34/13; [2013] VSCA 233

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v DOVER and THE COUNTY COURT of VICTORIA

Maxwell P, Tate JA and Garde AJA

16 May, 4 September 2013

MOTOR TRAFFIC – DRIVING OFFENCE – ACCUSED FELL OUT OF MOTOR VEHICLE WHILE DRIVING – STRUCK HEAD VERY HARD WHEN HIT ROAD – AT HOSPITAL, REFUSED TO ALLOW DOCTOR TO TAKE SAMPLE OF BLOOD – PROSECUTION MEDICAL EVIDENCE SUGGESTED REFUSAL MAY HAVE BEEN DUE TO SEVERE HEAD INJURY – TRIAL JUDGE DECIDED REFUSAL NEED NOT BE CONSCIOUS AND VOLUNTARY – ACCUSED CONVICTED AND SENTENCED – ON APPEAL FINDING THAT JUDGE ERRED IN LAW ON FACE OF THE RECORD – WHETHER VOLUNTARINESS AN ELEMENT OF THE OFFENCE – APPLICATION OF PRINCIPLE OF LEGALITY TO INTERPRETATION OF STATUTORY OFFENCES, INCLUDING DRIVING OFFENCES – MATTER REMITTED TO TRIAL JUDGE TO DETERMINE WHETHER THE CHARGE SHOULD BE DISMISSED – 'ALLOW' – MEANING OF CONSIDERED – APPEAL TO COURT OF APPEAL – OBLIGATION TO ALLOW THE TAKING OF A BLOOD SAMPLE – COMMON LAW PRESUMPTION THAT CRIMINAL LIABILITY ATTACHED ONLY TO ACTS OR OMISSIONS THAT WERE VOLUNTARY – COMMON LAW PRESUMPTION NOT DISPLACED – WHETHER APPEAL JUDGE IN ERROR: *ROAD SAFETY ACT* 1986 (VIC) S56(2), (5).

HELD: Appeal dismissed.

1. The authorities establish, and it is consonant with principle, that an accused person is not guilty of a crime if the deed which would constitute it was not done in the exercise of a will to act.
***Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488;**
***Kroon v R* (1990) 55 SASR 476; (1990) 12 MVR 483; (1990) 52 A Crim R 15; and**
***Edwards v Macrae* (1991) 14 MVR 193, followed.**
***Wallin v Curtain* (1998) 27 MVR 356; (1998) 100 A Crim R 506; and**
***Hammond v Lavender* (1976) 11 ALR 371; (1976) 50 ALJR 728, considered.**

2. Section 56(2) of the *Road Safety Act* 1986 ('Act') imposes a positive obligation to allow the taking of a blood sample and it does not in its terms specify whether a contravention involves a 'failure to allow' or a 'refusal to allow'.

3. The DPP was unable in this appeal to demonstrate that the presumption that the criminal law only punished conduct which was voluntary had been displaced in the context of s56(2) of the Act. To 'allow', in the context of the section, meant to 'permit', and it necessarily involved a person acting consciously and voluntarily. The Parliament has not made manifestly clear an intention to override the strong and long-established presumption of voluntariness in relation to criminal offences.

4. The presence of the exception in sub-s(5), which provided that a person is deemed to allow the taking of blood if unconscious or unable to communicate, reinforced this point: it was because the person was incapable of conscious or voluntary action that he or she must have been deemed to allow the taking of blood in order to avoid any legal consequences which might accrue to the doctor for taking a person's blood in those circumstances. This subsection provided an exception to the general rule that, in this context 'a choice was presented' — the person may, consciously and voluntarily, elect to allow the taking of a blood sample or refuse to allow the doctor to take a sample.

5. Accordingly, the appeal judge was correct in concluding that voluntariness was an element of the offence created by s56(2) which, if raised as a fact in issue by the defence, had to be established beyond reasonable doubt by the prosecution.

MAXWELL P:

1. My reasons for joining in the orders made on 16 May 2013 are fully set out in the judgment of Tate JA, which I have had the advantage of reading in draft.

TATE JA:

Introduction

2. The question at the heart of this appeal is whether, for the purposes of proving that a person

involved in a motor vehicle accident has not allowed a doctor or approved health professional to take a sample of blood contrary to s56(2) of the *Road Safety Act* 1986 ('the Act'), the prosecution is required to establish that the contravention was voluntary. In the trial division of the Court, Bell J held that the prosecution was so required.[1] The appeal was heard on 16 May 2013 and the Court ordered that the appeal be dismissed. I now set out my reasons.

History of proceedings

3. Deborah Dover ('Dover') was convicted of an offence under s56(2) of the Act in the Magistrates' Court. A fine was imposed, and Dover was disqualified from driving for a period of four years. On an appeal *de novo* to the County Court, Judge Chettle made orders in identical terms to those imposed by the magistrate, holding that voluntariness was not an element of the offence created by s56(2). In judicial review proceedings in the Supreme Court,[2] Bell J quashed the orders of Judge Chettle on the basis that voluntariness was to be treated as an element of the offence, and remitted the matter to the County Court for hearing and determination according to law.[3] The Director of Public Prosecutions (the 'DPP') appealed on behalf of the informant, Senior Constable Michael Doyle.

The legislative framework

4. Section 56(2) of the Act provides:

> If a person of or over the age of 15 years enters or is brought to a place for examination or treatment in consequence of an accident (whether within Victoria or not) involving a motor vehicle, the person must allow a doctor or approved health professional to take from that person at that place a sample of that person's blood for analysis.
> Penalty: For a first offence, 12 penalty units;
> For a second offence, 120 penalty units or imprisonment for 12 months;
> For any other subsequent offence, 180 penalty units or imprisonment for 18 months.

5. Section 56 is one of a range of statutory provisions found within Part 5 of the Act. Part 5 deals with offences involving alcohol and other drugs. The application of s56 is to be interpreted with reference to the objects of that Part, which are set out in s47:

> The purposes of this Part are to—
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
>
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
>
> (c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol; and
>
> (d) provide a simple and effective means of establishing the presence of a drug in the blood, urine or oral fluid of a driver.

6. Section 56(3) provides that, upon finding a person guilty of the offence created by sub-s (2), the court must cancel that person's driver's licence or permit and disqualify the offender from obtaining one for the time that the court thinks fit, for a period not less than two years in the case of a first offence, and four years where it is a subsequent offence.

7. Sub-sections (4)(a)-(d) set out the circumstances in which sub-s(2) does not apply.[4] Sub-section (5) contemplates the circumstances in which a person to whom sub-s(2) applies, and who is unconscious or otherwise unresponsive, is to be deemed to allow the taking of a blood sample: A person to whom sub-s(2) applies and who is unconscious or otherwise unable to communicate must be taken to allow the taking of a sample of his or her blood by a doctor or approved health professional at a place which he or she enters or to which he or she is brought for examination or treatment.

8. Sub-section (6) prohibits the use of the evidence of the taking, analysis or results of a blood sample except for the purposes of s57.[5] Section 57 has the effect of permitting use of such evidence in the event, for example, that the question of whether any person was or was not at any time under the influence of intoxicating liquor or other drug is relevant to a trial for murder, manslaughter, or negligently causing serious injury arising out of the driving of a motor vehicle, or to offences against the person which involve the driving of a motor vehicle, or to a trial for

culpable driving causing death or dangerous driving causing death or serious injury, or to a trial for offences involving driving under the influence of alcohol or drugs, or relevant to coronial inquests.

9. Sub-section (7) makes it an offence for any person to 'hinder or obstruct a doctor or approved health professional attempting to take a sample of the blood of any other person' in accordance with s36. Sub-section (8) deals with the circumstances in which a treating medical professional will be absolved of legal responsibility for taking blood he or she reasonably thought was required or allowed to be taken.

Circumstances of the offending

10. At around 12.45am on 5 December 2007 a witness driving on Dorset Road in Boronia saw something fall out of the driver's side of a van travelling the opposite way ('the accident'). After completing a U-turn, the driver came upon the respondent, Deborah Dover ('Dover'), lying on the road. The van had continued to travel some distance before coming to a stop.[6] After placing the hazard lights of her vehicle on to ward off oncoming traffic, the witness approached Dover and attempted to speak to her, but received no response, as Dover was apparently unconscious.

11. The witness called the police and the informant was instructed to attend the scene along with Senior Constable Hobson. They arrived at approximately 1.00am. Dover was conscious by this stage, and was asking where 'Michael' was, 'Michael' being the name of Dover's husband. The informant observed that Dover had injuries to her head and was incoherent. Because he was unsure as to the extent of her injuries, the informant was unclear as to whether Dover understood the questions that she was being asked because he did not know how badly she had been injured. The informant had formed the view that Dover was intoxicated, and claimed that she smelt of alcohol. At some stage Michael Dover arrived at the scene, and had a conversation the details of which were disputed at the County Court hearing but which are not materially relevant to this appeal.

12. Dover was placed in an ambulance and taken to Maroondah Hospital in Ringwood East. There she was attended by a Dr Lew, whose notes recorded that she 'appeared intoxicated, was vomiting', that he was unable to assist her as she was 'aggressive', and that she 'possibly had a head injury' and would require a CT scan of her brain if her condition deteriorated. He ticked that part of the 'Notice of person refusing or failing to provide a blood sample' which indicated that a person has refused to have a blood sample taken. Although Dr Lew could not actually recall the events of 5 December, he inferred from the manner in which he had filled out the Notice that he 'would have' and 'must have' asked Dover to take a blood test.

13. After being released from hospital, Dover was taken home by her husband. She was readmitted to Maroondah Hospital on 11 December and after that admitted to the Royal Melbourne Hospital, where she was found to have suffered an acute subdural haematoma. Dover subsequently consulted with Dr Symington, a neurologist, on 7 May 2008, as she was suffering from vertigo, collapse and forgetfulness. Dr Symington formed a view, based upon the results of several scans, that Dover had suffered a severe head injury and that irrational, aggressive and incoherent behaviour would be consistent with such an injury. He gave evidence before the County Court that a person with such an injury would not be competent to understand demands or questions; and that the injury had been suffered either on or after the date of the accident. Having become aware of the diagnosis from Dr Symington, Dr Lew accepted during cross examination in the County Court that it was possible that Dover's lack of cooperation and aggression on the night he examined her could have been a consequence of the severe head injury she had suffered.

14. The question that is the subject of this appeal arises from the possible effects of Dover's head injury upon her behaviour on the night of the accident in relation to the blood sample that Dr Lew requested. After hearing Dr Symington's evidence, Judge Chettle asked counsel:

> Is there any authority on the proposition that [Dover]'s got to understand the nature of what's being asked of her and whether it says she must allow a doctor or an approved health professional to take from that person a sample of her blood. Assuming I were to find that there was a request made for blood by the doctor and she effectively refused because of a head injury ... is that a failure to allow a blood sample?

The defence's response was that the failure to allow a sample of blood to be taken must 'be a voluntary conscious and deliberate act' which Dover's conduct was not.

15. Judge Chettle found that Dover had suffered a serious injury that may well have explained her aggressive behaviour on the night of the accident. However, he found that, as a matter of law, s56(2) of the Act did not impose a requirement upon the prosecution to show that that there was a conscious or voluntary refusal to cooperate. Rather, 'if anything that [Dover] did, that did in fact not permit or allow the sample to be taken, the section will have been satisfied'.

The Supreme Court judicial review proceedings

16. In support of her application for judicial review, Dover submitted that the construction of s56(2) of the Act adopted by Judge Chettle, namely, that it did not require the prosecution to prove that a failure to allow the taking of a sample of blood was conscious or voluntary, was an error of law on the face of the record.

17. In quashing the orders of Judge Chettle, Bell J upheld the proposition that 'it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts.'[7] He relied on numerous authorities including the heralded statement of Barwick CJ in *Ryan v The Queen*.[8] Bell J said:[9]

> As Barwick CJ held in *Ryan v The Queen*:
>
> That a crime cannot be committed except by an act or omission of or by the accused is axiomatic. It is basic, in my opinion, that the 'act' of the accused, of which one or more of the various elements of the crime of murder as defined must be predicated must be a 'willed', a voluntary act which has caused the death charged. It is the act which must be willed, though its consequences may not be intended.
>
> His Honour went on to say:
>
> In my opinion, the authorities establish, and it is consonant with principle, that an accused is not guilty of a crime if the deed which would constitute it was not done in exercise of his will to act. Barwick CJ returned to this subject in *R v O'Connor*, making clear that these principles applied to statutory offences (a category which includes driving offences):
>
> In *Ryan's Case* I attempted a summary statement of the principle that in all crime, including statutory offences, the act charged must have been done voluntarily, ie accompanied by the will to do it. I find no need to qualify what I then wrote. I stated the principle as without qualification.

18. The principle is addressed to the requirement of voluntariness as distinct from the requirement that the act be an intentional one, voluntariness being a separate and prior question to that of intention.

19. Bell J emphasised that the principle applies as a presumption to the construction of statutory offences, including driving offences, subject to contrary intention.[10] He relied on *Kroon v The Queen*,[11] in which the truck of a driver who was asleep collided head-on with another vehicle, killing three people. In that case, the driver was convicted of three counts of causing death by dangerous driving. The Full Court of the South Australian Supreme Court (King CJ, White and Mohr JJ) quashed the conviction and ordered a new trial. King CJ demonstrated how the principle applied as a presumption to offences created under statute, defeasible only by an unequivocal manifestation of a contrary intention:[12]

> At common law criminal liability attaches only to acts or omissions which are voluntary, that is to say, the result of an exercise of the will of the accused person. *There is a presumption that the legislature, when creating a statutory offence, does not intend to exclude such a basic principle of the criminal law and that presumption can only be rebutted by express words or the clearest of implications.* The language of the sections creating the offences of causing death or bodily injury by dangerous driving ... and of driving without due care ... does not exclude the principle requiring a voluntary act or omission as the condition of criminal liability, and there does not appear to be any basis for such an implication.

20. While Bell J acknowledged that the issue of '[i]ntention does not arise in this case'[13] he characterised s56(2) as a 'strict liability offence in the sense that intention to breach is not an

element'.[14] This was later agitated on the appeal. He went on to find nothing in the language or the purpose of s56(2) that, either expressly or by implication, indicated that Parliament intended to abrogate the principle of voluntariness for offending of this kind.

21. Furthermore, he found that the use of the word 'allow' in s56(2) implied that the object of the sub-section was to compel a person actively to permit a blood sample to be taken in the event that it was required, and that 'the active step of allowing, in the sense of permitting, a sample to be taken can only be taken by someone acting consciously and voluntarily'.[15]

22. When considering the purpose of s56(2), Bell J drew support from the terms of the earlier version, which provided that the doctor 'must take from [the] person a sample of [their] blood for analysis' whether or not the person consented.[16] He considered that the amendments to s56, which took place in 1991, were, by contrast, 'a scheme for imposing [criminal] responsibility on persons who refuse consciously and voluntarily and for allowing the sample to be taken (at the discretion of the doctor or professional) from unconscious or incommunicative persons'.[17]

23. Bell J concluded that when voluntariness is raised by the defence as a fact in issue, it requires the prosecution to 'establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused's will to act'.[18] He said:[19]

> It is an element of the offence specified in s56(2) of the *Road Safety Act* that the accused consciously and voluntarily refused to allow the taking of the sample. Where the matter is not legitimately in issue, the prosecution may prove that element by relying on the evidentiary presumption of voluntariness. Where the matter is legitimately an issue, as it was in the present case, the prosecution must prove the element on the evidence beyond reasonable doubt. The trial judge erred in law on the face of the record in deciding otherwise.

24. He considered that Judge Chettle erred in law on the face of the record by failing to recognise that Dover could only be guilty of the offence under s56(2) if she had consciously and voluntarily refused to allow Dr Lew to take a blood sample.

The appeal

25. The DPP identified two grounds of appeal:

> (1) The learned judge erred in holding that in order to prove the commission of an offence against s56(2) of the Act, the prosecution must establish that the person's omission to allow a doctor or approved health professional to take from that person a sample of that person's blood for analysis is conscious and voluntary.
>
> (2) The learned judge erred in holding that s56(2) of the Act creates a strict liability offence.

Ground 1 – is voluntariness an element of the offence created by s56(2)?

26. The DPP submitted that the common law principle adverted to by Bell J, that a person can only be held responsible for criminal acts which he or she has engaged in voluntarily and consciously, has been expressly displaced in relation to s56(2). He relied on the following factors:

> (1) The mandatory language used in s56(2), which requires that a person 'must allow' a doctor or approved medical health professional to take a blood sample;
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> (2) The purpose of the statute in preventing drink driving and detecting offences which, it was submitted, would be advanced if voluntariness was not an element of the offence; and
>
> (3) The legislative history of the provisions.

27. The DPP submitted that the use of the phrase 'must allow' in s56(2) ought not be understood as denoting that a failure to allow must be conscious and voluntary. He conceded that the word 'allow' may mean 'permit' or 'acquiesce' and that this connoted a degree of voluntariness and, indeed, knowledge of the thing done. However, he submitted that other meanings of the word 'allow' include 'tolerate' or 'suffer' and that these did not necessarily involve consciousness of what was occurring. The DPP relied on the list of meanings attributable to 'allow' in the *Macquarie Dictionary* that included as one possible meaning 'to permit involuntarily, by neglect or oversight'. An example of such use is that people may be said to have allowed their dinner to get cold, even though they were not aware it was waiting for them.

28. The DPP emphasised that the offence was not one of 'refusing', which may require some active conduct, but was rather premised on not allowing, or failing to allow, which could be passive and did not imply neglect, oversight or default of any kind. Furthermore, s56(2) was not premised on an absence of consent; there was no requirement for the prosecution to establish absence of consent as an element of the offence. This was confirmed by the Court of Appeal in *Wallin v Curtain*[20] where Phillips JA said:[21]

> Specifically, s56(2) does not mention consent; nor, I should have thought, does it mean consent. To consent is to signify a state of mind; to allow is merely to permit. It might well have been thought inappropriate to refer to 'consent' when the Act enjoins a driver to 'allow' and prescribes significant penalties in order to constrain compliance. Section 56 does not in terms require consent and it may be noted that, although s56(4) describes a number of situations in which, despite s56(2), a sample of blood is not to be taken, an absence of consent is not one of them. Therefore the Crown is not required, if proceeding in reliance upon s56, to establish consent to the taking of the blood sample before tendering evidence of its analysis. To that extent, consent is not an issue under s56.

29. Further, the DPP submitted that 'allow' should be understood as 'not opposing' and that it can occur without the need for any active choice or exercise of will.

30. In my view, despite the reliance on *Wallin v Curtain*, the DPP's submissions do not sit well with the observation made by Phillips JA in that case that, when a blood sample is proposed to be taken, a driver is faced with a choice to allow or not to allow. Nor do the submissions sit well with his treatment of the offence under s56(2) as tantamount to a refusal (and not merely a failure) to allow. Phillips JA said:[22]

> If a blood sample is sought from a driver, a *choice is presented*: he or she may allow the doctor to take the blood sample (in which case there is a risk of conviction under s49(1) [driving under the influence] or may *refuse to allow* the doctor to take the sample (in which case there is a risk of conviction under s56(2)).

31. It is to be remembered that s56(2) imposes a positive obligation to allow the taking of a blood sample and it does not in its terms specify whether a contravention involves a 'failure to allow' or a 'refusal to allow'. The DPP appeared to assume that a contravention need only be a 'failure' and not a 'refusal', when, as Phillips JA's observation makes plain, the contrary view is well open.

32. Moreover, some of the DPP's submissions were framed as though the words 'must not fail' appear expressly in the terms of s56(2) when they do not. In this vein, the DPP relied on *Victoria v The Commonwealth*[23] to submit that the High Court recognised that, while 'failing' to do something usually connotes some default on the part of the agent, sometimes it may be a synonym for 'omit' or 'does not'.[24]

33. The DPP also relied on *Hammond v Lavender*[25] as indicating that the offence of 'fail[ing] to provide' a breath specimen when directed to do so did not require proof of fault or a conscious refusal on the part of the driver. In *Hammond v Lavender* the issue facing the Court was whether the existence of a direction to provide a breath specimen was an essential element of the offence. The Court held that in the absence of the relevant direction, a refusal to provide the specimen of breath did not constitute a failure to perform the obligation imposed. Mason J,[26] in the course of giving close scrutiny to the statutory scheme, considered the words 'fails to provide as prescribed a specimen of his breath for analysis' in s16A(11) of the *Traffic Acts* 1949-1974 (Q) and held that: (1) that, by reference to *Victoria v The Commonwealth*, 'nothing is to be gained by exploring authorities on different statutes'[27] and (2) the sub-section to which s16A(11) was linked (s16A (8)(e)(i)) envisaged a direction 'as to the time and manner of providing the specimen of breath'[28] that was capable of being acted upon immediately without delay such that 'fail[ing] to provide' a breath sample might 'fit more readily' into the classification of omission rather than of connoting default. While Mason J recognised that the word 'fails' may mean no more than 'omits' or 'does not',[29] he observed that:[30]

> [I]n cases of this kind, [it] is not so much whether the defendant had an opportunity of doing something, but whether there was a direction given of the kind contemplated. The distinction between a refusal to provide and a failure to provide then ceases to have much practical importance because in general a refusal to provide will amount to a failure to provide.

34. There was no discussion in *Hammond v Lavender* of whether the offence could be committed by a person involuntarily or by a person who was not conscious.

35. The difficulty here for the DPP is that it is not enough to demonstrate that there are a range of meanings to be associated with the word 'allow', and its converse 'not allow', some of which may permit of conduct that is essentially passive. Rather, it is necessary for him to demonstrate that, in the context of s56(2), conduct can amount to a contravention of the obligation to 'allow' despite that conduct not being voluntary. In particular, it is necessary for him to show that the context of s56(2) displaces the principle, discussed above, that a person is criminally responsible only for their conscious and voluntary acts.

36. The DPP sought to demonstrate that the principle, and the statutory presumption to which it gives rise, is displaced in the context of s56(2) by adverting to the rare use of the words 'must allow' in criminal offences, the low penalties imposed, and the purpose of the Act, especially Part 5 in which s56(2) occurs, which is to prevent road accidents and injuries. These indicia, it was argued, demonstrate that the offence created by s56(2) belongs to a class of offences that are 'regulatory' in nature, in that, despite being criminal offences, they aim to penalize behaviour which obstructs the investigation and enforcement of the law. To find that voluntariness was an element of the offence would risk frustrating the purpose of the statute. By contrast, it was argued, the purpose of the statute 'could only be achieved' if the statute negatived the usual requirement that the offending conduct be committed consciously and voluntarily.

37. Furthermore, the DPP relied on the legislative history of s56 to support his construction. The original form of s56 compelled doctors to take blood samples, regardless of whether the person allowed it. Under that regime, Dr Lew would have been obliged to take a blood sample from Dover. Had he not done so, he would have committed an offence. Thus, either a blood sample would have been taken or an offence committed. As mentioned above, in 1991, in response to the concerns of the medical community,[31] the current provisions were introduced so that medical practitioners are no longer obliged to take samples from patients. The DPP submitted that this legislative reform was not intended to breach the dichotomy created that a blood sample is either taken, or an offence committed. It cannot be inferred, so it was argued, that the amendment created a third option, namely, where blood is not taken but no offence is committed.

38. In my view, the DPP's submissions failed to appreciate the force of the presumption that the criminal law only punishes conduct which is voluntary. It is not a presumption which can be easily displaced by examples from non-criminal contexts where 'allowing' a situation to occur may occur while one is unconscious. The presumption is a strong one, as made clear by statements made by Gleeson CJ in *Edwards v Macrae*:[32]

> [A]lthough parliament may by clear words provide to the contrary, the criminal law only punishes conduct which is voluntary. The strength of that presumption was emphasised by Jordan CJ in *R v Turnbull* ... In *O'Connor* Barwick CJ went so far as to say:
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> 'In *Ryan's Case* I attempted a summary statement of the principle that in all crime, including statutory offences, the act charged must have been done voluntarily, i.e. accompanied by the will to do it. I find no need to qualify what I then wrote. I stated the principle without qualification.'
>
> I do not take his Honour to mean that parliament could not, by appropriate language, make it clear that a contrary position was to apply in relation to some offences. However, the passage quoted demonstrates the strength of the presumption.

39. In *Edwards v Macrae* Gleeson CJ held that the defence of automatism may sometimes be a defence to a charge of driving a motor vehicle while there is present in the person's blood the concentration of alcohol prescribed by statute.[33]

40. As Bell J recognised, the presumption is fortified by the principle of legality, that being the principle (stated in cases such as *Coco v The Queen*[34] and *Lacey v Attorney-General* (Qld),[35]) that in the absence of 'unmistakable and unambiguous language', a statutory provision should not be read as expressing a parliamentary intention to abrogate basic rights, freedoms or immunities.

41. In my view, the DPP has been unable to demonstrate that the presumption that the criminal

law only punishes conduct which is voluntary has been displaced in the context of s56(2) of the Act. I agree with Bell J's observation below that to 'allow', in the context of the section, means to 'permit', the same meaning attached to 'allow' by Phillips JA in *Wallin v Curtain*,[36] and I consider that in the context of s56(2) it necessarily involves a person acting consciously and voluntarily.[37] The Parliament has not made manifestly clear an intention to override the strong and long-established presumption of voluntariness in relation to criminal offences.

42. The presence of the exception in sub-s(5), which, as mentioned above, provides that a person is deemed to allow the taking of blood if unconscious or unable to communicate, reinforces this point: it is because the person is incapable of conscious or voluntary action that he or she must be deemed to allow the taking of blood in order to avoid any legal consequences which might accrue to the doctor for taking a person's blood in those circumstances. This subsection provides an exception to the general rule that, as Phillips JA said in *Wallin v Curtain*, in this context 'a choice is presented':[38] the person may, consciously and voluntarily, elect to allow the taking of a blood sample or refuse to allow the doctor to take a sample.

43. I reject the submission that the interpretation proposed by the DPP is necessary in order to fulfil the purposes of the Act. The purposes of the Act, and of Part 5 in particular, can be advanced consistently with an interpretation which is faithful to those presumptions at law that are based on matters of principle. It would be wrong to assume that, when faced with constructional choice, the interpretation to be adopted is one that has as a single objective the furtherance of the purposes of an Act as though the legislation existed in a vacuum, unaffected by the presumptions at common law developed over time.

44. With respect to the legislative history, in my view it cannot be concluded that the legislative amendments, introduced to shift the obligation from doctors to take a blood sample whether or not the person allowed it onto the person to allow the sample to be taken, did not have as a consequence that there may be some circumstances in which no blood sample is taken and yet no offence is committed. This may simply be a consequence of relieving doctors of what must have been perceived to be a disproportionately onerous obligation.

45. In my opinion, Bell J was correct to conclude that voluntariness is an element of the offence created by s56(2) which, if raised as a fact in issue by the defence, must be established beyond reasonable doubt by the prosecution.

46. I reject Ground 1.

Ground 2 – absolute and strict liability

47. It was conceded at the hearing of the appeal that the question of whether s56(2) created a strict liability offence was not ultimately germane to the disposition of the proceeding before Bell J or the disposition of the appeal.

48. In the course of his reasons Bell J made a comment to the effect that s56(2) 'creates a strict liability offence',[39] which he took to mean that a person who refuses to allow a sample of blood to be taken commits the offence whether or not he or she intended to do so. The DPP urged that an offence of strict liability is one which does not depend on proof of any *mens rea* or fault element, although the defence of 'mistake of fact' is available. By contrast, offences of 'absolute liability' are those where the defence of mistake of fact is not available.[40]

49. The complaint of the DPP was, first, that the question of whether the defence of mistake of fact was available to Dover was not in issue before his Honour and it was therefore unnecessary for him to express a conclusion on the matter. Secondly, it was submitted that s56 is an offence of absolute liability which does not permit a person to escape liability on the basis of a mistaken belief that, for example, he or she had been asked for a sample of bone marrow rather than a sample of blood.[41]

50. I make no finding in respect of the nature of the offence created by s56(2) as the issue was not properly raised by the circumstances of the case. No attempt was made to rely on a defence of honest and reasonable mistake and nothing turns on Bell J's observations on this point.

51. I reject Ground 2.

52. For these reasons, I dismissed the appeal.

GARDE AJA:

53. I concur with Tate JA.

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[1] *Dover v Doyle* [2012] VSC 117; (2012) 34 VR 295; ('Reasons').
[2] The proceedings were brought pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules.*
[3] Bell J remitted the matter on the basis that he accepted it was for Judge Chettle to determine whether there was reasonable doubt, on the medical and other evidence, as to whether Dover had suffered a concussion which had precluded her refusal from being conscious and voluntary: Reasons, 307 [54]-[55].
[4] In summary, the sub-section will not apply if it is the opinion of the treating medical professional that the taking of a blood sample would prejudice the person's care and treatment; if the police notify the doctor that a preliminary breath test did not indicate that the person had imbibed in excess of the prescribed concentration of alcohol; if the police or ambulance service provide in writing that the person was not driving or in charge of a vehicle involved in the accident; and if the police or a medical professional informs the treating medical professional that a sample of blood was taken prior to the person being brought to a place for examination or treatment.
[5] Or for the purposes of the *Transport Accident Act* 1986.
[6] How far the vehicle travelled was the subject of dispute, but it is immaterial to this appeal.
[7] Reasons, 298 [17].
[8] [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488.
[9] Reasons, 298-9 [17] (citations omitted).
[10] Reasons, 304 [40].
[11] (1990) 55 SASR 476; (1990) 12 MVR 483; (1990) 52 A Crim R 15 ('*Kroon*').
[12] *Kroon* (1990) 55 SASR 476, 479 as quoted by Bell J: Reasons, 302 [32] (emphasis added); (1990) 12 MVR 483; (1990) 52 A Crim R 15. *Kroon* was approved by the High Court in *Jiminez v The Queen* [1992] HCA 14; (1992) 173 CLR 572, 578; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292.
[13] Reasons, 299 [19].
[14] Ibid 302 [30].
[15] Ibid 306 [48].
[16] Ibid 297 [10].
[17] Ibid 306 [50].
[18] Ibid 304 [40].
[19] Ibid 307 [51].
[20] (1998) 27 MVR 356; (1998) 100 A Crim R 506.
[21] Ibid 514 (Phillips JA, with whose judgment Tadgell and Ormiston JJA agreed [at 507 and 508 respectively]).
[22] Ibid 516 (emphasis added).
[23] [1975] HCA 39; (1975) 134 CLR 81; (1975) 7 ALR 1; (1976) 50 ALJR 7.
[24] The case arose in the entirely disanalogous context of s57 of the *Commonwealth Constitution* which governs the circumstances in which the Governor-General may convene a joint sitting of the Commonwealth Parliament when the House of Representatives has passed any proposed law, and the Senate rejects or 'fails to pass it'. In the course of discussion, the Court notes that sometimes the words 'fails' may mean no more than 'omits' or 'does not'. (at 146)
[25] (1976) 11 ALR 371.
[26] With whom Barwick, Stephen and Murphy JJ expressly agreed.
[27] *Hammond v Lavender* (1976) 11 ALR 371, 375; (1976) 50 ALJR 728.
[28] Ibid 375.
[29] Ibid 375.
[30] Ibid 376.
[31] See Victoria, *Parliamentary Debates,* Legislative Assembly, 10 April 1991, 946-7 (Mr Peter Spyker, Minister for Transport).
[32] (1991) 14 MVR 193, 198-9 (citations omitted).
[33] See also *Meertens v Falkenberg* (1981) 43 SASR 307; (1981) LSJS 202; *Police v Ghuede* [2007] SASC 351; (2007) 99 SASR 280; 48 MVR 486.
[34] [1994] HCA 15; (1994) 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[35] [2011] HCA 10; (2011) 242 CLR 573; (2011) 275 ALR 646; (2011) 85 ALJR 508; (2011) 207 A Crim R 91.
[36] *Wallin v Curtain* (1998) 100 A Crim R 506; see extract above, [28]; (1998) 27 MVR 356.
[37] Reasons, 306 [48].
[38] *Wallin v Curtain* (1998) 100 A Crim R 506; see extract above, [30]; (1998) 27 MVR 356.
[39] Reasons, 299 [20].
[40] *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523, 528-30, 533-7, 590; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; *Allen v United Carpet Mills Pty Ltd* [1989] VicRp 27; [1989] VR 323, 328-30; *R v Commercial and Industrial Construction Group Pty Ltd* [2006]

VSCA 181; (2006) 14 VR 321, 326 [24].
[41] See the discussion of the nature of these type of offences in *R v Walker* (1994) 35 NSWLR 384; (1994) 77 A Crim R 236; (1994) 21 MVR 249; *Hausman v Shute* [2006] ACTSC 54; (2006) 200 FLR 208; (2006) 45 MVR 259; *Jasinski v Police* (2004) MVR 117.

APPEARANCES: For the DPP: Dr S McNicol SC. Office of Public Prosecutions. For the first Respondent Dover: Mr PF Tehan QC with Ms D Price, counsel. David Tonkin & Associates, solicitors. No appearance of the second respondent The County Court of Victoria.
