35/13; [2013] VSC 439

SUPREME COURT OF VICTORIA

HALLEY v KERSHAW

Kaye J

19, 22 August 2013

MOTOR TRAFFIC – DRINK/DRIVING – DRIVING WITH BREATH ALCOHOL CONTENT IN EXCESS OF PRESCRIBED LIMIT – WHETHER DEFENDANT 'IN CHARGE OF VEHICLE' – DEFENDANT FOUND BY POLICE INFORMANT ASLEEP IN DRIVER'S SEAT WITH ENGINE RUNNING – VEHICLE STOPPED, GEAR IN PARK – ERRONEOUS VIEW OF MAGISTRATE AS TO CONSTRUCTION OF ACT – WHETHER CONVICTION NEVERTHELESS SHOULD STAND – WHETHER CASE SHOULD BE REMITTED FOR REHEARING: *ROAD SAFETY ACT* 1986, SS3AA(1), 48(1)(b), 49(1)(f).

H. was found by the police informant K. asleep in the driver's seat of his vehicle. K. noted that the engine was running and H. was slouched over the steering wheel. K. knocked on the window to attract H's attention and after a few minutes' delay, H. sat up and opened the car door. H. was later charged with being in charge of the vehicle with a BAC of 0.266. During the hearing, the Magistrate ruled that he was not constrained to confine his consideration to the question whether H's circumstances came within any of the four categories specified in s3AA(a) to (d) of the *Road Safety Act* 1986 ('Act'). The Magistrate found the charges proved. Upon appeal—

HELD: Appeal allowed. Magistrate's order set aside and the charges dismissed.

1. The terms of s48(1)(b) of the Act are clear and unequivocal. By its express terms, s48(1)(b) specifically provides that, for the purposes of Part 5 of the Act, a person is not to be taken to be in charge of a vehicle unless that person is a person to whom sub-paragraphs (a) to (d) of s3AA applies. There is no warrant for construing s48(1)(b) other than according to its plain terms.

2. In determining whether the Magistrate was satisfied that the appellant was 'in charge of' the vehicle for the purposes of s49(1)(b) of the Act, the magistrate was obliged to, but did not, consider whether he was satisfied that the case came within one of the four categories of circumstances specified in sub-paragraphs (a) to (d) of s3AA(1) of the Act. Instead of doing so, the magistrate considered that he was not bound to determine whether the case fell within one of those four categories, but, rather, he concluded that the appellant was 'in charge of' the vehicle because, when he woke up, he was in the driver's seat, with the engine running. That conclusion did not, alone and without more, bring the case within any of the categories specified in subparagraph (a) to (d) of s3AA(1). In that way, with respect, the magistrate made an error of law.

3. The Magistrate did not make any finding whether the police informant, at the relevant time, believed that the appellant intended to drive the vehicle, and, further, made no finding as to whether there were reasonable grounds for any such belief, if it was so held by the police informant.

4. Further, the police informant did not give any express evidence as to his belief as to that matter, and as to any grounds upon which he might have held such a belief. The principles relating to the proof of those matters have been discussed in a number of authorities.
***DPP v Farmer* [2010] VSC 343; (2010) 56 MVR 137, referred to.**

5. At most the evidence, by the informant, as to the requisite belief, was ambiguous. On the view most favourable to the informant, the evidence was not sufficiently clear and unequivocal to enable a conclusion that the Magistrate was bound to conclude that the informant held the belief, on reasonable grounds, that the appellant was then intending to drive his vehicle.

6. In those circumstances, the conviction should not stand. The magistrate having reached the conclusion on the basis of an erroneous proposition of law, it followed that the conviction was quashed.

KAYE J:

1. This is an appeal from a decision of the Magistrates' Court at Moorabbin of 29 October 2012. By that decision, the magistrate found the appellant guilty of an offence against s49(1)(f) of the *Road Safety Act* 1986 ('the Act'), fined the appellant $500, cancelled his licence, and disqualified the appellant from holding any licence to drive a motor vehicle for a period of 24 months.

2. Section 49(1)(f) of the *Road Safety Act* provides:

> (1) A person is guilty of an offence if he or she—
> ...
> (f) within three hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under s55 and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.

3. The question in the appeal is whether the magistrate erred, in law, in finding that, at the relevant time, the appellant was 'in charge of' a motor vehicle.

4. The only witness who gave evidence at the Magistrates' Court was the informant, Acting Sergeant Mark Kershaw, of the Oakleigh Police Station. Sergeant Kershaw stated that on 10 January 2012 he received a telephone call to attend a green Commodore sedan which was parked in Huntingdale Road, Huntingdale. When Sergeant Kershaw arrived, the vehicle was parked out the front of a shopping strip in Huntingdale Road. He approached the vehicle, and he noted that the engine was running, and that the driver, the appellant, was in the driver's seat slouched over the steering wheel.

5. Sergeant Kershaw knocked on the window to attract the appellant's attention. He had to knock several times. After seven to ten minutes' delay, the appellant sat up and opened the car door. He appeared somewhat disorientated. Sergeant Kershaw noticed that the gear of the vehicle was in 'park', but that the hand brake was off. Although the engine was running, the radio was not turned on, and neither the heating nor the cooling of the car was on. Sergeant Kershaw asked the appellant to turn off the engine, but the appellant did not do so, and Sergeant Kershaw himself turned off the ignition. Sergeant Kershaw asked the appellant how long he had been there. The appellant said that he had not been there for long. Sergeant Kershaw then requested him to undergo a preliminary breath test. That test was duly administered, and returned a positive reading. At Sergeant Kershaw's request, the appellant then accompanied him to the Oakleigh Police Station. There the appellant furnished a sample of his breath for analysis by a breath analysing instrument. The result of that test indicated that the appellant's blood alcohol content was 0.266 grams of alcohol per 210 litres of breath.

6. In cross-examination, it was put to Sergeant Kershaw that, although the appellant stated that he had only just arrived at the location, he had not in fact just got there, 'because he was asleep'. In response to that question, Sergeant Kershaw is recorded as responding 'Mm'hm'. Later in cross-examination, it was put to Sergeant Kershaw that he had no idea how long the appellant 'had been there asleep'. To that Sergeant Kershaw responded, 'I don't give an exact time, no'.

7. In re-examination, Sergeant Kershaw clarified that answer. He said that when he approached the vehicle, the appellant was slouched with his arm across the steering wheel, and his head was down. Sergeant Kershaw said 'I couldn't say that he was asleep but that's the way he appeared to be'.

8. Based on that evidence, the magistrate was satisfied that the appellant was in charge of the vehicle at the relevant time, and his Honour accordingly found the appellant was guilty of the offence charged under s49(1)(f) of the Act.

***Road Safety Act* 1986 s3AA(1), s48(1)(b)**

9. Section 3AA(1) of the Act provides:

> (1) Without limiting the circumstances in which a person is in charge of a motor vehicle, the following persons are taken to be in charge of a motor vehicle for the purposes of this Act—
> (a) a person who is attempting to start or drive the motor vehicle;
>
> (b) a person with respect to whom there are reasonable grounds for the belief that he or she intends to start or drive the motor vehicle;

(c) a commercial driving instructor while the person whom he or she is teaching to drive is driving or in charge of the vehicle;

(d) an accompanying licensed driver while the person whom he or she is sitting beside is driving or in charge of the vehicle.

10. Section 49 comes within Part 5 of the Act. Section 48, which is within the same Part, provides:

(1) For the purposes of this Part—
...
(b) a person is not to be taken to be in charge of a motor vehicle unless that person is a person to whom section 3AA(1)(a), (b), (c) or (d) applies.

The grounds of appeal

11. In the Notice of Appeal, the appellant relies on two grounds, namely:

(1) That the magistrate erred in law in finding that the respondent found the appellant in charge of a vehicle at the time when the appellant was asleep.

(2) The magistrate erred in his interpretation and application of s48(1)(b) of the Act, and wrongly convicted the appellant on the charge under s49(1)(f) of the Act.

12. The grounds of appeal, and the competing submissions, raise an issue as to the basis upon which the magistrate was satisfied that at the relevant time the appellant was in charge of the vehicle. The primary submission on behalf of the appellant was that the magistrate failed to interpret s48(1)(b) of the Act correctly, and that his Honour relied on the opening words of s3AA(1), which state 'Without limiting the circumstances in which a person is in charge of a motor vehicle ...' Thus, it was submitted that the magistrate wrongly proceeded on the basis that the four categories, specified in s3AA(1)(a), (b), (c) and (d), are not an exhaustive list of the circumstances in which a person might be taken to be in charge of a motor vehicle.

13. On the other hand, it was submitted on behalf of the respondent that the decision of the magistrate was based on a finding that the facts of the case came within subparagraph (b) of s3AA(1), namely, the appellant was a person with respect to whom there were reasonable grounds for the belief that he intended to start or drive the motor vehicle. It was submitted on behalf of the respondent that there were reasonable grounds for the belief that the appellant was intending to drive the motor vehicle, and that therefore the magistrate did not err in finding that the appellant was in charge of the vehicle at the relevant time.

14. It is therefore necessary to determine the particular basis upon which the magistrate was satisfied that the charge against the appellant was proven.

The magistrate's reasons

15. At the conclusion of the evidence of Sergeant Kershaw, counsel for the appellant unsuccessfully made a no case submission on behalf of his client. The magistrate did not uphold that submission. Counsel for the appellant, and the prosecutor, each made further submissions. The magistrate then stated his conclusions in short form as follows:

In this matter I accept the prosecution's submissions about the manner in which the evidence should be interpreted; the evidence that the accused was awake at the time that the informant knocked on the window. When that is added to the fact that the vehicle engine was running at that time I find it sufficient to constitute that he was in charge of the vehicle at that time and the offence made out.

16. In order to understand precisely what the magistrate thus decided, it is necessary to consider, in a little detail, what passed between the magistrate and counsel in the course of submissions.

17. As I stated, at the conclusion of the evidence, counsel for the appellant made a 'no case' submission. Counsel's submissions focused on subparagraph (b) of the definition in s3AA(1) of the Act. He submitted that in order to be in charge of the motor vehicle, the accused had to be found in circumstances where it was reasonable to believe that he intended to start or drive the vehicle.

He submitted that in this case such a belief could not have been held by the informant, because the appellant was asleep in his vehicle when he was approached by the informant. Counsel then took the magistrate to a number of authorities, to which I shall later refer. Having done so, he submitted that the prosecution needed to prove that, when the informant found the appellant, 'he was about to start or drive the car', and he submitted that there was no evidence before the court to support that conclusion.

18. In response, the prosecutor submitted that there was evidence that the informant had reasonable grounds for forming a belief that the respondent was about to start or drive the car. In particular, he referred to the evidence of Sergeant Kershaw of receiving the phone call, attending the car park, and observing the respondent there. The prosecutor submitted that the informant was entitled to base part of his reasonable grounds on the communication which he had received by the telephone. The magistrate interjected that he did not understand counsel for the appellant to be challenging the administration of the preliminary breath test. Counsel for the appellant responded by contending that there was no evidence to support a reasonable belief that the appellant at the relevant time was in charge of the vehicle, because he was found asleep.

19. In response, the prosecutor submitted that the magistrate could conclude that the appellant was in charge of the vehicle, because when he had 'woken up' he was seated in the driver's seat of the vehicle with the engine running, and he was then in a position of control of the vehicle. In an ensuing interchange with the prosecutor, the magistrate observed that 'there doesn't appear to be much doubt that he was asleep'. The prosecutor concurred with that observation. The magistrate expressed the view that the essential issue was whether someone who was found asleep in those circumstances could be regarded as being in charge of the vehicle.

20. The magistrate then stood the matter down to enable the prosecutor to conduct some research. When the matter resumed, the prosecutor submitted that the four circumstances, specified in s3AA(1) of the Act, were not exhaustive. In support of that submission, he relied on the opening words to the section.

21. In response, counsel for the appellant then drew the attention of the magistrate to s48(1)(b) of the Act which, he submitted, had the effect that a person is not to be taken to be in charge of a motor vehicle, unless that person is a person to whom subparagraphs (a), (b), (c) or (d) of s3AA(1) applied. There then followed a discussion between the magistrate and counsel relating to that submission. Following that discussion, the magistrate concluded:

> I don't read that section in the same manner as you do, [counsel for the appellant], and I accept the prosecution's submission that the words 'without limiting the circumstances' be given [indistinct] meaning and I accept the submission as to what meaning it should be given and find that on the evidence given to date there is a case to answer taken at its highest.

22. Pausing there, it is clear that the magistrate proceeded on the basis that, notwithstanding s48(1)(b) of the Act, a person may be taken to be in charge of a vehicle, for the purposes of s49, although that person did not come within subparagraphs (a), (b), (c) or (d) of s3AA(1) of the Act.

23. After the magistrate rejected the no case submission, counsel announced that he would not be calling evidence. The magistrate heard further submissions from the parties. The prosecutor submitted that once the police officer knocked on the window, the appellant awoke, if it is to be accepted that he was asleep in any event. He submitted that thus the appellant was awake when the vehicle was running, he was seated in the driver's seat, and that therefore he was in charge 'at that particular point of time, even if it was for the officer knocking on the window'. Counsel for the appellant interjected and objected that that was not how the case had been put against his client. It was following that interchange that the magistrate announced his decision in the terms which I have set out in paragraph 15 above.

24. In that context, three matters are clear from the magistrate's decision. First, his Honour proceeded on the basis that it was not necessary for him to find that the case came within any of subparagraphs (a) to (d) of s3AA(1) of the Act, in order to be satisfied that the appellant was in charge of the vehicle. Secondly, the magistrate accepted that when Sergeant Kershaw approached the Commodore and knocked on its window, the appellant was then asleep. Thirdly, the magistrate's decision was based on a finding that the appellant, when woken by the informant knocking on

his window, was in charge of the vehicle. The magistrate based that conclusion on the fact that the appellant was then awake in the driver's seat, and that the vehicle engine was running.

25. For those reasons, I do not accept the submission, made on behalf of the respondent, that the magistrate based his conclusion, that the appellant had been in charge of the vehicle, on a finding that the appellant came within subparagraph (b) of s3AA(1) of the Act, namely, that he was a person with respect to whom there were reasonable grounds for the belief that he intended to start or drive the vehicle. In particular the magistrate did not purport to make any finding as to the belief, or otherwise, of the informant, Sergeant Kershaw, as to that matter, nor as to whether such belief was reasonable. Rather, and on the contrary, the magistrate specifically ruled that, in determining whether he was satisfied that the appellant had been in charge of the vehicle, he was not constrained to confine his consideration to the question whether the appellant's circumstances came within any of the four categories specified in s3AA(1)(a) to (d) of the Act.

Ground 2 of the grounds of appeal: interpretation of s48(1)(b) of the Act

26. That analysis of the magistrate's reasons enlivens ground 2 of the Notice of Appeal. In particular, Mr Hardy, on behalf of the appellant, has submitted that the magistrate erred in holding that the opening words of s3AA(1) ('without limiting the circumstances in which a person is in charge of a motor vehicle …') has the effect that a person may be held to be 'in charge of' a motor vehicle, for the purposes of an offence against s49(1)(f) of the Act, notwithstanding that the circumstances of the case do not come within subparagraphs (a) to (d) of s3AA(1). Mr Hardy submitted that the clear purpose of s48(1)(b) of the Act is to narrow the circumstances in which a person is taken to be in charge of a vehicle for the purposes of Part 5 of the Act. It achieves that purpose by finding the ambit of the phrase 'in charge of a vehicle', for the purposes of Part A, to the four circumstances specified in subparagraphs (a) to (d) of s3AA(1). Mr Hardy submitted that the interpretation adopted by the magistrate ignores, and renders otiose, s48(1)(b) of the Act.

27. The submissions made by Mr Hardy are clearly correct, both as a matter of statutory interpretation, and by way of authority. Mr Gyorffy SC, who appeared on behalf of the respondent, did not contend to the contrary.

28. The terms of s48(1)(b) are clear and unequivocal. By its express terms, s48(1)(b) specifically provides that, for the purposes of Part 5 of the Act, a person is not to be taken to be in charge of a vehicle unless that person is a person to whom subparagraphs (a) to (d) of s3AA applies. There is no warrant for construing s48(1)(b) other than according to its plain terms.

29. The construction of s48(1)(b), contended for on behalf of the appellant, is consistent with the history of that provision. Section 48(1)(b) of the Act was amended, and s3AA(1) was introduced into the Act, by the *Road Safety (Further Amendment) Act* 2001.[1] Previously, s48(1)(b) had itself provided as follows:

> a person is not to be taken to be in charge of a motor vehicle unless that person is attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle.

30. The amending Act in 2001 substituted the words, 'a person to whom s3AA(1)(a), (b), (c) or (d) applies' for the words 'attempting to start or drive the motor vehicle or unless there are reasonable grounds for the belief that that person intends to start or drive the motor vehicle'. Thus, it is clear that the 2001 amendments were not intended to alter the definition of the phrase 'in charge of a motor vehicle' for the purposes of Part 5. Rather, the intention of the amending statute was to retain the existing definition of that phrase for the purposes of offences under Part 5 of the Act.

31. That construction of s48(1)(b) of the Act does not deprive the introductory words of s3AA(1) ('without limiting the circumstances in which a person is in charge of a motor vehicle …') of any useful purpose. Rather, s17 of the 2001 Act introduced a series of duties of a person 'in charge of' a vehicle, by amending s59 of the Act, to impose those duties, not only on drivers of a vehicle, but also on persons in charge of a vehicle. The opening words of s3AA(1) are applicable in determining whether a person is 'in charge of' a vehicle for the purposes of that amended provision.

32. The construction of s48(1)(b) contended for by the appellant, and which I accept, is supported by the decision of Bell J in *Director of Public Prosecutions v Farmer*.[2] In that case, the respondent had been charged with refusing to undergo a preliminary breath test. The question was whether, at the relevant time, the respondent was a person in charge of the vehicle. In respect of s48(1)(b), Bell J stated:

> For the purposes of Part 5, which include s53, s48(1)(b) provides that a person is not to be taken to be in charge of a motor vehicle unless the definition in s3AA(1)(a), (b), (c) or (d) applies. Section 48(1c) (sic) thus makes the definition in paragraphs 3AA(1)(a), (b), (c) and (d) an exclusive code for the purpose of determining when a person is in charge of a motor vehicle under s53(1)(a).[3]

33. Bell J then set out s3AA(1) in full, and stated:

> By reason of s48(1)(b), when applying this definition to Part 5, the opening words of s3AA(1) do not apply. Therefore, when determining whether a person is required by s53(1)(a) to undergo a preliminary breath test by reason of being in charge of a vehicle, the question is whether they are to be taken to be in charge by reason of the application of paragraphs (a), (b), (c) or (d) of the definition.[4]

34. Thus, in determining whether he was satisfied that the appellant was 'in charge of' the vehicle for the purposes of s49(1)(b) of the Act, the magistrate was obliged to, but did not, consider whether he was satisfied that the case came within one of the four categories of circumstances specified in subparagraphs (a) to (d) of s3AA(1) of the Act. Instead of doing so, the magistrate considered that he was not bound to determine whether the case fell within one of those four categories, but, rather, he concluded that the appellant was 'in charge of' the vehicle because, when he woke up, he was in the driver's seat, with the engine running. That conclusion does not, alone and without more, bring the case within any of the categories specified in subparagraph (a) to (d) of s3AA(1). In that way, with respect, the magistrate made an error of law.

35. As I have noted, Mr Gyorffy, on this appeal, did not contend that the magistrate had correctly construed s3AA(1) of the Act. Rather, the principal question on appeal concerned whether that error should lead to an order setting aside the appellant's conviction by the magistrate, and, secondly, if so, whether the case should be remitted to the Magistrates' Court for rehearing.

Submissions as to effect of magistrate's error

36. Mr Hardy, who appeared for the appellant, submitted that, on the evidence before him, the magistrate was bound to rule in favour of the appellant on the 'no case' submission. Mr Hardy submitted that there was no evidence, at all, that the respondent had formed any belief that the appellant intended to start or drive the vehicle. On the contrary, he submitted, the respondent's evidence was that he required the appellant to undergo a preliminary breath test because the appellant had told him that he had 'just got there'. In this respect, Mr Hardy referred to a number of authorities, including *DPP v Farmer*,[5] *Gillard v Wenborn*,[6] and *Woods v Gamble*.[7] He submitted that the effect of those authorities is that, in order to establish that the appellant was in charge of the vehicle at the relevant time on the basis of subparagraph (b) of the definition contained in s3AA(1), the respondent was required to, but did not, give evidence as to his belief that the appellant intended to start or drive the vehicle, and as to the basis for such a belief. Relying on those authorities, Mr Hardy further contended that the fact that the appellant was asleep, when the respondent found him, precluded a conclusion that the respondent could have formed the belief that the appellant, then, intended to start or drive the vehicle. Thus, Mr Hardy submitted that the correct disposition of this appeal is to allow the appeal, and to quash the appellant's conviction. Mr Hardy submitted that I should not remit the case for rehearing, because, on any view, the appellant could not be convicted of being in charge of the vehicle. Mr Hardy, again, submitted that that conclusion must follow from the fact that the respondent found the appellant asleep in the vehicle.

37. On the other hand, Mr Gyorffy submitted that, on the evidence adduced before the magistrate, his Honour could have reached no other conclusion than that the respondent believed, on reasonable grounds, that the appellant intended to drive the vehicle. Mr Gyorffy submitted that it was implicit in the respondent's evidence that, when he came upon the appellant's vehicle, he then believed that the appellant was about to drive the vehicle. Mr Gyorffy submitted, further, that the respondent had reasonable grounds for reaching that conclusion. In particular, Mr Gyorffy submitted that those matters were to be implied from a number of facts, including: the

police received an anonymous telephone call about the appellant's vehicle in Huntingdale Road, Huntingdale; when the respondent attended, the engine of the vehicle was running, and the appellant was seated in the driver's seat, slouched over the steering wheel; the vehicle's gear was in park, but the handbrake was off, the radio was not turned on, and no heating or cooling was operating in the car; accordingly there was no other reason why the engine of the vehicle was then running, other than so that the vehicle could be driven off; when the appellant was asked to turn off the ignition, he did not do so, and so the informant was required to turn it off; and the appellant said to the informant that he had not been at that location for long. Mr Gyorffy submitted that those facts gave rise to the clear implication that the respondent did form the belief, on reasonable grounds, that the appellant intended to drive the vehicle. In those circumstances, Mr Gyorffy submitted that the magistrate was not only entitled, but that he was obliged, to be satisfied beyond reasonable doubt that, at the time the respondent attended upon the appellant's vehicle, he believed, based on reasonable grounds, that the appellant was intending to drive the vehicle. Thus, Mr Gyorffy submitted that the magistrate was not only entitled, but obliged, to conclude that, at that time, the appellant was deemed to be in charge of the vehicle, by reason of the operation of s3AA(1)(b) of the Act. Alternatively, Mr Gyorffy submitted that, if the appellant's conviction is set aside, I should remit the case to the Magistrates' Court for a rehearing.

Whether the conviction should be set aside

38. The first question is whether, as a result of the error of the magistrate, the appellant's conviction should be set aside. That issue is raised by the submission by Mr Gyorffy, to which I have just referred, that, in the circumstances, the magistrate was both entitled and obliged to conclude that the informant believed, on reasonable grounds, that the appellant was about to drive the vehicle, at the time at which the respondent came upon the appellant's vehicle.

39. It is well established that in the case of a civil appeal, a respondent may support the decision below based on a ground other than that on which the decision was based, provided that there is sufficient evidence to sustain that ground, and provided that there is no resultant injustice or unfairness to the appellant.[8] On the other hand, the position is quite different with respect to an appeal from a criminal conviction imposed by a magistrates' court. In such an appeal, it is well established that where the decision by the magistrate to convict the appellant was the result of a material error of law by the magistrate, this Court, on review or on appeal, should only decline to quash the conviction if, notwithstanding that error of law, the appellant should nevertheless 'clearly have been convicted' on the evidence adduced before the magistrate.[9] Thus, in a case such as this, the respondent would need to be able to point to uncontradicted evidence upon which the court below, if it had not made the relevant error of law, would clearly have been obliged to convict the appellant.[10]

40. The difficulty with Mr Gyorffy's submission arises from the course which the case took before the magistrate. It would appear that, initially, both parties understood the respondent to be relying on s3AA(1)(b) of the Act to establish that the appellant was, at the relevant time, in charge of the vehicle. However, in the course of the no case submission, the prosecutor relied on an alternative proposition, namely, that the magistrate was not bound to find that the case came within any of the four categories specified in s3AA(1)(a) to (d). In effect, the prosecutor submitted that the magistrate should adopt a 'common law' definition of the phrase 'in charge of a motor vehicle'. In the course of further argument, that alternative position became the case made by the prosecution. The magistrate accepted that case so put by the respondent. As a result, the magistrate did not make any finding whether the respondent, at the relevant time, believed that the appellant intended to drive the vehicle, and, further, his Honour made no finding as to whether there were reasonable grounds for any such belief, if it was so held by the respondent.

41. Further, the respondent himself did not give any express evidence as to his belief as to that matter, and as to any grounds upon which he might have held such a belief. The principles relating to the proof of those matters have been discussed in a number of authorities, and were recently helpfully compiled by Bell J in *DPP v Farmer*.[11] In particular, the following principles are relevant:

> (1) The informant should give specific evidence as to the belief which he or she formed in relation to the intention of the defendant to start or drive the vehicle.[12]
>
> (2) In addition, the informant should expressly state the basis upon which he or she formed that belief.[13]

(3) It is not necessary that the informant be satisfied of the particular fact on the balance of probabilities; rather, the informant must establish that he or she held the belief on reasonable grounds.

(4) Such a belief has been described as 'an inclination of the mind towards assenting to, rather than rejecting, a proposition ...'[14] In *DPP v Farmer*,[15] Bell J stated that a 'belief is something more than suspicion but does not need to approach anything like certainty.'

(5) The belief by the informant must be a belief that the defendant intended to '... start the engine or drive off forthwith, or to do so at any point of very close futurity'.[16]

(6) The question is not whether the court itself holds, or agrees with, the belief that the defendant intended to drive or start the vehicle. Rather, the question is whether the informant held such a belief, and whether the informant did so on reasonable grounds.[17]

42. It is clear that the matters, to which I have just referred, received little, if any, attention in the evidence and in submissions. As I stated, the respondent did not give any express evidence as to his belief, or as to the grounds on which it was based. In his evidence, he stated that when the appellant told him that he had not been there long, he decided to administer a preliminary breath test to the appellant. That evidence, by the respondent, strongly suggests that he administered the breath test based on the erroneous view that he was entitled to do so, because the appellant had been driving recently. On the other hand, Mr Gyorffy submitted that, in the context of the case, the evidence of the respondent implied that the respondent had formed the view that the appellant was then intending to drive the vehicle. Mr Gyorffy submitted that that implication was based on the evidence that the engine was still running, that there was no reason to do so, and that the appellant said he had only arrived at the location a short time ago.

43. Even granting that the proposition advanced by Mr Gyorffy is arguable, at most the evidence, by the respondent, as to the requisite belief, was ambiguous. On the view most favourable to the respondent, the evidence was not sufficiently clear and unequivocal to enable me to conclude that the magistrate was bound to conclude that the respondent held the belief, on reasonable grounds, that the appellant was then intending to drive his vehicle.

44. In those circumstances, I reject the submission by Mr Gyorffy that the conviction should stand. Rather, the magistrate having reached the conclusion on the basis of an erroneous proposition of law, it follows that the conviction should be quashed.

Whether the matter should be remitted to the Magistrates' Court

45. The question which remains is whether I should accede to Mr Gyorffy's alternative submission, to remit the case to the Magistrates' Court for a rehearing. In general, when the Supreme Court reaches a conclusion that a trial in a Magistrates' Court has miscarried because of a failure of the lower court to direct its mind to the correct question, or to make the necessary findings of fact, the usual course is to remit the case for rehearing.[18] In particular, ordinarily, a case would be remitted for a rehearing, if the facts, proven on the first trial, would have been sufficient to support a conviction, if the magistrate had applied the correct principles of law.[19] On the other hand, if the evidence, adduced before the magistrate, was insufficient to justify a conviction, then the case should not be remitted to the court for a further hearing.[20]

46. In the present case, taking the evidence of the respondent before the magistrate at its highest, it is arguable that it is implicit that, at the relevant time, he believed that the appellant was intending to drive the vehicle. However, that evidence falls well short of satisfying the principles which I have summarised above, as to the evidence which needs to be adduced to prove the relevant state of mind of the informant. While the evidence might, perhaps, have been sufficient to enable the prosecution to withstand a no case submission,[21] nevertheless that evidence would be entirely inadequate to entitle a court to conclude, beyond reasonable doubt, that the informant believed, on reasonable grounds, that the appellant was intending to drive the vehicle, at the time the informant found the appellant in the vehicle. It is a matter of conjecture whether the respondent, on a rehearing, would depose to the required belief, and, if so, whether he would disclose reasonable grounds for such a belief. This is particularly so given the evidence by the respondent that, when he approached the vehicle, the appellant appeared to be asleep, and the appellant only woke up when the respondent knocked several times on the vehicle's window. In light of that evidence, it is very doubtful that, on a rehearing, the evidence would be sufficient to

prove, beyond reasonable doubt, that the respondent held the belief, referred to in s3AA(1)(b) of the Act.

47. In those circumstances, I do not accept the submission made on behalf of the respondent that the case be remitted to the Magistrates' Court for a rehearing.

Summary of conclusions

48. For the foregoing reasons, I have reached the following conclusions in this matter:

> (1) The magistrate made an error of law in his interpretation and application of s48(1)(b) of the *Road Safety Act*, and, as a consequence, his Honour wrongly concluded that the appellant was in charge of the vehicle for the purposes of the offence charged under s49(1)(f) of the Act. Accordingly the magistrate wrongly convicted the appellant on that charge.
>
> (2) I reject the submission made on behalf of the respondent that notwithstanding the error by the magistrate, the appellant's conviction for the charge under s49(1)(f) should not be quashed.
>
> (3) I do not accept the submission made on behalf of the respondent that the case be remitted to the Magistrates' Court for a rehearing.

Orders

49. Based on the above conclusions, and subject to hearing from counsel, I propose to make the following orders:

> (1) The appeal by the appellant against the orders made 29 October 2012 by the Magistrates' Court at Moorabbin is allowed.
>
> (2) The orders made by the Magistrates' Court convicting the appellant of a charge under s49(1)(f) of the *Road Safety Act* 1986, fining the appellant $500, and cancelling all licences and permits issued under the *Road Safety Act* for a period of 24 months, are set aside.
>
> (3) In lieu of such orders, it is ordered that the charges laid against the appellant by the respondent be dismissed.

50. I shall hear counsel on the question of costs.

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[1] Act No 92 of 2001.
[2] [2010] VSC 343.
[3] Ibid [7].
[4] Ibid [9].
[5] [2010] VSC 343.
[6] (Unreported, Supreme Court of Victoria, Marks J, 27 July 1988).
[7] (1991) 13 MVR 153.
[8] Compare *David Syme & Co Ltd v Lloyd* (1985) 1 NSWLR 416, 420-421 (Kirby P), 427 (Hope JA); 59 ALR 159; *Waller v Thomas* [1921] 1 KB 541, 548 (McCredie J); *Chapman v Knight* (1880) 5 CPD 308, 314 (Grove J); *In re the Solicitors' Act* [1938] 1 KB 616, 627 (Greer LJ).
[9] See *Knox v Bible (No 2)* [1907] VicLawRp 87; [1907] VLR 485, 497 (Cussen J); 13 ALR 352; 29 ALT 23; *Macmanamy v King* [1907] VicLawRp 93; [1907] VLR 535, 543; 13 ALR 258; 28 ALT 250 (A'Beckett and Cussen JJ); *Chappell v A Ross & Sons Pty Ltd* [1969] VicRp 48; [1969] VR 376, 394 (Gowans J); *Walford v McKinney* [1996] VICSC 57; [1997] 2 VR 353, 356 (Tadgell JA); *Engebretson v Bartlett* [2007] VSC 163; (2007) 16 VR 417, 437-438 [113], 439 [235] (Bell J); (2007) 172 A Crim R 304; *Walpole v Bywool Pty Ltd* [1963] VicRp 26; [1963] VR 157, 160 (O'Bryan J); 9 LGRA 44; *Johnson v Poppeliers* [2008] VSC 461; (2008) 20 VR 92, 110 [57]-[58] (Kyrou J); (2008) 190 A Crim R 23; (2008) 51 MVR 444.
[10] Cf *Pagett v Hales* [2000] NTSC 35, [18] (Mildren J); *Baini v The Queen* [2012] HCA 59; (2012) 246 CLR 469, 481-482 [33]; 87 ALJR 180.
[11] [2010] VSC 343; (2010) 56 MVR 137.
[12] Ibid [14]; *DPP v Mitchell* [2002] VSC 326, [39]; (2002) 37 MVR 142 (Gillard J).
[13] Ibid.
[14] *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104, 116; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246.
[15] [2010] VSC 343, [34]; (2010) 56 MVR 137.
[16] *Woods v Gamble* (1991) 13 MVR 153, 156 (Fullagar J).
[17] Cf *Walsh v Loughnan* [1991] VicRp 75; [1991] 2 VR 351, 356 (Vincent J).
[18] *Klemenko v Huffa* (1978) 17 SASR 549.
[19] *Davey v Liebelt* [1960] SASR 1, 4 (Reed J); *Brown v Department of Police and Emergency Management* [2009] TASSC 90, [9] (Evans J).
[20] *Reid v The Queen* [1980] AC 343, 348-9; [1979] 2 All ER 904; *Andrews v R* [1968] HCA 84; (1968) 126

CLR 198, 211; [1969] ALR 359; 43 ALJR 57 (Barwick CJ, McTiernan, Taylor, Windeyer and Owen JJ).
[21] *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654, 658; [1955] ALR 671; *Wilson v Kuhl* [1979] VicRp 33; [1979] VR 311, 319 (McGarvie J); *Attorney-General's Reference (No 1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410, 414, 417-418.

APPEARANCES: For the appellant Halley: Mr S Hardy, counsel. Thexton Lawyers. For the respondent Kershaw: Mr T Gyorffy SC, counsel. The Solicitor for Public Prosecutions.
