26/77

SUPREME COURT OF VICTORIA

SMITH v McGIRR; KRAUKLIS v McGIRR

Dunn J

8 November 1976

MOTOR TRAFFIC – DRINK/DRIVING – REFUSING PRELIMINARY BREATH TEST AND REFUSING TO PRODUCE LICENCE – *MENS REA* AND AUTOMATISM CONSIDERED – 'REFUSED' – DRIVER CLAIMED TO BE UNDER THE INFLUENCE OF CARBON MONOXIDE POISONING – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS29(1), 80E(3).

Charges of refusing a preliminary breath test and refusing to produce a licence were heard together and dismissed. The prosecution's evidence was not disputed, nor the fact that the defendant had consumed alcohol. The defence was that the defendant had been so affected by carbon monoxide poisonings innocently inhaled by him whilst driving his VW motor car, that he was not answerable for his actions. In defence, Mr Harmon, a qualified chemist and a faculty head of the Chemistry Department at Monash University gave evidence that subsequent to the date of the offence he tested the defendant's car, with the heater operating, for carbon monoxides. The test revealed that, with the car in the moving position, windows closed for half an hour and the heater operating, he found .19 percentage of carbon monoxide present; with the windows opened the same conditions .01 percentage. These findings resulted from a defective heating system working off the exhaust.

Dr Westerman, a Fellow of the Royal Australian College of General Practitioners, a faculty member of the School of Medicine at Monash University, and a designated medical examiner for airline pilots, gave evidence to the effect that, having heard the evidence of the informant, Constable Smith, as to the defendant's driving and behaviour, and having examined Mr Harmon's findings as to the presence of carbon monoxide, it was his opinion that the defendant's condition was more consistent with carbon monoxide than with being affected by alcohol. He based his opinion that the defendant had been suffering from carbon monoxide poisoning of .01 percentage for periods of exposure to a total of one hour. There was no evidence before the Magistrate to justify those assumptions.

The Magistrate accepted the evidence of Mr Harmon and Dr Westerman. He found the defendant was suffering from carbon monoxide poisoning and in consequence the defendant "was not in a proper state of mind to do the test" and dismissed the charges. The principle relied upon in *Barker v Burke* [1970] VicRp 111; [1970] VR 884 (i.e. it is not a defence to a charge of drunken driving or .05 that the defendant became drunk involuntary and without negligence) was said on behalf of the defendant to be inapplicable on the ground of the differences in facts and the absence of any expert evidence in that case of the kind given in the present one. The present case was argued before His Honour on the basis of the offence is an absolute one (*mens rea* was not a specific requirement) and automatism being a defence.

Upon Order Nisi to review—

HELD: Order absolute. Dismissals set aside. Remitted to the Magistrates' Court for determination in accordance with law.

1. In each of the informations the charge against the defendant was that he 'refused' to do what was required. The word 'refused' involves a mental element to this extent, that the mind of a person must be directed to what is required. A specific intent to commit either offence is not required. It would be no defence for a person to assert that he did not know or realise that the request was made by a member of the Police Force. In each case there was an absolute obligation to comply, if the mind was capable of doing so.

2. If the defendant was in such a condition from causes for which he was not responsible, that at the relevant time he had no appreciation or understanding of what was being requested of him, that would be a defence to each of these charges.

3. The word 'automatism' is applicable to acts done when in a state in which the mind does not control the body. Because the word 'refused' connotes a mental decision, a mental condition which results in the complete destruction of the power of decision would provide a defence.

4. In reviewing the evidence that was before the Magistrate there was not sufficient evidence on which he could find, if he did, that there was the necessary destruction of the defendant's power of decision which could excuse the refusals. The defendant did specifically refuse by answer to undergo the breath test and to give his name and address. Dr Westerman's evidence, once it was accepted,

established no more than the carbon monoxide poisoning and not alcohol was probably the cause of his condition. The defendant should have been convicted on each of these charges.

DUNN J: "In each of the informations the charge against the defendant was that he 'refused' to do what was required. The word 'refused' involves a mental element to this extent, that the mind of a person must be directed to what is required. *Re Edwards* (1910) 1 Ch 541; *Re Quinton Dick* (1926) 1 Ch 992, but, in my opinion, a specific intent to commit either offence is not required. It would be no defence for a person to assert that he did not know or realise that the request was made by a member of the Police Force. In each case there is an absolute obligation to comply, if the mind is capable of doing so. It is not clear what the learned Stipendiary Magistrate meant by his finding that the defendant 'was not in a proper state of mind to do the test'. If, by that, he meant the defendant's state of mind was not normal, although he had sufficient comprehension to know he was requested to do the breath test, then that finding is not sufficient to justify dismissal of the information. Such an approach would defeat the whole purpose of the Act and make it ineffective. See *R v Nicholls* (1972) 1 WLR 502 at p505; [1972] 2 All ER 186.

In my opinion, if a defendant was in such a condition from causes for which he is not responsible, that at the relevant time he had no appreciation or understanding of what was being requested of him, that would be a defence to each of these charges. I think this follows inevitably from the principle enunciated in *R v Carter* [1959] VicRp 19; (1959) VR 105; [1959] ALR 335. The word 'automatism' is applicable to acts done when in a state in which the mind does not control the body. In *Whatmore v Jenkins* (1962) 2 QB 572 at p586; (1962) 3 WLR 463 at p473, Winn J, delivering the judgment of a Divisional Court of five members said:

> 'It is equally a question of law what constitutes a state of automatism. It is salutary to recall that this expression is no more than a modern catch-phrase which the courts have not accepted as connoting any wider or looser concept than involuntary movement of the body or limbs of a person'.

The word was used with the same significance in *R v Carter*, *ante*; and in *Hill v Baxter* [1958] 1 QB 277; [1958] 1 All ER 193; (1958) 42 Cr App R 51; (1958) 2 WLR 76. In *R v Quick* [1973] EWCA Crim 1; [1973] QB 910 at 919; [1973] 3 All ER 347; (1973) 57 Cr App R 722; 137 JP 763; (1973) 3 WLR 26 at p32, Lawton J, speaking for the Court of Appeal, referred to 'such a complete destruction of voluntary control as constitutes, in law, automatism'. The word 'automatism' is not appropriate to the facts applicable to either of the offences with which these orders nisi are concerned, but because the word 'refused' connotes a mental decision, in my opinion a mental condition which results in the complete destruction of the power of decision — to adopt the words of Lawton J — would provide a defence.

The defendant was also charged with driving under the influence of intoxicating liquor. Because the learned Stipendiary Magistrate's reasons also dealt with the charges which he dismissed, it is not easy to determine what all his precise findings were. He accepted the evidence of Mr Harmon and Dr Westerman, and was not satisfied that the charge of driving under the influence of intoxicating liquor had been proved. He gave no specific reasons that have been recorded for dismissing the charges of the defendant refusing to give his name and address. In respect to the charge of refusing to undergo a preliminary breath test, the learned Stipendiary Magistrate said, 'He', that is the defendant, 'was not in a proper state of mind to do the test'. That is not a finding that the defendant was in such a state of mind that he did not know he was requested to do the test.

In any event, in reviewing the evidence that was before the learned Stipendiary Magistrate there is not sufficient evidence on which he could find, if he did, that there was the necessary destruction of the defendant's power of decision which could excuse the refusals. The defendant did specifically refuse by answer to undergo the breath test and to give his name and address. Dr Westerman's evidence, once it was accepted, established no more than the carbon monoxide poisoning and not alcohol was probably the cause of his condition. In my opinion, the defendant should have been convicted on each of these charges.

For these reasons, the orders nisi will be made absolute. The orders dismissing the informations will be set aside. The informations will be remitted to the Magistrates' Court to be further dealt with in accordance with these reasons."