16/70

SUPREME COURT OF VICTORIA

HANCOX v WALSTAB

Menhennitt J

25 June 1970

POLLUTION OF NAVIGABLE WATERS – OIL DISCHARGED INTO CORIO BAY – DEFENDANT MASTER OF A SHIP AT THE TIME OF THE OIL DISCHARGE – EVIDENCE PRESENTED BY THE PROSECUTION OF A CIRCUMSTANTIAL NATURE – ONUS OF PROOF – DENIAL BY THE DEFENDANT OF ANY KNOWLEDGE OR INVOLVEMENT IN THE OIL DISCHARGE — FINDING BY MAGISTRATE THAT CHARGE NOT MADE OUT – WHETHER MAGISTRATE IN ERROR: *NAVIGABLE WATERS (OIL POLLUTION) ACT* 1960, S6.

HELD: Order nisi discharged.
It was not for the defendant to establish anything; it was for the Magistrate to have regard to all the evidence at that stage, which he did. He reached his conclusion and there was evidence upon which the magistrate might, as a reasonable man, have come to that conclusion which he did.

MENHENNITT J: This is the return of an order nisi to review a decision of the Court of Petty Sessions at Geelong, constituted by a stipendiary magistrate, which decision was given on the 22 April 1969.

The Court of Petty Sessions on four days, the last of which was the 22 April 1969, had before it an information by Dalgleish George Haman, to whom I shall refer as the informant, against G. Walstab, to whom I shall refer as the defendant, that on or about the 7 September 1968 at Geelong the defendant did discharge oil into the waters within the jurisdiction of the Geelong Harbour Trust, namely Corio Bay, from a ship, to wit the *SS Iron Knight*. The charge was laid under s6 of the *Navigable Waters (Oil Pollution) Act* 1960, the relevant portions of which are

> "if any discharge of oil … into any waters within the jurisdiction occurs from any ship … then subject to the provisions of this Act—
>
> (a) if the discharge is from a ship, the owner, the agent and the master of the ship, severally; …
>
> shall be guilty of an offence against this Act and liable to a penalty of not more than $2,000."

The defendant was at the relevant time the master of the vessel *SS Iron Knight*.

The evidence establishes that that vessel unberthed at Corio Quay on 7 September 1968 and that at the time it was leaving the berth oil in significant quantity was seen in the water in the vicinity of part of the vessel.

On the hearing witnesses were called for the informant and for the defendant. At the conclusion of the hearing the magistrate dismissed the information. Affidavits have been filed on behalf of the informant and the defendant, and in accordance with the well-established practice, insofar as there is conflict between those affidavits I accept the affidavit filed for the defendant, and nothing to the contrary has been suggested. Heading the two affidavits in conjunction the reasons of the magistrate were as follows:

> "The case for the prosecution was based largely almost entirely on circumstantial evidence. They have led evidence that oil had been discovered amidships to aft of the *Iron Knight* at a distance from five feet between the ship and the underneath of the pier, which distance extended as the ship proceeded on outwards from the pier. The evidence disclosed that the wind's essential flow was in an easterly direction to the area occupied by the *Baron Forbes*, and oil was observed beneath the Pier decking towards the shore at a distance of about 50 ft. over the area. The prosecution furnished records of wind conditions before and up to the time of departure to exclude the possibility of oil being driven in from the south-east, also to avoid the possibility of oil being there any time with the

> wind in a north to north-west direction. Finally, the prosecution bases its proof on the analyst's report and the evidence given by Mr Lowther. In my view, keeping in mind that this is a criminal prosecution, and there is no real onus on the defendant to exculpate himself, I feel that the strength of the circumstantial evidence diminishes in the light of the immediate and unqualified denial by the Captain of any discharge at Geelong and the production of ship's records to prove the absence of pumping operations at Geelong which could lead to an oil spillage and is further diminished by absence of noting of oil near the ship's discharge outlet or any part of the ship above the waterline. I feel the defence case is strengthened by variance of view-point between two scientific witnesses. In this regard, I feel that the evidence of Mr Durham is overall to be preferred, largely due to his greater experience and the particular application of his experience in fuel oils. The view being to some extent strengthened by evidence extracted from cross-examination of Mr Lowther. 'I can't say that the oils examined came from the same ship, or that some came from industrial fuel.'
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> The function of this Court in these difficult cases is to avoid suspicion. The Court must arrive at a decision from evidence, be mindful of the standard of proof required on whom the onus is cast. Having regard to all the circumstances, I am left with that degree of doubt that is a reasonable doubt and the case will be dismissed."

The grounds of the order nisi to review are:

> "1. That the magistrate was wrong in regarding the denial made by the Captain out of court and the production of records out of Court as diminishing the strength of the circumstantial evidence.
>
> 2. That the evidence for the Informant excluded all hypotheses consistent with innocence and the evidence for the defence was in no way inconsistent with guilt and the magistrate ought therefore have convicted."

It is convenient in this case, having regard to the grounds of the order to review and the way in which the case has been argued, to deal first with some basic principles of law applicable. In my view, the argument for the informant proceeded on two fundamentally erroneous bases in law. In the first place, various of the submissions for the informant in substance invited me to reconsider the effect and significance of the evidence and the weight which the magistrate impliedly gave to it and although it was not put this way, I was really being invited to reconsider the evidence for myself. The Full Court has made it clear that that is not the function of this Court on an order to review. Among other places, the Full Court said that in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at p351; (1961) 19 LGRA 232, when it was said:

> "This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which be did come."

The other basic matter and basic submission for the informant on this appeal goes to the whole question of onus in a case of this kind in a Court of Petty Sessions. The matter can be, I think, summarised in this way. The submission for the informant was in substance that if an informant, in a case which it is conceded is based upon circumstantial evidence, calls evidence which establishes *prima facie* that all reasonable hypotheses consistent with innocence have been precluded, then there is an onus on the defendant to call evidence to negate this and establish one of those hypotheses consistent with innocence. That was the way which the case was argued, and accordingly counsel for the informant criticised as erroneous the statement of the magistrate in his reasons in these terms:

> "In my view, keeping in mind that this is a criminal prosecution, and there is no real onus on the defendant to exculpate himself", etc.

Counsel for the informant submitted that in a case where the informant has called evidence which amounts to a *prima facie* case, and *prima facie* excludes all reasonable hypotheses consistent with innocence, that there is a legal onus, not an evidentiary onus, a legal onus on the defendant to exculpate himself by establishing positively at least one of the hypotheses which otherwise have been negated by the informant, in other words, to establish positively a hypothesis which is consistent with innocence. In my view, that submission is contrary to the long and well-established legal principles applicable to this information, which is, as the magistrate rightly points out, in the category of a criminal prosecution.

The law is that the onus is on the informant to establish the guilt of the defendant beyond

reasonable doubt. And it is, I think, clear that in the absence of some statutory provision to the contrary, that principle applies to all statutory offences and that it requires a statutory exception to alter that onus. It is sufficient to refer to the decision of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 where the headnote states the effect of the relevant part of the unanimous decision of five judges of the High Court, presided over by Dixon CJ. And the headnote, so far as relevant, reads:

> "In criminal cases, when the prosecution has made out a *prima facie* case, the burden of proof does not in the absence of some statutory provision on the subject shift to the accused with the consequence that he fails to displace the *prima facie* case by denial or explanation, he ought to be convicted. The burden of proving guilt beyond reasonable doubt rests on the prosecution from first to last.
>
> A finding that a *prima facie* case has been made out is a finding of law that on the evidence as it stands the defendant could lawfully be convicted of the offence charged. Whether he ought to be convicted depends upon the tribunal being satisfied beyond reasonable doubt on the whole of the evidence before it that the defendant is guilty."

That basic principle applies in this case and there is no statutory provision which shifts the onus. On the contrary, the provisions of s7 of the *Navigable Waters (Oil Pollution) Act* reinforce the view that the onus of establishing the discharge of the oil from the ship is on the informant, because s7 provides special defences in a case where it is assumed that the discharge of the oil has been established but there are special or exceptional circumstances. The presence of those special defences underlines the conclusion that otherwise the onus is, as the High Court says, from first to last on the informant to establish the discharge of the oil from the ship. The fact that s6 makes liability vicarious, namely on the owner, the agent and the master, if anything would tend to point in the same direction, but the general principle of law is clear.

For the informant there were invoked decisions and reasons for judgment dealing with the situation where an informant has excluded all reasonable hypotheses consistent with innocence, but those cases are referable to the question as to whether or not there is a case to answer. In *Chappell v Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376 at 392, Gowans J said:

> "Before drawing an inference of guilt he, (that is the magistrate) would have had to consider whether the circumstances left open a reasonable hypothesis consistent with innocence and be satisfied that they did not: *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619 at pp630, 651; 17 ALR 566."

But His Honour goes on to make it clear that he is directing his attention to the question whether at the end of the prosecution case the defendant could lawfully be convicted. So that it was referable to both the issue of whether there was a *prima facie* case and whether at that point, that is at the conclusion of the informant's case, the defendant could be convicted. And the reasons for judgment in *R v Wilson* 2 W.W.& A'B. (L.) 22 at pp25, 26, and 27 make it clear that the exclusion of every hypothesis consistent with innocence is referable to the same issue, namely whether the judge should leave the case for the jury at the end of the Crown case.

It does not follow from those principles that because an informant has *prima facie* excluded every hypothesis which is consistent with innocence that that fact in some way alters the legal burden which is on the defendant. It is true that to call such evidence does have, I think, an effect on what is called the evidentiary onus. As *May v O'Sullivan* makes clear, there are at the conclusion of the informant's case, or the Crown's case, two issues, namely, whether the informant has made out a *prima facie* case, and secondly whether in the evidence as it stands the defendant ought to be convicted.

On those issues an evidentiary onus arises in the sense that if the case is left there, and no evidence is called for the defendant, not only may the Court rule that there is a case for the defendant to answer but the Court if it is satisfied may conclude that the defendant ought to be convicted, it not being obliged to do so.

But if it reaches either of those conclusions, or would reach either of those conclusions if asked, in that sense there is an onus on the defendant to give evidence relating to the issue. That burden of giving evidence relates not to the ultimate legal burden of proof but merely the evidentiary burden, and once the defendant gives some evidence relating to the issue in the case,

then that evidentiary burden is satisfied and the legal burden of establishing guilt is, as it always has been, on the informant. This aspect of the evidentiary onus is discussed in *Cross on Evidence*, 3rd ed. At p22 the learned author refers to "*Prima facie* evidence: first sense", and says:

> "The next degree of cogency is where a party's evidence in support of an issue is sufficiently weighty to entitle a reasonable man to decide the issue in his favour, although, as a matter of common sense, he is not obliged to do so."

And further down he refers to "*Prima facie* evidence; second sense (presumptive evidence)" and says:

> "The next degree of cogency is where a party's evidence in support of an issue is so weighty that no reasonable man could help deciding the issue in his favour in the absence of further evidence."

That, as I understand it, is a discussion and a statement of the distinction between a *prima facie* case and the next step, namely a situation where the evidence is such that without more the only conclusion open would be that the defendant or the accused would be found guilty, or convicted. But then the learned author goes on at p73 to discuss the matter under the heading "The Shifting of the Evidential Burden" in these words;

> "(i) Tactical shifting.– Let us assume that the proponent of an issue discharges the evidential burden which rests on him by adducing evidence that is '*prima facie*' in the first sense explained on p22, *ante*. If the tribunal of fact believes his witnesses, the requisite inference may be drawn in his favour, and the chances of this happening will generally be increased by the opponent's failure to adduce evidence.
>
> Nevertheless, it is quite possible that the tribunal of fact will not draw the requisite inference, even if the opponent does not adduce any evidence. He merely runs a risk of losing the issue if he remains silent, and, in such a case, when it is said that the burden of proof has shifted from the proponent to the opponent, all that is meant is that the latter should adduce some evidence as a matter of common prudence. Examples are provided by any criminal case in which the prosecution has adduced sufficient evidence to warrant a finding of *mens rea* if its witnesses are believed. Lord Denning describes the evidential burden of disproving the case made by the proponent on the issue in question as 'a provisional burden'.
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> (ii) Legal shifting.- Now let us assume that the proponent of an issue discharges the evidential burden which rests upon him by adducing evidence which is 'presumptive, or '*prima facie*' in the second sense explained on p22, *ante.* Provided his witnesses are believed, the tribunal of fact is bound to decide the issue in the proponent's favour if the opponent calls no evidence. In such a case, when it is said that the burden of proof has shifted from the proponent to the opponent, what is meant, is that the latter must adduce evidence on the issue or lose. If the opposition does call evidence, and the jury are unable to come to a definite conclusion one way or the other, the proponent will lose if the legal burden rests on him."

I understand that passage in *Cross* to mean that whether the evidence for the informant establishes a *prima facie* case or such a case as without further evidence would result in the conviction of the defendant, nonetheless the legal onus never alters, and that all the defendant must do to satisfy the evidentiary onus is to call some evidence on the issue, that being the expression which the learned author secondly uses, and the issue, I take it to mean the central issue in the case, the charge, and accordingly it appears to me that if the evidence makes out a *prima facie* case or even, in the absence of other evidence, would result in a conviction, all the defendant has to do is to call some evidence going to the basic question whether or not, in this case, the ship did or did not discharge oil, and once any such evidence, and by evidence I mean of course evidence of any significance, is called, then it seems to me that the matter reverts to the legal onus – the evidentiary onus has been satisfied – and it is then for the informant to satisfy the court on the balance of probabilities on the whole of the evidence that the defendant is guilty. And in that situation the duty of this Court then is to ask whether on the whole of the evidence the magistrate might, as a reasonable man, come to the conclusion which he did, as stated, in *Taylor v Armour* (*supr*a).

I repeat that it appears to me that in this case the argument for the informant has proceeded on bases fundamentally at variance with the law as I have stated it, and put forward a proposition which to me is basically erroneous, namely that once the informant has established a *prima facie c*ase, based upon *prima facie* evidence excluding all reasonable hypotheses consistent with

innocence, that then there is a legal onus on the defendant to show that one of those hypotheses consistent with innocence was present. In my view that is not the law, and is basically contrary to the decisions to which I have referred and the authorities to which I have referred.

In the light of the law as I have stated it, I now turn to consider my function, namely whether on the whole of the evidence the magistrate might as a reasonable man come to the conclusion he did.

It is convenient to deal with the grounds of the order nisi in turn and I repeat the first, namely that the Magistrate was wrong in regarding the denial made by the Captain out of court and the production of records out of Court as diminishing the strength of the circumstantial evidence. What the magistrate said was:

> "I feel that the strength of the circumstantial evidence (that is the circumstantial evidence to which he had previously referred) diminishes in the light of the immediate end unqualified denial by the Captain of any discharge at Geelong and the production of ships records, to prove the absence of pumping operations at Geelong which could lead to an oil spillage."

It is I think necessary to consider first what the magistrate meant by the introductory portion of that statement, namely "I feel that the strength of the circumstantial evidence diminishes". Up to that sentence the magistrate had summarised in a brief form the case made for the informant. I think it is a fair reading of what he said to that point that he was not merely stating in a descriptive way the evidence, but was stating what the effect of the evidence that he referred to would have been if there had been no other evidence, and indeed what that evidence in fact established, with this exception, that as to the analyst's report it was clear that he was merely referring to it descriptively and not making a finding about it, in the light of what he subsequently said.

He commenced his reasons by saying "The case for the prosecution was based largely almost entirely on circumstantial evidence". In the light of those opening words and what followed up to the sentence to which I am directing attention, it seems to me that the expression "I feel that the strength of the circumstantial evidence diminishes" must fairly be read to mean "I feel that the strength of the circumstantial evidence case diminishes", or putting it another way "I feel that the case for the informant which I have already said was based largely almost entirely on circumstantial evidence diminishes" etc. No other reading is, I think, a fair reading. He was not saying that this evidence collided directly with the evidence to which he had referred because it was obviously on a different subject matter. What he was saying was that there was a case for the informant based upon circumstantial evidence and that case diminished in the light of certain evidence.

The evidence to which he referred was evidence of a conversation between an officer of the Melbourne Harbour Trust and the defendant. And again reading the portions of the answering affidavit which correct what appeared in the affidavit for the informant, that evidence was this:

That on the 9th September at 3.00 p.m., that is almost two days after the departure of the vessel from Geelong, the witness Reginald Goodes said to Captain Walstab:

> "I understand there was a considerable amount oil in the water when you left Corio Quay. Were you aware of that?" He replied "No, not at all. I was amazed when the Harbor Master on the wharf pointed it out to me, as we were leaving." I said to him, "When you were at Geelong, did you pump any bilges, transfer tanks or carry out any operation likely to discharge oil?" The defendant said "No. My chief officer and chief engineer will make sworn statement to that effect." I said, "When did you last carry out any operations which would be likely to discharge oil?". The defendant replied, "I can show you a book which I am required to keep by the company, which shows what I say. My written authority must be obtained before any pumping is carried out likely to discharge oil." The defendant then produced and referred to the book. I said "Do you have any oily water separator in this vessel?" He said "Yes". I asked him what sort it was. He said a Victor. I said "It is possible to discharge bilge water from this ship, without going to the separator?" He said "Yes. I'm sure there was nothing discharged from this ship."'

It was not submitted on behalf of the informant that that was inadmissible evidence, and indeed, of course, it had been led for the informant as evidence-in-chief. Nor was it submitted that it was wrong for the magistrate to take into account the portions of that conversation that

were favourable to the defendant. Any such suggestion would, of course, have been contrary to the well-established law which is stated by Newton J in *Sharp v Hotel International Ltd* (1969) [1969] VicRp 12; [1969] VR 103 at 109-10, where His Honour says;

> "... it appears to be well established that where a prosecutor puts an accused person's statement in evidence, then it becomes evidence for the accused as well as against him, although the parts of the statement which are in favour of the accused may be contradicted by other evidence adduced by the prosecutor, and, in any event, the jury or other tribunal need not accept those parts."

And His Honour cites a number of decided cases and textbook authorities in support of that proposition of law. Counsel for the informant did not dispute it was a correct statement of the law. What he did submit was that the magistrate was in error in treating that evidence as in any way diminishing the strength of the circumstantial evidence, which I construe to mean, diminishing the case for the informant based upon the circumstantial evidence. It was submitted that it did not diminish that case because it dealt with different matters. In other words, it did not deal with any of the hypotheses consistent with innocence which had been covered by the evidence. It was further said that it was substantially or in part based upon hearsay and in any event that the magistrate had given it too much weight.

As to the first of those criticisms it appears to me that it proceeds upon a misconception of what the magistrate was saying. He did not say, and in my view did not intend to say, that this evidence went directly to the hypotheses which had been dealt with by the informant's evidence for the obvious reason that it went much more directly to the heart of the matter, it went to the question whether oil had been discharged from the ship. And in that sense it clearly went to the strength of the case for the informant based upon circumstantial evidence.

As to the aspect that the statement included some hearsay, it appears to me that it is clear that at three points at least the statement was concerned with matters of which the defendant had direct knowledge. The charge left open the possibility of discharge of oil either intentionally or accidentally. And this statement went directly to negating either intentional discharge or discharge within the knowledge of the master, because he was asked: "When you were at Geelong, did you pump any bilges, transfer tanks or carry out any operation likely to discharge oil?" And he said "No", and that was in part a matter as to which he had direct knowledge, or would have direct knowledge, and a matter which would be under his control to some extent and supervision.

Next he said, "I can show you a book which I am required to keep by the company which shows what I say, my Written authority must be obtained before any pumping is carried out likely to discharge oil." And the defendant then produced and referred to the book. That again was a statement pointing against any discharge with which he was concerned or for which he was responsible, because he was saying that if there were such his written authority was necessary and by inference he was saying that the book showed there was none. That again was a matter within his own knowledge. And finally he said, "I'm sure that there was nothing discharged from this ship." And that in part was a matter within his own knowledge.

Some of the matters referred to were within his own knowledge and insofar as he referred to other matters he was, in my view, referring to matters that were the natural outcome of the questions asked. But in any event, in my view, it was open to the magistrate to have regard at the least to the parts of the statement as to which he had personal knowledge. And that is the language of the magistrate when he says "I feel that the strength of the circumstantial evidence diminishes in the light of the immediate and unqualified denial by the Captain of any discharge at Geelong and the production of ship's records, to prove the absence of pumping operations at Geelong which could lead to an oil spillage." Those are all references to matters as to which the Captain had personal knowledge and the records which he personally produced. Accordingly, in my view, it was open to the magistrate to have regard to that fact and going directly to the issue whether there was a discharge of oil, in my view it did diminish the strength of the informant's case, or certainly it was open to the magistrate so to conclude.

As to the weight the magistrate gave to it, this is one of the areas in which, in my view, the argument for the informant proceeds upon an erroneous view. The weight is a matter for the magistrate. All he said was that it diminished the case, he did not say to what extent it diminished the case. In my view it was reasonably open to him to conclude that it diminished the informant's

case, and that is my only task on this order to review. For all of those reasons I conclude that the first ground of the order nisi is not made out and is not a ground for concluding that the magistrate was in error in dismissing the information.

The second ground, I repeat, was that the evidence for the informant excluded all hypotheses consistent with innocence and the evidence for the defence was in no way inconsistent with guilt and the magistrate ought therefore have convicted. This statement itself, in my opinion, indicates or points to the erroneous legal submissions that were advanced before me, and I have dealt with them. But I go beyond that and ask whether, applying the true legal test, the magistrate ought to have convicted assuming in the informant's favour that that is an issue covered by that ground.

The magistrate was not invited to find, nor did he find, whether there was a *prima facie* case which called upon the defendant to answer. He did not find, and it would be not appropriate ordinarily to ask him to find, whether at the conclusion of the informant's case he would have convicted the defendant. In order to consider what he said, however, it is necessary for me to examine the evidence to some extent and in the light of that evidence the first conclusion I reach is that it would have been open, in my view, to the magistrate to have held at the end of the informant's case that there were hypotheses consistent with innocence which had not been excluded by the informant.

The form the informant's case took was in effect dual. The informant's case took the form of attempting to exclude all possible sources of discharge of oil into the water near the vessel at about the time the vessel was leaving. In addition to that, the informant's case took the form of a quite separate form of circumstantial evidence namely, evidence called to establish that the oil found in the water and the oil in the ship were the same or similar. And I have not any doubt that that is how the case was presented to the magistrate, from a reading of the evidence and from the magistrate's dealing with the matter, that both of those matters were put as part of the circumstantial evidence upon which he should conclude that the defendant was guilty.

The hypotheses which might have explained the presence of the oil, other than by discharge was from the *SS Iron Knight* were the possibility that it came in from the east on the water, which possibility I think the evidence excluded by showing that that was contrary to the direction of the wind and that no tidal flow would have brought it there. The second possibility was that it came under the wharf and around the ship from the south; that again I think the evidence excluded by showing the direction of the winds. The third possibility was that it came from the bunker line; that I think was excluded on the evidence by evidence that at the time the bunker line was full of diesel and not fuel oil and that there was no sign of discharge at the discharge points from the bunker line. The fourth possible source was from Cowies Creek and there was evidence that that was observed and that no discharge was taking place from there. The fifth possibility was that the oil came from land outlets terminating on the wharf and from outlets into the wall at the western end of the quay which came past industrial properties.

In my view it was reasonably open to the magistrate to have concluded that that last real hypothesis consistent with innocence had not been excluded. In my view the evidence as to those outlets did not cover the whole of the time that the *Iron Knight* was present at the berth and I think that the evidence at page 27 in the affidavit for the informant that "During the time the *Iron Knight* arrived, and before I did not see any indication of any oil spillage in the dock inlets to the drains as shown on the plans in Exhibit "B"" is a reference to the time of arrival and the time before arrival and is not evidence that the witness was saying he inspected those outlets on the whole of the several days the *Iron Knight* was berthed. And again, I think that there is no evidence which excludes the possibility of discharge through the outlets in the western wall of the quay. However, the informant also called an analyst who gave evidence that the oil in the water and the oil in the ship on analysis were the same or similar, and bearing in mind all that it may well be that the magistrate would have ruled that there was a case for the defendant to answer and if he had so ruled I would hold that it was reasonably open to him so to do.

Whether it would have been open to him reasonably to conclude at the end of the informant's case that the defendant ought to be convicted is a more open question, bearing in mind the gap in the evidence to which I have referred. But it is not necessary for me to pronounce on that. It is sufficient only to say that the defendant elected to give evidence, that is, have evidence given on

his behalf, in the light of the state of the case at that stage. At that point all the defendant had to do, in my view, to shift any evidentiary onus that was then on him was to call some evidence, some real evidence, that went to the basic issue whether or not the ship did or did not discharge the oil, not evidence dealing with the hypotheses dealt with by the informant, although that could be covered; but any evidence going to the basic issue whether the ship discharged oil in my view was sufficient to satisfy the evidentiary onus.

In my view the defendant called evidence under three headings that was all evidence on that basic point. In part, it was evidence that was referred to by the magistrate and it is, I think, convenient to deal with it in the way in which he dealt with it and then advert to other matters.

The first matter he referred to I have already mentioned namely the answers of the defendant when interviewed at Geelong. In the light of the authorities, to which I have referred, in my view that is admissible evidence which did diminish the strength of the *prima facie* case made for the informant, being a circumstantial case, based on circumstantial evidence. And the mere fact that the statements were in the defendant's favour does not diminish its admissibility. The fact that the statements were made two days later does not affect its admissibility. The weight to be given to those statements, in all the circumstances, is entirely a matter for the magistrate, but in my view it was reasonably open to him to conclude that it did diminish the case for the informant based on circumstantial evidence.

The next matter referred to by the magistrate is the absence of noting of oil near the ship's discharge outlet, or any part of the ship above the water line. This is based in part upon evidence called for the informant as recorded at page 18 of the affidavit of the informant. Captain Gordon, Assistant Harbour Master at Geelong, gave evidence and under cross-examination he said, "There was no oil coming out of the outlets on my side of the ship. I saw no oil stain down the side of the ship." His earlier evidence under cross-examination on that page reveals that at the time he was walking up and down the wharf, that he had the ship under close observation and that he was within eight feet of it for some of that time. And he was obviously looking for what was happening because he observed the oil he said "Until the moment the ship pulled out, I did not see any oil", which indicates that it was at that time he saw the oil.

Accordingly, there is evidence that he looked and saw no oil coming out of the outlets on his side of the ship, and saw no oil stain down the side of the ship. It was acknowledged for the informant, as the evidence, I think, establishes that if there was an oil discharge it was from those outlets that it would have occurred.

In addition to that evidence, to which the magistrate is obviously referring, there is the evidence of the engineer Mr Adema as set out in paragraph 9 of the answering affidavit, which took the form of this question and this answer: Q. "If the line was accidentally pumped out under pressure there could be water as well as oil and if the side of the ship were wet then would it be unlikely that the oil would adhere in any quantity?" The witness replied, "Yes, but fuel oil is so thick that it would still be seen on the side." The combination of that evidence and the evidence of Captain Gibson, in my view, was evidence which the magistrate was reasonably entitled to conclude diminished the case for the informant based on circumstantial evidence.

The next matter the magistrate referred to was the difference in evidence of the two witnesses who had analysed the oil. He said that he preferred the evidence of Mr Durham called for the defendant for reasons he gave. It is to my mind clear that part of the circumstantial evidence called for the informant was the evidence of their analyst, or the analyst called by them that the oil in the water and the oil in the ship were the same or similar.

Included in the evidence of Mr Durham was evidence which the magistrate clearly accepted, saying that that was erroneous and that having regard to the analysis that was made and the evidence that was given they were not the same or similar. So that at this point there was a direct collision as to part of the circumstantial evidence. And in my view it was reasonably open to the magistrate to regard that as diminishing the strength of the case for the informant based on circumstantial evidence.

The magistrate called in aid in support of that conclusion the admission by Mr Lowther in

cross-examination, that is the analyst called for the informant, "I can't say that the oils examined came from the same ship, or that some came from industrial fuel." And the actual evidence itself is in substantially those terms because at page 36 in cross-examination being asked of the oil, that is the oil from the ship and the oil in the water, the question was "From the same ship?" A: "I can't say," Q. "One from a ship and one from industrial use? A. "I can't say." The magistrate accurately paraphrased that in the evidence I have read. That, as I have said, was evidence that he was reasonably entitled to believe and reasonably entitled to conclude diminished the strength of the informant's case based on circumstantial evidence.

Much reliance was placed for the informant before me on the fact that the engineer of the ship called for the defendant had conceded under cross-examination that there would have been at the time, or might well have been at the time, in the bilge pipe leading from the bilge pump perhaps twenty gallons of oil. And he acknowledged that with the general service pump, or ballast pump working, if the valve closing off that bilge pipe outlet were left open by mistake, water could be delivered at pressure on the inlet side of the bilge pump and if that were the case the remaining oil in the bilge outlet pipe could be discharged from the ship. Reliance was placed upon this as being another possibility consistent with innocence which had been excluded. However, the evidence before the magistrate was that when the oil was seen in the water, the defendant's attention was drawn to it and that he then communicated with the engineer on the telephone. In the answering affidavit, in paragraph 7, it is said that the engineer further said that after be got a phone call from the Captain in Corio Bay that oil had been discovered he checked and saw that every valve was shut.

In the account of the evidence given in the affidavit for the informant the engineer said, "I made sure every valve was shut. After the ship left the berth, I had 'phone call from the Captain while the ship was still in Corio Bay. It was then that I made the check and the enquiries". He had previously referred to enquiries he had made of various other persons on the ship, namely, greasers, first engineer and second engineer.

In my view it was reasonably open to the magistrate to conclude that that evidence meant that upon learning of the oil in the water the master communicated by 'phone to the engineer and that the engineer forthwith checked and saw that every valve was shut and that he did that before making the enquiries. It is significant that on page 46 that is the order in which it is said, "It was then that I made the check and the enquiries." In my view it was, therefore, reasonably open to the magistrate to conclude that the very possibility that was put to the engineer in cross-examination had occurred to him, namely, that by an inadvertent consequence of pumping elsewhere there had been an accidental discharge of fuel oil if a valve were left open, and the evidence is that he immediately checked and found that there had been no valve left open.

In my view, it was reasonably open to the magistrate to accept that evidence, and to reach that conclusion and if so, that did two things, it tended to establish that there was no discharge of oil accidentally and it tended to answer the suggestion that there was a reasonable possibility consistent with innocence that was still open. That evidence was indeed positive evidence in my view which it was reasonably open to the magistrate to accept and as diminishing the case based on circumstantial evidence.

It is true that the magistrate made no reference to it, but as it was relied upon heavily for the informant I have dealt with it because it seems to me that the magistrate was reasonably entitled to conclude that on all the evidence the probability was that the valve was not open; or certainly that it certainly had not been established that a valve had been accidentally left open or that that was a reasonable possibility. I have dealt with these matters because that is the way that the magistrate dealt with them, but he at the end of his reasons correctly came back to the real issue when he said,

> "The function of this Court in these difficult cases is to avoid suspicion. The Court must arrive at a decision from evidence, be mindful of the standard of proof required on whom the onus is cast. Having regard to all the circumstances, I am left with that degree of doubt, that is a reasonable doubt and the case will be dismissed."

In my view he was entirely right in approaching the case that way, it was not for the defendant to establish anything, it was for him to have regard to all the evidence at that stage,

which he did. He reached his conclusion and the only remaining function for me which I have really dealt with is to ask whether there was evidence upon which the magistrate might, as a reasonable man, come to that conclusion which he did.

For the reasons I have given, in my opinion there was such evidence and, assuming that that matter is raised by the second ground of the order to review, that ground made out, nor is the ground as expressed made out, which in my view proceeds on an erroneous basis in law. For all of the reasons I have given, the order nisi will be discharged. The order of the Court is that the order nisi is discharged. The informant is ordered to pay the defendant's taxed costs, not exceeding $120.00.
