07/69

SUPREME COURT OF VICTORIA

HINDSON v MONAHAN

Gowans J

18-19, 29 September 1969 — [1970] VicRp 12; [1970] VR 84

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REFUSED TO FURNISH A SAMPLE OF HIS BREATH FOR TESTING – DRIVER CHARGED WITH OFFENCE – NOTICE TO PRODUCE BREATH ANALYSING INSTRUMENT HAD BEEN GIVEN TO POLICE PRIOR TO THE HEARING OF THE CHARGE – INSTRUMENT NOT PRODUCED – AT THE HEARING OF THE CHARGE OBJECTION MADE TO THE OPERATOR SAYING THAT THE INSTRUMENT WAS AN APPROVED INSTRUMENT – OBJECTION UPHELD – "BEST EVIDENCE" RULE – CHARGE DISMISSED – WHETHER PROSECUTION REQUIRED TO PROVE COMPLIANCE WITH THE REGULATIONS – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408A; *MOTOR CAR ACT* 1958, S82.

HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination in accordance with the law.

1. The first of the defendant's arguments was based on an operation of the so-called "best evidence" rule which had long ceased to be accepted. That operation was that secondary evidence could not be given of the condition of a chattel until the chattel was produced. The rules as to a notice to produce applied only to documents. Accordingly, this argument could not be sustained.

2. The second argument that oral evidence could not be given of the markings of the instrument without producing them, rested upon a failure to distinguish between writings which were designed to relate events or facts and writings which were no more than identifying marks or features of an object. To the former the rule as to secondary evidence only being admissible in certain circumstances was applicable; to the latter it was not.

3. The words and figures to be borne by types of apparatus which are approved as breath analysing instruments are merely identifying marks, like the number on a motor car, or details of appearance, like a monogram on clothing, and however much they go to authenticate the character of the chattel, oral evidence of them can be given without observance of the conditions governing secondary evidence of a document.

4. The giving of the notice to produce the breath analysing instrument was misconceived, and the ground put forward for rejection of the oral evidence that the instrument was an approved breath analysing instrument, based upon its being a chattel inscribed with authenticating marks could not be sustained.

5. Proof of the fact that the instrument, to which the defendant was to furnish his sample, was approved, was enabled by s408A(3)(b). The instrument was, however, not lost or destroyed, so as to be beyond the reach of evidence for the defence. It could have been inspected by the defendant and any witnesses he would wish to call. If necessary he could have obtained an order from a justice of the peace pursuant to s207 of the *Justices Act* 1958, although one would expect that on a reasonable request being made it would not have been necessary to obtain such an order before the police would allow inspection. However, whether that would have been so or not, it was not rendered impossible for the defendant to obtain inspection and give evidence as to whether the instrument was or was not an approved breath analysing instrument.

6. If operator had been allowed to give the evidence which subs(3)(b) permitted him to give, there would have been *prima facie* evidence of compliance with the regulations, in the first instance, whatever the facts might have been, and unless there was a finding to the contrary effect of this *prima facie* evidence, there was no justification for a dismissal on that account. Notwithstanding that subs(3)(b) enabled evidence to be given by persons qualified as prescribed, that the instrument was properly operated and in relation to it all regulations made under the section with respect to breath analysing instruments were complied with, there was in fact nowhere in the section or in the Act any requirement that the regulations had to be complied with; therefore, compliance with the regulations was not a relevant circumstance in relation to the offence charged, so that failure to comply with them could not justify a dismissal.

GOWANS J: This order to review is concerned with the dismissal by the Court of Petty Sessions at St Kilda on 4 June 1969 of an information brought by the applicant Bruce Robert Hindson, a constable of police, against the respondent Anthony Monahan for an offence against s408A(4) and s408A(5) of the *Crimes Act* 1958.

These sub-sections (so far as material) read as follows:—

"(4)(a) Where a member of the police force believes on reasonable grounds that a person—
(i) has been at any time within the last two preceding hours, driving a motor car or in charge of a motor car within the meaning of s82 of the *Motor Car Act* 1958; and

(ii) has behaved, whilst driving or in charge of a motor car, in a manner which indicates that his ability to drive a motor car was impaired at the time he was so driving or in charge of a motor car— he may require that person to furnish a sample of his breath for analysis by a breath analysing instrument and that person shall, subject to the provisions of paragraph (b) furnish a sample of his breath by exhaling directly into the instrument."

(Paragraph (b) concerns itself with certain conditions to be observed and it need not be read.)

"5(a) A person who is required pursuant to subs(4) to furnish a sample of his breath for analysis and who refuses to do so shall be guilty of an offence and liable upon summary conviction, in the case of a first offence to a penalty of not more than $100 or in the case of a second or subsequent offence to a penalty of not more than $200 or to imprisonment for a term of not more than one month, unless the Court is satisfied—

(i) that there were no reasonable grounds for requiring the defendant to furnish his breath for analysis; or,

(ii) that there was some other reason of a substantial character for his refusal other than a desire to avoid providing information which might be used against him."

(Paragraph (aa) relates to an additional penalty and need not be read; nor need paragraph (b).)

Certain other parts of the section are relevant, however, and need to be read. They are as follows:–

"(6) In this section 'breath analysing instrument' means apparatus of a type approved for the purposes of this section by the Governor in Council by notice published in the *Government Gazette* for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood.

"(8) The Governor in Council may make regulations for or with respect to the maintenance and use of breath analysing instruments used for the purposes of this section, and the methods to be employed for ensuring that such breath analysing instruments give accurate results."

I turn back to subs(3) which reads:–

"(3)(a) A certificate purporting to be signed by the Chief Commissioner of Police that a person named therein is authorised by the said Chief Commissioner to operate breath analysing instruments shall be admissible in evidence of the authority of that person.

"(b) Evidence by a person authorised to operate a breath analysing instrument pursuant to this section—

(i) that an apparatus used by him on any occasion pursuant to this section was a breath analysing instrument within the meaning of this section;

(ii) that the breath analysing instrument was on that occasion in proper working order and properly operated by him;

(iii) that in relation to the breath analysing instrument all regulations made under this section with respect to breath analysing instruments were complied with-- shall be prima facie evidence of those facts."

A notice published in the *Government Gazette* No. 41, dated 18 April 1962, contained an approval in these terms:–

> "Approved Breath Analysing Instruments. Pursuant to the provisions of subs(6) of s408A of the *Crimes Act* 1958, His Excellency the Governor of the State of Victoria, by and with the advice of the Executive Council thereof, doth hereby approve, for the purpose of the said s408A of apparatus, of the types described hereunder, for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood:–
>
> Types of apparatus.
>
> "(1) Instrument for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood and bearing thereon (inter alia) the word 'Breathalyser' and the expression 'US Patent No.2,824,789'.
>
> "(2) Instrument for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood and bearing thereon (inter alia) this word 'Breathalyser' and the expression 'Made in USA by Rex Metal-Craft, Inc., Indianapolis, Ind., Serial No. BDF 342-G".

The *Crimes (Breath Analysing Instrument) Regulations* 1967 (SR No. 106 of 1967), which was also put in evidence, are as follows:–

> "1. These Regulations may be cited as the *Crimes (Breath Analysing Instrument) Regulations* 1967.
>
> "2. In these Regulations unless inconsistent with the context of the subject matter—
>
> 'Authorised operator' means a person authorised in writing by the Chief Commissioner of Police to operate breath analysing instruments. 'Breath Analysing instrument' means apparatus of a type approved by the Governor in Council, by notice published in the *Government Gazette* for ascertaining by analysis of a person's breath what percentage of alcohol is present in his blood. 'Standard Alcohol solution' means a solution of ethyl alcohol and distilled water in the proportion of 4.26 millilitres of ethyl alcohol in 1,000 millilitres of solution.
>
> "3. A breath analysing instrument shall—
>
> (a) when used to make a breath analysis at all times be operated at a temperature of between 45 to 50 degrees centigrade as indicated on the in-built thermometer;
>
> (b) before every analysis be flushed with air; and
>
> (c) be kept stable whilst in operation.
>
> "4. The authorized operator of a breath analysing instrument shall—
>
> (a) before a person's breath is analysed and after completing such analysis ascertain that the breath analysing instrument used is in proper working order by testing such instrument with a standard alcohol solution;
>
> (b) before commencing an analysis set the scale pointer of such instrument on the starting line; and
>
> (c) check the scale reading of every analysis and record that reading on the certificate required by the Act to be delivered to the person whose breath has been analysed.
>
> "5. An authorized operator shall not require any person to undertake a breath analysis until he is satisfied that such person has not consumed any intoxicating liquor for a period of at least 15 minutes prior to the analysis.
>
> "6. The authorized operator shall provide a mouth piece for use by the person submitted to the breath analysis, such mouth piece shall be taken from a sealed plastic bag and shall be used for one breath analysis only."

The evidence in relation to the alleged offence was given when the hearing commenced before the Court of Petty Sessions on April 9 1969 by First Constable Peter Panazzo. The substance of his evidence was that about 10.20 p.m. on Thursday, 3 October 1968, at the St Kilda police station, after he had asked the defendant questions about his consumption of alcohol that day

and about any disabilities he had and any treatment therefor and had received answers thereto, he had asked the defendant to blow into an instrument, but he had failed to do so, and after the informant had then required the defendant to furnish a sample of his breath for analysis by the instrument, he had also failed to blow into it.

There is a variance in the accounts given in the affidavits of the two policemen and that of the defendant respectively as to what followed. The police evidence is that the witness Panazzo gave evidence that the instrument on which he was prepared to make the analysis was available for use at the time of the demand, and was an approved instrument within the meaning of the Act and was in proper order, and that after interviewing the defendant he had tested it with a standard alcoholic solution and it was reading correctly. The defendant's evidence is that the witness was stopped from saying that the instrument was an approved instrument, and what follows as set out above, by an objection on the part of the defendant's counsel to the witness giving evidence that the instrument was an approved breath analysing instrument within the meaning of the Act.

In this conflict I think I should follow the practice of accepting the version in the answering affidavit of the defendant, and take it that the evidence was not given because of the objection.

The objection taken at that stage by counsel for the defendant was that a notice to produce the machine had been given to the informant and the police had refused to produce it, and that the evidence should not be received, and further that the label on the side of the machine which identified it by its trade name, the name of the manufacturer or its patent number was documentary evidence and that this should not be admitted pursuant to the "best evidence" rule which called for the production of the machine so that the court might read the label itself. A notice to produce was called for from the custody of the police and was put in evidence. It read (apart from the heading of the case) as follows:

> "To Bruce Robert Hindson, Constable of Police, St. Kilda. Take notice. You are required to produce to the Court of Petty Sessions at St. Kilda on the 9th day of April 1969 the breathalyser instrument allegedly used on 3rd day of October 1968 when the above-named defendant is alleged to have refused to blow into the said breathalyser. Dated this 2nd day of April 1969. Rennick and Gaynor, Solicitors for the defendant."

Evidence was given by the witness Panazzo that the real reason why the machine was not being produced was because there was a departmental instruction that under no circumstances was it to be produced in court.

After further submissions, the Stipendiary Magistrate adjourned the hearing of the information for four weeks to consider his ruling. The hearing was resumed on 24 June 1969. The magistrate then said that he had had quite a problem in deciding whether the breathalyser should be produced, and had been unable to find a decided case to follow. After some discussion about the certificate which had been put in, and some further discussion, then, according to the defendant's affidavit his counsel's submission proceeded as follows:—

> "Mr Meagher further said that his objection in this case was to the police proving that this was an authorised instrument without producing the instrument itself. He said that where a notice to produce has been served, so that the police had had notice that it is required, then they are unable to describe the instrument or give any evidence as to it unless they can show that it has become lost, or that they are for some other good reason unable to produce it. In this case the police have admitted that the instrument is available and could be produced and that it is not being produced only because there is some departmental regulation prohibiting it. He said that if there was no way in which an accused person could have this machine produced, then there was no way in which an accused person could ever test the police evidence that the machine was a proper machine. He disclosed that I was going to give evidence that there had not been a machine available at the time when I was requested to take the breath test. He said that I had never seen a machine and that without the police producing it the defence would be gravely prejudiced. He also referred to a case recently heard by the Supreme Court of Criminal Appeal in which it was stated that a Judge, upon hearing a criminal charge, always had a discretion to exclude evidence in fairness to an accused and in the interests of justice. Mr Meagher said that this was such a case and that the Stipendiary Magistrate should exclude the evidence of the breathalyser upon hearing that the only reason why it was not produced was because of some departmental instruction that it be not produced at court hearings."

It thus appears that at this stage there was an additional submission made that the evidence should be excluded in the exercise of discretion as unfair to the accused.

The hearing was concluded in this way, according to the affidavit of the defendant: "The Stipendiary Magistrate then said: 'Well I am prepared to dismiss this matter if you are prepared to run the risk of being reviewed'. Mr Meagher replied that this was a matter that had already been considered by me and that he would not have persisted in his application to exclude the evidence had he not been prepared to face the consequences of a review. The Stipendiary Magistrate then said: 'I will dismiss this case on the grounds that the notice to produce should have been complied with'."

It appears from this recital that the dismissal of the complaint by the Stipendiary Magistrate was because he either regarded the failure to comply with the notice to produce the instrument as sufficient ground in itself to justify a dismissal, or because having excluded the evidence of its being an approved breath analysing instrument within the meaning of the Act, he then held that in the absence of such evidence, there was no proof of the offence.

The grounds upon which the order nisi to review the order of dismissal was granted were as follows:—

> "(1) That the Stipendiary Magistrate ought to have held that it was not competent for the defendant to give the informant the notice to produce.
>
> "(2) That the Stipendiary Magistrate was in error in holding that the informant was bound to produce the breath analysing instrument pursuant to the notice to produce given by the defendant.
>
> "(3) That the Stipendiary Magistrate was wrong in dismissing the information on the ground either of the informant's failure to comply with the notice to produce or on the ground that the informant should have complied with the said notice to produce."

At my suggestion on the return of the order nisi that these grounds did not go to the crux of the matter, the parties consented to an additional ground being added as follows:

> "(2A) That the Stipendiary Magistrate was in error in treating as inadmissible the evidence of Constable Panazzo as to the nature and condition of the instrument referred to in his evidence."

It is convenient to deal first with the issues relating to the admission of the evidence.

The argument that the evidence should not have been allowed to be given was put in a number of different ways. It appears to me that the argument as to this was rested on three grounds:—

> (1) that oral evidence could not be given of the nature or condition of the instrument without producing it as the best evidence, and that was sufficient to justify exclusion of the evidence;
>
> (2) that oral evidence could not be given of the markings on the instrument, because this would amount to secondary evidence of a writing, in circumstance which did not permit that to be done, and that justified the exclusion;
>
> (3) that the evidence was prejudicial and unfair to the defendant in the absence of production of the instrument by the informant, and for that reason it was properly to be rejected in the exercise of discretion, and it was so rejected.

I do not say that these propositions were formulated exactly in this way, but they seem to me to have been involved in the submissions that were made. The matter can be dealt with first on the basis of principle.

The first of these arguments is based on an operation of the so-called "best evidence" rule which has long ceased to be accepted. That operation was that secondary evidence cannot be given of the condition of a chattel until the chattel is produced. The matter is dealt with by Dixon CJ in *Commissioner for Railways (NSW) v Young* [1962] HCA 2; (1962) 106 CLR 535, at pp544, 545; [1962] ALR 406, at p411; (1962) 35 ALJR 416, as follows:—

> "The rule excluding secondary evidence did not go beyond writing and include physical objects. 'Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that, when the issue is as to the state of a chattel, e.g. the soundness of a horse, or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given until the chattel is produced in court for the inspection of the jury': per Lord Coleridge CJ for the Court of Crown Cases reserved in *R v Francis* (1874) LR 2 CCR 128, at p133. This is true of a picture where the question is whether a photograph is a copy: *Lucas v Williams and Sons* [1892] 2 QB 113. It is true of an article of clothing where the question is as to its manufactured condition. *Hocking v Ahlquist Bros Ltd* [1944] 1 KB 120; *sub nom Hocking v Ahlquist Bros Ltd* [1943] 2 All ER 722. It has been held too, that upon the trial of an indictment containing counts for an unlawful assembly, seditious combinations and the like, production was unnecessary of flags, banners and placards bearing seditious inscriptions and devices."

Then follows an extract from the judgment of Abbott CJ in *R v Hunt* (1820) 3 B and Ald 566, at p574; 106 ER 768, at p771; [1814-23] All ER Rep 456. To the illustrations thus given by Dixon CJ may be added *R v Fell* (1880) 2 SCR (NSW) 109 (branded sheep); *R v Lynch* (1865) 2 WW and A'B (L) 102 (jewellery), and *Arnold v R* (1946) 48 WALR 83; 72 CLR 657(n) (jungle green clothing).

Reference may also be made to *Phipson on Evidence*, 10th ed., p11, and to an article on "Real Evidence" by Dr GD Nokes (the author of the 10th edition of *Cockle's Cases and Statutes on Evidence*), 65 LQR 57, from which a passage at pp64, 65, may be quoted:—

> "The law as to the admissibility of oral or documentary evidence of things presents at first sight a striking contrast with the law as to secondary evidence of private documents. The so-called best evidence rule, by which a portable thing or original document was the only evidence thereof admissible, was relaxed, partly in the case of documents and wholly in the case of things, with one possible exception which will be mentioned in due course, towards the end of the eighteenth century or later; but the old rule as to production of things was applied to a bushel measure as late as 1797. The well-established rule in relation to private documents now requires that the absence of the original should be accounted for before other evidence of the contents of the document may be given; and such evidence is said to be secondary, as being that 'which may be given in the absence of the better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence'. But in the case of things, the actual thing need not be produced to or examined by the tribunal; it is not necessary to explain its absence before other evidence concerning it becomes admissible, so that such evidence does not merit the name secondary within the dictum above; and the tribunal may act upon any evidence adduced, even though the best evidence is in the curtilage of the courthouse."

And at p68 it is said:

> "Though the possession of the thing by the opposite party may no doubt explain its non-production, the rules as to notice to produce it for trial apply only to documents, and it has been held that notice to produce things is unnecessary as a condition precedent to oral evidence concerning them; while the old ruling at nisi prius on the effect of failure to produce a thing on notice has not apparently been followed. Again, there are various occasions when no attempt is made to account for the absence of a thing, but oral or other evidence of it is admitted as a matter of course in accordance with the general rule."

This ground for the rejection of the evidence had, therefore, no foundation, and cannot be sustained.

The second argument that oral evidence could not be given of the markings of the instrument without producing them, rests upon a failure to distinguish between writings which are designed to relate events or facts and writings which are no more than identifying marks or features of an object. To the former the rule as to secondary evidence only being admissible in certain circumstances is applicable; to the latter it is not.

In the judgment of Dixon CJ in *Commissioner for Railways (NSW) v Young*, *supra*, after the quotation from *R v Hunt* mentioned above, the learned Chief Justice (at CLR p546; ALR p411) referred to the distinction between "physical things bearing written inscriptions and documents the written contents of which amount to what may be called an instrument of writing which,

because of the significance of what it expresses, has some legal or evidentiary operation or effect material to the case"; and after referring to the circumstances of the case then before the Court, he concluded: "In other words, the vessel was 'an inscribed chattel' of which the correct view is that the full description was admissible by oral proof for the purpose of identification". The matter is also dealt with by Windeyer J in a passage at (CLR) pp556, 557; (ALR) p419, part of that passage is as follows:—

> "There is probably no rule of evidence that is better known than that secondary evidence of the contents of written documents is, in general, not receivable. 'The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself and by that alone, if the paper be in existence' is the way in which the judges stated the rule on the occasion of The Trial of Queen Caroline (1820) 2 Bro and B 286; [1820] EngR 563; 129 ER 976, at p977. The ordinary exceptions to this are well known. None of them applies here. No attempt was made to show that the label had been lost or destroyed. The rule prohibiting the proof of writings by secondary evidence is generally said to be a survival of the requirement of the 'best evidence', although its origins may have been in still earlier doctrine and its development influenced by the requirement of profert in pleadings. The reported decisions on the scope of the rule are not all marked by consistency of reasoning. At one time it seems to have been considered that it applied not only to writings in the ordinary sense, but to anything bearing any form of inscription or marking, unless it were physically impossible to produce it. Today the rule is, generally speaking, restricted to writings in the sense of words and figures, and is not applied to other marks. It was, for example, held in New South Wales in 1879 that the brands on sheep might be described to the jury without the sheep being brought to court: *R v Fell* (1879) 2 SCR (NSW) 109. But, the rule is not confined to documents in the ordinary sense. Its scope is not precisely defined. Its application to a given case may depend more on the purpose for which the evidence is tendered than on the nature of the writing or the material, paper, parchment, stone, metal or calico, on which it appears. Cases in which the rule does not apply must be distinguished from cases where production of a writing is on some recognised ground, excused and secondary evidence received. Some fallacious arguments were advanced for discarding the rule in this case. It matters not whether written words are put forward as true or false, whether they define rights or create rights, whether they make statements, express emotion or constitute insults—deeds, contracts, bills of exchange, libel, threatening letters and love letters are alike subject to the rule. But the rule does not apply to writings or other markings that are not relied upon for their meaning but only as part of the appearance of a thing. If words or figures appearing on some thing or at some place are referred to merely as marks distinguishing that thing or place, secondary evidence of them may be given without it being necessary to explain the absence of primary evidence."

Reference may also be made to *Martin v White* [1910] 1 KB 665, where it was held that oral evidence of the identifying number of a motor driving licence could be given.

The words and figures to be borne by types of apparatus which are approved as breath analysing instruments are merely identifying marks, like the number on a motor car, or details of appearance, like a monogram on clothing, and however much they go to authenticate the character of the chattel, oral evidence of them can be given without observance of the conditions governing secondary evidence of a document.

It is only in the case of a document that a notice to produce has any relevance, and then its operation is only to let in secondary evidence in place of the document which has not been produced. Its function is thus described in *Cross on Evidence*, 2nd ed., pp498, 499:—

> "(i) Nature and purpose of notice to produce.—A notice to produce informs the party upon whom it is served that he is required to produce the documents specified therein at the trial to which the notice relates. The notice does not compel production of the documents in question, but the fact that it has been served provides a foundation for the reception of secondary evidence. If a party wishes to compel his opponent to produce documents, the proper course is for him to serve the opponent with a subpoena duces tecum and this will be adopted when the party is not in a position to adduce satisfactory secondary evidence, or when an issue turns on the form of the original as when handwriting is material. Notice to produce is not served in order to give the opponent notice that the documents mentioned in it will be used by the other party, and thus to enable the opponent to prepare counter evidence, but so as to exclude the objection that all reasonable steps have not been taken to produce the original document."

This is based on *Dwyer v Collins* [1852] EngR 578; (1852) 7 Exch 639; 155 ER 1104, an authority set out in *Cockle's Cases and Statutes on Evidence*, 10th ed., p335. It was applied by the Full Court of New South Wales in *Ewart v Royds* (1954) 72 WN (NSW) 58.

It may be possible to find cases where a notice to produce has been given in respect of a chattel. But as far as I am aware there has been no judicial recognition of the efficacy of the procedure. Thus in *Line v Taylor* (1862) 3 F and F 731; [1862] EngR 105; 176 ER 335, notice to produce a dog was given, and it was produced. But in the notes to the case it is observed that "though the plaintiff had given notice to produce the dog, it might be doubtful how far he could, under an order [sic] to produce, call for anything but books, papers or documents".

In my opinion, the giving of the notice to produce the breath analysing instrument was misconceived, and the ground put forward for rejection of the oral evidence that the instrument was an approved breath analysing instrument, based upon its being a chattel inscribed with authenticating marks cannot be sustained.

The third argument has resort to the principle that in a criminal case, in certain circumstances, the trial judge has a discretion to exclude evidence otherwise admissible. What are the limits of those circumstances is not well defined; they refer generally to cases where the probative force is slight and the prejudice to the accused great: *Kuruma v R* [1955] AC 197; [1955] 1 All ER 236. Perhaps a strong application of the principle is the recent decision of the Full Court of Victoria in *R v Devenish* [1969] VicRp 95; [1969] VR 737, where secondary evidence had been admitted in the Crown case at the trial, of a receipt alleged to have been forged by the accused and expert evidence had been given of a comparison of the handwriting in it with that in an undisputed writing of the accused, although the original of the receipt had been lost whilst in the custody of the Crown and was, therefore, unavailable to the accused for the purpose of testing this evidence; and it was held by the Full Court that the evidence should not have been admitted. Much reliance was placed on this decision, which was said to provide a parallel which made out a stronger case in the present proceedings for the exclusion of the evidence.

It was said, in the first instance, that the presence, at the time of the member of the police force requiring the defendant to furnish a sample of his breath for analysis, of an approved breath analysing instrument was mandatory (*Scott v Dunstone* [1963] VicRp 77; [1963] VR 579), and, therefore, the fact of an instrument being present, and of its being approved, was a crucial link in the chain of evidence tending to prove the guilt of the accused.

Then it was said that the particular instrument was not present in court at the hearing by reason of circumstances which were the sole responsibility of the prosecution and not of the defence, just as the receipt had been lost whilst in the custody of the prosecution in *Devenish's Case*.

Thirdly, it was said, the absence of the instrument at the hearing rendered impossible the giving of evidence for the defendant contrary to any evidence given for the prosecution that it was an approved breath analysing instrument, just as the absence of the receipt had made it impossible for the accused to procure expert opinion evidence as to the handwriting thereon.

Fourthly, it was said that the absence of the instrument at the hearing left the prosecution with evidence of it being an approved instrument whilst at the same time denying to the defendant the possibility of adducing evidence to the contrary, just as the loss of the receipt in *Devenish's Case* had left the Crown with photographic evidence of similarities in the handwriting whilst denying to the accused the opportunity of adducing the like evidence to the contrary.

Fifthly, the absence of the instrument deprived the tribunal of fact of the opportunity of examining for itself the features of approval said to have been present in the instrument according to the evidence of the prosecution, just as the loss of the receipt had deprived the jury of examining for itself the features of the handwriting referred to in the Crown evidence in *Devenish's Case*. And, so it was said, (in the language used by the Full Court in *Devenish's Case*) the absence of the instrument so substantially diminished the probative value of the evidence adduced as to make its prejudicial effect out of due proportion, and so as to render it in the circumstances of the case unfair to admit it against the defendant in the overriding interests of justice.

But the analogy is superficial, and the conclusion inapplicable. Proof of the fact that the instrument, to which the defendant was to furnish his sample, was approved, was, no doubt, crucial to the case for the prosecution. Section 408A(3)(b) enables that evidence to be given. The instrument was, however, not lost or destroyed, so as to be beyond the reach of evidence for

the defence. It could have been inspected by the defendant and any witnesses he would wish to call. If necessary he could have obtained an order from a justice of the peace pursuant to s207 of the *Justices Act* 1958, although one would expect that on a reasonable request being made it would not have been necessary to obtain such an order before the police would allow inspection. However, whether that would have been so or not, it was not rendered impossible for the defendant to obtain inspection and give evidence as to whether the instrument was or was not an approved breath analysing instrument. Moreover, by s31(1)(d) of the *Justices Act*, a justice is empowered to do all necessary acts preliminary to the hearing. If it were necessary in the interests of justice to have the instrument produced at the hearing, this power could, in my opinion, be exercised. I do not regard that provision as representing merely a prefatory and unnecessary statement of the powers set out in the next division, Division 2. I regard it as a substantial source of power as I think Madden CJ did in *R v Merrick* [1916] VicLawRp 11; [1916] VLR 195. This provision is wide enough to cover a power to order production of a chattel at the hearing. To say that it would be impossible to ascertain who had control of the instrument so as to be in a position to have it produced, carries little persuasion, in view of the common experience of subpoenas being addressed to the Chief Commissioner of Police, or the officer in charge of a particular branch of the police force.

To say also that the refusal of the officers concerned in this prosecution to comply with the notice to produce the instrument, which had no legal force, meant that the prosecution had put the instrument out of reach for the purposes of the proceedings as effectively as though it had been lost or destroyed puts the matter much too high. The true position is that the defence, by purporting to bring into play a procedure which was not available to it, in order to force production by the prosecution of a piece of real evidence which the defence might wish to use, instead of resorting to procedures which were open to it, brought about a refusal to comply, which the defence then sought to make use of by labelling it as a denial of rights which justified shutting out evidence for the prosecution which the statute allowed it to give. A situation of unfairness and injustice to the defendant justifying the exercise of a discretion to exclude admissible evidence cannot be created in that way. So far from it being a wrongful exercise of discretion to let in the evidence, it would be a wrongful exercise of discretion to shut it out.

I am far from satisfied that the Stipendiary Magistrate purported to exercise his discretion to exclude the evidence. If he did, however, I am of opinion, with respect, that he was wrong.

Thus, in my opinion, there was no principle upon which the exclusion of the evidence could be based.

But even if any of the objections I have discussed were soundly based in principle, I would consider that the provision contained in s408A(3)(b) would stand in the way of effect being given to any of them. The legislature has authorized the giving of evidence by a person qualified in a specified way, as to certain matters, which include the fact that an apparatus used by him on any occasion pursuant to the section was within the definition in the section, and that means of a type approved as required. It has provided that if that evidence is given, it shall be *prima facie* evidence of that fact. It would, in my view, be quite inconsistent with obedience to that prescription to refuse to allow the evidence to be given or to refuse to treat it as of *prima facie* value, unless the instrument were also produced at the time when the evidence was given. The provision was probably enacted for the very purpose of avoiding the necessity for detailed proof or production of the instrument, as a matter of convenience. No doubt that puts the defendant at a disadvantage, if he genuinely wishes to raise a question as to whether the evidence given of the character or condition of the instrument is correct. But all such evidentiary provisions in aid of prosecutions operate, or may operate to some degree, to the disadvantage of the defence. They represent a legislative policy in favour of facilitating prosecutions notwithstanding that disadvantage. In this case the policy goes no further than to provide for the giving of evidence which shall have *prima facie* effect only. It does not shut the defendant out from access to any procedural machinery properly open to him to enable him to combat the evidence for the prosecution by cross-examination or in rebuttal. And, of course, it is always open to the tribunal to decide for itself on the whole of the evidence when it is complete, whether it leaves it with the necessary persuasion of guilt.

For these reasons I am of opinion that ground (2A) of the order nisi has been made out.

Ground (1), when it speaks of it not being "competent for the defendant to give the informant the notice to produce", uses inappropriate language. It is not a matter of competency. In any case the ground if upheld would be inconclusive.

Ground (2), when it uses the term "bound to produce", may mean "bound by obligation of law to produce" or "bound on pain of dismissal of the information to produce". Either view would be wrong, in my opinion, and ground (2) is made out.

Ground (3) may assume that the evidence objected to was given and the dismissal was on account of the failure to produce the instrument pursuant to the notice to produce, or it may assume that the evidence was not given and that the dismissal was then on account of the absence of necessary evidence. On either view the dismissal was wrong when so founded, and ground (3) is made out.

But a new reason has been put forward for sustaining the dismissal. And of course this is open. The argument was this. It conceded that the qualification of Constable Panazzo to give the evidence referred to in s408A(3)(b) of the *Crimes Act* was sufficiently proved by the certificate put in evidence that he was "authorized in accordance with the provisions of s408A(3) of the *Crimes Act* 1958 to operate breath analysing instruments", notwithstanding the fact that the certificate was signed by the Deputy Commissioner and not by the Chief Commissioner of Police as subs(3)(a) prescribes. That was the result (it was conceded) of s6 of the *Police Regulation Act* 1958, as substituted by s2(b) of Act No. 6597, since it provides that anything required to be signed by the Chief Commissioner can be signed by the Deputy Commissioner if it is required "by this or any other Act", and it was so required by the *Crimes Act*. But (it was said) that that did not apply to anything required to be signed under any regulations as distinct from an Act.

Now when the *Crimes (Breath Analysing Instrument) Regulations* 1967 requires by reg4 that the authorized operator of a breath analysing instrument shall do certain things to an instrument before a breath analysis is made, the reference is to an "authorized operator" as defined in reg2, and that is "a person authorized in writing by the Chief Commissioner of Police to operate breath analysing instruments". Thus (it was said) to such an authorization for the purposes of the regulations, s6 of the *Police Regulation Act* has no application, since that section is confined to things required to be done by Act and not by regulations, and therefore an authorization in writing signed by the Deputy Commissioner has no force under the regulations. So (it was said) the authorization evidenced by the certificate produced in evidence, which purported to have been made "pursuant to the authority conferred upon me by s6 of the *Police Regulation Act* 1958, as amended by s2 of the *Police Regulation Act* 1962" could have no force for the purposes of the regulations. The conclusion thus reached that not only was there no evidence that the regulations had been carried out by a person designated to carry them out, but the contrary was the only reasonable conclusion. Therefore (it was said) the dismissal was justified for this reason alone.

There may be a number of answers to this. One is that if Constable Panazzo had been allowed to give the evidence which subs(3)(b) permits him to give, there would have been *prima facie* evidence of compliance with the regulations, in the first instance, whatever the facts might be, and unless there was a finding to the contrary effect of this *prima facie* evidence (and there was none), there was no justification for a dismissal on that account. Another answer, perhaps more annihilating, is that, notwithstanding that subs(3)(b) enables evidence to be given by persons qualified as prescribed, that the instrument was properly operated and in relation to it all regulations made under the section with respect to breath analysing instruments were complied with, there is in fact nowhere in the section or in the Act any requirement that the regulations have to be complied with; therefore, compliance with the regulations is not a relevant circumstance in relation to the offence charged, so that failure to comply with them could not justify a dismissal. These answers are sufficient to meet the point. Having regard to these conclusions, the order nisi should, in my opinion, be made absolute.

The order of the Court will be:—

1. Order absolute. 2. Order of dismissal set aside.

3. Information remitted to the Court of Petty Sessions at St Kilda to be dealt with in accordance with this judgment.

Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
Solicitors for the defendant: Rennick and Gaynor.