17/09; [2009] VSC 267

SUPREME COURT OF VICTORIA

UREN v NEALE

J Forrest J

27, 28 May, 26 June 2009 — (2009) 53 MVR 57; (2010) 196 A Crim R 415

MOTOR TRAFFIC – DRINK/DRIVING – REFUSE BREATH TEST – REFUSE TO PROVIDE BLOOD SAMPLE – REFUSE TO REMAIN AT POLICE STATION FOR PURPOSE OF BLOOD SAMPLE – REQUIREMENTS – NO NECESSITY FOR APPROVED INSTRUMENT – DRIVER UNDERSTOOD NATURE OF REQUIREMENT TO ALLOW A MEDICAL PRACTITIONER TO TAKE A BLOOD SAMPLE – DRIVER NOT TOLD THAT A 3-HOUR TIME LIMIT APPLIED – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR – STATUTORY CONSTRUCTION – DISTINCTION BETWEEN SUBSTANTIVE/PROCEDURAL LAW – FILING OF CHARGES BY POLICE OUT OF TIME – WHETHER A SUBSTANTIVE OR PROCEDURAL QUESTION – MAGISTRATE REFUSED TO STRIKE OUT CHARGES – WHETHER MAGISTRATE IN ERROR – CHARGES WENT TO CONTEST MENTION – REQUIREMENT FOR PRE-HEARING DISCLOSURE – STATEMENTS OF POLICE WITNESSES NOT PIVOTAL TO THE HEARING NOT DISCLOSED TO DEFENDANT PRIOR TO HEARING – APPLICATION BY DEFENDANT FOR AN ADJOURNMENT – APPLICATION REFUSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 SS49(1)(e), 55(2), 55(9A); *MAGISTRATES' COURT ACT* 1989, S30; *INTERPRETATION OF LEGISLATION ACT* 1984 S14(2).

N. a police officer, intercepted U. whilst driving his motor vehicle. After undergoing a preliminary breath test, U. was conveyed to the police station to undergo a breathalyser test. At the station U. was either unable or deliberately refused to provide a breath sample for analysis by the breath analysing instrument. He was then asked by N. to remain at the police station to await the arrival of a medical practitioner to take a blood sample. U. refused and left the police station.

Subsequently U. was charged with offences under the *Road Safety Act* 1986 ('Act') namely, refusing to undergo a breath test (s49(1)(e)), refusing to allow a blood sample to be taken (s49(1)(e)) and refusing a remain at the police station for the purpose of a blood test (s49(1)(e)). The charges were signed by N. on 23 May and filed with the Magistrates' Court on 5 June, that is, outside the seven-day period allowed by s30(2)(a) of the *Magistrates' Court Act* 1989 ('MCA'). The charges were before the Mention Court on three occasions and a trial fixed for hearing. At the hearing, U. applied for an adjournment because statements of two of the police witnesses had not been served on U. The Magistrate refused this application and after hearing evidence found the charges proved. Upon appeal—

HELD: Appeal dismissed in respect of two charges. Appeal upheld in respect of one charge.

1. The question whether the Magistrate should have struck out the charges on the ground that they were filed outside the period allowed required a consideration of whether the provisions of the MCA as to filing of charges are procedural or substantive.

2. The distinction between statutory provisions which are characterised as either substantive or procedural commonly arises in two contexts. One is for the purpose of conflict of laws considerations in determining the application of "foreign" law by characterising such law or laws as substantive (in which case the "foreign" law is to be applied by the forum court) or procedural (in which case the law of the forum applies). The other purpose of the distinction (and the necessary characterisation of the provision) is in determining the retrospective effect of a piece of legislation upon a particular set of facts or events occurring prior to the enactment of the legislation. The primary rule is that absent clear intention to the contrary a statute is *prima facie* to be construed as not attaching new legal consequences to facts or events which occurred before its commencement.

3. The starting point is to examine the words of the MCA and the context in which they appear. Whilst it is not conclusive, the section falls within a part of the MCA described as "procedure". Section 30(3) imposes an obligation upon the Court to strike out the charge if not filed within the seven days of the issue. The filing within seven days forms part of an administrative scheme that has been established under the MCA empowering the "on the spot" issue of summonses by police amongst other prescribed persons.

4. There is nothing in the scheme of the MCA which indicates that the legislature intended to provide a substantive right to a person charged with an offence in which the s30 process was utilized. Its purpose is to provide a procedure or process for a different method of filing a summons. The purpose of the seven day time limit between issue and filing and the necessity for striking out the charge was to ensure that once charges were laid then the documentation needed to be filed

promptly in the relevant Magistrates' Court Registry, as the new procedure required the police officer (or other prescribed person) to choose the venue and the date of hearing. In those circumstances it is understandable that for court management purposes the registry of the relevant Magistrates' Court should be armed with the charge and summons at an early date and time. The entitlement given to a defendant under s30(3) also points to the provision being procedural rather than substantive. It does not spring up once the seven days has expired. The section speaks of an obligation upon a court once evidence substantiates the failure to comply with s30(2). S30(3) does no more than provide a mandatory stipulation in respect of the filing of process. It is directed to an administrative task of the filing of the summons and it regulates the mode of the proceeding. It did not give U. a substantive right; at best it gave him a procedural entitlement to raise the issue before the Magistrate and to seek that the matter be struck out. Accordingly, the Magistrate was not in error in rejecting the argument advanced by U.

5. In relation to the question of whether the Magistrate should have adjourned the proceeding, no identifiable prejudice was demonstrated. The key witness was N. and U. had a copy of her statement. The corroborator simply confirmed N's evidence. Two other police officers were not pivotal to the proceeding. The Magistrate was correct in dismissing the application and in categorising the application for documents as a fishing expedition.

6. In relation to the issue whether it was necessary for the prosecution to prove that the breathalyser was an approved instrument, case law has decided that it is not necessary. Further, having regard to the amendment of the Act in 2004, it appears that Parliament was intending to remove the need to establish as an element of an offence under s49(1)(e) of the Act proof of the presence of an approved instrument.

***Lisiecki v Grigg* (1990) 10 MVR 336; and**

***MacDonald v The County Court of Victoria* [2004] VSC 202; (2004) 41 MVR 183, followed.**

7. In relation to the requests made by N. for U. to allow a medical practitioner to take a blood sample, N. told U. that she required U. to allow a medical practitioner to take a sample of blood for analysis and when U. was asked to remain for that purpose, he said 'No'. In those circumstances the question was whether the requirement was made sufficiently clear to U., in conformity with the law, so that U. would know what was being required of him and why.

8. When one looks at the whole of the evidence and the context in which the initial statement was made by N. it is clear beyond argument that U. must have understood that he was being required to provide a blood sample. The provision of a blood sample was the next logical step well known to most members of the community. The words uttered by N., in the light of the aborted breath test, must have alerted U. to that fact that the next step was for the police to seek a blood sample, and further that this was the requirement being made of him. Common sense would have told him this as well. His initial answer was given on the basis that he understood that there was a requirement that he provide a blood sample and accordingly, he knew that he was required to take a blood sample and he refused.

9. In relation to the requirement that he remain at the police station, U. was told that he was required to remain for his blood to be taken and if he refused he would be charged. U. was not told that he was required to remain at the police station for three hours after the driving. It was incumbent upon the prosecution to prove at least in a basic sense that the terms of the requirement were communicated to U. Critical to this is that three hours "after the driving" was the maximum period for which he could be detained. N's requirement was not "near enough" to be anywhere approximating "good enough". This is particularly so when one takes into account the context. The request was made at approximately 1.15 am at the Frankston Police Station. When the medical practitioner might arrive, if at all, was "open-ended" to use the Magistrate's words, whereas the section was not. U. was entitled to know what was required of him. What he was not told was the most basic proposition required by the section, namely that he did not have to stay at the station once the three hour period after the subject driving had expired. To establish the offence, it was necessary to prove the requirement. The refusal can only become relevant provided that the requirement has been properly stated, at least so that the driver knows his or her basic obligations. This was not done and therefore an essential element of the offence was not made out.

***Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503, applied.**

J FORREST J:

Introduction

1. At 12.25am on 23 May 2007 in Beach Street, Frankston, Mr Bruce Uren, the appellant, was apprehended by the respondent, Acting Sergeant Edwina Neale, and a fellow officer, Senior Constable Gerhardt Kaschke. As a result of their observations of his driving, he was required to undertake a preliminary breath test and was then taken to the Frankston Police Station to undergo a breathalyser test.

2. At the station he was either unable to or deliberately refused to provide a breath sample for analysis using a breathalyser. He was then asked by Ms Neale whether he would remain at the police station to await the arrival of a medical practitioner to take a blood sample. He refused and left the station.

3. He was, on 23 May 2007, charged on summons with breaches of the *Road Safety Act* (Vic) 1986, including three charges that related to his alleged refusal to provide a breath test or a sample of his blood.[1]

4. Ultimately, the hearing of the charges came on before a Magistrate in October and November 2008 at the Frankston Magistrates' Court and a number of defences (which may be described as technical by some and by others as simply requiring strict compliance by the prosecution with the law) were taken on his behalf. Four police officers gave evidence. Mr Uren's daughter, who had collected him from the police station, gave evidence. Mr Uren stood mute.

5. The Magistrate convicted Mr Uren on each of the charges, his licence was cancelled and he was disqualified from driving for two years and fined a total of $1500.

6. On this appeal, a number of discrete issues (all of which were argued before the Magistrate and rejected) are raised by Mr Uren, who asserts that the Magistrate erred in law[2] in finding each of the three charges, the subject of the appeal, proved.

The charges

7. The charges relevant to this appeal[3] laid against Mr Uren can be summarised as follows:

(a) Refusing to undergo a breath test contrary to s49(1)(e) of the *Road Safety Act* ("RSA") – Charge two.

(b) Refusing to allow a blood sample to be taken contrary to s49(1)(e) of the RSA – Charge one.

(c) Refusing to remain at the Frankston Police Station for the purpose of a blood test contrary to s49(1)(e) of the RSA – Charge four.

The issues on the appeal

8. Mr G Hardy, who appeared for Mr Uren both before the Magistrate and before me, relied upon four asserted errors of law on the part of the Magistrate in the hearing of the charges against his client, Mr Uren.

9. First, that the Magistrate should have struck out the charges as the filing of the relevant charge and summons with the Magistrates' Court was outside the seven day period allowed by s30(2)(a) of the *Magistrates' Court Act* ("MCA"). This, as will be seen, requires a consideration of whether these provisions are procedural or substantive. If found to be substantive, then it was said that the Magistrate was subject to a mandatory obligation to strike out the charges; if the provisions are procedural, a subsequent amendment to the section meant that the Magistrate had a discretion in relation to the striking out of the charges which he refused to exercise. There was no challenge by Mr Uren to his exercise of the discretion, rather the issue is whether there was any power to exercise it.

10. Secondly, that the Magistrate should have granted an adjournment to Mr Uren as a result of a request, said to have been made pursuant to cl 1A of Schedule 2 of the MCA. It was asserted that the prosecution should have provided copies of statements or the substance of the evidence to be given by each of the officers who gave evidence at the hearing, whereas only two statements were provided. This failure, so it was argued, necessitated the granting of an adjournment so that statements could be supplied by the prosecution. The failure to grant the adjournment was said to constitute an error of law.

11. Thirdly, that it was a necessary element of each of the charges that the prosecution establish that the breathalyser which Mr Uren had been asked to exhale into was proved to be a defined instrument as provided for by s3 of the RSA. It was contended on behalf of Mr Uren that the evidence did not establish that it was such an instrument.

12. Finally, that the requests made by Ms Neale of Mr Uren as to the taking of a blood sample and that he remain at the police station and await the arrival of a medical practitioner did not

comply with the requirements of s55(9A) of the RSA and therefore charges one and four should have been dismissed.

The factual background

13. Ms Neale was on patrol with Mr Kaschke in the early hours of 3 May 2007. She observed Mr Uren's vehicle pull into a petrol station, without an indicator being displayed. She saw him get out of the vehicle and stagger, and concluded that he was drunk.[4]

14. She carried out a preliminary breath test using a prescribed device[5] and then asked Mr Uren to accompany her to the Frankston Police Station. He agreed and was taken by officers to the interview room at the station. At the station, she interviewed him using a proforma document upon which she recorded in handwriting his answers.[6] When asked whether he suffered from any medical condition or physical disability, Mr Uren replied "Possibly, because I don't sleep very well". He described the medical condition as being one of "lack of sleep, hard work, pressure".

15. Ms Neale gave the following evidence in relation to the events surrounding the attempted taking of a breath test at about 1.05am:[7]

> "Q: Yes?
> A: I said, 'I now require you to take a breath test in accordance with s55 of the *Road Safety Act*'.
> Q: About what time was this?
> A: The first breath test was at 1.05, so it was just prior to that.
> Q: What did he say in response to that question?
> A: He didn't say anything, I had explained to him very clearly prior to putting that demand on him on how the breath test would be conducted and what was expected of him. I then handed him the hose and the straw from the breath test machine expecting him to conduct the breath test in a manner that I've explained to him that would be necessary. What he did at that point. The hose and the straw and the breath test machine expecting him to conduct the breath test in a manner that I have explained to him that it would be necessary. What he did at that point was he took the hose from my hand, he started to – he put it to his mouth. He attempted to blow into it in a fashion. He then put his thumb over the top of the hose - - -
> Q: Just slow down please?
> A: Put his thumb over the top of the hose. He waved it around in the air and at one stage he moved the hose at the point where I thought he was going to actually dislodge the breath testing machine off the bench that it was on.
> Q: Can you give a demonstration to the court if you can of exactly what he did with regards to the first test?
> A: Well he had the hose in his hand and he sort of put it to his mouth but he put his thumb over the top of it and then he sort of waved it around a bit and then he just reached at it and went to pull it off and I had to actually catch the hose on the machine so that he didn't you know - - -"

16. She then said as follows in relation to the taking of the sample:[8]

> A: I'm sure he understood what I was asking of him but I don't think he – he wanted to comply. He was totally uncooperative. He just didn't want to comply with it."

17. At about 1.16am Ms Neale then made a second attempt at obtaining a breath sample from Mr Uren. Her evidence was as follows:[9]

> "Q: Can you remember what you said to him?
> A: I'm looking at my notes. I can't remember exactly what my wording was. As I read it off the pro forma document. 'I now require you to furnish a further sample of your breath for analysis pursuant to s55(2)(a) of the *Road Safety Act* 1986'.
> Q: About what time was this?
> A: The second test was at 1.16 so it was just prior to that.
> Q: What did he do following the – your request to furnish a sample?
> A: Well again in the meantime, before I put the second demand on him I explained very, very clearly to him what had gone wrong on the first test and I described to him what was required for the second test. That he needed to put his mouth on to the instrument and not to break the breath. He – evidentiary breath machine requires one long continuous breath. If you stop in the middle of it, it won't continue to - - -
> Q: Was that explained to him?
> A: It was explained to him very, very clearly. Considering he had already failed the first one, I

made it very, very obvious how the second one had to proceed.
Q: Having explained your requirements to him, what did the defendant do?
A: He did start to blow into it and then stopped and then waved it around in the air again.
Q: Can you demonstrate to the court what he did please?
A: He started off in the correct manner. He put it in his mouth and started to blow it and then he stopped blowing into it. From memory he sucked back air on to it and then took it out of his mouth and waved it around again."

In cross-examination, Ms Neale was asked:[10]

> "Was the second instruction the same?---Similar. The first instruction was I showed him the straw and the approved breathalysing instrument and I explained to him he must place the straw in his mouth and furnish one continuous sample of breath. The second instruction was I explained the method required clearly to him and also the consequences to him if he didn't do it this time."

So by this time she had made two attempts to obtain breath samples using the instrument, both of which had been unsuccessful.

18. It is necessary to mention one other matter here. The breathalyser produces a printout which is referred to in the RSA variously as either a "printout"[11] or a "certificate".[12] If there is a sufficient breath sample, the analysis is disclosed on the printout. In this case there were two printouts which recorded "insufficient sample at 1.05" and "analysis interrupted at 1.16", both with the notation "test discontinued" and signed by Ms Neale. The printouts are headed "Victoria Police *Road Safety Act* 1986", then just beneath it "Drager Alcotest 7110". It also contains the serial number (presumably of the machine) as well as the sample number. The printouts were tendered in the course of the hearing.[13]

19. Ms Neale then made several requests of Mr Uren in relation to providing a blood sample. Mr Uren refused to remain at the police station.

20. He then went and sat in the foyer of the reception area of the police station and was collected by his daughter, Michelle Dracos, who drove him home.[14]

Procedural background

21. On 23 May 2007, Ms Neale signed a charge sheet, identified by the document as a "charge and summons" returnable on 6 August 2007 at the Magistrates' Court at Frankston. It was accepted that charges one, two and three were each signed by Ms Neale on charge sheets signed on this date. These charge sheets were filed on 5 June 2007 with the Magistrates' Court at Frankston.[15]

22. During the course of the hearing before me, an issue arose as to when charge four was issued and filed. This had also been adverted to before the Magistrate but had not been resolved. I permitted copies of the originals of the charge and summons to be produced.[16] The original of charge four contains a date stamp of 10 December 2007 of the Magistrates' Court, but the informant Ms Neale did not date that part of the charge sheet so as to indicate the date of issue[17]. An appeal on a question of law under s109 of the *Magistrates' Court Act* is not the place at which to determine particular dates of issue and filing, particularly where there is contest concerning those dates. This could have been resolved before the Magistrate but was not. In the result, the only matter of which I can be comfortably satisfied is that charge four was filed on 10 December 2007. I am unable to conclude when it was issued[18]. Ultimately, as will be seen, I do not think that anything turns on this.

23. I now return to the procedural history.

24. As the summons required the matter was first mentioned at the Frankston Magistrates' Court on 6 August 2007 and a second mention was then held on 12 September 2007. The MCA provides for "contest mention" at which time directions are given in relation to contested matters.[19] The first contest mention was heard on 12 September 2007 then again on 7 November 2007 which apparently resumed and concluded on 26 November 2007. The trial was then fixed on that occasion for 20 May 2008. On that date, on the application of the prosecution, the hearing of the charges was adjourned to 29 October 2008.[20]

The Hearing

25. At the commencement of the hearing on 29 October, the Magistrate declined to adjourn the hearing as had been requested by counsel for Mr Uren. Four witnesses were then called on behalf of the prosecution, namely, Ms Neale, Mr Kaschke (being the two officers who had intercepted Mr Uren's vehicle) and Sergeants Straughen and Pregnell. The evidence of Messrs Straughen and Pregnell went to Mr Uren's behaviour at the police station and his interaction with the police. Mr Straughen confirmed that Mr Uren had been asked to provide a blood sample and Mr Pregnell, who was the section sergeant on the night, also gave evidence concerning Mr Uren being asked to remain for the purpose of the blood test. Their evidence was not the subject of serious challenge and no evidence was called to contradict it.

26. The only witness called on behalf of Mr Uren, was his daughter Ms Dracos whose evidence was of peripheral, if any, relevance.

27. At the conclusion of the hearing on 29 October counsel for Mr Uren made a series of submissions. The Magistrate adjourned the hearing to 13 November to enable the prosecution to meet the submissions and in particular that part relating to compliance with s30(2)(a) of the MCA.

28. Further submissions were then heard by the Magistrate on 13 November.

29. The Magistrate found the charges proved but made no specific finding as to acceptance or otherwise of the evidence given by Ms Neale. Her evidence was corroborated by Mr Kaschke and there is nothing in the cross-examination of either witness that would indicate that their evidence was challenged to any real extent. Indeed, the only true challenge mounted to their evidence was on the basis that Mr Uren would give evidence contradicting what had been said by the officers on certain matters, in particular his ability to give an adequate breath sample. Mr Uren, of course, did not give evidence.

30. It was implicit, I think, in the findings of his Honour that he accepted the evidence given by these two police officers. I proceed on that basis.

31. His Honour then convicted Mr Uren on each of the charges as I have set out in [5] and [7].

The first issue: Should the summons and charges have been struck out? (Grounds four and five of the Notice of Appeal)

The statutory provisions

32. As at 23 May and 5 June 2007, s30 of the *Magistrates' Court Act* read as follows:

> "(1) Without limiting the power of a registrar in any way, in the case of a charge for a prescribed summary offence if the informant is a prescribed person he or she may, at the time of signing the charge-sheet, issue a summons to answer to the charge.
>
> (2) If a prescribed person issues a summons under sub-section (1)—
> (a) *he or she must file the charge and original summons with the appropriate registrar within 7 days after signing the charge-sheet; and*
> (b) the proceeding for the offence is commenced at the time the charge-sheet is signed, despite anything to the contrary in section 26(1).
>
> (3) Subject to subsection (4), if it appears to the Court that subsection (2)(a) has not been complied with in relation to a proceeding, *the Court must strike out the charge* and may, in addition, award costs against the informant." (Emphasis added).

33. Before I turn to the amendments to the section, which came into force on 1 July 2008, it is necessary to say something of the practical consequences of the failure to comply with the provisions of s30. Depending on timing, if the charge or charges had been struck out, then that was not necessarily the end of the matter. The charges could be issued again by a registrar of the Magistrates' Court pursuant to s26 of the MCA or, possibly, by another police officer as the informant pursuant to s30 of the MCA. The critical factor, however, is s26(4) of the MCA in relation to summary offences which provides that a charge can only be issued within twelve months of the commission of the offence. The practical effect, for the purpose of the hearing before the Magistrate,

was that if Mr Uren's application was made after that period and s30(3) as unamended, prevailed, then the charge could not be revived.

34. In 2008, sub-s(3) of s30 was altered to read as follows:

> "(3) Subject to subsection (4), if it appears to the Court that subsection (2)(a) has not been complied with in relation to a proceeding, *the Court may strike out the charge*." (Emphasis added).

35. Section 30 falls within Part 4 of the MCA under Division 2 – "Procedure". Section 26 provides for a criminal proceeding to be commenced by filing a charge with the Registrar. The charge is required to "be on a charge sheet signed by the informant". Section 30 empowers a member of the police force or a public official to "after signing a charge sheet, issue a summons to answer the charge"[21].

The Magistrate's decision

36. The Magistrate rejected the application made on behalf of Mr Uren on two bases. First, his Honour held that it did not create a substantive right but rather cast a positive obligation upon the Court and second, that in any event any entitlement under the section was procedural rather than substantive.[22]

Submissions

37. Mr Hardy contended that s30(3) of the MCA was substantive in nature and provided Mr Uren with a clear right to strike out the charge. He said that right crystallised on or about 1 June, after the seven day period to file the charge and summons. Once it was accepted that the provision was substantive it was the operative provision at the time of the hearing before the Magistrate then, in accordance with s14(2) of the *Interpretation of Legislation Act* (Vic) 1984 and the common law principles as set out in *Maxwell v Murphy*[23] the law should have been applied and the summons struck out.

38. Mr Ihle, who appeared for Ms Neale, contended that the provisions were clearly procedural and if that was the case then the Magistrate was correct in applying the MCA as amended on 1 July 2008. Next he contended that if there was a substantive right it only sprung up at the time that it was made to appear to the Court that there was non-compliance with s30(2). This, he said, meant that the right only came into existence on 29 October 2008, the date upon which the application was made at and which time the section provided for a discretion rather than a mandatory dismissal. Finally, he contended that if there was a substantive right then it was confined to the right to make an application to the Court and no more and therefore it was only that right that was preserved.

Analysis

39. The distinction between statutory provisions which are characterised as either substantive or procedural commonly arises in two contexts. One is for the purpose of conflict of laws considerations in determining the application of "foreign" law by characterising such law or laws as substantive (in which case the "foreign" law is to be applied by the forum court) or procedural (in which case the law of the forum applies).[24]

40. The other purpose of the distinction (and the necessary characterisation of the provision) is in determining the retrospective effect of a piece of legislation upon a particular set of facts or events occurring prior to the enactment of the legislation. The primary rule, and that relied upon by Mr Uren, is that absent clear intention to the contrary a statute is *prima facie* to be construed as not attaching new legal consequences to facts or events which occurred before its commencement[25].

41. This principle against retrospective effect is also set out in statutory form by s14(2)(e) of the *Interpretation of Legislation Act* (Vic) 1984 which provides:

> "Where an Act or a provision of an Act—
> (a) is repealed or amended; or
> (b) expires, lapses or otherwise ceases to have effect—
> the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears—

> (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision."

42. *John Pfeiffer v Rogerson*[26] was a conflict of laws case which involved analysis by the High Court of the distinction between matters of procedure and substance (in that case concerning statutory limitations on damages). The Court said:

> Secondly, matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance, not with issues of procedure. *Or to adopt the formulation put forward by Mason CJ in McKain, "rules which are directed to governing or regulating the mode or conduct of court proceedings" are procedural and all other provisions or rules are to be classified as substantive.* (Emphasis added)[27]

43. Last year in *Western Australia v Richards*,[28] Steytler P said of the distinction between substantive and procedural rights or entitlements:

> It is important to bear in mind, in this respect, that the common law presumption has been said not to 'call for a narrow conception of a right' because, if the position were otherwise, 'the essential justice of the rule would be eroded': (Mason, Murphy & Wilson JJ). In *Zhang* [2002] HCA 10; (2002) 210 CLR 491; (2002) 187 ALR 1; (2002) 76 ALJR 551 Kirby J preferred, in this context, to use the word 'entitlement' rather than 'right'. He said that the word 'indicates that what is involved may fall short of an immediately enforceable legal right in the strict sense'. Also, as he pointed out, 'accrued entitlement' was the phrase used by Lord Brightman in *Yew Bon Tew* [1982] UKPC 35; [1983] 1 AC 553; [1982] 3 All ER 833; [1982] 3 WLR 1026 to explain the broader types of "rights" protected against extinguishment by non-specific laws'. Kirby J went on to say [40] and [41]:
>
> > The House of Lords has accepted (*Plewa v Chief Adjudication Officer* [1995] 1 AC 249; [1994] 3 WLR 317 per Lord Woolf), as did the Privy Council earlier (*Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541; [1964] 1 All ER 457) that inchoate rights, obligations and liabilities are protected by statutory provisions such as s20 of the *Acts Interpretation Act* 1954 (Qld) which the appellants invoked here. The same is true of the common law principle that preceded, and moulds itself to, such statutory provisions.
> >
> > The foregoing is the approach that this Court adopted in *Maxwell v Murphy* ... Cases of this kind commonly provoke dissenting opinions ... This fact itself suggests that a non-mechanical approach to the protection of 'entitlements', rather than of strict 'rights', is at stake. *The search is one for the overall effect and operation of the legislation.* (Emphasis added, citations omitted).[29]

44. The characterisation of a right or entitlement as substantive does not, as Steytler P explained, necessarily depend upon that right being legally enforceable as at the time of the relevant event or directly thereafter. The right may be inchoate or contingent but nevertheless still substantive.[30] Accordingly, I accept that if the characterisation of Mr Uren's entitlement to strike out the summons was substantive then it is no answer, as Ms Neale contended, that the entitlement only becomes operative once it has "been made appear" (s30(3)) to the Magistrate that the filing was out of time. Nor does its description within the MCA as "procedural" necessarily determine the matter – what is important is the nature of the entitlement or right said to be held by the person affected.

45. Determining whether a provision is procedural or substantive turns both upon the words used in the statute and the context in which the relevant provision is found. As Campbell JA in *Garsec v Sultan of Brunei*[31] said:

> It is well recognised that it is impossible to draw a bright line, good for all purposes, between matters of substance and matters of procedure.

46. The starting point in the analysis of the MCA, and particularly s30(3) is then to examine the words of the statute and the context in which they appear. Whilst it is not conclusive I have already observed that the section falls within a part of the Act described as "procedure". Section 30(3) imposes an obligation upon the Court to strike out the charge if not <u>filed</u> within the seven days of the issue. The filing within seven days forms part of an administrative scheme that had been established under the MCA empowering the "on the spot" issue of summonses by police,[32] amongst other prescribed persons.

47. In *DPP v His Honour Judge Fricke*,[33] the Full Court said of the procedures which had been introduced in 1989 by the MCA.

> The new procedure empowers those police officers (among others) to perform a function that previously was performed by justices. There is no longer any need for the informant to make application to another person for the issue of a summons. *That procedure is perpetuated, although modified, in s28(1) but under s30(1) the informant may himself issue a summons at the time of signing the charge sheet. Both charge sheet and summons may then be handed to the defendant at the time of the initial contact – and hence, no doubt, the appellation in the Second Reading speech of 'on the spot' summonses.* [34] (My emphasis added)

48. The second reading speech of the Bill referred to by the Court was as follows:-

> The new on-the-spot summons permits police to issue a summons in relation to offences at the time of their original contact with the defendant. It is not necessary for the police to go before a justice to have the summons issued, nor to wait until a later date to have it served. This change will lead to considerable economies in the use of police resources.[35]

In the explanatory memorandum for the 1988 Bill, the following was said:

> Clause 30 provides that in relation to prescribed summary offences a prescribed informant may at the time of the signing of the charge sheet issue a summons to answer the charge. The charge and original summons must then be filed with the registrar within 7 days.[36]

49. In *DPP v Magistrates' Court and another*,[37] Williams J considered whether, once a charge had been struck out under s30(3) of the MCA, the Magistrates' Court had power to reinstate the charges. Her Honour said:

> In my view, the statutory scheme under s30 provides an alternative procedure for the issuing of a summons by a prescribed person to compel a defendant to answer a charge in relation to a prescribed summary offence. Section 30(2)(b) of the Act has the effect that a criminal proceeding commences in the Magistrates' Court upon the signing of the charge-sheet, once a summons has been issued under s30(1).
>
> The proceeding commences and continues, despite any non-compliance with s30(2)(a). *In other words, compliance with s30(2)(a) is not a condition precedent to the commencement of a proceeding, nor does a failure to comply with the sub-section constitute a breach of a condition subsequent automatically terminating, invalidating or nullifying the proceeding.* This view finds support in the terms of s30(3) which refers to the court's obligation to strike out a charge: " if it appears to the court that sub-section (2)(a) has not been complied with *in relation to a proceeding* " (emphasis added).[38]

50. *In DPP v Fodero*,[39] Bell J was required to consider whether s34(1)(b)(i) of the MCA required a "true copy" of the summons to be issued and filed. In his Honour's detailed analysis of the Act he described the scheme in the following terms:

> Read as a whole, I think the provisions were intended to allow the police to adopt a four-step procedure, in this order: (1) signing the charge-sheet under s30(1); (2) issuing the summons under s30(1); (3) serving a true copy of the summons as issued under s34(1)(b)(i) (or in the alternative way); and (4) filing the signed charge and issued summons under s30(2)(a). Under the procedure, serving a signed charge and issued summons as filed under s30(2)(a) is fully compliant with s34(1)(b)(i), but it is not necessary to achieve compliance.

The scheme does have a safeguard. As we have seen, if the magistrate sees that a charge and summons has not been filed within the seven days specified in s30(2)(a), it must be struck out under s30(3). But, with respect, I agree with Williams J's approach of interpreting the provisions as a scheme that centres on the capacity of police (among others) to commence summary criminal proceedings, subject to the safeguard.

51. In each of these decisions the "on the spot" provisions of s30 were regarded as setting up a new process for the issuing of a charge and summons. The provisions were treated as part of a new procedure for the issuing and filing of such documents.

52. The Full Court said in *Director of Public Prosecutions and Anor v His Honour Judge Fricke*[40] of s30(2)(a) and the task required of the informant:

> In its popular and usual sense, "filing" means no more than depositing the document at the relevant court office for the purpose of its use in court. Obviously in s30(2)(a), the word has the popular meaning.

53. This demonstrates the administrative nature of the task of filing the charge and summons – it is part of the process set out by the Parliament.

54. I can detect nothing in the scheme of the Act which indicates that the legislature intended to provide a substantive right to a person charged with an offence in which the s30 process was utilized. Its purpose is to provide a procedure or process for a different method of filing a summons. The purpose of the seven day time limit between issue and filing and the necessity for striking out the charge was, I think, to ensure that once charges were laid then the documentation needed to be filed promptly in the relevant Magistrates' Court Registry, as the new procedure required the police officer (or other prescribed person) to choose the venue and the date of hearing. In those circumstances it is understandable that for court management purposes the registry of the relevant Magistrates' Court should be armed with the charge and summons at an early date and time.

55. The entitlement given to a defendant under s30(3) also points to the provision being procedural rather than substantive. It does not spring up once the seven days has expired. The section speaks of an obligation upon a court once evidence substantiates the failure to comply with s30(2). This is to be contrasted with the type of entitlement which courts have in the past held to be substantive rather than procedural, e.g. in *J & P Lemming Holdings Pty Ltd v O'Keefe*[41] a right to interest at a specified rate; in *TAC v Lanson*[42] a right of indemnity pursuant to the Transport Accident Act as it stood at the time of the subject accident; in *VWA v Kenman Kandy Pty Ltd*[43] a right to seek indemnity from a third party in respect of an industrial accident which arose upon each payment of compensation to the worker.

56. I think that s30(3) did no more than provide a mandatory stipulation in respect of the filing of process. It is directed to an administrative task – the filing of the summons. It, to use Mason CJ's words in *McKain v Miller*, regulates the mode of the proceeding. It did not give Mr Uren a substantive right; at best it gave him a procedural entitlement to raise the issue before the Magistrate and to seek that the matter be struck out. That entitlement remained on foot until the amendment and then continued, in its amended version, subsequent to 1 July 2008.

57. Mr Uren's argument was correctly rejected by the Magistrate.

The second issue: Should the Magistrate have adjourned the hearing? (Grounds six and seven of the Notice of Appeal)

The statutory provision - Schedule 2 of the MCA

58. Schedule 2 of the MCA sets out procedures to be undertaken in summary criminal proceedings. If clause 1A of the Schedule which deals with pre-hearing disclosure is engaged, the provisions of the schedule require the informant (upon being given notice by the defendant) to provide the defendant with access to specified material (e.g. statements, exhibits, details of prior convictions etc): cl 1A(2).

The Magistrate's decision

59. The prosecution had supplied statements from Ms Neale and Mr Pregnell to Mr Uren's solicitors. Statements were not provided from Mr Kaschke or Mr Straughen. The solicitors had also sought access to the patrol duty return of the vehicle used in the apprehension of Mr Uren and of the equipment register relating to the preliminary breath test devices.

60. At the commencement of the hearing, after an application for adjournment by Mr Uren on the basis of non-compliance, the Magistrate held that there had been a number of contest mentions at which these matters had not been raised and that there was waiver in relation to any right to obtain the material. He regarded the exercise in relation to access the documentary material as "fishing".

Submissions

61. Counsel for Mr Uren submitted before me that there was an entitlement pursuant to cl 1A which enabled Mr Uren to obtain copies of the statements of witnesses or written summaries

of the substance of evidence likely to be given. It was said that once it was established that cl 1A had not been complied with, then the Magistrate should have adjourned the hearing.

Analysis

62. The Magistrate was clearly correct in rejecting the application for the adjournment. The proceeding had been on foot for nearly a year and a half. There had been three contest mentions[44] at which nothing had been said about access to statements (if they existed) or other material. Mr Uren had been served with a "brief of evidence" which, itself, was not the subject of any complaint about non-compliance at these hearings.

63. As I have said, the application by Mr Uren was made pursuant to cl 1A of the Second Schedule of the MCA which "does not apply if the informant serves a brief of evidence on the defendants in accordance with s37".[45] The correspondence between Mr Uren's solicitor and the prosecutor acknowledged that a brief of evidence had been served. It must have been served pursuant to s37 of the MCA. Although there were some errors – it incorrectly named Sergeant Straughen as Strauss and nominated Messrs Kaschke and "Strauss" as having made statements – the brief on its face had been served in accordance with s37. That is where the matter should end – cl 1A was not engaged.

64. If I am wrong about that point then the entitlement under cl 1A(2) is predicated upon the notice being given at least 10 days prior to the contest mention date. No such notice was given and the matter was, understandably, set down for a contested hearing. The failure to give notice meant that cl 1A(2) and its requirements were not enlivened and therefore the complaint of non-compliance was unjustified.

65. During the time between the contest mention and the hearing Mr Uren obtained material under the *Freedom of Information Act* (Vic) 1982 and was at liberty to issue any subpoenas, as he saw fit or was so advised, to the officers.

66. Although counsel raised questions of "unfairness" with the Magistrate no identifiable prejudice was demonstrated. It hardly could have been. The key witness to the case against him was Ms Neale and he had a copy of her statement. Mr Kaschke, the corroborator, simply confirmed Ms Neale's evidence. He gave evidence and was cross-examined. The two sergeants, Messrs Pregnell and Straughen, were not pivotal to the proceeding – Mr Straughen had in fact provided a statement and both were cross-examined.

67. The Magistrate was also correct in categorising the application for documents as a fishing expedition. It is beyond me as to how the equipment register for the PBT devices[46] could possibly be relevant to a prosecution brought in relation to Mr Uren's failure to provide a breath sample into a breathalyser (*not* a PBT) and his refusal to comply with requests in relation to providing a sample of his blood. Similarly, the patrol running sheet in which entries were made whilst the 2 officers (Neale and Kaschke) were on patrol does not leap up as being relevant given that the subject offences occurred at the police station subsequent to the apprehension of Mr Uren.

68. At no time during the hearing before me did counsel for Mr Uren identify with precision any true prejudice that arose to his client as a result of the refusal to grant the adjournment. He contended with some vigour that he was disadvantaged as he learnt during the course of cross-examination of Ms Neale that there had been discussion between some of the police officers of the evidence that may be given in court. This is the typical stuff of cross-examination in the Magistrates' Court. This fact would hardly have been included in any police statements or the provision of the substance of evidence as required by Cl 1A of the Second Schedule. In any event, nothing turned on it. There was no serious suggestion of collusion. The case turned on Ms Neale's evidence and her contemporaneous notes were tendered.

69. In my view the Magistrate was clearly correct in dismissing the application for an adjournment and regarding the documentary pursuit as a fishing exercise.

The third issue: Was it necessary for the prosecution to prove that the breathalyser was an approved instrument in establishing charges one, two and four – if so was there evidence adduced that it was an approved instrument? (Ground two of the Notice of Appeal)

The statutory provisions

70. Section 55(2) of the RSA relates to the provision of a sample of breath by a motorist. It is the basis for Charge two, and reads as follows:

> A member of the police force may require any person whom that member reasonably believes to have offended against section 49(1)(a) or (b) to furnish a sample of breath for analysis by a breath analysing instrument (instead of undergoing a preliminary breath test in accordance with section 53) and *for that purpose may further require the person to accompany a member of the police force to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and any further sample required to be furnished under subsection (2A)* and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.(emphasis added)

71. Section 55(9A) of the RSA relates to the provision of a blood sample by a motorist. It is the basis for Charges one and four and reads as follows:

> The person who required a sample of breath under subsection (1), (2), (2AA) or (2A) from a person *may require that person to allow a registered*[4] *medical practitioner or an approved health professional nominated by* the person requiring the sample to take from him or her a sample of that person's blood for analysis if it appears to him or her that—
> (a) that person is unable to furnish the required sample of breath on medical grounds or because of some physical disability; or
>
> (b) the breath analysing instrument is incapable of measuring in grams per 210 litres of exhaled air the concentration of alcohol present in any sample of breath furnished by that person for any reason whatsoever—
> and for that purpose *may further require that person* to accompany a member of the police force to a place where the sample is to be taken *and to remain there until the sample has been taken or until 3 hours after the driving*, being an occupant of or being in charge of the motor vehicle, *whichever is sooner.* (Emphasis added.)

72. Section 3 is also relevant to a resolution of this issue; it defines breath analysing instrument as follows:

> (a) the apparatus known as the Alcotest 7110 to which a plate is attached on which there is written, inscribed or impressed the numbers "3530791" whether with or without other expressions or abbreviations of expressions, commas, full stops, hyphens or other punctuation marks and whether or not all or any of the numbers are boxed in; or
>
> (b) apparatus of a type approved for the purposes of section 55 by the Minister by notice published in the *Government Gazette* or for the purposes of any corresponding previous enactment by the Governor in Council by notice published in the Government Gazette for ascertainment by analysis of a person's breath what concentration of alcohol is present in his or her breath;

73. Section 49(1)(e) provides that a person is guilty of an offence if he or she refuses to comply with a requirement made under s55(2) or (9A). Although I shall return to the scheme in a little more detail shortly it is important to note at this point that charges relating to the provision of a sample of breath in excess of the prescribed concentration of alcohol are dealt with under s49(1)(f).

The Magistrate's decision

74. The Magistrate ruled as follows:

> "On the question of there's no evidence that there's a breath analysing instrument, in my view the s58(2) satisfies that requirement and as I've said my view is that what that section talks about, sub-s 2 is it is a document purporting to be a certificate which would contain the prescribed particulars in the ordinary course of events, but the fact that it doesn't contain a reading is neither here nor there from the point of view of the certificate evidence in the instrument or the status of the instrument. So on that basis I'm in favour of the prosecution and against the argument that there's no evidence that there was a breath analysing instrument."[47]

Submissions

75. Counsel for Mr Uren contended that it was necessary, as an element of each of the three charges under s49(1)(e) to prove that the breathalyser into which Mr Uren was asked to furnish a

breath sample was a breath analysing instrument within the meaning of s3 of the RSA (whether the charge related to s55(2) or s55(9A).[48] He argued that the evidence did not establish beyond reasonable doubt that the breathalyser was an approved instrument.

76. Counsel for Ms Neale said that it was not essential to establish that the breathalyser was an approved instrument within the meaning of the RSA; he said that the elements of each of the three offences were confined to establishing a lawful request and a failure to comply with that request. Alternatively he submitted that if Mr Uren's submission as to the necessity to prove that the breathalyser was an approved instrument was accepted by the Court then there was a sufficient factual basis to establish that it was such an instrument in conformity with the provisions of the RSA.

Analysis: Charge two – the refuse breath test charge: s49(1)(e) and s55(2) of the RSA

77. Nineteen years ago counsel for Mr Uren, in *Lisiecki v Grigg*,[49] propounded an identical argument in relation to the application of s49(1)(e) and the need for the prosecution to establish that the relevant breathalyser was an approved instrument. A little surprisingly, counsel did not refer to this decision in either his written or oral submissions. Rather on this issue, he directed my attention primarily to a series of decisions concerned with s49(1)(f) culminating in *Impagnatiello v Campbell*.[50] The context in which those cases were decided needs to be understood. Each dealt with a detected breath analysis in excess of the statutory limit in which the reading *per se* is the very core of the charge under s49(1)(f). However, the question as to whether the prosecution needs to prove, in a refuse breath test prosecution under s49(1)(e), whether a breathalyser is an "approved instrument" raises a significantly different question – namely, identification of the elements of an offence relating to a refusal to give a sample of breath as opposed to an analysis of a sample of breath. In a s49(1)(e) case, it is the refusal of the defendant to comply with the lawful request (be it for a sample of breath or a blood test or to remain until a doctor arrives) that is the gist of the offence. This distinction was recognised by Marks J in *Lisiecki v Grigg*.

78. However, identification of the elements of a s49(1)(e) charge (or its equivalent) has caused a degree of judicial division in the past.[51]

79. In *Scott v Dunstone*,[52] Sholl J concluded, in relation to the application of s408A of the *Crimes Act* (Vic) 1958, (broadly similar in terms to s55(1) in combination with s49(1)(e) of the RSA) that a driver must be asked to furnish a sample of his breath for the stated purpose of analysis by an approved instrument and that such an instrument must be proved to have been present at the time of the requirement.[53]

80. There is support for this approach in *DPP v Foster*,[54] although a case involving an offence created by s49(1)(f), in which Winneke P said:

> "In other words, the section itself makes it plain, as I see it, that the power to make the latter requirement is to facilitate the purpose for which the power to make the primary requirement is given, which can only sensibly be exercised when the motorist is confronted with the machine."[55]

81. On the other hand, there is the line of authority, commencing with *Lisiecki v Grigg* and more recently in *MacDonald v The County Court of Victoria*,[56] in which judges of this Court have taken the view that it is not necessary to establish, as an element of the offence under s49(1)(e) that the breathalyser to be used in carrying out the putative analysis is an approved instrument. Rather, the constituent elements of the offence are a request in accordance with the terms of the Act and a refusal to comply.

82. In *Lisiecki v Grigg*, Marks J declined to follow the decision in *Scott v Dunstone*. His Honour held, in relation to s55(1), that it was not a necessary element of an offence under s49(1)(e) for it to be established that there was an approved instrument (in that case a breathalyser) present at the time of the requirement to furnish a sample of breath. His Honour acknowledged the "marked difference between a prosecution for refusal to furnish a sample of breath for analysis by an instrument and the prosecution based on what such an instrument displays"[57] and concluded: "Neither s55(1) nor any other provision of the Act requires proof of the presence of a breath analysing instrument to sustain a prosecution under s49(1)(e). In my opinion, neither common sense nor any principle of law requires it. Where evidence shows that a suspect refused point blank to provide

a sample of his breath no matter what the instrument, particularly in circumstances indicating that his refusal was motivated by fear of the result of compliance with such a requirement, a tribunal of fact is entitled to conclude that the elements of the offence have been established."[58]

83. Subsequently, in *MacDonald v The County Court of Victoria*,[59] in which the sample by breathalyser was sought under s55(1) of the RSA, Teague J analysed a raft of authorities in, as his Honour described it, "this much harrowed area".[60] His Honour concluded that the decision in *Lisiecki v Grigg* was binding upon the County Court judge who heard an appeal from a Magistrate. It is clear that his Honour regarded *Lisiecki v Grigg* as being correctly decided.[61]

84. As Bell J observed in *Shaw v Yarranova Pty Ltd*,[62] a trial judge is obliged to determine a case as it is presented to the Court, and particularly so where the case involves a question of statutory construction.[63] However, questions of comity play a part in determining issues which have previously been resolved by another judge at first instance. As observed by Burchett J in *La Macchia v Minister for Primary Industries and Energy*[64]:

> "The doctrine of *stare decisis* does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same court. Even a decision of a single justice of the High Court exercising original jurisdiction, while 'deserving of the closest and respectful consideration', does not make that demand upon a judge of this court: *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* [1988] FCA 127; (1988) 82 ALR 499. But the practice in England, and I think also in Australia, is that 'a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance [*scil* of coordinate jurisdiction] unless he is convinced that the judgment was wrong': *Halsbury*, 4th ed, vol 26, para 580. The word 'usually' indicates that the approach required is a flexible one, and the authorities illustrate that its application may be influenced, either towards or away from an acceptance of the earlier decision, by circumstances so various as to be difficult to comprehend within a single concise formulation of principle."

85. Given that two judges of this Court have specifically considered s49(1)(e) of the RSA in circumstances which involved determination of the necessity to prove that an approved instrument was present at the time of the request, I would need to be satisfied that those decisions were clearly wrong before departing from them. I am not so persuaded.

86. Indeed, there is a further matter that convinces me that I should apply what was said by Marks J in *Lisiecki v Grigg*. Section 49(1A)(c)(1) was introduced into the RSA in 2004.[65] It reads as follows:

> "A person may be convicted or found guilty of an offence under paragraph .... (e) of sub-section (1) even if—
> a breath analysing instrument was not available at the place or vehicle where the requirement was made at the time it was made."

87. It seems to me to follow logically that if the prosecution is not required to prove that an approved instrument is available at the police station, then it is not required to prove that the available breathalyser is an approved instrument. Parliament was, I think, clearly intending to remove, if it was necessary, the need to establish as an element of an offence under s49(1)(e) proof related to the presence of an approved instrument. To interpret the section in any other way would lead to an absurd result: in a prosecution under s49(1)(e) where a motorist refuses to provide a sample, the police would be better off not having a breathalyser present at the police station, rather than having one available for use.

88. I therefore conclude that it was not necessary for the prosecution to establish as an element of charge one that the breathalyser was an approved instrument.

89. If I am wrong in that conclusion, I am satisfied, nevertheless, that there was evidence before the Magistrate that entitled him to conclude that the breathalyser present and used by Ms Neale was an approved instrument.

90. Ms Neale, in cross-examination, (reproduced at [17]) said, in the context of asking him to provide a sample of breath, that she showed Mr Uren "the approved breathalysing instrument".[66]

91. Section 58(4) of the RSA provides that

> "Evidence by a person authorised to operate a breath analysing instrument under s55—
> (a) that an apparatus used by him or her on any occasion under that section was a breath analysing instrument within the meaning of this part ... is, in the absence of evidence to the contrary, proof of those facts."

Ms Neale swore that she was an authorised breath test operator and a certificate signed by the Deputy Commissioner (presumably of Police) authorising her to operate a breath analysing instrument was tendered in the course of the prosecution case.[67] Her authorisation was not challenged by counsel for Mr Uren.

92. Therefore, there was before the Magistrate evidence that the breathalyser was an approved instrument and, absent challenge (of which there was none), this evidence was capable of satisfying a requirement (if it existed) of proof of this matter.

93. Accordingly, I conclude that there was no error of law on the part of the Magistrate in regard to the question of proof of the approved instrument on charge one.

Analysis: Charges two and four - The blood sample charges: s49(1)(e) and s55(9A) of the RSA

94. The two charges under s 49(1)(e) relating to the provision of a blood sample under s 55(9A) do not, in my view, require proof that the breathalyser available at the station was an approved instrument within the meaning of s3 of the RSA.

95. The reasoning of Marks J in *Lisiecki v Grigg* is, in my view, persuasive:

> "The elements of the offence are to be found in the words of the statute. In this case they required proof of a requirement and of a refusal to comply with it. Evidence capable of satisfying such proof might vary from case to case."[68]

96. The terms of the section are set out at [71]. I think s55(9A) makes it necessary for the officer to form a relevant opinion, namely, that it appears that the instrument is incapable of measuring the concentration of alcohol present in the sample within the terms of the section. That is the first element. There was no issue about it being satisfied.

97. As I read the section, the next element is the requirement, to be made by the officer in accordance with the terms of the section. Finally, the prosecution must prove the refusal to comply on the part of the motorist, which is provided for by s49(1)(e).

98. I do not think that the offence requires the prosecution to prove that the breathalyser (which is not used or relied upon in any sense) is an approved instrument. The requirement for the provision of a blood sample is at a distinct and separate stage of the process unrelated to the provision of a breath sample other than the requirement to provide a blood sample is only triggered when a breath sample cannot be obtained. The accuracy of the breathalyser or its conformity to the statutory definition has nothing to do in a practical sense with the extraction of a blood sample. Nowhere in s55(9A) is there reference in terms to the "breath analysing instrument" (cf s55(2) of the RSA). It is, as I have said, a totally different means of proof of the relevant blood alcohol level of the driver to that involving the taking of a sample of breath. It would be altogether surprising that it was necessary for the prosecution to prove, in a case such as this, that a breathalyser, which has no practical relevance to the taking of a blood sample, was an approved instrument.

99. In summary I can find no suggestion in the terms of s55(9A) or by implication that the legislature intended in imposing an obligation upon a driver to provide a blood sample the need for it to be established that the breathalyser was an approved instrument.

100. If I am wrong in this conclusion, then for the reasons I have given in relation to charge one, there was evidence before his Honour, unchallenged, which led to the conclusion that the machine used was, indeed, an approved instrument.

101. I should add that I am not convinced that the Magistrate's reliance upon the provisions of s58(2) of the RSA was necessarily correct. However, it is not necessary, given my conclusion, to explore this matter further.

102. I conclude, therefore, that there was no error of law relating to the issue of proof that the breathalyser was an approved instrument in relation to charges two and four.

The final issue: Were the requests made by Ms Neale of Mr Uren in relation to the blood sample sufficient to prove charges one and four? (Grounds one and three of the Notice of Appeal)

103. Determination of the previous question does not resolve the fate of charges one and four as it was contended on behalf of Mr Uren that the form of the request made by Ms Neale in relation to both charges one and four did not satisfy the terms of s55(9A) which gave rise to both offences.

Factual background

104. Ms Neale gave evidence that she made the request in relation to the provision of the blood sample in the following terms:

> "You've now asked him to provide two samples of breath for analysis into a breath testing instrument. He hasn't complied with both of those requests. What has happened then?---I then naturally had to ask him for blood as he – after two failed breath tests.
> *What did you say?---I said 'It appears that you are unable or unwilling to provide a sample of breath. I now require you to allow a medical practitioner to take a sample of your blood for analysis pursuant to s55(9A) of the Road Safety Act 1986. Will you remain for the purpose of providing a sample of your blood'. He said 'No, do I have to?' I said, 'In the circumstances I require you to remain here for your blood to be taken. If you choose to leave and refuse, you will be charged with that offence and if convicted, you will lose your licence for two years. Will you remain?'* He said, 'No' and I served the two records of the breath samples on the defendant and I said, 'You will receive a summons to go to court'."[69] (Emphasis added).

105. Mr Straughen was present when Ms Neale made the request. He had apparently been alerted by "some ruckus". He observed Mr Uren "ranting and raving".[70] He could not recall the exact words used by Ms Neale, but in cross-examination said as follows:

> "A: He certainly made it clear that he did not wish to undertake or partake in a blood test, he wanted a solicitor.
> Q: I put it to you that he wasn't asked to provide a sample of blood at all?
> ---Sir, he definitely was."

106. It will be recalled that Mr Uren did not dispute Mr Straughen's version of events. Mr Straughen confirmed that that Ms Neale used a proforma statement in relation to the blood test and therefore her evidence provides the detail of what was actually said to Mr Uren. Although it is not entirely clear, I assume the Magistrate took the view that her evidence was to be accepted as she uttered the words and recorded the answers.

The statutory provisions

107. The relevant parts of s55(9A) are set out at [71].

The charges:

108. The relevant part of charge one read as follows:

> "He was further required to allow a medical practitioner, nominated by the person who required the sample of breath, to take from him a sample of blood for analysis, did refuse to allow such blood sample to be taken".

109. The relevant part of charge four read:

> "He was further required by a member of the police force to remain at that location, he did refuse to comply with such requirement to remain at that location prior to the blood sample being taken or three hours elapsing since the driving of a motor vehicle."

The Magistrate's decision

110. The Magistrate concluded as follows:

> "As for the argument that the request of the defendant was open-ended, my view is that the only importance of stating such things as times to the defendant in that context, it that he can exercise his right to leave if he is informed of that. But regardless of that he's, I suppose, taken to know the law and to know he can leave if he is of a mind to. He is in fact told that he is not obliged to stay in any event, because of an overall obligation which is to inform the defendant that he is not obliged to

> stay in any event. But the possession of that information would only provide him with the ability to leave at a certain time or a defence if there was any breach of the requirements in that respect."[71]

Submissions

111. On the appeal, counsel for Mr Uren contended that the Magistrate's conclusion as to the requirements of the section and the need for those requirements to be properly explained was wrong. He contended that in relation to both requirements in respect of charge one and four that Ms Neale had not adequately informed Mr Uren of what the law required of him. In particular, he said in respect of charge four that it was not enough to convey to his client that he had to remain until the medical practitioner arrived. Rather, he had to know the actual terms of the requirement both in terms of the provision of a sample and remaining at the police station. Importantly, he had not been told that he was only obliged to remain for the lesser of two times, namely, three hours after the driving or the arrival of the medical practitioner.

112. Counsel for Ms Neale contended that notwithstanding the failure to mention the period of three hours, decisions of this Court and the Court of Appeal demonstrated that what was required was that the substance of the requirement be imparted to or understood by the defendant. This, he said, had been done by Ms Neale.

Analysis

113. There was no issue on the appeal as to the issue of Ms Neale forming the relevant opinion as to Mr Uren's inability to provide a sample of breath. Indeed it would have been patently open to his Honour to have concluded given Ms Neale's unchallenged descriptions of Mr Uren's behaviour that he deliberately avoided providing a continuous sample.[72] Accordingly, the only live issues in terms of the essential ingredients, or elements, of the offences were that of the requirement and the refusal.[73]

114. Section 55(9A) permitted the person who has required the sample of breath, Ms Neale, to require Mr Uren to permit a blood sample to be taken by a medical practitioner or approved health professional where he was unable to furnish a required sample of breath. It was also open to the police to "further require" him to remain at the police station "until a sample has been taken or three hours after the driving ... whichever is sooner".

115. It was not contended on behalf of Mr Uren that s55(9A) could not give rise to separate charges, as reflected by charges one and four.[74] However, as demonstrated by the terms of the particular charges and the section itself, each part of the section has a particular requirement that needed to be imparted to Mr Uren. In the case of charge one it was whether he would allow a medical practitioner to take a sample of blood and in the case of charge four it was whether he would remain at the police station for the period of time stipulated by the sub-section.

116. Mr Uren was not asked by Ms Neale in terms whether he was prepared to provide a sample of blood which is the thrust of charge one. Rather, she made two statements and then posed a question. The first of these statements related to the failure to provide a sample of breath, the second to allowing a medical practitioner to take a blood sample and as to remaining at the police station. After his first refusal – "No do I have to" – he was again told that he was required to remain to which he replied "no".

117. There was no issue that Ms Neale had not told Mr Uren that there were two elements to the requirement to remain at the police station stipulated by s55(9A), namely:

> (a) three hours after the relevant driving; or
>
> (b) the arrival of the medical practitioner, or health professional, whichever was the *sooner*.

It was not suggested in argument how Mr Uren might have acquired knowledge of these obligations absent being told by Ms Neale.

118. In *Rankin v O'Brien*,[75] the defendant driver refused to accompany a police officer to a police station to undergo a breath test following a request that he do so. The argument in the case before the Magistrate and Southwell J turned upon the nature of the request. Southwell J said as follows of the requirement under the *Motor Car Act* (the predecessor to the *Road Safety*

Act):

> "This is a penal statute. The Court must beware of taking a 'near enough is good enough' approach. In that regard, see the observations of McInerney J in *Reddy v Ross* [1973] VR 462 at p469. *In a case such as this it is fundamental that the suspect be given sufficient information in the request to know what is required of him and why.* On the other hand the purpose of this legislation and the community's interest in its application must be considered. There may at times be a fine line to draw between the interests of the suspect and the interests of the community."[76] (Emphasis added.)

119. After considering the facts of that case his Honour concluded that the informant had given sufficient information to the driver to understand the requirement.

120. In *DPP v Foster* the Court of Appeal considered a prosecution for an offence under s49(1)(f), and the sufficiency of a request made in relation to furnishing a sample of breath. Ormiston JA said as follows:[77]

> "On the other hand, however, there is nothing either in para (f) s49(1) or in s55(1) which would compel a conclusion that a requirement under the latter sub-section must be expressed in precise or unvarying terms, *so long as the intent of the police officer and the obligation of the person required have been made clear.*" (Emphasis added.)

121. More recently in *Sanzaro v County Court of Victoria and anor*,[78] Nettle J was required to determine the sufficiency of a requirement in relation to a breath test under s55(1) of the RSA with the offence being said to have been created by s49(1)(e). In that case the defendant, having been intercepted, was told to wait at the rear of a booze bus while the police officer went inside the area. When the officer returned the defendant had decamped. It was argued that simply telling him to stay at the rear of the booze bus did not constitute a valid request within the meaning of s55(1).

122. His Honour upheld the findings of the County Court judge that the request was adequate. I take the law to be as stated by his Honour in the following terms:

> "The plaintiff is no doubt right that the existence of a requirement under s55 is an essential element of an offence under s49(1)(e) of failing to comply with a requirement under s55(1). It may also be accepted that it would not be open to infer the existence of such a requirement in the face of direct evidence that none was ever issued. But it is not necessary to use a particular form of words in order to constitute a valid requirement and it does not necessarily follow from the fact that a requirement is couched in the future simple tense, in the way in which Constable Sadler spoke to the plaintiff, that it is not a valid requirement. *As the judge rightly said, the test is whether the evidence as it stood was such as to prove that the plaintiff was given reasonably sufficient information to know what was required of him and why.* Consequently, a requirement need not take the form of a demand in imperative terms. A request in precatory or polite terms by a person clothed with apparent authority will ordinarily be sufficient. And indeed it is to be hoped, and in most cases may be expected, that a requirement will be made in terms of a polite request. In any event, whatever terms may or may not be used in any given case, *it will be enough that the intent of the police officer and the obligation of the person required to comply have been made clear.*" (Emphasis added).[79]

His Honour went on to say

> "... Of course I do not overlook that s49(1)(e) is a penal provision and therefore, as Southwell J put it in *Rankin v O'Brien*, that the Court must beware of taking a "near enough is good enough" approach. *But once it is understood that the terms in which a requirement is stated need not follow any precise formula of words, and that all that is required is that the driver be told sufficient to know what it is that is being required of him or her, I see no relevant problem.* Given that spoken words are an inherently imprecise means of communication, the effect of which depends as much upon the persons between whom and the context in which they are spoken as upon the words themselves, the question of whether what is spoken constitutes a requirement for the purposes of the section is necessarily a question of fact and degree. Such a question is to be decided upon the whole of the evidence, including such inferences, not inconsistent with the direct evidence, as it may be appropriate to draw." (Emphasis added.)[80]

123. I accept that the words used by Ms Neale did not make it as clear as one might have wished, that there were two separate and distinct requirements being made of Mr Uren, each of which may found a charge in the event of refusal. This was particularly so when Ms Neale only referred to the refusal to remain at the police station as founding a potential charge. Having said

that, the question is whether the requirements of each charge were made sufficiently clear, in conformity with the law, to Mr Uren so that he could know what was required of him and why.

124. In relation to charge one, when one looks at the whole of the evidence and the context in which the initial statement was made by Ms Neale I think it is clear, beyond argument, that Mr Uren must have understood that he was being required to provide a blood sample. He had done his best, the Magistrate appears to have concluded, to avoid giving a breath sample.[81] The provision of a blood sample was the next logical step well known to most members of the community. The words uttered by Ms Neale, in the light of the aborted breath test, must have alerted Mr Uren to that fact that the next step was for the police to seek a blood sample, and further that this was the requirement being made of him. Common sense would have told him this as well. His initial answer, I readily infer, (despite the conflated nature of Ms Neale's requirement), was given on the basis that he understood that there was a requirement that he provide a blood sample. In my view he knew that he was required to take a blood sample and he refused.

125. I turn now to charge four, the remain at the police station charge, and whether the words used by Ms Neale made it clear as to the obligation of Mr Uren of the terms of the requirement to remain at the police station. In my view, they did not. A common thread in the decisions in both *Foster* and *Sanzaro* was that in this day and age most members of the community understand the working of the breath analysis system and are aware of the manner in which breath tests are conducted, either in the form of a preliminary breath test or at what is described as an "evidentiary" breath test (s55(2)). As I have said, I think most members of the community are also aware of the further potential obligation to provide a blood sample whether at a hospital or police station. However, I doubt very much whether anyone, unless highly familiar with the provisions of the RSA, is aware of the temporal requirements as to remaining at "a place" for the taking of a blood sample. No doubt the sunset provision of three hours as a maximum period was inserted to ensure that what would otherwise be an unlawful detention was limited to a reasonable time. This maximum duration of the statutory requirement was not conveyed to Mr Uren.

126. In my view the Magistrate misinterpreted s55(9A) in relation to charge four. It was incumbent upon the prosecution to prove at least in a basic sense that the terms of the requirement were communicated to Mr Uren: critical to this is that three hours "after the driving" was the maximum period over by which he could be detained. In relation to charge four, Ms Neale's requirement was not "near enough" to be anywhere approximating "good enough" as Southwell J in *Rankin* said. This is particularly so when one takes into account the context. The request was made at approximately 1.15 am at the Frankston Police Station. When the medical practitioner might arrive, if at all, was "open-ended" to use the Magistrate's words, whereas the section was not. Mr Uren was entitled to know what was required of him. What he was not told was the most basic proposition required by the section, namely that he did not have to stay at the station once the three hour period after the subject driving had expired. He was not given reasonably sufficient information to know what was required of him – indeed, he could have been detained interminably on the basis of Constable Neale's requirement.

127. It may well be, as counsel for Ms Neale contended, that the voicing of such a requirement would have made no difference whatsoever to Mr Uren's actions. This is not to the point. Nor is the proposition advanced by the Magistrate as to the presumption that citizens should be aware of the law. That is not the law in this type of case. To establish the offence, it was necessary to prove the requirement.[82] The refusal can only become relevant provided that the requirement has been properly stated, at least so that the driver knows his or her basic obligations. This was not done and therefore an essential element of the offence was not made out.

128. I have therefore concluded that the Magistrate was in error in convicting Mr Uren on charge four and that the conviction on that charge should be quashed.

Conclusion

129. Mr Uren's appeal in respect of charges one and two should be dismissed. His appeal in respect of charge four is upheld and his conviction is quashed.

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[1] There is an issue about the date of issue of charge four which I will return to later.

[2] Under s109 of the *Magistrates' Court Act* (Vic) 1989 the appeal to this Court must be on a question of

law. See *Ericsson (Australia) Pty Ltd v Popovski* [2000] VSCA 52; (2000) 1 VR 260.
[3] Count 3 – the failure to give sufficient warning of the change of direction of the vehicle, is the subject of an appeal to the County Court.
[4] T18 – the transcript of the hearing before the Magistrate.
[5] Section 53 RSA.
[6] Exhibit BU4 to Mr Uren's affidavit.
[7] T29-30.
[8] T31.
[9] T32.
[10] T65.
[11] e.g. RSA s55 (14).
[12] e.g. RSA s55(4), s58(2).
[13] T31 Exhibit BU 6 to Mr Uren's affidavit.
[14] T93.
[15] Exhibit R1 on the appeal – stamped 5 June with the seal of the Magistrates' Court.
[16] Exhibit R1 on the appeal.
[17] Compare: charges 1, 2 and 3 all dated 23 May and stamped by the Magistrates' Court 5 June.
[18] I reject the submission on behalf of Ms Neale that the evidentiary onus was on Mr Uren on this issue. The only reason that this was a live issue was the failure of Ms Neale to place a date on the relevant charge sheet – as she should have.
[19] MCA. Schedule 2 cl3A.
[20] T130-131 of this appeal.
[21] S 30(1A) MCA defines public official.
[22] T 148 -149.
[23] [1957] HCA 7; (1957) 96 CLR 261, 267; [1957] ALR 231; (1957) 31 ALJR 143.
[24] See *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; (2000) 203 CLR 503; (2000) 172 ALR 625; (2000) 74 ALJR 1109; [2000] Aust Torts Reports 63,826; *Regie Nationale des Usines Renault v Zhang* [2002] HCA 10; (2002) 210 CLR 491; (2002) 187 ALR 1; (2002) 76 ALJR 551; *Neilson v Overseas Projects Corp of Victoria Limited* [2005] HCA 54; (2005) 223 CLR 331; 221 ALR 213; (2005) 79 ALJR 1736.
[25] *Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261, 267; [1957] ALR 231; (1957) 31 ALJR 143; *Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188, 194; 34 ALJR 316; *Interpretation of Legislation Act,* s14(2).
[26] [2000] HCA 36; (2000) 203 CLR 503; (2000) 172 ALR 625; (2000) 74 ALJR 1109; [2000] Aust Torts Reports 63,826.
[27] Ibid [99]. See also *McKain v Miller* [1991] HCA 56; (1991) 174 CLR 1; (1991) 104 ALR 257; 66 ALJR 186; [1991] Aust Torts Reports 81-146 in which Mason CJ was in the minority.
[28] [2008] WASCA 134; (2008) 37 WAR 229; (2008) 185 A Crim R 413.
[29] Ibid [37].
[30] *Carr v Finance Corporation of Australia* [1982] HCA 43; (1982) 150 CLR 139, 151; 42 ALR 29; (1982) 56 ALJR 730; *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 560-562; [1982] 3 All ER 833; [1982] 3 WLR 1026. *Crimmins v SIFC* [1999] HCA 59; (1999) 200 CLR 1 [8], [15], [135] [142]; (1999) 167 ALR 1; (1999) 74 ALJR 1; [1999] Aust Torts Reports 81-532; (1999) 19 Leg Rep 2 in relation to contingent liabilities.
[31] [2008] NSWCA 211; (2008) 250 ALR 682 [109].
[32] See s30(1)(a) MCA and *DPP v His Honour Judge Fricke* [1993] VicRp 27; [1993] 1 VR 369, 371.
[33] [1993] VicRp 27; [1993] 1 VR 369.
[34] Ibid 371.
[35] Victoria, *Parliamentary Debates*, Legislative Assembly, 13 October 1987, 1434 (Frank Wilkes, Minister for Housing) of the Bill for the *Magistrates' Court Act* 1988 – which became the MCA in 1989.
[36] Explanatory memorandum for the *Bill for the Magistrates' Court Act* 1988.
[37] [2006] VSC 257; 162 A Crim R 564.
[38] [2006] VSC 257 [37], [38]; 162 A Crim R 564.
[39] [2008] VSC 46; [2008] 18 VR 606, [16], [17]; (2008) 181 A Crim R 228.
[40] [1993] VicRp 27; [1993] 1 VR 369.
[41] [1984] VicRp 79; [1984] VR 1005.
[42] [2001] VSCA 84; (2001) 3 VR 250; (2001) 33 MVR 507.
[43] [2002] VSCA 190; (2002) 6 VR 666.
[44] Provided for by cl 3a of Schedule 2.
[45] Schedule 2 cl 1A(1) of the MCA.
[46] T13.
[47] T148. Note: Not revised by the Magistrate.
[48] I will use the term "approved instrument" to describe a breathalyser or breath analysing instrument that complies with the description in s3 of the RSA.
[49] (1990) 10 MVR 336.
[50] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.
[51] Section 408A *Crimes Act* 1958 (Vic).
[52] [1963] VicRp 77; [1963] VR 579.
[53] [1963] VicRp 77; [1963] VR 579, 582.
[54] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.

[55] [1999] 2 VR 645 [48]. This passage was clearly *obiter dicta* in the context of s49(1)(e). See the observations of Teague J in *MacDonald v County Court of Victoria* [2004] VSC 202; (2004) 41 MVR 183 [21].
[56] [2004] VSC 202; (2004) 41 MVR 183
[57] (1990) 10 MVR 336, 340.
[58] Ibid 341, but see also the editor's note at 342.
[59] [2004] VSC 202; (2004) 41 MVR 183.
[60] Ibid [9].
[61] Ibid [25].
[62] [2006] VSC 45.
[63] Ibid [66].
[64] (1992) 110 ALR 201, 204, applied by Bell J in *Shaw v Yarranova Pty Ltd* [2006] VSC 45.
[65] *Transport Legislation (Miscellaneous Amendments) Act* 2004, s34.
[66] T65.
[67] T17 – 18.
[68] (1990) 10 MVR 336, 339.
[69] T 34.
[70] T68.
[71] T149.
[72] See [14]-[17] above.
[73] See *DPP Reference No. 2 of 2001* [2001] VSCA 114; (2001) 4 VR 55 [19], [37]; (2001) 122 A Crim R 251; (2001) 34 MVR 164; *DPP v Foster* [1998] VSCA 145; [1999] 2 VR 643, [75]; (1999) 104 A Crim R 426; (1999) 29 MVR 365; *Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279 [11].
[74] See *DPP v Greelish* (2002) VR 220, [25].
[75] [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503.
[76] Ibid, 72.
[77] [1999] VSCA 73; [1999] 2 VR 643 [75]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[78] [2004] VSC 48; (2004) 42 MVR 279.
[79] Ibid [11].
[80] Ibid [13]. See also *DPP v Greelish* [2002] VSCA 49; (2002) 4 VR 220, 225; (2002) 128 A Crim R 144; (2002) 35 MVR 466; *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365; *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[81] T150.
[82] *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 [75]; (1999) 104 A Crim R 426; (1999) 29 MVR 365. *Sanzaro v County Court of Victoria* [2004] VSC 48; (2004) 42 MVR 279 [11].

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