts need not be established to the satisfaction of the member beyond reasonable doubt. Having ascertained the facts, he then forms his belief.

49. What is involved in forming a belief was discussed by the High Court in *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.

50. The High Court was concerned with the issue of a search warrant and the relevant statutory provision required a justice to be satisfied that there "are reasonable grounds for suspecting". At p112, the Court said –

> "When a statute prescribes that there must be `reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

51. On p113, their Honours went on to say –

> "It follows that the issuing justice needs to be satisfied that there are sufficient grounds reasonably to induce that state of mind."

52. In the present context, that means inducing the state of mind that a person has offended against s49(1)(b). That is, that there are reasonable grounds for inducing that state of belief.

53. At p115, the Court emphasised that there was a difference between "suspicion" and "belief". They are different states of mind.

54. More importantly, at p116, the Court said –

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture." (Emphasis added).

55. In *Walsh v Loughnan* [1991] VicRp 75; [1991] 2 VR 351, Vincent J considered a provision of the *Crimes Act* 1958 and considered the phrase "a member of the police force believes on reasonable grounds that the person has committed the offence". His Honour, at p356, after emphasising that it was the member of the force who must hold the belief on reasonable grounds, went on to say –

> "No such belief need be held by the magistrate who deals with the application. The magistrate must be satisfied in this context only that reasonable grounds exist. In dealing with this question, it is important that it be kept in mind that there is no requirement that an applicant establish that a prima facie case exists or even that there be evidence or information available which indicates the suspect is probably guilty."

56. His Honour referred to what the High Court said in *George v Rockett*, *supra*.

57. His Honour, at p357, said –

> "The questions to be determined by the learned magistrate were not to be resolved by reference to the rules of evidence or by the application of a test related to the balance of probabilities. In the process of investigation it is by no means uncommon for information to be obtained which would not be admissible in a court of law, or for well-founded suspicions and beliefs to be developed on the basis of a variety of pieces and types of information, including evidence of consistency or inconsistency of

conduct, which could not be advanced as proof of the facts outlined or suspected to exist."

58. Whilst accepting that the High Court was dealing with the issue of a search warrant and Vincent J was dealing with an application for an order that a suspect be directed to give a sample of blood for DNA, nevertheless, the reasoning of the High Court and that of Vincent J are persuasive in considering what has to be established in the present matter.

59. In the present matter, the member of the force must form the belief that the person has offended against s49(1)(a) or (b). That is, the person has committed the offence. He does not have to form that belief beyond reasonable doubt. But his belief must be reasonably based.

60. Given the facts known to him, was it reasonable for him to believe that the person had offended against s49(1)(a) or (b)?

61. In the present case, as the opening words of the charge show, the belief was that the respondent had offended against s49(1)(b).

62. This paragraph creates two different offences. That is, driving the motor vehicle OR being in charge of the motor vehicle.

63. Whilst it would be open to the member of the force to form the belief that the offender had driven the car and was in charge so that the belief was in respect to two discrete offences, I am satisfied that when the charge was heard before the learned magistrate, it was heard and determined on the basis that the belief was that the respondent had offended by being in charge of the motor vehicle.

64. This is apparent, as I have already stated, from the concluding words of the charge, the evidence given by the informant and the supporting witness, and also the magistrate's reasons.

65. I agree with Mr Alger's submission that it would be unfair to permit the informant on the appeal to proceed on a different basis. The respondent came to court ready to meet a case on a certain basis, the wording of the charge led to the belief that he was charged in relation to "being in charge of a motor vehicle" and the case clearly was presented on that basis.

66. The final matter constituting the belief is that the member reasonably believed at the relevant time, that is, at the driving or being in charge stage, that the offender had more than the prescribed concentration of alcohol present in his blood.

67. The belief has to be reasonable. Unless it is proven beyond reasonable doubt that he held the belief and that it was reasonable, the charge must fail.

68. But that is different to the question of whether or not the member of the force, in forming the belief, had to be satisfied beyond reasonable doubt. In my opinion, he did not. He was entitled to rely upon any information that was available to him, even though it was hearsay and may not be admissible in a court of law, as long as he formed the belief and it was reasonable on the information available.

69. The informant gave evidence that he believed the respondent was in charge of the motor vehicle at or within three hours prior to the requirement being made to accompany him to the police station. That fact of being in charge did not have to be proven beyond reasonable doubt before the informant could form a belief.

70. The learned magistrate was wrong in concluding that the prosecution had to prove beyond reasonable doubt that the respondent was in charge of a motor vehicle at the time when the request was made.

71. I accept that there is a time element in relation to the charge. This must be so by reason of s55(6). In other words, the belief that an offence had been committed had to be based upon facts which had occurred within that three hour period.

72. But in my view, he did not have to prove beyond reasonable doubt that the respondent was in charge of the vehicle at the time he required him to furnish the sample of breath, nor did he have to prove beyond reasonable doubt that he had reasonable grounds for belief that he had a present intention to start or drive the motor vehicle.

73. The belief that was formed by the informant was that he believed that the respondent had breached s49(1)(b), in that he had been in charge of a motor vehicle at a time when the prescribed concentration of alcohol in his blood had been exceeded. This fact had to occur within a period of no greater than three hours prior to the requirement being made that he furnish a sample of his breath for analysis.

74. The informant presented the case on the basis that the respondent was in charge of his motor vehicle. Ms Judd of Counsel, for the appellant, submitted that if one was to drive a motor vehicle, it must follow that the person is in charge of the motor vehicle. As a matter of ordinary language, I agree. But the legislature has drawn a clear distinction between driving and being in charge. Section 48(1)(b) makes that clear. It is also clear that s48(1)(b) was passed to cover a particular situation, namely, proof that at the relevant time, the person was about to start or drive the motor vehicle. See *Gillard v Wenborn*, unreported decision of Marks J delivered 27 July 1988, and *Woods v Gamble* [1991] 13 MVR 153.

75. But nevertheless, if it is established that a person was driving a car at a particular time, it must follow that at some point in time prior to commencing to drive, that person was in charge of the vehicle.

76. In my opinion, it is unnecessary for the informant to prove that at the time when he made the request, the person was guilty of the offence of being in charge of the vehicle within the meaning of s49(1)(b). All that he had to be satisfied of was, that he had a belief, that within a period of no greater than three hours prior to making the request to furnish a sample, the person was in charge of the vehicle.

77. In the present case, there was ample evidence pointing to the respondent driving the vehicle within a relatively short period prior to him being questioned by the informant. The informant had other information which was used to form his belief.

78. But was he in charge of the vehicle within the three hour period?

79. In my opinion, the magistrate misdirected herself and was wrong in concluding that it was necessary to prove either (1) that at the time the request was made, the respondent was in charge of the motor vehicle within the meaning of s49(1)(b) and (2) that the informant had reasonable grounds that at the time when he made the request, he was in charge of the vehicle.

80. What the informant had to prove was that he had a belief that at some time prior to the request, no greater than three hours prior to the request to furnish a sample of breath, the respondent was in charge of a motor vehicle whilst more than the required concentration of alcohol was present in his blood contrary to s49(1)(b).

81. If the informant formed that belief, was it reasonable in the circumstances for him to have formed the belief?

82. In my opinion, the learned magistrate did not address that question. She focused and concentrated at a point in time just prior to the request being made and following s49(1)(b), she was of the opinion that at that point in time, he was not in charge of the vehicle. But it was his state of belief at that time which was relevant. The state of belief could be based on an event which had occurred earlier.

83. The question was whether the informant, on reasonable grounds, believed at the time he made the request, that the respondent had been in charge of the motor vehicle, at some point prior to the request, with more than the prescribed concentration of alcohol present in his blood, but no greater than three hours prior to being requested to furnish a sample.

Outcome of Appeal

84. It is clear that the magistrate misdirected herself on the law. She failed to properly address the real issue. Some of her findings of fact were not relevant to the charge.

85. In answer to question of law (i), in my opinion, the learned magistrate was wrong in holding that it was necessary for the prosecution to prove beyond reasonable doubt that the defendant was in charge of a motor vehicle at the time when he was questioned, or within three hours of the request being made to undergo the breath test.

86. With respect to question of law (ii), that if she had found the facts stated, she should have found the charge proven, but on a proper reading of her reasons, in my opinion, the learned magistrate did not eventually hold that a member of the force reasonably believed that the driver had offended against s49(1)(b) of the Act.

87. The question is, what should be done?

88. Clearly, the appeal must be allowed.

89. Ms Judd, on behalf of the appellant, submitted that the Court should consider the facts which, she submitted, established beyond reasonable doubt that the charge had been established, and make such a finding and direct that the magistrate conclude the matter on the basis of such a finding.

90. It was submitted that an order should be made remitting the matter to the Magistrates' Court to decide the question of penalty.

91. In my opinion, there was ample evidence to conclude that the respondent was the driver of the motor vehicle and, further, that he had recently driven the motor vehicle to the place where he was questioned by the informant. In my opinion, the formation of that belief by the informant was reasonable.

92. The question is, whether the belief that he was in charge of the vehicle at any time within the three hour period prior to the request to provide a sample and the refusal, was supported by any evidence.

93. I have closely considered the transcript of the evidence given. The prosecutor sought to lead evidence of the belief of the informant with respect to this question, but counsel for the respondent objected to the evidence as being irrelevant and hearsay.

94. The learned magistrate did rule that the evidence was relevant and admissible but due to the continual objection by counsel for the defence, the evidence given is somewhat disjointed.

95. The informant did give evidence that he believed that at some point in time within the three hour period, the respondent was in charge of the vehicle. He referred to evidence of what he had been told by another member of the force that he had driven from his home, and information he had received over the radio. He also had evidence of the address of the respondent and other evidence to suggest that the respondent had been drinking at a hotel approximately 13 kilometres from where he was first questioned. Further, there was the evidence of the state of dress of the respondent and his state of insobriety which suggest that he had not been indulging in a long period of driving on that night.

96. In my opinion, there was sufficient evidence to draw the conclusion that the respondent had been in charge of the vehicle within the three hour period prior to the request to provide a sample was made. In my view, the formation of the belief by the informant in the circumstances was reasonable.

97. In re-examination, the informant was asked the question as to the basis upon which he concluded that he was in charge of the vehicle. He responded by saying, "At Bayne Street because to me he's got to be in charge before he can be driving the car. And again in Station Street."

98. Station Street was where the vehicle was located when the respondent was questioned. Bayne Street is where he resided.

99. The learned magistrate evidently concluded that the evidence given by the police of the report over the radio that the respondent was driving, was hearsay. But in my opinion, the informant was quite entitled to take that into account in forming his belief.

100. In addition, the respondent did not give evidence. The belief was formed by the informant on the basis that the respondent had driven from his home shortly prior to arriving in Station Street. Prior to the commencement of his driving, he was in charge of the vehicle. If the respondent wished to contest the factual matters forming the basis of the belief, then it was open to him to give evidence that the factual matters upon which the informant relied were incorrect. His failure to give evidence would entitle the learned magistrate to more readily accept the evidence of the informant and to exclude any hypothesis consistent with innocence.

101. In *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23, Mason CJ, Deane and Dawson JJ, at CLR p227, said –

> "There has never really been doubt that when a party to litigation fails to accept an opportunity to place before the Court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the Court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular in a criminal trial hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused." (Emphasis added).

102. If the respondent had not been in charge of his motor vehicle within a period of three hours prior to the request being made to furnish a sample, then that factual information is within his knowledge and he could have given evidence and maybe called other evidence to establish that the ground of belief of the informant was non-existent. He failed to do so. He did not seek to raise a defence pursuant to s55(6) of the Act.

103. In my opinion, the overall evidence leads to the conclusion beyond reasonable doubt that the informant had formed the necessary belief and that the basis for his belief was reasonable.

104. In my opinion, the magistrate should have found the charge was proven, and I propose to remit the matter to the Magistrates' Court sitting at Bendigo to further deal with the charge in accordance with the law.

105. Whether the magistrate should have concluded that the admissions made five days later, that the respondent was in fact driving and therefore at some point in charge, were inadmissible, I leave for another day. The ruling was not the subject of a question of law. Arguably, the evidence was admissible to confirm a fact which the informant relied upon to form his opinion and to rebut any suggestion that his belief, formed at the relevant time, was not reasonable.

106. Subject to any submissions by counsel, I propose to make the following orders -

> (i) That the appeal against the order made by the Magistrates' Court of Victoria sitting at Bendigo on 18 January 2002 whereby a charge brought against Glenn William Mitchell under s.49(1)(e) of the *Road Safety Act* 1986 was dismissed, be allowed;
>
> (ii) that the order be set aside;
>
> (iii) that the proceeding against Glenn William Mitchell be remitted to the Magistrates' Court of Victoria sitting at Bendigo to be further dealt with in accordance with the law and in accordance with the reasons for judgment delivered in the appeal;
>
> (iv) that the respondent pay the appellant's costs of the appeal including any reserved costs.

APPEARANCES: For the Appellant DPP: Ms K Judd, counsel. Office of Public Prosecutions. For the Respondent Mitchell: Mr I Alger, counsel.