03/02; [2002] VSC 29

SUPREME COURT OF VICTORIA

DPP v MOORE

Balmford J

5, 27 February 2002 — (2002) 35 MVR 357; (2002) 129 A Crim R 95

MOTOR TRAFFIC – DRINK-DRIVING – READING 0.074% – DEFENDANT ADVISED BY OPERATOR NOT TO HAVE A BLOOD TEST – CHARGES LAID UNDER S49(1)(b) AND (f) OF *ROAD SAFETY ACT* 1986 – CHARGE UNDER S49(1)(f) DISMISSED AS BEING A NULLITY BECAUSE IT DID NOT CONTAIN THE WORDS "AFTER HAVING UNDERGONE A PRELIMINARY BREATH TEST" – WHETHER MAGISTRATE IN ERROR – NO NOTICE GIVEN REQUIRING OPERATOR TO ATTEND COURT – FINDING BY MAGISTRATE THAT ADVICE GIVEN BY OPERATOR AND TO EXCLUDE EVIDENCE RELATING TO THE BREATH TEST – CHARGE UNDER S49(1)(b) DISMISSED – WHETHER IN THE CIRCUMSTANCES THE MAGISTRATE HAD A DISCRETION TO EXCLUDE THE CERTIFICATE FROM EVIDENCE – WHETHER MAGISTRATE IN ERROR IN DISMISSING THE CHARGE: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), 58(2).

After undergoing a breath test, M. was found to have a BAC of 0.074%. M. said that he was advised by the operator not to have a blood test. Charges were laid pursuant to s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). At the hearing, no notice under s58(2) of the Act requiring the operator to attend was given. The certificate was formally tendered and was conclusive proof of the matters set out in paras (a) to (f) thereof. In response to a preliminary submission by M., the magistrate declared that the charge under s49(1)(f) was a nullity because it did not contain the words "after having undergone a preliminary breath test" and accordingly, struck out the charge. In relation to the charge under s49(1)(b), in view of the advice given by the operator to M., the magistrate excluded the certificate from evidence and dismissed the charge. Upon appeal—

HELD: Appeal in respect of the s49(1)(f) charge upheld. Order set aside. Remitted for further determination by the magistrate. Appeal in respect of the s49(1)(b) charge dismissed.

1. The charge under s49(1)(f) was not a nullity. The omission of the words "after having undergone a preliminary breath test" did not constitute an essential element of the offence so as to require individual particularisation in the charge.

***DPP Reference No 2 of 2001* MC 13/01; [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164, followed.**

2. The *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretion has a very specific role and justification in the context of broader questions of high public policy. That being so, the provision in s58(2) which renders the certificate conclusive proof of the matters listed, absent the service of a notice requiring the operator to attend court, cannot be taken to exclude the operation of that discretion. Had Parliament intended the exclusion of such a significant discretion, it would have said so expressly. Accordingly, the magistrate had a discretion to exclude the certificate from evidence where no notice under s58(2) had been properly served on the informant.

3. There was a clear nexus between the failure to obtain a blood test and the giving of advice by the operator. There was a possibility that the blood test might have produced a lower reading than the breath analysis thus giving ground for M. to dispute the finding recorded in the certificate. There is no ground on which it could be found that the Magistrate erred in the exercise of the discretion to dismiss the charge.

BALMFORD J:

1. This is an appeal under section 92 of the *Magistrates' Court Act* 1989 from a final order made on 8 June 2001 in the Magistrates' Court at Melbourne, constituted by Dr K Auty, Magistrate, dismissing a charge against the respondent under section 49(1)(b) of the *Road Safety Act* 1986 ("the Act"), and striking out a charge under section 49(1)(f) of the Act.

2. The relevant provisions of the Act are sections 49, 53, 55 and 58, all of which appear in Part 5 of the Act, and the relevant portions of which read as follows:

> **49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she— ...
> (b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed

concentration of alcohol is present in his or her blood; or …
(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55(1) and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;

53. Preliminary breath tests
(1) A member of the police force may at any time require—- …
(b) the driver of a motor vehicle that has been required to stop at a preliminary breath testing station under section 54(3); …
to undergo a preliminary breath test by a prescribed device.

55. Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force … under section 53 to do so and—
(a) the test in the opinion of the member … in whose presence it is made indicates that the person's blood contains alcohol; …
any member of the police force … may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force … to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner. …

(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate in the prescribed form produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood. …

(10) A person who is required under this section to furnish a sample of breath for analysis may, immediately after being given the certificate referred to in sub-section (4), request the person making the requirement to arrange for the taking in the presence of a member of the police force of a sample of that person's blood for analysis at that person's own expense by a registered medical practitioner nominated by the member of the police force. …

58. Evidentiary provisions — breath tests
(1) If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood of any person at any time or if a result of a breath analysis is relevant— …
(c) on a hearing for an offence against section 49(1) of this Act—
then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under section 55 and the concentration of alcohol so indicated is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument.

(2) A document purporting to be a certificate in the prescribed form produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceedings referred to in sub-section (1) and … is conclusive proof of—
(a) the facts and matters contained in it; and
(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and
(c) the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under section 55; and
(d) the fact that all relevant regulations relating to the operation of the instrument were complied with; and
(e) the fact that the instrument was in proper working order and properly operated; and
(f) the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath and that it was signed by the person who operated the instrument and given to the accused person as soon as practicable after the sample of breath was analysed—
unless the accused person gives notice in writing to the informant not less than 28 days before the hearing, or any shorter period ordered by the court or agreed to by the informant, that he or she requires the person giving the certificate to be called as a witness or that he or she intends to adduce evidence in rebuttal of any such fact or matter. …

(2C) If an accused person gives notice to the informant in accordance with sub-section (2) that he or she requires the person giving a certificate to be called as a witness and the court is satisfied that that person—
(a) is dead; or
(b) is unfit by reason of his or her bodily or mental condition to testify as a witness; or
(c) has ceased to be a member of the police force or is out of Victoria and it is not reasonably practicable to secure his or her attendance; or
(d) cannot with reasonable diligence be found—
the court must order that sub-section (2) has effect as if the notice had not been given.

3. On 6 August 2001 Master Wheeler ordered that the questions of law raised by this appeal were:

(1) (a) Is it necessary for a charge for an offence contrary to section 49(1)(f) of [the Act] to contain the words "after having undergone a preliminary breath test" or words to that effect?

(b) If yes, what is the effect of not including the said words?

(2) Did the Magistrate have a discretion to exclude from evidence the certificate produced by the breath analysing instrument in circumstances where no notice under section 58(2) had been properly served on the informant?

(3) If yes, did the Magistrate have a discretion to exclude from evidence the certificate in circumstances where it was not suggested that the police had acted unlawfully or improperly?

(4) If yes, did the Magistrate err in the exercise of that discretion?

The Facts

4. The facts appear from the affidavits of Mr Castle, a solicitor employed in the Office of Public Prosecutions; Senior Constable Rogers, who appeared to prosecute the respondent in the Magistrates' Court; and Mr Barrington, an articled clerk in the employ of the solicitors for the respondent; and also from the transcript of the taped proceedings in the Magistrates' Court. The transcript contains numerous gaps, indicated by dots, where apparently the transcriber had been unable to understand the sense of the tape, and is otherwise unsatisfactory, in that it contains many passages the meaning of which is obscure to the reader.

5. Early in the morning of 19 September 1998, the respondent was required to stop at a mobile breath testing station in Port Melbourne, where he underwent a preliminary breath test pursuant to section 53 of the Act, which indicated the presence of alcohol in his blood. A breath test was conducted by an authorised operator of a breath analysing instrument, and four certificates of analysis of breath stating a blood alcohol concentration of 0.074%, which exceeds the prescribed concentration, were produced and signed by the operator.

6. The matter came on for hearing in the Magistrates' Court at Melbourne, and for reasons not here relevant was adjourned to 8 June 2001. A notice pursuant to section 58(2) of the Act requiring the operator to attend at the court was served on 17 May 2001, which was six days short of the period prescribed by that section of not less than 28 days prior to the hearing date. The prosecution did not consent to short service of the notice.

7. In response to a preliminary submission by counsel for the respondent, the Magistrate declared that the charge under section 49(1)(f) was a nullity because it did not contain the words "after having undergone a preliminary breath test" or words to that effect, and accordingly struck out the charge. In making that finding Her Worship relied on a decision of Judge Hassett in the County Court in the matter of *R v Callegher.*

8. The respondent said in evidence that after he received the certificate, he said to the operator "Because of the fact that it was so close, I'm entitled to a blood test." The operator said to him that by the time a doctor arrived his blood alcohol level would probably be higher than .07, "so if I was you, I'd cop the .07 and forget about the blood". The respondent went on to say "My thoughts were that he's obviously thinking in my best interests, and of course, .07's a better result than .09, so I took his advice." It would appear from the transcript that this evidence was accepted by the Magistrate, and that she decided on that basis to exclude the evidence relating to the breath test and accordingly to dismiss the charge under section 49(1)(b).

Question (1)

9. The decision in *R v Callegher*, on which the Magistrate relied in striking out the charge under section 49(1)(f), was subsequently reviewed by the Court of Appeal in *Director of Public Prosecutions Reference No. 2 of 2001*[1] where, in answer to certain questions put to it, the Court decided that the charge in that matter was not a nullity. On the basis of that decision, Mr Reynolds, for the respondent in the present case, conceded at the outset that the answer to Question (1)(a) must be No, and that question (1)(b) was thus unnecessary to answer.

Question (2)

10. Mr Reynolds submitted that there was no evidence in the transcript that the certificate produced by the breath analysing instrument had in fact been tendered before the Magistrate. He had himself appeared for the respondent in the Magistrates' Court, and he said, "I must admit that in the running of the matter I did not pick up that there had been no formal tender of the certificate of analysis." I would agree that there is no indication in the transcript of a formal tender, although it appears that the certificate was produced by the prosecutor in the course of his examination in chief of the informant, and handed to Mr Reynolds before (probably) being handed to the Magistrate. The copy of the certificate before this Court bears no exhibit marker from the Magistrates' Court, but as four copies of the certificate were prepared I do not regard that matter as significant.

11. However, Senior Constable Rogers deposes that the certificate was tendered, and was relied upon by him as conclusive, pursuant to section 58(2) of the Act. Mr Reynolds did not attempt to impugn that evidence, and it is not challenged in the answering affidavit of Mr Barrington. Given the defects in the transcript to which I have already referred, I cannot rely on the absence from the transcript of any reference to the tender as conclusive of the question of whether tender did take place, especially given the affidavit evidence of Senior Constable Rogers. It may be that the reason for Mr Reynolds's failure to notice the absence of a formal tender was that a formal tender had in fact occurred.

12. The words initially used by the Magistrate to express her decision, as recorded in the transcript, are: "in the exercise of my discretion the evidence will be excluded in relation to the breath test". Later, the transcript of a question and answer reads:

> Senior Constable Rogers: Can I just clarify, Your Worship. Your Worship hasn't admitted the certificate as evidence of a reading obtained of - in Your Worship's - - -
> Her Worship: I've taken the view that, in relation to the ... before the court as to that reading, the defendant had sought to have a - a blood test. Having taken the advice of the operator - whose evidence I've not heard today - that it's inappropriate to accept the evidence of the breath test, in the circumstances and exercised the discretion to exclude it.

Those passages are inconclusive as to whether the certificate had been tendered.

13. Having considered the material before me, I accept the evidence of Senior Constable Rogers, and now turn to consider the question on the basis that the certificate was formally tendered in the Magistrates' Court. In the absence of a notice properly served under section 58(2), that certificate is, by virtue of that section, conclusive proof of the matters set out in paragraphs (a) to (f) thereof. The question before the Court is thus whether in that situation the Magistrate had a discretion to exclude the certificate from evidence.

14. Counsel were in agreement that this and the following questions relate to the discretion the existence of which was established by the High Court in *R v Ireland*[2] and *Bunning v Cross*[3], empowering a judicial officer presiding in a criminal trial to exclude evidence otherwise admissible on the basis that that evidence was obtained by illegal or unfair means. It is not in issue that the certificate was admissible in evidence by virtue of section 58(2) of the Act; even if it were found to have been obtained by illegal or unfair means, a matter which does not concern me at this stage, that finding would not render it inadmissible[4].

15. Mr Just submitted that when, as in this case, no notice had been properly served under section 58(2) of the Act, the *Bunning v Cross* discretion was not available to enable the exclusion of the certificate referred to in that section. The discretion was excluded by the provision in the section that where no notice was served the certificate was "conclusive proof" of the matters set

out in paragraphs 58(2)(a) to (f). If the discretion were available, that would, he submitted, be indicated in the statutory provision by some expression such as "is admissible in evidence if not excluded by the operation of a judicial discretion".

16. He referred to section 35 of the *Interpretation of Legislation Act* 1984, requiring that a construction that would promote the purpose or object underlying the Act should be preferred to a construction that would not promote that purpose or object. In his submission, the main purpose of section 58(2) was to avoid the need for the attendance in court of the person who had given the certificate ("the operator") where there was no issue being taken by the defence as to the evidence or conduct of that person. This was in the interests of convenience and efficiency, and not wasting the time of the operator. To allow the operation of a *Bunning v Cross* discretion where no notice had been given, and accordingly the operator would not appear, would be inconsistent with that purpose because it would be necessary to call the operator in case evidence was required on matters relevant to the exercise of the discretion.

17. In response, Mr Reynolds submitted that the purpose of section 58(2) was simply to allow the certificate to take the place of *viva voce* evidence. In the absence of a notice, the certificate was conclusive proof not of guilt, but only of the facts and matters set out in paragraphs (a) to (f). In his submission, the exclusion of the discretion in those circumstances would require express words.

18. There is no authority directly in point. In *DPP v Connor*[5] a certificate under section 58(2) was tendered without objection. The issue before the Court related to the validity of the preliminary breath test under section 53(1), which O'Bryan J found not to be relevantly flawed.

His Honour continued at [36]:

> Had the evidence impugned the preliminary breath test, it would not follow necessarily that the charge laid under s49(1)(f) must fail. It would still be necessary for the Magistrate to determine why the result was unreliable. If the conduct of the member who conducted the test resulted from a mistake and not from deliberate or reckless disregard of the law, the evidence may have been admitted according to the principles in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. In the absence of a law requiring a mandatory procedure to be followed, it would be surprising were a Magistrate not to accept the evidence. After all, the preliminary breath test requirement is preliminary to the breath analysing instrument test. The result of the first test does not have to be disclosed to the respondent, it is simply the foundation for the opinion of the member that a person's blood contains alcohol.

That passage is, of course, *obiter*, but I would agree with Mr Reynolds that it indicates a considered position of His Honour, no doubt intended to give guidance to lower courts as to the availability of the *Bunning v Cross* discretion in circumstances where the certificate was tendered and no notice given under section 58(2), and as to the exercise of that discretion.

19. *Stiles v Lamont*[6] was a decision of the Appeal Division of this Court. The lead judgment was given by Brooking J, with whom Fullagar and Marks JJ agreed. It appears that a certificate was tendered although it is not apparent whether or not a notice was served under section 58(2). His Honour set out[7] the submission of counsel for the defendant before the Magistrate, that the necessary opinion under section 55(1) of the Act had not been formed, and continued:[8]

> The learned magistrate upheld this submission and dismissed the charge, being of the view that the informant (who had administered the preliminary test) had not held the opinion required by s 55(1)(a) and that the evidence of the breath analysis made at the police station should not be admitted since it had been unlawfully obtained. Reference was made to *Bunning v Cross* ...

After consideration of a different issue, His Honour said:[9]

> I therefore turn to consider whether the learned magistrate erred in excluding the evidence of the breath test at the police station. I am afraid it is plain that he did. ... The evidence of the breath test at the police station was not shown to have [been il]legally obtained. At best there was doubt as to whether the opinion mentioned in s55(1)(a) had been formed. And even if it could have been said that the evidence was in the present case illegally obtained, it was not open to the magistrate, directing himself in accordance with *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and having regard to the whole of the evidence, to conclude that it was right to

> exclude the result of the police station breath test. [Text corrected by reference to the original of His Honour's judgment.]

It would appear from that decision that their Honours were of the opinion that the *Bunning v Cross* discretion was available (although not properly to be exercised in the circumstances of that case); but in the absence of a finding as to the service of a notice, it does not determine the issue before me.

20. I was referred by counsel to my own decision in *DPP v Murphy*[10], where the certificate was admitted pursuant to section 58(2C), the operator being unavailable. In that case the Magistrate found that the certificate had been legally and properly obtained, and accordingly he had no discretion to exclude it under the *Bunning v Cross* principle. He then went on to exclude it on the basis of what he described as "the rather unusual facts of this case". On the basis of authorities I held that it would be difficult to maintain that there was not a residual discretion to exclude evidence on the ground that to receive it "would be unfair to the accused in the sense that the trial would be unfair". In the circumstances of that case, I found that the exercise of the Magistrate's discretion should not be allowed to stand. For various reasons, I do not consider that case to be relevant to the issue before me.

21. In *Nolan v Rhodes*[11] the facts were in effect identical with those before me, in that the same advice as to a blood test was given by the operator of the breath analysing instrument and adopted by the driver. Bollen J proceeded expressly on the basis of the *Bunning v Cross* discretion. Mr Just submitted that that decision was distinguishable on the ground of differences between the South Australian and Victorian legislation, in that the South Australian legislation provided that evidence of the concentration of alcohol indicated by the breath analysing instrument was conclusive, save only if rebutted by evidence of a blood test; in contrast to the Victorian provision that the evidence was conclusive in the absence of a notice. However, that submission is relevant to the exercise of the discretion in the particular case, and not to His Honour's finding that the discretion was available in the face of evidence deemed to be conclusive.

22. In *DPP v Berman*[12] the questions posed in the Master's order were identical with questions (2), (3) and (4) before me, save for the omission of the word "properly" from question (2). However, Ashley J found that the questions did not relate to the basis upon which the decision of the Magistrate had been made, and accordingly he did not deal with them. His Honour rejected a request by counsel that he express an opinion on the answers to the questions, and no reference was made to the availability of the *Bunning v Cross* discretion.

23. In considering the question now before me, that is, whether the *Bunning v Cross* discretion is available where no notice has been given under section 58(2), it is important to consider the principles justifying the existence of that discretion, as set out in the case itself. Stephen and Aickin JJ, with whom Barwick CJ agreed,[13] cited[14] from *R v Ireland*[15] the following passage from the judgment of the Chief Justice:

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

Their Honours then continued:

> That statement represents the law in Australia; it was concurred in by all other members of the Court in *Reg v Ireland* and has since been applied in a number of Australian cases. Its concluding words echo the sentiments expressed long ago by Knight Bruce VC when, in a different yet relevant context, he said, (*Pearse v Pearse* [1846] EngR 1195; (1846) 1 De G & Sm 12 [63 ER 950, at p957]):
>
> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, ... Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.

Their Honours later said[16]:

> What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.
>
> Since it is with these matters of public policy that the discretionary process called for in *Ireland* is concerned it follows that it will have a more limited sphere of application than has that general discretion to which Lord Widgery refers, which applies in all criminal cases. It applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities (or, as Dixon CJ put it in *Wendo's Case* [1963] HCA 19; (1963) 109 CLR 559 at p562; [1964] ALR 292; 37 ALJR 77, unlawful or improper conduct).

24. The *Bunning v Cross* discretion thus has a very specific role and justification, in the context of "broader questions of high public policy". That being so, I do not consider that the provision in section 58(2) which renders the certificate conclusive proof of the matters listed, absent the service of a notice, can be taken, as Mr Just submitted it could, to exclude the operation of that discretion. Had Parliament intended the exclusion of such a significant discretion, it would, in my view, have said so expressly. On that basis, and relying also on what was said by O'Bryan J in *Connor* and the decision in *Nolan v Rhodes*, I find the answer to question (2) to be Yes.

Question (3)

25. The state of the transcript of the hearing before the Magistrate is such that it is not, in my view, possible to say that "it was not suggested that the police had acted unlawfully or improperly". Something to that effect may well have been said which does not appear in the transcript. Accordingly, I do not consider it appropriate that I deal with this question. I note, however, that in *Nolan v Rhodes*[17] Bollen J said of the action of the operator in advising against the taking of the blood test:

> [The operator] was guilty of no unlawful conduct. There was no overt defiance of legislature or common law. He was, however, guilty of relevant unfairness in offering bad advice which had the result which I have mentioned. I think it correct to say … that he overbore the appellant's will. He did it in no sinister, hostile or dishonourable sense, but he did overbear the will of the appellant.

That passage at least indicates the view of His Honour that the action of the operator in giving the advice (see [21] above) was improper.

26. Mr Just pointed out in this context that the giving of the advice not to have a blood test, being the conduct on which the Magistrate relied as the basis for the exercise of the discretion (see [12] above), occurred after the taking of the sample of breath and production of the certificate. That being so, he submitted, there was no nexus between the giving of the advice and the evidence contained in the certificate, and thus it was inappropriate to exclude the certificate from evidence on that basis. However, there was a clear nexus between the failure to obtain a blood test and the giving of the advice, and that submission overlooks the possibility that the blood test might have produced a lower reading than the breath analysis, thus giving ground to the respondent to dispute the finding recorded in the certificate.

Question (4)

27. In *House v R*[18], Dixon, Evatt and McTiernan JJ said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

28. Considering the matter in the light of the principles set out in that passage, and bearing in mind the deficiencies of the transcript, there is no ground on which I could find that the Magistrate erred in the exercise of the discretion which I have found that she had. The answer to question (4) is accordingly, No.

Conclusion

29. Submissions were made by counsel as to the orders that would be appropriate to be made depending on what I found to be the answers to the questions in the Master's order. Having considered those submissions, I make the following orders:

> 1. The appeal against the striking out of the charge under section 49(1)(f) will be upheld, the order striking out that charge will be set aside, and the matter remitted to the Magistrate for determination according to law.
>
> 2. The appeal against the decision to dismiss the charge under section 49(1)(b) will be dismissed.

Counsel may wish to make submissions as to costs.

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[1] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164, decided on 8 August 2001.
[2] [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[3] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[4] See the joint judgment of Stephen and Aickin JJ in *Bunning v Cross* at 66.
[5] [2000] VSC 407; (2000) 117 A Crim R 319; (2000) 32 MVR 479, decided on 6 October 2000.
[6] (1992) 15 MVR 557.
[7] At 558.
[8] At 558.
[9] At 561.
[10] [2000] VSC 458, Unreported, decided on 3 November 2000.
[11] (1982) 32 SASR 207.
[12] [2001] VSC 367; (2001) 34 MVR 403, decided on 26 September 2001.
[13] At 65.
[14] At 72.
[15] At 335.
[16] At 74-5.
[17] At 214.
[18] [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202.

APPEARANCES: For the appellant DPP: Mr D Just, counsel. Solicitor for Public Prosecutions. For the respondent Moore: Mr PS Reynolds, counsel. Voitin Walker Davis, solicitors.
