46/91

SUPREME COURT OF VICTORIA

REEVES v PENNO

O'Bryan J

25, 28 June 1991 — (1991) 14 MVR 145

CRIMINAL LAW – SPECIAL PLEA OF *AUTREFOIS CONVICT* – TESTS TO BE APPLIED – CONVICTED OF CULPABLE DRIVING – CHARGED UNDER *ROAD SAFETY ACT* 1986, S49(1)(f) – WHETHER SIMILARITY BETWEEN OFFENCES – WHETHER SPECIAL PLEA APPLIES: *CRIMES ACT* 1958, S318(1), (2); *ROAD SAFETY ACT* 1986, S49(1)(f).

1. Two of the principles which apply to a plea of *autrefois convict* are whether:
(i) the facts of the second charge would have been sufficient to procure a legal conviction on the first charge;
(ii) the second charge is the same or substantially the same as the first charge.
***R v Connelly* [1964] AC 1254; [1964] 2 All ER 401; [1964] 2 WLR 1145 (1964) 48 Cr App R 183; applied.**

2. Where a person pleaded guilty to a charge of culpable driving causing death (under s318(1) of the *Crimes Act* 1958) in that he drove a motor vehicle negligently, and was also charged with an offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act'), the facts of the latter offence would not have been sufficient to procure a legal conviction for culpable driving nor was the offence the same or substantially the same as the form of culpable driving charged.

3. Accordingly, a magistrate was not in error in rejecting a special plea of *autrefois convict* and convicting an offender of a charge under s49(1)(f) of the Act.

O'BRYAN J: [1] This is an appeal from a decision in the Magistrates' Court at Sale on 21st February 1991 whereby the appellant was convicted of an offence that on 16th June 1989 within three hours of driving a motor vehicle he furnished a sample of breath for analysis by a breath analysing instrument and the result of the analysis as recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol was present in his blood contrary to s49(1)(f) of the *Road Safety Act* 1986. The learned Magistrate fined the appellant $800 and ordered that he be disqualified from driving a motor vehicle in the State of Victoria for a period of 46 months, effective from 18th June 1989.

The questions raised by the appeal are whether the learned magistrate should have:-

(i) upheld the plea of *autrefois* convict;

(ii) held that the charge before the Court should not be proceeded with by reason of s318(6) of the *Crimes Act* 1958;

(iii) permanently stayed the hearing of the information as an abuse of process.

On Friday 16th June 1989, whilst driving a utility vehicle along a sealed surface roadway in the early evening the appellant struck and killed a cyclist travelling along the edge of the roadway in the same direction as the utility. There was no evidence of untoward speed but the happening of the accident created an overwhelming inference that the appellant had failed to keep a proper look-out. The bicycle was well lit and the cyclist was wearing reflective clothing and a helmet which had a reflective strip on it.

[2] The evidence showed that the appellant had consumed alcohol after work, one witness estimated a quantity of about eleven pots of full strength beer. A breath test analysis arranged by the police shortly after the collision showed a reading of .200. A blood test which was taken subsequently disclosed a reading of .237. The appellant was charged with culpable driving causing

the death of another person contrary to s318(1) of the *Crimes Act* 1958. Culpable driving is an indictable offence. Sub-section (2) of s318 prescribes that a person drives a motor car culpably if he drives the motor car—

(a) recklessly; or

(b) negligently; or

(c) whilst under the influence of alcohol to such an extent as to be incapable of having proper control of the motor car; or

(d) whilst under the influence of a drug to such an extent as to be incapable of having proper control of the motor car.

Sub-section (3) requires a presentment of culpable driving to specify which form of culpability within the meaning of ss(2) is charged but evidence of the whole of the circumstances shall be admissible on the hearing of the presentment.

The appellant was also charged with an offence of driving a motor vehicle in a manner which was dangerous to the public contrary to s64(1) of the *Road Safety Act* and careless driving contrary to s65. The appellant was also charged with driving under the influence of intoxicating liquor to such an **[3]** extent as to be incapable of having proper control of his motor vehicle contrary to s49(1)(a) of the *Road Safety Act*. Finally, the appellant was charged with the offence against s49(1)(f) earlier referred to. All the charges save culpable driving are summary offences.

The appellant was presented for trial in the County Court at Sale on 24th April 1990 on one count of culpable driving. The presentment alleged:

"That (the appellant) at East Sale on the 16th day of June 1989 by culpable driving of a motor vehicle caused the death of Bart Gerhard Roos in that he drove the said motor car negligently."

To this count the appellant pleaded guilty. After a plea was made on his behalf the appellant was sentenced to a term of imprisonment of one year and it was ordered that a period of 6 months of that sentence be suspended for one year. It was further ordered that all licences held under the *Road Safety Act* be cancelled and that the appellant be disqualified from obtaining a motor vehicle licence for a period of two years.

Subsequently, the Director of Public Prosecutions appealed the sentence on the ground that in all the circumstances the sentence was manifestly inadequate. This appeal was dismissed by the Court of Criminal Appeal on 17th August 1990. The learned judge who sentenced the appellant found that the appellant was intoxicated at the time of the accident to the extent that his degree of alertness on the roadway was diminished and that he had put other road users at risk. The **[4]** learned judge was aware that the blood alcohol level of the appellant was over four times the legal limit.

As a consequence of being convicted of culpable driving the appellant could not in respect of the circumstances concerned be proceeded against the under the *Road Safety Act* for driving in a manner dangerous (s64)(1)) or having driven whilst under the influence of intoxicating liquor (s49(1)(a)). Sub-section (6) of s318 of the *Crimes Act* precludes such proceedings after a person is convicted or acquitted for an indictable offence under ss(1). The respondent decided to proceed against the appellant in respect of the s49(1)(f) offence. When the appellant was charged in the Magistrates' Court he entered a special plea of *autrefois convict*. The learned magistrate rejected the special plea and convicted the appellant.

The central issue that arises in this appeal is whether the more serious indictable offence of culpable driving included the same acts or omissions as constitute the lesser summary offence of exceeding .05. There can be no doubt that culpable driving, being an indictable offence and involving the death of a person, is more heinous than a summary offence involving driving a motor vehicle with an excess concentration of alcohol present in the blood.

Two curious anomalies may be commented upon. The appellant's concern today is only

with that part of the penalty which touches his licence. The more heinous offence resulted in a penalty of disqualification of his licence for two years, which was not increased on appeal but the less serious offence **[5]** resulted in a penalty of disqualification of 46 months. The latter penalty was the statutory minimum which the learned magistrate had to impose upon the appellant following conviction.

A second anomaly is that whereas a conviction of the more heinous offence is not a relevant prior conviction in the case of a subsequent offence under s49(1) of the *Road Safety Act* a conviction of the less serious offence is a relevant prior conviction in the case of a subsequent offence. Mr Mueller of counsel who appeared for the appellant submitted that, if *autrefois convict* was not available to the appellant in the Court below, it was within the power of the magistrate in the Court below to stop the prosecution as an abuse of process. I am not persuaded there is a relevant distinction. Should the special plea fail there would be no basis in law to stop the prosecution as an abuse of process.

A third limb of Mr Mueller's argument involved the construction of ss(6) of s318. Mr Mueller contended that the prohibition against further proceedings under the *Road Safety Act* provided by ss(6) extended to and included an offence against para.(f) of ss(1) of s49. I am unable to agree with this argument. In my opinion, there is a clear connection between the four forms of culpability specified in ss(2) and the exemptions granted by ss(6) of s318. An offence against para.(f) of ss(1) of s49 is outside the four forms of culpability specified in ss(2). I do not consider that Parliament intended to exempt from prosecution the several offences created by s49 not specified in ss(6) of s318. The second question of law will be answered in the negative. **[6]** I shall now turn to the special plea of *autrefois acquit*. This defence is founded upon the proposition that a person who has once been lawfully convicted of any offence cannot be re-tried for the same offence; a man must not be put twice in peril for the same offence. Hawkins, *Pleas of the Crown*, Book ii, C.36.

The leading authority upon the doctrine is *R v Connelly* [1964] AC 1254; [1964] 2 All ER 401; [1964] 2 WLR 1145; (1964) 48 Cr App R 183. In the House of Lords, the principles were stated in a speech which was delivered by Lord Morris of Borth-y-Gest. Lord Morris (at 1305-6) stated nine governing principles which apply to the plea of *autrefois acquit* and *autrefois convict*. It is only necessary to refer to two of those principles for present purposes:

> "(4) One test as to whether the rule (that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted) applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty. **[7]** That what has to be considered is whether the crime or offence charged with the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings."

The common law rule is now enacted in s51 of the *Interpretation of Legislation* Act 1984 (Cf. Act 3630 of 1928, s27). Cf. *The Interpretation Act* 1889, 52 & 53 Vict. (7) C.63, s33; *Wemyss v Hopkins* (1875), LR 10 QB 378; 39 JP 549; *R v King* (1897) 1 QB 214; 66 LJQB 87.

Mr Mueller relied upon the decision in *R v O'Loughlin; ex parte Ralphs* (1971) 1 SASR 219. In that case a person was charged in a Magistrates' Court with an offence the equivalent of s49(1)(a) of the *Road Safety Act* (driving under the influence) and secondly, with having on the same occasion committed an offence the equivalent of s49(1)(b) (driving with more than the prescribed concentration of alcohol in his blood). The defendant was convicted of the first offence. When the Magistrate directed that a stay of proceedings be entered upon the second charge an appeal was taken by the informant to the Court of Appeal which upheld the Magistrate's decision. The Court held that there was sufficient identity between the acts or omissions constituting the two offences charged to make it improper for the court of summary jurisdiction to proceed to a conviction upon the second charge as well as on the first. Bray CJ observed:

> "In my view a conviction for the greater offence ought to bar a prosecution for the lesser offence when that is wholly comprised within the greater, for the tribunal must have found the accused guilty of the ingredients of the lesser offence and the sentence for the greater offence must therefore have involved punishment for the lesser."

Later, the learned Chief Justice said:

> "The view I take then is that a man should not be convicted again in respect of any act or omission for which he has previously been punished but it is necessary to define with some care the precise act or omission for which he was previously punished in order to see whether it is the same act or omission which is in question in the second prosecution."

[8] Although Mr Mueller spent some time with the learned and lengthy judgment of Wells J in *O'Loughlin's* case, I do not perceive that Wells J stated the relevant principles of law differently to Chief Justice Bray. Mr Hender, who appeared for the respondent drew attention to the decision of the Full Court in *R v Feketa* (1983) 10 A Crim R 287. There, the applicant was convicted of culpable driving causing death and the Crown case included evidence that at the relevant time the applicant would have been incapable on account of his consumption of alcohol of having proper control of his motor car. A breath sample taken from the applicant at a relevant time gave a reading above the legal limit. The Court upheld a direction given to the jury by the trial Judge that it was unnecessary for the Crown to prove a causal connection between the alcoholic state of the driver and the death. The offence would be proved if the jury was satisfied that death was caused by the driving and that the driver was under the influence of alcohol to the required extent. This was because the form of culpability specified was driving the motor car whilst under the influence of alcohol to the requisite extent (s318(2)(c)).

In the present case the form of culpability specified was driving the motor car negligently and ss(3) of s318 admitted on the hearing "evidence of the whole of the circumstances". Evidence of the taking of a blood and of a breath sample and the result of the analysis showing the concentration of alcohol in the blood and breath was clearly admissible on the hearing. The appellant's plea of guilty to the count of culpable driving constituted an admission:

> **[9]** (1) that at the time and place alleged in the presentment he caused the death of a person whilst driving a motor car; and
>
> (2) that he drove the motor car negligently (to the degree required by para. C of ss(2) of s318).

The Court was entitled to have regard, as it did, to the circumstance that the appellant was probably under the influence of intoxicating liquor to such an extent that he drove the car with the requisite degree of negligence. Consumption of intoxicating liquor by the appellant, in the circumstances disclosed, was an aggravating factor to penalty.

I turn now to answer the critical question of whether the culpable driving count is the same or substantially the same as the offence created by s49(1)(f). The offence created by s49(1)(f) is clearly not the same or substantially the same as the form of culpable driving charged in the present case. Should a presentment specify driving whilst under the influence of alcohol to the requisite extent as the form of culpable driving a much stronger argument could be mounted that the elements of the offences created by s49(1)(f) and s318(1) are substantially the same. The presentment in the present case did not do so.

Applying the principles to which I earlier referred (*Connelly's* case at 1305-6) I am clear in my mind that the facts which constitute the s49(1)(f) offence would not have been sufficient to procure a conviction for culpable driving. If the test formulated by Bray CJ is applied, the act or omission for which the appellant was punished in the County Court was causing death whilst driving a motor vehicle **[10]** negligently. The Court accepted as an explanation for the negligence that the appellant was under the influence of alcohol when the collision occurred.

Whilst I appreciate that the appellant feels a sense of injustice on account of the second charge being pursued in the Magistrates' Court I am unable to uphold the special plea of *autrefois convict*. It follows that the respondent was entitled to proceed with the second charge and the hearing of the second charge was not an abuse of process. Each question of law will be answered in the negative. The appeal will be dismissed with costs.

APPEARANCES: For the appellant Reeves: Mr B Mueller, counsel. Warren Graham & Murphy, solicitors. For the respondent Penno: Mr F Hender, counsel. JM Buckley, Solicitor for the DPP.