21/93

SUPREME COURT OF VICTORIA

BEARDSLEY v HOWER

Ashley J

4 March 1993 — (1993) 19 MVR 15

MOTOR TRAFFIC – DRINK/DRIVING – REQUIREMENT MADE TO UNDERGO FULL BREATH TEST – REQUEST MADE BY DRIVER TO MAKE TELEPHONE CALL – WHETHER A "REFUSAL" – TEST TO BE APPLIED WHETHER REFUSAL EXCUSABLE: *ROAD SAFETY ACT* 1986, SS49(1)(e), 55(1), (9).

When B., a driver of a motor vehicle was requested to undergo a full breath test, she declined to do so seeking permission to make a telephone call to a Police Inspector. B. said that if the Inspector told her to take the test, she would do so. Subsequently, after making a call, B. spoke to the Inspector who told her to undergo the test. B. then indicated that she was willing to take the test but the police informant refused to arrange a test and later laid a charge against B. of refusing to comply with a requirement made under s55(1) of the *Road Safety Act* 1986 ('Act'). Upon convicting B. of the charge, the magistrate said that the question to be determined was whether it was reasonable in the circumstances for B. to have given a conditional refusal. Upon appeal—

HELD: Appeal allowed. Conviction set aside. Matter remitted for further hearing and determination.
(1) Section 55(9) of the Act casts an onus on a defendant of satisfying a court that because of a reason of substantial character (other than a desire to avoid providing information which might be used against the defendant) the refusal to submit to a breath test is excusable.
***Burns v Storey* [1970] VicRp 50; (1970) VR 388, applied.**

(2) Accordingly, in deciding whether the reason for the refusal was reasonable, the magistrate applied the wrong test.

(3) *Obiter*. Whether there has been a refusal in a particular case depends on the facts. In the present case, it was open to the magistrate to find that B. had refused to comply with the requirement under s55(1) of the Act. The subsequent willingness to undergo the test was irrelevant once the refusal was in fact given.
***Reddy v Ross* [1973] VicRp 46; (1973) VR 462, applied.**

ASHLEY J: [1] This is an appeal brought under s92(1) of the *Magistrates' Court Act* 1989 from a final order of a Magistrate made at the Frankston Magistrates' Court on 19 October 1992. The order appealed from is the conviction of the appellant, Susan Therese Beardsley, upon a charge laid under s49(1)(e) of the *Road Safety Act* 1986 (the Act). That sub-section is in these terms:

> "A person is guilty of an offence if he or she—
> (e) refuses or fails to comply with a requirement made under s55(1) or (2)."

I should next refer to s55(1), which was relevant to the facts of this matter. It reads as follows:

> "If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation under section 53 to do so and—
> . . .
> the member of the police force or officer of the Corporation may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force or an officer of the Corporation authorised in writing by the Corporation for the purposes of section 53 to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath or until 3 hours after the driving or being in charge of the motor vehicle, whichever is sooner."

An appeal under s92(1) of the *Magistrates' Court Act* must be upon a question of law. The question of law framed for my consideration, in the form into which they were by consent amended at the hearing before me, are as follows:

"(a) whether the Magistrate erred in convicting the appellant, she having withdrawn her objection to furnish a sample of breath for analysis pursuant to s55(1) of the *Road Safety Act*; **[2]**

(b) whether the test to be applied in determining whether there was some reason of a substantial character for the refusal is to be determined by "subjective" or "objective" considerations."

To understand how the questions arise, it is necessary to set out the facts of the matter. They are described in an affidavit of the appellant sworn 18 November 1992. There are no answering affidavits. The events out of which the charge arose occurred on the early morning of 21 February 1992. The appellant was intercepted by the informant, Daniel Gerard Hower, at about 3:39 a.m. whilst she was driving a motor vehicle. She was required to undergo, and underwent, a preliminary breath test; see s53(1)(a) of the Act. The test was apparently positive. The informant then required the appellant to accompany him to the Frankston Police Station, and she did so. At about 4:15 a.m. an authorised breath analysis officer, Constable Lloyd, arrived at the station. The informant then required the appellant to "undergo a breath test pursuant to s55 of the *Road Safety Act*". This requirement was restated a number of times, and not only by the informant. On no occasion did the appellant agree to comply; nor did she comply in fact. It appears that at one point a more senior officer was called into the room and described the breath-testing laws to the appellant. Whilst the evidence suggests that the appellant was abusive, unpleasant and behaved very badly when she was at the police station – at least until she spoke with an Inspector Ken Dainton – the following matters also emerged from the evidence: **[3]**

1. From the outset, whilst at the police station, the appellant made it clear that she was not prepared to believe that the informant and other police officers said was her obligation to undergo a breath test.
2. From a time prior to the arrival of the operator, the appellant requested that she be allowed to call Inspector Dainton, and said that she would not say anything until she had made that call.
3. The appellant told the informant that if Inspector Dainton told her to take the test, she would do so.
4. When first required to undergo breath analysis the appellant said, "I do not understand why I cannot make a phone call".
5. When next asked if she would comply with the requirement, she made no reply.
6. A conversation between the appellant and Constable Lloyd then took place, in which Lloyd required the appellant to undergo breath analysis. The appellant said, in part, "I'm not going to provide a sample of breath until I've made a phone call to find out if I'm doing the right thing".
7. Thereafter, the informant further required the appellant to undergo a test, and she replied, "No, not until I make a phone call".
8. The appellant was then told that she could make a call, after the test, and was warned of the penalty for refusing a test. Her response was to say:
"I don't fucking well care of what you do. I'm not blowing into that until you ring Ken Dainton. I don't trust you cunts".
9. Thereafter, the more senior officer at the **[4]** Frankston Station shortly described to the appellant the breath-testing laws The appellant "again refused to submit".
10. The appellant was asked by the informant why she (had) refused a breath test. She replied, "Because I wanted to make a phone call".
11. The appellant was thereafter permitted to ring her home. She spoke to her brother, who apparently contacted Inspector Dainton. The latter rang the Frankston Station and spoke both to the informant and to the appellant. He told her that she must undergo the test. The appellant then told the informant she would do so. But, although this was communicated to the informant well within the three-hour period referred to in s55(1) of the Act, the informant refused to arrange a test. It is not quite clear whether the authorised operator was then still present at the Frankston Station – but the certain evidence of the appellant and Constable Chisholm in the affirmative, and the less certain evidence of the operator that he was present might well have been preferred to the apparently uncertain recollection of the informant to the contrary.
12. Both the informant and the operator said that their practice was not to give a person a second chance when there had been a refusal.
13. The appellant's willingness to undergo breath analysis was repeated on a number of occasions. Indeed, she returned to the police station after having left a short while, again offering to **[5]** undergo a test.
14. The appellant was a divorcee, her former husband being a member of the Police Force. There had been a protracted property dispute. A possible settlement had fallen through not long before these events occurred and the appellant was bitter and suspicious as regards the police generally.
15. The appellant knew that if she was pulled up at a booze bus, she would have to furnish a breath sample.

This last evidentiary matter, I should note, is derived from a passage in the reasons reportedly given by the Magistrate. There is no reference to it in the account of the evidence, so far as I can see. The magistrate accepted that:

> A The appellant had said she would furnish a sample of breath after speaking to Inspector Dainton.
>
> B The appellant was scared and angry because of her marital history.
>
> C In the appellant's own mind, in light of recent trauma, the appellant believed that she needed to speak to Inspector Dainton.

The Magistrate said, in convicting the appellant of the matter now under consideration, that:

> 1. The question for him was whether it was reasonable for the appellant to give a conditional refusal in these circumstances.
>
> 2. It was not to the point that the appellant had offered to provide a sample of breath after speaking to Inspector Dainton.
>
> 3. The appellant's desire to speak to Inspector **[6]** Dainton was not a sufficient reason to furnish a sample of breath.

I have already referred to s49(1)(e) and s55(1) of the Act. I should now refer to s55(9). It reads as follows:

> "A person must not be convicted of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her".

A problem with affidavit material in a matter such as this, no matter how carefully it is drawn, is that almost inevitably it lacks completeness and precision. In the present appeal that seems likely to be the case with the Magistrate's reasons for finding that the charge was proved. But it must be emphasised, as I earlier said, that there is no answering material. In these circumstances, I must assume that what the Magistrate is sworn by the appellant to have said is what he did say.

I turn to consider the first question of law framed for my consideration. It is in terms which superficially appear to concede that what the Magistrate described as the "conditional refusal" constituted a refusal for the purposes of s49(1)(e) of the Act. But in fact the question makes no such implied concession. The word "objection" is used, rather than "refusal". The question is intended to raise the issue whether there was ever a refusal for the purposes of s49(1)(e). In this context, although nothing was sought to be made of it, I note that the appellant was charged with refusing to comply rather than with failing to comply with a requirement: they being two alternative charges that might **[7]** be preferred under that sub-section. The Magistrate said, as I have earlier noted, that the question for him was whether it was reasonable for the appellant to give a conditional refusal in the circumstances. He accepted, impliedly, in that passage of his reasons that the refusal was conditional. The Magistrate later said, however, that the appellant's desire to speak to Inspector Dainton was not a sufficient reason to refuse to furnish a breath sample. That would seem to assume that there had been a refusal, and to involve a consideration of s55(9).

The Magistrate's reasons, as they are reported in the only material before the court, are not very clear. Doing the best I can, it appears that the Magistrate considered that a conditional refusal, at least in the circumstances of this case, constituted a refusal for the purposes of s49(1)(e). It appears also that the Magistrate considered that the question that he then had to determine was whether that refusal was reasonable, in the context of determining whether a sufficient reason for refusal had been established. Mr Gebhardt of counsel, for the respondent, did not contend other than that the Magistrate's reference to whether the refusal was "reasonable" was a lead-in to the resolution of a s55(9) defence.

It is convenient to deal with the second question of law first of all. Mr Gebhardt frankly

conceded that the question to be resolved under s55(9) is not whether refusal is reasonable; nor whether sufficiency is to be established by what is reasonable. Rather, he submitted, the proper approach is that to which **[8]** the Full Court of this Court referred in *Burns v Storey* [1970] VicRp 50; [1970] VR 388. There, the court was considering a predecessor of s55(9), namely, s408(5)(a) of the *Crimes Act* 1958. That sub-section was in these terms:

> "A person who is required pursuant to sub-section (4) to furnish a sample of his breath for analysis and who refuses to do so shall be guilty of an offence and liable upon summary conviction "(to the penalty therein set out)" unless the court is satisfied
>
> (i) that there were no reasonable grounds for requiring the defendant to furnish his breath for analysis; or
> (ii) that there was some other reason of a substantial character for his refusal, other than a desire to avoid providing information which might be used against him".

The defendant had successfully relied upon sub-paragraph (ii) before a Court of Petty Sessions, relying upon a belief that he said he had as to who was authorised to administer him a breath test. The court (at p391) held that:

> ". .. a reason for refusal could be constituted by a belief or apprehension in the mind of the defendant. It need not be confined to objective facts or circumstances existing outside the mind of the defendant".

The Court then said at p391, speaking of the word "substantial":

> "It is obvious that the use of a word of such an indefinite character means that the courts are entrusted with the making of a judgment within a fairly extensive area as to whether a refusal to submit to a test is to be regarded as excusable or not. The guidance afforded is not precise and is probably deliberately so".

Their Honours then said – and I take it to be of cardinal importance – that;

> "It is sufficient to take the reason for refusing found to have been put forward by the defendant **[9]** and ask whether it will fairly answer to the description used in the Statute".

In my opinion, that is the way in which s55(9) should also be approached, bearing in mind always that the sub-section casts an onus upon the defendant. It is not the case, as was contended for the appellant by Mr Swanwick, that determination whether a reason is of a substantial character falls to be determined solely by whether the defendant so regarded it at the critical time. *Burns* is no authority for such an approach. But neither is it the case that the proper question is whether the reason for refusal is reasonable; or that determination whether a reason is reasonable will necessarily determine its sufficiency; (i.e., in the sense of it being a reason of substantial character). The task is neither more nor less than that set out by the Full Court in *Burns*. In the present case it appears, for reasons to which I have adverted, that the Magistrate did not resolve the issue raised for his consideration under s55(9) in accordance with proper principle.

Mr Gebhardt urged me to conclude that the evidence compelled the actual outcome, whether or not the right question had been asked and answered. I am not prepared to say that this was so. The main question must have been whether the reason was of a substantial character. The matter of "desire" raised by the last portion of s55(9) would seem almost inevitably to have been resolved in the appellant's favour. In *Burns*, the Magistrate had applied the correct test and the next question was whether the finding that had been made was open. In this case, a wrong test was, in my opinion, applied and the factual **[10]** outcome, had the correct test been adopted, is a matter of real uncertainty. The affidavit material does not enable me to arrive at a conclusion which would be soundly based.

It is, in the circumstances, strictly unnecessary for me to deal with the first question of law raised for my consideration. But I should briefly advert to it. The Magistrate apparently equated a "conditional refusal" with a "refusal" for the purposes of s49(1)(e) of the Act. Whether there has been a refusal in a particular case depends upon its peculiar facts. In *Reddy v Ross* [1973] VicRp 46; [1973] VR 462, McInerney J, in the context of a case involving alleged refusal of a defendant to undergo a preliminary test, said this, at pp470 to 471:

> "The dismissal of the information was in law justifiable if the magistrate was not satisfied as to each and every ingredient of the charge. The argument for the informant proceeds on the view that there was only an ingredient in issue, namely, the ingredient of refusal to undergo the test. The language attributed to the magistrate suggests that having found that there had been a refusal, the magistrate nevertheless dismissed the information. One can understand a magistrate taking the view that the informant ought to have accepted the defendant's offer to undergo the test. On any view, and adopting the informant's version of the facts, the episode appears to have lasted no longer than perhaps five minutes, certainly no more than three minutes from the time of the defendant's last refusal till the time when the defendant intimated that he was prepared to undergo the test. The magistrate might well have thought that the action of the police in declining to administer the test and in arresting and charging the defendant with the offence of having refused to undergo the test – an offence in respect of which conviction would have rendered the defendant liable to a fine of up to $100, in addition to cancellation of his licence and a minimum term of disqualification from the obtaining a licence for 12 months – was a misuse of police power. The magistrate might well have been of the view that in those circumstances the institution of the prosecution against the defendant was officious and overbearing. But even if the magistrate were of that opinion, if he once concluded that there had in fact been a refusal by the defendant to undergo the test, it would have **[11]** been the magistrate's duty to convict. As has been pointed out by the Court of Criminal Appeal in New South Wales in *R v Honan* [1971] NSWLR 697, at p701:
>
> > 'Once a refusal is in fact given, and it is for the tribunal of fact to determine whether it is or not, the offence is complete and a consent later given, when the two hours may be up or nearly up or when the delay may have reduced the blood concentration is immaterial'.

At p702 of the same case it is said:

> 'No precise form of words or actions is required to constitute a refusal. It is a question of fact to be inferred from all the circumstances, and in this context the remarks of Geoffrey Lane J, in *R v Clarke* (1969) 53 Cr App R 438 at p442; [1969] 2 All ER 1008 at p1010, dealing it is true with different words in an English Act of Parliament but one that was enacted in the same field, are pertinent. Plainly no particular formula of words is necessary from a defendant to constitute a refusal by him. It is the police, and not defendants who are required by this legislation to adhere to formulae. Any words, or indeed any actions, on the part of the defendant, which in the eyes of the jury make it clear that the defendant in all the circumstances of the particular case is declining the police officer's proper invitation, amount to a refusal within the section'.
>
> The question whether there has been a refusal is, therefore, always a question of fact to be spelt out from the circumstances. Having regard to the drastic nature of the consequences of a refusal, a magistrate, before convicting, must be satisfied that there has been a real refusal to undergo the test."

R v Honan (1971) NSWLR 697, referred to by McInerney J in *Reddy*, is simply a decision that there was evidence to support a finding of refusal in circumstances where a defendant required to take a test replied that his counsel was on the way and would advise him. The decision does not compel a conclusion that a "conditional refusal", as it was termed in the present case, must necessarily constitute a refusal under the **[12]** Act. The particular circumstances in any case require careful consideration. The fact that, given a refusal, a defendant may seek the protection of s55(9) is no basis for not carefully evaluating the facts to determine whether there has been a refusal at all. *Bormann v Coldwell* (1986) 43 SASR 297; (1986) 4 MVR 447 was a case where a refusal couched in terms of a desire by the defendant to consult his lawyer first was held to have justified a finding that there had been a relevant refusal. That is, the court found that there was evidence to support a conviction. No new principle emerges. The Magistrate in the present case appears to have held, as I have said, that the "conditional refusal" so-called, was a refusal for the purpose of s49(1)(e) of the Act. Upon the evidence to which I have referred he was entitled, in my opinion, to so conclude. I should add that, once he had found that there had been a refusal, a subsequent willingness to undergo a test was irrelevant to that issue, even if the period of three hours contemplated by s55(1) had not expired. That is not to say, however, that the later expressions of frank consent might not have cast light upon the question whether there had been a prior refusal. The question should be answered:

> (a) It was open to the Magistrate to find that the appellant had refused to comply with the requirement made under s55(1) of the *Road Safety Act*.
>
> (b) The Magistrate was required under s55(9) of the *Road Safety Act* to be satisfied that the reason for refusal which he found to be established **[13]** upon the evidence would fairly answer the description

found in the Statute; that is, a reason of substantial character other than a desire to avoid providing information which might be used against the defendant.

The orders that I would propose, subject to anything that counsel may say, are as follows:

1. Appeal allowed.

2. Order of the Magistrate convicting the appellant of an offence under s49(1)(e) of the *Road Safety Act* set aside.

3. Matter remitted to the Magistrates' Court at Frankston for hearing and determination in accordance with these reasons.

4. Respondent pay the appellant's costs of the appeal, including any reserved costs.

5. Grant a certificate to the respondent under the *Appeal Costs Act*.

APPEARANCES: For the appellant Beardsley: Mr AH Swanwick, counsel. Le Souef Preston & Associates, solicitors. For the respondent Hower: Mr SP Gebhardt, counsel. JM Buckley, Solicitor for the DPP.
