50/08; [2008] VSC 461

SUPREME COURT OF VICTORIA

JOHNSON v POPPELIERS

Kyrou J

24 October, 7 November 2008

(2008) 20 VR 92; (2008) 190 A Crim R 23; (2008) 51 MVR 444

MOTOR TRAFFIC – DRINK/DRIVING – SUMMONS FOR PRODUCTION OF DOCUMENTS RELATING TO THE SERVICE AND MAINTENANCE OF A BREATH ANALYSING INSTRUMENT – TEST FOR DETERMINING WHETHER THERE IS A LEGITIMATE FORENSIC PURPOSE – FINDING THAT IT WAS NOT WITHIN THE RANGE OF PROBABILITY THAT THE DOCUMENTS WOULD ASSIST DEFENDANT IN HIS DEFENCE – WHETHER MAGISTRATE IN ERROR – DRIVER NOT GIVEN CERTIFICATE OF THE READING OF THE BREATH ANALYSING INSTRUMENT – DRIVER NOT INFORMED OF THE RIGHT TO A BLOOD TEST – WHETHER SUCH FAILURE JUSTIFIED REJECTION OF THE CERTIFICATE – FINDING OF CHARGE UNDER S49(1)(f) PROVED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f); 55(4).

1. Proof of compliance with s55(4) of the *Road Safety Act* 1986 ('Act') is not a pre-condition for a conviction under s49(1)(f) of the Act and non-compliance does not render the certificate inadmissible in respect of a charge under that section. Accordingly, it was open to a magistrate to convict a defendant of a charge under s49(1)(f) notwithstanding that the defendant was not given a certificate of the reading of the breath analysing instrument as required by s55(4) of the Act.

***Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547, applied.**

2. The test for determining whether evidence sought on summons by a defendant has a legitimate forensic purpose, is whether there is a reasonable possibility that the evidence would materially assist the defence. The test of "within the range of probability" does not correctly state the law. The authorities also establish that while a fishing expedition is insufficient, the test of "reasonable possibility" must be applied flexibly and with common sense in order to give the accused a fair opportunity to test the Crown's case and take advantage of any defences available to the accused. Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively "eviscerate" the defence.

***Fitzgerald v Magistrates' Court of Victoria* [2001] VSC 348; (2001) 34 MVR 448; and**
***Glare v Bolster* (1993) 18 MVR 53, distinguished.**

3. In this case, the "reasonable possibility" test for determining whether access to the records surrounding the test on the defendant and the service and maintenance records for the instrument used on the defendant would materially assist the defendant in defending the charge under s49(1)(f) of the Act had to be applied having regard to the fact that s49(4) of the Act provides the only statutory defence that is available to a motorist in the defendant's position. A defendant's ability to have access to such documents is of fundamental importance in being able to establish a defence under s49(4). The summons did not involve a fishing expedition. The possibility that the documents would materially assist in establishing the defence was not merely hypothetical. The magistrate should have inspected the documents. The magistrate was in error in finding that the documents were not required to be provided to the defendant.

KYROU J:

Introduction and summary

1. This is an appeal under s92(1) of the *Magistrates' Court Act* 1989 (Vic) ("MCA") from a final order made on 7 December 2007 by the Magistrates' Court at Frankston, convicting the appellant, Leigh Johnson, of an offence under s49(1)(f) of the *Road Safety Act* 1986 (Vic) ("RSA") for

furnishing a sample of breath within three hours after driving a motor vehicle which is recorded by a breath analysing instrument as being in excess of the prescribed concentration of alcohol. The respondent, Senior Constable Darren Poppeliers, was the informant.

2. There are two issues in the appeal proceeding. The first is whether the Magistrate erred in law in finding that certain documents relating to the service and maintenance of the breath analysing instrument used to analyse Mr Johnson's breath were not required to be provided to Mr Johnson pursuant to a summons because Mr Johnson had not demonstrated a legitimate forensic purpose. The second is whether the Magistrate erred in law in convicting Mr Johnson under s49(1)(f) of the RSA notwithstanding that he was not satisfied that Mr Johnson had been provided with a certificate containing the results of the breath analysing instrument, as required by s55(4) of the RSA. The second issue involves consideration of whether the Magistrate failed to properly exercise his discretion to reject the certificate in order to ensure the trial was not unfair.

3. For the reasons set out in this judgment, I have concluded that the Magistrate erred in law in relation to the first but not the second issue, that the appeal should be allowed, that the conviction should be set aside and that the charge under s49(1)(f) of the RSA should be remitted to the Magistrates' Court at Frankston to be reheard and determined by another Magistrate according to law.

Facts

4. At approximately 1.34pm on 25 May 2006, Mr Johnson underwent a preliminary breath test at a random breath testing site set up in Park Road, Cheltenham. The test was conducted by Sergeant Lonsing and indicated that Mr Johnson's breath contained alcohol. Mr Johnson informed Sergeant Lonsing that he had consumed three cans of full strength Victoria Bitter beer in the previous hour or so. He was requested to accompany Sergeant Lonsing to the Moorabbin Police Station for a breath test. At the police station, Sergeant Lonsing conducted a breath analysis upon Mr Johnson that produced a reading of 0.155 percent.

5. Sergeant Lonsing informed Mr Johnson orally of the reading. Mr Johnson said "I can't believe it's that high". He claims that Sergeant Lonsing did not give him a certificate containing the reading as required by s55(4) of the RSA. He was not aware he had a right under s55(10) of the RSA to request a blood test and at no stage did the police advise him of that right. Sergeant Lonsing's failure to tell Mr Johnson he had a right to request a blood test was deliberate.

6. While he was at the Moorabbin Police Station on 25 May 2006, Mr Johnson was served with a notice under s51 of the RSA suspending his driver licence with immediate effect. The notice set out the reading of 0.155 percent. The notice was cancelled on 20 December 2006.

7. On 30 August 2006, Mr Johnson was charged on summons with two offences brought conjunctively under s49(1) of the RSA, being charges under s49(1)(b) for driving a motor vehicle while the concentration of alcohol in his breath exceeded 0.05 percent and s49(1)(f) for furnishing a sample of breath within three hours after driving a motor vehicle which is recorded by a breath analysing instrument as being in excess of the prescribed concentration of alcohol of 0.05 percent.

8. On 28 February 2007, Mr Johnson filed two witness summonses in the Magistrates' Court proceeding directed to the Chief Commissioner of Police and Dr Glen Bowkett, the Forensic Officer at the Technical Services Laboratory, Traffic Alcohol Section of the Victoria Police, respectively. Both summonses sought production of the same documents and ultimately only the summons to Dr Bowkett was dealt with. The schedule to the summons listed 11 items of documents sought. The summons came on for hearing before a Magistrate on 20 July 2007. All items were produced to the Court but there was a dispute as to whether Mr Johnson had a legitimate forensic purpose to justify being given access to the documents.

9. As access to items 3, 4, 9 and 10 was consented to and Mr Johnson withdrew his application for access to items 5 and 11, only items 1, 2, 6, 7 and 8 remained the subject of dispute and required a ruling by the Magistrate. Those items (which I will refer to as "the schedule items") are as follows:

1. The Register and/or Records kept of Preliminary Breath Testing Lion Alcolmeter SD – 400PA

Serial No. 025675D being designated "Serial No. 025675D" (hereinafter called "the PBT") as held by Traffic Alcohol Section.

2. The Register and/or Records kept of Preliminary Breath Testing Lion Alcolmeter SD – 400PA Serial No. 025675D being designated "Serial No. 025675D" as held by the relevant Police Station when the PBT was taken out on 25 May 2006.

6. The memory print-out records applicable to the Defendant, from the Preliminary Breath Testing device, namely the Lion Alcolmeter SD400-PA (or such other model device as may have been used).

7. The memory print-out records surrounding the test on the Defendant or applicable to the Defendant, from the Breath Analysis Instrument as was used on the Defendant.

8. All service and maintenance records for both:-
(a) the Preliminary Breath Testing device used on the Defendant by the Informant, and
(b) the Breath Analysis Instrument used on the Defendant by the authorized Breath Analysis Instrument Operator (SGT. H.A. LONSING (22754)).

10. Mr Billings appeared for Mr Johnson on the return of the summons before the Magistrate. He also appeared subsequently at the hearing of the charges before the same Magistrate and at the hearing of the appeal before me. Senior Constable O'Donague appeared as prosecutor on the return of summons and at the hearing of the charges. Mr Trapnell appeared for the respondent before me.

11. In order to show a legitimate forensic purpose before the Magistrate, Mr Billings called Dr Bowkett. In his evidence, Dr Bowkett explained in general terms the nature of the schedule items and the information they record. He was not cross-examined by the prosecutor.

12. The prosecutor submitted that the test for determining whether there was a legitimate forensic purpose was whether it was within the range of probability that the documents would assist Mr Johnson in his defence of the charges in accordance with the decision of Balmford J in *Fitzgerald v Magistrates' Court of Victoria*.[1] He submitted that, as there was no evidence before the Court identifying any specific fault with the breath analysing instrument so as to attract the defence in s49(4) of the RSA, no legitimate forensic purpose could be demonstrated. Mr Billings submitted that the documents were required for the purpose of challenging the proper operation and proper working order of the breath analysing instrument pursuant to s49(4) of the RSA and for cross-examination and therefore a legitimate forensic purpose was shown.

13. The Magistrate reserved his decision on the objections to the schedule items. He subsequently delivered his ruling on 6 August 2007. He upheld the objections and refused Mr Johnson's application to view the schedule items. His ruling was handwritten. Mr Johnson's solicitors produced a typed version of the ruling, which has been accepted by the parties before me as accurate. In his ruling, the Magistrate relevantly stated:[2]

> As I understand it in this present case, the Defence at the hearing will ... be considering the effect of Section 49(4) in a challenge to the reading. However, at this stage, I have not been presented with evidence to suggest legitimate fault. The Prosecution would argue that this equates with a Decision of *Gla[r]e & Anor. -v- Bolster & Ors.*, which related to a possible defect or deficiency in a speed camera or any departure from the operating instructions. Beach J. stated that Counsel did not identify any such defect, deficiency or departure, describing the procedure as a "fishing expedition" and simply seeking to use the Summons to Witness as a process of obtaining Discovery ... In *Fitzgerald's case*, the NSW Supreme Court case of *Saleam* was referred to, in particular the passage "he must be satisfied that it is "on the cards" that the documents would materially assist the accused in his Defence". In coming to her Decision, Balmford J. in *Fitzgerald's case* referred to the *Oxford English Dictionary* to define the meaning of "on the cards", which was held to mean "within the range of probability". I find this to be a reasonable meaning. In the presen[t] case, Mr Billings has stated that the materials or documents sought are in order to provide materials for cross examination as to the operation of the instrument. I note that Mr Billings also made such a submission in Fitzgerald's case (Paragraph 20), which was considered by Her Honour. ... I have noted the NSW case of *RTA of NSW -v- [Conolly]*, which also related to alleged documents relating to a speed camera. Adams J. stated at paragraph 12: "I think that there is a reasonable chance that the material sought will assist the Defence". I have further read that His Honour also refers to Her Honour's comments in *Fitzgerald's case*, stating that in *RTA -v- [Conolly]'s case*, it was, indeed, proposed to lead evidence that the device had incorrectly recorded the Defendant's speed and disagreed with Balmford J's judgment (as to reasoning).

> I have also read the NSW case of *AMD Far East Limited -v- Ngat Doan*, which discusses a "legitimate forensic purpose" as opposed to a "fishing expedition". The Prosecution has stated that both *RTA -v- [Conolly]* and *AMD Far East* are NSW cases which are persuasive but that I should be bound by the Victorian Supreme Court case of *Fitzgerald*. ... Ultimately, I find the reasoning of Balmford J. and *Fitzgerald -v- Magistrates' Court of Victoria* to be sound. I disagree with the criticism of Her Honour in the NSW Supreme Court in *RTA -v- [Conolly]*. In respect of the evidence of Dr Glenn Bowk[e]tt, he gave evidence that the documents or records in issue are in his possession, but that the Applicant has failed to demonstrate a legitimate forensic purpose for which it seeks material. I come to the same conclusion as Balmford J. (*Fitzgerald's case* – Paragraph 37):
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> "No material has been produced which could form the basis of a submission that it was within the range of probability that the denied documents would assist the Applicant in his Defence of the charges as to Section 49(4) or as to cross examination." Again, quoting *Ex parte Ca[r]dy and Ex parte Williams*, "a mere statement by a party that an instrument must be defective does not give rise to a probability". For all of these reasons, the Application for Access to Denied Items is refused.

14. The charges came on for hearing on 20 November 2007. A certificate produced by the breath analysing instrument was tendered in evidence. The hearing occupied two days and the Magistrate reserved his decision. He handed down his decision convicting Mr Johnson of the offence under s49(1)(f) of the RSA and dismissing the charge under s49(1)(b), on 7 December 2007. The Magistrate dismissed the charge under s49(1)(b) on the basis that he was not satisfied beyond reasonable doubt that Mr Johnson had been given a certificate produced by the breath analysing instrument as required by s55(4) of the RSA. However, he relied on the certificate in convicting Mr Johnson of the charge under s49(1)(f) of the RSA on the basis that, in accordance with the Court of Appeal decision in *Furze v Nixon*,[3] the non-compliance with the requirement in s55(4) that a certificate be given to Mr Johnson did not render the certificate inadmissible for the purpose of establishing the offence under s49(1)(f). As Mr Johnson did not have any prior convictions, the Magistrate fined him $600, ordered him to pay statutory costs of $38.70, cancelled his driver licence and disqualified him from obtaining a licence for 15 months. The Magistrate granted leave to drive pending appeal.

15. Mr Johnson filed a notice of appeal to this Court on 8 January 2008. During the hearing before me, I gave leave to Mr Johnson to amend one of the grounds of appeal. The amended notice of appeal essentially raised two issues, namely:

> (a) did the Magistrate err in law in finding that Mr Johnson had failed to demonstrate a legitimate forensic purpose for access to the schedule items ("summons issue"); and
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> (b) did the Magistrate err in law in convicting Mr Johnson of the offence under s49(1)(f) of the RSA notwithstanding non-compliance with the requirement in s55(4) of the RSA to give Mr Johnson a certificate, and in failing to properly consider and/or exercise a judicial discretion to rule the certificate inadmissible ("certificate issue").

16. Although the ruling on the summons was interlocutory, any error in the ruling was involved in the final order of the Magistrate to convict Mr Johnson and therefore an appeal to this Court lies in relation to the ruling as part of the overall appeal.[4] However, as only schedule items 7 and 8(b) related to the breath analysing instrument (which is relevant to the charge under s49(1)(f) of the RSA), while the other items related to the preliminary breath testing device (which was relevant to the charge under s49(1)(b) that has been dismissed), only that part of the ruling that relates to items 7 and 8(b) forms part of this appeal.

Relevant provisions of the RSA

17. Sub-sections49(1) and (4) of the RSA provide:

> (1) A person is guilty of an offence if he or she— ...
> (b) drives a motor vehicle or is in charge of a motor vehicle while the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood or breath; or ...
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> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; ...

(4) It is a defence to a charge under paragraph (f) of subsection (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated.

18. Sub-sections 55(4), (10) and (13) of the RSA provide:

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

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

19. Sub-sections 58(1), (2) and (2D) of the RSA provide:

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

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

(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.

Certificate issue

20. In *Furze*, the Court of Appeal dealt with the consequences of non-compliance with s55(4) of the RSA in relation to charges under s49(1) of the RSA and said the following:[5]

10. ... At least as written, the offence created by s49(1)(f) is independent of any certificate. So far as presently relevant, the offence depends only upon "the result of the analysis as recorded or shown by the breath analysing instrument": nothing more and nothing less. ...

> 12. ... The findings of fact that we have quoted state "the result of the analysis as recorded or shown" by the breath analysing instrument into which the appellant supplied a sample of his breath and, given that that result as recorded or shown was "more than the prescribed concentration of alcohol", the offence charged is surely established. There is no need for anything further in relation to the reading and in particular no need for any certificate ...
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> 30. ... [Section] 58(1) does not, in a case like this, make s55(4) relevant. That portion of s58(1) which is "subject to compliance with section 55(4)" concerns evidence of the actual concentration of alcohol present in the blood; on a prosecution for an offence against s49(1)(f) there is no need — and indeed no warrant — to use or have resort to such evidence and so that portion of s58(1) which refers to s55(4) is of no consequence at all. ...
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> 32. ... Unlike s49(1)(b), para (f)(i) does not refer, relevantly, to the concentration of alcohol in the blood; the offence is constituted directly by the indication given by the machine (albeit as to blood alcohol concentration) — and no more than that: see *Meeking v Crisp*, *Bracken v O'Sullivan*, *R v Williams*, *Thompson v His Honour Judge Byrne* at [24]. ... The actual concentration of alcohol present in the blood is irrelevant; the criterion of criminality under s49(1)(f) is quite different, as the High Court pointed out in *Thompson*.
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> 33. As the appellant's argument to us about non-compliance with s55(4) depended upon the requirement for such compliance in s58(1), the argument must fail once that requirement is seen to be irrelevant on a prosecution under s49(1)(f). When the certificate of analysis from the breath analysing instrument was tendered in evidence, its value was *not* made by s58(1) "subject to compliance with s55(4)" because it was not tendered as "evidence of the concentration of alcohol present in the blood of the [appellant] at the time his ... breath [was] analysed by the instrument" that was used to test the breath sample given. The certificate was tendered under s58(2) as evidence of what was indicated by "the result of the analysis as recorded or shown by the breath analysing instrument", on which criminality under s49(1)(f) depends. That is not to say that s58(1) is altogether irrelevant on such a prosecution; far from it. First, the certificate was tendered under s58(2) (albeit in this instance in conjunction with s58(2D)) and that could be justified only if the proceeding for an offence against s49(1)(f) was within the expression "any proceedings referred to in sub-section (1)", to which the operation of s58(2) is expressly confined. A proceeding for an offence against s49(1)(f) is such a proceeding, however, since the words "or if a result of a breath analysis [is relevant]" were added to s58(1) by amendment in 1990, expressly to overcome the decision of the Full Court in *Bracken v O'Sullivan*.
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> ...
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> 35. Thus far we have dealt with the appellant's argument as presented to us on the hearing. After the hearing concluded, however, we invited counsel to make further submissions in writing, if they wished, on the possible relevance of compliance with s55(4), independently of the express mention made to such compliance in s58(1). We were mindful of the possibility that in the context of this very complicated legislation some other argument might perhaps be devised to support the need for such compliance beyond that derived immediately from the words in s58(1); but in his further submissions appellant's counsel did no more than rely directly upon what he described as the mandatory terms in which s55(4) was couched. It may be accepted readily enough that s55(4) is in mandatory terms: in some cases the delivery of a certificate to the defendant may lead to his or her requesting the taking of a blood sample under s55(10), which could be important — though not on a prosecution against s49(1)(f), when only the result recorded or shown by the breath analysing instrument is relevant. In this proceeding the mandatory form of s55(4) would avail the appellant only if it could properly be concluded that the tendering of the certificate in evidence under s58(2) was conditional upon compliance with s55(4). And in our opinion it cannot be so concluded. ...
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> 41. Thus, however it is approached, we think we must reject the argument of the appellant that the respondent had to prove compliance with s55(4) before being able to rely upon the certificate in evidence, Ex "A", on the prosecution of the appellant for an offence against s49(1)(f). In our opinion compliance with s55(4) was irrelevant on such a prosecution. ...

21. Mr Billings conceded that the above observations in *Furze* meant that proof of compliance with s55(4) of the RSA was not a precondition for a conviction under s49(1)(f) of the RSA and that non-compliance did not render the certificate inadmissible in respect of a charge under that section. However, he submitted that the case was not authority for the proposition that such non-compliance is not relevant in the exercise of the general unfairness discretion (which enables admissible evidence to be excluded in order to ensure the accused's trial is not unfair) to reject the certificate as evidence and thus determine to dismiss the charge. He submitted that the High Court in *Thompson v Judge Byrne*[6] said that a blood test obtained by an accused under s55(10) of the RSA could help establish the defence in s49(4) and therefore, in this case, the double failure of the police to give Mr Johnson a certificate and inform him of his right to a blood test should have

resulted in the Magistrate rejecting the certificate in the exercise of the unfairness discretion. He submitted that the Magistrate erred in law either because he decided that Furze meant he could not exclude the certificate on the basis of the unfairness discretion, or alternatively because he did not properly consider the exercise of that discretion. He conceded that the public policy discretion discussed in *Bunning v Cross*[7] was not relevant to this appeal, as non-compliance with s55(4) does not involve unlawfully or illegally obtained evidence.

22. Mr Trapnell submitted that *Furze* is clear authority for the proposition that although compliance with s55(4) of the RSA is mandatory, any non-compliance with it is irrelevant to a charge under s49(1)(f) of the RSA. He submitted that the comments of the High Court in *Byrne* regarding a blood test being used to establish the defence in s49(4) were not only *obiter* but also incorrect because a blood test result is only admissible in proceedings referred to in s57(2), which does not include proceedings for an offence under s49(1)(f). He submitted that, in any event, the Court of Appeal in *Furze* discussed *Byrne* and, accordingly, the Court of Appeal's statement that the taking of a blood test under s55(10) of the RSA cannot be important on a prosecution under s49(1)(f) was binding on the Magistrate and is binding on me. I discuss this submission in relation to *Byrne* in paragraph 48 below.

23. In relation to the unfairness discretion, Mr Trapnell submitted that it was appropriate for the Magistrate to refuse to exclude the evidence of the reading of 0.155 percent. There was no connection between the inadvertent failure to provide Mr Johnson with a certificate produced by the breath analysing instrument and the exercise of his right to request a blood test under s55(10) and therefore no prejudice was caused to Mr Johnson. On a proper construction of s55(10), the giving of the s55(4) certificate is not a precondition to the exercise of the right conferred by s55(10); rather, it merely references the point in time in the process when such a request may be made. Here, the operator informed Mr Johnson of the reading orally and the reading appeared in the notice of suspension served under s51 of the RSA. Mr Johnson was unaware of his right to request a blood test, there was no obligation on the police to inform him of this right and the certificate, if given to him, would not have made him aware of the right. Mr Trapnell submitted that, in any event, the Magistrate went on to consider whether he should take the non-compliance with s55(4) into account in the exercise of his discretion whether to admit the certificate into evidence and properly exercised his discretion to do so.

24. *Furze* decided that notwithstanding that s55(4) is mandatory, non-compliance with the sub-section does not preclude a conviction under s49(1)(f) of the RSA. It was therefore open to the Magistrate to convict Mr Johnson of an offence under s49(1)(f) notwithstanding that he was not given a certificate of the reading of the breath analysing instrument as required by s55(4). The key issue is whether the Magistrate erred in law in not excluding the certificate as evidence in the exercise of the unfairness discretion.

25. In *Director of Public Prosecutions v Moore*,[8] the Court of Appeal held that the discretion to reject admissible evidence could, in an appropriate case, be exercised to exclude a breath analysis certificate. In that case, after the result of the breath analysing instrument showed a concentration of 0.074 percent, the accused informed the operator that he wished to have a blood test but was dissuaded from doing so because the operator advised him that by the time a doctor arrived to take a blood test, the blood alcohol concentration would be likely to be higher. Chernov and Eames JJA held that the Magistrate did not err in excluding the breath analysis certificate on the basis of the public policy discretion discussed in *Bunning v Cross*[9] because the operator had acted improperly and this impropriety, although occurring after the certificate was produced, had a sufficiently close connection to the reading on the certificate. Batt JA held that although the public policy discretion was inapplicable because the operator's conduct occurred after the certificate was produced, the unfairness discretion was applicable. The Court of Appeal concluded that the Magistrate had not erred in excluding the certificate from the evidence.

26. The facts of this case, however, are very different from *Moore*. Neither Mr Johnson nor any police officer mentioned a blood test. There was no improper conduct by the police which dissuaded Mr Johnson from seeking a blood test. I reject Mr Billings' submission that failure to inform Mr Johnson of the right under s55(10), even if deliberate, is tantamount to dissuading him from exercising that right. While s49(10) of the RSA gave Mr Johnson a right to request a blood test, the RSA does not impose an obligation on the police to inform him of that right. The failure

to inform Mr Johnson of his right under s55(10), without more, cannot enliven the unfairness discretion to exclude the breath analysis certificate. In light of *Furze*, the giving of a certificate to Mr Johnson was not a precondition to establishing the offence under s49(1)(f) and it is therefore difficult to see how an inadvertent failure to give a certificate, without more, can enliven the unfairness discretion to exclude the certificate. Do the two failures, in combination, enliven the discretion? In my opinion, they do not because they are not causally linked. The certificate does not refer to the right under s55(10) and therefore Mr Johnson's lack of awareness of that right was not affected by his not having been given a certificate.

27. While it is true that s55(10) states that a motorist may request a blood test "immediately after being given the [s55(4)] certificate", that does not mean that a request cannot be made where a certificate is not given. The quoted words impose a temporal requirement, namely that the motorist must make the request immediately after being informed of the reading produced by the breath analysing instrument, rather than rendering the furnishing of a certificate a condition precedent to the right to request a blood test. To hold otherwise would give the police control over which motorists can exercise that right, depending on whether or not the police provide a certificate. It could not have been Parliament's intention to make the availability of such an important right depend on the conduct of the police. In particular, it could not have been Parliament's intention for the right to cease being available because the police failed to comply with the mandatory requirement under s55(4) to give a certificate to the motorist.

28. Mr Billings made submissions to the Magistrate that he should exercise his discretion to exclude the certificate. The Magistrate considered those submissions and decided not to exclude the certificate. In the circumstances of this case, he was justified in doing so.

29. Accordingly, I find that the Magistrate did not err in law in admitting the certificate into evidence notwithstanding the non-compliance with s55(4) of the RSA and in relying on the certificate in deciding whether to find Mr Johnson guilty of an offence under s49(1)(f) of the RSA.

Summons issue

30. In *Alister v R*,[10] Gibbs CJ discussed (in the context of a claim for public interest immunity) the circumstances in which a court should permit disclosure of documents produced on summons in a criminal proceeding. His Honour stated:[11]

> [I]n considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.

Brennan J stated:[12]

> [T]he right to compulsory process cannot be dependent upon the party's ability to prove the existence and content of a document when the party has reasonable grounds to believe that a document exists and seeks to obtain it by subpoena. That would eviscerate the right and limit its enforcement to occasions when the party already has in his possession secondary evidence of the original document the production of which the subpoena is intended to secure.

31. In *R v Saleam*,[13] Hunt J (with whom the other members of the New South Wales Court of Criminal Appeal agreed) held that an accused seeking access to documents must identify expressly and with precision a legitimate forensic purpose and that the criterion of "on the cards" adopted by Gibbs CJ in *Alister* should be applied in determining whether a legitimate forensic purpose exists.

32. A number of decisions in the trial division of this Court have considered the meaning of the expression "on the cards".

33. In *Glare v Bolster*,[14] Beach J referred to *Alister* and quashed summonses seeking production of documents relating to an automatic speed detection camera, on the basis that they were simply being used as part of a fishing expedition and with a view to obtaining discovery in a criminal proceeding. His Honour relied on the fact that no alleged defect or deficiency in the camera or any departure from the operating instructions by the operator of the camera had been identified by the defendant.[15]

34. In *Fitzgerald*,[16] Balmford J, after consulting the *Oxford English Dictionary* meaning of "on the cards", concluded that it meant "within the range of probability". That case involved a summons for the production of documents similar to those in the present case in the context of charges under s49(1)(b) and (f) of the RSA. Counsel for the defendant had submitted to the Magistrate in that case that as he was instructed by the defendant that the result of analysis was incorrect, an issue arose as to whether the instrument was properly operated and that was sufficient to establish a legitimate forensic purpose. Her Honour decided that a legitimate forensic purpose had not been established because the defendant "produced no material which could form the basis of a submission that it was within the range of probability that the denied documents would assist the [accused] in his defence of the charges ... in terms of s49(4)".[17] Her Honour saw no ground to disturb the Magistrate's view that "a mere statement by a party that the instrument must be defective does not give rise to such a probability".[18]

35. In *Thomas v Campbell*, Nettle J held, in the context of charges of assault with a weapon, breach of an intervention order and stalking, that in criminal cases an accused is *prima facie* entitled to inspect any document which may give the accused an opportunity to pursue a proper and fruitful course in cross-examination, whether it goes to a matter in issue or simply to credit.[19] His Honour held that the test is "whether it was 'on the cards' or reasonably likely that the documents would be of assistance to the [accused] in the conduct of his defence".[20]

36. In *Felice v County Court of Victoria*,[21] Osborn J quashed a County Court judge's order setting aside a subpoena seeking production of affidavits sworn and relied upon by the Australian Crime Commission in support of an application for telephone intercepts warrants even though the accused did not put forward any evidence which provided the basis for a positive inference of fraud, misrepresentation or lack of good faith in relation to the application for the warrants. Osborn J held that:[22]

> It is sufficient in a criminal proceeding if the material before the court gives rise to a possibility which is not merely hypothetical, but sufficiently reasonable having regard to the circumstances as a whole, to justify production of documents because it is "on the cards" they will materially assist the defence.

His Honour held that the circumstances of the case (particularly the differences between the stated basis on which the warrants were issued and the sequential intercepted material produced) satisfied the above test and that the County Court judge had erred in law by requiring evidence which would provide the basis for a positive inference of fraud, misrepresentation or lack of good faith.[23]

37. In *Director of Public Prosecutions v Selway (No 2)*, Cummins J said, in the context of a subpoena for production of material as to surveillance methods utilised by investigating police:[24]

> I consider that the true test is whether there is a reasonable possibility that the sought-for information would materially assist the defence. Probability is too high a standard. Mere possibility is too low. The adverb "reasonably" gives proper scope to the judge to determine the issue responsibly and objectively. Such a standard also is consonant with the principles of open justice.

38. In *Ragg v Magistrates' Court of Victoria*, Bell J said, in the context of summonses for production of a large number of police investigative material in a committal proceeding involving tax evasion charges:[25]

> 95. I would adopt [the] approach [in *Selway*], not only because it is not clearly wrong, but because I think it is correct. More specifically, a "reasonable possibility" test expresses in more certain language what Gibbs CJ probably had in mind when he used the "on the cards" metaphor in *Alister v R*, gives proper effect to the underlying fundamental duty of the court to ensure a fair trial and is consistent with international human rights and principles that Australia recognises. With respect, I would not follow the judgment of Balmford J in *Fitzgerald v Magistrates' Court* that "on the cards"

> means "within the range of probability" because it is clearly incorrect.
>
> 96. In summary, an accused person is entitled to seek production of such documents as are necessary for the conduct of a fair trial between the prosecution and the defence of the criminal charges that have been brought. When objection is taken, the accused must identify expressly and with precision the forensic purpose for which access to the documents is sought. A legitimate purpose is demonstrated where the court considers, having regard to its fundamental duty to ensure a fair trial, that there is a reasonable possibility the documents will materially assist the defence. That is a low threshold, but it is a threshold.
>
> 97. The "reasonable possibility" test does not apply in all cases in a fixed manner as if the relevant considerations always have the same value. It is necessary to consider "the importance of the issue to which it is said the subpoena relates and the importance of the document in question in the determination of that issue" and, more generally, "the circumstances as a whole". In doing so, it is necessary to give a "broad interpretation" to the issues in the case or, to put it another way, the "parties' respective cases should not be restrictively analysed." It is also important to pay due regard to the fact that "[d]efence lawyers are in a better position than a judge to make an appraisal of the value of information contained." Lastly, as Pincus JA said in *R v Spizzirri*: "courts should be careful not to deprive the defence of documents which could be of assistance to the accused."

39. In the recent case of *Attorney-General for New South Wales v Chidgey*,[26] the New South Wales Court of Criminal Appeal reviewed the relevant authorities and held that the test set out in the 1999 case of *R v Saleam*[27] should continue to be applied. That test is as follows:[28]

> The principles governing applications [for an order that documents not be produced] are no different from those governing applications for access to documents produced in answer to a subpoena. Before access is granted (or an order to produce made) the applicant must (i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is 'on the cards' that the documents will materially assist his case. ...

The Court emphasised that mere relevance is not sufficient to satisfy the above test. It declined to follow the earlier decision of Adams J in *Roads & Traffic Authority of New South Wales v Conolly*,[29] where his Honour adopted a "reasonable chance" test. The Court also discussed *Fitzgerald* and *Selway* (both in passing only) and *Ragg*, and said that there was no reason to depart from the language in the 1999 case of *R v Saleam* and that to do so "only invites confusion".[30]

40. Mr Billings submitted that, in light of *Felice*,[31] *Selway*[32] and *Ragg*,[33] the test in Victoria for determining whether there is a legitimate forensic purpose is "reasonable possibility", rather than the "within the range of probability" test in *Fitzgerald*. He submitted that the Magistrate erred in law by applying the wrong test and that, as the Magistrate's ruling prevented Mr Johnson from having access to schedule items 7 and 8(b), the Magistrate's error affected his decision to convict Mr Johnson and the conviction should be quashed accordingly.

41. Mr Trapnell submitted that the correct test is the "on the cards" test and that the various alternative descriptions of that test all had as a common characteristic, that there must be an objective basis to support the proposition that the documents sought might assist the defence. Mere speculation is not sufficient, as it constitutes a fishing expedition. He also submitted that a mere belief by a motorist that the reading on a breath analysing instrument is erroneous based on the quantity of alcohol they remember consuming, is also insufficient to satisfy the legitimate forensic purpose requirement. He relied on the following statement of Robert Goff LJ and Glidewell J in *R v Skegness Magistrates' Court; Ex parte Cardy*:[34]

> Solicitors acting for the defendants must constantly be met with assertions by their clients that the amount of alcohol consumed by them was so small that it could not possibly have resulted in the reading revealed on the printout from the device which carried out the relevant sampling and testing. They may think it right, in the circumstances of a particular case, to challenge the reliability of the particular device at the hearing of the charge against their client. But they have no right to discovery of documents with a view to searching for material which might support a submission that the device in question was defective at the relevant time and, as the present case shows, they must not misuse the witness summons procedure for the purpose of obtaining discovery.

42. In my view, the authorities discussed above establish that in Victoria, the test for determining whether evidence sought on summons by a defendant has a legitimate forensic purpose, is whether there is a reasonable possibility that the evidence would materially assist the

defence. The test of "within the range of probability" set out in *Fitzgerald* does not correctly state the law. The authorities also establish that while a fishing expedition is insufficient, the test of "reasonable possibility" must be applied flexibly (and, I would add, with common sense) in order to give the accused a fair opportunity to test the Crown's case and take advantage of any defences available to the accused.[35] Where the accused wishes to rely on a statutory defence, the absence of evidence from which an inference can be drawn that the documents sought will satisfy the requirements of the defence does not necessarily mean that the reasonable possibility test is not met. This is particularly so where there is only one statutory defence available to the accused and that defence involves technical information exclusively in the possession of the Crown; insistence by the court that the accused present evidence which provides a basis for a positive inference that the documents sought will satisfy the requirements of the defence may effectively "eviscerate"[36] the defence.

43. Neither Mr Billings nor Mr Trapnell referred me to *Chidgey*. Notwithstanding that case, in my opinion, *Felice*, *Selway* and *Ragg* usefully clarify how the question of the existence of a legitimate forensic purpose should be decided in Victoria.

44. It follows that *Fitzgerald* and *Glare* should not be regarded as establishing any principles that are generally applicable to charges under the RSA. As for *Skegness*, it is important to bear in mind that the circumstances of each case and the terms of the applicable statutory scheme are the primary considerations and thus little assistance can be obtained from generalised comments made by a court in another jurisdiction applying a different statutory scheme.

45. In this case, although the Magistrate referred to the "on the cards" principle and statements to the effect that a fishing expedition is not sufficient to establish a legitimate forensic purpose, he did not make any express finding that Mr Johnson was engaging in a fishing expedition in seeking the schedule items. He repeatedly said that he was applying the "within the range of probability" test in *Fitzgerald* and based his decision on a finding that he was not satisfied that it was within the range of probability that the schedule items would assist Mr Johnson's defence. The fact that the Magistrate referred to the absence of evidence that the breath analysing instrument was faulty also indicates that the Magistrate proceeded on the erroneous basis that Mr Johnson had to present evidence that the instrument was faulty in order to satisfy the legitimate forensic purpose test.

46. It follows that the Magistrate applied the wrong test in ruling that Mr Johnson had not demonstrated a legitimate forensic purpose for seeking access to schedule items 7 and 8(b).

47. In this case, the "reasonable possibility" test for determining whether schedule items 7 and 8(b) would materially assist Mr Johnson in defending the charge under s49(1)(f) of the RSA had to be applied having regard to the fact that s49(4) of the RSA provides the only statutory defence that is available to a motorist in Mr Johnson's position. Section 49(4) places the onus on the motorist to prove "that the breath analysing instrument used was not on that occasion in proper working order or properly operated". The onus could, depending on the circumstances, be satisfied by an acknowledgment by the officer operating the breath analysing instrument that it has malfunctioned. However, this is likely to be rare. In *Byrne*,[37] Gleeson CJ, Gummow, Kirby and Callinan JJ stated that an "analysis of blood which is seriously inconsistent with the analysis of breath conducted by [a] breath analysing instrument could, in a given case, cast doubt on the working order or proper operation of the ... instrument." However, a motorist will not necessarily know of the right under s55(10) of the RSA to require the taking of a sample of their blood and police officers do not always inform motorists of that right. That information was not given to Mr Johnson in this case. It follows that a motorist's ability to have access to documents similar to schedule items 7 and 8(b) is of fundamental importance in being able to establish a defence under s49(4). These circumstances should inform how the "reasonable possibility" test is applied.

48. I do not accept Mr Trapnell's submission that the High Court's observations in *Byrne* regarding a blood test being used to establish the defence in s49(4) were incorrect and cannot be followed because of *Furze*. *Furze* does not directly state that the results of a blood test are inadmissible for the purpose of establishing a defence under s49(4) of the RSA. In any event, since *Furze*, the Court of Appeal has, in the case of *Director of Public Prosecutions v Hore*,[38] referred with approval to the High Court's observation about use of a blood test to establish a defence under

s49(4). The Court of Appeal's decision in *Moore* also appears to implicitly support this approach. If Mr Trapnell's submission were correct, and the results of a blood test were not admissible to establish a defence under s49(4), then the importance of documents such as schedule items 7 and 8(b) to the establishment of such a defence would become even more pronounced.

49. Had the Magistrate applied the "reasonable possibility" test and that application been informed by the matters discussed in *Alister*, *Felice* and *Selway* and the potential importance of documents such as schedule items 7 and 8(b) in establishing the only statutory defence available to an accused in Mr Johnson's position in respect of a charge under s49(1)(f) of the RSA, it would have been open to him to find that Mr Johnson had satisfied the test having regard to the following circumstances:

> (a) Mr Billings articulated the purpose for which access to schedule items 7 and 8(b) was required, namely to establish a defence under s49(4) of the RSA. Although he also mentioned use of the documents in cross-examination, this was of limited assistance because he did not identify who would be cross-examined and how the documents might assist the cross-examination.
>
> (b) Dr Bowkett gave evidence which enabled the Magistrate to understand what items 7 and 8(b) were and, depending on their precise contents (which was not disclosed in Dr Bowkett's evidence), they could possibly assist in establishing that the breath analysing instrument used on Mr Johnson was not in proper working order or properly operated (the onus being on Mr Johnson to establish this in order to satisfy the defence in s49(4)).
>
> (c) Schedule items 7 and 8(b) existed and were in court. It would have been easy to provide access to Mr Johnson. The prosecutor did not submit that any inconvenience to the police was caused either in producing the documents or giving access to Mr Johnson.
>
> (d) A ruling that Mr Johnson be refused access to schedule items 7 and 8(b) would severely prejudice Mr Johnson's ability to establish the only statutory defence available to him (namely the defence in s49(4) of the RSA), thus significantly undermining the utility of that defence which Parliament intended be available to motorists.

50. On the basis of the above matters, had the Magistrate applied the correct test, it would have been open to him to find that the summons did not involve a fishing expedition. This was not a case where the summons sought documents which may or may not exist on the speculative basis that they might contain something which might be of some assistance to the defence in some unspecified way. It would have been open to the Magistrate to find that the possibility that schedule items 7 and 8(b) would materially assist in establishing the defence in s49(4) of the RSA was not merely hypothetical.

51. Mr Johnson's case in support of the existence of a legitimate forensic purpose would have been strengthened if the Magistrate had been informed prior to making his ruling that the following evidence would be given:

> (a) Mr Johnson did not know he had a right to request a blood test and the police did not advise him of this right. Had he known of the right, Mr Johnson would have requested a blood test. The police did not make any admission that the breath analysing instrument was malfunctioning. In these circumstances, having access to schedule items 7 and 8(b) afforded the only means by which Mr Johnson could have any prospect of establishing the defence in s49(4) of the RSA.
>
> (b) Mr Johnson believed that the reading of 0.155 percent was inaccurate and indicated this to the operator of the breath analysing instrument when he said "I can't believe it's that high".
> (c) The operator of the breath analysing instrument did not note slurred speech, bloodshot eyes, lack of balance, dishevelled appearance or any other indication that Mr Johnson was intoxicated, other than "smelt of liquor", at the time of the breath analysis test.

52. In *Hore*, in the course of discussing the ways in which the defence in s49(4) may be established, Hansen AJA made the following observation which is supportive of use of a summons to require production of documents relating to the operation of the breath analysing instrument:[39]

> It is to be noted that in the present cases counsel for the defendants cross-examined the police witnesses as to the test, but did not subpoena or otherwise require the production of the instrument or such other information as appropriately may have aided the inquiry and establishment of the defence.

53. In this case, the schedule items were produced to the Magistrates' Court and were available to be given to Mr Johnson in response to the summons. The prosecutor agreed to Mr Johnson having access to some of the items but not others. The basis for the different approach is not clear. Had access been given to items 7 and 8(b), much delay and cost might have been avoided. If schedule items 7 and 8(b) had disclosed no basis for challenging the working order or operation of the breath analysing instrument, the proceeding would have focused on the substantive issues. If schedule items 7 and 8(b) had disclosed a basis for challenging the working order or operation of the breath analysing instrument, the focus would have been on whether the defence in s49(4) was satisfied.

54. It is also not clear why the Magistrate was not requested to inspect the schedule items. As they were in court and readily available for inspection by him, he should have done so before ruling on the prosecutor's objections. Such inspection is encouraged by the authorities[40] as it enables an informed decision to be made and has the potential to save time and costs.

Consequences of error of law

55. Mr Billings submitted that if I found that the Magistrate's ruling in relation to schedule items 7 and 8(b) was erroneous as a matter of law, I should allow the appeal and quash the conviction. In the alternative, he submitted that I should allow the appeal, quash the conviction and remit the matter to another Magistrate to hear and determine the charge under s49(1)(f) of the RSA.

56. Mr Trapnell submitted that if I found that the Magistrate's ruling in relation to schedule items 7 and 8(b) was erroneous as a matter of law, I should dismiss the appeal, as the error would not have affected the ultimate result. He submitted that whether a "within the range of probabilities" or a "reasonable possibility" test had been applied by the Magistrate, only one outcome was available to the Magistrate, namely that the test had not been satisfied because no objective basis had been suggested for the proposition that the breath analysing instrument used to test Mr Johnson's breath was not in proper working order or properly operated.

57. Section 92(7) of the MCA provides: "After hearing and determining the appeal, the Supreme Court may make such order as it thinks appropriate, including an order remitting the case for re-hearing to the Court with or without any direction in law". It has been held, with regard to s92(7), that this Court may, in the exercise of its discretion, decline to allow an appeal even if it finds that an error of law exists. In *Walford v McKinney*, Tadgell JA said that s92(7) has the effect that "[m]erely to demonstrate error of law is insufficient to warrant the appeal's being allowed: there must be some practical justification for allowing it".[41] In *Engebretson v Bartlett*, Bell J referred to *Walford* and said: "The language of s92(7) shows, and the authorities confirm, that the court may consider it to be appropriate to refuse to make an order where the court can clearly say the error of law did not affect the result".[42]

58. *Walford* and *Engebretson* concerned alleged errors of law made by a Magistrate relating to admissibility of evidence. However, in my opinion, the principles set out in the cases have general application to all errors of law found under s92 of the MCA. This Court's power under s92(7) to "make such order as it thinks appropriate" includes the power to decline to allow an appeal even where the Court finds that an error of law exists, provided that it can clearly be said that the error of law did not affect the result. In the circumstances of this case, I cannot be satisfied that, if the Magistrate had applied the correct test, he would have reached the same conclusion in relation to schedule items 7 and 8(b). If the Magistrate had decided that Mr Johnson be given access to those items, it is possible that their contents may have established the defence under s49(4) of the RSA. If the defence had been established, Mr Johnson would not have been convicted. It is thus not possible for me to say that the denial of access to schedule items 7 and 8(b) did not deprive Mr Johnson of an opportunity of acquittal.

Proposed orders

59. I have concluded that the appropriate course is to allow the appeal, set aside the conviction and remit the charge under s49(1)(f) of the RSA to the Magistrates' Court at Frankston to be reheard and determined by another Magistrate according to law.

60. I will hear from the parties on the precise form of the orders to be made and on the question of costs.

[1] (2001) 34 MVR 448; [2001] VSC 348, [31] ("*Fitzgerald*").
[2] The underlining is the Magistrate's.
[3] [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547 ("*Furze*").
[4] *Thomas v Campbell* [2003] VSC 460; (2003) 9 VR 136, 149 [36] ("*Thomas*").
[5] [2000] VSCA 149; (2000) 2 VR 503 , 509-10, 516-19, 521; (2000) 113 A Crim R 556; (2000) 32 MVR 547 (citations omitted; emphasis in original).
[6] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 ("*Byrne*").
[7] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[8] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323 ("*Moore*").
[9] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[10] [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97 ("*Alister*").
[11] [1984] HCA 85; (1984) 154 CLR 404, 414-15; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[12] [1984] HCA 85; (1984) 154 CLR 404, 441; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[13] (1989) 16 NSWLR 14, 18; 39 A Crim R 406.
[14] (1993) 18 MVR 53, 64 ("*Glare*").
[15] (1993) 18 MVR 53, 62.
[16] (2001) 34 MVR 448, 455; [2001] VSC 348, [20].
[17] (2001) 34 MVR 448, 458; [2001] VSC 348, [31].
[18] (2001) 34 MVR 448, 458; [2001] VSC 348, [31].
[19] [2003] VSC 460; (2003) 9 VR 136, 143 [13].
[20] [2003] VSC 460; (2003) 9 VR 136, 143 [12].
[21] [2006] VSC 12 ("*Felice*").
[22] [2006] VSC 12, [52].
[23] [2006] VSC 12 [51].
[24] [2007] VSC 244; (2007) 16 VR 508, 514 [10]; (2007) 212 FLR 243; (2007) 172 A Crim R 359 ("*Selway*") (citations omitted).
[25] [2008] VSC 1, [95]-[97]; (2008) 18 VR 300; (2008) 179 A Crim R 568 ("*Ragg*") (citations omitted).
[26] [2008] NSWCCA 65; (2008) 182 A Crim R 536 ("*Chidgey*").
[27] [1999] NSWCCA 86.
[28] *R v Saleam* [1999] NSWCCA 86, [11] (Simpson J, Spigelman CJ and Studdert J agreeing), quoted in *Chidgey* [2008] NSWCCA 65, [64]; (2008) 182 A Crim R 536. The Court also referred, with apparent approval, to the judgment of Hunt J in *R v Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406 which is discussed in paragraph 31 of this judgment.
[29] [2003] NSWSC 327; (2003) 57 NSWLR 310, 318-19 [12]; (2003) 38 MVR 444, *AMD Far East Ltd v Doan* [2004] NSWSC 78, [13]-[16] followed *Conolly*.
[30] See generally *Chidgey* [2008] NSWCCA 65, [64]-[80]; (2008) 182 A Crim R 536.
[31] [2006] VSC 12, [52].
[32] [2007] VSC 244; (2007) 16 VR 508, , 514 [10].; (2007) 212 FLR 243; (2007) 172 A Crim R 359.
[33] [2008] VSC 1, [92]-[97]; (2008) 18 VR 300; (2008) 179 A Crim R 568.
[34] [1985] RTR 49, 60-1 ("*Skegness*").
[35] See also *Gaffee v Johnson* (1996) 90 A Crim R 157, 163-5.
[36] *Alister* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[37] [1999] HCA 16; (1999) 196 CLR 141, 154 [31].; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27. See also *Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[38] [2004] VSCA 192; (2004) 10 VR 179, 195 [66]; (2004) 42 MVR 520 (Hansen AJA, with whom Ormiston and Charles JJA agreed) ("*Hore*").
[39] [2004] VSCA 192; (2004) 10 VR 179, 195 [66]; (2004) 42 MVR 520.
[40] See *Thomas* [2003] VSC 460; (2003) 9 VR 136, 144 [18].
[41] [1996] VICSC 57 [1997] 2 VR 353, 356 ("*Walford*").
[42] [2007] VSC 163; (2007) 16 VR 417, 434 [93]; (2007) 172 A Crim R 304 ("*Engebretson*").

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