45/74

SUPREME COURT OF VICTORIA — FULL COURT

KING v McLELLAN; KERLEY v FARRELL

Gowans, Nelson and Anderson JJ

23, 24, 28 May, 24 June 1974 — [1974] VicRp 92; [1974] VR 773

MOTOR TRAFFIC – DRINK/DRIVING – CHARGES LAID – WHETHER DRIVER OF MOTOR CAR WHO IS UNDER ARREST OBLIGED TO COMPLY WITH A POLICE OFFICER'S REQUEST TO FURNISH A SAMPLE OF BREATH: *MOTOR CAR ACT* 1958, SS80F(6), (8).

HELD:

1. In *Thomson v Cotton*, unrep, VSC, 8 October 1973, Murphy J ruled that, notwithstanding the provisions of s80F(6) of the *Motor Car Act* 1958 ('Act') which authorized a member of the police force to require a person who had become a suspect by answering to one or other of the descriptions therein set out to furnish a sample of his breath, and s80F(8) which obliged the "suspect" to do so, and s80F(11) which made it an offence for him to refuse or fail to do so, such provisions did not apply to a person who when so required was already under arrest on a charge of driving a motor car while under the influence of intoxicating liquor under s80B and that a refusal to furnish the sample was therefore not an offence under s80F(11) of the Act. The basis of his Honour's reasoning was that there was applicable to the case of a person under arrest a common law rule that protected him from being obliged to incriminate himself in any form. He held that in the absence of clear words in the relevant legislation, indicating that the legislature had intended to abrogate the common law rule, the legislation should not be construed so as to require a person under arrest to furnish a sample of his breath, the analysis of which might incriminate him, and further that on its proper construction s80F(11)(a) of the Act did not evince an intention to make it apply to a person under arrest.

2. The Court of Appeal did not share these views. Section 80F(11)(a) was not to be read down in the way suggested but applied to all persons in respect of whom the requirements of s80F(6) and s80F(8) had been fulfilled. The contrary conclusion appeared to depend in part upon attributing to a maxim of the common law a breadth of operation which it did not have and in part upon finding in the relevant statutory provisions indications of intention which were not there and downgrading the clarity of the meaning of the provisions themselves.

***Thomson v Cotton*, unrep, VSC, 8 October 1973, Murphy J, overruled.**

3. That there is a fundamental principle that no man can be compelled to incriminate himself cannot be gainsaid. The maxim is one expression of the principle which has been quoted and applied countless times. But as an examination of the history of this principle shows, the protection afforded by it has always been accorded, and has only been accorded, in respect of a right to refuse to answer incriminating questions and not to incriminate himself, when being interrogated in some form of judicial inquiry. Even in the United States where the common law maxim has been transmuted into constitutional safeguards or statutory protections the principle has not been extended beyond incriminating answers to questions.

4. Accordingly, the common law principle regarding self-incrimination did not apply to the taking of a breath sample pursuant to s80F of the Act.

THE FULL COURT (Gowans, Nelson and Anderson JJ) delivered the following judgment: There are before this Court two orders nisi to review orders made by Magistrates' Courts in respect of prosecutions for offences against provisions of the *Motor Car Act* 1958, as amended, relating to or arising out of the driving of motor cars where intoxicating liquor was involved. Both cases relate to the obligation imposed by the Act upon motorists in certain circumstances to furnish a sample of their breath by means of a breath analysing instrument and the consequences in the event either of a refusal to furnish such a sample or of the sample being above a certain prescribed content of alcohol. These orders to review have been made returnable before or referred to the Full Court for the purpose of consideration being given to the judgment of Murphy J in *Thomson v Cotton* delivered on 8 October 1973, wherein his Honour held that the driver of a motor car was not obliged to comply with a request of a member of the police force to furnish a sample of his breath

under s80F(6) and s80F(8), and was not guilty of an offence under s80F(11) if he refused to do so, if he were already under arrest on a charge of driving a motor car while under the influence of intoxicating liquor.

It is convenient to set out in some detail at the outset the relevant provisions of the *Motor Car Act*. The sections particularly involved are s80B, s80D, s80E, s80F, s81A and s82 which are designed to deal with persons who drive motor cars and who are or may be affected by intoxicating liquor. They constitute a set of provisions for ascertaining whether such persons are so affected and for prescribing appropriate obligations and penalties.

Section 80B makes it an offence for any person to drive a motor car while under the influence of intoxicating liquor or of any drug to such an extent as to be incapable of having proper control of the motor car, and a member of the police force has the same powers of arrest of such an offender as he has in relation to felonies.

Section 80D provides that in relation to a variety of offences, including driving under the influence of liquor and driving with a blood alcohol count of more than .05 per cent, evidence may be given of the taking of a blood sample and of its analysis. The section sets out at length the procedures involved in the taking of the blood sample. The details are not material to either of the cases under review.

Section 80E and s80F provide an alternative method of determining the alcoholic content of a motorist's blood by the analysis of his breath by a breath analysing instrument. These provisions need to be considered in some detail.

Section 80E(1) authorizes any member of the police force at any time to require any driver of a motor car or person in charge of a motor car whose ability to drive he reasonably believes is impaired by intoxicating liquor, or who has been involved in an accident, "to undergo a preliminary breath test by a prescribed device...for detecting speedily without disclosing the actual level of concentration whether the percentage of alcohol in the person's blood is greater than .05 per cent or is less than .05 per cent". Any person when so required, who refuses or fails to undergo such a preliminary breath test, is guilty of an offence.

Section 80F deals with the taking of the more formal and more precise breath test by the use of a breath analysing instrument, and the result of such a breath analysis as certified in a prescribed form of certificate is by subs(1) admissible in evidence in respect of a variety of motoring and allied offences, including driving under the influence of liquor (s80B) and driving with a blood count of more than .05 per cent (s81A), to prove the percentage of alcohol present in the blood of the person at the time his breath was analysed by the instrument. One effect of this is that provided for by s80G, that if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of any person charged with the offence, it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed.

Section 80F(6) provides in the first instance that a person who undergoes a preliminary breath test may, according to the result, be required by a member of the police force to furnish a sample of his breath for analysis by a breath analysing instrument, and further it provides as follows:—

> (b) Where a member of the police force—
>
> (i) finds a person driving a motor car or in charge of a motor car within the meaning of s82; or
>
> (ii) believes on reasonable grounds from his own observations or from information received by him or both that a person has been driving a motor car or in charge of a motor car within the meaning of s82—
>
> and such person behaves in a manner which, in the reasonable belief of such member, indicates that such person's ability to drive a motor car is or was impaired (as the case requires) by the consumption of intoxicating liquor the member of the police force may, instead of requiring such person to undergo a preliminary breath test, require such person to furnish a sample of breath for analysis by a breath analysing instrument."

By s80F(8) any person so required to furnish a sample of his breath shall do so by exhaling into the breath analysing instrument through the tube connected thereto, but shall not be obliged so to do (a) more than two hours after the driving or being in charge of the motor car, and (b) except at or in the vicinity of the place where the driving or being in charge of the motor car occurred or at a police station or within the grounds or the precincts thereof, or where he may have been taken for medical treatment.

Section 80F(11)(a) provides that any person who, when required by a member of the police force pursuant to the provisions of subs(6) to furnish a sample of his breath for analysis, refuses or fails to do so shall be guilty of an offence against the sub-section, and subs(11)(b) of the section provides that any person guilty of an offence against s80F(11) may be apprehended without warrant by the member of the police force making the requirement.

Section 80F(12) provides that a person is not to be convicted of refusing to furnish such a sample of his breath for analysis if he satisfies the court that there was some reason of a substantial character for his refusal other than a desire to avoid providing information that might be used against him.

Section 81A(1) provides that any person who drives a motor car while the percentage of alcohol in his blood in grammes per 100 millilitres of blood is more than .05 per cent shall be guilty of an offence. Subs(2) provides that any person guilty of an offence under subs(1) may be apprehended without warrant by any member of the police force.

In *Thomson v Cotton*, Murphy J ruled that, notwithstanding the provisions of s80F(6) which authorizes a member of the police force to require a person who has become a suspect by answering to one or other of the descriptions therein set out to furnish a sample of his breath, and s80F(8) which obliges the "suspect" to do so, and s80F(11) which makes it an offence for him to refuse or fail to do so, such provisions did not apply to a person who when so required was already under arrest on a charge of driving a motor car while under the influence of intoxicating liquor under s80B and that a refusal to furnish the sample was therefore not an offence under s80F(11). The basis of his Honour's reasoning was that there was applicable to the case of a person under arrest a common law rule that protected him from being obliged to incriminate himself in any form. He held that in the absence of clear words in the relevant legislation, indicating that the legislature had intended to abrogate the common law rule, the legislation should not be construed so as to require a person under arrest to furnish a sample of his breath, the analysis of which might incriminate him, and further that on its proper construction s80F(11)(a) did not evince an intention to make it apply to a person under arrest.

We should say at the outset that with respect we do not share these views. We are of opinion that s80F(11)(a) is not to be read down in the way suggested but applies to all persons in respect of whom the requirements of s80F(6) and s80F(8) have been fulfilled. The contrary conclusion appears to us to depend in part upon attributing to a maxim of the common law a breadth of operation which it does not have and in part upon finding in the relevant statutory provisions indications of intention which are not there and downgrading the clarity of the meaning of the provisions themselves.

Each of the counsel who appeared for the respective defendants in the two orders to review with which we are now concerned sought to maintain for two broad reasons that s80F(11)(a) was inapplicable to any person under arrest for an offence against s80B of the *Motor Car Act* or any cognate offence.

In the first instance they adopted the reasons which Murphy J had advanced in reliance on common law principle. Secondly, they advanced an argument which looked to the effect of s460 of the *Crimes Act* 1958 with respect to procedure on arrest.

In relation to the first argument the maxim concerned is *nemo tenetur se ipsum accusare*. It was submitted that though the authorities on the existence of the rule uniformly referred to such a rule in relation to curial interrogations, the protection afforded by the common law was not limited to persons asked incriminating questions in the course of proceedings but extended to protect a person in custody against being required in any way by act or conduct or word to

provide evidence against himself. It was then said that the breath analysis legislation did not clearly abrogate the right of a person in custody not to incriminate himself, for, though s80F(6), s80F(8) and s80F(11) imposed an obligation to give a sample of breath and a penalty for refusing or failing to do so, the legislation did not in terms or in clear language stipulate that such obligation existed after a person was arrested, and thus Parliament could not be taken to have intended to abrogate a person's common law right not to incriminate himself in such a situation. So, it was said, the right remained, entitling a person to decline to furnish what might be an incriminating sample of his breath.

That there is a fundamental principle that no man can be compelled to incriminate himself cannot, of course, be gainsaid. The maxim is one expression of the principle which has been quoted and applied countless times. But as an examination of the history of this principle shows, the protection afforded by it has always been accorded, and has only been accorded, in respect of a right to refuse to answer incriminating questions and not to incriminate himself, when being interrogated in some form of judicial inquiry. Even in the United States where the common law maxim has been transmuted into constitutional safeguards or statutory protections the principle has not been extended beyond incriminating answers to questions.

> "The history of the privilege—especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of his guilt which would thus take the place of other evidence.... In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion": *Wigmore on Evidence*, Revised Edition, s2263.

The operation of the maxim has been equally limited in Australia: *Kempley v R* (1944) 44 SR (NSW) 416; 61 WN (NSW) 16; *R v Owen* [1951] VicLawRp 57; [1951] VLR 393; [1951] ALR 852; *R v Carr* 20 ALR 373; [1972] 1 NSWLR 608; 8 ATR 728. If in his general observation in *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579 at p581 Sholl J intended to say something different from what he had said in this regard in *R v Owen* we are unable to accept it.

It is unnecessary to pursue the connexion between the principle and such statutory immunities for witnesses as are to be found in s29 and s30 of the *Evidence Act* 1958, for these subjects do not extend beyond the field of interrogation in the course of curial proceedings, and the present discussion is not concerned with that. Nor is it profitable to examine the limits within which confessional statements are admitted in evidence, for these concern extra-curial statements, and not only did the principle not extend to them, but they are not in question in the present case. On the other hand, when the subject matter extends beyond interrogation and beyond statements, to other forms of conduct, the principle pursuant to which evidence as to such conduct may be excluded in the exercise of judicial discretion has a different history and a different source from the immunity against self-incrimination in curial proceedings expressed in the maxim. Such evidence is excluded on the basis of fairness and not because of the common law right of non-incrimination. The common law right is, of course, based on fairness, but it is not the basis for excluding evidence unfairly obtained.

But there is also a distinction to be maintained between a statement made by a prisoner and a fingerprint or facial or other physical characteristics of a person. The making of an incriminating statement brings into being adverse evidence which previously did not exist. If forced from a prisoner it requires him to create evidence against himself, possibly in circumstances where he makes a statement not in accordance with facts. On the other hand, a fingerprint or some physical feature is already in existence; it exists as a physical fact, and is not susceptible of misrepresentation in any relevant sense. If it is to be excluded as evidence it is on the basis of accompanying circumstances of unfairness. In *Callis v Gunn* [1964] 1 QB 495 at p502; [1963] 3 All ER 677; (1963) 3 WLR 931, Lord Parker CJ illustrated circumstances in which evidence of fingerprints taken from a prisoner may be excluded, in a passage which reads:

> "In the present case it is to be observed that whatever the defendant knew about the law and his rights, the police never misrepresented it to him. True they did not give him any caution. There is no suggestion here that they conveyed to him that he had to accede to the request. If that had been done there might have been a clear case for excluding the evidence."

The alcoholic content of the blood of a person is no less a physical fact than a fingerprint. There would seem to be no valid ground for saying that the furnishing of a blood sample under s80D or a breath sample under s80F which upon analysis may indicate a particular quantity of alcohol in the suspect's blood is in any way different in principle from the taking of a fingerprint, for if any alcohol is in the suspect's blood, it is of a particular concentration whether sampled or not, and the procedures laid down by the Act do no more that bring to light by analysis what is hidden but already in existence. As was observed by Newton J in *Genardini v Anderton* [1969] VicRp 61; [1969] VR 502 at p506:

> "The result of the breath analysis test is in no sense equivalent to a confession."

For these reasons, we are of opinion that the common law principle regarding self-incrimination does not apply to the taking of a breath sample pursuant to s80F. This is sufficient answer to this part of the argument.

But even if it could be said, as was submitted to us, that the common law principle, though in terms limited to statements, nevertheless should be regarded as extending to any conduct by or in respect of the suspect so that it came under the same protection as statements, we are of opinion that it would have to yield to the operation of the statute. As was said by Isaacs J in *Huddart Parker and Co Pty Ltd v Moorhead* [1909] HCA 36; (1909) 8 CLR 330, at p385; 15 ALR 241; 345 ALJR 485, whatever has happened to the maxim in the United States, it was in England only a rule of evidence, and, as pointed out there (at p386), and by Latham CJ in *Kempley v R* [1944] ALR 249 at p252; (1944) 18 ALJR 118; [1944] SR (NSW) 416, the rules must give way to statutory regulation. Whether the rule is excluded must depend upon the provisions of the legislative Act or the nature of the subject: per Starke J at p253.

In our opinion, having regard to the language of the statutory provisions the rule would be inapplicable to the furnishing of breath samples under s80F. In the first instance the language of s80F(6), s80F(8) and s80F(11) is clear and unambiguous. Section 80F(6) authorizes a member of the police force to require "any person" answering to a description set out in that sub-section, namely a person who has undergone a preliminary test under s80E with one or other of the results specified or a person found by the member of the police force driving or in charge of a motor car or believed to have been so, who behaves in a manner indicating, in the reasonable belief of such member, that his ability to so drive is or was impaired, to furnish a sample of breath for analysis by a breath analysing instrument. The class of person who may be so required is clearly and precisely defined, and s80F(11) provides that any one of such class, i.e. a person liable to be required, who when requested refuses or fails to furnish a sample shall be guilty of an offence. There is no room for arguing that the expression "any person which introduces the description is in such general terms that it should be read down so that the sub-section would have excluded from its scope persons who purport to claim a common law right not to incriminate themselves, for the provisions of s80F(12) make it clear that a desire to avoid providing information which might be used against such person is not in itself to afford escape from the provisions of subs(11). The argument then must be that the language of subs(6), subs(8), subs(11) and subs(12) is inapposite to embrace the case of a person under arrest. It is not sufficient to say that the class of persons described as having undergone a preliminary test does not necessarily include a person under arrest or that the class of persons described as found driving or in charge and behaving in the specified manner does not necessarily include persons under arrest. It is certainly not implicit in the language used that the person concerned will not be under arrest. The language used would, in its natural sense, include all persons whether under arrest or not. Moreover, the assumption under consideration would mean that the protection extended to all conduct of any suspect and not merely the conduct of a person under arrest and there would be no reason to confine the protection to persons under arrest; but s80F(12) in terms denies to any suspect the right to refuse a test on the ground that it might provide information that might be used against him. If the right is denied to all persons to whom in terms the legislation applies, there is no logical basis for reading down those terms to exclude a particular group of such persons from the application of the legislation.

The second relevant consideration (which is to be regarded as cumulative upon the first) relates to the nature of the subject matter. The purpose of s80B, s80D, s80E, s81E, s81A and s82 is to combat the evil of motorists driving vehicles while likely to be affected by alcohol. This

is apparent from the contents of the sections and the history of this legislation during the past several years since legislation relating to the taking of breath tests was first introduced in 1961. These sections form a set of provisions which over the years have become increasingly stringent. They are designed to facilitate the apprehension and punishment of inconsiderate motorists who when driving under the influence of alcohol are a serious menace to themselves and the rest of the community. Section 80E authorizes a member of the police force to require specified persons to undergo a preliminary breath test. Refusal or failure to do so is an offence and the offender may be apprehended without warrant: s80E(3), s80E(4). Depending on the outcome of the preliminary test, if taken, the member of the police force may require the motorist to furnish a sample of breath for analysis by a breath analysing instrument, and he may make such a request even though no preliminary test has been undertaken: s80F(6). Any such person who refuses or fails to furnish such a sample of breath is guilty of an offence and may be apprehended without warrant: s80F(11).

A person required under s80F(6) to furnish a sample of breath is, subject to limitations as to time, obliged to do so at or in the vicinity of the alleged offence or at or in the precincts of a police station or at a place where he is receiving medical treatment. As well as being liable to arrest without warrant for refusing or failing to take either of the tests, the motorist is liable to be arrested, depending on his state of sobriety and other circumstances, under s80B for driving under the influence of alcohol, or under s81A for driving with more than .05 per cent of alcohol in his blood, or under s82 for being in charge of a motor car while apparently under the influence of alcohol, and there may be other bases on which he may be arrested. Evidence of the alcoholic content of his blood as determined by a breath analysing instrument may be given pursuant to s80F(1)—(a) upon any trial for manslaughter or negligently causing grievous bodily harm arising out of the driving of a motor car; or (b) upon any trial or hearing of an offence against s318(1) of the *Crimes Act* 1958 (culpable driving causing death); or (c) upon any hearing for an offence against s80A (reckless or dangerous driving), s80B, s81F or s82 of the *Motor Car Act*.

It would be strange indeed, having regard to this subject-matter and the manner in which it has been dealt with and in view of the language of s80F and of the cognate provisions referred to, if at some stage in the course of carrying out the procedure for the obtaining of an analysis of the person's breath, for example after the taking of the preliminary test, it became advisable for the member of the police force to arrest the person, that such arrest would have the effect of barring access to the procedure of obtaining an analysis of the suspect's breath, which would be available if he were not arrested, or have the effect that a refusal or failure to provide a sample of breath was not an offence.

As to the argument that a comparison of the Victorian legislation with the English legislation on the same subject (*Road Safety Act* 1967) leads to the conclusion that a reference to persons under arrest was deliberately omitted from the Victorian legislation, we are satisfied that there is lacking the necessary factual foundation for the argument, namely that the Victorian legislation introduced by the *Motor (Driving Offences) Act* 1971 was modelled on the English legislation. As we have said the first breath test evidence legislation was in fact introduced in Victoria by Act No.6806 in 1961.

In our opinion, both the language of the legislation and its subject-matter would exclude the operation of the principle relied upon even in the expanded form suggested.

It is apparent that the same considerations are sufficient to meet any contention that a clear expression of intention is required to bring persons within the ambit of a penal provision.

The second broad submission by counsel for the defendant motorists was that the operation of s460 of the *Crimes Act* 1958 was such that it is inconsistent with a requirement that a person under arrest should be required to furnish a sample of his breath under s80F(11) of the *Motor Car Act* 1958 and that the latter provision could not, therefore, be construed as applicable to a person under arrest.

Section 460 of the *Crimes Act* 1958 was enacted in 1972 when the *Crimes (Powers of Arrest) Act* 1972 (No. 8247), repealed s39 of the *Justices Act* 1958 (No. 6282), and substituted for it s460, which, with differences immaterial to the matters now under consideration was in substantially

the same terms as s39. Section 80F(11) of the *Motor Car Act* 1958 was enacted by the *Motor Car (Driving Offences) Act* 1971 (No. 8143), and it was submitted that when Parliament passed Act No. 8247 in 1972 prescribing that a person who had been arrested was to be taken before a justice or Magistrates' Court as soon as practicable after the arrest, it must have intended that such a procedure be followed without any other incident intervening, and so impliedly, was removing the right to request a breath sample and the obligation to supply one in the case of a person under arrest.

We do not think that the re-enactment in 1972 of s39 of the *Justices Act* 1958 in the form of s460 of the *Crimes Act* 1958 is susceptible of such a result. It would involve a repeal *pro tanto* of the operation of s80F(11) but what part was so repealed could not be identified. The extent of the inhibition on s80F(11) might have to depend on a consideration as to whether (while waiting for a justice to arrive at the police station or for the Magistrates' Court to commence, or for the arrival of a sergeant, who, under s460(5), is in some circumstances required to inquire into the case and give consideration to the imminence of a hearing) the furnishing of a sample of breath might or might not be required consistently with compliance with the obligation under s460(1).

An alternative argument placed reliance on the application of the principle of statutory construction that the language of a statute should as far as possible be construed in accordance with the language of any other statute. This principle was said to operate so as to subordinate the provisions of the *Motor Car Act* dealing with the taking of breath tests to the requirements of s460(1).

We agree that this principle is applicable. But we think it operates to defeat the arguments in both these aspects. In our view, the language of s460(1) "as soon as practicable after the arrest" leaves room for the carrying out of any procedures which the law permits, and if on their proper construction, considered apart from s460(1), the provisions in s80F(6), s80F(8) and s80F(11) apply to a person under arrest, there is nothing in the language of s460(1) which is so intractable as to raise an inconsistency with that provision. We think that the position is that it is the language of s460(1) that is amenable and not that the language of s80F(6) and s80F(11) must be distorted.

For these reasons, we are of opinion that the conclusion in *Thomson v Cotton* is wrong and that that case should be overruled.

KING v McLELLAN

This order to review relates to a decision of the Magistrates' Court at Frankston on 23 November 1973 dismissing an information laid by the informant, Senior Constable John Raymond King, against the defendant, Colin Reginald McLellan, charging him with having on 12 October 1973 driven a motor car whilst the percentage of alcohol in his blood expressed in grammes per 100 millilitres exceeded .05 per cent.

The case first came before the Magistrates' Court on 23 October 1973 when evidence was given on behalf of the informant by the informant himself and Sergeant Lilley, and on behalf of the defendant by the defendant himself, and the defendant's solicitor made certain submissions. Evidence vital to the informant's case consisted of the contents of a certificate which stated the result of the analysis of the defendant's breath taken shortly after the alleged offence. This certificate which was admissible in evidence as prima facie proof of the amount of alcohol in the defendant's blood indicated that the quantity was 0.125 grammes per 100 millilitres, an amount substantially in excess of the permitted amount. The magistrate constituting the court adjourned the matter sine die to enable him to read the then recent decision in *Thomson v Cotton*. On 23 November 1973 when the hearing resumed the solicitor for the defendant repeated his earlier submissions and the magistrate thereupon dismissed the information, stating that he was not prepared "to accept in evidence any matter concerning the breath test including the reading obtained because the evidence was unfairly obtained". As authority for this latter proposition he said he relied on *Thomson v Cotton*.

The informant obtained an order nisi to review the dismissal on the following grounds:—

(a) that in the circumstances of the case the magistrate was wrong in refusing to accept in evidence any matter concerning the breath test given to the respondent, including the reading obtained; and

(b) that the magistrate should have admitted in evidence the evidence concerning the furnishing by the respondent of a sample of his breath by exhaling into a breath analysing instrument and concerning the percentage of alcohol indicated to be present in his blood by the said breath analysing instrument.

The order nisi was made returnable before this Court. For an appreciation of these grounds it is necessary to refer to the material adduced before the magistrate. The informant gave evidence that very early on the morning of 12 October 1973 in company with Sergeant Lilley he saw the defendant drive his station wagon from the parking area at the rear of a hotel in Frankston; the police followed and eventually intercepted the defendant who then smelt of liquor, and when asked "Have you been drinking?, he answered "Yes, I've had quite a few as a matter of fact"; he was then asked "Are you prepared to have a breath test?", to which he replied "No worries"; the defendant was then conveyed to the police station in a locked compartment of the police divisional wagon, and at the police station he said in answer to questions that he had earlier had about nine glasses of beer at a hotel over a period of about an hour and a half; he underwent a breath test by means of a breath analysing instrument which indicated that the quantity of alcohol present in his blood was 0.125 grammes of alcohol per 100 millilitres, and the officer conducting the test issued the appropriate certificate which was in due course tendered and admitted as evidence without objection; the defendant was then placed in the cells. In cross-examination the informant stated that the reason why he had intercepted the defendant was that he and Sergeant Lilley had seen the defendant at the back of the hotel and had suspected that he had been drinking. Sergeant Lilley, when asked in cross-examination why the police had intercepted the defendant, said that the defendant had been speeding while under observation. The informant, under cross-examination, at first said that he had not placed the defendant under arrest when he put him in the divisional wagon, but stated that he would not have then released him had the defendant no longer desired to attend the police station, and he then conceded that he had placed him under arrest. He had said that he had not at any time cautioned the defendant.

At the close of the informant's case the defendant's solicitor submitted that there was no case to answer because, first, there was no lawful reason to intercept the defendant, and, secondly, because a person under arrest was not obliged to perform a breath test; and he said he relied on *Thomson v Cotton*. The magistrate ruled that there was a case to answer. The defendant then gave evidence that when intercepted by the police and asked to go to the police station he believed he was under arrest and that even if he did not wish to go, he would still have been required to go to the police station, and he also believed than when he agreed to take the breath test he did not think he had any option.

It was on this evidence that the magistrate held that the evidence of the breath analysis certificate had been unfairly obtained. In the light of this finding certain observations need to be made. The first is that there was not at any stage in the case any suggestion that the police had in any way threatened, intimidated or coerced the defendant. Whether or not as a matter of law he was under arrest when placed in the divisional wagon, no threat of force was made; the defendant was merely asked if he was prepared to have a breath test, and he assented, and his own evidence was that he was "only requested to go to the police station" though he believed he was under arrest and had to go.

In the second place, nothing was said which could be construed as misrepresenting to him what his rights were, whatever they may have been; in other words he was told nothing to the effect that he was required by law or could be compelled to go to the police station or to take a breath test. The case appears, from the material before this Court, to have been conducted by the defence solely on the basis that the defendant had been under arrest at the time when he submitted to a breath test and that the arrest was unlawful, and that evidence of the breath test was to be rejected because of *Thomson v Cotton*.

It is, in our view, important to bear in mind that there is no basis for the argument which counsel advanced before this Court that the magistrate was exercising his discretion to exclude admissible evidence on the ground that it was obtained by methods of unfairness relating to other factors than those set out above. It appears from the material that neither in the evidence nor in the submissions made was any suggestion made of unfairness or misrepresentation in the conduct of the police. There was no suggestion in the evidence of any maltreatment or threat or misrepresentation or persuasion on the part of the police.

Counsel submitted that the magistrate may have considered that the unfairness to which he referred might have been a formidable demeanour of the police by which any inclination to resist the request to go to the police station and be tested might have been overcome. As the evidence is recorded before us there is no suggestion of any such formidable demeanour of the police leading to such a result and the magistrate in his reasons did not advert to any such position. The defendant merely stated that he believed that he was under arrest and that he had no option but to go to the police station and to furnish the sample of his breath when required to do so.

Though it is proper to say that every reasonable presumption should be made in favour of the decision of the magistrate and that it should be upheld provided it can be supported upon any reasonable view of the evidence open to the magistrate (*Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38; [1954] ALR 168), it is necessary that it appear in the proceedings before the magistrate that there existed a basis for his decision. In *Young v Paddle Bros. Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38 at p41; [1956] ALR 301, Herring CJ, said: "The principle that has to be applied is that applicable to the verdict of a jury: *Wilson v Jones* [1915] VicLawRp 94; [1915] VLR 636 at p638; 21 ALR 490; 37 ALT 198, per Hood J".

This principle has been repeatedly applied in the cases where the evidence has been effectively challenged: *Wilson v Jones*, *supra*; *Aldom v Dunn* [1917] VicLawRp 9; [1917] VLR 70; 23 ALR 3; *Llewellyn v Reynolds* [1952] VicLawRp 24; [1952] VLR 171; [1952] ALR 358; and see *Quinn v Shepard* [1921] VicLawRp 98; [1921] VLR 555 at pp558-9.

The cases generally refer to a decision of the lower court contrary to unimpugned evidence as to which there is no basis for attributing falsity. In such a case the court of review does not appraise the credibility of evidence as to which more than one interpretation or conclusion is reasonably available, but determines that the evidence is reasonably capable of only one interpretation. As the cases make clear this Court will reverse a magistrate's decision if in the affidavit or affidavits filed on the return of the order nisi there does not appear to be any reasonable basis for the magistrate's decision. What might have been, or could have been in the magistrate's mind, if not supported by evidence or by what happened in the proceedings before him, cannot be called in speculative aid of a magistrate's decision which is contrary to all that appears to have transpired before him. It is, of course, possible that there may be indications from the manner in which a case has been conducted, or from submissions made, or in remarks of the magistrate which throw light on the reasons for the magistrate's decision. But where they do not, reasons for judgment which do not condescend to particulars, are weak support for the conclusion if they indicate a misunderstanding of the evidence or a view which is untenable in the light of the rest of the proceedings in the court below. There is nothing in the material to suggest that the matters referred to by counsel constituted the basis of the magistrate's finding.

Counsel also submitted before this Court that the magistrate after reading *Thomson v Cotton* was entitled, upon a consideration of all the topics or a particular topic dealt with in that judgment, to find a basis for saying that the police had been unfair.

In our opinion, there was no foundation in the evidence before the magistrate (other possibly than the fact of arrest) to support the conclusion that there was any unfairness to the defendant in the obtaining of the evidence which enabled him to exercise his discretion by rejecting the certificate as evidence of the alcoholic content of the defendant. Certainly the decisions in *Callis v Gunn* [1964] 1 QB 495; [1963] 3 All ER 677; (1963) 3 WLR 931; *Benney v Dowling* [1959] VicRp 41; [1959] VR 237; [1959] ALR 644; *Walker v Viney* [1965] Tas SR 96, and *Genardini v Anderton* [1969] VicRp 61; [1969] VR 502, afford no basis to support such a conclusion and indeed operate against it. In so far as the magistrate may have relied on the fact of the test being administered to a person under arrest as making it unlawful, on the basis of *Thomson v Cotton*, such a basis has been disposed of by what we have already decided.

Counsel sought to justify his submission by contending that the defendant was arrested unlawfully and thus any evidence obtained from him while under such unlawful arrest could be rejected in the exercise of discretion and that it should be presumed that this too was a basis for the magistrate's exclusion of the evidence. As to this there are several things to be said. The first is that this reads more into the reasons given than they are capable of bearing. The second is that the onus of establishing facts justifying the exercise of discretion to exclude admissible evidence

and of showing that the discretion ought to be exercised in that way lay on the defendant: *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517. Assuming that the magistrate was entitled to find on the evidence that the defendant was under arrest when, at the police station, he gave the sample of his breath, the arrest of the defendant may have been capable of being justified under s81A(2) of the *Motor Car Act*, or under s456 of the *Crimes Act*, or possibly under s80B(3)(a) of the *Motor Car Act*.

These matters do not appear to have been explored at the hearing. If there could exist a lawful justification for such arrest then it was for the defendant to show that the arrest was not so justified and the material does not show any foundation for such a finding, if it were in fact made. Finally, even assuming that it was right to find that the defendant was under arrest and that the arrest was unlawful, that circumstance of itself cannot justify the rejection of admissible evidence as to the effect of the breath test. Something more was required to justify the exercise of discretion to exclude it. *Kuruma v R* [1955] AC 197; [1955] 1 All ER 236, and *King v R* [1969] AC 304, [1968] 2 All ER 610; (1968) 3 WLR 391, both decisions of the Privy Council, show that evidence obtained directly by illegal search, although admissible, may be excluded in the exercise of the court's discretion. In *Merchant v R* [1971] HCA 22; (1971) 126 CLR 416 at pp419-20; [1971] ALR 736, it was said that if a breath test had been unlawfully administered the tribunal before whom it was sought to prove the results would be bound to consider whether or not in point of discretion in all the circumstances the evidence should be received. But the suggestion here under consideration is not that the test was unlawfully administered but that a collateral circumstance, the arrest of the defendant, had been unlawfully made.

If there are other reasons suggested for excluding evidence than the fact that the evidence itself was obtained unlawfully those other reasons ought to be reasonably set out, and if they are not, may fairly be regarded as not the basis on which the discretion was exercised. The question of unlawful arrest is not adverted to in the reasons given by the magistrate for his exclusion of the evidence. There is no indication either that he found the arrest to be unlawful or that if he did so find, he based his decision to exclude the evidence in any way upon that finding.

Accordingly, we are of opinion that the magistrate wrongly exercised his discretion in refusing to act upon the evidence contained in the certificate, showing an excessive blood alcohol content of 0.125 per cent. Upon that evidence which was properly before him, and the accuracy of which was not challenged by the defendant, the only conclusion was that the defendant was guilty of the offence charged.

This order nisi should, accordingly, he made absolute with costs and the order of dismissal should be set aside, and the information should be remitted to the Magistrates' Court with a direction that the defendant should be dealt with according to law.

KERLEY v FARRELL

In this case the defendant was on 7 December 1973 convicted in the Magistrates' Court at Casterton upon an information charging him that on 7 October 1973 he, having driven a motor car within the last preceding two hours in a manner which indicated that his ability to drive a motor car was impaired, did refuse to furnish a sample of his breath for analysis in an approved breath analysing instrument. Although the information was somewhat strangely phrased, having regard to the terms of subs(6) and subs(11) of s80F of the *Motor Car Act*, it was clearly a charge that he had committed an offence against subs(11) of that section, and no issue arose in the hearing in regard to the form of the information.

The evidence, in so far as it is relevant to the issues which arise, can be shortly summarized. The informant, a constable of police, swore that on Sunday, 7 October 1973, at about 12.10 a.m. he saw a motor car being driven fast through an intersection, and after a stop being driven off with a loud screeching sound and in an erratic manner. He followed the car in his police car and when it stopped, stopped his car alongside it and as the defendant got out of his car noticed that he was very unsteady on his feet and braced himself against the car. He spoke to the defendant about his erratic driving and asked him if he had had any intoxicating liquor to drink. The defendant replied that he had had a few beers.

The informant then said to the defendant: "Will you get into the police car and accompany

me to the police station to undergo a breath analysis test." The defendant got into the police car where his breath smelt of alcohol and went with the informant to the police station where his walk was seen to be staggering. At the police station the informant told the defendant to take a seat and said that he was going to ring for a breath analyser from Hamilton. The informant then did ring the Hamilton Police Station and requested the attendance of a breath analysis operator. The informant then questioned the defendant about the drink he had consumed, and following the questioning, stated that from his observations of the appellant's driving, it was his opinion that the defendant was affected by alcoholic liquor. He then asked the defendant whether he was prepared to take a breath test by furnishing a sample of his breath for analysis. The defendant in colourful language said that he was not blowing into anything. At about 1.30 a.m. the breathalyser operator arrived at the police station and after the breath analysing instrument had been properly set up and tested, the defendant was asked if he was prepared to furnish a sample of his breath for analysis, and said that he would not. At 1.50 a.m. a formal demand was made upon the defendant requesting him to submit to a breathalyser test. The defendant refused to do so. In cross-examination the informant said that when he first spoke to the defendant, he believed that the defendant was under the influence of alcohol and he would have a blood alcohol content in excess of .05. He said that the defendant was obliged to wait at the police station for the arrival of the breathalyser operator for approximately an hour and a half, and that the defendant became impatient. When asked what he would have done if the defendant had attempted to leave the police station, the informant said that that situation had not arisen. He asserted that the defendant was not arrested until after he had refused the breathalyser test.

A sergeant of police gave corroborating evidence as to the defendant's refusal to take a breath test. The defendant in evidence said that when he was told by the informant to get into the police car and that they would get a breathalyser, he had asked whether he could go and get his father and the informant had said he could not. He said that the informant took his arm whilst going into the police station. He said that after sitting in the police station for a long time, he said that he thought he would walk out and the informant told him he would just have to wait a bit longer. He said he believed at the police station that he was under arrest. In cross-examination he said that he was told that he had to go to the police station and that he believed then that he was arrested.

At the conclusion of the evidence, the solicitor for the defendant submitted that the defendant had been arrested prior to being formally requested to submit to the breath test, and relying upon the decision in *Thomson v Cotton*, submitted that the defendant was not in the circumstances required to submit to a breath test. The stipendiary magistrate reserved his decision.

On 7 December 1973 he convicted the defendant. When asked his reasons, he stated that he was satisfied that on the evidence the defendant was under arrest at the time that he was formally requested to undergo the test. He referred to the provisions of subs (11) and subs (12) of s80F of the *Motor Car Act*, describing them as distinct statutory enactments which must take preference over the common law. He distinguished *Thomson v Cotton* on the ground that in that case the defendant had been arrested on another charge.

It is clear that there was evidence before the stipendiary magistrate upon which it was open to him to find that the defendant was under arrest at the time when he was required to furnish a sample of his breath for analysis. An order nisi to review the decision of the magistrate was obtained upon several grounds. It was referred to this Court. By consent of counsel for the informant, a further ground for review was added during argument. It is unnecessary to set out these several grounds at length. In effect the original grounds asserted that the magistrate was wrong in law in holding that the defendant was required by the provisions of s80F(6) and s(11) of the *Motor Car Act* 1958 to furnish a sample of his breath for analysis whilst he was under arrest, or alternatively, whilst he was under arrest for any offence against s81A of the Motor Car Act. The added ground asserted that the magistrate should have held that the defendant was not so required to furnish a sample of his breath whilst under arrest for any offence against s80A, s80B, s81A or s82 of the Act.

The arguments have been reviewed earlier in this judgment. As we have already stated that, in our opinion, the provisions of s80F(11) apply to a person who is under arrest, no error in

law on the part of the magistrate has been established upon any of the grounds taken. The order nisi in this case must, therefore, be discharged with costs. Orders accordingly.

King v McLellan: Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: MA White, Cleland and Associates.
Kerley v Farrell: Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Melville, Orton and Lewis.