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## SUPREME COURT OF VICTORIA

***NICHOLS v FUNSTOW***

Murphy J

16 June 1976

**MOTOR TRAFFIC - DRINK/DRIVING - REFUSING BREATH TEST - REASON OF A SUBSTANTIAL CHARACTER A DEFENCE - DEFENDANT ADVISED BY SOLICITOR TO REFUSE BREATH TEST - WHETHER REASON OF A SUBSTANTIAL CHARACTER - CHARGE DISMISSED - WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80F.**

**HELD:** Order absolute. Dismissal set aside.

1. The situation was open to no other construction than that the reason for refusal was simply a desire to avoid providing information which might be used against the defendant.
2. Accordingly, the Magistrate was wrong in dismissing the Information and the Magistrate did not, according to the affidavit material, advert, apparently, to this question which was involved in the words appearing in s80F(12) namely, "other than a desire to avoid providing information which might be used against him". If he had adverted to these words, he would have well appreciated that this was the only desire that the defendant had in refusing to supply a sample of breath.

**MURPHY J:** In this matter the Order Nisi will be made absolute. In my opinion, on the evidence set out in the affidavit of Kevin William Dowling, there can be no doubt but that the defendant in the court below advanced no reason of a substantial character for his refusal other than a desire to avoid providing information which might be used against him. It is implicit in the circumstances in which his refusal occurred, it is implicit in the reasons he advanced for his refusal to supply a sample of breath that he had simply a desire to avoid providing information which might be used against him. He rang his solicitor to see what advice he could receive and received the advice not to provide a sample of breath, to refuse a breath test as it is put. In my view, this situation is open to no other construction than that the reason for refusal was simply a desire to avoid providing information which might be used against the defendant.

I can see no other argument that can be advanced to interpret this reason other than that and, for that reason I am of the opinion that the Magistrate was wrong in dismissing the Information and the Magistrate did not, according to the affidavit material, advert, apparently, to this question which is involved in the words appearing in s80F(12) namely, "other than a desire to avoid providing information which might be used against him". If he had adverted to these words, I feel sure he would have well appreciated that this was the only desire that the defendant had in refusing to supply a sample of breath.