07/83

SUPREME COURT OF VICTORIA

COUSENS v MORAN

Starke J

24 November 1982

MOTOR TRAFFIC – DRIVER OF MOTOR VEHICLE FOUND DRIVING – REFUSAL BY DRIVER TO FURNISH A SAMPLE OF BREATH FOR ANALYSIS – WHETHER REASON OF A SUBSTANTIAL CHARACTER: *MOTOR CAR ACT* 1958, S80F.

M. had been found driving a motor car in the early hours of the morning. He underwent a preliminary breath test and was then taken to a police station and requested to undergo a breath analysis test. M. stated that he would undergo the test only if the police officer would sign something to say that the medication M. was taking would not affect his reading. In evidence, M. said that he had inferred from what his doctor had told him, that the drugs he had taken might cause the breathalyser machine to inaccurately record the blood/alcohol concentration. The court found that M. held this belief and the charge was dismissed. On order nisi to review—

HELD: Order nisi discharged.
M's belief was not an unreasonable one to hold and that the reason given by M. was of a substantial character. It is a question of fact in each case as to whether the defendant holds a belief and the basis for that belief.
***Burns v Storey* [1970] VicRp 50; (1970) VR 388 applied.**

STARKE J: *[After setting out the facts, His Honour continued]:* A doctor was called and he gave evidence that the applicant was indeed on medication of the nature that he had indicated and that he had warned him not to drink whilst he was on that medication. He had not, however, informed him that if he did his blood content would be heightened. The respondent said in his evidence, in effect, that he had drawn the inference from what his doctor had told him that his compliance with the request to have a breath test may have resulted in the machine incorrectly estimating his blood alcohol level in a manner prejudicial to his interests.

The question of the construction of this particular subsection has been the subject of a Full Court decision. In *Burns v Storey* [1970] VicRp 50; (1970) VR 388, a very strong Full Court comprising Sir Henry Winneke CJ, Smith and Gowans JJ held that where a police officer had the belief 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 and the member of the police force who had proposed to operate the test was not a sub-officer, that the belief was a reason of a substantial character for the refusal within the meaning of the section.

The Court at p391 said this:

> "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 had 'satisfied 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 <u>any</u> reason of <u>any</u> kind while not requiring a reason amounting to complete justification. We are unable to accept the contention that the reason given must amount to a justification at law. It is not required to be more than of a substantial character. It is obvious that the use of a word of such indefinite character means that the Courts are entrusted with 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 *ignatim 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 is not concerned."

In this case the starting point of the conclusion which the Magistrate reached is that in fact the respondent had drawn an inference from what the doctor told him that the drugs he had taken might cause the breathalyser machine to inaccurately record the content of alcohol in his blood. The Magistrate found that in fact he did hold that belief and in my opinion, the respondent having sworn to that fact, that was a finding open to the Magistrate. It seems to me, on the fact of it, not an unreasonable belief to hold, even though it is an erroneous belief. But the apprehension that this belief raised in the respondent's mind was heightened by certain other matters.

In this connection I return to what the Full Court said in *Burns v Storey* (*supra*) at p391:

> "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."

The things to which I refer are these. I have already read various parts of the evidence. From start to finish, or so it seems to me on the material before me, the respondent was saying, "Yes, I will take a breath test if you will sign a paper which says that the fact that I have taken drugs will not alter the reading." The police consistently refused to sign any such paper and, when properly construed refused to tell him that the drugs that he said he had taken would not affect his blood reading. The nearest they got to it is where the police officer said, "You are required to furnish a sample of your breath for analysis, the breathalyser will only show your blood alcohol concentration." The applicant said, "I want you to write that down, give it to me and sign it." Now in fact what the police officer said had nothing to do with whether the blood content would be increased or lowered by the drugs he had taken, all it says is that the test would show the blood alcohol concentration. This, of course, is only restating the problem. His difficulty was not whether it would show his blood alcohol concentration, but whether the reading would be inaccurate as a result of the taking of the drugs. Now the effect of the police's refusal to do what he asked – which I might say does not seem unreasonable to me – or even to tell him verbally that there would be no effect on the accuracy of the figures would, in my opinion, inevitably have increased the apprehension which he initially had formed as a result of the medical advice tendered to him and which the Magistrate found proved as a fact.

Furthermore, the question the police asked "Are you taking any tablets, drugs, insulin or other medicines?" might reasonably be taken by the respondent to mean that the ingestion of such substances might affect the result of the test and to increase this apprehension. Accordingly, I have no hesitation in arriving at the conclusion that in the words of the Act the reason he gave for refusing was of a substantial character.

The other expression with which I am concerned are the final words of subsection (12) which are – "...other than a desire to avoid providing information which might be used against him." Now it is one thing to refuse to give information by breathing into this machine, which can be used against you, where there is no question of the accuracy of the machine's reading; it is quite another thing to be required to be a party to a procedure which will, or might, create a false case against you, and accordingly in my opinion, having given a reason of a substantial character, it cannot be said that his desire was to avoid providing information which might be used against him. What he had a desire to do was to avoid providing false information which might be used against him. I appreciate that this construction really involves the reading of a word into the section, but I think that in the context there is a necessary implication that such a construction should be given to it. This is a penal, and somewhat Draconic, piece of legislation and I can hardly believe that it was intended that the police should be permitted to require that information should be given, true or false.

I might say that in *Burns case*, of course, the inference was clearly open that Burns was doing no more than making a technical point as to whom he believed was the officer who would test him. It could hardly be argued that he was not motivated by a desire to avoid providing information which might be used against him. Nevertheless, the Full Court had no difficulty in finding that he brought himself within the provisions of what was then the counterpart of subsection (12). I might say that this really is not a landmark in the interpretation of this section. If further defences of this nature arise, the question of fact must first always be determined in favour of the defendant to the proceedings before the Magistrate that he was in fact taking drugs, that he did have this belief and on what evidence the belief was based. If the Magistrate does not

find the facts in his favour, of course he cannot rely on an explanation of this nature to bring himself within subsection (12). It will remain, in my opinion, as it always has been, a matter of fact. In those circumstances, in my opinion the order nisi should be discharged, and I order that the respondent's costs be taxed and when taxed, paid by the applicant.

APPEARANCES: Mr G Nash, counsel for Applicant. Mr W Strugnell for Respondent.
