01/12; [2012] VSC 35

SUPREME COURT OF VICTORIA

DPP v SERBEST

Robson J

10 November 2011; 10 February 2012

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST CONDUCTED – POSITIVE RESULT – DRIVER ASKED TO RETURN TO POLICE STATION TO UNDERGO A BREATH TEST – DRIVER SAID HE DID NOT WANT TO – DRIVER SUBSEQUENTLY CHARGED WITH REFUSING TO COMPLY WITH A REQUIREMENT TO ACCOMPANY A POLICE OFFICER – CHARGE DISMISSED BY MAGISTRATE – WHETHER THE MAGISTRATE IN ERROR IN FINDING THAT THERE WAS A REQUIREMENT TO PROVE A SUBJECTIVE UNDERSTANDING OF THE RELEVANT SECTION OF THE *ROAD SAFETY ACT* 1986 – WHETHER THE RELEVANT SECTIONS IMPOSE AN OBLIGATION TO ACCOMPANY POLICE OFFICER FOR FURTHER BREATH TEST: *ROAD SAFETY ACT* 1986, SS49(1)(e) and 55(1).

S. was charged under s49(1)(e) of the *Road Safety Act* 1986 ('Act') with refusing to comply with a requirement to accompany a police officer to a police station to undergo a breath test. S. had undergone a PBT which showed positive for alcohol and was asked to return to the police station. S. said "I don't want to". S. was warned that a refusal to accompany in the circumstances was an offence punishable by law. At the hearing, the Magistrate found that the police informant had only made a request rather than a requirement and dismissed the charge on the ground that the police had not proven that S. understood that he had to go to the police station. Upon appeal—

HELD: Appeal allowed. Magistrate's order quashed. Remitted to the Magistrates' Court for hearing and determination according to law.

1. The test as to what constitutes a request is whether the evidence as it stood was such to prove that the driver was given reasonably sufficient information to know what was required of him and why. Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient and indeed it is to be hoped, and in most cases expected, that a requirement will be made in terms of a polite request. In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear.

***Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279; MC09/04 per Nettle J, applied.**

2. The offence is created under s49(1)(e) of the Act by the driver's refusal to accompany a member of the police force when required to do so. In the present case the informant told S. he had a choice. That is, there was no compulsion on S. to comply with the requirement of the informant to accompany him to the police station. There were consequences and, indeed, serious consequences if S. failed to comply with the requirement of the informant and S. was clearly told of these consequences. The Magistrate proceeded on the assumption that the informant was required to prove that S. understood that he had to go to the police station.

3. There is no enforceable obligation imposed on the driver by the Act that he accompany the police officer. Rather, the driver commits an offence if he or she 'refuses' to comply with the request. It is the refusal to comply that triggers the offence. The person cannot be compelled to go and cannot be arrested for failing to go and take another test.

4. The police informant correctly informed S. that he was not under arrest but there were important consequences if he did not comply with the request. S. was not confused as to the necessary elements of the offence. That is, a request had been made and that his refusal to comply constituted an offence.

5. Accordingly, the Magistrate was in error in finding that the subjective state of the mind of S. was relevant to the offence and in dismissing the charge.

ROBSON J:

1. The appellant appeals to this Court under s272(1) of the *Criminal Procedure Act* 2009 against final orders made on 19 October 2010 by a Magistrate, in the Magistrates' Court at Dandenong, whereby her Honour dismissed a charge for the offence of refusing to comply with a requirement to accompany a police officer to a police station pursuant to s55(1) of the *Road Safety Act* 1986

(the Act), and contrary to s49(1)(e) of the same Act. The Magistrate also ordered that the Chief Commissioner of Police pay costs of the respondent, Erhan Serbest.

The incident

2. Mr Serbest, was charged with the following:

> The accused, at Moorabbin on 06/12/2009 having been required to furnish a sample of breath pursuant to section 55(1) of the *Road Safety Act* 1986 and for that purpose a requirement was made for him to accompany a member of the police force to a place namely Moorabbin Police Station did refuse to comply with such requirement to accompany the member of the police force prior to three hours elapsing since the driving of a motor vehicle.

3. The evidence before the Magistrate was as follows. Constable Howard gave sworn evidence that on 6 December 2009, he was in a marked police car driven by Sergeant Bell when, at 3.40 am, he intercepted the accused in Nepean Highway, Moorabbin. There were two other male occupants in the accused's car. Constable Howard had a conversation with the accused in the presence of Sergeant Bell and the two other occupants of the vehicle. The accused underwent a breath test, which was positive for alcohol. Constable Howard told the accused he had tested positive for alcohol. Constable Howard returned to the police vehicle to do some checks and then went back to the accused and asked him to return to the police station to undergo a breath test.

4. The Magistrate found that the following conversation took place:

> THE ACCUSED: 'Am I over?'
> THE INFORMANT: 'The test indicates your breath contains alcohol.'
> THE ACCUSED: 'What police station?'
> THE INFORMANT: 'Moorabbin Police Station', and he motioned up the road.
> THE ACCUSED: 'Do I have to?'
> THE INFORMANT: 'You are not under arrest but the decision is yours. There is important information I need to give to you if you don't.'
> THE ACCUSED: 'I don't want to.'
> THE INFORMANT: 'If you fail to accompany me for a breath test you will commit an offence which if you are found guilty carries a fine and imprisonment and two years loss of licence.'
> THE ACCUSED: 'No I don't want to.'

5. Her Honour found that, after this conversation, the informant read from his proforma notes, a copy of which were exhibited. The notes set out what must be said to a person who has failed a preliminary breath test, and how a request to accompany the police officer to the police station must be worded.

6. Following this, the police officers returned to their car, remaining in possession of the driver's licence of the accused. The accused then walked over to the police car and knocked on the front passenger window. The informant rolled down the window and activated his voice recorder as he was concerned there might be a confrontation. Exhibit B was tendered as the transcript of the conversation that then took place. The Magistrate did not refer any further to this conversation in her judgment.

7. As the transcript reveals, much of the second conversation between the police officers and the accused relates to whether or not the accused's licence was suspended. It was later shown that the accused's licence was not suspended. The transcript of the second conversation reveals that the accused's refusal to attend the police station for further testing hinged on the fact that he was told that, because of his suspension, he was not allowed to have any alcohol in his system. Sergeant Bell gave evidence, however, that he believed the offence of refusing to accompany the police offers to the station was completed at the time the officers returned to their vehicle. His said that the second conversation, at the window of the police vehicle, was after the offence had been committed. His evidence was:

> I can't argue with drivers all night. The decision was made by the defendant not to attend so the offence was complete.

8. I infer from the Magistrate's reference to this evidence that the police were putting forward an argument that, although the accused had a conversation with them in which it appears that he

refused to attend the station because they erroneously believed him to have a suspended licence, this conversation was not relevant to the laying of the charge, and the offence was complete (that is, the accused had refused to attend the station) before the second conversation took place.

9. The accused gave sworn evidence that he had volunteered to pick up his friends on 6 December 2009 and that he was intercepted by the police on his way home and breath tested. The Magistrate said that his evidence was that he did not recall being told the consequences [of refusing to attend the police station]. She said that the accused stated that:

> They gave me a choice, it's up to you. I didn't think I had to do it if I didn't blow over. I asked if I have to I'll go, I thought it was relating to my licence suspension.

***The relevant sections of the Road Safety Act* 1986**

10. Section 49(1)(e) of the Act provides:

> (1) A person is guilty of an offence if he or she—
> ...
> (e) refuses to comply with a requirement made under section 55(1) ...

11. Section 55(1) provides:

> (1) If a person undergoes a preliminary breath test when required by a member of the police force ... to do so and—
> (a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; or
> (b) the person, in the opinion of the member ... refuses or fails to carry out the test in the manner specified in section 53(3)—
> 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 place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath ...

The Magistrate's decision

12. The Magistrate found that the offence under s49(1)(e) was refusing to comply with a requirement made under s55(1). She found that there was no issue that the preconditions of s55(1) had been satisfied, in that the accused was required to undergo a breath test, which he did, and that test was positive for alcohol.

13. Her Honour held in written reasons that for the offence to be committed, 'the police are to require the defendant to accompany them to a place for a breath test and the accused then refuses to comply. The police have to prove that the accused understood that he had to go and, if he did not, then he would lose his licence for two years and may suffer other consequences.'

14. The Magistrate found, following *Rankin v O'Brien*[1], that there was good authority for the proposition that lay terms could be used [presumably in relation to how a person is to be instructed on the law in relation to the offences relevant here], but it was necessary that the accused understood what was being required and the consequences thereof.

15. Her Honour found that the evidence, as it stood, did not prove that the accused was given reasonably sufficient information to know what was required of him and why. She said that the Court must be wary of taking a 'good enough is near enough' approach, and that on the evidence that she had heard, there was an 'ask', but the accused had clearly not considered it to be a demand. Her Honour found the accused had considered it to be a request which gave him a choice, and that he had chosen not to accompany the police officer. She said that the accused had not been absolutely certain, so after the first request he had approached the police car to clarify the situation. She said that the accused seemed confused and focused mainly on the status of his licence, rather than his state of sobriety. She said that his sworn evidence was: 'If I had been told I had to go, why wouldn't I', because it was his evidence that he had only a modest amount to drink and believed he was under the limit.

16. The Magistrate held that it was necessary for the informant to go further than to ask the driver to accompany [him]. Quoting from *DPP v Ellison*[2] she said

> To ask someone to go and tell them that they are obliged to go seems to me to make a requirement on any possible meaning of the word 'require'.

17. Her Honour found that the informant had asked the accused [to accompany him to the police station], but had then not expressed to the accused that it was a requirement that he do so. She said that the informant told the accused what the consequences of the refusal would be and also that he may receive a summons, but she said it was clear from the evidence of the accused that he did not consider it a requirement to go and the informant did not go so far as to require him to accompany him.

18 Accordingly, her Honour dismissed the charge.

Grounds of appeal

19. The grounds of appeal are as follows:

> (1) The learned Magistrate erred in law in finding that essential ingredients or elements of the offence were not made out.
> (2) The learned Magistrate erred in law in failing to apply the relevant test as laid down in *R v Foster* and *DPP v Sanzaro* to the evidence.
> (3) The learned Magistrate erred in law in taking an irrelevant matter into account, namely the respondent's subjective belief.
> (4) The learned Magistrate erred in law by failing to take into account a relevant matter, namely the warning that was given of the consequences of refusal.
> (5) The learned Magistrate erred in law in citing the remarks of Brooking J in *DPP v Ellison* as a basis for her finding.
> (6) The learned Magistrate erred in law in dismissing the charge.

The orders sought in the appeal

20. The appellant seeks orders that:

> (1) The appeal be allowed.
> (2) The orders made on 19 October 2010 by the Magistrate in the Magistrates' Court at Dandenong in the case whereby her Honour dismissed charge two and ordered the Chief Commissioner of Police to pay costs, be quashed.
> (3) Charge two in the Magistrates' Court case be remitted back to the Magistrates' Court at Dandenong for hearing and determination according to law.
> (4) That the respondent pay the appellant's costs of this appeal, including any reserved costs.
> (5) Such further and other orders and relief as the Court deems appropriate.

***Criminal Procedure Act* 2009**

21. Section 272(1) of the *Criminal Procedure Act* 2009 provides:

> (1) A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law from a final order of the Magistrates' Court in that proceeding.

22. Section 272(9) provides:

> After hearing and determining the appeal, the Supreme Court may make any order that it thinks appropriate, including an order remitting the case for rehearing to the Magistrates' Court with or without any direction in law.

Appellant's submissions on the appeal

23. The appellant submits that the essential element of the relevant offence is the failure to accompany the member of the police force when required to do so. The appellant contends that for the offence to be established two things must be proven: first, that a requirement has been made, and secondly, a refusal to comply with that requirement.

24. The appellant contends that her Honour fell into error when finding that the police had not proven that the accused understood that he had to go. The appellant says that the relevant sections and the authorities on them do not require the police to prove a subjective understanding on the part of the accused. Further, the appellant says that the relevant sections do not in any event impose an obligation on the accused to accompany a police officer. Rather, the offence is

committed not by a failure to accompany a police officer but a failure to comply with a requirement to accompany a police officer. For the reasons that follow I accept the contentions of the appellant.

25. The appellant refers to two recent Court of Appeal decisions, *DPP v Piscopo*[3] and *DPP v Rukandin*[4] which deal with the same sections of the *Road Safety Act* 1986 which are in dispute here. The appellant submits that these two cases confirm that, in relation to s55(1) there are three separate requirements which are engaged at different times. The first or primary purpose of s55(1) is to obtain a sample of breath for analysis by a breath analysing instrument.[5] The second requirement is the requirement to accompany for the purposes of a breath test, and the third is a requirement to remain. The appellant submits that the Court of Appeal confirmed that the requirement to accompany and the requirement to remain were separate requirements, but that both were 'for the purpose' of getting a breath sample. The appellant submits that the police have no power, under the relevant section, to order in mandatory terms that someone accompany them because there is no power of arrest or detention in the legislation.

26. The appellant refers to the judgment of *DPP v Piscopo* where Ashley JA quotes Winneke P in *DPP v Foster*[6] where the President said, in relation to s55(1)[7]:

> 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 ... Rather, as I see it, they are powers which a police officer 'may' exercise as and when circumstances dictate.

27. The appellant cites Ashley JA in reference to the above quote from Winneke P, where Ashley JA says:

> Two points may be made about his Honour's reasons: (1) they involved rejection of single judge decisions ... those decisions focusing upon there being a duty to inform motorists of the content of the various requirements ...

28. The appellant submits that the Magistrate misunderstood the meaning of the word 'requirement' in s55(1). The appellant submits that the Magistrate erred in this case in finding that the police officer had only made a request, rather than a requirement, and that this was insufficient. She submitted that the Magistrate defined requirement as being an imperative command, but that this was a misunderstanding of the meaning of that word as, under s55(1), the police officer is not empowered to make such a demand.

29. The appellant further refers to *DPP v Foster*, where Winneke P held that it was erroneous to assume that the legislative intention which lies behind s55(1) was to protect the interests of motorists[8]:

> This assumption has led the courts to construe more strictly the discretionary powers of 'requirement' and to convert them into obligations as distinct from powers.

Relevant authority

30. In *Sanzaro v County Court of Victoria and Sadler*,[9] Nettle J summarised the relevant authorities as to what constitutes a request as follows:

> The test is whether the evidence as it stood was such to prove that the plaintiff was given reasonably sufficient information to know what was required of him and why?[10] Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient[11] and indeed it is to be hoped, and in most cases expected, that a requirement will be made in terms of a polite request.[12] In any event, whatever terms may or may not be used in any given case, it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear.[13]

31. The appellant submits that the Magistrate misapplied the law as articulated in *DPP v Foster*[14] and *Sanzaro v County Court of Victoria*[15] to the evidence before her. The appellant contends that her Honour erred in law in that she failed to apply an objective test to the evidence. The appellant says that her Honour erred in that she took into account an irrelevant matter, namely evidence of the respondent's subjective perception that he had a choice, that he was merely being asked and did not believe that he was required to accompany the police officer to the station.

32. The appellant says that her Honour erred in that she failed, notwithstanding a reference to it in her reasons, to take into account a relevant matter, namely evidence that the defendant was warned that a refusal to accompany in the circumstances was an offence punishable by law.

33. The appellant contends that in all the circumstances, the Magistrate's finding was not reasonably open on the evidence and therefore the learned Magistrate erred in law in dismissing the charge.

34. In *DPP v Foster*, Ormiston JA held that s55(1) does not in its own terms contain an obligation to undergo a second breath test. He said:

> The connection with s55(1) provides a problem in itself in that sub-s (1) does not contain any obligation to undergo a second breath test for the purpose of analysis by breath analysing instrument; it only refers to the power of the police to require a furnishing of a sample of breath. That appears to be so unless sub-s (5) contains in itself such an obligation, but that reads:
> 'A person who furnishes a sample of breath under this section must do so by exhaling continuously into the instrument to the satisfaction of the person operating it.'
>
> With this section may be contrasted s53 which states explicitly in sub-s(3) that:
> '[a] person required to undergo a preliminary breath test must do so by exhaling continuously ...'
>
> Likewise s56(2) contains a direct obligation on persons to 'Allow a doctor to take from that person ... a sample of that person's blood for analysis'. Sub-s (3) of s55 *assumes* that a person is furnishing a sample of breath but then such a person is required to do so by exhaling continuously *et cetera*. Other sub-sections such as (6) and (7) deal with reasons why persons shall not be obliged to provide samples of breath. The solution may be that there is an explicit offence contained in paragraph (e) of s49(1) which makes a person guilty if he or she 'refuses or fails to comply with a requirement made under s55(1) or (2)'. Whatever conclusion one reaches as to the obligations of persons to provide or furnish samples of breath for analysis, certainly sub-s (1) of s55 does not in its own terms appear to impose the obligation.

35. Similarly, s55(1) does not impose by itself an obligation on the defendant to accompany the member of the police to the police station. The offence is created under paragraph (e) of s49(1) by the defendant's refusal to accompany a member of the police force when required to do so. As the officer told the accused, he had a choice. That is, there was no compulsion on him to comply with the requirement of the police officer to accompany him to the police station. Obviously, there were consequences and, indeed, serious consequences if the accused failed to comply with the requirement of the police officer. The accused was clearly told of these consequences. The learned Magistrate proceeded on the assumption that the police were required to prove that the accused understood that he had to go to the police station. That is made clear when she says, 'The informant has asked the accused but has then not expressed to him that it is a requirement that he accompany'.

36. As indicated by Ormiston JA, there is no enforceable obligation imposed on the person by the Act that he accompany the police officer. Rather, the person commits an offence if he or she 'refuses' to comply with the request. It is the refusal to comply that triggers the offence. The person cannot be compelled to go and cannot be arrested for failing to go and take another test.

37. The police officer correctly informed the accused that he was not under arrest but there were important consequences if he did not comply with the request. The accused was not confused as to the necessary elements of the offence. That is, a request had been made and that his refusal to comply constituted an offence.

38. It is clear from the evidence in this case that there was some confusion in the mind of the accused as to the exact reasons he was being requested to accompany the police officer to the station. His refusal to attend appears to have been predicated on being told erroneously that his licence was suspended and therefore told, again erroneously, that his allowable alcohol limit when driving while suspended was zero. This may go to the issue of penalty however, as the discussion above indicates, the subjective state of mind of the accused is not relevant to the offence with which he was charged. His response indicates that he was aware that he had been requested to accompany the police officer.

39. For these reasons, I will allow the appeal and quash the orders made by the Magistrate and order that charge two in the Magistrates' Court case number A10601633 be remitted back to the Magistrates' Court at Dandenong for hearing and determination according to law.

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[1] [1986] VR 67.
[2] *DPP v Ellison* (Victorian Supreme Court, unreported 18 January 1995).
[3] [2011] VSCA 275.
[4] [2011] VSCA 276.
[5] This was first described by Winneke P in *DPP v Foster & Bajram* [1999] VSCA 73; [1999] 2 VR 643.
[6] [1999] VSCA 73; [1999] 2 VR 643, 652 [29].
[7] [2011] VSCA 275 [49].
[8] [1999] VSCA 73; [1999] 2 VR 643, 658.
[9] [2004] VSC 48.
[10] *Rankin v O'Brien* [1986] VR 67 at 73 per Southwell J.
[11] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 47 per Winneke P.
[12] *DPP v Blyth* (1992) 16 MVR 159 at 161.37.
[13] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at [75] per Ormiston JA.
[14] [1999] VSCA 73; [1999] 2 VR 643.
[15] [2004] VSC 48.

APPEARANCES: For the appellant DPP: Dr SB McNicol, counsel. Solicitor for Public Prosecutions. No appearance for the respondent Serbest.
