37/06; [2006] VSC 357

SUPREME COURT OF VICTORIA

DPP v COLBEY

Redlich J

2 May, 29 September 2006 — 166 A Crim R 85

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUESTED TO UNDERGO BREATH TEST – BREATH ANALYSING INSTRUMENT UNABLE TO MEASURE DRIVER'S CONCENTRATION OF BLOOD/ALCOHOL – DRIVER REQUESTED BY POLICE OFFICER TO ALLOW A MEDICAL PRACTITIONER TO TAKE A SAMPLE OF BLOOD – LATER A DOCTOR CAME TO POLICE STATION AND TOOK A SAMPLE OF BLOOD – BLOOD PLACED IN THREE SEPARATE CONTAINERS ONE OF WHICH WAS HANDED TO DRIVER – DOCTOR TOOK OTHER TWO CONTAINERS TO HOSPITAL AND PLACED THEM IN A BLOOD SAFE – DOCTOR REQUIRED BY REGULATIONS TO PROVIDE SAMPLE TO POLICE INFORMANT – NO SAMPLE PROVIDED TO POLICE OFFICER – SAMPLE LATER COLLECTED FROM BLOOD SAFE AND CONVEYED TO POLICE FORENSIC SERVICES CENTRE – LATER ANALYSIS REVEALED BAC OF 0.087% – DRIVER SUBSEQUENTLY CHARGED WITH TWO OFFENCES – AT HEARING SUBMITTED THAT THE STATUTORY REQUIREMENT TO DELIVER A SAMPLE TO THE POLICE OFFICER WAS MANDATORY – MEANING OF "MANDATORY" – FINDING BY MAGISTRATE THAT THE CONTINUITY OF THE SAMPLE LEFT THE COURT WITH A REASONABLE DOUBT AS TO ITS INTEGRITY – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER COMPLIANCE WITH THE STATUTORY REQUIREMENT AN ESSENTIAL ELEMENT OF THE CHARGES: *ROAD SAFETY ACT* 1986, SS49(1)(b), (g), 55(9B).

C. was intercepted driving his motor vehicle and later at a police station asked to undergo a breath test. As the breath analysing instrument was unable to measure C.s blood/alcohol concentration, the police informant required C. to allow a medical practitioner to take a sample of his blood. When this was done, the medical practitioner handed one container of the sample to C. and retained the other two which she later placed in a blood safe at the hospital. By virtue of s55(9B) of the *Road Safety Act* 1986 ('Act') the medical practitioner was required to deliver a part of the blood sample taken to the police informant; however, this was not done. Some time later the police informant collected one container of the sample from the blood safe at the hospital and conveyed it to Victoria Police Forensic Services Centre where an analysis revealed a BAC of 0.087%. C. was later charged with offences against s49(1)(b) and (g) of the Act. At the hearing of the charges, the magistrate found that the prosecution had failed to establish to his satisfaction that the sample of blood when analysed was in the same condition it was in when it was taken from C. That is, the magistrate was left with a reasonable doubt as to its integrity. Accordingly, the charges were dismissed. Upon appeal—

HELD: Appeal dismissed.

1. As the continuity of the part of the sample which was analysed was in issue, the magistrate was not in error in refusing to act upon the evidence of the analysis of the blood sample and in refusing to give effect to the evidence of the analyst.

Obiter.

2. The question was whether compliance with s55(9B) of the Act was an essential element of the charges under s49(1)(b) and (g) of the Act or were so fundamental that they must be established if the offences are to be proved. The central issue was whether s55(9B) is a 'mandatory' or 'directory' provision.

3. A test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. In the present case, the issue was not whether the actions of the police and prosecuting authorities were 'void' or 'invalid' as a result of the doctor's failure to comply with s55(9B). Rather, the questions raised concerned the significance of that failure to the charges brought against C.

***Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41, applied.**

4. In relation to the charge under s49(1)(g) it is clear from the terms of that section that compliance with the relevant statutory procedure for the taking of a blood sample is a necessary element of the offence. The requirement that a part of the sample be delivered to the person who requested the taking of the sample is an essential precondition or element of the offence created by s49(1)(g). The place of s55(9B) within the statutory regime shows that strict compliance is required.

The language employed in s55(9B), and in particular the use of the term "must", strongly supports this conclusion. The importance of the delivery of a part of the blood sample to the person who requested the sample be taken, and who assumed responsibility for maintenance of the integrity of the part of the sample to be analysed, was demonstrated clearly by the circumstances of this case. The evidentiary difficulties which arose in this case were a direct consequence of the failure to comply with the procedure in s55(9B). Compliance with the requirement for the delivery of the blood sample is an important statutory protection for the accused in the prosecution of an offence under s49(1)(g).

5. In relation to a charge under s49(1)(b) different considerations apply. In *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, the Court of Appeal held that compliance with s55 is not an element of the offence enacted by s49(1)(b). There is no explicit requirement in that section for compliance with a statutory procedure as, unlike s49(1)(g), the offence under s49(1)(b) does not require that the procedure for the taking of and delivery of the sample be "in accordance with s55".

REDLICH J:

1. Pursuant to s92(1) of the *Magistrates' Court Act* 1989, the Director of Public Prosecutions appeals against the decision of the Magistrates' Court at Korumburra made on 9 September 2005 dismissing charges laid pursuant to s49(1)(b) and 49(1)(g) of the *Road Safety Act* 1986 ("the Act"). The appeal concerns part of the procedure, pursuant to the provisions of the Act, for the taking of a sample of blood from a driver for the purpose of determining the concentration of alcohol in the driver's blood. Section 55(9B) requires the medical practitioner who takes the sample to deliver a part of that sample to the person from whom it is taken and another part of that sample to the person who requested that it be taken. The principal questions raised in this appeal are: (i) whether a failure to deliver a part of the sample to the person who requested it be taken is fatal to prosecutions under ss49(1)(b) and 49(1)(g) of the Act and (ii) what consequences follow when the continuity of possession of that part of the sample has been compromised.

Summary of facts

2. The proceedings arose from the following facts. On 23 June 2004 a police officer, Timothy Gleeson ('the informant'), intercepted a motor vehicle which was being driven by the respondent, Mark Colbey, along the South Gippsland Highway. At the informant's request, the respondent underwent a Preliminary Breath Test which indicated the presence of alcohol in his blood. The respondent then accompanied the informant to the Foster Police Station, where the informant required him to undergo a breath test pursuant to s55A of the Act.

3. By reason of some malfunction, the breath analysing instrument was not able to measure the concentration of alcohol in the respondent's blood. The informant then required the respondent to allow a medical practitioner to take a sample of his blood for analysis pursuant to s55(9A) of the Act. Dr Maria Sippen came to the police station and took a sample of blood from the respondent. The blood was placed in three separate containers, one of which was handed to the respondent. Dr Sippen then signed a Certificate of the Taking of a Blood Sample, took the other two containers of blood with her to the South Gippsland Hospital, and placed them in the blood safe. Dr Sippen did not provide the person who requested the taking of the sample, or any other member of the police force, with any part of the sample of the respondent's blood.

4. On 3 August 2004, Senior Constable Smith collected one container of the sample of the respondent's blood from the blood safe at South Gippsland Hospital and delivered it to Foster Police Station. On 4 August 2004, the sample was taken to Wonthaggi Police Station, and on 6 August 2004 it was taken to the Victoria Police Forensic Services Centre for analysis.

5. On 9 August 2004, Catherine Davies of the Victoria Police Forensic Services Centre analysed the blood sample. Ms Davies' analysis revealed a blood alcohol reading of 0.087%. On 3 November 2004 the respondent attended at Foster Police Station where he was given a copy of a statement by Ms Davies which advised that an analysis of his blood had revealed a blood alcohol concentration of 0.087%. The respondent was charged with offences under ss49(1)(b) and 49(1)(g) of the Act.

Statutory provisions

6. Before examining the course of the proceedings I should refer to a number of provisions in

the Act which are relevant to the resolution of the appeal. The offences with which the respondent was charged are defined in s49 in the following terms:

> "**49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> ...
> (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 ...
>
> (g) has had a sample of blood taken from him or her in accordance with section 55, 55B, 55E or 56 within 3 hours after driving or being in charge of a motor vehicle and—
> (i) the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of section 57 and the analyst has found that at the time of analysis the prescribed concentration of alcohol or more than the prescribed concentration of alcohol was present in that sample; and
> (ii) the concentration of alcohol found by the analyst to be present in that sample was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle."

7. In this case, the blood sample was taken from the respondent under s55(9A)(b), which allows for a sample to be taken where a breath analysing instrument is incapable of accurately measuring a driver's blood alcohol content.

8. The central provision for the purposes of this appeal is s55(9B), which provides:

> "The registered medical practitioner or approved health professional who takes a sample of blood under sub-section (9A) must deliver a part of the sample to the person who required it to be taken and another part to the person from whom it was taken."

9. Section 57 contains evidentiary provisions regarding blood tests carried out under the Act, and relevantly states:

> "(2) If the question whether any person was or was not at any time under the influence of intoxicating liquor or any other drug or if the question as to the presence of alcohol or any other drug or the concentration of alcohol in the blood of any person at any time or if a finding on the analysis of a blood sample is relevant—...
> (c) on a hearing for an offence against section 49(1) of this Act; ...
> then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking, after that person drove or was in charge of a motor vehicle, of a sample of blood from that person by a registered medical practitioner or an approved health professional, of the analysis of that sample of blood by a properly qualified analyst within twelve months after it was taken, of the presence of alcohol or any other drug and, if alcohol is present, of the concentration of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis and, if a drug is present, evidence may be given by a properly qualified expert of the usual effect of that drug on behaviour when consumed or used (including its effect on a person's ability to drive properly).
>
> (3) A certificate containing the prescribed particulars purporting to be signed by a registered medical practitioner or an approved health professional is admissible in evidence in any proceedings referred to in sub-section (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.
>
> (4) A certificate containing the prescribed particulars purporting to be signed by an approved analyst as to the concentration of alcohol expressed in grams per 100 millilitres of blood found in any sample of blood analysed by the analyst is admissible in evidence in any proceedings referred to in sub-section (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it. ...
>
> (5) A certificate given under this section must not be tendered in evidence at a trial or hearing referred to in sub-section (2)(a), (ab), (b) or (c) without the consent of the accused unless a copy of the certificate is proved to have been served on the accused more than 10 days before the day on which the certificate is tendered in evidence. ...
>
> (7) An accused who has been served with a copy of a certificate given under this section may, with the leave of the court and not otherwise, require the person who has given the certificate or any other person employed, or engaged to provide services at, the place at which the sample of blood was taken to attend at all subsequent proceedings for cross-examination and that person must attend accordingly.

(7A) The court must not grant leave under sub-section (7) unless it is satisfied—
(a) that the informant has been given at least 7 day's notice of the hearing of the application for leave and has been given an opportunity to make a submission to the court; and
(b) that—
(i) there is a reasonable possibility that the blood referred to in a certificate given by an analyst under sub-section (4) was not that of the accused; or
(ii) there is a reasonable possibility that the blood referred to in a certificate given by a registered medical practitioner or an approved health professional had become contaminated in such a way that the blood alcohol concentration found on analysis was higher than it would have been had the blood not been contaminated in that way; or
(iia) there is a reasonable possibility that the blood referred to in a certificate given by a registered medical practitioner or an approved health professional had become contaminated in such a way that a drug found on analysis would not have been found had the blood not been contaminated in that way; or
(iii) there is a reasonable possibility that the sample was not taken in accordance with the Code of Practice for Taking Blood Samples from Road Accident Victims; or
(iiia) there is a reasonable possibility that the sample was not taken within 3 hours after the person who provided the sample drove or was in charge of the vehicle; or
(iv) for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain relevant facts. ...".

10. The 'prescribed particulars' referred to in s57(3) are set out in r206 of the *Road Safety (General) Regulations* 1999 ('the Regulations'), which states (in part):

"**206. Certificate under section 57(3)**
A certificate under section 57(3) of the Act must contain the following particulars—
(a) a statement by the registered medical practitioner or approved health professional that the requirements of these Regulations for the taking of blood samples have been complied with."

11. One of the requirements in the Regulations is that a medical practitioner who takes a sample of blood under s55 must provide part of that sample to 'a member of the police force' (r205(2)).[1] The certificate which was signed by Dr Sippen after she had taken a sample of the respondent's blood contained a statement to the effect that the regulations relating to the collection of the sample had been complied with. Whatever the extent of her obligation, that statement was not in all respects an accurate one as the sample was not provided to the person who requested the sample be taken or to another member of the police force.

Proceedings in the Magistrates' Court

12. The respondent's trial on the two charges was heard in the Korumburra Magistrates' Court on 9 September 2005. The prosecution led evidence from the informant, during which it tendered in evidence the Certificate of the Taking of a Blood Sample which had been signed by Dr Sippen on the date of the alleged offences. The prosecution also called as a witness Ms Catherine Davies, who had carried out the analysis of the respondent's blood. As Ms Davies was at that time not an 'approved analyst' within the meaning of s57(1)(b) of the Act, the prosecution could not rely simply on her certificate as *prima facie* proof of the concentration of alcohol in the respondent's blood pursuant to s57(4). Rather, it was accepted by the parties that Ms Davies could give evidence as a 'properly qualified analyst' pursuant to s57(2).

13. At the conclusion of the evidence before the Magistrate the defence argued that there had been no compliance with s55(9B). The substance of the submission was that the statutory requirement was that the medical practitioner "must" deliver a part of the blood sample to the police officer who requested it. This, it was said, was mandatory. It was implicitly contended in the submissions made by defence counsel before the learned Magistrate that the charges under both ss49(1)(b) and 49(1)(g) must fail for want of compliance with s55(9B).

14. The following exchange occurred between the learned Magistrate and the prosecutor.

"PROSECUTOR: ... although the blood sample may not have been in actual possession of the police informant, Senior Constable Gleeson, the fact that the doctor has taken the sample and locked it in the safe for the purpose of a police member to collect it, may be interpreted that it is in the possession, although not the actual possession, of the police.
HIS HONOUR: Where is the evidence that the doctor took the sample for the purpose of retaining it for a member to collect?

> PROSECUTOR: There is no evidence of that, sir. Well, apart from the fact that the doctor put it in the safe and it was obtained from the safe by a police member. The police member, in his statement, says that he personally unlocked the safe. The court can infer from that the safe at the hospital is a safe where police members have access...
> HIS HONOUR: Well, it's a safe to which the member who collected the sample had access on that occasion.
> PROSECUTOR: Yes sir.
> HIS HONOUR: There is, of course, no evidence about the safe. There is no evidence about who else might have had access.
> PROSECUTOR: No, there's not sir. I will concede that.
> HIS HONOUR: This is a critical piece of evidence. It is this sample which is, in fact, analysed.
> PROSECUTOR: That's right, sir.
> HIS HONOUR: And it is this sample that forms the basis of the evidence given by Miss Davies.
> PROSECUTOR: Yes sir.
> HIS HONOUR: The handling of that sample is critical to Mr Colbey's case."

15. The learned Magistrate dismissed the charges against the respondent. After referring to the fact that there was no evidence as to who had access to the hospital safe in which the sample had been stored, his Honour said:

> "This is a quasi criminal prosecution and strict proof is required. The consequences of a finding of guilty for Mr Colbey are serious. It will result in him losing his licence for a period of at least six months. In the circumstances, and having regard to the words of the section, but not solely having regard to the words of the section which include the words 'must deliver a sample to the person who required it to be taken' but also having regard to the evidentiary rules applicable to this case, and in particular, to the fact that the only evidence of ... the concentration of alcohol in Mr Colbey's blood at the time is the sample which is the subject of the evidence in relation to its handling, having regard to all those things I think that it's not appropriate that I accept that the reading of which evidence was given by Miss Davies be accepted into evidence in these proceedings. There were opportunities for some discrepancies to have occurred in relation to that sample. In regard to that notion, the charges against Mr Colbey will be dismissed."

16. It was agreed by the parties to this appeal that the Magistrate dismissed the charges for a combination of reasons. The Magistrate found that the prosecution had failed to establish to his satisfaction that the sample of blood taken from Mr Colbey was, when analysed, in the same condition it was in when it was taken from him. That is to say the question of the continuity of the sample left his Honour with a reasonable doubt as to its integrity. Counsel for the Director, quite properly, did not seek to challenge this aspect of his Honour's decision. He conceded that the appeal must therefore fail as it could not be demonstrated that the learned Magistrate erred in dismissing the charges. However counsel for the Director, with the support of counsel for the respondent, submitted that I should determine the other grounds of appeal as there had been extensive argument directed to them. In deference to the parties' request, I agreed to determine the substantive point raised by those grounds which may be summarised in these terms:

> 2. The learned Magistrate erred in law in holding (if he did so hold) that compliance with s55(9B) of the Act was an essential element of a charges under ss49(1)(b) and 49(1)(g) of the Act.
>
> 3. The learned Magistrate erred in law in holding (if he did so hold) that non-compliance with s55(9B) of the Act was a fatal defect in prosecutions under ss49(1)(b) and 49(1)(g) of the Act.

Submissions

17. It was common ground that s55(9B) was not complied with as no part of the sample was delivered to the person who required it to be taken. Counsel for the Director submitted that compliance was unnecessary in order to sustain a charge under either s49(1)(b) or s49(1)(g). The Director argued that s55(9B) is a facilitative provision, rather than a strict procedural requirement, and characterised the requirement as directory rather than mandatory. It was submitted that Parliament could not have intended that non-compliance "would make void" any sample taken pursuant to s55. Finally it was submitted that even if compliance with s55(9B) was essential to a prosecution under s49(1)(g), a charge under s49(1)(b) could still be proved where there was non-compliance.

18. Counsel for the respondent argued that a failure to comply with s55(9B) is fatal to a prosecution under s49(1)(g), because compliance is an essential element of a charge under this section. He further submitted that the blood sample obtained from the respondent could not be

relied upon to support the charge under s49(1)(b), as the mandatory nature of s55(9B) rendered the blood sample null and void.

Resolution of the appeal

19. The consequences of a failure to comply strictly with statutory requirements for the prosecution of drink driving offences have been the subject of much judicial consideration. Different terminology has been used to describe the nature of those requirements under the *Road Safety Act*, and its predecessor, the *Motor Car Act* 1958. Strict compliance with those requirements has sometimes been described as a pre-requisite to the admissibility evidence,[2] and as a 'pre-condition for a conviction'.[3] Other cases have considered what the 'necessary ingredients' or 'essential elements' of the statutory offences are.[4] The varied consequences of non compliance with a statutory requirement have depended upon the language employed and its significance within the statutory regime. The consequences of a failure to comply with any requirement specified by s55(9B) has not been previously considered. The question is to be answered by considering the nature of that requirement in the context in which it appears.

20. The legislative scheme contemplates that a part of the sample of blood taken from the driver will be subjected to analysis and the result of that analysis will be admissible in evidence as proof of the driver's blood alcohol level in the absence of evidence to the contrary effect. The Act does not in terms specify which part of the sample is to be provided for analysis, but I assume, as this case illustrates, that it is a common procedure for a part of the sample to be given by a police officer to the Victoria Police Forensic Services Centre for analysis. The provisions of the Act and the Regulations to which I have referred contemplate that it is the part of the sample delivered to the person who requested that the sample be taken that is then analysed. It is the result of that analysis which establishes the blood alcohol level of the driver. The integrity of the evidentiary chain concerning that part of the sample thus assumes significance.[5] The scheme of the statute is based upon the implicit assumption that generally no issue will arise as to the integrity of the sample that was given to the person who requested the taking of the sample and who was responsible for its analysis. Where such an issue does arise s57(7A) becomes relevant.

21. The grounds of appeal direct attention to the question of whether the requirements of s55(9B) are elements of the offences with which the respondent was charged or are so fundamental that they must be established if the offence is to be proved.

22. The parties to the appeal cast the central issue in terms of whether s55(9B) is a 'mandatory' or 'directory' provision. This approach may cloud more than it illuminates. In *Project Blue Sky Inc v Australian Broadcasting Authority*,[6] McHugh, Gummow, Kirby and Hayne JJ said of the distinction between mandatory and directory provisions:

> "They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning (*McRae v Coulton* (1986) 7 NSWLR 644 at 661; *Australian Capital Television* (1989) 86 ALR 119 at 147; (1989) 7 ACLC 525; (1989) 17 ALD 658). That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

23. In this context, the issue is not whether the actions of the police and prosecuting authorities were 'void' or 'invalid' as a result of the failure by Dr Sippen to comply with s55(9B). Rather, the questions raised concern the significance of that failure to the charges brought against the respondent under ss49(1)(b) and 49(1)(g) of the Act.

24. The offences created by s49(1)(b) and s49(1)(g) are defined quite differently. The criterion for criminal liability under s49(1)(g) is the result of an analysis of a driver's blood, so long as that analysis has been carried out in accordance with the Act.[7] By contrast, the offence enacted by s49(1)(b) is defined in terms of a driver being in charge of a vehicle with more than the prescribed concentration of alcohol in his or her blood, leaving at large the means by which that offence may be proved.

The charge under s49(1)(g)

25. Considering firstly the charge under s49(1)(g), it is clear from the terms of that section that compliance with the relevant statutory procedure for the taking of a blood sample is a necessary element of the offence.[8] The section states that a person will be guilty of an offence where he or she "has had a sample of blood taken *in accordance with* section 55...." Those words were considered by Kellam J in *McPherson v County Court of Victoria*.[9] Counsel for the Director relied upon *McPherson* in contending that compliance with s55(9B) was not essential to sustain a charge under s49(1)(g).

26. In *McPherson's* case, a police officer, having administered a preliminary breath test, was accompanying the accused to the police station for a breathalyser analysis when the accused complained of chest pain. The officer then took the accused to a hospital where a blood sample was taken, which on analysis was found to contain more than the prescribed concentration of alcohol. The accused was convicted of an offence under s49(1)(g), and on appeal argued that the blood test was not taken 'in accordance with' s55 as the police officer had not 'required' him to undergo a breath test under s55(1) or (2). Those sections provide that a member of the police '*may* require' a driver to provide a sample of breath for analysis.

27. The appellant relied on the following passage from the judgment of Kellam J:

> "Whilst it is true that Parliament has chosen to use the words 'under s55(1)' in s49(f) and the words 'in accordance' with s55(9A) in s49(g), I do not conclude that the words 'in accordance' mean that total compliance with s55(9A) is required to the point that such compliance is an essential precondition or element to be proved before an offence under s49(g) can be made out. Notwithstanding the use of the word 'accordance' in s55(9A) instead of 'under' in s55(1), I conclude that the words 'the person who required a sample of breath' do not mean that the Sergeant in this case must have articulated a requirement for a sample of breath to be supplied by the plaintiff before he was able to articulate a requirement for a sample of blood to be obtained legally. In my view, those words are facilitative and, if anything, are intended to identify the person who is authorised to make the requirement for the provision of a blood sample."[10]

28. In reaching the conclusion that the provision which allowed members of the police force to require a sample of breath was not "*an essential precondition or element"* but was facilitative, and that the power did not need to be exercised by means of a specific demand,[11] Kellam J observed that, in the circumstances of the case, it would have been nonsensical for the police officer to have formally required a breathalyser test at the hospital (where none would have been available) before requesting the taking of a blood sample.[12] His Honour also noted that it was 'well arguable' that, in the circumstances of the case, the police officer had *implicitly* required the appellant to provide of sample of breath.[13] *McPherson's* case was not concerned with compliance with the procedure set out in s55(9B) or with whether non compliance will be fatal to proof of an offence under s49(1)(g).

29. The appellant also cited *DPP v Foster*[14] in support of a submission that s55(9B) should be interpreted as a facilitative provision. In that case it was held that it was not necessary for proof of the offence under s49(1)(f) that the driver had by a formal demand been required to furnish a sample of his breath for analysis. It did not deal with the provisions with which I am concerned. The judgments do not express any view inconsistent with the respondent's proposition that non compliance with s55(9B) would result in the prosecution failing to establish an element of the offence under s49(1)(g). As Winneke P observed, the court was concerned only with technical non compliance which did not lead to a conclusion that the sample as analysed was unreliable.[15]

30. The requirement that a part of the sample be delivered to the person who requested the taking of the sample is, in my view, an essential precondition or element of the offence created by s49(1)(g). The place of s55(9B) within the statutory regime shows that strict compliance is required. The language employed in s55(9B), and in particular the use of the term "must", strongly supports this conclusion. The importance of the delivery of a part of the blood sample to the person who requested the sample be taken, and who will assume responsibility for maintenance of the integrity of the part of the sample to be analysed, is demonstrated clearly by the circumstances of this case. The evidentiary difficulties which arose in this case, and which were considered decisive by his Honour, were a direct consequence of the failure to comply with the procedure in s55(9B).

31. This is not a case in which this Court is faced with an unmeritorious and overly technical defence to a drink driving charge.[16] Counsel for the appellant conceded that it was difficult to contend that the requirement in s55(9B) that the medical practitioner or approved health professional provide part of the blood sample to the driver from whom it was taken was merely a "facilitative" provision which was not essential to a prosecution under s49(1)(g). He accepted that it was an important statutory safeguard that the defendant be provided with part of the blood sample. This concession, properly made, exposed the difficulty in the appellant's construction of the section. The appellant's interpretation would give rise to the curious result that the word "must" in s55(9B), though used only once, has different meanings depending on whether it was the requirement to give the part of the sample to the driver or to the person who requested the sample be taken.

32. Criminal liability under s49(1)(g) is *prima facie* established by reason of the results of the analysis of the part of the blood sample. Moreover, ss57(3) and (4) allow for the results to be proved, in the absence of evidence to the contrary, simply by the admission into evidence of a certificate of the taking of a blood sample and a certificate of the analysis of that sample. Compliance with the requirement for the delivery of the blood sample is an important statutory protection for the accused in the prosecution of an offence under s49(1)(g).

The charge under s49(1)(b)

33. Different considerations apply to the charge under s49(1)(b). In *Foster*, the Court of Appeal held that compliance with s55 is not an element of the offence enacted by s49(1)(b).[17] There is no explicit requirement in that section for compliance with a statutory procedure as, unlike s49(1)(g), the offence under s49(1)(b) does not require that the procedure for the taking of and delivery of the sample be "in accordance with s55".

34. It is unnecessary to decide whether, in a prosecution for an offence under s49(1)(b), a certificate may still be admissible pursuant to s57 where, contrary to s55(9B), there has been no delivery of a part of a blood sample to the person who requested it. I assume without deciding that oral evidence may be called by the prosecution as to the analysis of the sample as such evidence may be admissible without the authority of statute. That is not to say that the court is obliged to act upon such evidence where there is reason to doubt the integrity of the sample or the reliability of the analysis.

35. In this case, as the continuity of the part of the sample was in issue, it would have been open to the prosecution, in proving the charge, to have led evidence concerning who had access to the hospital safe in which the blood sample was stored in order to establish that the condition of the sample was unaltered when it was tested. No such evidence was called. His Honour stated that he refused to act upon the evidence of the analysis of the blood sample given at the hearing by Ms Davies. That was a course that was plainly open to his Honour. As counsel for the director conceded, it could not be said that his Honour was in error in refusing to give effect to the evidence of the analyst, Ms Davies.

36. The appeal should be dismissed.

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[1] The terms of s55(9B) and those of r205(2) are different, as the former requires that part of the sample be provided to the person who requested the sample be taken, while the latter requires that part of the sample be provided to a member of the police force (which presumably contemplates any member to whom the sample could be given at about the time it was taken). That difference was not the subject of argument or relied upon in the present case.

[2] *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361 at 364 per Anderson J, see also *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613 at 617.

[3] *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403, at 407; (1992) 16 MVR 367 per Ormiston J; *Wright v Morton* [1998] 3 VR 316; (1997) 95 A Crim R 125; (1997) 26 MVR 159; *Platz v Barmby* [2002] VSC 531; (2002) 135 A Crim R 571.

[4] *Smith v Van Maanen* (1991) 14 MVR 365 at 371, *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.

[5] *DPP v Loftus* [2004] VSC 39 at [32]; (2004) 40 MVR 415 per Cummins J.

[6] [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41.

[7] See *Thompson v His Honour Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at [24]; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 per Gleeson CJ, Gummow, Kirby and Callinan

JJ. In that passage their Honours also distinguish the offences enacted by ss49(1)(b) and 49(1)(f).
[8] In *Papadopolous v Hunter* (1995) 85 A Crim R 572 at 578, Coldrey J seems to have come to the same conclusion.
[9] [2003] VSC 105.
[10] At [48].
[11] *McPherson*, *supra* at [46], [49]-[50].
[12] *Ibid*, at [41].
[13] *Ibid* at [42].
[14] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[15] *Foster* at [66].
[16] See *Sher v DPP* [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[17] *Supra* at [58]-[66] per Winneke P, with whose judgment Batt JA agreed, and with whose reasons Ormiston JA concurred on this point.

APPEARANCES: For the appellant DPP: Mr DL Flynn, counsel. Adrian Castle, for the Office of Public Prosecutions. For the respondent Colbey: Mr JL Smith, counsel. Sullivan Braham, solicitors.
