32/07; [2007] VSC 230

SUPREME COURT OF VICTORIA

BURRIDGE v TONKIN

Williams J

13 June, 3 July 2007

MOTOR TRAFFIC – DRINK/DRIVING – APPLICATION TO RE-OPEN PROSECUTION CASE – AT COMMENCEMENT OF HEARING, WITNESSES INCLUDING OPERATOR ORDERED FROM THE COURT – APPLICATION MADE BY DEFENCE FOR PERMISSION TO SERVE A S58(2) NOTICE OUT OF TIME – NOTICE SPECIFIED THAT ISSUE WAS TAKEN WITH FACT THAT DEFENDANT WAS GIVEN A CERTIFICATE OF ANALYSIS AS SOON AS PRACTICABLE AFTER SAMPLE OF BREATH ANALYSED – APPLICATION GRANTED – OPERATOR SUBSEQUENTLY GAVE EVIDENCE – FAILURE BY OPERATOR TO STATE HIS AUTHORITY TO OPERATE INSTRUMENT – TEST TO BE APPLIED ON APPLICATION TO RE-OPEN – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986 S49(1)(f), 58(2).

At the commencement of the hearing of a drink/driving charge, all witnesses were ordered from the court including the breath analysing instrument operator. Defence counsel then applied to the magistrate for an abridgment of time to serve a notice on the informant pursuant to s58(2) of the *Road Safety Act* 1986 ('Act'). The magistrate granted the application on the basis that there was no prejudice identified by the prosecutor. In giving evidence the operator failed to state that he was authorised by the Chief Commissioner of Police to operate breath analysing instruments or produce a certificate signed by the Chief Commissioner to that effect. After the defence case had been closed, defence counsel submitted that the prosecution had failed to prove the authorisation of the operator in the manner allowed for under s58(3) of the Act. The prosecutor indicated the making of an application to re-open the prosecution case to call evidence of authorisation. Subsequently, the magistrate granted the application and evidence was led of the operator's authorisation. The charge was later found proved and the defendant convicted. Upon appeal—

HELD: Appeal dismissed.

1. A magistrate has a discretion in relation to an application to re-open the prosecution case. However, the prosecution may call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen.

***R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495, applied.**

2. In the present case, the magistrate clearly noted and applied the principles established by authority and did not take into account any irrelevant considerations in determining that exceptional circumstances existed justifying the exercise of his discretion to permit the re-opening of the prosecution case. Nor was the magistrate's decision either unreasonable or unjust.

3. Factors which were relevant to the magistrate's determination were the late service of the s58(2) notice and the fact that the operator was absent from the court when the application for abridgment of time of service of the notice was allowed. Also, it was relevant that the notice did not on its face draw the prosecutor's attention to the challenge to the operator's authority and further that it was difficult to point to any resultant unfairness to the defendant in granting the application.

WILLIAMS J:

The appeal

1. The appellant ("Mr Burridge") appeals against the order of the Magistrates' Court at Ararat on 29 May 2006, convicting him of an offence under s49(1)(f) of the *Road Safety Act* 1986 ("the Act"). The conviction followed the Magistrate being satisfied that Mr Burridge had furnished a breath sample which indicated that the concentration of alcohol in his breath was .228%, within three hours of driving a motor car on 12 November 2005 in Ararat.

2. Mr Burridge was also convicted of the offence of careless driving under s65 of the Act in relation to that driving. Mr Burridge's licence was cancelled and he was disqualified from driving in Victoria for twenty-two months from 12 November 2005. The learned Magistrate also imposed a fine of $700 and ordered Mr Burridge to pay $59.80 by way of statutory costs as part of an aggregate order in relation to the s49(1)(f) and the careless driving offences.

3. Mr Burridge does not appeal against his conviction for careless driving.

The question of law

4. Mr Burridge set out three questions of law in his notice of appeal filed on 28 June 2006. He did not pursue questions 2 and 3 in the notice and the appeal proceeded on the basis that the first and only question for the Court was in the following terms:

> Did the learned magistrate err in law in permitting the prosecution to reopen the prosecution case and call further evidence in circumstances where the defence had already closed its case?

It was common ground that the Court had the power to permit the amendment of the question of law.

The Act

5. It is convenient here to refer to relevant provisions of the Act.

6. Mr Burridge was convicted of an offence under s49(1)(f) of the Act which was, at the relevant time, in the following terms:

> **49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
>
> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle...

7. At the hearing before the Magistrate the prosecutor tendered a certificate which the respondent ("the informant") stated in evidence was produced by the breath analysing instrument used to analyse a sample of Mr Burridge's breath at 8.03 pm on 12 November 2005.

8. Section 55(3) of the Act required that the relevant breath analysing instrument be operated by a person authorised to do so by the Chief Commissioner of Police.

9. Section 58 of the Act provided for the evidentiary use of the certificate produced by the instrument operated by the authorised operator. Section 58(1) allowed a certificate produced by the breath analysing instrument to be tendered as evidence at a hearing for an offence under s49(1)(f). Section 58(2) provided for that certificate to be conclusive evidence of a number of facts unless a notice is given within a certain time by an accused person.

10. Section 58 was in the following terms:

> **58. Evidentiary provisions—breath tests**
> (1) If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the breath of any person at any time or if a result of a breath analysis is relevant— ...
> (c) on a hearing for an offence against section 49(1) of this Act ...
> then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the breath of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under section 55 and the concentration of alcohol so indicated is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the breath of that person at the time his or her breath is analysed by the instrument.
>
> (2) A document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the breath of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceedings referred to in sub-section (1) and, subject to sub-section (2E), is conclusive proof of—

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

(2A) A notice under sub-section (2) must specify any fact or matter with which issue is taken and indicate the nature of any expert evidence which the accused person intends to have adduced at the hearing.

(2B) The accused person may not, except with the leave of the court, introduce expert evidence at the hearing if the nature of that evidence was not indicated in a notice under sub-section (2). ...

(2D) A certificate referred to in sub-section (2) remains admissible in evidence even if the accused person gives a notice under that sub-section but, in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section. ...

(3) In any proceeding under this Act—
(a) the statement of any person that on a particular date he or she was authorised by the Chief Commissioner of Police under section 55 to operate breath analysing instruments; or
(b) a certificate purporting to be signed by the Chief Commissioner of Police that a person named in it is authorised by the Chief Commissioner under section 55 to operate breath analysing instruments—
is admissible in evidence and, in the absence of evidence to the contrary, is proof of the authority of that person.

The proceeding in the Magistrates' Court

11. I will now turn to the evidence as to significant events and matters which occurred during the period leading up to the Magistrates' Court hearing and in the course of that hearing.

12. A copy of the transcript of the proceeding before the Magistrate is in evidence, as exhibit "SB1" to Mr Burridge's affidavit sworn on 27 May 2007. That transcript shows that, very shortly after the proceeding commenced on the morning of 7 April 2006, there was an order made for the exclusion of witnesses from the court. It is common ground that, at that point, the operator of the breath analysis instrument on 12 November 2005, Senior Constable Greenwood, ("the operator") left the court in compliance with the order. The operator was also the corroborator in relation to the evidence of the informant.

13. Immediately after the exclusion order was pronounced, counsel for Mr Burridge raised, as a preliminary matter, the fact that he had not served a notice under s58(2), notwithstanding discussions between himself and the prosecutor in the week leading up to the hearing. Counsel for Mr Burridge told the court that he had indicated to the prosecutor that the defence wished to serve such a notice and had been informed that the prosecutor would not consent to the abridgment of time required under s58(2). Counsel submitted that there would be no prejudice to the prosecution if the abridgment of time for service were to be allowed.

14. The transcript records counsel for Mr Burridge's submission and the prosecutor's response as follows:

30. Counsel: In my submission there is no prejudice to the prosecution if the court grants the abridgment of time to allow the notice to be served today. Indeed the prosecution has a copy of the notice today. It is not a notice that involves any expert evidence. It is just a notice that allows me to cross-examine the operator.

31. Pros: Your Honour, in relation to that, the Act is quite clear and specific in relation to time frames.

> It is to put us on notice what the requirements are. Simply being handed a document this morning is the first I have been told about what exactly is in issue. Other discussions have not revealed anything Your Honour. It is my submission that the prosecution is entitled to rely on the conclusiveness of the certificate and that should be presented today.

The order under s58(2)

15. The Magistrate noted that the operator was at the court that day. His Honour went on to allow an abridgement of the period for service of the notice under s58(2), on the basis that there was no prejudice identified by the prosecutor.

The notice

16. The notice was in the following terms:

> IN THE MAGISTRATES COURT OF VICTORIA AT ARARAT
> BETWEEN
> SENIOR CONSTABLE DEAN TONKIN Informant
> And
> SAMUEL GEORGE BURRIDGE Defendant
> NOTICE UNDER S.58(2) ROAD SAFETY ACT 1986
>
> The defendant gives notice that she (sic) requires the person who allegedly gave the certificate of analysis to the defendant to be called as a witness in these proceedings.
>
> The defendant takes issue with the alleged fact that a certificate of analysis produced by the breath analysing instrument was given to the defendant as soon as practicable after the sample of breath was analysed.
> 15 February 2006

The informant's evidence

17. After the order allowing an abridgment of the period for service of the notice was made under s58(2), the informant was called to give evidence.

18. The informant stated that, on the evening of 12 November 2005, he had been performing mobile traffic duties in the Ararat town area with the operator. He said that he had observed what might be described as Mr Burridge's erratic driving on a damp roadway. The officers had stopped Mr Burridge and questioned him about his driving and his consumption of alcohol that day. Mr Burridge had admitted having consumed alcohol that day. The informant had then administered a preliminary breath test, after which Mr Burridge had attended at the Ararat police station for the breath test carried out on the breath analysis instrument. The police questioning had continued at the station and Mr Burridge had told the informant that he had consumed alcohol both at home and, earlier that day, at Dunkeld where he had attended the races.

19. The informant is then recorded in the transcript as having given evidence as follows:

> 71. ...
> Inf: I said: "I then introduced the defendant to Senior Constable Greenwood, an authorised breath analysis instrument operator. ..."

20. The informant was cross-examined by counsel for Mr Burridge about Mr Burridge's driving and his co-operativeness. Counsel for Mr Burridge described Mr Greenwood as "the operator" when asking questions as to whether the breath analysis machine had been set up before the informant arrived at the station.

21. The informant's description of the operator as an authorised person was not challenged under cross-examination.

The operator's evidence

22. The operator was then called. He described his observations of Mr Burridge's driving, the administration of the preliminary breath test and Mr Burridge's attendance at the police station.

23. The operator stated that he was present whilst the informant and Mr Burridge had a conversation at the station in what he called the "breath analysing room". The transcript records

the prosecutor as then stating:

> 204. Pros: Now, just for the information of this witness, this witness was out of court when the s58(2) notice was authorized to have been served so Your Honour the witness was under the impression that the certificate would have been served [sic] by this stage. In relation to the events he will need to continue his conversation, that's all.

24. The prosecutor went on to question the operator about his conversation with Mr Burridge concerning the alcohol he had consumed that day. The operator gave evidence about requiring Mr Burridge to undergo the breath test and his own operation of the breath analysing instrument.

25. The transcript records the prosecutor's examination as to the operator's authority to operate the instrument:

> 225. Pros: In relation to the instrument itself, who operated the device?
>
> 226. operator I did.
>
> 227. Pros: Are you authorised to operate the device?
>
> 228. operator: Yes I am.

26. There was no challenge to this evidence as to the authorisation of the operator under cross-examination.

The re-opening of the prosecution case

27. The defence only called Mr Burridge's father. He gave evidence about his son's character and his own shocked reaction to news of the charges. He gave no evidence about the events of the evening of 12 November 2005.

28. After the defence case had been closed, counsel for Mr Burridge submitted that the prosecution had failed to prove the authorisation of the operator of the breath analysis instrument in the manner allowed for under s58(3) of the Act. Counsel for Mr Burridge submitted that it needed to be stated clearly that the operator was authorised by the Chief Commissioner. The proof of the authorisation was deficient in that regard.

29. The prosecutor responded that there was sufficient proof of the requisite authorisation and pointed out that there had been no challenge to the evidence of authorisation. He foreshadowed an application by the prosecution for the re-opening of the case. There was some discussion and counsel for Mr Burridge indicated his opposition to the re-opening.

30. On 7 April 2006, the Magistrate adjourned the case part–heard for some six weeks to 29 May 2006. His Honour heard submissions on 29 May 2006, having previously been provided by the parties with lists of authorities relevant to the issue of the reopening of the prosecution case.

The Magistrate's decision

31. The learned Magistrate decided to exercise his discretion to allow the prosecution to re-open its case.

32. In giving his reasons, his Honour first stated:

> I appreciate that to exercise my discretion to [grant the prosecution's application for leave to re-open its case] there must be some exceptional or special circumstances that justify such leave. Such as --- not reasonably foreseeable circumstances.

33. He went on to refer to the decision of *Blair v County Court of Victoria*[1] and the High Court's decision in *R v Chin*[2].

34. The Magistrate referred to the conduct of the case. He noted that the prosecutor had indicated to counsel for Mr Burridge, in the week before the hearing, that he would not accept an abridgment of the period for service of the s58(2) notice. His Honour also referred to the prosecutor having been unaware of the matters challenged in the notice, until the morning of the hearing.

He recognised that, if the notice had not been served, the certificate from the breath analysis instrument would have constituted conclusive proof of the matters referred to in sub-section 58(2) and the authority of the operator would not have been in issue. He further noted that the authority of the operator was not challenged expressly in the notice.

35. The Magistrate stated that he regarded it as most unfortunate that the question of the s58(2) notice had not been raised before the operator left the court "so that [the operator] could officially know the status of the certificate and the extent to which he would be required to give his evidence". His Honour also said that, at the time the operator left the court, the operator was unaware that the ruling allowing the notice to be given would be made. He had commenced his evidence, without being aware that the certificate did not constitute a conclusive proof. The Magistrate expressed the view that the argument relating to the provisions of the s58 notice should have been conducted in the operator's presence.

36. Ultimately, his Honour stated his conclusion in this way:

> Taken together, the late service of the s58 notice, the witness entering the witness box unaware of my ruling on the s58 notice and the content of the s58 notice are all factors that in my view justify granting leave to the prosecution to re-open its case.

37. His Honour expressed the view that proof of the operator's authorisation was not merely a "formal" matter.

The re-opening of the case in the Magistrates' Court

38. Counsel for Mr Burridge did not then seek an adjournment. Notwithstanding the way in which his submission was recorded in the transcript, it was common ground that he informed the court that the defence would not be "in any better position" if an adjournment was granted.

39. The prosecution case was then re-opened. The operator gave evidence that he had been authorised under s55(3) of the Act, when operating the breath analysis instrument which produced the certificate on 12 November 2005. The operator produced an authority, dated 15 May 2000, which was tendered in evidence. Under cross-examination, he said that the document had been at the police station which was "just outside the door of the court" when he gave his oral evidence of authorisation on 7 April 2006. He agreed that it would have taken about one minute for him to have gone to fetch the authority from the station that day. The operator was asked whether a copy of the authority had been included in the police brief to the prosecutor. He responded that he did not know and had not seen the brief.

40. The Magistrate then asked counsel for Mr Burridge whether he wanted to seek leave to call further evidence. Counsel responded that he had considered calling a witness to tender the police brief, but had decided not to do so because he did not wish to waste the court's time by trying to mount a "recent invention" argument which was unlikely to be accepted.

41. The Magistrate invited further submissions, but none were forthcoming. The prosecutor did, however, state that he conceded that there had been no copy of the authority on the police brief.

42. The learned Magistrate then stated that he found the charges under s65 and s49(1)(f) of the Act proven and sentenced Mr Burridge, after hearing a plea by counsel on his behalf.

The Magistrate's discretion

43. It was common ground that the Magistrate had a discretion in relation to the re-opening of the prosecution case. The relevant principles were agreed to have been stated by the High Court in *R v Chin* where Gibbs CJ and Wilson J said:

> The principles that govern the exercise of the discretion of a trial judge to call evidence after the close of the case for the defence have been discussed in this Court in *Shaw v R* [1952] HCA 18; (1952) 85 CLR 365, at pp378-380, 383-384; [1952] ALR 257; *Killick v R* [1981] HCA 63; (1981) 147 CLR 565, at pp568-571, 575-576; 37 ALR 407; 56 ALJR 35 and *Lawrence v R* (1981) 38 ALR 1 at pp3, 7, 22-23. The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. Although the trial judge has a discretion to allow the prosecution to call

> further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen. The principle applies where the prosecution seeks to call evidence to rebut matters raised for the first time by the defence; if the rebutting evidence was itself relevant to prove the prosecution case (unless, perhaps, it was no more than marginally, minimally or doubtfully relevant: *R v Levy and Tait* (1966) 50 Cr App R 198 at p202) and the need to give it could have been foreseen it will, generally speaking, be rejected.
>
> The principle would not prevent the prosecution from giving in reply evidence directed to an issue the proof of which did not lie on the prosecution, such as insanity, or from rebutting evidence of the accused's good character, provided that the prosecution had not anticipated the raising of an issue of this kind and led evidence with regard to it, for the prosecution must not split its case on any issue. Also, it has been held that evidence may be given in reply to prove some purely formal matter the proof of which was overlooked in chief.[3]

44. Dawson J added the following:

> If the evidence was only of marginal, minimal or doubtful relevance to the prosecution case, it may properly be admitted to rebut the defence case. There is also authority for the proposition that the prosecution may be permitted to reopen its case to repair omissions of a formal, technical or non-contentious nature: see Archbold's *Criminal Pleading, Evidence and Practice*, 41st ed. (1982), par. 4-414, and the cases there cited.

45. His Honour went on to explain that:

> The relevant principle is essentially one of fairness. The accused is entitled to know the case which he has to meet so that he may have adequate opportunity to determine what questions he may wish to ask in cross-examination, what evidence, if any, he may wish to call and what objections, if any, he may wish to raise in the case against him. Ordinarily the depositions upon which he is committed for trial will provide him with this information in advance and if the prosecution intends to call additional evidence it is required to give notice of its intention to do so. The whole procedure would be undermined if the prosecution were permitted, save in exceptional circumstances, to call evidence in support of its case after the close of the case for the defence. [4]

Appeal from a discretionary decision

46. The question of law in the appeal challenges the exercise of the learned Magistrate's discretion.

47. The principles governing appeals from the exercise of a discretion are common ground. Ashley J summarised them in *Kurzbock v Hallett*.[5] His Honour stated that the bases for a successful challenge to the exercise of a judicial discretion are set out in *House v The King*;[6] *Australian Coal and Shale Employees' Federation v Commonwealth*;[7] *McKenna v McKenna*[8] and *Norbis v Norbis*.[9] Ashley J went on as follows:

> In short, there is a strong presumption in favour of the correctness of the decision. To succeed in a challenge it must be shown that the judge or magistrate acted on a wrong principle, took account of some extraneous consideration or irrelevant matter, failed to take a relevant consideration into account, or mistook the facts; or that the decision was unreasonable or plainly unjust as would imply a failure to properly exercise the discretion. Failure to take account of a relevant consideration refers to a consideration which must properly have been brought to account.[10]

Submissions — Counsel for Mr Burridge

48. Counsel for Mr Burridge submits that the learned Magistrate erred in the exercise of his discretion because none of the circumstances which he took into account were relevant to the determination as to whether there were "exceptional" circumstances justifying the re-opening of the prosecution case. Essentially, he argues that they are irrelevant because they could not reasonably be characterised as "exceptional", in the sense referred to in the relevant authorities.

49. Counsel for Mr Burridge contrasts the situation before the Magistrate with cases in which he submits the exercise of the discretion was warranted by relevant conduct which led the prosecutor to fail to adduce evidence in the prosecution case. He refers to *Kurzbock*, in which the defence had invited the prosecutor to use the informant's statement as evidence in the prosecution

case and then, later, objected to the re-opening of the prosecution case to elicit other necessary evidence to the effect that speed signs complied with relevant statutory rules. He also cites *Blair* in which the judge had allowed the re-opening of the prosecution case to prove that a preliminary breath testing machine was a "prescribed device" under the Act, after counsel for the defence had indicated in opening that there was no issue as to the preliminary breath test.

50. Counsel for Mr Burridge argues that, unlike the situations in *Kurzbock* and *Blair*, there is no causal nexus between any of the circumstances relied upon by his Honour and the prosecutor's failure to adduce the necessary evidence in the course of the prosecution case.

51. The abridgement of time, in his submission, simply put the prosecutor back into the situation of having to prove authorisation which would have been the case if the notice had been served within time.

52. Counsel for Mr Burridge maintains that, notwithstanding the operator's absence when the Magistrate allowed short service of the s58(2) notice, the prosecutor was present throughout. He contends that it was up to the prosecutor to ask the right questions to prove the operator's authorisation in the manner allowed under s58(3). He submits that the need to prove authorisation should have been foreseen, even though the s58(2) notice was only given to him at the court on the morning of the hearing.

53. Counsel goes on to submit that the contents of that notice were also irrelevant because the notice had the effect of putting all matters otherwise proved by the certificate in issue, not just those expressly identified as being in contest.

54. He argues that the evidence at the end of the prosecution case was insufficient to prove the offence alleged against Mr Burridge, despite the oral evidence as to the operator's authorisation[11]. He contends that to allow the re-opening of the prosecution case in such circumstances would, in effect, open the flood gates, inviting the re-opening of prosecution cases in any circumstances where the need to adduce evidence has been overlooked.

55. Counsel for Mr Burridge in effect argues that the Magistrate's decision to allow the re-opening of the prosecution case on the grounds that the circumstances identified by him were exceptional was unreasonable and unjust, constituting a failure to properly exercise his discretion.

Counsel for the informant

56. Counsel for the informant argues that each of the matters together regarded as constituting as exceptional circumstances by his Honour, was a relevant consideration to be taken into account in the exercise of his discretion. This was not a case in which the decision was susceptible to challenge as unreasonable or unjust, being one which no reasonable magistrate, properly directed, would have made.

57. Counsel for the informant refers to the need for the Court to recall that the Magistrate was in a position to judge the significance of the events which took place in the Court.

58. He refers particularly to the significance to be attached to the operator's role in the proceedings: namely, that he had come to the court to give evidence corroborating that of the informant, rather than as the operator of the breath analysis instrument. The circumstances were that the time for service of the notice under s58(2) had not been abridged at the commencement of the hearing and the operator's evidence would not have been required to prove the matters which the certificate would otherwise conclusively prove. He was, in effect, a "professional" witness who gives the evidence that authorised operators give when required. Counsel describes him as having been "caught on the hop", as it were, with no prior notice of the decision which deprived the certificate of the effect which it would otherwise have had.

59. Counsel argues that the failure of the notice to specify the challenge to the proof of the operator's authorisation was also relevant to the exercise of the discretion in relation to the fairness of the decision in all the circumstances. He submits that the clear legislative purpose is to put the informant on notice of the issues in the case, even though the notice does, in effect, put in issue all matters of which the certificate would otherwise have constituted conclusive proof.

60. Counsel for the informant also submits that it was significant that this was a case in which there had been some evidence of the operator's authorisation, albeit not in the form of evidence which would prove that authorisation under s58(3) of the Act. He further relies upon the absence of challenge to the operator's authority under cross-examination of either the informant or the operator. He cites *Dalzotto v Lowell*[12] in which an operator's, similarly uncontested, oral evidence of authorisation to operate a breath analysis instrument was held by Ashley J to be sufficient proof of that fact. He characterises the evidence of the certificate of authorisation as "formal" proof of a matter already the subject of uncontested oral evidence.

61. Counsel argues that there was no such unreasonableness or injustice in this case. The decision, based on a finding of exceptional circumstances, was both fair and reasonable in all the circumstances. He submits that the determination as to whether circumstances are exceptional is very much one of impression and the issue of their existence one about which reasonable minds could differ. This is not a case, in his submission, where the Court should find that no reasonable magistrate could have concluded as his Honour did.

62. He further contends that, in any event, the decision is supportable on the alternative ground that the re-opening was for the purpose of tendering merely an uncontentious formal proof.

Counsel for Mr Burridge in reply

63. Counsel for Mr Burridge replies that the very existence of the authorisation document as at the date the operator operated the breath analysis instrument was a matter of contention in the case. As a result, he argues, the re-opening should not be supported on the alternative basis for which the informant contends.

64. He challenged the informant's reliance on *Dalzotto*, contending that the Court of Appeal's decision in *Impagnatiello v Campbell*[13] made it clear that authorisation could not be proved inferentially.

Conclusions

65. I am not persuaded that the learned Magistrate's discretion miscarried.

66. I am satisfied that his Honour clearly noted and applied the principles established by authority.

67. I am not persuaded that he took any irrelevant considerations into account in his determination that exceptional circumstances existed, justifying the exercise of his discretion to permit the re-opening of the prosecution case.

68. I consider the late service of the s58(2) notice to be clearly relevant to the determination, notwithstanding the role of the prosecutor and the requirement to prove the case. Further, I agree with counsel for the informant that, although the prosecutor was present when the abridgment of time for the service of the s58(2) notice was allowed, the absence of the operator could properly be regarded as relevant, bearing in mind the events leading up to the hearing, the operator's role as corroborator and his usual role as a witness in relation to the operation of a breath analysis instrument. The learned Magistrate was in a position to assess whether the operator's absence was significant, being present in the courtroom throughout. The same applies to the fact that the notice did not on its face draw the prosecutor's attention to the challenge to the operator's authority, notwithstanding that its service put all facts matters listed in s58(2) in issue. In my view, it was proper for his Honour to regard that fact as relevant. Further, it was not unreasonable for it to be included as one of a number of matters characterised, in combination, as "exceptional".

69. I am not persuaded that the learned Magistrate's decision was either unreasonable or unjust. I consider that a reasonable magistrate could well have concluded that the circumstances which his Honour characterised as exceptional were just that, in the context of the hearing before him. The comparison with fact situations in other cases does not persuade me to a contrary view.

70. I agree with the submission of counsel for Mr Burridge to the effect that the absence of unfairness would not alone justify the exercise of the discretion in favour of the re-opening of the prosecution case. Nevertheless, I take it into account that counsel conceded that it was difficult

to point to any resultant unfairness, in the circumstances in which the Magistrate had offered him the opportunity, which he declined, to seek to call further evidence or ask further questions in relation to the issue of the operator's authorisation. I do not consider the decision to be unjust.

71. In light of my conclusion that the Magistrate did not err in the exercise of his discretion on the grounds he stated, it is not necessary for me to determine whether his Honour's decision could, in any event, have been supported on the alternative ground that the proof of authorisation was a formal or technical matter in the circumstances. I note, in this regard, that the transcript shows[14] that the prosecutor suggested to his Honour that the proof of the operator's authorisation was a formal matter, but that the learned Magistrate expressed the view that it was not.

72. The appeal should be dismissed.

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[1] [2005] VSC 213.
[2] [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[3] [1985] HCA 35; (1985) 157 CLR 671 at 676-7; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[4] [1985] HCA 35; (1985) 157 CLR 671 at 685-6; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495.
[5] [2001] VSC 459; 126 A Crim R 125.
[6] [1936] HCA 40; (1936) 55 CLR 449 at 505 per Dixon, Evatt and McTiernan JJ.
[7] [1953] HCA 25; (1953) 94 CLR 621 at 627 per Kitto J.
[8] [1984] VR 665 at 672.
[9] [1986] HCA 17; (1986) 161 CLR 513 at 517-518 per Mason and Deane JJ; [1986] FLC 91-712; 65 ALR 12; (1986) 60 ALJR 335; (1986) 10 Fam LR 819.
[10] [2001] VSC 459 at [24]; 126 A Crim R 125.
[11] Citing *Impagatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486 and *Sirajuddin v Ziino* [2005] VSC 418; (2005) 14 VR 689; (2005) 45 MVR 21 in support of the proposition that the prosecution could not have relied upon inference to establish the requisite authority.
[12] Unreported, Supreme Court of Victoria, 18 December 1992.
[13] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.
[14] At T 98 [528]-[529].

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