01/07; [2006] VSCA 252

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v O'ROURKE

Maxwell P, Chernov and Neave JJ A

22 November 2006

(2006) 14 VR 522; (2006) 165 A Crim R 445; (2006) 47 MVR 175

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT CHARGED WITH DRIVING A MOTOR VEHICLE WHILST OVER THE LIMIT – READING 0.175BAC – CHARGE SPECIFIED "BEING ANY CONCENTRATION OF ALCOHOL WHATSOEVER" – DEFENDANT PRODUCED A DRIVER LICENCE ENDORSED WITH A "Z" MEANING DEFENDANT WAS SUBJECT TO A ZERO LIMIT – AT HEARING NOT PROVED THAT DEFENDANT WAS SUBJECT TO ZERO BLOOD ALCOHOL LIMIT – FINDING THAT SUCH PROOF WAS AN ELEMENT OF THE CHARGE – "ANY OTHER PERSON" – MEANING OF – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS3(1), 49(1)(b), (f), 52.

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

(1) A person is guilty of an offence if he or she—
(b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath;

Section 3(1) of the Act provides:

"**prescribed concentration of alcohol**" means—
(a) in the case of a person to whom section 52 applies, the concentration of alcohol specified in that section; and

(b) in the case of any other person—
(i) a concentration of alcohol present in the blood of that person of 0.05 grams per 100 millilitres of blood; or

(ii) a concentration of alcohol present in the breath of that person of 0.05 grams per 210 litres of exhaled air;"

Whilst driving her motor vehicle, O'R. was stopped by a "booze bus" and later underwent a breath test which returned a reading of 0.175. O'R. produced her driver licence which was endorsed with a "Z" which signified that a zero blood alcohol limit condition applied to the licence. O'R. was later charged with offences under s49(1)(b) and (f) of the Act and the charges specified that she did drive a motor vehicle "while more than the prescribed concentration of alcohol was present in her blood **being any concentration of alcohol whatsoever**." At the hearing the prosecution did not lead admissible evidence to show that O'R. was a person to whom s52 applied, that is, subject to the zero limit. At the conclusion of the prosecution case, O'R. made a 'no case' submission on the basis that O'R.s status as the holder of a Z licence was an element of the offence that had not been proved. The magistrate agreed and dismissed the charges. On appeal to the Supreme Court, Bell J dismissed the appeal. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for hearing and determination.
1. A single offence is created by 49(1)(b) of the Act that is, the offence of driving while more than the prescribed concentration of alcohol is present in the driver's blood. There is an absolute maximum of 0.05 blood alcohol for all drivers. For certain special categories of driver, alcohol in the blood is prohibited altogether.

2. Where a person is subject to a zero blood alcohol limit, it is not an element of the offence and it is not necessary for the prosecution to prove that the driver was a person subject to that limit. Breach of the zero limit is an aggravating factor which may affect penalty.

3. Where the prosecution failed to prove that a driver was subject to the more stringent limit, proof that the driver was driving with a blood alcohol concentration of 0.175 was sufficient, without more, to establish guilt of the offence under s49(1)(b) of the Act. For the purposes of the definition of "prescribed concentration of alcohol" the driver fell into the category of "any other person", since it had not been proven that the driver was a person to whom s52 applied.

4. Accordingly, a magistrate was in error in dismissing a charge under s49(1)(b) (reading 0.175) on the ground that it had not been proved that the driver was subject to zero blood alcohol.
***DPP v O'Rourke* (2006) 159 A Crim R 590; [2006] VSC 150; (2006) 45 MVR 223, overruled.**

MAXWELL P:

1. On 20 December 2003, Heather O'Rourke was stopped by what is colloquially known as a "booze bus". A preliminary breath test indicated the presence of alcohol in her blood. A second breath test was then taken at the breath testing station. It produced a reading of 0.175. There is no dispute about that reading or the manner in which it was taken.

2. O'Rourke produced her driver's licence on request. The relevant police officer noted that the licence was endorsed with a "Z", which signified that a zero blood alcohol limit condition applied to the licence.

3. O'Rourke was charged with two drink driving offences. The charges read as follows:

> "1. The defendant at Malvern East on 20/12/03 did drive a motor vehicle while more than the prescribed concentration of alcohol was present in her blood ***being any concentration of alcohol whatsoever***. (Alleged Reading 0.175).
>
> 2. The defendant at Malvern East on 20/12/03 did within 3 hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to section 55 of the *Road Safety Act* 1986 and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol ***being any concentration of alcohol*** was present in her blood and the concentration of alcohol indicated by the analysis to be present in her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle. (Alleged Reading 0.175)" (emphasis added).

4. The relevant section of the *Road Safety Act* 1986 (Vic) ("RSA") is section 49. The applicable paragraphs of s49(1) provide as follows:

> "**49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she— ...
> (b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; or
> ...
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and--
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle..."

5. The phrase "prescribed concentration of alcohol" is defined in s3(1) of *RSA*, as follows:

> "**prescribed concentration of alcohol** "means—
> (a) in the case of a person to whom section 52 applies, the concentration of alcohol specified in that section; and
> (b) in the case of any other person—
> (i) a concentration of alcohol present in the blood of that person of 0.05 grams per 100 millilitres of blood; or
> (ii) a concentration of alcohol present in the breath of that person of 0.05 grams per 210 litres of exhaled air;"

6. Section 52 in turn identifies certain categories of person – in some cases by reference to their driving of particular types of vehicle – for whom the prescribed concentration of alcohol is "any concentration of alcohol". Thus, when s49(1)(b) is read with the relevant part of the definition, a person to whom s52 applies is guilty of an offence under that paragraph if he or she –

> "drives a motor vehicle or is in charge of a motor vehicle while any concentration of alcohol is present in his or her blood or breath".

In the case of "any other person" – and again reading in the relevant part of the definition of "prescribed concentration of alcohol" – an offence is committed under s49(1)(b) if that person –

> "drives a motor vehicle or is in charge of a motor vehicle while 0.05 grams of alcohol per 100 millilitres of blood (or more than that amount) is present in his or her blood".

7. The holder of a Z licence is a person to whom s52 applies. O'Rourke having produced a Z licence to the officer, the charges against her were evidently drafted on the basis that, in her case, the prescribed concentration of alcohol was "any concentration of alcohol" (s52(2))

8. When the matter came on for hearing in the Magistrates' Court, the appropriate certificate was tendered to prove that O'Rourke had a blood alcohol concentration of 0.175. The prosecution did not, however, lead admissible evidence to establish that O'Rourke was a person to whom s52 applied. The informant gave evidence that O'Rourke had produced her licence on request and that he had observed the "Z" marking on it. Quite properly, however, counsel for O'Rourke objected on the ground that this was hearsay evidence, which could not prove that O'Rourke was the holder of a Z licence and hence a person to whom s52 applied.

9. At the conclusion of the prosecution case, counsel for O'Rourke made a no case submission, on the basis that O'Rourke's status as the holder of a Z licence – and therefore subject to the zero limit – was an element of the offence that had not been proved. The no case submission was upheld. The Magistrate held that, having regard to the wording of the charges:

> "[I]t is an essential element of the charges that it be established that there be a basis for saying that the defendant had to have a zero, or basically, any concentration of alcohol being a zero limit or to which s52 applied... That would be proved by, in the normal course, over objection, by a s84 notice and, if there was objection to that, by the calling of evidence from the Roads Corporation and someone to prove those particular records. That was not done on this occasion and, consequently, I don't accept that there is evidence before me to show in this situation that she, the defendant Miss O'Rourke, had a requirement to have a Z condition on her licence – on her at the relevant time".

10. The prosecution appealed under s92 of the *Magistrates' Court Act* 1989 (Vic). The trial Judge dismissed the appeal.[1] His Honour described the only real issue before him as being whether the magistrate had been correct in his conclusion "that Ms O'Rourke's licence status was a necessary element of the offences with which she had been charged."[2] The question for decision, in his Honour's view, was –

> "whether or not ... the words 'being any concentration of alcohol whatever' have been included merely by way of particulars rather than by way of elements of the offence."

11. The Judge concluded that the applicable blood alcohol limit was an element of the offence. He said:

> "The question whether or not the fact that Ms O'Rourke was alleged to have 'any concentration of alcohol whatsoever' in her blood is an element of the offences with which she was charged is to be ascertained by reference to the legislation creating the offences. It is necessary to read s49(1)(b) and (f) together with s3(1), which defines 'prescribed concentration of alcohol', and s52(2), which deals with offences of the category with which Ms O'Rourke was charged. It is not possible to ascertain from s49(1)(b) and (f) alone what are the elements of the offences that may be applicable in circumstances such as the present. The words 'prescribed concentration of alcohol' in s49(1)(b) and (f) have to be understood in the context of the meaning that the definition of 'prescribed concentration of alcohol' in s3(1) and the words 'the prescribed concentration of alcohol' in s52(2) give to that expression.
>
> So construed it is clear that, where the prosecution specifies in a charge and summons that the nature of the charge is that the prescribed concentration of alcohol is as mentioned in s52(2) of the *Road Safety Act*, namely 'any concentration of alcohol', it is an offence of that nature that is being brought against the defendant."[3]

12. The one ground of appeal before us challenges this conclusion.

Parliament's intention

13. With respect to the learned Judge, and to the learned magistrate, I consider that the appeal must be allowed. In my opinion, Parliament's intention is clearly expressed in the language of s49(1)(b) and in the definition of "prescribed concentration of alcohol". A maximum blood alcohol concentration of 0.05 has been established. That maximum applies to any person who drives a motor vehicle or is in charge of a motor vehicle. Quite deliberately, a more stringent limit – of zero blood alcohol – has been imposed on drivers who fall into one or other of the categories specified in s52.

14. As Mason CJ and Toohey J succinctly stated in *Mills v Meeking*[4] (not a case, I should point out, where this issue arose for decision):

> "[T]he prescribed concentration is 0.05 grams per 100 millilitres of blood except for probationary or learner drivers[5] for whom the prescribed concentration is zero blood alcohol."

In short, there is an absolute maximum of 0.05 blood alcohol for drivers. For certain special categories of driver, alcohol in the blood is prohibited altogether.

15. What this means is that a driver who is found to have had a blood alcohol concentration of 0.04 will have committed no offence unless it is proved that he or she is a person to whom s52 applied at the time of the relevant driving. On the other hand, driving with a blood alcohol concentration of 0.08 is a breach of s49(1)(b) whether or not the driver is a person to whom s52 applies. Of course, it is always open to the prosecution in such a case – that is, where the blood alcohol concentration exceeds 0.05 – to prove that the driver was a person to whom s52 applied and, hence, was subject to the more stringent (zero) limit. But it is not necessary for the prosecution to do so.

16. Thus understood, breach of the zero limit in a case such as this is an aggravating factor. If established, it may affect penalty. It is not itself an element of the offence. A single offence is created by s49(1)(b), the offence of driving while more than the prescribed concentration of alcohol is present in the driver's blood.[6] This conclusion is unaffected by the fact that the blood alcohol concentration applicable to s52 drivers is more stringent.

17. As Batt JA said in *R v Satalich*,[7] whether a provision creates one or more offences is a question of construction.[8] Counsel for the respondent sought to draw an analogy with *Greelish*,[9] where it was held by this Court that RSA s49(1)(e) created more than one offence. There is no such analogy. The language of paragraph (e) is quite different. Under paragraph (e), a person commits an offence if he/she "refuses to comply with a requirement made under s55(1), (2), (2AA), (2A) or (9A)". Plainly enough, there is a discrete offence referable to each of the sections there specified. A refusal to comply with a requirement under, for example, s55(1) is a different offence from a refusal to comply with a requirement made under s55(2A) or s55(9A).

18. Proof that O'Rourke was driving with a blood alcohol concentration of 0.175 was sufficient, without more, to establish her guilt of the relevant offence under s49(1)(b) – that is, of driving with more than the prescribed concentration of alcohol in her blood. For the purposes of the definition of "prescribed concentration of alcohol", she fell into the category of "any other person", since it had not been proven that she was a person to whom s52 applied.

19. The category "any other person" is thus a default category. Every person is prohibited from driving with a blood alcohol concentration of 0.05 or greater. If it is shown that the driver is a "s52 person", then he/she is subject to a more stringent limit. But if it is not shown that he/she is "a s52 person", then the driver must be classified as "any other person", who is therefore subject to the same limit as applies to every driver. On that view, O'Rourke, if convicted, will have to be treated for sentencing purposes as someone for whom the prescribed concentration of alcohol was 0.05, not zero.

20. There are two elements of the offence under s49(1)(b). The first is that the person was driving a motor vehicle or was in control of a motor vehicle. The second is that, at the time, he/she had more than the prescribed concentration of alcohol in his/her blood. The first element was not in issue in this case. The second element was, as I have explained, established by proof that O'Rourke had a blood alcohol concentration of 0.175.

21. The position would have been different if O'Rourke's blood alcohol concentration had been between zero and 0.05. The prosecution's failure to prove that she was a person to whom s52 applied would have necessitated the dismissal of the charge.

22. Nothing, in my opinion, turns on the fact that the charges disclosed the prosecution's intention to prove that O'Rourke was a person to whom s52 applied. O'Rourke was in no way prejudiced by the prosecution's failure to prove that she was such a person. As Mr Walsh-Buckley properly conceded before us this morning, she had – and he as her counsel had – all the information required to enable her to meet the charge.[10]

23. There was no failure to prove an element of the offence. There was simply a failure to prove an aggravating feature, notice of which had – quite properly – been given to O'Rourke in the wording of the charges.[11]

24. It follows that the appeal must be allowed and the decision appealed from set aside. In place of his Honour's order, there should be an order allowing the Director's appeal with costs, setting aside the Magistrate's order and remitting the matter to the Magistrate to be determined in accordance with law.

CHERNOV JA:

25. I agree with the President. It seems to me that, on a proper construction of the *Road Safety Act* 1986, s49(1)(b) creates one offence, the essential element of which is driving a motor vehicle while a concentration of alcohol in the blood or breath of the driver is above the prescribed limit. The definition of "prescribed concentration of alcohol" draws the distinction between a driver to whom s52 of the Act applies and one who is "any other person". In my view, that distinction goes to the question of penalty: see, for example, s50(1) and s49(3)[12] and s50(1A) of the Act respectively. This, however, does not bear on what is the essential element of the offence: see, for example, *Director of Public Prosecutions Reference No.2 of 2001*[13] and *Mills v Meeking*.[14] Thus, if the charge omitted the words "being any concentration of alcohol whatsoever", it would nevertheless have been a valid charge. The respondent would, of course, have been entitled to know whether the prosecution alleged that she was a person to whom s52 of the Act applied but, in my view, this does not mean that the absence of such particulars would invalidate the charge. The evidence here established that the respondent was a person who drove a motor vehicle with a blood alcohol content of 0.175 so that, on any view, the amount of alcohol present in her blood was above "the prescribed concentration of alcohol". What it failed to establish was that the respondent fell within s52 of the Act. Nevertheless, the offence was proved because obviously the respondent fell within the term "any other person" within the definition of the relevant term, and the magistrate erred in upholding the "no case" submission. In the circumstances, I agree, with respect, with the disposition of the appeal as is proposed by the learned President.

NEAVE JA:

26. I also agree with the disposition of the appeal as proposed by the learned President, for the reasons which his Honour gives.

MAXWELL P:

27. Accordingly, the orders of the Court will be as follows:

1. Appeal allowed.

2. Decision of the judge of the Trial Division made 27 February 2006 be set aside and in lieu thereof it be ordered as follows:
(a) Appeal allowed.

(b) Decision of the Magistrate made 19 May 2005 dismissing the charges be set aside.

(c) The matter be remitted to the Magistrates' Court for hearing and determination in accordance with law.

(d) Defendant pay the plaintiff's costs of the proceeding.

3. Respondent pay the appellant's costs of the appeal.

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[1] *DPP v O'Rourke* [2006] VSC 150; (2006) 159 A Crim R 590; (2006) 45 MVR 223.
[2] At [12].
[3] At [20]-[21].
[4] [1990] HCA 6; (1990) 169 CLR 214 at 218 (footnote added); (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.
[5] Those being the relevant categories at the time.
[6] I ignore for this purpose the separate offence including being "in charge of a motor vehicle."
[7] [2001] VSCA 106; (2001) 3 VR 231 at 248; (2001) 124 A Crim R 335.
[8] See, and compare, *R v Satalich* (*supra*) at 238-245 per Winneke P; *Kingswell v R* [1985] HCA 72; (1985) 159 CLR 264; 62 ALR 161; (1985) 60 ALJR 17; 19 A Crim R 65; *R v Meaton* [1986] HCA 27; (1986) 160 CLR

359 at 363; (1986) 65 ALR 65; 21 A Crim R 117; 60 ALJR 417; *Cheng v R* [2000] HCA 53; (2000) 203 CLR 248 at 264-8; 175 ALR 338; (2000) 74 ALJR 1482; 115 A Crim R 224 (2000) 203 CLR 248.
[9] *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466.
[10] cf. *John L Pty Ltd v Attorney-General (NSW)* [1987] HCA 42; (1987) 163 CLR 508; 73 ALR 545; 61 ALJR 508; 27 A Crim R 228.
[11] *Kingswell* (*supra*) at CLR 278-80; *Meaton* (*supra*) at CLR 363-4.
[12] Substituted by the *Road Legislation (Projects and Road Safety) Act* 2006, s4(2). Now see s49(2A) of the Act.
[13] [2001] VSCA 114; [2001] 4 VR 55 at 61-62 per Charles JA; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[14] [1990] HCA 6; (1990) 169 CLR 214 at 228 per Dawson J and at 237 per McHugh J, both of whom dissented on grounds irrelevant to the present case; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.

APPEARANCES: For the appellant DPP: Mr CW Beale, counsel. Ms A Cannon, Solicitor for Public Prosecutions. For the respondent O'Rourke: Mr WJ Walsh-Buckley, counsel. Stephen Andrianakis & Associates, solicitors.
