15/06; [2006] VSC 195

SUPREME COURT OF VICTORIA

DPP v LUFF

Osborn J

18, 19, 29 May 2006 — (2006) 45 MVR 248

MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE GIVEN BY OPERATOR OF BREATH ANALYSING INSTRUMENT – STATEMENT THAT OPERATOR NOT FAMILIAR WITH RELEVANT REGULATIONS – UNABLE TO SAY WHETHER REGULATIONS COMPLIED WITH – CHARGES DISMISSED BY MAGISTRATE – MAGISTRATE NOT SATISFIED THAT ELEMENTS OF OFFENCES PROVED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f); 55, 58(4).

L. was charged with offences of drink/driving under s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). At the hearing, the operator of the breath analysing instrument was called to give evidence. In cross-examination when asked what regulations he complied with he said: "I don't know the exact regulations and what they say." When asked whether he complied with the regulations in conducting the breath test, the operator said: "I can't say." In dismissing both charges, the magistrate said: "…the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorised officer and those .05 charges will be dismissed accordingly." The matter went on appeal to the Supreme Court of Victoria (see *DPP v Luff* MC19/01) and to the Court of Appeal. In allowing the appeal, it was held that in relation to a charge under s49(1)(f) of the Act, it was no part of the prosecution case to prove that on the relevant occasion the breath analysing instrument was either in proper working order or properly operated. It was a matter for the defence to prove that the instrument was not properly operated on the relevant occasion. When the matter was referred back to the Magistrate, after hearing submissions, the Magistrate dismissed both charges stating that she was not satisfied that the elements of either offence were made out. Upon appeal—

HELD: Appeal allowed. Dismissal of s49(1)(f) charge set aside and referred to the Magistrate to be further considered in accordance with the law.

Two decisions of the Court of Appeal now make clear that the onus is upon the defendant to establish the defence under s49(4) of the Act and that it was not for the prosecution to establish the instrument was properly operated. The approach put in submission to the Magistrate was fundamentally flawed in that it specifically invited her to simply state that she was not satisfied that the essential elements of the offence under s49(1)(f) were made out in that she was not satisfied that the instrument was operated correctly. The necessity to find positively that the defence was made out under s49(4) was not conceded. It was incumbent upon the Magistrate to consider whether she was positively satisfied on the balance of probabilities that the instrument was not properly operated. Unless she was so satisfied the relevant defence could not succeed. As the Magistrate did not consider properly or at all the onus upon the defence under s49(4), the matter is remitted to the Magistrate for further consideration.

OSBORN J:

1. At approximately 12.30 a.m. on 5 December 1997 the respondent ("Luff") drove into a gate post in Osborne Street, South Yarra. Thereafter he was observed to be affected by alcohol. Following a preliminary breath test, a breath analysis was conducted at 3.07 a.m. at Prahran Police Station. The breath analysis produced certificates showing a blood alcohol concentration of 0.189%, being substantially in excess of the prescribed concentration.

2. Luff was charged with a number of offences including offences under s49(1)(b) or (f) of the *Road Safety Act* 1986 ("the Act"). These sections then provided:

> "49. **Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> …
> (b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood; or
> …

(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(1) and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and

(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;
..."

3. When the matter came before the Magistrates' Court these latter charges were dismissed, although Luff was convicted of four other offences arising out of the incident.

4. On appeal to this Court, Balmford J set aside the orders of the Magistrates' Court[1] and on further appeal the Court of Appeal affirmed the decision of Balmford J.[2]

5. The matter came back to the Magistrate who had originally considered the matter for reconsideration in accordance with law on the basis of the evidence originally heard by her. She again dismissed the charges. The Director now appeals this decision on the basis of three questions of law:

(1) Did the learned Magistrate err when she ruled on the evidence that there was no case to answer?

(2) Did the learned Magistrate err when she ruled on the evidence that the informations should be dismissed?

(3) Did the learned Magistrate err in concluding if she did so, that
(a) the breath analysing instrument was not operated correctly, or
(b) she was not satisfied that the breath analysing instrument was not operated correctly?

6. It is agreed that the first question of law is misconceived.

7. Although question (2) is broadly expressed it was understood by the parties to raise two fundamental issues which were articulated in written submissions and oral argument before me. Those questions are:

(a) Was it open to the Magistrate on the evidence to dismiss the charges?;

(b) Did the Magistrate consider (properly or at all) s49(4) of the Act?

8. Save insofar as the third question of law may be said to be subsumed by question of law (2) that question was not further argued.

9. Section 55 of the Act provides for breath analysis as follows:

"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 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 police station or other place 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.
...
(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 deliver to the person whose breath has been analysed a certificate in the prescribed form produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood."

10. Section 58 in turn contained evidentiary provisions:

"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 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 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 of that person at the time his or her breath is analysed by the instrument.
(2) A document purporting to be a certificate in the prescribed form produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood 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 ... 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.
...
(2D) A certificate referred to in sub-section (2) remains admissible in evidence even if the accused person gives a notice under that sub-section but, in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section.
...
(4) Evidence by a person authorised to operate a breath analysing instrument under section 55—
(a) that an apparatus used by him or her on any occasion under that section was a breath analysing instrument within the meaning of this Part;
(b) that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her;
(c) that, in relation to the breath analysing instrument, all regulations made under this Part with respect to breath analysing instruments were complied with—
is, in the absence of evidence to the contrary, proof of those facts."

11. The relevant regulations were regulations 303, 304 and 314 of the *Road Safety (Procedures) Regulations* 1988 which read as follows:

"**Interval before taking of sample**
303. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator does not require a person to undertake a breath analysis until the operator is satisfied that the person has not consumed any intoxicating liquor for a period of at least fifteen minutes before the analysis.

Mouthpiece
304. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator--
(a) provide a fresh mouthpiece for use by each person submitted to breath analysis; and
(b) use only a mouthpiece which has been kept in a sealed container until required for carrying out the analysis.

Certificate under section 55(4)

314. A certificate given in accordance with section 55(4) is in the prescribed form if it includes—
(a) the serial number of the instrument; and
(b) the sample number; and
(c) the location of the test; and
(d) the name and date of birth of the person tested; and
(e) the surname of the operator; and
(f) the results of the self tests conducted before and after the analysis of the sample provided; and
(g) the results of zero tests conducted before and after the analysis of the sample provided; and
(h) the date and time the test was taken; and
(i) the concentration of alcohol in grams per 100 millilitres of blood indicated by the analysis to be present in the blood of the person tested."

12. By reason of s58(1)(c) of the Act each of the certificates printed out by the breath analysis instrument in the present case (upon compliance with s55(4) as occurred) constituted evidence of the concentration shown.

13. In turn s48(1)(a) provided:

"48. **Interpretative provisions**
(1) For the purposes of this Part—
(a) if it is established that at any time within 3 hours after an alleged offence against paragraph (a) or (b) of section 49(1), a certain concentration of alcohol was present in the blood of the person charged with the offence it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed;"

14. By reason of s58(2) the certificate constituted conclusive proof of the matters referred to in that sub-section subject to notice of objection being given. In the present case notice was given requiring the person giving the certificate to be called as a witness. Thus the certificate, although remaining evidence of the analysis stated pursuant to s59(2D), was not conclusive evidence of such analysis.

15. Upon the initial hearing before the Magistrate the defence put in issue the question whether the breath analysing instrument was properly operated.

16. The operator was cross-examined first as to the basis on which he sought to refer to his notes and then as to the operation of the instrument:

"Q: You said in evidence in chief that you complied with the regulations when you operated the breath analysing instrument, correct?
A: Yes.
Q: Which regulations were you referring to?
A: The regulations for breath tests
Q: Which ones exactly?
A: I don't know the exact regulations and what they say.
Q: If you don't know the exact regulations and what they say how can you give evidence that you complied with them?
A: I can't remember the exact ones.
Q: You don't even know if you complied with them do you?
A: I can't recall which ones they are and if I have complied no.
Q: It follows then does it not that you can't give evidence that you did comply with regulations relevant to this test?
A: That needs to be assessed by the Court.
Q: Well in any event it follows from your evidence does it not that you do not know the regulations required to be complied with to properly operate the breath analysing instrument?
A: That needs to be assessed by the Court.
Q: Well doesn't it follow that you need personal knowledge of the regulations and their requirements in order to assert that you complied with them?
A: As I said before that needs to be assessed by the Court.
Q: I suggest you are being evasive on this point?
A: No I'm not.
Q: Look, you can't even tell the Court specifically what you did on this night with respect to compliance with the regulations can you?
A: I said I can't.
Q: I suggest then that you simply read a bland type statement from the proforma with respect to

complying with the regulations and hoped that you wouldn't be cross-examined upon it to expose your lack of knowledge?
A: I am inexperienced. This is actually the first time I have given evidence as an operator.
Q: Is that your excuse for not complying with the regulations?
A: No.
Q: You didn't comply with the regulations did you?
A: I can't say."

17. The Magistrate commenced her ruling by stating that this was a most unusual case in her experience. After making findings concerning the happening of the incident involving Luff's driving on the night in question she stated:

> "Senior Constable Charlesworth gave evidence that he had been an authorised operator from the 9th July 1997 a few months only. He agreed that he had done the relevant courses. He was cross-examined extensively. He also said ... 'I have never given evidence before as an operator'. And this is ... the crux of this case. I am perfectly satisfied that Rory Luff was driving the vehicle when it crashed into the fence. ... I am not, however, perfectly satisfied that he had a breath alcohol reading of .189. This is why I say it's a most unusual case. Let me just read some of the evidence directly that Senior Constable Charlesworth gave. You will recall that when he gave his evidence I gave the witness permission to refer to his statement which contained the ... proforma proof part of a breath operator's statement ... He continued with his evidence and then in cross-examination he said that he had read his notes before he gave evidence, though there was a lot of the formal matters that he was unable to recall. He agreed that the last page of his notes contained the formal proof. He disagreed that his mind went blank in evidence in chief just before he got to those important parts. He denied a number of other suggestions which we don't have to ... bother about. He said he did say that he had had a blank and that's why he hadn't been able to recall the – which lead of course to me giving him leave. He couldn't remember the numbers on the machine, though he remembered the machine. He was asked – he gave evidence that he complied with the regulations. He then gave this piece of evidence when asked. He was asked what were the exact regulations he complied with. He said 'I don't know the exact regulations and what they say. I can't remember the exact one. I can't recall which ones they are and if I have complied.' When put to him this question 'You can't give evidence that you did comply with them?' he said 'That needs to be assessed by the Court' and he denied he was being evasive on that point. He wasn't being evasive. He had been cornered and the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorised officer and those .05 charges will be dismissed accordingly."

18. On appeal Balmford J relevantly held:

> (a) that the Magistrate had not recognised the onus cast on the defendant by s49(4) of the Act;
>
> (b) that there was no evidence upon which the Magistrate could find on the balance of probabilities that the instrument was not properly operated so as to establish under s49(4) a defence to the charge under s49(1)(f);
>
> (c) it was not an element of either the offence under s49(1)(b) or (1)(f) that the instrument be properly operated;
>
> (d) the Magistrate had erred with respect to the basis of her decision and the matter should be remitted for further hearing in accordance with law.

19. On further appeal the Court of Appeal relevantly held:

> (a) it was not an element of the offence either under s49(1)(b) or (f) to prove that the instrument was properly operated;
>
> (b) that the decision in *Furze v Nixon*[3] was correct and that s49(4) reverses the onus of proof as to proper operation of the instrument in respect of an offence under s49(1)(f).
>
> (c) the appeal should be dismissed and the matter remitted for further hearing in accordance with the order of Balmford J.

20. In so holding, however, Vincent JA (with whom Callaway and Eames JJ A agreed) recognised two matters fundamental to the issues which arise before me.

21. First, his Honour noted that although the proof of proper analysis is not an element of the offence under s49(1)(b):

> "If, however, a reasonable doubt can be seen to exist concerning the reliability of the analysis, a magistrate may well not be satisfied that the commission of the offence has been established. That is not because there is an onus cast upon the prosecution to establish that the instrument has been properly operated but because they have failed to prove the presence of an essential element of the offence itself."[4]

22. Secondly, it was not the impossibility of hypothesising an analysis of the evidence favourable to Luff which vitiated the Magistrate's initial decision but the stated basis of that decision.

> "[31] Counsel for the appellant conceded that it was not necessary for the prosecution in order to secure a conviction under s49(1)(b) to establish that the breath analysing instrument was properly operated, and contended that the magistrate's remarks, considered in context, should be interpreted as indicating no more than that, on the basis of the evidence taken as a whole, she was not satisfied beyond reasonable doubt of the appellant's guilt on this charge. She was not compelled by s58(4) to act on the basis of evidence that she regarded as hopelessly unsatisfactory, but if some "contrary" evidence was required to challenge the evidence of the operator, it was to be found in his own answers in cross-examination and re-examination, the argument proceeded. It was, counsel submitted, a relatively straightforward case in which the magistrate was singularly unimpressed by the evidence of the operator and, in consequence, was not satisfied beyond reasonable doubt that the elements of either an offence against s49(1)(b) or s49(1)(f) had been established.
>
> [32] This argument may well have been sustainable, in my opinion, were it not for the clear identification by the magistrate of the foundation for her decision. It is not necessary, in the circumstances, to determine whether it was open to her to arrive at the conclusions she did or to explore by reference to the authorities the manner or extent to which averments of the kind encompassed by s58(4) must be depreciated before they cease to have effect as proof of the facts averred. Whilst, as Ormiston J held in *Binting v Wilson*[5], an averment made under this provision retains validity unless and until evidence to the contrary is presented to the court, the making of empty or clearly unreliable assertions of the matters set out in s58(4) would be likely to require little rebuttal in my view. However it is, I consider, evident that the magistrate simply did not reason about the matter in this fashion, which was ingeniously ascribed to her by counsel. There is little room for doubt that she regarded proof that the breath analysing instrument was properly operated as being essential before a finding of guilt could be made on either charge. In this context, I observe that when delivering reasons for dismissing the charges, and after remarking upon the various deficiencies in the evidence of the operator, she said:
>
> 'It leaves me in the position where I cannot be satisfied that the test result was obtained as a result of a properly operated machine by an authorized officer.'
>
> The judge in the Trial Division correctly found that in determining the matter on this basis, her Worship fell into error."

23. Callaway JA, whilst agreeing with Vincent JA, added the following observations:

> "[4] On remitter it will be for the Magistrates' Court to decide whether the charge under s49(1)(b) of the *Road Safety Act* 1986 is proved beyond reasonable doubt, applying that provision in the manner explained by Vincent JA at [27][6] below, and, in relation to the charge under s49(1)(f), whether the affirmative defence afforded by s49(4) is made out. In view of some of the affidavit material, the judgment of Hedigan J in *Verbaken v Dowie*[7] and the course of argument, I am unwilling to say that there was no evidence upon which the magistrate could find, on the balance of probabilities, that the instrument was not properly operated."

24. Unfortunately when the matter was further considered by the Magistrate she was persuaded to adopt an approach other than that suggested by Callaway JA. When the matter came back before the Magistrate counsel for Luff submitted detailed written submissions and a folder of background material to her. On the other hand, the prosecution made an abbreviated submission to the effect that the Magistrate should find the charges proved.

25. Ultimately her Honour ruled in the following terms:

> "I don't propose to say very much at all this morning, this matter has had a long life in the courts I suppose. It is now more than five years since this matter was before me and since that time it has

had two trips to the Supreme Court. I have of course thoroughly read and I hope absorbed the Court of Appeal decision of their Honours Callaway, Vincent and Eames and it is not necessary for me to revisit the evidence that I found, that is clearly detailed in the various affidavits that have been filed.

This is not a rehearing and I have been assisted by submissions that have been made and all I really wish to say about proceedings now is that in relation to both of the instant charges I was not satisfied that the elements of either offence were made out in relation to them.

Now I don't think it is necessary for me to articulate any more is it? I don't think so, and those charges of course will be dismissed."

26. I turn then to the grounds of appeal. Insofar as the contention that it was not open to dismiss the charge under s49(1)(b) is concerned, in my view this must fail. The only evidence that Luff drove a motor vehicle while more than the prescribed concentration of alcohol was present in his blood or breath, was the analysis evidence constituted by the certificate. It is clear the Magistrate was not satisfied the evidence of analysis was reliable. It was open to her to conclude there was no satisfactory evidence meeting the requirements of s58(4) and that the charge was not proven because there was no direct evidence of the relevant blood alcohol concentration.

27. Insofar as the charge under s49(1)(f) is concerned, however, I am satisfied the Magistrate's reasons demonstrate an acceptance of submissions made on behalf of Luff which were misconceived and as a result she did not address the onus imposed by s49(4).

28. The submissions made to the Magistrate with respect to both charges were in part as follows:

"(vi) The right to dismiss both charges because you are not satisfied on all the evidence that the essential elements of either offence was made out, is a right recognised by the Court of Appeal in *Barrett v Wearne* (1994) 18 MVR 331 at 334-335. It was also recognised in *Luff* per Vincent JA at paragraphs [31] and [32] ... in which his Honour conceded such a right, but felt bound by the 'clear identification by the magistrate of the foundation for her decision'. That is, relying on the words used in your ruling.

(vii) Given your findings of fact regarding the evidence of the operator, it is now open to your Honour to dismiss both charges on the basis that you are not satisfied on all the evidence that the essential elements of either offence are made out. In making that ruling, all your Honour needs to do is state it, and say nothing more."

29. It was further submitted with respect to the charge under s49(1)(f) specifically:

"(iv) In the instant case, there can be no stronger reason for dismissal of the charge than a finding that there can be no satisfaction that the regulations were complied with at all. On that basis, the defence under s49(4) is made out.

(v) In *Verbaken* ... Hedigan J concluded at 468:
'At the end of the day, the Magistrate had to be satisfied that the breath analysing instrument was operated correctly. He clearly stated that he was not so satisfied, and that was because the evidence of the operator was inconsistent with him waiting for 90 seconds.'

This finding although remarkably consistent with your Honour's original ruling, is correct at law because it does not state that it relies upon proof by the prosecution that the breath analysing instrument was properly operated. However, if an appellate point had been taken on the plain meaning of those words, the consequences may very well have been the same as that which occurred in this case.

(vi) Again, in my respectful submission, the words used by your Honour in your original ruling were given a different meaning by the appellate courts from that which your Honour clearly intended. It is open now for your Honour to clearly state in reaffirming dismissal of both charges, that you were simply not satisfied that the instrument was operated correctly, on all the evidence, and also in the sense that the defence under s49(4) had been made out, if it be necessary to so find."

30. Two decisions of the Court of Appeal now make clear that the onus was upon Luff to establish the defence under s49(4) and that it was not for the prosecution to establish the instrument was properly operated. In my view, the approach put in submission to the Magistrate

was fundamentally flawed in that it specifically invited her to simply state that she was not satisfied that the essential elements of the offence under s49(1)(f) were made out in that she was not satisfied that the instrument was operated correctly. The necessity to find positively that the defence was made out under s49(4) was not conceded.

31. It was incumbent upon the Magistrate to consider whether she was positively satisfied on the balance of probabilities that the instrument was not properly operated. Unless she was so satisfied the relevant defence could not succeed.

32. In *Verbaken* Hedigan J was ultimately of the view that the Magistrate's reasons disclosed:

> "...a finding that the Magistrate was satisfied that [the operator] had not waited that [specified] period and that, if he had addressed the matter specifically, he would have pronounced the view that the respondent had satisfied him, at least on the balance of probabilities that the machine had not been correctly operated."[8]

33. In the present case there is no such finding implicit in the Magistrate's reasons, which have taken an abbreviated form at the invitation of Luff's counsel.

34. The proper test to be applied in appeals on questions of law from Magistrates' Courts is that stated by Sholl J in *Yendall v Smith Mitchell & Co Ltd*[9]; adopted by Adam J in *McConkey v McConkey*[10]. The test was restated by Sholl J in *Harrison v Mansfield*[11] after referring back to *Yendall v Smith Mitchell & Co Ltd:*

> "The true principle ... must be, not that everything relevant which a magistrate does not refer to is to be taken to have been overlooked, or on the other hand, that it is to be taken to have been considered, but that, if something which should have been considered is not referred to, and the nature of the decision suggests some error, which may have been due to that matter not having been considered as it should have been, or if the magistrate's observations indicate, on a comparison of what he said with what he did not say, that the matter in question has not been considered as it should have been, the appellate tribunal may properly draw such an inference, and the magistrate will have no cause to complain if it does so."[12]

35. In the circumstances of the case I am satisfied that the Director has established the Magistrate did not consider properly or at all the onus upon the defence under s49(4).

36. It remains to consider whether it was open to the Magistrate to conclude that the onus under s49(4) could have been satisfied on the evidence before her.

37. It is apparent that neither Vincent JA (implicitly) nor Callaway JA (explicitly) were prepared to exclude this possibility when the matter was considered in the Full Court.

38. In my view it cannot be demonstrated that the whole of the evidence given by the operator (including the manner in which such evidence was given) could not found an inference on the balance of probabilities that the instrument was not properly operated.

39. It is for the Magistrates' Court to consider whether it is satisfied of such inference or not.

40. Accordingly the matter will have to be remitted for further consideration with respect to the s49(1)(f) charge.

41. It was submitted on behalf of the Director that if the matter were remitted to the Magistrates' Court it should not be sent back to the original Magistrate. I reject this submission:

> (a) I do not accept that the Magistrate's second decision gives rise to an apprehension of possible bias. The provisions she was required to construe are labyrinthine and difficult. She accepted detailed written submissions made to her in circumstances where no argument of the type put to me now by Mr Tinney was then put to her by the Director. I do not accept a reasonable onlooker would suspect she would do other than further address the case in accordance with law if it were re-submitted to her.
>
> (b) It is now some eight years since the events in issue and there is a real risk that a full retrial of the matter would not result in a fair hearing. Fairness to Luff requires that the evidence originally given

forms the basis of the determination of this matter. Only the original Magistrate is in a position to make such a determination properly.

(c) Justice demands finality in this matter be achieved as quickly as is reasonably practicable.

42. Accordingly I propose to set aside the order of the Magistrates' Court with respect to the charge under s49(1)(f) and direct that the matter be further considered by the Magistrate in accordance with law.

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[1] *DPP v Luff* [2001] VSC 260; (2001) 34 MVR 78.
[2] *Luff v DPP* [2003] VSCA 81; (2003) 39 MVR 277.
[3] [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[4] [2003] VSCA 81; (2003) 39 MVR 277 at [27].
[5] Supreme Court, Unreported, 19 December 1989.
[6] Quoted at [21] above.
[7] (1992) 16 MVR 461 esp. at 467-468.
[8] 16 MVR 461 at 468.
[9] [1953] VicLawRp 53; [1953] VLR 369 at 379; [1953] ALR 724.
[10] [1960] VicRp 47; [1960] VR 295 at 300.
[11] [1953] VicLawRp 60; [1953] VLR 399.
[12] At 404.

APPEARANCES: For the appellant DPP: Mr A Tinney, counsel. Office of Public Prosecutions. For the respondent: Mr P Billings, counsel. Wilmoth Field Warne, solicitors.
