59/08; [2008] VSC 567

SUPREME COURT OF VICTORIA

JOHNSTONE v MATHESON

Cavanough J

5 & 6 March, 18 December 2008 — (2008) 21 VR 570; (2008) 52 MVR 1

MOTOR TRAFFIC – DRINK/DRIVING – READING OF 0.091% BAC – CHARGES LAID UNDER S49(1)(b) AND (f) OF *ROAD SAFETY ACT* 1986 – BOTH CHARGES FOUND PROVEN – AT THE SENTENCING STAGE CHARGE UNDER S49(1)(f) DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – READING READ DOWN BY MAGISTRATE TO 0.067% BAC – NO ORDER MADE AGAINST OFFENDER'S DRIVER LICENCE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), 49(4), 50(AA), 50(1AB).

J. was charged with driving a motor vehicle with more than the prescribed concentration of alcohol in his breath under s49(1)(f) of the *Road Safety Act* 1986 ('Act') and with an offence under s49(1)(b) of the Act. J's reading was 0.091% BAC. At the hearing the magistrate found both charges proved but dismissed the charge under s49(1)(f), read down the reading to 0.067% BAC and decided not to make an order against J's driver licence. Upon appeal—

HELD: Appeal allowed.

1. It is well established that a s49(1)(b) offence and a s49(1)(f) offence are different in nature and that a driver may be charged with either or both offences. It has been the practice in Victoria to allege both offences and to try them together but in the event of a finding of guilt to seek a penalty on one offence only even though they are discretely different offences involving proof of different ingredients. There is nothing inappropriate in principle in the laying of charges and the undertaking of a prosecution in respect of both offences: they contain different elements, notwithstanding that they may be based on the same facts.

2. The doctrine against double punishment cannot be used to justify a choice by a sentencing court to dismiss the most serious charge of a group of two or more duly lain, duly prosecuted and duly proven charges where a mandatory penalty is prescribed for the most serious charge. To do so would not be an appropriate means of avoiding double jeopardy or double punishment. Rather, it would inappropriately shield the offender from the penalty prescribed by law for the single most serious offence committed.

3. In the present case, the charge under s49(1)(f) should be regarded as the more serious of the two charges. Upon being found proved, it carried with it a finding that the concentration of alcohol in J's breath at the time relevant for that offence – the time of the test – was 0.091%. By contrast, assuming for the moment that it was legitimate in the circumstances for the Magistrate to "read down" the result of analysis for the purpose of the charge under s49(1)(b), the concentration of alcohol as found in relation to the time relevant for that charge – the time of driving – was 0.067%. In those circumstances, the Act treats the s49(1)(f) charge as the more serious, in two respects. First, speaking generally, the Act is framed on the basis that higher readings involve higher levels of criminality. Higher readings tend to authorise or require higher penalties, both in relation to the level of fines and the minimum periods of disqualification from driving. The difference in the readings would probably have been a relevant discretionary consideration in sentencing. Secondly, and more significantly for this case, so far as relevant, s50(1AB) of the Act only applies (as an exception from the requirement under s50(1A) to cancel the offender's licence and disqualify the offender from driving) where it appears to the Court that at the relevant time the concentration of alcohol in the breath of the offender was less than 0.07%. However, s50(1AB) would not have been available to the Magistrate in this case in relation to the offence under s49(1)(f), because the relevant reading was 0.091%.

4. The Victorian practice of alleging both offences under s49(1)(b) and (f) of the Act and trying them together, in itself, does not amount to an abuse of process. Further, the prosecutor by offering to withdraw the charge under s49(1)(b) or to have it struck out or dismissed was not engaging in an abuse of process.

5. As J. was found guilty of an offence under s49(1)(f) with a reading of 0.091%, the Act imposed a mandatory minimum penalty for such an offence, namely cancellation of J.s driver's licence and disqualification from obtaining a further licence for a period of 6 months. Given that, by virtue of s50(1AB), the Magistrate was not obliged to convict J. of the offence under s49(1)(b) or otherwise to

impose any punishment on him for it, the mere fact that the Magistrate had found him guilty of that other offence could not, whether by virtue of the doctrine of double punishment or otherwise, enable the Magistrate to avoid the imposition of the mandatory minimum penalty for the offence under s49(1)(f). Accordingly, the magistrate had no power to dismiss the charge under s49(1)(f) in order to avoid sentencing J. for that charge.

6. In relation to J.s submission that the breath analysing instrument was not in proper working order at the relevant time, the magistrate's findings were open on the evidence.

CAVANOUGH J:

1. Before the Court are an appeal and a cross-appeal under s92(1) of the *Magistrates' Court Act* 1989.

2. In November 2005, Senior Constable Scott Matheson charged Peter James Johnstone with an offence under s49(1)(b) of the *Road Safety Act* 1986 ("the Act") of driving a motor vehicle with more than the prescribed concentration of alcohol in his breath. At the same time Senior Constable Matheson also charged Mr Johnstone with an offence under s49(1)(f) of the Act. Relevantly, such an offence is committed when a person furnishes, within three hours of driving a motor vehicle, a sample of breath for analysis by a breath analysing instrument and the result of analysis indicates that more than the prescribed concentration of alcohol is present in the person's breath. In relation to each charge, the reading alleged was 0.091 grams per 210 litres of exhaled air, based on a single breath test and a single result of analysis. The prescribed concentration is 0.05 grams per 210 millilitres of exhaled air. (For brevity and simplicity I will hereafter refer to all concentrations of alcohol in percentage terms, despite the inaccuracy of such shorthand.)

3. Mr Johnstone was subsequently found guilty of both offences in the Magistrates' Court. However, over opposition from the prosecution, the Magistrate dismissed the charge under s49(1)(f) and proceeded to deal with Mr Johnstone by reference to the charge under s49(1)(b) only. On the basis of expert evidence she "read back" the result of analysis to 0.067% as at the time of driving. She then exercised in Mr Johnstone's favour the discretion which is conferred by s50(1AB) of the Act not to interfere with an offender's licence where (so far as relevant) it appears to the court that "at the relevant time" the concentration of alcohol in the breath of the offender was less than 0.07%. No such discretion would have been available to the Magistrate had she sentenced Mr Johnstone by reference to the charge under s49(1)(f), because the "relevant time" for that offence is the time of the test.[1]

4. The principal question in this case is whether the Magistrate truly had the power to dismiss the charge under s49(1)(f) in order to avoid sentencing Mr Johnstone by reference to that charge. For reasons I will explain, I consider that she did not, and that the appeal by the Director of Public Prosecutions (on behalf of Senior Constable Matheson) must be allowed accordingly.

5. Mr Johnstone has cross-appealed[2] on the ground that, on the evidence, it was not open to the Magistrate to have found him guilty of either offence. However, in my view, as I will explain in due course, the findings of guilty were quite open to the Magistrate and Mr Johnstone's cross-appeal must therefore fail.

The DPP's appeal

6. It is well established that a s49(1)(b) offence and a s49(1)(f) offence are different in nature and that a driver may be charged with either or both offences.[3] It has been the practice in Victoria to allege both offences and to try them together but in the event of a finding of guilt to seek a penalty on one offence only even though they are discretely different offences involving proof of different ingredients.[4] There is nothing inappropriate in principle in the laying of charges and the undertaking of a prosecution in respect of both offences: they contain different elements, notwithstanding that they may be based on the same facts.[5]

7. However, as was said by Redlich J (as his Honour then was) in *Neill v County Court*[6]:

> ... different considerations arise at the sentencing stage of criminal proceedings. A court may dismiss a charge to avoid double punishment when the doctrine of double jeopardy is applicable.

8. Redlich J elaborated on this point as follows[7]:

> An offender may not be convicted twice for the same offence. Where the one offence is an element of another offence the person cannot be convicted of both offences. *Li Wan Quai v Christie* ; *R v Dodd*; *R v Sessions*. The rule against double jeopardy is the foundation for the pleas of *autrefois*: *Davern v Messel* . Though a plea in bar of *autrefois* does not strictly arise out of the prosecution of a summary offence in the Magistrates' Court the doctrine of double jeopardy would prevent dual convictions. Whether as a consequence of the common law or by virtue of s51 of the *Interpretation of Legislation Act* 1984 an offender cannot be punished twice for the same act or omission: *Sentencing – Fox & Freiberg* 2nd Edit par 1.409. Whilst the boundaries of the doctrine remain uncertain they extend to prohibit conviction where the elements of the offences are the same, or where the two offences contain elements established by the same act unless there are different consequences from the same act: *R v Sessions*; *R v Bekhazi*; *R v Lelah*; *R v El Kotob Hi Jazi*; *R v R.H.McL*; *R v Henderson*; *R v Lancefield*; *Queen v Pearce; Pearce v The Queen*; *R v Tricklebank*. Though the doctrine has a scope of operation beyond such circumstances, the fact that the offences are similar or arise substantially out of the same facts is not determinative of whether a conviction on both offences offends these principles: *R v Henderson*; *R v El Kotob*.

9. *Neill* involved charges against a motorist under s49(1)(b) and s49(1)(f) of the Act and a contention by the motorist that a magistrate had infringed the rule against double punishment by convicting him on both charges. However, in the absence of clear evidence to show whether or not the offences were based upon the same facts and, more importantly, upon the same acts or omissions of the plaintiff, Redlich J was not prepared to make a finding on that question. His Honour remitted the question, among others, to the County Court[8], saying[9]:

> The provisions of the *Sentencing Act* 1991 provide the Magistrate and a County Court Judge on appeal with all of the powers that are necessary to ensure that an offender is not doubly punished for the same conduct. When s51 of the *Interpretation of Legislation Act* 1984 comes into play the court cannot convict on both offences as a conviction constitutes punishment: s7 of the *Sentencing Act* 1991 (Vic); *R v Pearce*. Where the act or omission constituting each offence is identical or an act or omission required to establish one offence is a necessary part of one or more elements of the other offence a conviction on both is in most circumstances impermissible. Where that is not so but both offences arise out of the same facts the question may still arise as to whether there should be a conviction on both charges, or if it is recorded whether any additional punishment should be imposed.

10. In the present case I have more evidence concerning the material that was before the magistrate than Redlich J apparently had in *Neill*. However, in the end I do not need to decide whether, if the magistrate had punished Mr Johnstone on both charges (by conviction or otherwise), the doctrine against double punishment would have been infringed. I will assume in Mr Johnstone's favour, without deciding, that to have done so would have infringed that doctrine.[10]

11. It seems to me that the doctrine against double punishment cannot be used to justify a choice by a sentencing court to dismiss the most serious charge of a group of two or more duly lain, duly prosecuted and duly proven charges where a mandatory penalty is prescribed for the most serious charge. To do so would not be an appropriate means of avoiding double jeopardy or double punishment. Rather, it would inappropriately shield the offender from the penalty prescribed by law for the single most serious offence committed.

12. In the present case, it is common ground[11] that the two charges were duly laid and duly prosecuted, and (for the reasons I will give in relation to the cross-appeal) I am satisfied that each was duly proven, as the Magistrate found. The charge under s49(1)(f) should be regarded as the more serious of the two charges. Upon being found proved, it carried with it a finding that the concentration of alcohol in Mr Johnstone's breath at the time relevant for that offence – the time of the test – was 0.091%. By contrast, assuming for the moment that it was legitimate in the circumstances for the Magistrate to "read down" the result of analysis for the purpose of the charge under s49(1)(b), the concentration of alcohol as found in relation to the time relevant for that charge – the time of driving – was 0.067%. In those circumstances, the Act treats the s49(1)(f) charge as the more serious, in two respects. First, speaking generally, the Act is framed on the basis that higher readings involve higher levels of criminality. Higher readings tend to authorise or require higher penalties, both in relation to the level of fines[12] and the minimum periods of disqualification from driving.[13] As it happens, Mr Johnstone was a first offender. Therefore, had the Magistrate been free to sentence him on both charges, and had the Magistrate convicted him on both charges, the minimum period of disqualification would have been the same for both offences (6 months)[14] and the maximum fine would also have been the same.[15] However, the

difference in the readings would probably have been a relevant discretionary consideration in sentencing. Secondly, and more significantly for this case, so far as relevant, s50(1AB) of the Act only applies (as an exception from the requirement under s50(1A) to cancel the offender's licence and disqualify the offender from driving) where it appears to the Court that at the relevant time the concentration of alcohol in the breath of the offender was less than 0.07%. As I have said, s50(1AB) would not have been available to the Magistrate in this case in relation to the offence under s49(1)(f), because the relevant reading was 0.091%.

13. Counsel for Mr Johnstone submitted that if an informant brings charges under both s49(1)(b) and s49(1)(f) and fails to withdraw the s49(1)(b) charge, or to have it struck out or dismissed, before the magistrate finds it proven, the magistrate acquires a discretion to determine which of the two charges should attract punishment.[16] In response to my testing of that proposition, counsel further submitted that even if an informant were to bring only a single charge, being a charge under s49(1)(f) alleging a reading of 0.091%, and proved it at that reading, the court which found the charge proved would still be at liberty to impose no penalty or to dismiss the charge under the Court's ordinary sentencing discretion.

14. However, I cannot accept either proposition. No authority supports either of them. As to the first proposition, counsel for Mr Johnstone did no more than refer to certain authorities to the effect that magistrates in Victoria have inherent or implied power to permit or refuse to permit the withdrawal or striking out or dismissal of an information.[17] But the proper exercise of that power may be confined by the circumstances or by specific statutory provisions. Although the prosecutor in this case may have indicated, after the charge under s49(1)(b) was found proven, that he was prepared to withdraw that charge or to have it struck out or dismissed, he was not thereby appealing to some unbridled discretion of the Magistrate. He was not seeking an indulgence. Rather, in effect, he was merely inviting the Magistrate to take the only proper course available for the purpose of avoiding double punishment in this case.

15. Contrary to Mr Billings' submissions[18], the prosecutor, by offering to withdraw the charge under s49(1)(b) or to have it struck out or dismissed, was not engaging in an abuse of process. It may be that the prosecution can obtain a forensic advantage by bringing charges under both s49(1)(b) and s49(1)(f), as Mr Billings submitted. In some cases, at least, the bringing of both charges may, as a matter of forensic reality, compel the accused to adduce evidence, such as evidence of the amount of his or her drinking and expert evidence as to the effect on persons generally of such drinking.[19] That may be thought necessary because of the reverse onus of proof under s49(4) in respect of charges under s49(1)(f). On the other hand, evidence of that kind might be thought necessary in any event because of the special evidentiary provisions of the Act concerning breath analysing instruments and certificates of analysis.[20] As it happens, in the present case Mr Johnstone gave evidence that he drank 8 pots of beer – perhaps one more or one less – in the period of 5 hours or so before he was intercepted. Further, he had available evidence from an expert, Mr Graham Young, tending to show that at the time of driving his breath (and blood) alcohol concentration would have been approximately 0.067% and that at the time of the test it would have been approximately 0.091%.[21] Of course, this evidence was designed to help him with respect to the charge under s49(1)(b), not the charge under s49(1)(f). However, it is possible, I suppose, that in some other case evidence of this general kind adduced by a defendant in order to demonstrate that the breath analysing instrument was not "in proper working order" or was not "properly operated" (within the meaning of s49(4), for the purposes of s49(1)(f)) might be latched onto by the prosecution to assist it to prove the charge under s49(1)(b), whereas otherwise the onus of proof would be on the prosecution to prove its case under s49(1)(b) beyond reasonable doubt (albeit still with the help of the special evidentiary provisions). However that may be, *Neill* confirms that the Victorian practice of alleging both offences and trying them together, in itself, does not amount to an abuse of process. It seems to me that, in a case like the present, the accused's only resort is to the doctrine of double punishment. If in the circumstances that doctrine does not assist the accused to keep his or her licence, he or she cannot be heard to complain. The accused is not entitled to some other *quid pro quo* for the forensic advantage which the statute may effectively give to the prosecution. In any event, the accused is not entitled to any *quid pro quo* that would be inconsistent with the provisions of the Act.

16. As to the second proposition, it does not avail Mr Johnstone that general sentencing provisions might in other circumstances permit a magistrate to impose no conviction or other

punishment[22], or even to dismiss a charge[23], in the exercise of an ordinary sentencing discretion. General provisions of that nature give way to specific provisions, such as s50(1A) of the Act.[24] So also does the common law sentencing principle of parsimony to which Mr Billings referred, and which[25] is now encapsulated in s5(3) of the *Sentencing Act* 1991.

17. Even if, as Mr Billings submitted, it is incorrect to view the charge under s49(1)(f) as more serious than the charge under s49(1)(b) in the circumstances of this case, the result would be the same. The plain fact is that Mr Johnstone was found guilty of an offence under s49(1)(f) with a reading of 0.091%. The Act imposes a mandatory minimum penalty for such an offence, namely cancellation of the driver's licence and disqualification from obtaining a further licence for a period of 6 months.[26] Given that, by virtue of s50(1AB), the Magistrate was not obliged to convict Mr Johnstone of the other offence (the offence under s49(1)(b)) or otherwise to impose any punishment on him for it, the mere fact that the Magistrate had found him guilty of that other offence could not, whether by virtue of the doctrine of double punishment or otherwise, enable the Magistrate to avoid the imposition of the mandatory minimum penalty for the offence under s49(1)(f).[27]

18. I need not, and do not, decide what the position of a sentencing court would be if faced with two proved offences each carrying a mandatory penalty in a situation where the doctrine of double punishment would otherwise apply. My provisional view would be that, in the absence of a special, explicit statutory provision to the contrary[28], the doctrine of double punishment would apply to the extent that the court ought impose no punishment on the lesser offence as measured by the applicable penalties or, if the offences be equal in seriousness in that sense, ought impose no penalty on one or other of the offences at the option of the court, or, arguably, at the option of the prosecutor.

19. Mr Billings relied generally on the judgment of Vincent J in *Skase v Holmes and Another*[29]. However it does not assist him. In *Skase*, the driver was initially charged under both s49(1)(b) and s49(1)(f), but the charge under s49(1)(b) was not proceeded with. The driver suffered from a gastric reflux condition. He underwent a breath test. Despite a reading of 0.160%, the magistrate found positively[30], and without subsequent challenge by the prosecution, that the concentration of alcohol in the driver's blood did not exceed 0.03% at any relevant time, including the time of the breath test. On that basis, Vincent J held that the magistrate erred by omitting to recognise that, by virtue of s50(1AB) – as it stood in 1995 when the case was decided – the magistrate could and should have dismissed the charge under s49(1)(f). I need not, and do not, decide whether the reasoning in *Skase* can stand with the reasoning of Gillard J in *DPP v Drucker*[31]. Subsection 50(1AB) has been amended since 1995. It now refers to the concentration of alcohol in the breath of the offender, as well as to the concentration of alcohol in the offender's blood. Again, I need not, and do not, decide whether the result in *Skase* might have been different under the amended version of s50(1AB).[32] However *Skase* is clearly distinguishable from the present case because, apart from the matters the subject of the cross-appeal, it is conceded by Mr Johnstone that the magistrate duly found that the concentration of alcohol in his breath at the time of the test was 0.091% and there is nothing to suggest that the concentration of alcohol in his blood was any different from the concentration of alcohol in his breath at that time (or at any other time).

20. Mr Billings further submitted, in the alternative, albeit faintly[33], that because the Magistrate assumed (wrongly, as I would now hold) that a finding of guilty[34] on the charge under s49(1)(f) would not preclude her from preserving Mr Johnstone's licence, she should be given an opportunity now to resile from her finding. However such a course would clearly be contrary to proper principles.[35]

21. In these circumstances I do not need to deal with the Director's further or alternative argument to the effect that it was too late, at the sentencing stage, for Mr Johstone to seek to present the expert evidence (the tenor and effect of which the prosecutor ultimately conceded, without requiring Mr Young to be physically called) that was relied on by the Magistrate to "read down" the result of the analysis for the purposes of the offence under s49(1)(b).[36]

22. Subject to the cross-appeal, the Director's appeal must be allowed, for the reasons I have given.

Mr Johnstone's cross-appeal

23. By his notice of appeal, Mr Johnstone challenges the Magistrate's decision to find the charge under s49(1)(f) proved, and also her decision to find the charge under s49(1)(b) proved. The latter challenge was not seriously pursued and I say no more about it.

24. Subsection 49(4) of the Act provides:

> "(4) It is a defence to a charge under paragraph (f) of subsection (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated."

25. So far as presently relevant, the sole issue before the Magistrate was whether Mr Johnstone had made out the defence under s49(4). He did not suggest to the Magistrate that the instrument had not been properly operated. His case was that the instrument was not in proper working order.

26. Mr Johnstone invited the Magistrate to infer that the instrument was not in proper working order from a comparison between, on the one hand, printouts from the instrument itself purporting to show that the authorised operator took 10 minutes to administer the test in Mr Johnstone's case, and, on the other, the oral evidence of the authorised operator tending to show that he took only 3 minutes or so to administer the test.

27. The Magistrate summed up her findings on this point as follows (the reference to "Mr King" is a reference to the authorised operator, who had retired from the police force in the meantime) [37]:

> It comes down to this. In order to be satisfied on the probabilities that the instrument was not in proper working order, I would need to accept the evidence of Mr King as to the period of time it took him to complete the process. However, I am required to evaluate that evidence in the context of his whole evidence and the manner in which he gave it. First he admitted it being a while since he had used such an instrument. He also commented that he hadn't used the machine in two years, and that he could be proven wrong about the time of analysis.
>
> Finally, he also said that he would have to listen the recording he made on the evening to be precise about times. Whilst I am certain that Mr King was doing his utmost best in recalling the evening and particular matter, and whilst I am satisfied that he was not lying or being untruthful, I am of the view that he is in error about the length of time it took him to complete this particular test. That error can and should be attributed to nothing more than human foibles.
>
> Accordingly, in the light of all the evidence, I am not satisfied that it was more probable than not that the instrument was not in a proper working order on that occasion. The defence in section 49(4) not being made out, I find the charge under section 49(1)(f) proved.

I have carefully examined the transcript of the evidence before the Magistrate, together with the exhibits. In my view, the Magistrate's findings were not only open to her but were well supported by the evidence, for the reasons she gave. Mr Billings criticised one of those reasons, namely the comment that Mr King had said that he would need to listen to the recording of the events of the night in question to be precise about times. Mr Billings submitted that Mr King had plainly implied in his evidence that he had already listened to the tapes. On my reading of the evidence, I simply cannot accept that submission.[38] Further, numerous additional supporting points were available and were drawn to my attention by counsel for the informant, including, first, that much of Mr King's evidence was apparently based on his usual practice rather than on any specific recollection of the night in question[39]; second, that there was evidence from Mr Johnstone himself[40] (being evidence that was put to the informant in cross-examination and not disputed[41]) that it was busy at the booze bus that night and that, as a result, at a stage after Mr Johnstone was first interviewed by the authorised operator, Mr Johnstone went outside for a 5 minute cigarette break; and, third, that counsel for Mr Johnstone kept his point hidden until it was too late for the authorised operator to be given an opportunity to comment directly on the proposition that there was no explanation for the alleged 10 minute gap other than that the instrument was not in proper working order.

28. In any event, Mr Johnstone had the burden of proof on this point below. He has certainly

not discharged the difficult task of showing before this Court, as he needed to do[42], that the evidence below was such that the Magistrate was, as a matter of law, obliged to find that he had satisfied the burden of proof.

29. In these circumstances, there is no need for me to rule on the debate that took place before me as to whether any proven departure from proper working order on the part of the instrument needs to be such that the result of analysis produced by the instrument would "probably" or "possibly" be unreliable[43], and I do not do so. However, in passing, I note that there was no clear or direct evidence that a fault in the time recording function of the instrument would tend to indicate that the result of the analysis was, or even might be, unreliable.

30. Mr Johnstone's cross-appeal fails.

Conclusions and orders

31. For the reasons I have stated, the DPP's appeal will be allowed and Mr Johnstone's appeal will be dismissed. Mr Billings urged me, if I were to reach those conclusions, not to re-sentence Mr Johnstone myself but to send the matter back[44] to the Magistrates' Court for Mr Johnstone to be re-sentenced. This, he said, would eliminate any doubt about the preservation of Mr Johnstone's full right of appeal to the County Court on the merits and on sentence.[45] In any event, I have heard no plea on behalf of Mr Johnstone. So I am prepared to remit the matter to the Magistrates' Court for the re-sentencing of Mr Johnstone as requested. There is no reason why the same Magistrate should not re-sentence Mr Johnstone.

32. Subject to any further submissions as to the form of orders or as to costs, I propose to make orders as follows:

> 1. In proceeding no 10052 of 2006, the appeal by the Director of Public Prosecutions (on behalf of Scott James Matheson) be allowed.
>
> 2. The order made by the Magistrates' Court on 1 November 2006 whereby Peter James Johnstone was fined $600 without conviction in respect of the charge against him under s49(1)(b) of the *Road Traffic Act* 1986 be set aside.
>
> 3. The order made by the Magistrates' Court on 1 November 2006 whereby the charge against Peter James Johnstone under s49(1)(f) of the *Road Traffic Act* 1986 was dismissed be set aside.
>
> 4. The case be remitted to the Magistrates' Court for the hearing of a plea and the imposition of a penalty on Peter James Johnstone in accordance with law in relation to the finding made on 1 November 2006 that he was guilty of an offence under s49(1)(f) of the *Road Traffic Act* 1986, and also for the Magistrates' Court to deal as it sees fit with the matter of the further finding made on 1 November 2006 that Peter James Johnstone was guilty of an offence under s49(1)(b) of the *Road Traffic Act* 1986.
>
> 5. In proceeding no 10036 of 2006, the appeal by Peter James Johnstone be dismissed.
>
> 6. Peter James Johnstone pay the opposite party's costs of both appeals.

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[1] *DPP v Drucker* (1997) 27 MVR 248 at 254; (1997) 98 A Crim R 142 (Gillard J).
[2] Mr Johnstone's appeal was actually filed one day prior to Senior Constable Matheson's appeal, but I was told by counsel that Mr Johnstone's appeal was prepared and filed in anticipation of Senior Constable Matheson's appeal.
[3] *Neill v County Court of Victoria* [2003] VSC 328, (2003) 40 MVR 265 (Redlich J).
[4] Ibid.
[5] Ibid.
[6] Ibid, 40 MVR at 380 [48].
[7] Ibid at 284 [65]. Footnotes omitted.
[8] On the motorist's (*de novo*) appeal to the County Court, the judge had refused to strike out either charge at the outset. The motorist then sought judicial review by the Supreme Court of this ruling of the County Court judge, alleging that an abuse of process was involved in the prosecution of both charges.
[9] (2003) 40 MVR 265 at 286-287 [72]. Footnotes omitted.
[10] See generally and compare *R v Pearce* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 at 623 [40]; *Neill*, *supra*; *R v Audino* [2007] VSCA 318; (2007) 180 A Crim R 371 at 374-375 [11]-[18].
[11] Any contention to the contrary would not have been open in the light of *Neill* and the cases referred to

at paras [50]-[63] thereof.
[12] See, eg, s49(2A).
[13] See s50(1A) and Schedule 1. See also s50(4A).
[14] See s50(1A) and Schedule 1.
[15] Section 49(2A)(a).
[16] Indeed, before the Magistrate, with an eye to making such a submission, counsel had been astute to ensure, once his client's defence on the merits failed, that the Magistrate found *both* charges proved.
[17] See *Willis v Magistrates Court of Victoria and Another*, unreported SCV, Smith J, 2 December 1996 BC9606097 at 26-28 and authorities there cited.
[18] Transcript pp 65-67, 84.
[19] See *Campbell v Renton*, unreported, Marks J, 18 August 1988; *DPP v Hore* [2004] VSCA 192; (2004) 10 VR 179 at 184 [19], 193 [58]-[59], 195 [66]; (2004) 42 MVR 520.
[20] See ss 48(1)(a), 48(1A), 49(6), 55(14) and 58 of the Act.
[21] That evidence happened to be exactly consistent with the *preliminary* breath test result. As to the admissibility of the result of a preliminary breath test, see *R v Ciantar* (2006) 16 VR 28 at 30-31 [9]-[10].
[22] Eg *Sentencing Act* s7.
[23] Eg *Sentencing Act* s76.
[24] *R v Pearce* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 at 623 [40]; *R v Audino* [2007] VSCA 318; (2007) 180 A Crim R 371 at 374-375 [14]. Section 7 of the *Sentencing Act* 1991 is itself expressed to be subject to "any specific provisions relating to the offence."
[25] As was noted in *R v Piacentino and Another* [2007] VSCA 49 at [47]; (2007) 15 VR 501; (2007) 209 FLR 439; (2007) 169 A Crim R 348.
[26] Section 50(1A) and Schedule 1.
[27] See *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121 at 127; *Earl v Butler* [1974] VicRp 44; [1974] VR 359 at 361; *DPP v Norman* [2003] VSC 369 (Kellam J) at [23]-[27]; (2003) 39 MVR 480; *DPP (Vic) v Fernandez* [2004] VSC 401; (2004) 149 A Crim R 390; (2004) 42 MVR 59 (Smith J) at 65 [15]-[17].
[28] See and compare *R v Pearce* [1998] HCA 57; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; (1998) 194 CLR 610 at 623 [40]; *R v Audino* [2007] VSCA 318; (2007) 180 A Crim R 371 at 374-375 [14].
[29] Unreported, SCV, 11 October 1995.
[30] Indeed, beyond reasonable doubt.
[31] (1997) 27 MVR 248, esp at 254; (1997) 98 A Crim R 142.
[32] Compare, by way of analogy, in relation to s49(4), *Charles v Koetsier* (1994) 20 MVR 381; *DPP v Hore* [2004] VSCA 192; (2004) 10 VR 179; (2004) 42 MVR 520; *Wilson v County Court of Victoria* [2006] VSC 322; (2006) 14 VR 461 at 462 [1]; (2006) 164 A Crim R 525; (2006) 46 MVR 117.
[33] Transcript pp 113-114.
[34] Or a finding that the charge was "proved." In my view, the two expressions are interchangeable for present purposes: see *DPP v Croaker* [2001] VSC 342; (2001) 34 MVR 397; (2001) 120 A Crim R 588 (Bongiorno J) at MVR 399 [8] and cases there cited. The Magistrate announced repeatedly (orally) that she found the charges proved. The amended certified extract from the Magistrates' Court register (Exhibit B) records that the defendant was "found guilty" on both charges.
[35] *Aherne v Freeman* [1974] VicRp 17; [1974] VR 121 at 127.
[36] Paragraphs 14 and 16(c) of Mr Johnstone's affidavit of 14 September 2007 suggest that the expert evidence was tendered or sought to be tendered during the "trial" stage (ie before the sentencing stage) of the hearing. However the transcript of the hearing shows clearly that that was not so: see pp 180-187, esp at p 182. On the other hand, the prospect of calling the expert evidence was plainly foreshadowed earlier, and there is authority to suggest that, at least in such circumstances, it is not too late at the sentencing stage to call the evidence: *DPP v Drucker, supra*, (1997) 27 MVR 248 at 252-253; cf, in relation to jury verdicts, *Cheung v R* [2001] HCA 67; (2001) 209 CLR 1; (2001) 185 ALR 111; (2001) 76 ALJR 133; (2001) 22 Leg Rep C19.
[37] Magistrates' Court transcript p 180.
[38] Compare Magistrates' Court transcript pp 36-38.
[39] Magistrates' Court transcript, p 33 lines 42-45.
[40] Ibid, p 41 (lines 36-45) and 42 (lines 1-12).
[41] Ibid, p 15 lines 32-42.
[42] See *Ericsson Pty Ltd v Popovski* [2000] VSCA 52 ;[2000] 1 VR 260 at 265; *State of Victoria v Subramanian* [2008] VSC 9 at [33] and cases there cited; (2008) 19 VR 335.
[43] Compare *Ozbinay v Crowley* (1993) 17 MVR 176 (Byrne J) at 184; *Fitzgerald v Howey* (1995) 24 MVR 369 (Eames J) at 380-383; *Williams v Jacobs* [1999] VSC 88; (1999) 29 MVR 244 (Balmford J) at MVR 246-248.
[44] Pursuant to s92(7) of the *Magistrates' Court Act* 1989.
[45] Compare s92(8) of the *Magistrates' Court Act* 1989.

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