26/01; [2001] VSC 348

SUPREME COURT OF VICTORIA

FITZGERALD v MAGISTRATES' COURT and ORS

Balmford J

28 August, 19 September 2001 — (2001) 34 MVR 448

MOTOR TRAFFIC – DRINK/DRIVING OFFENCE – PROCEDURE – WITNESS SUMMONS TO PRODUCE DOCUMENTS IN RELATION TO BREATH ANALYSING INSTRUMENT AND OTHER THINGS – PRODUCTION OF DOCUMENTS OPPOSED BY PROSECUTION – TEST TO BE APPLIED BY MAGISTRATE – ORDER THAT PRODUCTION BE DENIED AND WITNESS SUMMONS SET ASIDE – WHETHER LEGITIMATE FORENSIC PURPOSE EXISTED TO COMPEL PRODUCTION OF DOCUMENTS – WHETHER IT WAS "ON THE CARDS" THAT THE DOCUMENTS WOULD MATERIALLY ASSIST THE DEFENDANT IN HIS DEFENCE – MEANING OF "ON THE CARDS" – WHETHER MAGISTRATE IN ERROR.

F. was charged with drink/driving offences. Prior to the hearing, a witness summons was served on the Chief Commissioner of Police requiring the production of certain documents surrounding the taking of the breath test on F. After inspecting the documents sought, the magistrate stated that the material sought was nothing more than a 'fishing expedition' and that the defendant had failed to demonstrate a legitimate forensic purpose for which he sought the denied documents. The magistrate upheld the objection to the production of the documents and set aside the witness summons. Upon an originating motion seeking an order to quash—

HELD: Motion dismissed.

1. The principle of law as to whether access should be granted to documents subpoenaed from the police in relation to which objection has been taken that no legitimate forensic purpose exists for their production is well established. That principle is that a magistrate must be satisfied that it is "on the cards" that the documents would materially assist the defendant in his/her defence. "On the cards" means "within the range of probability".

***R v Saleam* (1989) 16 NSWLR 14; (1989) 39 A Crim R 406, applied.**

***Kaschke v Hornsby* (1998) 27 MVR 337; and**

***Gaffee v Johnson* (1996) 90 A Crim R 157, distinguished.**

2. A mere statement by a party that the breath analysing instrument must be defective or was not properly operated does not give rise to a probability that the requested documents would assist the defendant in the defence of the charges. In the present case, no material was produced which could form the basis of a submission that it was within the range of probability that the denied documents would assist the defendant in his defence of the charges. Accordingly, there was no ground to rebut the presumption as to the correctness of the exercise of the magistrate's discretion.

BALMFORD J:

Introduction

1. This matter was commenced on 15 September 2000 by originating motion under Order 56 of Chapter I of the *Supreme Court (General Civil Procedure) Rules* 1996 ("the Rules"). The plaintiff seeks judicial review of an order made by His Worship Mr RW Franich ("the Magistrate") in the Magistrates' Court of Victoria at Melbourne on 17 July 2000 ("the order"). By the order the Magistrate denied production of the documents sought under paragraphs 1, 2, 5 and 6 of the schedule to a witness summons dated 28 June 2000 directed to the second named defendant ("the Commissioner") and set aside the witness summons in respect of those documents ("the denied documents"). This being an interlocutory question, the matter is brought under Order 56 and not as an appeal under section 92 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act").

2. On 23 November 2000 Deputy Chief Magistrate Popovic of the Magistrates' Court of Victoria requested that a formal appearance be entered for the Magistrates' Court and indicated that the Magistrate was content to abide by the decision of this Court.

3. Briefly, the plaintiff seeks:

• an order in the nature of *certiorari* that the order of the Magistrates' Court be removed into this Court and be quashed;

• a declaration that the request for production of the denied documents was not 'a fishing expedition';

• an order in the nature of mandamus directing the first defendant ("the Magistrates' Court") to order production of the denied documents and that access to them be given to the plaintiff;

• an order directing the Commissioner to produce the denied documents to the Magistrates' Court at least one month prior to the date fixed for hearing of the charges laid against the plaintiff by the thirdnamed defendant ("the informant"); and

• an order in the nature of prohibition prohibiting the Magistrates' Court from proceeding to hear and determine the charge and summons issued on 3 June 1999 and laid against the plaintiff under sections 49(1)(b), 49(1)(f) and 18(1)(a) of the *Road Safety Act* 1986 ("the Act") by the informant, nor to fix a date for the hearing of the charges until production of the denied documents and such date fixed to be not less than one month after production of the documents.

4. The grounds of the application as appearing in the originating motion read as follows:

(a) That [the Magistrate] erred in law in setting aside a subpoena directed to the [the Commissioner] dated 28th June 2000 and denying production of certain documents sought from the second named defendant by the plaintiff namely and described in paragraphs 1, 2, 5 and 6 in the Schedule to the said subpoena.

(b) That the plaintiff was denied natural justice.

No submissions were made for the plaintiff relating to any breach of the rules of natural justice, nor was there anything in the material before the Court to support ground (b), and I need say no more about it.

5. The relevant provisions of the Act read as follows at the date of the offences:

49. Offences involving alcohol or other drugs

(1) A person is guilty of an offence if he or she—
…
(b) drives a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood; or
…
(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(1) and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;
…
(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated.

53. Preliminary breath tests
(1) A member of the police force may at any time require—
…
(c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident;
…
to undergo a preliminary breath test by a prescribed device.

55. Breath analysis

(1) If a person undergoes a preliminary breath test when required by a member of the police force … under section 53 to do so and—

a) the test in the opinion of the member … in whose presence it is made indicates that the person's blood contains alcohol;

…
any member of the police force … may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force … for the purposes of section 53 to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.
…
(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate in the prescribed form produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood.

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 blood 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 blood 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 blood of that person at the time his or her breath is analysed by the instrument.

(2) A document purporting to be a certificate in the prescribed form produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood 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 … 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.
…

(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.
…
(4) Evidence by a person authorised to operate a breath analysing instrument under section 55—

(a) that an apparatus used by him or her on any occasion under that section was a breath analysing

instrument within the meaning of this Part;

(b) that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her;

(c) that, in relation to the breath analysing instrument, all regulations made under this Part with respect to breath analysing instruments were complied with—

is, in the absence of evidence to the contrary, proof of those facts.

6. On the evening of 31 October 1998 the plaintiff furnished a sample of his breath into a breath analysing instrument ("the instrument") at a breath testing station in North Melbourne. The certificate produced by the instrument indicated a concentration of .113 grams of alcohol per 100 millilitres of blood. As a result he was charged on 5 June 1999 with offences in the alternative under sections 49(1)(b) and 49(1)(f) of the Act. A further charge under section 18(1)(a) of the Act is not relevant to this proceeding.

7. A notice under section 58(2) of the Act was served upon the informant calling for the person who operated the instrument to be called at the hearing of the charges, setting out that issue would be taken as to the matters set out in section 58(2)(a) to (f) of the Act, and putting the prosecution on notice that expert evidence would be called on behalf of the plaintiff at the hearing for the purpose of discharging the onus created by section 49(4) of the Act with respect to the charge under section 49(1)(f).

8. On 28 June 2000 the witness summons referred to in paragraph 1 above was served on the Commissioner requiring production of certain documents. The Commissioner objected to production of the documents sought and an application to set aside the witness summons was heard in the Magistrates' Court on 17 July 2000. The documents sought were in Court and were inspected by the Magistrate.

9. Some of the documents sought were released to the plaintiff by consent. However, as has been said, the Magistrate refused production of the denied documents, being the documents described in paragraphs 1, 2, 5 and 6 of the schedule to the witness summons, and set aside the witness summons in respect of the denied documents.

10. Paragraphs 1, 2, 5 and 6 of the schedule to the witness summons read as follows:

1. All documents kept by the Victoria Police and/or at Traffic Alcohol Section relevant to the operation, breakdown, service or the like of breath analysis instrument serial no. MRFL 0027 for the months of October and November 1998 inclusive, being (but not restricted to) service records, work orders, breakdown logs, schedules, statistics, parts replacement, calibration, down load of data and similar including any reports or memo(s) relevant to this instrument;

2. Force Circular Memoranda or Notices issued by the Victoria Police for general and/or internal circulation since 10 May 1994, concerning and relevant to:
a. the operation of the Drager Alcotest 7110 as defined under s3 of [the Act];
b. the operating procedure for proper operation of the Drager Alcotest 7110 as defined under s.3 of [the Act]; and
c. procedure to be used by Victoria Police members in the investigation of alleged offences under Part V of [the Act];

5. Schedule, list or any document containing details and/or statistics of preliminary breath tests conducted at the Preliminary Breath Testing Station in which it is alleged that [the plaintiff] was tested, for the evening of the 31st of October, 1998;

6. Log, schedule, register, running sheet or other document pertaining to the operation, breakdown, service or the like of breath analysis instrument serial no. MRFL 0027 during police shifts or employment of that instrument for the months of October and November 1998 inclusive and specifically containing within that period (but not restricted to) as aforesaid any notations made for the evening of the 31st of October, 1998;

It is not in issue that breath analysis instrument serial number MRFL 0027 was the instrument used to analyse the breath of the plaintiff.

The originating motion

11. Mr Dennis, for the Commissioner and the informant, submitted that the statement of ground (a) in the originating motion, which is set out in paragraph 4 above, was too wide and vague to be taken as a proper statement of the grounds on which the relief was sought, and thus did not comply with Rule 56.01(4) of the Rules. That provision reads:

> (4) The originating motion shall, in addition to complying with the requirements of Rule 5.05, state the grounds upon which the relief or remedy specified in the originating motion is sought, and, where any mistake or omission in any judgment, order or other proceedings in respect of which relief or remedy is sought is a ground, shall specify the mistake or omission.

He relied on the judgment of Brooking J in *Motor Accidents Board v Coutts* [1984] VicRp 69; [1984] VR 790; (1984) 1 MVR 407 where his Honour found that a similar ground of an order to review under the *Magistrates' Court Act* 1971 was "about as general an assertion as can be imagined", gave no indication of the nature of the error, and being not a ground at all, could not be amended. I have been unable to locate any authority as to the operation of Rule 56.01(4).

12. The principal remedy sought by the plaintiff under Order 56 is an order in the nature of *certiorar*i (see paragraph 3 above), which is a precondition to the obtaining of the other remedies sought. In *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 175; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 the High Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) said:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for *certiorari* can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record.

13. As to error of law on the face of the record, their Honours at 182 approved the following passage from the judgment of Wilson J in *Hockey v Yelland* [1984] HCA 72; (1984) 157 CLR 124 at 143; (1984) 56 ALR 215; (1985) 59 ALJR 66:

> Ordinarily, in the absence of statutory prescription, the record will comprise no more than the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication.

14. It is apparent from the affidavit of Ms Golvan in support of the originating motion, and from the transcript of the decision of the Magistrate, that the two grounds on which the defendants submitted that the denied documents should not be produced were first, that no legitimate forensic purpose for their production had been demonstrated, and second, that it would be oppressive and burdensome to require the prosecution to comply with the request. The transcript of the decision of the Magistrate concludes:

> Taking all into account my view is that the material being sought is in fact nothing more than a fishing expedition, an operator will be called to give evidence of the material which at this point would have been produced by certificates, in order words in his absence that would normally occur of course with the objection taken it has now encumbered upon the prosecution to give #### evidence from the operator of the instrument. With all that certified evidence and so forth and what would probably now be #### evidence is that contained under section 58 amongst other things. We can be cross-examined on all matters amongst other things relevant to section 49(4).
>
> My view is that the defendant has failed to demonstrate a legitimate forensic purpose for which it seeks the said material in the schedule in the subpoena. Matters will be decided on the circumstances that existed under the procedure adopted at the time in question on the 31st October 1998. Apart from anything else, my view is that the subpoena is too wide and takes the nature of discovery, it is

> clearly standard #### that it is on the cards that the documents would materially assist the accused in his defence. I find that #### hasn't been met and I uphold the objection to the production of the material sought under paragraphs 1, 2, 5 and 6. It goes without saying that the other material be released #### by consent basically.

15. That transcript does not appear to have been produced by a professional transcription service, and in parts its meaning is not entirely clear. However, it is verified as "accurate in substance" by Ms Golvan in her affidavit, and its accuracy was not challenged by the defendants. It is at least apparent from that record that the Magistrate decided the question before him on the sole ground that the defendant (the plaintiff in this proceeding) had failed to demonstrate a legitimate forensic purpose for which he sought the denied documents, and was thus engaging in a fishing expedition. His expression of his view that "the subpoena is too wide and takes the nature of discovery", is effectively a restatement of the same point.

16. That being so, the only error of law in that decision which could have been intended to be relied on by the plaintiff is an error in that specific finding. I note that the defendants were not taken by surprise; Mr Dennis had clearly come prepared to argue that point, as he proceeded to do. In all the circumstances, I consider it appropriate that I exercise the power in Rule 2.04 of the Rules to dispense with compliance with the requirements of Rule 56.01(4).

The substantive issue

17. Section 43(3)(b) of the *Magistrates' Court Act* empowers the Magistrates' Court or a registrar to issue a witness summons to any person who appears "to be likely to have in the person's possession or control any documents or things which may be relevant on the hearing of the proceeding".

18. In *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97 Gibbs CJ said at CLR 414:

> Both *Burmah Oil Co Ltd v Bank of England* [1979] UKHL 4; (1980) AC 1090 and *Air Canada v Secretary of State for Trade* [1983] 2 AC 394; [1983] 1 All ER 161; [1983] 2 WLR 494 support the view that where the Crown objects to the production of a class of documents on the ground of public interest immunity, the judge should not look at the documents unless he is persuaded that inspection would be likely to satisfy him that he ought to order production; in the words of Lord Wilberforce in *Air Canada v Secretary of State for Trade* at AC p439, he must have "some concrete ground for belief which takes the case beyond a mere 'fishing' expedition". In the latter case the House of Lords divided on the question whether, before inspection is ordered, the documents should appear likely to support the case of the party seeking discovery, or whether it is enough that they should appear likely to assist any of the parties to the proceedings; the majority favoured the former view. In both cases the proceedings were civil and not criminal. Just as in the balancing process the scales must swing in favour of discovery if the documents are necessary to support the defence of an accused person whose liberty is at stake in a criminal trial (see *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR at pp42; 21 ALR 505; 53 ALJR 11; 37 ALT 122, 62), so, in considering whether to inspect documents for the purpose of deciding whether they should be disclosed, the court must attach special weight to the fact that the documents may support the defence of an accused person in criminal proceedings. Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence. If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery only for that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.

19, In *R v Saleam* (1989) 16 NSWLR 14; (1989) 39 A Crim R 406 Hunt J in the New South Wales Court of Criminal Appeal, with whom Carruthers and Grove JJ agreed, said at ACR 409, after consideration of authorities:

> In my view, the criterion finally suggested by Gibbs CJ in *Alister* as that which had to be satisfied before a court should inspect documents in relation to which a claim for public interest immunity had been made is appropriate to be applied also when the trial judge has to determine whether access should be granted to documents subpoenaed from the police in relation to which objection has been taken that no legitimate forensic purpose exists for their production. He must be satisfied that it is "on the cards" that the documents would materially assist the accused in his defence.

20. I note that in the second edition of the *Oxford English Dictionary* "on the cards" is defined as meaning "within the range of probability". Thus the decision of the Magistrate which is under review is a decision that it was not within the range of probability that the documents would materially assist the plaintiff.

21. Mr Billings, for the plaintiff, submitted that all of the denied documents, save those described in paragraph 5, were relevant to the establishment of a defence under section 49(4) of the Act "that the breath analysing instrument used was not on that occasion in proper working order or properly operated". As Parliament had seen fit to provide, in a penal statute, the defence established in section 49(4), then any documents going to the establishment of that defence should be provided as a matter of course.

22. He said that the documents described in paragraph 5 were sought in order to provide material for cross examination as to the operation of that instrument and therefore as to the opinion formed upon it by the operator pursuant to section 55(1)(a) of the Act, the formation of which was a necessary ingredient of the charge under section 49(1)(f).

23. As to the documents described in paragraphs 1, 2 and 6, Mr Billings relied on the judgment of Marks J in *Campbell v Renton* (unreported, delivered on 18 August 1988). The issue in that case was whether evidence as to the time taken by persons generally for their blood alcohol level to reach its peak after consumption was evidence of the effect of the consumption of alcohol on the defendant. If so, it would by virtue of section 49(6) of the Act be inadmissible for the purpose of establishing a defence under section 49(4). Section 49(6) read at that time:

> (6) In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by section 48(1A) but is otherwise inadmissible.

24. Marks J said at 10:

> In any event, the statute expressly provides the applicant the defence referred to in s49(4). It cannot be supposed that Parliament intended, particularly in a penal statute, to give with one hand and take away with the other. ... I would read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4). This is because Parliament must have intended by providing the defence under s49(4) to entitle an accused to adduce all evidence going to its establishment.

25. Mr Dennis put it that Mr Billings was in effect saying: "My client says that he had not drunk as much as the certificate from the instrument showed; therefore there must be something wrong with the instrument." He cited a passage from *R v Skegness Magistrates' Court, Ex parte Cardy* and *Ex parte Williams* [1985] RTR 49 at 60 where Robert Goff LJ said, delivering the judgment of himself and Glidewell J:

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

The legislation relevant to that case which empowered the issue of a witness summons used the expression "document ... likely to be material evidence" rather than, as in section 43(3)(b) of the *Magistrates' Court Act*, "documents or things which may be relevant on the hearing of the proceeding". In the context with which I am concerned, that is a distinction without a difference.

26. The passage cited above from *Ex parte Cardy* and *Ex parte Williams* was relied on by Beach J in *Glare v Bolster* (1993) 18 MVR 53 at 63, the only Victorian case directly on point which was put to me by either counsel. In that case the defendant in the Magistrates' Court had been charged under the Act with exceeding the speed limit, and witness summonses were served on the Commissioner seeking production of documents relating to a photographic speed detection device. There were relevant legislative provisions analogous to section 58 of the Act. His Honour

said at 62:

> At no stage did counsel identify any alleged defect or deficiency in the camera or any departure from the operating instructions by the operator of the camera.
>
> In that situation I find it very difficult to conclude that the solicitors for Mr Munz are engaged on anything other than a fishing expedition and are simply seeking to use the summonses to witness as a means of obtaining discovery in a criminal proceeding.

And at 64:

> There is no requirement in the *Supreme Court Rules* or the *Crimes Act* that the court must be satisfied that the person in question is likely to be able to give material evidence or to produce any document or thing likely to be relevant at the hearing of the proceeding before a subpoena will be issued as there is in respect of summonses to witness issued pursuant to the provisions of s43 of the *Magistrates' Court Act*.
>
> In that respect this case can be compared with *Cardy's* case, *Williams'* case and [*R v Tower Bridge Magistrates' Court; Ex parte DPP* [1989] RTR 118], and distinguished from *Alister's* case and *Saleam's* case.
>
> However, be that as it may, it is nevertheless my opinion that if one applies the principle enunciated by Gibbs CJ in *Alister's* case and Hunt J in *Saleam's* case to the facts in the present case, that is of little comfort to Mr Munz. I say that for the reason that in my opinion there is nothing in the material placed before the magistrate and now placed before me from which it can be said that it is "on the cards" that production of the documents in question and the speed camera itself will materially assist the defence. ...
>
> [I]n my opinion the much broader ground for quashing the summonses to witness is that they are simply being used as part of a fishing expedition and with a view to obtaining discovery in a criminal proceeding.

His Honour pointed out at 65 that:

> [I]t would constitute a gross failure on the part of the prosecution to fulfil its duty to disclose to the defence material evidence of which it is aware and which might be of assistance to the defence, if it withheld from the defence evidence that the particular speed detection device used to measure the speed of the defendant's motor vehicle on the occasion in question was defective or that speed detection devices of the type in question were generally defective or unreliable.

27. Mr Billings relied on *Gaffee v Johnson* (1996) 90 A Crim R 157 in which the Magistrate had made an order for pre-trial discovery of documents of a similar kind to the denied documents. Smith J said at 165:

> Ultimately, we are concerned with the due administration of justice in the criminal justice system. In prosecutions of the kind considered below, the legislature has given the prosecution significant assistance in proving its case and, as a result, a substantial forensic advantage. In the vast majority of cases the defendant will not contest the result of the radar test. In those cases where a defendant wishes to contest the result, however, it would, in my view, be contrary to the interests of justice for the prosecuting authority to withhold relevant documentary information concerning relevant aspects of the radar device, its testing, sealing and its use if that is sought by the accused. If it reveals nothing to detract from the evidence of the device's reading, no harm is done from the prosecution's point of view. If it reveals facts which do so detract, then the accused is entitled to know. To permit the withholding of such information would be to allow a situation to exist where, in most cases, the prima facie proof intended by Parliament would become conclusive. That was not Parliament's intention and the courts should not permit such a situation to exist without the plainest statutory direction.

28. He also referred to *Kaschke v Hornsby* (1998) 27 MVR 337 at 339 where I adopted the principles set out in *Gaffee v Johnson*. I do not resile from that position. However, the issue before me, like that in *Glare v Bolster*, turns on the merits of an application for a witness summons, and not to the power of the Magistrates' Court to give pre-trial discovery, which was in issue in *Gaffee v Johnson* and *Kaschke v Hornsby*.

29. Nevertheless, the principle of law as to whether access should be granted to documents subpoenaed from the police, in relation to which objection has been taken that no legitimate

forensic purpose exists for their production, is well established, and is set out in the passage from *Saleam* appearing in paragraph 19 above. That principle was adopted without question by Beach J in *Glare v Bolster*, and has been applied in other jurisdictions. See *Carter v Hayes* [1994] SASC 4477; (1994) 61 SASR 451; (1994) 72 A Crim R 387 at 389 (Court of Criminal Appeal, South Australia) and *R v Jumeaux* (unreported, delivered 22 September 1994) (Seaman J, Supreme Court of Western Australia).

30. This matter must be considered in the light of the well-known principle enunciated by Hedigan J in *Urban No 1 Co-operative Society v Kilavus* [1993] VicRp 69; [1993] 2 VR 201 at 211; [1993] ANZ Conv R 397; [1992] V Conv R 54-452:

> The principles governing appeals against discretionary judgments are well established. The appellate court is not free to act upon its own conclusions but may only alter the decision of the tribunal at first instance if it has acted on a wrong principle of law, misapprehended the facts or made a wholly erroneous assessment of the relevant issue. In such cases, there is a strong presumption in favour of the correctness of the decision appealed from and the general rule is that that decision should be affirmed unless the appellate court of review in court is satisfied that it is clearly wrong: *Australian Coal and Shale Employees' Federation v The Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, at p627; *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513; (1979) 29 ALR 129; [1979] FLC 90-716; (1979) 54 ALJR 243; (1979) 5 Fam LR 719; 44 ALT 153; *McKenna v McKenna* [1984] VicRp 58; [1984] VR 665, at p683; *Australian Dairy Corporation v Murray Goulburn Co-operative Ltd* [1990] VicRp 33; [1990] VR 355. It is sometimes said that the appellant must show that it will suffer a substantial injustice if the order sought to be appealed from is allowed to stand.

31. While Mr Billings did put the matter to this Court in the terms suggested by Mr Dennis in paragraph 25 above, he did so only indirectly. However, the transcript of the hearing before the Magistrate indicates that he there said that the defendant "says that the result of analysis is incorrect on my instructions, it follows therefore, hypothetically, or taken hypothetically, that something is wrong with the instrument on that evening or it wasn't properly operated. That therefore is a legitimate forensic purpose." He produced no material which could form the basis of a submission that it was within the range of probability that the denied documents would assist the plaintiff in his defence of the charges; i.e. that they would provide a basis for submissions that the instrument "was not on that occasion in proper working order or properly operated" in terms of section 49(4) of the Act, or that there was a defect relevant to the formation of the opinion by the operator. It was the view of the court in *Ex parte Cardy* and *Ex parte Williams* that a mere statement by a party that the instrument must be defective does not give rise to such a probability. It is apparent from the decision of the Magistrate in the matter before me that he shared that view, and I see no ground to rebut the presumption as to the correctness of his exercise of his discretion.

32. For the reasons given, the claim of the plaintiff will be dismissed. Counsel may wish to make submissions as to costs.

APPEARANCES: For the Plaintiff Fitzgerald: Mr PJ Billings, counsel. Garland Hawthorn Brahe, solicitors. For the 2nd and 3rd Defendants: Mr BM Dennis, counsel. Victorian Government Solicitor.
