41/00; [2000] VSC 474

SUPREME COURT OF VICTORIA

MANSFIELD v HRYSIKOS

Smith J

1, 14 November 2000 — (2000) 32 MVR 491

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUESTED TO GO TO BOOZE BUS AND REMAIN THERE UNTIL BREATH SAMPLE GIVEN – SAMPLE OF BREATH FURNISHED – DRIVER ASKED TO WAIT FOR SECOND SAMPLE – DRIVER LEFT BUS TO HAVE CIGARETTE – REMAINED CLOSE TO STEPS OF BUS IN COMPANY OF TWO POLICE OFFICERS – "OTHER PLACE" – MEANING OF – WHETHER INCLUDES BUS ITSELF – WHETHER DRIVER REMAINED LINKED TO THAT PLACE – WHETHER DRIVER REMAINED THERE FOR PURPOSES OF ACT – WHETHER THE REQUIREMENT TO REMAIN IN THE BUS WAS AN UNREASONABLE REQUIREMENT – EVIDENCE – AT TRIAL INFORMANT REFRESHED MEMORY FROM WRITTEN STATEMENT – DEFENCE COUNSEL CROSS-EXAMINED INFORMANT USING STATEMENT – DOCUMENT ADMITTED INTO EVIDENCE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1); *EVIDENCE ACT* 1958, S36.

M. was intercepted driving a motor vehicle. After undergoing a preliminary breath test, M. was required by the informant H. to accompany him to a booze bus for the purpose of a breath test and to remain there until a sample of breath was furnished and a certificate of analysis given. M. complied with this request and underwent a breath test. The result showed "alcohol in mouth" and M. was told to wait a further 15 minutes. M. said she wanted to go outside and have a cigarette. She left the vehicle, obtained a cigarette from her partner but remained close to the steps of the bus in the company of two police officers. Subsequently M. became involved in a dispute and was later arrested and charged with an offence against s49(1)(e) of the *Road Safety Act* 1986 and an offence against s52(1) of the *Summary Offences Act* 1966. At the hearing of the charges, H. refreshed his memory from a copy of a written statement he had made earlier and was cross-examined by defence counsel, using the statement, about what happened at the scene. The magistrate stated that as defence counsel cross-examined on the statement it would be admitted into evidence for all purposes. At the close of the case, M. was found guilty of the charges. Upon appeal—

HELD: Appeal allowed. Conviction on the drink/driving charge quashed.

(1) The words "other place" mean the booze bus itself; however, it does not follow that by going outside the bus M. ceased to "remain there". A person can remain at the "other place" notwithstanding that that person may be outside its four walls. The critical question is whether the person remained linked to that place.

(2) In the present case, M. remained in close proximity to the bus. It could not be shown that she did not intend to return inside the bus to be tested and she had not entered another "place". On the evidence, the link with the bus remained. Accordingly, it was not open to the magistrate to find that M. refused to "remain there".

(3) It was not disputed that all M. wished to do was to go outside the bus to smoke a cigarette. There was nothing to indicate that she would not in due course, after her cigarette, submit to a breath test. Further, while M. was outside the bus, she was kept under observation by two police officers. In those circumstances it was not open to the magistrate to find that a requirement that M. remain within the confines of the bus was a reasonable requirement.

***DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367, applied.**

(4) The magistrate was in error in taking the view that counsel having cross-examined the witness on the prior statement to show inconsistency between the evidence and the statement was obliged to tender the document. The relevant section was s36 of the *Evidence Act* 1958.

SMITH J:

Background to appeal

1. On 13 July 2000 at the Magistrates' Court in Melbourne, the appellant Deborah Elaine Mansfield (Mansfield) was charged with breach of

(a) s49(1)(e) *Road Safety Act* 1986 (the Act) in that she was required to remain for the purposes of providing a sample for breath analysis pursuant to s55(1) of the Act but refused to do so.

(b) s52(1) of the *Summary Offences Act* 1966 in that she assaulted one Lisa Metcher, member of the police force, in the execution of her duty.

2. Mansfield pleaded not guilty to the charge brought under s49 (1)(e) of the Act. She was convicted and fined $400 together with statutory costs of $55 and all licences and permits held by her under the Act were cancelled and she was disqualified from obtaining any such licence for a period of two years. Mansfield appeals from the order made in respect of that charge. As to the charge under s52(1) of the *Summary Offences Act* 1966, she pleaded guilty and was fined $500 without conviction.

3. By his order made 14 August 2000, the Master identified the following questions of law as raised by this appeal

(a) under the circumstances was a document (see Exhibit "G") from which the witness Hrysikos refreshed his memory tenderable at the behest of the prosecutor?

(b) having regard to the whole of the evidence was it open to the learned Magistrate to hold that:
(i) under the circumstances the appellant was in breach of s49(1)(e) of the *Road Safety Act* 1986; and or

(ii) the appellant (having already supplied a sample of breath for analysis pursuant to our requirement under s55(1)) was in breach of s49(1)(e) of the said Act so far as she refused to remain within the confines of the "booze bus" pending a requirement that she was to provide a second sample.

Evidence before the Magistrate

4. In considering the arguments advanced relevant to both questions of law, it is necessary to outline the substance of the evidence led, much of which was not disputed; for while the magistrate gave a preliminary analysis of the evidence in dealing with a no case submission, he did not give findings of fact when announcing his final decision other than to express the view that the appellant's recollection was affected by liquor.

5. It appears that on 19 December 1998, at approximately 1.15am, a vehicle driven by the appellant was directed into a random breath testing station. The appellant underwent a preliminary breath test on a prescribed device which indicated that her blood contained alcohol. The respondent, Constable Hrysikos, gave evidence that he then said to the appellant

"In my opinion, the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me to the breath testing vehicle for the purpose of a breath test and to remain there until you have furnished a sample of your breath and been given a certificate of analysis or until three hours after the time you were drinking or in charge of a motor vehicle, whichever is sooner. Are you prepared to accompany me?"

He gave evidence that the appellant replied "Yes". The appellant denied any express requirement to "remain there" being made at that time but the appeal must proceed on the basis that the Magistrate accepted the respondent's account on that issue.

6. The appellant, Mansfield, accompanied the respondent as requested to the breath testing bus. A record of interview was conducted between Mansfield and the respondent. A further interview was conducted between Mansfield and the breath analysis operator, Acting Sergeant Homan. At the conclusion of the interview between Mansfield and the operator, the respondent stated that he said to Mansfield "I now require you to undergo a breath test pursuant to s55 of the *Road Safety Act*". She complied with that request and furnished a sample of her breath into the breath analysing instrument. The machine produced a certificate of result stating "alcohol in mouth". The test time on the certificate was recorded as 01.35am. At about 01.50am, the operator explained to the appellant in the presence of the respondent that she would have to wait a further 15 minutes for a second breath test due to the result "alcohol in mouth". The appellant, Mansfield, said that she wanted to go outside and have a cigarette and walked towards the rear door of the bus. The operator, Homan, said to her, again in the presence of the respondent, that if she left the bus she may lose her licence for two years and may receive a substantial fine. The appellant, Mansfield, left the bus abusing the officers and was followed closely by the operator, Homan, and the respondent Hrysikos. Outside the bus, Sergeant Homan again repeated her warning. The appellant obtained a cigarette from Moore (her partner, the passenger in her vehicle). She remained close to the steps to the bus and in the company of the two police officers. The respondent gave

evidence that outside the bus he said to the appellant, during the 15 minute wait,

> "Miss Mansfield you are required to furnish a sample of your breath. If you refuse to do so you may receive a fine and lose your licence for two years."

He said she again abused him and told him she wanted to have a cigarette.

7. From the time the issue of a cigarette was raised the appellant behaved in an angry manner and used colourful language to express her feelings. At no time, however, did she say she would not give a further sample (and that was not alleged) or that she wanted to leave the site. There was evidence that she briefly went inside the van to get her bag but returned outside to the same position – close to the steps of the bus. Otherwise, she was at all times in close proximity to the bus and the officers. The evidence was that, shortly after she came out of the bus the second time, a dispute broke out initially between the police and Moore. The appellant became involved and was arrested along with Moore for certain offences. The appellant was subsequently charged with the offence under s49(1) (e) of the Act.

Question (a); the evidentiary issue

8. Counsel for Mansfield cross-examined the respondent on two statements he had made to demonstrate that they did not refer to Mansfield returning to the bus — a matter on which he had given evidence. The second statement related to the incidents giving rise to the assault charges.

9. The following exchanges took place between counsel for Mansfield and the informant and between counsel and the learned Magistrate.

10. The respondent admitted that in neither of his statements did he mention that the appellant, Mansfield, went back inside the bus. In the course of further questioning on this omission from the statements it was put to the respondent that he was lying about Mansfield's return to the bus. He denied this. He was then asked if he had read his statements recently and he said he had not. He was asked if he wished to read them now and he said he did. He was shown a copy of the second statement. He confirmed that it was made by him. The prosecutor then submitted that the statement should be tendered on the basis that it hadn't been used to refresh the witness' memory and the witness was about to be cross-examined on it. Counsel for Mansfield responded saying the application was premature and that the document had been handed to the witness to enable the witness to refresh his memory. The magistrate said he would wait and see. Having refreshed his memory, he was then cross-examined, using the statement, about what occurred in relation to the fracas that broke out. After a few questions the learned magistrate intervened to state that the statement would be admitted as Exhibit C. Counsel for Mansfield asked the basis upon which it was admitted. His Worship responded

> "You have looked at the statement, you have examined from the statement, you have used the precise words. You say 'in your statement'.

Counsel responded,

> "But the witness has refreshed his memory from the statement handed to him, Sir."

The magistrate responded

> "You have cross-examined, you have called for the document, or you have had it in your papers and you have cross-examined on it. You use the words, 'you say in your statement'."

Counsel responded

> "Indeed I did, but the witness has refreshed his memory from the statement, its not tenderable if the witness refreshes his memory, in my respectful … "

He was cut short, with the magistrate reiterating that the document was now Exhibit C. It was admitted into evidence for all purposes.

11. It is unclear what principle the learned Magistrate was applying. The situation was not the

Walker v Walker [1937] HCA 44; (1937) 57 CLR 630 situation where a party calls for a document and inspects it. In any event there is authority (*R v Weatherstone* (1968) 12 FLR 14) supporting the proposition that the rule in *Walker v Walker* does not apply in criminal trials in relation to the Crown documents.

12. The better view, I suggest, is that the learned Magistrate took the view that counsel having cross-examined the witness on a prior statement to show inconsistency between the evidence and the statement, was obliged to tender the document. This was once the common law (see *The Queen's case* 2 Brad and Bing 286) but legislation has long been in place which has been accepted as overruling that decision. (See RG Reynolds, QC *Some Problems arising out of Cross-examination on Documents* in Glass, *Seminar on Evidence*, LBC, 1970, 126-138). The relevant section in Victoria is s36 *Evidence Act* 1958.

13. It provides as follows:

> "**36 Witnesses may be cross-examined as to written statements without producing them.**
> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject matter of the cause or prosecution without such writing being shown to him. But if it is intended to contradict such witness by the writing, his attention must before such contradictory proof can be given be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always that it shall be competent for the court at any time during the trial or enquiry to require the production of the writing for inspection and the court may thereupon make such use of it for the purposes of the trial or enquiry as the court thinks fit."

14. That section it should be noted empowers the judge to "use" the document. The section, however, does not expressly refer to the tendering of the document or to the question of admissibility into evidence of the document. McHugh QC (as he then was) in *Cross-examination on Documents* (1985) Aust Bar Rev 51,53 has suggested that the trial judge retains a general discretion to require the tender of the document, relying on the section and *dicta* in *Alchin v Commissioner for Railways* (1935) 35 SR (NSW) 498, at 509; 52 WN (NSW) 156; *Wood v Desmond* (1958) 78 WN 65, 67; see also (*Savanoff v Re-Car Pty Ltd* [1983] 2 Qd R 219). The latter dicta in turn rely upon *R v Jack* (1894) 15 LR (NSW) 196 which on its face appears to support the power of the judge to require the cross-examining party to tender a document used in cross-examination. The correctness of that authority, however, has been questioned (see Glass, above; McHugh, above; Malcolm QC (as he then was) *Cross-examination on Documents* (1986) Aust Bar Rev 267, 271), on the basis in part, that the authorities relied upon all predated the legislation. It was also questioned in *Maddison v Goldrick* [1976] 1 NSWLR 651, at 660 and in *R v Thomson* [1995] 3 NZLR 423.

15. There is uncertainty, therefore, as to whether the power to "make use" of the document confers a power to require a party to tender it (see also Brown, *Documentary Evidence in Australia* (1996) 162-3). It might be said that in an adversary system you would expect such a power to be expressly conferred if that was the drafter's intent. Similarly, if the judge in his or her discretion, was intended to have the power to override the rules of admissibility, you would expect such a power also to be expressly conferred.

16. It is suggested that the power to "make use" is to be exercised after the judge has inspected the document and, typically, will be exercised to permit the copying of the document and perusal by the other party. The decision whether the document should be tendered would then remain with the parties. If tendered, the rules of admissibility would apply. It is suggested that, in practice, such a discretion will enable the judge to ensure that there is no unfairness to the parties to the proceedings.

17. If, however, the judge does have a statutory discretion to require a cross-examining party to tender a document used in cross-examination, the circumstances of the case did not warrant such a course. Up to the moment of the tender of the document the witness had admitted the specific contents put to him and the lack of a reference in it to the appellant Mansfield returning inside the booze bus. As I read the transcript, he was not otherwise challenged using the document. In those circumstances there was not, in my view, any proper basis upon which the issue might have been said to arise as to whether cross-examining counsel should be required to tender the documents. There was no reason why the respondent could not have tendered it if he had wished, and, if it was admissible for a relevant purpose, had it admitted into evidence (cf *Wood v Desmond* (1958) 78 WN (NSW) 65, 69).

18. I am satisfied, therefore, that error has been shown in his Worship's decision to require cross-examining counsel to tender the document. What should be the consequences of that error?

On my reading of the statement, it contained material which lent support to the evidence of the informant. It also contained inflammatory material which had not been the subject of evidence (and was not cross-examined upon) about statements made by Moore to Senior Constable Steele which were not relevant and which might have indirectly prejudiced the appellant.

19. The authorities establish that where evidence is wrongly admitted, the conviction will stand

> (a) where the evidence was not relied upon below and there was other evidence sufficient to support the conviction (*Pearce v Jones* [1917] HCA 50; (1917) 23 CLR 438; *Krummel v Kidd* ([1905] VicLawRp 29; [1905] VLR 193; 10 ALR 264; 26 ALT 131), or
>
> (b) where the appellant clearly should have been convicted on evidence properly admitted. (*Knox v Bible* [1907] VicLawRp 87; [1907] VLR 485; 13 ALR 352; 29 ALT 23; *Macmanamny v King* [1907] VicLawRp 93; [1907] VLR 535; 13 ALR 258; 28 ALT 250).

If the evidence might have affected the decision the conviction cannot be sustained even though the admissible evidence was sufficient to support a conviction (*Duncan v Pilcher* (1895) 21 VLR 412).

20. In the present case, there being no detailed reasons given, it cannot be demonstrated that the evidence was not relied upon. As to whether the appellant should have been convicted on the admissible evidence, the answer depends on the issues raised under Question (b). In particular, if leaving the four walls of the bus constituted refusing to meet a requirement to "remain", then the appellant should have been convicted. I turn, therefore, to the issues raised under Question (b).

Question (b); refusal to remain — issues

21. In essence the prosecution case was that the appellant, Mansfield, had been required to go to the bus and "remain there" for the purpose of breath analysis and that, in going outside the bus, she had refused the requirement to "remain there".

22. Within the ambit of the question of law identified in para (b) above, the appellant argued that the learned Magistrate erred in law in convicting the appellant on the charge of breach of s49(1)(e) where:

> (a) no formal requirement to remain was made by any member of the police force any time prior to the appellant leaving the bus, such a requirement being an element of the offence;
>
> (b) the request to remain, if made, was made by Sergeant Homan who did not have authority under the section to make the request. The only person with that authority was the respondent who did not require the appellant to remain;
>
> (c) it was not open to find that the appellant had not in fact remained for the purpose of the section. It was put that the requirement to remain under the section was not restricted to an obligation to remain inside the bus;
>
> (d) any request to remain, if made, was unreasonable and, therefore, not authorised. Thus it was not open to the learned Magistrate to find that the request to remain was reasonable.

23. I note that the appellant's counsel conceded before that there was an obligation to furnish further samples under s55(2A) after the initial test result showed "alcohol in breath".

Question (b) — the relevant provisions

24. The relevant provisions are as follows:

> **49.** ***Offences involving alcohol or other drugs***
> (1) A person is guilty of an offence if he or she— …
> (e) refuses to comply with a requirement made under section 55(1), (2), (2A) or (9A); or … "
>
> **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)

and 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.

(2A) The person who required a sample of breath under sub-section (1) or (2) may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample, or each of the samples, previously furnished in grams per 100 millilitres of blood because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever."

25. It is to be noted that the breath testing procedures are dependant upon the consent of the person being tested. The person tested has not been arrested. There is no power in the police to compel a person to submit to a test. The discipline and pressure to comply are to be found in the consequences of either refusing to submit to breath test or refusing to remain for the purpose of a breath test.

Question (b) — whether a requirement to remain was made

26. The appellant's counsel put submissions similar to those put below in the course of the no case submission on this question. In essence the submission put is that the prosecution had to prove, as an element of the offence, that the respondent, Hrysikos, required the appellant, Mansfield, to remain. Counsel submitted that the respondent had not made a requirement but had merely informed the appellant of her rights and obligations.

27. Counsel further submitted before me that Sergeant Homan's comment about the possibility of losing the licence and being fined was no more than a warning; Sergeant Homan at no time required the appellant to remain for the purpose of a further breath test.

28. In considering the submission, his Worship correctly noted that the case relied upon by the appellant, *DPP v Foster* [1999] VSCA 73; (1999) 2 VR 643, at 657; (1999) 104 A Crim R 426; (1999) 29 MVR 365, was authority for the proposition that there was no need for any slavish following of any particular words. Adopting this approach, it seems to me that the question was very much a factual question and it was a matter for the Magistrate to determine on the evidence whether the appellant had been required to remain prior to her leaving the confines of the bus. It was open to the learned Magistrate, in my view, to find that the respondent had initially required her to come to the bus and to remain there for the purpose of being tested and that that requirement had not ceased to operate.

29. In light of this conclusion, it is unnecessary to consider the second issue — whether Sergeant Homan had authority to require the appellant to remain.

Question (b) — the finding that the appellant refused to remain

30. To convict the appellant, the learned magistrate must have found that in going outside the bus, the appellant had refused to "remain there". That was the way the case was put by the respondent below.

31. It is submitted for the appellant that the learned Magistrate had incorrectly confined the expressions "other place" and "there" to the space inside the four walls of the bus. Counsel

submitted that the bus was set up as the focus of the operation but the site allocated to the operation extended to the other areas into which cars were diverted for testing purposes. It was put that at all times the appellant remained at the bus site and never left it. Reference was made to *DPP v Williams* [1998] VSC 119; (1998) 104 A Crim R 65; (1998) 28 MVR 521, a case where I had to consider whether a police car was "another place" for the purpose of the same provisions. I was referred to para. 26 and 27 of my reasons for judgment which state:

> "26. Construing the language of the section without the assistance of *Hansard*, I would have concluded that the words 'other place' required at least a defined structure or space of some substance either attached to land or having a connection to a location of some permanence giving it a degree of localisation. It also would need to be a space capable of substantially serving the purposes of a police station.
>
> 27. With the assistance of *Hansard*, it would seem that Parliament had the above in mind but not necessarily attached to land in that it wanted the words to cover a 'booze bus' and thus a mobile location but one with a connection to a particular location of some permanence when in use. A 'booze bus' is like a mobile police station and can serve similar purposes. A police car is not and cannot."

32. Turning to the facts of this case, the "other place" to which the appellant was taken was, in my view, the bus itself. The original preliminary test was conducted at the bus site but she was then asked to go from that general site into the bus for the breath test. It thus became the "other place" for the purpose of the section.

33. It does not follow, however, that, in going outside the bus, she ceased to "remain there". Those words require the person being tested to remain at the "other place". That person, however, can remain at the other place notwithstanding that that person may be outside its four walls. What is critical is the question of whether the person remains linked to that place. For example, if a person were taken to a police station for the purpose of breath analysis under s55 and, while the equipment was being set up, stood immediately outside the front entrance while smoking a cigarette fully intending to return for the test and remaining under police supervision it could not be said that that person had refused to remain at the police station. What is critical is the proximity to the "other place" and the continuation of the purpose for which the person was taken there and the fact that the person has not gone to another place.

34. Ultimately it becomes a question of fact. The case here, however, was presented by the respondent to the learned magistrate and determined on the basis that merely leaving the four walls of the bus involved ceasing to remain at the bus. For the above reasons, I have concluded that that construction was incorrect. Applying the above alternative construction it was not open, in my view, to find that there had been a severing of the link between the visit of the appellant to the bus and the bus. On the evidence, she remained in close proximity to the bus. It could not be demonstrated that she did not intend to return inside the bus to be tested and she had not entered another "place". On the evidence the link with the bus remained. Thus, it was not open to find that the appellant refused to "remain there".

35. Should this analysis be incorrect it is necessary to consider the final issue raised under question (b) — the reasonableness of requiring the appellant to remain within the bus.

Question (b); the reasonableness of the requirement

36. Counsel for the appellant repeated the submission made to the learned magistrate that the requirement to remain inside the bus was not reasonable and, therefore, was made without authority. Reliance was placed on the decision of Ormiston J in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367. That case was concerned with the obligation to undergo a preliminary breath test. In respect of that obligation his Honour commented that (at VR 416):

> "If a qualification is to be read into the requirement, it should be by reading the section as confined to an obligation to comply only with a reasonable requirement. To that limited extent an implication modifying the terms of the section is necessary. As to the place of undergoing the test, such an implication would, for the reasons already given, not necessarily limit the area in which the test must be conducted, although the consequences may be same in effect. If a police or other officer requires that the driver travel any extensive distance from the place of the requirement, it would be a requirement beyond the simple terms of the section, as it would implicitly and unjustifiably place a restriction on his liberty. Likewise as to time, if the person was required to stay at the scene of the

> requirement for specified or unspecified time, beyond what was necessary to undergo the test, then the requirement would also be beyond the terms of the section. Such a requirement would import an unjustified detention or, alternatively, an unjustified requirement to return to that or some other place at another time to undergo the test, again placing an unjustified restriction on the driver's liberty. In a sense, therefore, the test should be undergone 'then and there' after a requirement has been made, but it is unnecessary to restrict the words in that way, for the convenience of both police officer and driver may dictate some other place or time for the undergoing of the test. So long as the requirement does not import an unjustified detention of the driver or an unjustified demand that he go to some other place to the extent that he would be wrongfully deprived of his liberty, no implication is otherwise necessary restricting the time or place where the test must be conducted."

Again at VR p418 his Honour stated:

> "For the reasons already stated, the only implication which needs to be read into s53 is that the requirement should be reasonable. If the driver agrees to wait or agrees to go elsewhere, such as to a police station, for the purpose of undergoing the test, that does not invalidate the test. If he refuses to do so then, in the ordinary case, any requirement which would have the effect of obliging the driver to wait more than a few minutes or to travel any significant distance to undergo the test would be unreasonable and a refusal to undergo the test in those circumstances would not be an offence under s49(1)(c)."

37. In my view, it was not open to find that a requirement that the appellant remain within the confines of the bus was a reasonable requirement. It was not disputed on the evidence that all the appellant wished to do was to go outside to smoke a cigarette. While she reacted angrily to statements by the police about her obligation to submit to a breath test, there was nothing to indicate that she would not in due course, after her cigarette, submit to a breath test. The operator, Sergeant Horman, acknowledged in evidence that to smoke a cigarette would not affect the breath analysis. It was also common ground that while outside the bus the appellant was kept under observation by the two police officers. This was plainly available as a consideration when the appellant asked to leave the booze bus to smoke a cigarette — thus addressing any concern the police might have had that she might do something to compromise the next attempt at breath analysis. She remained close to the bus and there was nothing to indicate that she had thoughts of leaving the site without taking part in the breath test. What she wanted was a cigarette.

Conclusion

38. For the above reasons the appeal should be allowed and the conviction quashed. In particular, the learned Magistrate erred in holding that the appellant had failed to remain for the purpose of a breath analysis test. In addition, assuming a requirement was imposed upon Mansfield to remain, it was an unreasonable requirement and not authorised by the Act.

APPEARANCES: For the appellant Mansfield: Mr P Billings, counsel. Jack Sher & Associates, solicitors. For the respondent Hrysikos: Mrs C Quin, counsel. Solicitor for DPP.
