02/90

SUPREME COURT OF VICTORIA

LISIECKI v GRIGG

Marks J

18, 26 January 1990 — (1990) 10 MVR 336

MOTOR VEHICLES – DRINK/DRIVING – REFUSING A BREATH TEST – ELEMENTS OF OFFENCE – WHETHER PROOF NECESSARY THAT BREATHALYZER BE AVAILABLE WHEN REQUEST MADE – REASONS FOR DECISION TO BE GIVEN – WHERE REASONS OBVIOUS BUT NOT GIVEN – WHETHER CONVICTION VITIATED: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1).

1. Where a person is charged with an offence under s49(1)(e) of the *Road Safety Act* 1986 ('Act') of refusing to comply with a requirement made under s55(1) of the Act, the elements of the offence require proof of a requirement and a refusal to comply with such a requirement. The Act does not require proof that when the requirement was made a breath analysing instrument was present and available for use.

***Scott v Dunstone* [1963] VicRp 77; [1963] VR 579, not followed.**

2. Where the reasons why a Magistrate found a charge proved are obvious, it does not follow that the conviction should be set aside because the Magistrate failed to give reasons.

MARKS J: [1] This is the return of yet another Order Nisi to Review a Magistrates' Court decision arising out of the *Road Safety Act* 1986 ("the Act").

At 3.25 a.m. on the 14th January 1989 the informant was on police divisional van duty with Senior Constable Giles when they intercepted the defendant who was driving another motor vehicle in Ryrie Street Geelong. After obtaining the defendant's name and address and other particulars the informant administered a preliminary breath test pursuant to s53(1) of the Act which proved positive. The defendant acceded to the request of the informant to accompany him and Giles to the Geelong Police Station.

At the Geelong Police Station the defendant admitted that he had been drinking at the Queen's Head and National Hotels since about 11.00 to 11.30 the previous evening. There is a reference to the material to 11 a.m. but it is likely that it is a typing error and I assume that it is. There was also evidence that the defendant visited another hotel called the Elephant and Castle. The informant gave evidence that he noticed that the defendant smelt strongly of intoxicating liquor, that his eyes were glazed and he was very careful in his movements and speech.

There was an exchange between Giles and the defendant as follows.

> Giles: "Are you prepared to furnish a sample of your breath for analysis?" Defendant: "No".
> Giles: "Are you aware that analysis is compulsory and if you refuse or fail to provide a sample for **[2]** analysis without reason of a substantial character you may be charged with this offence."

The defendant did not reply. At 3.56 a.m. the informant Grigg said to the defendant:

> "At 3.25 I found you driving a motor vehicle and as a result you underwent a preliminary breath test on a prescribed device which indicated your blood contained alcohol in excess of the prescribed concentration and I now require you to furnish a sample of breath for analysis by this approved analysing instrument. Do you understand that." Defendant: "No I am not going to."
> Grigg (Informant): "Are you aware that by refusing to provide a sample of your breath you are liable to be charged with refusing to provide a sample and face the probability of losing your licence for a period of two years?" Defendant: "No wait a minute."
> Grigg (Informant): "What is your reason for refusing to provide a sample of breath for analysis?"
> Defendant: "Oh come on."
> Grigg (Informant): "You will be charged with refusing a breath test. Is there anything you wish to say about this?"
> Defendant: "I can't accept that. As I said you said the proper machine."

There was evidence that at the time that the defendant was asked to furnish a sample of his breath a breathalyzer was set up in his presence. However there was no evidence that the breathalyzer conformed with the definition in s3(1) of the Act. **[3]** The defendant was charged that "on the 14th of January 1989 at Geelong in the State of Victoria .... after having been required to have a preliminary breath test" he was "then further required to furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* and .... did refuse to comply with such requirement."

The Summons with Information came on for hearing in the Magistrates' Court at Geelong on the 14th day of June 1989. Mr David O'Donoghue, Magistrate, constituted the Court. The defendant was legally represented and at the conclusion of the hearing he was convicted and fined $700.00, his licence cancelled and he was suspended from obtaining any licence under the Act for a period of 24 months. The order for payment of the fine was stayed for 30 days.

No evidence was called on behalf of the defendant before the Magistrate but at the conclusion of the case for the prosecution his solicitor made a no case submission on the ground that there was no evidence that the defendant was asked to furnish a sample from a machine which was present at the time, complied with the Act and Regulations and in a state of readiness for immediate operation. Reliance was placed on *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579. The Magistrate rejected the submission and after being informed that no evidence was called on behalf of the defendant pronounced the conviction and imposed the penalty. In rejecting the submission the Magistrate said:

> "You can take the argument up elsewhere Mr Cassidy but you are not going to persuade me. Do you have anything else which you wish to say."

[4] In the course of the submission the Magistrate said:

> "I do not know what you are talking about Mr Cassidy. In the evidence of the police there is the statement that the defendant was asked to furnish a sample of breath for analysis by the approved breath analysing instrument."

When the Magistrate indicated his rejection of the submission the solicitor for the defendant asked the Magistrate to make a note of his reasons for decision but the Magistrate replied that he had made all the notes he intended to make. After the Magistrate was told that the defendant was not to give or call evidence he said that he found the charge proved against the defendant.

The order nisi was granted by Master Evans on the 11th July 1989 on the following grounds:-

> "(a) No reasonable Magistrate properly directly (*sic*) himself as to the law could have concluded on the evidence before the Court that the prosecution had proved all the elements of the offence of which the defendant was convicted.
>
> (b) The learned Magistrate erred in law in concluding that there was any, or any admissible evidence before the Court to establish that there was present at the time the defendant was requested to furnish a sample of his breath for analysis a breath analysing instrument.
>
> (i) as defined in s3(1) of the *Road Safety Act* 1986;
> (ii) in proper working order;
> (iii) in respect of which all regulations made under Part "5" of the *Road Safety Act* 1986 had been complied with.
>
> (c) The learned Magistrate erred in law in failing to state his reasons for convicting the defendant."

[5] Grounds (a) and (b) have been argued together and it is convenient to treat them as raising the one issue namely whether the prosecution was required to prove the matters referred to in ground (b). In *Scott v Dunstone* Sholl J decided that the provisions of s408A of the *Crimes Act* 1958 (which might well be regarded as a predecessor of s55(1) in combination with s49(1)(e) of the Act) required such proof. It is a question here whether I should follow *Scott v Dunstone*. Regrettably, despite the eminence of the late Sir Reginald Sholl and the very high desirability that a single judge of this Court should follow the decision of another single judge as matter of comity and promotion of certainty in the law, the matter here is one of great public importance requiring

a decision which I think is right. I have reluctantly concluded that *Scott v Dunstone* should not in all its aspects be followed and I do not propose to do so. The relevant provision here is s55(1) of the Act which so far as relevant provides:-

> "If a person undergoes a preliminary breath test when required by a member of the police force... 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 in excess of the prescribed concentration of alcohol;
> or
> (b) ... the member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument..."

Section 49(1)(e) of the Act provides that -

[6] "A person is guilty of an offence if he or she—
(e) refuses or fails to comply with a requirement made under section 55(1) or (2);..."

The charge against the plaintiff was that he refused to comply with a requirement under s55(1). In *Scott v Dunstone* the offender was required "to furnish a sample of your breath directly into this analysing instrument for analysis." Dunstone sat down in front of the instrument but said "I'm not giving a test."

Thus the circumstances were very similar but not identical. The requirement in *Scott* did not contain any words that indicated that the instrument was one approved under the Act. Sholl J held that a suspect must be asked to furnish a sample of his breath for the stated purpose of analysis by an approved breath analysing instrument and that such an instrument must be proved to be present at the time of the requirement.

The elements of the offence are to be found in the words of the statute. In this case they required proof of a requirement and of a refusal to comply with it. Evidence capable of satisfying such proof might vary from case to case. Whether there has been a requirement which satisfies the provisions of s55(1) and a refusal within s49(1)(e) are matters of fact. If the evidence is capable of sustaining proof beyond reasonable doubt of these elements then a suspect is vulnerable to conviction. In my opinion, *Scott v Dunstone* confuses proof of the elements of the offence with proof of the facts which might establish their existence. The question is always whether the evidence is sufficient to **[7]** found proof of the elements of the offence which the statute defines. This is my understanding of the approach of the law. If it is correct then the soundness of the conviction in the present case depends on whether the evidence was capable of establishing that the plaintiff received a requirement "to furnish a sample of breath for analysis by a breath analysing instrument" and whether he refused to comply.

The Magistrate was clearly entitled to be satisfied that it did. Mr Hardy of Counsel submitted that the requirement related to "this" approved analysing instrument. He submitted that there was no proof that the designated instrument was "approved" under the Act and that the prosecution was required to prove that it was.

This submission, in my opinion, assumes that the legislature intended that a refusal by a suspect is justified if the instrument, the subject of the test, has not been demonstrated to him or her that it complies with the requirements of the Act. There is nothing in the Act to suggest such an interpretation and indeed there are provisions such as s55(6) and (9) which suggest strongly to the contrary.

A further answer to this submission is that proof of a s55(1) requirement and a s49(1)(e) refusal depends on a consideration of the whole of the evidence. Here the evidence, which was uncontradicted, allowed the inference that the plaintiff was required to furnish a sample of his breath for analysis by an instrument which was approved under **[8]** Part 5 of the Act and that he refused. The evidence allowed the conclusion that his refusal was point blank to have his breath analysed by any instrument.

If the plaintiff had complied with the requirement and the instrument were not proved to have been a "breath analysing instrument" within the meaning of the Act he could not be convicted,

as Ormiston J decided, I think correctly, in *Bogdanovski v Buckingham* (1989) VR 896 of any offence based on the result of such a test. Mr Hardy of Counsel at first submitted that *Bogdanovski* supported his contentions. I think it does not. There is a marked difference between a prosecution for refusal to furnish a sample of breath for analysis by an instrument and a prosecution based on what such an instrument displays. In the latter case, it is, in my view, as Ormiston J decided, necessary to provide that the machine met the requirements of the statute. The legislature has expressly provided that only such a machine is to be used to obtain results which might found a conviction.

What I have said is to a degree supported by two decisions of the Supreme Court of Tasmania. In *Draper v Morgan* [1970] Tas SR 247 an attack was made on the lawfulness of a direction of a police officer to furnish a sample of breath by a breath analysing instrument which was not present at the time of the direction. The case did not concern a refusal but the lawfulness of the direction and thus the validity of a conviction in the circumstances. The words of the relevant statute are analogous to those here under consideration. It was held that it was not necessary that **[9]** the machine be present. Reference was made by Burbury CJ to *Campbell v Epping* [1970] Tas SR 215 at p229 where a member of the Full Court in an *obiter dictum* said that the decision of Sholl J in *Scott v Dunstone* did not apply to the Tasmanian legislation. Whether that be so is not to the point here but at p251 Burbury CJ said that he did not think that the fact that the machine was not immediately available when the suspect arrived afforded any answer to a charge of failing to comply with the direction of the police officer. His Honour went on to say:-

> "The statute does not expressly require that a breathalyzer be immediately present and available when a driver attends to fulfil his statutory obligation and I see no reason to imply such a condition as a necessary element of lawfulness of the direction."

In *R v Hinman* (1970) Tas SR 285 Crawford J did not follow *Harris v Moore* (1969) Tas SR 61 where Neasey J had followed *Scott v Dunstone*.

In *Mintern-Lane v Kercher* [1968] VicRp 71; [1968] VR 552 Newton J referred without criticism to *Dunstone v Scott* but the issue, although relating to a refusal to undergo a breath test, concerned an entirely different statutory provision as to the place where the requirement was capable of being made. No question as to the correctness of *Dunstone v Scott* was argued or considered.

In *Hindson v Monahan* [1970] VicRp 12; (1970) VR 84 at p93 Gowans J appears to have assumed the correctness of *Scott v Dunstone* but this assumption underlay the argument concerning admissibility of evidence about the subject breathalyzer machine and it was this question of admissibility alone with which his Honour was concerned. **[10]** I have not been made aware and am not otherwise aware of any decision since *Dunstone v Scott* in which its correctness has been considered.

Although the Tasmanian cases are not directly in point, they are supportive of what I think is the correct approach. Neither section 55(1) nor other provision of the Act requires proof of the presence of a breath analysing instrument to sustain a prosecution under s49(1)(e). In my opinion neither common sense nor any principle of law requires it. Where evidence shows that a suspect refused point blank to provide a sample of his breath no matter what the instrument, particularly in circumstances indicating that his refusal was motivated by fear of the result of compliance with such a requirement, a tribunal of fact is entitled to conclude that the elements of the offence have been established. Grounds (a) and (b) fail.

Ground (c) is that the Magistrate failed to give reasons. It is not strictly correct that the Magistrate gave no reasons at all. He said that he found the elements of the charge proved after rejecting the submission that there was no case to answer. In the course of that submission it was apparent that the Magistrate was of the view that the presence of the breath analysing instrument was not required by the statute to be proved. In saying that he found that the charge was proved he is clearly to be understood as meaning that the elements of the offence were established by the evidence.

There was no contest on the facts and the Magistrate was not invited to entertain a

submission that the **[11]** evidence failed to disclose that there had been a requirement of the specified kind and a refusal. In any event, it must be taken that the Magistrate by his ruling thought that there was such evidence. The only issue which the Magistrate in effect was asked to determine was the subject matter of the no case submission.

It is not an invariable rule of law that a Magistrate is obliged to give reasons for his or her decision. The numerous cases on the topic do not concern facts and circumstances of the present kind. They have to a large extent been summarised in *De Iacovo v Lacanale* [1957] VicRp 78; [1957] VR 553 to which counsel referred. It is, I think unnecessary to discuss here the law concerning the circumstances under which a decision might be vitiated by the absence of reasons.

Even if it can be said in the present case that the Magistrate did not give any reasons at all, which I do not think is strictly correct, this is not a case where the conviction should be set aside by reason of any failure on the part of the Magistrate to elaborate his reasons. In my opinion, the reasons were obvious and it cannot be said that as a matter of law any failure to state them here amounted to such travesty of justice that the conviction should be set aside. Ground (c) also fails.

APPEARANCES: For the plaintiff Lisiecki: Mr G Hardy, counsel. Lamb & Cassidy, solicitors. For the defendant Grigg: Mr G Maguire, counsel. Victorian Government Solicitor.
