**53/10; [2010] VSCA 323**

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

# *DPP v KYPRI*

**Harper and Hansen JJA**

**29 October 2010**

**MOTOR TRAFFIC – DRINK/DRIVING – FAILURE TO OBEY A REQUIREMENT TO ACCOMPANY A MEMBER OF THE POLICE FORCE TO A POLICE STATION IN ORDER TO FURNISH A SAMPLE OF BREATH – CHARGE DISMISSED BY THE MAGISTRATE – APPEAL FROM THE MAGISTRATE TO A SINGLE JUDGE DISMISSED – APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEAL – WHETHER CHARGE AS FRAMED SUFFICIENTLY SPECIFIED THE OFFENCE – WHETHER CHARGE SHOULD HAVE REFERRED TO THE RELEVANT SUBSECTIONS OF SECTION 55 OF THE *ROAD SAFETY ACT* 1986 – WHETHER OFFENCE AS CHARGED DUPLICITOUS – LEAVE TO APPEAL GRANTED: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1), (2), (2AA), (9A).**

Section 49(1)(e) of the *Road Safety Act* ('Act') 1986 provides:

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

K. was charged under s49(1) of the Act with the offence of having failed to furnish a sample of breath pursuant to section 55 of the Act. The charge did not specify which of the various statutory requirements under s55 K. had failed to comply with. At the hearing of the charge, K. submitted that the charge should be dismissed because the essential ingredients of the offence were missing from the charge. The Magistrate agreed, upheld the submission and dismissed the charge. Upon appeal to the Supreme Court (Pagone J) the appeal was dismissed. Upon application for leave to appeal—

**HELD: Leave to appeal granted.**
**1. Only two of the specified subsections of s55 empower a member of the police force to require a person who has already been required to furnish a sample of breath to subsequently accompany such a member to a place where a sample of breath is to be furnished. These are subsections (1) and (2) of s55. As framed, the charge therefore, at least arguably, raised no difficulty with the remaining subsection specified in s49(1)(e), namely sub-ss (2AA), (2A) and (9A).**

**2. It is arguable that the charge as framed adequately specified the offence which the prosecution sought to establish had been committed by K. It is true that both sub-s (1) and sub-s (2) of s55 empower a member of the police force, when the circumstances specified in one or other of those subsections obtain, to require a person to accompany that member to a police station. But, although the preconditions which enliven the right to so require are (slightly) different as between those two subsections, the offence constituted by a failure to comply with the requirement is the same in each case. And that is the offence of which (as the prosecution alleged) K. is guilty, namely the offence of failing to obey a requirement that the respondent accompany a member of the police force to a police station.**

**3. It is arguable that the magistrate ought to have allowed the prosecution the opportunity to amend the charge or to make an election in favour of one of the counts included in the duplicitous charge. The fact that the opportunity was not allowed is another argument for the conclusion that the magistrate was wrong to dismiss the charge.**

## HARPER and HANSEN JJA:

1. This is an application for leave to appeal. It is brought pursuant to s17A(3A) of the *Supreme Court Act* 1986. By that provision an order made by a judge of the trial division on an appeal, pursuant to s109 of the *Magistrates' Court Act* 1989, from a decision of a magistrate, is not subject to further appeal except by leave of the judge or of the Court of Appeal.

2. On 22 November 2006, the respondent was charged with an offence against s49(1)(e) of the *Road Safety Act* 1986. By that provision, a person is guilty of an offence if (among other things) he or she refuses to comply with a requirement made under s55(1), (2), (2AA), (2A) or (9A).

3. In dismissing an appeal from the Magistrates' Court at Ringwood, the trial division judge held that, while s49(1)(e) created the relevant offence, the particular s49(1)(e) offence thus created would in any particular case differ according as to which of the specified subsections of s55 were alleged by the prosecution to apply. Because in this case the charge failed this test of specificity, his Honour upheld the applicant's submission that it 'did not aver the essential ingredients of an offence under s49(1)(e) of failing to comply with s55(1)' and was therefore bad.[1]

4. The relevant charge was in the following terms:

> The defendant at Doncaster on 27 November 2005 having been required to furnish a sample of breath pursuant to s55 of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a police station did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

5. Only two of the specified subsections of s55 empower a member of the police force to require a person who has already been required to furnish a sample of breath to subsequently accompany such a member to a place where a sample of breath is to be furnished. These are subsections (1) and (2) of s55. As framed, the charge therefore, in our opinion, at least arguably, raises no difficulty with the remaining subsection specified in s49(1)(e), namely sub-ss (2AA), (2A) and (9A).

6. In our opinion, it is arguable that the charge as framed adequately specifies the offence which the prosecution seeks to establish has been committed by the respondent. It is true that both sub-s (1) and sub-s (2) of s55 empower a member of the police force, when the circumstances specified in one or other of those subsections obtain, to require a person to accompany that member to a police station. But, although the preconditions which enliven the right to so require are (slightly) different as between those two subsections, the offence constituted by a failure to comply with the requirement is the same in each case. And that is the offence of which (as the prosecution alleges) the respondent is guilty, namely the offence of failing to obey a requirement that the respondent accompany a member of the police force to a police station.

7. The respondent submitted that the charge, if it was to be properly drawn, should have specified the source of the power relied upon by the member as the basis for the requirement to which we have just referred – that is the requirement to accompany the member to a police station.

8. In our opinion it is arguable that it is not necessary for the charge to include the source of the power so relied upon by the relevant member of the police force. We point by way of analogy to the example to which the applicant refers in its written submissions where an affray is charged. It is, as the applicant there submits, unnecessary to specify the circumstances which give rise to the allegation that the accused participated in an affray. It may also be a relevant analogy that a charge such as murder does not need to specify all the elements which the prosecution must prove before the charge is made good.

9. It is, in our opinion, therefore arguable that a charge framed in the terms of this charge adequately describes the offence which the respondent is alleged to have committed. It is not an offence which is difficult to describe. It is simply that he failed to do what he was required to do, that is, he refused, when required to accompany a member of the police to a police station, to do so. The charge as framed says just that. It also gives the date and place of the alleged offence.

10. The charge was dismissed by the magistrate. In the words of the judge, the magistrate held that it 'failed to include essential elements'.[2] The judge agreed, and therefore dismissed the appeal. But the only 'elements' which might have been added would have been a description of the circumstances upon which the power to require attendance at the station arose. In our opinion, for the reasons which we have endeavoured to express, it is arguable that such a description is unnecessary.

11. It was also submitted by the respondent that the offence as charged was duplicitous – or at least the charge raised an issue of duplicity – and for that, and for the reasons to which we have already adverted, required amendment.

12. It was submitted by the applicant in answer to those submissions that, if there was duplicity, or if there was a need to amend, then the magistrate ought to have offered the prosecution an opportunity to amend or to make an election in favour of one of the counts included in the duplicitous charge. In our opinion, it is again arguable that the magistrate ought to have allowed the prosecution that opportunity.

13. The fact that the opportunity was not allowed is, in our view, another argument for the conclusion that the magistrate was wrong to dismiss the charge.

14. For these reasons it is, in our opinion, again arguable that the decision of the trial judge is attended with sufficient doubt to make good this limb of the preconditions for the grant of leave to appeal. We will therefore do so.

15. We are also of the opinion that substantial injustice would be done if the decision were to stand. It is at least arguable that that would be the result.

16. We have been informed by counsel for the applicant that more than 700 summary prosecutions involving a charge laid under s49(1)(e) await hearing and therefore the ultimate outcome of this litigation. More than 400 of these charges are over 12 months old. They are too old, therefore, to permit their being amended or reissued. For these reasons there will be leave to appeal the order of Pagone J pronounced on 7 September 2010. There will also be an order that the appeal be given such priority as the Registrar or Acting Registrar of the Court of Appeal deems appropriate.

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[1] *DPP v Kypri* [2010] VSC 400; (2010) 201 A Crim R 424.
[2] Ibid [5].

**APPEARANCES:** For the Crown: Mr JD McArdle QC, counsel. Mr C Hyland, Solicitor for Public Prosecutions. For the respondent Kypri: Mr OP Holdenson QC with Mr WJ Walsh-Buckley, counsel. Victoria Legal Aid.

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