**6/98**

## SUPREME COURT OF VICTORIA

# *CHAPMAN v KAVANAGH*

**Smith J**

**26 November, 10 December 1997 — (1997) 26 MVR 43**

**MOTOR TRAFFIC – DRINK/DRIVING – SINGLE MOTOR VEHICLE ACCIDENT ON COUNTRY ROAD AT NIGHT – NO WITNESSES TO ACCIDENT – EMERGENCY TELEPHONE CALL RECEIVED BY AMBULANCE OFFICER – AMBULANCE ATTENDED SCENE – BLOOD SAMPLE LATER TAKEN – NO ADMISSIONS MADE OR EVIDENCE GIVEN BY DEFENDANT – NO EVIDENCE GIVEN AS TO TIME OF ACCIDENT – WHETHER OPEN TO MAGISTRATE TO FIND THAT SAMPLE TAKEN WITHIN 3 HOURS OF ACCIDENT – WHETHER OPEN TO MAGISTRATE TO TAKE ACCUSED'S FAILURE TO GIVE EVIDENCE INTO ACCOUNT: *ROAD SAFETY ACT* 1986, S49(1)(g).**

As a result of receiving an emergency call at 1.29am, ambulance officers attended the scene of a single motor vehicle accident where they saw C. sitting on a tree stump. A blood sample later taken from C. at 3.10am showed a blood alcohol concentration of 0.178%. C. made no admissions. C. was subsequently charged with an offence against s49(1)(g) of the *Road Safety Act* 1986. At the hearing C. did not give evidence and submitted that the magistrate could not be satisfied beyond reasonable doubt that the accident occurred within the prescribed 3 hours. The magistrate rejected this submission and found the charge proved. Upon appeal—

**HELD: Appeal allowed. Conviction quashed.**
**1. For the magistrate to be able to be satisfied beyond reasonable doubt that the blood test was taken within 3 hours of the driving of the motor vehicle, evidence was needed that would enable that inference to be drawn in the absence of any direct evidence about the time of the accident. The accident occurred on a country road at night where there would not be a great deal of passing traffic or persons. It was possible for passing traffic not to notice the vehicle. Having regard to these matters it was a matter for speculation to infer that the accident occurred within the 3-hour period. Accordingly, it was not possible for the magistrate to draw the necessary inference in the absence of evidence of the location.**

***Scilley v Potter* (1991) 13 MVR 23; and**
***Kislinsky v Spence* (1989) 10 MVR 163, considered.**

**2. As the drawing of the necessary inference was not open, it was not permissible for the magistrate to take into account the fact that C. did not give evidence. However, assuming a *prima facie* case had been made out, C. may not have been in a position to give evidence as to the time when the accident occurred. Further, the deficiencies in the prosecution case may have accounted for C.'s remaining silent and relying on the burden of proof resting on the prosecution. In those circumstances, it was not open for the magistrate to take C.'s failure to give evidence into account in deciding whether to infer from the evidence that the last driving had occurred within the requisite 3 hours.**

***Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23, applied.**

**SMITH J: [1] The Appeal:** Graham James Chapman (Chapman) appeals to this court from orders of the Magistrates' Court of Victoria made on 1 July 1997 whereby he was convicted for breaching s49(1)(g) of the *Road Safety Act* 1986 (Vic). It was ordered that his licence be cancelled and that he be disqualified from driving in the State of Victoria for a period of 17 months effective from 1 July 1997. He was also fined $400 with $63.20 costs with a stay of payment to 20 August 1997. *[After setting out the provisions of s49(1)(g) of the Act His Honour continued*]... In his order made on 31 July 1997, Master Evans identified the following questions of law for determination.

> (a) Whether there was any evidence upon which the learned magistrate could be satisfied beyond reasonable doubt that the blood sample had been taken within three hours after the appellant had been driving or was in charge of a motor vehicle;
> (b) whether, in light of the presumption of innocence and the appellants fundamental right to remain silent at trial, it was impermissible for the learned magistrate to take into account the failure of the appellant to give evidence in the circumstances of this case;
> **[2]** (c) whether the learned magistrate misdirected himself by shifting the burden of proof upon the appellant;

(d) whether the learned magistrate erred in law by failing to correctly apply the principles enunciated in *Scilley v Potter* (1991) 13 MVR 23;
(e) whether the learned magistrate erred in law by failing to rely upon the prosecutor's failure to call witnesses at the scene of the accident in order to draw the inference that the evidence of those witnesses would not have assisted the prosecution;
(f) whether the learned magistrate erred in law by failing to state or adequately state his reasons for concluding that the accident happened after 12.10 am.

**The proceedings below:** It was alleged before the Magistrates' Court that Chapman had a blood alcohol concentration of .178% grams per 100 millilitres of blood. The informant adduced evidence that the blood test was taken at 3.10 am. The informant also led evidence that:

(a) Joanne Kerr, an ambulance officer, received an emergency call at 1.29 am on the same morning;
(b) that the ambulance officers attended at the scene of the accident at 1.57 am;
(c) that the police attended the accident scene at approximately 2.00 am; and
(d) the original emergency telephone call had been made from somebody who was at a camp site in close proximity to the scene of the accident via a mobile phone.

It appears that no evidence was given as to the precise location of the accident. It was apparently in the vicinity of Echuca. The ambulance officer, Joanne Kerr, gave evidence that in driving to the scene she passed the All River Caravan Park in Torrumbarry before arriving at the scene. There she noticed a car with its **[3]** rear wheels and tail lights visible above an embankment and observed a man sitting on a tree stump whom she identified as the accused. She also gave evidence that there were no signs that the accused was in shock. She said that she had received the call at the Echuca Ambulance Station and had to collect her partner and travel to the scene and that the journey had taken more than thirty minutes. Constable Kavanagh gave evidence that the front half of the car was over the embankment.

Critically, there was no direct evidence about the time of the actual accident. There was no evidence as to when it was that the emergency call was received and thus how much time elapsed until the ambulance service was contacted. There was no evidence as to the visibility in the area, the volume of traffic at the relevant time and the proximity of the embankment to the road and whether and to what extent the car was visible to ordinary passing cars. There was no evidence as to when it was that the people at the campsite first became aware of the accident, where they were at the time and how they became aware of it. Evidence was given, without objection, of conversations with people at the scene but not as to any of the above details. The accused made no admissions.

At the end of the prosecution case counsel for Chapman submitted that there was no case to answer on the grounds that the court could not be satisfied beyond a reasonable doubt that the accident occurred within the prescribed three hours. He submitted that on the evidence one simply could not draw the necessary inferences. The prosecutor informed the court that she had been informed by Senior Constable Orazvary who had appeared at the contest mention on behalf of the informant, that the only issue in contention that had been advised at that mention was the issue of identity. The prosecutor, submitted to the court that the purpose of the contest mention was to identify issues in contention and to thereby narrow the issues to be dealt with on the hearing. She submitted that, if the time of the accident had been identified as an issue, the prosecution would have called the person who received the 000 telephone call who would have documented the time of the call, the complainant and location of the accident. I note that this statement by **[4]** the prosecutor constituted a relevant admission of the making of a 000 emergency call prior to the call to the ambulance service. The prosecution would also have called the other ambulance officer who attended the accident and spoke to other persons at the scene.

The learned magistrate had no personal knowledge of the contest mention but noted that on the cover sheet his colleague had noted that the defence would not contest the blood alcohol reading of 0.178% and that the words "three hours" also appeared on the cover sheet. The learned magistrate asked Mr Hartnett, counsel for Chapman, whether he was seeking an adjournment. Mr Hartnett indicated that he was there to proceed that day. Accepting that the informant was not asked if he sought an adjournment, there was nothing to stop the informant asking for one, in the circumstances outlined, to call the requisite evidence, assuming it was available. It seems that no application was made. His Worship ruled against the no case submission. The affidavits

filed do not record any reasons. Chapman elected not to give evidence. His counsel then submitted again that the court could not be satisfied beyond a reasonable doubt that the accused had been driving the vehicle within the required three hours and that there was a lack of evidence.

**The Magistrate's Reasons:** The appellant summarises the learned magistrate's reasons as follows:

> "(a) He made reference to the observations and the times given by witnesses;
>
> (b) He noted that the three hour limit would have expired if the accident happened at 0010 hours or earlier and stated that there was no evidence of the time driving;
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> (c) He took note of the fact that the defendant did not give evidence;
>
> (d) He made reference to the case of *Scilley v Potter* an unreported case in the Supreme Court of Victoria dated 21 January 1991;
>
> (e) He concluded beyond reasonable doubt that the accident happened after 0010 as finding that the accident happened before 0010 hours strained credulity."

**[5]** The respondent does not dispute the above statement of reasons save for that set out in paragraph (e). The prosecutor, Senior Constable Nation, deposes that the magistrate did not conclude that "a finding that the accident happened before 0010 hours strained credulity". She deposes that those words were taken from the case of *Scilley v Potter* but were not used by the learned magistrate in his findings. She summarises his reasons as follows:

> "The magistrate found that given the time of the test, 0310, and the time of the telephone call being received by the ambulance officer who attended the scene, 0129, and also the time of attending the scene given by the ambulance officer, and the distance of the scene from the place of the test, then it was not beyond reasonable contemplation that the driving had occurred within three hours of the test. The magistrate held that it was open to him to find the charges proved beyond a reasonable doubt."

**Question (a)** Turning to the first question in the appeal, for the magistrate to be able to be satisfied beyond reasonable doubt that the blood test was taken within three hours of the driving of the vehicle, evidence was needed that would enable that inference to be drawn in the absence of any direct evidence about the time of the accident. It was, it must be remembered, for the prosecution to prove that the sample was taken within three hours after the accident. The appellant submits that the evidence could not support such an inference. The respondent relies upon the discussion in *Scilley v Potter* (above). In that case a police officer gave evidence that he arrived at the accident scene at 11.20 pm on 3 June 1989. The accident scene was on the Tullamarine Freeway at Strathmore near the Bulla Road off-ramp. He said he there observed two vehicles which had been involved in a collision. The vehicle driven by the defendant had apparently run into the rear of an abandoned Jaguar parked in the safety lane. He observed the defendant seated in the driver's side seat. It later became obvious to him that the defendant was trapped in the vehicle. He gave evidence that the collision had wrecked both cars. The Jaguar vehicle had been pushed into the safety rail causing the front left panels to be badly damaged. When he arrived there was an **[6]** ambulance in attendance. There was no evidence as to whether there was any obstruction to traffic but the evidence was consistent with both vehicles being off the freeway at 11.20 pm and in the safety lane and causing no obstruction. It was contended apparently that sixty minutes might well have elapsed between the collision and the arrival of the policeman. The blood alcohol test was not performed until 1.20 am on the morning of 4 June 1989.

On the return of an order to review the decision of a magistrate convicting the defendant, Fullagar J articulated the question that was before him in the following terms:

> "The question is whether it was open to the magistrate to be satisfied beyond reasonable doubt that the collision occurred after 10.20 pm. on 3 June 1989. In all the circumstances of this case, and despite the fact that the applicant did not go into evidence, I have with some hesitation concluded that it was not open to the magistrate to be so satisfied."

Fullagar J was referred to a decision of Crockett J in the matter of *Kislinsky v Spence* (1989)10 MVR 163. That case raised a similar issue but concerned a collision in Burwood Road,

Hawthorn. The police officers attended at about 3 am. They found glass and debris on the left side of the roadway beginning at a concrete barrier separating tram tracks from the roadway and extending to where the defendant's vehicle was lying upside down on its roof. Crockett J (at 166) referred to the submission that it was not at all inconceivable that the accident had occurred before 1 am and that it had taken two hours for the overturned vehicle to be observed and for steps to be taken to have it reported to the authorities and for the police to attend. Crockett J stated that this submission "would I think tend to strain credulity somewhat". In that case, however, it seemed that the driver admitted the accident occurred at about 2.40 am. As Fullagar J pointed out it was not clear. therefore, whether Crockett J would have been prepared to infer that it was open to the learned magistrate to be satisfied beyond reasonable doubt that the overturning of the car occurred later than 1 am. Fullagar J went on to say that the case before **[7]** him differed from *Kislinsky* in that it was one hour in question not two. He also said that the case was not one:

> " ... of the car lying upside down on a main road and surrounded by broken glass in the heart of the eastern suburbs, but rather, so far as appears, a case of two smashed cars probably both in the emergency strip at the side of the Tullamarine Freeway at Strathmore near the Bulla off-ramp."

He went on to comment that on a point of this kind he thought that the benefit of any doubt should be given to an accused man. He was not prepared to say that the possibility of the collision occurring before 10.20 pm so strained credulity that the magistrate was justified in concluding beyond reasonable doubt that the collision occurred after 10.20 pm. He went on to say:

> "In all the circumstances of this case an hypothesis that the collision occurred before 10.20 pm is not so far beyond reasonable contemplation that the magistrate was entitled to be satisfied beyond reasonable doubt that it was not the actual event."

In the present case, the specific question raised would appear to be whether it was reasonably open to the learned magistrate to be satisfied beyond reasonable doubt that the accident occurred after ten minutes after midnight on the night in question. It is necessary to consider first whether an inference was reasonably open on the evidence that the accident so occurred. Ultimately the argument that has to be relied upon by the respondent is similar to that sought to be relied upon in *Scilley v Potter,* namely, that to accept as a possibility that the accident occurred before ten minutes after midnight strained credulity and that it was open to the learned magistrate to draw the necessary inference. Whether such an inference was open however, depended on the evidence before the learned magistrate about the relevant circumstances. For example, it would not be possible to draw such an inference in the absence of evidence of the location. There would also be a significant difference in result where the evidence gives a location of King Street, Melbourne as opposed to a remote track in the Victorian Alps.

**[8]** The respondent here points to the fact that there was a period of one hour and nineteen minutes involved in which the accident could have occurred. He argues that it is not possible that that period could have elapsed without the car being observed and steps being taken to report the accident to the relevant authorities. On the evidence, it is said that it was probable that the accident was heard by those at the camp site or the car was observed by a passing motorist or person – possibly someone from the camp site. The case has to be put in the alternative because there was no evidence about how the people at the camp site found out about the accident. There was a further possibility – that the driver went for help and found people at the camp site. There was, however, no evidence to suggest that that had occurred and it was not advanced as a possibility by counsel for the respondent.

It may be observed that the arguments make some alternative factual assumptions. (a) The first assumption is that it was open on the evidence to find that the people at the camp site heard the accident. That assumption depends upon the proximity of the camp site to the accident scene and whether the accident involved sufficient noise to be heard. (b) The alternative assumption is that the car could be seen by a passing motorist or person. This alternative depends on the proximity of the car to the roadway, its visibility to passing traffic or persons and the frequency of passing traffic or persons.

There was no evidence of such matters and no evidence from which such matters could be inferred. On the contrary, it seems that the accident occurred in the country anything up to

half an hour's drive from Echuca. While there was a camp site "in close proximity", there was no evidence before the learned magistrate as to what that meant. Further, there was no evidence as to whether the accident involved any noise and the accident may well have involved very little noise - the car ran off the road and up and partially over an embankment. On the evidence, the **[9]** location would not appear to be the sort of location where there would be a great deal of passing traffic or persons at the relevant time. It was unlikely that there was any artificial lighting. On the evidence, it was possible for passing traffic not to notice the car: the location was not Burwood Road, Hawthorn or the Tullamarine Freeway. While the rear lights were on, the car had travelled off the road, reached an embankment and straddled it. In any event, one hour and nineteen minutes could easily have elapsed from the time of the accident and the call to the ambulance service. Significant time could have elapsed between

(a) the time of the last driving and the discovery of the accident,

(b) discovery of the accident and the first telephone call,

(c) the call to the emergency number and the call to the ambulance service.

Having regard to the foregoing matters, it seems to me that it would be a matter of speculation to infer, on the evidence led by the prosecution, that the accident had occurred within the three-hour period. It was not, in my view, open to the learned magistrate to draw that inference from that evidence. The first question should be answered in the negative.

**Question (b)** If the above be the correct response to question (a), it would not avail the prosecution to point to the fact that the accused had remained silent at trial. (*Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217; (1993) 117 ALR 545; 68 A Crim R 251; 68 ALJR 23 and *R v Neilan* [1992] VicRp 5; [1992] 1 VR 57; (1991) 52 A Crim R 303). The prosecution had to be in a position to point to the requisite inference as being open on the evidence and then argue, in the light of *Weissensteiner*, that such inference might more readily be drawn. If my view be correct that such an inference was not open on the prosecution case, it was not permissible for the learned magistrate to take into account the fact that the appellant did not give evidence.

**[10]** If the correct view be, however, that the requisite inference was open on the evidence, then the issue arises as to whether the learned magistrate erred in law in relying upon the failure of the appellant to give evidence. For the respondent it is argued that it was open to the learned magistrate to do so. Counsel referred to passages from the High Court judgment in *Weissensteiner v R* (above). He referred to the comment from the judgment of Mason CJ, Deane J and Dawson J (at 225):

"The reasoning process whereby the failure of a party to give or to call evidence is taken into account in evaluating evidence which is before the court has long been recognized by the law and is not confined to the criminal law."

Counsel also referred to the later comment in the same reasons for judgment (at 227);

"... when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence given against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence if it exists at all must be within the knowledge of the accused."

Counsel for the appellant, however, drew attention to a later passage in the same reasons for judgment which he submitted point to a need for caution (at 228):

"Of course, an accused may have reasons not to give evidence other than that the evidence would not assist his or her case. The jury must bear this in mind in determining whether the prosecution case is strengthened by the failure of the accused to give evidence. Ordinarily it is appropriate for the trial judge to warn the jury accordingly.

> Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge. Even if there are facts peculiarly within **[11]** the accused's knowledge the deficiencies in the prosecution case may be sufficient to account for the accused remaining silent and relying upon the burden of proof cast upon the prosecution. Much depends upon the circumstances of the particular case and the jury should not be invited to take into account the failure of the accused to give evidence unless that failure is clearly capable of assisting them in the evaluation of the evidence before them."

It should be noted that their Honours commented that the jury should not be invited to take the failure to give evidence into account unless it was "clearly capable of assisting them in the evaluation of the evidence before them". They referred to two factors in particular - whether the facts were peculiarly within the accused's knowledge and the strength of the Crown case. Thus, if there are other witnesses able to give evidence of the facts in question, then they seemed to be suggesting that the failure to give evidence may not warrant adverse comment. Secondly, if there are deficiencies in the prosecution case, that may justify the accused remaining silent even if there are facts peculiarly within the accused's knowledge.

In the circumstances of this case, the issue plainly arose for the consideration of the learned magistrate. Assuming a *prima facie* case had been made out, the accused was the only person at the hearing who might be able to give evidence about the time when the accident occurred. It is possible, however, that he was not in a position to speak as to the time of the accident and thus could not usefully add to the evidence before the court. Importantly also, there were such deficiencies in the prosecution case that they were sufficient to account for the accused remaining silent and relying upon the burden of proof cast on the prosecution.

It should not be forgotten that the reasoning process being invoked by the respondent in this instance is that which was analysed in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395 and later in *O'Donnell v Reichard* [1975] VicRp 89; [1975] VR 916. [*After quoting a passage at p929 from the latter case, His Honour continued*]...**[12]** In determining whether the relevant inferences should be drawn, the court is always faced with the difficulty that there is no evidence given to explain a decision not to give evidence. The accused is also entitled in a criminal trial to the benefit of the presumption of innocence. It has often been pointed out that there can be any number of reasons why an accused person will not give evidence (see Isaacs J *Bataillard v R* [1907] HCA 17; (1907) 4 CLR 1282, 1290 and Palmer, *Silence In Court – The Evidential Significance of An Accused Person's Failure to Testify,* 18 University of New South Wales Law Journal 1).

In a case like the present where there are deficiencies in the Crown case, the accused's legal adviser will be faced with a difficult judgment to make in advising the accused whether to give evidence. Where a court takes the view that the Crown case is subject to such deficiencies but a *prima facie* case is made out it would need to bear in mind that accused's counsel may well have held a different view and advised accordingly. In the present case the decision not to call the accused to give evidence may have been based on erroneous advice as to the weakness of the prosecution case. In addition, the accused may not have been in a position to give evidence as to the time when the accident occurred. In that situation, to give evidence would not have assisted him on the critical point.

**[13]** One matter that has not been considered in the authorities, as yet, is the significance to be attached to the fact that the authorities relied upon in *Weissensteiner* were decided at a time when the right of the accused to make an unsworn statement existed. That right has now been abolished in this State and it seems to me that that introduces a further problem. It is one thing to attach significance to the silence of the accused when the accused has the choice to either give sworn evidence or unsworn evidence and thus could, by giving unsworn evidence, give his account without running the risk of being convicted because of his inability to handle cross-examination. With that right available it could be said that, if the accused had an explanation, the accused could be expected to give it. The choice facing an accused person now is to give evidence and be cross-examined or to remain silent. The inarticulate, excessively nervous or slow-witted accused runs the risk of being made to seem evasive or dishonest in cross-examination even though innocent.

In light of the above, it seems to me that this case was clearly one of those cases where even

if the inference required was open applying the principles enunciated in *Weissensteiner*, it was not open to the learned magistrate to infer that the accused's evidence would not have assisted the accused on the issue of time. Thus the failure to give evidence could not properly be taken into account in deciding whether to infer from the evidence that the last driving had occurred within the requisite three hours.

**Remaining Questions:**
I turn to the remaining questions of law posed:

> (c) I do not accept on the limited evidence before me that the learned magistrate shifted the legal burden of proof to the appellant.
>
> (d) In light of my analysis, however, I am persuaded that the learned magistrate did not correctly apply the principles enunciated in *Scilley v Potter.*
>
> (e) I am not persuaded that the learned magistrate erred in law in failing to rely on the prosecutor's failure to call witnesses at the scene of the accident. **[14]** An explanation was given to the learned magistrate which it was open to him to accept.

Finally, I am not persuaded that the learned magistrate's reasons were in some way inadequate. This is a difficult issue to resolve in part because the affidavit material filed before me does not purport to give an exhaustive statement of the learned magistrate's reasons. If the reasons are inadequate, it is for the reason that error is demonstrated in the learned magistrate being prepared to draw an inference that the last driving of the motor vehicle occurred within the required three-hour period.

Thus, the answers to questions (c) to (f) should be the following:

(c) The learned magistrate did not shift the legal burden of proof to the appellant.

(d) Yes.

(e) No.

(f) No.

**Conclusion:** For the foregoing reasons, the appeal should be allowed.

**APPEARANCES:** For the Appellant: Mr Selimi, counsel. Testart, Robinson & Pitts, solicitors. For the Respondent: Mr C Ryan, counsel. Peter Wood, Solicitor for DPP.

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