01/03; [2003] VSC 105

SUPREME COURT OF VICTORIA

McPHERSON v COUNTY COURT OF VICTORIA & ANOR

Kellam J

18 November 2002; 4 April 2003 — (2003) 38 MVR 362

MOTOR TRAFFIC – DRINK-DRIVING – PBT POSITIVE – DRIVER REQUESTED BY POLICE OFFICER TO GO TO POLICE STATION FOR BREATH TEST – ON WAY TO POLICE STATION DRIVER COMPLAINED OF CHEST PAIN – DRIVER TAKEN TO HOSPITAL – AT HOSPITAL DRIVER REQUIRED TO PROVIDE BLOOD SAMPLE – DRIVER AGREED TO ALLOW MEDICAL PRACTITIONER TO TAKE BLOOD SAMPLE – ANALYSIS LATER SHOWED BAC OF .180% – DRIVER SUBSEQUENTLY CHARGED WITH OFFENCE – CHARGE FOUND PROVED - WHETHER SAMPLE TAKEN "IN ACCORDANCE" WITH S55(9A) OF *ROAD SAFETY ACT* 1986 – WHETHER REQUIREMENT TO FURNISH BREATH SAMPLE AN ELEMENT OF THE OFFENCE – WHETHER COURT IN ERROR IN FINDING CHARGE PROVED: *ROAD SAFETY ACT* 1986, SS49(1)(g), 55(1), (2), 55(9A).

Whilst driving his motor car, McP. was intercepted by a police officer. A PBT was taken of McP. which proved positive and the police officer requested McP. to accompany him to a police station for the purposes of a full breath test. On the way to the police station, McP. complained of chest pain and accordingly, he was taken to the nearest hospital where a blood sample was subsequently taken. Prior to the taking of the blood sample the police officer told McP. that he was required to allow a medical practitioner to take a sample of blood to which McP. responded: "Yes, OK." On analysis, the BAC was 0.180%. McP was later charged with an offence under s49(1)(g) of the *Road Safety Act* 1986 ('Act'). At the hearing, McP. was convicted and fined and an order made against his driver licence. Upon appeal to the County Court, it was argued that as the police officer had not required McP. to undergo a breath test as provided for in s55(1) of the Act an essential part of the prosecution case had not been established. This argument was rejected and the appeal was dismissed. Upon originating motion seeking judicial review—

HELD: Originating motion dismissed.

1. It is not an "essential pre-condition" or an element of an offence under s49(1)(g) of the Act in circumstances where reliance is held by the prosecution upon a blood analysis obtained pursuant to s55(9A) of the Act for the police officer who requires a blood sample to be taken to state to the motorist that he or she "requires the person to furnish a sample of breath for analysis" before a blood sample can be taken and evidence of its analysis given to the court. The words "the person who required a sample of breath" in s55(9A) do not mean that the police officer must have articulated a requirement for a sample of breath to be supplied by McP. before he was able to articulate a requirement for a sample of blood to be obtained legally.

***DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, applied.**

2. In the circumstances, the court made no error of law on the face of the record in finding the charge proved notwithstanding that there was no specific "requirement" to provide a sample of breath either articulated by the police officer or demonstrated by a requirement to provide a sample of breath by the presence of a breath analysing instrument at any time.

***Walker v DPP* (1993) 17 MVR 194, applied.**

KELLAM J:

1. I have before me a summons in a proceeding instituted by originating motion filed on behalf of Andrew Lachlan McPherson ("the plaintiff") seeking judicial review pursuant to Order 56 of the Rules of Court of a decision of His Honour Judge RPL Lewis of the County Court of Victoria upon the hearing of an appeal by the plaintiff against a decision of the Magistrates' Court.

2. The first defendant, the County Court of Victoria is joined to this proceeding as required by Rule 56.01(3) representing His Honour Judge RPL Lewis whose decision is subject to the review. There was no appearance by the first defendant, it having, in accordance with the usual practice, informed the Court that it would not participate in the proceeding and would abide the result.

3. The second defendant Kevin David Hickson ("the Sergeant") is a Sergeant of police.

Proceeding in the Magistrates' Court

4. On 1 August 2001 the Sergeant laid a charge against the plaintiff. The charge alleged that the plaintiff:

> "Did within three hours of driving a motor vehicle ... undergo a preliminary breath test as required under s53 of the *Road Safety Act*, the result of which indicated there was alcohol present in your blood, you were unable to furnish the required sample of breath on medical grounds or because of some physical disability. A blood sample was taken from you by a doctor in accordance with s55(9A) of the said Act, such sample having been analysed by a properly qualified analyst within 12 months of being taken and found at the time of the analysis more than the prescribed concentration of alcohol was present in that sample being .05 grams per 100 millilitres of blood and the concentration of alcohol indicated by the analysis to be present in the blood was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle (alleged reading 0.18%)."

5. The charge came on for hearing at the Sunshine Magistrates' Court on 8 October 2001. The plaintiff defended the prosecution. The plaintiff was convicted and fined $850 with costs of $34. His driver's licence was cancelled and he was disqualified from driving for a period of 18 months.

6. Pursuant to his rights under s83(1) of the *Magistrates' Court Act* 1989, the plaintiff appealed to the County Court.

County Court Appeal

7. The County Court Appeal was heard on 21 February 2002 by His Honour Judge RPL Lewis. The Sergeant, the informant, was represented by counsel as was the plaintiff. Both the Sergeant and the plaintiff gave evidence before the learned Judge who found that the charge was proved and dismissed the appeal on conviction, but set aside the order of the Magistrates' Court on penalty and imposed a penalty of $500 fine with costs of $34. The plaintiff's licence was cancelled and he was disqualified from driving for 18 months.

Background

8. It is useful by way of background to refer to the factual matters which were before the learned Judge and some of the issues which arose in the appeal before him. Evidence was given that the plaintiff was intercepted by the Sergeant when driving a motor car in Little River late in the evening of 6 January 2001. A preliminary breath test was undertaken and the Sergeant being of the opinion that the plaintiff's blood contained alcohol requested the plaintiff to accompany him back to Werribee Police Station for the purpose of a breathalyser analysis. On the way back to Werribee Police Station the plaintiff complained of chest pain and accordingly the Sergeant took him to Werribee Hospital. There a blood sample was taken from the plaintiff. The learned Judge accepted the evidence of the Sergeant that prior to the taking of the blood sample the Sergeant told the plaintiff that pursuant to s55(9A) of the *Road Safety Act* 1986 ("the Act") the plaintiff was required to allow a medical practitioner to take a sample of his blood for analysis. That blood sample was alleged to have a blood alcohol content of .180% upon analysis.

9. The learned Judge observed that s55(9A) of the Act provides as follows.

> "The person who required a sample of breath under sub-section(1) or (2) 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 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 three hours after driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

10. The learned Judge said –

> "It was common ground on the appeal that at no time had Sergeant Hickson required a sample of breath under s55(1) or (2) from the appellant. This being so, Mr Walsh-Buckley submitted that an

essential element of the charge had not been proved and that the charge must be dismissed. Further, he submitted that even if this threshold requirement in s55(9A) was not strictly an element of the offence, under s49(1)(g), the non-compliance was of a kind, which demanded that any exercise of judicial discretion should be exercised in favour of the appellant. (The prosecution) submitted that the failure by the respondent/informant to require a sample of breath was not fatal to the prosecution case. Assuming such a requirement was an element of the offence in all the circumstances of the case, I should exercise a Bunning and Cross discretion and admit the evidence of the taking of the blood sample and the certificate of analysis. In my opinion, I should exercise my discretion in favour of the prosecution and accept the tender of the Exhibits A and B *(ie. evidence of the taking of the blood sample and its analysis)* absolutely. I have no doubt that in the ordinary course of events, the appellant would have been required to take a breathalyser test at the Werribee Police Station. It is not the fault nor neglect of the police that that procedure did not eventuate. There is not the slightest suggestion that the failure to take a sample of breath was due to malicious intent or deliberate flouting of the law by the police. It was the statement by the appellant that he was suffering from chest pains which aborted the trip to the police station and took the appellant and Sergeant Hickson to the Werribee Hospital. The action taken by Sergeant Hickson was not only appropriate in the circumstances but his subsequent behaviour as confirmed by the appellant, was that of a reasonable and conscientious police officer. For example, he drove to Hoppers Crossing in order to bring the appellant's brother back to the hospital. Further since the failure to require a sample of breath was not intentional nor was it reckless I am of the view that that omission did not, in this case affect the cogency of the evidence relating to the blood sample and the analysis of the same. Mr Walsh-Buckley had argued that the intrusive nature of the taking of the blood sample, an invasion of a person's privacy, demands that there be strict compliance with the terms of s55(9A) He went further and submitted during argument that even impossibility of compliance with the requirement of taking a sample of breath would not attract the exercise of the Bunning/Cross discretion. He submitted that legislative amendment is required rather than "law making" by Judges. Such approach is no doubt desirable in an appropriate case, but the case before me is not such a case. In these days where road accidents have enormous personal, social and economic consequences, driving a motor vehicle with a blood alcohol reading in excess of a prescribed limit qualifies as a serious offence. It is a valid exercise of judicial discretion to weigh in the balance the failure to comply with the relevant legislative provisions, which of course include the reasons associated with such a failure and the public interest. In the circumstances of this case and for reasons already stated I have no hesitation in concluding that I should admit the evidence. (The prosecutor) also relied on the provisions of s57(9) as an alternative argument. The sub-section reads as follows – 'Except as provided in ss55(9A), 55(B) and 56, a blood sample must not be taken and evidence of the result of the analysis of the result of a blood sample must not be tendered unless the person from whom the blood has been collected has expressed consent to the collection of blood and the onus of proving that express of consent is on the prosecution.' I am satisfied that when the appellant consented for the taking of a blood sample he was "expressing consent to the collection of the blood". Accordingly, the certificate may be tendered absolutely on that basis, the result is that for the reasons advanced by the prosecution, the evidence is admitted and I find the charge proved."

Judicial Review

11. Save for a limited right of appeal where the penalty is increased on appeal to imprisonment, there is no right of appeal from a decision of a County Court Judge hearing an appeal from a Magistrates' Court[1]. It follows that the only avenue open to the plaintiff to challenge the decision of His Honour Judge RPL Lewis is by judicial review.

12. Order 56 of the Rules of Court establishes the procedure by which the common law jurisdiction of judicial review is exercised. As Gillard J said in *Kuek v Wellens & Anor*[2] –

> "The jurisdiction of the court to review decisions of inferior courts and tribunals is limited. The jurisdiction is supervisory and does not entitle this court to canvass matters that it would on appeal. In a judicial review the court is exercising common law jurisdiction. The jurisdiction is different from an appeal. The judicial review procedure is concerned with the legality of what was done by the court or tribunal, and is not concerned with the merits of the decision under review. This is to be contrasted from an appeal, where the question usually is whether the decision is right or wrong, whereas the question of a judicial review is whether or not the decision is in accordance with the law. Order 56 is concerned with procedure. It abolishes the remedies and the nature of the old prerogative writs that nevertheless deserve the jurisdiction of the court to make prerogative writ-type orders. It is clear that the rules do not affect the common law jurisdiction of the court, and it is equally clear that this court has jurisdiction to make an order in the form similar to the old prerogative writ of *certiorari*, namely, quashing the decision under review. The scope of the jurisdiction was recently discussed by the High Court in *Craig v South Australia*.[3] In a joint judgment the Court said: `Where available, *certiorari* is a process by which the superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or tribunal. It is not an appellate procedure enabling either a general review of the

> order or decision of the inferior court or tribunal, or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of an impugned order or decision upon one or more of a number of distinct established grounds: most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, or fraud, an error of law on the face of the record. Where the writ is sought on the ground of jurisdiction error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to `the record' of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record'."

The Grounds for Relief

13. The originating motion filed by the plaintiff, as required by Rule 56.01(4) of the Rules of Court, sets out the grounds relied upon by the plaintiff in the following terms.

> "In finding the Plaintiff guilty of the offence under s49(1)(g) of the *Road Safety Act* 1986 ("the s49(1)(g) offence") the First Defendant erred in law because:
> (a) the first defendant erroneously found the plaintiff guilty of the s49(1)(g) offence because an element of the s49(1)(g) offence, that is, 'had a blood sample taken from him ... in accordance with s55(9A)' had not been established in the prosecution brought by the second defendant.
>
> (b) the first defendant erroneously found that he had power to exercise a judicial discretion to admit evidence of the certificate of taking blood and certificate of analysis revealing the plaintiff's blood alcohol concentration was in excess of his prescribed concentration in order to find the plaintiff guilty of the s49(1)(g) offence when an element of that offence, that is, 'had a blood sample taken from him ... in accordance with s44(9A)', had not been established by the prosecution brought by the second defendant.
>
> (c) the first defendant erroneously found that he could use his finding that the plaintiff had consented to his blood being taken to find the plaintiff guilty of the s49(1)(g) offence when an element of that offence that is, 'had a blood sample taken from him ... in accordance with s55[(9A)]', had not been established by the prosecution brought by the second defendant'."

14. It can be observed that the grounds make no allegation that there was error of law on the part of the learned Judge on the face of the record. However, the plaintiff through his Counsel, Mr Walsh-Buckley, submits that the alleged errors of law set out in the grounds are founded on jurisdictional error of law and/or of error of law on the face of the record.

Jurisdictional Error of Law

15. Mr Walsh-Buckley submits that an order in the nature of *certiorari* should be granted in this case. He submits that the learned Judge fell into jurisdictional error in three ways.

16. First, it is submitted that the learned Judge did something which he lacked authority to do. Mr Walsh-Buckley submits that there was no jurisdiction for the learned Judge to exercise any discretion under *Bunning v Cross*[4] because "that decision does not state that a missing element of an offence can be rectified by the use of a discretion".

17. Secondly, and in the alternative, it is submitted that the learned Judge fell into jurisdictional error because he disregarded "something the statute requires to be taken into account as a pre-condition of the authority to make an order in the particular case". In this regard it is submitted by the plaintiff that s53 (1)(g) of the Act requires, as a pre-condition to the proving of the offence that the plaintiff had a blood sample taken from him in accordance with s55(9A) of the Act.

18. Thirdly in the alternative, it is submitted that the learned Judge "misconstrued a statute thereby misconceiving the extent of his powers". It is submitted that s49(1)(g) of the Act requires as proof of the offence, that the plaintiff "had a blood sample taken from him ... in accordance with s55(9A)". Mr Walsh-Buckley submits that jurisdictional error arises because the learned Judge misconstrued the statute in that he concluded that the requirement that a "blood sample taken ... in accordance with s55(9A)" was "something less than an element or precondition of that offence".

19. In *Craig v South Australia*[5] the High Court stated:

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it directly recognises that jurisdiction does exist. Such jurisdictional error can effect either a positive act or a refusal or failure to act. Since *certiorari* goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction. Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of the kind which wholly or partly lies outside the theoretical limits of its functions and powers. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge. Such a court would act partly outside the general of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach. Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error which the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur when an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring jurisdiction requires that that particular matter be taken into account or ignored as a precondition of the existence of any authority to make that order or decision in the circumstances of the particular case. Again an inferior court would exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern."

20. As I understand the submission advanced on behalf of the plaintiff it is the second and third last sentences of the passage quoted above from *Craig v South Australia* upon which he principally relies in submitting that the learned Judge fell into jurisdictional error. However, it is apparent that the observations of the High Court there referred to relate to error in relation to authority or power to make an order or decision.

21. Whilst the "line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern"[6] it appears to me that the circumstances of the case now before me, do not demonstrate jurisdictional error in an inferior court. It is apparent that the learned Judge had the jurisdiction to determine whether or not he was satisfied on the evidence before him that the prosecution had proved all the elements of the charge beyond reasonable doubt. In my view he clearly had jurisdiction to rule on the admissibility of the certificate of taking blood and the certificate of analysis of blood, both under the principles of *Bunning v Cross* and the alternative basis under s83(1) of the Act 1986.

22. Furthermore, and as stated in *DPP and Anor v His Honour Judge Fricke*[7]

> "Clearly *certiorari* lies not only when a body purports to exercise a jurisdiction that it does not have, but also when a body fails or refuses to exercise jurisdiction that it does have: see e.g. the discussion in *Public Service Association of South Australia v Federal Clerks' Union of Australia* (1991) 65 ALJR 610. This is not a case in which there was error on the face of the record, however widely the expression `record' can be understood. The appellant's arguments depend upon their demonstrating that there was a usurpation of jurisdiction or a refusal (whether actual or constructive) by the County Court Judge to exercise jurisdiction. The mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute an error of jurisdiction. *R v Toohey; ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170 at 268 per Aitkin J; 38 ALR 439; (1981) 56 ALJR 164; *R v Minister of Health* (1939) 1 KB 232 at pp245-6. It is important to observe that, on the views we have already expressed, there was no want of jurisdiction in the Magistrates' Court. The magistrate had proceeded to hear and determine the merits of the matter and to record a conviction. ... An appeal having been duly brought before the County Court Judge, the question for us is whether his erroneous decision that s30(2)(a) was not complied with involved

an error going to his jurisdiction and producing the result that his decision was subject to review. Since the appeal has been duly brought the argument for the appellants that the orders made by the Judge involved a usurpation of jurisdiction falls to the ground. It was not argued before this court – indeed it was not in our opinion properly arguable - that the County Court Judge was required to decide *correctly* that s32(a) had been complied with before he had jurisdiction to engage in the re-hearing. Correspondingly, his decision – albeit erroneous – that s32(a) had not been complied with did not mean that he had no such jurisdiction. His Honour having had jurisdiction to engage in the re-hearing had, as has sometimes been starkly put, as much jurisdiction to decide the case wrongly as he had to decide it correctly. To adapt the language of Lord Wilberforce in *Amisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6; [1969] 2 AC 147 at p210; [1969] 1 All ER 208; [1969] 2 WLR 163, his Honour was not making a decision outside his area; he was simply making a wrong decision within his area. There being no appeal from his decision, its correctness or otherwise is not to the point in determining whether he is amenable to judicial review."

23. Further, the Court in *Craig v South Australia*[8] stated –

"... the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine tests in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve an error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

24. This issue was considered in *Coleman v DPP & County Court.*[9] Batt JA said –

"The principal argument for the appellant was that in finding the appellant had committed another offence punishable by imprisonment the County Court Judge had fallen into jurisdictional error ... The County Court Judge was, I consider, acting within jurisdiction when on the hearing of the charge against the appellant for an offence under sub-s(1) of s31 of the *Sentencing Act* he, pursuant to sub-s(5) of that section, erroneously, as I would hold, found the appellant guilty of the offence and proceeded in substance to restore the suspended sentence and order the appellant serve it."

25. The question of whether or not the learned Judge exercised his discretion erroneously in admitting evidence of the taking of the blood sample and of the analysis of the blood sample is not relevant to the question of whether or not he had jurisdiction to exercise such a discretion. Accordingly, as stated above, I conclude that there was no jurisdictional error on the part of the learned Judge and thus if the plaintiff is to succeed in this application he must prove error of law on the face of the record.

Error of Law on the Face of the Record

26. I am relieved of any difficulty in establishing which documents form the record in this case as the parties before me agree that the record consists of Exhibits A, B, H and I to the affidavit of the plaintiff sworn on 10 May 2002 and filed in this proceeding;[10] that is the record consists of the copy original charge and summons addressed to the plaintiff and filed in the Magistrates' Court, the Notice of Appeal to the County Court dated 8 October 2001, the transcript of "Appeal Ruling" delivered by His Honour Judge RPL Lewis on 21 February 2002 and the certificate of the Order of the County Court upon appeal dated 8 May 2002. In the light of s10 of the Administrative Law Act 1978 and the observations of Charles JA in *Thompson v His Honour Judge Byrne*[11] and the decision in *Flynn v DPP*[12], Mr Trapnell of Counsel who appears for the Sergeant, concedes that I am bound to regard the 'ruling' of the learned Judge as part of the record.

27. The submission of the plaintiff is that the learned Judge made an error of law on the face of the record by finding the plaintiff guilty of an offence under s49(1)(g) of the Act because "an element or essential pre-condition, ie "had a blood sample taken from him ... in accordance with s55(9A)" had not been established.

28. Furthermore it is contended on behalf of the plaintiff that error on the face of the record is established by the finding of the learned Judge that he had power to exercise judicial discretion to admit the evidence of certificates of taking blood and analysis of blood in circumstances where it had not been established that the blood sample was taken in accordance with s55(9A) of the *Road Safety Act*.

29. In essence, each complaint of error of law on the face of the record made by the plaintiff is based upon the same point. The plaintiff was charged under s49(1)(g) of the Act. That section provides -

> "49(1) A person is guilty of an offence if he or she— ...
> (g) has had a sample of blood taken from him or her in accordance with s55 or 56 within three hours after driving or being in charge of a motor vehicle and
> (i) the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of s6 and the analyst has found that at the time of analysis the prescribed concentration of alcohol or more than the prescribed concentration of alcohol was present in that sample; and
>
> (ii) the concentration of alcohol found by the analyst to be present in that sample was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle."

(Emphasis added).

30. For current purposes it may be said that the matters required to be proved in order to convict the plaintiff under s49(1)(g) of the Act are –

> (a) A sample of blood has been taken from him.
>
> (b) In accordance with s6.
>
> (c) Within three hours after driving or being in charge of a motor vehicle.
>
> (d) The sample has been analysed within 12 months after it was taken.
>
> (e) By a properly qualified analyst within the meaning of s57.
>
> (f) The analyst has found at the time of the analysis that more than the prescribed concentration of alcohol was present in the sample.
>
> (g) The concentration of alcohol found by the analyst to be present in the blood sample of the plaintiff was not due solely to his consumption of alcohol after driving or being in charge of the motor vehicle.

31. There is no argument that the plaintiff had a sample of blood taken from him within three hours after driving a motor vehicle. It is apparent that he did not consume alcohol between the time of his apprehension by the Sergeant and the time of the taking of the blood sample. Subject to the argument advanced by the plaintiff that the certificates of taking blood and of the analysis thereof were inadmissible before the learned Judge because the blood sample was not taken "in accordance with s55" of the Act, there is no other relevant issue about the taking of the blood and its analysis. Accordingly the only issue is whether or not the sample was taken "in accordance with s53 of the Act.

32. Through his counsel, the plaintiff argues that the prosecution failed to establish before the learned Judge that the sample of blood was taken from the plaintiff "in accordance with s55" of the Act. Consideration of s55 of the Act reveals that the only way a blood sample can be taken is in accordance with the discretionary power contained in s55(9A). As the plaintiff submits, the charge which was laid against the plaintiff refers specifically to the blood sample having been taken in accordance with s55(9A).

33. The plaintiff relies upon the statement of the learned Judge appearing in the transcript of his reasons that "It was common ground on the appeal that at no time had Sergeant Hickson required a sample of breath under s55(1) or (2) from the appellant". Mr Walsh-Buckley submits that at the highest, the evidence before the learned Judge was that the Sergeant had made a request to the plaintiff to accompany him to a police station for a breath test some time prior to the blood sample being required by him.

34. Accordingly, it is submitted on behalf of the plaintiff that as no such requirement for a breath test was made under s55(1) or (2) of the Act an essential part of the prosecution case has not been established.

35. In my view, it is not an "essential pre-condition", or an element, of an offence under s49(1)(g) of the Act, in circumstances where reliance is held by the prosecution upon a blood analysis obtained pursuant to s55(9A) of the Act, for the police officer who requires a blood sample to be taken to state to the motorist that he or she "requires the person to furnish a sample of breath for analysis" before a blood sample can be taken, and evidence of its analysis given to the court.

36. If one looks at the circumstances of the current case, one can see the difficulty that such a requirement would create. In this case, as appears from the learned Judge's ruling, the plaintiff was intercepted by the Sergeant at 11.15 p.m. or thereabouts. The Sergeant formed the opinion after the plaintiff underwent a preliminary breath test that the plaintiff's blood contained alcohol. The Sergeant requested the plaintiff to accompany him back to Werribee Police Station. Clearly the plaintiff complied with that request. The purpose of the intended visit to Werribee Police Station is obvious and beyond argument. It can only have been for the purposes of the administration of a breathalyser test as required by the Sergeant pursuant to s55(1) of the Act.

37. Section 55(1) of the Act provides as follows:

> "55(1) If a person undergoes a preliminary breath test when required by a member of the police force ... 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) ...
> 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 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-s.(4) or until three hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

(Emphasis added.)

38. It is apparent, as stated above, that the plaintiff was travelling to Werribee Police Station pursuant to a requirement made by the Sergeant to accompany him to the police station for the purposes of the provision of a sample of breath for analysis in accordance with the provisions of s55(1) of the Act.

39. However, before that requirement could be put into effect and as the plaintiff accompanied the Sergeant to the Werribee Police Station the plaintiff complained of chest pain and the Sergeant accordingly took him to Werribee Hospital rather than to the police station. Shortly thereafter the Sergeant told the plaintiff that it appeared to him that the plaintiff was unable to provide a sufficient sample of breath on medical grounds and that he would require a blood sample.

40. The learned Judge accepted the evidence of the Sergeant given before him that the Sergeant had said to the plaintiff immediately prior to the taking of the blood sample, "Because 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 to take a sample of your blood for analysis pursuant to s55(9) (sic) of the *Road Safety Act* 1986". The learned Judge accepted that the plaintiff's response to this statement was, "Yes, OK".

41. It is true that there is authority that the requirement to furnish a sample of breath under s55(1) of the Act can be made sensibly only when the breath analysing instrument is presented to the motorist at the police station or other place at the time of the requirement.[13] In the circumstances of this case, however, it cannot be suggested seriously that a breathalyser machine should have been brought to the hospital, where "requirement" be made by the Sergeant under s55(1) for a breathalyser test and then a further "requirement" be made by the Sergeant under s55(9A) for a blood sample. It would be equally as nonsensical for the Sergeant to precede his statement requiring a blood sample (under s55(9A)) by a statement requiring a breath test (under s55(1)).

42. Indeed, and notwithstanding the acceptance by the learned Judge that it was "common ground" that the Sergeant had not "required" a sample of breath under s55(1) or (2) of the Act, in my view it is well arguable that the fact that it appeared to the Sergeant that the plaintiff was unable to furnish a sufficient sample of breath carried with it the implication that he, the Sergeant, had at all material times prior thereto, required a sample of breath to be provided by the plaintiff within the meaning of s55(1) of the Act.

43. In *DPP v Foster*,[14] Winneke P said in relation to a charge under s49(1)(f) of the Act –

> "It seems to me to be reading a lot into the words 'under s55(1)' if they are to comprehend proof that the panoply of discretionary 'requirements' to which the subsection refers, have been made of the motorist, and made in the street following the completion of the preliminary breath test. I would have thought, ... that the opening words of s49(1)(f) are fulfilled by proof that the police officer formed the opinion described in s55(1)(a) following the administration of a preliminary breath test (which is undoubtedly a precondition of the offence), and that, thereafter, the motorist furnished a sample of his breath for analysis by the approved instrument within three hours of driving: cf. *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at 743; (1989) 9 MVR 1. It is the fact of furnishing the sample of breath to which s49(1)(f) specifically refers; not the fact that the person has been *required to furnish* the sample. Granted that an element of compulsion may be readily inferred from the fact that a person furnishes a sample of his or her breath into an approved instrument, it is not easy to see why a sample furnished by a willing and co-operative motorist after the administration of a positive preliminary breath is not as much a sample furnished 'under section 55(1)' as is a sample furnished by an unco-operative motorist who has only been prepared to do so after a specific requirement, in terms of s55(1), has been imposed: cf. *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 per Barwick CJ at CLR 58, 63-4. The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to exercise them, let alone in the manner of a ritual incantation of the type which counsel for the respondents suggests. Rather, as I see it, they are powers which a police officer `may' exercise as and when circumstances dictate."

44. In my view, the above statements are applicable to a prosecution brought under s49(1)(g) of the Act. That is, it is "reading a lot into the words" appearing in s49(1)(g) of the Act "in accordance with s55", if they are to comprehend proof that the member of the police force (or other authorised person) who has required a person to undergo a preliminary breath test which indicates that the person's blood contains alcohol, has actually required the provision of a sample of breath by stated demand or by the provision of a breath analysing instrument to the person before requiring a blood sample to be obtained under s55(9A) of the Act.

45. It is apparent from the legislation that once the plaintiff provided a "positive" sample of breath into the preliminary breath test device pursuant to s55(1) of the Act, he remained under a continuing obligation either to furnish a sample of his breath for analysis by a breath analysing instrument or alternatively and pursuant to s55(9A) of the Act, to provide a sample of blood for analysis for a period of three hours after he was found driving a motor vehicle. In *Day v County Court of Victoria and Hanson*[15] Smith J observed –

> "Sub-section 55(9A) is ancillary to (the other provisions containing s53 and is drafted on the assumption of the continued existence of the entitlement of the police officer to require a breath test and of the obligation to submit to a breath test."

46. At the time the plaintiff was required by the Sergeant to provide the sample of blood for analysis, the Sergeant was entitled to require a breath test in accordance with s55(1) and the plaintiff was under an obligation to submit to such breath test. In my view, the words "the person who required a sample of breath" – under sub-s.(1) or (2)" as they appear in s55(9A) of the Act, are facilitative. They are designed to facilitate the person who requires a breath test under s55(1) and/or s55(2) of the Act to obtain a blood sample for analysis in the circumstances set out in sub-s(9A). It is not necessary for the police officer to exercise such facilitative power by way of a demand or a specific stated requirement for a sample of breath in order to prosecute a person successfully under s49(g) of the Act. In my view, the approach taken by the Court of Appeal in *DPP v Foster* applies to the circumstances which apply in this case.

47. However, Mr Walsh-Buckley submits that *DPP v Foster* is not apposite to the current circumstances and can be distinguished. First he argues that *DPP v Foster* was concerned with an offence contrary to s49(f) of the Act. Under that sub-section the motorist is guilty of an offence if he or she furnishes a sample of breath for analysis by a breath analysing instrument under s55(1) and the analysis is in excess of the relevant legal limit. He submits that this is quite different from an offence charged under s49(g) of the Act which requires a sample of blood to be taken from the motorist within three hours of driving "in accordance with s55" of the Act. Mr Walsh-Buckley submits that Parliament chose to use deliberately different words (ie. "under s55" in the case of s49(f) and "in accordance with s55" in the case of s49(g)) and the use of different words is reflective of Parliament's intention that there be strict compliance with s55(9A) in cases where blood samples are to be taken. He submits that the fact that blood samples are far more intrusive than breath samples reinforces the fact that Parliament intended strict compliance with s55(9A) to be an element to be proved in the prosecution. He submits that this leads to a conclusion that a judicial discretion cannot be exercised to include evidence which has been obtained illegally in circumstances where strict compliance with s55(9A) is an essential part of the case which the prosecution must make out.

48. Whilst it is true that Parliament has chosen to use the words "under s55(1)" in s49(f) and the words "in accordance" with s55(9A) in s49(g), I do not conclude that the words "in accordance" mean that total compliance with s55(9A) is required to the point that such compliance is an essential precondition or element to be proved before an offence under s49(g) can be made out. Notwithstanding the use of the word "accordance" in s55(9A) instead of "under" in s55(1), I conclude that the words "the person who required a sample of breath" do not mean that the Sergeant in this case must have articulated a requirement for a sample of breath to be supplied by the plaintiff before he was able to articulate a requirement for a sample of blood to be obtained legally. In my view, those words are facilitative and, if anything, are intended to identify the person who is authorised to make the requirement for the provision of a blood sample.

49. I observe that in *Walker v DPP*[16] the Full Court of the Supreme Court concluded in the circumstances of that case which related to a prosecution under s49(1)(f) of the Act, that the fact that a motorist was willing to provide a sample of breath made a request, order or demand under s55(1) of the Act unnecessary. Fullagar J said in relation to that case[17]:

> "The second contention was that there was no evidence that the defendant was 'required' to take a preliminary test or that she was later 'required' to furnish a sample of breath for analysis within the meaning of the word where it appears twice in s55 of the Act. As I have said, the evidence was that the policeman asked the defendant `Are you willing to undergo a preliminary blood test?' She replied 'Yes' and she was then given a preliminary ... test ... In my opinion, in all the surrounding circumstances it would have been clear to the policeman that the defendant was indicating that she would take the preliminary test, whether it was officially or officiously demanded or not, and indicating that any more specific requirement was a mere waste of words ... In my opinion, the evidence that 'the defendant agreed to accompany me back to Carlton', in order to undergo a breathalyser test is, in all the circumstances, evidence of the fact that the defendant was willing to undergo a breathalyser test as well as willing to go to the police station for that purpose, and of the fact that a request or demand was unnecessary. Again I point out that the defendant was not charged with refusing to undergo a test when required to undergo one. At the police station a third consent was obtained when the defendant was asked 'Are you prepared to furnish a sample of your breath for analysis?' and she replied 'Yes' and then undertook the test. In my opinion, the above evidence and the surrounding circumstances was sufficient to establish a prima facie case that both the preliminary test and the breathalyser test were furnished to the defendant 'under s55(1)', and the second contention made to this test should be rejected."

50. In the same case Brooking J said[18] –

> "I am prepared to assume, without expressing any opinion on the question, that it would not have been open to a magistrate to find that there had been a requirement for the purposes of either s53(1) or s55(1) so as to support a charge under s49(1)(c) or (e) in the event that the defendant had answered `no' to either of the questions put to her and nothing more of relevance had been shown to the court. These two provisions create the offence of refusing or failing to undergo a preliminary breath test when required under s53 to do so and refusing or failing to comply with the requirement made under s55(1), but, as the learned presiding Judge has emphasised, in the present case the offence allege was against s49(1)(f), and in my view it is not an element of this offence that there should have been a requirement made under s53 or that there should have been a requirement made

> under s55(1). As regards the latter suggested element of the offence paragraph (f) of s49(1) does not speak in terms of a requirement under s55(1). It speaks of the furnishing of a sample of breath for analysis by a breath analysing instrument `under s51(1)', and in my opinion a sample is furnished for analysis `under' s55(1) if the defendant, so to speak, dispenses with the 'requirement' which is that by means of which the furnishing of the sample is made compulsory in the sense that, by the combined operation of s49(1)(e) and s55(1), the refusal or failure to furnish the sample is made an offence. ... During argument, the court, by giving examples of the willing or over anxious defendant, drew attention to the absurd results which would result if the contrary view were to be taken."

51. In my view, the opinions expressed by Fullagar J and Brooking J in *Walker v DPP* in relation to the nature of a "requirement' to furnish a sample of breath in a prosecution under s49(1)(f) of the Act are equally applicable to a prosecution under s49(1)(g) of the Act.

52. It follows that in my view the learned Judge made no error of law on the face of the record in finding the plaintiff guilty of the s49(1)(g) offence notwithstanding that there was no specific "requirement" to provide a sample of breath either articulated by the Sergeant or demonstrated by a requirement to provide a sample of breath by the presence of a breath analysing instrument at any time.

53. It follows further that no error of law on the face of the record is demonstrated by the learned Judge exercising his discretion to admit the certificate of taking blood and the certificate of analysis into evidence in accordance with the principles in *Bunning v Cross*. It is apparent that his Honour considered carefully the principles set out in *Bunning v Cross* and I can see no basis upon which his exercise of discretion in this regard discloses any error of law on the face of the record.

54. In my view, his Honour's alternative basis for admitting the certificate of taking blood and the certificate of analysis pursuant to s57(9) of the Act also discloses no error of law on the face of the record. It should be noted that this case is quite different from that of *Day v County Court of Victoria and Hanson* in that in that case, three hours from the driving had expired and the defendant had not been informed that he was then under no legal obligation to submit to a blood test. In such circumstances it is apparent that the consent of the defendant was not an informed consent. It appears to me to be apparent in the circumstances of the case before me that no error is disclosed on the face of the record by the learned Judge finding that the plaintiff consented to a blood sample being taken.

55. It follows that in my opinion no error which entitles the plaintiff to relief by way of judicial review has been demonstrated and accordingly the originating motion should be dismissed with an order that the plaintiff pay the costs of the second defendant.

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[1] See *Magistrates' Court Act* 1989 s91.
[2] [2000] VSC 326 at pp 2-3.
[3] [1995] HCA 58; (1994) 184 CLR 163 at 175-76; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[4] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[5] at pp177-178.
[6] See *Craig v South Australia* p178.
[7] [1993] VicRp 27; [1993] 1 VR 369 at p376.
[8] At 179-180.
[9] [2002] VSCA 116 at p4; (2002) 5 VR 393; (2002) 132 A Crim R 255.
[10] At p7 of the transcript of proceedings dated 18/11/02.
[11] (1998) 2 VR 274 at 280; (1997) 93 A Crim R 69.
[12] (1998) 1 VR 322.
[13] *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 and *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 677; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[14] At p652.
[15] [2002] VSC 426 at para 27; (2002) 37 MVR 319.
[16] (1993) 17 MVR 194.
[17] at pp195-196.
[18] at pp198-199.

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