

03/04; [2004] VSC 39

SUPREME COURT OF VICTORIA

DPP v LOFTUS

Cummins J

30 June 2003; 18 February 2004 — (2004) 40 MVR 415

MOTOR TRAFFIC – DRINK/DRIVING – PBT POSITIVE – DRIVER REQUESTED TO ACCOMPANY POLICE OFFICER TO BOOZE BUS TO FURNISH SAMPLE OF BREATH FOR ANALYSIS – DRIVER REQUESTED TO REMAIN IN BOOZE BUS BY ANOTHER POLICE OFFICER – DRIVER FAILED TO REMAIN – CHARGED WITH REFUSING TO COMPLY WITH A REQUIREMENT TO REMAIN – CHARGE DISMISSED – MAGISTRATE HELD THAT SAME POLICE OFFICER MUST MAKE EACH REQUIREMENT – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, SS55(1), (2A), (9A).

For a valid requirement to remain under s55(1) of the *Road Safety Act 1986*, it is not necessary that that requirement be made by the same officer who made the requirement to furnish a sample of breath for analysis or the requirement to accompany a member to the place or vehicle where it is to be furnished or both such requirements.

CUMMINS J:

1. This is an appeal pursuant to s92 *Magistrates' Court Act 1989* from a decision of a Magistrate at the Heidelberg Magistrates' Court on 17 February 2003 concerning the application of s55(1) *Road Safety Act 1986*. The question of law for consideration, as stated in the Order of a Master of 19 March 2003, is:

“Following a preliminary breath test, can a Police Officer, other than the one who conducted same (and formed the opinion that it indicated that a person's blood contained alcohol) require the driver to remain for further testing under section 55(1) of the *Road Safety Act 1986*?”

2. The respondent, Michael David Peter Loftus, on 15 November 2001 was charged on summons as follows:

“The defendant at South Morang on the 19/08/2001, after having been required to have a preliminary breath test under Section 53 of the *Road Safety Act 1986*, and the test in the opinion of the member of the police force, in whose presence it was made indicated that his blood contained alcohol, he was then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to section 55(1) of the said Act, and for that purpose he accompanied a member of the police force to the on-site booze bus, where the sample of breath is to be furnished he did refuse to remain there until he had furnished a sample of breath for analysis and been given a certificate in the prescribed form or until 3 hours had elapsed after driving.”

The Informant was Constable Kelly Leanne Ramsey. The summons stated that the charge was laid under s49(1)(e) *Road Safety Act 1986*. In essence that provision relevantly proscribes a driver refusing to comply with a requirement made under s55(1).^[1]

3. Section 55(1) *Road Safety Act 1986*, the provision the subject of this appeal provides:

“(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)—

any 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 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 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.”

4. The matter came on for hearing at the Magistrates’ Court at Heidelberg. The hearing took place over two days, 18 December 2002 and 17 February 2003. A Senior Constable stationed at the Heidelberg Prosecutor’s Office appeared to prosecute and the defendant was represented by counsel. The prosecution called evidence, the defendant gave evidence and substantial legal submissions were made on behalf of the prosecution and the defence. The Magistrate dismissed the summons, essentially on the basis that for a conviction the police officer who required the defendant to furnish a sample of breath for analysis (after the preliminary breath test) and to accompany a member to the vehicle where the sample of breath was to be furnished was the only officer who could require the defendant to remain for further testing under s55(1). The appellant before me contends that that decision was erroneous in law because s55(1) does not require the same officer to require the defendant to remain for further testing a who made the earlier requirements. Thus this appeal.

5. In summary the evidence before the Magistrate was as follows. In the summary I use the expression “booze bus” as that is the familiar term used in evidence below. The statutory term is mobile breath testing vehicle or station.

6. The Informant, Constable Ramsey gave evidence that on early Sunday morning, 19 August 2001 she was in uniform performing duties at a preliminary breath testing station in Plenty Road, South Morang. At about 12.18 am she intercepted the defendant, Mr Loftus, who was driving a 1980 Ford utility, and required him to blow into the preliminary breath testing device. When he did so, it registered that there was alcohol content in his blood. She then said to the defendant: “In my opinion, the result of the preliminary breath test indicates that your blood contains alcohol. I now require you to accompany me back to the booze bus for the purpose of a breath analysis test”. She read those words from a printed card. She continued: “Are you prepared to accompany me?” The defendant replied “Yes, okay”. The two then walked together the ten metres to the booze bus. They entered the rear cabin of the bus together. Inside the rear cabin was an attendance register. They both sat down. Constable Ramsey asked the defendant his name and address. These he correctly told her. She then requested him to produce his driver’s licence. He did not have his driver’s licence with him but had a shooter’s licence. At that point another officer who had parked the defendant’s vehicle came to the rear cabin of the bus and commenced to write the Ford registration number on a whiteboard (in order that the keys later did not become wrongly allocated). The defendant became very agitated, demanded to know why the registration number was being written down and made a call on his mobile telephone. Constable Ramsey did not hear what the defendant said on the phone. He then requested to see “a certificate of authenticity of Australian Standards”. Constable Ramsey attempted to explain to the defendant that the purpose of writing the registration number on the whiteboard was for his benefit so that the keys were not lost or confused. The defendant appeared very angry, kept standing up and sitting down in the bus, and made a second mobile telephone call. Constable Ramsey also was trying to continue to ask the defendant, reading from another proforma, routine questions such as when his last drink was. The defendant refused to answer any further questions (including that question). Accordingly Constable Ramsey requested an officer in the front section of the bus, Senior Constable Wansleben, to enter the rear section. This he did. She explained to that officer what had occurred and that the defendant was refusing to answer her further questions from the proforma. The defendant then said: “Do I have to stay? I’m leaving”. He asked Senior Constable Wansleben for the certificate of authenticity. That officer (not Constable Ramsey) said to the defendant: “You’re not under arrest. You can leave the booze bus but be aware that there are consequences if you do so”. Constable Ramsey was present in the rear of the bus when this was said by Senior Constable Wansleben. Indeed she was present in the rear of the bus for the whole of the conversation between Senior Constable Wansleben and the defendant. Simultaneously the officer who had parked the defendant’s vehicle was in the front section of the bus on the radio attempting to confirm the identity of the defendant and that he held a current Victorian driver’s licence (as he had only produced his shooter’s licence). Senior Constable Wansleben told the defendant that if he failed to remain for the breath test he could lose his driving licence for two years and could incur a fine of more than \$1,000. The defendant did not reply and then left the bus by walking out of the back of the bus. There was a

taxi in the line of randomly intercepted vehicles. Both Constable Ramsey and Senior Constable Wansleebeben followed the defendant to the taxi. After the defendant entered the taxi but before he closed the door Senior Constable Wansleebeben held the door open and said the police had not confirmed the defendant's identity yet. At the same time Constable Ramsey ran to the front of the bus, ascertained that the identity was confirmed, obtained the defendant's shooter's licence from the officer who had done the radio confirmation and returned to the taxi. Constable Ramsey in the presence of Senior Constable Wansleebeben returned the shooter's licence to the defendant who was still in the taxi. The defendant then promptly left the vicinity in the taxi. The keys to his Ford utility were still hanging up in the rear section of the bus beside the whiteboard. The defendant to the end remained "very rude" and was "adamant that he wasn't answering any more questions". His eyes were bloodshot and his speech was slurred. The whole episode took some ten minutes.

7. Senior Constable Wansleebeben gave evidence that he was the booze bus operator that night. It was stationed on Plenty Road, South Morang. He was in the front section of the bus interviewing another defendant around 12.30 am when he heard loud noises from the rear section of the bus. He entered the rear section where the defendant and Constable Ramsey were. The defendant was very agitated and was talking on a mobile phone. Then the Senior Constable had a conversation with the defendant. The officer told the defendant that "what was required was the informant was going to ask a series of questions, after which I would ask him a series of questions and then he would be asked to blow into a breath analysing instrument". The defendant still agitated said "I want to see the Australian Certificate of Authenticity of the machine". The Senior said to the defendant that he was not able to produce any certificate of that sort at that stage and that if the defendant required anything of that description he should take the matter to court. The defendant then asked if he could leave.^[2] The Senior replied: "You're not under arrest. But there are consequences if you fail to remain or refuse the breath test". The defendant said "What are they?" The Senior replied: "Your licence would be cancelled or disqualified for a period of two years and you may receive a fine of \$1,200 or \$1,300". The defendant then said: "I don't care. I'm going". With that the defendant "jumped out of the rear of the booze bus" and "jumped straight into the rear of the taxi" that was in the area. The defendant promptly shut the rear door. Senior Constable Wansleebeben and Constable Ramsey immediately followed the defendant to the taxi. The Senior instructed the taxi driver to remain and told Constable Ramsey to ascertain whether the defendant's identity had been confirmed. She ran to the front of the bus, ascertained that his identity had been confirmed, and returned to the taxi with that information and with the shooter's licence. One or other officer then handed that licence to the defendant. Senior Constable Wansleebeben said to the defendant "You do realise you're going to lose your licence over this?" The defendant replied "I don't care". The Senior said "I'll see you in court" and the taxi then promptly left the scene with the defendant in it. Senior Constable Wansleebeben, when asked below "What was the defendant's demeanour towards you, or his general demeanour?" replied: "My recollection was that he was just agitated about everything basically. Just his demeanour, Your Worship. He was very agitated. Didn't want to be there. He wanted to go".

8. The defendant gave evidence before the Magistrate. It differed markedly from the police evidence. He said that in the back of the bus he said to Constable Ramsey "Oh while you're there, could I see the Australian Standards Authorisation and calibration date for the hand held device you are using, please?" to which she replied "I don't have to show you that". The defendant then said "Fine. I will reserve my rights and answer no further questions until my solicitor is present. So would you like me to ring a solicitor or am I free to leave?" She replied "Well, that's not up to me. You'll have to wait and speak to the officer-in-charge". Shortly afterwards, a male officer put his head from the front into the rear section and said "You're right to go, sir". The defendant said "What, keys and all?" The male officer said "Yes". The defendant then took his keys, said "Thanks" to the male officer, left the bus and (although he had his car keys) hailed the taxi and left the scene.

9. This skeletal outline has omitted the many credit issues litigated before the Magistrate.

10. The defendant's point before the Magistrate, and before this Court, was that the police requirement to the defendant to remain for the breath test was invalid because the wrong officer made it. The defence submitted below, and before me, that Constable Ramsey should have made it, not Senior Constable Wansleebeben. The defence submitted below, and before me, that the relevant section, s55(1), requires the officer who required the defendant to furnish a sample of breath for

analysis by a breath analysing instrument and for that purpose further required the defendant to accompany an officer to the vehicle where the sample of breath was to be furnished, and no-one else other than that first officer, make the requirement to remain for the breath test by the breath analysing instrument.

11. After an extensive hearing of the evidence, and of legal submissions, the Magistrate on 17 February 2003 orally gave his decision with reasons. He generally accepted the accuracy and truthfulness of the police evidence. He “found the defendant’s evidence to be all over the place and very unsatisfactory”. He said of the defendant “I have got no doubt he knew why he was there and that the purpose in being there was for a breath test to be conducted”. He found that the defendant “knew in his mind that he should remain for a breath test, but chose to leave and the reason he chose to leave was to avoid providing a breath sample”. The Magistrate found that the words uttered by Senior Constable Wansleebein fell within the requirement to remain. However the Magistrate dismissed the summons because the wrong officer uttered the words of requirement to remain to the defendant. He found as a matter of law that the terms of s55(1) required that the officer who required the defendant to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose required the defendant to accompany an officer to the vehicle where the sample of breath was to be furnished, be the same officer who required the driver to remain for the purpose of furnishing the sample of breath for analysis. The Magistrate gave considered reasons for that conclusion of law, addressing himself to the terms of the legislation (notably s55(1)) and to relevant authority (notably *Hrysikos v Mansfield*^[3] and *Bell v Dawson*^[4]). He dismissed the summons and ordered the Chief Commissioner of Police to pay the defendant’s costs of the proceedings, fixed at \$2,900.00.

12. I consider that the Magistrate, despite his considered address to the legislation and relevant considerations, was wrong in law in his reasoning and in the conclusion he reached. It is not a requirement of s55(1) that the officer who required the defendant to accompany an officer to the vehicle where the sample of breath was to be furnished, be the officer who requires the driver to remain for the purpose of furnishing a sample of breath for analysis.

13. In my view the Magistrate was correct in finding that the requirement to remain, under s55(1), was made, albeit by Senior Constable Wansleebein. In the affidavit of Senior Constable Mullaly sworn on 18 March 2003 and filed in support of the appeal, she deposes (at paragraph 14) that the Magistrate “found that a valid request to remain was made by Senior Constable Wansleebein”. The Magistrate found that “the words (said by Senior Constable Wansleebein) in general do fall within a requirement for the purposes of the Act (and that) they would come within the definition of the requirement”. In my view as a matter of fact the Magistrate found, in Senior Constable Mullaly’s words, that “a valid request to remain” was made by Senior Constable Wansleebein. Further, as a matter of law I consider that the Magistrate in so finding was correct. Although the Senior did not use the words “required to remain” he made it plain to the defendant that the defendant was required so to remain, by the statement that “If you fail to remain ... your licence would be cancelled (etc)” in response to the defendant’s question “Do I have to stay?” Nor was it argued otherwise before me.

14. It will have been seen that the question of law for consideration stated in the Order of the Master of 19 March 2003 was:

“Following a preliminary breath test, can a Police Officer, other than the one who conducted same (and formed the opinion that it indicated that a person’s blood contains alcohol) require the driver to remain for further testing under section 55(1) of the *Road Safety Act 1986*?”

That question goes to the identity of the officer who conducted the preliminary breath test (on the one hand) and of the officer who required the driver to remain for further testing (on the other). Mr McArdle QC before me for the Appellant contended that that was the true question before me (and issue before the Magistrate). Mr Nash QC, who appeared with Mr Lavery before me for the respondent, submitted that the true question and issue was whether an officer other than the officer who required the defendant to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose further required the defendant to accompany an officer to the vehicle where the sample of breath was to be furnished, can lawfully require the defendant to remain for the purpose of furnishing a sample of breath for analysis.

15. I consider Mr Nash's submission to be correct. I also must say that I found his oral submissions, both upon this matter and generally, to be clear and relevant and most helpful.

16. There are two reasons why there was some disputation before me as to what precisely the Magistrate found as a matter of law and whether the Master's question was misconceived or at least imperfectly expressed. First, the transcript of the Magistrate's reasons was afflicted by incompleteness in some critical passages (notably p189 l. 18 and p191 l. 6-7) and error in some other respects (the word "acquiring" appearing at p191 l. 8 plainly should be "requiring"). Next, and this is no criticism of the Magistrate, his reasons were given orally and there is a developmental character about them (particularly his addendum at p191) which render it a little difficult to settle upon the precise *ratio* of his decision. Also the respondent was not represented at the hearing on 19 March 2003 before the Master.

17. However that may be, I first address the question formulated by the Master.

18. It is plain beyond argument that a police officer other than the one who conducted the preliminary breath test can validly require the driver to remain for further testing under s55(1). That is because that is what the section clearly states. It states:

"(1) If a person undergoes a preliminary breath test when required by a member of the police force ... and—
 (a) the test in the opinion of this member ... in whose presence it is made indicates that the person's blood contains alcohol ... —
 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 ..."

The section, having specified the officer performing the preliminary breath test and forming the requisite opinion, proceeds to state that "any member" may make the subsequent requirements. By s10(1) *Road Safety (Amendment) Act 1994* section 55(1) was amended by substituting the word "any" for the word "the" before "member of the police force" in the body of the sub-section immediately after paragraph (b). There is a clear bifurcation between the preliminary breath test subject-matter of the sub-section and the subsequent requirements subject-matter of the sub-section. The matter is as a matter of language obvious. Further, the source of the power for requiring a person to undergo a preliminary breath test is contained in another section (s53(1)). The answer to the question formulated by the Master is: yes.

19. However, for the reasons I stated in paragraph 16, I do not consider that that is the true issue before me and I consider the question formulated by the Master is inaccurate. The true question, as Mr Nash correctly contended before me, following so far as one can the wording of the Master and arising on the facts of this case is:

"Following a preliminary breath test which in the opinion of the police officer in whose presence it is made indicates that the person's blood contains alcohol, can a member of the police force – other than the member of the police force who requires the person to furnish a sample of breath for analysis by a breath analysing instrument and who for that purpose requires the person to accompany a member to a vehicle where the sample of breath is to be furnished – require the person to remain there until the person has furnished the sample of breath and been given the appropriate certificate or until 3 hours after the driving, whichever is the sooner?"

Ultimately, in written submissions filed by leave after the conclusion of the hearing, counsel for the appellant in substance acknowledged that that was the true question for determination.

20. The question, as now formulated, is of more complexity than that formulated by the Master.

21. In the instant case, the officer administering the preliminary breath test and forming the requisite opinion under s55(1)(a) – Constable Ramsey – was also the officer who required the defendant to furnish a sample of breath for analysis by a breath analysing machine and who further required the defendant to accompany her to the vehicle where the sample of breath was to be furnished. However it was Senior Constable Wansleben, not Constable Ramsey although in her presence and hearing, who required the defendant to remain. That is where the reformulated

question intersects: at the change of police identity between the officer requiring the defendant to furnish a sample of breath and to accompany the officer to the vehicle, and the officer requiring the defendant to remain. That is the issue. After all, that was the essence of the charge below: failing to remain. The summons correctly stated the offence to be one contrary to s49(1)(e) (refusing to comply with a requirement under s55(1)) but the words of the charge relevantly were “... he did refuse to remain there until he had furnished a sample of breath for analysis ...”

22. Mr Nash on behalf of the respondent submitted that the provisions of s55(1) require that one person impose all three requirements. He correctly submitted that a police officer other than the one who administered the preliminary breath test can impose the subsequent requirements set out in s55(1) (to furnish, to accompany and to remain). However he submitted that the correct construction of s55(1) was that only one police officer can impose those requirements. He submitted that the plain and natural meaning of the body of the sub-section after paragraph (b) was that “any member” may require the person to furnish a sample of breath for analysis by a breath analysing instrument but once that member did so, only that member could further require the person to accompany a member to the place or vehicle where the sample of breath is to be furnished and only that member (who required the person to furnish the sample of breath and who required the person to accompany a member to the testing vehicle) could require the person to remain until the person had furnished the sample of breath and been given the appropriate certificate or until three hours after the driving, whichever is sooner.

23. Mr Nash further submitted that it was significant that when by s10(1) *Road Safety (Amendment) Act 1994* s55(1) was amended by substituting the word “any” for the word “the” before “member of the police force” in the body of the sub-section immediately after paragraph (b), the amendment did not proceed to insert the word “any” as to the member who imposed the subsequent requirements. He also relied upon *Bell v Dawson*^[5] per Balmford J at [17].

24. Finally Mr Nash submitted that in accordance with well-known canons of construction, especially with an essential ingredient of an offence as this is, one should not construe a provision in a strained or artificial way seeking a socially desirable result.

25. Ultimately, in written submissions made by leave after the conclusion of the hearing, counsel for the appellant made submissions directed to the question as properly formulated. Counsel submitted that it is conspicuous that in s55(1) after the expression “any member” appears, there is no later expression “that member”. Counsel submitted that had the legislature (in the amending Act, the *Road Safety (Amendment) Act 1994* or otherwise) intended that the member imposing the first requirement (to furnish) be the only member to impose the later requirements (to accompany and to remain) the legislature would have stated the words “that member” at each subsequent requirement and the legislature did not do so. Counsel submitted that a proper construction of s55(1) after paragraph (b) was to imply the words “any member” rather than “that member” before the second and third requirements. Finally he submitted that the purpose of the sub-section was to prevent a serious social ill and that the sub-section should not be construed to defeat that aim or to render police work unnecessarily resource intensive.

26. Accordingly I turn to the body of the s55(1) after paragraph (b).

27. In that part of s55(1), there are three acts of requirement specified. First, the requirement to furnish a sample of breath for analysis by a breath analysing instrument (which I shall call the first requirement); second, the requirement to accompany a member of the police force to a place or vehicle where the sample of breath is to be furnished (which I shall call the second requirement); and third, the requirement to remain there until the person has furnished the sample of breath and been given the appropriate certificate or until 3 hours after the driving, whichever is the sooner (which I shall call the third requirement). Although in the instant case Constable Ramsay did not articulate the first and second requirements separately (“I now require you to accompany me back to the booze bus for the purpose of a breath analysis test”) nothing turns on this. Both requirements were communicated to the defendant clearly enough.

28. The question truly before the Court is whether, for a valid requirement to remain for furnishing a sample of breath for analysis by a breath analysing instrument following a preliminary breath test which indicates alcohol, the officer requiring the driver to remain must be the same

officer who required the person to furnish a sample of breath for analysis and who required the person to accompany a police officer to the place or vehicle where the sample of breath is to be furnished. The defence contended below, and before me, that for each of those three requirements to be valid (or any of them) the same officer must make each such requirement.

29. To answer the reformulated question, recourse should be had first to the terms of the relevant legislation, notably s55(1).

30. It is plain that the member who forms the opinion that the subject of the preliminary breath testing (whom for convenience I shall hereafter call 'the subject') has alcohol in the blood (s55(1)(a)) must be the same member as the officer who requires the subject to undergo the preliminary breath test (s55(1)). So much is evident by the words:

"(1) If a person undergoes a preliminary breath test when required by a member of the police force ... and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's blood contains alcohol; ..."

Like identity of officer can be found in the requirements of closely related provisions. Thus s55(2):

"A member of the police force may require any person whom that member reasonably believes ..."
and s55(2A):
"The person who required a sample of breath under sub-section (1), (2) or (2AA) may require the person who furnished it to furnish one or more further samples ..."

and s55(9A):

"The person who required a sample of breath under sub-section (1), (2) or (2AA) from a person may require that person to allow a registered medical practitioner ..."

It is thus evident, both from the terms of the relevant sub-section, s55(1), and from the terms of closely related sub-sections, that the legislation is capable of saying in terms that the same officer must do two or more things. That, however, is not what the legislation says in relation to the requirements in the body s55(1) (after para (b)). The relevant part states:

"... 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 ..."

Section 55(1) does not say in terms "that member" before the words "may further require". The legislation could have stated "that member", just as it does in s55(2), but it does not.^[6] The legislation does not say in terms "The person who required ... may require" just as it does in s55(2A) and (9A), but it does not. I consider that omission in s55(1), and that contrast with s55(2), (2A) and (9A) is significant. The subject of the verb "may require" and "may further require" is unstated; it is implicit. The clear implication upon a proper grammatical construction of s55(1) is:

"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 any member of the police force 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 ..."

So construed, the section means the very opposite of the Magistrate's construction. He said the same member must do the requiring; the section says any member can. If the legislature intended to say what the Magistrate said, all the legislature had to do (as it did in related sub-sections) was to say "that member" before each requirement. That the legislature conspicuously failed to say. To imply the words "that member" is in my view inappropriately restrictive.

31. It is no answer to say that the legislature contemplated an identity of officer because of the word "further" before the requirement to accompany. The expression "may further require" is an expression of sequential requirement, not an expression of identity of speaker.

32. Next, there is no logic or social utility in construing s55(1) to require identity of police officers. There is logic and social utility in the other sub-sections I have cited (in paragraph 30) requiring identity of police officer, for the procedures comprehended by those sections involve the observation by and compliance by an officer with scientific procedures and it would be undesirable for different levels of compliance by different officers to be permitted to enter the evidentiary chain. No such situation arises in s55(1). There is no logic or social utility in requiring the officer who makes the first requirement (to furnish a sample of breath for analysis by a breath analysing instrument) to be the same officer who makes the final requirement (to remain there). It may often happen to be the one officer; it may be convenient for it to be the one officer; but there is no logical consistency, forensic requirement, citizen's right or social utility harmed or afflicted by different officers making the requirements after s55(1)(b).

33. Accordingly, examining the relevant legislation, I consider that grammar, procedure and social policy do not support the Magistrate's construction of s55(1).

34. Next, I turn to relevant authority.

35. There is no binding authority on the matter. There is high persuasive authority, namely *Hrysikos v Mansfield*^[7]. That case was not concerned with the question before me, there being in that case an admittedly valid requirement to remain and the issue there being whether the person in fact remained. However, in the course of giving reasons, Chernov JA at [22] of the requirement to remain said:

"Moreover, the scheme of the section [s55(1)] is that the police officer will go with the person in question to the 'place' and will remain with that person until the testing is complete. That is made apparent by sub-s.(1) which contemplates that the person will 'accompany' the police officer to the station and by sub-s.(2A) which effectively requires the police officer to remain there until, to the extent practicable, a sample of breath has been satisfactorily processed."

Eames JA at [47] stated:

"Furthermore, the obligation to remain arises by reference to the requirement imposed initially to accompany the police officer to the place at which testing was to occur. Thus, the obligation to remain at the place, which s55 permits, can not be divorced from the requirement 'to accompany' the officer to the place for the purpose of testing."

These observations, although of high authority, are *obiter* and no doubt for that reason do not address the indefinite article "a" ("may further require the person to accompany a member"). I am unaware whether the issue in the present case was litigated before the Court of Appeal in that case.

36. In *Bell v Dawson*^[8], Balmford J at [17] stated (having cited s55(1)):

"The requirement to accompany must thus be made specifically by the member of the police force who required the person to furnish the sample of breath. It is not sufficient only that a requirement be made; it must be made, specifically, by that member."

However, as Her Honour noted in that paragraph, that matter was "one further issue, not considered by either counsel". Her observation also was *obiter*.^[9]

37. Given the circumstance that the question and issue before me was not before the Court of Appeal for determination in *Hrysikos* and not before Balmford J in *Bell* I conclude that those decisions, although of significant importance, do not conclude the matter before me.

38. Analytically the most relevant decision in my view is *DPP v Foster*, *DPP v Bajram*^[10]. In the judgment of Winneke P (in whose judgment Ormiston JA substantially agreed and Batt JA agreed) at [29], [48], [50] and [56] it is established that the various requirements set forth in s55(1) are discrete and need not be communicated holistically. The Court in *DPP v Greelish*^[11] held likewise. In my view the circumstance that it is authoritatively stated that the requirements under s55(1) are discrete significantly supports the interpretation of s55(1) for which the appellant ultimately contended in this case, namely that it is not necessary for the same officer to make the requirements.

39. For the above reasons I conclude that for a valid requirement to remain it is not necessary that that requirement be made by the same officer who made the requirement to furnish a sample of breath for analysis or the requirement to accompany a member to the place or vehicle where it is to be furnished or both such requirements. Accordingly I would answer the reformulated question posed in paragraph 19 above: Yes.

40. I allow the appeal, set aside the orders made below and remit the matter to the Magistrate to be determined according to law. I shall hear counsel on consequential orders and on costs.

[1] *Hrysikos v Mansfield* [2002] VSCA 175 per Ormiston JA at [3]; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.

[2] In Senior Constable Wansleben's evidence there is no direct speech reproduction of this question by the defendant. In Constable Ramsey's evidence the question was stated directly viz. "Do I have to stay?"

[3] [2002] VSCA 174.

[4] [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111.

[5] [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111.

[6] The second reading speech for the *Road Safety (Amendment) Bill* 1993 (*Hansard*, 7 October 1993, 1025-1026) sheds no light on the matter.

[7] [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.

[8] [2000] VSC 169; (2000) 114 A Crim R 26; (2000) 31 MVR 111.

[9] The point was not passed upon on appeal: *Bell v Dawson* (2001) 4 VR 55.

[10] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.

[11] [2002] VSCA 49; (2002) 4 VR 220 at [12]; (2002) 128 A Crim R 144; (2002) 35 MVR 466 per Buchanan JA (in whose judgment Phillips JA agreed) and at [25] and [28] per O'Bryan JA.

APPEARANCES: For the appellant DPP (Ramsey): Mr JD McArdle QC, counsel. K. Robertson, Solicitor for Public Prosecutions. For the respondent Loftus: Mr G Nash QC and Mr J Lavery, counsel. Tony Danos and Co, solicitors.