**61/88**

## SUPREME COURT OF VICTORIA

# *PEEBLES v HOTCHIN*

**Southwell J**

**10, 20 October 1988 — (1988) 8 MVR 147**

**MOTOR TRAFFIC – DRINK/DRIVING – VEHICLE OWNER NOT FOUND DRIVING NOR IN CHARGE – WHETHER LAWFULLY REQUIRED TO UNDERGO A PRELIMINARY BREATH TEST – REFUSAL TO UNDERGO FULL BREATH TEST – "FINDS DRIVING" – "IN CHARGE" – WHETHER REQUIREMENT TO UNDERGO TEST MUST BE LAWFUL: *ROAD SAFETY ACT* 1986, SS48(1), 49(1)(e), 53(1), 55(1).**

Section 53(1)(a) of the *Road Safety Act* 1986 ('Act') provides (so far as relevant):

"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—
to undergo a preliminary breath test by a prescribed device."

Section 55(1) of the Act relevantly provides:

"If a person undergoes a preliminary breath test when required by a member of the police force... under section 53 to do so... the member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument..."

Section 48(1)(b) of the Act relevantly provides:

"...a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

Whilst P, a police officer, was taking particulars in respect of a parked motor vehicle, he was approached by the owner H., who appeared to have been under the influence of intoxicating liquor. In due course, H. submitted to a preliminary breath test under s53(1) of the Act, but later refused to undergo a full breath test under s55(1) of the Act. H. was charged, *inter alia*, with an offence under s49(1)(e) of the Act of refusing to undergo a breath test. On the hearing, the magistrate upheld a submission of 'no case' on the ground that P had not "found" H. driving his motor vehicle and dismissed the charge. Upon order nisi to review—

**HELD: Order nisi discharged.**
**It is a condition precedent to the obligation imposed on a motorist under s55(1) of the Act, that there be a lawful requirement under s53(1) of the Act for the motorist to undergo a preliminary breath test. In the circumstances, the police officer did not "find" H. driving his motor vehicle, nor was H. in charge of his motor vehicle as he was not attempting to start or drive it when spoken to by the police officer. Accordingly, there was no basis upon which the officer could require H. to undergo the preliminary breath test, nor the full breath test, and it was open to the magistrate to have held that H. had no case to answer and dismiss the charge.**

**SOUTHWELL J: [1]** Return of an order nisi to review a decision of the Magistrates' Court at Berwick on 15 December 1987 dismissing an information for an offence shortly described as refusing a breath test, contrary to s49(1)(e) of the *Road Safety Act* 1986 ("the Act"). That sub-section provides that "a person is guilty of an offence if he or **[2]** she ... refuses or fails to comply with a requirement made under s55(1) or (2)". *[After setting out the provisions of ss55(1) and 53(1) of the Act, His Honour continued].*

The relevant facts are: at about 3.30 pm. on Friday 28 August 1987 Mr Lever, a security officer on duty at the Fountain Gate Shopping Centre, Endeavour Hills, saw a man park a white Ford panel van in an area set aside for buses in front of a shop. The manner of its parking caused **[3]** him to take particular notice: he recognised the driver as a man he had seen at the centre on a number of occasions. Some little time later a commotion occurred in the nearby mall: Mr Lever saw the driver involved in an argument with another man. A few minutes later (this was at about 4.00 pm.) he saw a policeman (Constable Peebles, the informant) talking to the driver (the

defendant) in whose presence Mr Lever reported his observations to the informant, including the fact that Mr Lever had seen the defendant parking the panel van. The informant had been taking particulars of the vehicle when he was approached by the defendant.

The informant then commenced to question the defendant: he arrested him for being drunk in a public place: the defendant made some denials (which could be held to be false) about his ownership, possession and driving of the car. He claimed that another man had driven and parked the van for him later to collect, stating that the other man intended to leave the keys under the front seat. After his arrest, the defendant was searched, and the car keys were found in his pocket. The defendant declined to give any explanation. Later, the defendant admitted having driven the panel van earlier in the day, but denied driving it to and parking it at the shopping centre. The defendant submitted to a preliminary breath test, which was positive. Later, he refused to undergo a breath test. He was charged with that refusal, with unlicensed driving and with having driven an unregistered vehicle.

**[4]** One might pause to wonder why he was not charged with driving whilst under the influence of liquor. At the conclusion of the prosecution case, a submission that there was no case to answer was, after discussion, upheld by the Magistrate, who stated that "it must be a police member who finds the defendant driving".

The order nisi was granted upon a number of grounds which, as it seems to me, are somewhat repetitive. It is necessary to set out only some of them.

> "1. On the evidence the Magistrate should have held that the Informant had found the Defendant in charge of a motor vehicle and accordingly that the Informant was authorized to require the Defendant to take a preliminary breath test pursuant to section 53(1) of the *Road Safety Act* 1986;
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> 2. The Magistrate was wrong in holding that a member of the police force could not pursuant to section 53(1) of the *Road Safety Act* 1986, require a person to undergo a preliminary breath test unless that member had himself observed such person driving a motor vehicle;
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> 3. The Magistrate was wrong in holding that a member of the police force was not authorized by section 53(1) of the *Road Safety Act* 1986 to require a person to undergo a preliminary breath test unless that member had observed such person in control of a motor vehicle whilst such motor vehicle was in motion;
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> 6. The Magistrate should have held that the Defendant, having taken a preliminary breath test which test in the opinion of the Informant was positive, was obliged when required by a member of the police force to provide a sample of his breath for analysis by a breath analysing instrument pursuant to section 55(1) of the *Road Safety Act* 1986."

Mr Moshinsky, who appeared for the informant/applicant (there being no appearance for the defendant/respondent) submitted that it was not necessary **[5]** for proof that the defendant was "found driving" within the meaning of s53(1) for the informant personally to have observed the driving. He referred to *Abbott v Pulbrook* (1947) SASR 57 at p62 where it is said the word "found", "can convey the sense of discovering, the exposing or unmasking of someone in a situation that has an element of secrecy of hiding, or of dissimulation by the alleged offender to conceal or screen presence, identify, conduct, purpose, or other circumstance".

In any event, Mr Moshinsky submitted, when the defendant was in the company of the informant alongside the vehicle, in all the circumstances the evidence showed that the defendant could be held to have then been in charge of the vehicle, and was accordingly, "found" in charge of it. I cannot accept that the informant here "found" the defendant driving the vehicle. He found him in circumstances which led quickly and reasonably to the belief that the defendant had very recently been driving. I do not regard *Abbott v Pulbrook* as authority for the proposition for which Mr Moshinsky contends. That is the construction I would place upon s53(1)(a) without reference to any other provision in the Act. However, in my opinion reference to s53(1)(c), the terms of which are set out above compels that construction. Section 53(1)(a) and (c) deal respectively with a person found driving or in charge, and a person believed on reasonable grounds to have been driving or in charge of a vehicle when it was involved in an accident. The underlined words are critical: a mere belief that a person has been **[6]** driving is not sufficient – there must have been an accident. If a mere belief that the person had been driving was regarded by Parliament as a sufficient basis for a preliminary breath test, the words underlined would have been omitted.

Furthermore, if Mr Moshinsky's submission is correct, the combined operation of s53(1)(a) and s48(1)(b) leads to incongruity. Section 48 provides -

> "(1) For the purposes of this Part—
> (a) ... (b) a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle."

The defendant in this case was not attempting to start or drive the van, nor, so it appears, did the informant form a belief that he was then intending to start or drive it, a matter which is referred to hereafter. Accordingly, s48(1)(b) barred a finding that the defendant was "found in charge". Yet, it is said, the defendant was on the proper construction of s53(1)(a), "found driving". That cannot be right. It might be thought that in the Court below an issue might have been raised as to whether there was a *prima facie* case that the informant "found" the defendant "in charge" of the van. Section 48(1)(b) significantly cuts down the definitions of being "in charge" of a motor vehicle which **[7]** have been considered in somewhat similar legislation in this country and in England and Scotland (some of the relevant authorities have been discussed by me in *Davies v Waldron* [1989] VicRp 43; [1989] VR 449; (1989) 8 MVR 363).

It does not appear that the Magistrate made any specific finding as to whether there were "reasonable" grounds for the belief that the defendant intended to start the car. That is doubtless explained by the fact that so far as the material presently before the Court suggests, the informant did not turn his mind to the question whether the defendant intended to start or drive the van. He did not form the relevant belief, and accordingly, the Magistrate was not called upon to decide whether there were reasonable grounds for any such belief. I am not in doubt that were it not for s48(b) the defendant would be held to be "in charge" of the van: he was its owner, or at least entitled to possession of it: he was in possession of it that day: he had just driven it to the place where it was parked: he had its keys in his possession: there was no evidence that he had put anyone else "in charge" of it.

However, the evasiveness of some of the defendant's answers showed that he was not so intoxicated as to be less than fully aware of the dangers of having anything to do with the van, let alone intending to drive it or start it. Be that as it may, I repeat that the informant did not form the relevant belief, or if he did, he gave no evidence of it, and the material filed shows that the case was not put upon the basis that the defendant was "in charge" as having formed the intention to drive the van away. **[8]** For the reasons given, the Magistrate was correct in his conclusion that the informant did not "find" the defendant driving the van. In support of Ground 6, Mr Moshinsky submitted that it was not a condition precedent to the obligation imposed by s55(1), that there be a lawful requirement for a preliminary breath test under s53(1): in other words, it was as if s55(1) provided that "if a person undergoes a preliminary breath test when lawfully or unlawfully required by a member of the police force ... under section 53..."

I cannot accept that submission. If it appears that the "requirement" under s53 was indeed unlawful, then it must follow that that requirement cannot form a valid basis for the requirement under s55. The requirement that a person exhale into a testing instrument "involves an invasion of the normal rights of the citizen" per Lush J in *Mallock v Tabak* [1977] VicRp 7; (1977) VR 78 at p85 (that was a blood test case). There must be a lawful justification for that invasion. It would seem to me to be quite unfair that evidence gained through an unlawful invasion (the evidence being the positive finding) should be used as the basis for a requirement that the citizen submit to a further test. In my opinion, Ground 6 has not been made out. Before parting with the case, I should add that this very unsatisfactory result could have been avoided: there was abundant evidence to justify charging the defendant with an offence under s49(1)(a) of the Act (driving under the influence); quite apart from the informant's observation of the defendant, the latter later **[9]** stated "I was a bit under the weather that day, I could hardly stand up".

The informant's observations and the information he had obtained from Mr Lever would no doubt have led him to form the reasonable belief that the defendant had offended against s49(1)(a), and he could then have required the defendant to take a breath test, pursuant to s55(2). If he did form the relevant belief, he did not purport to rely upon it in requiring the defendant to undergo a breath test, nor did he give evidence of having formed that belief. The case was not put upon that basis, and the Magistrate could not properly have held that there was a case to answer. Accordingly, the order nisi must be discharged.