20/03; [2003] VSCA 90

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v MOORE

Batt, Chernov and Eames JJ A

24 April, 29 July 2003 — [2003] 6 VR 430; (2003) 39 MVR 323

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

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

Upon appeal to a judge of the Supreme Court, the Appeal in respect of the s49(1)(f) charge was upheld, the order set aside and remitted for further determination by the magistrate. The appeal in respect of the s49(1)(b) charge was dismissed. See *DPP v Moore* [2002] VSC 29; (2002) 35 MVR 357; (2002) 129 A Crim R 95; MC 03/02. On appeal—

HELD: Appeal in respect of the s49(1)(b) charge dismissed. In respect of the s49(1)(f) charge appeal upheld, the judge's order set aside and the appeal dismissed as incompetent.

1. The Court. The decision by the magistrate to strike out the charge under s49(1)(f) was incorrect. See *DPP Reference No 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55; 34 MVR 164; MC 13/01. The general principle is that what has been struck out, whether it be an information, charge, summons, proceeding or appeal, may be restored or reinstated because the legal effect of striking out is merely to take the subject matter out of the court lists. The principle that a court of summary jurisdiction has power to set aside an order striking out a complaint or information which has been made in error, is applicable to the order made in the present case striking out the charge under s49(1)(f). As the subject matter is capable of being brought on again, the order striking it out is not final and the judge did not have jurisdiction to hear an appeal from it. In the event that an application for reinstatement of the original charge is sought, the magistrate must grant it.

***R v McGowan* [1984] VicRp 78; [1984] VR 1000; and**

***Thiessen v Fielding* [1890] VicLawRp 138; (1890) 16 VLR 666, applied.**

2. Chernov and Eames JJ A, Batt JA dissenting. The public policy discretion discussed in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 was available to the magistrate and was appropriately applied. Accordingly, it was open to the magistrate to rule that evidence of the breath analysis should be excluded.

3. The Court. The concept underlying the public policy discretion applies when the evidence is the product of unfair and unlawful conduct on the part of the authorities. Its rationale is to prevent the administration of criminal justice from being brought into disrepute. It is a discretion which involves the balancing of two public policy considerations, namely, the public interest in placing all relevant and admissible evidence before the court and the public interest in ensuring that law enforcement officers do not act unlawfully or improperly. Hence, in appropriate cases, courts may exercise the discretion to exclude such evidence if the price of conviction that could be obtained by reason of such evidence, would be "too high".

R v Ireland **[1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, and** ***Bunning v Cross*** **[1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, applied.**

4. The Court. The general unfairness discretion may be exercised by the court to exclude evidence where it considers that it would be unfair to the accused if it were admitted in the sense that this would or might render the accused's trial unfair. Therefore, this discretion is primarily concerned with circumstances which might produce an unfair trial, carrying the potential for a miscarriage of justice. Although ordinarily there is a significant overlap in the underlying bases for the exercise of one or other of the categories of discretion to exclude evidence, considerations that may move the court to exercise the public policy discretion may not be identical to those which result in the exercise of the general unfairness discretion and vice versa. For example, the considerations which underpin the public policy discretion may not be accorded the same weight (and might not be deemed relevant at all) when considering the general unfairness discretion. It would have been appropriate for the magistrate in the present case to have exercised the general unfairness discretion so as to exclude the certificate from evidence. M., having been effectively divested of the opportunity of obtaining a blood test and thereby challenging the accuracy of the breathalyser instrument reading, was deprived of the opportunity of having a trial that was not unfair.

5. Chernov and Eames JJ A. It has been suggested that the public policy discretion had no operation in the present case because the improper conduct of the police officer concerning the oral advice took place temporarily after the certificate was lawfully obtained. However, having regard to the close connection between the breathalyser reading and the circumstances pertaining to the improper conduct the public policy discretion was enlivened. Clearly there is a point where events occurring after the obtaining of evidence could not bear upon the admissibility of that evidence. In the present case there was no reason why the public policy discretion should be unavailable merely because the conduct of the police officer followed immediately after the procuring of evidence rather than preceding it.

Question of Law Reserved (No 1 of 1998) **(1998) 70 SASR 281; (1998) 100 A Crim R 281, distinguished;**

R v Lobban **[2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357, not followed.**

BATT JA:

1. At 12.58 a.m. on 19 September 1998 the respondent, Andrew Gordon Moore, was stopped by police at Port Melbourne while driving a motor vehicle. A preliminary breath test pursuant to s53 of the *Road Safety Act* 1986 indicated the presence of alcohol in his blood. He told Senior Constable Timothy John Hansen ("the informant") that he had consumed about half a dozen stubbies of full strength beer between 7.30 p.m. and midnight just past. A breath test of the respondent was conducted by Senior Constable Steele, an authorised operator of a breath analysing instrument, and four certificates of analysis of breath stating a blood alcohol concentration of 0.074% and stating the time of the test as "01:26 hrs EST" were produced and signed by him. One of them was handed to the informant and another to the respondent.

2. More than nine months later, on 28 July 1999, two charges were filed by the informant against the respondent as defendant in the Magistrates' Court of Victoria at Melbourne. They were (with slight editing):

> (1) that at Port Melbourne on 19 September 1998 the respondent drove a motor vehicle while more than the prescribed concentration of alcohol, being 0.05 grams per 100 millilitres of blood, was present in his blood contrary to s49(1)(b) of the *Road Safety Act*; and
>
> (2) that at the same place and date the respondent did within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the *Road Safety Act* and the result of the analysis recorded or shown by the breath analysing instrument indicated that more than the prescribed concentration of alcohol, being .05 grams per 100 millilitres of blood, was present and the concentration of alcohol indicated by the analysis to be present in his blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle (B.A.C reading 0.074%), contrary to s49(1) of the *Road Safety Act*.

The differences between the two offences are well known. The first concerns the actual concentration in the blood at the time of driving, the second the concentration at the time of testing as shown by the instrument.

3. After various mentions or hearings (including a successful application by the respondent for a re-hearing), the case was adjourned part-heard to 8 June 2001. A notice requiring the operator

of the breath analysing instrument to attend court pursuant to s58(2) of the *Road Safety Act* was served on the informant on 17 May 2001, which was six days short of the period stated in the sub-section of not less than 28 days prior to the hearing (which for this purpose was treated as 8 June 2001). The informant declined to agree, as permitted by the sub-section, to a shorter period of service. The respondent did not seek an order shortening the period, as s58(2) permits.

4. On 8 June 2001 the case was called on for hearing before the magistrate Dr K Auty. Counsel for the respondent, relying upon the then recent decision of Judge Hassett of the County Court in *R v Callegher*[1], submitted that the wording of charge 2 was flawed because it did not include a reference to a preliminary breath test. The prosecutor informed her Worship that the decision in *R v Callegher* was the subject of a reference by the Director of Public Prosecutions which was to be heard by the Court of Appeal in the near future and also referred to certain Supreme Court decisions The magistrate followed the decision in *R v Callegher* and declared that charge 2 was a nullity and ordered it to be struck out. (The certified extract of the court register records the striking out but under the rubric "Reason" states "Withdrawn", which seems erroneous) The prosecutor applied to amend the charge and for an adjournment pending the outcome of the reference to the Court of Appeal, but the magistrate refused the applications, so that the case proceeded on charge 1 only.[2]

5. The informant, by then an acting sergeant, gave evidence of the events of 19 September 1998 referred to earlier. He produced one of the certificates of breath analysis, which was tendered and relied upon by the prosecutor as conclusive proof of the matters set out in s58(2) of the *Road Safety Act*. Senior Constable Steele was not called to give evidence. The respondent did not seek to rely on the short served notice requiring him to attend.

6. Counsel for the respondent cross-examined the informant about the terms of a conversation said to have occurred between Senior Constable Steele and the respondent on 19 September 1998 after the result of the breath analysis instrument had been obtained, but the informant stated in substance that he heard no such conversation. After the informant's evidence the prosecution case was closed.

7. The respondent gave evidence, in the course of which he said (with slight editing and the omission of interpositions by his counsel):

> "I said, `Well, because of the fact it was so close, I'm entitled to a blood test' ... When I said to him [the operator], `It's my right for a blood test' his advice to me was that 'More than likely ... we can have a doctor here in anywhere between half an hour - 40 minutes ... By the time he gets here, your blood will more likely be higher ... than 07. So, if I was you, I'd cop the 07 ... and forget about the blood'. ... Well my thoughts were that he's obviously thinking in my best interests ... and, of course, 07's a better result than 09 ... So, I took his advice."

8. The respondent's mother gave evidence, which would seem to have been inadmissible but was not objected to, that on his return home early on 19 September 1998 the respondent told her that the police had informed him that he would be better to stick with the reading of .07, because a blood test might, in fact, make it a higher reading.

9. Counsel for the respondent then closed the defence case and submitted that her Worship should exercise her discretion under *Bunning v Cross*[3] to exclude the certificate of analysis of breath because it had been unfairly obtained, relying upon the decision in *Nolan v Rhodes*[4] as a guide as to how her Worship should exercise her discretion. The prosecutor sought leave to re-open the case and call Senior Constable Steele to give evidence in rebuttal. The magistrate said that she was against the prosecutor on, as I read the transcript, the discretion. In answer to an enquiry by her, counsel for the respondent opposed the application to re-open, relying on *R v Chin*[5]. It was refused.

10. The magistrate ruled that the certificate of breath analysis should be excluded in the exercise of her discretion. She then pronounced orders that charge 1 be dismissed; that charge 2 be struck out; and that the informant pay the respondent's costs of $4,246.

11. On 6 August 2001 the appellant Director (on behalf of the informant) appealed from the orders made by the magistrate on 8 June, purporting to do so under s92(1) of the *Magistrates'*

Court Act 1989. A master stated the questions of law raised by the appeal to be:

> "(i) (a) Is it necessary for a charge for an offence contrary to section 49(1)(f) of the Road Safety Act 1986 to contain the words `after having undergone a preliminary breath test' or words to that effect?
>
> (b) If yes, what is the effect of not including the said words?
>
> (ii) Did the magistrate have a discretion to exclude from evidence the certificate produced by the breath analysing instrument in circumstances where no notice under section 58(2) had been properly served on the informant?
>
> (iii) If yes, did the magistrate have a discretion to exclude from evidence the certificate in circumstances where it was not suggested that the police had acted unlawfully or improperly?
>
> (iv) If yes, did the magistrate err in the exercise of that discretion?"

12. On 8 August 2001 the Court of Appeal gave judgment in *DPP Reference No.2 of 2001*[6], holding that the decision of Judge Hassett in *R v Callegher* was incorrect.

13. The appeal was heard on 5 February 2002 by a judge of the Trial Division and judgment was given on 27 February 2002. The judge accepted the concession of counsel for the respondent that the answer to Question (i)(a) must be, No. The judge recorded that it was common ground that the remaining questions related to the *Bunning v Cross* discretion to exclude evidence. It was held that the answer to Question (ii) was, Yes As to Question (iii), the judge said that the state of the transcript of the hearing before the magistrate was such that it was not possible to say that "it was not suggested that the police had acted unlawfully or improperly". Accordingly, the judge did not consider it appropriate to deal with the question, though the judge went on to make some observations which tended to suggest that the discretion considered in *Bunning v Cross* fell for consideration on the facts Indeed, the answer given to Question (iv), and the very fact that it was answered, show that the judge considered that the discretion fell to be exercised in the case. As to Question (iv) it was held that, in light of the principles set out in *House v The King*[7] relating to appeals from discretionary judgments and bearing in mind the deficiencies of the transcript, there was no ground on which it could be found that the magistrate erred in the exercise of "the discretion which I have found that she had". Accordingly, the answer to that question was, No. Conformably with the reasons just summarised it was ordered that:

> 1. The appeal against the striking out of the charge under s49(1)(f) be upheld, the order striking out that charge be set aside and the matter remitted to the magistrate for determination according to law.
>
> 2. The appeal against the decision to dismiss the charge under s49(1)(b) be dismissed.
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> 3. The appellant pay the respondent's costs.

14. On 12 April 2002 the Court of Appeal gave the appellant leave to appeal against the second and third of those orders The notice of appeal (which bears date 23 April 2002 and was amended by leave at the hearing of the appeal for the sake of clarity) states three grounds, namely (with some editing):

> 1. That the judge erred in holding that the magistrate had a discretion to exclude from evidence the certificate in circumstances where no notice under s58(2) had been properly served on the respondent.
>
> 2. That the judge erred in failing to answer question (iii) set out above.
>
> 3. That the judge erred in holding that the magistrate did not err in the exercise of her discretion.

The refusal of leave to re-open was not challenged in the Trial Division or on this appeal.

15. Without obtaining leave to do so or any extension of time for seeking such leave, the respondent on 7 May 2002 filed and presumably served a notice of cross-appeal against the first order made in the Trial Division on the sole ground that the Judge erred in not dismissing as incompetent the appeal against the magistrate's order striking out the charge under s49(1)(f) as that order was not a final order and thus not one in respect of which an appeal lay. Counsel for the respondent acknowledged before us that he needed leave to cross-appeal by reason of s17A(3A)(b) of the *Supreme Court Act* 1986, if not also because the first order made in the Trial

Division was interlocutory. He also acknowledged that, by virtue of Rule 64.03(3) of Chapter I of the Rules of Court, he needed an extension of time for applying for leave to appeal. The Court allowed him to argue not only that he should have an extension and leave to cross-appeal but also the cross-appeal itself, indicating that it would give its decision on the applications when it gave its decision on the appeal.

16. The hearing of the appeal commenced on 24 April 2003. On 22 April 2003, and therefore out of time, the respondent filed and presumably served a notice of contention that the second and third orders made in the Trial Division should be affirmed on a ground of fact or law which was not raised for decision there, setting out the following grounds:

> 1. It was open to the magistrate to find that the conduct of the police breath test operator was unfair to such an extent that the respondent could not have a fair trial.
>
> 2. The magistrate was entitled to [exercise] and, in the circumstances, should have exercised her discretion to exclude the evidence of the breath test on the ground that to receive it would be unfair to the respondent in the sense that the trial would be unfair.

During the hearing the Court gave leave to the respondent to rely on the notice of contention although it was out of time.

17. The questions raised by the appeal and cross-appeal are far from easy. It is convenient to take the cross-appeal first. The oral application for leave to cross-appeal was about a year out of time but, if, as is usually done, the effective date is treated as that when the notice of appeal or cross-appeal was filed, was about 7 weeks late. Counsel for the respondent (as I shall call the proposing cross-appellant) informed the court that it was only the publication of the reasons of Kellam J in *DPP v Sabransky*[8] on 30 April 2002 that alerted him to the point (though he now cites additional and pre-existing cases in support of the point). In the circumstances, if this is a case where leave to cross-appeal should be given, I would extend the time for applying for it retrospectively.

18. Although counsel for the appellant did not oppose the grant of leave, it is tempting in this case to refuse leave on the ground that, particularly in light of counsel's concessions in argument, the respondent will suffer no substantial injustice if the first order made in the Trial Division remains unreversed. Thus, on the assumption of the correctness of the ground of the cross-appeal, counsel frankly informed the Court he had been trying to think of reasons for a magistrate to refuse to reinstate the charge and could not do so. Further, speaking of the conduct of the respondent in seeking to maintain an order of the magistrate now known to be wrong in law on a new and perhaps technical ground, counsel said that he appreciated that it could be called opportunistic. In addition to the foregoing, no objection to the competency of the appeal against the order for striking out was taken before the primary judge. On the other hand, it may be that the question whether substantial injustice would be suffered is of less importance in the case of a provision limiting second appeals than in the case of a provision limiting interlocutory appeals[9] Be that as it may, this is a case where the respondent has not so far appealed in this litigation. More importantly, the ground of the proposed cross-appeal goes to the jurisdiction, admittedly not of the Court of Appeal, but of the Trial Division, and it is reasonably arguable. In all the circumstances I consider that we should not decline to entertain the objection now taken to the Trial Division's jurisdiction. I would therefore grant the retrospective extension of time sought and also leave to cross-appeal.

19. The right of appeal conferred by s92(1) of the *Magistrates' Court Act* is available only in the case of final orders of the Magistrates' Court. Hence, the primary judge had no jurisdiction with respect to the order striking out the charge under s49(1)(f) unless that order was a final order. Now, it is true that, if the order is not a final order, it is immune from challenge by appeal (though not by judicial review), unlike the "ordinary" kind of interlocutory order (such as an order for the answer of interrogatories), which can be challenged on an appeal from the final order in the proceeding if it affected that final order.[10] But to date the same tests have been applied in determining whether an order is final or not under s92(1) and, in respect of civil proceedings, s109(1) of the *Magistrates Court Act* as in determining whether a judgment or order is one in an interlocutory application under s17A(4)(b) of the *Supreme Court Act*.

20. The general principle is that what has been struck out, whether it be an information, charge, summons, proceeding or appeal, may be restored or reinstated[11], because the legal effect of striking out is merely to take the subject matter out of the court lists As the subject matter is capable of being brought on again, the order striking it out is not final.[12] A question arises here, however, whether, when the magistrate has dismissed the charge as a nullity, the order should be treated as impliedly forbidding an application for reinstatement. Certainly, one may surmise, the magistrate here would have been surprised if an application for reinstatement had been made to her. But I do not think that the order can be read as impliedly containing such a prohibition. After all, the magistrate may be said to have supplied her own lexicon, for she *dismissed* the other charge after a hearing on the merits. The merits were not investigated in the case of charge 2. Although no case considering reinstatement of a charge or information struck out as a nullity was cited or has otherwise come to my attention, I have in the end come to the conclusion that the principle discerned by Kaye J in *R v McGowan*[13] from the decision of the Full Court in *Thiessen v Fielding*[14], that a court of summary jurisdiction has power to set aside an order striking out a complaint or information which has been made in error, is applicable to the order striking out the charge under s49(1)(f) here. Accordingly, that order was interlocutory and the primary judge had no jurisdiction to hear an appeal from it.

21. In reaching that conclusion I have not overlooked Mr Silbert's submissions for the appellant (as I shall continue to call the proposed cross-respondent). He submitted that "strike out" means "dismiss", particularly in the Magistrates' Court, so that the order was final. He further submitted that *McGowan* depended upon a special section and argued that a distinction as to finality was warranted between civil and criminal cases as an order of the kind in question in a criminal case cannot be reversed because of the fundamental principle of double jeopardy and therefore irrevocably determines the rights of the parties I do not accept the submissions Although the provision relied on in *McGowan* is, it seems, not part of the present *Magistrates' Court Act*, so that there was no express statutory authority for the order made by the magistrate, it is trite law that the power to strike out by way of controlling the lists forms part of the jurisdiction, arising by implication, of the Magistrates' Court. Moreover, the expression "strike out" in one or other of its verb forms is found in the current Act in other contexts[15], as of course is the word "dismiss", which denies Mr Silbert's opening submission. So far as double jeopardy is concerned, that does not appear to have caused difficulty in any of the cases cited concerning reinstatement of charges or informations struck out, and does not, in my view, deny the existence of the power. Mr Silbert submitted that *DPP v Sabransky*[16], holding that a magistrate's order striking out charges for want of proper service of the summons to answer them was not a final order for the purpose of appeal, was erroneous But it follows from my reasons that, in my view, the case was correctly decided.

22. I have not found it necessary to consider whether the magistrate's order was not final on the ground that, quite apart from reinstatement, a fresh charge using language conforming to Judge Hassett's decision was, notwithstanding the order, capable of being filed. That way of concluding that the magistrate's order was not final would have had to confront s26(4) of the *Magistrates' Court Act*, whereby a proceeding for a summary offence must be commenced not later than 12 months after the date on which the offence is alleged to have been committed. Whether the fact that 12 months had elapsed by the time of the magistrate's order was admissible in considering the legal effect of that order would have required consideration.[17]

23. For the foregoing reasons the cross-appeal must be allowed, paragraph 1 of the primary judge's order set aside and the appeal to the Trial Division dismissed as incompetent. However, that may be a Pyrrhic victory for the respondent since, as his counsel's concession indicates, it would seem on the facts available to this Court that reinstatement of the original charge, if sought, must be granted.

24. I turn to the appeal. To consider the issues which it raises it is, unfortunately, necessary to set out or summarise at some length portions of Part 5 of the *Road Safety Act*.[18] The appeal concerns the charge under s49(1)(b). The text of that provision and the meaning of "prescribed concentration of alcohol"[19] sufficiently appear from the statement of the charge in paragraph [2] above. Section 48(1)(a) enacts a rebuttable presumption for the purposes of Part 5 that, if it is established that at any time within three hours after an alleged offence against s49(1)(b) a certain concentration of alcohol was present in the blood of the person charged, not less than that concentration was present in the person's blood at the time of the alleged commission of the

offence. Section 55 authorises a member of the police force in certain circumstances to require the driver of a motor vehicle, amongst other persons, to furnish a sample of breath for analysis by a breath analysing instrument. By sub-s(4) the operator of the instrument must as soon as practicable after the analysis has been made sign and give to the person whose breath has been analysed a certificate in the prescribed form produced by the instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood. By sub-s(10) a person who is required under the section to furnish a sample may, "immediately after being given the certificate", request the person making the requirement to arrange for the taking in the presence of a member of the police force of a sample of that person's blood for analysis at that person's own expense by a registered medical practitioner nominated by the member of the police force. Sub-section (13) provides:

> "(13) Evidence derived from a sample of breath furnished in accordance with a requirement made under this section is not rendered inadmissible by a failure to comply with a request under sub-section (10) if reasonable efforts were made to comply with the request."

25. I come to the evidentiary provisions. In the case of blood tests, s57(2) provides, so far as material, that if the question as to the concentration of alcohol in the blood of any person at any time is relevant on a hearing for an offence against s49(1), then, without affecting the admissibility of any evidence which might be given apart from that section, evidence may be given of the taking, within three hours after that person drove, of a sample of blood from that person by a registered medical practitioner, of the analysis of that sample by a properly qualified analyst within 12 months after it was taken, of the presence of alcohol and, if alcohol is present, of the concentration of alcohol found to be present in that sample at the time of analysis Certificates signed by registered medical practitioners and approved analysts are provided for in sub-ss(3) and (4). By sub-s(4) a certificate in the prescribed form by an approved analyst as to the concentration found in any sample of blood is admissible in a proceeding referred to in sub-s(2) "and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it". The certificate in the case of a blood test, then, is not conclusive. Section 58 relates to breath tests Sub-section (1) corresponds substantially to s57(2), but the evidence which it permits to be given is evidence of the concentration of alcohol indicated to be present in the blood of the person in question by a breath analysing instrument, and it concludes by providing:

> "and the concentration of alcohol so indicated, is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument."

So far as material, succeeding sub-sections of s58 provide as follows:

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

> (2D) A certificate referred to in sub-section (2) remains admissible in evidence even if the accused person gives a notice under that sub-section but, in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section.
>
> (2E) Nothing in sub-section (2) prevents the informant adducing evidence to explain any fact or matter contained in a certificate referred to in sub-section (2) and, if the informant does so, the certificate remains admissible in evidence but ceases to be conclusive proof of that fact or matter only. ..."

26. The burden of the first ground of appeal is that, where, as here, no notice under the concluding portion of s58(2) had been served within the time prescribed by the sub-section, the operation of the sub-section is such as to exclude any common law discretionary power in a judge to reject admissible evidence. This is what Question (ii) stated by the master was treated below as raising, though before us the argument was somewhat more diffuse. The argument of the appellant was that, since, in the absence of a properly served notice and of any evidence adduced by the informant pursuant to sub-s(2E) to explain any fact or matter contained in the certificate, the certificate was *conclusive* proof of the matters listed in the lettered paragraphs, there was no room for any discretion.[20] The primary judge analysed such cases as it was suggested might shed light on this question and concluded, in substance, that they suggested that the "*Bunning v Cross* discretion" was not excluded by s58(2) where a notice had not been served.

27. I agree in general with that analysis (though, as will appear, I consider that it is not the *Bunning v Cross* discretion which is applicable when the events relied on post-date the production of the certificate); but I would prefer to base my conclusion to that effect upon the terms of the Act.[21] To my mind, s58(2) contains two presently relevant statements The first is simply that a certificate under s55(4) is admissible, that is, that it may be admitted, *not* that it must be admitted. In other words, the certificate is no different from other admissible evidence in a prosecution, which may be excluded in the discretion of the judge. There is no reason why, if the facts warrant it, the certificate should not be excluded in the exercise of a discretion. Secondly, the sub-section states that the certificate is conclusive proof of the matters enumerated. But it can only be proof, and conclusive proof, when it has been admitted. The conclusive character of the proof which a certificate affords does not deny the possibility of the certificate's being excluded from evidence before it can constitute proof. The sub-section, then, is not expressly or impliedly inconsistent with the availability in appropriate circumstances of a discretionary power to exclude from evidence or to decline to receive in evidence that which is the subject matter of the sub-section, namely, a certificate under s55(4). Thus, the two statements which s58(2) relevantly makes do not support the suggested exclusion of the discretionary power. Furthermore, s55(13), to my mind, implies that evidence of the kind there referred to may not be received if reasonable efforts are not made to comply with a request under s55(10) and, perhaps, in other circumstances quite separate from an unsatisfied request under sub-s(10).

28. The second ground of appeal, which should really nominate the answer to Question (iii) which is contended for, seeks to agitate the point underlying that question. In my view, the point of substance should be dealt with, whether or not unlawful or improper action on the part of police had been suggested. The point of substance is whether the magistrate had a discretion to exclude the certificate on the ground of the police having acted unlawfully or improperly.[22]

29. I turn to that. The certificate was produced and a copy obtained by the informant without any unlawful or improper conduct by police. Nor, in my view, was there any unlawful conduct by the police thereafter. Even allowing that a request by the person required to furnish a sample of breath may be informal, to my mind the respondent's statement that he was entitled to a blood test was not such a request. It could, however, have proved to be a preliminary to such a request had the conversation gone in a different way. But the respondent decided not to make a request.[23] This is not a case where the request was made and the person making it was prevailed upon to withdraw it.[24] Therefore, in my view, there was no improper (as opposed to unwise) conduct. But, even if there was, it occurred *after* the evidence in the form of the certificate had been obtained and, in my opinion, the better view is, as was submitted for the appellant, at least initially, that in such a case the *Bunning v Cross* discretion cannot apply so as to permit of the exclusion of the certificate on that ground.

30. The evolution of that view can be seen in a series of decisions of the South Australian Full Court and Court of Criminal Appeal on similar, but by no means identical, legislation.[25] In

French v Scarman[26], where the member of the police force took no action to facilitate the taking of a sample of the driver's blood, King CJ (with whom the other members of the Full Court agreed) stated[27] that the provision requiring the police to facilitate the taking of the blood sample was an express legislative safeguard for the citizen and was so closely[28] connected with the obligation to submit to the breath test that non-observance by the police of the safeguard was a sufficient foundation for the *Bunning v Cross* discretion. The driver had been deprived of the opportunity of checking the accuracy of the breathalyser by means of a blood test and, notwithstanding the cogency of the breath test evidence, the magistrate had been correct in exercising his discretion to exclude it. The *Bunning v Cross* discretion was likewise applied by Bollen J in *Nolan v Rhodes*[29], a case much relied on before us by the respondent, where the facts were closer to those here. The driver there, who had been given a breath analysis test, was informed by the police officer of his right to have a blood test and was asked whether he wished to have a sample of his blood taken for that purpose. The police officer was found to have added that it was his advice that the driver not have it because in his experience it was always higher, to which the driver had replied, "If that's advice, I'll accept it". Bollen J held that by the additional statement the officer overbore the driver's will and that the magistrate should have rejected the evidence of the breath analysis in the exercise of his discretion.

In my view, it is clear from his Honour's discussion of *The Queen v Ireland*[30] and *Bunning v Cross* that it was the public policy discretion that his Honour held should have been exercised. (This is the view of the case that has been taken by the South Australian Full Court.[31]) His Honour's reference to unfairness[32] does not mean otherwise. Unfairness was after all referred to in the leading early case on this discretion, *Ireland*[33]. (In *Payne v Crawford*[34], which, so far as I am aware, is the only other reported case concerning the effect of oral "advice" offered by a police officer about blood tests, Zeeman J held that the magistrate had not erred when he declined in the exercise of the *Bunning v Cross* discretion to exclude the breath analysis certificate. His Honour distinguished *Nolan v Rhodes* on the basis that the Tasmanian Act did not contain a conclusive presumption and also on the basis that the advice given by the police officer in *Nolan v Rhodes* was offered by him gratuitously in the course of asking a question which the statute required him to ask and derogated from that question.) In *Ujvary v Medwell*[35] the South Australian Full Court declined to interfere with the exercise of the *Bunning v Cross* discretion by a single judge against rejection of evidence of the breath test result where the police were found to have failed to facilitate the taking of a blood sample. But the *Bunning v Cross* discretion was taken to exist.

31. Then a change occurred, as Mr Reynolds very properly drew to our attention. In *Question of Law Reserved (No. 1 of 1998)*[36] Doyle CJ, with whom the other members of the Court of Criminal Appeal agreed, speaking of the public policy discretion, stated[37] that, if the evidence in question was not obtained by unlawful or improper means, the discretion did not arise. It did not arise simply because the discretion was directed to preventing the curial advantage that would be gained from the use of the evidence, and avoiding the appearance of approval by allowing use of the evidence. The discretion arose when the improper or illegal conduct had procured the commission of an offence or had enabled the prosecution to obtain the relevant evidence. Then, in *R v Lobban*[38], where after material which had been seized was analysed and identified as cannabis the material was unlawfully destroyed by the police, Martin J (with whom Doyle CJ and Bleby J agreed), being called upon to resolve the apparent inconsistency as regards the availability of the public policy discretion between *French v Scarman* and *Question of Law Reserved*, approved, in a judgment described by this Court in *R v Juric*[39] as very helpful, the statement by Doyle CJ in *Question of Law Reserved* which has been summarised earlier and held that the conduct considered in *French v Scarman* did not come within the scope of the *Bunning v Cross* discretion because of the absence of the critical element of an attempt by the prosecution to advance its case by using evidence obtained by or involving unlawful or improper conduct by a law enforcement authority. Martin J was well aware[40] the conduct in *French v Scarman* occurred immediately after the evidence was obtained and was committed in connection with a safeguard directed to the reliability of the evidence. His Honour pointed out that the interests of the accused were nevertheless protected because circumstances such as existed in *French v Scarman* could fairly be encompassed within the ambit of a general unfairness discretion which had as its primary focus considerations of unfairness to the accused.[41] In other words, as Mr Reynolds accepted, the South Australian Full Court through Martin J effectively overruled its earlier decision so far as that decision held that it was the public policy discretion which authorised the exclusion of evidence of breath analysis where conduct of the police *after* the results of the analysis were obtained was illegal, improper,

or unfair.[42] I agree respectfully with the views of Martin J on this question. I need not consider whether this Court should in any case follow *R v Lobban*: compare *Question of Law Reserved*[43].

32. It follows that in excluding the certificate in this case under the public policy aspect of the discretion by reason of police conduct *after* the certificate had been produced**,** the magistrate erred. For she exercised it on a basis which was not available. Her decision cannot, I consider, be supported as having been made under the general unfairness aspect of the discretion, because, as appears from paragraph [9] above, which is based on the agreed facts before this Court, confirmed now by reference to the transcript, it was not so made. This is so even if, as the agreed summary states (though I cannot find the word in the transcript of her remarks), the magistrate spoke of the evidence as having been unfairly obtained.[44] Nor can it be said that the discretion must have been exercised on the latter basis in favour of excluding the certificate had it been exercised[45], for the factors requiring consideration, whilst overlapping, are by no means entirely the same as between the two aspects, as appears from their respective rationales.[46] 2[2]4[1]

33. I would therefore decide the point of substance raised by Question (iii) in favour of the appellant and Question (iv) would therefore not arise.

34. But that is not the end of the matter, for the notice of contention seeks to rely in another way on the discretion to exclude admissible evidence on the general ground of unfairness In the somewhat unusual circumstances of this case, I think it desirable to consider whether, on the evidence, that discretion was open to be exercised. It is impliedly assumed in paragraph [32] above that the general unfairness discretion was available, and, despite the appellant's initial submissions to the contrary, I think that that is correct: compare *R v Lobban*[47]*; Rozenes v Beljajev*[48]; and *R v Juric*.[49] Although the proceeding from which this appeal is brought was an appeal on a question of law, the orders which may be made on such an appeal are not narrow: s92(7) of the *Magistrates' Court Act* authorises "such order as [the Supreme Court] thinks appropriate, including an order remitting the case." In *Bunning v Cross* a majority of the High Court justices (Barwick CJ and Stephen and Aickin JJ) exercised the discretion there in question themselves rather than remitting the case to the magistrate for him to do so anew. Whilst the relevant facts of the two cases are not the same, several of the reasons given[50] by Stephen and Aickin JJ for the taking the course are applicable here. The procedure in the Supreme Court of Western Australia in that case was an order to review, which, though the Act spoke of "error or mistake in law or fact," is not significantly different, for present purposes, from that adopted here. In this case, too, it is desirable, if possible, that the matter of the charge be resolved now, which is already nearly five years after the events giving rise to it, than allowed to drag on further. All the evidence was in.[51] I therefore consider that the discretion, which for my part I consider to be the general unfairness discretion, should be exercised by this Court and, in light of that exercise, the appeal either be dismissed, with the dismissal of the charge standing, or allowed and the dismissal of the charge set aside and the case remitted to the Magistrates' Court with a direction to convict and consider the question of penalty and costs.

35. The onus is on the respondent to satisfy the court that the discretion should be exercised in favour of rejecting the evidence. The discretion is directed to the fairness of his trial, not the conduct of the police. The relevant material is sparse. There is no evidence that blood tests invariably or usually show a higher, or a lower, concentration of alcohol than breath tests. The discretion now in question is designed to guard against a miscarriage of justice. In *Dietrich v R*[52] Gaudron J stated that in some cases the requirement that a trial be fair results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted because its weight and credibility cannot be effectively tested. In this case the statement which the magistrate found the operator made at the least caused the respondent not to seek a blood test. Thereby the respondent lost the *possibility* of being able to lead evidence of a lower blood alcohol concentration. That was in a case where the reading on the instrument (0.074% or, on one view of the law, 0.07%) was, as these cases unfortunately go, not greatly above the prescribed percentage. Against the considerations so far discussed is the important one that it is highly desirable that those committing the anti-social acts proscribed by s49(1) of the *Road Safety Act* should be convicted and punished as a deterrent and a protection with a view to reducing the road toll and should not escape the fate justly due to them on a technicality or by tactics which catch a police prosecutor out. But in the end, after anxious consideration, I have come to the conclusion that in the facts of this case this consideration is outweighed by those pointing towards rejection of the certificate. I would add that I was at one time attracted to

the view that, as no valid notice had been given by the respondent under s58(2), the availability of a blood test result would have had no effect in his trial because of the conclusiveness of the breath test evidence, so that the loss of the possibility of obtaining blood test evidence did not affect the trial. But I concluded that that view unrealistically, and wrongly, postulates that, if favourable blood test evidence were available, the respondent would have been no more prompt in giving notice and no more active in seeking a curial shortening of the 28-day period of notice. If, then, it is proper to exclude the certificate in the exercise of a discretion in a case such as this, the lesson for members of the police force engaged in breath test duties should be obvious.

36. I would therefore dismiss the appeal. I would hear the parties on the question of costs I express no view on whether the manner of the exercise of discretion by this Court has any effect upon the hearing of the other charge, if reinstated.

CHERNOV JA:

37. I have had the considerable advantage of reading the draft judgment of Batt JA. For the reasons given by his Honour, I agree that the respondent's application for extension of time for the filing of his application for leave to cross-appeal against her Honour's first order, on the ground that the appeal against the striking out of the second charge was incompetent, be granted and that the cross-appeal be allowed. I also agree, again for the reasons given by Batt JA, that the legislation did not operate to take away from the magistrate the common law discretion to exclude the certificate in question ("the certificate") and that, therefore, her Honour did not err in answering Question (ii) in the affirmative. As Batt JA points out[53] the learned judge below had concluded that the *Bunning v Cross* discretion was not excluded by s58(2) of the *Road Transport Act* 1986 ("the Act") where the notice contemplated by the provision has not been served on the informant.

38. I now turn to the second ground of appeal which, as Batt JA points out[54], is directed to her Honour's failure to answer Question (iii) which, in terms, is not predicated on the claim that the police had acted unlawfully or improperly. Nevertheless, as his Honour points out, the ground raises a question of substance, namely, whether the magistrate had the discretion to exclude the certificate on the ground that the police acted unlawfully or improperly. Before proceeding to deal with this matter, I should emphasise that I do so within the confines of the relevant evidence that was before the magistrate on this issue, namely, that given by the informant in cross-examination and by the respondent in his evidence-in-chief, being the evidence which is set out in the reasons of Batt JA.[55] Thus, I obviously exclude from consideration any evidence that the operator of the breathalyser instrument might have given on the critical issue had he been called. It seems clear enough that the prosecution was apprised, at least during the course of the cross-examination of the informant, that the respondent would give evidence of his conversation with Senior Constable Steele (and which he eventually recounted in his evidence-in-chief). Notwithstanding this, the prosecution did not call Senior Constable Steele to give evidence of his version of this critical conversation. True it is that, after the defence closed its case, the prosecution sought leave to call the operator, but this was refused and this refusal has not been challenged on appeal.

39. I agree with Batt JA that, at the breathalyser "station", the respondent did not get to the stage of exercising his statutory right under s55(10) of the Act, that is, of requesting the informant to arrange for the taking of a sample of his blood. But, on the evidence, that was because the operator gratuitously advised him against that course. It seems clear enough that the operator's conduct in this regard was undertaken in order to dissuade or discourage the respondent from seeking a blood test, being a course that he was at least considering taking as is indicated by his assertion that he was "entitled to a blood test". In one sense, the respondent's decision not to proceed with the course was his own, but like the situation in *Nolan v Rhodes*[56] to which further reference will be made later, on the evidence, it was taken only because of the advice of the operator which effectively overbore his will in that regard. It may be that the operator was correct in his prediction as to the likely consequences if the respondent had a blood test and that the advice was given out of benevolence for him. But, as I have said, the prosecution led no evidence as to that and the evidentiary onus was on it to show either that the advice was sound, in which case no prejudice would have been suffered by the respondent not having proceeded to have a blood test, or alternatively, that the officer believed that to be the situation, in which case that factor would have been relevant to the question of the exercise of any discretion that the court may have to exclude the certificate. However, as I have said, an inference could be properly drawn that the

advice in question was given in order to dissuade the respondent from exercising his statutory right to request that a blood test be administered. Its effect was to deprive him of the possibility of challenging the blood alcohol reading produced by the breathalyser instrument.

40. I now turn to consider whether this conduct by the police officer was improper conduct for the purposes of the discretion that the court has to exclude otherwise admissible evidence. That requires a brief analysis of the legislative scheme and the rights and obligations that were given and imposed by it to the law enforcement authorities and persons in the position of the respondent. There is no doubt that the legislation in question is of utmost importance and that it is in the public interest that its dictates be strenuously enforced. So far as is relevant, it is directed to those who drive motor vehicles with a blood alcohol content that is considered by Parliament as likely to impair their ability properly to control the vehicles and thus increase the chance of causing property damage, injury and even death, thereby bringing about consequential problems in the community, sometimes of great magnitude.

It is important, therefore, that those who drive with a blood alcohol content above the statutory limit are apprehended and appropriately dealt with in accordance with the dictates of Parliament. In order to facilitate the proof of the blood alcohol content of drivers, the legislation has given considerable powers to the police to compel drivers, in certain circumstances, to submit to breath and other tests which are aimed at establishing, to the satisfaction of the courts, their blood alcohol content at the time of driving. Furthermore, the legislation has facilitated proof of this matter by the prosecution. In many respects the powers given to the police in this regard have correspondingly diminished the accepted rights of individuals, particularly those which ordinarily entitle them to refuse to participate in any procedure that might incriminate them.

The legislation, however, compels drivers, in certain circumstances, to undergo a preliminary breath test[57] and to furnish a sample of breath for analysis by a breath analysing instrument and, for that purpose, remain at the place where the breath test is to be taken for up to three hours[58]. The police may also require a driver, in certain circumstances, to allow a sample of his or her blood to be taken for analysis[59]. But the terms of the legislative provisions in question make it apparent that, in imposing these and other restrictions, Parliament has been careful to circumscribe the authority or power of the police to compel drivers to undertake these compulsory procedures In addition, as I have said, Parliament has given the driver who is subjected to breath analysing procedures, the right, in certain circumstances, to request that a sample of his or her blood be taken for analysis[60] (and has, by s55(13) of the Act, required the police to make reasonable efforts to implement that request[61]).

The importance that Parliament has attached to this statutory right is made apparent by the fact that s55(13) renders the evidence derived from the breath analysis inadmissible if the police do not make a reasonable effort to comply with the driver's request for a blood test. For completeness, I mention that s57(2)(c) of the Act makes provision for the admission into evidence the results of the blood test at a hearing for an offence such as that with which the respondent has been charged. Section 57(3) provides the mechanism for such proof by way of a certificate described in the sub-section. It provides that, in the absence of evidence to the contrary, such a certificate is proof of the facts and matters contained in it.

41. In the circumstances, the statutory option given to a driver in the position of the respondent is an important right and the police, who are charged with the administration of this important legislation, should not use their position to dissuade or discourage such a person from exercising it. In this case, the operator's apparent experience in this area and his standing as a senior constable and his older years would no doubt have formed a relevant context in which the respondent assessed the advice, although in fairness it should be made plain that there was no suggestion in the evidence that the police officer used his position or office to give credibility to his advice. Had the respondent pursued his apparent intention and exercised his right in that regard, the result of the blood test may have thrown into doubt the reliability of the breathalyser reading, particularly given that it showed that the respondent's blood alcohol level was in the order of 0.024% above the statutory limit. True it is that the respondent did not say in his evidence that, but for the advice, he would have requested a blood test, but in my opinion, it is implicit from the totality of his evidence that he would have taken that step.

42. In the circumstances, I consider that the conduct of the operator in this case, although not unlawful, was improper in the sense that it was, in the circumstances, of sufficient seriousness to warrant "sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."[62]

43. It was probably because the magistrate concluded that the operator sought to dissuade the respondent from exercising his statutory right to a blood test that she considered that the public policy discretion arose for consideration and she exercised that discretion to exclude the certificate from evidence. Thus, the questions that must now be addressed are whether the public policy discretion arose for consideration and, if it did, whether there was error in the magistrate's exercise of it.

44. The concept underlying this discretion was explained by Barwick CJ (with whom the other members of the court agreed) in *R v Ireland*[63]. His Honour said[64]:

> "Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or from statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. 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 there 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."

It is important to note that in *Bunning v Cross*[65] Stephen and Aickin JJ (with whom Barwick CJ agreed) explained[66] that *Ireland* was not concerned with the "simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law." Their Honours said that this was the aim of the discretionary process which is concerned with the broader question 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. Their Honours went on to say[67] that the discretion 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*[68], unlawful or improper conduct)."

45. The underlying basis of the existence of the public policy discretion in a case such as the present has been variously expressed by the courts[69] but in essence its rationale is to prevent the administration of criminal justice from being brought into disrepute. If courts permitted, without qualification, law enforcement officers to rely in the prosecution of a case on evidence which they obtained by unlawful or improper means, it would not only allow them to benefit from their own wrongdoing but it would also create the appearance of the courts condoning or approving the illegality or impropriety by which the evidence was obtained. Hence, in appropriate circumstances, courts exercise the discretion to exclude such evidence if the price of conviction that could be obtained by reason of such evidence, would be "too high".

46. On the question of the meaning of "fairness" in the context of the public policy discretion Aickin and Stephen JJ said[70] in *Bunning v Cross*:

> "'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."

More recently, Brennan CJ in *R v Swaffield; Pavic v R*[71] said[72] in the context of considering the role of the police in obtaining confessional evidence that "[f]airness to those suspected of crime is not the giving of a sporting opportunity to escape the consequences of any legitimate and proper investigation or the giving of a sufficient opportunity `to invent plausible falsehoods'".

47. There is, of course, also the general "unfairness" discretion which the court may exercise to exclude evidence where it considers that it would be unfair to the accused if it were admitted in the sense that this would or might render his or her trial unfair[73]. Although ordinarily there is a significant overlap in the underlying bases for the exercise of one or other of the categories of discretion to exclude evidence, considerations that may move the court to exercise the public policy discretion may not be identical to those which result in the exercise of the general unfairness discretion and vice versa. Nevertheless, it seems that, for certain purposes at least, the distinction between the two categories of discretion becomes merged into an "overall discretion" as has been recognised in the joint judgment of Toohey, Gaudron and Gummow JJ in *Swaffield*[74], although it should be said that there are passages in their Honours' joint judgment where they distinguish between the two categories of discretion[75]. Brennan, C.J. in that case distinguished between the two categories of discretion. His Honour said, for example,[76] that the conduct of law enforcement officers (in relation to the obtaining of confessional material) should be considered under the public policy discretion except where that conduct makes the reliability of a confession dubious, in which case the unfairness discretion can be invoked. In *Swaffield* the court was concerned with the question whether there should be excluded from evidence *confessional* statements of the accused where, in each case, he had effectively maintained his right to silence, but later made such statements to an undercover policeman in the first case and to a friend in the second. Whether such "blurring" of the distinction between the two categories of discretion is appropriate in relation to non-confessional evidence in a case such as the present, is yet to be authoritatively determined, although logically, it may be difficult to see why there should be two different approaches to the matter, depending on whether the evidence sought to be excluded is confessional or non-confessional. Be that as it may, it is convenient for the purpose of analysing the issues in this case to keep the distinction between the two aspects of the court's discretion to exclude what might otherwise be admissible evidence.

48. An important case for present purposes is *French v Scarman*[77]. There, the driver, having tested positively to a breathalyser test, sought to exercise his statutory right to have a sample of his blood taken for the purpose of determining his blood alcohol reading. The police did not comply with the request and, as a result, the driver was deprived of the opportunity of checking the accuracy of the breathalyser reading. The magistrate exercised the discretion to exclude the breath analysis evidence on public policy grounds and dismissed the complaint. On appeal, King CJ, relying principally on the decision of Barwick CJ in *R v Ireland*, including the passage to which I have referred[78] 4[4], and *Bunning v Cross*, considered that the circumstances of the case enlivened the public policy discretion for consideration and that the magistrate had rightly exercised it. In the course of his judgment, the learned Chief Justice specifically considered whether the improper conduct by the police was relevantly connected with the obtaining of the breath analysis evidence so as to enliven the *Bunning v Cross* discretion. His Honour said[79]:

> "In one sense, of course, it can be said that the evidence constituted by the breath analysis was not unlawfully or unfairly obtained, because the obligation to submit to the breath test was not dependent upon compliance by the police with sub-s(2)[80]. In my opinion, however, sub-s(2) is a safeguard for the citizen expressly provided by the legislature and it is so closely connected with the obligation to submit to the breath test that non-observance by the police of the safeguard is a sufficient foundation for the discretion. ... In this case the respondent was deprived of the opportunity of checking the accuracy of the breathalyser and the police evidence as to its results, by means of a blood test."'

49. It is also convenient to refer to the decision of Bollen J in *Nolan v Rhodes* where the facts were similar to those here. In that case, the police officer, who was a friend of the driver in question (who had tested positively to a breath analysis test), informed him of his right to have a blood test and asked whether he wished to have a sample of his blood taken for that purpose, adding that it was his advice that he should not undergo such a test because in his experience it was always higher. As a result, the driver accepted the advice. The breath analysis test was admitted

in evidence in the court below and the driver was convicted. His Honour, however, held that the result of the breath analysis test should have been excluded from the evidence by way of the exercise of the public policy discretion and that the conviction should be set aside. In relation to the contention by the prosecution that it was the driver's "own decision" not to proceed with the blood test, Bollen J said[81]:

> "I think it is wrong to hold that, in the circumstances, the appellant's deciding not to have the test was, in the sense intended by the Magistrate, his `own decision'. No doubt it was But it was a decision reached on advice which should not have been offered. It was a decision reached on advice which had the effect of making the appellant avoid grasping the one chance of defending the charge on the merits"

50. His Honour concluded that, although the police officer had not acted unlawfully in that there was no overt defiance of the statute or the common law, he was nevertheless "guilty of relevant unfairness in offering that advice" which overbore the defendant's will and deprived him of the chance of contradicting the breathalyser instrument reading. I note for completeness that, although his Honour spoke in terms of "unfairness", this was in the context of it being a basis for the exercise of the public policy discretion.

51. In light of these authorities, and given the circumstances of this case, I consider that the public policy discretion arose for consideration and that, in all the circumstances, there was no relevant error on the part of the magistrate in the exercise of it. It has been suggested, however, that, in light of the decisions in *Question of Law Reserved (No.1 of 1998)*[82] and *Lobban* the public policy discretion had no operation in this case because the improper conduct of the police officer, assuming it was that, took place, temporally, *after* the certificate was lawfully obtained. Consequently, I turn to consider the two cases.

52. In *Question of Law Reserved* Doyle CJ said[83], after carefully reviewing the relevant authorities, that the public policy discretion arises for consideration only where the improper or illegal conduct was the means by which the evidence in question was procured. The rationale underlying the existence of the public policy discretion to exclude such evidence, the learned Chief Justice explained, was two-fold, namely, first to prevent the prosecution from benefiting from its own wrongdoing by gaining a curial advantage and secondly, to ensure that, by admitting such evidence, the court does not appear to approve the illegality or impropriety by which the evidence was obtained. Whether the discretion comes to be exercised depends on whether, in the circumstances, those considerations are outweighed by the public interest in securing the conviction of those committing the offences The learned Chief Justice went on to warn that the discretion does "not arise simply because the discretion is directed to preventing the curial advantage that would be gained by the use of such evidence and from avoiding the appearance of approval by allowing the use of evidence." Rather, his Honour said, it is founded upon the need to preserve the integrity of the administration of justice and the need to protect the processes of the courts of justice. In that case, the agreement by the police to give false evidence in relation to the seized documents was made some time after the seizure and there was otherwise no relevant connection between the seizure of the documents and the subsequent illegal agreement between the police officers concerning the evidence they were to give in relation to them.

53. The principal question in *R v Lobban* was whether the public policy discretion arose for consideration in respect of the evidence which the prosecution sought to adduce essentially by way of a certificate of analysis of material that was seized from the defendant. Some three weeks after the material was seized and after it was analysed as cannabis, the police unlawfully, albeit unintentionally, destroyed the material. It was common ground in that case that the seizure was lawful and, as I have said, the destruction of it was unlawful. In considering the ambit of the circumstances in which the public policy discretion is enlivened, Martin J[84] comprehensively analysed the relevant authorities dealing with the operation of the public policy discretion, including those to which I have referred. His Honour noted that the Solicitor General had accepted in argument that *French v Scarman* was inconsistent with the approach taken in *Question of Law Reserved* as to when the public policy discretion is enlivened and had submitted that it was appropriate to revisit the reasoning in that case. Martin,J concluded that, as in *Question of Law Reserved*, the public policy discretion was not enlivened in the case before him because there was no relevant connection between the certificate of analysis of the seized cannabis and the *subsequent* unlawful destruction of it. More specifically, his Honour considered that the unlawful conduct in

question did not constitute circumstances that were identified by Doyle CJ in *Question of Law Reserved* as giving rise to the public policy discretion, namely, that the discretion was enlivened only when the evidence in question was obtained as a result of the relevantly impugned conduct. His Honour also considered[85] that the same consideration operated in respect of *French v Scarman*. In neither case, said the learned judge, was there an attempt by the prosecution to advance its case by using evidence "obtained by or involving" unlawful or improper conduct by the police. His Honour recognised that in *French v Scarman* the impugned conduct occurred "immediately" after the breathalyser reading had been obtained and that the impropriety was constituted by the police officers' disregard of the statutory safeguard provided by Parliament which was directed to the accuracy of the breathalyser reading and he accepted that there was force in the argument that, in those circumstances, the public policy discretion would arise for consideration otherwise the court could be perceived as condoning the improper conduct of the law enforcement authorities Nevertheless, his Honour concluded that, since "the history of the public policy discretion has been centred upon the discretion being enlivened only when the evidence is obtained by unlawful, improper or unfair conduct on the part of the law enforcement authorities", the improper conduct by the authorities in the case before him and in *French v Scarman* did not enliven the public policy discretion given that in both cases the "critical element [that was] missing was an attempt by the prosecution to advance its case by or involving unlawful or improper conduct by a law enforcement authority". His Honour went on to say that, nevertheless, the interests of the accused remained protected by the general fairness discretion.

54. In each of *Question of Law Reserved* and *Lobban* the unlawful or improper conduct occurred some time after the evidence in question was obtained so that in those circumstances, as their Honours said, the public policy discretion did not arise for consideration. By way of contrast, the improper conduct in this case occurred almost immediately after the breathalyser reading was lawfully obtained and, as I will explain later, the consequences, or the likely consequences, of the impugned conduct bore on the extent and quality of the evidence that the prosecution were able to tender in support of charge 1. Thus, to that extent, it is arguable that there is no conflict between the strict decision in each of *Question of Law Reserved* and *Lobban* and the conclusion here, namely, that the public policy discretion was enlivened. I will deal later with the fact that the court in *Lobban* went one step further and effectively overruled *French v Scarman*.

55. To reiterate, it seems to me that the authorities to which I have referred, including *Question of Law Reserved* and *Lobban*, establish that the public policy discretion is enlivened only where the impugned conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct. Thus, when the impugned conduct by the authorities takes place *after* the evidence has been obtained, the public policy discretion ordinarily does not arise for consideration even where it can be said that there was *some* connection between the conduct and the evidence, as was the case in *Question of Law Reserved* where the subject of the unlawful agreement by the police involved the evidence that was previously obtained by them.

But there may be situations where the improper conduct by the law enforcement authorities so closely follows that by which they have obtained the evidence and so closely relates to the value and effect of that evidence that there can be no meaningful separation between the two aspects of their seemingly continuous conduct for the purpose of determining if the public policy discretion is enlivened. In cases such as *Question of Law Reserved* and *Lobban* it may be straightforward enough to separate the acts by which the evidence was obtained from those which constituted improper or unlawful conduct and to conclude that, in those circumstances, the impugned conduct does not give rise to the public policy discretion.

56. It seems to me, however, that situations such as those in this case and in *French v Scarman* are altogether different. In this case, there was such a close connection between the breathalyser reading and the circumstances pertaining to the improper conduct that the public policy discretion could be said to have been enlivened. The statutory right given to the respondent by s55(10) of the Act was, as King CJ recognised in *French v Scarman*, closely connected with the obligation to submit to the breathalyser test. Furthermore, the improper behaviour occurred immediately after the breathalyser reading was obtained and it had the *consequence* of enabling the police to rely *only* on the breathalyser certificate in the prosecution of charge 1 and to avoid the prospect of having to lead evidence of blood test results which might have contradicted the reading that was reproduced in the certificate. Moreover, if a blood test had been taken, the respondent might have given notice to Senior Constable Steele pursuant to s58(2) of the Act to attend court in which

case, of course, the certificate would not have constituted conclusive proof of the respondent's blood alcohol content.

57. Thus, I remain of the view that, in the circumstances of this particular case, the public policy discretion was enlivened (and, as I have said, the magistrate did not relevantly err in excluding the certificate from the evidence in the exercise of her discretion).

58. Although, as I have mentioned, this conclusion could be said not to be inconsistent with the strict decisions in *Question of Law Reserved* and *Lobban*, the reality is that in the latter case the court went further and, as I have noted, accepted the submission of the Solicitor General that *French v Scarman* was inconsistent with *Question of Law Reserved* and effectively overruled that decision. To that extent, at least, my conclusion that the circumstances of the present case gave rise to the public policy discretion is inconsistent with that aspect of the decision in *Lobban*.

59. In reaching my conclusion, I have not overlooked the principle laid down in *Australian Securities Commission v Marlborough Gold Mines Ltd*.[86] that intermediate appellate courts should follow decisions of other intermediate appellate courts in relation to uniform law unless they consider the decision to be wrong. But, as I have said, although I respectfully agree with the decisions in *Question of Law Reserved* and *Lobban* in so far as they are concerned with the application of the relevant principles to the factual contexts before those courts, I respectfully differ from their Honours' view in *Lobban* and consider that the approach adopted by King CJ in *French v Scarman* was correct. In my view, that approach was not inconsistent with the authorities, including what was said in *Question of Law Reserved* and should be followed.

60. Consequently, I would decide the point of substance raised by Question (iii) and Question (iv) in favour of the respondent.

61. If, however, I am wrong in my conclusion that the public policy discretion was available to be exercised by the magistrate, then, as Martin, J. has made clear in *Lobban*[87] the interests of the respondent may nevertheless be protected by the general unfairness discretion. In my opinion, it would have been appropriate for the magistrate to have exercised this aspect of the court's discretion so as to exclude the certificate from evidence. The respondent, having been effectively divested of the opportunity of obtaining a blood test and thereby challenging the accuracy of the breathalyser machine reading, was deprived of the opportunity of having a trial that was not unfair.[88] In the circumstances, I consider that it would be appropriate to uphold the magistrate's decision on this alternative basis.

62. For these reasons, I would join with Batt JA in rejecting the second ground of appeal.

EAMES JA:

63. In this case I have had the advantage of reading, in draft, the reasons of Batt JA and Chernov JA. I agree with the conclusions of Batt JA, and his reasons, in granting an extension of time to the respondent for filing the application for leave to cross-appeal and in concluding that leave be granted and the cross-appeal be allowed. I also agree with his Honour's reasons for concluding that ground 1 of the grounds of appeal has not been made out. Although I agree with Batt JA that grounds 2 and 3 have not been made out I do so for different reasons.

64. In the hearing before the Judge on appeal it was assumed on both sides that when the learned magistrate excluded the evidence of the breath analysis she was purporting to apply the public policy discretion discussed in *Bunning v Cross*. In the hearing before us the same assumption was made, and, in my opinion, correctly so. The apparent reference by her Honour, in her brief reasons, to the unfairness flowing to the accused by virtue of the police conduct, initially raised some uncertainty in my mind, however it is probable that her Honour was applying the decision of Bollen J in *Nolan v Rhodes*[89] to which she had been referred. In that case his Honour, applying the public policy discretion, ruled that evidence of a breath analysis should be excluded in circumstances which bore some similarity to those which occurred in the instant case.

65. The approach adopted by Bollen J was consistent with the decision of the South Australian Court of Appeal in *French v Scarman*[90] which had earlier ruled that the public policy discretion arose in similar circumstances In both cases the results of a breath analysis test was excluded

by virtue of conduct of law enforcement officers which occurred after the breath test had been completed. In *French v Scarman* the unfair conduct was the denial to the driver of the opportunity to have a blood test conducted so as to check the result of the breath analysis, and in *Nolan v Rhodes* it was the discouragement of the driver from having such a test by the police officer proffering advice that the result of a blood test was likely to be a higher blood alcohol reading than that obtained in the breath test. So too, in a number of other South Australian cases conduct of police officers occurring after the completion of a breath analysis had been assessed by judges by reference to the *Bunning v Cross* discretion when considering whether the breath analysis evidence should have been excluded. In *Police v Jervis; Police v Holland*[91], Doyle CJ (with whom Matheson and Prior JJ concurred), accepted that the *Bunning v Cross* discretion might apply where the conduct which was impugned occurred after the breath test was completed, and in so doing cited *R v Swaffield*, *Nolan v Rhodes*, *French v Scarman* and *Ujvary v Medwell*[92], among other cases Doyle CJ noted, however, that no submission had been made to the court that any of the cases which by then constituted what he called a "substantial body of authority" was wrongly decided. In *Question of Law Reserved (No.1 of 1998)*[93], however, Doyle CJ (with whom Cox and Matheson JJ agreed) expressed the view that the *Bunning v Cross* discretion did not arise unless the evidence which was sought to be excluded had been obtained by the unlawful or improper conduct of law enforcement authorities.

66. The uncertainty created by the conflicting decisions in *French v Scarman* and *Question of Law Reserved (No.1 of 1998)* as to the scope of the public policy discretion was resolved in favour of the interpretation of Doyle CJ in the latter case, by virtue of the decision of the Court of Appeal in *R v Lobban*[94]. This appeal necessitates close consideration of the decision in *Lobban*.

67. Martin J in *Lobban* (with whose judgment Doyle CJ and Bleby J agreed) concluded that the public policy discretion of *Bunning v Cross* should not have been applied in *French v Scarman* because that discretion did not apply when the conduct of law enforcement authorities which was under scrutiny only occurred after the challenged evidence had been obtained. Martin J observed, however, that the same outcome would have been achieved, in any event, had the court applied the general unfairness discretion, which his Honour held was the appropriate discretion to be applied. As the judgments of Batt JA and Chernov JA indicate, it is also true in this case that the outcome would probably have been the same whichever discretion had been considered by the magistrate. The question raised by *Lobban* as to the scope of the public policy discretion is not, however, of mere academic interest because in some situations the outcome as to the exclusion of evidence might depend on the discretion which was applied.

68. In the event that we concluded that the public policy discretion was not available to the magistrate a notice of contention was filed on behalf of the respondent in which it was sought to support her Worship's decision by the application of a general unfairness discretion. Given that the other members of the court disagree on the question whether the *Bunning v Cross* discretion was open to be applied by the magistrate I wish to state my own view on that issue. As will be seen, I agree with Chernov JA that the public policy discretion was available to the magistrate in this case, and was appropriately applied by her.

69. As both Martin J in *Lobban* and Doyle CJ in *Question of Law Reserved (No.1 of 1998)* noted, the cases from which the public policy discretion derived do indeed lend support for the view that the *Bunning v Cross* discretion was limited to the exclusion of evidence which had been obtained by unlawful or improper conduct. The oft-cited passage of the judgment of Barwick CJ in *Ireland*[95] stipulated the exclusion of evidence of relevant facts or things "ascertained or procured" by unlawful or unfair acts and in *Bunning v Cross,* itself, Stephen and Aickin JJ said emphatically that the public policy discretion was more limited in application than the unfairness discretion, as: "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, unlawful or improper conduct)"[96].

70. In *Question of Law Reserved (No.1 of 1998)* Doyle CJ, concluded[97] that the confinement of the *Bunning v Cross* discretion to evidence obtained by unlawful or improper conduct was consistent with the rationale which the courts gave for the existence of the discretion, and that it would be inconsistent with such rationale to apply the discretion to conduct which occurred after the evidence had been lawfully and fairly obtained. The critical question raised in the present case is whether that is so, or whether it is equally appropriate and consistent with its judicial

rationale that the public policy discretion should be available in a case such as the present. In this case the misconduct occurred immediately after the procurement of the challenged evidence and related to the availability of a safeguard which was part and parcel of a legislative regime under which the respondent could be obliged to provide the incriminating evidence of the breath test.

71. The rationale for the public policy discretion has been variously described, and in both broad and narrow terms In *Ireland* the public interest which Barwick CJ identified was "the protection of the individual from unlawful and *unfair treatment*", and he observed: "Convictions obtained by the aid of unlawful or *unfair acts* may be obtained at too high a price. Hence the judicial discretion"[98]. The words emphasised by me might suggest a quite broad ambit for the discretion[99].

72. In *Question of Law Reserved (No.1 of 1998)* Doyle CJ articulated both broad and narrow rationales. Rationales which more closely related the discretion to conduct preceding the obtaining of the evidence included his Honour's statements, first, that the rationale for the public policy discretion was for the court "to prevent the prosecution from gaining curial advantage by using improperly or unlawfully obtained evidence", and, secondly, his statement that it was exercised so as to avoid it appearing that the manner in which the evidence was obtained had been approved by the court[100]. Elsewhere, however, his Honour said that the discretion was a broad one, being "founded upon the need to preserve the integrity of the administration of justice and the need to protect the processes of the courts of justice"[101]. Again, employing broad terms, the learned Chief Justice said that one object of the application of the discretion was "to discourage illegal or improper conduct by law enforcement authorities"[102].

73. In a later passage Doyle CJ held that the reason why the discretion only arises when illegality or impropriety procures the evidence was because to allow the use of that evidence "may appear to condone illegal or improper conduct, and may compromise the court's commitment to the upholding of the law"[103]. With respect, whilst that last mentioned rationale would, indeed, justify the application of the public policy discretion to evidence so obtained it does not provide an explanation why it must be limited to situations where the conduct precedes the obtaining of the evidence. A similar observation may be made with respect to statements as to the rationale for the discretion which were postulated in *Lobban.*

74. In *Lobban*, Martin J analysed the various judicial pronouncements as to the rationale, placing particular reliance on the statements of Doyle CJ, stated above, and acknowledged that application of the public policy discretion to circumstances such as existed in *French v Scarman* would not extend the operation of the discretion very far. His Honour accepted the force of an argument for applying the public policy discretion to such a case and observed:

> " . . . if law enforcement officers deliberately sabotage a safeguard with a view to placing an accused at a disadvantage in defending a charge, it can reasonably be argued that, although the evidence was lawfully obtained, the prosecution is indirectly obtaining a curial advantage through that unlawful or improper conduct. To allow such advantage to persist through a trial might be perceived as permitting a misuse of the court which could bring the administration of justice into disrepute"[104].

75. Having stated the argument so powerfully for the extension of the public policy discretion Martin J nonetheless rejected such extension, asserting that it would be at odds with the history of the development of the discretion. His Honour also considered that such an extension would be at odds with the rationale for the discretion. His Honour identified that rationale as being to prevent the courts being demeaned by the use of "the fruits of illegality" (which would certainly refer to the procurement of evidence) but also being demeaned by being used "to effectuate the illegal stratagems of law enforcement agents" (which, in my opinion, might well encompass the conduct in *French v Scarman*). Martin J held that the focus of the discretion was not on supervising the conduct of law enforcement agencies but, generally, on protecting the court from having its processes abused by those agencies in furthering the aims of their unlawful, improper or unfair conduct which was employed to obtain evidence.

76. Having stated the rationale in such terms Martin J held that the public policy discretion would not have arisen in either *French v Scarman* or *Question of Law Reserved* because:

> "The critical element missing in both is an attempt by the prosecution to advance its case by using evidence obtained by or involving unlawful or improper conduct by a law enforcement authority. In my view, the history of the development of the public policy discretion and the rationale now identified for its existence do not sit well with the extension of its area of operation to encompass the possible exclusion of evidence obtained lawfully and without the occurrence of any unlawful, improper or unfair conduct on the part of law enforcement officers in connection with the obtaining of the evidence."[105]

77. In my opinion, the statements of the rationale for the discretion, as emerge from the cases, are broad enough to encompass, at least, conduct such as occurred in this case. It is, with respect, no answer to say, as Martin J did, that the general unfairness discretion was sufficient to protect the interests of the accused. That might or might not be so, but if the public policy discretion is not available then the courts have no way of expressing curial disapproval of such conduct other than to the extent that public policy considerations of the kind discussed in *Bunning v Cross* might incidentally be considered when considering the unfairness discretion. If the conduct, even when strongly disapproved, did not cause the trial of the accused to be unfair then, arguably, there would be no reason for the exclusion of the evidence by application of the unfairness discretion. This point is made more apparent upon closer examination of the differences between the two discretions

78. The *Bunning v Cross* discretion is concerned with matters of high policy. As Brennan, CJ noted in *R v Swaffield*[106] the securing of fairness to the accused is one relevant factor in the exercise of the *Bunning v Cross* discretion, but fairness to the accused is not its primary focus[107]. It is a discretion which involves the balancing of two public policy considerations, namely, the public interest in placing all relevant and admissible evidence before the court and the public interest in ensuring that law enforcement officers do not act unlawfully or improperly[108]. Convictions obtained by relying on evidence so obtained may be achieved at too high a price. It is inappropriate, in my opinion, that the public policy discretion should be given a narrowly defined and constrained operation when it is recognised that it is but an incident of broad judicial powers which are vested in the courts in all criminal trials to ensure that justice is done, that the court processes are not abused by those charged with the task of enforcing the law, and that the administration of justice is not brought into disrepute[109].

79. In *Lobban* Martin J conducted a detailed and helpful analysis of the different discretions which apply in a criminal trial. He concluded that the unfairness discretion discussed in *Swaffield*, was one which was confined to confessional evidence, and which was enlivened where the confession had been the product of improper, unfair or illegal police conduct[110]. However, his Honour identified a separate unfairness discretion which did apply to non-confessional evidence yet did not require that there must be unlawful or improper conduct by law enforcement authorities before it could be employed. That unfairness discretion was concerned with ensuring that the accused received a fair trial, and although it was not predicated on there being improper conduct by law enforcement authorities any such conduct was a relevant consideration to be taken into account when considering the exercise of the discretion[111]. His Honour called this the "general unfairness discretion".

80. In *R v Juric*[112] the Court of Appeal noted the conclusion of Martin J that *Swaffield* was confined to confessional evidence, but whilst acknowledging that the decision in *Swaffield* assumed that the evidence to which its principles applied would be confessional did not express a final view as to the correctness of the assumption made by Martin J. The Court of Appeal concluded, however, that insofar as the evidence in question was not confessional then it fell to be assessed by reference to what the court called the overlapping public policy and general fairness discretions The Court held that those overlapping discretions had been subsumed into one "overall discretion" in the joint judgment in *Swaffield*, at least in so far as confessional evidence was concerned[113].

81. It is unnecessary to further analyse the conceptual differences between the variously described discretions As Martin J observed, the unfairness discretion which was subsumed in *Swaffield* into a general discretion with respect to confessions and the general unfairness discretion which applied to both real and confessional evidence are much the same, and both are concerned with the fairness of the trial and the risk of a miscarriage of justice[114]. In exercising the general unfairness discretion Martin J held that the court "may need to weigh factors such as those that are considered in the context of the public policy discretion"[115].

82. I will adopt the approach which was taken in *Juric* and will consider the issues by reference to what have been called the overlapping discretions, which in my opinion would lead to no different result than would occur if the principles discussed in *Swaffield* were held to also apply to real evidence.

83. The overlap between the public policy discretion and the unfairness discretion was acknowledged both in *Cleland*[116] and *Swaffield*[117]. The unfairness discretion is concerned with the question whether the fair trial of the accused has been prejudiced, but it is not confined to the question of the reliability of evidence[118], and once other considerations are introduced the line between unfairness and policy become blurred[119]. Even so, "the chief object of the public policy discretion is the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper conduct, although the securing of fairness to an accused is a relevant factor in the exercise of the discretion"[120].

84. Martin J concluded in *Lobban*, that no injustice would have been done in that case if the only relevant discretion to be exercised was the unfairness discretion and the *Bunning v Cross* discretion was thereby excluded. That would be so in many cases As Dawson J noted in *Cleland,* there would be few occasions where an objection to the admission of a voluntary confession on the ground of unfairness would fail and yet an objection on the ground of public policy would succeed[121]. The fact that such a situation might arise, whether the evidence in question be real or confessional, can not be denied, however, and the court should be slow to assume that the unfairness discretion would adequately address all factors relevant to attaining the interests of justice.

85. Although public policy considerations might fall to be addressed when exercising the general unfairness discretion the relative weight and significance to be attached to those factors is uncertain. Martin J, in assessing the exercise of the general unfairness discretion, stated:

> "The court may need to weigh factors such as those that are considered in the context of the public policy discretion. In this way, the type of circumstances that existed in *French v Scarman* are encompassed within the general unfairness discretion. The factors to be weighed may well include the conduct of the law enforcement authorities and whether that conduct has contributed to the unfairness For example, if the conduct of the authorities occurred with a view to placing an accused at a forensic disadvantage, and a disadvantage ensued, such conduct and the existence of the disadvantage would be highly relevant in determining whether the evidence should be excluded."[122]

86. The general unfairness discretion, therefore, is primarily concerned with circumstances which might produce an unfair trial, carrying the potential for a miscarriage of justice[123]. The considerations which underpin the *Bunning v Cross* discretion may not be accorded the same weight, and indeed might not be deemed relevant at all, when considering the general unfairness discretion. As Martin J noted, a court when considering whether to exclude evidence under the general unfairness discretion, and therefore assessing the risk of the trial being unfair, must not usurp the role of the jury as finder of fact. Thus, even if some unfairness arose the risk of a miscarriage of justice might be removed by proper directions Martin J held that in determining the nature and extent of any unfairness the court must also have regard to the probative and prejudicial value of the evidence and its importance to the prosecution case[124], and such factors might not always inure to the advantage of the accused in seeking to have evidence excluded. Likewise, the range of factors which might be considered under the public policy discretion is broad. Factors such as the seriousness of the offence[125], the flagrancy of the conduct and the motives of the law enforcement authorities[126], and the importance of the evidence to the Crown case[127] might all inure to the disadvantage of the accused when the public policy discretion was being considered. Despite the overlapping considerations which might be addressed under either discretion it is clear that the weight and significance attached to them might vary according to the category under discussion and might lead to different outcomes In other words, although appropriate directions to a jury might be thought capable of preventing an unfair trial, thereby avoiding the exclusion of evidence by reference to the general unfairness discretion, a different outcome might result when applying the *Bunning v Cross* discretion. Where the trier of fact is not a jury, but a judge or magistrate, it may be no less possible that different outcomes would result depending on which discretion was applied.

87. Whilst there may be some significant differences in the relevant factors which fall for

consideration under the two discretions one factor which would be common in both cases was that which Bollen J had identified in *Nolan v Rhodes*[128], and which was later also highlighted by both King CJ in *Ujvary v Medwell*[129] and by Mullighan J. in *Parker v Police*[130]. That factor was that the conduct of the officers in those cases, albeit occurring after the breath analysis was concluded, led to the drivers being denied the only means that could have been open to them to challenge the reading in the breath test. Referring to the failure to provide proper equipment which would have produced a useable blood test result, Mullighan J said that the driver had been "deprived of a statutory safeguard about a matter central to the charge"[131]. Whilst that consideration would be relevant to the exercise of the unfairness discretion (as Mullighan J so treated it) it was of such significance that in my opinion the public policy considerations which bore upon the conduct deserved full weight be given to them, as would assuredly be the case if it was the *Bunning v Cross* discretion which was being applied.

88. In the joint judgment of Stephen and Aickin JJ in *Bunning v Cross* their Honours discussed the notion that it had been "unfair" to receive evidence of the breath analysis test when it had been unlawfully obtained. Their Honours held that the question of "unfairness" was not the relevant consideration for such cases. They continued:

> "They are, however, cases in which the considerations referred to in *Ireland's* case 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*. 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."[132]

89. In my view, the force of those observations is as relevant to the situation where unlawful or unfair conduct immediately follows the obtaining of evidence, and which conduct denies the opportunity for the accused to test the evidence, as it is to conduct which precedes the obtaining of the evidence. In either case there is an important public policy consideration which deserves to be treated as more than merely one of a range of considerations which might or might not determine the question whether the trial of the accused had been rendered unfair.

90. In the present case the learned magistrate concluded that the conduct of Senior Constable Steele was persuasive in dissuading the respondent from exercising the right given to him by s55(10) to request that arrangements be made for him to take a blood test. In proffering advice that the blood alcohol reading from a blood test result was likely to be higher than from the breath analysis the circumstances were such that it was very likely that the advice would be heeded. Because Steele did not give evidence we do not know whether (assuming he agreed that he had proffered such advice) he genuinely believed the truth of what he said. Nor do we know whether, if it was his honest belief, there was any scientific basis for it. As I will later discuss, the answers to those questions might have been very relevant when applying the fairness discretion. However, even without knowing the answers to those questions the magistrate when applying the *Bunning v Cross* discretion was entitled to conclude that the conduct of the police officer was improper and effectively dissuaded the respondent from exercising his right under s55(10). That is conduct which should not be countenanced by the courts Notwithstanding the seriousness of drink driving offences the legislation provides a statutory safeguard by s55(10) and it is not for the law enforcement authorities to use their position to effectively withdraw that safeguard from a citizen[133].

91. In *French v Scarman* King CJ concluded that the discretion in *Bunning v Cross* should be applied because although the improper conduct in that case occurred after the breath analysis evidence had been obtained the safeguard of the blood test "is so closely connected with the obligation to submit to the breath test that non-observance by the police of the safeguard is a sufficient foundation for the discretion"[134]. In that case the police were obliged to advise the driver of his right to a blood test once the breath test had concluded. In the present case no such

obligation was imposed but, by s55(10) if the driver "immediately" after the breath test requested a blood test then it had to be facilitated. Despite those differences in the legislative regimes for the reasons stated above I consider that the analysis of King CJ is equally applicable in this case in explaining why the public policy discretion applied. To that extent, I am therefore at odds with the conclusion reached by the court in *Lobban*.

92. For the reasons discussed by Chernov JA I agree, however, that on the facts in *Lobban* and *Question of Law Reserved* the public policy discretion could not have arisen. The separation in time and the lack of any relevant connection between the improper conduct and the collection of the evidence took both cases outside the framework in which the public policy discretion was designed to operate. To that extent there is no disagreement between my conclusions as to the application of the discretions and those stated in *Lobban*. Clearly, there is a point where events occurring after the obtaining of evidence could not bear upon the admissibility of that evidence. As Kirby J noted, the public policy discretion is not enlivened simply because the conduct of police has been illegal or improper because "that issue would not properly arise for trial and determination, being a matter for police discipline, criminal charges or civil liberties"[135].

93. Nonetheless, for the reasons given in *French v Scarman* I do not consider that those restrictions apply to the present case and there is no reason why the public policy discretion should be unavailable merely because the conduct of the law enforcement authorities followed immediately after the procuring of evidence rather than preceding it.

94. I conclude, therefore, that the learned magistrate was correct in applying the *Bunning v Cross* discretion. The substantive issue raised by ground 2 in the grounds of appeal before us is whether there was a discretion to exclude the breath test evidence and for the reasons given I conclude that both a *Bunning v Cross* and a general unfairness discretion were open to be applied. The third ground of appeal contends that the magistrate erred in the exercise of any such discretion and I conclude that no error has been established. For the reasons given by Batt JA I conclude that ground 1 has also not been made out. That would be sufficient to dispose of the appeal. I add one further matter, however.

95. Had I concluded that only the general unfairness discretion was available to the learned magistrate I would have declined to exercise it and would have referred the matter back for re-hearing. Although it might be possible to conclude that the result would have been the same had the magistrate exercised the general unfairness discretion rather than the *Bunning v Cross* discretion I consider that the learned magistrate would have had to take into account one additional factor which was of particular importance in this case in determining whether the respondent had been denied a fair trial. That was an issue which might have required the hearing of further evidence and any conclusion which we might have reached had we exercised the discretion ourselves may well have been different to that which the magistrate might have reached had she reconsidered the matter and exercised the unfairness discretion.

96. In my view, the way in which the evidence had been produced in this case was unfair to the appellant. No notice having been given under s58(2), nor any warning having been given as to the allegation which it was intended to make, it must have been known to the respondent and his legal advisers that the person who it was to be claimed had proffered the advice to the respondent not to have a blood test would not be present to answer that allegation[136]. The absence of the operator was a forensic advantage which operated unfairly against the prosecution. In my opinion, the request of the prosecutor for an adjournment so as to call the operator to give evidence about the alleged advice should have been acceded to by the magistrate[137]. In my opinion, the question whether there had been any relevant unfairness to justify the exercise of the general unfairness discretion could not be answered in the absence of a response from the operator as to the allegation. The magistrate ought to have known whether the allegations were admitted by Senior Constable Steele, and, if so, whether he believed the truth of what he said, and whether, objectively, there was any truth as to what he asserted. Because of the conclusion I have reached as to the availability of the *Bunning v Cross* discretion it is unnecessary for me to further consider the application of the general unfairness discretion.

97. For the reasons given, the appeal should be dismissed.

[1] Unreported, 21 May 2001.
[2] Although the affidavit of the police prosecutor refers to argument, discussion and rulings as having been transcribed, those parts of the transcript were, by direction, excluded from the Appeal Book, but the court asked to be, and was, supplied with the full transcript.
[3] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. More accurately, it is a *power*: see, for example, *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173 at 201; (1998) 151 ALR 312; (1998) 72 ALJR 456; (1998) 99 A Crim R 57; [1998] 2 Leg Rep C1, per Toohey J; compare *R v Swaffield; Pavic v R* [1998] HCA 1; (1998) 192 CLR 159 at 189; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5, per Toohey, Gaudron and Gummow JJ.
[4] (1982) 32 SASR 207.
[5] [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[6] [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[7] [1936] HCA 40; (1936) 55 CLR 499 at 504-505; 9 ABC 117; (1936) 10 ALJR 202.
[8] [2002] VSC 143.
[9] Compare *Secretary to the Department of Premier and Cabinet v Hulls* [1999] VSCA 117; [1999] 3 VR 331 at 336-337; (1999) 15 VAR 360, though the orders under challenge there were final orders
[10] *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; (2002) 209 CLR 478 at [5]-[7]; (2002) 188 ALR 353; (2002) 23 Leg Rep 2.
[11] See, for instance, *R v McGowan* [1984] VicRp 78; [1984] VR 1000 at 1002-3 and cases there cited; and *Kelly v Von Einem* (1995) 84 A Crim R 37 at 43. It was conceded for the respondent, correctly in my view, that s26(4), referred to in para.[22] below, did not apply to re-instatement.
[12] Compare, for example, *DA Christie Pty Ltd v Baker* [1996] VicRp 89; [1996] 2 VR 582.
[13] At 1001.
[14] [1890] VicLawRp 138; (1890) 16 VLR 666.
[15] For example, in Schedule 2, clause 1(2A)(b), in relation to abuse of process, and the word "dismiss" is used in that Schedule. The expression is found also in s101(1)(c), in relation to want of jurisdiction, and in s86(3), in relation to abandonment of appeal, though in the latter provision it is used of the County Court.
[16] [2002] VSC 143.
[17] As to which reference would be required to *Brereton v Sinclair* [2000] VSCA 211; (2000) 2 VR 424 at para.[21]; (2000) 118 A Crim R 366 per Chernov JA.
[18] I shall speak in the present tense, though the provisions quoted or referred to are those in force at the relevant time.
[19] Defined in s3(1).
[20] Since the charge was for an offence under s49(1)(b), the prosecution needed to rely also on the presumption in s48(1)(a), applied in light of the conclusive evidence of the time of the test.
[21] Compare *Police v Jervis; Police v Holland* (1998) 70 SASR 429 at 443 per Doyle CJ; (1998) 101 A Crim R 1; 27 MVR 396.
[22] As the judge noted, it was common ground in the Trial Division, as it was before us, that Questions (ii) to (iv) related to the *Bunning v Cross* discretion, which is based on considerations of public policy, requiring a balance to be struck between placing the court in possession of all relevant admissible evidence and ensuring that law enforcement officers do not act unlawfully or improperly.
[23] "I took his advice." Compare *Ujvary v Medwell* (1985) 39 SASR 418 at 419; (1985) 3 MVR 203, per King CJ.
[24] The magistrate stated, "I've *taken the view* that ... the defendant had sought to have a blood test" (my emphasis). Even if, in light of the principle in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232 at 351 and *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19, that means that the view stated in the text that there was no request is not open to me, my conclusions would not be affected. For, first, as the last sentence of paragraph [29] shows, the impropriety would not enliven the *Bunning v Cross* discretion. Secondly, impropriety, whilst indirectly relevant in the exercise of the general unfairness discretion (which I hold later in these reasons to have been open), by no means requires its exercise favourably to a defendant. (Since the respondent "took [the operator's] advice", there is no question of implications arising from s55(13).)
[25] It is sufficient to say of that legislation that it provided that a person required to submit to breath analysis might request that a sample of his blood be taken and that a member of the police force to whom such a request was made was to facilitate the taking of the sample. The legislation was amended several times over the years A presumption was introduced that the concentration of alcohol indicated by a breath test was the concentration present in the blood at the time of analysis and then it was provided that the only method of rebutting that was by the analysis of a sample of blood in accordance with prescribed procedures The member of police was required, first, to advise the person whose breath was the subject of analysis of the person's ability to have a blood test and of the conclusive presumption that would otherwise apply and, secondly, to deliver an approved blood test kit to the person on request. But the obligation to facilitate the taking of the blood sample was removed.
[26] (1979) 20 SASR 333.
[27] At 338.
[28] Compare "immediately" in s55(10) of the *Road Safety Act*.
[29] (1982) 32 SASR 207.
[30] [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[31] In *Police v Jervis; Police v Holland* at 441.

[32] (1983) 32 SASR 207 at 214.
[33] [1970] HCA 21; (1970) 126 CLR 321 at 334 and 335; [1970] ALR 727; (1970) 44 ALJR 263.
[34] (1992) 3 Tas R 360.
[35] (1985) 39 SASR 418; (1985) 3 MVR 203.
[36] (1998) 70 SASR 281; (1998) 100 A Crim R 281.
[37] At 288.
[38] [2000] SASC 48; (2000) 77 SASR 24 at 34; (2000) 112 A Crim R 357.
[39] [2002] VSCA 77; (2002) 4 VR 411 at 440-441; (2002) 129 A Crim R 408.
[40] At 33-34.
[41] This discretion is based on the admission of the evidence in question being unfair to the accused or defendant in the sense that as a result he or she would not have a fair trial. It focuses upon the trial process and protects against forensic disadvantages Neither party cited *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5, the most recent extended consideration by the High Court of the common law power to exclude admissible evidence. In that case, in the context of confessional evidence, it was stated in substance in the joint judgment of Toohey, Gaudron and Gummow JJ at CLR 194-195 that the approach to be adopted is to consider in order voluntariness, reliability and finally "an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of the conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards", but that is subject to the qualification that in addition one aspect of the unfairness discretion is to protect against forensic disadvantages which might be occasioned by the admission of confessions improperly obtained. At CLR 198 their Honours referred to "the overlapping nature of the unfairness discretion and the policy discretion." I recognise that, but, like Doyle CJ in *Police v Jervis*, I have found it convenient to consider the two aspects of the discretion separately. Compare *Nicholas* at 201 per Toohey J and, generally, Martin J in *R v Lobban*. In view of the detailed discussion of both in *Question of Law Reserved, Police v Jervis* and *R v Lobban*, I refrain from attempting a further statement of the law relating to them.
[42] In *Parker v Police* [2002] SASC 256; (2002) 83 SASR 267; 37 MVR 199 the Full Court accepted that it was the general unfairness discretion that was applicable, but held that the judge had erred in excluding the evidence pursuant to it.
[43] At 297.
[44] Compare the discussion of *Nolan v Rhodes* in para.[30] above.
[45] This seems to be what the first ground of the notice of contention asserts
[46] Summarised in fnn**.**[and above.
[47] At 35 and 39-52, esp. at paras[60] and [77].
[48] [1995] VicRp 34; [1995] 1 VR 533 at 549; (1994) 126 ALR 481; 8 VAR 1, showing that in Victoria at any rate the discretion is not limited to confessional evidence.
[49] At para.[50].
[50] [1978] HCA 22; (1978) 141 CLR 54 at 80-81; 19 ALR 641; 52 ALJR 561, agreed in by Barwick CJ at 65.
[51] As noted in para.[14], no question of law or ground of appeal challenges the refusal of the adjournment sought.
[52] [1992] HCA 57; (1992) 177 CLR 292 at 363; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176.
[53] At para.[26].
[54] At para.[28].
[55] See paras[6], [7].
[56] (1983) 32 SASR 207.
[57] Section 53 of the Act.
[58] See s55(1)(2) of the Act.
[59] See s55(9A) of the Act.
[60] Section 55(10) of the Act.
[61] The sub-section does not, in terms, say that the failure to make reasonable efforts to comply with the request will have that result, but in my view, that is necessarily implicit from the words of the provision. To construe it otherwise would be to render the sub-section inoperable.
[62] *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1 at 34; 43 ALR 619; (1983) 57 ALJR 15 per Dawson J; *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177 at 196; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393 per Brennan, Dawson and Gaudron JJ and *R v Tang, Dang and Quach* [1997] VICSC 50; [1998] 3 VR 508 at 519-520; (1997) 141 FLR 338; (1997) 149 ALR 534; (1997) 96 A Crim R 550 per Tadgell and Batt JJ A and Vincent AJA.
[63] [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[64] At 334-335.
[65] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[66] At 74.
[67] At 75.
[68] [1963] HCA 19; (1963) 109 CLR 559 at 562; [1964] ALR 292; 37 ALJR 77.
[69] See, for example, in addition to the above references to the passages in *Ireland* and *Bunning v Cross*, *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177 at 202-203; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393 per Deane J; *Ridgeway v R* [1995] HCA 66; (1995) 184 CLR 19 at 31 per Mason CJ, Deane and Dawson JJ, at 48-49 per Brennan J, at 56 per Toohey J and at 83 per McHugh J; (1995)

129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1. See also *Question of Law Reserved (No.1 of 1998)* (1998) 70 SASR 281 at 287-288; (1998) 100 A Crim R 281 per Doyle CJ with whom Cox and Matheson JJ agreed.
[70] At 75.
[71] [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5.
[72] At 185-186.
[73] *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533 at 549; (1994) 126 ALR 481; 8 VAR 1 per Brooking, McDonald and Hansen JJ.
[74] At 194-195. See also *R v Juric* (2002) 4 VR 411 at 440-441, per Winneke P, Charles and Chernov JJ A and *R v Lobban* [2000] SASC 48; (2000) 77 SASR 24 at 35; (2000) 112 A Crim R 357 per Martin J with whom Doyle CJ and Bleby J agreed. The observation made by their Honours in *Swaffield* stems from an approach suggested by Brennan CJ during the course of the hearing of the appeal in respect of the admissibility of confessional evidence. His Honour suggested that ultimately, courts could resort to an "overall discretion" which would take into account all of the circumstances of the particular case in deciding whether to admit or exclude a confession.
[75] See, for example, at 202.
[76] At 181-182.
[77] (1979) 20 SASR 333.
[78] See para.[[] above.
[79] At 338-339.
[80] The provision entitled the driver in that case to request the police to arrange for him to have a blood test.
[81] At 214.
[82] (1998) 70 SASR 281; (1998) 100 A Crim R 281.
[83] At 288.
[84] Doyle CJ and Bleby J agreed with his Honour.
[85] At 33-34.
[86] [1993] HCA 15; (1993) 177 CLR 485 at 492; (1993) 112 ALR 627; (1993) 10 ACSR 230; (1993) 67 ALJR 517.
[87] At 34.
[88] *R v Rich* [1998] 4 VR 44 at 47; (1997) 98 A Crim R 61 per Brooking JA with whom Winneke P and Buchanan JA agreed. See also *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 56-57; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, per Deane J; *Dietrich v R* (1992) 177 CLR 292 at 299-300 per Mason CJ and McHugh J; *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 at 105 per McHugh J; (2001) 179 ALR 349; (2001) 75 ALJR 931; (2001) 22 Leg Rep C1; *Victoria Legal Aid v Beljajev* [1998] VSCA 56; [1999] 3 VR 764 at 771-772 per Winneke P; *Bayeh v Attorney-General (NSW)* (1995) 82 A Crim R 270 at 275 per Hunt CJ at CL; *Attorney-General (NSW) v X* [2000] NSWCA 199; (2000) 49 NSWLR 653 at 668-669 per Spigelman CJ, with whom Priestley JA agreed and per Mason P at 699.
[89] (1982) 32 SASR 207.
[90] (1979) 20 SASR 333.
[91] (1998) 70 SASR 429; (1998) 101 A Crim R 1; 27 MVR 396.
[92] In *Ujvary v Medwell* (1985) 39 SASR 418; (1985) 3 MVR 203 Bollen J with whom King CJ agreed, once again held that the public policy discretion was available in circumstances where exclusion of a breath test result was sought because police had subsequently failed to facilitate the taking of a blood test.
[93] *Question of Law Reserved (No.1 of 1998)* (1998) 70 SASR 281; (1998) 100 A Crim R 281.
[94] [2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357.
[95] See par [44].
[96] *Bunning v Cross*, at 75; see too *Cleland v R* [1982] HCA 67; (1992) 151 CLR 1, at 20; 43 ALR 619; (1983) 57 ALJR 15, per Deane J; *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177, at 202-203; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393, per Deane J; *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173, at 196-197; (1998) 151 ALR 312; (1998) 72 ALJR 456; (1998) 99 A Crim R 57; [1998] 2 Leg Rep C1, per Brennan J.
[97] At 287-288.
[98] *Ireland*, at 335.
[99] But see the statement of Barwick CJ at par [69].
[100] At 288.
[101] At 288, citing *Ridgeway v R* [1995] HCA 66; (1995) 184 CLR 19, at 30-32; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1, per Mason, CJ, Deane and Dawson JJ.
[102] At 288, citing *Ridgeway* at 32, *Swaffield* at 178 [22].
[103] *Question of Law Reserved (No.1 of 1998)*, at 288.
[104] *Lobban*, at 34 [40].
[105] *Lobban*, at [41].
[106] At 347.
[107] Whilst unfairness to the accused remains one factor to be considered (see *Bunning v Cross*, at 74-75) in *Nicholas v R* [1998] HCA 9; (1998) 193 CLR 173, at 218 [105]; (1998) 151 ALR 312; (1998) 72 ALJR 456; (1998) 99 A Crim R 57; [1998] 2 Leg Rep C1 McHugh J said that the rationale for the *Bunning v Cross* discretion renders the element of fairness "almost irrelevant".

[108] Per Brennan CJ in *Swaffield*, at 349.
[109] See *Ridgeway v R* [1995] HCA 66; (1995) 184 CLR 19, at 32-33; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1 per Mason CJ, Deane and Dawson JJ; *Nicholas v The Queen* (1998) 193 CLR 173, at 201, per Toohey J, at 208-209, per Gaudron J; at 218, per McHugh J.
[110] *Lobban*, at 37 [51].
[111] *Lobban*, at 48 [82].
[112] [2002] VSCA 77; (2002) 4 VR 411, at 441; (2002) 129 A Crim R 408.
[113] In *Swaffield*, in the joint judgment, at 194-195, their Honours said that the overall discretion only arose after first considering whether the confession should be excluded as involuntary, and then on the basis of being unreliable. The overall discretion took account of all the circumstances and assessed "whether the admission of the evidence or the obtaining of a conviction . . . is bought at a price which is unacceptable, having regard to contemporary community standards". As Kirby J also made clear, at 207-208, the overall discretion had regard to factors of unfairness and public policy, among other relevant considerations.
[114] *Lobban*, at 48 [82].
[115] *Lobban*, at 48 [82].
[116] *Cleland*, at 23-24, per Deane J.
[117] *Swaffield*, at [23] per Brennan CJ; per Toohey, Gaudron, Gummow JJ at [74]; per Kirby J at [128].
[118] *Swaffield*, at 189 [53]-[54], per Toohey, Gaudron, Gummow JJ.
[119] *Swaffield*, at 189-190 [54], per Toohey, Gaudron, Gummow JJ.
[120] *Swaffield*, at 178 [22], per Brennan CJ.
[121] *Cleland*, at 34-35; see, too, Brennan J in *Collins v R* [1980] FCA 72; (1980) 31 ALR 257, at 317.
[122] *Lobban*, at [82]
[123] *Rozenes v Beljajev* [1995] VicRp 34 [1995] 1 VR 533, at 549; (1994) 126 ALR 481; 8 VAR 1; *Swaffield*, at [52].
[124] *Lobban*, at [82].
[125] *R v Karam* (1995) 83 A Crim R 416.
[126] *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177 at 203; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393, per Deane J.
[127] *R v Edelsten* (1990) 21 NSWLR 542, at 557; (1990) 51 A Crim R 397.
[128] At 213.
[129] At 420.
[130] [2002] SASC 30; (2002) 81 SASR 240; 35 MVR 475.
[131] *Parker v Police*, at 251 [40]. Although the South Australian legislation (unlike that under consideration here) was couched in terms that obliged the right to a blood test to be advised to the driver after a breath test had concluded, in my opinion the point made by Mullighan J also has relevance to the Victorian situation.
[132] *Bunning v Cross*, at 77-78.
[133] See, too, the observations of King CJ in *Ujvary v Medwell*, at 420, where he said of the safeguard of a right to a blood test "it must be the paramount concern of the courts to ensure that the citizen has ready access to that check" and added that obstacles should not be placed in the way of the citizen seeking to exercise the right.
[134] At 338.
[135] *Swaffield*, at [133]; see too *Question of Law Reserved (No.1 of 1998)* (1998) 70 SASR 281, at 288; (1998) 100 A Crim R 281, per Doyle CJ, who observed that the courts do not have a "roving commission to search for illegality or impropriety by those responsible for the enforcement of the law", nor a right to exclude evidence as a means to punish the wrongdoing of law enforcement authorities In accepting that the role of the court is so constrained, it is presumed, of course, that nothing in the improper conduct of the authorities would otherwise awaken the inherent powers of the court to prevent injustice, the categories of such powers not being closed: see *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292, at 363-364; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176, per Gaudron J. The inherent discretion to exclude any evidence which is deemed unfair or oppressive might fall to be applied only in very exceptional circumstances but nonetheless remains, in my view, the overriding discretion available to a judge in any trial: see *Jeffrey v Black* [1978] QB 490; [1978] 1 All ER 555; [1977] 3 WLR 895; 66 Cr App R 81, and the discussion in *Bunning v Cross*, at 74-75, per Stephen and Aickin JJ.
[136] The leading of this evidence may not have amounted to a breach of the rule in *Browne v Dunn* (1893) 6 R 67; (1894) 6 Co Rep 67 (itself a rule as to fairness, see *R v Schneidas (No.2)* (1981) 4 A Crim R 101; [1973] 2 NSWLR 713), but a similar unfairness arises here as was the focus of that rule.
[137] The primary consideration relevant to the question whether an adjournment should be granted was the interests of justice as between the parties: see *Bulstrode v Trimble* [1970] VicRp 104; (1970) VR 840, at 845, per Newton J.

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