23/04; [2004] VSC 202

SUPREME COURT OF VICTORIA

MacDONALD v THE COUNTY COURT of VICTORIA and ANOR

Teague J

26 April, 8 June 2004 — (2004) 41 MVR 183

MOTOR TRAFFIC – DRINK/DRIVING – REFUSE BREATH TEST – MOTORIST TAKEN TO POLICE STATION – BREATH ANALYSING INSTRUMENT PRESENT WHEN MOTORIST REQUIRED TO TAKE TEST – INSTRUMENT NOT IMMEDIATELY AVAILABLE TO BE BREATHED INTO – COMPLIANCE STATUS OF INSTRUMENT NOT PRECISELY ESTABLISHED – MOTORIST CONVICTED – WHETHER COURT IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1), 55(1).

After being intercepted driving a motor vehicle, MacD. accompanied police officers to a police station where he was asked to undergo a breath test by a certified breath test operator. MacD. refused to undergo the test. At the time of the request a breath analysing instrument was present however, it was not immediately ready to be breathed into. MacD. was later charged with refusing to take a breath test. At the hearing, the compliance status of the instrument was not specifically established; however, MacD. was convicted. Upon appeal—

HELD: Appeal dismissed.
The Court was not in error in finding the charge proved despite the fact that it had not been specifically established that the breath analysing instrument complied with the statutory definition or that the instrument was not immediately ready to be breathed into.
***Lisiecki v Grigg* (1990) 10 MVR 336, followed.**
***Scott v Dunstone* [1963] VicRp 77; [1963] VR 579, discussed.**

TEAGUE J:

1. Must a magistrate dismiss a "refuse breath test" prosecution where the compliance status of the breathalyser is not specifically established as per the statutory definition, or where the breathalyser is not immediately ready to be breathed into? Put shortly, those are the issues raised in this Order 56 proceeding.

2. The plaintiff before me was Mr MacDonald, who was the defendant in a prosecution under ss49(1)(e) and 55(1) of the *Road Safety Act* ("the Act"), first heard in the Magistrates' Court in August 2002. He was convicted. He then appealed. His appeal was heard in the County Court by Judge Crossley in May 2003. Mr MacDonald was convicted. He then brought this proceeding in this Court under Order 56. Mr Tovey QC for Mr MacDonald sought relief in the nature of *certiorari*, contending that Judge Crossley had erred in not dismissing the prosecution.

3. On 3 May 2001, Mr MacDonald was intercepted by Senior Constables Linehan and McArthur while driving his car in Brighton. He performed a preliminary breath test. He went with Senior Constables Linehan and McArthur to the Moorabbin Police Station. He was asked questions there by a Sergeant Stockdale, a certified breath test operator. He answered them selectively. He expressed resentment at the attitude of Sergeant Stockdale. He asked for a more senior policeman to be called in. Sergeant Smith came and spoke with Mr MacDonald. That was a prelude to the carrying out of certain breath test requirement procedures to which I will shortly refer.

4. Before Judge Crossley, oral testimony was given by the four policemen and by Mr MacDonald. Mr MacDonald claimed that he had been threatened by Sergeant Stockdale, and that that led to Sergeant Smith coming in to the room he was in and speaking with him. He also claimed that he had not then been required to take, and thus had not refused to take, a breath test. The police evidence was: that Sergeant Smith spoke with Mr MacDonald; that Sergeant Smith left; that Mr MacDonald was required to take the test; that he refused. Judge Crossley indicated that he found that there was no threat, that Mr MacDonald had been required to take the test, and that there was a refusal.

5. There was nevertheless a complicating factor. It was as to timing. Sergeant Stockdale's

evidence included that the breath analysing instrument that was present when Mr MacDonald was required to take the test was an Alcotest 7110, that it had certain numbers on it, and that he believed that it was an approved instrument for breath analysis. Stockdale explained how the instrument, which I will call for reasons of convenience a breathalyser, is operated. Put shortly, it is like a computer, with a keyboard, a screen and a printer. It operates on a cycle. The cycle is akin to, but necessarily more complicated than, the cycle in use with an ATM. Once a cycle is started, the screen displays prompts over a series of stages. When responded to at each stage, it proceeds to the next stage. There are stages for typing information like names. There is a stage for the receiving of a sample of breath. There is a stage when the result is printed out. Crucially, the stage for the receiving of a sample of breath is of the order of two minutes. If there is no response, a fresh cycle must be started.

6. Judge Crossley was troubled by an aspect of the evidence that the police witnesses could not explain. In three separate documents, the same time, namely 2251 hours, was either printed or handwritten. One document was the handwritten record of Sergeant Smith speaking to Mr MacDonald. Another document was the handwritten record of Senior Constable Linehan of the stating of the requirement to take the breath test. The third was the record printed out by the breathalyser. The inclusion of the same time in three places was inexplicable, given the evidence as to the sequence of events and as to the operation of the breathalyser. One effect of the triple inclusion of the one time was to create a doubt as to the immediate readiness of the breathalyser as at the time the requirement to take the test was made. Submissions were made to Judge Crossley as to the implications. A number of cases, were referred to. They included *Scott v Dunstone* [1963] VicRp 77; [1962] VR 579 and *Lisiecki v Grigg* (1990) 10 MVR 336 to which I will come below. Judge Crossley said that he did not accept the submissions put on behalf of Mr MacDonald and convicted him. He stated his reasons orally.

7. I made clear when the matter came before me how troubled I was as to the unsatisfactory state of the materials before me. I summarise my litany of concerns. No transcript was kept of the proceedings before Judge Crossley. There was nothing before me to indicate that Judge Crossley had been asked at any time to provide reasons in writing. On file was an order of Master Wheeler made on 19 June 2003 requiring the plaintiff to file an affidavit by 21 July 2003. That order was not complied with. An affidavit was sworn by Mr MacDonald on 12 November 2003, and filed on 14 November 2003, nearly 6 months after the hearing of the appeal. An affidavit was sworn by Mr Moran of counsel, who had appeared before Judge Crossley to prosecute, on 30 March 2004, over four months later. There were troubling discrepancies in the contents of the affidavits of Messrs MacDonald and Moran. I listed for counsel nine areas of discrepancies. Some were substantial, particularly as to Judge Crossley's findings and reasons. There was nothing before me to indicate that Judge Crossley had been asked at any time to review the affidavits setting out to what was said to have occurred before him. Certainly, there was not the usual courtesy letter on the file of this court to indicate that the court below would abide the decision of this court.

8. Both Mr Tovey, for Mr MacDonald, and Ms Quin of Counsel, who appeared for the second named defendant, who was the informant, recognised my concerns. After discussion, it was accepted that I should proceed despite the irregularities, upon the basis that the issues should be treated as those addressed in the outlines of submissions lodged by counsel with the court. I direct that a copy of those outlines remain on the file of this court. In short, I treated the accepted position as meaning that I should consider whether Judge Crossley had erred on the assumption that he had found that the compliance status of the breath analysing instrument had not been precisely established, and that he had found that the instrument was not immediately available to be breathed into when Mr MacDonald was required to do so, but had nonetheless convicted Mr MacDonald in the light of his interpretation of the law as laid down in decisions of this court, and particularly in *Lisiecki v Grigg*, which was to be preferred to *Scott v Dunstone*.

9. I now set out in alphabetical order a list of twelve cases in this much-harrowed area:

DPP v Blyth (1992) 16 MVR 159
Bogdanovski v Buckingham [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257
Draper v Morgan [1970] Tas SR 247
DPP v Foster, DPP v Bajram [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365

DPP v Greelish [2002] VSCA 49; (2002) 4 VR 220; (2002) 128 A Crim R 144; (2002) 35 MVR 466
Halepovic v Sangston [2003] VSC 464; (2003) 40 MVR 203
Impagnatiello v Campbell [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486
Lisiecki v Grigg (1990) 10 MVR 336
Mintern-Lane v Kercher [1968] VicRp 71; [1968] VR 552
Rankin v O'Brien [1986] VR 86
Sanzaro v County Court of Victoria [2004] VSC 48; (2004) 42 MVR 279
Scott v Dunstone [1963] VicRp 77; [1963] VR 579
Walker v DPP (1993) 17 MVR 114

10. What Mr Tovey put, in short, was as follows. It was established from what was said by Sholl J in *Scott*, at 581-2 as to "refuse breath test" prosecutions, that the breath analysing instrument must be an approved one and that it must be immediately available for use. Judge Crossley had accepted that it had not been proved that the instrument referred to in evidence before him conformed with s3(1) and was immediately available. He was therefore obliged to follow *Scott*. What was said in *Scott* was wrongly rejected in *Lisiecki*, but approved in *Rankin*, *Foster*, *Greelish*, and *Halepovic*. What was said in *Walker*, approvingly of *Lisiecki*, was *obiter*. A requirement that the instrument be immediately available is consistent with the fact that the offence is complete immediately the refusal is uttered. It is no defence that a suspect changes his mind seconds later.

11. It is necessary to analyse several of the cases in a detailed way. Before I proceed to do so, I set out the statutory provisions applicable in the case before me. I note that *Scott* and *Mintern-Lane* are instances of "refuse breath test" cases under provisions which preceded s49(1)(e). *Rankin* is an instance of a "refuse to accompany" case under the provisions which preceded s49(1)(e). *Lisiecki*, *Blyth*, *Greelish* and *Sanzaro* are instances of "refuse breath test" cases under s49(1)(e) and 55(1). *Halepovic* is an instance of a different kind of "refuse breath test" case under s 49(1)(e)and 55(9A). *Bogdanovski*, *Walker*, *Foster* and *Impagnatiello* are instances of "exceed prescribed limit" cases under s49(1)(f).

3. Definitions
(1) In this Act—
...
"**breath analysing instrument**" means—
(a) the apparatus known as the Alcotest 7110 to which a plate is attached on which there is written, inscribed or impressed the numbers "3530791"...

49. Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she—
...
(e) refuses to comply with a requirement made under section 55(1) ...
(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 and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath ...
...
(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated.
...
(7) On convicting a person, or finding a person guilty, of an offence under sub-section (1) the court must cause to be entered in the records of the court—
(b) in the case of an offence under paragraph (f) of sub-section (1), the level of concentration of alcohol found to be recorded or shown by the breath analysing instrument; and

55. Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation or of the Department of Infrastructure under section 53 to do so and—
(a) the test in the opinion of the member or officer in whose presence it is made indicates that the person's blood or breath 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 place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath ...
>
> (2A) The person who required a sample of breath under sub-section (1) ... may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol present in the sample, or each of the samples, previously furnished in grams per 100 millilitres of blood or 210 litres of exhaled air because the amount of sample furnished was insufficient or because of a power failure or malfunctioning of the instrument or for any other reason whatsoever.
>
> (3) A breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police.

12. I now turn to the cases. I need to highlight important distinctions. For that purpose I have in my quotes from the decisions added bold formatting for propositions as to phraseology, machine presence, basic machine conformity, specific machine conformity and timeliness**.** That which distinguishes those matters appears from what follows.

13. The 1963 case of *Scott* was a decision as to basic machine conformity, with non-binding references to phraseology, machine presence and timeliness. In *Scott* a motorist was involved in an accident. A breathalyser was set up in front of him at the scene of the accident. The motorist was then required to furnish a sample of breath for analysis. He refused. There was no evidence that the breathalyser was an approved instrument within the meaning of sub-section (6) of section 408A of the *Crimes Act* 1958. Sholl J posed for himself a series of questions as to what the draftsman meant by sub-sections (4), (5) and (6) of that section. He then said:

> "I propose to construe the language in the way in which I think common sense requires, having due regard to the principle that one is not to cut down a person's common law rights against self-incrimination without clear language. In my opinion—
>
> (1) The officer, having the necessary belief on reasonable grounds referred to in sub-section (4)(a), **must clearly ask** the suspect to furnish a sample of his breath **for the *stated* purpose of analysis** by an **approved** breath analysing instrument. For example, **he may say** expressly, "I require you to furnish a sample of your breath for analysis by an **approved** breath analysing instrument", **or he may point** to such an instrument **and say**, "I required you to furnish a sample of your breath for analysis by this instrument", provided it is in fact so **approved**.
>
> (2) There must be an **approved** instrument **present at the time of the requirement**, into which the suspect can exhale **at once** if he consents to the test. That is to say, the appropriate operator must be **there** and **available**.
>
> Compliance with these two requirements must, therefore, be proved if the refusal is made the subject of proceedings for an offence under sub-section (5). I have construed the words "for analysis by a breath analysing instrument" as stating what the requirement by the officer **must express** to the suspect. And if he does not **expressly say** that the analysis is to be by an approved instrument, **he must at least point** out such an instrument as that by which the analysis to be done. (sic) I have also construed the reference in sub-section (4)(a) to exhalation by the suspect into the instrument as indicating by implication that Parliament contemplated that the instrument must be **there** and **available** for operation **at the time the requirement is made**. I have rejected any notion of applying to this legislation the concept of **anticipatory** breach or refusal. I know it can be said that the police may be put to inconvenience in having an instrument **brought to a police station** in order to make a request for a sample, whereupon the suspect may refuse it; or that if the suspect says, "It is no use bringing a breath analyser, I will not take a test under any circumstances", it is a useless labour to have one brought. That is a matter for police administration; but if the correct instrument is not there **at the time**, it merely means that no offence can be committed under sub-section (5). If the construction which I have given to the legislation and which appears to me to be at least simple, easily understood and calculated to avoid all prejudice to a suspect, is not what Parliament intended, it can easily amend the enactment. It follows from the construction adopted that the magistrate rightly dismissed the information in the present case. An instrument was **there at the material time, when the request was made**. If the instrument had been proved to be an **approved** instrument, I think the request would have been otherwise sufficient, and the rest of the prosecution's case was established. But there was no evidence that it was an **approved** instrument."

14. The 1968 case of *Mintern-Lane* was a decision as to machine presence. In *Mintern-Lane*, a motorist was prosecuted for refusing to perform a breath test. He had been required to furnish a

sample of breath for analysis. He was asked to do so when in a police car in the street outside the police station where the breathalyser was located. The police station was then locked and access to it could not be obtained. At issue was whether the machine was "at" the police station. Newton J, in holding that it was not, adverted to what Sholl J had said in *Scott* as to strictly construing the provision. *Scott* was not referred to on the matter of "presence". But Newton J ruminated as to whether, if the police car had been parked in a yard within the police station grounds, it would have been parked "at" the police station. He said that he was happy to leave that question for another day.

15. The 1985 case of *Rankin* was a decision as to phraseology, with a non-binding reference to machine presence. In *Rankin*, a motorist whose car was reasonably believed to have been in a collision was required to accompany a policeman for a breath test, and refused. At issue was the formulation of words of the requirement. Southwell J referred to what Sholl J had said in *Scott* in this way:

> "In that case his Honour held that the requirement of a person to undergo a breath test must be made **in specific language** closely following the words of the Act. Sholl J, *obiter*, as I believe, expressed views concerning the **phraseology** which a police officer should use in requiring a driver to undergo what has for long commonly been known as a "breath test".

Later, in a different context, Southwell J again referred to *Scott*:

> "The stage had not been reached when the respondent could have refused to undergo the test itself. That refusal cannot occur until the breathalyser machine is **present**: *Scott v Dunstone* [1963] VicRp 77; [1963] VR 579."

I would note that the matter of phraseology, which is not in issue before me, has been reviewed in a number of other cases, including *Foster* and *Sanzaro*.

16. The 1988 case of *Bogdanovski* was a decision as to specific machine conformity. It involved not a prosecution under ss49(1)(e) and 55, but a prosecution under s49(1)(f). In *Bogdanovski,* Ormiston J decided that a motorist could not be convicted of any offence under s49(1)(f) based on the result of a test by a breath analysing instrument unless it was proved that it was a "breath analysing instrument" which conformed with the definition in Section 3 of the Act.

17. The 1990 case of *Lisiecki* was a decision as to basic and specific machine conformity and as to timeliness, with non-binding references to machine presence. In *Lisiecki,* there is a highlighting of the important distinction between basic machine conformity for a prosecution under ss49(1)(e) and 55 and specific machine conformity for a prosecution under s49(1)(f). In *Lisiecki*, a motorist, who had been stopped performed a preliminary breath test, was then required at a police station to furnish a sample of breath for analysis, and refused. There was evidence that a breathalyser was set up in the presence of the motorist. There was no evidence that the breathalyser conformed with the definition in s3(1) of the Act. It was submitted, based on *Scott*, that the prosecution should have been dismissed, on the basis that there was no evidence that the motorist was required to furnish a sample from a machine which was present at the time, complied with the Act and regulations and was in a state of readiness for immediate operation. Marks J, after noting that *Scott* required that there be such evidence, concluded that *Scott* should not in all its aspects be followed. I pause to emphasise the use of the words: "in all its aspects". Marks J analysed the relevant statutory provisions and noted differences in circumstances. He expressed the opinion that, in *Scott*, proof of the elements of the offence was confused with proof of the facts which might establish their existence. He rejected the submission that the Act was to be interpreted so as to require that there be evidence that the designated instrument was approved under the Act, opining that the legislature had no such intention and that the provisions in s55 (6) and (9) suggested strongly to the contrary. He noted that the evidence in the case before him allowed the inference that the motorist was required to furnish a sample of breath for analysis by an instrument approved under the Act. He went on to say:

> "If the plaintiff had complied with the requirement and the instrument were not proved to have been a "breath analysing instrument" within the meaning of the Act he could not be convicted, as Ormiston J decided, I think correctly, in *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897; 9 MVR 257 of any offence based on the result of such a test. Mr Hardy of counsel at first submitted

> that *Bogdanovski* supported his contentions. I think it does not. There is a marked difference between a prosecution for refusal to furnish a sample of breath for analysis by an instrument and a prosecution based on what such an instrument displays. In the latter case, it is, in my view, as Ormiston J decided, necessary to prove that the machine **met the requirements of the statute**. The legislature has expressly provided that **only such a machine** is to be used to obtain results which might found a conviction."

18. Marks J went on to refer to the decisions in other cases including *Draper* and *Mintern-Lane*. In summarising what had been said by Burbury CJ in *Draper*, he referred approvingly to comments as to "the fact that the machine was not **immediately available**". He also directly quoted this passage from *Draper*: "The statute does not expressly require that a breathalyser be **immediately present and available** when a driver attends to fulfil his statutory obligation and I see no reason to imply such a condition as a necessary element of lawfulness of the direction."

19. The 1993 case of *Walker* involved a prosecution under s49(1)(f) where the issue arose out of the motorist's willing compliance. There is a non-binding reference to timeliness. In *Walker*, it had been submitted that *Scott* was authority for the proposition that it must be established that a breathalyser was set up and ready for use in the presence of the defendant at the time of the requirement to undertake a breathalyser test. Fullagar J (with whom MacDonald J concurred) at 196 rejected that contention because such a requirement was not an element of the offence charged. Brooking J at 199 elaborated on the importance of distinguishing between the elements of an offence under s49(1)(f) and an offence under s49(1)(e) and s 55(1).

20. In the 1999 case of *Foster*, also a prosecution under s49(1)(f), Winneke P (with whom Batt JA agreed) at 655-6 quoted at length from, and referred approvingly to, those passages in *Walker*. In *Foster*, Winneke P said this at 657:

> "... I do not accept that the "requirement" must be made **in terms of an imperative demand**. Nor do I accept that any such requirement is to be made "**at the outset**" in the sense that it must be made **at the scene of the preliminary breath test**. It is, to my mind, abundantly plain from a reading of s55(1) that the instrument to furnish a sample of breath for analysis by a breath analysing instrument can only sensibly be made **at the time when the device is presented** to the motorist **at the police station (or other place)**. That, as I see it, was the view taken by Southwell J in *Rankin* when considering different, but for present purposes, similar legislation which existed in s80F of the *Motor Car Act* 1958. Indeed, in my view, the words of s55(1) themselves imply that the requirement "to furnish a sample of breath" is to be made **when the instrument is presented** to the motorist because it is stated that the relevant member of the police force "may require the person to furnish a sample of breath for analysis...*and for that purpose* may further require the person to accompany a member of the police force ...to a police station...(emphasis added). In other words, the section itself makes it plain, as I see it, that the power to make the latter requirement is to facilitate the purpose for which the power to make the primary requirement is given, which can only sensibly be exercised **when the motorist is confronted** with the machine."

21. What was said by Winneke P must be assessed in context. As is apparent from my use of bold formatting, he was addressing matters of phraseology, of machine presence and of timeliness. As to timeliness, the contrasting times were when the motorist was at the scene as against when he was at the police station with the breathalyser. That contrast is very different from that before me, where the motorist was at the relevant time in the room in the police station housing the breathalyser. The contrasting times were when the breathalyser was immediately set up in testing mode as against when the breathalyser was not immediately but could be very shortly set up in testing mode.

22. In the 2002 decision in *Greelish*, what was said by Winneke P in *Foster* was referred to approvingly, and quoted in part by Buchanan JA (with whom Phillips JA agreed). It seems clear to me, having regard to the issues in *Greelish* and to the use of "where" in the comments of Buchanan JA, at [14] which followed the references to *Foster*, that it was the comments of Winneke P in *Foster* as to machine presence, rather than as to timeliness, that were referred to approvingly .

23. In the 2003 decision in *Impagnatiello*, it was accepted that it was an essential element of an offence under s49(1)(f) that the machine was a "breath analysing instrument" within s3 of the Act, and that it was not open to infer from an inadequate base that the instrument was a breath analysing instrument.

24. In the later 2003 decision in *Halepovic*, what was said by Sholl J in *Scott*, by Winneke P in *Foster*, and by Buchanan JA in *Greelish* was reviewed by Bongiorno J. I need not go to the detail as, again, it is clear that the focus was not on the matter of timeliness but by analogy as to the matter of machine presence. In *Halepovic,* it was the presence of a medical practitioner rather than a breathalyser.

25. As to both issues raised in the outlines before me, I am satisfied that Judge Crossley decided as he did correctly. He was bound to follow *Lisiecki*, both as to specific machine conformity and as to timeliness, as against *Scott* which was binding as to neither. *Scott* was referred to in Mr Tovey's outline as if all the opinions expressed by Sholl J had binding force. That is not so. As to basic compliance, the decision is binding, but not otherwise. In those other respects, the words of Sholl J should continue to be treated only as persuasive authority. They certainly ought not to be treated as if they were to be interpreted and applied like a statutory provision.

26. In *Lisiecki*, Marks J did not elaborate on factors going to timeliness. Indeed, there were only two references to immediacy. The first was in stating that there was no evidence that the breathalyser was in a state of readiness for immediate operation. The second was in the approving quotes from Burbury CJ in *Draper*. In the latter, the point is made that the statute could have specified, but did not specify, immediate availability. The same situation applies as to the Act. Even if the relevant provision had done so, there can be a degree of flexibility associated with the word "immediately". As to that, I refer to other sections in the Act where "immediately" is used. Under ss28(3), and 31(4) a Court must "immediately" send particulars of an order to the Roads Corporation. That can scarcely mean "at that very second". The like comment can be made as to the requirement in s55C(3)(a) that a video-recoding must be destroyed "immediately after that period of 12 months". Likewise as to the requirement in s.61 as to "immediately" rendering assistance after an accident. As Newton J said in *Mintern-Lane* in somewhat analogous circumstances relative to place not time, much depends upon context and subject-matter. Where precisely the line is to be drawn is often appropriately left, as did Newton J, for another day.

27. I have taken account of the context of the evidence before Judge Crossley, and of the decisions presented to him. I am well satisfied that he did not err as to the law to be applied. Unless there are other matters to be put to me as to costs or otherwise, the proceedings should be dismissed with the usual order as to costs.

APPEARANCES: For the plaintiff MacDonald: Mr M Tovey QC, counsel. John Morrow, solicitors. For the second defendant: Ms C Quin, counsel. Office of Public Prosecutions.
