13/99; [1999] VSC 301

SUPREME COURT OF VICTORIA

DPP v SPENCER

Eames J

13, 27 August 1999

PRACTICE AND PROCEDURE – CRIMINAL LAW – DEFENDANT CHARGED WITH TRAFFICKING IN AND POSSESSION OF A DRUG OF DEPENDENCE – DRUGS SEIZED FROM DEFENDANT'S RESIDENCE – DRUGS PUT INTO PLASTIC BAGS BY POLICE – DRUGS SUBSEQUENTLY TENDERED IN EVIDENCE WITH WRITTEN LABELS ATTACHED – CERTIFICATE OF BOTANIST TENDERED – SUBMISSION AT END OF CASE THAT CONTINUITY EVIDENCE INSUFFICIENT – APPLICATION BY PROSECUTOR TO RE-OPEN CASE TO LEAD EVIDENCE AS TO CONTINUITY – APPLICATION REFUSED – CHARGES DISMISSED FOR LACK OF SUFFICIENT EVIDENCE OF CONTINUITY - WHETHER MAGISTRATE IN ERROR: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT* 1981, S120(1).

Two charges of trafficking in and possession of a drug of dependence were brought against S. At the hearing evidence was given that a quantity of drugs and other drug-related items were seized from S's residence. The informant gave evidence that he arranged for all of the "green vegetable matter" seized to be conveyed to the State Forensic Science Laboratory (SFSL) for analysis by a botanist. No evidence was called by the prosecutor from the person who couriered the material from the police station to SFSL. A Certificate of a Botanist was tendered in evidence but the items in the Certificate were not particularised in a way which directly correlated with the items seized. When the Exhibits were tendered without objection labels with writing on them were attached. No evidence was given as to who completed the labels or attached them to the material.

At the close of the prosecution case, S's counsel indicated that the defendant would call no evidence and submitted that the prosecution had failed to prove its case by reason of the question of continuity. The prosecutor sought to re-open the case to call evidence from the police officer who conveyed the material to SFSL. This application was refused and the magistrate dismissed the charges stating that the evidence of continuity was insufficient to prove the charges beyond reasonable doubt. Upon appeal—

HELD: Appeal dismissed.

1. There was a necessity that the prosecution prove beyond reasonable doubt that what was seized be linked to what was transported to the botanist at SFSL. As the person who conveyed the material to SFSL was not called to give evidence, it was open to the magistrate to be satisfied that continuity had not been proved beyond reasonable doubt.

2. The fact that the labels attached to the Exhibits were not objected to on tender did not mean that they proved the truth of what was asserted on them. The statements on the labels were hearsay and were inadmissible without some legislative provision to the contrary. The labels would have been admissible to establish merely the identity of the bags transported to SFSL in order to establish that what was in the bags was the material which was analysed by the botanist.

3. Section 120(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 does not operate so as to prove all of the contents of a botanist's certificate. The only matters that may be certified by the botanist are the "identity" and the "quantity" of the thing examined. Proof of what was the thing examined, and whether what was examined was the same thing as had been seized in the search of S's premises, was the very matter on which continuity evidence was required to be led, unless the issue was admitted by the defence.

4. Permission to re-open the Crown case should only be granted if the circumstances are "very special or exceptional, and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen." The overriding question is one of fairness.

***R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495, referred to.**

5. The failure of the prosecutor to call the evidence of the police officer who conveyed the material to SFSL was not a case of oversight. The witness was present at court and was available to be called although no written statement from him had been supplied to the defence beforehand. The question of the continuity evidence was not a mere technical matter. Accordingly, it was open to the magistrate to reject the application by the prosecutor to re-open the case and to dismiss the charges.

EAMES J:

1. This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989 and arises from the dismissal of two charges brought against the respondent pursuant to ss71(1) (traffick a drug of dependence) and 73(1) (possess a drug of dependence) of the *Drugs, Poisons and Controlled Substances Act* 1981. hearing of the charges took place at the Benalla Magistrates' Court on 1 December 1998 before Magistrate Ms N Toohey M. [*His Honour set out the facts of the case, the evidence which was given and continued*] ...

26. By order of Master Wheeler, 16 February 1999, two questions of law are raised on this appeal:

> "1. Was the learned magistrate wrong in law when she concluded that there was no evidence, or insufficient evidence, that the cannabis analysed by the botanist was the cannabis seized at the respondent's home?
>
> 2. Was the learned magistrate wrong in law when she considered all of the circumstances of the case and did not allow the prosecutor to re-open the prosecution case to strictly prove that the cannabis was transported from the informant to Victorian Forensic Centre and then back to the informant."

Question 1: Was continuity proved?

27. Although the first question is couched in terms of it being a question of law, it seems to me to be a thinly disguised example of a question of fact. In my view it should not have been made an appeal question under s92, but, having been referred to me, I will deal with it on the charitable assumption that the issue raised is a question of law.

28. In her very clear and helpful submissions, Ms Pullen, counsel for the appellant, submitted that there was an abundance of material which should have led the magistrate to conclude that, notwithstanding the absence of Mr Werner, the material seized at the home of the respondent and tendered at the hearing, was that identified in the Certificate of Botanist.

29. Ms Pullen initially submitted that the learned magistrate fell into error by having concluded that there was "no evidence" of continuity. That would have been a misdescription of the state of the evidence, since even if it did not necessarily amount to proof of the charges beyond reasonable doubt (as counsel asserted it did), there was plainly some evidence which was capable, at least, of having satisfied the Magistrate to the requisite extent.

30. The magistrate did use the expression "no evidence" in her short extempore reasons for decision, and in so doing overstated the situation, but I did not permit the case to be argued on a narrow ground relating to the use of the expression "no evidence" because, as the terms of Question 1 make clear (by use of the alternative phrase "or insufficient evidence") the parties understood the magistrate to have been saying that such evidence as there was did not prove the prosecution case. In other words, the real complaint raised by the first question is not that the magistrate used the words "no evidence", but, rather, that her Worship ruled the evidence to be insufficient to prove the charges beyond reasonable doubt.

31. Both counsel agreed that for there to be an error of law demonstrated under Question 1, it must be shown by the appellant that the decision reached by the learned magistrate was one which, having regard to the state of the evidence, no magistrate acting reasonably could have reached: see *Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 at 368.

32. Ms Pullen took me though a detailed analysis of the evidence, and an examination of the exhibits tendered before the magistrate, in support of her contention that there could have been no reasonable doubt held as to proof of the charges. In particular, she submitted that there was abundant evidence of continuity connecting the items seized and the Certificate of Botanist.

33. Whilst there is indeed evidence which might have persuaded the magistrate that the items subject to the Certificate were those identified by the police witnesses, I am not persuaded that she was bound to be so satisfied beyond reasonable doubt. In particular, as, indeed, I was told she expressly noted, the five numbered items in the certificate, as described, did not expressly duplicate, by number or description, five numbered items tendered in evidence. If such a convergence was

to be proved then someone had to give that evidence, or else it had to be established, beyond reasonable doubt, by inference drawn from the evidence.

34. In support of her argument that there was sufficient evidence of continuity, Ms Pullen relied to a considerable extent on the evidence of the labels which appeared on the exhibits, which had been tendered without objection. Those labels, she submitted, must have come from two sources, the police and the forensic science centre. By reference to what is stated on the labels, she submitted, it could be shown that the items logged into the Exhibit Log correspond with items examined at the forensic science centre and, in turn, with items which Robb said in evidence had been seized at the premises of the respondent, and which were then tendered.

35. When the seized objects were tendered they were tendered in plastic exhibit bags, into which the objects had been placed by someone. On the outside of each plastic exhibit bag was a label bearing the words "Exhibit No." and with a number corresponding with the numbers used in the Exhibit Log. Inside the external plastic exhibit bag, were various items, and attached to those items (or, at least, to one of the items, if there was more than one) was a second label, titled "VFSC No" and bearing a number "3586/989". (One of the exhibits – a bowl – did not have such an internal label.) No direct evidence was led as to who placed the labels on the bags; it was a matter for inference, counsel submitted, that one label must have been attached by a police officer, and that someone at the forensic science centre must have attached the other. The inference, however, that the labels were written by police officers or by someone connected with the forensic examination can be drawn only by having regard to the words or terms used on the labels.

36. Counsel relied upon the labels in order to support her contention that continuity was proved beyond reasonable doubt. To illustrate the nature of her argument I will refer to one, only, of the three items which required proof of continuity. It is unnecessary, for present purposes, that I detail the similar arguments presented with respect to the two other items.

37. Item 5 in the Certificate of Botanist certified, as cannabis, material "pooled from three plastic bags, the total weight of which was 18.9 grams". The certificate concludes with the words: "I placed a determinavit (sic) slip with the item(s)". What is meant by a "determinative slip" is not explained, nor what the botanist means by "placed . . . with the items".

38. Counsel for the appellant submitted that Item No 5 refers to the three plastic bags of vegetable matter shown in photographs numbered 2 and 3, and also corresponds to item number 2 listed in the exhibit log as "3 x 'Glad' brand bags containing green vegetable matter". The actual exhibit which was tendered comprised an outer plastic exhibit bag containing within it three plastic bags, in only one of which was vegetable matter. On the outer, plastic exhibit bag was one label titled "Exhibit No 2", with the handwritten numbers "D23/98", and the date of the search, and name and address of the respondent written on it.

39. The search warrant which authorised the search at the respondent's premises was tendered by the defence during the hearing. Attached to it was a property receipt, for the seized items. The property receipt is identified by number "D23 of 1998", and the second seized item listed (and shown as item No.2) is "3 x bags GVM".

40. I agree that it was a reasonable inference open to be drawn that the label on the outside of the plastic exhibit bag, which was headed "Exhibit No 2", was probably written by a police officer involved in the execution of the search warrant. There was, however, no direct evidence of that, and it remains an inference to be drawn by reference to the words and numbers on the label. Ms Pullen submitted that it was the only inference that could reasonably be drawn.

41. The second label appears on one of three plastic bags which are found inside the outer, plastic exhibit bag. This label reads:

> "VFSC No 3586/989
> Time & Date 12:57 18 Nov 1998
> Result: Item 5
> Material of cannabis L pooled from three plastic bags.
> The total weight of this material was 18.9 grams.
> (1 of 1) Signed by SXA: "

42. A signature which was unreadable appeared on the label, but counsel suggested, by reference to the signature on the Certificate of Botanist, it may be concluded that the signature was that of Azzopardi. Counsel submitted that the initials "VFSC" were sufficient to identify the label as having been placed there by someone from the Victorian Forensic Science Centre, being initials also used in the Certificate, which was also headed with the same number, "3586/989", shown on the label. Ms Pullen also referred to the use of the name of the accused, which appeared on the top of the certificate, as also adding to the correlation between the seized items and the items identified in the Certificate.

43. The irresistible inference, so it was submitted, was that the label on the inside bag, contained within the outer exhibit bag, was placed there by a forensic science centre person, and that it coincided with the Certificate of the Botanist, as Item No 5.

44. Similar detailed submissions, as to the convergence of information on the labels with the evidence of the search and seizure which took place, was made concerning the two other items (the "Three Nuns" tobacco tin and the black bowl) seized with vegetable matter. Robb said he had arranged for all seized vegetable matter to be sent for analysis.

45. The fact that no objection was made to the tender of the exhibits in the form in which they were tendered, and with the labels attached, was a matter given emphasis by Ms Pullen.

46. The status of hearsay evidence admitted without objection in a criminal trial is the subject of some uncertainty. In civil proceedings it has been held that hearsay evidence once so admitted is able to be treated as evidence of the truth of the matters which have been asserted in hearsay form: *Re Lilley* [1953] VicLawRp 18; [1953] VLR 98; [1953] ALR 149; *Walker v Walker* [1937] HCA 44; (1937) 57 CLR 630; *Stunzi Sons Ltd v House of Youth Pty Ltd* [1960] SR (NSW) 220; *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206; (1979) 40 LGRA 323;; *Re Miller* [1979] VicRp 40; [1979] VR 381; *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 15 NSWLR 158; 95 FLR 418; 88 ALR 217; (1988) 12 IPR 417; [1989] AIPC 38,782.

47. As to criminal proceedings, in *R v Radford* [1993] VICSC 237; (1993) 66 A Crim R 210, at 232-234, Phillips CJ and Eames J, without finally deciding the question, considered that where it was the accused who sought to rely on hearsay evidence to which there had been no objection by the Crown when it was led, it would be appropriate that the hearsay evidence could be relied on as proof of the truth of that which was asserted. Where, however, it is the Crown which seeks to rely on hearsay evidence against the accused, the position is much less clear, save for some exceptional and limited situations, such as those discussed by the High Court in *R v Walton* [1989] HCA 9; (1989) 166 CLR 283; (1989) 84 ALR 59; (1989) 63 ALJR 226; 38 A Crim R 276 and *R v Pollitt* [1992] HCA 35; (1992) 174 CLR 558; (1992) 108 ALR 1; (1992) 66 ALJR 613; 62 A Crim R 190. Mason CJ in *Walton*, at CLR 293, and Deane J, at CLR 308, observed that a too-rigid application of the hearsay rule should not be adopted by the trial judge, so as to exclude evidence, where other material rendered the hearsay material reliable, credible and probative, but that considerations of justice must be applied, not just arguable notions of common sense.

48. In my opinion, the fact that the inner and/or outer labels were not objected to would not mean that they thereby could prove the truth of that which was asserted on them. It may have been that no objection was taken to their tender because the labels were, in fact, admissible for a limited purpose – not to prove the truth of what they stated but for the purpose of identifying, through the direct evidence of witnesses, that the vegetable matter which had been seized was the same vegetable matter which was transported to and analysed by the botanist. The labels would have been admissible if a witness had sought to refer to them for the purpose of identifying and proving that the same container or containers into which the vegetable matter had been placed by police had been delivered to the botanist, and from which he extracted the vegetable matter for analysis. In other words, the labels would be admissible if the labels were being relied on merely to establish the identity of the bags transported to the botanists so as to establish that what was in the bags was therefore, beyond reasonable doubt, the material which was analysed by the botanist.

49. By s70 of the Commonwealth *Evidence Act* 1995 writing contained on a label or tag attached to an object is deemed not to be hearsay if it was reasonable to suppose that the label or

tag was placed on the object, in the course of a business, so as to identify the nature, ownership, destination, origin or weight of the object or its contents. The prosecution in the present case did not have the benefit of such a provision. That section was introduced to overcome the effect of the decision in *Commissioner for Railways v Young* [1962] HCA 2; (1962) 106 CLR 535; [1962] ALR 406; (1962) 35 ALJR 416.

50. That was a case in which the appellant challenged a ruling by a trial judge in a civil negligence action brought by a dependant widow. A pathologist who conducted an autopsy had given evidence that he had taken a sample of blood and placed it in a jar and had attached a label to the jar and written on the label. Objection was taken, successfully, to his giving evidence of what he had written on the label. The label itself was not produced, but it was sought to lead secondary evidence of its contents. When, subsequently, an analyst was called to give evidence of his analysis of the blood alcohol concentration of the blood of the deceased - which analysis had been conducted on the sample of blood obtained by the pathologist - objection was again taken, successfully, to that witness referring to the label on the jar in order to identify the blood as being that of the deceased. Thus, the evidence of his analysis was ruled inadmissible, since he could not establish that it was the blood of the deceased, which he had examined. The appellant in that case argued that the evidence had been wrongly excluded, because the labels merely served to identify the jar and its contents, and thus constituted some evidence of continuity, so that the jury might be satisfied on the balance of probabilities that the analysed blood came from the deceased. It was accepted that there remained gaps in the evidence of continuity, even if this evidence was admitted, but it was submitted that went only to the weight of the evidence to which the jury might have reference in order to determine that issue.

51. Although the objection at trial had been based on the best evidence rule, and on the inappropriateness of reliance on secondary evidence, the decision on appeal in *Commissioner of Railways v Young* did not turn on that narrow distinction. Dixon CJ held, at 546, that the evidence was admissible not as proof of the truth of what was stated on the label (namely, that the jar contained a sample of the blood of the deceased) but because it was tendered, along with the evidence of the witness who wrote it, in order merely to prove that the jar which left the hands of the pathologist was the same as that which was received by the analyst for the purpose of his analysis. Thus, the full description on the label was admissible only as proof "for the purpose of identification". A retrial was ordered because it remained a matter for the jury whether they would accept that evidence as proof, on the balance of probabilities, as to continuity.

52. In his judgment, Taylor J emphasised that continuity evidence was an important matter for the appellant to establish (an issue to which I will return, since it was argued before me that continuity evidence in a criminal case, such as this, amounts merely to a matter of "technical" proof). His Honour noted that proof of the contents of the label was merely one link in the chain of continuity, which had to be proved to have remained unbroken. Taylor J held, at 548, that the contents of the label were admissible to establish the identity of the container in its movements from the time of the autopsy to the time of the later analysis of the blood sample. A similar distinction between establishing the identity of an object by reference to a particular label on it at a particular time, on the one hand, and attempting to prove the truth of the facts asserted on a label, on the other hand, was drawn both by Menzies J, at 553, and by Windeyer J, at 557. Windeyer J held that the label was being referred to so as to identify "the appearance of a thing" at a later time, with that seen on the earlier occasion.

53. The question of the use of labels on objects is discussed in *Cross on Evidence*, 5th Aust Ed, pp31,103-5, where the learned authors observe that it is difficult to reconcile some authorities concerning the admissibility of labels attached to objects, but the authors favour the view that such writings constitute hearsay insofar as they are relied on to prove the truth of what is asserted as fact on the label, rather than being relied on for purposes of identification of the object. That conclusion by the authors is consistent with the decisions of the Privy Council in *Patel v Comptroller of Customs* [1966] AC 356 and *Comptroller of Customs (UK) v Western Lectric Co Ltd* [1966] AC 367; [1965] 3 All ER 599 (see, too, *Laws of Australia* Ch 16.5, Div 11, par [86]; Ch 6, Div 2, par [166]).

54. The distinctions drawn in *Commissioner of Railways v Young* are important in this case because without direct oral evidence of the writing being placed on each label, and the placement

of the label on the object, then the label would serve no purpose with respect to identification, but would be merely sought to be used, instead, to achieve the very thing which the High Court said could not be achieved, namely, using the label as proof of the truth of its assertions, rather than for the purpose of identification of the object spoken of in the evidence of witnesses who were seeking to establish that in their respective dealings with an object, at different times, the object was the same on each occasion.

55. In the present case, however, the persons who placed the labels on the bags in which the exhibits were contained, did not give evidence of having done so. When giving their evidence that the exhibits were items of apparent drug paraphernalia and vegetable matter seized at the house at various locations, the police witnesses were handed the sealed bags upon which (on the outside bag, and/or on a bag or object within the outer bag) were the two labels (in one case, only one label was attached) but the affidavits do not disclose that any police witness gave evidence as to the labels or as to reliance on the labels for the purpose of making that identification. Even if it were to be concluded (contrary to my assessment of the evidence) that there was such evidence as to the "police" labels, no evidence was given at all concerning the placement of the "forensic science" labels.

56. The certificate of the botanist may be relied on as proof of the "identity" and/or "quantity" of the material which was examined (and the word "identity" used in section 120(1)(b) means the chemical composition of the material). The difficulty for the prosecution was that some witness (or witnesses) needed to give evidence to establish that what was examined by the botanist was the material which had been seized by the police. Unless the writing on the labels was to be regarded as proof of the truth of what they asserted then the use of the labels for the purpose of making the necessary connection required that there be some evidence from a witness of the labels being applied and written upon by their authors, so as to provide some evidence by inference that the same vegetable matter as was seized was that which was examined. In the absence of such evidence from a witness the writing on the labels could not itself be relied upon to prove that had occurred.

57. It was for the learned magistrate to decide whether she was satisfied beyond reasonable doubt as to continuity of the exhibited plant material from the time of seizure to the time of analysis. I do not consider that she must only have reached the conclusion that that matter was proved beyond reasonable doubt, certainly not if the labels could not be relied on to establish the truth of what was written on them. In my opinion, a reasonable magistrate, acting reasonably in the circumstances of this case could properly have concluded that she was not satisfied to the requisite extent. These were criminal proceedings carrying serious consequences for the accused, if convicted, and the full weight of the presumption of innocence was his entitlement.

58. The full force of the presumption of innocence is emphasised by reference to the approach of the High Court adopted in the civil case of *Commissioner of Railways v Young*. As Menzies J observed at 552, had the jury received evidence that what the pathologist wrote on the label corresponded with what was on the label of the container, from which the blood was taken by the analyst to make his test, then it was <u>open</u> to the jury to conclude on the balance of probabilities that the blood tested was that of the deceased man, but, as his Honour made clear, it was a matter for the jury to decide whether they were so satisfied. It was a question of fact for them to consider. Menzies J observed that in his view even if the evidence had been admitted it would not conclusively prove continuity but at most would establish that the blood analysed was probably that taken at the autopsy. Furthermore, he opined, the evidence was incapable of establishing the matter on the balance of probabilities unless, for the purpose of identification, there had been direct evidence of what the pathologist had written on the label.

59. In the present case however, the prosecution had to prove the matter beyond reasonable doubt. The situation was even less conducive to proof to any standard than was the case in *Commissioner of Railways v Young*. The botanist did not give oral evidence and so did not refer to the labels on the bags from which he took the vegetable matter which he analysed or into which he placed the material after his analysis. His evidence was solely that set out in writing in his certificate, and in that (subject to what I later discuss as to the reference to "determinative slips") he did not refer to any labels at all, but referred to five "items" by numbers 1 to 5. Nor was there direct evidence from any police witness of any label being completed by a police officer or of the botanist completing or attaching any label in the presence of the witness.

60. In his certificate the Botanist referred to "plant material presented to me" by a person he identified as "Senior Constable Werner". The concluding sentence in his certificate states: "I placed a determinavit (sic) slip with the item(s)." The certificate does not otherwise make any statement about either the attachment of any label, or the writing of any information on any label; nor does the certificate purport to identify the items he had examined by reference to any labels on any plastic bags. Ms Pullen submitted that by comparing the description of the items listed in the Exhibit Log with the description of the items in the Certificate it is possible to say which numbered item in the Exhibit Log corresponds with which numbered item in the list of items shown by the Botanist in his Certificate. But it is clear that there is not a direct correlation by virtue of the number assigned to an item between the items numbered 1 to 5 in the Certificate and any items with those numbers in the Exhibit Log, nor by reference to the exhibit numbers used on what are said to be the "police" labels attached to the plastic bags in which the exhibits were tendered. Furthermore, the Certificate refers to material pooled from three plastic bags which was not the state in which the material was found when the house was searched.

61. Thus, whilst it would be possible to conclude that what is listed as the five items in the Certificate bear a correlation to certain items listed in the Exhibit Log it does not follow in my view, that such a conclusion must necessarily have been drawn - beyond reasonable doubt - notwithstanding the fact that in rather general terms, Robb had said that all seized vegetable matter had been sent for analysis and that the Certificate asserted that all vegetable matter which had been analysed was cannabis. There was still a necessity that what was seized be linked, beyond reasonable doubt, to what was transported to the botanist and analysed by him. Accordingly, it was open to a reasonable magistrate to not be satisfied that the continuity had been proved beyond reasonable doubt.

62. The statements on the labels were hearsay, and were inadmissible unless those statements were made admissible by some legislative provision or were admissible by virtue of the fact that no objection was taken at the time when they were tendered. As I have indicated however, the failure to object is not capable of making the statements on the labels admissible as proof of the truth of what they stated. The question remains whether the statements in either label were admissible by virtue of the provisions of Section 120(1)(b). In my view they were not rendered immune from the hearsay rules by that section.

63. Section 120(1) of the *Drugs, Poisons and Controlled Substances Act* 1981 reads as follows:

> "(1) In any legal proceedings for an offence against this Act the production of a certificate purporting to be signed by an analyst or by a botanist with respect to any analysis or examination made by him shall, without proof of the signature of the person appearing to have signed the certificate or that he is an analyst or botanist (as the case requires) be sufficient evidence—
> (a) in the case of a certificate purporting to be signed by an analyst, of the identity or quantity or both the identity and quantity of the thing analysed, of the result of the analysis and of the matters relevant to such proceedings stated in the certificate; and
>
> (b) in the case of the certificate purporting to be signed by a botanist, of the identity or quantity or both the identity and quantity of the thing examined."

64. In my opinion section 120(1)(b) does not operate so as to prove all of the contents of the botanist's Certificate. That would have been the case had it been an analyst's certificate made pursuant to s120(1)(a). The omission from sub-section (b) of the words "and of the matters relevant to such proceedings stated in the certificate", which appear in sub-section (a) is significant, and serves to distinguish the present case from the situation considered by Murphy J in *Henry v Hasty* (unreported, 30 November 1977) to which I was referred. In that case there was a similar gap in the chain of continuity evidence as occurs here and although Murphy J held that there was sufficient evidence to sustain a conviction he held that it would have been far better that the omitted evidence had been called. Murphy J, (who was concerned with an appeal by the accused person, who was arguing that it was not open to the magistrate to convict him), merely held that it was "open" to the magistrate to be satisfied about continuity, not that it must inevitably have followed.

65. In *Henry v Hasty* however, unlike the present case, the certificate was that of an analyst given under a section equivalent to sub-section (a) of the s120(1). His Honour held, as have I,

that the word "identity" refers to the make-up of the substance. As to the effect of the words "the matters relevant to such proceedings", Murphy J held that they meant that the prosecution could rely on statements in the certificate to the effect that the suspect items were received from a named Sergeant of police - the person so named in that case being the person who was not, but should have been called as a witness at the hearing. Although he had not been called, the missing witness in *Henry v Hasty* was identified (in further contrast to the present case) at the hearing by another witness as in fact being the person who had been assigned the task of delivering the items to the analyst. No such evidence was given in the present case as to the role of Werner.

66. The issue of continuity was a question of fact for the magistrate. A similar conclusion was reached in *Anglim and Cooke v Thomas* [1974] VicRp 45; (1974) VR 363 per Harris J. That was another case in which the appeal was brought by the convicted person, claiming on appeal, that the evidence was incapable of supporting a conviction and it also was another instance involving a certificate of analyst under equivalent terms to those of sub-section (a).

67. I was referred to the judgment of Dunn J in *Beach v Pittard* (unreported, Full Court, 22 July 1975) as to the relevance of presumptions of continuity and regularity. But as his Honour noted, special care would need to be taken before any presumptions of continuity or of regularity were applied in a criminal case such as this. In *Collins v Mithen* (unreported, Gowans J, 21 May 1975) to which I was also referred, the presumption of regularity was relied on in a blood alcohol case under the *Motor Car Act*, but in that case there was express evidence that the same container on which certain markings had been made on its label had been the container taken to the forensic science laboratory and placed in a refrigerator for the purpose of the very test which was conducted. Such evidence is missing in the present case and neither the presumption of regularity nor that of continuance would necessarily have applied, nor even if they had been applied must those presumptions necessarily have led the magistrate to satisfaction beyond reasonable doubt.

68. The fact that it was open to the magistrate to have been satisfied beyond reasonable doubt as to continuity is not in doubt here. Thus, cases to which I was referred such as *Dimitriou v Samuels* (1975) 10 SASR 331; *Cosgriff v Bateman*, and *Beach v Pittard*, which merely confirm that it was a matter for the trier of fact to determine, do not assist the appellant. In any event in *Cosgriff*, where there was no suggestion that there could have been any mix up in the items taken for analysis, Southwell J nonetheless held that even if the certificate were permitted to be relied on to prove that the absent police witness had presented the drug to the botanist (as the certificate asserted), there remained no direct evidence as to how that absent police witness had obtained the items or their source, nor any evidence of a set practice or procedure which might form the basis for any inference of continuity. His Honour held that: "in the absence of satisfactory evidence linking the substance seized with the substance examined by the botanist, the court below should not have achieved satisfaction beyond reasonable doubt that the substances were the same". His Honour returned the case to the magistrate to consider whether the Crown should be permitted to re-open the case, and, without directing that she was bound to do so, expressed the view that it was likely that the magistrate would grant the application, since there was no unfair prejudice to the accused were that to occur. I will consider a similar proposition when I turn to consider Question 2.

69. Ms Pullen sought to draw comfort from the words "of the thing examined" in s120(1)(b), contending that those words permitted the Certificate to itself identify the object examined in a way which removed the need for proof of continuity. Thus, the statement in the Certificate that it was material "presented" to the botanist (which the botanist had then examined and certified), was submitted have been rendered admissible by the sub-section, as were the statements on the labels, because they constitute part of the certification of what was "the thing examined". I reject that contention. Had the additional words of sub-section (a) been included in sub-section (b) then the contention might have validity, but as sub-section (b) stands, the only matters that may be certified are the "identity" (which in context is the chemical identity) and the "quantity" of the thing examined. In *Cosgriff v Bateman* (unreported, 22 October 1990, Southwell J) also held that a certificate under sub-section (b) "is admissible to prove only one thing, and that is the identity and/or quantity of the thing examined". Proof of what was the thing examined and whether what was examined was the same thing as had been seized in the search of the premises of the respondent was the very matter on which continuity evidence was required to be led, unless the issue was admitted by the defence.

70. It follows, therefore, that the answer to the first question is "no". The learned magistrate has not been shown to be wrong in law in concluding that there was insufficient evidence of continuity to prove the case beyond reasonable doubt. I turn then to the second question, whether the learned Magistrate was wrong in law in refusing the request of the prosecutor to re-open the Crown case to address the gap in the evidence.

Question 2: The application to re-open the prosecution case

71. At the conclusion of the prosecution case, and after announcing that the defence would call no evidence, counsel for the defence submitted that the charges should be dismissed. Counsel identified a number of areas where there were gaps in the proof of the case which would prevent a finding of guilt beyond reasonable doubt. Among the areas so identified (the others not being relevant for present purposes) was the question of continuity of the evidence so as to establish that the seized material was that which was examined by the botanist.

72. Counsel for the informant responded to those submissions in the course of which he said that there had been no challenge made on the question of continuity during the hearing. As earlier noted (see paragraph 22 of these Reasons) he complained that the prosecution had been given no warning that the adequacy of continuity evidence would be challenged. He added that:

> "…as counsel for the respondent had indicated that he did not have instructions to object to the tender of the Certificate of a Botanist, and had not challenged the evidence of the informant, or the other witnesses in relation to the identity of the items seized, analysed and tendered during the course of the prosecution case, he had decided not to call additional evidence as to continuity"

73. Should the magistrate conclude that she was not satisfied beyond reasonable doubt because of the gap in continuity evidence then the solicitor for the informant applied in the alternative to re-open his case to call Senior Constable Werner who, he said, had delivered the items to the State Forensic Science Laboratory. He said that Werner was present in court and, whilst conceding that it was unusual to permit such a course, submitted it was appropriate, because Robb's evidence had shown that he had arranged to have the items analysed and had tendered the certificate both without any objection by the defence. He submitted that the continuity evidence was a mere "technicality" which could easily be overcome without inconvenience to the defence or the court. He added that had objection been taken to the evidence of continuity during the course of the police case he would have called Werner and possibly also the botanist before closing the case.

74. In response to the application to re-open, counsel for the defence noted that the defence had not objected when the prosecution called evidence of a witness of whom no proper notice had been given to the defence, nor any copy of a statement supplied concerning that additional evidence. Counsel submitted that once again, although the case had initially been listed as a committal, no statement had been provided to the defence from Werner as required by the Magistrate's Court Rules. He noted that it was not being proposed by the prosecution that the case might be adjourned so that a statement could be provided. He advised that in this instance the defence was not prepared to agree to the evidence being called.

75. I was referred to many authorities as to the principles which should govern an application to re-open the Crown case. Counsel for the appellant conceded that permission to re-open the Crown case could only be granted if the circumstances were "very special or exceptional, and generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen": per Gibbs CJ and Wilson J in *R v Chin* [1985] HCA 35; (1985) 157 CLR 671 at 676; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495. It was submitted however, that this situation fell within the ambit of what their Honours at 677 called "some purely formal matter the proof of which was overlooked in chief" and which thereby might (not must) allow a re-opening in the exercise of the discretion of the trial judge.

76. The overriding question is one of fairness: per Dawson J at 686. Fairness applies to the prosecution as well as to the defence (per Street CJ in *R v Wasow* (1985) 18 A Crim R 348 at 350) but in the present case I do not consider that the failure to call the evidence of the witness was truly a case of oversight. The solicitor prosecuting the case positively adverted to the issue, made a conscious decision that a statement of the witness would not be served on the defence and only sought to call the evidence when it was obvious that he had miscalculated the strength of his proofs. I do not consider that he was misled by anything said or done by the defence. He may

have misunderstood what he was told but in fact, the terms in which defence counsel stated his instructions concerning the certificate should have alerted the prosecutor to the problem he could face in proving his case. A criminal prosecution is not one which imposes on defence counsel an obligation to warn the prosecutor as to deficiencies in the prosecution case.

77. Whilst it has been suggested that the overlooking of proof of a merely technical matter would ordinarily lead to the favourable exercise of a discretion to re-open the Crown case (see *Hansford v McMillan* [1976] VicRp 80; [1976] VR 743 per Anderson J) I do not consider that the question of continuity of evidence should be so regarded, nor was I referred to any authority which so described such evidence.

78. In considering whether the Magistrate correctly exercised her discretion as to this application, it seems to me that this court should not overlook the context in which the application was being made. As appears from the affidavit material provided on the appeal this case had been the subject of previous applications and delays. On 15 September 1998 based on what the police had stated in a Summary provided to the defence as to the quantity of drugs involved, the respondent through his counsel, had announced that he was willing to plead guilty to a count of possession, and the magistrate had indicated that the quantity of drugs was small and that a suspended sentence of imprisonment was likely. Later that day the police advised her Worship that the quantity of drugs was greater than that stated in the Summary and the police would proceed with the count of trafficking rather than accept a plea of guilty to simple possession. The matter was again mentioned and this time the magistrate indicated that a sentence of immediate imprisonment was a distinct prospect. It was then announced that the charges would be contested by the defence. After several further mentions the case was finally heard on 1 December 1998. Thus, for some considerable time the respondent had had the prospect of imprisonment hanging over his head should he be convicted on these counts. In those circumstances the prosecution should have assumed that the defence would take all defences which were open to be taken in order to achieve an acquittal on the charges.

79. Although the respondent did not give evidence there had been challenges made to some of the police evidence and suggestions that evidence may have been tampered with. I make no comment as to any of those challenges and no finding was made by the magistrate as to those matters, nor was it necessary that she do so. It is to be recognised however, that when assessing the application to re-open the case the magistrate was entitled to exercise her discretion having regard to all of the circumstances of the case as indeed she said she had done. There might well be factors not expressly articulated which bear upon the reasonableness of the application having regard to delays and to the atmosphere in which a case has been conducted and the tensions which have been generated which are not immediately apparent to an appeal court. The exercise of a discretion, whilst bound to be conducted according to well known principles, is not one to be applied by the application of rigid and abstract rules. The very fact that judicial officers acting reasonably might come to different conclusions in the exercise of a discretion demonstrates the caution that a review court should apply before concluding that the exercise of a discretion was wrong in law. What may seem to be a clear and simple proposition when articulated in an appeal court many months later may have been much less clear and simple in the content in which it was formulated at an earlier time.

80. The decision not to permit the case to be re-opened was one which was open to the learned magistrate. The question of continuity was not merely academic in this case. Although the failure to provide statements of witnesses appears to have been a long-standing matter of complaint by the defence throughout the history of the prosecution no statement from Werner had been supplied to the defence, leading to the inference that a deliberate decision had been taken not to call him, at a time well before the hearing date, and thus, well before the conversation with defence counsel on the hearing date which was said to have misled the solicitor for the informant to believe that there was no dispute as to continuity. It was not suggested to the magistrate that the decision not to call Werner was taken in order to not prolong the hearing. That would have been a worthwhile objective, but even if that was the motive for the decision then counsel for the defence should have been asked expressly to make the concession that continuity was not in issue. If that concession was not made then the issue of continuity was not rendered less important and the decision not to call the evidence was not one caused by inadvertence. The solicitor prosecuting the case in fact adverted to the need to call the evidence and chose not to do so.

81. The inference open to be drawn by the magistrate was that the decision not to call Werner was taken in the mistaken belief that there was sufficient evidence of continuity to prove the case without him being called. Whatever may have been the motive for that assessment it proved wrong and was not one, I am satisfied, which was caused by any misleading statement of counsel for the defence. Indeed, what counsel for the defence said should have alerted the solicitor to the fact that continuity had not been admitted, and could not be, as he did not have instructions to do so.

82. What happened here was a tactical decision which was sought to be corrected. It was not the only tactical decision which had been taken. When the informer failed to appear at court the magistrate offered to issue a warrant for his arrest but that was expressly declined. So the informant decided to proceed notwithstanding the fact that the absence of that witness was bound to cause difficulties in proof of the case and would certainly render some evidence inadmissible if it was sought to be led in hearsay form.

83. The decision to refuse leave to re-open the case was a matter to be decided in the exercise of the discretion of the magistrate. The exercise of a discretion may be overturned on appeal only if the appellant demonstrates that the decision-maker proceeded upon some erroneous principle, was mistaken as to the facts, took into account irrelevant considerations, ignored considerations to which she was bound to have regard, or arrived at a decision which was manifestly unreasonable. The question is not how I would have exercised the discretion had it fallen to me to decide the question but whether appealable error has been demonstrated: see *House v R* [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202; *Burling v Leemac Nominees Pty Ltd* [1999] VSCA 45.

84. Notwithstanding the able arguments of counsel for the appellant, I am not persuaded in the circumstances of this case that appealable error has been shown in the exercise of the learned magistrate's discretion to decline the request to re-open the Crown case. No error of principle has been demonstrated. I conclude that the second question should also be answered "no".

85. The appeal will be dismissed. I will hear the parties as to costs and as to the discharge of stay orders earlier made in this case concerning the cost order made by the magistrate.

APPEARANCES: For the appellant DPP: Ms S Pullen, counsel. Solicitor for Public Prosecutions. For the respondent Spencer: Mr J Selimi, counsel. Byrne & Clark, solicitors.
