29/03; [2003] VSC 464

SUPREME COURT OF VICTORIA

HALEPOVIC v SANGSTON

Bongiorno J

24 October 2003 — (2003) 40 MVR 203

MOTOR TRAFFIC – DRINK/DRIVING – AT POLICE STATION DRIVER UNABLE TO PROVIDE A SUFFICIENT SAMPLE OF BREATH FOR ANALYSIS BY BREATH ANALYSING INSTRUMENT – REQUEST BY POLICE OFFICER THAT DRIVER ALLOW A MEDICAL PRACTITIONER TO TAKE A SAMPLE OF BLOOD FOR ANALYSIS – DOCTOR NOT PRESENT WHEN REQUEST MADE – DRIVER CHARGED WITH REFUSAL TO ALLOW BLOOD SAMPLE TO BE TAKEN – CHARGE FOUND PROVED – WHETHER REQUIREMENT FOR THE TAKING OF BLOOD MUST BE MADE IN THE PRESENCE OF MEDICAL PRACTITIONER – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(9A).

After being intercepted driving a motor vehicle, H. was asked by S., a police officer, to undergo a preliminary breath test. H. failed to produce an adequate sample of breath for analysis and then accompanied S. to a police station where further unsuccessful attempts were made to produce a breath sample from H. S. then required H. to allow a medical practitioner or approved health professional to take a sample of H's blood for analysis. H. refused to allow a blood sample to be taken and was charged with an offence under s49(e) of the *Road Safety Act* 1986 ('Act'). H. was later convicted of the offence. Upon appeal—

HELD: Appeal allowed. Order of magistrate set aside and the charge dismissed.
1. Before a person can be required to allow a registered medical practitioner or other approved person to take a blood sample from him or her, that registered medical practitioner or other approved person must be present.
***Scott v Dunstone* [1963] VicRp 77; [1963] VR 579; and**
***DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, applied.**

2. As it is not suggested that there was any doctor (or other approved person) present at the time H. was asked to permit a blood sample to be taken, it follows that there was no obligation on him to give his consent at that point. Such an obligation would only arise when the doctor was physically present wherever the driver might be. Accordingly, the magistrate was in error in finding the charge proved.

BONGIORNO J:
1. On 17 March 2002 the respondent, Constable Danni Sangston, was on duty in the Frankston area with two other police officers in a marked police sedan. He observed the appellant Maid Halepovic approach a white Ford sedan. He seemed to stagger as he walked. He was spoken to by the police who advised him to take a taxi home, but a short time later the respondent again saw the appellant approach the white Ford sedan. This time he was also staggering. He leant against the car when putting the key in the driver's door to unlock the car, got in and commenced to drive the vehicle.

2. Halepovic drove about 20 to 30 metres along Wells Street and was then intercepted by the same police officers who had earlier observed him going towards his car. The respondent asked him to undergo a preliminary breath test but he failed to perform that test to the satisfaction of the respondent in that he did not produce an adequate breath sample and was asked to perform another. Again he failed to produce a breath sample adequate for analysis.

3. The appellant was then asked to accompany the respondent to the Frankston Police Station for the purposes of a formal breath test. He agreed and he did so. At the police station an authorised breath test machine operator, Senior Constable Hunter, operated an approved breath testing machine on three occasions but on no occasion was he able to obtain a sample such that it could be analysed. In the course of these attempts the machine produced three certificates, each of them showing that no sample had been provided.

4. After these three failed attempts to produce a breath sample, Constable Sangston formed the view that there was some medical or physical reason for the appellant's inability to supply a sufficient breath sample, so he said to the appellant (via an interpreter who had been contacted on the telephone interpreting service):-

> "It appears to me that you are unable to provide a sufficient sample of breath on medical grounds or because of some physical disability. I now require you to allow a registered medical practitioner or approved health professional to take a sample of your blood for analysis pursuant to s55(9A) of the *Road Safety Act* 1986".

5. The appellant replied, "No, I have blown two time, I only had three beers and I will not give my blood. I want to go home now". I infer from the language used as reported by the police officer that that response of the appellant was given in English and not through the interpreter. The respondent then said to the appellant, "You have spoken to the interpreter over the phone who explained your requirement to come to the hospital to have a sample of your blood taken, do you understand the request?" The appellant said, "I have told you mate, I have blown for you twice, I not give the blood".

6. In the event, the appellant was charged with an offence under s49(e) of the *Road Safety Act* 1986 in a charge which was in the following terms:-

> "That the defendant at Frankston on 17/03/02, after having been required by a member of the police force to undergo a preliminary breath test, in accordance with section 53 of the Road Safety Act, and the test in the opinion of the member of the police force in whose presence it was made, indicated an insufficient sample, he was further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to section 55(1) of the act and for that purpose he accompanied a member of the police force to a police station where a sample of breath was to be furnished but he was unable to furnish the required sample of breath on medical grounds or because of some physical disability, he was further required to allow a registered medical practitioner, nominated by the person who required the sample of breath, to take from him a sample of blood for analysis, did refuse to allow such blood sample to be taken."

7. The matter came on before the Magistrates' Court on 26 May 2003. The magistrate found the charge proved and imposed a fine and cancellation of licence upon the appellant as he was required to do.

8. The magistrate rejected an application that the period of disqualification which he imposed should take into account a period already spent by the appellant under suspension pursuant to the summary suspension procedures provided for in the Act, whereby the police are able to issue a notice of suspension to take immediate effect subject to a magistrate's order.

9. The matter comes before this Court on an appeal by Mr Halepovic pursuant to s92 of the *Magistrates' Court Act* 1989. Such appeals are confined to questions of law. In this case, as usual, questions of law have been isolated by a Master. These questions of law are:

> (a) Does a requirement for the taking of blood made pursuant to s55(9A) of the *Road Safety Act* 1986 need to be
> (i) a requirement which is capable of promptly being complied with?;
> (ii) made in the presence of either a registered medical practitioner or an approved health professional?;
> (iii) made after the police member has nominated either a registered medical practitioner or an approved health professional in accordance with the section?;
>
> (b) Was there any evidence before the learned magistrate to enable him to find that the Appellant had refused to comply with the requirement to allow a registered medical practitioner who had been nominated by the police to take from him a sample of his blood for analysis?;
>
> (d) Whether the learned magistrate erred in sentencing by failing to take into account the period of time in which the Appellant's drivers licence was suspended pursuant to s51 of the *Road Safety Act* 1986 (See s51(14))?.

These questions of law raise the issue as to what the requirements are for a successful prosecution for a failure to comply with s55(9A) of the *Road Safety Act* 1986.

10. S55(9A) is a section which is designed to provide the police with a method of proceeding after a person who has tried to provide a preliminary sample of breath and a subsequent substantive sample of breath but has been unable to do so on medical grounds or because of some physical disability. That method of proceeding involves the use of blood sampling. The section is in the following terms:

> "(9A) The person who required a sample of breath under sub-s.(1), (2) or (2AA) from a person may require that person to allow a registered medical practitioner or an approved health professional nominated by the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> (a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or (b) the breath analysing instrument is incapable of measuring in grams per 100 millilitres of blood the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever— and for that purpose may further require that person to accompany a member of the police force to a place where the sample is to be taken and to remain there until the sample has been taken or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

11. Mr Hardy, of counsel, who appeared for the appellant relied upon two substantive arguments in support of his contention that the Master's questions should be answered such that the charge against his client should have been dismissed.

12. The first argument which he put was that in order for there to be compliance with s55(9A) the police officer must have nominated a medical practitioner or an approved health professional for the purposes of the sub-section before requiring the subject of his investigation to allow that medical practitioner or approved health professional to take a blood sample.

13. His argument is that for compliance with the section it is essential to the definition of relevant medical practitioner that he or she be actually nominated. He submitted that without appropriate nomination the police officer had not complied with the section so as to permit him to impose a lawful requirement on a driver. In particular he relied upon a judgment of Mason J in the High Court in *Hammond v Lavender*[1], a case which originated in Queensland. In that state s16A(e)(i) of the *Traffic Act* 1949-1974 (Qld), a statutory provision relating to breath analysis of drivers, is in the following terms:-

> "A person who is required pursuant to this subsection to provide a specimen of his breath for analysis shall do so when and in the manner directed by the... authorised member of the Police Force operating or who is to operate the breath analysing instrument".

Section 16A(11)(a) of the same Act provides:

> "A person who, upon a requisition duly made by a member of the Police Force under paragraph (a)... in subsection (8), fails to provide as prescribed a specimen of his breath for analysis... is guilty of an offence which shall be deemed to be an offence against subsection (1) of section 16...".

14. In dealing with a situation where a person had said that he would not comply with the requisition, as it is termed in s16A(11)(a) of the Queensland Act, His Honour said:

> "There is in an offence so constituted no room for the notion that a person, by announcing his refusal to provide a specimen of breath, dispenses with the necessity for a direction under sub-s (8)(e)(i) and thereby commits the offence, although no such direction is given. The obligation is not merely to provide a specimen of breath but to provide it when and in the manner directed. The existence of a direction is therefore an essential element in the requisition with which the person directed in bound to comply. Unless and until it is given there is not in my view "a requisition duly made" within the meaning of sub-s(11)(a)".

15. By analogy, Mr Hardy argues that here there is no room for the notion that by announcing that he will not permit a registered medical practitioner to take a blood sample, the appellant has dispensed with the necessity for that medical practitioner to be nominated by the person requiring the sample as required by the relevant statute.

16. There is much in this argument to commend it and it may well be right, but in the circumstances and having regard to the conclusion which I have reached on the second argument,

I do not propose to further rule upon it. I note that in *Campbell v Sanders*[2], Teague J of this Court dealt with a case on a related point in which it seemed to have been conceded by the Crown that there was a necessity for the police officer to nominate a doctor even if it was not necessary that that nomination descend to particulars of the doctor's name.

17. Here, there was clearly no evidence that any doctor was nominated and, if it was a necessary requirement of the section, then there was no evidence to satisfy that requirement. If the point of law were to be decided as Mr Hardy submits the appeal would be upheld on that ground. However, I say nothing further about it.

18. The second argument is to the effect that unless the registered medical practitioner or approved health professional is present at the time the driver is required to permit the blood sample to be taken, then the requirement cannot be put in terms where a refusal constitutes an offence.

19. Since 1963, it seems to have been accepted in this Court (with perhaps only one exception) that in the case of the offence of refusing to undertake a breath test it is necessary for the approved breath analysis instrument to be present at the time the request to take the test is made.

20. In *Scott v Dunstone*[3] Sholl, J was dealing with an order to review a magistrate in respect of a charge, under the then s408A(6) of the *Crimes Act* 1958, of refusing to furnish a sample of breath for analysis. In the course of his judgment, His Honour said that there were two requirements before an offence of failing to provide a sample of breath for analysis could be proved. They were (at 581

> "(1) The officer, having the necessary belief on reasonable grounds referred to in sub-section (4)(a), must clearly ask the suspect to furnish a sample of his breath for the *stated* purpose of analysis by an approved breath analysing instrument. For example, he may say expressly, "I require you to furnish a sample of your breath for analysis by an approved breath analysing instrument", or he may point to such an instrument and say, "I require you to furnish a sample of your breath for analysis by this instrument", provided it is in fact so approved. (2) There must be an approved instrument present at the time of the requirement, into which the suspect can exhale at once if he consents to the test. That is to say, the appropriate operator must be there and available."

21. In the course of deciding that case, His Honour rejected any notion of anticipatory breach or anticipatory refusal. That is to say that the words of refusal cannot, as a matter of law, refer to an event which cannot immediately take place. In doing so, he referred to the inconvenience that the police might be put to in having an instrument brought to a police station in order to make a request for a sample, if a suspect has in effect already said "It's no use bringing a breath analyser, I won't take a test under any circumstances." But if the correct instrument was not there at the time, His Honour considered no offence could be committed under the provision requiring the sample to be given.

22. That decision has been followed in a number of other cases, although it was not followed by Marks J in *Lisiecki v Grigg*[3A]. It was followed, however, by Southwell J in *Rankin v O'Brien*[4], and more importantly, it has been followed in two cases in the Court of Appeal. In *DPP v Foster*[5], a case which was concerned with the procedure for taking a breath test, Winneke, P said (at 657):

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

He referred to *Rankin v O'Brien*.

23. Further on in Winneke P's judgment, His Honour made the point that a motorist's refusal to accompany a police officer to a station or other place where a sample can be furnished for analysis does not constitute a refusal to furnish a sample when required, but rather a refusal to accompany a police officer to a police station. The offences are not the same.

24. In *DPP v Greelish*[6] Buchanan JA specifically referred to the passage that I have quoted from *DDP v Foster* and made the same point concerning the difference between a refusal to accompany

a police officer to a police station and a refusal to provide a sample of breath. The first cannot constitute the second.

25. No case has been cited to me concerned with s55(9A). However, when one looks at the words of s55(9A) its similarity to s55(1) is striking. Section 55(1) is in terms: "may require the person to furnish a sample of breath for analysis by a breath analysing instrument". Section 55(9A) is in terms: "may require that person to allow a registered medical practitioner...".

26. In the circumstances I am unable to distinguish the two provisions. It seems to me that it is necessary before a person can be required to allow a registered medical practitioner or other approved person to take a blood sample from him or her, that registered medical practitioner or other approved person must be present.

27. As it is not suggested that there was any doctor (or other approved person) present at the time the appellant was asked to permit a blood sample to be taken, it follows that there was no obligation on the appellant to give his consent at that point. Such an obligation would only arise when the doctor was physically present wherever the driver might be.

28. That finding would be sufficient to dispose of this appeal were it not for a further argument put by Mr McArdle QC for the respondent to the effect that if I formed that view, I should remedy the situation by an appropriate amendment to the charge. There seem to me to be a number of problems in the way of doing that.

29. For a start the proposal put by Mr McArdle is that the evidence before the magistrate would have disclosed the offence of failing to accompany a member of the police force to a place where the sample is to be taken. He relies upon the passage of evidence which I have quoted in which the police officer suggested that the appellant might go to the hospital to which he also gave a negative reply.

30. If that were the only evidence on the matter there might be some point in taking this argument further, but it is clear on a review of the whole of the evidence, and in particular having regard to the magistrate's finding, that the police officers had not at that stage, or at any stage relevant to this case, formed a clear intention either to have a relevant person brought to the police station or to take the appellant to a hospital. Thus the magistrate could never have been satisfied that the elements of the offence of failing to accompany a police officer had been made out beyond reasonable doubt.

31. As in the circumstances the offence proposed could not be made out if an amendment were permitted to the charge and accordingly, there being no utility in such an amendment, I disallow it.

32. Having said that, however, I might add that it seems to me that there are multiple offences created by a combination of ss49(e) and 55(9A) of the Act only one of which is a failure to allow a registered medical practitioner to take a blood sample. Other offences under the section would be failing to accompany a police officer to a place where a sample was to be taken after a requirement had been imposed or failing to remain there for the statutory time. I do not accept Mr McArdle's argument that there is only one offence and that the various parts of sub-s(9A) simply provide particulars of one offence. See *Goodey v Clarke*[7] and in particular the cases referred to in paragraph 11 of that judgment.

33. My finding means that this appeal must be upheld.

34. It follows that there is no need for me to determine now the question of the reduction in the period of disqualification which it seems clear should have been allowed either by virtue of s50(2) or s52(14) of the *Road Safety Act* 1986 because of the fact that the appellant had served some period of suspension of his licence prior to his being convicted by the Magistrates' Court.

35. In the circumstances the appeal will be upheld, the order of the Magistrates Court quashed, the charge dismissed and the questions posed by the Master will be answered as follows:

(a) (i) unnecessary to answer; (ii) yes;(iii) unnecessary to answer; (b) no; (d) unnecessary to answer.

36. There will be an order that the Chief Commissioner of Police pay the appellant's costs here and below.

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[1] (1976) 11 ALR 371; (1976) 50 ALJR 728.
[2] (1996) 86 A Crim R 378; (1996) 23 MVR 515;.
[3] [1963] VicRp 77; [1963] VR 579.
[3A] (1990) 10 MVR 336.
[4] [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503.
[5] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 36.
[6] [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[7] [2002] VSC 246; (2002) 37 MVR 121.

APPEARANCES: For the appellant Halepovic: Mr SP Hardy, counsel. Patrick W Dwyer & Associates, solicitors. For the respondent Sangston: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions.
