3/96

SUPREME COURT OF VICTORIA

SKASE v HOLMES and ANOR

Vincent J

11 - 12 September, 11 October 1995

MOTOR TRAFFIC – DRINK/DRIVING – WHETHER OFFENCE UNDER S49(1)(f) OF *ROAD SAFETY ACT* 1986 IS ONE OF STRICT LIABILITY – WHETHER DEFENCE OF HONEST AND REASONABLE MISTAKE AVAILABLE – FINDING THAT PERSON'S BLOOD/ALCOHOL CONCENTRATION COULD NOT HAVE EXCEEDED 0.03% – PERSON CONVICTED – WHETHER SUCH DISPOSITION OPEN: *ROAD SAFETY ACT* 1986, S49(1)(f).

1. The legislature has established an increasingly strict regime with respect to drink/driving offences designed to protect the community. There would seem to be little doubt that the offence established by s49(1)(f) of the *Road Safety Act* 1986 ('Act') is to be regarded as one of strict liability. Accordingly, the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the Act.

***Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173, applied.**

2. Where a magistrate found beyond reasonable doubt that a person's blood/alcohol concentration could not have exceeded 0.03%, the magistrate was in error in imposing a conviction and making an order against the person's driver licence.

VINCENT J: [1] This matter comes before the Court by way of an application for judicial review under Order 56 of the *Supreme Court Rules*. It arises out of a decision by a Magistrate, on 8 July 1994, concerning s49(1)(f) of the *Road Safety Act.*

The factual background is as follows. At approximately 7.00 p.m. on 28 January 1993, the appellant entered a mobile preliminary breath test station in Clayton North. He admitted having consumed some alcohol that day and was requested by the firstnamed respondent to furnish a sample of breath into a preliminary breath test device. The appellant complied with this request, the result indicating the presence of alcohol. He then furnished a sample of breath directly into a prescribed breath analysing instrument. He was informed that the analysis indicated that he had a blood alcohol concentration in excess of the prescribed limit, namely 0.160 per cent. The appellant declined the option of having a second test, remarking that he did not think that the reading would be that high. As a result, the appellant was charged under sections 49(1)(b) and (f) of the *Road Safety Act* 1986 and appeared in the Oakleigh Magistrates' Court on 8 July 1994. The former charge (s49(1)(b)) was not proceeded with by the informant.

Dr Ian Kronberg, a gastroenterologist, who was accepted by the Magistrate as an expert in his field, gave evidence in that proceeding that he had performed a gastroscopy upon the appellant. This examination revealed the presence of a moderately sized hiatus hernia and the existence of some antral erosion of the stomach. He found **[2]** that the appellant suffered from gastro-intestinal reflux. This, it would appear, is occasioned by the failure of the sphincter to seal off the top of the stomach as adequately as it should, thus allowing stomach gases to escape into the oesophagus and windpipe. In Kronberg's opinion, the appellant was suffering from gastro-oesophageal disease. Further, and more importantly for present purposes, he concluded that, based on his experience and knowledge, it was more likely than not that the sample of breath given by the appellant would have been contaminated by stomach gas enriched with alcohol. This contamination could, according to the witness, have resulted in an erroneously high reading. The appellant also gave evidence before the Magistrate, stating that he had consumed three standard seven ounce glasses of beer at about 4.00 p.m. on 28 January 1993. Later that day, between 6.00 p.m. and 7.00 p.m., he consumed a small can of beer. Not long after this, the appellant furnished a sample of breath at the random breath test station.

An analytical and consultant chemist, Graham Young, gave evidence, both parties admitting

that he was qualified to do so as an expert, in respect to the operation of the breath analysing instrument employed. Assuming that the appellant consumed the claimed amounts at the times specified and was tested with the type of breathalyser used and at the time it was used, Mr Young expressed the opinion that there was no time between the commencement of consumption of alcohol and 7.30 p.m. at which the alcohol concentration in the blood of the appellant would have approached 0.05 per **[3]** cent. Specifically, he opined that at no time over the whole of the period would the applicant's blood alcohol concentration have exceeded 0.03 per cent.

The Magistrate accepted Dr Kronberg's evidence with respect to the appellant's medical condition. Although satisfied that the instrument was operated in accordance with the regulations, he concluded that the reading was obtained partly from air from the lungs and partly from gas from the stomach and was, accordingly, misleading. Indeed, he found beyond reasonable doubt that the actual blood alcohol concentration of the appellant did not exceed 0.03 per cent.

Considering, however, that he was compelled by law to ignore the reality that the appellant had never in fact driven a motor car with a blood alcohol concentration in excess of the prescribed limit, the Magistrate fined him $100.00 and $26.00 court costs. In addition, he cancelled his driver's licence and disqualified him from obtaining a licence for 16 months from that day. Later, the appellant's counsel submitted that, by reason of these express findings, it was still open to the Magistrate not to record a conviction and not to cancel his driver's licence. Whilst His Worship stated that he found this submission attractive, apparently accepting its validity, he indicated that he considered himself to be *functus officio* at that stage (the conviction and penalties set out above having already been entered in the Register of the Court and an appeal filed).

In this Court, counsel for the appellant has argued that the appellant was a mere "luckless victim" who it was **[4]** never Parliament's intention to catch in this unjust fashion. It was submitted that he acted in the honest and reasonable, indeed correct, belief that he had committed no offence established by s49(1)(f) of the *Road Safety Act*. He was entitled, the argument proceeded, to rely upon that state of mind as constituting a defence in the circumstances.

Counsel for the appellant relied upon statements of principle in a large number of cases, in support of this proposition. These included the following: *R v Jones* [1995] QB 235; [1995] 3 All ER 139; [1995] 2 WLR 64; *Butler v Loneragan* ((1994) 19 MVR 361; (1994) 74 A Crim R 259, NSW Supreme Court, 16/6/94); *Hawthorne (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120; 65 A Crim R 227; *Edwards v Macrae* (1991) 14 MVR 193; *L v F* ((1985) 21 A Crim R 55; [1985] Tas R 112; (1985) 3 MVR 120, Tas. Supreme Court, 24/9/85); *Harmer v Grace, ex parte Harmer* [1980] Qd R 395; *Boucher v GJ Coles & Co Ltd* (1974) 9 SASR 495; (1974) 32 LGRA 87; *Mayer v Marchant* (1973) 5 SASR 567; (1973) 30 LGRA 246. Some reliance was also placed upon pronouncements of principle by the High Court in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, and *Jiminez v R* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292. Among the Victorian cases to which reference was made were*: Fitzgerald v Howey* ((1996) 24 MVR 369, Victorian Supreme Court, (Eames J) 10/8/95); *Robinson v Fisher* [1993] ACL Rep. 130 VIC 201; *Pilkington v Elliot and Anor*. (unreported, Victorian Supreme Court, (Coldrey J) 27/9/91); *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377; *Meeking v Crisp & Anor*. **[5]** [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1; *Kidd v Reeves* [1972] VicRp 64; [1972] VR 563; *Barker v Burke* [1970] VicRp 111; [1970] VR 884.

These authorities, emanating from different jurisdictions and concerned with a variety of pieces of legislation, contain statements emphasising the fundamental importance in the attribution of criminal responsibility of the existence of what might be described as a sufficiently culpable state of mind. The undoubtedly correct view is repeatedly expressed that Courts should be very reluctant to adopt interpretations of statutory provisions which could have the effect of holding criminally responsible an individual who has acted in the honest and reasonable belief that his or her conduct was lawful.

One decision that assumes particular significance in the current context is that of the Full Court of this Court in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173 where it was held that a defence of honest and reasonable mistake of fact was not available. The Court held that the offence then under consideration, concerning the gross weight of a vehicle, was one of strict

liability. Young CJ cited the well known statement of Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 that:

> "The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.
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> Indeed, there has been a marked and growing tendency to treat the *prima facie* rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation. But, although it has been said that in construing a modern statute a presumption as to *mens rea* does not exist (per Kennedy LJ, *Hobbs v Winchester Corporation* [1910] 2 KB 471, at p483; 26 TLR 557), it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence.
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> There may be no longer any presumption that *mens rea*, in the sense of a specific state of mind, whether of motive, intention, knowledge or advertence, is an ingredient in an offence created by a modern statute; but to concede that the weakening of the older understanding of the rule of interpretation has left us with no *prima facie* presumption that some mental element is implied in the definition of any new statutory offence does not mean that the rule that honest and reasonable mistake is prima facie admissible as an exculpation has lost its application also." (At p174)

However, he concluded that:

> "The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles." (At p177)"... the putting on the defendant under strict liability is necessary for the enforcement of the statute. In such a case the exclusion of the defence of honest and reasonable mistake inevitably means that individuals are called upon so to conduct their affairs that the general welfare is not prejudiced and to that extent the rights of the individual are subjected to the common good. I think that the class of person included in s35(5) shows that the legislature regards the legislation as being of that character **[7]** therefore intends that the defence of honest and reasonable mistake should be excluded." (At p178)

McInerney J in the same case stated:

> "I think, however, the general scheme of Pt. IV of the *Motor Car Act*, taken in conjunction with its legislative history, particularly the amendments as to additional penalty introduced in s35(5) of Act No. 6628, is too intractable to permit of the conclusion that the defence of honest and reasonable mistake is open." (At p191)

Counsel for the appellant submitted that the approach adopted in *Welsh v Donnelly* did not necessitate the rejection of a defence of honest and reasonable belief in relation to the section in question which should be considered in the light of those cases decided more recently in other jurisdictions. In response, it was submitted by counsel for the respondents that the legislature, through s49(1)(f) of the *Road Safety Act*, has created an offence of strict liability. *Welsh v Donnelly*, it was contended, is binding and applicable, having been endorsed in the last few years in *Kearon v Grant* (supra). In this context, reference was made to the judgment of Brooking J in that case where the following passage appears:

> These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, ... If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed. ..." (At p.323)

Reliance was also placed upon the High Court decision in *Mills v Meeking & Anor* [1990]

HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 which concerned s49(1)(f) of the *Road Safety Act* 1986.

On its proper construction, the argument proceeded, s49(1)(f) falls into the line of offences considered *by Welsh v Donnelly* (*supra*) (overloaded vehicles); *Kearon v Grant* (*supra*) (speeding); and *Pilkington v Elliot* (*supra*) (driving unregistered vehicle). Acknowledging the force of the arguments advanced on behalf of the appellant, I am of the opinion that the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the *Road Safety Act* 1986. I do not think that it is necessary to set out the history of this section or the structure within which it is contained. It is sufficient, I think, to state that over the years the legislature has established an increasingly strict regime with respect to drink driving offences designed to protect the community. There would seem to be little doubt that, at least since the decision in *Welsh v Donnelly*, and consistent with this approach, s49(1)(f) has been regarded as one of strict liability. Although the provision has been the subject of repeated examination in this Court over a number of years, there is nowhere to be found, as I understand the situation, any pronouncement or indication in any of many judgments handed down, that this is not the case. For good or ill, the position is, in my opinion, fairly clear. I do not consider that the Magistrate fell into error in deciding as he did. However, this does not dispose of the matter. **[9]**

Section 50(1AB) of the *Road Safety Act* 1986 reads:

> "If a court finds a person guilty of an offence under section 49(1)(b), (f) or (g) but does not record a conviction, the court is not required to cancel a driver licence or permit or disqualify the offender from obtaining one in accordance with sub-section (1A) if it appears to the court that at the relevant time the concentration of alcohol in the blood of the offender—
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> (a) in the case of a person previously found guilty of an offence against any one of the paragraphs of section 49(1) or any previous enactment corresponding to any of those paragraphs or any corresponding law, was not more than 0.05 grams per 100 millilitres of blood; or
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> (b) in any other case, was not more than 0.10 grams per 100 millilitres of blood."

In the present case, as earlier mentioned, the Magistrate found beyond reasonable doubt that the appellant's actual blood alcohol concentration could not have exceeded 0.03 per cent. He then imposed the penalties previously mentioned. There is obvious injustice to the appellant if that remains the case. Section 50(1AB) clearly requires a Magistrate to have regard to the real situation and enables the Court to avoid the injustice which might occur through the arbitrary operation of a strict liability provision without regard to the actual circumstances or the consequences of its mindless application. The learned Magistrate was bound to consider the issues raised by s50(1AB) and had the option open to him not to record a conviction. There is some reason to believe that these matters were simply overlooked. In that respect he did fall into error.

In the circumstances, I do not think that it is necessary for me to remit this matter to the Magistrates' Court. I consider that proper exercise of judicial discretion would inevitably lead to a dismissal of the charge against the appellant and, accordingly, direct that both the conviction and sentence be quashed. In view of discussions with counsel which occurred in the course of this proceeding, it is not necessary for present purposes for me to make any comment concerning the recent decision of Eames J (in *Fitzgerald v Howey* (1996) 24 MVR 369, Victorian Supreme Court, 10/8/95).

APPEARANCES: For the Appellant: Mr G Hardy, counsel. Solicitors: Einsiedels. For the First Respondent: Mr T Hurley, counsel. Solicitor: Victorian Government Solicitor.
