08/12; [2012] VSC 117

SUPREME COURT OF VICTORIA

DOVER v DOYLE

Bell J

20 October 2011; 29 March 2012

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 – DID NOT GO INTO MEDICAL EVIDENCE – ACCUSED CONVICTED AND SENTENCED – APPLICATION FOR JUDICIAL REVIEW – WHETHER 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 – WHETHER MATTER SHOULD BE REMITTED TO TRIAL JUDGE – 'ALLOW': *ROAD SAFETY ACT* 1986 (VIC) S56(2), (5); *SUPREME COURT (GENERAL CIVIL PROCEDURE) RULES* 2005 (VIC), O56.

D. fell out of her motor car while driving alone late at night. She struck her head very hard when she hit the road. At hospital not long afterwards, she was aggressive and uncooperative. She refused to allow a doctor to take a sample of her blood. Subsequently, she was charged with an offence under s56(2) of the *Road Safety Act* 1986 ('Act') in that she refused to allow a doctor to take a sample of her blood for analysis. She was convicted and later appealed to the County Court where her appeal was dismissed. The judge declined to dismiss the charge on the ground that, on the medical evidence, the prosecution had not proved beyond reasonable doubt that D.'s refusal had been conscious and voluntary. In his Honour's view, that was not an element of the offence. Therefore a person could be guilty of the offence even where the refusal had been unconscious and involuntary. Without going into the medical evidence, his Honour dismissed the appeal, found D. guilty of the charge, fined her $500 plus costs, cancelled her licence and disqualified her from obtaining a further licence for four years. Upon appeal—

HELD: Appeal allowed. Orders of the judge quashed. Remitted to the judge for hearing and determination according to law.

1. On the authorities, it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts. The prosecution must therefore establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused's will to act. As there is an evidentiary presumption of voluntariness, it is not usually necessary for the prosecution to supply express proof of this element. But where the issue is legitimately raised, the prosecution must prove beyond reasonable doubt that the accused's acts were conscious and voluntary. These general principles apply equally to statutory offences, including driving offences, subject to contrary provision.

***Ryan v The Queen* [1967] HCA 2; (1967) 121 CLR 205;**

***R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; applied.**

2. The provisions of s56(2) of the Act do not expressly abrogate the principle of voluntariness. Nor do the provisions implicitly abrogate that principle. There is nothing in the language of s56(2), the context of the section or the legislation as a whole or the legislative purpose to suggest unmistakably and unambiguously that the provisions should be interpreted so as to abrogate the principle. In s56(2), the word 'allow' is a verb meaning 'permit'. The person 'must allow' the sample to be taken, which compels them actively to permit the sample to be taken. 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. Their intention is not relevant, but their acts must be conscious and voluntary.

***Meertens v Falkenberg*, unreported, Supreme Court of South Australia – Full Court, King CJ, Sangster and Legoe JJ, 13 March 1981, applied.**

3. It is an element of the offence specified in s56(2) of the 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 was required to prove the element on the evidence beyond reasonable doubt. The trial judge erred in law on the face of the record in deciding otherwise.

***R v Carter* [1959] VicRp 19; [1959] VR 105, applied.**

4. The issue was legitimately raised in the present case. The medical evidence of both the prosecution and the defence suggested D. refused to allow the doctor to take a sample of her blood by reason of the severe head injury which she suffered in the accident. It was therefore necessary for the trial judge to consider this evidence and to determine whether the prosecution had established beyond reasonable doubt that D.'s refusal had been conscious and voluntary. His Honour erred in law in failing to do so.

5. The County Court will not be ordered to dismiss the charge against D. It is for the trial judge to determine whether the charge should be dismissed. An order will be made in the nature of *certiorari* quashing the orders of the judge and remitting the matter back to his Honour for hearing and determination according to law.

BELL J:

INTRODUCTION

1. Deborah Dover fell out of her motor vehicle while driving alone late at night. She struck her head very hard when she hit the road. At hospital not long afterwards, she was aggressive and uncooperative. She refused to allow a doctor to take a sample of her blood, for which she was convicted and sentenced in the Magistrates' Court of Victoria. She appealed to the County Court of Victoria.

2. In the appeal, the doctor gave evidence for the prosecution that Ms Dover's behaviour may have been a result of a severe head injury and she might not have understood his request. Ms Dover's treating neurologist supported that evidence.

3. The learned trial judge would not dismiss of the charge on the ground that, on the medical evidence, the prosecution had not proved beyond reasonable doubt that Ms Dover's refusal had been conscious and voluntary. In his Honour's view, that was not an element of the offence. Therefore a person could be guilty of the offence even where the refusal had been unconscious and involuntary. Without going into the medical evidence, his Honour dismissed the appeal, found Ms Dover guilty of the charge, fined her $500 plus costs, cancelled her licence and disqualified her from obtaining a further licence for four years.

4. In this court, Ms Dover seeks judicial review of the decision of the judge on the ground of error of law on the face of the record. She contends the offence applies only to conscious and voluntary refusals and seeks orders quashing the conviction and penalty and compelling the County Court to dismiss the charge. The informant, Michael Doyle, submits the decision of the judge was correct and, if not, the matter should go back to his Honour for consideration of the medical and other evidence.

OFFENCE CHARGED

5. The informant charged Ms Dover with the offence that, at Ringwood on 5 December 2007, she refused to allow a doctor to take a sample of her blood contrary to s56(2) of the *Road Safety Act* 1986 (Vic).

6. Section 56(2) 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.

7. There is no issue that Ms Dover was over the age of 15 years, was brought to a place of examination or treatment in consequence of an accident involving a motor vehicle and was asked, and refused, to allow a doctor to take a sample of her blood. The only issue is whether the prosecution must prove (to the criminal standard) that her refusal was conscious and voluntary.

8. There are defences in s56(4) which are not relevant.

9. Under s56(5), a doctor can take a sample from a person who is unconscious or unable to communicate:

> A person to whom subsection (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.

10. These provisions were introduced by s11 of the *Road Safety (Drivers) Act* 1991 (Vic). The purposes of that Act were (among other things) 'to revise the compulsory blood testing system for road accident victims' (s1(a)). Prior to the amendments, s56(2) provided that the doctor 'must take from [the] person a sample of [their] blood for analysis' whether or not they consented, subject to a medical treatment exception. Taking into account the opposition of the medical profession to the compulsory taking of samples,[1] the amending legislation replaced the former provisions with provisions imposing an onus on the person to allow the sample to be taken.

APPLICATION FOR JUDICIAL REVIEW

11. Ms Dover challenges the decision of the trial judge by way of application for judicial review under O56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). She seeks an order in the nature of *certiorari* quashing the orders for conviction, penalty and costs which were made by the judge and an order in the nature of mandamus compelling the County Court to dismiss the charge brought against her.

12. An application for judicial review under O56 can be made in respect of a decision of a judge of the County Court in a criminal appeal from the Magistrates' Court of Victoria.[2] The present application is therefore regular. In determining the application, the function of the court is not to re-decide the case which was before the County Court on the merits or to conduct an appeal from the decision of the trial judge; it is to determine whether the judge made an error of law on the face of the record, that being the ground of judicial review relied on.

13. By s10 of the *Administrative Law Act* 1978 (Vic), the oral reasons of the trial judge form part of the record. Those reasons are proved by the transcript of the proceeding before his Honour, which have been taken into evidence here. The reasons show he decided it was not an element of an offence against s56(2) of the *Road Safety Act* that the person consciously and voluntarily refused to allow the sample of blood to be taken. If that was an error of law, it was on the face of the record and, subject to the exercise of this court's discretion, Ms Dover would be entitled to relief.

PARTIES' SUBMISSIONS

14. It was submitted for Ms Dover that s56(2) did not displace the fundamental principle of common law that a person is criminally responsible only for their conscious and voluntary acts. If the prosecution does not prove beyond reasonable doubt that the accused consciously and voluntarily did the act constituting the offence, they must be acquitted. If there is a reasonable doubt about that matter, the accused must be given the benefit of that doubt. The trial judge erred in law in failing to interpret and apply s56(2) in that manner.

15. It was submitted for the informant that s56(2) applied to all persons who came within the circumstances specified in the provision. People who fall within the section have no option but to comply with the mandatory obligation to allow the sample to be taken. Where the other parts of the provision are satisfied, the prosecution had to prove only that the person refused to allow the sample of blood to be taken. As there is no choice to allow or to refuse to allow a sample to be taken, there is no question of the refusal having to be conscious and voluntary. The provision says 'must allow' and attention must be paid to both words. Voluntariness comes about from a choice of compliance and there is no choice. Therefore, the trial judge correctly decided it was not necessary for the prosecution to prove the refusal was conscious and voluntary. Section 56(5) suggested the provision applied to involuntary refusals for it deemed unconscious and incommunicative people to have allowed the taking. This interpretation was consistent with the road safety purposes of the legislation as introduced.

16. On both sides a number of authorities were referred to, which I will now discuss.

CRIMINAL RESPONSIBILITY FOR VOLUNTARY ACTS

Voluntariness in crimes generally

17. It is a basic and fundamental principle of the common law that a person is held criminally

responsible only for their conscious and voluntary acts. As Barwick CJ held in *Ryan v The Queen*:[3]

> 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.[4]

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.[5]

18. Barwick CJ returned to this subject in *R v O'Connor*[6], 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.[7]

19. In making these remarks in *Ryan* and *O'Connor*, Barwick CJ was addressing himself to the requirement that the act constituting the alleged crime must be voluntary and willed and not to the separate requirement that the consequences of the act be intended. As Brennan J held in *He Kaw Teh v The Queen*,[8] voluntariness and intent are distinct mental states. In the present case, we are concerned with whether it was necessary for the prosecution to prove that Ms Dover's refusal of the doctor's request to take a sample was voluntary and willed, which is a prior and separate[9] question to whether her refusal was intentional. Intention does not arise in this case.

20. The question whether Ms Dover's refusal was intentional does not arise because s56(2) creates a strict liability offence in the sense that a person who, in the circumstances specified, refuses to allow a sample of blood to be taken commits the offence whether or not they intend to do so. The separate question which is at issue in this case is whether the prosecution must prove the refusal was conscious and voluntary.

21. While the voluntary act or omission of a person is the general foundation of their criminal responsibility, it is not usually necessary for voluntariness to be expressly proved. It is presumed the act of an apparently conscious person is willed or done voluntarily. This evidentiary presumption of voluntariness was described by Mason CJ, Brennan and McHugh JJ in *R v Falconer*[10] in these terms:

> Although the prosecution bears the ultimate onus of proving beyond reasonable doubt that an act which is an element of an offence charged was a willed act or, at common law, was done voluntarily,[11] the prosecution may rely on the inference that an act done by an apparently conscious actor is willed or voluntary to discharge that onus unless there are grounds for believing that the accused was unable to control that act.[12]

22. In an earlier passage in the judgment, their Honours gave this explanation of the principle:

> That presumption accords with, and gives expression to, common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice. Keeping steadily in mind that the concepts of will and voluntariness relate merely to what is done, not to the consequences of what is done, it would be an exceptional case in which a person, apparently conscious, committed an act proscribed as an element in a criminal offence without choosing to do so – or, at the least, without running the risk of doing so.[13]

23. It follows from these basic and fundamental principles of the criminal law that, subject contrary provision, a person cannot be guilty of a crime which they did not consciously and voluntarily commit. In *R v Radford*[14] King CJ stated that principle thus:

> If the actions which would otherwise amount to a crime are performed automatically and are not subject to the control and direction of the will, no crime is committed. The general onus which rests upon the prosecution in a criminal case extends, of course, to establishing that the acts said to constitute the crime were performed in consequence of the exercise of the will.[15]

Similarly, in *R v Morrison*[16] Gray J (Sulan and White JJ agreeing) held:

> In the present case, the prosecution had to prove beyond reasonable doubt that the appellant knew that he was doing the criminal acts with which he was charged, that he knew all the facts constituting the ingredients to make the acts criminal, and that those acts were involved in what he was doing. The prosecution was required to prove that the act or acts of the appellant that caused the death of

> Ms Sheridan were conscious and voluntary acts. Any act of the appellant that was unconscious, or involuntary, could not amount to a crime. The crime consisted of the doing of a deliberate act or acts.[17]

In *R v Marijancevic*,[18] Kellam JA and Vickery AJA (Dodds-Streeton JA agreeing) discussed and applied these principles in the context of explaining how a jury should be charged on the mental element of a statutory offence.[19]

24. As we will now see, the same principles apply in relation to driving offences.

Voluntariness in driving offences

25. In *R v Carter*[20] the accused pleaded not guilty to a charge of dangerous driving and raised the defence of post-traumatic automatism. On the medical evidence, this condition involved a temporary loss of full consciousness in which 'subconscious impulses might take control of the individual'.[21] Sholl J said automatism was not 'a defect of reason, but rather a defect of volition or will'.[22] His Honour referred to the 'ordinary principle of the common law ... that it is for the prosecution to prove full responsibility on the part of the accused person'.[23] He held the prosecution was not bound to negative the possibility of lack of responsibility due to automatism, but had to prove all elements of the offence when the matter was legitimately raised:

> if the defence does raise the issue in a genuine fashion then the Crown, which of course may call rebutting evidence on the matter, is bound in the long run to carry the ultimate onus of proving all the elements of the crime including the conscious perpetration thereof.[24]

In my view, that is the approach which must be followed in relation to the offence in s56(2).

26. *Meertens v Falkenberg*[25] is close to the present case. Section 47E(3) of the *Road Traffic Act* 1961 (SA) made it an offence for a driver to refuse forthwith to comply with a police officer's request on reasonable grounds to submit to a breath test. Section 47E(4)(b) supplied a defence of 'good cause' for the refusal to comply. The defendant was discovered in the driver's seat of a vehicle involved in an accident and refused a breath test. On medical examination, he was found to have suffered a head injury. A magistrate accepted this was good cause for the refusal and dismissed the charge. A trial judge allowed the prosecution appeal. King CJ, Sangster and Legoe JJ restored the dismissal.

27. Although the case had turned below on the good cause defence, the Full Court held it actually turned on whether the refusal was a conscious act. This is King CJ:

> The offence of refusing (or for that matter failing) to comply with a requirement or direction cannot be committed unless the person required or directed is capable of understanding and considering the request. The refusal or failure to comply contemplated by the section is a deliberate act or omission and involves a conscious decision by a person who has heard and understood the requirement or direction. This was the issue in the case. If the appellant was not able, by reason of concussion, to understand and consider the directions given to him by the police officer, there was no refusal and it is unnecessary to consider the defence of good cause.[26]

Sangster J held: 'Refusal obviously imports both knowledge of the request and wilfulness in refusing to comply with it'.[27] Legoe J agreed.[28] With respect, this authority should be followed in the present case.

28. In *Jasinski v Police*,[29] Gray J said '[t]he offence created by section 47E(3) is a strict liability offence'.[30] He said the defence in s47E(4) was necessary 'to provide protection against any possible harsh consequences from the offence being otherwise a strict liability offence'.[31] Counsel for the informant makes a similar point in her submissions about the operation of s56(2) of our *Road Safety Act*. But Gray J was not addressing the issue of voluntariness. As his Honour would have been aware, the Full Court in *Meertens* had decided voluntariness was an element of the offence in s47E(3). Section 47E(3) and (4) were subsequently considered by Vanstone J in *Police v Ghuede*.[32] Her Honour regarded as 'well supported by authority' the proposition that 'a defendant may answer a charge for an offence of strict responsibility by asserting that the act was involuntary'.[33] She went on to refer to *Meertens* and say 'the offence of refusing or failing to submit to an alcotest or breath analysis required proof by the prosecution of a voluntary act'.[34]

29. As the Victorian legislation previously did, s4F(1) of the *Motor Traffic Act* 1909 (NSW)

required a doctor to take a sample of blood from a driver involved in an accident. The issue in *Charles v Macrae and Pearce*[35] was whether guilty knowledge was an element of the offence in s4F(7)(a) of preventing, by reason of the person's behaviour, the doctor from taking the sample.

30. Grove J held there was no requirement of guilty knowledge.[36] His Honour said:

> it was the intention of the legislature to make guilty of an offence any person who behaved in a fashion which prevented a medical practitioner from taking a sample of his blood.[37]

As I have said, s56(2) of our *Road Safety Act* is to be interpreted in the same way. It creates a strict liability offence in the sense that intention to breach is not an element. That does not mean the offence is committed by persons acting unconsciously and involuntarily.

31. *Kroon v The Queen*[38] was also a dangerous driving case. While the driver was apparently asleep, his truck collided head-on with another vehicle, killing three people. The driver was convicted by verdict of a jury of three counts of causing death by dangerous driving. King CJ, White and Mohr JJ quashed the conviction and ordered a new trial.

32. In an influential judgment which has direct relevance for the present case, King CJ held:

> 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 (*Criminal Law Consolidation Act,* s19a) and of driving without due care (*Road Traffic Act* 1961, s45) 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.[39]

On this basis, his Honour held the driving offences with which the accused had been charged could not be committed while he was asleep.[40] Mohr J agreed.[41] White J said the offences could only be committed by 'a voluntary act, an act of which the driver was aware and for which he could properly be held criminally responsible'.[42] Again, that is the approach which should be followed in this case.

33. *Kroon* was approved by the High Court in *Jiminez v The Queen*.[43] A sleeping driver drove his vehicle into a tree, killing a passenger. He was charged with causing death by dangerous driving contrary to s52A of the *Crimes Act* 1900 (NSW) and convicted. The Court of Criminal Appeal dismissed the appeal. The High Court allowed the appeal, quashed the conviction and entered a verdict of acquittal.

34. The High Court held the offence was not one of strict liability.[44] In the words of the plurality judgment, 'if the applicant fell asleep, his actions while he was asleep were not voluntary and could not amount to driving in a dangerous manner'.[45] As had been held in *Kroon*,[46] the real question was whether the driver had driven dangerously by consciously choosing to drive when he was at risk of falling to sleep.[47]

35. The question reserved in the case stated in *Wallin v Curtain*[48] was whether analytical evidence of a blood sample taken without the person's consent was admissible under s57 of the *Road Safety Act*. Our Court of Appeal did not answer the question because it held express consent was not required under the section. However, comments were made about the operation of s56.

36. Ormiston JA said s56(2) provided for the taking of blood samples from persons who allowed it; persons who would not allow it committed an offence.[49] Phillips JA spoke of persons making a choice between allowing the doctor to take the sample (and risking conviction on one basis) or refusing to do so (and risking conviction on another).[50] Their Honours were clearly discussing cases in which persons were making a conscious and voluntary choice to allow or not to allow and suffering the criminal consequences. That tends to help Ms Dover in this case, but there was no direct consideration of the subject of voluntariness.

37. *Ahadizad v Emerton*[51] illustrates the application of the principles stated in *Falconer* and *Jiminez*. The convicted driver drove a long way under the influence of a sneezing attack. Miles CJ accepted the driver had lost control of his driving during the attack, for which he was not criminally

responsible, but not of his foot brake, which he dangerously failed to apply.[52] The appeal was dismissed. In the present case, the medical evidence (which the judge did not go into) suggested Ms Dover's behaviour was totally unconscious and involuntary in the relevant respect.

38. I will end this review of the authorities with *Police (SA) v Barber*,[53] which also illustrates the application of these principles. The respondent was apprehended driving a motor vehicle at night without the headlights on and with a flat tyre. She twice failed to provide a breath sample and refused a blood test. She did give one breath sample, which was positive for excessive alcohol. She was charged with drink driving offences (including failing to comply with reasonable breath test directions). The magistrate dismissed one charge because there was no case to answer and other charges because, on dubious medical evidence, the respondent's conduct was not voluntary. On appeal, the prosecution challenged the magistrate's findings of fact and also the decision that the failure to comply had to be voluntary.

39. Citing *Ryan*, *O'Connor* and *Ghuede*, White J held: 'The principle that the conduct relied upon to constitute a criminal offence must be conscious and voluntary applies as much to traffic offences as it does to [other] contraventions of the criminal law'.[54] His Honour referred to *Jiminez* and *Kroon* as examples.[55] He held that, in the case of driving offences, the prosecution had the benefit of the evidentiary presumption of voluntariness, but still had to establish voluntariness beyond reasonable doubt when it was legitimately raised.[56] With respect, I agree. His Honour applied these principles in the case before him, but held the magistrate had erred in law in relying on the medical evidence, which was poorly substantiated.[57] On the charge relevant here, he allowed the appeal and ordered a retrial. In the present case, it is not suggested the medical evidence was dubious or unsubstantiated.

Summary

40. On these authorities, it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts. The prosecution must therefore establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused's will to act. As there is an evidentiary presumption of voluntariness, it is not usually necessary for the prosecution to supply express proof of this element. But where the issue is legitimately raised, the prosecution must prove beyond reasonable doubt that the accused's acts were conscious and voluntary. These general principles apply equally to statutory offences, including driving offences, subject to contrary provision.

IS VOLUNTARINESS AN ELEMENT OF THE OFFENCE?

41. We now come to the central matter which is in issue: is voluntariness an element of the offence specified in s56(2) of the *Road Safety Act* of refusing to allow a sample of blood to be taken?

42. I have already set out the opposing arguments. In essence, it was submitted for Ms Dover that the provisions of s56(2) do not operate to qualify the usual requirement for voluntariness. For the informant, it was submitted the compulsory nature of the obligation to allow the sample to be taken left no scope for the operation of that requirement.

43. The submissions for Ms Dover also took the court to a number of licensing cases illustrating the meaning of 'allow' or 'permit' in other situations.[58] While these authorities illustrate the active meaning of those words, they are too far removed from the present case to be of much assistance.

44. In resolving this issue it is necessary to have regard to a particular rule of statutory interpretation. It was specified by Brennan J in *Baker v Campbell*[59] in these general terms: 'The relevant rule requires a presumption that Parliament does not intend to exclude the operation of a fundamental principle of law unless it says so …'[60] The principle was restated in *Coco v The Queen*[61] by Mason CJ, Brennan, Gaudron and McHugh JJ as follows:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.[62]

The principle has frequently been applied in recent years. For example, in *Lacey v Attorney-General (Qld)*,[63] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

> The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority*[64] as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have.[65] An example of a canon [sic] of construction directed to that objective and given in *Project Blue Sky* is 'the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities'.[66] That is frequently called the principle of legality.[67]

45. The principle of legality applies to the interpretation of statutory criminal offences, including driving offences. As we saw, it was applied by King CJ in *Kroon*[68] when determining whether voluntariness was an element of the statutory offence of dangerous driving. His Honour said the principle of law that criminal liability attached only to voluntary acts was presumed not to be rebutted except 'by express words or the clearest of implications'.[69] That is what the later authorities describe as the principle of legality.

46. It is therefore necessary to examine s56(2), interpreted in the context of the *Road Safety Act* as a whole and having regard to the purpose of the provisions, to see whether there is unmistakable and unambiguous language indicating that the legislature has intended to interfere with the basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts.

47. As we have seen, s56(2) requires a person of or over the age of 15 years who enters or is brought to a place for examination or treatment in consequence of an accident involving a motor car to allow a doctor or approved health professional to take from them at that place a sample of their blood for analysis. Criminal penalties for a breach of the obligation are specified.

48. In my view, the provisions of s56(2) do not expressly abrogate the principle of voluntariness. Nor do the provisions implicitly abrogate that principle. There is nothing in the language of s56(2), the context of the section or the legislation as a whole or the legislative purpose to suggest unmistakably and unambiguously that the provisions should be interpreted so as to abrogate the principle. In s56(2), the word 'allow' is a verb meaning 'permit'.[70] The person 'must allow' the sample to be taken, which compels them actively to permit the sample to be taken. 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. Their intention is not relevant, but their acts must be conscious and voluntary.

49. The deeming provisions in s56(5) do not suggest otherwise. By those provisions, a person who is unconscious or otherwise unable to communicate must be taken to allow the taking of the sample. In that kind of case only, an allowing is taken to have occurred even though it has not occurred, consciously and voluntarily or at all. The provision in effect authorises the doctor or health professional to take the sample without the actual consent of the person. It would otherwise be an assault to do so. If anything, the provisions reinforce the requirement that the person, if conscious and communicative, must actively (ie, consciously and voluntarily) allow the sample to be taken, on pain of criminal sanction for refusing.

50. The purpose of s56 does not support the contrary interpretation. As we have seen, the former provisions compelled doctors to take the sample whether or not the person allowed it. That placed doctors in a very difficult position. The current provisions impose an obligation on persons to allow the sample to be taken, on pain of criminal sanction for refusing. Because doctors are not in the same position of great difficulty when taking samples from unconscious or incommunicative persons, the provisions deem such persons, and only them, to allow the taking. The doctor or professional can then decide whether or not to take the sample. Section 56 does not create a scheme for imposing criminal responsibility on persons who unconsciously and involuntarily refuse to allow a sample to be taken. It is a scheme for imposing that 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.

51. I therefore conclude 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.

52. There will therefore be an order in the nature of *certiorari* quashing his Honour's orders.

SHOULD THERE BE AN ORDER FOR REMITTER?

53. Beside an order in the nature of *certiorari* quashing the orders of the trial judge, Ms Dover sought an order in the nature of mandamus directing the County Court to dismiss the charge brought against her. In her submission, the medical evidence was all in her favour. The prosecution doctor had accepted her refusal to cooperate could have been due to her head injury, which view was supported by Ms Dover's treating neurologist. That necessarily raised a reasonable doubt about this element of the offence. There was no evidence on which the judge could find the charge proven against her and the court should therefore compel the County Court to dismiss the charge.

54. In the informant's submission, the trial judge did not go into the medical evidence. On examination, that evidence may establish Ms Dover was not suffering from concussion at the time of the refusal. There were CT scans revealing her severe brain injury but they were taken afterwards. A driver who came across and rendered assistance to Ms Dover detected the smell of alcohol on her person. The doctor who sought the sample thought she was intoxicated. All these matters require investigation and consideration by the judge.

55. Although I think the medical evidence in Ms Dover's favour is extremely strong, I would not, against the opposition of the prosecution, compel the County Court to make an order dismissing the charge against Ms Dover in circumstances where the trial judge had not considered that and the other evidence. It is for the judge in the appeal in the County Court to determine whether or not there is a reasonable doubt that Ms Dover's refusal was conscious and voluntary, not this court on judicial review. In consequence, I will not go into the evidence any further.

56. There will therefore be an order remitting the proceeding back to the trial judge for hearing and determination according to law.

CONCLUSION

57. This application for judicial review must be granted because Ms Dover has established the learned trial judge of the County Court of Victoria erred in law on the face of the record when interpreting s56(2) of the *Road Safety Act*.

58. The proper interpretation of s56(2) must take into account the basic and fundamental principle of the common law that persons are criminally responsible only for their conscious and voluntary acts. This principle is not abrogated by contrary provision unless it is unambiguously and unmistakably clear the Parliament intended to achieve that result. The terms of s56(2) and the other provisions of the Act and the purposes of the legislation reveal no such intention.

59. In criminal cases it is not usually necessary for the prosecution expressly to prove that the accused acted consciously and voluntarily because there is an evidentiary presumption that they did so. However, where the issue of voluntariness is legitimately raised, the prosecution must prove this element of the offence beyond reasonable doubt.

60. The issue was legitimately raised in the present case. The medical evidence of both the prosecution and the defence suggested Ms Dover refused to allow the doctor to take a sample of her blood by reason of the severe head injury which she suffered in the accident. It was therefore necessary for the trial judge to consider this evidence and to determine whether the prosecution had established beyond reasonable doubt that Ms Dover's refusal had been conscious and voluntary. His Honour erred in law in failing to do so.

61. I will not order the County Court to dismiss the charge against Ms Dover. It is for the trial judge to determine whether the charge should be dismissed, not this court. I will make an order in the nature of certiorari quashing the orders of the judge dated 27 October 2010 and remit the matter back to his Honour for hearing and determination according to law.

---

[1] Victoria, *Parliamentary Debates*, Legislative Assembly, 10 April 1991, 946-947 (Peter Spyker, Minister for Transport). The Minister said the Bill was 'intended to ensure that drivers act responsibly on our roads':

ibid 946.
[2] The authorities are referred to in *Slater v Director of Public Prosecutions* [2005] VSC 115 (22 April 2005) [8] (Bell J).
[3] [1967] HCA 2; (1967) 121 CLR 205 ('*Ryan*').
[4] *Ibid* 213.
[5] *Ibid* 216.
[6] [1980] HCA 17; (1980) 146 CLR 64 ('*O'Connor*').
[7] *Ibid* 80 (footnote omitted).
[8] [1985] HCA 43; (1985) 157 CLR 523, 569.
[9] *O'Connor* [1980] HCA 17; (1980) 146 CLR 64, 81 (Barwick CJ).
[10] [1990] HCA 49; (1990) 171 CLR 30.
[11] *Woolmington v Director of Public Prosecutions; R v Mullen* [1938] HCA 12; (1938) 59 CLR 124.
[12] *Ibid* 41.
[13] *Ibid* 40.
[14] (1985) 42 SASR 266.
[15] *Ibid* 272 (Bollen and Johnston JJ agreeing).
[16] [2007] SASC 168; (2007) 171 A Crim R 361 (Supreme Court of South Australia – Court of Criminal Appeal).
[17] *Ibid* 367 [33]-[34].
[18] [2009] VSCA 135; (2009) 195 A Crim R 426 (Supreme Court of Victoria – Court of Appeal).
[19] *Ibid* 432-34 [27]-[34].
[20] [1959] VicRp 19; [1959] VR 105.
[21] *Ibid* 108.
[22] *Ibid* 109.
[23] *Ibid* 110.
[24] *Ibid* 111.
[25] Unreported, Supreme Court of South Australia – Full Court, King CJ, Sangster and Legoe JJ, 13 March 1981.
[26] *Ibid* 1-2.
[27] *Ibid* 5.
[28] *Ibid* 7.
[29] [2004] SASC 183 (25 June 2004).
[30] *Ibid* [24]; followed *Police v Wilkey* [2004] SASC 285; (2004) 89 SASR 460, 464 [20]-[21] (Nyland J).
[31] [2004] SASC 183 (25 June 2004) [24].
[32] [2007] SASC 351; (2007) 99 SASR 280 ('*Ghuede').*
[33] *Ibid* 283-84 [9].
[34] *Ibid* 286 [19].
[35] (1987) 26 A Crim R 22.
[36] *Ibid* 23-24.
[37] *Ibid* 24.
[38] (1991) 55 SASR 476 (King CJ, White and Mohr JJ) ('*Kroon*').
[39] *Ibid* 479.
[40] *Ibid.*
[41] *Ibid* 492.
[42] *Ibid* 487.
[43] [1992] HCA 14; (1992) 173 CLR 572, 578 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ) ('*Jiminez').*
[44] *Ibid* 581 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[45] *Ibid* 584 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[46] (1991) 55 SASR 476, 480 (King CJ, White and Mohr JJ agreeing).
[47] *Jiminez* [1992] HCA 14; (1992) 173 CLR 572, 581, 583-84 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).
[48] (1998) 100 A Crim R 506 (Supreme Court of Victoria – Court of Appeal).
[49] *Ibid* 508.
[50] *Ibid* 516.
[51] [2002] ACTSC 20; (2002) 167 FLR 234 (Supreme Court of the Australian Capital Territory).
[52] *Ibid* 235.
[53] (2010) 205 A Crim R 469 (Supreme Court of South Australia).
[54] *Ibid* 476 [30].
[55] *Ibid.*
[56] *Ibid* 476 [31].
[57] *Ibid* 496 [131].
[58] *Gilbert v Gulliver* [1918] VicLawRp 27; [1918] VLR 185 (Cussen J); *Bond v Reynolds* [1960] VicRp 93; [1960] VR 601 (Gavan Duffy J); *Jackson v Dyball* (1993) 74 A Crim R 10 (Supreme Court of Western Australia).
[59] [1983] HCA 39; (1983) 153 CLR 52.
[60] *Ibid* 104-05.
[61] [1994] HCA 15; (1994) 179 CLR 427.
[62] *Ibid* 437.

[63] [2011] HCA 10; (2011) 242 CLR 573.
[64] [1998] HCA 28; (1998) 194 CLR 355.
[65] *Ibid* 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).
[66] *Ibid* 384 [78] n 56 (McHugh, Gummow, Kirby and Hayne JJ).
[67] [2011] HCA 10; (2011) 242 CLR 573, 591-92 [43].
[68] (1991) 55 SASR 476.
[69] *Ibid* 479.
[70] JA Simpson and ESC Weiner (eds), *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1991) vol 1, 344-45.

APPEARANCES: For the plaintiff Dover: Mr Patrick Tehan QC and Mr Florian Andrighetto, counsel. David Tonkin & Associates, solicitors. For the first defendant Doyle: Ms Diana Karamicov, counsel. Adrian Castle, Office of Public Prosecutions.
