**48/78**

## SUPREME COURT OF VICTORIA

# *NICOLL v MILLER*

**Murray J**

**29 August 1978**

**MOTOR TRAFFIC – DRINK/DRIVING – REFUSE TO PROVIDE A SAMPLE OF BREATH FOR ANALYSIS – DRIVER OBSERVED TO BE SLUMPED IN DRIVER'S SEAT – SAID: "I JUST GOT HERE" – WHETHER OPEN TO COURT TO FIND THAT DRIVER HAD DRIVEN HIS MOTOR VEHICLE TO THAT SPOT WITHIN 55 MINUTES OF BEING APPREHENDED – DISCREPANCY GIVEN BY WITNESS AS TO DATE OF INTERCEPTION OF DRIVER – NO CROSS-EXAMINATION ON THE POINT – NO CASE SUBMISSION MADE – APPLICATION BY PROSECUTOR FOR MATTER TO BE STOOD DOWN WHILST CORRECT DATE ASCERTAINED – UPON RESUMPTION APPLICATION MADE TO COURT TO RE-OPEN PROSECUTION CASE – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR IN GRANTING APPLICATION TO RE-OPEN – WHETHER INCORRECT DATE WAS AN OBVIOUS SLIP: *MOTOR CAR ACT* 1958, S80F.**

**HELD: Order nisi discharged. Conviction affirmed.**

**1. On the evidence as set out in the affidavit of the respondent the ordinary meaning of the words 'I just got here' was that the applicant admitted that he had driven his car to that spot and had just got there in it. That evidence constituted *prima facie* evidence; it may have been evidence which would have been open to explanation by the applicant or even to contradiction but the applicant did not give evidence and nor was there any cross-examination by his solicitor directed to this aspect of the case.**

**2. Accordingly, the Magistrate was entitled to regard this in the first place as *prima facie* evidence of the facts necessary and upon finding that there was no other evidence touching on the point, it was open for him to be satisfied beyond reasonable doubt that the applicant had driven the car to that spot within fifty-five minutes of being apprehended by the respondent.**

**3. It is clear that the question whether to allow a case to be re-opened remains in Victoria a matter of discretion. Obviously the circumstances will vary immensely from case to case, and much may depend upon the stage at which the prosecution seeks to reopen its case, the nature of the evidence which it is proposed to call, to some extent the type of case that is being dealt with, and also the type of tribunal.**

**4. The evidence of the police officers made it perfectly clear that they were both talking about the same occasion. One of them said it was 6th October, and the other said it was 6th September. Although this cannot be said to be a mere absence of formal proof, as referred to in some of the decisions, it was nevertheless an obvious slip. Far from it being a miscarriage of the exercise of Magistrate's discretion to allow the prosecution to reopen, it may well have been a miscarriage if he had refused the Prosecution permission to reopen.**

**MURRAY J:** ... The order nisi was obtained on two grounds: first that on the whole of the evidence the Magistrate should not have been satisfied that the applicant had been required to furnish a sample of his breath into a breath analysing instrument within two hours after he had ceased to drive his motor car; and secondly that in all the circumstances of the case the said Court wrongly exercised its discretion by permitting the respondent to reopen his case and to call further evidence.

So far as relevant to the first ground, the evidence shows that at 8.45pm on Thursday, 6th October, 1977 the respondent and Senior Constable Begley observed a motor car parked across the entrance to the Mount Waverley fire station on the north side of High Street Road. They went across to this car and observed the applicant slumped across the front seat. There was a strong smell of intoxicating liquor when they opened the car. The keys were in the ignition and the ignition was apparently switched on because the ignition light was operating. The engine of the car was warm. The respondent aroused the applicant and in the course of a conversation the applicant said that he had driven the motor car to its present position and in reply to the question: 'How long have you been parked here?' the applicant said: 'I just got here'.

It was submitted by Dr Buchanan, who appeared for the applicant, that that evidence standing uncontradicted and by itself was not sufficient to enable the Magistrate to be satisfied that the applicant had recently driven his car to that spot. Dr Buchanan submitted that the answer to the question that the applicant gave, namely: 'I just got here' was equally consistent with his having driven the car to that spot some hours before and having left the car and then just recently returned to it.

In my opinion this submission fails. It appears to me on the evidence as set out in the affidavit of the respondent that the ordinary meaning of the words deposed to is that the applicant admitted that he had driven his car to that spot and had just got there in it. That evidence in my opinion at least constituted *prima facie* evidence; it may have been evidence which would have been open to explanation by the applicant or even to contradiction but the applicant did not give evidence and nor was there any cross-examination by his solicitor directed to this aspect of the case.

In my opinion the Magistrate was entitled to regard this in the first place as *prima facie* evidence of the facts necessary and upon finding that there was no other evidence touching on the point, it was open for him to be satisfied beyond reasonable doubt that the applicant had driven the car to that spot within fifty-five minutes of being apprehended by the respondent. The first ground of the order nisi therefore fails.

The respondent's evidence indicated that the events in question took place on the 6th October 1977, but when Senior Constable Pendleton gave evidence, he referred to the date as being the 6th September 1977. In cross-examination the solicitor for the applicant asked to see Senior Constable Pendleton's notes and he observed on the notes that the date of the 6th September 1977 appeared. He therefore tendered the notes, but did not, in any way cross-examine Senior Constable Pendleton as to the date, nor did he draw anybody's attention to the fact that there was a discrepancy in the dates given by the two witnesses.

The case for the prosecution having been closed, the solicitor for the applicant then made a submission to the Magistrate, part of which was based on the discrepancy of the dates. At that point, the prosecuting sergeant informed the Magistrate that he would require an adjournment to ascertain which date was correct and that it would be necessary to check running sheets and other documents. The Magistrate adjourned the hearing at 11.50am until 2.00pm and when he sat again at 2.00pm the prosecuting sergeant informed him that it had been established that the correct date was the 6th October and the sergeant applied for leave to re-open the case, to correct 'a slip' as he termed it. The solicitor for the applicant objected and said amongst other things 'that it would not be' a proper exercise of the Court's discretion to allow the prosecution to re-open, having regard to the fact that the case had been closed and having regard to the earlier application of the prosecutor for an adjournment to check which date was correct.

The case for the prosecution was then re-opened and Senior Constable Pendleton was recalled and he gave evidence that he had been incorrect in stating that the date in question was the 6th September and it was the 6th October, and in addition, Senior Constable Begley who had been with the informant gave evidence that the correct date was the 6th October and the watch-house book was tendered. As to the watch house book – in the absence of evidence by the person who filled it in it seems to me that it probably was not an admissible piece of evidence, but no objection was taken to its tender and nor did it do anything more than corroborate the correctness of the date being the 6th October.

Dr Buchanan most persuasively submitted that the Magistrate had been in error in allowing the prosecution to re-open its case and that doing so constituted a wrongful or mistaken exercise of his discretion. The circumstances in which the Crown case may be re-opened has been discussed in a number of decisions and I refer principally to *R v Bodi* [1969] VicRp 6; (1969) VR 36; *R v Mlaka* [1971] VicRp 47; (1971) VR 385 and *Hansford v McMillan* [1976] VicRp 80; (1976) VR 743.

While of course I unhesitatingly accept the principles that have been laid down in those decisions, it is clear, as is stated in all of them, that the question still remains, in Victoria, in any event, a matter of discretion. Obviously the circumstances will vary immensely from case to case,

and much may depend upon the stage at which the prosecution seeks to reopen its case, the nature of the evidence which it is proposed to call, to some extent the type of case that is being dealt with, and also the type of tribunal.

The evidence of Senior Constable Nicholl and Senior Constable Pendleton, made it perfectly clear in my opinion that they were both talking about the same occasion. One of them said it was 6th October, and the other said it was 6th September. Although this cannot be said to be a mere absence of formal proof, as referred to in some of the decisions, it was nevertheless an obvious slip. In my opinion, far from it being a miscarriage of the exercise of Magistrate's discretion to allow the prosecution to reopen, I think it may well have been a miscarriage if he had refused the Prosecution permission to reopen.

This is not a case in which it could be said that by allowing the prosecution to reopen for the purpose of proving which date was the correct date, the applicant was being placed in a position which he might be unfairly prejudiced, and that some miscarriage of justice might arise from the reopening. Certainly it can be said that unless the case had been reopened the applicant might have had the benefit of a dismissal of the information, but that is not to say that that would have been a just result, and, as the Magistrate very wisely, in my opinion, observed, it was not a sporting contest, it was a court of law.

In all those circumstances, I have been totally unpersuaded that the Magistrate made any error in allowing the Prosecution to reopen its case for the purpose of proving which of the two dates deposed to was correct. The applicant gave no evidence in his own defence, and it appears to me that all the elements of the offence were made out, and the order nisi will therefore be discharged and the conviction affirmed.

**APPEARANCES:** For the applicant: Dr P Buchanan, counsel. Messrs Joseph Lynch and Window. Solicitors. For the respondent: Mr PRA Gray, counsel. Mr EL Lane, State Crown Solicitor.

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