**12/91**

## SUPREME COURT OF VICTORIA

# *SCILLEY v POTTER*

**Fullagar J**

**22, 24 January 1991 — (1991) 13 MVR 23**

**MOTOR TRAFFIC – DRINK/DRIVING – COLLISION WITH VEHICLE IN EMERGENCY LANE OF FREEWAY – BLOOD SAMPLE TAKEN FROM DRIVER – EXCESSIVE BLOOD/ALCOHOL CONCENTRATION – TIME OF DRIVING – WHETHER SAMPLE TAKEN WITHIN 3 HOURS OF DRIVING: *ROAD SAFETY ACT* 1986, S49(1)(g).**

At 11.20 p.m., P., a police officer attended the scene of a 2-car collision in the emergency lane of the Tullamarine Freeway at Strathmore. S., who was in the driver's seat of one of the vehicles was taken to hospital where, at 1.20 a.m. a sample of blood was taken from him which, when analysed, disclosed an excessive blood/alcohol concentration. S., was subsequently charged with an offence against s49(1)(g) of the *Road Safety Act* 1986 ('Act') and convicted. Upon order nisi to review—

**HELD: Order absolute. Conviction/order quashed.**
**It is an element of an offence against s49(1)(g) of the Act that the sample of blood must have been taken within 3 hours after the driving of a motor vehicle. In the present case given the time leeway of 1 hour and the presence of 2 smashed vehicles in the emergency lane of a freeway in Strathmore, the possibility of the collision occurring before 10.20 p.m. did not strain credulity so as to satisfy the learned magistrate beyond reasonable doubt that the blood sample was taken within 3 hours after driving. Accordingly, the magistrate was in error in finding the charge proved.**
***Kislinsky v Spence* (1989) 10 MVR 163; MC 55/1989, discussed and distinguished.**

**FULLAGAR J: [1]** This is the return of an order to review the decision of a Magistrate at Moonee Ponds made on 8th May 1990 whereby he convicted the defendant-applicant of an offence under s49(1)(g) of the *Road Safety Act* 1986. In this case the relevant blood test of alcohol content was performed at 1.20 a.m. in the morning of 4th June 1989. There is no evidence as to when the applicant-defendant last drove his motor car except what appears in the next two paragraphs of these reasons. A policeman gave evidence that -

> "On 3rd June 1989 at 11.20 p.m. I attended an accident scene on the Tullamarine Freeway at Strathmore near the Bulla Road off-ramp where I observed two vehicles that had been involved in a collision. The vehicle being driven by the defendant had apparently run into the rear of an abandoned Jaguar vehicle parked in the safety lane. At the time of my arrival I observed the defendant seated in the driver's side (seat?) of the Toyota and it later became obvious that the defendant was trapped in the vehicle."

Further evidence was given by the policeman that "the collision had been so forceful that it had wrecked both cars. The Jaguar vehicle had been pushed up into the safety rail causing the front left panels to be badly damaged." There was an ambulance in attendance at 11.20 p.m. and an ambulance officer was attending to the defendant. The evidence was quite consistent with a situation where both vehicles at 11.20 p.m. were off the freeway and in the safety lane and where there was no obstruction to traffic, but the evidence is utterly silent as to these matters. If these matters were so it was contended that 60 minutes might well have lapsed between the collision and the arrival of the policeman who gave evidence.

**[2]** It is an essential element of an offence under s49(1)(g) that the sample of blood must have been taken within three hours after the defendant has driven or been in charge of a motor vehicle, and the information in the present case relied upon driving and not upon being in charge, doubtless because of the power of s48(1)(b).

The question is whether it was open to the Magistrate to be satisfied beyond reasonable doubt that the collision occurred after 10.20 p.m. on 3rd June 1989. In all the circumstances of this case, and despite the fact that the applicant did not go into evidence, I have with some

hesitation concluded that it was not open to the Magistrate to be so satisfied. Counsel in the course of their helpful arguments referred me to a substantial number of decided cases. In *Kislinsky v Spence* (1989) 10 MVR 163 Crockett J upon the review of a conviction had to consider the case of a collision in Burwood Road in the Melbourne suburb of Hawthorn where the policewoman said she attended the scene "at about 3 a.m." on 29th September. There was glass and debris on the leftside of the roadway beginning at the concrete barrier separating tram tracks from roadway and extending to where the defendant's vehicle was lying upside down on its roof. The blood sample was taken at 4 a.m. on 29th September. There was no direct evidence from the policewoman as to what the time of the accident was, and the submission was made on behalf of the applicant that it was not at all inconceivable that the accident had happened before 1 a.m., and that it had taken all of the period of two hours for the overturned vehicle to be observed and for steps taken to have it **[3]** reported to the authorities and, in due course, for the police to attend. As to this, Crockett J said at p166:

> "*That submission would I think tend to strain credulity somewhat*, despite various circumstances which were pointed to which would suggest there would be nothing untoward in a delay of 2 hours between the happening of such an accident, at the time and place that it did, and the attendance of the police at the scene ... However counsel for the respondent directed attention to a passage in the evidence of the respondent given at the prosecution in which she said to the applicant 'You were the driver of a motor car registered number DDY 239 which was involved in an accident at Burwood Road, Hawthorn at about 2.45 a.m. on Tuesday 29 September 1987? Answer, Yes'." (Emphasis added by me.)

It therefore does not appear whether, in the absence of the passage of evidence deposing to the admission by the defendant, his Honour would have considered credulity to be so strained as to justify the Magistrate in rejecting the submission altogether, that is to say, so strained as to justify the conclusion that a reasonable Magistrate could have been satisfied beyond reasonable doubt that the overturning of the car occurred later than 1 a.m.

In the present case it is rightly conceded that there is no further evidence as to time by way of admission as to time or otherwise. In the present case the leeway of time is not two hours, as in *Kislinsky*, but one hour. Further the case is not one of a car lying upside down on a main road and surrounded by broken glass in the heart of the eastern suburbs but rather, so far as appears, a case of two smashed cars probably both in the emergency strip at the side of the Tullamarine Freeway at Strathmore near the Bulla off-ramp. In this matter, on a point of this kind, I think that the benefit of any doubt should be given to the accused **[4]** man, although he has given no evidence. In all the circumstances, I am not prepared to say that the possibility of the collision occurring before 10.20 p.m. so strains credulity that the Magistrate was justified in concluding beyond reasonable doubt that the collision occurred after 10.20 p.m.

I was referred to *Sanders v Hill* (1964) SASR 327 and to some other cases like it. It is one thing, however, to say that when a prosecution case is unanswered and is to the effect that the defendant's car has run into a stationary car in a well-lit area there may be in some circumstances an irresistible inference that the defendant drove without due care or attention. Similarly, if the car has hit the collision-flanges of a tram safety zone and then turned upside down. It is quite another thing to say that the absence of an answer about time of occurrence may, as it were, sheet home the fact that the time was within the span required to support a conviction. There may still be insufficient evidence of the fact.

In all the circumstances of this case, the hypothesis that the collision occurred before 10.20 p.m. is not so far beyond reasonable contemplation that the Magistrate was entitled to be satisfied beyond reasonable doubt that it was not the actual events. Accordingly the order nisi should be made absolute on ground C(a)(ii). The conviction should be quashed and I do not think the case should be referred back to the Magistrate

Before leaving this matter I would like to add, with respect, that I feel considerable sympathy with the **[5]** Magistrate who was called upon to decide this case. In the first place I think there is nothing in the point about absence of date expressly stated in the second charge, and further I think the Magistrate was entitled in law to take the view which he did take upon the other points raised, concerning the identity of the person whose blood was taken and of the person whose blood was analysed, arising out of mis-spelling of the name and mis-renderings of the address. I think

there was sufficient evidence to justify the Magistrate being satisfied beyond reasonable doubt that the person whose blood was taken and the person whose blood was analysed was in each case the defendant, although resolution of that question is not necessary to my determination of this order to review.

In the second place the point upon which the Magistrate's decision to convict is now successfully impugned is a point which I do not think was ever clearly put to the Magistrate below. In paragraph 19 of the affidavit of counsel below in support of the order nisi, which purports to summarize his arguments below, there is a reference to -

> "there being no evidence as to the time (at) which the defendant last drove (the) motor vehicle prior to the alleged blood test nor any evidence of other relevant times which could satisfy you beyond reasonable doubt that a blood test was performed upon Scilly at 1.20 a.m. to assist you in inferring that Seilley was Scilley."

A close examination of the context makes it clear, I think, that this passage would be taken by any judicial officer as relating only to the identity point, and not as raising a separate point relating to time as an element of the offence charged. **[6]** However, in the absence of any argument on this matter before me, I think the proper remedy of the prosecution, if the point was not taken below, was to attack the form of the order nisi. Although in the course of the argument before me I drew attention to my doubts as to whether the time point had ever been clearly put to the Magistrate, counsel for the respondent did not contend that the point was otherwise than one to be argued in the review. It is clearly covered by one of the grounds in the order nisi. In the absence of any such contention, and in the absence of any argument upon it for the applicant, I think that the point can be taken now on this review although not taken below. This is because it is not open to the respondent upon the return of an order nisi to claim that the order nisi should not have been made; the same must apply I think to a claim by a respondent that the order nisi should not have been granted upon one of the several grounds contained in it – that complaint should be made separately upon a separate application to set aside, or perhaps vary, the order nisi: see e.g. *Tulk v Pritchard* [1951] VicLawRp 14; [1951] VLR 99; [1951] ALR 337.

As the appeal succeeds on a point which I am not satisfied was ever clearly put to the Court below, I am not prepared to award the successful applicant any costs of the appeal. Subject to any submissions going only to form, the orders of the Court will be in accordance with the following minutes:

> Order nisi made absolute on grounds C(a)(ii).
>
> Order that the conviction be quashed and the other orders of the Magistrate be set aside.
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> This Court is making no order as to costs.

**APPEARANCES:** For the plaintiff Scilley: Mr G Hardy, counsel. Brendon Stewart & Co, solicitors. For the defendant Potter: Mr BM Dennis, counsel. AG McLean, Acting Victorian Government Solicitor.

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