32/02; [2002] VSCA 175

SUPREME COURT OF VICTORIA — COURT OF APPEAL

HRYSIKOS v MANSFIELD

Ormiston, Chernov and Eames JJ A

4 September, 1 November 2002

(2002) 5 VR 485; (2002) 37 MVR 408; (2002) 135 A Crim R 17)

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUESTED TO GO TO BOOZE BUS AND REMAIN THERE UNTIL BREATH SAMPLE GIVEN OR UNTIL THREE HOURS AFTER DRIVING – SAMPLE OF BREATH FURNISHED – DRIVER ASKED TO WAIT FOR SECOND SAMPLE – DRIVER LEFT BUS TO HAVE CIGARETTE – REMAINED CLOSE TO STEPS OF BUS IN COMPANY OF TWO POLICE OFFICERS – WHETHER DRIVER REMAINED THERE FOR PURPOSES OF ACT – DRIVER CHARGED WITH REFUSING TO REMAIN AT BOOZE BUS – FOUND GUILTY BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – EVIDENCE – AT TRIAL INFORMANT REFRESHED MEMORY FROM WRITTEN STATEMENT – DEFENCE COUNSEL CROSS-EXAMINED INFORMANT USING STATEMENT – APPLICATION BY PROSECUTOR TO TENDER DOCUMENT – DOCUMENT ADMITTED INTO EVIDENCE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, S49(1)(e): *EVIDENCE ACT* 1958, S36.

M. was intercepted driving a motor vehicle. After undergoing a preliminary breath test, M. was required by the informant H. to accompany him to a booze bus for the purpose of a breath test and to remain there until a sample of breath was furnished and a certificate of analysis given. M. complied with this request and underwent a breath test. The result showed "alcohol in mouth" and M. was told to wait a further 15 minutes. M. said she wanted to go outside and have a cigarette. She left the vehicle, obtained a cigarette from her partner but remained close to the steps of the bus in the company of two police officers. Subsequently M. became involved in a dispute and was later arrested and charged with an offence against s49(1)(e) of the *Road Safety Act* 1986 and an offence against s52(1) of the *Summary Offences Act* 1966.

At the hearing of the charges, H. refreshed his memory from a copy of a written statement he had made earlier and was cross-examined by defence counsel, using the statement, about what happened at the scene. The prosecutor applied to have the statement admitted into evidence. Subsequently, the magistrate stated that as defence counsel cross-examined on the statement it would be admitted into evidence for all purposes. At the close of the case, M. was found guilty of the charges. Upon appeal to Smith J., the appeal was allowed and the conviction on the drink-driving charge quashed. Upon appeal by H.—

HELD: Appeal dismissed.

1. For the offence to be proved there must be a "refusal to comply" with the requirement to "remain there". The legislative objective in imposing the requirement is to discourage persons from choosing to depart the scene before completing an effective breath analysis. The requirement "to remain there" is to remain at the "place" where the testing is to take place. Nothing in the legislation imposes an obligation that if the requirement is to be met one must enter and remain in the vehicle or enter and remain in a particular section of the police station, rather than merely arrive and remain at the place with the intention of participating in the test as directed. The magistrate was in error in concluding that the offence was committed as soon as M. left the bus.

***Mansfield v Hrysikos* [2000] VSC 474; (2000) 32 MVR 491; MC41/00, approved (in relation to this point).**

2. In relation to the tender of the statement, the issue was whether the use made by defence counsel of the document enabled the prosecutor to require the document to be tendered. The real purpose behind placing the statement in the informant's hands was to cross-examine the witness on the statement under the pretext that that was being done as part of an exercise of refreshing his memory rather than as cross-examination to establish inconsistencies between the statement and his evidence. The further questions which were asked went beyond the topic on which memory had been refreshed. Accordingly, the magistrate was entitled to require that counsel tender the statement.

ORMISTON JA:

1. In this appeal brought by the Director of Public Prosecutions in the name of the informant I agree, subject to what appears below, with the conclusions and reasons for dismissing the appeal expressed in the judgment of Eames JA. Having regard to the nature of the charge and the minute

infraction of s49(1)(e) of the *Road Safety Act* 1986 ("the Act") here alleged, little further should have to be said, for his Honour's reasons ought to be more than sufficient to dispose of the appeal. I will, nevertheless, venture the following further views because I should like to express my own opinion upon the appeal which, I confess, I expressed forcefully during the hearing.

2. Although it carried and still carries quite significant penalties, an offence under s49(1)(e) would perhaps be seen at the lower end of the scale of seriousness of road traffic offences of this kind; certainly that would be so if the appellant were correct. The offence of refusing to comply with a requirement made under certain provisions in Part 5 of the Act concerning the taking of breath tests was and is designed[1] to ensure that people will not escape from the consequences of driving under the influence of liquor because they cannot be forced to undergo the relevant tests. In order to ensure that certain requirements under s55 were and are complied with, which in turn would lead to the obtaining of evidence of a kind which would ensure effective prosecution of offenders for the more serious offences under s49(1) of the Act, para.(e) makes "refusal" to comply an offence in itself.

As will be seen it is refusal, rather than non-compliance, which is penalised. First, however, one must see what is the nature of the requirement. The relevant requirement in the present case was under s55(1) of the Act which, although similar in form to the other requirements referred to in para.(e), is expressed in very elaborate terms.[2] In essence, though, at the relevant time the sub-section provided that, if either a person underwent a preliminary breath test which indicated that the person's blood contained alcohol or there had been a refusal or failure to carry out the preliminary test properly, then "any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument ... and *for that purpose may* further *require the person to accompany a member of the police force ... to a police station or other place* where a 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 ... or until three hours after the driving ...". (Emphases added.) It is first important to note that that any requirement under the sub-section itself did and does not, as was conceded, involve any arrest of the subject of a proposed test. A requirement by a police officer does not result in confinement for the purpose of the test. Rather the two sections should together be construed so as to impose a penalty for a driver who chooses to ignore any such requirement and refuses to comply with it. So much was accepted on both sides on the hearing of this appeal.

3. The penalty under paragraph (e), however, is not imposed for *failing* to undergo the necessary breath test, or to accompany the police officer, or to remain at a police station or other place; it is for *refusing* to do so. Why the paragraph was not expressed in terms of "failure" is not entirely clear, as the verb "fails" appears both in s49(1)(d) and in para.(b) of s55(1) of the Act. The word "refuses" must be taken to carry with it an element of mental intent, albeit judged objectively for the purposes of an offence such as the present. The simplest way of proving a refusal would be if the subject driver said "I refuse etc." or some equivalent words, with or without expletives, connoting an unwillingness to comply. Alternatively, the prosecution might ask a court to infer that a driver has refused to comply by proving acts from which that inference may be drawn, i.e. by proof of the circumstantial case from which the only inference is that the driver is refusing to comply, albeit he or she is not expressly saying so. A driver who immediately turns and runs away, a driver who jumps the back fence of a police station, a driver who forcibly pushes open the door of a mobile testing station and runs off without explanation would each be persons against whom the necessary inference could be drawn. It would not be the performance of an act exhibiting "consciousness of guilt" so much as an act exhibiting a conscious unwillingness, and thus a refusal, to comply with the stated requirements.

4. Thus it will not be sufficient for the prosecution to prove merely a failure to remain "there", i.e. at either the police station or the "other" (designated) "place", for that in itself may not be sufficient to allow the drawing of an inference to the criminal standard that the person was exhibiting such an unwillingness to comply with a requirement as to amount to a refusal. Each case must depend on its own particular circumstances but, in the absence of a direct and explicit refusal, it should be remembered that a failure to comply must always be shown to be such that implicitly the driver is refusing to comply with the relevant requirement. Further it should be remembered that the requirement is not merely a requirement to accompany a police officer and to remain in a stated place, but also to do so "for that purpose", in effect, for the purposes

of s55(1), for in each case the requirement is extended only so far as is necessary to enable a sample of breath to be furnished which is to be carried out within three hours of the last moment of driving.

5. Next, it is important to realise, as has been held on several occasions and was not disputed before this Court, that the person is not under arrest but only subject to a direction, the sole sanction for which is prosecution for refusal to comply, pursuant to s49(1)(e). This much may be derived, if only by analogy with similar provisions in s53, from the discussion in *DPP v Webb*[3]. Nevertheless, although there is a deprivation of liberty implicit in the whole of the relevant provision which derives from the fact that non-compliance has certain penal consequences if they can be characterised as a refusal, no aspect of the scheme under s55 entitles the police officer to treat the person, who is at that stage in effect merely a suspect, as a person under arrest and thus subject to explicit directions and control by the officer. The object sought to be achieved is that the driver attend at the designated place and undergo the appropriate breath test. So long as drivers are in a position whereby the test can be carried out at request with reasonable promptitude, they cannot be directed any more explicitly than s55(1) permits (for present purposes). One should not infer a right in a police officer to detain a driver by use of force or to require the subject to go to or stay in some particular room or place which would involve a further deprivation of liberty. No authority cited to the Court would gainsay any of these matters.

6. Counsel for the appellant valiantly tried to demonstrate difficulties which might occur if the alleged infraction in the present case were not treated as a refusal. They suggested that an interpretation which permitted an undue freedom to move around or near the designated police station or other place[4] would lead to the risk that in fact drivers subject to these requirements might "escape" and not undergo the tests or that they might ingest (I can express it no more precisely) some further drink or food which might affect the validity of the breath test they were required thereby to undergo. For myself I am not clear that these things cannot occur in any event, certainly if the driver were required only to attend at a designated police station and remain there. If drivers are not under arrest, then it seems to me that while waiting they can conduct themselves as they choose, so long as they do not breach the peace or otherwise interfere with normal police operations, and it would also seem to follow that relatives and friends could not be prevented from speaking or dealing with drivers as they waited, for that is not the nature of the detention connoted by the obligation to attend and remain at a designated place.

Police stations are many and various in size and layout. They may be purpose built, or either office buildings in the city or in country towns or conventional houses adapted for police use in suburb or country. Doubtless most have comparatively little public space but a requirement of the kind contemplated under s55(1) could not oblige persons to stay throughout the three hour period only in a specified room and it must surely be permissible for such drivers to wait in areas where they could not be said to be in custody as such, so that they might fairly wait in some public area, or on a verandah, or for that matter in a yard, so long as the yard could be said to be part of the station and within easy calling distance by the police officer. It would be amazing in such circumstances if a person using the toilet facilities, whether within the building or outside in the yard, would thereby be treated as refusing to comply with the stated requirements. Common sense and flexibility is what is demanded and the section in effect says as much by penalising refusal rather than failure to comply.

7. The difficulty, if so it may be dignified, is that in the present case the requirement was one which directed the respondent to accompany the appellant to a mobile breath testing vehicle or station (as it was variously called) situated at the side of the road in Todd Road, Port Melbourne, and she was likewise, in conformity with the section, required "to remain there" until a breath sample had been furnished and the certificate given or the three hours expired. As I understand it, at least by the time the matter reached the Trial Division and for the purposes of this appeal, the alleged infraction, that is, the refusal upon which the appellant bases his case, consisted in the respondent's having done no more than going down the back steps of the testing station and standing within two or three metres, after she had been warned that if she failed to remain for the purpose of a breath test she might lose her licence for two years and might receive a substantial fine. Her sole purpose, so it was made abundantly clear from the repetition of her requests and the proliferation of bad language which accompanied them, was to obtain a cigarette and to go outside the vehicle to smoke it.

8. For the purposes of this appeal it is important to know something of the "place" which the respondent had been required to attend for the purpose of undergoing the breath test. There can be little doubt that "other place" included a mobile breath testing vehicle or station, but precisely what that expression meant, as used by the appellant on the night, is by no means so clear. For this purpose it is necessary to examine some of the factual background which was outlined to us by senior counsel for the appellant which, as I understand it, was taken substantially from the evidence, but to the extent it went beyond that evidence counsel for the respondent expressly agreed that it was an accurate description. Although these mobile stations are and have been colloquially called "booze buses", they are in fact trucks or vans, the provision for the seating of police officers as passengers being confined to two rows at the front of the van. The rear part of the van, where the breath testing is in fact carried out, consists of an area of moderate size divided into two compartments. Each area ordinarily contains one operator conducting breath tests with the appropriate equipment pursuant to s55 of the Act. It seems that each compartment has another table at which suspected drivers are asked a number of questions ordinarily by the officer who has conducted the preliminary breath test and has required the attendance of the driver at the mobile station. Entry to the van may be gained by a side door but there seems also ordinarily to be a rear door to the rear compartment, as well as a sliding door between the compartments. There is some limited provision for seating on chairs or benches within each compartment. It was conceded that the area of each compartment was approximately 8 to 9 feet by 8 to 9 feet, perhaps a little longer but not greatly so.

Ordinarily a suspected driver is directed into one or other of the compartments and it is not common for suspected drivers to be moved from one compartment to the other for the purpose of testing. Although there may be room for more than two persons to be seated in each compartment, there is no waiting area within the mobile station and it was asserted that, if another suspected driver had to be tested, while another driver is waiting for a further test, there was no provision ensuring privacy for the second driver during testing. It seems that, having regard to the existence of two testing compartments, it was ordinarily unlikely that there would be any delay involving the need by any drivers to wait. However, it must be recalled that a requirement under s55 could oblige a driver to remain at the designated mobile station for up to three hours for the purpose of being tested. I would add that counsel conceded that there were no toilets in or attached to the mobile station, but he suggested that, if a driver had had the need to use them, there were toilets situated some metres away in a large service station nearby, though he was unable to refer to any power of dispensation or the like, other than necessity, which would permit such a driver to venture so far afield.[5]

9. Some further brief facts need to be noted as to what occurred on the night. The appellant, after conducting a positive preliminary breath test, said:

> "I now require you to accompany me to a breath testing vehicle for the purpose of a breath test and to remain there until you have furnished a sample of your breath and be given a certificate of analysis or until three hours after the time you were drinking or in charge of a motor vehicle, whichever is sooner."

The respondent agreed to accompany the appellant to the mobile station which was little more than ten or twenty metres away from where she had been stopped. She was shown into the rear compartment through a side door and then was asked a number of questions by the appellant as to her driving and drinking. An authorised operator then conducted a test on her but it was unsuccessful, apparently because there was alcohol in the respondent's mouth. A certificate was prepared to that effect but she was, in accordance with the Act, required to wait so that a proper test could be completed. It was indicated that she might have to wait an additional 15 minutes for that purpose.

10. At some stage, apparently shortly before that period expired, the respondent said that she wanted a cigarette and to go outside to smoke one. At this the operator warned her that, if she left the "booze bus", "she may receive a substantial fine and lose her licence for up to two years", in substance suggesting that she would be liable to prosecution in terms of s49(1)(e), although that provision was not expressly referred to. It seems the respondent did not accept the warning given in response to her request and proceeded to open the back door and to go down the steps uttering a string of expletives which need not be repeated. She walked two or three paces apparently in the hope of obtaining a cigarette from her male friend who was waiting outside in a nearby vehicle.

The appellant asked her again to return to the "bus", repeating the warning about refusing to furnish a sample of her breath, but she responded again with further expletives insisting that she wanted a cigarette. It seems her friend gave her a cigarette which she smoked within a few paces of the back door of the mobile station. It was not suggested during this time that the breath testing equipment was ready for use a second time, nor was it suggested that at any time she expressly refused to take a test. She did not try to leave the area and at first remained on her own. Apparently a few minutes later, presumably after smoking the cigarette, the respondent went back into the van to collect her bag and other belongings, but went outside again to a position again close to the mobile station. Again, at no stage during this period did she refuse to take a breath test, not did she attempt to move any further away from the mobile station.

11. However, when she again came down the steps, it seems that she had a dispute with the male friend and that soon involved the police, as a result of which they were both charged with assault. There seems to have been no further request for the respondent to undergo a breath test so that, as best one may discover, she eventually left the site of the mobile breath testing station after having been charged with certain offences.

12. Having regard to these facts, I have no doubt that the charge under s49(1)(e) was not made out and was properly ordered to be dismissed by the learned judge. Although there can be little doubt that a proper requirement was made pursuant to s55(1) of the Act, there was simply insufficient evidence upon which the magistrate could have found that there was a refusal to comply with the requirement so given to the respondent. The appellant's case was based on the simple proposition that as soon as the respondent left the mobile station she had committed the offence in that thereby she had refused to comply with the requirement that she remain "there", i.e. at the mobile breath testing station or "vehicle". Refusal was said to be the only inference open once she had gone through the door to walk down the steps at the back of the vehicle.

13. I cannot agree. Refusal is a matter to be inferred from the totality of the circumstances, and what is proscribed is not merely a refusal "to remain"[6], but a refusal to comply with the whole of the relevant requirement, being the requirement to remain at the designated place for the purpose of having a breath test conducted and a certificate furnished to her.[7] Having regard to the obvious concession that the requirement does not involve an arrest, the question in each case must be whether the person so required has exhibited an intention to be unwilling to remain at the designated police station or "other place" in order to undergo the test. If one could not infer a refusal to remain for the purpose of the test, then the precise place to which the respondent moved was of little consequence, so long as in practical terms she would have been able to comply with a request for the testing of her breath within a very short but reasonable time having regard to all the circumstances.

There cannot be an obligation to remain seated or standing next to the table at which the test is to be carried out for a period of up to three hours, for that is not what a requirement under s55(1) should state. The sub-section describes a practical but reasonable requirement. At a police station there is clearly no power to require a driver to remain in a cell, so that there must be scope for some flexibility if the operator is unable to conduct a first or later test immediately on the driver. If there is a room set aside for the testing, the section does not require the driver to remain in that room but merely at the station, whatever facilities by way of waiting rooms and the like it may have.

Some point was taken before the magistrate that the section as originally passed referred to a police station "or the precincts thereof", but that was repealed and re-enacted in the form which is relevant to the present offence. Subsequently in 2001[8] the expression was amended so as to read "to a place or vehicle where … "[9]. We were not referred to the parliamentary history of the original amendment, although the latter amendment seems to have resulted from the decision in *DPP v Williams*[10]. For myself I would doubt that the particular amendment made in 1989 can be used to infer that Parliament intended that the person so required had to remain within the four walls of the building used for the purposes of a police station. It would be remarkable if, say, a driver were not permitted to use the toilets in the yard of a country police station. In each case one would have to look to the precise circumstances and the layout of the police station to see what was reasonable and so what amounted to a refusal to comply. A person who waited on a verandah could hardly be said to be refusing to comply with such a requirement, and walking

from the verandah to a front garden or yard in close proximity would hardly seem to be an act which would permit the drawing of an inference that a person refused to remain at the police station to undergo the necessary test.

14. However, the question in the present case is whether a "place" should be restricted for the purposes of s55(1) in the manner for which the appellant contends. What is here argued is that, having been required to go to a mobile breath testing vehicle, the respondent was obliged to stay within the compartment to which she was directed by the appellant. In the first place, of course, that was not what she was required specifically to do. The rear compartment was only one portion of the breath testing vehicle, although no point was taken as to that or as to the form of the charge.[11] The practicalities of using any other part of the vehicle for the purpose of waiting were remote. The other compartment was likewise little more than 9 feet by 9 feet and, more likely than not, it was either being used or was about to be used for the purpose of testing some other driver. Likewise it seemed impracticable to go directly to the front of the vehicle, even if that were desired, and in itself that would have required the respondent to go from the back compartment around to the front of the vehicle, in breach, so it has been so strenuously argued, of the requirements of the section.

15. Common sense dictates that a requirement to remain "there" at a vehicle, with such confined space as is revealed by a description of the relevant compartments, could not be treated as requiring a driver to remain within a compartment for a period of up to three hours for the purpose of having a test. What is fairly required must depend on the nature of the place to which a driver is directed, but in each case it should not be assumed that an obligation to "remain there" involves an obligation to remain confined within the outer four walls, or the like, of the designated place. One might observe, considering the terms of the presently amended section, that it would be equally unreasonable to require a driver to remain inside a car at which a test was being conducted, if the test could not be immediately carried out for some reason or other, and so as to require a driver on a hot day to remain seated in the car for up to three hours.

16. The boundaries may not be precise, but the issue in each case is not a failure to "remain", rather the issue is whether there has been a "refusal to comply with a requirement". If a person is within a few metres of the place where the test is to be carried out, then there could not be the slightest doubt that that person should ordinarily be treated as complying with the requirement to remain at the relevant place. It would be quite another question if the person departing from the mobile vehicle were to burst out and run at high speed away into the distance, for then the evidence would permit an inference to be drawn, if all the facts justified it, that the driver was thereby refusing to comply with a relevant requirement.

17. Here the respondent was indisputably always within a few metres of the vehicle, in a position where she could be communicated with easily and where it would have taken much less than a minute to return to the table when the operator chose to have her equipment in order and ready to conduct the further test. There was no act or word that the respondent did or uttered which would permit an inference to be drawn that she refused to remain at the place for the purpose of complying with the requirement. Admittedly she used the foulest of language to vent her dissatisfaction, but the dissatisfaction was directed only to her inability to smoke a cigarette. However much one might disapprove of her language and smoking habits, there was no evidence at all of a refusal to comply with the requirement, once one accepts that the place at which she was obliged to remain was not confined to the four walls of the compartment or the outer exterior of the mobile breath testing vehicle, whichever interpretation one might wish to place on the appellant's contentions.

18. It is unnecessary for me to say anything as to the other basis considered by the learned judge for reaching a conclusion as to the commission of the offence, nor likewise is it necessary here to canvass in detail the evidentiary issue separately raised. As to this latter question I agree with Eames JA that counsel's questions permitted the magistrate to accede to the prosecutor's earlier request that the document be tendered[12], though I would prefer to express no opinion as to the precise meaning of the proviso to s36 of the *Evidence Act* 1958. One might venture only this further comment, that I find it strange that it was seen to be necessary to raise such minor issues in the Court of Appeal.

19. The appeal should be dismissed.

CHERNOV JA:

20. I have had the benefit of reading the draft reasons for judgment of Ormiston and Eames, JJ A in this case. I agree, substantially for the reasons given by Eames JA, that the appeal should be dismissed. It seems to me that, even if the relevant part of the mobile breath-testing station in question ("the station") was an "other place" for the purposes of s55(1) of the *Road Safety Act* 1986 ("the Act"), it was not open to the magistrate to find that, in the circumstances of this case, the respondent relevantly refused to remain there and had thus breached s49(1)(e) of the Act.

21. The question before the magistrate was whether, by leaving the van for the purpose of smoking a cigarette immediately outside it, the respondent thereby refused to comply with the requirement of the informant that she remain "there" for the purpose of s55(1) of the Act. The appellant's case before us, stripped to its essentials, was that, once the respondent walked out of the van to smoke the cigarette she thereby manifested such a refusal and thus breached s49(1)(e) of the Act. It was contended that such a result flowed from a proper construction of s55(1) of the Act which should be read as entitling a member of the police force to require the person to remain within the "four walls" of "the place" until the sample of breath has been furnished to the satisfaction of the police or three hours have elapsed, whichever period is the lesser. In my view, however, s55(1) does not support such a construction.

22. The section obviously recognises that there might be a delay of some considerable time – up to three hours – in the police officer administering the test to the person who, it will be remembered, had complied with the request to attend the station for the purpose of furnishing a sample of breath. It is also apparent that the provision contemplates that it will be the relevant police officer who will determine (on proper grounds) *when* the breath sample is to be furnished and how many samples are to be provided. Further, it seems that the section implicitly contemplates that, during the period of any delay, the person will remain under the broad supervision of the police and at their beck and call. In my view, the latter follows from the principal purpose of the provision, which is to enable the police to establish, by proper and reliable means, the blood alcohol content of the person who has "failed" the preliminary breath test. Unless the police officer remains with the person in question until the relevant sample of breath is furnished, he or she may ingest a substance or take some other step that would render any subsequent test invalid for relevant purposes. Moreover, the scheme of the section is that the police officer will go with the person in question to the "place" and will remain with that person until the testing is complete. That is made apparent by sub-s(1) which contemplates that the person will "accompany" the police officer to the station and by sub-s(2A) which effectively requires the police officer to remain there until, to the extent practicable, a sample of breath has been satisfactorily processed.

23. Whether the exit of a person from the station constitutes a relevant refusal to "remain there", depends on the circumstances of the case. To take an extreme example, if the person in question walks out of the station for a distance of no more than, say, a metre to take a breath of "fresh" air and immediately returns to it, it could not sensibly be said that the person has refused to "remain there" for the purposes of s55(1). Such an act would not impede the ability of the relevant police officer to determine *when* the sample is to be provided or the ability of the police to keep the person under constant supervision. On the other hand, if that person leaves the van to go to a nearby shop to buy a newspaper, such departure might amount to a "refusal" which would constitute a breach of s49(1)(e). In those circumstances it might be said that the relevant police officer would lose strict control over the timing of the provision of the sample; obviously no test could take place while a person is absent purchasing a newspaper. More importantly, the person's departure from the van might render it impracticable for police to maintain the requisite supervision.

24. But nothing of the sort happened in this case. The respondent said that she wanted to go outside to smoke a cigarette and the reason for her having to go outside was that, unsurprisingly, she was told that smoking was not permitted in the van. Homan said that one reason why she did not want the respondent to smoke a cigarette was that, if she did so, a breath test could not be administered for fifteen minutes thereafter. But as Mr McArdle effectively conceded, that apprehension had no demonstrable scientific or practical foundation. In any event, whether smoking would produce such a delay might go to the question whether the person refused to take

the test, but it would not be relevant to the issue of whether there had been a refusal to remain at the station for relevant purposes. Although the respondent walked out of the van, at all relevant times she remained within its immediate precinct and under police supervision. There was no suggestion by Mr McArdle that the respondent's conduct somehow inhibited the police in keeping her under scrutiny or that the respondent would not have complied with a request from the informant or Homan to return immediately to furnish a sample of breath. In those circumstances, and given the fact that the respondent had left her belongings in the station when she first went outside it to smoke a cigarette, (which supports her claim that she intended to return to the van), it cannot be sensibly said that she refused to remain there in breach of the Act. Had she decided, after having gone outside to smoke a cigarette, to wander away from the precinct of the station, a different conclusion might be reached on the issue. But that was not the case here.

25. In the circumstances, therefore, the learned primary judge was correct in his conclusion that it was not open to the magistrate on the facts before him to conclude that the respondent had refused to remain at the station in breach of s49(1)(e) of the Act.

26. In light of that conclusion, it is unnecessary to deal with the other issues raised in the appeal. For completeness, however, I indicate that, in relation to the second issue raised by this appeal concerning the tender of the informant's statement, I agree with Eames JA that, on a proper interpretation of what took place before the magistrate, the document was tendered at the behest of the prosecution and not the magistrate. That is made plain by the call by the police prosecutor for the statement to be tendered after counsel's initial cross-examination of the informant, the postponement of the ruling on this request by the magistrate until after completion of the relevant part of the cross-examination of the informant and by the subsequent admission of the document into evidence. It is also clear that the respondent's counsel had made use of the document in the cross-examination of the witness and did not merely use it to refresh his memory.

27. Consequently, in my view, the appeal should be dismissed.

EAMES JA:

28. This is an appeal against a decision of Smith J made on 14 November 2000 whereby his Honour allowed an appeal pursuant to s92 *Magistrates' Court Act* 1989 against orders made on 14 July 2000 by a magistrate sitting at Melbourne. His Honour set aside the orders of the learned magistrate who had convicted the respondent of an offence under s49(1)(e) of the *Road Safety Act* 1986, and fined her $400 together with costs and ordered that her licence be cancelled and that she be disqualified from driving for a period of two years.

29. The particulars of the offence alleged that the respondent on 19 December 1998 did:

> "refuse to remain after having been required to have a preliminary breath test under s53 of the *Road Safety Act* 1986" and being "then further required to furnish a sample of breath for analysis by a breath analysing instrument, pursuant to s55(1) of the said Act, and for that purpose you accompanied a member of the police force to a police station or other place, where the sample of breath is to be furnished, you refused to remain there until you furnished a sample of breath for analysis or until three hours have elapsed after driving of the motor vehicle whichever is sooner."

30. The respondent to the present appeal (and appellant before Smith J), Debra Elaine Mansfield, had been driving on Todd Road, Port Melbourne on 19 December 1998 when she was directed to stop near a mobile breath-testing station (more commonly known as "a booze bus"), and then provided a preliminary breath test which was administered to her by the appellant, Constable John Hrysikos. Seated in the front passenger seat of the vehicle was Gary William Moore, the partner of Ms Mansfield. The preliminary breath test was performed at about 1.15 am and it indicated that Ms Mansfield had alcohol in her blood. After the preliminary breath test proved positive Constable Hrysikos then made a request of the respondent in the following terms:

> "In my opinion, the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to a breath testing vehicle for the purpose of a breath test and to remain there until you have furnished a sample of your breath and be given a certificate of analysis or until three hours after the time you were drinking or in charge of a motor vehicle, whichever is sooner. Are you prepared to accompany me?"

31. In response to that question the respondent said "Yes" and then left her vehicle and went with Hrysikos to the "booze bus", which was close by.

32. The mobile breath-testing station is a large van, of a kind well-known to the citizens of Melbourne, and apart from the double cabin for the driver and passengers the rear breath-testing section is divided into two separate compartments each of which contains a breathalyser, tables and chairs and other equipment. The separate compartments enable breath testing of two persons to be conducted, in privacy, at the same time. The two compartments may be entered by a doorway on the side of the van or through a rear sliding doorway. There is access between the two compartments by an internal door. Steps led from the bus to the ground at the rear entry. It was in the rear section to which the respondent was directed for the purpose of being tested on a breath analysing instrument.

33. When the respondent entered the van she was introduced to Acting Sergeant Valerie Homan, a person duly authorised to operate the breath analysing machine. Upon being requested by Hrysikos to undergo a breath test pursuant to s55 *Road Safety Act* 1986 the respondent furnished a sample of her breath. The instrument printed out four copies of a certificate, which stated "alcohol in mouth". A copy of the certificate was handed to the respondent at about 1.35 or 1.36 am and Homan then said to the respondent that she would have to wait 15 minutes, at which time she would be given a further breath test. The respondent asked if she could have a cigarette and she was told that smoking was not permitted in the van. She then asked if she could go outside for a cigarette and was told that if she left the booze bus "you may lose your licence for two years and receive a substantial fine".

34. Homan said to the respondent that if she had a cigarette Homan would have to wait another 15 minutes before conducting a breath test, and because Homan had to make sure that the respondent did not consume anything during that 15 minutes, she was required to stay in the booze bus. The respondent said that she wanted a cigarette and Homan repeated that if she left the bus she could lose her licence and be fined. The respondent ignored the warning and departed the bus, stepping down its back stairs. She was followed by Homan and Hrysikos. On stepping from the bus she then walked towards Moore who was sitting on the grass verge just at the rear of the booze bus and to its side. She yelled at him that she wanted a cigarette. Moore stood up and walked towards the van and Homan told him not to give a cigarette to the respondent. Homan suggested to Moore that he "talk her into not leaving the site". Homan said that if the respondent left "the site" she would lose her licence for two years and may receive a substantial fine.

35. The respondent then took a cigarette from Moore, lit it and returned into the booze bus via the rear stairs. She was carrying her cigarette. She picked up her wallet, her licence and the print-out from the first breath test which was sitting on a table and then stepped out of the bus, down the stairs, once again. She then approached Moore and struck him over the head and Moore struck her back. Shortly after this a fracas erupted, in the course of which both the respondent and Moore were arrested on other charges. A second test via the breath analysing instrument was not conducted on this occasion.

36. The respondent was charged on summons with an offence which, in a shorthand way, alleged that she "refused to remain", contrary to s49(1)(e) of the *Road Safety Act* 1986.

37. The *Road Safety Act* 1986 as it applied at the date of the offence[13] contained the following relevant provisions:

> "49(1) A person is guilty of an offence if he or she—
> (e) refuses to comply with a requirement made under s55(1), (2), (2A) or (9A)."

38. Section 55 contains the following relevant sub-sections for present purposes –

> "(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 Transport 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 blood 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, any member of the police force or any officer of the Corporation or of the Department of Transport 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 Transport authorised in writing by the Corporation or the Secretary of the Department of Transport, as the case requires, for the purposes of section 53 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-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner. ...
>
> (2A) The person who required a sample of breath under sub-section (1) or (2) may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample, or each of the samples, previously furnished in grams per 100 millilitres of blood because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever."

39. The appeal on questions of law heard by Smith J raised two issues. The first concerned the circumstances in which a statement made by Hrysikos was tendered during his cross-examination by counsel for the respondent. The second question of law related to the charge under the *Road Safety Act*. As to the second issue, Smith J held that it was not open to the magistrate to find that there had been a refusal to remain contrary to s49(1)(e) of the *Road Safety Act*; and, alternatively, the request to remain in the bus was unreasonable.

40. The informant, Hrysikos, now appeals on the following grounds:

> "(1) That the learned judge erred in law in holding that the learned magistrate was in error in deciding to require the cross-examining counsel to tender the document identified as Exhibit C. (2) That the learned judge erred in holding:
> (a) That it was not open to find that there had been a refusal to remain in breach of s49(1)(e) *Road Safety Act* 1986;
>
> (b) That the request to remain in accordance with s55(1) *Road Safety Act* 1986 was unreasonable."

The offence alleged under s49(1)(e)

41. Having regard to the findings of the magistrate and the evidence before him Smith J concluded that at no time did the respondent say that she would not provide a further sample when called upon to do so, nor, at any time did she say that she wanted to leave the site. It is not contended by counsel for the appellant that the findings of the magistrate were inconsistent with those conclusions. Nor was his Honour's finding challenged that at all times the respondent remained in close proximity to the bus and the two police officers.

42. The learned magistrate found, and Smith J held that he was entitled to do so, that the relevant requirement "to remain there" was made when the respondent, having returned a positive preliminary breath test, was required by Hrysikos to accompany him "to a breath testing vehicle for the purpose of a breath test and to remain there until you have furnished a sample of your breath and been given a certificate of analysis or until three hours after the time you were drinking or in charge of a motor vehicle ..." Having been required to go "to" the bus, the continuing requirement was to remain at the bus. Counsel for the appellant contends that the requirement, more precisely, was that she remain within the four walls of the bus. Thus, she "refused to comply" with that requirement the moment she walked out the door of the van for the purpose of having a cigarette.

43. Smith J held that a person remained "at" the other place, namely, the booze bus, so long as she remained "linked to that place". Thus, his Honour observed, the offence would not be committed by a person who having been directed to go "to" a police station for the purpose of the test, having first entered the building then waited outside the front entrance, smoking a cigarette, while waiting for the breath analysing machine to be set up. When that person fully intended to perform the test, that person would not be said to refuse to remain at the police station to which he had been directed. Smith J held that the critical issue was "the proximity to the `other place' and the continuation of the purpose for which the person was taken there and the fact that the person has not gone to another place". His Honour said that the question was primarily one of fact.

44. In my respectful opinion, Smith J was correct in concluding that the issue is primarily one of fact. For the offence to be proved there must be a "refusal to comply[14]" with the requirement to remain "there". The legislative objective in imposing the requirement, in my opinion, was to discourage persons from choosing to depart the scene before completing an effective breath analysis. The requirement "to remain there" is to remain at the "place" where the testing is to take place.

45. Although counsel for the appellant contends that in the present case the "place" is the area bounded by the four walls of the van[15], it was not contended that where the place is a police station the person must remain within the four walls of the room where the breath analysing machine was located. It was submitted, however, that to stand outside the entrance of the police station would constitute a refusal to remain at the police station.

46. The absurdity of interpreting the requirement as obliging the person to remain within the confines of the precise location where the breath testing machine was located is highlighted when one has regard to breath testing in a police car. At the time of this offence the terms of s55(1) referred to "a police station or other place". Those words had been presumed to allow breath testing in a police car, but that was held to be unlawful by Smith J in *DPP v Williams*[16]. The legislation was subsequently amended to permit testing in a police car and the section now refers to "a place or vehicle"[17].

If the interpretation for which the appellant contends is correct then a person required to "accompany me to the police car" would refuse to comply with that requirement if, having once entered the vehicle, the person stepped out of the vehicle at any time before the handing over of a certificate after a satisfactorily conducted test. That would be so even if the persons' attendance became necessary (perhaps due to numbers of persons waiting to be tested or due to mechanical problems, for example) for the whole of the three hours allowed for testing, by s55(1). Mr McArdle acknowledged that he had some difficulty arguing that it would constitute a refusal to remain for a person to step out of the police car but to stand outside while preparations were made for a further test.

47. The booze bus is not equipped with a toilet. Mr McArdle, for the appellant, told us that it is common for the booze bus to be located, as it was on this occasion, at a place where access to a nearby toilet would be possible. He submitted that if the person being tested were to depart the bus (with permission) to use a toilet, or on account of ill health, that would not constitute a refusal to remain at the place at which he had been required to remain. He accepted that there could also be circumstances where the numbers of persons waiting to undergo tests required that some of them leave the bus and wait outside while others were tested. Mr McArdle submitted that none of the persons in those situations would commit an offence, because it must be read into the section that the requirement that a person remain at a place could be varied or suspended if circumstances made it reasonable to do so. Counsel conceded that there is no legislative authority given for the requirement to be modified or suspended in that way. Furthermore, the obligation to remain arises by reference to the requirement imposed initially to accompany the police officer to the place at which testing was to occur. Thus, the obligation to remain at the place, which s55 permits, can not be divorced from the requirement "to accompany" the officer to the place for the purpose of testing. Nor is support gained from the terms of sub-section (2A) because that merely permits the officer to require the furnishing of a further sample if there is a failure to successfully test the breath in an earlier test. That sub-section says nothing about remaining at any place.

48. There can not, in my view, be any difference in principle as to what "the place" is if one is asked to accompany the police officer "to the police station" or "to the breath analysing vehicle" or "to the police car". Nothing in the legislation imposes an obligation that if the requirement is to be met one must enter and remain in the vehicle or enter and remain in a particular section of the police station, rather than merely arrive and remain at the place with the intention of participating in the test, as directed.

49. In my opinion, the word "place" should not be given such a restricted interpretation as the appellant demands. The main reason for contending for such a narrow interpretation is that it would impose practical problems for the police if the person could depart the bus. It was said that those problems would remain, or might be exacerbated, even if the person remained close

to the bus, and notwithstanding that the person not only left the bus for reasons which were entirely innocent but also fully intended to comply with the requirement to be tested when called upon to do so.

50. It was not suggested that smoking a cigarette would compromise the test results; indeed, the evidence before the magistrate was that it would have no such effect. Concern was expressed that the person might drink liquor when outside the bus, thus delaying the testing, yet again, if there was alcohol in the person's mouth when being tested. It was accepted, however, that if the person did drink alcohol in the hope that the test results might be later successfully challenged then the legislation would thwart such ambition[18].

51. The primary concerns were that if persons were permitted to wander outside the bus they might be endangered by passing traffic, might become engaged in arguments with other persons at the scene, or else might act in a manner which imposed obligations upon police to supervise them. I fully appreciate that it would be more convenient for the police to be able to compel the persons to remain within the bus, but it was accepted that, as a matter of practice, the informant, in any event, remains with the person to be tested at all times until the testing process is concluded. Furthermore, the person being tested is not under arrest, and is free to depart, save for the fact that if the person does depart without completing the testing process that constitutes an offence, with severe consequences for failing to remain[19]. Once the testing process is concluded there must be many instances of the persons remaining at the scene until driven home by friends or perhaps waiting for a taxi. Any risks of the person being endangered by traffic or causing a scene are likely to be as real after the testing is completed as before it is concluded.

52. In my view, those practical considerations can not determine the appropriate interpretation of these sections, and Mr McArdle did not suggest otherwise. In any event, it seems to me that the problems are overstated and would not be eliminated even if the appellant's desired interpretation was adopted.

53. Smith J saw the question as being one of fact, and concerned with the issue of proximity of the person to the place of testing. His Honour also considered it important that the person was "fully intending to return for the test and remaining under police supervision". Whilst proximity would no doubt be a relevant factor, the intention of the person to refuse to remain for the test seems to me to be central to the offence. In my view, a person who walked out the door announcing that he was not going to remain at the site for a further test but was going home, would have demonstrated a refusal to comply with the direction to remain there the moment he walked out the door, just as he would have done if his starting point for his announced departure was some metres away from the bus near which he had been waiting. Thus, even when in close proximity to the bus a person might so act as to satisfy a court that he or she had refused to comply with the request to remain at the place for the purpose of being satisfactorily tested.

54. There might well be cases where it would become a difficult question of fact – whether by virtue of the distance the person moved from the bus, what the person said, or how the person acted – to determine whether the person was refusing to comply with the requirement. That was not this case.

55. In the present case, the issue was whether by leaving the bus for the purpose of smoking a cigarette, but remaining close to the bus, and fully intending to re-enter the bus when required for testing, that conduct constituted a refusal by the respondent to comply with the requirement which Hrysikos had initially made that she remain at the place to which she had been directed. The magistrate in this case concluded that the offence was committed as soon as the respondent left the bus. That, in my view, on the facts in this case did not constitute an offence. In my opinion, it was not open to conclude that the offence had been committed. The decision of Smith J, in that respect, was correct.

"Reasonableness"

56. Smith J considered an alternative submission that even if "the place" meant the inside of the bus an offence was not committed if it was unreasonable to prevent the person leaving the bus. Smith J concluded that, if he was wrong as to the interpretation of the section, then the charge should have been dismissed because the requirement to remain had to be reasonable, and

in this case it was not a reasonable requirement. Smith J held that importing of an obligation of reasonableness, in that way, was consistent with the introduction of such a requirement into s53, by Ormiston J (as he then was) in *DPP v Webb*[20].

57. With respect to the view of Smith J, I do not accept that the situation here was analogous to that in *Webb*. In that case the requirement of reasonableness was held to attach to the requirement to undergo a preliminary breath test pursuant to s53. Ormiston J held that there being no power to place the driver in custody or to detain the person indefinitely, it should be implied into the terms of the section that the requirement to undergo the test be reasonable, thus, if the requirement imposed an obligation that the person be delayed unduly or be obliged to travel a significant distance for the preliminary test, then it might not be a reasonable request.

58. In the present case, consistent with *Webb*, a requirement under s55(1) to accompany an officer to a place for the purpose of testing by a breath analysing machine would also need to be reasonable. It would not be difficult to postulate circumstances where the requirement might be unreasonably imposed. It was in a different situation, however, that Smith J introduced the notion of reasonableness. If the notion of reasonableness, as discussed in *Webb,* was sought to be applied to the present case, then it would be implied at the time of the making of the requirement to accompany to a place. Thus, a requirement to accompany and remain in a police car for up to three hours might very well be unreasonable. A requirement to accompany "to the police car" would not (assuming, for this example there is no other factor making the request unreasonable). Likewise, a requirement to remain within the four walls of the bus for up to three hours would be unreasonable; a requirement to accompany "to the breath testing vehicle" would not. The last instance imposes an obligation that the person "remain there" – that is at the place – until he has completed the furnishing of a valid sample of breath and received a certificate. It does not impose an obligation to remain within the bus, at all times, until that result is achieved.

59. In this case, however, it was unnecessary to consider whether at a later stage, once the person had accompanied the officer to the bus, it was unreasonable not to let the person leave the interior of the bus to have a cigarette. The person had complied and continued to comply with the requirement to remain at the bus, even though she stepped outside the bus, and she intended to perform such further tests as were required of her.

The tender of the Hrysikos statement

60. The second issue raised by this appeal has no bearing on the outcome of this case, in light of the conclusions reached above (if, indeed, it ever had any bearing on the outcome). Nonetheless, it raises a practical question relating to the applicable legal principles relating to the use of documents during cross-examination which frequently arises.

61. The respondent had been charged with a count of common assault and pleaded guilty to that charge. The charge under s49(1)(e) was strongly contested, however, with disputes on many issues, including the terms of the requirement which Constable Hrysikos gave to Ms Mansfield. Most of the issues are of no relevance to this appeal. There was, however, a dispute as to one matter which is now addressed by this ground of appeal.

62. Hrysikos said that after leaving the bus to have a cigarette the respondent went back inside the bus and collected her handbag and other belongings. The respondent denied that she had gone back to the bus, at all. During the cross-examination of Hrysikos counsel for Ms Mansfield suggested to Hrysikos that he was lying in his evidence. He put to the witness that he had made two statements concerning the events of the night and that in neither statement had he mentioned that the respondent had gone back inside the bus. Hrysikos agreed that that was the case. Having received that concession one would have expected the cross-examiner to move on, but counsel asked when Hrysikos had last read one of the statements and the witness said he could not remember. The questioning followed:

> "Well, you agree that that aspect isn't in it? - What's that? About going into the booze bus? Do you want to read it now? - I can read it now, yes. Refresh your memory from it. Would you satisfy yourself that that is a statement made by you? - Yes I would."

63. Counsel having handed the statement to the witness during this exchange then asked

> "Can I have that back, please? At that point the police prosecutor called for the statement to be tendered, because "he's about to be cross-examined on it". Counsel for the respondent replied:
> "I haven't cross-examined him on it, Your Worship. The application's premature and without substance, in my submission. It's exactly why I handed it to him, so he could refresh his memory from it."

64. His Worship responded: "We'll wait and see".

65. Counsel then asked the following questions of the witness:

> "Thank you your Worship. Have you refreshed your memory from that statement? - Yes. As a result of refreshing your memory from the statement you're now able to give evidence in accordance with that statement, correct? - That's right. You say in your statement, don't you, that after you exited the bus you witnessed a male person, that is Mr Moore? - Hmmm."

66. Counsel then asked three more questions, none of which challenged the witness with any inconsistency, indeed, each question involved reading a sentence from the statement and asking the witness if that is what the statement recorded, which he agreed was the case, and which the witness said was what he had already said in evidence. The statement had, thus, been used for the purpose of demonstrating that the evidence of the witness was consistent with his statement in those respects, which constituted something less than a forensic triumph, but no doubt foreshadowed what was intended to be a more meaningful challenge, one in which it would be asserted that there were inconsistencies between the statement and his evidence. Before such a cross-examination commenced, however, his Worship announced, "The statement will now be admitted as Exhibit C".

67. Counsel asked on what basis the statement had been "admitted", and his Worship said that counsel had looked at the statement, had examined from it and had used the words of the statement and the expression "in your statement". Counsel responded that the witness had refreshed his memory from the statement and that "It's not tenderable if the witness refreshes his memory".

68. In my opinion, the question of law, whilst accurately reflecting the basis for his Honour's decision on this issue perpetuates what I believe is a misunderstanding of the basis on which the document came to be tendered before the magistrate. The ground of appeal before us asserts that the judge was wrong to have held that the magistrate was himself in error "in deciding to require the prosecuting counsel to tender the document". Smith J, accepting the analysis presented by counsel for the present appellant, accepted that it was the magistrate who had required the tender of the document. Upon that assumption his Honour examined authorities on the question whether a judicial officer had an entitlement to require the tendering of evidence in a proceeding. With respect, I can not agree with the analysis which Smith J and counsel for the appellant made as to the circumstances of the tendering of the document.

69. In my opinion, on close analysis it is apparent that his Worship, having deferred ruling on the application of the prosecutor, which counsel for the respondent said was premature – because he had not cross-examined on the document – then ruled on the application once counsel did cross-examine on the document. The document was tendered, therefore, at the application of the prosecutor, and that is confirmed by the fact that it became the third prosecution exhibit.

70. The issue, therefore, was whether the use made by defence counsel of the document enabled the prosecutor to require the document to be tendered.

71. There are two quite distinct situations which can arise when a document is being referred to in cross-examination[21]. The distinction was blurred in this case and has caused some confusion in analysis as to what principles of the laws of evidence apply. One issue concerns use of a document to refresh memory. The second situation concerns cross-examination on the contents of a document to establish a prior inconsistent statement.

72. Counsel for the respondent contended before the magistrate and the judge that the document could not be tendered because it had merely been used to refresh the memory of the witness. Smith J concluded, rightly in my view, that this was not a case of a document being used

to refresh memory. There was no refreshing of memory, at all, in this case. The witness accepted that his statement did not make reference to a return visit to the bus. It was nonsense, therefore, to ask him to look at the statement to "refresh his memory" to confirm the truth of his evidence that the matter had been omitted from his statement.

73. The extracts from the transcript of hearing which I have discussed above, show that the witness did not refresh his memory, at all, from his statement. There was nothing in his statement which refreshed his memory, and for counsel to hand the statement to the witness and then ask him to agree that he had refreshed his memory, but without explaining whether he was referring to the omitted matter or some other topic, amounted to little more than a ruse. If the witness had indeed read the entire statement for the purpose of confirming that the topic of a return visit to the bus was omitted then the witness might have had his memory of events "refreshed", but he may have recalled all of the matters in the statement, in any event.

74. The real purpose behind placing the statement in his hands was to cross-examine the witness on the statement under the pretext that that was being done as part of an exercise of refreshing his memory rather than as cross-examination to establish inconsistencies between the statement and his evidence. The assumption of counsel was, wrongly, that if the magic words, "refreshing memory", were adopted by the witness then the document could not be tendered.

75. However, even assuming this was an instance where memory had been refreshed, then it was refreshed only as to the topic of the absence of reference to the return visit to the bus. The further questions which were asked went beyond the topic on which memory had been "refreshed" and the magistrate was entitled to require that counsel for the respondent tender the statement[22]. In fact, his Worship treated it as a prosecution tender, but that was not of practical importance.

76. As I have said, however, in my view this was not a case where memory had been refreshed. Smith J correctly analysed the situation to be that the document was used for the purpose of establishing prior inconsistent statements. In that analysis his Honour looked at the terms of s36 of the *Evidence Act* 1958, which reads as follows:

> "**Witness may be cross-examined as to written statements without producing them**
> **36.** A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the cause or prosecution without such writing being shown to him. But if it is intended to contradict such witness by the writing, his attention must before such contradictory proof can be given be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always that it shall be competent for the court at any time during the trial or inquiry to require the production of the writing for inspection and the court may thereupon make such use of it for the purposes of the trial or inquiry as the court thinks fit."

77. His Honour concluded that the document had been tendered at the behest of the magistrate but that the power given by s36 for the magistrate to "make such use of" the statement in these circumstances did not extend to a power to require one of the parties to tender the document. For the reasons given, I do not agree that the magistrate did require the prosecutor (or the defence) to tender it. The magistrate simply responded to the application of the prosecutor that the document be tendered.

78. Had his Honour concluded that this was a situation where the tender was made in response to the prosecutor's application for it to be tendered then there is no doubt that Smith J accepted that the document could be tendered at the request of the prosecutor. His Honour said, expressly:

> "There was no reason why the (appellant, Hrysikos) could not have tendered it if he had wished, and if it was admissible for a relevant purpose, had it admitted into evidence (cf. *Wood v Desmond*[23])."

79. The entitlement of the prosecutor to tender the statement might be confined only to so much of it as relates to the topics within it upon which there had been cross-examination, but that is a matter for the discretion of the judge or magistrate[24].

80. I make one observation, however, about His Honour's analysis of s36. His Honour concluded that the words "make such use of it" in s36 did not empower the magistrate to require either party to tender the document. With respect to his Honour, and with some hesitation, having

regard to his Honour's depth of knowledge as to the laws of evidence, I disagree that the section denies such power to the judge or magistrate, in an appropriate case, to compel the tender of a document. The section, in my view, is couched in terms sufficiently wide to cover such situations as cross-examination before a jury which would give a false or misleading impression that a document was inconsistent with the witness's evidence. In those circumstances, in my view, the judge or magistrate would retain the power to compel one or other party to tender the document. The power of the judge or magistrate to compel tender under s36 is recognised by the authorities, in my opinion[25]. Even when the contents of the document are not referred to explicitly in cross-examination, the manner in which cross-examination proceeds may still lead to the obligation being imposed on counsel to tender the statement. For example, if a statement is placed in the hands of a witness and he is asked "having read that do you stand by your evidence" then the statement may be required to be tendered by counsel who asked the question, in order to dispel any unfair suggestion that his statement was at odds with his evidence[26].

81. Smith J held that if (contrary to his opinion) the section did give such a discretion then this was not a case which warranted the magistrate requiring the tendering of the document, and that having wrongly exercised his discretion to admit it the respondent was denied a chance of acquittal. Smith J concluded that the tendering of the document might have wrongly prejudiced the respondent's defence, by introducing inflammatory material.

82. Had it been necessary to determine whether the discretion was correctly exercised (that is, had I concluded that the magistrate exercised his own discretion under s36 to compel the tender of the document, rather than simply respond to a prosecution application) then I would not have concluded that the discretion miscarried, or that the fair trial of the respondent was prejudiced. I find it difficult to understand why such a fuss was made about the tender of the document. The inflammatory material which it contained merely represented further examples of colourful and obscene language used by the witness at the scene, of which there was an abundance already in evidence. Counsel before us, on both sides, could not suggest what damage it did to the respondent's case to have the document admitted.

83. In my opinion, the appeal should be dismissed.

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[1] The language of s49(1)(e) has remained almost the same, although many of the related sections have been amended. I shall use the present tense, nevertheless, to describe the offence and its elements.
[2] The language of s55 has been amended since 1998, in some respects significantly, but I shall also use the present tense to describe its requirements.
[3] [1993] VicRp 82; [1993] 2 VR 403 esp. at 411-413; (1992) 16 MVR 367.
[4] It should be noted that s55(1) now refers to "a place or vehicle", and "examples" are now appended to the sub-section: see fn.[below at para.[9].
[5] Sub-section (9) of s55 would not provide a defence, for that is limited to refusals to provide a sample: see *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[6] As was seemingly charged in the first line of the charge, although, at the end of a long and highly confusing charge, spread over nine lines, it appears that the charge was repeated in fuller terms.
[7] It seems, from *DPP v Greelish*, a recent decision not cited to us, that each "requirement" under s55 may form the basis of separate charges pursuant to s49(1)(e).
[8] By s16 (1)(ii) of Act 92 of 2001.
[9] An "example" is now given at the foot of this section to the effect that 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".
[10] [1998] VSC 119; (1998) 104 A Crim R 65; (1998) 28 MVR 521. I should not be taken as accepting the whole of the reasoning in that case.
[11] Which was clearly defective: see esp. *DPP v Greelish* at 221-222.
[12] The making out of this latter ground cannot, of course, affect the outcome of this appeal, for this evidence had no bearing on the relevant facts which are the basis for the Court's legal conclusion that the charge was not established.
[13] Reprint No. 4 *Road Safety Act* 1986.
[14] The emphasis upon deliberate disobedience, by use of the words "refuses to comply" in s49(1)(e), is made even clearer when those words are contrasted with the terms of s49(1)(d) which makes it an offence where a person "refuses or fails" to comply with a request to stop.
[15] It was agreed by counsel that the compartment in the bus in which the respondent was tested measured approximately "eight or nine feet by eight or nine feet".
[16] *DPP v Williams* [1998] VSC 119; (1998) 104 A Crim R 65; (1998) 28 MVR 521.
[17] Amended by s16(1) of Act No. 92 of 2001. By s16(2) under a heading "Example", s55(1) and (2) are now followed by words "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".
[18] See s48(1A) and s49(1)(f).
[19] An offence will be committed under s49(1)(e) if there is a refusal to comply with any one of the discrete obligations imposed by s55(1); the requirement to remain at the relevant place being one such obligation: *DPP v Greelish* (2001) 4 VR 220, at 223.
[20] *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.
[21] See *De Bono v Neilsen* (1996) 88 A Crim R 46, at 52-53. In this case although the witness was cross-examined about an omission from his statement it was truly a case of refreshing memory because the witness admitted that he had used the statement before coming to court, for purposes of refreshing his memory.
[22] *Senat v Senat* [1965] P 172; [1965] 2 All ER 505;; *R v Harrison* [1966] VicRp 12; (1966) VR 72; *R v McGregor* [1984] 1 Qd R 256; 11 A Crim R 148; *Wood v Desmond* (1958) 78 WN (NSW) 65.
[23] (1961) 78 WN (NSW) 65, at 69.
[24] *R v Jack* (1894) 15 NSWLR 196; *Alchin v Commissioner for Railways* (1935) 35 SR (NSW 498; 52 WN (NSW) 156 52 WN (NSW) 156; *Wood v Desmond*, at 67.
[25] See *R v Jack*, at 199, per Windeyer J, with whom Innes and Stephen JJ agreed*; Wood v Desmond,* at 67, per Herron J, with whom Kinsella J agreed; *Alchin v Commissioner for Railways*, at 509, per Jordan CJ, with whom Street and Maxwell JJ. concurred.
[26] *R v Jack,* at 200-201.

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