08/90

SUPREME COURT OF VICTORIA

WOODWARD v MORGAN

O'Bryan J

19 January 1990 — (1990) 10 MVR 474

MOTOR TRAFFIC – SPEEDING – MEDICAL PRACTITIONER ATTENDING PATIENT WITH SEVERE CHEST PAINS – POSSIBILITY OF PATIENT DYING BEFORE HOSPITALISATION – DEFENCE OF NECESSITY – WHETHER AVAILABLE IN LAW – ELEMENTS OF – WHETHER DRIVING OUT OF PROPORTION TO EMERGENCY: *ROAD SAFETY (TRAFFIC) REGULATIONS* 1988, R1001.

W., a medical practitioner, who was charged with driving at 91 km/h in a 60 km/h zone, said that he was attending an elderly patient who had complained of chest pains and was unwell. W. formed the opinion that there was a significant risk that the patient might die from coronary problems before hospitalisation and drove accordingly "with a degree of urgency". The magistrate rejected W's defence of necessity. Upon order nisi to review—

HELD: Order discharged.
1. The defence of necessity is available in law as a defence to a *Road Safety (Traffic) Regulations* offence, and the onus of negating such a defence rests on the prosecution.

2. One of the elements of the defence is proportionality, that is, the act done to avoid the imminent peril must not be out of proportion to the peril to be avoided. In the present case, it was open to the magistrate to determine that W's speeding in the circumstances was out of proportion to the peril to be avoided.

O'BRYAN J: [1] This is the return of an order nisi to review a decision in the Magistrates' Court at Moonee Ponds on 13 July 1989 wherein Wayne Morgan was the informant and Michael Woodward was the defendant. The defendant in the court below, Dr Woodward, was charged on information that he did drive a vehicle in Camp Road Broadmeadows between Beulah Street and Main Street on 13th August 1988, at a speed exceeding 60 kilometres per hour indicated by the restriction sign, namely at a speed of 91 kilometres per hour. The offence is created by Regulation 1001 in the *Road Safety (Traffic) Regulations* 1988.

During the hearing, Dr Woodward raised in his defence that he drove his vehicle in excess of the speed limit out of necessity. The circumstances relied upon by way of defence of necessity were as follows. Whilst performing locum duties, the doctor received a call to attend an elderly patient who had complained of chest pain and was unwell. The patient had declined to use an ambulance. Because the patient had chest pain the doctor formed the opinion that he should proceed "with a degree of urgency" because there was a significant risk that the patient might die from coronary problems. The doctor proceeded "in great haste but at a safe speed". The road conditions were good and there were few other cars on Camp Road. Lighting was good and the road surface was good, it having recently been resealed. The doctor did not pass any other car.

[2] A medical witness supported Dr Woodward as to the seriousness of severe chest pains in an elderly patient and as to the possibility of the patient dying before hospitalisation. The affidavit made in support of the order nisi does not make it clear whether the informant submitted in the court below that a defence based upon necessity was not available because the offence charged was one of strict liability which precluded a defence of necessity, although the reasons of the Magistrate suggest that he did so. After hearing submissions, the learned magistrate ruled:

> 1. The defence of necessity was not available because it had been rebutted by the informant. The legislation is clear for emergency vehicles and does not allow every emergency vehicle such as doctors' cars; and
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> 2. Even if the defence of necessity was available, the offence charged is one of strict liability;

3. The third element of the defence of necessity, as set out in *placitum* (iii) at the head of p444 in *R v Loughnan* [1981] VicRp 43; (1981) VR 443, had not been made out because the use of excessive speed was not warranted in the circumstances and public policy would not allow the defence of necessity to be available on this occasion.

These reasons are very convoluted and suggest that the learned magistrate doubted that the defence of necessity was available in law. However, she also determined that if the defence was available in law, it failed on the facts because the speed at which the doctor drove along Camp Road was out of proportion to the necessitous circumstances – at least this is how I interpret the reasons provided by the learned magistrate. [See para.17 of the plaintiff's affidavit in support of the order nisi.]

[3] Four grounds of review were granted by Master Evans:

(a) There was no evidence before the court capable of rebutting the defence of necessity.

(b) The learned magistrate erred in law in taking into account
(i) the provisions relating to emergency vehicles in the legislation creating the offence with which the plaintiff was charged;
(ii) the fact that the offence was one involving strict liability in determining whether or not the defence of necessity was available to the defendant in the circumstances of the case or at all.

(c) The learned magistrate erred in law in concluding that the defence of necessity was not available on the grounds of public policy in respect of the offence with which the plaintiff was charged in the circumstances of the case or at all.

(d) The learned magistrate erred in law in her assessment of whether or not the act of the defendant was out of proportion to the peril to be avoided by failing to give any or any proper consideration to the peril to be avoided.

These grounds may be reduced to two main issues. Firstly, whether the defence of necessity was available in law. Secondly, whether on a consideration of the whole of the evidence the informant negated the defence of necessity.

The first issue is not in dispute as Counsel for the informant conceded in this court that the defence of necessity is available in law as a defence to a *Road Safety (Traffic) Regulation* offence. In my opinion, modern authority supports the concession made by Counsel. Cf. *re White* 89 FLR 444; (1987) 9 NSWLR 427; 31 A Crim R 194; *R v Conway* [1988] EWCA Crim 1; [1989] QB 290; [1988] 3 All ER 1025; (1988) 88 Cr App R 159; [1988] 3 WLR 1238; *R v Martin* [1988] EWCA Crim 2; [1989] 1 All ER 652; (1988) 88 Cr App R 343; [1989] RTR 63; [1989] Crim LR 284; (1988) 153 JP 231. Some doubt was cast upon the availability of the defence of necessity by *dicta* of Lord Denning in *Buckoke v Greater London Council* (1971) Ch 655 at 668; [1971] 2 All ER 254; [1970] 1 WLR 1092, but in my **[4]** opinion, *Buckoke* is not authority for the proposition that the defence of necessity is unavailable to the driver of a vehicle who contravenes a *Road Safety (Traffic) Regulation*. It would be illogical to hold that in no conceivable circumstances would the law recognise a defence of necessity simply because the offence is created by a *Road Safety (Traffic) Regulation*. In extreme but necessitous circumstances, the law will permit a person to breach a *Road Safety (Traffic) Regulation*.

In *Conway* the Court of Appeal upheld a submission that a defence of necessity is available to a person charged with reckless driving. Lord Justice Woolf said, at 297:

> We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish 'duress of circumstances' as in *R v Willer* (1986) 83 Cr App R 225 – that is, where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person."

Later His Lordship added, at 298:

> "It follows that a defence [of duress of circumstances] is available, only if from an objective standpoint, the defendant can be said to be acting in order to avoid a threat of death or serious injury. The approach must be that indicated by Lord Lane CJ, in *R v Graham* [1981] EWCA Crim 5; [1982] 1 All ER 801; (1981) 74 Cr App R 235; [1982] 1 WLR 294 at 300."

In *Martin*, Simon Brown J upheld a submission that the defence of necessity is recognised by English Law to answer a charge of driving a motor car whilst disqualified. His Honour said at 653-654:

> "The principles may be summarised thus. First, English law does in extreme circumstances recognise a defence of necessity. Most commonly this defence arises as duress, that is, pressure on the accused's will from the wrongful threats or violence of another. Equally however, it can arise from other objective dangers threatening the accused or others. Arising thus, it is conveniently called duress of circumstances. **[5]** Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury who would be directed to determine these two questions. First, was the accused or may he have been impelled to act as he did because as a result of what he reasonably believed to be the situation, he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, would a sober person of reasonable firmness sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was 'Yes', then the jury would acquit; the defence of necessity would have been established."

One may proceed in the present case upon the basis that the defence of necessity was available in law and that the evidence of the doctor fairly raised as an issue for determination by the court the defence. The onus of proving the offence rested on the informant. It was for the informant to prove all the elements of the offence and to negate the defence of necessity. Mr Hurley, who appeared for the informant, accepted that the onus of negating one or more of the elements of the defence of necessity, rested upon the informant.

What is most seriously in issue in this court is whether the learned magistrate was entitled to find that one of the requirements of the defence of necessity was negated by the informant. In *R v Loughnan* [1981] VicRp 43; (1981) VR 433 at 448, the requirements of the defence of necessity were stated in the majority judgment in the court as follows:

> "First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused **[6]** or upon others whom he was bound to protect. The limits of this element are at present ill defined and where those limits should lie is a matter of debate...
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> The other two elements involved ... can for convenience be given the labels, immediate peril and proportion, although the expression of what is embodied in those two elements will necessarily vary from one type of situation to another.
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> The element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril. As Edmund Davies LJ (as he then was) pointed out in *Southwark LBC v Williams* [1971] Ch 734; [1971] 2 All ER 175; [1971] 2 WLR 467, all the cases in which a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril. Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that the defence of necessity can succeed.
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> The element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way the test is: would a reasonable man in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?"

The elements thus described are analogous to the elements of the defence of provocation, well- known in Criminal Law in the case of homicide. Mr Justice Crockett, who delivered a separate judgement in *Loughnan*, stated the evidentiary requirements slightly different at 460. He said:

> "The essential conditions, I consider, so far as presently relevant are that:
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> 1. The harm to be justified must have been committed under pressure either of physical forces or exerted by some human agency so that 'an urgent situation of imminent peril' has been created;
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> 2. The accused must have acted with the intention of avoiding greater harm or so as to have made possible 'the preservation of at least an equal value'.

3. There was open to the accused no alternative, other than that adopted by him, to avoid the greater harm or 'to conserve the value'."

[7] It can be seen that a 'proportionality' test, viewed objectively, is a relevant element which must be negated by the informant. The learned magistrate determined that the informant had negated the third element enunciated in the majority judgment in *Loughnan* 'because the use of excessive speed was not warranted in the circumstances'. In other words, the learned magistrate found that for the doctor to drive at 91 kilometres per hour in all the circumstances was out of proportion to the urgent situation created by the patient's apparent condition as known to the doctor.

Ground (d) is the principal ground upon which Mr Macaulay based his argument. He submitted that the learned magistrate fell into error in determining, as she did, that the act of the doctor in driving at 91 kilometres per hour in all the circumstances was out of proportion to the peril to be avoided. The learned magistrate had the advantage which I do not enjoy of seeing and hearing the witnesses. After carefully perusing the evidence disclosed in the affidavit in support of the order nisi, I am not persuaded that the finding made by the learned magistrate was not open to her.

Whilst the reasons offered to support the decision are convoluted and proceeded perhaps upon an erroneous premise, namely that the defence of necessity was not available because the offence was one of strict liability, the alternative line of reasoning adopted by the learned magistrate really cannot be challenged in this court on the facts. In other words, the finding on the facts was open, **[8]** in my opinion, to the learned magistrate. She was entitled therefore to reject the defence of necessity. In my view the grounds of the order nisi have not been made out and the order nisi will be discharged with costs.

APPEARANCES: For the plaintiff Woodward: Mr CC Macaulay, counsel. JW Ball & Sons, solicitors. For the defendant Morgan: Mr TV Hurley, counsel. Victorian Government Solicitor.
