

43/10; [2010] VSC 343

SUPREME COURT OF VICTORIA

DPP v FARMER

Bell J

10 August 2010 — (2010) 56 MVR 137

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO UNDERGO PRELIMINARY BREATH TEST – DEFENDANT FOUND IN PARKED VEHICLE IN DRIVER'S SEAT WITH SEAT BELT ON AND ENGINE RUNNING – WHETHER REASONABLE GROUNDS FOR BELIEVING HE WOULD DRIVE THE VEHICLE – CHARGE DISMISSED – WHETHER MAGISTRATE APPLIED CORRECT LEGAL TEST – 'REASONABLE BELIEF': ROAD SAFETY ACT 1986, SS3AA(1), 48(1)(b), 49(1)(c), 53(1)(a).

F. was found in his motor vehicle parked on the side of the road at about 4am. A police officer found F. in the driver's seat with his seat belt on and talking on a mobile phone. The keys were in the ignition and the engine was running. F. was asked to undergo a preliminary breath test (PBT) which he refused to do. F. was later charged with an offence of refusing to undergo a PBT. At the hearing of the charge, the magistrate dismissed it on the ground that the police officer lacked reasonable grounds for believing that F. intended to drive the vehicle. On appeal—

HELD: Appeal upheld. Remitted to the Magistrates' Court for rehearing in accordance with law.

1. The Magistrate had to decide whether he was satisfied beyond reasonable doubt that F. was guilty of the charge and to determine whether on the facts proved by the prosecution, the police officer made the request to undergo the PBT on reasonable grounds.

DPP v Mitchell [2002] VSC 326; (2002) 37 MVR 142; MC22/2002, followed.

2. The issue about which the police officer was required to have that belief was whether F. intended to 'drive the motor vehicle' as specified in s3AA(1)(b) of the *Road Safety Act*. Intending to drive here has a temporal aspect. It means intending to drive near, but not necessarily exactly at, the point in time when the request to undergo the preliminary breath test is made.

Woods v Gamble (1991) 13 MVR 153; MC11/1991, applied.

3. Remembering the function of the magistrate was to determine beyond reasonable doubt whether the police officer's belief was reasonable, the magistrate held the observations made by the officer were equally consistent with the vehicle being stopped with a view to the cessation of any further driving by F. The magistrate pointed to a number of possibilities not consistent with F. intending to drive. The thrust of the Magistrate's reasoning was towards what was inconsistent with the officer's belief, not towards whether the grounds given for having the belief were reasonable.

4. By focusing on whether there were contrary possibilities, the magistrate did not really focus on the reasonableness of the police officer's grounds for having the belief. None of the contrary possibilities identified by the magistrate undermined the validity to a reasonable mind of the facts which were relied on by the officer as the grounds for his belief that F. would drive the vehicle. They were that F. was found alone in the driver's seat of a motor vehicle with his seat belt on, with the ignition turned on and with the engine running. The officer was told that he had just driven from home. The reasonableness of a belief based on these grounds cannot be defeated by pointing to mere possibilities consistent with F. having ceased driving.

5. While the magistrate purported to decide beyond reasonable doubt whether the police officer had reasonable grounds for the belief which he held, this is not the test which the magistrate actually applied. Rather, the magistrate determined beyond reasonable doubt whether he (the magistrate) held that belief on those grounds. That was to misunderstand and misapply the reasonable belief test.

BELL J:**INTRODUCTION**

1. David Farmer was in a motor vehicle parked on the side of the road at about 4am on a Sunday morning. The police were driving nearby and saw the vehicle. They found Mr Farmer in the driver's seat, with his seat belt on and talking on a mobile telephone. The keys were in the ignition and the engine was running.

2. After a conversation with Mr Farmer, Constable Stephen Maeland asked him to undergo a preliminary breath test, which he refused to do. The constable (who became the informant) warned Mr Farmer of the consequences of refusing and asked him again. Mr Farmer still refused to take the test.

3. The informant charged Mr Farmer on summons with refusing to undergo a preliminary breath test contrary to s49(1)(c) of the *Road Safety Act* 1986. The charge was heard in the Magistrates' Court at Sunshine. The magistrate dismissed it. He determined Mr Farmer was not required to undergo the test because the informant lacked reasonable grounds for believing Mr Farmer intended to drive the vehicle.

4. On behalf of the informant, the Director of Public Prosecutions now appeals against the decision of the magistrate on a question of law under s272(1) of the *Criminal Procedure Act* 2009. He submits the magistrate erred in law by stating but not applying the correct legal test.

5. I will begin with the applicable legislation.

LEGISLATION

6. Under s49(1)(c) of the *Road Safety Act*, it is an offence to refuse to undergo a preliminary breath test when required by s53 to do so.

7. Section 53(1)(a) provides that a police officer may at any time require a person found driving or in charge of a motor vehicle to undergo a preliminary breath test. In the present case, the charge was that Mr Farmer was in charge of the vehicle. For the purposes of Part 5, which includes s53, s48(1)(b) provides that a person is not to be taken to be in charge of a motor vehicle unless the definition in s3AA(1)(a), (b), (c) or (d) applies. Section 48(1)(c) thus makes the definition in pars 3AA(1)(a), (b), (c) and (d) an exclusive code for the purpose of determining when a person is in charge of a motor vehicle under s53(1)(a).

8. Here is the definition in s3AA(1) in full:

Without limiting the circumstances in which a person is in charge of a motor vehicle, the following persons are to be taken to be in charge of a motor vehicle for the purposes of this Act—

(a) a person who is attempting to start or drive the motor vehicle;

(b) a person with respect to whom there are reasonable grounds for the belief that he or she intends to start or drive the motor vehicle;

(c) a commercial driving instructor while the person whom he or she is teaching to drive is driving or in charge of the vehicle;

(d) an accompanying licensed driver while the person whom he or she is sitting beside is driving or in charge of the vehicle.

9. By reason of s48(1)(b), when applying this definition to Part 5, the opening words of s3AA(1) do not apply. Therefore, when determining whether a person is required by s53(1)(a) to undergo a preliminary breath test by reason of being in charge of a vehicle, the question is whether they are taken to be in charge by reason of the application of pars (a), (b), (c) or (d) of the definition.

10. In the present case, the vehicle was already started. The informant relied on par (b). He contended before the magistrate that he had a belief, based on reasonable grounds, that Mr Farmer intended to drive the vehicle.

11. Now to the function of magistrates in cases like the present.

FUNCTION OF THE MAGISTRATE

12. It was the magistrate's function to hear and determine the charge brought by the informant. He had to decide whether he was satisfied beyond reasonable doubt that Mr Farmer was guilty of that charge. The onus of proof was carried at all times by the prosecution. Mr Farmer was not obliged to give evidence.

13. But it is important to appreciate that, under the legislation, an offence against s49(1)(c) is made out whenever someone refuses to undergo a preliminary breath test at the request of an informant who has found them in charge of a motor vehicle in that the informant has reasonable grounds of believing that they intend to drive that vehicle. It is the magistrate's function to determine whether, on the facts as proved by the prosecution, the informant made such a request on reasonable grounds, not whether, on those facts, the magistrate would hold the same belief.

14. The court has considered the proper application of the reasonable grounds for believing test. In the context of drink-driving charges under the *Road Safety Act*, the matter was discussed fully by Gillard J in *Director of Public Prosecutions (Vic) (on behalf of Fleming) v Mitchell*.^[1] As his Honour said:^[2]

State of belief is a state of mind and the only person who can provide that evidence is the particular member of the force who formed the belief. He would have to give evidence not only of his state of belief just prior to making a request, but he would also have to state the facts upon which he relied to ground that belief. It would be necessary for the prosecution to persuade the tribunal of fact, namely, the magistrate, that his state of belief was reasonable, taking into account all the circumstances.

15. Gillard J went on to make the point that belief is a state of mind which is more than suspicion but less than satisfaction beyond reasonable doubt.^[3] Following the decision of the High Court in *George v Rockett*,^[4] his Honour held the question was whether there were grounds which were sufficient for inducing that state of mind in a reasonable person.^[5]

16. In *George v Rockett*,^[6] the High Court held that believing something on reasonable grounds was not the same thing as being satisfied of a fact on the balance of probabilities.^[7]

The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

17. The function of a magistrate in a case such as the present was considered by Vincent J in *Walsh v Loughnan*.^[8] His Honour made the fundamental point that the focus of the magistrate's attention must be on whether the grounds of the informant's belief were reasonable, which did not mean the informant had to be satisfied there was a *prima facie* case against the defendant. Speaking of determining whether an informant has reasonable grounds, Vincent J said:^[9]

No such belief need be held by the magistrate who deals with the application. The magistrate must be satisfied in this context only that reasonable grounds exist. In dealing with this question, it is important that it be kept in mind that there is no requirement that an applicant establish that a *prima facie* case exists or even that there be evidence or information available which indicates that the suspect is probably guilty.

18. Returning to Gillard J in *Director of Public Prosecutions (Vic) v Mitchell*,^[10] his Honour held the function of the magistrate was to determine whether they are satisfied beyond reasonable doubt that the informant held the required belief on reasonable grounds.^[11] That was the function of the magistrate in the present case.

19. The issue about which the informant was required to have that belief was whether Mr Farmer intended to 'drive the motor vehicle' as specified in s3AA(1)(b) of the *Road Safety Act*. Intending to drive here has a temporal aspect. It means intending to drive near, but not necessarily exactly at, the point in time when the request to undergo the preliminary breath test is made.^[12]

20. That takes me to the facts found by the magistrate.

FACTS FOUND BY THE MAGISTRATE

21. Evidence was given at the hearing by the informant and the corroborating police officer who was with him on the morning concerned. Mr Farmer did not give evidence, which of course was his right and does not count against him in any way.

22. On the evidence, the magistrate found the informant did have a belief that Mr Farmer intended to drive the vehicle. There seems to be no doubt about that matter and I will proceed on that basis. The sole basis on which the magistrate dismissed the charge was, to use his Honour's words:

I am not satisfied beyond reasonable doubt that the informant's belief was, in fact, held on reasonable grounds in this case and on that basis the charge is dismissed.

23. The grounds put forward by the informant for having the belief were very straightforward. As found by the magistrate, when on patrol at the time, the informant saw Mr Farmer sitting in a motor vehicle with the headlights on. The vehicle was parked in the bicycle lane of the road. Just after the informant saw the vehicle, the headlights went off. That raised his suspicions, so he drove past the vehicle. After making certain observations, he pulled up behind it.

24. The informant approached the driver's side door. He observed Mr Farmer talking on a mobile telephone. He saw that Mr Farmer was sitting in the driver's seat with his seat belt on and that the engine was running. The keys were in the ignition.

25. The informant asked Mr Farmer what he was doing there. Mr Farmer said he was waiting for friends he had dropped off. The informant asked him if he had been drinking. Mr Farmer said he had had a few. He asked him if he had driven there. Mr Farmer said yes and that he had just come from home.

26. The informant did licence checks on Mr Farmer, then asked him to undergo a preliminary breath test. As I have already stated, Mr Farmer twice refused.

27. Referring specifically to why he believed Mr Farmer intended to drive the car, the informant said in evidence that he thought he would do so in the near future, as he was alone in the vehicle. He said he regarded this as 'likely'.

28. The magistrate found the informant did not ask Mr Farmer what he intended to do and thus gave him no opportunity to say one way or the other. Mr Farmer was not asked why the lights had been turned off. There was no evidence of anybody else being in the vicinity at the time. The magistrate found the circumstances were consistent with him having waited where the car was parked for some time.

29. On these found facts, the magistrate concluded the informant's belief was not based on reasonable grounds. Whether that conclusion was legally mistaken requires me to analyse his Honour's reasoning.

REASONING OF THE MAGISTRATE

30. I will take fully into account that the magistrate gave ex tempore reasons for judgment which were recorded only on transcript. I will also take fully into account that the magistrate saw and heard the witnesses himself. I will consider his Honour's reasons fairly and in context with these considerations in mind.

31. Remembering the function of the magistrate was to determine beyond reasonable doubt whether the informant's belief was reasonable, the magistrate held the observations made by the informant were equally consistent with the vehicle being stopped with a view to the cessation of any further driving by Mr Farmer. The magistrate pointed to a number of possibilities not consistent with Mr Farmer intending to drive. The thrust of his Honour's reasoning was towards what was inconsistent with the informant's belief, not towards whether the grounds given for having the belief were reasonable. It was as if his Honour thought the informant should have approached the matter on the basis of whether Mr Farmer had an innocent explanation, and then determined whether the informant had a reasonable belief against that standard.

32. By focusing on whether there were contrary possibilities, the magistrate did not really focus on the reasonableness of the informant's grounds for having the belief. None of the contrary possibilities identified by the magistrate undermined the validity to a reasonable mind of the facts which were relied on by the informant as the grounds for his belief that Mr Farmer would drive

the vehicle. They were that Mr Farmer was found alone in the driver's seat of a motor vehicle with his seat belt on, with the ignition turned on and with the engine running. The informant was told that he had just driven from home. I do not understand how the reasonableness of a belief based on these grounds can be defeated by pointing to mere possibilities consistent with Mr Farmer having ceased driving.

33. The magistrate said he regarded the facts relied on by the informant as giving rise to no more than 'deep suspicion' and as open to a 'number of interpretations'. With respect, the focus of this reasoning seems to be on the impact of the facts proved on the magistrate's own state of mind, rather than on the informant's state of mind.

34. Just before expressing his final conclusion, the magistrate said belief was 'a state of mind which approaches certainty'. This statement of the test was not correct. I have referred to the principles which have been enunciated in the authorities. A belief is something more than suspicion but does not need to approach anything like certainty. The magistrate's statement confused belief based on reasonable grounds with satisfaction established to an evidentiary standard.

35. With respect, I think this was clearly a case in which the magistrate erred in law by dismissing the charge brought against Mr Farmer on the basis of incorrectly applying the correct test. While the magistrate purported to decide beyond reasonable doubt whether the informant had reasonable grounds for the belief which he held, this is not the test which the magistrate actually applied. Rather, his Honour determined beyond reasonable doubt whether he (the magistrate) held that belief on those grounds. That was to misunderstand and misapply the reasonable belief test.

CONCLUSION

36. For these reasons, the appeal must be upheld.

37. The question then arises whether I should determine the charge myself or remit it back to the Magistrates' Court for rehearing according to law. Section 272(9) of the *Criminal Procedure Act* gives me jurisdiction to make such order as I think is appropriate. That includes the jurisdiction to determine the charge brought against Mr Farmer, if it is appropriate for me to do so.

38. The director submits I should exercise this power and find the charge proven against Mr Farmer, leaving it to the magistrate to impose sentence.

39. Having considered this submission, I have decided to leave the matter entirely in the hands of the Magistrates' Court. I do not think I should split the issues in the way suggested by the director. Therefore I will uphold the appeal, quash the magistrate's orders and remit the case for rehearing in the Magistrates' Court in accordance with law. There will be orders accordingly.

[1] [2002] VSC 326; (2002) 37 MVR 142.

[2] *Ibid* [39].

[3] *Ibid* [48].

[4] [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.

[5] [2002] VSC 326; (2002) 37 MVR 142, [50]-[52].

[6] [1990] HCA 26; (1990) 170 CLR 104; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.

[7] *Ibid* 116.

[8] [1991] VicRp 75; [1991] 2 VR 351.

[9] *Ibid* 356.

[10] [2002] VSC 326; (2002) 37 MVR 142.

[11] *Ibid* [52], [59] and [67].

[12] *Woods v Gamble* (1991) 13 MVR 153, 156 per Fullagar J.

APPEARANCES: For the appellant DPP: Mr DA Trapnell, counsel. Office of Public Prosecutions. For the respondent Farmer: Self-represented.