52/94

SUPREME COURT OF VICTORIA

DPP v ELLISON

Brooking J

18 January 1995

MOTOR TRAFFIC – DRINK/DRIVING – REFUSAL TO ACCOMPANY FOR BREATH TEST – REASON GIVEN THAT DOG DUE FOR DAILY PILL – WHETHER REASON OF SUBSTANTIAL CHARACTER – WHETHER SUCH DEFENCE AVAILABLE – DEFENCE OF NECESSITY – UPHELD BY MAGISTRATE – WHETHER IN ERROR – WHETHER SUCH DEFENCE AVAILABLE – DEFENDANT ASKED TO GO TO POLICE STATION – WHETHER REQUIREMENT: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1), 55(9).

After undergoing a preliminary breath test, E. was asked by a police officer to go to the Police Station for a breath test. E. refused saying that if her dog were not given its nightly pill for the treatment of some ailment it might drop dead. At the hearing of the charge against E. under s49(1)(e) of the *Road Safety Act* 1986 ('Act'), E. raised the defence of necessity. This was upheld by the Magistrate and the charge dismissed. Upon appeal—

HELD: Appeal allowed. Remitted for further hearing. Application for an indemnity certificate refused.
1. It was not open to the Magistrate to find on the evidence that any delay in the administering of the pill to the dog would have caused it to perish or suffer serious injury. In any event, the defence of necessity is not wide enough to embrace the circumstances of this case.

2. Whilst the Magistrate was correct in expressing the view that the defence in s55(9) of the Act did not apply to a charge under s49(1)(e), it would not have been open to the Magistrate to find that E. had shown there was some reason of a substantial character for the refusal.

3. Where there was evidence that E. had been asked by the police officer to go to a Police Station for a breath test, it was open to the Magistrate to find that there had been a requirement under s55(1) of the Act.

***Walker v DPP* (1993) 17 MVR 194; MC 2/94, referred to.**

BROOKING J: [1] Mr Albert Haddock, the litigant created by AP Herbert, is probably not as well known nowadays as he deserves to be. The present case raises the kind of point for which Haddock was renowned. The respondent was charged with an offence against s49(1)(e) of the *Road Safety Act* 1986, refusing to accompany a police constable to a police station where a sample of breath was to be furnished, a preliminary breath test having indicated in the constable's opinion that the defendant's breath contained alcohol. The defendant had a dog – it is said to have been a somewhat elderly dog – in the car and when she was prosecuted her defence was the unusual one of necessity.

The submission made by Mr Swanwick of counsel, with some encouragement from the bench, evidently was that the defendant was constrained by circumstances not to go to the police station because the time was approaching at which her dog should be given by her its nightly pill for the treatment of some ailment and because if the pill was not timeously given the dog might drop dead. Most surprisingly, this defence was upheld and the charge dismissed.

The learned magistrate has clearly gone wrong. In the first place, making all due allowances for the advantage which the magistrate enjoyed of seeing and hearing the witnesses and his right to prefer the evidence of one witness to that of another, I consider that it was not open to the magistrate on the evidence to find that the defendant's complying with the constable's request would have caused or that it was reasonably possible that the defendant's complying with the request would have caused the dog to perish or suffer serious injury for want of its **[2]** pill.

I do not think in a case of this kind I need canvass the evidence. I mention only one or two points. There was no admissible evidence that the dog suffered from any serious ailment. There was no evidence that the taking of the pill somewhat later than usual (and to say this perhaps wrongly assumes that there was evidence that it was usually taken at the same time)

would adversely affect the dog, let alone put it at serious risk. In my opinion, the point ought not to have been taken and certainly ought not to have been upheld. The defence of necessity is in any event not wide enough to embrace solicitude for the wellbeing of a dog, elderly and ailing and well-loved as that animal may be.

Then it is said in opposition to the appeal that the magistrate wrongly ruled that the defence under s55(9) of the *Road Safety Act* 1986 was not available in proceedings for an offence against s49(1)(e). By sub-s(9) of s55 a person must not be convicted or found guilty of refusing to furnish under s55 a sample of breath if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against the defendant.

The magistrate was of the view that this sub-section did not apply to an offence against s49(1)(e) and as at present advised I see no reason to doubt the correctness of that conclusion. In any event, the defendant bore the burden of proving the reason of a substantial character mentioned in the sub-section and for the reasons which I have briefly given in dealing with the necessity point, I **[3]** am of the view that, notwithstanding the findings of fact made by the magistrate here, it was not open to a magistrate to find that the defendant had shown that there was a reason of a substantial character as required by the sub-section.

Then it is said by Mr Crafti for the respondent that the dismissal of the charge should not be disturbed because dismissal was inevitable having regard to the fact that the informant had failed to prove the making of the requirement mentioned in s55(1) of the *Road Safety Act*.

In *Walker v DPP* (Full Court, (1993) 17 MVR 194, 13 May 1993) I said something about what is needed under s55(1). In my opinion the material before me discloses that it was open to the magistrate to find and indeed, obligatory upon the magistrate to find that there had been a requirement. I say this because there is evidence that the police officer requested the defendant to attend and that the officer then informed the defendant of the obligation to attend the police station and of the consequences of a refusal to do so. The defendant is said to have replied that she did not care. To ask someone to go and tell them that they are obliged to go seems to me to make a requirement on any possible meaning of the word "require".

The order of dismissal cannot stand. It is tempting to substitute a conviction. So far as the form of order is concerned, in my opinion, the evidence led was, even on the most favourable view from the defendant's standpoint, not such as to suggest that the dog point was of any merit as explaining the defendant's refusal as opposed to excusing **[4]** it legally by way of defence. I find it difficult to see why the defendant should escape conviction as a result of the making of some order which does not result in a conviction.

The provisions of possibly relevant legislation have not been fully canvassed before me and I think on the whole, however, that my proper course is not to convict but to require the matter to be dealt with on the basis that the offence ought to have been found proved.

In my opinion the proper order is one which allows the appeal, sets aside the order of the Magistrates' Court at Prahran made on 23 September 1994, remits the case to that court for further hearing upon the basis that the defendant ought to have been found guilty of the offence charged and requires the respondent to pay the costs of the appeal including costs reserved. That is the order which I make.

[After discussion ensued concerning costs, His Honour continued]... **[5]** I have a clear view that I should not grant an indemnity certificate in this case. The point taken below was an idle one, supported neither by the evidence nor by the law.

APPEARANCES: For the appellant DPP: Mr SP Gebhardt, counsel. PC Wood, solicitor for the DPP. For the respondent Ellison: Mr N Crafti, counsel. Mr W Woolcock, solicitors.
