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HIGH COURT OF AUSTRALIA

BUNNING v CROSS

Barwick CJ, Stephen, Jacobs, Murphy and Aickin JJ.

14 June 1978

[1978] HCA 22; (1978) 141 CLR 54; 52 ALJR 561; 19 ALR 641; noted 52 ALJ 638; 54 ALJ 36; 6 Crim LJ 89

EVIDENCE – ILLEGALLY OBTAINED – STATUTORY OFFENCE – DRIVING UNDER INFLUENCE OF ALCOHOL – COMPULSORY BREATH AND BLOOD TESTS – GROUNDS FOR REQUIRING SUBMISSION TO TEST – GROUNDS NOT SATISFIED – WHETHER SAMPLE OBTAINED ILLEGALLY – WHETHER EVIDENCE ADMISSIBLE – ERROR IN OBTAINING EVIDENCE NOT WILFUL – DISCRETION TO EXCLUDE – PUBLIC POLICY: *ROAD TRAFFIC ACT* 1974 (WA), SS63-68, 70, 71.

Section 63(1) of the *Road Traffic Act* 1974 (WA) made it an offence for which the offender could be arrested without warrant for a person to drive or attempt to drive a motor vehicle while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle. Sub-section (5) deemed a person who had at the time of an alleged offence against s63 a percentage of alcohol in his blood of or exceeding 0.15 per cent to have been under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle at the time of the alleged offence. Section 66(1) authorized a patrolman to require a person to provide a breath sample for a preliminary test where he had reasonable grounds to believe that a certain state of affairs existed. Sub-section (2) provided that if it appeared to the patrolman that the preliminary test indicated that the blood contained 0.08 per cent or more of alcohol or if the patrolman had reasonable grounds to believe that a person had committed an offence against s63 by reason of his being under the influence of alcohol, he might require that person to accompany him to a particular place and provide a breath or blood sample for analysis. Section 70 made evidence of breath and blood samples so obtained admissible in proceedings for an offence against s63.

The driver of a motor car on a public highway was stopped by a patrolman who had seen the car moving on an erratic course and at an excessive speed. The driver staggered as he stepped out of the car. The patrolman asked whether he had been drinking. He replied that he had had about three glasses of beer. Without requiring the driver to undergo a preliminary breath test the patrolman asked him to accompany him to an office of the traffic authority to provide a breath sample for breathalyzer analysis. A breathalyzer test was administered which revealed 0.19 per cent concentration of alcohol. The driver was charged with breach of s63(1). The Magistrate rejected the evidence resulting from the breathalyzer test as inadmissible and dismissed the charge. The Magistrate found that the patrolman had not had a reasonable suspicion that the driver was under the influence of alcohol so as to be incapable of driving a car. Hence the breathalyzer evidence had been obtained unlawfully and was inadmissible on that ground.

Upon review, a judge of the Supreme Court held that the Magistrate had erred in rejecting the breathalyzer test evidence on the ground stated and remitted the ease with a direction that the Magistrate should exercise his discretion whether or not to admit the evidence because of the manner in which it had been obtained. When the complaint was heard again the Magistrate rejected the evidence on the ground that he considered the circumstances in which it had been obtained to be unfair to the driver. Upon review before the Full Court of the Supreme Court it was held that the Magistrate had misdirected himself upon the criteria by which admissibility should be determined and that he had wrongly excluded the evidence. The case was again remitted to the Magistrate with directions requiring him to admit the result of the breathalyzer test in evidence. Upon appeal by the driver from the decision of the Full Court.

HELD: Decision of the Supreme Court of Western Australia (Full Court) affirmed.
Per Barwick CJ, Stephen, Jacobs and Aickin JJ, Murphy J dissenting. The evidence of the breathalyzer was admissible.

By Barwick CJ, Stephen and Aickin JJ. The considerations affecting the reception of evidence obtained in contravention of requirements of law were not offended by admitting the evidence: the unlawful conduct of the patrolman had resulted from a mistake, not from deliberate or reckless disregard of the law. Further, the nature of the illegality had not affected the cogency of the evidence, cogency being a factor in determining the admissibility of evidence obtained illegally where the illegality arises only from mistake.

By Jacobs J. The evidence was voluntary and thus had been obtained lawfully.

R v Ireland **[1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, applied.**

Kuruma v R **(1955) AC 197; [1955] 1 All ER 236;**

Spicer v Holt **(1977) AC 987; [1976] 3 All ER 71; (1976) 3 WLR 398; and**

Jeffrey v Black **(1978) QB 490; [1978] 1 All ER 555; [1977] 3 WLR 895; 66 Cr App R 81, considered.**

BARWICK CJ: ... 11. The learned judge in the first instance held the administration of the breathalyzer test to be unlawful in the sense that a coercive demand for the taking of the test was not authorised by the *Road Traffic Act* under the provisions I have quoted. The judge did not consider whether the test was taken voluntarily and not under the coercion of a demand by the police officer.

12. There was material on which that question could have been considered. It appears, in my opinion, from the transcript of the magistrate's notes that the patrolman did not cause the applicant to engage in the breathalyzer test by any direction or command, or by any representation or any trick or improper behaviour. Nor did the authorized person who operated the breath analysing equipment by any such act cause the applicant to co-operate in the operation of that equipment. Nothing in ss63 to 73 inclusive of the *Road Traffic Act* in my opinion, precludes the voluntary submission of a person to the breathalyzer test or makes the validity of such a test voluntarily undergone dependent upon an antecedent use of the preliminary test. What s66 does is to empower the patrolman to require or command submission to the preliminary test and to provide a sample of breath for analysis by the breathalyzer apparatus or, in appropriate circumstances as stated in the sections, to require or command the provision of a sample of breath without there having been a preliminary test. Failure of compliance with the patrolman's requirement made in conformity with the provisions of the Act attracts the penalties provided by s67. But nothing in the Act precludes a patrolman or an authorized person from asking for a sample of breath of a person willing to give it or from operating the breathalyzer apparatus in relation to such a sample. There is, in my opinion, nothing unlawful in the making of such a test with the co-operation of a person willing without being required or commanded to take it.

13. Of course, a fine line divides such a willingness from a willingness the product of coercive conduct: and in deciding whether the willingness was uncoerced, it is proper to remember the apparent authority of a patrolman and the situation of the motorist who has been "taken" to the police station. But, in this case, there is no finding of any coercive conduct on the part of the patrolman or authorized person: nor, in my opinion, ought there to have been. Rather, the impression the magistrate's notes creates in my mind is that the applicant, confident of his own innocence of wrongdoing, was quite willing if not anxious to take the test which, it seems to me, it was likely that he believed would clear him.

14. However, no appeal having been brought from the first decision of the Supreme Court, it must now be accepted, when considering the propriety of the magistrate's exercise of discretion, that the administration of the breathalyzer test was enforced by the officer in virtue of his office as a constable of police and that the officer's demand that the applicant undergo the test was not warranted by the statute and thus was without legal authority.

15. I therefore turn to consider the propriety of the magistrate's decision now under review on the assumption that, in the sense I have indicated, the administration of the breathalyzer test was unlawful, i.e. that it was taken under the coercion of an unauthorized demand.

16. The question is whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or into the hands of the Crown that, notwithstanding its admissibility and cogency, it should be rejected. There are other conditions in which admissible evidence may be excluded by an exercise of judicial discretion: for example, where a comparison of the smallness of the probative value of the evidence with its considerable prejudice to the fair trial of the matter justifies its exclusion. But no such considerations arise in this case. Undoubtedly, the result of the test was relevant to the charge brought under s63(1) or under s64(1). It establishes the latter and is cogent in relation to guilt under the former.

17. This question of the competition of the public interest in conviction with the unfairness to the applicant in connexion with the taking of the test, the magistrate did not consider. If he had, the only conclusion to which, in my opinion, he could properly have come, was that there was no unfairness to the applicant in the circumstances and manner of the obtaining of the evidence as to the alcoholic content of his blood. There was nothing whatever to out-balance the public interest in the enforcement of the law.

18. I have had the advantage of reading the reasons for judgment prepared by my brothers Stephen and Aickin. I agree entirely with their observations on the proper principles to be followed in exercising a discretion to exclude admissible evidence because of the circumstances or manner in which it was obtained or came into existence. I also agree with their conclusion as to the impropriety of the magistrate's exercise of discretion.

19. The remaining question is whether the Full Court was correct in remitting the case without a specific direction to convict the applicant. The Court, in my opinion, erred in not doing so. There remained, in my opinion, no room for the exercise of any discretion to reject the evidence. In remitting the case to the magistrate, the Full Court should have directed him to convict the applicant and to impose an appropriate penalty.

20. I would grant special leave to appeal, vary the order of the Full Court by adding a direction to convict, and dismiss the appeal.

STEPHEN and AICKIN JJ: *[after discussing the Statute and the hearings in the Magistrates' Court the Supreme Court and the Full Court said]* ... 20. The proper course in these circumstances must be either to allow the magistrate's exercise of his discretion to stand if satisfied, as was Burt CJ, that "no ground exists upon which the Court should now say that he was wrong" or, if not so satisfied, then for this Court itself to exercise the discretion by reference to those criteria which the authorities in this country, and in particular *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, have established as proper for consideration in such a case. It is with reluctance that we adopt the second of these two courses; reluctance because of two considerations. First, because to do so is to interfere with the exercise of a discretionary judgment by the magistrate, one which Burt CJ, having a clear appreciation of what was called for by *Ireland's Case*, nevertheless concluded should be left undisturbed; secondly, because of the advantages which the magistrate enjoyed over this Court in the exercise of discretion, advantages not confined to his encounter at first hand with the parties and witnesses but extending also to what must be his intimate acquaintance with local circumstances relating to law enforcement, a matter germane to the proper exercise of this discretion. Nevertheless, a close examination of his reasons leads us to conclude that his Worship did not give proper effect to relevant criteria and that his exercise of discretion cannot be allowed to stand.

21. The substance of his Worship's reasons for his exercise of discretion appear from the written reasons for decision which he gave following the remission of the case to him pursuant to the order of Jones J. Those reasons lead off from the proposition that, although unlawfully obtained, the evidence was admissible subject only to a discretionary power to exclude it. His Worship then refers to *R v Ireland* as the only really relevant case and cites from it the appropriate passage from the reasons for judgment of the Chief Justice. He regards the "breathalyzer" testing as on all fours with the taking of photographs in that case and later describes the police requirement that the appellant take that test as "unfair and irregular as well as unlawful". He then refers to two English decisions, speaks of the case before him as involving "an unconscious trick" and of the ease with which the police might have administered a preliminary test, discards as irrelevant the cogency of the test result and the high blood alcohol content which it disclosed, makes further reference to his view that there was "in this case inherent unfairness", cites a passage from the judgment of Sangster J in *Evans v Sparrow* (1973) 6 SASR 519, at pp526-527 and concludes by saying that "in the light of the above comments I refuse in my discretion to admit the evidence of the breathalyzer result".

22. Despite his Worship's citation of the relevant passage from the judgment of the Chief Justice in *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 we do not understand his discretion as in fact having been exercised by reference to the principles there expressed. The Chief Justice there said (1970) 126 CLR at p335:

> "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."

That statement represents the law in Australia; it was concurred in by all other members of the Court in *R 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; 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 goods things, may be loved unwisely – may be pursued too keenly – may cost too much."

23. The statement of principle in *Ireland's Case* differs from some statements of principle overseas but reflects much of what was said by Zelling J when Ireland's appeal was before the Full Court of the Supreme Court of South Australia (*R v Ireland* (1970) SASR 416, at pp444-448). That judgment of Zelling J in turn cites extensively from the judgment of Kingsmill Moore J in *People v O'Brien* (1965) IR 142 at pp 148-162, where a far-reaching survey of authority is undertaken.

24. There exists a marked contrast between, on the one hand, the approach manifest in *Ireland's Case* and also in cases decided in the Irish and Scottish courts, of which the judgment of the Lord Justice-General, speaking for seven members of the High Court of Justiciary, in *Lawrie v Muir* (1950) SLT 37 is among the most explicit as to the principles involved, and on the other hand that of English and Canadian courts and of their Lordships in the Judicial Committee. In *Kuruma v R* (1955) 119 JP 157, [1955] 2 WLR 223, [1955] Crim LR 339, [1955] AC 197, [1955] Crim LR 69, [1955] 1 All ER 236, [1954] UKPC 43, Lord Goddard CJ, speaking for their Lordships in the Judicial Committee, appears to acknowledge as the only basis for exclusion of evidence illegally obtained that familiar discretion, applicable in all criminal trials, to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. It was of this discretion that Lavan SPJ spoke in the present case. In *Wendo v R* [1963] HCA 19; (1963) 109 CLR 559, at p562; [1964] ALR 292; 37 ALJR 77, Dixon CJ said that he did not believe that *Kuruma's Case* had put at rest "the controversial question whether evidence which is relevant should be rejected on the ground that it is come by unlawfully or otherwise improperly". That it had not been put at rest is apparent from what is now the Australian law on the subject, founded upon the passage which we have cited from Barwick CJ in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR at p335; [1970] ALR 727; (1970) 44 ALJR 263.

25. As we understand it, the law in Australia now differs somewhat from that in England. What Lord Goddard CJ, speaking for their Lordships, said in *Kuruma's Case* reflects the latter. Whatever may initially have been the authority of *Ireland's Case* in the light of the earlier decision of their Lordships in *Kuruma* (see the observations of JD Heydon *Illegally Obtained Evidence* (1973) Criminal Law Review 603, at p607) we have no hesitation in following the principles established in *Ireland's Case*, and this for the reasons which we later discuss.

26. According to *Kuruma* the discretion to be exercised when real evidence is sought to be tendered in a criminal trial is no different from, is indeed but an instance of, that general discretion which always exists to exclude admissible evidence when to admit it will be unfair to the accused. Perhaps the most common instance of such a discretion arising is when the evidence in question is of relatively slight probative value but is highly prejudicial to the accused. *Kuruma* treats the case of real evidence unlawfully obtained as merely a further instance which opens the way to the exercise of this same discretion. Quite recently Lord Edmund-Davies, in recounting the arguments of counsel, spoke, we think without any disapproval, of the case of unlawfully obtained real evidence, in that case a breathalyzer test result, as depending on "the application of the ordinary principles of the common law illustrated by such cases as *Kuruma v R*". (*Spicer*

v Holt (1977) AC 937, at p1004). More recently still, in *Jeffrey v Black* (1978) QB 490; [1978] 1 All ER 555; [1977] 3 WLR 895; 66 Cr App R 81 Lord Widgery CJ, in a case involving evidence procured by an unlawful search, applied *Kuruma's Case* on the admissibility of the evidence and went on to describe the relevant discretion as no more than that general discretion "which every judge has all the time in respect of all the evidence which is tendered by the prosecution". It was a discretion to be exercised when it would be "unfair or oppressive" to allow particular evidence to be called by the prosecution but was applicable only to "very exceptional situations".

27. The contrast between these statements of principle and that enunciated in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 becomes apparent as soon as the objects sought to be attained by the exercise of the discretion, as stated in the judgment of Barwick CJ in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR at p335; [1970] ALR 727; (1970) 44 ALJR 263, are examined. What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighting 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.

28. 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). Moreover it does not entrench upon the quite special rules which apply to the case of confessional evidence. Its principal area of operation will be in relation to what might loosely be called "real evidence", such as articles found by search, recordings of conversations, the result of breathalyzer tests, fingerprint evidence and so on.

29. The relevance of the competing policy considerations to which we have referred becomes of especial importance in an age of sophisticated crime and crime detection when law enforcement increasingly depends upon electronic surveillance and eavesdropping, the unannounced search of premises or of the person and upon scientific methods, whether of identification, by fingerprints or voiceprints, or of ascertainment of bodily states, as by blood alcohol tests and the like. In many such cases the question of fairness does not play any part. "Fair" or "unfair" is largely meaningless when considering fingerprint evidence obtained by force or a trick or even the evidence of possession of, say, explosives or weapons obtained by an unlawful search of body or baggage, aided by electronic scanners. There is no initial presumption that the State by its law enforcement agencies, will in the use of such measures of crime detection observe some given code of good sportsmanship or of chivalry. It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired. A discretion exercisable according to the principles in *Ireland's Case* serves this end whereas one concerned with fairness may often have little relevance to the question.

30. Several passages from earlier cases exemplify the principle which finds expression in *Ireland's Case*. In *People v O'Brien* (1965) IR 142, at p160 Kingsmill Moore J said:

> "I am disposed to lay emphasis not so much on alleged fairness to the accused as on the public interest that the law should be observed even in the investigation of crime."

In *Lawrie v Muir* (1950) SLT 37, at pp39-40 (in a passage later cited by Lord Hodson, speaking for their Lordships in the Judicial Committee, in *King v R* (1969) 1 AC 304, at p315; [1968] 2 All ER 610; 1968 3 WLR 391) the Lord Justice-General, Lord Cooper said:

> "From the standpoint of principle it seems to me that the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State

> to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any merely formal or technical ground. Neither of these objects can be insisted upon to the uttermost. The protection of the citizen is primarily protection for the innocent citizen against unwarranted, wrongful and perhaps high-handed interference, and the common sanction is an action of damages. The protection is not intended as a protection for the guilty citizen against the efforts of the public prosecutor to vindicate the law. On the other hand the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods."

31. In *King v R* (1969) 1 AC 304; [1968] 2 All ER 610; 1968 3 WLR 391 their Lordships do indeed, while applying *Kuruma* (1955) AC 197 so enlarge the matters to be considered under the rubric of unfairness to the accused, a concept which they observe to be "not susceptible of close definition", that it closely approaches what was said in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263. Their Lordships agreed with Lord MacDermott CJ who had said, in *R v Murphy* (1965) NILR 138, at p149, that unfairness to the accused was to be judged "in the light of all the material facts and findings and all the surrounding circumstances. The position of the accused, the nature of the investigation, and the gravity or otherwise of the suspected offence, may all be relevant". Their Lordships concluded by a phrase which perhaps savours more of the *Ireland* approach than that of *Kuruma*: they spoke of "conduct of which the Crown ought not to take advantage".

32. If, then, for Australia the law on this topic is as stated in *Ireland's Case* and affirmed in *Merchant v R* [1971] HCA 22; (1971) 126 CLR 414, at pp417-418; [1971] ALR 736; 45 ALJR 310, and if, accordingly, it is by reference to large matters of public policy rather than solely to considerations of fairness to the accused that the discretion here in question is to be exercised, it becomes necessary to state, with such precision as the subject will allow, criteria upon which this discretion is to be exercised. This cannot, we think, be done in the abstract but only by reference to the case in hand. Otherwise the exercise of judicial discretion may become fettered by rules, seemingly apt enough when first conceived but inappropriate to all the varied circumstances with which courts will be confronted in the future.

33. We have already summarized his Worship's reasons for his particular exercise of discretion. In our view that exercise miscarried because of misconceptions about the matters which should be taken into account and, perhaps, an excessive concern with "unfairness", which appears to us to play no part in this case.

34. His Worship in his reasons refers to an "unconscious trick" and appears throughout to be largely concerned with the concept of fairness to the accused. We would agree with those members of the Full Court who were unable to discern anything unfair in what occurred; to our minds unfairness does not enter into this case, any more than it should in a case of the unlawful search of person or premises. If a "breathalyzer" test, properly performed and with all attendant safeguards observed, discloses an excessive level of alcohol in a motorist's blood it is in no sense "unfair" to use it in the conviction of the motorist, just as it is surely not "unfair" to use, against a person accused of having in his possession weapons or explosives, evidence obtained by means of an unlawful body search so long, once again, as that search is so conducted as to provide all proper safeguards against weapons or explosives being "planted" on the accused in the course of the search.

35. These are cases into which unfairness does not enter at all. They are, however, cases in which the considerations referred to in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 may be of the greatest relevance. The liberty of the subject is in increasing need of protection as governments, in response to the demand for more active regulatory intervention in the affairs of their citizens, enact a continuing flood of measures affecting day-to-day conduct, much of it hedged about with safeguards for the individual. These safeguards the executive, and, of course, the police forces, should not be free to disregard. Were there to occur wholesale and deliberate disregard of these safeguards its toleration by the courts would result in the effective abrogation of the legislature's safeguards of individual liberties, subordinating it to the executive arm. This would not be excusable however desirable might be the immediate end in view, that of convicting the guilty. In appropriate cases it may be "a less evil that some criminals should escape than that the Government should play an ignoble part" – per Holmes J in *Olmstead*

v United States [1928] USSC 133; (1927) 277 US 438, at p470 (72 Law Ed 944 at p953) . Moreover the courts should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law. On the other hand it may be quite inappropriate to treat isolated and merely accidental non-compliance with statutory safeguards as leading to inadmissibility of the resultant evidence when of their very nature they involve no overt defiance of the will of the legislature or calculated disregard of the common law and when the reception of the evidence thus provided does not demean the court as a tribunal whose concern is in upholding the law.

36. The first material fact in the present case, once the unlawfulness involved in the obtaining of the "breathalyzer" test results is noted, is that there is here no suggestion that the unlawfulness was other than the result of a mistaken belief on the part of police officers that, without resort to an "on the spot" "alcotest", what they had observed of the appellant entitled them to do what they did. The magistrate himself described what occurred as an unconscious trick, a phrase which, whatever its precise meaning, is at least inconsistent with any conscious appreciation by the police that they were acting unlawfully. This impression is consistent with the evidence as a whole; no deliberate disregard of the law appears to have been involved. The police officers' erroneous conclusion that the appellant's behaviour demonstrated an incapacity to exercise proper control of his car may well have been much influenced by what they observed of his staggering gait. Unlike the magistrate, they were unaware that the appellant suffered from a chronic condition of his knee joints which could, apparently, affect his gait. If the unlawfulness was merely the result of a perhaps understandably mistaken assessment by the police of the inferences to be drawn from what they observed of the appellant's conduct this must be of significance in any exercise of discretion. Although such errors are not to be encouraged by the courts they are relatively remote from the real evil, a deliberate or reckless disregard of the law by those whose duty it is to enforce it.

37. The second matter to be noted is that the nature of the illegality does not in this case affect the cogency of the evidence so obtained. Indeed the situation is unusual in that the evidence, if admitted, is conclusive not of what it demonstrates itself but of guilt of the statutory offence of driving while under the influence of alcohol to an extent rendering him incapable of having proper control of his vehicle.

38. To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.

39. Where, as here, the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. It bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction. If other equally cogent evidence, untainted by any illegality, is available to the prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker. This is not such a case, due to the mistaken reliance of the police, when they first intercepted the applicant, upon what they thought to be their powers founded upon s66(2)(c) of the Act.

40. A third consideration may in some cases arise, namely the ease with which the law might have been complied with in procuring the evidence in question. A deliberate "cutting of corners" would tend against the admissibility of evidence illegally obtained. However, in the circumstances of the present case, the fact that the appellant was unlawfully required to do what the police could easily have lawfully required him to do, had they troubled to administer an "alcotest" at the roadside, has little significance. There seems no doubt that such a test would have proved positive, thus entitling them to take the appellant to a police station and there undergo a "breathalyzer" test. Although ease of compliance with the law may sometimes be a point against admission of evidence obtained in disregard of the law, the foregoing, together with the fact that the course taken by the police may well have been the result of their understandably mistaken assessment of the condition of the applicant, leads us to conclude that it is here a wholly equivocal factor.

41. A fourth and important factor is the nature of the offence charged. While it is not one of the most serious crimes it is one with which Australian legislatures have been much concerned in recent years and the commission of which may place in jeopardy the lives of other users of the highway who quite innocently use it for their lawful purposes. Some examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required by *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.

42. Finally it is no doubt a consideration that an examination of the legislation suggests that there was a quite deliberate intent on the part of the legislature narrowly to restrict the police in their power to require a motorist to attend a police station and there undergo a "breathalyzer" test. This last factor is, of course, one favouring rejection of the evidence. However it is to be noted that by the terms of s66(1) the legislation places relatively little restraint upon "on the spot" breath testing of motorists by means of an "alcotest" machine. It is essentially the interference with personal liberty involved in being required to attend a police station for breath testing, rather than the breath testing itself (albeit by means of a more sophisticated appliance), that must here enter into the discretionary scales.

43. The magistrate does not appear to have considered some of the above criteria. He seems to have much relied upon what he regarded, we think erroneously, as the "inherent unfairness" of what occurred and to have stressed the prejudicial nature of the evidence, which was only prejudicial in the sense that it was by statute made conclusive of the guilt of the appellant. He also does not seem directly to have accorded any weight to the public interest in bringing to conviction those who commit criminal offences.

44. In the end we believe that the balance of considerations must come down in favour of the admission of the evidence. We have earlier stated why, in our view, his Worship's existing exercise of discretion cannot stand. There remains the question whether this Court should now itself exercise the discretion or rather have the case once more remitted to the magistrate for him to exercise anew his discretion in accordance with law.

45. We have concluded that the first of these courses should be followed. The discretion here in question is of an unusual character and arises in quite special circumstances. It is not at all such a discretion as arises when the specific function of a primary judge is to make a discretionary judgment (see *Mace v Murray* [1955] HCA 2; (1955) 92 CLR 370, at pp378, 380) nor does its proper exercise require any further factual investigation (cf. *Pearlow v Pearlow* [1953] HCA 77; (1953) 90 CLR 70, at p83; [1953] ALR 1087). The occasion for its exercise arose only as an incident in the hearing of the charge and then only for the purpose of determining whether evidence otherwise admissible should nevertheless be rejected. Its exercise requires no new evaluation of facts but rather the adoption of the facts as already found by the magistrate and the assessment of their relative significance against the wider background provided by those public interests to which we have already adverted. Such a process is not one necessarily to be undertaken by the tribunal of first instance: it is not in any ordinary sense concerned with fact finding or the evaluation of the significance of particular testimony. There appears to us to exist no want of power on the part of this Court preventing it from an exercise of this discretion – see *Justices Act* 1902 (WA), as amended, s205. It is, then, for these reasons that we think it proper in the present case to set aside the magistrate's exercise of discretion and, in its stead, for this Court to exercise the discretion in a contrary sense. In our judgment the evidence should have been received. The case should be remitted to the magistrate with a direction that the appellant be convicted, a course which the magistrate had indicated he would have been obliged to follow had the evidence of the "breathalyzer" test been received in evidence.

46. The proper order would be to dismiss the appeal but to vary the order of the Full Court by substituting for par. 3 of that order the following: "Matter be remitted to the Court of Petty Sessions with a direction that the respondent (defendant) be convicted and that such Court consider the question of penalty and costs", leaving the balance of the order to stand. We think that in the unusual circumstances there should be no order as to costs on the appeal to this Court.

JACOBS J: In my opinion special leave to appeal ought to be granted. With the appeal before it, this Court must determine whether on the evidence the conclusion of the Supreme Court of

Western Australia was correct, that is to say, whether the magistrate ought to have admitted the evidence in question.

2. This Court is not bound to proceed in its consideration of this question with the constriction that the evidence was unlawfully obtained. This is so even though it may have been held in the Supreme Court of Western Australia by Jones J at an earlier stage in these proceedings that the evidence was unlawfully obtained. No application was made to this Court for leave and special leave to appeal from that decision of Jones J but at that interlocutory stage no such application was necessary in order to enable this Court at this later stage in the proceedings to consider the question whether the evidence was unlawfully obtained (*Crowley v Glissan No 1* [1905] HCA 13; (1905) 2 CLR 402; High Court Rules O70, r26).

3. I agree with the reasons expressed by the Chief Justice for the conclusion that nothing in the *Road Traffic Act* 1974 (WA) precludes a patrolman or an unauthorized person from asking for a sample of breath of a person willing to give it or from operating the breathalyzer apparatus in relation to such a sample. It appears to me that that is what occurred in the instant case and that a contrary view of the evidence is not sustainable.

4. The evidence was thus lawfully and regularly obtained. It was admissible under s70 of the Act and there was no proper basis for any conclusion that it should be rejected in exercise of any discretion.

5. In the particular circumstances, as the magistrate had indicated that if it were not for the discretion which he exercised to exclude the evidence, he would have convicted, the conclusion of the majority of the Full Court amounted in effect to a direction to convict. That being so it appears best to include such a direction in the order. I agree with the orders proposed by the Chief Justice.

6. I do not find it necessary to consider whether, if the evidence had not been regularly and lawfully obtained it either would have been admissible or in the circumstances of this case ought to have been excluded.

MURPHY J: (dissenting) ... 7. Discretion to Exclude. On the second occasion, the magistrate treated the evidence as unlawful, and excluded it. The question of unlawfulness was concluded in the applicant's favour by the judgment of Jones J, as was the question of discretion to exclude the evidence. For the magistrate to regard himself as not entitled to exclude would have been inconsistent with Jones J's directions. The same applied to the Full Court and applies to this Court.

8. The magistrate also exercised his discretion according to the test of unfairness to the defendant. He held that the defendant had been unfairly the victim of an "unconscious trick by the police officer". This was a view open to the magistrate.

9. Mr Bunning was at a police station (presumably under arrest); he was required several times to take the test and declined; but finally agreed. The police officer required him to do so in the belief that he was lawfully requiring him to do so. In these circumstances, it is idle to regard Mr Bunning's submission as voluntary. It was obtained by implied coercion, possible only because the police officer was ostensibly clothed with the authority of State law. When a citizen is required by a police officer to do something, he can comply or risk committing an offence. A police officer acting, although unlawfully, in the name of the government possesses a far greater capacity for overbearing a person than does an ordinary person exercising no authority other than his own. When a person is unlawfully required to incriminate himself, the evidence should be rejected in other than exceptional cases. Whatever might be done where there is a grave criminal charge, this was a traffic charge which, although serious, is not so serious that judicial protection of the public against unlawful coercion should be outweighed by considerations of law enforcement. At least, it was open to the magistrate to take that view.

10. As well, the *Road Traffic Act* imposes strict conditions under which a person may be required to undergo a breathalyzer test. To allow the evidence of a test to be admitted when the conditions have been broken is to undermine the protection upon which the legislature insists.

11. In any event, whether the test of unfairness was correct or not if the case were being considered for the first time, is not the point. The magistrate was bound to act in accordance with the judgment of Jones J, which directed him that he was entitled to exclude the evidence if it unfairly prejudiced the applicant.

12. There is no doubt a social value in those who have offended the *Road Traffic Act* having their guilt determined and appropriate punishment (if any) inflicted. But there is also a social value in the principle that a government should not persecute a person by repeated criminal proceedings on the same matter.

13. Appeals against Acquittals. One of the best traditions of the common law is its abhorrence of appeals against acquittals. The general principle is that an acquitted person is not to be jeopardized a second time. This has been described in *Benson v Northern Ireland Road Transport Board* (1942) AC 520, at p526; [1942] All ER 465 as:

> ". . . an extremely important and universally accepted principle of our law, and a principle which has been recognized again and again by the highest authorities . . . In *Reg v Tyrone County Justices* (1906) 40 IR LT 181 . . . the elementary principle that 'an acquittal made by a court of competent jurisdiction and made within its jurisdiction, although erroneous in point of fact, cannot as a rule be questioned and brought before any other court.'"

The same principle applied to an appeal against a discharge of *habeas corpus*. As Lord Halsbury said in *Cox v Hakes* (1890) 15 AC 506, at p522:

> "It is the right of personal freedom in this country which is in debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal."

14. The "cardinal principle" of our law is "that when once a person has been held entitled to liberty by a competent Court there shall be no further question" (Lord Dunedin in *Secretary of State for Home Affairs v O'Brien* (1923) AC 603, at p621).

15. Convicted persons now have rights of appeal and review, but there is a vast difference between the position of the government (the respondent here is supported by the government) and the private person. The government is not affected to the same degree (if at all) by the trouble, expense and embarrassment of long, drawn-out legal proceedings.

16. The principle is so fundamental that the common law rule was incorporated in the *United States Constitution*: ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . " (Amendment 5). No narrow view is taken of the words, "in jeopardy of life or limb"; the immunity applies to all acquittals.

17. Section 73 of our *Constitution* provides: "The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments, . . . " Yet, in accordance with the common law tradition, this was construed to exclude an appeal from an acquittal by a jury (*R v Snow* [1915] HCA 90; (1915) 20 CLR 315; 21 ALR 382). The principle has been departed from (unfortunately, in my opinion, and I trust not irreversibly) by allowing appeals from other acquittals.

18. In some States of Australia, this fundamental principle of personal freedom has been eroded by statute. To conform with the common law tradition, any statutory encroachment should be read with the utmost strictness in favour of the accused person and ought to be applied with the utmost strictness in his favour.

19. Section 197 of the *Justices Act* (WA) gives an appeal to "a person who feels aggrieved as complainant defendant or otherwise". The applicant has not contended that despite the general words, the provision should be read so as to exclude an order to review a dismissal of a charge. So this case has been conducted on the basis that the fundamental principle is impaired by this legislation. (at p86)

20. The magistrate has dismissed this charge against Mr Bunning twice and is now to be

directed to convict. This "third time proves it" approach is not appropriate to the administration of criminal justice, and the magistrate, who faithfully observed the judgment of Jones J, should not be put in this position.

21. Special leave should be granted, the appeal allowed, and the order of the Full Court set aside.

ORDER

Application for special leave granted. Order of the Full Court of the Supreme Court of Western Australia varied by substituting for par. 3 of that order: "Matter be remitted to the Court of Petty Sessions with a direction that the respondent (defendant) be convicted and that such Court consider the question of penalty and costs"; otherwise appeal dismissed with no order as to costs on the appeal to this Court.
