9/96

SUPREME COURT OF VICTORIA

HILL v PECK

O'Bryan J

16 February 1996 — (1996) 84 A Crim R 139; (1996) 23 MVR 68

MOTOR TRAFFIC – DRINK/DRIVING – INTENTION TO CALL EXPERT EVIDENCE – NOTICE OF GIVEN IN THREE LETTERS TO INFORMANT – WHETHER NOTICE MUST BE GIVEN IN THE ONE DOCUMENT – WHETHER PROCEDURAL PROVISION – WHETHER STRICT COMPLIANCE REQUIRED: *ROAD SAFETY ACT* 1986, S58(2), (2A), (2B).

Section 58 of the *Road Safety Act* 1986 ('Act') provides that where a person requires the attendance of the operator or intends to adduce expert evidence in rebuttal of any facts or matters stated in a breathalyser certificate, written notice must be given to the informant not less than 28 days before the hearing. H. sent 3 letters to the informant; the first two indicated an intention to call expert evidence and the nature of it, the third requested the attendance of the operator for cross-examination. The magistrate upheld a submission by the prosecutor that the notice for the purposes of s58(2) and (2A) of the Act must be one document and not a combination of two or more documents. Consequently, the magistrate refused leave to introduce expert evidence and convicted H. Upon appeal—

HELD: Appeal allowed. Conviction quashed. Remitted for further hearing.
Non-compliance with a procedural provision should not shut out a *bona fide* defence in a criminal proceeding except in rare and special circumstances. The requirements of s58(2) and (2A) of the Act are procedural provisions which do not require the strict construction placed on them by the magistrate. As the letters given within the prescribed time had the effect of giving notice to the informant, the requirements of s58(2) of the Act were satisfied.

O'BRYAN J: [1] This is an appeal from a decision in the Magistrates' Court at Prahran on 18 September 1995 whereby the appellant was convicted of a charge against s49(1)(b) of the *Road Safety Act* 1986. The charge arose out of an incident on 26 June 1994. The appellant pleaded not guilty. In the Court below the appellant intended to call expert evidence in rebuttal of the facts and matters contained in a certificate given in accordance with s55(4) of *the Road Safety Act* but was not allowed to do so. Such evidence is admissible in defence of a charge under s49(1)(f): *DPP v Phung* (1993) 2 VR 337.

By s58(2) an accused requiring the person giving the certificate in accordance with s55(4) to be called as a witness or intending to adduce evidence in rebuttal of any facts or matters stated in the certificate, must give notice in writing to the informant not less than 28 days before the hearing or any shorter period ordered by the Court or agreed to by the informant. Sub-section (2A) requires that such a notice must specify any fact or matter with which issue is taken and indicate the nature of any expert evidence which the accused intends to have adduced at the hearing. Sub-section (2B) provides that the accused person may not, except with the leave of the Court, introduce expert evidence at the hearing if the nature of that evidence was not indicated in a notice under ss(2).

The appellant argued in the Court below that notice as required by s.ss(2) and (2A) was given to the informant by three letters. Firstly, by a letter dated 1 December 1994 in **[2]** which the accused said he would call an expert witness to give evidence that the breath analysing instrument used was not on that occasion in proper working order or properly operated and that the concentration of alcohol present in his blood would not have been as alleged in the certificate.

Secondly, by a letter dated 17 February 1995 in which the accused said that he intended to call an expert witness and provided the informant with an "expert witness statement".

Thirdly, by a letter dated 8 March 1995 in which the accused requested that the letter be read "in conjunction with previous letters concerning evidentiary matters" and requested the attendance of the breath operator for the purpose of cross-examination. The combined effect of

these letters gave notice in writing to the informant not less than 28 days before the hearing that the operator of the breath analysing instrument was required to be called as a witness (8 March 1995) and that the accused intended to call expert evidence in rebuttal of facts and matters stated in the certificate (17 February 1995). The informant was put on notice by these letters that the defence case would raise a reasonable doubt whether the breathalyser was in proper working order or properly operated and would do so by calling an expert witness.

In the Court below the learned Magistrate upheld a submission by the prosecutor that a notice for the purposes of s58(2) and (2A) must be one document and not a combination of two or more documents. The learned Magistrate also upheld a submission that because the notice given on 8 March 1995 did not indicate the nature of the expert evidence to be called, the applicant could not call such evidence in his defence. **[3]** The learned Magistrate refused leave to introduce expert evidence at the hearing and thus deprived the appellant of putting his defence before the Court.

The requirements in s58(2) and (2A) for notice to be given to the informant are procedural provisions and do not require the strict construction placed upon them by the learned Magistrate. Should two or more documents given within the prescribed time have the effect of giving notice to the informant that the accused person requires the person who gave the certificate to be called as a witness and/or that he or she intends to adduce expert evidence in rebuttal of any fact or matter in the certificate, the requirements of ss(2) are satisfied, in my opinion. In the present case the requirements of ss(2A) were also satisfied by the combined effect of the first and second letters.

In the circumstances described leave of the Court to introduce expert evidence was not required pursuant to ss(2B). If it had been required either because the notice was insufficient or was unclear or because the informant had been misled by the three letters, an appropriate course would have been for the Magistrate to grant an adjournment on terms as to costs. The discretion exercised by the Magistrate operated to deprive the appellant of the opportunity of putting his defence to the charge based upon expert evidence.

Non-compliance with a procedural provision as to notice should not shut out a *bona fide* defence in a criminal proceeding except in rare and special circumstances. Inordinate delay may cause such prejudice to the informant that a Court may be required to refuse leave pursuant to **[4]** ss(2B). The circumstances disclosed in the present proceeding called for the discretion to be exercised in favour of the appellant.

The appeal will be upheld. The order made in the Court below is set aside. The matter is remitted to the Magistrates' Court at Prahran to be further heard according to law. The Chief Commissioner of Police is ordered to pay the appellant costs in the sum agreed by the parties, $5,260, such costs are to be paid on or before 16 May 1996.

APPEARANCES: For the Appellant: Mr PG Priest, counsel. Woodhams O'Keefe & Co. Solicitors. For the Respondent: Mr M Robinson, counsel. Solicitor to the Office of Public Prosecutions.
