

22/01; [2000] VSC 364

**SUPREME COURT OF VICTORIA**

***DPP v GREELISH***

**Nathan J**

**5, 13 September 2000 — (2000) 32 MVR 271; (2000) 115 A Crim R 178)**

**MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT INTERCEPTED DRIVING MOTOR VEHICLE IN COMPANY WITH 8-YR OLD DAUGHTER – PRELIMINARY BREATH TEST POSITIVE – DEFENDANT REQUIRED TO ACCOMPANY MEMBER TO POLICE STATION FOR BREATH TEST – REFUSAL TO ACCOMPANY – STATEMENT BY DEFENDANT THAT HE WANTED TO TAKE CHILD TO HIS PARENTS' HOME NEARBY – DEFENDANT LEFT SCENE WITH CHILD – SUBSEQUENTLY CHARGED WITH REFUSING TO ACCOMPANY POLICE OFFICER TO POLICE STATION – "SOME REASON OF A SUBSTANTIAL CHARACTER" – DISTRESS TO CHILD BY BEING TAKEN IN A POLICE CAR – DEFENCE UPHELD – CHARGE DISMISSED BY MAGISTRATE – WHETHER DEFENCE APPLIES IN SUCH CIRCUMSTANCES: ROAD SAFETY ACT 1986, SS49(1)(e), 55(9).**

Section 55(9) of the *Road Safety Act 1986* provides that a person must not be convicted or found guilty of refusing to furnish a sample of breath if the court is satisfied that there was some reason of a substantial character for the refusal. The exculpatory provisions of sub-s(9) relate to all the component steps of the taking of a sample of breath for analysis. That includes accompanying a member of the police force to a police station as much as it does any of the other events envisaged in the section. In reading sub-s(9) in the context of the section as a whole and in the terms of interpreting privative and penal legislation, the sub-section relates to all the events encompassed by section 55, including the refusal or failure to submit to a test as well as to accompany a member of the police force to a police station where a test could be carried out.

Cf *DPP v Ellison*, unrep, VSC, Brooking J, 18 January 1995 (MC 52/94).

**NATHAN J:**

**The Surrounding Events**

1. On 1 September 1999 at about 4.40pm, members of the police force saw Mr Greelish leave the RSL Club at Altona in company with his eight year old daughter, get into his truck and trailer and drive away. Shortly thereafter, both in time and distance, the police stopped Mr Greelish from driving and told him to get out of his vehicle. He was then about 500 metres from his destination, which was apparently his parents' home, into whose care he was about to deliver his daughter.

2. The police asked if he had been drinking and he said, "Yes, only four pots". Police member Maher then conducted what is known under the *Road Safety Act 1986* No 127 ("the Act") as a preliminary breath test. No contest arises here as to the efficacy of that testing. Constable Maher then said, "In my opinion the result of a preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to the Altona North Police Station for the purpose of a breath test and to remain there until you have furnished a sample of your breath or have been given a certificate or until three hours after the time you were driving and in charge of this motor vehicle, whichever is the sooner. Are you prepared to accompany me?" Mr Greelish said, "No, I'll meet you there." Constable Maher then said, "Okay, Peter, now listen carefully to me. I'm going to explain to you that if you refuse to accompany me to the Altona North Police Station for the purpose of a breath test you may be charged with this offence and if found guilty you may be fined or imprisoned for three months and you will lose your licence for a minimum period of two years. Are you prepared to accompany me?" Mr Greelish shook his head, indicating a negative answer and turned his back and walked away. So much of that evidence is uncontested.

3. Thereafter followed events about which there is some dispute and which I must resolve in favour of the respondent, Mr Greelish. He says that some discussion took place about delivering his daughter into the care of his parents and that he would not allow anybody other than himself to take his child to his parents' home. He does concede that the police offered to take his daughter to his parents' home in a specially summoned marked police vehicle and that he would follow them in the divisional van. Whatever the offers may have been, the issue was resolved when Mr Greelish

took firm physical control of his daughter and walked with her to his parents' home, where he then left her. He then says that he returned to where the police were, being absent therefrom for no more than ten minutes, but was told that he was too late and would be proceeded against.

### The Charge

4. The Magistrate disposed of a charge under section 55(1)(b) of the Act. It can be summarised thus:- Mr Greelish, having provided a preliminary breath sample for testing and the member having concluded that alcohol was present in his blood, did refuse to accompany the member to the police station when required to do so where a sample of breath for analysis could be taken. I have paraphrased the charge because that which was formally delivered to the defendant does not appear to be the charge which was disposed of by the Magistrate. However, all parties agree that the offence which Mr Greelish faced was one of refusing to comply with a requirement to accompany a member of the police force to an appropriate police station.

### The Question of Law for Review

5. This matter is an appeal on a question of law pursuant to the *Magistrates' Court Act* 1989, section 92. It is instituted by the Director of Public Prosecutions on behalf of the police informant, Maher. Master Wheeler has ordered that the following question be resolved by the court — Does section 55(9) of the *Road Safety Act* 1986 provide a defence to all charges arising from section 49(1)(e) of the Act? The substantive issue of vexation is clear: does section 55(9) of the Act, that is, the defence of having "some reason of a substantial character" for refusing to comply with the requirement to accompany a member of the police force to a police station, apply to the breath testing requirements of the Act?

### The Magistrate's Findings

6. The Magistrate did not deliver formal reasons for dismissing the information and acquitting Mr Greelish. However, his reasons can be easily ascertained from his comments. He took the view that the whole offence consisted of refusing to supply a sample of breath for testing and that failing to accompany a member of the police force to a police station had to be viewed as a component part of the greater offence. That being so, the defence available under the section relating to failing to provide a breath sample had to extend to the refusal to accompany a member of the police force to a police station. In these circumstances, the Magistrate thought that the reasons provided by Mr Greelish for refusing to accompany the member of the police force were "of a substantial character", thereby entitling him to the advantage of section 55(9). Those reasons included the distress his daughter would have suffered by being delivered to his parents' home in a police car, with him following in a divisional van. The Magistrate must have concluded that Mr Greelish was entitled to avoid or to mitigate that distress by taking her home personally.

7. It is not for me to substitute my own view as to what might have constituted "some reason of a substantial character" in the given circumstances. However, I would be reluctant to conclude that a child being driven to his or her home in a police car, with a parent following immediately behind in a divisional van, would have given rise to such distress as could be said to amount to "some reason of a substantial character" for not accompanying a member of the police force to a police station. Parental solicitude is one matter and compliance with the law relating to driving whilst having consumed alcohol is another. The Magistrate did pass some paternalistic remark about the inadvisability of taking children to RSL clubs and consuming alcohol and I make no further reference to that fact. But a parent who drives an infant child, after having consumed alcohol, could hardly be characterised as prudent or thoughtful.

### The Act

8. Part 5 of the Act deals with offences involving alcohol or other drugs. Section 47 enumerates the purposes of the part. Sub-section (c) recites that one of its purposes is to provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol. The entire Part must be interpreted in the context of this legislative indication. Section 49 lists the offences involving alcohol and other drugs. Sub-section 1(e) provides that a person is guilty of an offence if he or she refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A).

9. Section 55, entitled "Breath Analysis", requires close examination. The relevant provisions are as follows:

**"55. Breath analysis** (1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation or of the Department of Infrastructure under section 53 to do so 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) the person, in the opinion of the member or officer, refuses or fails to carry out the test in the manner specified in section 53(3)—

any member of the police force or, if the requirement for the preliminary breath test was made by an officer of the Corporation or of the Department of Infrastructure, any member of the police force or any officer of the Corporation or of the Department of Infrastructure 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 or an officer of the Corporation or of the Department of Infrastructure authorised in writing by the Corporation or the Secretary of the Department of Infrastructure, as the case requires, for the purposes of section 53 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-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

(2) A member of the police force may require any person whom that member reasonably believes to have offended against section 49(1)(a) or (b) to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test in accordance with section 53) 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-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner."

10. Sub-section (1) recites that a person is to undergo a preliminary breath test when required. To this provision is appended Part (a), introduced by the word "and". It provides that if "the test in the opinion of the member in whose presence it is made indicates that the person's blood contains alcohol...". The sub-section then proceeds after a semi-colon to introduce the word "or" and is followed by Part (b), which deals with the circumstances where a person refuses or fails to carry out the preliminary breath test. It provides – "or the person, in the opinion of the member..., refuses or fails to carry out the test...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..."

11. I pause to observe that Parts (a) and (b) deal with two separate fact situations. Part (a) addresses itself to the circumstances where a preliminary breath test has been administered and the results indicate to the member of the police force that the person's blood contains alcohol. Part (b) is not conjoined to Part (a), rather, it addresses itself to a different fact situation, namely, one where the person, in the opinion of the member of the police force, refuses or fails to carry out the preliminary breath test.

12. Sub-section (1) is curiously printed. After Part (b), there follows a dash which re-introduces the text of the sub-section and refers back to the introductory words dealing with the circumstances where a person has undergone a preliminary breath test. It then recites — "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..." (My emphasis).

13. In my view, the privative provision requiring the person to accompany a member of the police force to a police station arises in circumstances where a preliminary breath test has been administered and the member of the police force concludes that it indicates that the person's blood contains alcohol: (Part (a)), or that the person has refused or failed to carry out the test properly: (Part (b)). Then, for the purpose of obtaining a sample of breath for analysis by the appropriate machine, the member of the police force may require the person to accompany him or her to a police station.

14. In my view, sub-section (2) entrenches what is the pellucid import of sub-section (1). It deals with circumstances where a preliminary breath test has not been administered and

provides – "A member of the police force may require any person whom that member reasonably believes to have offended against [the Act] to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test ...) and for that purpose may further require the person to accompany a member of the police force to a police station..." The provision is plainly intended to deal with circumstances where members of the police force do not have in their possession preliminary breath testing instruments, but an offence may be apparent. Accordingly, there is a confluence of circumstances. In those cases where a preliminary breath test has been administered and in any other where it is thought that an offence under the Act may have occurred, members of the police force are possessed of powers to require citizens to accompany them to police stations. However, the purpose which must be served is that of obtaining a sample of breath for analysis by a breath analysing instrument and no other. It does not amount to a general power requiring citizens to surrender their liberty and accompany members of the police force to police stations.

15. The respondent was exculpated by the Magistrate pursuant to section 55(9). I recite it in full.

"A person must not be convicted or found guilty of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her."

### **Appellant's Submissions**

16. Mr Just for the DPP contended that the defence under section 55(9) is not open on a charge of refusing to accompany a member of the police force in order for a breath sample to be taken, but is confined to circumstances of refusing to furnish a sample of breath for analysis. Mr Just contended that the latter was a separate and discrete matter from refusing to accompany under this section. He submitted that it does not follow that "refusing to accompany" is within the definition of "refusing to furnish". He provided the example of a person required to accompany a member of the police force, who responds that he or she is willing to furnish a sample of breath but refuses to accompany the member due to lack of available time. Mr Just indicated that it would be artificial to regard such an example as a refusal to furnish a sample of breath.

17. Mr Just contended that it could not have been the intention of Parliament to apply section 55(9) to the requirement to accompany, because to do so would render the power to require to accompany virtually worthless. He referred, by way of analogy, to *Burns v Storey* [1970] VicRp 50; [1970] VR 388. That case, decided by the Full Court of the Supreme Court of Victoria (per Winneke CJ, Smith and Gowans JJ) in 1969, concerned predecessor legislation relating to a refusal to furnish a sample of breath. The court discharged an order nisi, which had been obtained against a ruling of a Magistrate, who had accepted the driver's defence that he had a "reason of a substantial character" for refusing to provide a breath sample, namely, that he was following superior police orders. I should observe at this juncture that I find the case to be of little assistance in dealing with this entirely separate and novel provision.

### **Respondent's Submissions**

18. Mr Connors for the respondent contended that the Magistrate was correct in finding that the defence was available to a charge of refusing to accompany, because the accompaniment was an essential predicate and ingredient of the offence of failing to provide a sample of breath for analysis.

19. He submitted that "some reason of a substantial character" required for exculpation must be a reason which satisfies the court, rather than the member of the police force. He noted that a refusal to accompany on the ground that it might be self-incriminatory was not justified under section 55(9) and, accordingly, the privative nature of the section had been legislatively circumscribed.

### **Legislative History**

20. It appears that the provisions relating to preliminary breath tests were introduced into the Act by the *Crimes Act* 1958. That legislation has been the subject of much judicial attention, most recently in *DPP v Williams* [1998] VSC 119; (1998) 104 A Crim R 65; (1998) 28 MVR 52.

21. Provisions concerning the obligation to accompany are of more recent origin, but they have been part of the legislation for more than a decade. I am of the view that nothing in the history of section 55 aids in its interpretation and nothing of value can be found in *Hansard*. Therefore, the section falls for interpretation upon its own terms and within the context of Part 5.

### Decision

22. I am mindful of Smith J's remarks in *DPP v Williams* viz paragraph 23. In considering the provisions (that is, sections 49(1) and 55(1) of the Act) and the issue of what constitutes "other place" vis-à-vis a police station, he said:

"In construing the provisions, it must be remembered that they are privative provisions which require persons to provide evidence incriminating them. They involve a curtailment of citizens' rights and immunities. They should therefore be construed in favour of a defendant to the extent of any ambiguity, (*Scott v Dunstone* [1963] VicRp 77; [1963] VR 579, 580-1, cited by Tadgell, J (as he then was) in *Bolton v Glover*, [(1986) 4 MVR 463, Tadgell J (as he then was), 27 August 1986]; see also *R v Coco* [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270."

23. In my view, there is no doubt that section 55(1)(a) is privative in character. A citizen's liberty may be curtailed if, as a result of a preliminary breath test, he or she is considered by any member of the police force to have alcohol in his or her blood. That member may require the citizen to accompany him or her to a police station for the purpose of providing a sample of breath for analysis by an instrument. The citizen's freedom of action is constrained and, in effect, his or her liberty removed during the period of the accompaniment and possibly for a further three hours (viz sub-section (1)).

24. The serious nature of the curtailment of the citizen's freedom of action is ameliorated by sub-section (9). It provides that the citizen may not be compelled to furnish a sample of breath if the court is satisfied that there was "some reason of a substantial character" for not doing so.

25. The words of sub-section (9) are pre-emptory in character and assist this court in discerning its meaning. I requote part thereof: "A person must not be convicted or found guilty..."

26. The iteration of "convicted" and "guilty" is not necessary, but does impart to the section the commanding nature of the word "must". That is, under no circumstances must a citizen be penalised if he or she proffers "some reason of a substantial character" to the satisfaction of the court. I pause here and ask rhetorically: of what must not a citizen be penalised? The section itself provides the answer, namely, "refusing to furnish...a sample of breath for analysis". Upon examination of the section as a whole, one finds that it relates to the taking of preliminary breath tests and then to the analysis of breath samples by a breath analysing instrument. The section also relates to the requirement that citizens accompany members of the police force to a suitable place where those samples may be analysed. In Victoria, at the moment, those places are police stations and "booze buses" which have been specially equipped for the analysis of breath samples. At a booze bus location, the distance between the roadside location, at which a preliminary breath test may be conducted, and the interior of the booze bus, where the breath is actually analysed, may only be a few paces. Obviously, a refusal to walk those few paces would be regarded as a refusal to submit for breath analysis. Likewise, a refusal to accompany a member of the police force to a police station could also be regarded as a refusal to submit breath for analysis. They are of like character. Accordingly, I consider that the word "section" in sub-section (9) must be given its ordinary and natural meaning and that it is to relate to all the events encompassed by section 55, including the refusal or failure to submit to a test as well as to accompany a member of the police force to a police station where a test could be carried out. Furthermore, there is no punctuation mark between the word "section" and "analysis". So, considered compositely, the section relates to the taking of a sample of breath for analysis. That can only be done at designated places in conformity with the decision in *DPP v Williams*, where the back of a police car was not considered to be one of the places referred to in the legislation.

27. Therefore, the exculpatory provisions of sub-section (9) relate to all the component steps of the taking of a sample of breath for analysis. That includes accompanying a member of the police force to a police station, as much as it does any of the other events envisaged in the section.



28. In my view, it offends logic to bifurcate the section by finding that the exculpation relates only to the refusal to furnish a breath sample and not to the events which make the furnishing of that breath sample possible, that is, the accompaniment to the police station. It would be extraordinary to conclude that the legislature would set up the exculpation in sub-section (9) in such pre-emptory and imperative terms and then read it down so that it relates to the furnishing of a sample alone and to nothing further. Sub-section (9) must be read in the context of the section as a whole and in the terms of interpreting privative and penal legislation.

29. It is a separate and distinct issue as to whether or not the reason proffered by the citizen constitutes one "of a substantial character". That is essentially an issue for judicial dispatch. In this case, it is not my function to substitute my view of those facts for that of the Magistrate. However, I can say that I would be very surprised if a refusal to accompany a member of the police force to a police station because it was said that the interests of the child prevailed, when the child was in fact to be taken home, could amount to "some reason of a substantial character" for refusing to go with the member. On the facts in this case, the Magistrate thought that exculpation was warranted and he acquitted Mr Greelish. I find that the Magistrate had the power to do so under the section. Accordingly, the answer to the question is "Yes". The appeal should be dismissed. I shall hear counsel as to costs.

**APPEARANCES:** For the appellant DPP: Mr D Just, counsel. Office of Public Prosecutions. For the respondent Greelish: Mr D Connors, counsel. Mahonys, solicitors.

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