



Client Newsletter

DPP v Serbest

April 2012

Facts

The case of *DPP V Serbest* [2012] VSC 35 (**Serbest's Case**) involved an individual who refused to accompany police for the purposes of administering a breath test pursuant to s 55(1) of the *Road Safety Act 1986* (**RSA**).

The case involved two Victoria Police constables stopping a vehicle being driven by the Accused and administering a preliminary breath test. The test indicated that the Accused had alcohol in his system. The following exchange then occurred:

Accused: 'Am I over?'

Police Informant: 'The test indicates your breath contains alcohol.'

Accused: 'What police station?'

*Informant: 'Moorabbin Police Station.'
[motions up the road]*

Accused: 'Do I have to?'

Informant: 'You are not under arrest but the decision is yours. There is important information I need to give to you if you don't.'

Accused: 'I don't want to.'

Informant: 'If you fail to accompany me for a breath test you will commit an offence which if you are found guilty carries a fine and imprisonment and two years loss of licence.'

Summary

Serbest's Case provides clarification as to the operation of s49(1)(e) and s 55 of the *Road Safety Act*.

It confirms that a request by a police officer for a motorist to accompany them to a police station is allowed to be expressed as a **request** rather than an **obligation**. It also confirms that the offence of not accompanying a police officer to a station is triggered at the time when the motorist states that he is refusing the request.

Accused: 'I don't want to.'

After this conversation, the informant read from his proforma notes, which stated how a request to accompany a police officer to a police station must be worded. The informant then returned to his vehicle still in possession of the Accused's licence.

The Accused then got out of his vehicle and walked over to the police vehicle. A conversation took place whereby the Accused appeared confused as to whether or not his licence was already suspended. It also became clear that the Accused's earlier refusal to accompany police to the police station hinged upon the fact that he thought his licence was suspended and that as a consequence, he was not allowed to have any alcohol in his system. It was later determined that the Accused's licence was not suspended.

The Accused did not accompany police to the police station and accordingly was charged with an offence under s 49(1)(e) of the RSA.

The Original Decision

The Magistrate dismissed the charge against the accused on the grounds that the evidence did not prove that the Accused was given sufficient information in order for him to understand what was required of him and why.

The Magistrate held that for an offence to be committed under s 49(1)(e) the police have to prove that the accused understood that he had to accompany them to the station, and the consequences of non-compliance.¹

The Magistrate also concluded that the police officer had asked the Accused to accompany him to the police station but had not expressed that it was a requirement that he do so - and that this distinction was important.

The Appeal

The DPP appealed the decision of the Magistrate to the Supreme Court, and were successful in overturning the decision.

The judge agreed with the DPP's argument that an offence under s 49(1)(e) of the RSA involves only two elements:

- That a requirement has been made, and
- That there has been a refusal to comply with that requirement.

The judge also concluded that the relevant sections of the RSA and the relevant authorities do not require the police to prove a subjective understanding on the part of the Accused.

Rather, the only thing that prosecutors need to prove is that the Accused was given reasonably sufficient information to know what is required of him/her, and why.²

It was also held that the relevant sections of the RSA did not impose any obligation on the Accused to accompany the police officer.

The reason for this is that police have no power under the relevant section, to actually order that someone accompany them because there is no power of arrest or detention in the legislation.³

In this case, the offence under s 49(1)(e) was created by the Accused's refusal to accompany a member of the police force when required to do so.⁴ Therefore it is the refusal to comply, rather than the physical act of non-compliance, that triggers the offence.^{5 6}

The judge also stated that he agreed with the analysis of *Sanzaro v County Court of Victoria*⁷, which held that s 55 did not require a demand to be made and that a request would suffice.

For these reasons the Court allowed the appeal and sent the matter back to the Magistrates' Court for determination.

Lessons

Serbest's case provides clarification in respect of the operation of s 49(1)(e) and s 55 of the RSA. Specifically, it confirms that:

- When a police member asks a motorist to accompany him back to the police station, that request should clearly communicate to the motorist exactly what is required of him/her, and why;
- That the above requirement is allowed to be expressed as a *request* rather than an *obligation*;
- That an offence under s 49(1)(e) is triggered at the moment when a person refuses the request, rather than by the fact that they failed to accompany the officer; and
- That, assuming that it can be proven that sufficient information was provided to the motorist, his/her subjective state of mind is not relevant.

If you need assistance with any aspect of the *Road Safety Act* or traffic law in general, then please contact the VGSO for assistance.

¹ *DPP v Serbest* [2012] VSC 35, 14

² [1986] VR 67, 73

³ *DPP v Serbest* [2012] VSC 35 at 25, see also *DPP v Piscopo* [2011] VSCA 275 and *DPP v Rukandin* [2011] VSCA 276.

⁴ *DPP v Serbest* [2012] VSC 35, 35

⁵ *DPP v Serbest* [2012] VSC 35, 36

⁶ We note that the appeal did not make a determination as to whether this refusal took place at the time of the initial refusal, or the subsequent refusal after the Accused had approached the police vehicle.

⁷ [2004] 42 MVR 11

For further information

For further information or legal advice on any issues raised in this newsletter contact:

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