

EDWARDS v MACRAE

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

5 GLEESON CJ, SAMUEL AP and MEAGHER JA

2 May 1991, 5 July 1991

[1991] NSWCA 88

10 **VEHICLES AND TRAFFIC — OFFENCES — prescribed concentration of alcohol.**
Stated case — magistrate dismisses charge on ground that evidence raised an issue
of automatism and prosecution had not discharged onus of proving defendant's
conduct was voluntary — Supreme Court judge (Gyles AJ) held that automatism was
15 **not a possible answer to a charge under Motor Traffic Act 1909 s4E(1G) — HELD —**
the trial judge had erred and automatism was a possible answer to such a charge.

R v Falconer (1990) 65 ALJR 20,
Hill v Baxter [1958] 1 QB 277,
R v Turnbull (1944) 44 SR (NSW) 108,
20 The Queen v O'Connor (1980) 146 CLR 64 considered.
R v Glennan (1970) 91 WN (NSW) 609 distinguished.
R v Quick [1973] QB 910 at 922 not followed.

PRACTICE AND PROCEDURE - Stated Case - HELD - the Stated Case was defective
in form in not raising questions for decision and the Court would not embark upon a
25 consideration of whether the evidence in the instant case properly raised an issue of
automatism.

Gleeson CJ The principal issue in this appeal is whether what is sometimes
described as automatism can be raised in any, and, if so, what, circumstances as
an answer to a charge that a person was guilty of driving a motor vehicle whilst
30 there was present in his blood the concentration of alcohol prescribed by statute.

The offence in question is created by the Motor Traffic Act 1909-1986 which,
at the time of the conduct the subject of this appeal, was in the following terms:
“S4E -

(1G) Any person who while there is present in his blood the high range
35 prescribed concentration of alcohol:

(a) drives a motor vehicle; or

(b) occupies the driving seat of a motor vehicle and attempts to put the motor
vehicle in motion, shall be guilty of an offence under this Act and shall be liable

40 (c) in the case of a first offence - to a penalty not exceeding \$1,500 or to
imprisonment for a period not exceeding 9 months or to both such penalty and
imprisonment; or

(d) in the case of a second or subsequent offence - to a penalty not exceeding
\$2,000 or to imprisonment for a period not exceeding 12 months or to both such
45 penalty and imprisonment.

The Proceedings to Date:

The appellant was charged before a Local Court with having committed an
offence against s4E(1G) on 27 August 1986. In the early hours of the morning of
that day a car that he was driving was involved in a collision with another
50 vehicle. The appellant suffered serious injuries as a result of the collision, and
was taken to hospital. According to the evidence he suffered from amnesia

covering a period beginning several hours before the accident and extending over about a week after it. A reading was taken of his blood alcohol content, and it showed that there was present in his blood the high range prescribed concentration of alcohol referred to in the Act.

5 For reasons that are not material, the charge against the appellant took a long time to come to Court. When it did, there was no contest about the fact that the appellant was driving a motor vehicle at the relevant time and place, or about the alcohol content of his blood. The defence case was based upon the evidence of
10 a psychiatrist, who first interviewed the appellant about two years after the accident, and who expressed the opinion, founded on information he had been given by the appellant, that at the time of the accident the appellant might have been subject to “a dissociative disorder” and that he might have been driving his motor vehicle in a state of automatism. I will have more to say below about the nature and quality of that evidence. It suffices for present purposes to say that the
15 opinion was based largely upon the following facts. Neither the appellant nor anybody else could give any explanation as to what the appellant was doing driving a motor vehicle at the time and place where the accident occurred. The appellant had been suffering from severe depression for a substantial time before the accident, and on the previous day had been prescribed, and had taken a
20 quantity of, a tranquilliser, Ativan. He had also consumed a substantial quantity of alcohol. It seems to have been the possible effect of the combination of the appellant’s depression, and the consumption of the drug and the alcohol, that was said to have been a possible cause of suggested automatism.

25 There does not seem to have been much investigation at the hearing of how such a state or condition might have been consistent with the performance of acts of the kind which the appellant had apparently performed, such as getting into a motor car, switching on the engine, driving a considerable distance, making appropriate turns at intersections, perhaps obeying traffic signals, and other such
30 conduct. However, the learned magistrate came to the view that the evidence properly raised the possibility of what he called “the defence of automatism” and he concluded that he was not satisfied beyond reasonable doubt that the appellant’s act of driving “was a conscious act”. Accordingly, the charge was dismissed.

35 The prosecutor applied to have a case stated under s101 of the Justices Act 1902. In due course a case, which was defective in form, was stated, and it came on for hearing in this Court before Gyles AJ. The principal defect in the stated case was that it did not formulate any question of law for the opinion of the Supreme Court. The learned magistrate set out in a summary form his view of the
40 facts of the case, and his understanding of the evidence of the psychiatrist, and annexed a copy of the psychiatrist’s written report and the transcript of his oral evidence. The magistrate then went on to set out, as the grounds for his determination, the conclusions summarised above, and recorded that the prosecutor contended, first, that the determination was erroneous in law, and,
45 secondly, that “evidence of automatism had not been properly raised”. Gyles AJ, with the consent of both parties, treated the stated case as raising the question whether the magistrate erred in law in dismissing the information on the basis that a defence of automatism was available. It is clear from his reasons for judgment that, by that formulation of the question, Gyles AJ meant to identify as
50 the point at issue the question whether, on the true construction of s4E(1G), there are any circumstances in which automatism might constitute an answer to a

charge of an offence against the section. Gyles AJ answered that question in the negative, concluded that the magistrate had erred in law, and remitted the matter to the magistrate.

5 The appellant appeals against the decision of Gyles AJ. When this Court raised the problem of the defects in the stated case both counsel agreed that the appeal should be dealt with on the basis that the stated case was intended to raise the following question:

10 “Where a person is charged with an offence against s4E(1G) of the Motor Traffic Act 1909-1986 can that person be convicted regardless of whether the act of driving the motor vehicle in question was a voluntary act?” The appellant contended for a negative answer to that question, and the respondent contended for an affirmative answer.

15 There was disagreement as to whether this Court should treat the stated case as raising, and should itself, if it arose, proceed to answer, a further question in the following terms:

20 “Was there in the present case evidence that was capable in law of giving rise to a reasonable doubt that the appellants act of driving the motor vehicle on the occasion in question was a voluntary act?” It is convenient to defer consideration of that second matter and to address the primary issue in the case, which is raised by the first question.

25 Automatism as a possible answer to a charge under s4E(1G): Notwithstanding the references to the “defence” of automatism, it seems clear that, at all stages of the proceedings, the issue has been treated as concerning non-insane automatism. On the view taken by Gyles AJ the distinction between insane and non-insane automatism was irrelevant, because his Honour held that the statute applied whether or not: the driving was done in a state of automatism. The distinction could have been material before the learned magistrate, but, notwithstanding some references in the evidence to psychiatric problems of the appellant, neither
30 the psychiatrist nor the magistrate adverted to it. The problem is compounded by some lack of clarity as to what the psychiatrist meant, and what the magistrate understood him to mean, by “automatism”. The manner in which the law distinguishes between insane and non-insane automatism has been criticised as illogical, but it is important. See *R v Yousseff* (1991) 50 A Crim R 1, and the cases there considered). If it is insane automatism that is relied upon then the principles as to insanity, which is truly a defence, are material. If what is
35 in question is non-insane automatism then the issue is whether the prosecution has discharged the onus of proving that the act of the accused person was, in the relevant sense, voluntary. I shall deal with the case upon the basis that we are here concerned with non-insane automatism.

40 The matter of automatism and its role in the criminal law has recently been the subject of comprehensive consideration by the High Court in *R v Falconer* (1990) 65 ALJR 20. (See also *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, *R v Radford* (1985) 42 SASR 266 at 272, *Ryan v The Queen* (1967) 121 CLR 205). As a general rule, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will. Ordinarily, criminal responsibility attaches only to voluntary, that is, willed, conduct. The term “automatism” is used to refer to one kind of involuntary conduct. Lord Denning, in *Bratty*, at 409, referred to “an act which is done by the muscles
50 without any control of the mind”. Acts done in an epileptic state, or whilst sleep-walking, are sometimes given as illustrations.

It is necessary to distinguish the question now under consideration from the question whether knowledge or intention is a necessary element of an offence (*R v Carter* [1959] VR 105 at 113, *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 573-575). It is one thing to say that a particular offence may be committed
5 without a guilty mind. It is another thing to say that it may arise from an involuntary act or omission. In *Hill v Baxter* [1958] 1 QB 277 Lord Goddard CJ observed that, if a man at the wheel of a motor car suffered a stroke or an epileptic fit, it might well be appropriate to say that he was not really "driving" the car at all. The existence of a possible defence of honest and reasonable
10 mistake is another matter again.

In *R v Glennan* (1970) 91 WN (NSW) 609 the Court of Criminal Appeal held that mens rea is not an essential element in the offences created by s4E(1) of the Motor Traffic Act and the Court also made some remarks about a defence of honest and reasonable belief in circumstances which would not give rise to an
15 offence. The Court observed that, for example, it was not a necessary element of the offence presently in question that the defendant should realise that he has a blood alcohol content of a certain level. Similarly, in *Barker v Burke* [1970] VR 885, Newton J held that the corresponding Victorian legislation was not concerned with the circumstances under which a person comes to have alcohol
20 in his blood stream. These are questions which are distinct from that in the present appeal. The conduct which gives rise to the relevant offence against s4E(1G) is the act of driving whilst being in a certain condition with respect to blood alcohol content. The question is whether, assuming the subject of automatism is properly raised, the prosecution must show that the act of driving
25 was voluntary, that is to say, an act accompanied by the will of the defendant.

It was pointed out in *Falconer* that, in the absence of some contrary evidence, the law presumes, in accordance with common experience, that an act done by a person who is apparently conscious is willed or done voluntarily. An accused person who wishes to raise automatism bears an evidential onus. In *Hill v Baxter*,
30 at 286, Pearson J said:

"In an ordinary case, when once it has been proved that the accused was in the driving seat of a moving car there is, prima facie, an obvious and irresistible inference that he is driving it. No dispute or doubt will arise on that point unless
35 there is evidence tending to show that by some extraordinary mischance he was rendered unconscious or otherwise incapacitated from controlling the car."

The examples given in the reported cases concerning automatism in driving a motor vehicle almost all deal with quite brief periods during which a person at the wheel of a moving vehicle is not really in control of it or, for that matter, of himself. It may be possible that a state of automatism could be consistent with
40 more prolonged driving of a vehicle, but, no doubt, if any such suggestion were made it would attract close scrutiny. It is important to distinguish automatism from mere impairment of capacity or judgment, even though such impairment may be of a high degree. That distinction is of particular relevance where alcohol is involved. (*Roberts v Ramsbottom* [1980] 1 WLR 823).

The courts have repeatedly stressed that automatism is a narrow concept, and that cases of it will be relatively rare. In *Bratty* ([1963] AC at 409-410) Lord Denning distinguished automatism from various other states or conditions which might, in popular, but not in legal, terms involve involuntary acts. In *Falconer* (65 ALJR at 36) Toohey J pointed to the danger of terminological confusion, and
50 quoted a distinguished legal scholar who said, inaccurately, that the term "automatism" is used only in connection with epilepsy. That view is rather too

narrow, but it illustrates the caution that needs to be applied in this area of discourse. In Gelder, Gath and Mayon, "Oxford Textbook of Psychiatry" (1983) p 728, in a chapter headed "Forensic Psychiatry" the learned authors state:

5 "If a person has no control over an act, he cannot be held responsible for it. For this reason verdicts of not guilty have been returned when acts of violence were judged to be committed as automatisms. Such circumstances are rare, but have occurred in association with hypoglycaemia, epileptic seizures, concussion, and sleep-walking."

10 It may be supposed that a court would receive with some scepticism a suggestion that a person had safely driven a motor vehicle, over a substantial time and distance, in a state of automatism. However, that would be a matter for evidence in the individual case. It seems clear that, at least in some circumstances, a person can be a driver of a car, at least for a short time, whilst he is in such a state. That possibility gives rise to the question of law with which
15 we are not concerned.

Although the principle of common law is that conduct can only give rise to criminal liability if it is voluntary, when one is dealing with a statutory offence there arises the possibility that the language used by the legislature, or the nature of the subject matter, might require the conclusion, as a matter of construction,
20 that the prohibited act or omission was intended to be punished whether or not it was voluntary (R v Turnbull (1944) 44 SR (NSW) 108; The Queen v O'Connor (1980) 146 CLR 64 at 125). It is the submission of the respondent that the present is such a case.

For reasons given above, this is not the same question as whether mens rea is
25 a necessary element in an offence against s4E(1G), or whether there is some excuse or defence of honest and reasonable mistake. (cf R v Glennan, supra, He Kaw Teh v The Queen, supra, R v Wampfler (1987) 11 NSWLR 541). Nevertheless, so the respondent submits, the reasoning which led to the conclusion that s4E(1G) creates an offence of strict liability, in that it does not
30 matter whether the driver in question knew his blood alcohol content exceeded the limit, and it does not matter how it happened that the blood alcohol content came to be there, should also lead to the conclusion that it does not matter whether the act of driving was voluntary or involuntary. As Newton J put it in Barker v Burke ([1970] VR at 889), the object of this legislation is to protect the
35 public by preventing persons from driving motor cars, which are dangerous machines, if they are so affected by alcohol as to be incapable of having adequate control. Why, it is asked, would the legislature not have intended to prevent driving by persons who are in a state of automatism?

The respondent's argument was supported by the following consideration. A
40 driver's state of automatism, it was said, may (as appears to be alleged in the present case) result from the consumption of alcohol, either alone or in combination with other drugs. It seems very odd, so the argument runs, that a person may commit an offence by driving a car whilst affected by alcohol, but that no offence would be committed if the person had consumed so much alcohol,
45 and was so badly affected, that he had reached a state of total loss of control of his physical actions. This argument gains strength from the consideration that, since the decision of the High Court: in O'Connor, there is no room for drawing a distinction between self-induced intoxication and other forms of intoxication. The High Court's refusal in that case to follow the English authorities on the
50 point renders inapplicable in Australia the reasoning in R v Quick [1973] QB 910 at 922 where, in the context of a discussion of automatism, Lawton LJ said that

“a self-induced incapacity will not excuse” and gave as an example the consumption of drugs and alcohol. That approach was referred to with approval by Mason J in his dissenting judgment in O’Connor (146 CLR at 109) but it is inconsistent with the majority view. The English approach, rejected in O’Connor,
5 is that, in a case of self-induced intoxication, the relevant voluntariness is supplied by the willing consumption of alcohol, and drunken behaviour which follows is taken to be voluntary.

If, in Australia, as in England, the common law recognised a material difference between self-induced intoxication and other forms of intoxication, it
10 would be possible, as a matter of construction, to read such a distinction into s4E(1G) and conclude that automatism may be an answer to a charge brought under the section, but not where it resulted in whole or in part from the voluntary consumption of alcohol. However, where the common law of Australia denies the relevance of such a distinction it would be inappropriate to read it into the statute.
15 (For a discussion of the complex issues of policy involved in choosing between the English and Australian approaches, or finding another alternative, see I Leader-Elliot, “Voluntariness, Intoxication and Fault” (1991) 15 Crim LJ 112).

The respondent also pointed out that, since decisions such as R v Glenman and Barker v Burke establish that absence of moral blameworthiness is no defence to
20 a charge under s4E(1G) (though it may well go to penalty, or to the exercise of a discretion not to prosecute), there is nothing offensive to ordinary notions of fairness in treating the section as potentially applicable to cases of involuntary driving. Indeed, it was said, the operation of the section would be capricious if it were otherwise. Why should the section be construed as treating some forms
25 of mental condition which negate moral blameworthiness as irrelevant and other forms as relevant?

These are forceful arguments. However, in my view they must yield to the presumption that, although Parliament may by clear words provide to the contrary, the criminal law only punishes conduct which is voluntary. The strength
30 of that presumption was emphasised by Jordan CJ in R v Turnbull, supra. In O’Connor Barwick CJ went so far as to say (146 CLR at 180):

“In Ryan’s case I attempted a summary statement of the principle that in all crime, including, statutory offences, the act charged must have been done voluntarily, ie accompanied by the will to do it. I find no need to qualify what I
35 then wrote. I stated the principle as without qualification.”

I do not take his Honour to mean that Parliament could not, by appropriate language, make it clear that a contrary position was to apply in relation to some offences. However, the passage quoted demonstrates the strength of the presumption.

40 In the section in question, the conduct penalised by statute is the act of driving whilst in a certain physical condition. It is not the activity of getting into that physical condition (normally, drinking) that is penalised. The state of being in that condition may not be one that was known or intended. However, reading the statute in the light of the principle set out above, I conclude that the act of driving
45 must be voluntary.

In response to the argument that it is incongruous that the section should not penalise a person who has had so much to drink that he reduces himself to a state of automatism before driving, I would observe that, as I have already indicated, when what the law regards as automatism is properly understood, the cases in
50 which that problem will arise in practice will be very rare. Impairment of judgment and capacity, even of a gross kind, does not of itself amount to

automatism. Furthermore, the examples to be found in the decided cases of driving whilst in a state of automatism ordinarily relate to brief episodes of concussion or epileptic seizure rather than to the conduct of someone who goes through the procedures of getting into a car, starting it, driving off along a highway and (as in the present case) doing all the things necessary to avoid, for a significant time at least, an accident.

I would answer the question in the negative, and, therefore, allow the appeal. Was the issue of automatism properly raised in the present case? The appellant does not consent to this Court treating the stated case as being amended by the addition of the second question earlier formulated.

Having read the report of the psychiatrist, and the transcript of the evidence before the learned magistrate, I consider that there was, at the hearing, a very real question as to whether the issue of automatism had been properly raised.

The importance of this matter was emphasised by this Court in *R v Tsigos* [1964-65] NSW 1607. In that case Moffitt J said at 1630:

“It has been claimed from time to time that ‘automatism’ can exist in cases where it does not arise from any disease of the mind and examples have been given, such as sleep-walking activity in a dream or when suffering concussion. That involuntary conduct of a sane person can exist cannot be doubted. It could, no doubt, cause harm to others as where a person after being concussed or in an epileptic fit runs his car off the road or otherwise causes injury to another in an uncontrolled physical way. However, it is much more difficult to conceive the possibility of a sane person performing acts with the external semblance of intentional acts which would constitute a crime, while acting in a state of automatism. Judges have been reluctant to exclude the possible existence of such occurrences, but have doubted the credibility of examples at times claimed or envisaged, eg, as of a man strangling another in an epileptic fit, or a man killing his wife in his sleep, dreaming he was fighting a wolf... before such a condition can be considered by a jury as a reasonable hypothesis of innocence, a proper foundation for such an inference must first appear. A mere assertion by the accused, such as that ‘I had a blackout’ will provide no such foundation, as it has been said ‘blackout’ is one of the first refuges of a guilty conscience and a popular excuse... Thus the proper foundation could not be laid except by means of proper evidence, which in most cases would need the support of some qualified scientific opinion, properly based, explaining the cause of the mental incapacity... At this point, ordinarily, it can be expected it will appear whether the condition arises from disease of the mind or not and then, as indicated, it is only in the latter case that the consideration mentioned could arise for the jury in relation to a complete acquittal.”

As the above passage indicates, the importance of the distinction between insane and non-insane automatism is such that it will normally be difficult to give proper consideration to the issue of automatism unless there is available evidence which permits that distinction either to be applied, or to be treated as irrelevant to the particular case (see also *R v Yousseff*, supra). Furthermore, the Court in *Tsigos* pointed out that it is not enough to raise the issue of automatism that one can conjecture, as a bare possibility, that an accused person was in that state. There must be available evidence from which an inference can be drawn that there is at least a reasonable possibility that the accused was acting in a state of automatism. In this respect, as has been noted, the accused bears an evidential onus.

In the present case the appellant was not able to be of assistance, because he had no memory of the events leading up to his driving the car on the night in question, and he suffered a head injury in the collision. The psychiatrist first examined him about two years after the accident, and a good deal of the material
5 in the written report was inadmissible in form. Furthermore, although the appellant's depressed state prior to the accident was evidently regarded as an important factor that might have contributed to a possible state of automatism, there was no serious attempt to come to grips with the question whether the appellant might have been suffering from a disease or disorder of the mind. The
10 appellant's lawyers at no stage set out to establish the proposition that he was insane. However, the distinction earlier referred to was not one that could simply be disregarded.

The problem is compounded by the defective form of the stated case. The report and evidence of the psychiatrist were annexed to the stated case, but it also
15 contained a statement of certain conclusions which the magistrate drew from that material. There was room for argument as to the correctness of those conclusions, but the stated case did not raise for decision, for example, the question whether those conclusions were open to the magistrate on the evidence before him.

The respondent has, at all stages of the proceedings, maintained that, on the
20 facts of the case, there was no serious issue as to automatism available to be considered. Gyles AJ did not find it necessary to deal with this because, on the view he formed in relation to the main issue, it did not arise. This Court thus finds itself in a situation where the matter is not adequately dealt with in the stated case, and there is no reasoning on the point of the judge at first instance. In the
25 circumstances I do not consider that it is appropriate that we should embark upon the exercise of first formulating for ourselves an appropriate question and then answering it. Conclusion: This Court has wide powers of disposition of stated cases under s106 of the Justices Act. Notwithstanding the uncertainty as to whether there was a proper factual basis for the magistrate's ultimate decision, I
30 do not consider that the case should be remitted to the magistrate. Even if an offence were committed, it is stale. The appellant has succeeded on the main point argued in this Court, and the matter should be left at that. Gyles AJ made no order as to costs. The case was brought before him because of its importance to the prosecuting authorities, and since I consider that Gyles AJ should have
35 decided the main question in favour of the present appellant, I consider that this Court should order that the respondent should pay the appellant's costs of the proceedings before Gyles AJ. For reasons that were explained to us we were told that it was agreed that there should be no order as to the costs of this appeal.

I consider that the appeal should be allowed, and the orders made by Gyles AJ
40 should be set aside. The respondent should be ordered to pay the appellant's costs of the proceedings before Gyles AJ. There should be no order as to the costs of this appeal. There is no occasion to make any further order in relation to the stated case.

45 **Samuels JA** I agree with Gleeson CJ.

Meagher JA I agree with the Chief Justice.

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1. Appeal allowed.
 2. Orders of Gyles AJ set aside.
 3. Respondent to pay appellant's costs of proceedings before Gyles AJ.
 4. No order as to costs of appeal.

Counsel for Appellant: R J B St John, QC and K Roser.
Solicitors for Appellant: Robson and Porter.
5 Counsel for Respondent: Sharron Norton.
Solicitors for Respondent: S E O'Connor.

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