09/91

SUPREME COURT OF VICTORIA

BARBARO v SPYROU

Beach J

14, 18 January 1991 — (1991) 13 MVR 449

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO UNDERGO PRELIMINARY BREATH TEST – REQUEST MADE IN HOUSE OCCUPIED BY ALLEGED OFFENDER – AFTER REQUEST MADE POLICE OFFICER REQUESTED TO LEAVE – WHETHER OFFICER ENTERED HOUSE AS TRESPASSER – WHETHER EVIDENCE OF SUBSEQUENT ACTIONS INADMISSIBLE – WHETHER REQUEST TO UNDERGO BREATH TEST LAWFULLY MADE: *ROAD SAFETY ACT* 1986 S49(1)(c), 53.

As a result of information given to S., a police officer, attending the scene of a motor vehicle collision in which one vehicle was said to have fled the scene, S. proceeded to a house a short distance away and drove the police vehicle onto the unobstructed driveway and parked it. As a result of something said by 2 males on the property, S. entered the house and spoke to a person who told S. to "wait a minute" in the kitchen. When B. appeared in the kitchen, S. requested B. to undergo a preliminary breath test, B. refused and ordered S. to leave the house. Subsequently, B. was charged with an offence of refusing to undergo a preliminary breath test pursuant to s49(1)(c) of the *Road Safety Act* 1986 ('Act') and was convicted.

HELD: Appeal dismissed. Conviction confirmed.
Up until the time the police officer was ordered to leave the house, the police officer was either an invitee or at least had an implied licence to be in the house. Accordingly, the police officer was lawfully on the premises and could lawfully require the driver to undergo a preliminary breath test the refusal of which was a breach of s49(1)(c) of the Act.

***Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 59 ALJR 124; (1984) 2 MVR 161; [1984] Aust Torts Reports 80-315, referred to.**

BEACH J: [1] I have before me a case stated by His Honour Judge Crossley. The case relates to an appeal heard by Judge Crossley on 28 May 1990. The appeal was from convictions of the appellant by the Magistrates' Court of Broadmeadows for refusing to undergo a preliminary breath test when required to do so pursuant to s53 of the *Road Safety Act* 1986 and for certain other traffic offences. Although reference is made to those traffic offences in the case stated, counsel for the appellant did not address any argument to me in relation to them and they can be disregarded for present purposes.

The question which it is desired to raise for the determination of this court concerns the evidence of two police officers of their actions, observations and conversations subsequent to entering the dwelling house of the appellant. What is said in that regard is that the officers entered the house as trespassers; accordingly and as a matter of law, evidence as to their subsequent actions, observations and conversations whilst trespassers is inadmissible in criminal proceedings brought by them against the appellant.

The findings of fact made by His Honour appear in paragraphs 4.1 to 4.8 inclusive of the case stated which read:

> "4.1 That at about 3.40 am on 3rd October 1987 one Anne Penno was driving her blue Corolla vehicle along Hilton Street towards Sydney Road. At the intersection of Hilton Street and Eucra Street whilst waiting in the lefthand carriageway of Hilton Street before entering the roundabout her stationary vehicle was involved in a collision with another vehicle entering the street from the roundabout. The headlights of the second vehicle were not illuminated. The other vehicle left the scene of the collision shortly **[2]** afterwards driving towards Eucra Street.
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> 4.2 Before the other vehicle left the scene Ms. Penno was able to establish that the vehicle which collided with her own vehicle was a cream coloured Kingswood sedan registered number LCE 660 and that the driver of the vehicle had shoulder length hair which was not dark or blond but had dark tinges to it.

4.3 At 4.20 am Constable Spyrou and Della Riva attended at the scene of the collision and had a conversation with Miss Penno. As a result of this conversation and some further inquiries they attended at the premises of the defendant a short distance from the scene of the accident. They arrived at these premises at 4.50 am. When they arrived they drove their police vehicle into the driveway of the premises and parked it. They walked to a garage at the rear of the premises where red lights were seen below the garage door. The police observed a cream Holden with tail lights on in the garage. They then went outside the garage had a conversation with two males who indicated that the driver of the vehicle was inside the house. As a result of this conversation one of the two males went into the house.

4.4 The two police entered the garage and made further observations of a cream coloured Holden vehicle and identified the registration number as LCE 660. The police observed damage to the right front side of the vehicle and blue paint corresponding in colour to Ms. Penno's vehicle. They smelt liquor in the vicinity of the vehicle.

4.5 The police then heard voices in the house. They walked to the rear door which was open. They then entered the house of their own accord and walked into a kitchen area where they observed the two men they had previously spoken to, two younger males and a middle aged woman. They made further enquiries of those persons present as to the driver of vehicle registration number LCE 660 and were told by the woman, the defendant's wife, to wait a minute. One of the males then left the kitchen area and the police heard a loud voice from another room saying: "I was drunk and I made a mistake" and the defendant walked into the kitchen area with the other male.

4.6 The police observed that the defendant was dressed in pyjamas and had cuts and abrasions around his forehead, eyebrow, cheeks and nose and they detected the odour of intoxicating liquor when he walked into the room.

[3] 4.7 The defendant denied being the driver of the vehicle and being involved in an accident. He claimed that he had been sleeping for some time and that he had received cuts as a result of altercations with a friend.

4.8 The police had a prescribed preliminary breath test device assembled and ready for use and the defendant who vas an occupier of the premises, on two occasions refused to undergo the test. Upon such refusal he asked the police whether they had a search warrant and ordered them from the premises."

His Honour dismissed the appellant's appeal and confirmed the convictions and sentences which had been imposed upon him by the Magistrates' Court. Before I return to a consideration of the facts as found by His Honour it is convenient to refer to the two authorities relied upon by counsel for the appellant in support of his contention that when the police officer entered the home of the appellant they were trespassing on his property.The first of those decisions is the decision of the Court of Appeal in *Fox v Chief Constable of Gwent* (1985) 1 WLR 33. The facts in that case are set out in the head note which reads: *[His Honour set out the decision of Mann J, referred to the provisions of s7 of the* Road Traffic Act *1972 (UK) and continued]* ....**[6]** The decision of the Court of Appeal was affirmed by the House of Lords (see [1986] 1 AC 281; [1985] 3 All ER 392; [1985] 1 WLR 1126; [1985] RTR 337; [1986] Crim LR 59; (1985) 82 Cr App R 105; (1985) 150 JP 97). It is unnecessary to make reference to the decision of their Lordships in these reasons for judgment as it did not really deal with the point presently in issue.

In my opinion there are two points to be made about the decision in *Fox's case* and the reference in it to the speech of Lord Diplock in *Morris' case*. In the first place the provisions of s7 of the *Road Traffic Act (UK)* are somewhat different from the provisions of s53 of the *Road Safety Act* 1986. Section 53 of the *Road Safety Act* states:

"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 (b) the driver of a motor vehicle that has been required to stop at a preliminary breath testing station under s54(3); or (c) any person who he or she believes on reasonable grounds has within the last three 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.

2. An officer of the Authority who is authorized in writing by the Authority for the purposes of this section may at any time require any person he or she finds driving a commercial motor vehicle or in charge of a commercial motor vehicle to undergo a preliminary breath test by a prescribed device.

[7] 3. A person required to undergo a preliminary breath test must do so by exhaling continuously

into the device to the satisfaction of the member of the Police Force or the officer of the Authority.

4. A person is not obliged to undergo a preliminary breath test if more than 3 hours have passed since the person last drove or was in charge of a motor vehicle.

Section 7(6) of the *Transport Act (UK)* specifically authorizes a police officer to enter, if need be by force, any place where the person he wishes to provide a specimen of breath is, if he has reasonable cause to suspect that the accident in question involved injury to another person. There is no equivalent provision in s53 of the *Road Safety Act*. In *Fox's case* the Court of Appeal decided the matter on the ground that the police officers had no reasonable cause to suspect that the defendant's accident had involved injury to another person, and were therefore unable to avail themselves of the provisions of s7(6) of the Act. Further, that as they had entered the defendant's home without his consent they were at the relevant time trespassers and their request to the defendant to supply a breath specimen was therefore unlawful.

The decision of the court to the effect that the police officers were trespassers appears to have been based upon the fact that they opened the door to the defendant's house without invitation. Clearly the situation would have been different if they had been invited into the house. In that case it could not be said that they were trespassers. But what if the door had been open, and they had simply entered the house? In the second place in his speech to the House of **[8]** Lords in *Morris' case* [1981] AC 446; [1980] 2 All ER 753; [1980] RTR 321; (1980) 71 Cr App R 256; [1980] 3 WLR 283; (1980) 144 JP 331 Lord Diplock said:

"I have considered whether even if it must be accepted in accordance with this presumption that Parliament did not 'authorise' a constable to enter a person's home *against his will* in order to require him to take a breath test, it nevertheless intended the requirement made in such circumstances to be a lawful one". (The emphasis is mine.)

His Lordship is there talking about a constable entering a person's home *against his will*. If a police officer makes a forcible entry into a person's home in the absence of something more one would be entitled to find that the entry was made against that person's will. If the door to a person's home is closed and a police officer opens it and uninvited steps inside, in the absence of something more one would again be entitled to find that the entry was made against the person's will or at the least without his consent. But, what if the door is open?

The other authority relied upon by counsel for the appellant was the following passage from the judgment of Brennan J in *Halliday v Nevill & Anor* [1984] HCA 80; (1984) 155 CLR 1; (1984) 57 ALR 331; (1984) 13 A Crim R 250; (1984) 59 ALJR 124; (1984) 2 MVR 161; [1984] Aust Torts Reports 80-315. In that case a police officer pursuing a disqualified driver entered the open driveway of premises in which he had taken refuge and arrested him while he was standing in the driveway. The officer did not seek the permission of the owner of the premises before entering and making the arrest. *[His Honour set out part of Brennan J's judgment and continued]* .... **[10]** His Honour then proceeded to express the view that the presence of the police officer on the driveway at the relevant time was not for any purpose with which the person in possession was concerned and that there was no ground for inferring that the police officer had a licence from that person to come on to his driveway without his permission for the purpose of arresting a suspected offender.

But His Honour's judgment was a dissenting judgment. The other members of the court (Gibbs CJ, Mason, Wilson and Deane JJ) held that the officer had an implied licence from the owner of the premises to be on the driveway, and accordingly the arrest was lawful. At page 6 their Honours said:

"While the question whether an occupier of land has granted a licence to another to enter upon it is essentially a question of fact, there are circumstances in which such a licence will, as a matter of law, be implied unless there is something additional in the objective facts which is capable of founding a conclusion that any such implied or tacit licence was negated or was revoked: cf. *Edwards v Railway Executive* [1952] AC 737 (24). The most common instance of such an implied licence relates to the means of access, whether path, driveway or both, leading to the entrance of the ordinary suburban **[11]** dwelling house. If the path or driveway leading to the entrance of such a dwelling is left unobstructed and with entrance gate unlocked and there is no notice or other indication that entry by visitors generally or particularly designated visitors is forbidden or unauthorized, the law will imply a licence in favour of any member of the public to go upon the path or driveway to the

entrance of the dwelling for the purpose of lawful communication with, or delivery to, any person in the house. Such an implied or tacit licence can be precluded or at any time revoked by express or implied refusal or withdrawal of it. The occupier will not however be heard to say that while he or she had neither done nor said anything to negate or revoke any such licence, it should not be implied because subjectively he or she had not intended to give it: see, generally, *Robson v Hallett* [1967] 2 QB 939; [1967] 2 All ER 407 (25); (1967) 3 WLR 28; *Lipman v Clendinnen* [1932] HCA 24; 46 CLR 550; 39 ALR 20 (26); *Lambert v Roberts* (1980) 72 Cr App R 223 (27). Nor, in such a case, will the implied licence ordinarily be restricted to presence on the open driveway or path for the purpose of going to the entrance of the house. A passer-by is not a trespasser if, on passing an open driveway with no indication that entry is forbidden or unauthorized, he or she steps upon it either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath. Nor will such a passer-by be a trespasser if, for example, he or she goes upon the driveway to recover some item of his or her property which has fallen or blown upon it or to lead away an errant child. To adapt the words of Lord Parker CJ in *Robson* [1967] 2 QB 939; [1967] 2 All ER 407 (28); (1967) 3 WLR 28, the law is not such as ass that the implied or tacit licence in such a case is restricted to stepping over the item of property or around the child for the purpose of going to the entrance and asking the householder whether the item of property can be reclaimed or the child led away. The path or driveway is, in such circumstances, held out by the occupier as the bridge between the public thoroughfare and his or her private dwelling upon which a passer-by may go for a legitimate purpose that in itself involves no interference with the occupier's position nor injury to the occupier, his or her guests or his, her or their property.

The evidence indicates that the premises at 375 Liberty Parade were residential premises with an open driveway to the roadway. There is no suggestion that the driveway was closed off by a locked gate or any other obstruction or that there was any notice or other indication advising either visitors generally or a particular class or type of visitor that intrusion upon the open driveway was forbidden. **[12]** That being so, a variety or persons with a variety of legitimate purposes had, as a matter of law, an implied licence from the occupier to go upon the driveway. The question which arises is whether, in those circumstances, the proper inference as a matter of law is that a member of the police force had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of questioning or arresting a person whom he had observed committing an offence on the public street in the immediate vicinity of that driveway. The conclusion which we have reached is that common sense, reinforced by considerations of public policy, requires that that question be answered in the affirmative. That conclusion does not involve any derogation of the right of an occupier of a suburban dwelling to prevent a member of the police force who has no overriding statutory or common law right of entry from coming upon his land. Any such occupier who desires to convert his path or driveway adjoining the public road into a haven for minor miscreants can, by taking appropriate steps, preclude the implication of a licence to a member of the police force to enter upon the path or driveway to effect an arrest with the result that a police officer's rights of entry are restricted to whatever overriding right he might possess under some express provision or necessary implication of a statute (cf. *Crimes Act*, s459A and note generally *Morris v Beardmore* [1981] AC 446; [1980] 2 All ER 753; [1980] RTR 321; (1980) 71 Cr App R 256; [1980] 3 WLR 283; (1980) 144 JP 331 (29) and the discussion in the judgment of Kennedy J in *Dobie v Pinker* [1983] WAR 48 (30) of the common law. All that that conclusion involves is that, in the absence of any indication to the contrary, the implied or tacit licence to persons to go upon the open driveway of a suburban dwelling for legitimate purposes is not so confined as to exclude from its scope a member of the police force who goes upon the driveway in the ordinary course of his duty for the purposes of questioning or arresting a trespasser or lawful visitor upon it. It follows that Police Constable Nevill was lawfully upon the driveway of 375 Liberty Parade when he arrested the appellant."

[13] I return to the facts in the present case. In light of the decision of the High Court in *Halliday's case*, there can be no question but that Constable Spyrou and Della Riva were not trespassing when they drove their vehicle into the driveway of the appellant's premises and parked it there. There was no obstruction to the driveway or other notice preventing or forbidding them from entering the driveway. In that situation they had an implied licence to be there. Nor was that licence revoked at any time before they entered the kitchen of the appellant's house. Although it is unnecessary for me to make any determination in relation to the matter, it could well be successfully contended that Constables Spyrou and Della Riva were trespassing when they entered the appellant's garage. The doors of the garage were closed when they parked their vehicle in the driveway, and it was necessary for them to open them to gain access to the appellant's car. I think it could well be argued that they had no implied licence to take that action. Nevertheless, as I have stated, it is unnecessary for me to make a final determination in the matter, and I do not do so.

I turn then to the entry of the two police officers into the kitchen of the house. The first point

to be noted is that two occupants of the house, namely the two males referred to in paragraphs 4.3 and 4.5 of the case stated, knew that Constables Spyrou and Della Riva were outside the house and that they were looking for the driver of the car which was then in the garage. Further, the two males, when questioned about the whereabouts of the driver of the car, told the police **[14]** officers that the driver was in the house. Having given the police officers that information, the two males then went into the kitchen of the house leaving the kitchen door open behind them. At no time did they tell Constables Spyrou and Della Riva that they were not to enter the house. It must have been apparent to the two men that once the police officers completed their examination of the car, the very next thing they would do would be to come to the house seeking to speak to the driver of the car. In my opinion, from the very fact that in those circumstances those two occupants of the house returned to the house leaving the kitchen door open – and it must be borne in mind that this was approximately 4.20 a.m. on an early October morning – one can but conclude that they were, by implication, inviting the police officers to enter the house. Had that not been the situation, they would surely have closed the door.

At all events, and whether that be so or not, having entered the kitchen of the house and explained the nature of their business to the appellant's wife, who was clearly an occupant of the house, they were expressly invited by the appellant's wife to "wait a minute". In my opinion, that was an express invitation to Constables Spyrou and Della Riva to remain in the kitchen. Following the appearance of the appellant in the kitchen, the two constables then asked him to submit to a breath test. It was only after the police officers asked the appellant to submit to a breath test and he had refused to do so that the appellant ordered the police officers to leave the house. In my opinion, up to the time at which Constables Spyrou and Della Riva were ordered to leave the house, they **[15]** were either invitees to the house or at the least had an implied licence to be there. They did not become trespassers to the house until such time as the appellant ordered them to leave. Indeed, it could be argued that even then they were not trespassers because they were in the house at the invitation of the appellant's wife and the two other male occupants of the house. Those occupants had not withdrawn their invitations. It would be a nonsense to suggest that if a person enters a house at the invitation of a number of occupants of the house he immediately becomes a trespasser if he is ordered from the house by another occupant.

It follows from those findings that in my opinion at the time Constables Spyrou and Della Riva asked the appellant to submit to a breathalyzer test, they were legally on the appellant's premises and could lawfully require the appellant to submit to such a test. The appellant's refusal to undergo such a test was a clear breach of s49(1)(c) of the *Road Safety Act*, and the learned County Court Judge was perfectly correct in dismissing the appellant's appeal and confirming his conviction and sentence. In my opinion the appropriate order to make in respect of the case stated is that the respondent's costs of the case stated including any reserve costs be taxed and when taxed paid by the appellant. (Discussion ensued)

HIS HONOUR: I order that the appellant's appeal be dismissed, and I confirm the convictions and penalties imposed by the Broadmeadows Magistrates' Court on 6 February 1989.

APPEARANCES: For the appellant Barbaro: Mr P Cash, counsel. Home, Wilkinson & Lowry, solicitors. For the respondent Spyrou: Mr R Elston with Mr D Trapnell, counsel. Solicitor for the DPP.
