20/90

SUPREME COURT OF VICTORIA

FRANCIS v RICE

Gobbo J

15 January 1990

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT INVOLVED IN MOTOR VEHICLE ACCIDENT – TAKEN TO HOSPITAL – REFUSED TO ALLOW TAKING OF BLOOD SAMPLE – WILLING TO UNDERGO BREATH TEST – WHETHER GOOD CASE FOR REFUSAL – WHETHER REQUEST FOR BLOOD SAMPLE TO BE MADE WITHIN A CERTAIN TIME: *ROAD SAFETY ACT* 1986, SS55(9), 56.

At 10:15 p.m. R. was found at the scene of a motor vehicle accident. He was conveyed to hospital where, at about 11:50pm as a result of a request's being made, refused to allow a medical practitioner to take a sample of blood from him. However, R. indicated that he was prepared to submit to a breath analysis. R. was subsequently charged with refusing to allow the taking of a blood sample pursuant to s56(7) of the *Road Safety Act* 1986 ('Act') and at the hearing, the Magistrate upheld a 'no case' submission on the grounds that the defendant had a reason of a substantial character for refusing to give a blood sample and that no valid request was made in that it was not made within 3 hours after driving. Upon order nisi to review—

HELD: Order absolute. Remitted for further hearing.
(1) The defence under s55(9) of the Act namely, that the person charged had a substantial reason for refusing, applies to cases of refusing to give a sample of breath for analysis, and there is no basis for saying way of analogy, that the defence is open to a person charged with failing to allow the taking of a blood sample.

***Daire v Rollins* (1982) 30 SASR 156; MC 36/1983, referred to.**

(2) The obligation on medical practitioners to take blood samples from persons admitted to hospital following a motor vehicle accident is not limited to drivers, but can extend to passengers or injured persons. Further, no express time limit is provided as to when the sample should be taken; however, it should be taken within a reasonable time after admission to hospital. Accordingly, the magistrate was in error in dismissing the charge on the basis that the blood test had to be requested within 3 hours after driving.

***Mesley v Ralte* (1988) 7 MVR 170; MC 16/1988, referred to.**

GOBBO J: [1] This is the return of an order nisi to review calling upon the defendant, Ian Hamilton Rice, to show cause why a decision of the Magistrates' Court at Moe made on 31st July, 1989 dismissing an information on the part of the plaintiff Constable Andrew Francis against the defendant should not be reviewed. The charge was one under s56(7) of the *Road Safety Act* 1986. Sub-section 2 provides as follows:

> "If a person of or over the age of 15 years enters or is brought into a designated place for examination or treatment in consequence of an accident involving a motor vehicle, the legally qualified medical practitioner who is first responsible for the examination or treatment of that person, must take or cause to be taken by another legally qualified medical practitioner from that person a sample of that person's blood for analysis, whether or not that person consents to the taking of it, unless in the opinion of the legally qualified medical practitioner who is first responsible for the examination and testing of the person the taking of a sample of that person's blood would be prejudicial to the proper care and treatment of that person."

The sub-section had been amended by Act No. 78 of 1987 and also by Act No. 53 of 1989 but this latter amendment is not relevant for the purposes of this case.

The ingredients of the information, which were subject of this argument that I will shortly advert to, were laid in evidence before the Stipendiary Magistrate, and at the conclusion of the case for the informant the learned Magistrate accepted an argument that there was no evidence that the blood test was requested of the defendant within three hours of the happening of an accident. As a matter of background, it should be noted that the informant had given evidence before the **[2]** Magistrate that at about 10:15 on 23rd July, 1988, he went to the scene of an accident and

interviewed the defendant who had been involved in an accident and was still at the scene. There was no evidence as to what time that accident had occurred. The constable gave evidence that the defendant appeared to have consumed intoxicating liquor and was also suffering from an injury and was taken to the LaTrobe Valley Hospital, where, at about 11:50 p.m. on that night, the doctor on duty at the Casualty Section of the LaTrobe Valley Hospital examined the defendant and requested that he provide a sample of his blood. The defendant refused to do so, and it is that refusal that was the subject of the charge laid against the defendant under s56 of the *Road Safety Act* 1986.

There is no dispute before the Magistrate or before me that the evidence before the Magistrate did not establish at what time the accident had occurred and that if it was an ingredient of proof of the offence the sample of blood must have been requested within three hours of the driving of the vehicle, then such ingredient was not able to be made out. On behalf of the informant, for whom Miss Millane appeared, it was submitted that s56 is a section that has to be construed in the light of its own terms, and although regard must be had to the other provisions of the same Act, it is clear that s56 differs in critical terms from the other provisions in the *Road Safety Act*, in that it does not refer to the taking of samples of blood for analysis from a driver of a motor car but casts its operations over all persons who attend a designated hospital for examination **[3]** or treatment in consequence of being involved in a motor vehicle accident.

It is clear enough, as was submitted, that s56(2) may oblige a passenger in a vehicle involved in an accident giving a sample of blood. The offence provision of the *Road Safety Act* that is directly relevant in this case is s56(7) which is in these terms:

> "A person must not refuse to allow or fail to allow a legally qualified medical practitioner to take a sample of blood in accordance with this section or hinder or obstruct a legally qualified medical practitioner attempting to take a sample of the person's blood or the blood of any other person in accordance with this section.

Again, it was submitted by counsel for the informant that this provision is in wide terms and refers to and casts an obligation on any person and not simply on a driver of a vehicle. The obligation is cast upon any person not to refuse or fail to allow a sample of blood in accordance with this section. Otherwise, if the sub-section was taken alone, for example, it would not be tied to a person who was referred to in the earlier provision of s56, namely, a person over the age of 15 years and one who was brought to a designated place for examination or treatment in consequence of an accident involving a motor vehicle.

Section 56 provides a number of defences in relation to any claim by a legally qualified medical practitioner that he or she has not committed an offence by failing to take a blood sample in circumstances set out in the section. **[4]** Section 56, however, does not in terms set out grounds for a defence on the part of the person the subject of the blood sample request.

The arguments put to the learned Stipendiary Magistrate for the defendant fell under two headings. The first argument put to him was that there not being evidence that the sample was requested within three hours of driving then there could not be a valid request made. Therefore, the section which creates the offence did not operate. The second argument put was one based upon reliance upon a decision of the Full Court in South Australia in *Daire v Rollins* (1982) 30 SASR 156.

This second argument, which was that upheld by the learned Stipendiary Magistrate, turned on accepting a view that there was a choice open to this defendant as between a blood test and a breath analysis and that he having indicated that he was prepared to submit to a breath analysis but not to the taking of blood, accordingly, by analogy with the decision in *Daire v Rollins*, he had a good defence. It is clear that in *Daire v Rollins*, with respect to the learned Magistrate, the Court did not decide that there was any such choice in relation to a charge of failing to submit to a blood test under the equivalent provision to s56. Rather, it was dealing with a provision analogous to s55(9) of the *Road Safety Act*, which enables a person to rely upon a defence of reasonably refusing to give a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for that refusal.

[5] It was that provision which fell to be decided in *Daire v Rollins* and it was simply an

illustration in that case that, having regard to the confusion that had been caused by the informant and in the mind of the defendant, the defendant had in the circumstances of the case good cause for refusal. It is clear that the decision afforded no support for the argument put to the learned Stipendiary Magistrate and that there was no basis for the learned Stipendiary Magistrate finding that there was any defence open to this defendant based upon any analogous argument.

I should point out that although the grounds of review included a review of the Magistrate's decision on this matter, Mr Gebhardt, who provided an admirably succinct and forceful argument, indicated at the outset that he did not propose to argue against those grounds of the order nisi or to contend that the learned Magistrate was entitled to dismiss the information upon that basis. The matter therefore falls to be decided on the question as to whether or not the blood test had to be requested within three hours of driving. Mr Gebhardt submitted that when one considered the whole of the context of Part 5 of the *Road Safety Act* and the specific provisions of s49, including in particular s49(1)(f) and (g), which are specific offences, both of them referring to the taking of samples within three hours of driving, that the provisions of s56 had to be read in the context of all those sections, and if so read led to the result that a sample had to be requested within three hours.

[6] It was submitted on behalf of the respondent that if no such time limit was read into s56 in its operation then the result would be that there would be no effective time limit and that a blood sample could then be taken at any time, possibly even days or weeks after the driving of the vehicle. In my view that argument should not be accepted for the following reasons. In the first place it is clear that s56 is different in character from the sections that surround it, in that it is directed to the taking of blood samples by legally qualified medical practitioners responsible for treatment of persons admitted to hospitals. The obligations on the medical practitioners to take these samples and the obligations to give samples are not limited to drivers, and specifically cover any person, and therefore would cover passengers in motor vehicles or even injured pedestrians. Furthermore, s56(2) does not itself readily lend itself to an operation that postulates the request for a blood test only being made within three hours of driving.

There is undoubted difficulty in its practical operation as a provision if the medical practitioner has not only to decide in the case of those involved in the motor vehicle collision, who was the driver and who was a passenger, but must also go further and make a decision as to the time of driving. I appreciate that a medical practitioner might in securing a medical history seek to ascertain in the normal course the time when the accident occurred, but that does not, however, require great **[7]** precision on the part of the medical practitioner. The practitioner must only act to take a blood sample where the section permits it, and it seems to me that one should not read in provisions that have a measure of precision about them that will reduce either completely or substantially the effect of this provision, unless one is driven to by clear language. I do not see that the context of the legislation compels that situation.

It was urged that the new provisions in the *Road Safety Act* really had the effect of codifying the taking of samples of blood from drivers of motor cars and that accordingly, unless the sample was taken within three hours after the person drove or was in charge of the motor vehicle, then such a sample would not be admissible. The difficulty about that argument is that in itself it is inconsistent with the terms of s57(2) which, after setting out the circumstances there, goes on the say "without affecting the admissibility of any evidence which might be given apart from provisions of this section."

In my view, as was indicated by the Full Court in *R v Cheer* [1979] VicRp 53; (1979) VR 541, that type of saving provision illustrates that these are evidentiary provisions that are not substantively a codification of the circumstances under which blood samples may be used. It would be an odd result if in no circumstances could a blood sample be used that was taken more than three hours after driving, because it would possibly preclude a defendant who had had such a blood sample taken by his own medical practitioner from being able thereafter to call evidence, **[8]** presumably supported by expert testimony, that the nature of the consumption of alcohol that occurred and the evidence of the sample combined to show that he could not have been in breach of any of the relevant provisions at the relevant time.

Returning to s56 and the argument that was put, that the absence of a three hour provision

leaves the section without a time limit, as to that argument, as I indicated during the course of argument, I took the view in an earlier decision under the *Motor Car Act*, namely *Mesley v Ralte* (1988) 7 MVR 170, that there was no express time limit laid down in the section in relation to the taking of sample, and accordingly, in relation to the request for samples the view that I reached in that case, although it dealt with quite different circumstances to those that are before me, was that the appropriate and necessary course was to read into the section that the blood sample was to be taken within a reasonable time of the matters arising under the section.

Of course, as was pointed out in argument, the sections of the *Road Safety Act* and in particular the new provisions in s49, are different from those in Part 6 of the *Motor Car Act*, which Part 5 of the *Road Safety Act* repealed, and substantially replaced. Section 56 itself is not in very different terms from its predecessor in the *Motor Car Act*. That predecessor similarly did not, as I have already indicated, have a time limit for its operation laid down, except by implication. **[9]** In my view the more sensible and consistent implication is one that it be a blood sample requested within a reasonable time rather than one that ties s56 to the driving provisions of other sections and thereby limits of course the effectual operation of s56 itself.

In all of those circumstances, I therefore conclude that the learned Stipendiary Magistrate was in error in dismissing the information, and in indicating he would have dismissed the information in any event on the basis that there was no evidence of the sample being requested within three hours of driving. It follows therefore that the order nisi should be made absolute.

APPEARANCES: For the plaintiff Francis: Ms Millane, counsel. Gordon Lewis, Victorian Government Solicitor. For the defendant Rice: Mr SP Gebhardt, counsel. Anderson Rice, solicitors.
