30/04; [2004] VSC 393

SUPREME COURT OF VICTORIA

SCULLY v SEMPLE

Williams J

17 September, 11 October 2004 — (2004) 42 MVR 88

MOTOR TRAFFIC – DRINK/DRIVING – NOTICE GIVEN TO POLICE INFORMANT REQUIRING THE PERSON WHO GAVE THE CERTIFICATE OF ANALYSIS TO BE CALLED AS A WITNESS – NOTICE DID NOT SPECIFY THE FACTS AND MATTERS WITH WHICH ISSUE WAS TAKEN – WHETHER NOTICE COMPLIED WITH LEGISLATIVE REQUIREMENTS – MAGISTRATE FOUND THAT NOTICE NOT VALID – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(f), 58(2), (2A).

Scully was charged with a drink/driving offence pursuant to s49(1)(f) of the *Road Safety Act* 1986 ('Act'). Prior to the hearing Scully's lawyer wrote to the police informant requiring a copy of the police brief and for the person who gave Scully the certificate of analysis to be called as a witness. The letter did not specify any fact or matter with which issue was taken as required by s58(2A) of the Act. At the hearing, the magistrate held that the notice did not meet the legislative requirements and accordingly there was no valid notice. Scully was convicted. Upon appeal—

HELD: Appeal dismissed.
The requirement of a notice under s58 of the Act is to oblige the defence to specify what matters are challenged. One of the purposes of the Act is to ensure that the prosecution is not taken by surprise thereby preventing the adjournments necessitated by the need to adduce evidence and in particular expert evidence to meet unanticipated challenges. The requirement for a notice to be specific applies whether or not the defendant intends to adduce any evidence in rebuttal. If a defendant did not intend to adduce any expert evidence at the hearing, the facts or matters which are put in issue would need to be specified in the notice. In the present case the letter did not specify the facts or matters with which issue was taken. Accordingly, it did not comply with s58(2A) of the Act and the magistrate was not in error in so ruling.

***Impagnatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486; MC 27/03, followed;**

***Roberts v Beet* [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51; MC53/87, distinguished.**

WILLIAMS J:

1. The appellant was convicted of an offence under s49(1)(f) of the *Road Safety Act* 1986 ("the Act") on 18 March 2004 in the Magistrates' Court at Melbourne constituted by Ms Bolger M. The appellant's driver licence was cancelled, she was fined and she was disqualified from obtaining a licence for a period of six months.

The issue

2. The appeal concerned the effect of a letter dated 18 February 2004 from counsel for the appellant to the respondent (the informant in relation to the charge) ("the letter"). The appellant challenged the learned Magistrate's decision that the letter did not operate as the requisite written notice under s58(2) of the Act to prevent a certificate produced by a breath analysing instrument ("the certificate") from constituting conclusive proof of the facts and matters referred to in s58(2)(a) - (f) of the Act. She contended that the Magistrate erred in so far as she found the appellant guilty of the offence under s49(1)(f) of the Act on the basis that relevant facts or matters were proved by the certificate.

The Act

3. The Act relevantly provided:

> **Part 1—Preliminary 3. Definition**s
> (1) In this Act—"breath analysing instrument" means—
> (a) the apparatus known as the Alcotest 7110 to which a plate is attached on which there is written, inscribed or impressed the numbers "3530791" whether with or without other expressions or abbreviations of expressions, commas, full stops, hyphens or other punctuation marks and whether or not all or any of the numbers are boxed in; or ...

Part 5—Offences Involving Alcohol or Other Drugs 47. Purposes of this Part
The purposes of this Part are to—
(a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
(b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
(c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol. ...

49. Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she—
... (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood or breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ...

55. Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's blood or breath contains alcohol; ...
any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... for the purposes of section 53 to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

... (3) A breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police.

(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing the prescribed particulars produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood or breath. ...

58. Evidentiary provisions—breath tests
(1) If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood or breath of any person at any time or if a result of a breath analysis is relevant— ...
(c) on a hearing for an offence against section 49(1) of this Act—
then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood or breath of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under section 55 and the concentration of alcohol so indicated is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the blood or breath of that person at the time his or her breath is analysed by the instrument.

(2) A document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood or breath of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceedings referred to in sub-section (1) and, subject to sub-section (2E), is conclusive proof of—
(a) the facts and matters contained in it; and
(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and
(c) the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under section 55; and
(d) the fact that all relevant regulations relating to the operation of the instrument were complied with; and
(e) the fact that the instrument was in proper working order and properly operated; and
(f) the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath and that it was signed by the person who operated the instrument and given to the accused person as soon as practicable after the sample of breath was analysed—
unless the accused person gives 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, that he or she requires the person giving the certificate to be called as a witness or that he or she intends to adduce evidence in rebuttal of any such fact or matter.
>
> (2A) A notice under sub-section (2) must specify any fact or matter with which issue is taken and indicate the nature of any expert evidence which the accused person intends to have adduced at the hearing.
>
> (2B) 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 sub-section (2). ...
>
> (2E) Nothing in sub-section (2) prevents the informant adducing evidence to explain any fact or matter contained in a certificate referred to in sub-section (2) and, if the informant does so, the certificate remains admissible in evidence but ceases to be conclusive proof of that fact or matter only.
>
> 4. The Act had been amended by the *Road Safety Amendment Act* 1994 ("the Amendment Act") to provide for the use of a new machine, known as the Alcotest 7110 apparatus ("the apparatus"), as a breath analysing instrument.
>
> 5. S4(1) of the Amendment Act had inserted a reference to the apparatus into the definition of "breath analysing instrument" in s3(1) of the Act. S12(2) had inserted, as s58(2)(a)-(f) of the Act, evidentiary provisions relating to the proof of proper operation and use of the apparatus as prescribed. It was in that statutory context that s12(2)(d) had provided for the amendment of s58(2) of the Act by the addition of the reference to the giving of notice of an intention to adduce rebuttal evidence and s12(3) had introduced s58(2A) into the Act.

The Material before the Court

6. The appellant relied upon her affidavit sworn on 17 April 2004 together with its exhibits. A copy of the letter was exhibited to her affidavit. It was relevantly in the following terms:

> "I am briefed to appear on behalf of Lyn Scully in respect of drink drive charges. I would be grateful if you could send to me a copy of the police brief including all relevant witnesses (sic) statements and copies of any exhibits so that I may advise my client accordingly. Further, the defendant requires the person who gave the defendant the certificate of analysis pursuant to s55(4) to be called as a witness at the hearing of the charges."

7. The appellant's affidavit described the proceeding in the Magistrates' Court. There was no dispute about her account. She recorded that the Magistrate said words to the following effect when announcing her decision:

> "The defendant's and her husband's evidence is not entirely clear. They describe different areas of the booze bus and different people being present. I accept that the Scullys gave honest evidence, but I accept the evidence of Constable Semple in relation to the conduct of the breath test. With regard to s58(2), the sub-section must be interpreted strictly. Sub-section 2(a) requires specificity. The notice does not meet the legislative requirements. There was no valid notice."

8. The appellant's affidavit went on to state that her Worship had referred to and followed the decision of the Court of Appeal in *Impagnatiello v Campbell.*[1]

The questions of law

9. The questions of law raised by the appeal were formulated by the Master on 27 April 2004 as follows:

> "(a) Did the written notice to the Respondent dated 18 February 2004 comply with s58(2) of the *Road Safety Act* 1986 so as to prevent the tendering of the certificate of analysis becoming conclusive proof of each of the facts referred to in s58(2) of the *Road Safety Act*?
>
> (b) If yes to question (a) above, did the Court err in convicting the Appellant?"

Submissions

10. I note, at the outset, that no point was taken as to the form of the notice nor as to the time at which it was given. The narrow issue in dispute was as to whether the letter complied with s58(2) of the Act, it being common ground that it did not comply with s58(2A).

11. Counsel for the appellant submitted that the notice complied with s58(2) and that the prosecution could not rely upon the certificate from the breath analysing instrument as conclusive proof of the matters in s58(2)(a)-(f). He argued that s58(2A) only applied to a notice given under s58(2) when:

> (a) the notice was of the accused person's intention to adduce evidence in rebuttal of any fact or matter in sub-s (2)(a)-(f); and
>
> (b) the accused person giving notice took issue with any fact or matter of which the certificate in question would otherwise constitute conclusive proof under s58(2)(a)-(f); and, or
>
> (c) the accused person giving the notice intended to adduce expert evidence at the hearing.

12. He contended that there was no evidence before the Magistrate that the appellant intended to adduce any evidence in rebuttal, or any expert evidence, or that she took issue with any fact or matter listed in s58(2)(a)-(f). Accordingly, he submitted, s58(2A) did not apply to a notice given under s58(2) requiring the calling of the person giving the certificate containing the prescribed particulars.

13. Counsel for the respondent submitted that the Magistrate's conclusion was correct. He argued that the letter did not comply with the requirements of s58(2A) and so did not operate as notice under s58(2) to prevent the certificate from constituting conclusive proof of the facts and matters referred to in s 58(2)(a)-(f).

The statutory purpose argument

14. Counsel for the appellant argued that the Act should be interpreted so as to give effect to the legislative purpose or object. He submitted that the purpose of the relevant Amendment Act provisions was to prevent the defence from calling its expert witnesses without notice. He argued that s58(2A) was "an expert evidence provision" and was "irrelevant" when expert evidence was not being called[2]. He submitted that the purpose of the amendment was to ensure that police be given notice of expert evidence to be adduced at the hearing. He submitted that the amendment should be characterised as "an expert evidence amendment to stop the defence from hijacking the case after the police [had] closed evidence". He called in aid of this submission the prohibition in sub-s(2B) relating to the adducing of expert evidence, the nature of which had not been disclosed in the notice under sub-s(2).

15. In support of his contentions as to the proper interpretation of s58(2) and s58(2A), counsel for the appellant cited that part of the explanatory memorandum in the Bill relating to clauses 12(2)(d) and 12(3):

> "Clauses 12(2)(d), 12(3), ... require that notice be given to the police of expert evidence to be given in the hearing of drink driving cases, allow a certificate to be accepted if the person who issued it is unable to be called as a witness and allow police to give evidence on matters contained in the certificate."

16. Counsel for the appellant also sought to call in aid extracts from the Parliamentary debates in relation to the *Amendment Act Bill*. The Bill had received bipartisan support in relevant respects and he referred to:

(a) The second reading speech of the Minister for Public Transport, Mr Brown, in the Legislative Assembly and, in particular, to his statements that:

> "[t]he introduction of the new instrument may lead to technical challenges in a number of different areas. It will be necessary for the prosecution to have available expert witnesses in each area. To avoid costly adjournments, the Bill introduces a requirement for defendants to disclose the nature of expert evidence to be adduced. It is intended that sufficient detail be provided to allow the prosecutor to determine which kind of expertise will be required to assess, and where appropriate, rebut evidence provided by expert witnesses called by a defendant."[3]

(b) An extract from the speech in the debate of the Member for Wantirna, Mr Wells, when he said:

> "Police also expect the number of appeals against the validity of blood alcohol readings to drop because of the accuracy of the machine. Obviously some lawyers are looking for more work because

> of the number of loopholes closed in the WorkCover legislation; they will be looking for loophole in this legislation following the introduction of the new machinery. However, the Bill will require the prosecution to have expert witnesses available in each area. To avoid unnecessary adjournments of court cases, the Bill introduces a requirement for the defendant to disclose prior to the case the nature of expert evidence to be produced. It is essential that the prosecutor have enough time prior to the case to determine what kind of expertise will be required to assess and, where appropriate, to rebut evidence provided by expert witnesses called by a defendant."[4]

(c) The contribution from the Member for Yan Yean, Mr Haermeyer, who said:

> "It is important that the prosecution is aware in advance of what expert witnesses it will need when a defendant challenges a charge on technical grounds. The Bill will reduce the costs and loss of time associated with the adjournment of court cases."[5]

(d) The statement of Mr Baxter, the Minister for Roads and Ports, in the Legislative Council on 9 November 1993, who repeated some of what had been said in the Assembly by Mr Brown when he said:

> "It will be necessary for the prosecution to have available expert witnesses in each area. To avoid costly adjournments, the Bill introduces a requirement for defendants to disclose the nature of expert evidence to be adduced. It is intended that sufficient detail be provided to allow the prosecutor to determine which kind of expertise will be required to assess and, where appropriate, rebut evidence provided by expert witnesses called by a defendant."[6]

17. Counsel for the appellant argued that the requirements of sub-s (2A) were only intended to apply to the situation in which the accused person had given notice of the intention to adduce rebuttal evidence, under what he described as the "second limb" of s58(2) added by the Amendment Act. The subsection did not apply where the notice simply required the calling of the operator of the apparatus given under the "first limb" of s58(2). He argued that, if the words constituting the "second limb" referring to the intention to adduce rebuttal evidence were absent, s58(2A) would be nonsensical.

18. Counsel for the respondent, on the other hand, urged the Court to construe the provisions of s58(2A) in accordance with the legislative intention which he said was ascertainable from its statutory context and in light of the relevant authorities. He pointed out that s58(2) was to be found in Part 5 of the Act under the heading: "Offences Involving Alcohol Or Other Drugs". He referred to the purposes of Part 5 set out in s 47. He relied upon the decision of the High Court in *Thompson v Judge Byrne*[7] in which the majority had considered the ambit of s49(1)(f) of the Act in the context of s47 and had stated:

> "... even accepting that the offence provided by [s 49(1)(f)] is a far-reaching one, it is clearly enacted, as the stated purpose of the Part of the Act in which it appears make plain, to deal with a major social problem. The provision of the offence in such terms is the means by which Parliament has sought to achieve those generally stated purposes, viz to reduce the number of motor vehicle collisions to which alcohol or other drugs are causally related, to reduce the number of drivers whose driving is impaired by such causes and to provide a simple an effective means of establishing the presence in the blood of a driver of more than the legal limit of alcohol."[8]

19. He pointed out that the Amending Act made provision for the use of the apparatus in Victoria. He noted that it had also replaced a provision in the former s58(2) making the notice under s58(2) conclusive proof of "the facts and matters contained in it and of the fact that the breath analysing instrument was on the relevant occasion properly operated". The notice after the amendment constituted conclusive proof of what he described as "a more comprehensive and detailed list of facts and matters" set out in sub-s58(2)(a)-(f). He argued that the purpose of the amendments was to ensure that the prosecution would not be taken by surprise. It was intended by the legislature that the prosecution should be advised as to what facts or matters would be in issue in order to be in a position, in advance, to determine whether it should call expert evidence at the hearing. He contended that the provisions were also designed to overcome technical points concerning the admission of evidence.

20. In support of his arguments relating to the purpose of the Act and the Amending Act, counsel for the respondent also referred to the passage from the second reading speech of the

Minister, Mr Brown, relied upon by the appellant.[9] He argued that the Court should not frustrate the clear intentions of Parliament by acceding to the appellant's submissions in the interpretation of s58(2) and s58(2A) of the Act.

21. When interpreting the Act the meaning which promotes the purpose or object of the Act is to be preferred[10]. The meaning of a provision may be ascertained with reference to extrinsic materials such as those referred to by the appellant in certain circumstances[11]. However, as the majority of the High Court in *Thompson v Judge Byrne*[12] cautioned with reference to the suggested reading down of s49(1)(f):

> "... the ministerial remarks made during the passage of the Bill which become the Act cannot be determinative. ... Even if ... there were a disharmony between what the minister said or what the members of parliament subjectively believed to be the intended operation of par (f) and what the Act provided, the Court may not rewrite the Act. This is what, in effect, the appellant's argument invited the Court to do."[13]

22. I am not persuaded by the argument of counsel for the appellant that the ordinary meaning of sub-s(2A) was nonsensical, unless read down in accordance with s15AB (1)(b)(ii) of the *Acts Interpretation Act* 1901 (Cth)[14] to apply only to the written notice given of intention to adduce rebuttal evidence referred to in s58(2). In my view, the subsection could logically relate to the situation, such as that in the present case, in which notice requiring the attendance of the operator of the instrument had been given, even if it was not intended by an accused person to adduce any evidence in rebuttal. The facts or matters which were thereby put in issue (in the sense that the accused person required them to be proved by other evidence or other additional evidence) would then need to be specified in the notice, notwithstanding that the accused did not intend to adduce any expert evidence.

23. I agree with counsel for the respondent's submission that the amendments introduced by the Amending Act were designed to fulfil the Act's purposes as they were stated by the majority of the High Court in *Thompson v Judge Byrne*[15], in the context of the introduction of a new breath analysing device. Those statutory objectives would be achieved, in part, by preventing the adjournments necessitated by the need to adduce evidence and, in particular, expert evidence, to meet unanticipated challenges to the facts or matters referred to in s58(2)(a)-(f).

24. The cited passages of *Hansard*[16] do not preclude the view as to the purposes of the Amending Act contended for by the respondent. In my opinion, the specific references highlighting the requirement in s58(2A) that details be provided as to the nature of expert evidence to be adduced do not indicate a legislative intent precluding its application in situations in which no expert evidence or no evidence at all was intended to be adduced by the accused. Indeed, if an accused person were able to prevent the certificate from constituting conclusive proof of any fact or matter listed in s49(1)(a)-(f) and then to cross-examine the operator of the apparatus in respect of any such fact or matter in relation to which the operator was unable to give the necessary probative evidence, the objective of preventing adjournments to allow the prosecution to arrange for the calling of the requisite expert or other evidence would not be achieved.

The argument based on *Impagnatiello v Campbell*

25. Counsel for the respondent urged the Court to construe s58(2) and s58(2A) in accordance with the views expressed by Eames JA in *Impagnatiello v Campbell*[17] as to the requirements of the subsections. In *Impagnatiello*, the defendant had served a notice expressly stating that he took issue with all matters required to be proved constituting the elements of the offences the subject of the charges laid against him under s49(1)(b) and (f) of the Act. On an application by the prosecution to strike out the notice for failure to comply with s58(2), the magistrate had held that he did not have the requisite power, but that, in any event, the notice did comply with s58(2). The issue had not been raised on appeal to the single judge and had, ultimately, become relevant in relation to the issue of costs on appeal to the Court of Appeal.

26. Eames JA stated, in a passage relied upon by counsel for the respondent:

> "[t]he requirement of notice under s58(2) and (2A) is, in my opinion, to oblige the defence to spell out any technical or substantive defence which was to be taken in answer to the certificate. Sub-section (2A) requires there be notice of 'any fact or matter with which issue is taken'. In my opinion, the

> notice under subs.(2) must state what matters addressed by s58(2)(a)-(f) are challenged, and as to what fact or matter. In my opinion, it would be consistent with the intended purpose of the provision as to notice that specificity should be required."

27. Counsel for the appellant in this case responded by seeking to distinguish *Impagnatiello* on the basis that the defendant in that case had given notice of an intention to adduce evidence in rebuttal and had thereby sought to put in issue all matters required to be proved by the prosecution, in contrast to the situation in this case.

Roberts v Beet

28. Counsel for the appellant also argued that an accused person had previously been able to prevent the certificate of the relevant testing apparatus from constituting conclusive proof of certain matters and that any ambiguity in sub-s(2A) should be resolved by the Court adopting an interpretation which retained the status quo in that regard. All the appellant was doing, in his submission, was what she would previously always have been entitled to do, namely, to require the prosecution to prove its case.

29. In relation to his argument for the preservation of the *status quo*, counsel for the appellant referred to the decision of O'Bryan J in *Roberts v Beet*[18] which dealt with the validity of a notice served under s80F(3) of the *Motor Car Act* 1958. S80F(3) had relevantly provided:

> "A document purporting to be a copy of any certificate given in accordance with the provisions of subs(2) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-s(1) of the facts and matters stated therein, unless the accused person gives notice in writing to the informant, a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness."

30. Counsel for the appellant argued that the letter constituted valid notice under s58(2) for the same reason as the notice under s80F(3) of the *Motor Car Act* 1958 relied upon in *Roberts v Beet*[19] had been held to be valid. The effect of his submissions was that, when interpreting s58(2) and s58(2A), the Court should adopt the approach taken by O'Bryan J to the construction of s80F(3). His Honour had explained his conclusion that personal service of a notice under the subsection was unnecessary. He said that he had taken into account the nature of the statutory provision which "relaxe[d] the rules of evidence in favour of an informant in a quasi-criminal proceeding". He noted that an adjournment to enable the calling of a breath analysing instrument operator would be inevitable if the question of the reception of the notice were to be raised. In his view, the requirement of personal service would impose a considerable burden on an accused person for no compelling reason.

31. The *Motor Car Act* 1958 was a predecessor to the Act. However the wording of 80F(3) differed from that of s58(2) of the Act and the *Motor Car Act* 1958 contained no equivalent of s58(2A). Accordingly, I consider that the decision is distinguishable.

32. Although I have taken into account O'Bryan J's disinclination to burden an accused person in the circumstances before him, I am not persuaded by the decision in *Roberts v Beet*[20] to opt for a construction of s58(2) and s58(2A) which might well result in the adjournment of the proceeding to enable the prosecution to meet an unexpected challenge.

Was issue taken with any fact or matter?

33. S58(2A) requires the notice under s58 (2) to specify any fact or matter with which "issue is taken". Counsel for the appellant argued that there was no evidence that the appellant had taken issue with any fact or matter of which the certificate would otherwise constitute conclusive proof.

34. The second edition of the *Oxford English Dictionary* includes the following within the definition of the noun "issue":

> "A point on the decision of which something depends or is made to rest; a point or matter in contention between two parties; the point at which a matter becomes ripe for decision. Esp. In to put to (...upon, an, the) issue and similar phrases: to bring to a point admitting of decision."

35. In paragraphs 14(b) and 15 of her affidavit the appellant gave the following relevant account of events in the Magistrates' Court:

> "14. Counsel made the following submissions: ...
> (b) That the informant had been given written notice pursuant to s58(2) *Road Safety Act* requiring the person who gave [the appellant] this certificate of analysis pursuant to s55(4) *Road Safety Act*, and as a consequence the admission of the certificate of analysis into evidence was not conclusive proof of any of the matters set out in paras (a) - (f) of s58(2) *Road Safety Act* 1986, and that there was no other evidence proving those matters.
>
> 15. In support of the submissions in relation to para 14 (b) above, counsel handed the Magistrate a copy of the decision of *Roberts v Beet* [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51 together with a copy of s80F *Motor Car Act* 1958. He submitted that in the absence of evidence proving that the operator was authorised and had used an approved device in accordance with the Regulations and that the device was in proper working order, then the Magistrate was obliged to dismiss the charges."

36. In my view, the evidence as to the submissions of the appellant's counsel in the Magistrates' Court to the effect that the matters in s58(2)(a)-(f) of the Act had not been proved indicates that the appellant did make the question as to the proof by the prosecution of the facts and matters set out in s58(2)(a)-(f) one for decision by the Magistrate. In other words, the appellant took issue with those facts or matters within the meaning of sub-s (2A).

37. I am also of the view that the giving of notice under sub-s (2) requiring the attendance of the operator of the apparatus would have had the same effect, in any event, because it would have resulted in the prosecution being required to prove by other means those facts and matters relevant to the proof of any offence.

38. The letter did not specify the facts or matters with which issue was taken. Accordingly, in my opinion, it did not comply with s58(2A).

39. The questions posed by the Master should be answered:
Question (a) No. Question (b) Inapplicable.

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[1] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.
[2] T11.
[3] *Hansard* 7 October 1993 Assembly at p1026.
[4] *Hansard* 7 October 1993 Assembly at 1391.
[5] *Hansard* 7 October 1993 Council at 1400.
[6] *Hansard* 7 November 1993 Council at 835.
[7] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[8] (1999) 196 CLR 141 at 150 per Gleeson CJ, Gummow, Kirby and Callinan JJ.
[9] See: [16(a)] *supra.*
[10] *Acts Interpretation Act* 1901 (Cth) s15AA.
[11] *Acts Interpretation Act* 1901 (Cth) s15AB.
[12] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[13] [1999] HCA 16; (1999) 196 CLR 141 at 150; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 (1999) 196 CLR 141 per Gleeson CJ, Gummow, Kirby and Callinan JJ.
[14] applicable under s3A of the Act.
[15] [1999] HCA 16; (1999) 196 CLR 141 at 149-50; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 per Gleeson CJ, Gummow, Kirby and Callinan JJ.
[16] see *supra* at [16(a)-(d)].
[17] [2003] VSCA 154; (2003) 6 VR 416 at 429; (2003) 39 MVR 486.
[18] [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51.
[19] [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51.
[20] [1988] VicRp 15; [1988] VR 118; (1987) 6 MVR 51.

APPEARANCES: For the appellant Scully: Mr S Hardy, counsel. Keogh & Co, solicitors. For the respondent Semple: Mr M Gibson, counsel. Office of Public Prosecutions.
