52/10; [2010] VSCA 353

SUPREME COURT OF VICTORIA — COURT OF APPEAL

EASWARALINGAM v DPP & ANOR

Buchanan and Tate JJA

17 November, 20 December 2010 — (2010) 208 A Crim R 122

PRACTICE AND PROCEDURE – DISCRETION TO ADMIT WITNESS STATEMENT INTO EVIDENCE WHEN A PERSON IS NOT AVAILABLE TO GIVE EVIDENCE – ABSENT WITNESS RECOVERING FROM EMERGENCY SURGERY – MAGISTRATE REFUSED APPLICATION TO ADMIT WITNESS STATEMENT – WHETHER MAGISTRATE IN ERROR – MATTER REMITTED TO MAGISTRATES' COURT: *EVIDENCE ACT* 2008, SS65, 67.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – REFUSAL OF MAGISTRATE TO ADJOURN PROCEEDINGS – ERROR OF LAW ON THE FACE OF THE RECORD – WHAT CONSTITUTES THE RECORD – PROCEEDING FOR JUDICIAL REVIEW HEARD CONCURRENTLY WITH APPEAL – NEED TO DISTINGUISH BETWEEN THE TWO PROCEEDINGS AND THE MATERIAL ON WHICH THEY COULD BE DECIDED – NEED TO HAVE REGARD TO THE EVIDENCE WHICH WAS THEN BEFORE THE MAGISTRATE WHEN THE APPLICATION FOR ADJOURNMENT WAS DECIDED – APPEAL AGAINST ORDERS FOR JUDICIAL REVIEW ALLOWED. WORDS AND PHRASES – "RECORD" – "NOT AVAILABLE".

The prosecution's main witness was unable to attend court because she had undergone emergency surgery two days before the date of hearing of charges arising from a road rage incident. It was said that the witness was groggy and apparently under the influence of medication. The defendant was notified of a pending application for an adjournment and in the event the adjournment was not granted, given notice that an application would be made to rely upon the witness' statement pursuant to s65 of the *Evidence Act* 2008 (Vic) ('Act').
When the matter came on for hearing, the application for adjournment was made and refused by the magistrate on the ground that the prejudice to the defendant was far outweighed by any prejudice to the public interest. In relation to the application to admit the witness' statement under s65 of the Act, the magistrate in refusing the application said that the notice of the application was deficient in relation to the time of service and the detail contained within it. Also, the magistrate stated that the application for admission was an abuse of process. Upon appeal to the Supreme Court (Pagone J MC47/10), the appeal was allowed and the matter remitted to the Magistrates' Court for hearing and determination. Upon appeal to the Court of Appeal—

HELD: In relation to the order granting *certiorari* in respect of the adjournment application, leave to appeal granted. In relation to the admissibility of the witness' statement, appeal dismissed. Remitted to the Magistrates' Court for further hearing.
1. By reason of s10 of the *Administrative Law Act* 1978, in Victoria the 'record' includes a court's reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under Order 56. The transcript of proceedings may be incorporated into the record by reference.

2. In the present case, the reasons were transcribed. The applicant accepted that other matters in the transcript could be considered to the extent that reference to them was necessary to enable understanding of the Magistrate's reasons. Beyond those matters, only the charges, the oral application for the adjournment, and the oral decision of the Magistrate could be taken into account. What could not be taken into account was the content of the witness' statement that detailed the circumstances of the offence, including the circumstance that only she and the applicant were present at the scene, or the notes taken by the informant.

3. The trial Judge (Pagone J) considered material which was well beyond the ambit of the record, however defined. Indeed, the error he made – of considering material not before the Magistrate on the adjournment application – would still have been an error had the challenge to the refusal to adjourn been brought by way of an appeal (if an appeal had been available). However, because the proceeding was an application for *certiorari*, this should have alerted the trial Judge to the need to be particularly careful in identifying precisely to what material reference could be made in determining whether the Magistrate had committed an error of law. This he failed to do.

4. The trial Judge (Pagone J) found that the Magistrate was in error in reaching the conclusion that the application for the admission of the statement was an abuse of process. Amongst the errors committed by the Magistrate was the erroneous conclusion that what was meant by 'not available' was not defined in the legislation when it is so defined, in the 'Dictionary' section at the back of

the *Evidence Act*. It is defined in a manner that includes where 'the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability'. The trial Judge found that the Magistrate failed to consider whether that condition was satisfied, and her failure to do so contributed to her conclusions about abuse. Had she been alert to the relevant definition she may have considered that a policy objective of s65 was to provide for evidence to be adduced in the circumstances before her, if the statutory pre-conditions were satisfied on the facts. It was necessary for the statutory definition of a person's availability, upon which s65 depends, to have been considered before determining whether or not reliance on s65 in the circumstances of the case was an abuse. The failure of the Magistrate to consider the statutory definition of 'not available', and the consequent failure to determine whether that definition was satisfied in the circumstances of the case, was an error of law.

BUCHANAN JA:

1. I agree with Tate JA.

TATE JA:

2. On 1 October 2010 a trial Judge allowed an application for judicial review, brought by originating motion by the Director of Public Prosecutions ('the DPP'), with respect to an order made by the Magistrates' Court of Victoria in Dandenong on 24 February 2010 refusing an adjournment.[1] The trial Judge also allowed an appeal brought by the DPP pursuant to s272(1) of the *Criminal Procedure Act* 2009 of a refusal by the same Magistrate in the same proceeding to admit into evidence the victim's statement as an exception to the hearsay rule under s65 of the *Evidence Act* 2008.[2] His Honour proposed to remit the matters to the Magistrates' Court for rehearing.[3] His Honour's reasons in relation to the judicial review application and the appeal are contained in a single judgment. The applicant now applies for leave to appeal with respect to both proceedings.

3. The two applications for leave to appeal are made by separate summonses, each dated 15 October 2010, one in relation to the judicial review proceeding and the second in relation to the allowance of the appeal. Section 272(1) allows for appeals to be brought on a question of law only from a 'final' order of the Magistrates' Court. The Magistrate's refusal to adjourn the hearing was not a 'final' order and thus, in addition to the appeal, the judicial review proceeding was brought, under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005, seeking *certiorari* for error of law on the face of the record.

4. More particularly, the relevant orders made by the Magistrate on 24 February 2010 were two-fold. The first was the dismissal of an application to adjourn the hearing of criminal charges because the prosecutor's principal witness, Kelly Venner (the alleged victim), was ill and unavailable to attend court. The refusal of an adjournment was the subject of the judicial review proceeding before the trial Judge.

5. The second relevant order of the Magistrate was to reject the application made under s65 of the *Evidence Act*, which provides an exception to the hearsay rule in criminal proceedings if the maker of a statement is not available to give evidence, for Ms Venner's statement to be admitted into evidence. This refusal was the subject of the DPP's appeal before the trial Judge.

6. The applicant sought to have the two leave applications heard together and the appeals heard instanter, if leave was to be granted. The appeals were heard by two Judges of Appeal constituting and exercising all the jurisdiction and powers of the Court of Appeal, pursuant to certificates signed by the President of the Court of Appeal in each proceeding, pursuant to s11(1A) of the *Supreme Court Act* 1986.[4]

7. There were four criminal charges that were initially brought against the applicant: unlawful assault upon Ms Venner, use of indecent language to Ms Venner in a public place, stalking Ms Venner in a way that could reasonably be expected to arouse apprehension or fear (a charge that was later withdrawn), and behaving in an offensive manner in a public place.

8. The charges were based upon allegations made by Ms Venner as to the conduct of the applicant on the evening of 26 October 2007. In her statement she gave details of how the applicant's car, with its lights on high beam, pulled in behind her car. She said she and the applicant had never met before and the only people present at the events which gave rise to the charges were herself and the applicant.

9. The Magistrate was told that Ms Venner was the alleged victim and the principal witness for the prosecution. In the course of the adjournment application counsel for the accused asked the informant the following question (to which he received an affirmative answer):

> And, in relation to this victim, it's a situation where it's essentially one person says one thing, the other person says another. They're diametrically opposed views in many respects, aren't they, other than presence?

10. The prosecutor's application for an adjournment was based upon the informant having received a message on 22 February that Ms Venner would not be able to attend court on 24 February as she had been admitted to hospital to undergo emergency surgery. Counsel for the accused conceded that he had been told on 23 February that an adjournment would be sought the next day because of Ms Venner's unavailability and told that if the adjournment was refused, an application would be made to rely on Ms Venner's statement under s65 of the *Evidence Act*. Ms Venner had been admitted to hospital on Sunday 21 February, had surgery on Monday 22 February and was discharged on 23 February but, in his sworn evidence, the informant said that, on speaking to Ms Venner on the morning of 24 February, she was 'extremely groggy' and he assumed that this was the result of her still being under the influence of medication.

11. In her reasons, the Magistrate supported her refusal of an adjournment on the ground that the prejudice to the accused far outweighed any prejudice to the public interest. In particular, she took into account the prejudice to the accused that derived from his citizenship application being refused pending the criminal proceedings and his deferral of an MBA course into which he had been accepted at Monash University.

12. The trial Judge determined that the exercise of discretion by the Magistrate in refusing the adjournment was wrong in law because the Magistrate failed to take into account the relevant consideration that a consequence of her refusal would be that of denying the informant the opportunity to present his case. He found that the Magistrate did not consider whether the effect of refusing the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges, as his Honour noted, in the absence of admitting into evidence the written statement of Ms Venner.[5] Accordingly, he granted the DPP's application for judicial review.

13. In support of the application for leave to appeal, it is now argued by the applicant that his Honour's reasons were dependent upon his making certain findings of fact, which he was wrong to find, and on the record could not find:

> (1) that the only evidence against the applicant was that of a single witness, Ms Venner;
>
> (2) that Ms Venner was unable to give oral evidence because of unexpected surgery only a few days before; and
>
> (3) that the refusal of the adjournment would have, and did have, the effect of denying the informant the opportunity to present his case and to insist on a hearing in which no evidence would be called with the consequence of dismissal of the charges.

14. The applicant's submissions involved identifying what constituted the 'record' for the purpose of the judicial review proceeding. The applicant submitted that, in determining the application for judicial review, the trial Judge considered material which he was not permitted to take into account for that purpose. More generally, it is argued that the trial Judge, faced with two distinct proceedings arising out of the same hearing before the Magistrate, failed to distinguish and keep separate the range of material to which he could permissibly have regard with respect to the judicial review application from that to which he could have regard for the appeal. This is said to be apparent when regard is had to the nature of the second application made before the Magistrate.

15. Before the Magistrate, the prosecutor's application for admission into evidence of the statement by Ms Venner was opposed on the basis that reliance upon s65 of the *Evidence Act* was, in the circumstances of the case, an abuse of process as an attempt to circumvent the Court's refusal to adjourn the hearing by proceeding in another way.

16. It was also contended that the form of the application was insufficient because it failed to provide any precise foundation as to why the statement should be admitted.

17. The Magistrate decided not to admit the statement of Ms Venner on several grounds. She said:

> In my view, the notice is deficient. It has not been served within a reasonable time, it does not have the necessary detail that's prescribed for in the legislation, and it would require an adjournment for these deficiencies to be addressed which would, therefore, result in the outcome that is originally sought by the prosecution. And, accordingly, I do consider that to be an abuse, and I consider that to be unfair to the accused.

18. It is noteworthy, however, that the refusal to admit the statement of Ms Venner occurred after the application for the adjournment had been rejected. Given that sequence of events, the applicant argued, it was not permissible for the trial Judge to consider the refusal to admit Ms Venner's statement, or the consequences of that refusal (the dismissal of the charge), when reviewing the Magistrate's rejection of the prosecutor's application for an adjournment.

19. In other words, the applicant argued, the trial Judge's failure to be mindful of the relevance of the sequence of the events that took place before the Magistrate led him into error. That error consisted in his consideration of matters that went beyond the 'record' of the disposition of the adjournment application before the Magistrate to which he was confined in the judicial review proceeding. His Honour said:[6]

> There may be many circumstances when refusing an adjournment will be justified in the exercise of a discretion even though the practical effect of a refusal to adjourn the hearing will result in the dismissal of a proceeding. However an application for an adjournment which is likely to have that effect should not be refused without considering that consequence and taking it into account as a factor to be weighed against others. In this case the only evidence against Mr Easwaralingham was of the one single witness (Ms Venner) who was not able to give oral testimony because of unexpected surgery only a few days before....The inability of Ms Venner to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted into evidence ... under s65 of the *Evidence Act* 2008 (Vic), however the learned magistrate *did not consider whether the effect of the ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of Ms Venner had been admitted in evidence). The learned Magistrate did not weigh that consequence against the factors tending against an adjournment.*

20. It was submitted that it is apparent from this passage that the trial Judge had erred because it was wrong for him to criticise the Magistrate for failing to take into account the consequence that the refusal of the adjournment application would deny the informant the opportunity to present his case when, at the time of refusing the adjournment, it could not be inferred that no evidence would be called. Indeed, the prosecutor had not made the submission that a refusal to grant an adjournment would mean that the hearing could not proceed, nor could he, for the very reason that he sought to proceed with the hearing of the charges, albeit on the basis of the victim's written statement rather than her oral evidence. The trial Judge's error occurred because he considered the two applications in an undifferentiated way, without appreciating the significance of the fact that the application for the admissibility of Ms Venner's statement had neither occurred, nor been foreshadowed before the Magistrate, when the adjournment was refused. I agree.

21. By reason of s10 of the *Administrative Law Act* 1978, in Victoria the 'record' includes a court's reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under Order 56.[7] The strictures of *Craig v South Australia*[8] in this respect are thus avoided. The transcript of proceedings may be incorporated into the record by reference.[9]

22. Here, the reasons were transcribed. The applicant accepted that other matters in the transcript could be considered to the extent that reference to them was necessary to enable understanding of the Magistrate's reasons. Beyond those matters, only the charges, the oral application for the adjournment, and the oral decision of the Magistrate could be taken into account. What could not be taken into account was the content of the statement by Ms Venner that detailed the circumstances of the offence, including the circumstance that only she and the applicant were present at the scene, or the notes taken by the informant.

23. Within the material to which the trial Judge could permissibly have regard was the evidence of the informant before the Magistrate that the prosecution would be a contest between one person saying one thing, and the other person saying something diametrically opposed. However, the Magistrate was careful, during the course of the adjournment application before her, to stop defence counsel articulating the nature of those different views or the circumstances leading to the charges, saying 'I'll stop you there. I haven't even started to hear a contest yet.'

24. In hearing the judicial review application together with the appeal, it is understandable why his Honour set out all the details of the allegations in order to provide the background for the single judgment he gave disposing of both proceedings. He also appeared mindful that, as he said, 'the material upon which the appellant may be able to rely [in one] is narrower than the other'.[10] However, he was wrong to say, as he did, that:[11]

> The complaints in each proceeding are substantially the same and the issues raised in each of them are also substantially the same.

25. The complaints were not the same, nor were the issues raised the same. Distinct forms of relief were sought in the two proceedings. The question of whether *certiorari* was available to quash the order refusing the adjournment stood to be considered in the light of the historical purpose for which that form of relief was granted. As the High Court said recently in *Kirk v Industrial Court (NSW)*, 'the availability of *certiorari* is confined for the stated purpose of not providing a "discretionary general appeal for error of law".'[12] While in Victoria that confinement does not extend to preclude examination of the reasons of an inferior court, given the statutory extension of the 'record' under s10 of the *Administrative Law Act*, it remains the case that an application for *certiorari* is not the same as a general appeal for error of law, most importantly, because it falls to be determined on the basis of different material. An application for *certiorari* does not invite a scouring of all the evidence before the inferior court to determine whether the proper inferences were drawn from it or whether an item of evidence was overlooked.

26. Moreover, not only did his Honour fail to confine himself to the 'record', he failed to confine himself to the material before the Magistrate on the adjournment application. His conclusion that the Magistrate erred by failing to consider that the refusal to adjourn would lead to the dismissal of the charges was dependent upon his finding that Ms Venner was the only witness whose evidence would be adduced in support of the prosecution which could not proceed in her absence. This was not something known to the Magistrate at the time she refused to adjourn. Although it was clear that Ms Venner was the 'principal witness', it was not known that no other witness would be called. One of the charges was for assault and one was for the use of indecent language in a public place. The particular circumstances in which those offences allegedly occurred were described in detail in Ms Venner's statement but this was not before the Magistrate at the time of the adjournment application and the Magistrate was careful not to receive 'evidence from the Bar table' as to the alleged circumstances of the offences.

27. Furthermore, and as mentioned above, at the time the adjournment application was refused the Magistrate did not know whether the prosecutor would seek to rely upon a statement of Ms Venner's, nor did she know if reasonable notice had been given to the applicant, nor if any statement proffered satisfied any one of the conditions that would permit it to be received as an exception to the rule against hearsay. In those circumstances, it was not open for the trial Judge to conclude that the Magistrate fell into error by failing to weigh the consequence that the refusal of the adjournment would have the effect of denying the informant the opportunity to present his case. This was not a consequence known to the Magistrate on the material before her on the adjournment application.

28. It follows that the trial Judge considered material which was well beyond the ambit of the record, however defined. Indeed, the error he made – of considering material not before the Magistrate on the adjournment application – would still have been an error had the challenge to the refusal to adjourn been brought by way of an appeal (if an appeal had been available). However, because the proceeding was an application for *certiorari*, this should have alerted the trial Judge to the need to be particularly careful in identifying precisely to what material reference could be made in determining whether the Magistrate had committed an error of law. This he failed to do.

29. It might be argued, in support of his Honour's reasons in the paragraph extracted above,[13] that he intended to convey no more than that the Magistrate fell into error in not considering what the consequences of a refusal of an adjournment might be. Before refusing the adjournment, the Magistrate should have considered, but did not, whether the refusal might mean that the charges were dismissed. However, this is not what his Honour said. He described the error clearly in terms that made reference to the statement of Ms Venner as though the existence of it was known to the Magistrate and as though she also had knowledge of its inadmissibility. This represented a failure by the trial Judge to distinguish between the two proceedings or the material on which they could be decided.

30. However, with respect to the challenge to the finding of fact by the trial Judge referred to above,[14] I consider that it was open for the trial Judge to find on the material before the Magistrate on the adjournment application that Ms Venner was unable to give oral evidence on the scheduled day of the hearing because of unexpected surgery a few days before, given the sworn evidence of the informant, his evidence being referred to in general terms in the Magistrate's reasons, to the effect that, on the day on which the contested hearing was due to be heard, Ms Venner was extremely groggy.

31. I would grant leave to appeal from his Honour's order granting *certiorari* and allow the appeal.

32. Turning to the question of the admissibility of Ms Venner's statement under the *Evidence Act* and the appeal before the trial Judge, his Honour allowed the appeal on the ground that the Magistrate had erred in concluding that reliance on s5 was an abuse of process and in treating the form of the notice as insufficient. He also considered that she was wrong in finding that there had been no reasonable notice given.[15]

33. The requirement for reasonable notice is provided for by s67 of the *Evidence Act* which reads:

> (1) Sections 63(2), 64(2) and 65(2), (3) and (8) do not apply to evidence adduced by a party unless that party has given reasonable notice in writing to each other party of the party's intention to adduce the evidence. ...
>
> (3) The notice must state—
> (a) the particular provisions of this Division on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence; and
> (b) ...
>
> (4) Despite subsection (1), if notice has not been given, the court may, on the application of a party, direct that one or more of those subsections is to apply despite the party's failure to give notice.
>
> (5) The direction—
> (a) is subject to such conditions (if any) as the court thinks fit; and
> (b) in particular, may provide that, in relation to specified evidence, the subsection or subsections concerned apply with such modifications as the court specifies.

34. His Honour considered that what constitutes reasonable notice is something that must depend on all the circumstances of the case and that here notice of an intention to rely upon a written statement was given to the accused's legal representative promptly, as soon as the unavailability of the witness became known.[16] Furthermore, it is clear from the sequence of events before the Magistrate that there would have been no need for reliance upon Ms Venner's statement had the adjournment been granted to a date when she was available to be called as a witness. The prosecutor thus gave notice in writing at the first opportunity on which it became relevant to do so, namely, when the adjournment was refused. In those circumstances, it was not open to the Magistrate to conclude that the notice was not served in reasonable time.

35. The submissions on the deficiencies on the form of the notice focused upon that part of the notice which specified that s65 of the *Evidence Act* was relied upon but failed to stipulate which particular sub-section was relevant. Section 65 permits the admission into evidence of a previous representation if the person who made the representation 'is not available to give evidence about an asserted fact'.

36. The notice provided by the prosecutor stated: 'It is intended to rely on the *Evidence Act* 2008, s65(2)(a) or (b) or (c) or (d), s65(3)(a) or (b) or s65(8)(a) or (b)'. Some of the sub-sections were clearly not applicable.

37. Section 65 reads:

> (1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.
> (2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation—
> (a) was made under a duty to make that representation or to make representations of that kind; or
> (b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication; or
> (c) was made in circumstances that make it highly probable that the representation is reliable; or
> (d) was—
> (i) against the interests of the person who made it at the time it was made; and
> (ii) made in circumstances that make it likely that the representation is reliable. ...
> (3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the accused in the proceeding to which this section is being applied—
> (a) cross-examined the person who made the representation about it; or
> (b) had a reasonable opportunity to cross-examine the person who made the representation about it.
> ...
> (8) The hearsay rule does not apply to—
> (a) evidence of a previous representation adduced by an accused if the evidence is given by a person who saw, heard or otherwise perceived the representation being made; or
> (b) a document tendered as evidence by an accused so far as it contains a previous representation, or another representation to which it is reasonably necessary to refer in order to understand the representation.

38. The trial Judge found that although some of the provisions may not have sustained the application, there was asserted the provisions on which reliance was placed. He found the Magistrate's conclusion to the contrary not to be sustainable.

39. It was argued on the appeal that the broad reference to a range of sub-sections was not a statement of the particular provisions on which the prosecution intended to rely. It was, rather, a statement of almost every provision on which the prosecution might conceivably rely, although most of them were clearly inapplicable (s65(2)(a) or (d)(i), or 65(3)(a) or (b)), especially those that apply to statements adduced by an accused (s 65(8) (a) or (b)). The applicant argued that none of the sub-sections applied and that, in particular, the exception founded upon s65(2)(b) should be read to reflect only the common law *res gestae* exception to the hearsay rule which, it was submitted, would preclude reliance upon it by the DPP in the circumstances of the case.[17] Further, it was submitted, his Honour's analysis leaves s67(1) and 67(3)(a) with no function to perform.

40. The respondent argued that no prejudice flowed to the defence merely because some of the provisions relied upon may not have sustained the application. What mattered is that at least some of the provisions identified (s65(2)(b), and perhaps s65(2)(c)) could, at least arguably, be relied upon, in the circumstances of the case. This would not deny the function of s67(1) or s67(3)(a) as there was compliance with both sections, given that reasonable notice was given which did specify the particular provisions relied upon (amongst others), whether or not that reliance might ultimately prove to be justified.

41. The applicant is correct in his submission that most of the sub-sections of s65 were inapplicable in the circumstances of the case. However, while it is to be expected that the Crown, when giving notice of an intention to adduce hearsay evidence, will identify with some precision the particular provisions sought to be relied upon, there was here no prejudice which flowed to the applicant by the failure to do so. What ultimately matters is whether the conditions under any of the relevant sub-sections relied can be made out. It may be that an analogy could be drawn with the principle that a decision made by an administrative decision-maker purporting to be done under one statutory power which is not available may nevertheless be valid if supported under another statutory power, so long as any pre-conditions to the exercise of that power are satisfied.[18] Whether or not that is so, just as the failure to serve a notice under 67 may not be fatal to the

application by the Crown to utilise s65 of the *Evidence Act*, in the circumstances of a case,[19] in my opinion, so too the failure of the notice here to stipulate the sub-sections relied upon was not fatal to the application by the prosecutor to utilise s65 of that Act.

42. The trial Judge also found that the Magistrate was in error in reaching the conclusion that the application for the admission of the statement was an abuse of process. Amongst the errors committed by the Magistrate was the erroneous conclusion that what was meant by 'not available' was not defined in the legislation when it is so defined, in the 'Dictionary' section at the back of the *Evidence Act*. It is defined in a manner that includes where 'the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability'.[20] The trial Judge found that the Magistrate failed to consider whether that condition was satisfied, and her failure to do so contributed to her conclusions about abuse. Had she been alert to the relevant definition she may have considered that a policy objective of s65 was to provide for evidence to be adduced in the circumstances before her, if the statutory pre-conditions were satisfied on the facts. It was necessary for the statutory definition of a person's availability, upon which s65 depends, to have been considered before determining whether or not reliance on s65 in the circumstances of the case was an abuse. I agree that the failure of the Magistrate to consider the statutory definition of 'not available', and the consequent failure to determine whether that definition was satisfied in the circumstances of the case, was an error of law.

43. The applicant also sought to argue that in the circumstances of the case the conditions of s65(2)(b) were not in fact satisfied. I agree with the trial Judge that this issue remains to be determined before the Magistrates' Court upon the matter being remitted.

44. I would grant leave to appeal from the orders of Pagone J allowing the appeal from the refusal by the Magistrate to admit Ms Venner's statement under s65 of the *Evidence Act*, and dismiss the appeal.

45. The matter should be remitted to the Magistrates' Court for further hearing.

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[1] *DPP v Sajanesh Easwaralingam* [2010] VSC 437.
[2] Ibid.
[3] Ibid. [22]. In proposing to remit the matter to the Magistrates' Court his Honour rejected a submission of the DPP that the remittal be to a differently constituted court: [20] – [21]. This was not challenged on appeal. The orders of the trial Judge made 1 October 2010 did not include an order for remittal.
[4] The orders of Pagone J appeared not to have been authenticated before the applications for leave, and the instanter appeals, were heard. In the circumstances, an order should be made granting leave for the appeals to be heard in the absence of authenticated orders, pursuant to Order 60 rule 01(1) of the *Supreme Court (General Civil Procedure Rules)* 2005.
[5] Ibid [11].
[6] Ibid [11] (emphasis added).
[7] *Returned Services League of Australia (Vic) Inc v Liquor Licensing Commission* [1999] VSCA 37; [1999] 2 VR 203; 15 VAR 96; *Kuek v Victoria Legal Aid* [2001] VSCA 80; (2001) 3 VR 289, 292.
[8] [1995] HCA 58; (1995) 184 CLR 163, 181; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359. See also the discussion of *Craig* in *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 567-8, 575-8.
[9] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 181; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[10] *DPP v Sajanesh Easwaralingham* [2010] VSC 437, [1].
[11] Ibid [1].
[12] [2010] HCA 1; (2010) 239 CLR 531, 577; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437, citing *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 181; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[13] In paragraph 19.
[14] In paragraph 13(2).
[15] His Honour considered that the question of reasonable notice had not been raised before the Magistrate. This was disputed at the hearing of the appeal from the trial Judge because counsel for the applicant had said to the Magistrate he had 'been caught on the hop'. In any event, his Honour found error in the Magistrate's reasons on the issue.
[16] [2010] VSC 437, [18].
[17] *Williams v R* [2000] FCA 1868; (2000) 119 A Crim R 490, 502.
[18] *Lockwood v The Commonwealth* [1954] HCA 31; (1954) 90 CLR 177, 184; [1954] ALR 625; *Brown v West* [1990] HCA 7; (1990) 169 CLR 195, 203; 91 ALR 197; (1990) 64 ALJR 204; *Johns v Australian Securities Commission* [1993] HCA 56; (1993) 178 CLR 408, 426, 469; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR

467; 116 ALR 567; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* [1997] HCA 38; (1997) 190 CLR 513, 618; (1997) 147 ALR 42; (1997) 71 ALJR 1346; (1997) 13 Leg Rep 22; *Eastman v DPP (ACT)* [2003] HCA 28; (2003) 214 CLR 318, 362; 198 ALR 1; 77 ALJR 1122; (2003) 24 Leg Rep 8; *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* [2003] NSWCA 297; (2003) 58 NSWLR 631, 638; (2003) 128 LGERA 419.
[19] *R v Darmody* [2010] VSCA 41, [50]-[51]; (2010) 25 VR 209.
[20] Dictionary, Part 2, clause 4(1)(g) (inserted as from 1 January 2010 by s52(b) of Act No. 69 of 2009 (*Statute Law Amendment (Evidence Consequential Provisions) Act* 2009).

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