35/06; [2006] VSC 327

SUPREME COURT OF VICTORIA

DPP v CUMMINGS

Kellam J

30 May, 11 September 2006 — (2006) 46 MVR 84

MOTOR TRAFFIC – DRINK/DRIVING – MOTOR VEHICLE ACCIDENT – DRIVER TAKEN TO HOSPITAL – BLOOD SAMPLE TAKEN FROM DRIVER BY MEDICAL PRACTITIONER – DRIVER LATER CHARGED WITH OFFENCES – AT HEARING A CERTIFICATE SIGNED BY THE MEDICAL PRACTITIONER SOUGHT TO BE TENDERED IN EVIDENCE – OBJECTION TAKEN BY DEFENCE – CERTIFICATE MARKED FOR IDENTIFICATION – MEDICAL PRACTITIONER NOT REQUIRED TO ATTEND COURT – EVIDENCE GIVEN BY DRIVER THAT HE DID NOT HAVE HIS BLOOD SAMPLE IN HIS POSSESSION WHEN HE LEFT HOSPITAL – FINDING BY MAGISTRATE THAT THERE WAS "EVIDENCE TO THE CONTRARY" – MEANING OF – FINDING THAT REGULATIONS NOT STRICTLY COMPLIED WITH – QUESTION OF FAIRNESS RAISED BY MAGISTRATE – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(g), 57(2), (3), (7), (7A).

C. was driving a motor vehicle when it was involved in an accident. As a result C. was conveyed to hospital where a sample of his blood was taken from C. in the presence of the police informant. C. was later charged with offences under the *Road Safety Act* 1986 ('Act'). Prior to the hearing no notice was served requiring the medical practitioner to attend court to give evidence in relation to the procedure involved in the taking of the blood sample. At the hearing, the prosecution sought to tender the doctor's certificate however objection was taken by C. The magistrate initially marked the certificate for identification. Evidence was given by C. that when he left the hospital some three days after the accident he did not have the blood sample in his possession. At the conclusion of the case, in dismissing the charges, the magistrate stated that there was evidence that the medical practitioner, contrary to her certificate, did not deliver a container of the blood sample to C. nor place it with his personal property at the hospital. Accordingly, the magistrate found that there was "evidence to the contrary" of the facts contained in the certificate and dismissed the charges. Upon appeal—

HELD: Appeal allowed. Dismissals set aside. Remitted to the Magistrates' Court to be re-heard according to law.

1. The phrase "to the contrary" means "to the opposite effect". To be evidence to the contrary the evidence must at least be accepted by the tribunal of fact as having some weight. In the circumstances of the certificates referred to in s57 of the Act the circumstances in which evidence to the contrary could be established without any challenge being made to the maker of the certificate or to other persons as referred to in s57(7) would be rare. It is not sufficient that such evidence be no more than slight or unconvincing in circumstances where the defendant has chosen to lead it without seeking to challenge the certificate by cross-examination of its maker.

***Roads and Traffic Authority of NSW v Michell* [2006] NSWSC 194; (2006) 45 MVR 162, distinguished.**

2. Section 57(7) of the Act requires the accused to seek leave before requiring a witness who has given a certificate to attend for the purposes of cross-examination. However, the Act does not state that no evidence can be called to rebut proof of the facts contained in the certificate unless application for leave to cross-examine the maker of the certificate has been made. Accordingly, the magistrate was not in error in allowing the defence to call evidence concerning the issue of whether the defendant had been supplied with a sample of his blood.

3. The evidence before the magistrate was that the defendant had no memory of the blood sample having been taken. Accordingly, there was no evidence upon which the magistrate could find that the medical practitioner did not deliver the container to the defendant or place it with his personal property at the hospital.

4. It is clear beyond argument that there is nothing in s57(3) or s49(1)(a) or (g) of the Act that suggests that it is an element of the offence that the blood sample must be taken or collected in conformity with the regulations under the Act. Numerous decisions of the Supreme Court of Victoria have held consistently that prosecutions of the nature of those under s49(1)(a) or (g) of the Act do not require proof by the prosecution that the regulations governing the collection of blood samples have been complied with.

***Kos v Johnston* (1990) 11 MVR 471, applied.**

5. There was no evidence that the statutory requirements of the taking of the blood sample and its analysis were anything other than in accordance with the regulations. There was no evidence that the medical practitioner did not comply with the regulations. The highest point the evidence reached is that the defendant did not have possession of a blood sample when he left hospital and had no memory of possession of it during the time he was in hospital. There is no evidence apart from a subsequent visit to the hospital deposed to by the defendant, that any endeavour was made to request that the screening sample be tested. Furthermore, the defendant did not avail himself of the opportunity to seek leave to cross-examine the doctor in relation to the issue raised by him at the hearing of the matter. Accordingly, there was no basis in all of the circumstances before the magistrate for any exercise of a general discretion based upon unfairness.

***DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323, applied.**

6. There can be no doubt that the use of "contest mentions" in the Magistrates' Court has proved to be highly effective in terms of dealing with issues before that Court. However, there are no rules or legislative support for contest mentions. In the present case the contest mention was conducted and there was no suggestion made at that time of the nature of the defence to be raised before the magistrate. Since the enactment of the *Crimes (Criminal Trials) Act* 1993 and its subsequent re-enactment in 1999, trial by ambush in the superior courts has been virtually removed. There is no reason why the issues upon which a proceeding is to be fought should not be enunciated clearly at the contest mention in the Magistrates' Court and it appears if necessary, appropriate legislation and rules should be put in place so as to enable such identification of issues.

KELLAM J:

1. On 16 September 2005 a magistrate dismissed a charge against the respondent who had been charged with having a blood alcohol concentration exceeding 0.05% either at the time of or within three hours of driving a motor car. The Director of Public Prosecutions ("DPP"), on behalf of the informant in the matter, brings this appeal pursuant to s92(1) of the *Magistrates Court Act* 1989.

2. Shortly before 6.25pm on Sunday, 17 October 2004 the respondent, John Cummings, was driving a motor vehicle in Albert Park. His car was observed by a witness to be weaving from left to right before it collided with a parked car and other stationary objects before coming to rest. The respondent suffered apparent injury sufficient for an ambulance to be called and for him to be taken to the Alfred Hospital. Before the ambulance left the scene the respondent was spoken to by the police who administered a preliminary breath test upon him. That test proved positive and a police officer accompanied the respondent in the ambulance to hospital.

3. At 7.30pm at the Alfred Hospital a medical practitioner, Dr West, took a sample of the respondent's blood in the presence of the informant. Dr West filled out and signed a certificate of the taking of the blood sample in accordance with s57(3) of the *Road Safety Act* 1986 ("the Act").

4. Subsequent analysis of the blood sample taken by Dr West indicated a level of 0.205% blood alcohol concentration.[1] Subsequently the respondent was charged with having a blood alcohol concentration exceeding 0.05% present within three hours after driving a motor vehicle pursuant to s49(1)(g) of the Act.

5. The certificate signed by Dr West was served upon the respondent by it being delivered to him personally on 24 August 2005.

6. The proceeding came on for hearing before a magistrate on 16 September 2005. After leading evidence of the circumstances of the accident and the taking of the preliminary breath test, the prosecutor sought to tender the certificate of the taking of the blood sample signed by Dr West.

7. Section 57(3) of the Act states:

> "A certificate containing the prescribed particulars purporting to be signed by a registered medical practitioner ... is admissible in evidence in any proceedings referred to in sub-s.(2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it."

8. The proceeding before the magistrate was in relation to an offence referred to in s57(2) of the Act.

9. Mr Bourke of counsel, who appeared for the respondent both at the hearing of the proceeding before the magistrate and before me, objected to the tender of the certificate.

10. At that stage the magistrate marked the certificate for identification. I am unsure as to why the magistrate did that. Provided the certificate contained the prescribed particulars and purported to be signed by a registered medical practitioner, as it did, it was admissible and capable of being tendered absolutely pursuant to s57(3). The marking of an exhibit "for identification" is a course often followed where it is intended that a subsequent witness will prove the source or the authority of the document so as to make it admissible. It was never intended to tender the certificate absolutely before the magistrate. Apparently what was intended in the proceeding before the magistrate was to hear further evidence to establish whether there was other evidence that was "contrary" to the evidence the subject of the certificate. Section 57(3) of the Act provides that if the certificate contains the prescribed particulars and purports to have been signed by a doctor, then the certificate is admissible, and in the absence of evidence to the contrary, is proof of the facts and matters contained in it.

11. In any event, in handing down her decision, the magistrate dealt with the admissibility of the certificate as follows:[2]

> "The first matter before me is the question of the admissibility of the certificate provided by Dr Emma West and dated 17 October 2004 which was sought to be tendered by the prosecution in this matter. Objection was taken to the tendering of that certificate. The significance of this particular certificate relates to the provisions of s57(3) of the *Road Safety Act* which provides, 'a certificate containing the prescribed particulars purported to be signed by a registered medical practitioner or an approved health professional is admissible in evidence in any proceeding referred to in sub-s.(2) and in the absence of evidence to the contrary, it is proof of the facts, and matters contained in it'. The way the matter was dealt with before me by agreement was that the certificate was sought to be tendered, marked for identification and I would then hear the evidence that was sought to be led by the defendant to the contrary. It seems to me that, in fact, the correct approach – and certainly at the time that it was sought to be admissible – it's – there is a question of admissibility as opposed to the weight or whether or not the evidence can be taken into account. Certainly, the certificate is *prima facie* entitled to be tendered by the prosecution, but effectively, if facts and matters or evidence to the contrary is led, then it seems to me that that certificate can't be relied upon. It is certainly my view in the circumstances that the certificate can't be relied upon for the reasons that I will give, but from a technical point of view, it seems to me that it is appropriate that the certificate be tendered as part of the prosecution case, but in dealing with it as I give my reasons, as I will in a moment, in relation to the substantive matters of the prosecution. It is not to be used as proof of the facts and matters contained therein."

12. In the end result, and after analysing the way in which the magistrate referred to the tendering of the certificate in handing down her reasons, and conceding that there is some lack of clarity and confusion about what actually occurred, it nevertheless appears to me that the magistrate did permit the certificate to be tendered, but concluded that there was "evidence to the contrary" which rebutted it.

13. The first question of law raised on the appeal is:

> "Did the learned magistrate err in law in ruling that the certificate of the taking of the blood sample was inadmissible and could not be tendered absolutely by the prosecution, either as part of the prosecution case or at any later time?"

14. I am far from convinced that the magistrate did rule that the certificate was inadmissible and accordingly the premise upon which the first question of law is asked does not appear to me to have been established.

15. The remaining questions of law raised upon the appeal are as follows:

> "(2) Did the learned magistrate err in law in allowing the defence to call evidence concerning the issue of whether the defendant had been supplied with a sample of his blood in accordance with regulation 205(3)(c) of the *Road Safety (General) Regulations* 1999 in circumstances where the defence had never sought or obtained the court's leave under s57(7) of the *Road Safety Act* 1986?
>
> (3) Did the learned magistrate err in law in finding that the evidence of John Cummings was 'evidence

to the contrary' of the certificate of the taking of a blood sample under s57(3) of the *Road Safety Act* 1986.

(4) Did the learned magistrate err in law in holding (if she did so hold) that compliance with Regulation 205(c) of the *Road Safety (General) Regulations* 1999 is an essential element of a charge under s49(1)(g) of the *Road Safety Act* 1986?

(5) Did the learned magistrate err in law in holding (if she did so hold) that non-compliance with Regulation 205(c) of the *Road Safety (General) Regulations* 1999 is a fatal defect in a prosecution under s49(1)(g) of the *Road Safety Act* 1986?

(6) Did the learned magistrate err in law in holding (if she did so hold) that compliance with Regulation 205(c) of the *Road Safety (General) Regulations* 1999 is an essential element of a charge under s49(1)(a) of the *Road Safety Act* 1986?

(7) Did the learned magistrate err in law in holding (if she did so hold) that non-compliance with Regulation 205(c) of the *Road Safety (General) Regulations* 1999 is a fatal defect in a prosecution under s49(1)(a) of the *Road Safety Act* 1986?

(8) Did the learned magistrate err in law in dismissing the charge under s49(1)(g) of the *Road Safety Act* 1986?

(9) Did the learned magistrate err in law in dismissing the charge under s49(1)(a) of the *Road Safety Act* 1986?

16. The above questions of law arise in the following circumstances. The respondent gave evidence which, in summary, was to the effect that he had no memory of the blood sample being taken upon admission to hospital and that upon discharge from hospital three days later he had no blood sample in his possession. In the course of her reasons for decision the magistrate said:

> "I certainly am satisfied as a matter of fact that the sample was not provided to the defendant nor was it placed with his personal property. There is no evidence to that effect and having heard the evidence of the defendant, I am so satisfied."

17. This finding related to the evidence which was led before the magistrate in relation to whether or not the respondent had been supplied with a sample of his blood.

18. Regulation 205(3) of the *Road Safety (General) Regulations* 1999 deals with the procedure to be adopted after the taking of a blood sample under s56 of the Act as was the circumstance in this case.

19. Regulation 205(3) provides:

> "If a blood sample is taken ... the doctor must ensure that
> (a) one container is placed in a locked receptacle provided for the purpose at the place at which the sample was taken; and
>
> (b) one container is placed and sealed in a container labelled 'screening sample'; and
>
> (c) one container is delivered to the person from whom the blood sample was taken or placed with that person's personal property at the place at which the sample was taken."

20. In the course of the hearing before the magistrate the informant gave evidence that he was present at the Alfred Hospital when Dr West took blood from the respondent but that he did not see what the doctor did with the blood.

21. The informant gave further evidence that on 27 November 2004 the respondent attended at South Melbourne Police Station for an interview. He gave evidence about a discussion had with the respondent about the taking of the blood sample in the course of the interview. That evidence was as follows:

Question:	Would you agree that police attended the scene?
Answer:	Yeah. I can't remember much after the prang though.
Question:	Do you remember me giving you a preliminary breath test?

Answer: No.
Question: Do you remember me at all?
Answer: No.
Question: Do you remember being transported to hospital by ambulance?
Answer: Vaguely.
Question: Do you remember being at the Alfred Hospital?
Answer: Yeah, the day following. I was in there for two or three days.
Question: Do you remember a doctor taking a blood test from you?
Answer: No, not that day.

22. At the end of the interview the respondent was asked whether there was anything further he wanted to say. The answer was, "After further consultation with my solicitor I will contact you about not receiving a sample of the blood".

23. There was no evidence before the magistrate that any contact was made with police by the respondent or his solicitor from the date of the interview until the date of the hearing.

24. The respondent gave evidence before the magistrate about the matter. The evidence-in-chief was as follows:

Question: As far as the blood test being taken, do you recall the blood test being taken?
Answer: I – no, definitely not, not after the accident at all.
Question: But you don't dispute that a blood test was taken?
Answer: No, not at all.
Question: And as far as the blood test that was taken on the night in question by Dr Emma West?
Answer: Yes.
Question: Were you ever given a sample of that blood?
Answer: At no stage was I ever given any blood at - - -
Question: Okay, and what makes you come to that conclusion?
Answer: Well I think it would be a pretty important thing. When you've been taken to hospital and been accompanied by the police under the suspicion of being drunk and in charge of a vehicle or whatever, I think I would remember whether or not the hospital actually furnished me with a blood sample.
Question: Okay, and what enquiries did you make in respect of a blood sample?
Answer: Well, I didn't know anything about it until I spoke to Constable Sheehan at the South Melbourne Police Station on the – I think it was the 27th.

25. He said that after speaking to the informant on 27 November 2004 he went to the out-patients department of the Alfred Hospital two days later to make enquiries in respect of his blood sample. He gave evidence that at the time that he was admitted to hospital he had no possessions apart from a pair of jeans, a shirt and his shoes. He was asked the following question:

Question: Did you at any stage when you left the hospital with your possessions, or on you personally have a blood sample?
Answer: I did not and to the best of my knowledge have never – I have never received one.

26. In cross-examination the following questions and answers were recorded:

Question: Now you agree don't – do you not, with the interview given by Constable Sheehan this morning as the truth of that interview when he spoke to you at the South Melbourne Police Station on 27th November 2004?
Answer: Yes.
Question: And that's totally consistent with the evidence you have given a few minutes ago that you don't have any recollection of the blood sample that was taken or much that happened around the hospital over your injuries?
Answer: That's correct.
Question: Alright. Now, you say when – when were you discharged from the hospital?
Answer: Three days after.
Question: Now, at any stage during those three days did you ask any of the hospital staff for a sample of your blood?
Answer: No I did not.
Question: Now you are aware that the police are alleging that you had alcohol in your system because of the preliminary breath test?
Answer: Well I would presume so, yes.

Question: Yeah, and I put it to you it would have been on your mind what your blood alcohol concentration would have been, given the result of the preliminary breath test at the scene?
Answer: No, I can assure you sergeant that the main thing that was on my mind was the pain I was going through at the time.
Question: But it must have crossed your mind being involved in an accident and giving a positive preliminary breath test?
Answer: Of course it crossed my mind.
Question: Yeah, well if you're in hospital for three days, why didn't you ask somebody at the hospital whether or not a blood sample had been taken?
Answer: I don't have to ask whether a blood sample has been taken. Surely if there is a procedure in place that they take blood from me - - -
Question: Were you aware of that procedure?
Answer: No, I was not.

27. He was then asked about returning to the hospital after the interview with police on 27 November 2004.

Question: What you're saying is you went to the hospital and you were unable to locate a sample of blood?
Answer: That's correct.
Question: Did you go back to Constable Sheen then and tell him that you couldn't locate a sample of blood?
Answer: No. I didn't think it meant anything to Constable Sheen whether I had blood or not. He certainly - - -
Question: Did you go back and ask him?
Answer: No, I did not.
Question: Because on your evidence, he told you that a sample had gone to the Forensic Science Laboratory for analysis?
Answer: That's right.
Question: Now wouldn't logic now flow that you could have said to him "Look I can't get my sample, but you've got a sample. I want to get – I want to get a sample of that. It's at the Forensic Science Laboratory? Did that cross your mind?
Answer: Well, no, it didn't. Constable Sheen could have suggested that to me as well.
Question: But you knew where a sample of your blood was?
Answer: I knew where the sealed vial that was sent to the police pathology for testing was.
Question: How did you know it was sealed?
Answer: Well, I've read the Act and they're sealed vials which I should have received.

28. On the basis of the above evidence, counsel for the respondent submitted that the certificate under s57(3) of the Act should not be accepted into evidence. It was submitted that there was evidence to the contrary of the certificate and for that reason the certificate could not be accepted as proof of the facts and matters contained in it.

29. The prosecution contended that in circumstances whereby an accused person seeks to challenge the certificate, that accused must seek leave of the Court to cross-examine the person who has given the certificate in accordance with s57(7) and (7A). It was submitted by the prosecutor before the magistrate that s57(7) and (7A) were "a mechanism" to enable the defence to take exception to the certificate. The magistrate in her reasons for decision said as follows:

"The prime issue that was in dispute in this matter related to the alleged failure by the doctor to provide the sample of blood to the person or placed with the defendant's personal property contrary to the provisions of Regulation 205 of the *Road Safety (General) Regulations* 1999, sub-s.(3)(c). It is to be noted that I heard evidence from a witness to the accident who was in a car travelling behind the defendant and from the informant and his corroborator. And I also heard evidence from the defendant and it is to be noted that Dr West was not called to give evidence. She was the provider of the certificate to which I have already referred. That certificate had indicated that – being the certificate for the taking of the sample of blood, and without going into all of the material contained in the certificate, it was indicated that the code of practice and/or the regulations relating to the collection of the sample were complied with. Regulation 205 is certainly the relevant regulation for the purpose of this prosecution. I heard from the defendant who gave evidence that his blood sample had not been provided to him or placed with his personal property. The fact that the container had not been delivered to him or placed with his personal property in contravention with the regulations on its own is not reason to indicate that in all the circumstances the strict compliance of the regulations will result in the prosecution case not being proved. If I can indicate in this case the situation in relation to the defendant was that after he had been admitted to hospital – or certainly after the blood

> sample was taken he was admitted to hospital and he subsequently attended for interview with the informant on 27th November of that year. When he attended for that interview, and it was certainly – the course of the interview and what took place at that time was effectively agreed between the informant and the defendant and certainly towards the end of the interview the defendant was asked – it was put to the defendant 'Your blood has been analysed following the collision and a reading of .205 grams per 100 millilitres has been recorded. What do you say about that?' 'Dumbfounded'. He goes on to say that he didn't think that he would be anywhere over the limit, but he might, that he was probably over and then he goes on to say 'After further consultation with my solicitor I will contact you about not receiving a sample of blood'. Further evidence was given by the defendant that he attended the Alfred Hospital two days later. He said for the purpose of making further enquiries about the blood - the sample of blood which he had indicated hadn't been provided. The police were on notice right from the – at the very point at which they first interviewed the defendant that an issue in relation to the question of the non-compliance with the provision of the blood sample was raised and the – certainly before the matter came before the court today it was certainly indicated by the prosecution that it was – there was some surprise and a discussion about whether or not there would be some sort of trial by ambush. Certainly, it seems to me, and the fact that this matter has been through a contest mention, it was a live issue from the commencement certainly at the very start of these proceedings that the failure to provide the blood sample was a live issue in this case."

30. The magistrate went on to say:

> "Whether or not the failure to comply strictly with the regulations ought to be treated as inadmissible and because of the facts of this case and it being the central issue before the Court, the concern raised by the defendant right from the start, his inability in the circumstances in a reasonable way to test the sample, that being the reason why the regulations are in existence to provide for that fairness and that fairness not having been accorded to the defendant, it is for those reasons that the failure to comply strictly with the regulations in this case has resulted in my ruling that I am not satisfied that the certificate should be relied on as proof of the facts and matters contained in it. Having regard to those matters, I am not satisfied that the prosecution has discharged their onus of proof ... ".

31. Mr Johnson who appears for the appellant contends that the effect of s57(7) and (7A) of the Act is that those sub-sections lay down "the scheme" whereby there is a "restricted right to challenge the certificates upon which prosecutions are based" and that the magistrate ignored those provisions in finding that there was evidence which displaced the certificate.

32. Mr Bourke of counsel for the respondent submits that s57(3) stands alone. He submits that the section provides that the certificate is *prima facie* admissible, and that the obligation then falls upon the defence to produce evidence to the contrary. He submits that if an accused seeks to adduce "evidence to the contrary" as permitted by s57(3) there is no requirement that such accused seek leave to cross-examine the maker of the certificate. He argues that the police "upon the calling of that evidence have the option of seeking leave to re-open their case or call in rebuttal evidence, if evidence to the contrary is led". In this regard Mr Bourke relies upon a recent unreported decision of the Supreme Court of New South Wales. In *Roads and Traffic Authority of New South Wales v Michell*,[3] Adams J dealt with a provision similar to that under consideration and relating to photographic evidence of speeding offences. The provision in question states that:

> "Evidence that a photograph taken by an approved digital camera recording device bears a security indicator of a kind prescribed by the regulations is evidence (unless evidence to the contrary is adduced) that the photograph has not been altered since it was taken".

33. A further provision provides that a photograph tendered in evidence as a photograph taken by an approved camera recording device "is evidence (unless evidence to the contrary is adduced) of the matters shown or recorded on the photograph". His Honour said:[4]

> "The argument focuses upon the significance of the phrase 'unless evidence to the contrary is adduced'. ... It is important at the outset to note that in order to remove what I might call the 'default position', all that is necessary is that evidence to the contrary be adduced. The statute does not require that evidence to be of any particular quality. Even slight or unconvincing evidence 'to the contrary' would satisfy the negating requirement. The phrase to which I have drawn attention is in marked contrast to one which is often used where evidence is to be given prima facie cogency: 'unless the contrary is proved' or, as appears in s146 of the *Evidence Act* 1995 'unless evidence sufficient to raise doubt about the presumption is adduced'. It cannot be doubted that the negating phrase used in the Act has been intentionally and carefully chosen in pursuant to the purpose to which I referred at the beginning of these reasons, namely, to create an appropriate balance between proof by mechanical or electrical device on the one hand and the right to defend a case on the other."

34. However, the decision of Adams J in the above case must be viewed in the context of the relevant legislation, which is substantially different from that under consideration by me. I do not accept that "slight or unconvincing evidence" could rebut the statutory presumption set out in s57(3) of the Act (or for that matter in sub-s57(4), (4A), (4B) and (6) thereof).

35. The phrase "'to the contrary" means "to the opposite effect".[5] In my view, to be evidence to the contrary the evidence must at least be accepted by the tribunal of fact as having some weight. In the circumstances of the certificates referred to in s57 the circumstances in which evidence to the contrary could be established without any challenge being made to the maker of the certificate or to other persons as referred to in s57(7) would be rare. By way of example, could it be suggested seriously that an accused person could attend the Magistrates' Court upon the hearing of the matter and assert that no blood test had been taken from the accused whilst he or she was in hospital, in the face of a certificate under s57(3) to the contrary, without the magistrate taking into account the failure of the accused to seek leave to cross-examine the maker of the certificate under s57(7). The very fact that such an assertion is being made in the face of the certificate, without seeking leave to cross-examine the maker of the certificate, may render such an assertion as highly suspect. Yet, on Mr Bourke's submission, such an assertion, no matter how "slight or unconvincing" it may be, would be "evidence to the contrary" and which would render the certificate as inadmissible, or at least of no probative value. In my view, such a conclusion, flies in the face of both common sense and the clear intention of the legislature in the enactment of s57 of the Act. Furthermore, and although the evidence in these cases is given by certificate and thus the so-called rule in *Browne v Dunn*[6] does not strictly apply the principles of procedural fairness which are the subject of that rule continue to apply. In the case before the magistrate, the effect of the challenge to the certificate was that Dr West certified that she had complied with the regulations when she had in fact not so complied. Thus her evidence, given by certificate, was challenged in circumstances not where it was put to her that she had not complied with the regulations, but by the side route of calling so called evidence to the contrary. That would be a matter that the magistrate would be entitled to take into account in consideration of the weight of the evidence to the contrary, and certainly in consideration of whether in the circumstances the prosecution ought to have the opportunity to call rebuttal evidence. It is for these reasons that I conclude that although s57 (7) and (7A) of the Act do not form" a code" preventing the calling of any evidence to rebut matters certified, the circumstances under which such evidence might be called in the absence of seeking leave to cross-examine in accordance with those subsections is likely to be rare indeed.

36. Turning to the question of whether s57(7) is an exhaustive code, as submitted by the appellant in relation to the way in which evidence might be given in rebuttal of any certificate under s57 of the Act, it is necessary to look at the plain language used. In my view, it is apparent from a reading of s57(7) that a person who has given a certificate may not be required to attend court for cross-examination without the leave of the Court. The obvious purpose of such a section is to ensure that medical witnesses are not inconvenienced by reason of having to give evidence in court. In my view, the wording of the sub-section is clear, but if there is any doubt about the matter the second reading speech for the *Road Safety (Drivers) Act* 1991 dealt specifically with s57(7) of the Act. There Mr Spyker said:

> "The problem of doctors being compelled to give evidence unnecessarily is addressed by requiring leave of the Court to be obtained before the doctor can be called as a witness. The Bill provides some guidance as to the cases in which leave would be given."

37. Clearly the scheme of s57 is to facilitate the giving of evidence in relation to blood tests. Sub-section (1) defines the persons who may be able to give evidence as appropriately qualified analysts or experts. Sub-section (2) provides that in certain proceedings evidence may be given of the concentration of alcohol in the blood of a person by way of proof of analysis of such sample of blood. Sub-sections (3), (4), (4A) and (4B) provide that certificates containing the prescribed particulars and purporting to be signed by the relevant medical practitioner, analyst or expert are to be proof of the facts and matters contained in the certificate "in the absence of evidence to the contrary". Sub-sections (5), (5A) and (6) relate to service of the relevant certificate. Sub-sections (7), (7A) and (7B) relate to the way in which an accused person may seek leave to cross-examine any person who has given a certificate or others who are engaged to provide services at the place at which the sample of blood was taken. Sub-section (7B) provides that such a person

is not required to attend court on the hearing of an application for leave under sub-section (7). Sub-section (8) provides for immunity of medical practitioners, and sub-sections (9) to (11) other procedural matters relating to blood tests.

38. Section 57(7) does not prevent the prosecution from calling the person who has given the certificate as a witness. What it does to do is require the accused to seek leave before requiring such a witness to attend for the purposes of cross-examination. It limits to a number of defined circumstances the basis upon which a court may give leave for such a witness to be required to attend court for cross-examination. Insofar as they relate to alcohol in the blood sample, those circumstances are as follows:

> (i) there is a reasonable possibility that the blood sample referred to in the certificate is not that of the accused;
>
> (ii) there is a reasonable possibility that the blood sample was contaminated so as to give a higher blood concentration than would otherwise be the case;
>
> (iii) there is a reasonable possibility that the sample was not taken in accordance with the relevant Code of Practice;
>
> (iv) there is a reasonable possibility that the sample was not taken within three hours after the person who provided the sample was in charge of a vehicle.

39. In addition, there is what might be described a "catch-all" phrase that for "some other reason the giving of evidence by the person who gave the certificate would materially assist the Court to ascertain relevant facts."

40. The submission of the appellant is that the respondent was not permitted to "challenge" the facts and matters contained in the certificate, unless application for leave to cross-examine the maker of the certificate or other person referred to in s57(7) has been made. Mr Johnson submits that the certificate "... stands, unless it can be challenged, and the Act lays down a method only by which it may be challenged." He submits that the challenge to the certificate can be made only on the basis of the criteria laid down in s7A(b) of the Act.

41. In my view, that is not so. It would have been a simple matter for the legislature to have stated clearly that no evidence could be called to rebut proof of the facts contained in the certificate, unless application for leave to cross-examine the maker of the certificate had been successfully made. A simple example of the difficulty that the construction of s57(7) urged by Mr Johnston would cause would be in circumstances where an accused wished to endeavour to prove that the person who gave the sample was not him. Could he not call alibi evidence to prove that some person must have impersonated him? Could he not cross-examine the informant to prove that the certificate did not relate to him in that he was not the person driving? Would he be required to seek leave to cross-examine the person who took the sample or the person who analysed the sample before he could take such a defence? In my view, the answer, is obviously "no". It might well be that the circumstances put before the Magistrate would be such that it would be proper to give the prosecution the opportunity to call the maker of the certificate as rebuttal evidence, but that is different issue.

42. It will be recalled that Question 2 is:

> "(2) Did the learned magistrate err in law in allowing the defence to call evidence concerning the issue of whether the defendant had been supplied with a sample of his blood in accordance with regulation 205(3)(c) of the *Road Safety (General) Regulations* 1999 in circumstances where the defence had never sought or obtained the court's leave under s57(7) of the *Road Safety Act* 1986?"

43. The answer to that question is in the negative.

44. Nevertheless, and although I do not accept the submission of the appellant that s57(7) is an "exhaustive code" which regulates how evidence might be given in rebuttal of any certificate under s57 of the Act, it must be remembered that the scheme of the Act is to provide for proof of many formal matters by certificate. As conceded by Mr Bourke in the case before me, the respondent had an evidentiary onus upon him to establish that there was evidence to the contrary which would

render the certificate not to be proof of the "facts and matters contained in it". As stated above, I do not accept that it is sufficient that such evidence be no more than slight or unconvincing in circumstances where the defendant has chosen to lead it without seeking to challenge the certificate by cross-examination of its maker or others as provided for by s57(3).

45. I return to the remaining issues raised by the appeal, the first of which is whether the evidence of the respondent was "evidence to the contrary" of the certificate of the taking of a blood sample under s57(3) of the Act.

46. Regulation 206 of the *Road Safety (General) Regulations* 1999 provides as follows:

> "**206. Certificate under s57(3)**
> A certificate under s57(3) of the Act must contain the following particulars;
> (a) a statement by the registered medical practitioner or approved health professional that the requirements of these regulations for the taking of blood samples has been complied with; and
>
> (b) the name of the person from whom the blood sample was taken; and
>
> (c) the time and date the blood sample was taken; and
>
> (d) the name and signature of the registered medical practitioner or approved health professional who took the blood sample."

47. The certificate produced pursuant to s57(3) of the Act before the magistrate on the face of it complied completely with the requirements of Regulation 206. Accordingly, it is proof of the following things. First, that Dr West is a registered medical practitioner and that she collected a sample of blood from the respondent at the Alfred Hospital at 1930 on 17 October 2004. The certificate contained the name of the person from whom the blood sample was taken and it provided the name and signature of Dr West. No evidence to the contrary of those facts and matters was called. In the absence of any evidence to the contrary those matters were proved before the magistrate.

48. The certificate also contains a statement that "all the regulations relating to the collection of such sample were complied with". The only regulation which deals specifically with the "collection of" blood samples is Regulation 204 which is in the following terms.

> "**204. Procedure for taking blood sample**
> If a blood sample is taken by a registered medical practitioner or an approved health professional for the purposes of the Act, the site of the puncture must be cleansed with a swab taken from a container which –
> (a) appears to be sealed against contamination; and
>
> (b) bears a label stating that the container holds an aqueous solution of chlorhexidine and cetrimide and no methylated spirits, alcohol, tincture of iodine or other substance containing alcohol."

49. Clearly no evidence to the contrary in relation to those matters was called and accordingly those matters were each proved before the magistrate by the production of the certificate.

50. However, as stated earlier, Regulation 205 deals with the "procedures after taking blood samples". There was no evidence to the contrary in relation to the compliance of Dr West with Regulation 205(1) which refers to the procedure for placing the blood into containers and the sealing and labelling of such containers and that matter was thus proved by the tender of the certificate. However, the magistrate found that there was evidence to the contrary of part of that stated in the certificate. In particular, she found that Regulation 205(3)(c) which requires that the doctor taking the sample must ensure that one container is delivered to the patient or placed with that person's property "at the place where the sample was taken" was not proved. She said, "I have heard from the defendant who gave evidence that his blood sample had not been delivered to him or placed with his personal property". She said further, "I certainly am satisfied as a matter of fact that the sample was not provided to the defendant and nor was it placed with his personal property. There is no evidence to that effect and having heard the evidence of the defendant, I am so satisfied".

51. Of course there was evidence of compliance with the regulations by reason of the certificate signed by Dr West. The real question was whether or not the certificate in this regard was proof of the facts and matters contained in it by reason of there being an absence of evidence to the contrary. As stated above, clearly the magistrate found that there was evidence to the contrary of one fact, being that Dr West, contrary to her certificate, did not deliver a container of the blood sample to the respondent or place it with his personal property at the place of the taking of the sample.

52. Such evidence as there was before the magistrate in relation to whether or not Dr West delivered a blood sample to the respondent is set out in paragraphs 21, 24 and 26 above.

53. In his interview with police on 27 November 2004 the respondent told the police that he had no memory of a doctor taking a blood test from him on the day of the accident. Indeed, he said his memory of being in the Alfred Hospital was of the "day following".

54. Likewise he gave evidence before the magistrate that he had no memory of the blood test having been taken on the night of the accident. He was then asked if he had ever been given a sample of the blood. He said, "At no stage was I ever given any blood ... ". His counsel asked him what made him "come to that conclusion". The respondent was then permitted to express the conclusion that, "When you've been taken to hospital and been accompanied by the police under the suspicion of being drunk and in charge of a vehicle or whatever, I think I would remember whether or not the hospital actually furnished me with a blood sample". This was clearly an expression of opinion by the defendant and of no evidentiary value. The evidence before the magistrate was that the respondent had told police that he had no memory of the preliminary breath test, that he had only a vague memory of being transported to hospital and that he had no memory of Dr West taking the blood sample. In cross-examination he agreed that what he had said in the record of interview was true and he repeated that he had no recollection of the blood sample having been taken.

55. Accordingly, there was no evidence whatsoever before the magistrate upon which she could find as she did that the "defendant gave evidence that his blood sample had not been provided to him or placed with his personal property." There was no evidence upon which she could find as she did that "as a matter of fact ... the sample was not provided to the defendant and nor was it placed with his personal property".

56. The highest point reached by the evidence was that the respondent, possibly on the day after the blood sample was taken, or alternatively upon his discharge from hospital three days later, did not have a blood sample in his possession. All sorts of circumstances consistent with that evidence might be capable of being considered, in the circumstances of a busy public hospital ward. In this regard the evidence before the magistrate was that the police attended at the scene of the accident at 6.35pm by which time the respondent was in an ambulance. A brief interview was had with him whereby he gave his name and address and produced his licence to police. A preliminary breath test was undertaken and police then accompanied the respondent in the ambulance to the Alfred Hospital. The certificate under s57(3) proves that the blood sample was taken at 7.30pm. Although no evidence was before the magistrate as to the place at which the blood sample was taken, the overwhelming likelihood is that it was in the casualty department of the hospital. It will be recalled that the obligation upon the doctor under Regulation 205(3)(c) was to deliver the sample to the person from whom the blood sample was taken or alternatively to place it with that person's property "at the place at which the sample was taken". The evidence before the magistrate was that the respondent had no memory of the sample having been taken. Accordingly, there was simply no evidence upon which the magistrate could find, as she did, that Dr West did not deliver the container to the respondent or place it with his personal property at the place at which the sample was taken.

57. Even by the application of the test used by Adams J in *Roads and Traffic Authority of New South Wales v Michell* that "even slight or unconvincing evidence 'to the contrary' would satisfy the negating requirement" the fact that the respondent did not have possession of a blood sample at the time he left hospital is not evidence to the contrary of the certificate. There is no direct evidence that the requirements of the regulations were not complied with by Dr West and no inference can be drawn that she did not comply with the regulations by reason of the evidence

of the respondent that he did not have a blood sample in his possession when he left hospital or that he had no memory of being in possession of it during his time in hospital, if that was the effect of his evidence.

58. For the above reasons I conclude that the magistrate was in error in finding that the evidence of the respondent was "evidence to the contrary" of the certificate of the taking of a blood sample under s57(3) of the Act. The answer to Question 3 is in the affirmative and accordingly the appeal should be upheld.

59. However, notwithstanding that conclusion it is appropriate to consider the apparent finding of the magistrate that compliance with 205(c) of the *Road Safety Regulations* 1999 was an essential element of the charge brought against the respondent, or in the alternative that non-compliance thereof was a fatal defect in the prosecution. This is the issue raised by the questions of law numbered 4 to 7 and raised on the appeal.

60. It is clear beyond argument that there is nothing in s57(3) or s49(1)(a) or (g) of the Act that suggests that it is an element of the offence that the blood sample must be taken or collected in conformity with the regulations under the Act. Numerous decisions of this Court have held consistently that prosecutions of the nature of those under s49(1)(a) or (g) of the Act do not require proof by the prosecution that the regulations governing the collection of blood samples have been complied with. The early decisions are set out with approval in the decision of Marks J in *Kos v Johnston*.[7]

61. Even accepting the view of the magistrate that there was evidence to the contrary that the respondent was not provided with a sample of his blood by Dr West, the fact is that there was unchallenged evidence that the blood sample was taken in accordance with s56(2) of the Act and that this blood sample had been analysed with the result that the prescribed quantity had been exceeded as provided for by s49(1)(g) of the Act. In my view, no matter put before the magistrate as to the possible breach of the regulatory requirement that the respondent be supplied with a sample of his blood, permitted the above evidence to be treated as inadmissible or to be ignored. There was no basis for the magistrate to conclude that the sample actually taken from the respondent was in any way contaminated or otherwise improperly analysed.

62. Before disposing of this matter it is appropriate to turn to the question of whether or not, rather than relying upon the finding that the certificate could not be relied upon because there was "evidence to the contrary", or a finding that a purported failure to comply strictly with the regulations was fatal to the prosecution case, the magistrate in fact excluded the certificate under s57(3) from evidence, or declined to receive the certificate into evidence on the basis of a discretionary power to do so by reason of unfairness. The questions of law raised on this appeal raise issues different from those of wrongful exercise of discretion. Mr Bourke, however, argues that the magistrate was entitled to exclude the certificate, being otherwise admissible, on the grounds of fairness. In my view, although the magistrate did not find the certificate to be inadmissible there are statements in her ruling which appear to demonstrate that she relied upon an unfairness-type discretion. She said:

> "Whether or not the failure to comply strictly with the regulations ought to be treated as inadmissible and because of the facts of this case and it being the central issue before the Court, the concern raised by the defendant right from the start, his inability in the circumstances in a reasonable way to test the sample, that being the reason why the regulations are in existence to provide for that fairness and that fairness not having been afforded to the defendant, it is for those reasons that the failure to comply strictly with the regulations in this case has resulted in my ruling, in my ruling that I am not satisfied that the certificate should be relied upon as proof of the facts and matters contained in it."

63. It is clear that the public policy discretion is enlivened only where there was unlawful or improper conduct in the obtaining of evidence by the authorities.[8] There was no suggestion of any such conduct on the part of the prosecution in the case before the magistrate. However, that leaves the question of the so-called general discretion. As Batt JA said in *DPP v Moore*:[9]

> "The onus is on the respondent to satisfy the Court that the discretion should be exercised in favour of rejecting the evidence. The discretion is directed to the fairness of his trial, not the conduct of the police."

64. His Honour said further that the discretion was "designed to guard against a miscarriage of justice". He referred to *Dietrich v R*[10] where Gaudron J stated[11] that in some cases the requirement that a fair trial be fair, results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him or her at risk of being improperly convicted because its weight and credibility cannot be effectively tested. Nevertheless his Honour said:

> "Against the considerations so far discussed is the important one that it is highly desirable that those committing the anti-social acts proscribed by s49(1) of the *Road Safety Act* should be convicted and punished as a deterrent and a protection with a view to reducing the road toll and should not escape the fate justly due to them on a technicality or by tactics which catch a police prosecutor out."

65. In the case before me there is no evidence that the statutory requirements of the taking of the blood sample and its analysis were anything other than in accordance with the regulations. There is no evidence that Dr West did not comply with the regulations. The highest point the evidence reached is that the respondent did not have possession of a blood sample when he left hospital and had no memory of possession of it during the time he was in hospital. There is no evidence apart from a subsequent visit to the hospital deposed to by the respondent, that any endeavour was made to request that the screening sample be tested. Furthermore, the respondent did not avail himself of the opportunity to seek leave to cross-examine Dr Ryan in relation to the issue raised by him at the hearing of the matter. In my view, there is no basis in all of the circumstances before the magistrate for any exercise by her of a general discretion based upon unfairness.

66. The answer to Questions of law numbered 3 to 7 and raised in this appeal must be in the affirmative and it follows that the magistrate did err in law in dismissing the charges brought under s49 of the Act.

67. There are other aspects of the proceeding before the magistrate which warrant comment. As stated above, the respondent told the informant at the conclusion of the interview which took place on 27 November 2004 that "after further consultation with my solicitor I will contact you about not receiving a sample of the blood". No evidence was given before the magistrate of any such contact having been made subsequently either by the respondent or his solicitor. There was no evidence of any request having been made to have access to the police sample of the screening sample. It appears to be clear from the transcript of the proceedings before the magistrate that the matter was not raised at the contest mention. No application was made for leave to cross-examine Dr West pursuant to s57(7). Rather, the matter was first raised at the time that the prosecution sought to tender the certificate of Dr West taken under s57(3) of the Act. The prosecutor complained to the magistrate that what was taking place was an "ambush". The magistrate replied, "Well, if that's the case, then there – I mean it's a matter for you, but the Court doesn't permit trial by ambush and if that had been a problem, then there is plenty of other ways of dealing with it. We are in the middle of a case now. That's not my problem now. It might be your problem, but it's not my problem now." It would appear that the magistrate took the view that because of the statement made by the respondent at the conclusion of his record of interview, the informant should have had Dr West available to give evidence. She said in her reasons that the issue of whether the respondent had been supplied with a blood sample "was clearly the central issue in this case and had been from the start and certainly the prosecution would have had an opportunity to call the doctor in the circumstances when facing that risk knowing that ... the principal issue that was to be before the Court and the failure to call that doctor in the circumstances also needs to be taken into account in terms of the weight that I give the evidence of the defendant and the basis upon which I was satisfied."

68. Based upon the statement made to the informant by the respondent at the time of his interview that his solicitor would be in touch about failure to provide him with a blood sample, the magistrate concluded that the principal issue in the case was non-compliance with Regulation 205. In my view, that conclusion was not justified in the circumstances. As long ago as 1953 Dean J said in *Hardess v Beaumont*:[12]

> "I would add that the presumptions to which I have referred are founded on obvious good sense and that the courts should be ready to apply them in cases of this kind. Very large numbers of these prosecutions are heard in the Courts of Petty Sessions. It would add greatly to the time and expense if the informant had to be prepared in every case to prove matters as to which there can very rarely

> be any controversy. It is always open to a defendant to rebut the presumption, but in the absence of some reason for supposing that there is some irregularity, legal practitioners should be discouraged from taking points based on the supposed formal defects in the informant's proof. A judicious use of such presumptions is abundantly warranted by authority and should serve to prevent excessive insistence on formal requirements of proof."

69. In my view, the circumstances of this case did arise by reliance upon a technicality in circumstances which were designed to catch out the police prosecutor. In my view, the statements made by Marks J in *Kos v Johnston*[13] to the following effect are relevant in this case.

> "I do not think that any matter placed before the magistrate as to the possible breach of the regulations, permitted him to treat as inadmissible the above evidence. He was obliged to consider it. It may well be that in certain circumstances where procedures required by regulations had not been followed, that a tribunal of fact fails to be satisfied beyond reasonable doubt of one or more elements of an offence. The evidence, such as it was, concerning any breach here of the regulations, was unlikely, in my opinion, to have led a reasonable tribunal of fact to conclude that the sample actually taken from the defendant had in some way lost its integrity or that the analysis was other than reliable. There has been a tendency for magistrates to uphold ill-founded technical points in this area. It is difficult to understand the reason unless it is that magistrates are reluctant to register convictions against persons who, when sober, are of good character. The legislation is directed at promotion of road safety and the law now places a strict burden on motorists to drive while sober, or certainly while unaffected in any significant way, by the consumption of alcohol. The law has become more strict in this area and reflects the concern of the community about those road accidents which are partly contributed to by drivers affected by the consumption of alcohol. In the instant case there was no basis for the tribunal of fact concluding that the sample actually taken from the defendant was in any way unlikely to provide an accurate analysis of the concentration of alcohol in the blood of the defendant."

70. There can be no doubt that the use of "contest mentions" in the Magistrates' Court has proved to be highly effective in terms of dealing with issues before that Court. However, there are no rules or legislative support for contest mentions. In the case before me the contest mention was conducted and as I understand the evidence, there was no suggestion made at that time of the nature of the defence to be raised before the magistrate. I understand from having heard a number of similar appeals to this that it is common-place for counsel at such contest mentions to assert on behalf of an accused that "all issues are in contest". Since the enactment of the *Crimes (Criminal Trials) Act* 1993 and its subsequent re-enactment in 1999, trial by ambush in the superior courts has been virtually removed. There is no reason why the issues upon which a proceeding is to be fought should not be enunciated clearly at the contest mention in the Magistrates' Court and it appears to me, if necessary, appropriate legislation and rules should be put in place so as to enable such identification of issues.

71. Irrespective of these matters and as stated above, I conclude that the magistrate did err in law in dismissing the charge brought against the respondent and the proceeding should be remitted to the Magistrates' Court to be re-heard according to law.

72. I reserve to Counsel the opportunity to make submissions as to costs.

---

[1] The statement of the analyst as to the analysis of the blood sample was admitted into evidence before the magistrate without challenge.
[2] Transcript p87.
[3] [2006] NSWSC 194; (2006) 45 MVR 162.
[4] At paras 15 and 16.
[5] *Oxford Concise Australian Dictionary*.
[6] (1893) 6 R (HL) 67.
[7] (1990) 11 MVR 471 at 473.
[8] *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[9] At p445.
[10] [1992] HCA 57; (1992) 177 CLR 292; (1992) 109 ALR 385; (1992) 67 ALJR 1; 64 A Crim R 176.
[11] At 373.
[12] [1953] VicLawRp 46; [1953] VLR 315 at 320; [1953] ALR 656.
[13] At 474.

APPEARANCES: For the appellant DPP: Mr RJ Johnston, counsel. Solicitor to the Office of Public Prosecutions. For the respondent Cummings: Mr T Bourke, counsel. Simon English, solicitors.