56/10; [2010] VSC 590

SUPREME COURT OF VICTORIA

RUGOLINO v HOWARD

Bell J

26 August, 17 December 2010 — (2010) 57 MVR 178

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER REQUIRED TO UNDERGO BREATH TEST – DRIVER UNABLE TO UNDERGO TEST DUE TO A MEDICAL OR PHYSICAL REASON – DRIVER REQUESTED BY POLICE OFFICER TO ALLOW A SAMPLE OF BLOOD TO BE TAKEN – SAMPLE TAKEN – ON ANALYSIS SAMPLE FOUND TO HAVE A BAC OF 0.18% – DRIVER SUBSEQUENTLY CONVICTED – WHETHER PROSECUTION HAD TO PROVE AUTHORITY OF OPERATOR OF BREATH ANALYSING INSTRUMENT – WHETHER FINDING OF FACT CAN BE APPEALED AGAINST – DRAWING OF INFERENCES – WHETHER APPEAL SHOULD BE ALLOWED IF AN ERROR DID NOT CLEARLY AFFECT THE RESULT: *ROAD SAFETY ACT* 1986, SS49(1)(b), (g), 55(1), (3), (9A).

HELD: Appeal dismissed.

1. In a criminal appeal, a finding of fact supporting conviction beyond reasonable doubt can be attacked as erroneous in law if (but only if) there was no evidence to support it or, where the finding was made by drawing inferences from circumstantial evidence, the inference of guilt was not reasonably open in the sense that there was no evidence on which the inference might reasonably have been drawn. In the present case, there was direct evidence to support the magistrate's finding. Even if the magistrate made the finding by drawing inferences from the totality of the evidence, the inference was reasonably open on that evidence. There was no inference, consistence with innocence, which the magistrate could not rationally exclude. Accordingly, the magistrate made no error of law in finding the operator to have been authorised at the time of the alleged offence.

2. On the proper interpretation of the applicable provisions of the *Road Safety Act*, the police officer was empowered to require the driver to allow a sample of blood to be taken because he was entitled to require him to furnish a sample of breath and he formed the view that the driver appeared unable to do so for medical or physical reasons. The authority of the operator of the breath analysing instrument was not legally material to the powers which the police officer exercised. The prosecution was based on the sample of blood taken from the river, not on a sample of breath. Accordingly, even if the magistrate erred in law in the finding he made about the authority of the operator, the finding clearly did not affect the result of the hearing. The conviction of the driver must therefore stand in any event.

BELL J:

INTRODUCTION

1. Albert Rugolino was stopped driving his motor vehicle for a preliminary breath test. When he tested positive, Constable Michael Howard took him to the nearby booze bus to give a sample of his breath for analysis by a breath analysing instrument.

2. Mr Rugolino unsuccessfully attempted to use the instrument to give a sample of breath to the operator. Concluding that his inability to do so was because of some medical or physical disability, Constable Howard asked Mr Rugolino to allow a sample of his blood to be taken, which he did. The sample was found to have a blood alcohol concentration of 0.18%, which is more than the prescribed concentration of 0.05%.

3. On the basis of the blood analysis results, Constable Howard, as informant, charged Mr Rugolino with drink-driving offences against the *Road Safety Act* 1986. At the hearing of the charges by a magistrate, Mr Rugolino did not challenge those results. Rather, he contended that blood tests could be requested, and the results used in court, only where the authority of the operator of the breath-analysing instrument was proved, even where the prosecution was not based on a sample of breath. In his submission, that authority had not been proved. He also pleaded the defence of necessity. He said he was driving himself to hospital for treatment for a panic attack

4. The magistrate found as a fact the operator had the required authority and rejected the defence of necessity. His Honour convicted Mr Rugolino of driving with a blood alcohol concentration exceeding 0.05%. In view of his poor driving record, his licence was cancelled for four years, he was fined $1,500 and he was sentenced to imprisonment for three months (wholly suspended for 24 months).

5. Mr Rugolino now appeals against this conviction on a question of law. He contends there was no evidence to support the magistrate's finding about the operator's authority. The informant contends the finding was open and, in the alternative, was not a prerequisite to a conviction for the offence.

APPEALS AGAINST FINDINGS OF FACT ON A QUESTION OF LAW

6. This appeal is brought under s92(1) of the *Magistrates' Court Act* 1989. Such an appeal can be brought only on 'a question of law' and not on a question of fact. As Brooking JA (Ormiston and Charles JJA agreeing) said in *Ericsson (Aust) Pty Ltd v Popovski*,[1] 'the appeal … is only on a question of law and it is not enough to show error of law simply to persuade a judge that the magistrate went wrong on a question of fact.' An appeal to the Supreme Court on a question of law under s92(1) is to be contrasted with an appeal to the County Court on questions of fact or law under s83(1). Appeals to the County Court are not confined to questions of law.

7. The requirement that an appeal to the Supreme Court be on a question of law is not just a prerequisite of the appeal but also signifies that the legal question is the only subject matter of the appeal. The court does not have jurisdiction to do other than determine that legal question and can only make orders flowing from that determination. By contrast with appeals to the County Court, the Supreme Court has no power to conduct a rehearing of the charges and to make factual findings as if it were deciding the matter at first instance.

8. Legal principles govern the making of findings of fact by a court. Whether a magistrate properly applied these principles can give rise to a question of law. One such principle is that, when determining criminal charges, and in the absence of admissions, the magistrate can only make findings of fact on the basis of probative evidence which has been admitted at the hearing of the charges. Without admissions, the magistrate can only make findings of fact which are based on the evidence and cannot make findings which are arbitrary or capricious. Making findings of fact in conformity with this principle, and ensuring the hearing at which the evidence is admitted is fair, is the magistrate's judicial function.

9. When called on to do so in the exercise of its appellate jurisdiction, this court will examine the magistrate's determination against these principles, and thus afford a remedy against decision-making which is alleged to be contrary to the applicable legal standards. The nature of this appellate jurisdiction is supervisory not substitutionary. The scope of the remedy which the court can give is confined to enforcing those standards as a matter of law; it does not allow the court to remake the magistrate's decision on the facts as if it were determining the matter at first instance.

10. These principles have been established in the decided cases, usually in the context of defining the proper role of a judge on appeal. So in *Roads Corporation v Dacakis*,[2] Batt J held 'the question whether there is any evidence of a particular fact is a question of law.' Therefore a finding of fact is open to challenge as 'erroneous in law', but only if 'there is no probative evidence to support it'.[3] Similarly, in *S v Crimes Compensation Tribunal*,[4] Phillips JA said making a finding of fact would ordinarily give rise to an error of law only if 'it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it.' His Honour emphasised that the question was not whether the finding was 'reasonably open', for that implied the court on appeal could test the finding against a reasonableness standard, but whether the finding was open at all.

11. *S v Crimes Compensation Tribunal* has been followed and explained by the Court of Appeal. In *Myers v Medical Practitioners' Board of Victoria*,[5] Warren CJ (Chernov JA and Bell AJA agreeing) held there was no error of law in making a finding of fact unless the finding was 'not open'. After endorsing[6] the decision of Phillips JA in *S v Crimes Compensation Tribunal*, the Chief Justice approved the statement of Kirby P in *Azzopardi v Tasman UEB Industries*[7] that it was 'critical' to making findings of fact that they be based on the evidence, but there would be no error of law 'unless it can be shown that there was no evidence' to support the finding. The decision of Phillips

JA in *S v Crimes Compensation Tribunal* was also followed in *ISPT Pty Ltd v Melbourne City Council*.[8] After approving the 'not open' test, Warren CJ, Kellam JA and Osborn AJA referred to *Transport Accident Commission v Hoffman*[9] where Young CJ and McGarvie J said an appeal court, when determining whether a finding of fact was made in error of law, had to determine whether there was 'any evidence' to support it.[10]

12. In *State of Victoria v Subramanian*,[11] Cavanough J examined these and other authorities. As his Honour held, whether a finding was open on the evidence, or whether there was any or some evidence to support it, are different ways of expressing the same test.

13. It follows that, if there is any direct evidence in support of the finding of fact which is under challenge, the court cannot interfere with the finding on appeal, even if it would have made a different finding on the evidence before the magistrate. As we will see, on one view of the evidence in the present case, there was such direct evidence before the magistrate on the issue of the authority of the operator, and that would be enough to dismiss the appeal. On another view, however, the evidence on this subject was all circumstantial and the magistrate's finding could only have been made by drawing inferences.

14. An inference of guilt can be drawn after considering the totality of the evidence when particular facts do not support the inference on their own, provided such facts have been individually and properly proved.[12] Intermediate facts which are seen to be important to a finding of guilt beyond reasonable doubt must themselves be established according to that standard of proof.[13] Where a finding of guilt is based on inferences of fact drawn from circumstantial evidence, the inference must be the only inference which can reasonably be drawn from the entire body of evidence.[14] A reasonable hypothesis consistent with innocence must not be available on the evidence.[15] If an inference of innocence is reasonably open on that evidence, whether or not the trier of fact would accept that inference, or there is a reasonable hypothesis consistent with innocence on that evidence, whether or not the trier of fact would accept that hypothesis, there can be no finding of guilt beyond reasonable doubt and the accused must be acquitted.[16] The existence of an inference of innocence which is reasonably open, or a reasonable hypothesis which is consistent with innocence, legally demands the conclusion that there is a reasonable doubt about the guilt of the accused. But the trier of fact does not have to accept as reasonably consistent with innocence an inference or hypothesis which is speculative, fanciful, a bare possibility or irrational.[17]

15. Those being the principles which governed the magistrate, it is now necessary to identify when a finding of guilt based on drawing inferences can be challenged on appeal as erroneous in law. In such an appeal, the appellate function of the court is to determine whether the inference drawn from the evidence was reasonably open, not whether the court itself would have drawn that inference. As Brennan J said in *Chamberlain v R [No 2]*[18] in reference to juries: 'The question whether one body of evidence should be accepted over another is not a question for an appellate court; conflicts of evidence are to be resolved by the jury as the constitutional judge of fact…'

16. That principle was applied in the same stream of authorities on which I earlier drew. So in *Roads Corporation v Dacakis*,[19] Batt J said it was a question of law 'whether a particular inference can (as opposed to whether it should) be drawn from the facts found.' His Honour referred[20] to *Australian Broadcasting Tribunal v Bond*,[21] where Mason CJ said: 'So long as there is some basis for the inference – in other words, the particular inference is reasonably open - … no error of law has taken place.' In *S v Crimes Compensation Tribunal*,[22] Phillips JA said 'reasonably' was used in this context 'to emphasise that, when judging what was open and what was not open below, we are speaking of rational tribunals acting according to law, not irrational ones acting arbitrarily.' His Honour adopted this oft-cited test stated by Mildren J in *Tracey Village Sports and Social Club v Walker*:[23]

> If there are primary facts upon which a secondary fact might be inferred, there is no error of law. It is not sufficient that this Court would have drawn a different inference from those facts. The question is, whether there were facts upon which the inference might be drawn.

17. The Court of Appeal has also endorsed this approach to appellate review of drawing inferences. When approving the decision of Phillips JA in *S v Crimes Compensation Tribunal*, in *Myers v Medical Practitioners' Board of Victoria*[24] Warren CJ cited with approval the judgment of Mildren J in *Tracey Village Sports and Social Club v Walker*. The Chief Justice went on to refer to

this passage from the judgment of Kirby P in *Azzopardi v Tasman UEB Industries Ltd*:[25]

> If there is evidence, or if there are available inferences which compete for the judge's acceptance, no error of law occurs simply because the judge prefers one version of the evidence to another or one set of inferences to another. This is his function. The evaluation of competing evidence and inferences is reserved ... to the judge ...

18. As we have seen, the magistrate could infer the defendant's guilt if this was the only inference which was reasonably open on the evidence. If an inference consistent with innocence was reasonably open on the evidence, the magistrate was bound to acquit the defendant. To repeat, in determining whether to accept or reject competing inferences, the magistrate was not bound to accept an inference consistent with innocence which was speculative, fanciful, a bare possibility or irrational. He was entitled to reject such inferences as not being reasonably open. As Ormiston JA held in *R v Cengiz*,[26] 'it is only if the alternative inference can be described as reasonable or rational that the obligation to acquit arises'.

19. In appeals against a magistrate's finding of guilt based on drawing inferences, the convicted defendant must establish an error of law. In such appeals, the court does not list the competing inferences and decide for itself whether the magistrate should have accepted or rejected one or the other, for that is the function of the magistrate as the trier of the facts. Returning to *R v Cengiz*,[27] Ormiston JA (speaking of juries) said it would only be an error of law to refuse to accept an inference consistent with innocence which 'was so patently reasonable that no jury properly instructed could rationally exclude it.' Similarly, Harper AJA said an error of law would only be committed if the 'inference consistent with innocence is not only open ... but is also an inference which cannot be rationally excluded.'[28]

20. In summary, the function of the magistrate in the present case was judicially to determine, on the evidence presented at the hearing, whether he was satisfied beyond reasonable doubt of Mr Rugolino's guilt of the charges. The magistrate had to base his findings of fact on that evidence and could not make the findings capriciously or arbitrarily. This appeal against the magistrate's conviction of Mr Rugolino is confined to a question of law. If there was some evidence in support of the magistrate's findings of fact, they cannot be challenged as erroneous in law, even if the court would not have made those findings on that evidence. It is only an error of law to make findings which are not open on the evidence in the sense that there is no evidence to support them. To the extent that the magistrate made a finding of guilt based on inferences drawn from the established facts, there will be an error of law if, but only if, an alternative finding consistent with innocence was not only open but was not rationally excludable.

21. Applying those principles in the present case, it is first necessary to consider whether the magistrate erred in law in finding that the operator of the breath analysing instrument was authorised. That consideration will not require any analysis of the provisions of the *Road Safety Act*, which I will carry out later in the context of the informant's alternative submission.

MAGISTRATE'S FINDING ABOUT OPERATOR'S AUTHORITY

22. The legal question is whether the finding was open on the evidence in the sense that there was some evidence to support it or, to the extent that the finding was based on inferences drawn from the established facts, whether there was an alternative inference consistent with innocence which was not only open but was not rationally excludable.

23. I have organised the evidence into five categories.

24. There was first the evidence of the operator himself, Leading Senior Constable Shalders. He said he was 'a leading senior constable stationed at the Traffic Drug and Alcohol Section' of Victoria Police. He produced 'a certificate of authority signed by the Chief Commissioner of Police authorising me to operate a breath-analysing instrument issued in accordance with s55 of the *Road Safety Act* 1986.'

25. The magistrate accepted the instrument as an exhibit. It is also in evidence in the appeal. It is dated 1 August 2008 and states that Leading Senior Constable Shalders 'is authorised' to operate a breath analysing instrument. But the offence was allegedly committed on 8 December 2007. Although it was a certificate admissible under the evidentiary provision,[29] it was only proof of the operator's authority from 1 August 2008. The certificate could not establish the operator

was authorised on the date of the offence. But there was other evidence.

26. The second category of evidence was the oral evidence of the operator. The operator was asked the question: 'Are you an authorised operator to operate an approved breath analysing instrument?' He answered: 'I am'. While the question and answer were both expressed in the present tense, the context of this evidence was the test which the operator administered on 8 December 2007 when the offence was allegedly committed. It is neither unusual nor unnatural for witnesses to speak of their authority in the present tense when they are referring to their involvement, in that authorised capacity, in past events. It is therefore necessary to consider this evidence in the context of the operator's evidence as a whole.

27. The operator went on to give further evidence about his administration of the test to Mr Rugolino. That is the third category of evidence. It is not necessary to set this evidence out in detail. Both in examination-in-chief and under cross-examination, the operator describing the administration of the test in a way which was consistent with him having the necessary experience and authority to do so.

28. Fourthly, the operator gave evidence about the instrument which he used to administer the test and the way in which he operated that instrument. He said:

> It was an approved breath analysing instrument within the meaning of s58 of the *Road Safety Act* in that it had written, impressed and described on it on a plate attached to it the expression 'Alcotest 7110' and the number 3530791. It was in proper working order and was properly operated by me, or [sic] regulations pertaining to breath test contained in the *Road Safety (General) Regulations* 1999 pertaining to breath tests were complied with.

29. The crucial part of this evidence was the statement that the instrument 'was properly operated by me, or regulations pertaining to breath tests contained in the *Road Safety (General) Regulations* 1999 pertaining to breath tests were complied with'. I think here 'or' naturally means 'under'. These regulations were the ones which applied at the time. The prosecutor had earlier tendered these regulations. He drew the magistrate's attention to regulations 201 and 202, which related to preliminary breath testing devices and breath testing devices. This is regulation 202 of the *Road Safety (General) Regulations* 1999:

> **202. Procedure for breath analysis**
> It is a requirement for the proper operation of a breath analysing instrument that a person authorised under section 55(3) of the Act to operate a breath analysing instrument—
>
> (a) does not require a person to provide a breath sample for analysis until the authorised person is satisfied that the person has not consumed any alcohol for a period of at least 15 minutes before the analysis; and
>
> (b) provides a fresh mouthpiece for use by each person required to provide a breath sample; and
> (c) uses only a mouthpiece which, until required for taking a breath sample, has been kept in a sealed container.

30. It can be seen that the regulations impose obligations on persons authorised under s55(3), which is the applicable provision in the present case.[30]

31. That brings me to the fifth and last category of evidence. This consisted of the answers given by the operator in cross-examination about his role as an operator, both generally and at the time concerned. He deposed that, prior to his administration of the test to Mr Rugolino, he was recording details on a data sheet which were required for collecting and updating the running sheet. He said this was his standard and typical practise in a booze bus. He said he had been on booze bus duties for two years. He said that he had been on duty since 6.00pm or 9.00pm on the evening before he tested Mr Rugolino. His evidence was that he was the officer in charge of the booze bus at that time. In running the bus, he was responsible for supervising numerous people. His job was to process alleged offenders as efficiently and quickly as he could. What he needed to do was get a reading from them and get them out of there.

32. At the end of the hearing, counsel for Mr Rugolino submitted the prosecution had failed to prove the operator was authorised at the relevant time. He submitted the certificate which had

been tendered did not prove the operator's authority as it post-dated the alleged commission of the offence. The prosecutor submitted the operator had given evidence that he was authorised at the relevant time.

33. The magistrate considered the evidence and found the operator was authorised when the offence was allegedly committed. This is his Honour as recorded in the transcript:

> In relation to the first submission I accept the evidence of Leading Senior Constable Shalders that when giving evidence as to whether he was properly authorised to operate the breath-analysis instrument his evidence was directed to him being so authorised at the time of the alleged offence.

34. That is an express finding on the point in issue. I think the magistrate found as a fact that the operator had authority on the basis of his direct evidence. But I cannot exclude the possibility that he made that finding by drawing inferences from the whole of the evidence. For reasons which I will now give, I do not think it matters one way or the other

35. In my view, the operator's evidence about operating the instrument in accordance with the regulations was direct evidence that he had authority to do so at the time he administered the test to Mr Rugolino. His oral evidence was that the instrument was operated by him at that time in accordance with the regulations, which were tendered. The regulations stipulated the requirements for the proper operation of the instrument by the person having the relevant authority under s55(3). In my view, this was a statement within the evidentiary provision[31] that the operator 'was authorised by the Chief Commissioner of Police under s55 to operate the breath analysing instrument.' There was no evidence to the contrary and, under that provision, the statement was therefore proof of the operator's authority.

36. That is enough to dismiss the appeal. The evidence of the operator was some evidence in support of the magistrate's finding. More than that, under the evidentiary provision, the operator's statement was proof of his authority.

37. However, as I have said, the magistrate may have made his finding on the basis of inferences drawn from the whole of the evidence. I will therefore go on to consider the appeal on this basis.

38. In my view, there was ample evidence to support an inference that the operator had the necessary authority. His oral evidence was that he was an authorised operator, he performed tests in accordance with the regulations, he had been on booze bus duties for two years, he was in charge of the bus at the time of the offence and was responsible for supervising numerous people. He described his work as an operator in a manner which was consistent with him having the necessary authority. He gave evidence about applying the relevant regulations and their content. None of this was contradicted in the hearing before the magistrate. On this and the other evidence which was given, a reasonable (indeed a strong) inference arose that the operator had the necessary authority at the time of the offence. At the very least, an inference of guilt was one which the magistrate might reasonably have made on the evidence.

39. In my view, this was a case like *Dalzotto v Lowell*.[32] There too the operator said he was authorised, but did not refer to the relevant time. He too gave evidence of his usual practice and experience. Ashley J held the magistrate could have inferred the authority from this evidence:[33]

> In my opinion the facts in evidence in the present case entitled the Magistrate to draw an inference that [the operator] was relevantly authorised at the critical time. The Magistrate had evidence of present authority, a past course of study and previously conducted tests. He was entitled to infer that [the operator] had not commenced testing until the course of study was complete, and that he would not have been undertaking tests had not study been successfully concluded and authority granted.

40. On the other hand, the present case is to be distinguished from *Robertson v Smith*.[34] There the informant gave no evidence of his authority, under the then legislation, to use a preliminary breath testing device. The defendant successfully appealed on the ground that the magistrate had erred in law in convicting him of refusing to undergo the test. Nicholson J held the fact of authority could not be inferred.[35] In the present case, by contrast, there is a significant body of evidence on the subject.

41. Straining to see the evidence in a light which is most favourable to the accused, it is theoretically possible to construct the alternative inference, consistent with innocence, that the operator had been acting without authority up until the certificate dated 1 August 2008 was issued. This theoretical possibility is perhaps left open by the date of the certificate which was tendered to the magistrate, the fact that a certificate that was current at the relevant time was not tendered and the failure of the prosecutor to clear the matter up. However, on the whole of the evidence, I would regard such an inference as being speculative, fanciful and not reasonably open. More than that, it is not an inference which the magistrate could not have rationally excluded.

42. For these reasons, I reject Mr Rugolino's submission that there was an error of law in the magistrate's finding that the operator had the necessary authority. I would therefore dismiss the appeal.

43. That brings me to the informant's alternative submission.

WAS PROOF OF OPERATOR'S AUTHORITY REQUIRED?

44. The informant's alternative submission was that any error of law in the magistrate's finding that the operator had authority could not have affected the result. In case I am incorrect in concluding that the magistrate's finding was not legally erroneous, to that submission I now turn.

45. Section 92(7) of the *Magistrates' Court Act* empowers the court, after determining an appeal, to 'make such order as it thinks appropriate'. Such an order may include remitting the case for rehearing.

46. After examining the authorities, in *Engebretson v Bartlett*[36] I held that s92(7) allowed the court to make no order quashing a conviction where an error of law had been made which clearly did not affect the result. I express the principle in these terms:[37]

> In a case where the court determines that a magistrate has made an error of law, the legislation thereby leaves it to the court to determine whether it is appropriate to make any and what order. The language of s92(7) shows, and the authorities confirm, that the court may consider it to be appropriate to refuse to make an order where the court can clearly say the error of law did not affect the result.

47. While the authorities on which I relied concerned the wrongful admission of evidence, this principle is one of general application. I can see no reason why it should not apply where the error of law was making a finding of fact (whether directly or by inference) which was not open. Mr Rugolino did not submit any different principle should apply where the error of law was of that nature.

48. The informant submitted the magistrate's finding on the operator's authority could not have affected the result because proof of that authority was not an element of an offence against s49(1)(g) of the *Road Safety Act* which was based on a sample of blood taken under s55(9A). I accept that submission.

49. Mr Rugolino was charged with offences against s49(1)(b) and (g). He was convicted of an offence against s49(1)(g). The offence against s49(1)(b) was struck out. But the procedures governing the application of s49(1)(b) and (g) share some common ground. To consider the informant's submissions on s49(1)(g), it is therefore appropriate also to consider the operation of s49(1)(b).

50. Section 49(1)(b) creates the offence of driving or being in charge of a motor vehicle while the, or more than the, prescribed amount of alcohol[38] is present in the person's blood or breath. Section 49(1)(g) creates a similar offence where a sample of blood has been taken, but which is aimed at slightly different fact situations.

51. For a conviction against the provisions of s49(1)(b), the prosecution must prove beyond reasonable doubt that:

- the person was driving or was in charge of a motor vehicle
- while doing or being so, the, or more than the, prescribed concentration of alcohol was present in their blood or breath.

52. Where the offence against s49(1)(b) is based on the concentration of alcohol in the person's breath as revealed by a sample of breath taken and analysed according to s55(1) or (2), s55(3) will apply. As we have seen, s55(3) requires a breath analysing instrument to be operated by a person authorised to do so by the Chief Commissioner of Police. Therefore, the prosecution must also prove that the breath analysis instrument was operated by an authorised person. But this is not a prerequisite where the offence is based on the concentration of alcohol in the person's blood as revealed by a sample of blood taken and analysed according to s55(9A). In such a case, the authority of the operator of the breath analysing instrument is not material.

53. Under s49(1)(g), a person is relevantly guilty of an offence where they have a sample of blood taken from them 'in accordance with section 55' within three hours after driving a motor vehicle, the sample is analysed within 12 months of being taken by a properly qualified analyst within the meaning of s57, the blood is found by that analyst to contain the, or more than the, prescribed concentration of alcohol and that concentration was not solely due to the consumption of alcohol after the person drove or was in control of the vehicle.

54. As Smith J held in *Day v County Court of Victoria and Hanson*:[39] 'Sub-section 55(9A) is ancillary to [the other provisions containing s55] and is drafted on the assumption of the continued existence of the entitlement of the police officer to require a breath test and of the obligation to submit a breath test'.

55. The entitlement of the officer to require a breath test, and the obligation to submit one, arise under ss53 and 55.

56. Under s53(1)(a), a member of the police force may require any person found driving or in charge of a motor vehicle to undergo a preliminary breath test by a prescribed device. Sections 53(1)(b)-(d) specify other circumstances in which such a request can be made. It is to be noted that, in the specified circumstances, any member of the force can make the request. They do not have to be specifically authorised.

57. If a person undergoes a preliminary breath test when so required by a member of the force under s53 and, in the opinion of the member in whose presence the test is made, the test indicates the person's breath contains alcohol, s55(1) allows any member of the force to require the person to furnish a sample of their breath for analysis by a breath analysing instrument.[40]

58. Section 55(1) also empowers an officer to require the person to accompany any member of the force to a place or vehicle where the breath sample can be furnished.

59. Neither the officer forming the opinion that the person has returned a positive preliminary breath test, the member of the force who can require the person to furnish a sample of breath nor the officer who may accompany the person to the sample-taking place need to be specially authorised. They only need to be members of the force.

60. Although s55(2) did not apply in the present case, it allows a member of the force to require any person whom they believe to have offended against s49(1)(b) to furnish a sample of their breath for analysis by a breath analysing instrument, and to accompany a member of the force to a place where that can be done. Where the officer has that reasonable belief, they do not have to require the person to undergo a preliminary breath test, and see it is positive, before requiring the person to furnish the sample of breath. Members making these requirements, and accompanying the person, do not have to be specially authorised. Here too they only need to be members of the force.

61. To summarise, for a conviction against the provisions of s49(1)(g) in a case where the prosecution relies on the application of s55(9A), the prosecution must prove beyond reasonable doubt that:

- a sample of blood was taken from the person in accordance with s55
- the sample was furnished within three hours of the person driving or being in charge of a motor vehicle

- the sample was analysed within twelve months after being taken by a properly qualified analyst[41]

- the sample was found by that analyst to contain the, or more than the, prescribed concentration of alcohol

- that concentration of alcohol was not solely due to the post-driving or post-control consumption by the person.

62. To remind you, in the present case the informant made a request under s53 that Mr Rugolino undergo a preliminary breath test. When it tested positive, the informant then requested of Mr Rugolino under s55(1) that he furnish a sample of breath for analysis by a breath analysing instrument. It is the magistrate's finding about the authority of the operator of that instrument which Mr Rugolino has placed in issue on the appeal. When Mr Rugolino unsuccessfully attempted to furnish the sample of breath, and in reliance on s55(9A), the informant asked Mr Rugolino to allow a sample of blood to be taken from him for analysis, which he did. The prosecution was based on that blood sample, not on a sample of breath.

63. In Mr Rugolino's submission, for a sample of blood to be taken from a person in accordance with s55(9A), the person must first have undergone a preliminary breath test as required 'by a member of the police force'[42] in accordance with s53. If that test indicates to the requesting member that the person's breath contains alcohol, under s55(1) any member of the force may require the person to furnish a sample of breath for analysis by a breath analysing instrument. Mr Rugolino's submissions treat compliance with s55(1) and (3) as prerequisites to the application of s55(9A) and as elements of an offence against s49(1)(g) based on the application of s55(9A).

64. I do not find in s55(9A) the prerequisites which Mr Rugolino sees there. As relevant to the present case, s55(9A)(a) applies where it appears to the 'person who requested a sample of breath under subsection (1)' that the person 'is unable to furnish the requested sample of breath on medical grounds or because of some physical disability'. If it so appears, the person requesting the sample of breath may request the person to allow a registered medical practitioner or an approved health professional to take the sample of blood. Sections 55(9B)–(9E) contain further provisions regulating this process. In s55(9A), the 'person who requested a sample of breath under subsection (1)' is the 'member of the police force' referred to in that sub-section. In the present case, that was the informant.

65. Clearly, for an offence against the provisions of s49(1)(g) in a case like the present, the sample of blood must be taken 'in accordance with' s55. But it is 'in accordance with' s55 for a member of the police force to obtain a blood sample from a person under s55(9A)(a) from a person who appears to be unable to furnish a sample of breath on medical grounds or because of some physical disability. The person who can so obtain a sample of blood is the person who can require a sample of breath under s55(1). I repeat, that was the informant.

66. For s55(9A) to apply in such a case, there is no requirement for the member of the force to make an explicit request of the person to furnish a sample of breath,[43] let alone for the operator of 'the' breath analysing instrument to be authorised. I put 'the' in quotation marks because, in the circumstances in which s55(9A) will apply, the person has been unable to furnish a sample of breath and there is no breath test analysis for use in a prosecution. In those circumstances, whether the operator of the instrument was qualified is not to the point.

67. As was held by Kellam J in *McPherson v County Court of Victoria*[44] by reference to the decision of Smith J in *Day v County Court of Victoria and Hanson*[45] and the Court of Appeal in *Director of Public Prosecutions v Foster*,[46] the opening words of s55(9A) are facilitative. In that sub-section, the function of the words 'the person who required a sample of breath' under the specified provisions of s55 is 'to facilitate the person who requires a breath test under [those provisions] to obtain a blood sample for analysis in the circumstances set out in sub-s. (9A).'[47] Thus the opening words of s55(9A) do not specify any prerequisites but rather identify who can exercise the power to obtain the blood sample. Section 55(9A) empowers a person who is entitled to require someone to furnish a sample of breath under s55(1), (2), (2AA) or (2A) to require that same person to furnish a sample of blood in the circumstances specified in s55(9A)(a) or (b).

68. There was no dispute in the present case that the informant was a person who, within the

opening words of s55(9A), required a sample of breath of Mr Rugolino under s55(1). The informant was therefore empowered to require Mr Rugolino to allow a blood sample to be taken from him under s55(9A). There has been no challenge to the magistrate's finding that it appeared to the informant that, as specified in s55(9A)(a), Mr Rugolino was unable to furnish the required sample of breath on medical grounds or because of some physical disability. There has been no challenge to the validity of the results of the analysis of the blood, which showed that the concentration of alcohol in Mr Rugolino's blood was more that the prescribed maximum.

69. As is demonstrated by the facts of *McPherson v County Court of Victoria*[48] and the present case, s55(9A) serves an important purpose in the statutory scheme. It enables blood samples to be taken from people, on pain of risking conviction for refusing, who appear unable to give a sample of breath, and apparently for medical or physical reasons, including those who would feign such reasons to avoid giving the sample.[49] In *McPherson*, the blood sample was taken from someone who was rushed to hospital where the blood sample was obtained. It did not matter to the application of s55(9A) that the police officer omitted to make an explicit requirement to furnish a sample of breath under s55(1). For s55(9A) to apply, it was enough that the officer had an entitlement to do so and came to the view specified in s55(9A)(a). In the present case, the blood sample was required of someone who appeared unable to give a sample of breath for medical or physical reasons. Whether the operator of the instrument was authorised or not is immaterial to the application of s55(9A). It is enough that the informant was entitled to make the request under s55(1) and came to the view specified in s55(9A)(a).

70. Mr Rugolino submitted that, in this case, it was necessary for the prosecution to prove the authority of the operator because the informant relied on the failure of the breath analysing instrument to produce a certificate after he blew into it. In his submission, the proper use of the instrument was a thus part of the informant's decision-making process under s55(9A), which meant the authority of the operator had to be proved.

71. It follows from my analysis of the operation of s55(9A) that this submission must be rejected. The informant was entitled to make the requirement under s55(1) and he concluded that s55(9A)(a) was applicable. In doing so, he was acting in accordance with the provisions. In forming the view that Mr Rugolino was unable to furnish a sample of breath for medical or physical reasons, he could rely on his observations of Mr Rugolino's attempt to furnish the sample to the instrument. That did not give rise to a requirement that the operator of the instrument be authorised. What mattered was the entitlement of the informant to make a requirement under s55(1) and Mr Rugolino's apparent inability to furnish a sample of breath for the specified reasons. I repeat, the prosecution was based on the sample of blood, not a sample of breath.

72. In the circumstances, any error of law made by the magistrate in relation to the finding about the authority of the operator could not have affected the conviction, which was clearly correct on the unchallenged facts otherwise found. I would therefore exercise my discretion in s92(7) of the *Magistrates' Court Act* to refuse to quash the conviction even if the magistrate's finding was legally erroneous.

CONCLUSION

73. Having appealed on a question of law against his conviction for a drink-driving offence under the *Road Safety Act*, Albert Rugolino has sought to establish that the magistrate erroneously found the operator of a breath analysing instrument had the necessary authority. At the hearing, the prosecutor tendered and relied on a certificate which proved the operator's authority from a date after the offence was allegedly committed. Mr Rugolino contended in the appeal that it was not open to the magistrate to find the operator to be authorised at the relevant time.

74. The evidence before the magistrate went beyond the certificate. The operator described his operation of the instrument, his experience, his supervision responsibilities in the booze bus on the evening concerned, his attempted administration of the breath test to Mr Rugolino and his compliance with the governing regulations, which applied to authorised operators.

75. In a criminal appeal, a finding of fact supporting conviction beyond reasonable doubt can be attacked as erroneous in law if (but only if) there was no evidence to support it or, where the finding was made by drawing inferences from circumstantial evidence, the inference of guilt was not

reasonably open in the sense that there was no evidence on which the inference might reasonably have been drawn. In the present case, there was direct evidence to support the magistrate's finding. Even if the magistrate made the finding by drawing inferences from the totality of the evidence, the inference was reasonably open on that evidence. There was no inference, consistence with innocence, which the magistrate could not rationally exclude.

76. Therefore the magistrate made no error of law in finding the operator to have been authorised at the time of the alleged offence. I would dismiss the appeal on that basis.

77. In the alternative, in an appeal of this kind the court is empowered by the provisions of the *Magistrates' Court Act* to exercise a discretion to refuse to quash a conviction, even if an error of law was made by the magistrate, if the error clearly did not affect the result.

78. I have concluded that, on the proper interpretation of the provisions of the *Road Safety Act* , a member of the police force may require a driver to allow a sample of blood to be taken where it appears they are unable to furnish a sample of breath for a medical for physical reason. The capacity of the member to require the person to allow a sample of blood to be taken depends on their entitlement to require a sample to breath to be furnished, not on the authority of the operator of the breath analysing instrument. So, when a member of the police force is statutorily entitled to require someone to furnish a sample of breath and it appears they are unable to do so for a medical or physical reason, the member can require the person to allow a sample of blood to be taken and the authority of the operator of the breath analysing instrument is not material.

79. In the present case, Constable Michael Howard stopped Mr Rugolino driving his vehicle at a preliminary breath testing station. Mr Rugolino tested positive to a preliminary breath test. Constable Howard then required Mr Rugolino to furnish a sample of breath. When Mr Rugolino attempted unsuccessfully to do so, Constable Howard considered his inability appeared to be for a medical or physical reason and required him to allow a sample of blood to be taken. That sample of blood was found to have a concentration of alcohol of 0.18%, which is more than the required concentration of 0.05%. Mr Rugolino was convicted on the basis of the results of the analysis of the blood, which were not challenged.

80. On the proper interpretation of the applicable provisions of the *Road Safety Act* , Constable Howard was empowered to require Mr Rugolino to allow a sample of blood to be taken because he was entitled to require him to furnish a sample of breath and he formed the view that Mr Rugolino appeared unable to do so for medical or physical reasons. The authority of the operator of the breath analysing instrument was not legally material to the powers which Constable Howard exercised. The prosecution was based on the sample of blood taken from Mr Rugolino, not on a sample of breath.

81. For those reasons, even if the magistrate erred in law in the finding he made about the authority of the operator, the finding clearly did not affect the result of the hearing. The conviction of Mr Rugolino must therefore stand in any event.

82. There will be orders dismissing the appeal.

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[1] [2000] VSCA 52; (2000) 1 VR 260, 265.
[2] [1995] VicRp 70; [1995] 2 VR 508, 517.
[3] Ibid, 520.
[4] [1998] 1 VR 83, 90.
[5] [2007] VSCA 163; (2007) 18 VR 48, 59.
[6] Ibid [43]-[44].
[7] (1985) 4 NSWLR 139, 151.
[8] [2008] VSCA 180; (2008) 20 VR 447; (2008) 162 LGERA 59.
[9] [1989] VicRp 18; [1989] VR 197, 199; (1988) 7 MVR 193.
[10] [2008] VSCA 180; (2008) 20 VR 447, [65]; (2008) 162 LGERA 59.
[11] [2008] VSC 9; (2008) 19 VR 335, [32].
[12] *Chamberlain v R [No 2]* [1984] HCA 7; (1983) 153 CLR 521, 535-536, 599; 51 ALR 225; (1984) 58 ALJR 133; *Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573, 578-579; 97 ALR 161; (1990) 65 ALJR 132; 51 A Crim R 181.
[13] *Chamberlain v R [No 2]* [1984] HCA 7; (1983) 153 CLR 521, 535; 51 ALR 225; (1984) 58 ALJR 133; *Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573, 576, 578-579; 97 ALR 161; (1990) 65 ALJR 132; 51 A

Crim R 181.
[14] *Re Hodge's Case* (1838) 165 ER 1136; *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619, 634; 17 ALR 566; *Plomp v R* [1963] HCA 44; (1963) 110 CLR 234, 252; [1964] ALR 267*; Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573, 578; 97 ALR 161; (1990) 65 ALJR 132; 51 A Crim R 181; *Doney v R* [1990] HCA 51; (1990) 171 CLR 207, 211; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416.
[15] *Barca v R* [1975] HCA 42; (1975) 133 CLR 82, 104; 7 ALR 78; (1975) 50 ALJR 108.
[16] *Chamberlain v R [No 2]* [1983] HCA 13; (1983) 153 CLR 514, 590; 46 ALR 608; (1983) 57 ALJR 356; *Shepherd v R* [1990] HCA 56; (1990) 170 CLR 573, 579; 97 ALR 161; (1990) 65 ALJR 132; 51 A Crim R 181; *R v Kotzmann* [1999] VSCA 27; [1999] 2 VR 123, [15]; (1999) 105 A Crim R 243; *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619; 17 ALR 566, 634; *Barca v R* [1975] HCA 42; (1975) 133 CLR 82, 104; 7 ALR 78; (1975) 50 ALJR 108.
[17] *Barca v R* [1975] HCA 42; (1975) 133 CLR 82, 104; 7 ALR 78; (1975) 50 ALJR 108.
[18] [1984] HCA 7; (1983) 153 CLR 521, 598; 51 ALR 225; (1984) 58 ALJR 133.
[19] [1995] VicRp 70; [1995] 2 VR 508, 517.
[20] Ibid, 518.
[21] [1990] HCA 33; (1990) 170 CLR 321, 356; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[22] [1998] 1 VR 83, 91.
[23] [1992] NTSC 91; (1992) 111 FLR 32, 37-38.
[24] [2007] VSCA 163; (2007) 18 VR 48, 60.
[25] (1985) 4 NSWLR 139, 151.
[26] [1998] 3 VR 720, 722.
[27] [1998] 3 VR 720, 722.
[28] Ibid, 735.
[29] Section 58(3) provides:
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
[30] Section 55(3) provides: 'A breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police'.
[31] Section 58(3)(a) (see above).
[32] Unreported, Supreme Court of Victoria, Ashley J, 18 December 1992.
[33] Ibid 13.
[34] Unreported, Supreme Court of Victoria, Nicholson J, 27 July 1983.
[35] Ibid 21.
[36] [2007] VSC 163; (2007) 16 VR 417; (2007) 172 A Crim R 304.
[37] Ibid [93].
[38] Being 0.05 grams of alcohol per 100 millilitres of blood, or 0.05 grams per 210 litres of exhaled breath (air), as specified in the definition of 'prescribed concentration of alcohol' in s3(1) of the *Road Safety Act* 1986.
[39] [2002] VSC 426, [27]; (2002) 37 MVR 319.
[40] The definition of 'breath analysing instrument' in s3(1) specifies the apparatus which satisfy that description.
[41] Section 57 contains provisions in relation to analysts. Section 57(1)(a)(i) defines 'properly qualified analyst' to mean 'an approved analyst'. Section 57(1)(a)(ii) contains another definition which is not presently relevant. Section 57(1)(b) defines an 'approved analyst' to mean: 'A person who has been approved by Order of the Governor in Council published in the *Government Gazette* as a properly qualified analyst for the purposes of this section ...'
[42] Under the definition in s 3(1), 'member of the police force' has the same meaning as 'member of the force' has in the *Police Regulation Act* 1958.
[43] *McPherson v County Court of Victoria* [2003] VSC 105, [48]; (2003) 38 MVR 362.
[44] [2003] VSC 105; (2003) 38 MVR 362.
[45] [2002] VSC 426, [27]; (2002) 37 MVR 319.
[46] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365,
[47] [2003] VSC 105, [46]; (2003) 38 MVR 362.
[48] [2003] VSC 105; (2003) 38 MVR 362.
[49] There is no suggestion that Mr Rugolino was feigning his inability to give a sample of breath in the present case.

APPEARANCES: For the appellant Rugolino: Mr S Hardy, counsel. Law Offices of Barry Fried, solicitors. For the respondent Howard: Mr B Sonnet, counsel. Craig Hyland, Solicitor for Public Prosecutions.