16/06; [2006] VSC 228

SUPREME COURT OF VICTORIA

HANNON v NORMAN

Gillard J

6, 30 June 2006 — (2006) 45 MVR 520

MOTOR TRAFFIC – DRINK/DRIVING – COPY OF BRIEF OF EVIDENCE SERVED ON DEFENDANT – NOTICE GIVEN BY DEFENDANT REQUIRING PERSON WHO GAVE BREATHALYSER CERTIFICATE TO ATTEND COURT – DEFENDANT FAILED TO APPEAR ON HEARING DATE – MATTER PROCEEDED *EX PARTE* – ORAL EVIDENCE CALLED – CERTAIN PROCEDURE NOT FOLLOWED BY MAGISTRATE – BRIEF OF EVIDENCE NOT TENDERED IN EVIDENCE – NO PROOF THAT OPERATOR AUTHORISED OR THAT PBT HAD BEEN CONDUCTED USING A PRESCRIBED DEVICE – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(f), 58(2); *MAGISTRATES' COURT ACT* 1989, S37, Sched 2.

H. was charged with an offence against s49(1)(f) of the *Road Safety Act* 1986 ('Act'). Some time later the police informant served a copy of the charge and summons and a copy of the brief of evidence on H. A date of hearing was fixed and when the case was called, H. did not appear. The magistrate granted an application for the matter to proceed *ex parte*. The informant gave evidence and a certificate of analysis was tendered. However, the procedure set out in cl 5 of Schedule 2 of the *Magistrates' Court Act* 1989 was not followed. This procedure required the brief of evidence to be tendered in evidence and the magistrate to consider the question of admissibility of any documents in the brief. Further, the informant failed to prove (a) that the PBT was conducted pursuant to s53(1) of the Act (b) that the PBT was conducted on a prescribed device and (c) that the person who operated the breath analysing instrument was authorised to do so by the Chief Commissioner of Police. The defendant was convicted. Upon appeal—

HELD: Appeal allowed. Orders quashed and the charge dismissed.
The Court did not follow the proper procedure after a direction was given that the matter proceed *ex parte*, and further, that the oral evidence called was deficient and failed to prove the case against the appellant. The evidence failed to prove that the operator was authorised to operate the breath analysing instrument and that the instrument was one within the meaning of the Act. Further, there was no proof that the preliminary breath test had been conducted using a device prescribed under the Act. As the evidence before the Court did not establish beyond reasonable doubt all of the elements of proof that rested upon the respondent as informant the magistrate was in error in convicting and penalising N.

GILLARD J:

1. This is an appeal from orders made by the Magistrates' Court sitting at Broadmeadows pursuant to s92 of the *Magistrates' Court Act* 1989 ("Court Act"). The appellant was convicted of an offence against s49(1)(f) of the *Road Safety Act* 1986 ("the Act"), namely, that being a driver of a motor vehicle, he furnished a sample of his breath for analysis and, upon analysis, the result showed that he had an excess concentration of alcohol in his breath. He was fined $550, his licence to drive a motor vehicle was cancelled and he was disqualified for a period of 10 months from driving in this State.

Parties

2. The appellant, Aaron Hannon ("the appellant"), is aged 35 years, and according to what he told the police, his occupation at the time of the offence was business analyst.

3. The respondent, Senior Constable Jeremy Norman ("the respondent"), is a member of the Victoria Police and was the informant in the proceeding brought against the appellant.

Proceeding in Magistrates' Court

4. On 14 December 2004, the appellant was charged with two drink driving offences. On 25 May 2005, a summons was issued by the Broadmeadows Magistrates' Court. The return date was 6 July 2005. Charge 1 was withdrawn at the hearing. The second charge, of which he was convicted, was expressed as follows:

> "The defendant at Flemington on 02/09/04 did within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55 of the *Road Safety Act* 1986 and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol being .05 grams per 210 litres of exhaled air was present in his breath and the concentration of alcohol indicated by the analysis to be present in his breath was not due solely to the consumption of liquor after driving or being in charge of the motor vehicle."

5. The alleged reading was 0.109%, that is, 0.109 grams of alcohol in 210 litres of breath.

6. On 15 June 2005, the informant served the appellant, by prepaid post, with the charges and summons and a copy of the brief of evidence. The brief of evidence was served pursuant to s37 of the Court Act. The informant filed with the Magistrates' Court a copy of the brief of evidence. The return date of the summons was 6 July 2005.

7. On 1 July 2005, the appellant sent a letter to the respondent. In it, the appellant stated that he wanted to adjourn the case to August so that he could obtain some advice, as he wished to challenge the breath test result. He asserted that he had drunk two wines and one mixed drink over four hours prior to being intercepted by police. He then stated:

> "I believe the breath test machine was faulty or else Senior Constable Wansleeben must have made a mistake when operating the machine or he failed to follow proper breath test procedures and this caused the high reading. He will need to be at the court hearing because I want him to tell the Magistrate about the way he used the machine. If there is any way I can keep my licence without having to fight this in court, I would be happy to take that option."

8. On the same day, he forwarded a letter to the Court seeking an adjournment "for about four weeks" in order to obtain advice. He attached a copy of the letter to the respondent. By reason of s58(2) of the Act, an accused person may give notice in writing to an informant that he requires the person who gave the breathalyser certificate to attend court. The giving of the notice has an effect upon the evidentiary weight of the certificate after it is tendered in evidence.

9. It appears that the matter was adjourned to 3 October 2005 for a contested hearing. On that day, the appellant did not appear to contest the charges. He was convicted and penalised in his absence. He did not seek to have the matter re-heard by the Magistrates' Court pursuant to s93 of the Court Act. If he had, and his application had been granted, it would have been necessary for the charges to be re-heard *de novo*. If he had proceeded down that path, he would have had to state in his application form for a re-hearing why he did not attend the original hearing. See s94(1)(a) of the Court Act. The lodging of the notice would not have stayed the order cancelling his licence (see s93(3)), but he could have applied for a stay pursuant to s94(4). This procedure obviously did not suit the appellant's purpose. Instead, he filed a Notice of Appeal to the County Court on 5 October 2005 and was granted permission to drive, pending appeal, by a magistrate on 7 October 2005. The County Court appeal was fixed for hearing on 24 January 2006. The appeal in the County Court would have been a re-hearing *de novo*. This would have given the appellant the opportunity to contest the charges, including, of course, any factual matter, and the opportunity to call evidence. He declined to do this because on the last day permitted by s92 of the Court Act, he appealed to this Court. On 2 November 2005, the appellant filed his Notice of Appeal in this Court. On 10 November 2005, the appellant swore an affidavit in support of his appeal and on 21 November 2005, at a directions hearing held by Master Efthim, the latter granted a stay of the Magistrates' Court's orders until further order. On 24 January 2006, the County Court appeal was struck out. There is no evidence before this Court as to the reason why the appellant did not attend the hearing in the Magistrates' Court.

10. The steps taken by the appellant have resulted in deferring the finalisation of the charges brought against him by a period of nearly one year. The lodging of a County Court appeal does not constitute an election by the appellant to waive any other appeal rights. See s83(2) of the Court Act. The steps taken by him were in accordance with the law.

11. The charges were heard and determined in the Magistrates' Court in the absence of the appellant. The hearing was recorded and a transcript has been prepared by the appellant and placed before the Court on the appeal.

12. On 21 November 2005, Master Efthim ordered that any affidavit by the respondent be filed on or before 12 December 2005. An affidavit of the respondent, sworn 2 June 2006, was filed with the Court on 5 June 2006. It was received by counsel for the appellant some days before that. Mr SP Hardy of counsel, who appeared for the appellant, objected to the Court considering it on the appeal as it was late and contained irrelevant matter. He disavowed any prejudice. The affidavit sets out in chronological form the steps that were taken by the appellant. I granted leave to the respondent to file and serve the affidavit out of time, subject to the objection of relevance.

13. It is necessary to set out what took place before the magistrate. The transcript revealed what occurred as follows:

"The case of Aaron Hannon was called to Court 2 by the Clerk.
1. Prosecutor: Good morning Your Honour.
2. MAG: Good morning.
3. PROS: Your Honour, I just had this mentioned, it was booked in for a contest today. I have just been given a list, and there are other people waiting, I have two police witnesses waiting. At this stage Mr Hannon has not presented himself and it would be an application for an ex parte.
4. MAG: Alright. We'll just have him pages (sic) one more time.
5. Clerk: Aaron Hannnon to court room two. Aaron Hannon.
6. MAG: In fact there has been a brief of evidence serviced, is that right?
7. PROS: There has Your Honour. That's right. That was the initial course of action.
8. MAG: I grant your application to proceed ex parte.
9. PROS: Thank you Your Honour. I officially tender the Road Safety (General) Regulation 1999. Call the informant constable ...
10. MAG: Yes. Are you proceeding on both charges?
11. PROS: No, Your Honour, we will strike out one and proceed on two.
12. MAG: I withdraw charge 1. The 49(1)(b).
13. PROS: I think it is struck out as opposed to withdrawn Your Honour.
14. MAG: I'll hear the evidence and then if I am satisfied I will strike it out before ... Right. Yes, take the witness box please sir.
15. Norman: [Sworn in]
16. Norman: My full name is Jeremy .... I am a senior constable of police stationed at Brunswick Police Station.
17. PROS: Will a summary suffice your worship?
18. Norman: On Wednesday 1 September 2004 at approximately 11.48PM the defendant was driving a black Mazda wagon registration number SIG 785 in a southerly direction along Stubbs Road (sic) in Flemington where he was intercepted at a breath testing station which was set up and operating pursuant to the Road Safety Act 1986. A preliminary breath test was conducted on the driver the result of which indicted (sic) the defendant's breath contained alcohol. The defendant then accompanied police to the breath testing vehicle for the purpose of undergoing a breath analysis test. The defendant furnished a sample of breath for analysis on the breath analysing instrument. The result of the analysis showed that the defendant has a breath alcohol concentration of 0.109%. the defendant admitted to drinking 2 glasses of wine and one mixed spirit. The defendant's reason for exceeding the prescribed concentration of alcohol was "I don't know if I should answer".
19. PROS: Do you have the certificate of analysis with you?
20. Norman: I do.
21. PROS: And did you make any inquiries with VicRoads as to the status of the defendant's licence?
22. Norman: I did. I applied for an extract from VicRoads.
23. PROS: Do you have a copy of that with you?
24. Norman: I don't.
25. PROS: Can you explain to her Honour what that is?
26. Norman: A certified extract from VicRoads, stating that Mr Aaron Hannon was licenced (sic) under the Road Safety Act and his licence was current at the date of the offence.
27. PROS: I tender that Your Honour. Now, how was Mr Hannon dealt with on the night?
28. Norman: He was given a penalty notice which -
29. PROS: I don't remember the monetary penalty but it was disqualified and cancelled for 10 months.
30. MAG: And you weren't the authorized operator of the breathalyser. There was another office there?
31. Norman: Yes, that's correct Your Honour.
32. PROS: That's the evidence of this witness Your Honour.
33. MAG: Can you give me the full name and address of the driver.
34. Norman: Aaron Hannon. 27 White Street Footscray. Date of Birth was 23 of 12 1970.
35. MAG: Are you calling any other evidence?
36. PROS: No Your ...
37. MAG: Is there any evidence at all of the certification of the operator? You need to establish that` don't you?
38. PROS: With the tendering of the certificate that becomes conclusive proof that it -
39. MAG: Oh it does to. Unless there is evidence to the contrary ...

40. PROS: it was operated – Yes.
41. MAG: Yes, I find the charge proved. Any matters being alleged?
42. PROS: No Your Honour.
43. MAG: Charge 1 is the normal alternative charge isn't it?
44. PROS: Yes, to be struck out. We will be proceeding on 2. Thank you Your Honour.
45 MAG: Any matters being alleged?
46. PROS: No Your Honour.
47. MAG: There are three charges. There should only be two aren't there.
48. PROS: There should be. Excuse me, my apologies. The third one is – assuming this went ahead as a contest, the original 49(1)(b) was to be struck out. The third charge is a correct replacement for that charge. So if charge one could be withdrawn. That charge is incorrect. If charge three, which is the alternate one could be struck out. And proceed on two please.
49. MAG: OK. What was the infringement amount?
50. PROS: $429.00 Your Honour.
51. MAG: The defendant's licence is cancelled for a period of 10 months effective from the 3rd October 2005. He is convicted and fined $550.00 with costs of $36.80."

14. The breathalyser operator was present in Court but was not called as a witness. Mr Hardy submits that the evidence placed before the magistrate failed to establish each element of the charge against his client, and that the magistrate should have dismissed the charge. As the appellant did not appear at the hearing, it was open to the prosecution to proceed, in accordance with the provisions of the Court Act, as an *ex parte* matter. Upon application by the prosecutor, the magistrate granted the application to proceed *ex parte* pursuant to s41(2)(b) of the Court Act.

15. A number of matters are noted:

- The appellant did not attend at Court despite giving a notice requiring the presence in Court of the breath analyser operator;
- The magistrate and the prosecutor were aware that a brief of evidence had been served;
- The magistrate granted the application of the prosecutor to proceed *ex parte* pursuant to s41(2)(b) of the Court Act;
- The prosecutor did not tender the brief of evidence which had been served on the appellant and filed with the Court;
- The prosecutor called the informant as a witness;
- The magistrate agreed with that course;
- The prosecutor requested an indication from the magistrate as to whether a summary of the offence would suffice. There was apparently no response to that request, although it may be inferred the magistrate agreed;
- The informant gave a summary of the offence;
- The Certificate of Analysis was apparently tendered;
- It was noted by the magistrate that the informant was not the authorised operator of the breathalyser. The informant informed the Court that there was another officer present in Court;
- The magistrate adverted to calling further evidence and posed the question of whether there was any evidence of the certification of the operator. The prosecutor stated that the tendering of the certificate became conclusive proof; and
- The magistrate observed that that was so, unless there was evidence to the contrary.

16. It is necessary to now consider the procedure available in the Magistrates' Court where a criminal proceeding proceeds *ex parte*.

***Ex parte* procedure in summary offence**

17. The 1989 Court Act contained a new procedure relating to *ex parte* hearings in criminal cases. The object was to shorten the hearing time involved in cases where a defendant did not appear in answer to a summons charging him with a summary criminal offence. There was power to proceed *ex parte* under the pre-existing Act. There was also an alternative procedure available, which involved the informant serving a sworn statement on the defendant and the defendant having an election to appear. See s78(3)(a) and ss84-89 of the *Magistrates (Summary Proceedings) Act* 1975. The new procedure under the 1989 Act was a variation on the previous legislation, but was markedly different. Section 37 authorises an informant to serve on a defendant charged with a summary offence, a brief of evidence. Section 37(1) specifies what must be contained in the brief of evidence. First, a notice in the prescribed form explaining s37 and clause 5 of schedule 2. Secondly, a list of the persons who have made statements which the informant intends to tender at the hearing, if the defendant does not appear, and thirdly, copies of the statements. In addition, the brief of evidence must contain a copy of the charge sheet relating to the offence, together with

any other documents which the informant intends to rely upon, a list of proposed exhibits and a photograph of any proposed exhibit that cannot be described in detail on the list. Section 37(2) prescribes the means of ensuring that the statements are true and correct. A statement must either be in the form of an affidavit or contain an acknowledgment that the statement is true and correct and made in the belief that if a false statement is made the person shall be liable to perjury. If the maker of a statement is under the age of 18 years, that fact must be stated. Sections 37(3) and 37(4) deal with a situation where the maker of a statement cannot read.

18. A brief of evidence must be served either by personal service or by leaving the brief at the defendant's last and most usual place of residence or of business, or, in respect to certain offences, by prepaid post to residence or business. See ss34 and 36(1). I interpolate to note that there is an alternative procedure under s37A that permits the service of an outline of evidence on the defendant, which may be relied upon if the defendant fails to appear at the proceeding.

19. Section 41 deals with the non-appearance by the defendant. If a defendant fails to appear, the Court may, *inter alia*, proceed to hear and determine the charge in his or her absence in accordance with Schedule 2 to the Act. The Schedule prescribes, *inter alia*, the procedure of a summary criminal hearing. Clause 5 of Schedule 2 deals with the situation where the defendant does not appear after the informant has served a brief of evidence. The first step is for the Court to direct that the matter proceed in the absence of the defendant. See s41(2). The next step is for the magistrate to determine whether the informant has served the brief of evidence on the defendant in accordance with s37. Once the magistrate is so satisfied, any statements served in the brief of evidence, and any admissible exhibits or documents referred to therein, are admissible "as if their contents were a record of evidence given orally." See clause 5(1)(c) and (d). The Court is empowered to rule as inadmissible the whole or part of any statement or of any exhibit or document referred to in the brief. See clause 5(2).

20. The prosecutor sought and obtained a direction that the hearing and determination of the charge proceed *ex parte*. However, the procedure set out in clause 5 of Schedule 2 was not followed. Although it was known to both the magistrate and the prosecutor that a brief of evidence had been served, the prosecutor did not make any reference to any document in the brief, nor did the prosecutor seek to tender the contents of the brief. It followed that the Court was not called upon to rule as to the admissibility of any document contained in the brief. Nothing was said at the hearing to lead to the conclusion that the magistrate was relying upon any document in the brief, nor does it appear that the prosecutor sought to rely upon any document in the brief. In my opinion, if the procedure under clause 5 of Schedule 2 is to be followed, the brief of evidence must be tendered in evidence. To avoid any doubts about what was tendered, the documents should be marked as Exhibits. Further, the magistrate must consider the question of admissibility of any of the documents in the brief.

21. The fact that the defendant did not appear does not entitle the prosecution to obtain a conviction without proper proof of the elements of the charge. Whilst the objection to the tendering of inadmissible evidence may be waived by a litigant present at a hearing, the mere absence of the litigant does not entitle the Court to ignore the principles of evidence. Where a proceeding is heard *ex parte*, it is incumbent upon the Court to closely examine the evidence to ensure that it is admissible. It would appear that neither the magistrate nor the prosecutor fully understood the requirements of the Act and the Schedule with respect to an *ex parte* hearing, where a brief of evidence had been served pursuant to s37. Although the magistrate directed that the matter could proceed *ex parte*, at the request of the prosecutor and presumably pursuant to s41(2)(b), the procedure laid down by clause 5 of Schedule 2 was ignored. Further, despite the direction, the prosecutor called oral evidence relating to the charge.

22. Mr Chris Ryan SC, on behalf of the respondent, submitted that although the Court had directed that the matter should proceed *ex parte*, the charge was not heard and determined in accordance with clause 5 of Schedule 2, the jurisdiction was accordingly not properly exercised, and the matter should be remitted to the Magistrates' Court to be re-heard. Mr Hardy, on behalf of the appellant, opposed this course, and submitted that on the evidence placed before the magistrate, the informant had failed to prove the charge, and accordingly the appeal should be allowed and the charge dismissed.

23. This Court on an appeal, after determining the same, has the power to remit the case for rehearing to the Magistrates' Court.[1] A factor which is relevant to the exercise of that power in the present matter is the effect in law of what the magistrate did. The thrust of Mr Ryan's submission was that the jurisdiction had not been exercised and accordingly, the proceeding was a nullity. Before considering any such question, it is necessary to hear and determine the appeal before the Court. At the outset, it is necessary to state a number of concessions made on behalf of the respondent.

Concessions by Respondent

24. Mr Ryan, on behalf of the respondent, conceded that the hearing conducted by the magistrate was not in accordance with the law. He submitted that once the magistrate had granted leave to proceed *ex parte*, the proceeding should have been conducted pursuant to clause 5 of Schedule 2. The Court did not properly exercise its jurisdiction. Further, he conceded that on the evidence before the magistrate, the informant failed to prove the case in a number of respects. He accepted that it was essential in proving the offence prescribed by s49(1)(f) of the Act that the preliminary breath test was performed in accordance with the Act. The authorities establish that an informant must prove that the preliminary breath test was conducted pursuant to s53(1). See *Smith v Van Maanen;*[2] *DPP v Webb;*[3] *DPP v Foster*;[4] and *DPP Reference No. 2 of (2001).*[5]

25. I must say that I have difficulty with the proposition that it is an essential element of the proof of a breach of s49(1)(f) that a preliminary breath test has been undergone. Section 49(1)(f) establishes that certain conduct is an offence. It is a statutory offence. The elements which constitute the offence are established by the provision. There is no common law rule that a prosecution must prove that the evidence was lawfully obtained. Of course, it would be open to a defendant to raise such an issue. Whether or not the evidence would be excluded would be a matter for the Court. The mere fact that there are a number of provisions in the Act which deal with the right to demand a preliminary breath test, does not appear to me to be a basis for inferring that the Legislature intended that it was an essential element of proof of an offence under s49(1)(f) that a preliminary breath test had been undertaken in accordance with the law. However, it is clear that the authorities establish the proposition and they bind both this Court and the Magistrates' Court.

26. In this case, there was oral evidence that a preliminary breath test had been undertaken, and had established the presence of alcohol on the breath of the appellant. In a recent decision in this Court, Hargrave J held that it was necessary to prove that the preliminary breath test was conducted on a prescribed device.[6] Mr Ryan did not seek to argue to the contrary. He accepted that there was an omission in the oral evidence that the device was a prescribed one, and that this was fatal to the success of the prosecution. In the circumstances, it is unnecessary for me to consider the question decided by Hargrave J that the informant must prove that the preliminary breath test was conducted on a prescribed device.

27. The third concession made by Mr Ryan was that on the oral evidence before the magistrate, the informant failed to prove that the person who operated the breath analysing instrument was authorised to do so by the Chief Commissioner of Police. Section 58(2) of the Act is an evidentiary provision which, if complied with, provides evidence of certain matters concerning the breath analysing instrument and its use. The production of the certificate containing the prescribed particulars produced by the instrument is conclusive proof of certain matters, unless the accused person gives notice in writing to the informant. The appellant did so in the present matter. But that is not the end of the certificate. It still has evidentiary value. By reason of s58(2D), a certificate remains admissible in evidence but if notice is given, "in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section." As stated, it appears the certificate was tendered in evidence.

28. In *Furze v Nixon*,[7] the Court of Appeal held[8] that if the certificate is no longer conclusive proof, its contents provide evidence, but only as to the matters contained in the certificate. In the present matter, the certificate did not state that the operator was authorised by the Chief Commissioner of Police. Accordingly, on the evidence before the magistrate, there was no proof of the fact that the operator was authorised to operate the instrument.

29. I also have difficulty with the reasoning in *Furze v Nixon.*[9] The certificate is still admissible

in evidence even though notice has been given. Sections 58(2) and 58(2D) make it clear that it is evidence, but no longer conclusive evidence. It is not only evidence of the facts and matters contained in it – see s58(2)(a) – but on a plain reading of the two provisions, is evidence of the other matters set out in s58(2). The difference, however, is that it is not conclusive evidence, which means that it is open to a defendant to challenge the evidence. The certificate is given pursuant to s55(4) of the Act. The certificate must contain prescribed particulars. The prescribed particulars are set out in Regulation 203 of the *Road Safety (General) Regulations* 1999. The prescribed particulars do not include some of the matters set out in s58(2)(b)-(f) (inclusive) of the Act. Despite this, the certificate is conclusive proof of all those matters unless notice is given. All that changes on a notice being given, is that the evidence is no longer conclusive. However, it is still evidence. It is then a matter for the defendant to contest any of the factual matters set out in s58(2). The reasoning in *Furze v Nixon* seems to me to be inconsistent with the intention of the Legislature. However, *Furze v Nixon* is a decision which binds this Court and Mr Ryan did not seek to submit that the observations made by the Court of Appeal were *obiter dicta* or that the reasoning was incorrect.

30. By reason of the concessions made, it was accepted on behalf of the respondent that the Court had not followed the proper procedure after a direction was given that the matter proceed *ex parte*, and further, that the oral evidence called was deficient and failed to prove the case against the appellant.

31. As stated, it was Mr Ryan's submission that the orders should be set aside and that the charge be remitted to the Magistrates' Court so that the proper procedure should be followed and the jurisdiction exercised in accordance with the law. I interpolate to observe that the respondent has not appealed the orders made in the Magistrates' Court, nor has he sought judicial review. In the circumstances, it was most unlikely that the respondent would have had a right to appeal or standing to bring judicial review.

32. Mr Hardy countered Mr Ryan's submission by submitting that the police should ensure that a summary prosecution is properly presented, that all evidence is placed before the Court, and that the charge be proven beyond reasonable doubt. He submitted that the oral evidence was defective.

33. The appellant has appealed the orders. He has invoked the appellate jurisdiction of this Court. The appeal must be heard and determined.

Points of law and grounds of appeal

34. The Notice of Appeal filed on 2 November 2005 identified three points of law. The first point raised the question of whether the magistrate erred in law in convicting the appellant given that notice had been given pursuant to s58(2) of the Act, the operator of the breath analysing instrument had not been called as a witness, and no order was made pursuant to s58(2C). The point was that there was no evidence before the magistrate of the matters set out in s58(2)(a) – (f) (inclusive) of the Act.

35. The second point raised the question of whether the prosecution had failed to prove that the preliminary breath test had been conducted using a device prescribed under s53 of the Act. The third point raised was the question of whether the magistrate erred in law in convicting the appellant when "all of the evidence given by the informant was hearsay".

36. The Notice of Appeal, after stating the questions of law, then proceeded to state what are described as eight grounds of appeal. Save for grounds 7 and 8, they do not constitute grounds of appeal. In the circumstances, it is more convenient to deal with the points of law as to the grounds of appeal. They raise the real issues.

First point of law

37. On the assumption that the only evidence before the Court was the oral evidence given before the magistrate, the ground has clearly been made out. By reason of *Furze v Nixon*, the certificate produced by the breath analysing instrument did not contain certain matters that must be proven. It was necessary to prove that the operator was authorised to do so by the Chief

Commissioner of Police and that the instrument was one within the meaning of the Act. This ground has been established.

Second point of law

38. On the basis that the decision of Hargrave J in *Shabbir Sirajuddin v Glenn Ziino*,[10] is correct, there was no proof that the preliminary breath test had been conducted using a device prescribed under the Act. This ground has also been established.

Third point of law

39. This point of law has not been made out. The informant's evidence was not all hearsay.

Conclusion

40. The appellant has established a number of grounds of appeal and is entitled to have the orders set aside. Mr Ryan submitted that the magistrate, having directed that the matter should proceed *ex parte* pursuant to s41(2) of the Court Act, did not exercise the jurisdiction of the Court as required by s41(2)(b), namely, to proceed in accordance with Schedule 2. There is no doubt that both the magistrate and the prosecutor misunderstood the procedure to follow where a direction is given that the charge be heard and determined *ex parte*. But the effect of the mistake is not to make the proceeding null and void. At most, it could be voidable, which means that on appeal or judicial review, the orders made could be set aside. What took place did not constitute a want of jurisdiction. The Magistrates' Court clearly had the jurisdiction to hear and determine the charge. It made a mistake in its procedure to hear and determine the matter, having directed that it be heard *ex parte*. Nevertheless, despite that direction, oral evidence was given. The Court exercised its jurisdiction. What it did may arguably be voidable, but is not null and void. Sections 37 and 41 of the Court Act, and Schedule 2, do not relate to the jurisdiction of the Magistrates' Court but are provisions which provide for a certain procedure in relation to the exercise of the jurisdiction. The Court exercised the jurisdiction and what occurred did not make the purported exercise of the jurisdiction void. This is made clear by what Dixon J said in *Parisienne Basket Shoes Pty Ltd v Whyte*.[11] His Honour said:

> "It is not true that because an information is in fact laid out of time, the Court of Petty Sessions is powerless to deal with it. Whether or not an information was laid too late is a question committed to their decision; it is not a matter of jurisdiction. In courts possessing the power, by judicial writ, to restrain inferior tribunals from an excess of jurisdiction, there has ever been a tendency to draw within the scope of the remedy provided by the writ complaints that the inferior court has proceeded with some gross disregard of the forms of law or the principles of justice. But this tendency has been checked again and again, and the clear distinction must be maintained between want of jurisdiction and the manner of its exercise. Where there is a disregard of or failure to observe the conditions, whether procedural or otherwise, which attend the exercise of jurisdiction or govern the determination to be made, the judgment or order may be set aside and avoided by proceedings by way of error, *certiorari*, or appeal. But, if there be want of jurisdiction, then the matter is *coram non judice*. It is as if there were no judge and the proceedings are as nothing. They are void, not voidable."
> (Emphasis added).

41. In that case, the High Court was concerned with the prerogative writ jurisdiction of this Court. The prerogative writ of *certiorari* was available to quash orders that were voidable.[12] Dixon J made it clear that a voidable order may be set aside on appeal if there was an avenue of appeal. In my opinion, his Honour's observations are apposite to the effect of what occurred in the Magistrates' Court when hearing and determining the charge against the appellant. However, the respondent has not sought to appeal the orders made or to seek judicial review of them.

42. At best, from the respondent's position, the proceeding was arguably voidable only and since there is no proceeding in this Court to attack its validity, in my opinion this appeal should be determined in accordance with general principles. The appellant has succeeded. The orders convicting and penalising the appellant must be set aside. The evidence before the Court did not establish beyond reasonable doubt all of the elements of proof that rested upon the respondent as informant. There is no basis for remitting the charge back to the Magistrates' Court for re-hearing.

43. Subject to submissions by counsel, I propose to make the following orders:

(i) That the appeal be allowed;

(ii) That the orders made by the Magistrates' Court at Broadmeadows on 3 October 2005, namely, that the appellant be convicted of a breach of s49(1)(f) of the *Road Safety Act* 1986; that he be fined $550 with $36.80 statutory costs; that his licence be cancelled; and that he be disqualified from driving in the State of Victoria for a period of ten months, be set aside;

(iii) That the charge be dismissed;

(iv) That the respondent pay the appellant's costs of the appeal, including any reserved costs.

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[1] See s92(7) of the Court Act.
[2] (1991) 14 MVR 365 at 371.
[3] [1993] VicRp 82; [1993] 2 VR 403 at 407; (1992) 16 MVR 367.
[4] [1999] VSCA 73; [1999] 2 VR 643 at paras 34 and 35; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[5] [2001] VSCA 114; (2001) 4 VR 55 at para 23; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[6] See *Shabbir SiraJuddin v Glen Ziino* [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21.
[7] [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[8] at pp511-512.
[9] at pp551-512.
[10] [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21.
[11] [1938] HCA 7; (1938) 59 CLR 369 at 389; [1938] ALR 119.
[12] Ibid at p392.

APPEARANCES: For the appellant Hannon: Mr SP Hardy, counsel. The Law Offices of Barry Fried, solicitors. For the respondent Norman: Mr C Ryan SC, counsel. Stephen Carisbrooke Acting Solicitor for Public Prosecutions.
