**06/89**

## SUPREME COURT OF VICTORIA — FULL COURT

# *MEEKING v CRISP and MILLS*

**Fullagar, McGarvie and Marks JJ**

**27 February, 22 March 1989 — [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1**

**MOTOR TRAFFIC – DRINK/DRIVING – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION – INTERCEPTED WHILST DRIVING – NO ACCIDENT INVOLVED – CHARGED UNDER S49(1)(f) OF *ROAD SAFETY ACT* 1986 – WHETHER PROOF OF ACCIDENT INGREDIENT OF OFFENCE – WHETHER LAYING OF CHARGE UNDER S49(1)(f) WHERE NO ACCIDENT AN ABUSE OF PROCESS: *ROAD SAFETY ACT* 1986, SS49, 53(1), 55(1).**

**1. Section 49(1)(f) of the *Road Safety Act* 1986 ("Act") in combination with ss53(2) and 55(1) of the Act clearly creates an offence where a test performed by a person at a particular time records a particular result, and there is no ingredient of an offence under s49(1)(f) requiring proof of an accident occurring when the person charged was driving.**

**2. The authority given to a police officer under s53(1) of the Act is merely to require and administer a preliminary breath test, and there is no limitation on the offences to which the person in question might be vulnerable if the result of the test shows an excess over the prescribed limit. Therefore, a prosecution for an offence (against, say, s49(1)(f)) cannot be said to be an abuse of process simply because the defendant has less chance of success than if prosecuted for another offence (against, say, s49(1)(b)) which is founded on similar evidence.**

***Meeking v Crisp and Mills*, unrep, Vic Sup Ct, Crockett J, 14 November 1988, reversed.**

**THE COURT: [1]** The appellant, on 10th October 1987, was one of two police officers who intercepted the second respondent ("Mills") when driving a motor vehicle in Toorak. There had been no accident. She subjected Mills to a preliminary breath test which proved positive and then required him to undergo a breath analysis test at Malvern Police Station. In fact, he underwent two tests each conducted by a breath **[2]** analysis operator who provided certificates as provided by the *Road Safety Act* 1986 ("the Act") indicating readings respectively of .130 and .125 per cent alcohol in Mills' blood.

Three charges were laid against Mills but we are concerned only with the one under s49(1)(f) of the Act which provides:-

> "49(1) A person is guilty of an offence if he or she—
> (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(1) and the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; or..."

The information was heard by the Magistrate who is the first respondent sitting at the Magistrates' Court at Prahran on 17th May 1988. At the end of the prosecution case Counsel for Mills made a no-case submission on the basis that the prosecution under s49(1)(f) was an abuse of process because the provision under which he should have been prosecuted if at all was s49(1)(b) which provides:-

> "49(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 more than the prescribed concentration of alcohol is present in his or her blood; or..."

After hearing submissions on both sides, the Magistrate said that the prosecution under s49(1)(f) was appropriate and he would amend the information to allege an offence under s49(1)(b). This was opposed both by the **[3]** prosecutor and Counsel for Mills. The Magistrate nevertheless ruled that he would make the amendment, holding that he had power to do so under s157 of the *Magistrates (Summary Proceedings) Act* 1975.

He then adjourned the hearing to allow his ruling to be tested which both parties wished to do. Mills obtained an order nisi to review the amendment order, but the appellant was refused a similar order by the Senior Master on the ground that s88 of the *Magistrates' Courts Act* 1971 only empowered such an order when it is to be directed to a party interested in maintaining the order sought to be reviewed. The Magistrate was not a party. Here, both parties, for their respective different reasons, did not want the amendment order maintained.

The appellant then issued an originating motion pursuant to O56 of Chapter 1 of the *Rules of the Supreme Court* seeking a judicial review of the order in question. This came before a Judge of this Court who gave judgment on 14th November 1988 in favour of Mills and ordered that the amendment order be quashed and directed that the Magistrate, on the further hearing, dismiss the charge under s49(1)(f).

This appeal is from that part of the decision which directed a dismissal. Both parties sought to maintain the order below quashing the amendment order. We have, accordingly, been asked to decide the appeal on the basis that the quashing of the amendment order was correct and that the only question is whether the direction of his Honour that on the further hearing the charge under **[4]** s49(1)(f) should be dismissed in the proper performance of the duty of the Magistrate was correct. It is thus unnecessary to set out the numerous grounds in the notice. Mr Nash QC, for the appellant conceded in effect there was the one issue which we have stated.

It was submitted on behalf of the appellant that there was no abuse of process and that on the proper construction of the Act, Mills was vulnerable to conviction under s49(1)(f) notwithstanding that he might also have been vulnerable to prosecution and conviction under s49(1)(b) although probably not vulnerable to conviction under both (see s51 of the *Interpretation of Legislation Act* 1984). Of course, there was no information against Mills under s49(1)(b) until the Magistrate on his own motion, against the submissions of the parties, made the amendment.

The contentions of the parties are better understood by reference to the statutory context of the two offences and the background against which s49(1)(f) was introduced. An ingredient of s49(1)(f) is that a breath analysis has been furnished under s55(1) which itself (among other things) applies only where a preliminary breath test has been required by a member of the police force and undergone under s53(1) which provides:-

> "53(1) A member of the police force may at any time require—
> (a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; or **[5]**
>
> (b) the driver of a motor vehicle that has been required to stop at a preliminary breath testing station under section 54(3); or
>
> (c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident—
>
> to undergo a preliminary breath test by a prescribed device."

Accordingly, there are only three circumstances in which a police officer is authorised to require a person to undergo a preliminary breath test. It is common ground that the circumstances of s53(1)(a), but not of s53(1)(b) or (c), applied to Mills. The submission for Mills which found favour with the learned Judge was that the appropriate charge, if any, was under s49(1)(b) and not under s49(1)(f) because the latter was "inappropriate" where there had been no accident and the preliminary breath test had not been required pursuant to s53(1)(c). The contention was that if, as occurred in this case, a police officer exercised his or her power at or about the scene of the driving there was no basis for a charge under s49(1)(f) which prescribed an offence after driving, the offence being, in effect, simply failing a breath test.

In his reasons his Honour said:-

> "It appears to me tolerably plain that, if a preliminary breath test undergone by a person who has driven a vehicle within three hours of that vehicle's involvement in an accident leads to a breath analysis by a breath analysing instrument (by virtue of ss53(1) and 55(1)) which discloses a blood alcohol concentration in excess of the prescribed limit, then the offence created to deal with that circumstance is that to be found in s49(1)(f). It is to be noted that the three hour period referred

> to in s53(1)(c) commences with the driver's vehicle's involvement in an accident. This serves only to emphasise that the offence created to deal with **[6]** an adverse breath test result arising from employment of the power given by s53(1)(c) is one with regard to which it was thought necessary to prevent the driver's relying on an alleged post-accident consumption of alcohol. But none of this has anything to do with the defendant. He was not involved in an accident. He could not have consumed alcohol so as to confound the proper assessment of his culpability. He was caught up by a power to be breath tested created by s53(1)(a). Accordingly, he should have been charged under s49(1)(b). Instead, he was charged under the wrong provision."

His Honour went on to construe s49(1)(f) as if the words 'which has been involved in an accident' were inserted after 'motor vehicle'. In our opinion, even assuming that the words 'when it was' were substituted for 'which has been' (as we think would be necessary having regard to the words of s53(1)(c)), such an implication, for reasons we will give, cannot be supported. Section 49(1)(b) and s49(1)(f) create different offences. The first relates, in effect, to having more than .05 per cent alcohol in the blood when driving or in charge of a motor vehicle, while the second relates solely to having that excess within three hours after driving.

It is important to emphasise, however, that proof of the latter depends on a preliminary test having been administered under s53(1)(a) (b) or (c) and a sample taken pursuant to s55(1). Thus, if there were no accident and no reasonable belief that one had occurred the preliminary test must have been administered under s53(1)(a) or (b). This provides some safeguard, for example, against a person being intercepted after drinking with dinner at home and being required to undergo a breath test within three hours **[7]** of having driven without incident from work. A test under s55(2) cannot lead to a prosecution under s49(1)(f) because the latter depends for its proof on tests having been administered under s55(1).

The distaste for a prosecution under s49(1)(f) and preference for a prosecution under s49(1)(b) stem from the provisions of s49(4) and (6) which severely restrict the availability of any defence to a prosecution under s49(1)(f). The provisions of s49(1)(f) are obviously very harsh which can be demonstrated by the case of the sober person who is involved in a collision on the way home and in which no-one is injured and then returns home and has his or her first drinks for the day and is then tested.

While a person charged under s49(1)(b) is confronted by the presumption provided by s48(1) that a test recording within three hours proves the concentration of alcohol in a person's blood when driving or in charge, it is rebuttable. Evidence such as that held admissible in *Lamb v Morrow* [1986] VicRp 61; (1986) VR 623; (1986) 3 MVR 175 as to the accuracy of breath analysing machines and otherwise as to rise and fall from peak levels of the concentration of alcohol, may be received to rebut that presumption. Effectively however the only available defence to a s49(1)(f) prosecution is under s49(4) that the breath analysing instrument used was not on the relevant occasion in proper working order, a defence which for practical purposes may be without real value if examination of a particular machine by or on behalf of a person whose breath has been tested has no practical **[8]** possibility. Section 49(6) excludes evidence of the effect of the consumption of alcohol, and the nature of the offence in s49(1)(f) renders irrelevant any evidence of post-driving consumption of alcohol.

It may be accepted that *Lamb v Morrow* inspired the insertion of s49(1)(f) although it was not a case concerning the admissibility of post-driving consumption of alcohol. The effect of s49(1)(f), however, is for practical purposes to render inadmissible the type of evidence which might be available on a charge under s49(1)(a) or (b) going to rebut the presumption mentioned in s48. A number of unreported first instance judgments support this understanding: *McDonald v Bell*, (1987) 6 MVR 113,Phillips J, 4th Dec. 1987, *Giankos v Ellison*, McDonald J, 26th May 1988, (1988) 7 MVR 104; *Bakker v Boyle*, *Ladgrove v Wayne*, *Miles v Gilmore*, O'Bryan J, 17th June 1988, [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149.

We have been referred to a number of other unreported judgments on the operation of what might compendiously be regarded as the .05 provisions of the Act and their predecessors in some instances in the *Motor Car Act* 1958. In our view they are not of assistance on the present question. They bear testimony, however, to frequent superior court intervention where some Magistrates' Court decisions manifest a reluctance to give effect to the truly harsh laws which in this area Parliament has seen fit to pass. The Courts, however, no matter in what hierarchy cannot ignore the clear expression by Parliament of its will.

In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1980-81) 147 CLR 297; (1981) 35 ALR 151; (1981) 11 ATR 949; (1981) 55 ALJR 434, Gibbs CJ said (p305):-

> **[9]** "...if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligently applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust...The danger that lies in departing from the ordinary meaning of unambiguous provisions is that "it may degrade into mere judicial criticism of the propriety of the acts of the legislature", as Lord Moulton said in *Vacher & Sons Ltd v London Society of Compositors* (1913) AC 107 at p130; it may lead judges to put their own idea of justice or social policy in place of the words of the statute."

In *Byrne v Armstrong* [1900] VicLawRp 23; [1900] 25 VLR 126 at pp127-8, Madden CJ, speaking for four members of a Full Court of six, said the following in relation to s389 of the *Crimes Act* 1890:-

> "A great deal that has been urged in this case may be got rid of at once when we consider that we are not here to administer abstract justice, but merely to act according to law. We must not assume the position of law-makers, and we cannot redress grievances contrary to the intention of the statute law. The common law is subject to some degree of variation as circumstances arise, and through changes of society, but so far as statute law is concerned we have no right to act except according to well-known canons of construction. That being so, we have a statute here which has already led to misuse, but statutes passed with the best intentions have before now been frequently applied to undesirable purposes, but in such cases it rests with the Legislature to set the trouble right. Therefore, apart from the concrete part of the discussion, we need not consider the abstract argument as to whether justice or injustice may or may not follow from the correct rendering of the section."

No doubt Parliament has been motivated by the need to prevent or reduce road carnage from alcohol-affected driving. It was not submitted, for it would appear difficult to have done so, that the language of s49(1)(f) and s53(1) and s55(1) of the Act here under consideration **[10]** is other than clear and unambiguous and capable of intelligent application. That being so, it is not to the point that an act or omission might be caught by more than one provision of the Act, one having harsher application than another.

The present contentions, we think, stem from confusion caused by the introduction of clearly harsh laws capable as such laws always are of producing gross personal injustice, into a society accustomed to enjoyment of unique private liberty and rights which protect it. In our opinion, s49(1)(f), in combination with ss53(1) and 55(1) in the context of the Act, provides no difficulty of interpretation. There is no ambiguity or uncertainty. It creates an offence where a test performed by a person at a particular time records a particular result. Injustice might well result, – the result of the test might be either wrong, which cannot be proved, or affected by a consumption of alcohol which was after the driving of a vehicle and which from a social point of view was harmless. This much is clear and not disputed. However, the records of parliamentary debates reflect the clearest intention to treat evidence of post-driving consumption of alcohol as inadmissible.

In our opinion, the question here, is whether the test which Mills failed was authorised and performed in accordance with s55(1) and yielded a result which provided a foundation for prosecution under s49(1)(f). The only evidence, not here challenged, is that it was and did. The mere fact that the preliminary test was authorised under s53(1)(a) cannot logically or otherwise produce the result **[11]** that a prosecution could not be launched under s49(1)(f). The offence is created by the latter, no ingredient of which requires proof of an accident occurring when the person charged was driving.

We do not know of any authority, and we have not been taken to any, which holds that a person is not vulnerable to prosecution for an offence where evidence of its commission was obtained in the course of lawful investigation of another offence. The circumstances here are not even quite those. The authority given to a police officer under s53(1) is merely to require and administer a preliminary test. The subsection does not express or necessarily imply any limitation on the offences to which the person in question might be vulnerable if the result shows an excess over the prescribed limit. The reference to an accident in s53(1)(c) merely restricts the occasions on

which a person is vulnerable to the requirement when not intercepted when driving. Similarly, a prosecution for an offence cannot be said to be an abuse of process simply because the defendant has less chance of success than if prosecuted for another offence which is similar or founded on similar evidence. The law does not say, as the submissions for Mills suggest, that where there are possible alternatives of the stipulated kind, prosecution must be confined to such offence or offences as allow the best chance of success of a defence or the maximum avenues of defence (See *Clyne v Director of Public Prosecutions* [1984] HCA 56; (1984) 154 CLR 640 at 648; 55 ALR 9; (1984) 58 ALJR 493).

**[12]** It was submitted by Mr Gebhardt of Counsel for Mills that Mills should have been prosecuted only under s49(1)(b) because it was available, and any offence against that provision or s49(1)(f) was constituted by the same act or omission. The latter proposition is not strictly true. The offence under (b) is possession of an alcohol level when driving, while that under (f) is possession when tested within three hours after driving. The fact that (f) is easier to prove cannot, in our opinion, render a prosecution under it an abuse of process. There is nothing in the statute nor in the Parliamentary debate which suggests the contrary. In fact, the speeches of the Minister to which we have been referred show an understanding that a person contemplated by s49(1)(b) might indeed be charged under s49(1)(f). In moving the amendment which has come to be s55(2) of the Act in the House of Assembly 12th November 1986, the Minister for Transport at p1998 (*Hansard*) said:-

> "A preliminary breath test can be administered where the person has been found driving or has been in an accident. A breath analysis after this can still lead to a 'fail the test' charge".

We would allow the appeal and order that the order of the learned primary Judge made 14th November 1988 be varied by setting aside paragraphs 2 and 3 thereof where secondly appearing and substituting for them the following:-

> "2. That the information under s49(1) of the *Road Safety Act* 1986 be remitted to the Magistrates' Court at Prahran for further hearing and determination according to law".

Solicitor for the appellant: Victorian Government Solicitor.
Solicitor for the second respondent: David Bullard.

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