18/91

SUPREME COURT OF VICTORIA

STAFFORD v VAN TIEN NGUYEN

Southwell J

20 March 1991 — (1990) 52 A Crim R 173

SENTENCING – DRINK/DRIVING – REFUSING TO UNDERGO PRELIMINARY BREATH TEST – SIX OPPORTUNITIES GIVEN TO UNDERGO TEST – OFFENDER FAILED TO EXHALE INTO PRELIMINARY BREATH TEST DEVICE – CHARGE PROVEN – DISMISSED AS TRIFLING – NATURE OF OFFENCE – WHETHER DISMISSAL APPROPRIATE: *ROAD SAFETY ACT* 1986 SS49(1)(c), 53(1),(4); *PENALTIES AND SENTENCES ACT* 1985, S81.

V., when requested on 6 occasions by S., a police officer, to undergo a preliminary breath test, placed the mouthpiece of the device in his mouth but did not exhale. He was subsequently charged with an offence of refusing to undergo a preliminary breath test, the charge was found proved and pursuant to s81 of the *Penalties and Sentences Act* 1985, dismissed as trifling on the grounds that at the time of the commission of the offence V. was sober and of Asian extraction which caused his distrust of the police and his uncooperative attitude in relation to the requirement to undergo the test. Upon order nisi to review—

HELD: Order absolute. Offender convicted. Remitted to the Magistrate for further hearing.
Whilst the circumstances of each case must be looked at in deciding whether or not an offence is trifling, it would only be in very rare circumstances that the offence of refusing a breath test could be regarded as trifling. In the present case, the sobriety or otherwise of the offender was irrelevant and there were no circumstances existing whereby the magistrate could find that the offence was trifling.

[Note: See also *Stafford v Redmond* MC 54/1990. Ed.]

SOUTHWELL J: [1] Return of an order nisi to review a decision of the Magistrates' Court at Melbourne, made on 20 November 1989, the order nisi having been granted by Beach J on 20 December 1989 on a number of grounds. The defendant was before the court on an information for an offence against s49(1)(c) of the *Road Safety Act* 1986, which may shortly be described as the offence of refusing to undergo a preliminary breath test in accordance with s53 when required under that section to do so.

Section 50 of the Act imposes a penalty which includes a disqualification for a period of two years, following a conviction. Section 53(1) of the Act empowers a member of the police force at any time to require any person that he finds driving a motor vehicle to undergo a preliminary breath test. It is to be observed that the only relief from the obligation upon a driver imposed by that section is contained in subsection (4) of s53, which provides that a person is not obliged to undergo a preliminary breath test if more than three hours have passed since the person last drove or was in charge of the motor vehicle. That may be contrasted with s55 of the Act relating to what I might call 'the breath test proper' when a breathalyser is used and where, by subsection (9) of section 55, a defence is allowed where the person required to undergo the test satisfies the Court that there was some reason of a substantial character for the refusal. It may be said to be clear that the legislature did not wish to provide any loop-holes in the requirement to undergo a preliminary breath test.

[2] The facts forming the background to the prosecution are set out in the affidavit of Senior Constable McCarthy, who prosecuted in the Magistrates' Court. There has been no answering affidavit filed and the defendant has not appeared, although the plaintiff's solicitors have been in contact with the defendant's solicitors from time to time. The facts are these:

> At about 12.20 am on Saturday, 25 February, the informant, Constable Stafford, saw the defendant driving a motor car. He assembled the alcometer and requested the defendant to blow into the tube. The defendant placed the mouthpiece in his mouth but did not exhale. Then followed a series of warnings given by the informant and directions to the defendant as to the obligation that the law

> imposed upon him. The defendant appeared to block the tube with his tongue and balloon his cheeks, but at no time exhaled. During the significant period that the defendant was in the company of the informant, he appeared to suffer no breathing defects. The only reasonable conclusion to draw from the detailed evidence given by the informant was that the defendant was consciously refusing to perform the test at all, let alone to the satisfaction of the informant, as the law required him to do.

In all, the informant gave the defendant six opportunities to blow into the device. The defendant is of Asian extraction but he was able to understand English and to respond to questions in a sensible manner, although during part of the conversation, one of the defendant's passengers interpreted for him. The defendant gave evidence before the magistrate, stating that he had been ill on the day in question, that he **[3]** was scared of involvement with police because of the large number of passengers he had in his vehicle, that he had a stomach complaint on the day in question which affected his breathing and this was the reason he was unable to blow into the prescribed device to the satisfaction of the informant. He agreed that he was afforded at least six opportunities to blow into the prescribed device. He also agreed that he was licensed to drive and had been driving in Victoria for some five years. It is to be observed that his evidence that he was physically incapable of performing the test could not have been accepted by the magistrate, even to the point of creating any reasonable doubt in the magistrate's mind because, as will appear, the magistrate found the charge proved. Accordingly, this was a case where a conscious and repeated refusal to perform a test, after the legal obligation had repeatedly been explained to him, was proved against him.

In the course of a plea for leniency, counsel for the defendant submitted that the defendant should be released on a bond pursuant to s78 of the *Road Safety Act*, as it applies to s83 of the *Penalties and Sentences Act* 1985. However, the magistrate went further than counsel suggested was appropriate in all the circumstances, because he dismissed the matter as trifling, pursuant to s81 of the *Penalties and Sentences Act*. Section 81 provides that a court, if it thinks that though the charge is proved, "the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment", may, *inter alia*, dismiss the information. **[4]** The reasons given by the magistrate were, so it appears, brief. They were that the defendant was sober, cooperative in all respects other than undergoing the preliminary breath test and that, as he was Asian, his distrust of the police would have led him to be uncooperative in undertaking the preliminary breath test. The magistrate then commented that the informant had been most tolerant in his dealings with the defendant, who now "knew he had to comply with the requests of the police in these circumstances". Not surprisingly, as it seems to me, the informant sought and obtained the order nisi to which I have referred, the grounds of which may briefly be stated as ones in which it is claimed that the magistrate was wrong in law in finding that the offence was trifling and, further, that he took into account irrelevant matters or failed to take into account or give sufficient weight to other relevant matters.

Mr Dennis, who appeared in this court for the informant to move the order absolute, submitted that each of the grounds upon which the order nisi had been obtained was made out. He submitted that there was no evidence that the defendant was sober, the only evidence being that the informant did not detect the smell of alcohol on the defendant's breath and, accordingly, the magistrate reached a finding which, firstly, was irrelevant, and secondly, was not open upon the evidence. It is true that there is no evidence that the defendant appeared to be affected by liquor, and there is evidence that the informant did not detect the smell of alcohol upon his breath, but there was no evidence which **[5]** would entitle the magistrate to find that the defendant was sober, and even if there had been that evidence, it would have been irrelevant to the question as to whether the offence was of a trifling nature. That is not to say that the question whether the defendant was under the influence of liquor or was sober would be entirely irrelevant on a question relating to a plea in mitigation of the seriousness of the offence. Mr Dennis went on to submit that upon the whole of the evidence and whether or not it was open to the magistrate to find that the defendant was sober, there were no grounds upon which the magistrate could reasonably reach the conclusion that the offence was trifling. Mr Dennis was kind enough to refer me to several authorities, some of them to which I shall make brief reference.

In *Williams v May* [1908] VicLawRp 85; [1908] VLR 605 at p608; 14 ALR 504; 30 ALT 89, Hood J said:

> "An offence may be of a trifling nature in itself, or when serious the facts of the particular case may

> reduce the gravity of it, but in the latter event the mitigating circumstances ought to be very marked in order to bring this section into operation."

That statement was adopted by Little J in *Farrelly v Little* [1970] VicRp 2; (1970) VR 18 at p20, and also on that page His Honour quoted, with approval, an observation of Street J in a New South Wales case, where His Honour said:

> "There must be good and substantial ground for absolving an offender from the punishment prescribed by law for this offence."

In *Reddy v Ross* [1973] VicRp 46; (1973) VR 462 at p470, in dealing with an offence similar to that here under consideration, McInerney J said, on the question whether or not the magistrate might there have dismissed the information upon the basis that the offence was trifling,

> **[6]** "The reasons stated in the informant's affidavit do not suggest that the magistrate did in fact take that course, and whether it would, in law, have been open to the magistrate to take the view that this particular offence could in any circumstances be regarded as of so trifling a nature as to warrant the Court in exercising the powers conferred by s75, is, to say the least, open to doubt."

I respectfully adopt that observation. The passage of this legislation has for long been regarded, not only in the courts but, I think, by the community in general, as an important tool in combating the still prevalent offence of driving whilst the judgment of the driver is impaired by reason of the ingestion of alcohol. Parliament saw fit to impose a penalty of two years' disqualification of a driving licence for this offence and, while it is true that the question of triviality cannot be decided merely by looking at the minimum or maximum penalties and that the particular circumstances of each case must be looked at in deciding whether or not an offence is trifling, I would think it would only be in very rare circumstances indeed that the offence of refusing a breath test could be regarded as trifling.

The reasons given by the magistrate, in my opinion, fall far short of justification for the course that he took. The evidence simply did not disclose mitigating circumstances of a very marked character, and they could not, I think, on any view, be regarded as circumstances which must exist before the magistrate can make a finding that the offence was, indeed, trifling. For those reasons, the order nisi must be made absolute. The order of the Court below is set aside. The **[7]** Court ought not, I think, go further than that by recording a conviction, but should remit the matter to the Magistrates' Court for further hearing, according to law. The defendant to pay the plaintiff's costs.

APPEARANCES: For the plaintiff Stafford: Mr BM Dennis, counsel. Victorian Government Solicitor. For the defendant Van Tien Nguyen: No appearance.
