30/06; [2006] VSC 322

SUPREME COURT OF VICTORIA

WILSON v COUNTY COURT & ANOR

Cavanough J

7-8 June, 7 September 2006

(2006) 14 VR 461; (2006) 164 A Crim R 525; (2006) 46 MVR 117

MOTOR TRAFFIC - DRINK/DRIVING – DRIVER INTERCEPTED WHILE DRIVING – BREATH TEST TAKEN – DRIVER NOTIFIED OF RESULT – GIVEN CAUTION – DRIVER MADE "NO COMMENT" TO QUESTIONS ASKED BY POLICE OFFICER – DRIVER LATER CHARGED WITH OFFENCE AND CONVICTED IN MAGISTRATES' COURT – APPEAL TO COUNTY COURT – CONVICTED BY COUNTY COURT – JUDGE USED DRIVER'S SILENCE AFTER POLICE CAUTION TO IMPUGN HIS CREDIBILITY AS A WITNESS – EXTENT OF THE RIGHT TO SILENCE – WHETHER RIGHT APPLIES WHERE ACCUSED RAISES ISSUE OF HIS OWN CREDIT IN HIS OWN CASE – WHETHER RELEVANT THAT BURDEN OF PROOF AS TO OPERATION OF THE BREATH ANALYSING INSTRUMENT WAS ON THE ACCUSED – WHETHER AN ERROR OF LAW ON THE FACE OF THE RECORD – WHETHER ERROR MUST BE FUNDAMENTAL – WHETHER JUDGE IN ERROR IN FINDING CHARGE PROVED: *ROAD SAFETY ACT* 1986, SS49(1)(f), (4).

W. was intercepted driving his motor vehicle and later underwent a breath test which returned a reading of 0.147%. W. was subsequently charged and convicted in the Magistrates' Court. On appeal to the County Court W. was again convicted. At the hearing on appeal, W. claimed that because of his gastric reflux disease he burped at the time of taking the test. Further, he claimed that he had not drunk nearly enough alcohol to warrant the reading. In finding the charge proved, the judge indicated that in assessing W.s credibility he had taken into account that W. had said "No comment" and that he did not mention having burped while taking the test. Upon appeal—

HELD: Orders made by County Court quashed. Appeal remitted to the County Court (differently constituted) to be heard and determined according to law.

1. Silence by an accused in the face of questioning by the police or similar authorities cannot be used against the accused in a criminal proceeding in any circumstances or for any purpose.

***Petty v R* [1991] HCA 34; (1991) 173 CLR 95; 102 ALR 129; 55 A Crim R 322; 65 ALJR 625, applied.**

2. There is nothing in the language used in *Petty* to suggest that the principles discussed are not universal. That is, the principles are applicable in trials before juries as well as summary proceedings.

3. Further, there is no support in law to state that the principles may not apply where the onus of proof is on an accused in relation to the defences under s49(4) of the *Road Safety Act* 1986.

4. Where a judge or jury takes an unfavourable view of a witness's credibility because of the witness's prior silence on a particular matter, an inference or a suspicion of "recent invention" will inevitably be involved in the process of reasoning, at least in the usual case. It is hard to imagine that any other kind of reasoning could logically link the conclusion with the premise. The relevant comments of the judge show that he inferred or at least strongly suspected recent invention on the part of W. in relation to the alleged burping incident, and that he accorded less credibility to W.s evidence in general on that basis. W.s "No comment" answer was used by the judge to impugn his credibility on the question of the amount of his drinking. Accordingly, the court committed an error of law.

5. W. was able to show that the judge's decision might have been different in the absence of the error of law. Further, the error was so fundamental to the decision as to strike at the very roots of its order and to invalidate it. Accordingly, W. was entitled to an order quashing the orders made by the County Court.

CAVANOUGH J:

1. Leigh Wilson was intercepted at a "booze bus" while driving. He took a breath test. The reading was 0.147%. He was later convicted in the Magistrates' Court of an offence against s49(1)(f) of the *Road Safety Act* 1986. He appealed to the County Court. He relied on s49(4) of the Act

which provides that it is a defence for the person charged to prove that the breath analysing instrument used was not in proper working order or not properly operated.[1] The onus of proof is on the accused under s49(4). Mr Wilson raised two claims of fact in this regard. First, he said that he had long suffered from gastric reflux disease, and that this condition had caused him to burp at the time of taking the breath test, distorting the result.[2] Second, he claimed that he had not drunk nearly enough alcohol to warrant the high reading. He gave sworn evidence himself on those matters, and called certain corroborative and expert evidence. If he was to have any prospect of succeeding in his defence it was essential (albeit not in itself sufficient) that his evidence as to his drinking be accepted. So his own credibility was vital.

2. In giving judgment, the learned County Court judge said, among other things, that he was not convinced that Mr Wilson was being truthful in his evidence before the Court as to how much he had drunk. He announced that the appeal against conviction would be dismissed. In the course of pre-sentence discussions, his Honour made certain remarks that now form the sole remaining basis of Mr Wilson's complaint to this Court. His Honour indicated that he had taken into account in assessing Mr Wilson's credibility that, after being notified of the high reading and after being given the usual caution by the police, Mr Wilson, on being asked whether he had any comment to make, simply said "No comment", and did not mention having burped while taking the test. Mr Wilson claims that this should not have been taken into account against him, because it represented an exercise by him of his "right to silence". All the more so because he had been given the usual caution.

3. Mr Wilson's argument is simple. He says that silence in the face of questioning by the police or similar authorities cannot be used against the accused in a criminal proceeding in any circumstances or for any purpose. He cites *Petty v R*[3].

4. Mr Wilson has applied to this Court pursuant to Order 56 of the *Supreme Court Rules* for an order in the nature of *certiorari* to quash the decision of the County Court on the ground of "error of law on the face of the record". In the originating motion it was claimed that the alleged error in question also amounted to "jurisdictional error",[4] but at the hearing Mr Wilson's counsel expressly abandoned that claim. Ultimately, all of the other grounds set out in the originating motion were dropped.

5. The second defendant, a police officer who was the original informant ("the informant"), says that the application should be refused for one or more of four specified reasons.

6. First, he contends that because of the way in which Mr Wilson presented his defence, the County Court judge was not in error in using Mr Wilson's "no comment" response against him in the particular way that he did. In this regard the informant also says that the "right to silence" principles may not apply in relation to a summary proceeding in the same way as they do in relation to a trial before a jury. A further, related question arises as to whether it makes any difference that the onus of proof was on Mr Wilson in relation to the defence under s49(4) of the Act.

7. Second, the informant submits that the alleged error of law on the part of the learned County Court judge is beyond review by this Court because it does not appear "on the face of the record", in that the remarks upon which Mr Wilson relies were made in the course of pre-sentence discussions rather than in the reasons initially given by the judge for dismissing the appeal on conviction.

8. Third, the informant submits that the error, if any, was not of a "fundamental" nature, and that it is beyond review for that additional reason.

9. Fourth, the informant argues that his Honour's decision was separately supported by reasons independent of the alleged error, and that relief should therefore be refused in any event.

10. The issues I must decide can be identified accordingly.

Was it an error to use Mr Wilson's silence to the police against him?

11. The informant says that there are exceptions to the principle that an accused's silence before

persons in authority should not be used against the accused at the trial. For example, he says, if the accused alleges that the police investigation was inadequate in particular respects,[5] it may be proper for the prosecution to lead evidence that the police put all the reasonable possibilities to the accused and that he or she remained silent.[6] The informant acknowledges that silence in circumstances of that kind could at best be used only to counter the allegation of inadequate investigation and that it could not be used to infer consciousness of guilt or to suggest recent invention. The informant also refers to cases where **selective** refusals to answer police questions have been used against an accused: eg *Woon v R*[7]. The informant accepts that the present case is not within either of the exceptional categories just mentioned, but he contends (I think) that the very existence of those categories indicates that there may be others. And he says that there is indeed another exceptional category into which this case falls.

12. The informant contends that Mr Wilson's silence in the hands of the police was properly taken into account because Mr Wilson himself raised the issue of his own credit as part of his own case and because, he contends, the judge used Mr Wilson's silence for a certain limited purpose only.

13. The informant says that Mr Wilson raised the issue of his own credit by claiming in the witness box that his conduct had been consistent throughout and that he had had a particular state of mind while in the hands of the police. The informant refers to Mr Wilson's claims that he had been aware that his reflux condition could distort a breathalyser reading; that, for that reason, he was in the habit of counting his drinks; that he had in fact done so on the occasion in question; and that he had therefore been surprised when the police told him of his reading.

14. The informant accepts that it would not have been proper to treat Mr Wilson's pre-trial silence as an indication of consciousness of guilt or of recent invention. But he says that the County Court judge did neither. Rather, he says, the judge looked at it as part of the entirety of Mr Wilson's conduct in the hands of the police, and did so merely for the purpose of assessing Mr Wilson's credibility as a witness. He submits that the judge's adverse findings about Mr Wilson's credibility related only to the issue of how much he had had to drink; not to the issue whether he burped or not at the time of the test. He says that while the judge found against Mr Wilson on the former issue, he did not do so on the latter. He says that using Mr Wilson's silence for this limited purpose was permissible in the circumstances.

15. For the reasons which follow, I do not accept the informant's argument.

16. In the first place, there is no hint or suggestion in the judge's reasons that he himself recognised an exception to the *Petty* principles of the kind suggested by the informant. His Honour made no mention of Mr Wilson seeking to bolster his own credit. Rather, I think that his Honour simply took the view that if Mr Wilson had burped into the machine he would have said so to the police at the time, and would probably have asked for another test, despite the caution. Such a view has a certain attraction as a matter of ordinary human experience[8]. His Honour's remarks show that his view was also influenced by observing Mr Wilson in the witness box.[9]

17. In any event, there is no authority to support the proposition that the usual incidents of the right to silence do not apply where the accused raises the issue of his own credit in his own case (whether in relation to the alleged consistency of the accused's prior conduct or in relation to the accused's possession of a particular state of mind while in the hands of the police or otherwise). Mr Ryan SC, who appeared for the informant, was unable to point to any authority for the proposition, even by way of analogy. Nor have my own researches revealed any such authority. To the contrary, the leading authorities on the right to silence tend to deny the existence of any exception for cases where the accused raises his or her own credibility. Further, they indicate that there is no room to make a distinction between using the accused's silence to show consciousness of guilt or recent invention on the one hand, and using it to impugn the accused's credibility in the witness box on the other hand.

18. Indeed it is a central feature of the relevant principles that the exercise of the right to silence before the police or like officials must not be used to impugn the accused's credibility in any circumstances or in any way. In *Glennon v R*[10], the accused gave sworn evidence denying an allegation of a sexual offence against a child. He swore, in addition, that a third person had been

in the relevant room at the time. That person was called and testified that she had indeed been in the room at the time and that nothing untoward had happened. However, before the trial the accused had declined to answer police questions about the alleged incident and had not mentioned the third person to the police. In his charge, the trial judge said to the jury that they were not to use the accused's exercise of his right to silence adversely to him. But his Honour went on to say that in testing the "veracity" of the accused's defence the jury could take into account that it was not revealed to the police. When the matter reached the High Court it was common ground that the trial judge's direction had violated the principles laid down in *Petty*. The outstanding question was whether there had been a "substantial miscarriage of justice" for the purposes of s568 of the *Crimes Act* 1958. The High Court answered this question in the affirmative. Mason CJ, Brennan and Toohey JJ noted that "the applicant's credibility was of central importance to his defence"[11]. Deane and Gaudron JJ said:

> "[W]here, as here, a finding as to an element of an offence necessarily depends on credibility, a direction which wrongly impugns the credibility of an accused or of his witness must be seen as involving a substantial miscarriage of justice."[12]

19. The tenor of these observations indicates that the more the case depends on the credibility of the accused, the more important it is that the accused's credibility should not be impugned by reference to his or her prior silence while in the hands of the police. The position cannot be any different merely because the accused has sought to bolster his or her own credit (by one means or another). Indeed in such a case the position may be all the stronger. It is no answer, in law, to say that prior silence may be more relevant or more probative where the accused seeks to bolster his or her own credit or because of some other special circumstance. The discussions of principle in this area sometimes acknowledge that prior silence before officialdom may well be considered logically relevant and probative (to a greater or lesser extent depending on the circumstances), but it is clear that other values and purposes of the law nevertheless require that silence while in the hands of officials must not be used adversely to the accused at the trial.[13]

20. Nor is there any validity for present purposes in the distinction the informant seeks to draw between, on the one hand, using prior silence to show consciousness of guilt or recent invention and, on the other, using it to assess the credibility of the accused in the witness box. In *Petty*, Mason CJ, Deane, Toohey and McHugh JJ said:

> "An incident of that right to silence is that **no adverse inference** can be drawn against an accused person by reason of his or her failure to answer such questions or to provide such information."[14] (Emphasis added.)

Their Honours also said:

> "Nor should it be suggested that previous silence about a defence raised at the trial provides a basis for inferring that the defence is a new invention or **is rendered suspect or unacceptable**."[15] (Emphasis added.)

21. In any event, it seems to me that where a judge or jury takes an unfavourable view of a witness's credibility **because of** the witness's prior silence on a particular matter, an inference or a suspicion of "recent invention" will inevitably be involved in the process of reasoning, at least in the usual case. It is hard to imagine that any other kind of reasoning could logically link the conclusion with the premise. Take the present case. Contrary to the informant's submission, I consider that the relevant comments of the learned judge show that his Honour inferred or at least strongly suspected recent invention on the part of Mr Wilson in relation to the alleged burping incident, and that his Honour accorded less credibility to Mr Wilson's evidence in general on that basis. In the first of the two passages most strongly relied on by the plaintiff, the learned judge said:

> "The view I took of his evidence was that he was not telling the truth about the amount of drinking that he'd done, and when he answered me, and I don't propose to go over my reasons, but since you raised it, when he answered me about the belching at the time, 'Why did you not tell the policeman that you belched' and he resorted to the, 'Well I was told not to comment'. A man of the intelligence and robust personality that your client exhibited in the witness box, I do not believe would have simply said, simply been quiet when that was put. That's a judgment I've got to make. Judges are vulnerable, but doing the best I can that's the view I took of his evidence."[16]

When counsel then complained that Mr Wilson's silence after the caution should not have been used against him, his Honour said:

> "I considered that, but as I say I'm here, I'm the jury and sit here as a tribunal. I saw the man in a very short space of time give evidence. He's a forthright successful businessman obviously, and the caution in my view wouldn't prompt him to be absolutely silent when he had the capacity to voice something which was exculpatory. He didn't do it. I'm not condemning him for that nor am I making a general observation about his credit. He's been in a situation where he's doing the best he can to recover his licence and many an individual of high calibre has been inclined [to] minimise the amount of the drinking in circumstances like this. But that's not a broad reflection on your client's character, but it's an assessment of his approach to the evidence in this case."[17]

22. Mr Ryan SC tried to deflect the apparent impact of these remarks. He said that they do not disclose an actual finding of non-acceptance of Mr Wilson's evidence about burping into the machine, and that no such finding was made. According to Mr Ryan SC, his Honour went no further than refusing to accept Mr Wilson's evidence about his drinking. He points out that credit is a divisible thing, and that a person may be accepted on one matter but not on another.

23. However, in my view, his Honour's quoted remarks speak for themselves. In both passages, his Honour links his non-acceptance of Mr Wilson's evidence about the amount of his drinking to his Honour's disbelief that Mr Wilson would have remained silent if in truth he had burped into the machine. This necessarily implies disbelief of Mr Wilson's evidence in the witness box that he had burped into the machine, and a consequent downgrading of Mr Wilson's general credit. Mr Ryan SC tried to deal with this by pointing out that at one stage Mr Wilson had said that he **believed** (as distinct from knew) that he had burped into the machine.[18] But Mr Wilson's evidence on this point firmed up as it went along. Ultimately he claimed he actually felt the burp during the test.[19] So the claim was squarely before his Honour.

24. His Honour's omission to pronounce a distinct finding on the burping allegation is explicable. His Honour had ruled – consistently with *Charles v Koetsier*[20] – that to show that a reflux condition has distorted a breath test reading does **not** tend to show that the machine was out of order or improperly operated for the purposes of s49(4) of the Act.

25. In my view, if a court forms a negative view of the credibility of an accused as a witness on a relevant issue (or generally), and if that view has been formed wholly or partly because the court has taken into account something which by law it was prohibited from taking into account, then the court will generally have committed an error of law, even if the matter taken into account relates to a subject wholly outside the issues on which the court ultimately needs to rule. In the present case, his Honour plainly formed an adverse view of Mr Wilson's credibility on the question of the amount of his drinking (at least). If that view was contributed to by his Honour drawing an inference of recent invention (or any other adverse inference) from Mr Wilson's silence to the police in relation to the burping incident, then his Honour erred in law, regardless of whether his Honour needed to, or did, make an explicit finding of fact on the burping allegation. In my opinion, that is what happened in this case.

26. There is one other, rather curious, feature of this case which might at first glance be thought to support Mr Ryan's submission that his Honour did not decline to accept Mr Wilson's evidence about the burping incident. The judge ultimately ordered that Mr Wilson's licence be cancelled for a period which was less than the (mandatory) period which applied under the Act to a person in Mr Wilson's position in respect of an offence under s49(1)(f) where the reading is 0.147%. His Honour did so by applying a notional reduction of the reading by approximately 20%. This in turn was apparently done by reference to the expert evidence called, which suggested that if Mr Wilson had not belched, his reading might have been 20% lower. Mr Ryan SC did not himself rely on his Honour's sentencing order to support his submission that his Honour had not rejected Mr Wilson's evidence about the alleged burp in determining the appeal against conviction. There may have been forensic reasons for Mr Ryan's stance in this regard. I note that before me Mr Billings (who appeared for Mr Wilson) had at one stage sought to rely for another purpose on his Honour's reduction of the penalty. In any event, because Mr Ryan SC did not rely on it, I should not take it into account against Mr Wilson for present purposes. Indeed, I would infer that his Honour was merely being merciful to Mr Wilson on sentence.[21] I do not think that the sentencing order casts any significant doubt on the proposition that his Honour had used Mr Wilson's silence to

the police against him on the appeal against conviction, contrary to the principles stated in *Petty* and *Glennon*.

Summary proceedings and the right to silence

27. Mr Ryan SC suggested during argument that the principles relating to late defences discussed in *Petty* may only be applicable in trials before juries. He noted that *Petty* itself was a decision arising from a jury trial and that much of the discussion of principle was couched in terms of what juries might and might not be invited to do.

28. However, the Court of Appeal of New South Wales has applied the *Petty* principles to a decision of a District Court judge sitting alone on an appeal from a Local Court: see *Yisrael v District Court of New South Wales*.[22] This was noted by Cummins J in *DPP v Butay*.[23] I can see nothing in the language used in *Petty* to suggest that the principles discussed are not universal. I would reject the (passing) suggestion made by Mr Ryan in this regard.

The right to silence where the onus of proof is reversed

29. During the hearing I raised with both counsel the question whether the principles stated in *Petty* remained applicable insofar as the burden of proof lay on the accused. (It will be recalled that the present case turned entirely on the application of s49(4) of the Act, under which the burden of proof is on the accused). My question was prompted because of suggestions I had seen, including in *Petty* itself,[24] that the right to silence was a reflection of the fundamental principle in criminal trials that the accused is presumed to be innocent and that the burden of proof (beyond reasonable doubt) is on the prosecution.

30. Mr Ryan SC said that it had not occurred to him that the location of the burden of proof might be significant for present purposes. Mr Billings said that the need to respect the accused's right to silence in the hands of the police was all the greater where the accused bore the burden of proof at trial. Both counsel undertook to consider the point further and to advise the Court within a limited period of any relevant authorities discovered. Apparently neither side was able to find any such authorities, because nothing that bore on this question was received from the parties.

31. My concern that the reversal of the onus of proof might be significant for present purposes was heightened by my consideration of the High Court's decision in *Weissensteiner v R*[25]. In that case it was held that, in some limited circumstances, especially where exculpatory information, if it exists, must be known to the accused, the jury may take into account, for the purpose of evaluating the evidence that has been given, the fact that the accused has elected to remain silent at the trial.

32. However, later decisions of the High Court[26] have qualified and restricted what was said in *Weissensteiner*. Moreover, on reflection, I am satisfied that whatever is left of *Weissensteiner* does not apply to pre-trial silence on the part of the accused while in the hands of the police[27]. Therefore, in my opinion, the approach taken by the learned County Court judge gains no support in law from the fact that the burden of proof was effectively on the accused, whether or not it was reasonable to expect that Mr Wilson, had he burped during the breath test, would have told the police so despite the caution.[28]

Conclusion as to error of law

33. It follows from the above that, in my opinion, the learned County Court judge used Mr Wilson's "no comment" answer to impugn his credibility as a witness on the question of the amount of his drinking, and that while this may have been understandable as factual reasoning, it involved an error of law.

Are the relevant remarks part of "the record"?

34. Mr Ryan SC suggested to this Court,[29] albeit faintly, that the remarks of the learned County Court judge on which Mr Wilson relies do not form part of "the record" for the purposes of *certiorari*.

35. The remarks were made after his Honour gave what the transcript describes as an "(unrevised) ruling" on the appeal. The ruling contained reasons for decision. At the end, his Honour

said " ... and accordingly this appeal will be dismissed". But this was not the pronouncement (formal or otherwise) of an order. The actual making of orders only came later, at the very end of the hearing.[30] The first order was an order setting aside the decision of the Magistrates' Court. Other orders dealt with penalty. Therefore his Honour was not *functus officio* in relation to the substantive appeal at the time of making the remarks in question. Section 10 of the *Administrative Law Act* 1978 provides:

> "Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record."

The expression "inferior court" in s10 has been held to cover the County Court.[31] Further, it has been held that where a court makes statements which reveal its reasons during argument, and later makes a further statement of its reasons when announcing its decision, s10 can apply to both.[32] The remarks on which Mr Wilson relies in the present case plainly answer the description "any statement by [the court] ... of its reasons for decision", notwithstanding that the remarks were made after the "ruling" had been given and during the sentencing stage of the appeal. The remarks were a further explanation of the Court's reasons for its decision. They were therefore part of "the record" for the purposes of the application made in this Court for an order in the nature of *certiorari*.[33] This objection by the informant fails.

A "fundamental" error?

36. Next Mr Ryan SC submitted that an error of law does not suffice for *certiorari* unless it is of a "fundamental" nature in the sense that it "strikes at the roots of the order". He denied that the alleged error in the present case was of that nature.

37. Mr Ryan SC relied on *Flynn v DPP*[34]. In that case, McDonald J said[35]:

> "For this court to grant relief to quash an order of an inferior court, in the nature of *certiorari* if an error of law is demonstrated to exist on the face of the record, including the reasons for decision of the judicial officer, it is my opinion that what must be demonstrated is that the error is so fundamental to the decision of the court as to strike at the very roots of its order and to invalidate it. Other errors of law on the face of the record of an inferior court, including the reasons for decision, would not entitle this court in the exercise of its supervisory jurisdiction to grant relief in the nature of *certiorari* to quash the order of that court."

38. I note that in *Tural v Potter; BAH v Magistrates' Court of Victoria*[36], Eames J referred to these observations of McDonald J without comment. It is not fully clear to me what McDonald J meant in the passages set out above. In *Flaherty v DPP*[37], Osborn J treated his Honour's observations as requiring no more than that the error be a "vitiating error". Osborn J held that there was a "vitiating error" in that case because the sentencing judge had failed to have due regard to the principle of double jeopardy as applicable to prosecution appeals against sentence.

39. If, in *Flynn v DPP*, McDonald J intended to go further, and to restrict the ground of "error of law on the face of the record" to errors so fundamental or so serious as to amount to, or to be comparable with, jurisdictional error, then, with respect, I would not follow *Flynn*. The observations were *obiter*, because in the end his Honour found no error at all in the decisions in question. His Honour cited no authority for the proposition that the error of law must be "so fundamental to the decision of the court as to strike at the very roots of its order and to invalidate it".

40. In *Craig v South Australia*[38], the High Court did say in effect that an error of law on the part of a **court**, as distinct from a tribunal, will only constitute **jurisdictional** error in limited circumstances. And it has been said that "a jurisdictional error of law has to be fairly fundamental if the decision-maker is an inferior court, but less so if it is a tribunal or administrator".[39] However "error of law on the face of the record" is not a species of jurisdictional error. It is a distinct ground of review. The High Court's decision in *Craig* restricted the application of the ground by confining the things to be regarded as falling within the concept of "the record" at common law. The High Court did not say or imply that where an error of law does appear on the face of the record it must also be "jurisdictional" to be reviewable by *certiorari*. Indeed, the very point of considering and restricting the scope of "the record" was a recognition by the High Court that an "error of law on the face of the record" did not need to be of the same nature as a "jurisdictional error".

41. Nor did the High Court say or imply that an error of law on the face of the record needed to be "fundamental" (in any sense). Rather, the Court indicated that it is enough if the impugned order or decision be "affected" by "some" error of law that is disclosed by the record.[40]

42. Further, it appears from *Craig* and from other cases that there is no need to distinguish between inferior courts and tribunals as to the circumstances in which errors of law on the face of the record will be reviewable.[41]

43. The authors of the current leading Australian textbook on administrative law say that supervising courts may "decline relief because of the triviality or immateriality of the error itself".[42] This implies, correctly in my view, that a material, non-trivial error of law on the face of the record will attract relief in the nature of *certiorari*, subject to any applicable discretionary factors. In this regard, the learned authors (again, in my view, correctly) equate judicial review for non-jurisdictional error of law at common law with judicial review for error of law under the various administrative law statutes, such as the federal ADJR Act. They quote Mason CJ in *Australian Broadcasting Tribunal v Bond*, who said[43]:

> "A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different."

They also quote Toohey and Gaudron JJ in the same case[44]:

> "For an error of law to be involved in a decision something more than the mere occurrence of error is necessary. The error must have contributed to the decision in some way or, at the very least, it must be impossible to say that it did not so contribute. Conversely, an error is not involved in a decision if it did not contribute to the decision or if the decision must have been the same regardless of the error. Thus, to show that an error of law is involved in a decision it is necessary, at the very least, to show that the decision may have been different if the error had not occurred."

Similarly, in *Samad v District Court (NSW)*, Gleeson and McHugh JJ said[45]:

> "To vitiate the decision of an administrative tribunal an error must be material; it must affect the decision itself."

44. To the same effect, in *RSL v Liquor Licensing Commission*,[46] JD Phillips JA (with whom Charles and Buchanan JJA agreed) observed that to demonstrate (non-jurisdictional) error of law on the face of the record in relation to the interpretation by the Liquor Licensing Commission of a certain statutory provision would not necessarily be very difficult for a party "genuinely prejudiced" by a wrong interpretation by the Commission.

45. In *Yisrael v District Court of New South Wales*,[47] a District Court judge had inferred consciousness of guilt from the accused's silence at a police interview. This was held by the NSW Court of Appeal to constitute error of law. The error contributed to the judge's finding that the accused was guilty of assault. The error was apparent from his Honour's reasons, but in New South Wales there was no equivalent to s10 of the *Administrative Law Act* 1978 (Vic). So Mr Yisrael was unable to establish error of law on the face of the record. A majority of the Court of Appeal held, applying *Craig*, that the error was not jurisdictional. (Their Honour's view was perhaps influenced by a privative clause which applied to the decision of the District Court judge). The accused's application for *certiorari* was therefore dismissed. However Meagher JA delivered a strong dissenting judgment. His Honour said[48]:

> "In my opinion, the right of an accused to decline to answer questions put by the police should be stated higher than simply 'an established practice or convention'. It is, rather, a 'fundamental rule of the common law': see *Petty* at 99; 323 per Mason CJ. It is, further, a right 'most jealously protected' by the general law: see *Edelsten v Richmond* ((1987) 11 NSWLR 51, Court of Appeal, NSW, 16 November, 1987). Lord Parker has gone so far as to describe the right as 'the whole basis of the common law': see *Rice v Connolly* [1966] 2 QB 414 at 416. The right to silence is perhaps best considered as one of those mechanisms by which the legitimacy of judicial administration is maintained. As such, and as authorities suggest, it is a right that has developed a fundamental importance within criminal procedure. It is a right that an accused could reasonably expect will be upheld in any proceedings against him: 'a regular practice which the person affected can reasonably expect to continue', see

> *Kioa v Minister for Immigration and Ethnic Affairs* [1985] HCA 81; (1985) 159 CLR 550; (1985) 62 ALR 321 at 345; (1986) 60 ALJR 113; 9 ALN N28 per Mason J. For this reason, I would suggest that the error of the trial judge was in excess of jurisdiction."

46. It is clear that if the equivalent of s10 had existed in New South Wales, and if the privative clause had not, Mr Yisrael would have succeeded in the Court of Appeal on the ground of error of law on the face of the record. Even if there had been some superadded requirement to show that the error was "so fundamental to the decision of the court as to strike at the very roots of its order and to invalidate it", Mr Yisrael might well still have succeeded in the Court of Appeal.

47. In the present case, it seems to me that Mr Wilson only needs to show that the decision of the learned County Court judge **might** have been different in the absence of the identified error of law. I think that he has done that. The judge's remarks show that his Honour's view of Mr Wilson's credibility was detrimentally affected by Mr Wilson's silence in the hands of the police. It is true that Mr Wilson faced an uphill battle to discharge his onus of proof in any event. But if he was to have any chance of succeeding, it was vital that his evidence as to the amount of his drinking be believed. The learned judge repeatedly referred to the fact that he was not convinced that Mr Wilson had been truthful with respect to his drinking. It is true that his Honour also referred to the high level of the reading and to the absence of "compelling objective evidence" to show that the machine was not operating properly. But his Honour did not say, even after he was respectfully queried by Mr Billings about having taken into account the post-caution "no comment" answer, that he had had independent reasons for dismissing the appeal. On the contrary, his Honour defended his use of Mr Wilson's prior silence.[49]

48. Further, if it matters, I consider that the identified error of law does, at least in certain senses, answer the description of an error "so fundamental to the decision of the court as to strike at the very roots of its order and to invalidate it". The law attaches great importance to the "right to silence", as the abovementioned observations of Meagher JA (dissenting) in *Yisrael* indicate. Whether or not the error was jurisdictional, it was of a fundamental nature, at least in the sense indicated by Meagher JA and in the sense that it involved a "substantial miscarriage of justice". [50]

49. In any event, I consider that it is enough for present purposes that the outcome of the case might have been different if the error had not occurred. In that sense, the error was a "vitiating error", to use the language of Osborn J in *Flaherty v DPP*[51].

50. For these reasons I reject the respondent's submission, based on *DPP v Flynn*,[52] that the identified error of law is beyond review because it was not "fundamental".

Was the decision independently supported?

51. Mr Ryan's fourth objection was that his Honour's decision was supported by reasons independent of his Honour's use of Mr Wilson's silence to the police.

52. As already indicated, I consider that his Honour's finding as to Mr Wilson's credibility was affected by his use of Mr Wilson's pre-trial silence and that this in turn could have affected the ultimate result. I am not satisfied that any other reasons for his Honour's decision were fully independent of this reasoning.[53] Accordingly Mr Ryan's fourth objection fails.

Discretion

53. It was not suggested that there are any discretionary reasons for refusing relief.

Conclusion

54. In summary, I consider that the learned County Court judge made an error of law by discounting Mr Wilson's credibility as a witness on the basis of his silence to the police at the time of the breath test. It makes no difference that Mr Wilson endeavoured to bolster his own credit in the witness box, nor that this was a summary matter rather than a trial before a jury, nor that Mr Wilson bore the onus of proving that the breath analysing instrument was not operating properly. The error is properly regarded as an error of law "on the face of the record". It may have affected the outcome of the case in the County Court. Therefore Mr Wilson is entitled to an order in the nature of *certiorari* quashing the orders made by the County Court.

55. Of course, this will leave Mr Wilson's appeal to the County Court undetermined and it will need to be heard and determined again or otherwise disposed of. The originating motion sought, in addition to *certiorari*, an order in the nature of *mandamus* requiring the County Court to uphold Mr Wilson's appeal from the Magistrates' Court. However, in the end, Mr Billings conceded that the best he could achieve was an order requiring the County Court to hear and determine the appeal in accordance with law (i.e. without repeating the identified error of law)[54]. Because the learned County Court judge's decision was based in part on credit, the Court should be reconstituted for the re-hearing of the appeal: see *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal*[55]; *Kapoor v Monash University*[56] and *Flaherty v DPP*[57].

56. Accordingly I propose to make orders to the effect that:

> (a) The orders made by the County Court on 27 May 2005 in the plaintiff's appeal to that Court be quashed.
> (b) The plaintiff's appeal be remitted to the County Court (differently constituted) to be heard and determined according to law.

57. I will hear counsel as to the precise form of those orders and as to whether any other orders (such as an order temporarily staying Mr Wilson's disqualification) are necessary or appropriate. Subject to any submissions to the contrary, I would be inclined to order that the defendant pay the plaintiff's costs of the proceeding in this Court.

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[1] See *DPP v Hore* [2004] VSCA 192; (2004) 10 VR 179; (2004) 42 MVR 520.
[2] It seems to me that success in this factual claim would **not** have tended to show that the breath testing instrument was out of order or improperly operated – see *Charles v Koetsier* (1994) 20 MVR 381 – but as the argument in this Court has developed this question does not need to be decided.
[3] [1991] HCA 34; (1991) 173 CLR 95; 102 ALR 129; 55 A Crim R 322; 65 ALJR 625.
[4] See *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[5] Suggesting, for example, that a better investigation might have identified another person as the offender.
[6] No authority was cited for this proposition, but I note that in *R v Hartwick (No 2)* (Court of Appeal, Victoria, unreported, 20 December 1995), Callaway JA said (at 6) that evidence of previous silence might be proper if the defence case involved an imputation that the accused had not been given an opportunity to respond to the allegations made. See also *DPP v Butay* [2001] VSC 346 (Cummins J) at [3]-[4]; 124 A Crim R 41.
[7] [1964] HCA 23; (1964) 109 CLR 529; [1964] ALR 868; 38 ALJR 32. Compare *Yisrael v District Court of NSW* (1996) 87 A Crim R 63 at 73.
[8] Compare, for example, *Petty v R* (1991) 173 CLR 95 at 125-127 per Gaudron J.
[9] See below, para 21.
[10] [1994] HCA 7; (1994) 179 CLR 1; (1994) 119 ALR 706; (1994) 68 ALJR 209; 70 A Crim R 459.
[11] Ibid, 9.
[12] Ibid, 13-14.
[13] The principal rationale is the desire to protect the citizen against official oppression. See eg *R v Petty* [1991] HCA 34; (1991) 173 CLR 95 at 107; 102 ALR 129; 55 A Crim R 322; 65 ALJR 625 per Brennan J; E Stone, "Calling a Spade a Spade: the Embarrassing Truth about the Right to Silence" (1998) 22 Crim LJ 17. Compare *RPS v R* [2000] HCA 3; (2000) 199 CLR 620 at 632 [25]; (2000) 168 ALR 729; (2000) 113 A Crim R 341; (2000) 74 ALJR 449; (2000) 21 Leg Rep C1 per Gaudron A-CJ, Gummow, Kirby and Hayne JJ; *DPP v Butay* [2001] VSC 346 (Cummins J) at [4]; 124 A Crim R 41.
[14] [1991] HCA 34; (1991) 173 CLR 95 at 99; 102 ALR 129; 55 A Crim R 322; 65 ALJR 625.
[15] Ibid. And see generally Nash and Bagaric, *Bourke's Criminal Law Victoria*, 2005 at pages 728-733.
[16] Transcript p 107.
[17] Transcript p 108.
[18] Transcript p 22. This may involve going outside what constitutes "the record" for the purposes of *certiorari*. However I will assume in the informant's favour (without deciding) that a defendant may refer to such matters in a proceeding of the present kind, even if a plaintiff may not. However, if the defendant can do so, it must be legitimate for the Court to have regard to my other parts of the transcript which qualify the part relied on by the defendant.
[19] Transcript p 26. See the previous footnote.
[20] (1994) 20 MVR 381.
[21] As at present advised, I am unable to see how his Honour had power under the Act or otherwise to reduce the disqualification period whilst dismissing the substantive appeal, but the respondent has not challenged the sentence. Of course, if the whole appeal must be reheard and redetermined in the County Court, Mr Wilson risks incurring the higher penalty if he fails again on the substantive appeal.
[22] (1996) 87 A Crim R 63.
[23] [2001] VSC 346 at [3].
[24] [1991] HCA 34; (1991) 173 CLR 95 at 128-130; 102 ALR 129; 55 A Crim R 322; 65 ALJR 625 per Gaudron J.

[25] [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23. See also Bagaric, "The Diminishing Right of Silence" (1997) 19 Syd L Rev 20; Hocking and Manville, "What of the Right to Silence: Still Supporting the Presumption of Innocence, or a Growing Legal Fiction?" [2001] Mq LJ 3.
[26] Especially *RPS v R* [2000] HCA 3; (2000) 199 CLR 620; (2000) 168 ALR 729; (2000) 113 A Crim R 341; (2000) 74 ALJR 449; (2000) 21 Leg Rep C1; *Azzopardi v R* [2001] HCA 25; (2001) 179 ALR 349; (2001) 75 ALJR 931; (2001) 22 Leg Rep C1; (2001) 205 CLR 50 and *Dyers v R* [2002] HCA 45; 210 CLR 285; 192 ALR 181; 76 ALJR 1552.
[27] See *Weissensteiner* itself: [1993] HCA 65; (1993) 178 CLR 217 at 228, 231; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23 and *Azzopardi v R* [2001] HCA 25; (2001) 179 ALR 349; (2001) 75 ALJR 931; (2001) 22 Leg Rep C1; (2001) 205 CLR 50 at 104 [156] and 108 [168] per McHugh J (who dissented on other questions).
[28] Compare *Weissensteiner*, 178 CLR at 238 per Brennan and Toohey JJ.
[29] Transcript of argument pp89, 99.
[30] Transcript p112.
[31] *Hansford v His Honour Judge Neesham* (1994) 7 VAR 172 (affirmed at [1995] VICSC 58; [1995] VicRp 51; [1995] 2 VR 233). See also Kyrou, *Victorian Administrative Law*, [3161].
[32] *Tural v Potter*; *BAH v Magistrates' Court of Victoria* [2000] VSC 80 (Eames J) at [18]; 110 A Crim R 475; 16 VAR 381.
[33] See *Kuek v Wellens* [2000] VSC 326 (Gillard J); cf *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[34] [1998] 1 VR 322 (McDonald J).
[35] At 340.
[36] [2000] VSC 80 a [22]; 110 A Crim R 475; 16 VAR 381.
[37] [2003] VSC 234 at [35]-[39].
[38] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[39] Aronson, Dyer and Groves, *Judicial Review of Administrative Action,* 3rd edition, 2004 at 203.
[40] [1995] HCA 58; (1995) 184 CLR 163 at 176; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[41] At 182, the High Court refers indifferently to courts and tribunals when dealing with the determination of the precise documents which constitute the record. In *RSL v Liquor Licensing Commission* [1999] VSCA 37; [1999] 2 VR 203 at 210; 15 VAR 96, the Victorian Court of Appeal said that it was becoming increasingly difficult to apply the *Craig* distinction between courts of law and administrative tribunals at all (even in relation to jurisdictional error).
[42] Aronson *et al*, op. *cit*, 203.
[43] [1990] HCA 33; (1990) 170 CLR 321 at 353; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[44] [1990] HCA 33; (1990) 170 CLR 321 at 384; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[45] [2002] HCA 24; (2002) 209 CLR 140 at [44]; (2002) 189 ALR 1; (2002) 23 Leg Rep 2.
[46] [1999] VSCA 37; [1999] 2 VR 203 at 225; 15 VAR 96 at 225.
[47] (1996) 87 A Crim R 63.
[48] (1996) 87 A Crim R 63 at 68-69.
[49] Transcript p108.
[50] *Glennon v R* [1994] HCA 7; (1994) 179 CLR 1 at 8-9, 13-14; (1994) 119 ALR 706; (1994) 68 ALJR 209; 70 A Crim R 459.
[51] [2003] VSC 234 at [35]-[39].
[52] [1998] 1 VR 322 at 340.
[53] See also, and compare, *Samad v District Court (NSW)* [2002] HCA 24; (2002) 209 CLR 140 at 156 [45]-[46]; (2002) 189 ALR 1; (2002) 23 Leg Rep 2 per Gleeson CJ and McHugh J; *Minister for Immigration and Multicultural Affairs v Rajamanikkan* [2002] HCA 32; (2002) 210 CLR 222; (2002) 190 ALR 402; (2002) 76 ALJR 1048; (2002) 69 ALD 257; (2002) 23 Leg Rep 12.
[54] Compare the forms of order made in, for example, *Kerr v Colley* [2002] VSC 204 (Bongiorno J) and *Tural v Potter; BAH v Magistrates Court of Victoria* [2000] VSC 80; 110 A Crim R 475; 16 VAR 381 (Eames J).
[55] (1990) 26 FCR 39 at 43.
[56] [2001] VSCA 247; (2001) 4 VR 483 at 499; [2002] EOC 93-188.
[57] [2003] VSC 234 at [40].

APPEARANCES: For the plaintiff Wilson: Mr P Billings, counsel. Moores Legal, solicitors. For the second-named defendant Whitteker: Mr C Ryan SC, counsel. Office of Public Prosecutions.
