IN THE DISTRICT COURT
OF NEW SOUTH WALES
CRIMINAL JURISDICTION

JUDGE ELLIS

EAST MAITLAND: FRIDAY 5 MARCH 2010

2009/230464 - Susan Elizabeth ABBOTT v R

JUDGMENT

HIS HONOUR: Susan Elizabeth Abbott appears before this court appealing against her conviction in the Local Court at Scone for one count of rider not wear a bicycle helmet, contrary to regulation 256 of the Road Rules 2008.

There is no suggestion in the appeal that she was doing anything other than appropriately riding her cycle into town from her residence just out of town. There is also no argument from her that she was not at that time wearing a helmet.

The highway patrol police stopped her; she gave an explanation. One might have thought that the nature of this matter could have permitted them to deal with it by way of a caution. In any event, the matter came before the magistrate, and the argument which was intended, although restricted somewhat by the way in which the proceedings unfolded, was that the Crown had not disproved a defence of necessity.

So there was no issue of credit with the police officers, or indeed with the evidence of Mrs Abbott.

There was an issue in relation to the calling of expert evidence from a Mr Kernot. In my view, having read the transcript, the Crown objections were misconceived and the magistrate was incorrect in his interpretation of the law regarding the admissibility of expert evidence.

So, notwithstanding that there was no question about the expertise of Mr Kernot, he was restricted from referring to anything other than papers which he had written. One wonders that if he was not permitted to refer to other journals, as experts are normally permitted to do, how, I ask, could he actually refer to his own, which were as much hearsay as any other of the documents to which he might have referred.

In any event, in my view it is not necessary to permit further evidence as the success or otherwise of this appeal does not hinge upon the acceptance of Mr Kernot or the belief of the appellant as to the dangers involved in the wearing of a bicycle helmet.

It is clear that there is a significant argument taking place in certain scientific circles regarding the efficacy of helmets, in terms of their ability to protect. On one view, they appear to pose as much danger when worn as the danger of not wearing them. Unfortunately, that issue is an issue for Parliament in terms of whether they should rescind the mandatory requirement for helmets to be worn by cyclists.

There is a provision that allows individuals to make application to be exempt from rule 256, but there is little in the legislation to establish the parameters of acceptable explanations, which would justify such an exemption. Although I do note that religion appears to be one; for example, Sikhs, who obviously cannot wear a helmet over the top of their headgear, which is part of their religious practice.

On the appeal, Mrs Abbott has presented a well researched and articulated set of written submissions. It is fair to say that the issue is whether the Crown has negatived necessity. Even if it is more dangerous to wear a helmet than not, there is a question as to the immediacy of the danger. As Mrs Abbott herself has pointed out, she has been riding a cycle in excess of forty years, and fortunately the type of potential problem that is raised in Mr Kernot's material has never arisen, nor indeed has she been in a position where, with or without a helmet, she has suffered significant head injuries.

It is to be hoped that that continues to be the case.

The question, though, is how immediate, or how great must the risk be to justify breaking the law?

A number of the cases that have been referred to provide facts that are quite understandable, and it is no great surprise in those cases that the Crown was unable to negative necessity for instance, the individual who, in taking a sick person for immediate medical attention, breaks a traffic law of some type or another. One can well understand that the last thing a person might be worried about in those circumstances is whether

they are doing 70 K's or 60 in a 60 zone if they have a critically injured passenger. No doubt the last thing that people within our community or the law itself would be saying would be, "It is more important for you not to break the regulation of 60 kilometres per hour than to take steps to ensure the saving of a life."

Clearly that is why necessity is an established legal principle. But as a legal principle, it applies across the board from the most serious criminal cases to the most minor regulatory breach, such as this. It is not either legally correct or appropriate to attempt to give a broad interpretation to necessity for minor regulatory breaches and then somehow to try and narrow that same principle when it is applied to a more serious criminal offence. The principle must be the same. The parameters or extent of the operation of necessity must be identical, no matter what the crime.

In my view, necessity has not been extended to cover what I might call social choices, no matter how positive any particular choice might be. The lifestyle choice of riding a cycle is obviously a good one from the community's point of view in terms of the lowering of an individual's green footprint. It is obviously a good one from the individual's point of view in terms of health, both physical and mental and from that point of view it is obviously something to be encouraged and not discouraged. This does raise the question of the necessity in relation to this particular provision, albeit it does not, in my view, establish necessity for breaching the provision.

The difficulty as I see it in applying necessity is that it is said that it only applies when the subject conduct avoids a legally undesirable consequence which could not otherwise be avoided. Well, in this case the consequence of injury from the use of a helmet could be avoided if the cycle was not ridden at all. Even accepting the strength of the social justifications for riding a cycle, there would still be a method which could avoid the consequence, and that would be simply to walk or, to take it to its more ridiculous extreme, to push the cycle. Obviously if those social factors are not paramount, a motor vehicle could be driven, a taxi could be taken, although I assume in this situation that it is unlikely that there was public transport available.

The other factor is that it is said that if you did not break the law, you would have inflicted upon you an inevitable and irreparable evil. There is nothing in this case that is inevitable about the wearing of the helmet producing a significant physical or mental problem for Mrs Abbott.

In terms of the question of disproportionality, if you like, between the law to be breached and the breaching, it does not seem to me that there is a problem here. This is such a minor regulatory breach that the act of failing to comply with the provision is an insignificant breach in the scheme of things, and arguably there is no impact upon anyone other than the individual who chooses to breach that particular law.

So the evil to be avoided, that is, the potential injury caused by a helmet, I accept, is not disproportionate to the breach in the sense that the breach itself is a minor breach. But the difficulty that I perceive for Mrs Abbott and the strength for the Crown in disproving necessity is twofold, as I have indicated. First, there were alternate means by which the potential consequence could be avoided, and secondly, the potential consequence is far too remote in reality to justify the breach, and in that sense it is not, and never could be said, that it was an inevitable and irreparable evil or inappropriate consequence.

The court has noted the cases to which reference has been made in the written submissions, including the New South Wales decision of Rogers, the two Victorian decisions and then the two District Court decisions of his Honour Judge Levine, as he then was, in Wald and also a decision in of his Honour Judge Shadbolt in White.

Clearly, the application of the legal principle of necessity very much depends upon the factual context and while I have no issue with the submissions made by Ms Abbott as to what the law of necessity is, unfortunately I disagree with her in terms of its application to this given factual proposition or situation.

Accordingly, the offence is proved, as I am satisfied beyond reasonable doubt that, one, she did ride the cycle and, two, she was not wearing a helmet at the time and, three, she was not exempt from so wearing a helmet and, four, that the crown has disproved the necessity defence raised by her.

Mr Crown, do you want to say anything about where I go from here?

OUTRAM: Always been section 10, your Honour, without a doubt.

HIS HONOUR: But nevertheless, it seems to me, having regard to the fact that Ms Abbott is a fifty year old lady with no prior criminal convictions and, in my mind, she had an honestly held and not unreasonable belief as to the dangers associated with the use of a helmet by cyclists, that it is not appropriate to record a convic-

tion and accordingly the appeal is dismissed but the conviction is quashed and she is discharged pursuant to section 10.
OUTRAM: Section 10(1)(a), that's without--
HIS HONOUR: Yes, that's the discharge; the other one, discharged under section 10(1)(a).
APPELLANT: Thank you, your Honour; thank you very much.