

05/91

SUPREME COURT OF VICTORIA

ASKEW v SVOBODA

Nathan J

14 January 1991

MOTOR TRAFFIC – DRINK/DRIVING – MOTOR VEHICLE COLLISION – OFFENDER REASONABLY BELIEVED TO HAVE BEEN DRIVING AT TIME OF COLLISION – WITHIN PREVIOUS 3 HOURS – REQUEST TO UNDERGO PRELIMINARY BREATH TEST – WHETHER PRE-CONDITION FOR REQUEST THAT POLICE OFFICER MUST FIND OFFENDER DRIVING AT TIME OF ACCIDENT: ROAD SAFETY ACT 1986, SS49(1)(b), 53(1)(c).

Where a court is satisfied that there are reasonable grounds for believing that within the previous 3 hours a person has driven a motor vehicle when it was involved in an accident, it is not necessary for the informant to prove that the person charged was found driving a motor vehicle at the time of the accident.

Peebles v Hotchin (1988) 8 MVR 147; MC 61/1988, explained.

NATHAN J: [1] John Svoboda, threw a can of beer at a police divisional van, in McArthur Street, Sale, on 1st February, 1990. He was arrested and charged with discharging the missile, an offence to which he subsequently pleaded guilty. This incident arose out of a motor accident at the same time and place, after a car which he had been driving had collided with a tree. In respect of that driving he was charged with an offence under the terms of s49(1)(b) of the *Road Safety Act* 127 of 1986 (the Act), which reads:

"A person is guilty of an offence if he or she—

drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood."

The Magistrate dismissed an information laid against Svoboda under that section and it is from that decision that the applicant seeks review pursuant to the [2] *Magistrates' Courts Act* 1971. In his fact-finding, the Magistrate found that Svoboda had driven at the time and place alleged in the information. He disbelieved a fabricated account of the incident given by Svoboda to the police. The Magistrate heard evidence from the informant, other police who attended the scene and a person authorised to operate breath analysing equipment under the terms of the Act. A certificate under the terms of the Act was tendered. The order nisi to review was obtained upon the following ground: the Magistrate erred in law in not convicting the respondent after having found that he had driven the car at the time of the accident and after having admitted into evidence the "Certificate of authorised operator of breath analysing instrument", which indicated that the respondent was in excess of the prescribed concentration of alcohol in his blood. The order will be made absolute on this ground and there is no need for me to deal with its alternatives.

In my view the learned Magistrate, sitting in a busy court where expedition is demanded, and in fact delivered, was led into an understandable error which failed to account properly for sub-s53(1)(c) of the Act. The Magistrate accepted a no case submission put to him that in order for Svoboda to be convicted, it was necessary for the informant to have found him driving at the time of the accident. If this were not so, then the breath test was unlawfully conducted and could not sustain a conviction. Reference was made to the Magistrate of *Peebles v Hotchin* per Southwell J, 20th October 1988, reported in [3] (1988) 8 MVR 147.

In my view, upon more measured consideration as I am now able to give the matter, this submission is without substance. *Peebles v Hotchin* is not applicable and concerns s53(1)(a) of the Act not adverting to sub-s(c) which is the relevant and pertinent provision in this case. I recite it – the section is headed Preliminary Breath Tests 53(1):

"A member of the police force may at any time require—

(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle, or

(b) ... the driver of a motor vehicle that has been required to stop ... or

(c) any person who he or she believes on reasonable grounds has within the last three preceding hours driven or been in charge of a motor vehicle when it was involved in an accident—to undergo a preliminary breath test by a prescribed device."

Peebles v Hotchin concerned a case where no accident had occurred, the alleged driving being reported by a bystander. Southwell J found that the use of the phrase 'finds driving', required the member of the police force referred to, to find or see the driving as a physical fact and not as a matter of inference. It was the submission upon these lines which enticed the Magistrate in this case into error.

Sub-section (c) of s53 widens the ambit of its operation to encompass a member of the police force, who believes on reasonable grounds that a person who has driven a motor vehicle involved in an accident within the last preceding three hours, undergo a breath test. The predicates of the sub-section are:

(1) an accident,

(2) driving within the time frame and

(3) reasonable grounds for [4] believing that there was such driving.

In this case the Magistrate found as a fact there was an accident; any other conclusion from his acceptance of the police evidence and his rejection of that of the respondent, is impossible. He found as a stated fact that Svoboda was the driver. In my view it follows the preliminary breath test was lawfully conducted; no other conclusion is possible.

As to the predicate of reasonable belief, the Magistrate did not direct his attention to this, but I find there was ample evidence to justify such a belief by the attending Police members. They would not be required to actually see the accident to justify a prosecution. See *Iskov v Matters* [1977] VicRp 26; (1977) VR 220, and *Mills v Meeking & Anor* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257. The case is to be distinguished from *Bracken v O'Sullivan*, unreported, Full Court, 15th October 1990, which concerned the acceptance of a certificate of an operator under s58 of the Act because the Magistrate there found the driving is a proven fact, and secondly he also had the evidence of the actual operator, as well as the certificate.

In this case it was not possible to conclude, otherwise, that Svoboda drove whilst his blood alcohol levels were in excess of those permitted and did so and was doing so when the car he was driving was involved in an accident. I shall remit this matter to the Magistrate at Sale for further adjudication in accordance with the tenor of this judgment.