3/95

COUNTY COURT AT MELBOURNE

WATT v SMYTH

Judge Jones

10 May 1995

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUIRED TO GO TO "THE POLICE STATION" – PARTICULAR POLICE STATION NOT NOMINATED – WHETHER PROVISION OF S55(1) *ROAD SAFETY ACT* 1986 NOT COMPLIED WITH – WHETHER CHARGE SHOULD HAVE BEEN DISMISSED: *ROAD SAFETY ACT* 1986, S55(1).

Section 55(1) of the *Road Safety Act* 1986 ('Act') empowers a police officer to require a person who has undergone a preliminary breath test to accompany the officer "to a police station" for the purpose of furnishing a sample of breath. Where a police officer required a person to "come back to the police station for the purpose of conducting a breath test" the requirement of S55(1) of the Act was complied with. The section does not require the nomination of a particular police station in order to sufficiently inform the person as to what is involved in the person's deprivation of liberty.

***McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; 20 MVR 275; MC 19/94;**
***Dalzotto v Lowell* MC 6/93; and**
***DPP v Blyth* (1992) 16 MVR 159; MC 22/92, referred to.**

JUDGE JONES: [1] This is an appeal against conviction and sentence imposed by the Heidelberg Magistrates' Court on 19 December 1994. The appellant, William Harold Smyth, was convicted of the following charge: that he did at Hurstbridge on the 6th day of May 1994, within three hours after driving a motor vehicle, furnish a sample of breath for analysis by a breath-analysing instrument pursuant to s55(1) of the *Road Safety Act* 1986, which I will herein after refer to as the Act, and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol, being 0.05 per cent was present, and the concentration of alcohol indicated by the analysis to be present in his blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.

Evidence was given on the hearing of the appeal by the respondent, Detective Senior Constable Watt and Police Officer Hassett, from the Police Traffic Alcohol section. No evidence was called on behalf of the appellant. The circumstances surrounding the offence can be briefly stated as follows: in the evening of 26 May 1994 the respondent was performing duties in company with other police officers. Whilst travelling on the Heidelberg Kinglake Road he saw a vehicle travelling in the same direction weaving on and off the road in an erratic manner. The police eventually intercepted the vehicle when it pulled into a church car-park. The appellant was the driver of this vehicle.

The respondent obtained personal details from the appellant and arranged for another police unit to attend. **[2]** Acting Sergeant Murphy attended with a Lion Alcometer preliminary breath-testing device, which is approved for the purpose of s53 of the Act. The respondent prepared the device for use and required the appellant to supply a sample of his breath for analysis into the device. The appellant undertook the test which returned a positive result. The respondent informed the appellant of the result of the preliminary breath test and that he required him to come back to the police station for the purpose of conducting a breath test. The appellant was conveyed to the Hurstbridge Police Station where a breathalyser test was conducted by Police Officer Hassett. That analysis showed a blood alcohol concentration of .26 per cent.

With commendable frankness and brevity Mr Murphy, who appears on behalf of the appellant, submitted that there was only one issue involved in this appeal. He did not dispute that apart from this matter the respondent had proved the offence. However, he maintained that this matter was fatal to the respondent's case and should lead to the charge being dismissed. Mr Reynolds, who appears on behalf of the respondent, submits that the matter raised by Mr

Murphy is not fatal to the proof of the offence and maintains that the offence has been proven beyond reasonable doubt.

The matter raised by Mr Murphy is concerned with what the respondent told the appellant after the conduct of the preliminary breath test before he was conveyed to the Hurstbridge Police Station. In essence, Mr Murphy submits that a proper foundation has not been established pursuant to s55 of the Act for the appellant to be required to submit to analysis by a breath analysing **[3]** instrument. It is clear that such a foundation has to be established by the respondent. It is an essential element of the charge under s49(1)(f) that the requirement of s55(1) be complied with. For present purposes, s55(1) provides that:

> "Where a police officer is satisfied of certain matters after a preliminary test has been conducted, he 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 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, or until three hours after the driving."

Mr Murphy submits that a proper foundation has not been established in that the requirement of s55(1) has not been complied with because the appellant was not informed by the respondent that he was required to attend a particular police station, namely, the Hurstbridge Police Station. Rather, he was informed that he was required to come back to the police station and was then taken to the Hurstbridge Police Station.

In cross-examination, the respondent said that it was normal practice to tell a person who has been the subject of a preliminary breath test the particular police station he was being taken to. However, he agreed, having regard to his notes of the conversations with the appellant, he did not nominate a particular police station. His notes state, and I quote, "I now require that you come back to the police station for the purpose of conducting a breath test".

I am satisfied that the respondent did not refer to a particular police station in his conversation with the appellant. Mr Murphy has said that there is no decision that he **[4]** is aware of that has specifically dealt with this point and Mr Reynolds has also informed me that he is not aware of any decision that specifically deals with the point raised by Mr Murphy.

Mr Murphy has referred me to a number of decisions which he submits by analogy support his argument. They are a decision of Eames J in *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517; (1994) 20 MVR 275 judgment being given 1 June 1994. A decision of Ashley J in *Dalzotto v Lowell*, judgment being given on 18 December 1992, and a decision of Coldrey J in *DPP v Blyth* (1992) 16 MVR 159, judgment being given on 28 April 1992. I have been provided with copies of those judgments and have considered them.

The question raised is whether the requirement of s55(1) has been complied with. It has been held that the requirement involves more than a mere request to accompany the police officer and that the purpose for which the requirement is made must also be stated to the driver concerned. (See *DPP v Blyth*, *Dalzotto's case* and also *McCardy's case*.) The terms in which the requirement is stated need not follow any precise formula of words. (See *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503.)

In *Dalzotto*, Ashley J was concerned with a case where a driver had been intercepted on a country highway some distance from Ballarat. The driver having failed a preliminary test but not having been told that he had so failed, was required to accompany the police officer in the police car to the Ballarat Police Station. He was given no reason why he was being asked to do so. Ashley J held that the conviction could not be sustained in view of the failure to state the reason. He reached **[5]** that conclusion notwithstanding his acceptance that the driver had understood why the request had been made. In the course of his judgment, His Honour referred to the policy considerations behind the imposition of an obligation, that the requirement convey the reason for its imposition. And he said at p7 of his judgment:

> "The member of the public is effectively being deprived of his or her liberty, albeit in a transitory way. In these circumstances the legislature has required the police officer to convey to a member of the public the purpose for which the requirement to attend the police station is being imposed."

In *McCardy's case* the appellant was stopped at a preliminary breath-testing station. After a test she was told, "Come with me." The purpose for which the police officer required the appellant to accompany him was not disclosed. Eames J held that what was stated was not sufficient. The reason for the requirement needed to be clearly stated when the requirement is to accompany a police officer to another place.

In considering the operation of s55(1) and the duty imposed by it, courts have referred to the fact that the deprivation of the liberty of the citizen is involved, and the citizen is entitled to know why he or she is being deprived of his or her liberty and what is entailed in the requirement that he or she be deprived of his or her liberty. (See Eames J's judgment in *McCardy's case* at p12).

In essence, as I understand him, Mr Murphy submits that the citizen is entitled to know not only that he is being required to go to a police station for a breath analysis or test, but the particular police station he is being required to go to. I do not consider the duty or **[6]** requirement imposed by s55(1) of the Act goes so far. The words used in the sub-section are "a police station", not "a particular police station" or "a nominated police station" or "a stated police station". This factor is not conclusive but is, in my view, important. What the citizen needs to know is that he or she is being required to go to a police station and why he or she is being so required. That is what the section requires. It does not go so far as to require the nomination of the particular police station and I do not think it is necessary to take the requirement that far in order to ensure that the citizen is sufficiently informed as to what is involved in the deprivation of his or her liberty.

To sum up the position, although it may be the practice to inform a person of the name of the particular police station he or she is required to accompany the police officer to, there is not, in my view, a duty or requirement pursuant to s55(1) of the Act to provide that information.

In this case I am satisfied that the respondent has proved beyond reasonable doubt that the information required by s55(1) to be provided to the appellant, was provided to him. In the result, I am satisfied beyond reasonable doubt that the offence under s49(1)(f) has been proven. *[After discussion as to penalty, His Honour continued]* ... **[8]** I do not see any reason to take a different course to that taken by the magistrate, so the orders of the court are that as required by law the orders of the Magistrates' Court are set aside. On the charge of exceeding prescribed concentration, the appellant is convicted and fined $450 with statutory costs of $27.50. All licences and permits held under the *Road Safety Act* are cancelled and he is disqualified from obtaining a licence or permit under the Act for a period of 26 months which is effective from today.
