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SUPREME COURT OF VICTORIA — FULL COURT

BURNS v STOREY

Winneke CJ, Smith and Gowans JJ

23-24, 31 October 1969 — [1971] VicRp 50; [1971] VR 388

MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT INTERCEPTED WHILST DRIVING A MOTOR VEHICLE – DEFENDANT A POLICE OFFICER – DEFENDANT CONVEYED TO POLICE STATION AND REQUESTED TO PROVIDE A SAMPLE OF BREATH – DEFENDANT REFUSED – DEFENDANT STATED THAT THERE WAS IN EXISTENCE A DEPARTMENTAL INSTRUCTION WHICH REQUIRED A SUB-OFFICER ONLY TO PERFORM BREATH TESTS ON MEMBERS OF THE POLICE FORCE – WHETHER REFUSAL WAS A "REASON OF A SUBSTANTIAL CHARACTER" – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408A(5)(a).

HELD: Order nisi discharged.
1. The question was whether the fact that the defendant was induced to refuse to furnish a breath sample for analysis by the first constable because he had a belief that there was an instruction by the Chief Commissioner, the effect of which was to prescribe that only sub-officers should test members of the force, exhibited a reason of a substantial character.

2. It was open to the Magistrate to take the view that the mere awareness by the defendant of the fact that what was contemplated would run counter to a direction given by the head of the force to its members and that he was to be a central figure in what was to take place could provide a reason for not submitting to it, which could not be dismissed as being without weight or as lacking in substance, and which was entitled to be regarded as "of a substantial character".

3. Once the defendant's reason for his refusal had been identified in the terms in which it was described in the Magistrate's finding, it was clearly open to the magistrate to have found as a matter of fact, having regard to the evidence that the defendant's objection was referable to the rank of the operator, that the refusal was not merely from a desire to avoid providing information which might be used against him.

WINNEKE CJ: (delivered the judgment of the Court (Winneke CJ, Smith and Gowans JJ.): This is the return before the Full Court of an order nisi to review the decision of a Court of Petty Sessions at Flemington dismissing an information that charged the defendant with an offence against s408A(5)(a) of the *Crimes Act* 1958.

The information charged the defendant that on 12 October 1968 at Flemington, being a person whom the informant, a member of the police force, believed on reasonable grounds had been within the last two preceding hours driving a motor car and had behaved whilst driving such motor car in a manner which indicated that his ability to drive such motor car was impaired at the time he was driving the motor car and being required by the said informant to furnish a sample of his breath for analysis by an approved breath analysis instrument did refuse to furnish a sample of his breath by exhaling directly into the instrument.

Section 408A(1) of the *Crimes Act* 1958 provides that where the question specified therein is relevant on a trial or hearing in relation to certain offences therein set out, evidence may be given of the percentage of alcohol indicated to be present in the blood of the person charged by a breath analysing instrument operated by a person authorized in that behalf by the Chief Commissioner of Police and that the percentage of alcohol so indicated shall be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument.

Subs(4) (a) provides:—

"Where a member of the police force believes on reasonable grounds that a person—

(i) has been at any time within the last two preceding hours, driving a motor car or in charge of a motor car within the meaning of s82 of the *Motor Car Act* 1958; and

(ii) has behaved, whilst driving or in charge of a motor car, in a manner which indicates that his ability to drive a motor car was impaired at the time when he was so driving or in charge of a motor car— he may require that person to furnish a sample of his breath for analysis by a breath analysing instrument and that person shall, subject to the provisions of paragraph (b) furnish a sample of his breath by exhaling directly into the instrument."

Subs(5) (a) provides:—

"A person who is required pursuant to subs(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 evidence before the magistrate disclosed that the defendant was a member of the police force. Early on the morning of 12 October 1968 he was seen by the informant, an inspector of police, to enter a motor car and drive it along Flemington Road, North Melbourne, and Racecourse Road, Flemington, in an erratic manner. The defendant was intercepted and exhibited signs of being affected by alcohol, and he was taken to the Flemington police station. A little later a First Constable Johnston, a person duly authorized by the Chief Commissioner of Police to operate a breath analysing instrument, arrived. A breath analysing instrument was also present. In the presence of the defendant, First Constable Johnston stated to the informant that there was in existence a departmental instruction which required a sub-officer only to perform breath tests on members of the police force. The instruction was issued by the Chief Commissioner of Police and was in writing. First Constable Johnston was not a sub-officer. The position was explained to the informant by First Constable Johnston before a sample of his breath was required of the defendant. The informant required Johnston to conduct the test and he said he was willing to do so. The informant then required the defendant to furnish a sample of his breath for analysis by the breath analysing instrument. This the defendant refused to do.

The defendant's account as given in evidence was in the following terms:

"The first time I was asked to have a breath analysis was when First Constable Johnston arrived. I was not asked to have a breath analysis before that time. When First Constable Johnston arrived a discussion occurred between the inspector and himself at which I was present. First Constable Johnston told the inspector that the Chief Commissioner had given a written instruction to the effect that no member of the police force should have a breath analysis test except by a sub-officer. I already knew of this instruction. I knew that First Constable Johnston was not a sub-officer and I decided that I would not have the test. There was quite a long conversation about the instruction and when First Constable Johnston put the formal question to me I told him quite definitely that I would not take the breath test unless there was a sub-officer to take it in accordance with the Chief Commissioner's instructions. I did say that I was not well but I also made it clear that I was relying on the fact that the Chief Commissioner had instructed sub-officers only to take the tests. My reason for refusing the test was because I believed that I was not compelled to do so as I was a member of the force and First Constable Johnston was not a sub-officer. I stated that I had discussed the matter some 18 months ago with members of the police force at North Melbourne police station and I distinctly remembered that only sub-officers should test members of the police force."

After hearing submissions by the solicitor for the defendant the Magistrate dismissed the information. In so doing he gave (according to the defendant's version) the following reasons:—

"I accept the defendant's evidence that the reason for which he refused to take the breath test was that he believed that a policeman should only be tested by a sub-officer. I have carefully perused s408A of the *Crimes Act* and I accept the defendant's explanation as a reason of a substantial character for his refusal to take a breath test. Having regard to all the evidence in this case, I am satisfied that the inspector should have ensured that the Chief Commissioner's instruction was complied with. I am satisfied that the inspector knew that he was not complying with the instructions of the Chief Commissioner. These instructions have obviously been given for the protection of individual members

> of the police force and I am satisfied that the inspector knew he was not justified in ordering the test. The inspector saw fit to go ahead and ordered the test to be made but in these circumstances the defendant was justified in refusing to take the breath test. I also think there is merit in Mr Dunn's other argument that there were no reasonable grounds for requiring the defendant to furnish a sample of his breath because the inspector knew of the Chief Commissioner's instruction that it should only be taken by a sub-officer. However, I have no doubt the defendant had a reason of a substantial character for his refusal to take the test and that that refusal was not merely from a desire to avoid providing information which might be used against him. The information will be dismissed."

The ground of the order nisi, as amended at the hearing by leave of the Court, is that on the evidence before him the magistrate was in error:

> (a) in holding that the fact that a directive or instruction had been given by the Chief Commissioner of Police that breath analysis tests upon members of the police force were to be conducted only by sub-officers or the fact that the defendant believed that he should by reason thereof be only tested by a sub-officer for purposes of breath analysis was a reason of a substantial character for the defendant's refusal to furnish a sample of his breath for analysis; or
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> (b) in holding that the defendant had a reason of a substantial character for his refusal other than a desire to avoid providing information which might be used against him.

The alternative ways in which the ground is expressed are due to the differing versions given by the two parties of the reasons for the decision and of the reason for refusal attributed to the defendant by the magistrate, and also to the latter's findings with respect to the several parts of subs(5)(a)(ii).

The argument has centred around the meaning of the phrase "reason of a substantial character for his refusal" and what those words denote. It was said for the informant that while the word "reason" was concerned with the factor which influenced the defendant to refuse to furnish a breath sample, it denoted some circumstance existing outside his mind which so influenced him and which was examinable by the tribunal, and found by it to be established. As we understand this submission it is concerned to assert that a belief or apprehension existing in the mind of the defendant whatever its subject-matter and however strongly held or entertained could not be treated as constituting a "reason" for refusal within the meaning of the phrase. In our opinion, the meaning of the word in its context cannot be so constrained.

It is true that the words "some other reason" in paragraph (ii) indicate that the matter in paragraph (i) is regarded as in itself constituting a "reason" and it is also true that that matter is of a factual character—the absence of the "belief" referred to in subs(4)(a), or the absence of the "reasonable grounds" therein referred to. But nevertheless the words "some other reason" are words of extension, and there is not sufficient to justify applying the *ejusdem generis* principle. Moreover it is obvious that the word "reason" is used in such a sense that but for the exclusion set out in the concluding words of paragraph (ii) it would include a desire to avoid providing information of the kind referred to.

So understood it could by no means be confined to objective facts or circumstances existing outside the mind of the defendant. We are of opinion that the word "reason" is wide enough to embrace a belief or apprehension influencing the mind of the defendant to refuse the test, provided that it satisfies the other language of the paragraph. Any qualifying or limiting consideration is to be found in the words that follow. The words that operate in such a way are: "of a substantial character" and "other than a desire to avoid providing information which might be used against him". The first phrase qualifies the word "reason", and the second phrase qualifies the whole concept thus produced.

The word "substantial" in this context has obviously been selected to express an idea which requires something more than any reason of any kind while not requiring a reason amounting to a complete justification. We are unable to accept the contention that the reason given must amount to a justification in law. It is not required to be more than "of a substantial character".

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.

It is not easy to express the content of the word "substantial" by resort to synonyms. That is apt to result in a case of defining "ignatum per ignatius". The word suggests something which has substance in it or which would ordinarily carry some weight. It is perhaps easier to say what it excludes—anything which is frivolous, far-fetched, trivial, imaginary, shadowy or unreal. It is not, however, desirable to attempt to define the term exhaustively nor necessary to do so. Nor is it necessary or desirable to attempt to apply the touchstone to other reasons for refusing a test with which the present case is not concerned.

It is sufficient to take the reason for refusing found to have been put forward by the defendant and to ask whether it will fairly answer to the description used in the statute.

In the course of his evidence the defendant spoke of the time and circumstances of his having decided that he would not submit to the test and what he had told the informant of his reasons therefor. But his direct evidence was that his reason for refusing the test was because he believed that he was not compelled to do so as he was a member of the force and First Constable Johnston was not a sub-officer, and that he knew from discussion of "the matter" (i.e. the Chief Commissioner's instructions) that only sub-officers should test members of the police force. In giving his reasons for his decision the magistrate described the defendant's reason for refusal as being "that he believed that a policeman should only be tested by a sub-officer". This must mean, in the setting of the evidence, that the defendant had a belief that there was an instruction by the Chief Commissioner the effect of which was to prescribe that only sub-officers should test members of the police force. The evidence already referred to justified such a finding.

It was submitted for the informant that this afforded no basis for an inference or implication that the defendant's reason was that he apprehended that by complying he would expose himself to the displeasure of his superior, the Chief Commissioner, or commit a disciplinary offence. This may be conceded. The defendant did not say enough nor did the magistrate find enough to justify that step being taken. But then, on this assumption, the argument proceeded to say that the necessary corollary was that the defendant must be treated as entertaining the belief that if he failed to comply he could not be charged or would commit no offence, and that it is a reason in these terms that should have been attributed to the defendant.

But we do not think that it is permissible to attribute to the defendant any belief, hope or apprehension in relation to the consequences which might follow from his refusal, which he did not express. The finding made by the magistrate stops at a point where it attributes to the defendant a belief as to the existence of the Chief Commissioner's instruction and as to its immediate purport and effect, and treats that as being the factor which influenced him to refuse the test. It is neither necessary nor permissible to consider whether the defendant pursued his reasoning to the point where he contemplated the possibility, on the one hand, of the operator's authority to administer the test being curtailed by the Chief Commissioner's instruction or, on the other hand, the operator merely being exposed to disciplinary action, or the possibility of the Chief Commissioner's instruction being legally effective, unlawful or invalid, or any other aspect of the situation other than such as is covered by his expressed reason.

But of course in considering the question as to the character of the reason the facts that it was entertained by a member of the police force and that it concerned the conduct of other members of the organization to which he belonged, and that that organization was subject to a system or order and discipline in relation to the conduct of its members and by which its members were bound are not to be ignored.

The question, therefore, is whether against the background of those circumstances the fact that the defendant was induced to refuse to furnish a breath sample for analysis by the first constable because he had a belief that there was an instruction by the Chief Commissioner, the effect of which was to prescribe that only sub-officers should test members of the force, exhibits a reason of a substantial character.

In our opinion, it was open to the magistrate to take the view that the mere awareness by the defendant of the fact that what was contemplated would run counter to a direction given by the head of the force to its members and that he was to be a central figure in what was to take place could provide a reason for not submitting to it, which could not be dismissed as being without

weight or as lacking in substance, and which was entitled to be regarded as "of a substantial character".

The question whether the defendant is to be exonerated on account of his reason for refusal being of a substantial character is one which is in the first instance entrusted to the court of summary jurisdiction before whom the defendant is brought. The language used by Hood J in *Williams v May* [1908] VicLawRp 85; [1908] VLR 605, at pp607, 608; 14 ALR 504, when dealing with the provision in the *Justices Act* enabling an information to be dismissed when the offence is of so trifling a nature that it is inexpedient to inflict any punishment, may be applied to the present provision: "The discretion is confined within indefinite limits, and is, within those limits, final." We do not think the magistrate travelled outside the limits laid down by the provision, in holding that the defendant had established a reason falling within the first part of paragraph (ii) of s408A(5)(a).

Once the defendant's reason for his refusal had been identified in the terms in which it was described in the magistrate's finding, then if it did not follow as of course, it was clearly open to the magistrate to find as a matter of fact, having regard to the evidence that the defendant's objection was referable to the rank of the operator, that the refusal was not merely from a desire to avoid providing information which might be used against him.

It should be added that the Court is not concerned, and has not concerned itself, with any question as to whether the inspector should or should not have ensured that the Chief Commissioner's instruction was complied with, or whether the inspector did or did not appreciate that he was not complying with instructions given for the protection of individual members of the police force, or did or did not know that he was not justified in ordering the test, or whether he was so justified or not. Those are not the matters with which this Court is concerned.

For the reasons given, the ground of the order nisi has not been made out and the order nisi should be discharged.

Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
Solicitor for the defendant: RH Dunn.
