13/94

SUPREME COURT OF VICTORIA

ROBINSON v FISHER

Teague J

29, 30 October, 15, 17 December 1992; 31 August 1993

[1993] ACL Rep 130 VIC 201

MOTOR TRAFFIC – FAILING TO STOP/RENDER ASSISTANCE/REPORT TO POLICE – CATEGORISATION OF OFFENCES – WHETHER INVOLVING STRICT LIABILITY – WHETHER DEFENCE OF HONEST AND REASONABLE MISTAKE AVAILABLE – ELEMENTS OF OFFENCES – SENTENCING – WHETHER APPROPRIATE TO IMPOSE AGGREGATE FINE: *ROAD SAFETY ACT* 1986, S61(1)(a),(b) & (e); *SENTENCING ACT* 1991, S51.

Section 61(1) of the *Road Safety Act* 1986 ('Act') provides (so far as relevant):

> "If owing to the presence of a motor vehicle an accident occurs whereby any person is injured or any property (including any animal) is damaged or destroyed, the driver of the motor vehicle—
> (a) must immediately stop the motor vehicle; and
> (b) must immediately render such assistance as he or she can; …
> (e) if any person is injured … must … report in person full particulars of the accident at the police station …"

1. For the purpose of considering criminal intent, statutory offences fall into three categories. (1) Prosecution must prove *mens rea* as an essential ingredient of the offence (2) Prosecution must negative evidence of the defendant's honest and reasonable belief (3) absolute offences or ones of strict liability.

2. The provisions of s61(1) of the Act do not create absolute offences nor impose strict liability. That is, s61(1) does not create Category 3 offences.

3. Having regard to the relative seriousness of the offences and other matters, s61 offences do not fall within Category 2 offences involving the defence of honest and reasonable belief. S61 requires that the appropriate mental element be proved by the prosecution as an essential ingredient of the offence.

4. To establish an offence under s61(b) or (e) of the Act it must be proved that there was actual knowledge on the part of the driver that an accident had occurred and that a person was injured. Where a driver knew he had been in a collision but did not know he had hit a person, a magistrate was in error in finding proved charges laid pursuant to s61(1)(b) and (e) of the Act.

5. In relation to a charge under s61(1)(a) of the Act, the prosecution must show there was appreciable damage to property other than the defendant's motor vehicle.

6. Where facts giving rise to offences occurred within a short time and involved the driving of a motor vehicle, it was open to a magistrate to impose an aggregate fine pursuant to s51 of the *Sentencing Act* 1991.

TEAGUE J: *[After setting out the facts, the hearing before the magistrate, the grounds of appeal and relevant provisions of the Act, His Honour continued…]* **[8]** It seems to me clear that the offence under para. (a) of failing to stop has to be treated differently to the offence under para. (b) of failing to render assistance and the offence under para. (e) of failing to report an accident if any person is injured. The preliminary portion of s61(1) contains the word "or" between "whereby any person is injured" and "any property (including any animal) is damaged or destroyed", as qualifying the kinds of accidents which trigger off the obligations specified in each of paras. (a) to (f). It does not distinguish **[9]** between the obligations which follow in the paragraphs. However, paras. (c), (e) and (f) contain words which do distinguish between the triggering options. Paragraph (e) contains only one of those options. It applies only if a person is injured. For reasons that will later appear, my view is that part of the mental element for an offence under s61(1)(e) is actual knowledge that a person is injured.

Paragraphs (a) and (b) do not contain either of the triggering options. As to para. (a), it seems to me that the plain meaning of the words is that the obligation to stop is triggered by either or both of the options. It is not as easy to be so definite with para. (b). The obligation to render assistance is clearly triggered by an accident in which a person is injured. I would come to the same conclusion in relation to an accident in which an animal is damaged or destroyed. However, I have trouble with the notion of there being an obligation to render assistance where the damage is to a tree or a post.

It suffices for me to say at this point, that I am satisfied that separate consideration has to be given to the evidence relative to any charge under separate paragraphs of s61, and that the appropriate mental element has to be established relative to each charge. I turn to the first question posed in the order of the Master, as to whether the learned magistrate erred in deciding that s61(1) of the *Road Safety Act* created an absolute offence. **[10]** *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 is the leading case dealing with the categorisation of statutory offences for the purpose of considering criminal intent. As a very general proposition, it is possible to say that such offences fall into three categories. To none of those categories it is easy to give a satisfactory label. The first category covers offences in which there is an original obligation on the prosecution to prove *mens rea* as an essential ingredient of the offence. The second category has commonly been referred to as covering the middle ground. It relates to offences where *mens rea* will be presumed to be present unless and until some evidence is advanced by the defendant that he had an honest belief in facts which would make his act lawful, and some evidence or basis for thinking that it was on reasonable grounds, in which circumstances the onus is on the prosecution to disprove honest belief on reasonable grounds beyond reasonable doubt. The third category is also not easy to give a label to, as it apparent from two relatively recent decisions of the Victorian Full Court in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173, and *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377. In each case the court held that a statutory provision creating an offence was intended to create an offence in the third category and not an offence in the middle ground.

In *Welsh*, the court carried out a close analysis of the tests to be applied to determine the character of an offence under s35 of the *Motor Car Act* which prohibited a vehicle being used to carry an excessive gross weight in contravention of the terms of a permit. The headnote reads that the court held that the prohibition imposed by the section **[11]** was intended to be absolute, and that a defence of honest and reasonable mistake of fact was not therefore available. No member of the Court referred to the offence as being an absolute offence. With the exception of one reference by McInerney J at p85 to whether the prohibition imposed by the section was intended to be absolute, the judgments of all members of the court are expressed in terms of whether "strict liability" was imposed.

In *Kearon*, the court was concerned with the prohibition against exceeding 60 kph under regulation 1001(c) of the *Road Safety Regulations* 1988. Brooking J, which whom Kaye and Murphy JJ agreed, stated -

> "I think it clear that the defence, as I shall call it, of honest and reasonable belief is not open ... In my view, the subject matter and character of this regulation are such as to make it likely that the exclusion of this defence was intended ... If ever one might expect an intention to impose strict liability, it would be in relation to this offence of driving a motor vehicle at an excessive speed",

and then referred to passages in *Welsh*.

In the light of what was said in those cases, I am not disposed myself to adopt "absolute offence" as a label to identify an offence in the third category. However, I am satisfied that it was in that sense that the label was used by the learned magistrate. All six of the cases to which I am about to refer involved prosecutions based on legislative provisions in terms comparable to but not the same as s61. All six were cited to the learned magistrate. There is not in any of those cases, or in any case to which I was referred in argument, support for the proposition that such a provision should be taken to create **[12]** an "absolute offence", or, to use a different expression, to impose strict liability.

In *Hubbard v Beck* (1947) 64 WN (NSW) 20, Maxwell J, without citing authority, held that

the accused could not be convicted of the offence of failing to stop after an accident when he was unaware that his vehicle had been involved in an accident.

In *Harding v Price* [1948] 1 KB 695; [1948] 1 All ER 283, the accused was acquitted on appeal of a charge of failing to report an accident, he being a driver who was found to have been unaware that an accident had occurred. Lord Goddard CJ referred to the general rule that a man should not be found guilty of an offence against the criminal law unless he has a guilty mind, and to the exception to that rule where a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime by making an absolute prohibition against the doing of some act, and to the qualification to the exception that, even where the statute imposes what is apparently an absolute prohibition, an absence of guilty knowledge may in some cases be a defence.

In *Waddington v Boyd* [1959] NZLR 1332, Henry J dealing with a charge of failing to render assistance after an accident, held that there must be evidence that the accused knew that there had been an accident, and knew that the accident had been one in which injury had occurred.

The authority which appears to have received closest scrutiny before the learned magistrate, and the one which, before me, Mr Webb spent much time attacking, was *Dickson v Police* [1968] NZLR 499. In *Dickson*, Macarthur J, after **[13]** making a close analysis of the distinction between knowledge of the accident and knowledge of injury or damage to property, concluded that, where it was proved that "the driver knew that there had been an event which was untoward so far he (as the driver of the vehicle) was concerned which might possibly cause injury or damage", he had the necessary "knowledge of an accident in which injury had occurred" as required by the legislation under consideration, and so such a driver was obliged to stop, check for injury, and report if there was injury.

In *Ex parte Bedser; Re Kotze* [1969] 2 NSWR 268, Nagle J reviewing the decision of a magistrate on a prosecution for failing to stop and give assistance, held that the prosecution must establish not only that the accused knew that an accident had occurred, but that he knew that death or injury to a person had been caused in and by the accident. He so held after reviewing a number of cases including Harding concerned with departure from the principle of requiring the establishing of *mens rea*. I do note that the presence in the relevant section in New South Wales, of the word "knowingly", makes it easier to categorise the offence as one calling for proof of knowledge of the accident and of injury or death as essential ingredients of the offence.

In *Barker v Bruce* [1970] VicRp 111; [1970] VR 884, Newton J held that the offence of failing to stop under the legislative provision analysed by him "does involve an element of *mens rea* in that the driver must have been aware that the vehicle was involved in the accident". He cited *Hubbard*, *Harding* and *Bedser*. He set aside the magistrate's dismissal of the charge on the basis **[14]** that there was evidence upon which the magistrate could have been satisfied that the accused was aware of the accident. *Barker* appears to represent the most recent Victorian reported case. Although the form of the legislative provision before me is different from that before Newton J, I certainly do not perceive any difference indicative of an intention on the part of the legislature to make the offence "absolute". No submission to that effect was put to me by Mr Gebhardt on behalf of the respondent.

Although those six cases were cited to the learned magistrate, he decided, without elaborating other than to say that he rejected the defence arguments, that s61(1) created an absolute offence. I am satisfied that he erred. I think that that conclusion is so clear in the light of the authorities that I have cited, that it is not necessary to spell out why that conclusion is also appropriate based on the application of the principles as to the classification of statutory offences according to the mental element, as spelt out in *Welsh*, *He Kaw Teh*, *Kearon* and other cases to which I will return in another context. Having decided that the learned magistrate erred, the next question is whether I have any option but to set aside his orders and to refer the further determination of these matters back to him. Mr Webb urged me not to do so on the basis that the findings of the learned magistrate warranted my dismissing all charges. That would mean attributing considerable significance to what the learned magistrate found as to Robinson's knowledge, which was in short that Robinson knew a collision **[15]** had occurred, believed he had hit a crash barrier, but did not know he had struck an individual.

Premises underlying Mr Webb's submissions included that each charge under s61 had to be treated separately, that the appropriate mental element had to be established relative to each charge, and that the learned magistrate's findings as to Robinson's knowledge precluded the conclusion that the mental element had been established. The primary case advanced by Mr Webb was that each of s61 offences was in the first of the categories that I have referred to above, that *mens rea* was an essential ingredient of all of the offences created by s61. His alternative position was that the offences were in the middle ground and that the defence of "honest and reasonable belief" was open. To put those submissions in context, it is necessary to go back to *He Kaw Teh*, where the High Court was faced with a like choice in relation to offences created by s233B(1) of the *Customs Act*, and reviewed the basis for distinguishing offences. At p528, Gibbs CJ cited with approval the principle taken from *Sherras v De Rutzen* [1895] 1 QB 918; 11 TLR 369, in this passage (QB):-

> "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

He Kaw Teh is a case of some complexity. I derived some assistance in better understanding it by what was said in *Millar v Ministry of Transport* [1986] 1 NZLR 660, a decision of the High Court of New Zealand which came after *He Kaw Teh*, and **[16]** in which a different principle to *He Kaw Teh* was adopted. In *Millar*, in the context of a charge of driving while disqualified, the New Zealand Court of Appeal reviewed cases including *He Kaw Teh* in the course of considering differences in the approach to the classification of offences according to the mental element. It decided that for New Zealand, the law was not as stated in *He Kaw Teh* with respect to the middle ground, but was marginally more favourable to the defendant. For the defendant to claim lack of knowledge, he would need to point to some evidence suggesting otherwise, but would not have to satisfy the court that he had reasonable grounds for his belief in circumstances inconsistent with knowledge. In the absence of such evidence the offence would be inferred to have been committed knowingly. *Millar* has a further significance. *Dickson*, upon which the prosecutor did rely, and upon which the magistrate may well have relied in coming to his conclusion that the s61 offences were absolute liability, was concerned with a legislative provision framed quite differently from s61. But *Dickson* was decided before *He Kaw Teh* and *Millar*, which have somewhat altered the approach to the analysis of what must be established when dealing with charges of the kind in question here.

From what was said in *He Kaw Teh*, I am satisfied that, when addressing the issue of the appropriate classification of an offence created by a statutory provision, I should have regard to, at least, the proper construction of the section, the mischief which the section is designed to remedy, the context in which the section stands in the statute, the subject matter of the statute itself, and whether putting **[17]** the defendant under absolute liability would assist in the enforcement of the statute.

There can only be a limited benefit to be gained by examining the different circumstances in which courts have gone about this exercise with other statutory provisions. That limited benefit lies in becoming better acquainted with the process. The process resulted in a full *mens rea* classification in *He Kaw Teh* as to an offence under the *Customs Act* of importing heroin. In *Welsh* and *Kearon*, the two Victorian cases I earlier referred to, the analysis resulted in the classification of the offence being considered as one of strict liability. *Welsh* was decided before *He Kaw Teh*. *Kearon* was decided after, but without reference to *He Kaw Teh*.

Then there are the cases in which the analysis resulted in a classification of the offence as one allowing for an "honest and reasonable belief" defence. They include *Chiou Yaou Fa v Morris* [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342, as to an offence under the *Fisheries Act* of being in the Australian Fishing Zone, *R v Wampfler* (1987) 11 NSWLR 541; (1987) 34 A Crim R 218, as to an offence under the *Indecent Articles and Classified Publications Act* of publishing an indecent article, *Caralis & Ors v Smyth* (1987) 34 A Crim R 193; (1988) 65 LGRA 303, as to an offence under the *Heritage Act* of demolishing a building protected by a heritage order, *Binskin v Watson* (1990) 48 A Crim 33, as to an offence under an ordinance under the *Local Government Act* of driving an overweight vehicle, and *Jiminez v R* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292, as to an offence under the NSW *Crimes Act* of culpable driving.

[18] Not without reservation, I have concluded that offences under s61 are to be given a full *mens rea* classification, that is that they are to be treated as requiring the appropriate mental element to be proved as an essential ingredient of the offence. Before I state the reasons why I have reservations, and why I have nonetheless come to the conclusion I have, I would make these comments as to s61 and the Act in which it appears. The Act draws together a number of provisions directed at safer, more responsible driving. Other parts of the Act are more focused than Part 6, which contains s61. Part 6 covers a variety of offences. A broader construction might be seen to be needed given that the words have to cover diverse situations. Section 61 is framed to achieve a number of purposes. One purpose is to maximise the prospect that any person injured in a motor vehicle accident is appropriately assisted and that the owner of any property damaged in such an accident is appropriately informed. Another purpose is specify the obligations which the law imposes on the driver of a vehicle involved in an accident. Another is to spell out, with somewhat more than the usual attention to detail in sub-ss(3) to (7), the penalties for breach of those obligations. With the references in the section to damage to property, there is also a reference to the owner of the property, which may be thought to leave uncertainty as to the position where the ownership of property damaged is not, or not readily ascertainable.

I have reservations for more than one reason. The offences which are the subject of Part 6 are not totally **[19]** dissimilar from the "traffic" offences which were not only the subject of analysis in *Welsh* and in *Kearon*, but were classified as "strict liability" offences. "Hitrun" incidents, although relatively rarer, are a matter of community concern in much the same way as speeding drivers and overweight vehicles. The word "knowingly" or a like word does not appear in the section. There is said to be a trend towards classifying offences in the middle ground. In *Wampfler*, Street CJ at p224, said:-

> "There is a discernible trend in modern authorities away from construing statutes as creating absolute liability and towards recognising statutory offences as falling within the middle or second category – that is to say the category in which the prosecution must negative the honest and reasonable belief in innocence if there is sufficient basis advanced to be capable of raising a reasonable doubt of such belief."

I have nonetheless concluded that s61 charges are not in the middle ground. That is partly because of my assessment of the relative seriousness of the offences created by the section, as reflected in the penalties imposed, which are relatively harsh, and partly because what has been said in the "failing to stop" cases from *Hubbard* through to *Barker* is strongly supportive of a full *mens rea* categorisation, although the courts did not directly carry out a categorisation analysis. I have taken particular note of Newton J having said in *Barker* that the offence of failing to stop "does involve an element of *mens rea*".

Mr Webb sought to rely upon the decision of the High Court in *Kingswell v R* [1985] HCA 72; (1985) 159 CLR 264; 62 ALR 161; (1985) 60 ALJR 17; 19 A Crim R 65, in support of his submission that *mens rea* was an essential element. *Kingswell* certainly illustrates the need for special care in interpreting a legislation provision, like s61, which provides **[20]** for a different range of penalties depending upon different circumstances. In *Kingswell*, the High Court accepted that there was a general principle that, where an offence was punishable more severely if there were aggravating circumstances, those circumstances must be the subject of the charge or of an admission. While the majority of the Court in *Kingswell* recognised the potential for injustice in a situation where graded penalties were imposed, they also, at p276, made it clear that Parliament had the final say, and could so frame legislation as to permit the existence of a particular circumstance to increase the range of punishment available without altering the nature of the offence. As I construe s61, it has been deliberately framed in such a way. It seems to me that the graded penalty provisions of s61 were framed to achieve a similar result to that which was seen by the High Court to have been achieved in s235(2) of the *Customs Act*, which was examined in *Kingswell*.

Mr Webb also sought to rely upon what was said in *R v Westaway* (1991) 52 A Crim R 336, where the Victorian Court of Criminal appeal held that the offence of intentionally causing serious injury under s16 of the *Crimes* Act required evidence of intention to cause serious injury, and not just evidence of an intention to cause an act which in fact caused serious injury. From that proposition, he argued that the prosecution on a s61 charge was required to establish *mens rea* for the consequences of the criminal act, and not just for the act. He submitted that it could not be correct that the *actus reus* could be the failure to do one act, namely "not stopping after

being involved in an injury-causing accident", while the **[21]** *mens rea* could be as to a different act, namely "not stopping after knowingly being involved in a property damage-causing accident". I did not find *Westaway* helpful, essentially because of the different kinds of exercises in statutory construction involved. It is not enough to conclude that with an offence, the element of *mens rea* must be proved without addressing the further questions with respect to that particular offence, of what the essential elements of that guilty mind are, and how are those elements proved? If knowledge of circumstances is an element, must there be actual knowledge, or will it suffice if there is shown to be 'wilful blindness', as where a person has deliberately refrained from making inquiries because he prefers not to have the result, wilfully shutting his eyes for fear that he may learn the truth?

In *He Kaw Teh*, and in *Bahri Kubal v R* [1987] HCA 16; (1987) 162 CLR 502; 70 ALR 658; 29 A Crim R 12; 61 ALJR 239, *Saad v R* [1987] HCA 14; (1987) 70 ALR 667; (1987) 61 ALJR 243; (1987) 29 A Crim R 20 and *Pereira v DPP* [1988] HCA 57; (1988) 82 ALR 217; (1988) 63 ALJR 1; (1988) 35 A Crim R 382, the High Court said much that was relevant to those questions, in the course of scrutinising the position relative to drug importation charges under the *Customs Act*. I note first the warning given in *Bahri Kubal* at p505 as to the importance of not transforming matters of fact into propositions of law. In *Bahri Kubal* at pp504 and 505, the High Court said:-

> "Because the mental elements in different crimes vary widely it is impossible to make a statement which is universally valid for all purposes about the essential elements of a guilty mind. Depending upon the nature of the particular offence the requirement of a guilty mind may involve intention, foresight, knowledge or awareness with respect to some act, circumstance or consequence ... What we have said is **[22]** designed to emphasise that the existence of the requisite intention is a question of fact and that in most cases the outcome will depend on an inference to be drawn from primary facts ..."

In an article published in (1991) 15 Crim LJ 5 at p15, Sir Daryl Dawson, after referring to *Bahri Kubal* and *Pereira*, said:-

> "It was made clear in those two cases that, whilst knowledge as an ingredient of an offence may be established by inference, it must be established as fact. If the term 'wilful blindness' is used merely as a shorthand expression to indicate circumstances which warrant the drawing of the necessary inference, then it is acceptable. But it is unacceptable if it is used as a basis for imputing knowledge where actual knowledge is not proved ... At the most, wilful blindness might be evidence of the actual knowledge or foresight of the accused."

Taking what has been said above and seeking to apply it in the context with which I am concerned, it seems to me first that there are different essential elements of the guilty mind in relation to the three offences in question in this case. It seems to me that, as to each of the offences under s61, there is a knowledge element and an intention element. There must be proved actual knowledge of certain circumstances prescribed by the statute, and an intention to omit to take certain actions required to be taken by the terms of the statute. Whether there is the actual knowledge and the intention are questions of fact which may be inferred. I leave to one side the matter of the proof of the intention element, and focus only on the knowledge element.

It seems to me that, to establish an offence under sub-ss(b) and (e) of s61, it must be proved that there was actual knowledge on the part of the driver both that there had been an accident and that in that accident a person had been injured. **[23]** It seems to me that, to establish an offence under sub-ss(a) of s61, it must be proved that there was actual knowledge on the part of the driver both that there had been an accident, and that in that accident either a person had been injured or property had been damaged or destroyed. Given the findings of the learned magistrate as to Robinson's knowledge, that is that Robinson knew he had been in a collision, that he did not know that he hit a person, but that he believed that he had hit a guard-rail, I am satisfied that those findings are enough to enable me to deal with the charges under sub-ss(b) and (e), by directing that those charges should be dismissed.

The position with respect to the charge under s61(a) is not so straightforward, having regard to a decision not cited to the magistrate, on which Mr Webb relied before me. He urged me to accept that *Wilde v Preston* [1963] VicRp 61; [1963] VR 429 was authority for the proposition that, on any prosecution for an offence under s61(a), the prosecution must show that there was

appreciable damage to property other than the car of the accused. He argued that the corollary was that there must also be shown to have been knowledge on the part of the accused that there had been such appreciable damage.

In *Wilde v Preston*, Sholl J made absolute an *order nisi* to review a decision by a magistrate to convict on prosecutions under the then legislative provision (s80 of the *Motor Car Act*) relating to offences of failing after an accident to stop, to render assistance, and to provide the required particulars. Sholl J said this at pp433 and 435:-

> " ... the onus was on the prosecution to exclude the possibility that there was a brushing of the cars **[24]** which did not cause any appreciable damage to Hinshelwood's car ... the order must be made absolute with regard to all four informations under s80, since there is not sufficient evidence of damage to property for the purposes of the section."

There is only the one reference made by Sholl J to "appreciable damage". However, it does seem to be essential to the decision he arrived at that he found that there was no appreciable damage. It appears that he was faced with only an apparently trifling scrape between two vehicles travelling in the same direction. I accept the proposition that there is a need for there to be damage that is appreciable, which is consistent with the general approach of the law to matters which are *de minimis* or trifling. The circumstances of this case are quite different from those in *Wilde v Preston*. But there are countervailing considerations. On the one hand, Robinson heard a bang, and found his car skidding out of control across a median strip towards cars travelling on the opposite side of a freeway. *Prima facie*, the drawing of inferences first that those consequences could only have been caused by an impact causing appreciable damage, and secondly that Robinson would have known that, would seem to me to be inescapable.

On the other hand, Robinson was able to keep driving and he believed that he had hit a guard-rail, which is an item designed to withstand a heavy impact without appreciable damage. Given those and other considerations noted below, I take the view that the drawing of the inferences of appreciable damage, and of knowledge of appreciable damage, is not inescapable. I would add, although not relevant in this context, that damage to a guard rail as an item of property of a road authority is not to be treated as if it was damage to unowned property. **[25]** The question as to whether an inference ought reasonably to be drawn brings me back to what I have noted above as to what was said in *Bahri Kubal* and written by Sir Daryl Dawson to the effect that the existence of the requisite mental element is a question of fact likely to depend on an inference to be drawn from primary facts, with wilful blindness being perhaps evidence of actual knowledge or the appropriate mental element.

There are a number of aspects of the circumstances of this particular case which are unusual. Those unusual circumstances are relevant to the reasonableness of the inferences properly to be drawn. One of the circumstances was that the accident occurred on a freeway. Being on a freeway is a circumstance which, it seems to me, is significant in a number of respects. Freeways are designed, and the laws relating to freeways are framed, so as to minimise the prospect that a motorist will collide with a pedestrian on a freeway. Measures are taken which are calculated to exclude pedestrians as far as is possible. Freeways are designed to minimise the risk that vehicles will collide with any property while on them. Apart from other vehicles, the property of the road construction authority (culverts, bridges, signs, guard-rails) is almost the only property which is at risk. Freeways are designed so as to facilitate high speed driving and to inhibit stopping and reversing. Generally speaking, the only lawful and safe way to return to a point already passed on a freeway will be to continue to the next exit, leave the freeway, take an overpass or the like, re-enter the freeway, travel in the opposite direction to the next exit available in that **[26]** direction, and then exit and re-enter the freeway again travelling in the original direction.

Another of those circumstances was that the accident initiated a traumatic series of events which required Robinson to take measures to avoid risk of serious injury to himself and others on the eastbound traffic side of the freeway. It could only have been after Robinson had got past a time of intense concentration on the taking of measures to gain control of the car he was driving, to steer it to as avoid a head-on collision and to get it back onto the correct side of the road, that he could reasonably have been expected to have had time to analyse, and seek to draw inferences as to what had happened.

The third of those circumstances was that the car Robinson was driving continued to be capable of being driven as if it had not been damaged. Having noted those matters which seem to me to operate quite strongly against drawing the inference that Robinson must have known that he had been in an accident in which appreciable damage had been caused, I come back to the circumstances which operate the other way. It is clear from what Robinson said in the record of interview that the noise that he heard was a loud one. It is also clear that he was aware that the car's change in direction was a major one. If those two matters had not had to be taken with the other matters I have detailed, as if the collision had occurred in a suburban street with no other traffic about, it seems to me that the drawing of an inference as to the driver's state of mind would be inescapable. **[27]** Because I am not able to form a satisfactory conclusion on the material before me, and because the learned magistrate has evidence available to him that I do not have, I have concluded that the most appropriate course is for me to refer back to him the further consideration of this matter.

I turn briefly to the fourth of the questions posed in the Master's order, as to whether the learned magistrate erred in sentencing Robinson in imposing an aggregate fine for all the charges. The learned magistrate appears to have applied s51 of the S*entencing Act*. Mr Webb submitted that he was not justified in doing so. Section 51 provides:-

> "51. Aggregate fines
> If a person is found guilty of two or more offences which are founded on the same facts, or form, or are part of, a series of offences of the same or a similar character, the court may impose one fine in respect of those offences that does not exceed the sum of the maximum fines that could be imposed in respect of each of those offences."

Behind s51 lies the aim of providing an exception to the general rule that a separate sentence must be passed on each count. That exception could be seen to be useful in permitting appropriately linked criminal conduct to be reviewed as a whole, in the context of multiple charges from the same facts or that of multiple offending, rather than a narrow focus on each individual offence. The formulation of the test contained within the section mirrors that in Rule 2 of the presentment rules in the Sixth Schedule of the *Crimes Act*. That rule was the subject of a limited analysis in *R v Smart* [1983] VicRp 22; [1983] 1 VR 265; 6 A Crim R 192, where it was said, at page 282:- **[28]**

> "Offences containing different ingredients may form part of a series and may be offences of the same or a similar character. Consideration must be given not only to the form of the presentment but also to the evidence to be adduced to support the charges. As it is put in some of the authorities, there has to be some nexus between the offences charged."

I considered whether any guidance in making an assessment of similarity of the character of offences might be obtained from looking at the apparently analogous context of determining whether or not concurrent sentences should be imposed. I have satisfied myself that the cases reviewed in *Fox & Frieberg* at and after p368 provide no real assistance to me, although I did note that in *R v Brown* (Victorian Court of Criminal Appeal, 10 August 1978, unreported), it was stated:- "The fact of similar character in the offences does not produce any necessary justification for a concurrency order. The two offences here were quite separate in time".

In the instant case, the offences are linked in at least two respects. There is the "continuing episode" link in that the facts giving rise to the offences have occurred within a matter of seconds. There is also the circumstance that both of the offences involve a failure to act appropriately in the course of driving a motor vehicle. One the other hand, I take into account that some of the offences are for conduct proscribed under different Acts, and that there is a clear temporal separation of the conduct.

On balance, I am satisfied that, because the offences were not entirely, as distinct from somewhat, different in character, and because there was such a close temporal connection in the facts giving rise to the offences, the learned magistrate did not err in deciding to apply s51.

APPEARANCES: For the appellant Robinson: Mr L Webb, counsel. Melasecca Zayler, solicitors. For the respondent Fisher: Mr SP Gebhardt, counsel. Director of Public Prosecutions.