27/00; [2000] VSC 156

SUPREME COURT OF VICTORIA

YAMASA SEAFOOD AUSTRALIA PTY LTD v WATKINS

Eames J

11, 12, 27, 28 April 2000

OCCUPATIONAL HEALTH AND SAFETY – EMPLOYEE INJURED BY MACHINE – EMERGENCY STOP BUTTON NOT IMMEDIATELY ACCESSIBLE – EMPLOYER CHARGED BY INSPECTOR – PROOF OF INSPECTOR'S APPOINTMENT – ORAL EVIDENCE GIVEN AND WRITTEN DOCUMENTS TENDERED – WHETHER SUFFICIENT TO PROVE INSPECTOR'S APPOINTMENT – INSTRUMENT OF DELEGATION MISSING – SET OUT PREVIOUSLY IN JUDGMENT OF SUPREME COURT JUDGE – CASE REFERRED TO BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – PRESUMPTION OF REGULARITY – WHETHER REBUTTED IN RELATION TO PROOF OF INSPECTOR'S APPOINTMENT – PROSECUTION PERMITTED TO RE-OPEN CASE TO TENDER DOCUMENTS – WHETHER MAGISTRATE IN ERROR – "PRACTICABLE" – REFERENCE BY MAGISTRATE TO FORMER REGULATIONS AND STANDARDS – WHETHER MAGISTRATE IN ERROR – FINDING CHARGES PROVED – WHETHER MAGISTRATE IN ERROR: *OCCUPATIONAL HEALTH AND SAFETY ACT* 1985, SS21, 38, 47; *OCCUPATIONAL HEALTH AND SAFETY (PLANT) REGULATIONS* 1995, R706(4)(a)(i); *PUBLIC SERVICE ACT* 1974, S37(4).

An employee of YS was injured whilst operating a machine at YS's factory. In the course of his duties, a part of the employee's clothing became entangled in the machinery whereby he suffered serious injuries to his arm. Although YS had previously installed an emergency stop button, it was not immediately accessible to the worker. Subsequently, charges were laid by W. (an inspector appointed under the *Occupational Health and Safety Act* 1985 ('Act')) against YS alleging, *inter alia*, that YS failed:

> (i) to provide and maintain so far as it was practicable for employees a working environment that was safe and without risks to health
>
> (ii) to ensure that the emergency stop device was prominent clearly and durably marked and was immediately accessible to each operator of the plant.

When the charges came on for hearing, YS stated that "all matters were in issue and strict proof of formal proofs would be required". Thereafter a number of witnesses were called by the informant. During the course of his evidence, W. said he had been appointed as an inspector under the Act and had been an inspector for some ten years. Two documents were tendered without objection dealing with a delegation of powers and an authorisation to bring the proceedings against YS. After the defence evidence was completed, YS made a series of submissions that there had been omissions in the chain of technical proofs of matters which were said to be essential to be established by the prosecution. The primary submission was that there was insufficient evidence to prove that W. had been properly appointed as an inspector under the Act. The matter was then adjourned and upon resumption, the prosecution was granted leave by the magistrate to re-open its case. Evidence was then led from a former Director-General of the Department of Labour to the effect that he had appointed W. an inspector and that the power to do so derived from an instrument of delegation from the Minister. The witness was unable to produce the instrument. Several other documents were tendered by the prosecution. Ultimately, the magistrate concluded that W. had been properly appointed and referred, *inter alia*, to the decision of *Davis v Grocon* [1992] VicRp 92; [1992] 2 VR 661; (1992) 47 IR 404 where Hayne J held similarly in respect of an inspector in parallel circumstances to those of W. The magistrate imposed convictions and fines on YS. Upon appeal—

HELD: Appeal dismissed.

1. The decision in *Davis v Grocon* was directly relevant to the issue before the magistrate in the present case. It was not necessary to prove that the Director-General who made the appointment had been delegated the power to do so. The appointment was validly made by reference to a specific and distinct power given to the Director-General under s37(4) of the *Public Service Act*. Accordingly, it was open to the magistrate not only to act on the decision in *Davis v Grocon* but also to conclude that the power to appoint W. had been validly exercised.

2. Once the original appointment of W. was proved, the savings provisions of the 1992 and 1996 amending legislation ensured that the validity of W's appointment as an inspector remained incapable of a successful challenge.

3. It was open to apply the presumption of regularity in this case. The presumption is that acting in a public office is evidence of due appointment to that office. It is always open to the person challenging the presumption to seek to rebut it. As there was no evidence led to cast doubt on the presumption that W. had been appointed, the presumption of itself when taken with the oral evidence of W. proved his appointment.

4. The instrument of delegation which was said to be lost was set out in the judgment of Hayne J in *Davis v Grocon*. Whilst it would not be appropriate to treat the judgment of Hayne J as proof as a fact of the existence at the relevant time of the missing instrument of delegation, it was relevant as being a factor to which the magistrate could have regard in determining whether the presumption applied.

5. In relation to YS's submission that W's authority to bring the charges had not been established because there was no written evidence of his appointment as an inspector, proof of authority to bring the charges was not a mere technicality but a matter of substance. However, the decision of the magistrate to permit re-opening of the prosecution case was one involving the exercise of a discretion. Having regard to the fact that YS allowed W. to give evidence of his appointment without objection, had not submitted no case to answer at the close of the prosecution case and could point to no disadvantage or prejudice which YS would suffer, no error was shown in the magistrate's exercise of discretion to permit the prosecution to re-open the case.

6. It was open to the magistrate to have regard to former Regulations and Standards as items relevant to the question as to whether it was practicable for YS to identify and eliminate the risks to the employee. It was also open in all of the circumstances for the magistrate to find that all of the elements of the charges had been proved beyond reasonable doubt.

EAMES J:

1. This is an appeal brought pursuant to s92 of the *Magistrates' Court Act* 1989. The appellant appeals against orders made on 19 October 1999 by Magistrate Mr M Walter at the Magistrates' Court, Melbourne. His Worship convicted the appellant of two offences against s21(1) and s21(2)(a) and s47 of the *Occupational Health and Safety Act* 1985 (hereafter referred to as "the Act", or "the OH&S Act"). The offences for which the appellant was convicted were counts 1 and 5, and, in substance, read as follows:

> 1. That contrary to s47 of the *Occupational Health and Safety Act* 1985 it did as an employer fail to provide and maintain so far as it was practicable for employees a working environment that was safe and without risks to health, in contravention of ss21(1) and 21(2)(a) of the *Occupational Health and Safety Act* 1985.
>
> 5. That on or about 16 June 1998 it was guilty of an offence pursuant to s47 of the Act in that as an employer it failed to ensure that if the design of plant, namely, a stick forming machine, included an emergency stop device, that device was prominent clearly and durably marked and was immediately accessible to each operator of the plant, in contravention of regulation 706(4)(a)(i) of the *Occupational Health and Safety (Plant) Regulations* 1995.

2. After seven days of hearing, his Worship, on 19 October 1999, found the charges proved, and on the first count convicted and fined the appellant the sum of $30,000 and on one other charge, listed above as No. 5, the appellant was convicted and fined $5,000. Although there had, in all, been seven charges initially brought against the appellant — later reduced to five — certain additional charges were withdrawn by the informant upon the conviction for the two offences listed above.

3. On an *ex-parte* application to a Master of the Court, the following questions of law were identified as being raised on this appeal. As I will later note, it is my view that some of the grounds identified do not constitute grounds of appeal on questions of law, at all, or else are so broadly stated as to provide little or no appropriate assistance to the Court in narrowing down the issues which were sought to be raised on the appeal. The following grounds of appeal were referred to the Court by the Master:

> "(a) The Magistrate erred in law in admitting into evidence as part of the prosecution case against the Appellant and/or placing any reliance on the *Occupational Health and Safety (Machinery) Regulations* 1985 regulation 12, such regulations having been repealed prior to the accident which was the subject matter of the charges.
>
> (b) The Magistrate erred in law in admitting into evidence as part of the prosecution case and/or relying on Australian Standards AS4024, given that the *Occupational Health and Safety (Plant) Regulations* 1995, *inter alia*, contained procedures to achieve compliance with section 21 of the *Occupational Health and Safety Act* 1985 obligations.
>
> (c) The Magistrate erred in law in the exercise of the Court's discretion by permitting the prosecution

to re-open its case, after the defence had completed its case, in order to prove that the informant had been duly appointed as an inspector under the *Occupational Health and Safety Act* 1985.

(d) The Magistrate erred in law by finding that he was bound by the decision in *Davis v Grocon* on the question of whether the informant had been duly appointed as an inspector under the *Occupational Health and Safety Act* 1985.

(e) The Magistrate erred in law by relying on document 'MM', in order to decide whether the informant had been duly appointed as an inspector under the *Occupational Health and Safety Act* 1985, such document being the purported exercise of a power to vary the duties of officers and employees, ie, to be an inspector under the *Occupational Health and Safety Act* 1985, when the delegation to the person purporting to exercise that power had not been established by successfully tendering of the instrument of delegation alleged to have been issued by the Public Service Board.

(f) The Magistrate erred in law by relying on document 'LL', in order to decide whether the informant had been duly appointed as an inspector under the *Occupational Health and Safety Act* 1985, such document being the purported exercise of a power to appoint the informant as an inspector under the *Occupational Health and Safety Act* 1985, when the delegation to the person purporting to exercise the power had not been established by tendering the instrument of delegation issued by the then Minister and/or in circumstances where the prosecution conceded that such instrument could not be produced.

(g) The Magistrate erred in law by finding that the prosecution had produced any proof that the informant had been duly appointed as an inspector under the *Occupational Health and Safety Act* 1985.

(h) The Magistrate erred in law on the facts found to be proved by him in deciding that the Appellant had breached regulation 706(4)(a)(i) *Occupational Health and Safety (Plant) Regulations* 1995 namely, having failed to have an emergency stop device located in a position as required by that regulation."

BACKGROUND TO THE CHARGES

4. The background to the charges was as follows. On 16 June 1998 Mr Nenad Bakic, who was employed by the appellant at its factory at Gilbertson Road, Laverton North, was injured when operating a stick-forming machine which was used in the manufacture of "crab sticks". As part of that work Mr Bakic was required to scrape fish paste from the sides of a hopper. Inside the hopper there was a vertical rotating shaft. At the top of that shaft there was a metal boss fitted, which connected the rotating shaft to another shaft which was driven by an electric motor via a reduction gear box mounted above the hopper. The boss was connected to each shaft by a metal pin, the upper of which was bent at one end and projected through the boss, and the lower of which was straight, and projected from the boss horizontally. In the course of scraping the hopper the right sleeve of the overalls worn by Mr Bakic became entangled with the connecting pins, he was drawn into the shaft and sustained very serious injuries to his right upper arm.

THE HEARINGS OF THE CHARGES

5. On 28 July 1999, the first day of the hearing, counsel for Yamasa Seafood Australia Pty Ltd, Mr Lindeman, who also appeared on the appeal before me, advised the Magistrate that his client would consent to summary jurisdiction on the indictable charges, and entered pleas of not guilty to what were then seven charges. Mr Lindeman advised his Worship that "all matters were in issue and strict proof of formal proofs would be required". Thereafter a number of witnesses were called by the informant on 28, 29 and 30 July 1999. Evidence from a witness for the defendant/appellant was then interposed by video link from Japan.

6. The informant for the charges was Mark William Watkins who was identified on the charge and summons sheet as "an inspector appointed under the *Occupational Health and Safety Act* 1985". His address was given as Victorian Workcover Authority in LaTrobe Street, Melbourne.

7. During the course of his evidence, Mr Watkins said that he had been appointed as an inspector under the *Occupational Health and Safety Act* 1985, and had been an inspector for some ten years. No objection was taken to that evidence. Mr Armstrong, counsel for the informant, tendered two documents which are identified before me as exhibits "NA2" and "NA3" to the affidavit of Niki Andriopoulos sworn 20 December 1999 (and which were, respectively, Exhibits "K" and "C", before the magistrate).

8. The first of those documents was a delegation of the powers of the Victorian Workcover

Authority under s21 of the *Accident Compensation Act* 1985 which delegated to the Chief Executive of the Authority all of the Authority's powers, functions, authorities, duties and discretions under various Acts including the *Occupational Health and Safety Act* 1985, "except and excluding the powers of the Authority to appoint any officer or employee of the Authority to be an inspector for the purposes of the *Equipment (Public Safety) Act* 1994 and the *Occupational Health and Safety Act* 1985". This delegation was dated 8 July 1996, and was sealed by the Authority.

9. The second document which was tendered through the informant was a document titled "Authorisation of Proceedings under the *Occupational Health and Safety Act* 1985". In that document the authorisation of proceedings was signed by Andrew Lindberg, Chief Executive of Victorian Workcover Authority and was dated 27 October 1998. That document read as follows:

> "I, Andrew Lindberg, being the person occupying the position or performing the duties of Chief Executive of the Victorian Workcover Authority ('the Authority') have been delegated, by the Authority by instrument under its common seal pursuant to s21(1) of the *Accident Compensation Act* 1985, the power of the Authority under s48(2) of the *Occupational Health and Safety Act* 1985 ('the Act') to authorise in writing, either generally or in any particular case, an inspector appointed under the Act to bring proceedings for an offence against the Act. Pursuant to the powers delegated by the Authority to me I hereby authorise Mark William Watkins an inspector appointed under the Act to bring these proceedings against Yamasa Seafood Australia Pty Ltd for offences pursuant to s47(1) of the Act in relation to the following sections and regulations."

10. The authorisation of proceedings then listed various sections of the *Occupational Health and Safety Act* 1985 and the *Occupational Health and Safety (Plant) Regulations* 1995 (hereafter referred to as "the Plant Regulations") under which the proceedings were brought against the appellant.

11. The Magistrate, without objection from counsel for the appellant, received the two documents "NA2" and "NA3" into evidence.

12. At the completion of the prosecution's evidence Mr Armstrong closed the prosecution case and the defence then entered into evidence. Counsel for the defendant/appellant did not make a submission of no case to answer to the Magistrate. The defendant/appellant called a witness, an occupational health and safety consultant, whose evidence had not concluded on 30 July whereupon the case was adjourned to 2 August 1999, it being agreed that the parties would provide written submissions to the Court prior to that date.

13. On 2 August 1999 the defence evidence was completed, and Mr Lindeman, for the defendant/appellant, then made a series of submissions amounting, in the main, to assertions that there had been omissions in the chain of technical proofs of matters which were essential to be established by the prosecution.

14. The primary submission, and the one which mainly concerns me on this appeal, was Mr Lindeman's contention that there was insufficient evidence to prove that the informant had been properly appointed as an inspector under the *Occupational Health and Safety Act*. He submitted that that appointment was an essential element in the Crown case. Upon that submission, the case was adjourned and counsel each prepared additional submissions on that issue, which were later delivered to the Court. Mr Armstrong, for the informant, advised counsel for the defence that he might make an application to reopen the prosecution case in order to call further evidence as to the due appointment of the informant as an inspector.

15. On 6 August 1999 the case re-commenced, there having been further additional submissions filed prior to that date. On that day an application was made by counsel for the informant to reopen the case, which was opposed by Mr Lindeman.

16. On 23 August 1999 his Worship handed down what he described as being an interim judgment on the merits of the prosecution, and he said his findings were made subject to proof of the appointment of the informant as an inspector, and subject also to his decision permitting the prosecution to reopen its case for that purpose. On the same date his Worship decided that he would admit into evidence the Australian Standards AS4024 and would also receive into evidence what had been Regulation 12 of the *Occupational Health and Safety (Machinery) Regulations* 1985,

which regulations had been repealed and replaced by the Plant Regulations from 1 July 1995. That material was received against the objection of Mr Lindeman for the appellant.

17. Upon granting leave to the prosecution to re-open its case, on 27 August 1999 the prosecution tendered additional evidence. The prosecution called Mr Graham Holmes, a former Director General of the Department of Labour, who gave evidence that he had appointed the informant an inspector, under the *Occupational Health and Safety Act* 1985, on 12 April 1991. Mr Holmes produced various documents relating to that appointment.

18. MrHolmes said that he signed a document titled "Certificate of Appointment" (later tendered as "LL") and that he had done so pursuant to advice. When cross-examined by counsel for the appellant/defendant Holmes said that, as he understood the advice he was given at the time, his power to make an appointment of an inspector under s38(1) of the OH&S Act, by the instrument of appointment signed on 12 April 1991, derived from a delegation from the Public Service Board (which was produced and marked as Exhibit "KK", but was not tendered absolutely), and that his power to "furnish" the certificate to the newly appointed inspector pursuant to s38(2) of the Act derived from a delegation from the Minister (which he could not produce). As to the missing instrument of delegation from the Minister, Mr Holmes said that he did not know the whereabouts of that document. Mr Armstrong, for the informant, later advised the Court that that document had apparently been lost, and was unable to be produced.

19. The prosecution then sought to tender and (with some exceptions to which I will refer) did tender into evidence a number of additional documents. These included the following documents which are marked with the exhibit numbers given to them by the Magistrate.

> "'AA' Newspaper advertisement - Adviser Level 1. 'BB'´ Letter - Department of Labour to M. Watkins dated 10/10/88. 'CC' Letter - Public Service Board to Department of Labour dated 12/10/88. 'DD' M. Watkins Superannuation Scheme document undated. 'EE' Letter - State Superannuation Board to M. Watkins. 'FF' Public Service Board Appointment Certificate Mark Watkins AOSE 1 dated 17/1/89. 'GG' Public Service Advice to Applicants to M. Watkins dated 29/3/89 - Adviser AOSE 2. 'HH' Public Service Provisional Promotion dated 29/3/89 - Adviser AOSE 2. 'JJ' Letter - Department of Business and Employment to Mark Watkins dated 18/11/93. `KK' Public Service Board Decision dated 18/3/91. 'LL' Certificate of Appointment 12/4/91. 'MM' Variation of Duties of Officers and Employees dated 12/4/91 with list of names. 'NN' Government Gazette extract of 15 May 1991 with List of Appointments."

20. Mr Lindeman objected to the tender of documents ""KK"" and "NN", and submitted that the prosecution had failed to produce any statutory or other authority to enable those documents to be accepted as proof of their contents. Mr Lindeman further submitted that without the missing instrument of delegation signed by the Minister then document 'LL' could not amount to proof of appointment of the inspector. Thus, he submitted, the prosecution could not prove that the informant had authority to prosecute, because it was an essential preliminary step to first prove that the informant had been properly appointed as an inspector. The prosecution case was then closed.

21. The hearing re-commenced on 19 October 1999, there having been further written submissions filed on both sides, and extensive arguments were then addressed to the Court as to whether the prosecution had proved the appointment of the informant as an inspector, and had proved his authority to prosecute. His Worship then made a decision, and gave reasons for the decision, that Mr Watkins was properly appointed and was authorised to bring the prosecution.

22. In the course of his reasons, his Worship concluded that Mr Watkins had been properly appointed, and held that he was bound by a decision of Hayne J in *Davis v Grocon*[1] a decision which involved another inspector, one Mr Davis, who had been appointed in circumstances that were parallel to those of Mr Watkins. The learned magistrate did not expressly discuss whether the power of appointment which Holmes had exercised as Director General derived from the Public Service Board delegation, from the Ministerial delegation or from some other source. His Worship appeared to have adopted the view that the power came by virtue of the Public Service Board delegation. His Worship concluded that, although there were some differences in the material tendered in the two cases, the position of the informant in *Davis v Grocon* was identical to that of Watkins. He rejected the contention (correctly, in my view) that by virtue of the fact that s38

had subsequently been amended that *Davis v Grocon* had no application to the present case. The amendments, he held (again, correctly, in my view), in fact confirmed that the appointment of Watkins remained immune from successful challenge.

23. The terms of s38 as it applied when Hayne J decided *Davis v Grocon*, were equally applicable to the appointment of Mr Watkins as an inspector in the present case. Section 38(1), as it then was, provided that, "Subject to the *Public Service Act* 1974, there shall be appointed such inspectors as are necessary for the purposes of the Act". Section 38(2) provided that the Minister "shall furnish every inspector with a certificate of appointment . . ." The section at that time did not state how an appointment was to be made, nor by whom, and the certificate under s38(2) was to be used for the purpose of the inspector entering workplaces in the course of his duties; it was not deemed to be proof of his appointment for the purpose of prosecutions.

24. As a result of various technical defences being taken to prosecutions in this important area of public safety, amendments were later made to the legislation, first, by Act No. 37 of 1992, and subsequently by Act No. 13 of 1996. The terms of the changes made to s38 were the subject of much discussion before me, and are set out later in these reasons. His Worship concluded that having been duly appointed as an inspector on 12 April 1991, Mr Watkins' status was protected and preserved by virtue of savings provisions which were introduced when s38 was later amended in 1992 and in 1996.

25. I turn to deal with the various questions of law referred by the Master for the appeal. I will deal with them in an order which is more convenient than the order in which they were listed by the Master.

GROUND (D): WRONGLY APPLYING *DAVIS v GROCON*

26. As a distinct ground, the appellant contends that his Worship erred in regarding himself as bound by the decision of *Davis v Grocon*.

27. Hayne J was concerned with s38 as it applied before the 1992 amendments. Counsel for the appellant did not seriously dispute, however, that the inspector in that case, Davis, was in an identical situation to the informant in the present case, Watkins. Indeed, counsel relied on the fact that they were in a similar situation in order to highlight the fact that some of the proofs which were tendered to the court with respect to the appointment of Davis, were not tendered to the magistrate in this case, thus making manifest, so it was submitted, the deficiencies in proof of appointment in this case.

28. In *Davis v Grocon* the appeal arose after it had been successfully submitted to the magistrate that authority to prosecute had not been proved because there was no proof that the inspector had been properly appointed. It was contended that the phrase "Subject to the *Public Service Act*", in s38(1), necessitated that an appointment be made by the Governor in Council. Hayne J rejected that contention and held that the informant had been properly appointed. Hayne J examined the means of appointment of persons to positions provided under the *Public Service Act*. In the course of his decision his Honour identified and discussed a range of instruments of delegation, and of appointment, which had been tendered before the magistrate. In the course of argument before Hayne J those documents had been variously advanced as being the possible source of power and/or the mechanism for the appointment of an inspector under the *Public Service Act*.

29. The material which was tendered in *Davis v Grocon* was on all fours with that which was finally tendered in the present case, save for two exceptions — which I shall discuss shortly, and which were the subject of much attention during the course of this appeal. Those two documents were instruments of delegation to the Director General of Labour: one from the Minister, and one from the Public Service Board. In broad terms, counsel for the appellant submitted that the absence of those instruments of delegation, or, at the very least, the absence of the delegation from the Minister, was fatal to the case for the informant. The successful outcome on appeal for the prosecution in *Davis v Grocon*, so it was submitted, could not be repeated in the present case, because for there to be proof that a valid appointment of Watkins, as an inspector, had been made by the Director General, it was essential that there be proof of a valid delegation of power to the Director General.

30. Whilst the discussion of the similarities and differences between the documents tendered in the two cases is not surprising, the decision in *Davis v Grocon* seems to me, with respect to counsel, to have been misinterpreted by counsel in the hearing before the magistrate. On both sides, it was accepted that in order for the appointment to have been proved in *Davis v Grocon*, and also in the present case, it was necessary to prove that the Director General, who made the appointment, had been delegated the power to do so. The necessary delegation of power to make an appointment was argued to have been given either by the Public Service Board, or, else by the Minister. In the course of argument before me it became clear that both counsel for the appellant and counsel for the respondent acknowledged that the most likely source of power was that derived by delegation from the Minister. Ground (f) of the Grounds of Appeal is predicated on that proposition being correct. The dispute between the parties in the hearing before the magistrate, and also before me, primarily related to the question whether the necessary delegation had been proved without the tendering of the instrument of delegation. On one side, the defendant/appellant argued that such a delegation could only be proved by tendering the actual instrument of delegation; on the other side, the informant/respondent argued that the delegation could be proved in other ways.

31. His Worship, not surprisingly, adopted the interpretation of *Davis v Grocon* as expounded, on both sides, by counsel, and then, applying that analysis of the basis for the decision to the facts of the case before him, held that the missing documents did not have to be produced in order to prove that the Director General had been empowered to make the appointment. His Worship held that there was such power and that the appointment had been proved.

32. In my opinion, however, the decision in *Davis v Grocon* did not turn, at all, on the effect of either of the two instruments of delegation. Notwithstanding the shared understanding of counsel to the contrary effect, neither document, in my opinion, was held by Hayne J to be the source of power for the appointment of the inspector, Davis. The appointment was held to have been validly made by reference to a specific, and distinct, power given to the Director General under s37(4) of the *Public Service Act*. For precisely the same reasons as discussed by Hayne J, with respect to Inspector Davis, the appointment of Watkins in the present case was valid.

33. Thus, it is my view that the decision in *Davis v Grocon* was, indeed, directly relevant to the issue before the magistrate in the present case. When properly understood, it would have led to the decision which his Worship, in fact, reached, so that what I consider to have been a misapprehension of the basis for the decision of Hayne J did not affect the outcome of the present case.

FURTHER EXAMINATION OF *DAVIS v GROCON*: WHAT DID IT DECIDE?

34. As I have said, attention during argument was concentrated on what were said by counsel for the appellant to be significant differences in the evidence presented in *Davis v Grocon* compared with the present case. Whilst the evidence was otherwise identical, there were two exceptions.

35. The first document which constitutes an exception, was a document, tendered in *Davis v Grocon* but successfully objected to and not tendered absolutely in the present case. That document was titled "Public Service Board decision", and Hayne J said in his judgment that it was dated 14 February 1991 (although, his Honour later gave it a date of 18 March 1991). That document was a delegation by the Public Service Board to the Director General of all of its powers "to vary the duties of officers and employees of the Department of Labour by adding to the duties of any officer or employee the duties of inspector under the following Acts, and to appoint officers and employees as inspectors accordingly". Among the Acts listed was the *Occupational Health and Safety Act* 1985. An equivalent document was sought to be tendered in the present case, albeit dated 18 March 1991 (Hayne J, when first mentioning the document, at p663, in *Davis v Grocon*, stated that 14 February 1991 was the date the Public Service board executed the delegation, but later, at 664, said that the date of the Public Service Board delegation was, in fact, 18 March 1991, which appears to have been the date upon which the delegation was to take effect). An identical document to the "Public Service Board Decision" was handed to Holmes in the witness box in the present case, was marked as an MFI Exhibit, designated "KK", but was objected to, and was never absolutely made an exhibit. (This is the document identified in Ground (e) of the Grounds of Appeal).

36. Apparently acting pursuant to that Public Service Board instrument of delegation, in *Davis v Grocon* the Director General (the same MrHolmes as gave evidence in the present case) issued a certificate dated 12 April 1991, titled "Variation of Duties of Officers and Employees" which purported to vary the duties of officers, whose names were listed in a schedule, so as to include the duties of inspectors, and which "confirmed" them to be appointed as inspectors. Davis was listed in that schedule.

37. In the present case, document "MM" dated 12 April 1991, and signed by Holmes, was tendered. That, too, was titled "Variation of Duties of Officers and Employees," and also decreed that those persons listed on a schedule thereby had their duties varied so as to include the duties of inspectors under the OH&S Act. The document "MM" was identical to that tendered under the same title in *Davis v Grocon*. In the annexed schedule to "MM" was Watkins' name. On the same list was Davis' name. Document "MM", in common with the document in *Davis v Grocon* also stated: "I confirm that the persons listed in the attached schedule are appointed and continue to be appointed as Inspectors".

38. It was submitted on behalf for the appellant that because the Public Service Board delegation had not been tendered in the present case, then, unlike the situation in *Davis v Grocon*, the document "MM" did not have efficacy as proof of the variation of duties, or the appointment of Watkins as an inspector.

39. The second instance of a document which had been tendered in *Davis v Grocon* but which was not tendered in the present case was a delegation from the Minister for Labour to the Director General, Mr Holmes, pursuant to s57 of the OH&S Act, whereby the Minister delegated his powers, duties and functions under s38 "to furnish inspectors appointed pursuant to the said *Occupational Health and Safety Act* 1985 with certificates of appointment". The text of that instrument is set out in full in the judgment of Hayne J in *Davis v Grocon* at pages 663-4, but the instrument itself was lost subsequent to that decision.

40. In *Davis v Grocon* the Director General, Holmes, had issued a "certificate of appointment" in the name of Mr Davis, dated 12 April 1991, appointing him an inspector under the Act. Although the instrument of delegation from the Minister to the Director General was not produced to the magistrate in the present case, there was an identical document tendered as Exhibit "LL", which was dated 12 April 1991, which also was titled "Certificate of Appointment" and which purported to appoint Watkins as an inspector.

41. It is the contention for the appellant that the Certificate of Appointment, "LL", in this case, can have no efficacy, because the Director General, so it was submitted, was purporting to exercise power to appoint Watkins pursuant to the delegation of power from the Minister. Since that delegation can now not be produced, the chain of proof is broken, so it is submitted, and strict proof of appointment has not been made. Thus, the contention on the part of the appellant is that a document of delegation which undoubtedly existed at one time, and which is set out in full in a judgment of this court, must be produced if a prosecution for a serious breach of an Occupational Health and Safety regulation is not to fail, no matter how clear it is that the prosecution would otherwise succeed. It is the contention for the appellant that the proof that there was such a delegation can only be made by the production of the lost document, and that the law allows no other means of proof when the document has been lost.

42. As can be seen, the two documents which were not tendered in the present case (and, in particular the missing Minister's delegation) were said by counsel for the appellant to be vital if the purported appointment of Watkins as an inspector was to be proved.

43. The written outline of the appellant put the contention this way:

> "It is noted that in Grocon there were two certificates of appointment (p664) and that Hayne J, as he then was, at pp668-9 concluded that the delegation under the Public Service Act provided the power to appoint inspectors, under s38 as it was before the amendments by Act no 37/1992. It would appear from the discussion of the Ministerial delegation, referred to at pp663-4, of the Grocon case, that this or a similar delegation is the likely trigger for the creation of exhibit "LL". Assuming this is correct, the ministerial delegation should have been produced, as without it, Exhibit "LL" can have no independent existence. (the OH&S Act in s57 requires delegations to be in writing, i.e. it refers to "instruments of delegation").

44. It will be noted that the contention in the first paragraph of the outline, in asserting that the power of appointment derived from the Public Service Board delegation is inconsistent with what is asserted in Appeal Ground (f).

45. A close examination of the reasons for decision of Hayne J discloses that the contentions of counsel for the appellant are based on a fundamental misconception of the basis of the decision in *Davis v Grocon*.

46. Hayne J, at 664, first dealt with a contention that the appointment might have been made by virtue of the variation of duties document (ie, the equivalent of "MM" in the present case), executed pursuant to powers granted by the Public Service Board delegation (ie, the equivalent to MFI "KK"). His Honour rejected the contention that the appointment was made by the variation of duties document which the Director General has issued. His Honour held:

> "The variation of duties document said in terms that the Director-General was acting pursuant to delegation made by the Public Service Board but in my view that document, fairly construed, shows that the Director-General sought to rely upon the Public Service Board delegation only in connection with the variation of the duties of officers recorded in the document and did not rely upon it in stating in the document, as he did, that he "confirmed" that those persons "are appointed and continue to be appointed as inspectors".

47. His Honour did not expressly address the question whether the certificate of appointment therefore derived its power from the instrument of delegation of the Minister (which is the missing document in the present case). Although it had been taken by all counsel in the present case that that must have been the source of the power which was exercised by the Director General I do not consider that Hayne J so decided, but, rather, I consider that his Honour held the source of power to be independent of the Minister's delegation, and to derive from s37(4) of the *Public Service Act*.

48. Relevant provisions of s37 of the *Public Service Act* 1974 are as follows:

> 37(1) The Board may from time to time specify the qualifications or experience necessary for promotion or transfer to any office or class of offices.
>
> (3) Where a senior office is vacant or about to become vacant the relevant chief administrator may—
> (a) after consultation with the Board transfer or promote a qualified officer to fill the vacancy;
> (b) cause notice of the vacancy to be given; or
>
> (c) request the Board to cause public notice of the vacancy to be given under sub-section (4D).
>
> (4) Subject to sub-section (4A) where any other office is vacant or about to become vacant the relevant chief administrator may—
> (a)transfer or promote a qualified officer to fill the vacancy; or
>
> (b) cause notice of the vacancy to be given.
>
> (4A) Where the relevant chief administrator is of the opinion that having regard to the nature of the duties of the office that is vacant or about to become vacant, it is unlikely that there is an officer suitable for appointment to the office he may report accordingly to the Board and request the Board to cause notice of the vacancy to be given under sub-section (4D).
>
> (11) Any promotion made in pursuance of this section and any transfer, other than a transfer of an unattached officer, to an office notice of the vacancy in which has been given under sub-section (4) shall be provisional and shall be notified in the prescribed manner and shall be subject to appeal as provided in the next succeeding section and shall not have effect pending confirmation of the promotion or the transfer.

49. Following the passage cited above, at paragraph [46], Hayne J continued, at 664, after speaking of his interpretation of the variation of duties document:

> "In any event, whether or not that is the true construction of that particular document, I consider that the certificate of appointment of 12 April 1991 was intended to take effect according to its terms and that it is not permissible to give the certificate of appointment any construction other than that which its words dictate, viz, that the Director-General was thereby purporting to appoint the informant as an inspector. In particular, I do not consider it permissible to construe the certificate

> of appointment by reference to the variation of duties document which has no connection with the certificate other than that it bears the same date and deals with the same general subject matter."

50. Hayne J, at 666-7, examined the history of appointments made under the *Public Service Act*, and identified a distinction drawn between the appointment to "government office", on the one hand, and offices in the Public Service, on the other hand, it being the former appointments which were the prerogative of the Governor in Council. His Honour noted that s21 of the *Public Service Act* 1974 provided that the Public Service "shall consist of the chief administrators of particular administrative units" and, among others, "the persons for the time being holding offices or employed in the administrative units". Hayne J concluded that in order to determine who was required to make an appointment which was to be "subject to the Public Service Act" one had to consider who it was to be appointed and to what duties.

51. Hayne J, having, in my opinion, held, at 664, that neither of the two delegations was the source of power for the appointment made by the Director General, held, at 668-669:

> "It follows then that in my view the Director-General of Labour as the "relevant Chief Administrator" had power under s37(4) of the *Public Service Act* to transfer or promote a qualified officer to fill the vacancy in the office of inspector created by s38 of the *Safety Act*. That power was exercised by the Director General by his appointment of 12 April 1991 of the informant to that office. It follows that in my opinion the informant was validly appointed and had authority to institute the proceedings which he did"

52. The evidence of Holmes in the present case, the various documents tendered from "AA" to "NN", and in particular the certificate tendered, "LL", place Watkins in precisely the same position as Davis.

53. It was only after argument on the appeal had concluded, and I had reserved to consider my decision, that I reached a tentative conclusion as to the *ratio decidendi* of *Davis v Grocon* which was at odds with that which had been adopted by counsel during the course of argument. Accordingly, I invited counsel to make further submissions as to this question.

54. Mr Rozenes QC and Mr Armstrong, counsel for the informant/respondent, agreed with the tentative conclusion which I had reached as to the effect of *Davis v Grocon*. Mr Lindeman, counsel for the appellant, accepted that my analysis of the decision of Hayne J appeared to be valid, but submitted that insofar as Hayne J decided that the source of power of the Director General to make the appointment of Davis as an inspector derived from s37(4) of the *Public Service Act* 1974, and not from either instrument of delegation, I should not consider myself bound to follow the decision of Hayne J. It is, of course, the case that I am not bound by the decision of another judge, sitting alone, and Mr Lindeman submitted that there were good reasons why I should not regard the decision as being persuasive, on this issue.

55. In the first place, Mr Lindeman submitted that the conclusion reached by Hayne J as to the source of power of the Director General to make the appointment was obiter dictum. In my opinion, however, that was not so. The questions whether the Director General had power to make the appointment of Davis and whether he had properly exercised that power were directly raised by the grounds of appeal in the case, and were directly answered by his Honour, in a considered judgment.

56. Mr Lindeman, in the alternative, submitted that it was not clear from the judgment that Hayne J had had the benefit of argument as to the question whether s37(4) was the source of power for the appointment; it may have been, he submitted, that the issue was conceded without argument. In my view, there is no indication, at all, that the issue was conceded, and his Honour's judgement demonstrates that Hayne J had conducted a comprehensive analysis of the provisions, and the history, of the *Public Service Act*. If that was so, then, Mr Lindeman submitted, his Honour was simply wrong, in the conclusion he reached. In my view, the conclusion reached by Hayne J is not only directly on point, and is demonstrably a considered decision, but it is also, in my respectful opinion, plainly right as to s37(4) being a source of power of appointment independent of any instrument of delegation from either the Public Service Board or the Minister.

57. Mr Lindeman submitted that in the event that my analysis of the decision of Hayne J was

correct then, factually, the circumstances of the purported appointment of Watkins were not shown to have been identical to those of the appointment of Davis. It is quite correct that no evidence was directly led before the magistrate to the effect that the Director General was exercising power under s37(4). In his oral evidence Holmes, tentatively, suggested that to the extent that he could remember the advice which he had received at the time, his understanding was that his power of appointment of Watkins derived from the delegation from the Public Service Board, and that his power to issue the certificate of appointment derived from the delegation from the Minister. Mr Lindeman objected to that evidence when it was given, on the basis that it was an opinion as to a matter of law, an objection well taken, in my view. The opinion was, in any event, at odds with the conclusion reached by Hayne J, as to the source of power which Holmes exercised, in identical circumstances, when appointing Davis. Although Holmes did not give evidence that he was the "relevant chief administrator" for the purpose of s37(4), the definition of "relevant chief administrator" in s4 referred to Schedule 2, which identified the Director General of Labour as holding that position for his administrative unit, the Department of Labour.

58. Mr Lindeman sought to draw a distinction, pursuant to s37(4), between appointment of a person to a vacant "office" and a transfer or promotion to fill a vacancy, but in my view the conclusion reached by Hayne J did not turn on any such distinction. In my view, it remains the fact that the positions of Davis and Watkins — appointed the same day, by identical instruments, and by the same person — can not be distinguished. Mr Lindeman also referred to s37(11), but in my view that does not affect the situation, either.

59. Having heard the further submissions of counsel, I am confirmed in my opinion that *Davis v Grocon* is authority for the proposition that the power to appoint Watkins derived from s37(4) of the *Public Service Act* and, in my opinion, the evidence called before the magistrate must have led to the conclusion that that power had been validly exercised by Mr Holmes. Not only was his Worship entitled to have acted upon the decision in *Davis v Grocon*, it was appropriate that he should have done so. The ground of appeal identified in Question (d), must fail.

60. That conclusion is sufficient to dispose of many of the Grounds of Appeal which were predicated on the fact that the instruments of delegation were not tendered in this case. Thus, many of the Grounds of Appeal explored the question whether, in the absence of instruments of delegation, there were other ways in which proof of due delegation could be established beyond reasonable doubt. I will, however, deal with the other arguments, and with the other Grounds of Appeal, because it is possible that my decision might itself be the subject of appeal, and were my understanding of *Davis v Grocon*, or its application to the present case, to be held to be incorrect it would be unfortunate if I had not also addressed the detailed arguments of counsel which I heard on those other grounds. Counsel for the appellant did not abandon his contention that it remained necessary to prove the delegation to the Director General of power to make appointments of inspectors.

61. As will emerge, none of the arguments raised on appeal by the appellant could have succeeded, in any event.

62. In my opinion, even if it had been the case that the instrument of delegation from the Minister was important to the decision of Hayne J, and that proof of delegation was necessary, it would not have followed that the absence of the instrument in the present case was fatal to the prosecution.

63. Had it been required to be proved, the fact that the Director General had been delegated powers either by the Minister or by the Public Service Board was quite capable of being proved by means other than by the production of the instrument of delegation itself.

GROUND (G): THE PROSECUTION FAILED TO PROVE THAT THE INFORMANT HAD BEEN DULY APPOINTED AS AN INSPECTOR

(1) Outline of the contentions for Ground (g)

64. Although this ground complains that there was a failure to prove that the informant was an inspector duly appointed under the OH&S Act, the real challenge which was sought to be made was as to the question whether he had authority to bring proceedings against the appellant. The proof of appointment was said to be a pre-condition for proof of authority to prosecute. It

is not disputed by counsel for the respondent that proof of authority to prosecute is a matter of substance, and could not be described as being a matter which was merely formal or technical. On the other hand, the respondent submits that the appointment as an inspector does fall into the category of being merely a matter of formal or technical proof, not an essential element of the offence.

65. By s48(1) of the OH&S Act, proceedings for an offence may be brought by the Authority or by an inspector. The Authority is defined as being the Victorian Workcover Authority established under the *Accident Compensation Act* 1985. Sections 48(2) of the OH&S Act provides that:

> "No proceedings for an offence against this Act shall be brought by an inspector without the authority in writing of the Authority given generally or in any particular case".

66. The word "inspector" is defined at s5 to be an inspector appointed under the OH&S Act. The appointment of inspectors has, at all relevant times, been governed by s38 of the OH&S Act. It was the contention of the respondent that the informant, Watkins, was appointed under the same terms of the legislation as had been considered in *Davis v Grocon*.

67. The contentions of the respondent, on appeal, were advanced on several bases. In the first place, it was submitted that at the close of the prosecution case there was sufficient evidence as to the appointment of Watkins, as an inspector, to prove the case, anyway. However, if that was not so, then the presumption of regularity could have been applied, so as to prove the matter. It was submitted, further, that if there still remained any doubt, then having regard to the totality of the evidence, including the evidence called after the case was re-opened, the matter was unquestionably proved beyond reasonable doubt.

68. The respondent contended that if there were any deficiencies or omissions in the chain of proof of the appointment (which was not conceded) then those were not fatal to the prosecution case, and there remained ample evidence upon which the finding of guilt could be made beyond reasonable doubt. Finally, it was submitted, the savings provisions of the 1992 and 1996 amending legislation meant that the issue should be taken as having been proved, even if there were any deficiencies in the evidentiary proofs which were tendered.

(2) The state of the evidence at the end of Prosecution case

69. At the end of the prosecution case the learned magistrate held that although he would allow the re-opening so as to call additional evidence, had he been called upon to make a decision on the existing evidence he would have concluded that the appointment of the informant had been proved. In my opinion, it would have been open to the magistrate to be so satisfied, at that time, beyond reasonable doubt. The oral evidence of Watkins, when coupled with the documents then tendered, would have led to that conclusion, notwithstanding the statement by counsel for the appellant that he required "strict proof" of relevant matters.

70. The oral evidence of Watkins was not objected to and, even if it had been, it was open to be accepted, and, was not hearsay evidence, in any event[2]

71. In *Rabczynski v Morrison*[3], Pidgeon J was concerned with oral evidence as to authority to prosecute. In that case the relevant legislation required that the informant be authorised to prosecute by the Executive Director of the Wildlife Department. Pidgeon J noted that the formal complaint document did not assert that the informant had authority to prosecute, but he held that oral evidence of the informant, that he was so authorised (and which had been objected to), could not have been rejected on the grounds that it was hearsay.

72. His Honour held, however, that the oral evidence in that case was not sufficient to prove the matter beyond reasonable doubt, because it emerged that the statement made by the witness as to his status was based on a document which simply did not establish what the witness thought it did. As to the objection based on hearsay, and the reception of the oral evidence, however, Pidgeon J held: "In his oral testimony the complainant referred to the fact that he was so authorised. This was objected to on the ground that it was hearsay. I would not see it as being such and I would consider that a person could testify as to his own status. It may not be the best evidence, but the Court is required to receive all relevant evidence". His Honour cited passages from *Phipson* in support of that conclusion.

73. In that case, Pidgeon J held that the evidence did not go far enough to prove authority to prosecute, but left it open that it may have done so had not a fundamental flaw been established as to the basis on which the opinion was held.

74. In *United Transport Services v Evans*[4], Southwell J held that oral evidence from the responsible Minister could not prove that he had the power, which he asserted he had, to make appointments. In that case, the prosecutor had not sought to call oral evidence as to the fact of appointment, as opposed to calling evidence as to the question of the power to make appointments. Proof of the power of appointment was the necessary pre-requisite to its exercise. Southwell J drew a distinction between the calling of oral evidence to prove the existence of power, on the one hand, and to prove the exercise of the power (by the fact of an appointment), on the other hand. Although he did not decide the question, there is nothing in his Honour's decision inconsistent with the suggestion that oral evidence might be called to establish the latter proposition. In *Schultz v Virgin*[5], however, Walters AJ accepted, expressly, that oral evidence might establish the fact of appointment of a health inspector.

75. In the present case (leaving to one side the separate question of whether authority to prosecute had been proved) in my opinion, it was undoubtedly the case that there was sufficient evidence to justify a finding, beyond reasonable doubt — by virtue of his own evidence — that Watkins had been appointed as an inspector under the OH&S Act.

76. Furthermore, in my opinion, the two documents which had been tendered, when taken with the terms of the legislation, as to the savings clauses introduced in 1992 and 1996, not only supported the conclusion that Watkins was a duly appointed inspector, and remained so, they were more than adequate to establish beyond reasonable doubt the next proposition, namely, that he had been authorised to bring the prosecution. I will deal with the savings clauses later in these reasons, when I develop the arguments which lead me to these conclusions.

77. Although, as I have said, in my opinion the evidence which was called was sufficient to prove the fact of appointment, the learned magistrate would have been entitled to conclude that the question was put entirely beyond doubt when resort was had, additionally, to the presumption of regularity, which applied here. I will later discuss the application of that presumption.

(3) Was there evidence of appointment?

78. Under the terms of s38 of the OH&S Act as it was when Hayne J decided *Davis v Grocon*, the appointment of an inspector was made subject to provisions of the *Public Service Act* 1974. Section 38(1), as it then was, provided that, "Subject to the Public Service Act 1974, there shall be appointed such inspectors as are necessary for the purposes of the Act". Section 38(2) provided that the Minister "shall furnish every inspector with a certificate of appointment …" The certificate of appointment there mentioned was to be used for the purpose of the inspector entering workplaces in the course of his duties; it was not a certificate deemed to be proof of his appointment for the purpose of prosecutions.

79. Southwell J held in *United Transport Services v Evans*[6], that the legislation at that time was silent as to the person who was to make the appointment, and as to the manner in which it was to be done. His Honour rejected the contention that oral evidence from the Minister could prove that the Minister had power under the Act to make the appointment. The question whether oral evidence might be called as to the actual appointment did not arise, because the prosecutor in that case did not seek to call oral evidence as to that matter.

80. Mr Lindeman submitted that proof of the appointment of Watkins as an inspector depended, in the first place, upon the terms of the legislation as it existed before the 1992 amendments. Before 1992 s38(2) did not spell out who was to make the appointment, nor provide the means of proof that the appointment had been made. In other words, there was no stipulated method of proving the appointment, before 1992. In my opinion, however, Hayne J accepted in that case that an instrument of appointment by the Director General did constitute such proof.

81. Mr Lindeman submitted, however, that, if that was so, then the subsequent amendment, in 1992, provided that it was to be the Minister who made the appointment, and that there had to be a certificate of appointment made after the time of the 1992 amendment, which was thenceforth

to be proof of the appointment. Thus, Mr Lindeman contended, because s8 of Act no 37/1992 provided for proof to be by means of a certificate of appointment from the Minister, that, thereafter, became the sole means of proof. Accordingly, whether the appointment was made before or after the 1992 amendments, for prosecutions brought subsequent to the 1992 amendments proof of appointment as an inspector was required to be given by production of a certificate of appointment issued by the Minister, under s38, at a time after the section was amended in 1992.

82. It was then contended that this method of proof — the sole method of proof, so it was said – was not employed in prosecuting the appellant. The document 'LL' could not have been such a certificate of appointment, so it was submitted, because it was not signed by the Minister, and was not issued pursuant to the terms of s38 as it was after the 1992 amendment.

83. Insofar as there might have been an appointment made pursuant to the legislation as it was before 1992, then "LL" was not sufficient to prove that appointment because, so Mr Lindeman submitted, there was no instrument of delegation to the Director General. I have dealt with this argument earlier, when I dealt with the ground relating to *Davis v Grocon*. However, even accepting Mr Lindeman's contention as to the source of authority prior to 1992 for the grant of the certificate of appointment by the Director General, the contention that there was a need for a new certificate of appointment to be issued by the Minister, after the 1992 legislation, would still be unsound. Plainly, as an examination of its terms, hereafter, will demonstrate, the saving clause with respect to "the appointment or purported appointment" of inspectors before 1992 was intended to bring to an end the sort of technical defences relating to formal proofs of appointment which motivated this appeal.

(4) Did the saving clauses of the 1992 and 1996 amendments prove the appointment?

84. As noted earlier, in order to overcome various technical defences, which persons prosecuted for offences had sought to take in this important area of public safety, amendments were made to the legislation both in 1992 and in 1996. The amendments in 1992 were made by s8 of Act No. 37 of 1992. The 1996 amendments were made directly to s38 by Act No 13 of 1996. The changes appear as follows: [*After setting out these changes, His Honour continued ...*]

85. The argument of the appellant, as to the effect of the savings provisions, is that it was intended by the Parliament that a person who had been appointed before the 1992 legislation and whose appointment was under challenge could not prove his appointment by virtue of being either a "purported appointment" before the 1992 legislation or by virtue of being a "former inspector" under the 1996 legislation.

86. Mr Lindeman submitted that the certificate of appointment, "LL", could not become a certificate which constituted conclusive proof of appointment by virtue of s38(3) as amended in 1992. He submitted that the certificate of appointment which was made conclusive proof by s38(3), as amended in 1992, is a certificate furnished by the Minister after that amendment. Document "LL" is a certificate of appointment which is signed before 1992. Insofar as s8(3)(a) of the amending 1992 Act deemed valid a certificate furnished under the pre-1992 terms of s38, then it preserved only a certificate of appointment furnished by the Minister, whereas the certificate "LL" was signed by MrHolmes, the Director General, and no instrument of delegation to him had been produced.

87. As to the terms of s8(2) of the 1992 amending legislation, which on its face was intended to defeat just the sort of challenge which Mr Lindeman now seeks to make, counsel submitted that that was a provision which dealt with "the fact of appointment" and not with "the proof of appointment". Thus, that provision did not provide proof of the appointment by reference to anything which had occurred before 1992.

88. Mr Lindeman submitted, further, that the reference to "purported" appointments made before 1992 did not save Watkins' situation anyway, because when the Act was further amended in 1996 it did not carry forward, beyond 1992, those appointments which had, as at 1992, caused persons to be deemed inspectors by virtue of being "purported" appointments made before 1992.

89. The answer to these rather tortuous arguments is that even if a certificate such as "LL" is not made conclusive proof — by virtue of it being a certificate which was issued under s38(2) of the 1992 Act, or by virtue of it being a certificate of appointment furnished under the pre-1992

Act and thus saved by s8(3)(b) of the 1992 Act — the instrument which is "LL" is capable of being evidence which, alone, or with other evidence, might constitute evidentiary material which might satisfy the magistrate that the appointment made before 1992 had in fact been proved. If that was not sufficient to put an end to the challenge as to Watkins' appointment then resort to the savings provisions of the 1992 and 1996 amending legislation puts it beyond doubt (as Parliament intended).

90. The clear intention of s8(2) is to deem valid a "purported appointment" made before 1992. Watkin's appointment was at the very least a "purported appointment", not only because "LL" purported to appoint him, but also Mr Holmes gave evidence that he appointed Watkins an inspector, and also Watkins himself purported, in his own evidence, to have been appointed an inspector. Thus, under s8(2) his appointment as an inspector is to be taken as having always been valid. By s8(3)(a) a person purporting to have held office before the 1992 amendment is to be taken to be an inspector appointed under s38(1) of the Act as amended in 1992. Mr Lindeman referred me to some written submissions, in which he contended that the expression "is to be taken to be" is simply a deeming provision, and I agree with that. So, Watkins, by the 1992 provisions, was deemed to be an inspector appointed under the 1992 Act. Mr Lindeman submitted that that had to give way to the fact that it was mandatory that a new certificate be issued by the Minister under s38(1) of the 1992 Act. That would seem to entirely defeat the very point of s8(2) and s8(3).

91. If there is an obligation on the Minister to furnish inspectors with certificates which will be conclusive proof of their status, that does not negate the effect of s8(2) and (3) of the amending legislation, which removes the need for proof of the appointment of those inspectors who were appointed or purported to be appointed prior to that date.

92. As I understood his argument, Mr Lindeman contended that even if Mr Watkins had been deemed validly appointed by the 1992 legislation, he lost that status, once more, this time by virtue of the 1996 legislation. The 1996 legislation, by s68, referred to a "former inspector", not a "purported appointment", and the conclusion which that leads to, Mr Lindeman contended, was that only those persons who had been appointed by the Minister under s38(2) of the 1992 Act qualified as being "former Inspectors". Why the Parliament should have intended to produce that extraordinary result is difficult to conceive. It meant that, having passed legislation in 1992 with the intention of defeating technical defences based not on the merits but on the formal proof of appointment of inspectors — and to that end declaring persons to be inspectors who had hitherto been "purported" appointees — Parliament must then have wanted to deny them that status by the 1996 legislation.

93. The only explanation for Parliament intending to produce that result, which Mr Lindeman could venture, was that it was would serve as a reprimand to the Minister for having failed to formally appoint, anew, under s38(1) of the 1992 legislation, all those people whose appointments may have been subject to doubt between 1992 and 1996. An added factor which might have motivated Parliament in that way, so it was suggested, was that because the employment status of inspectors was changing from that of Public Servants to employees of the Authority, it was Parliament's intention to ensure that a fresh start would be made, as to that status, by the new certification of inspectors, and Parliament had expected that its intention in that regard would have been followed. Thus, it was presumed that there would no longer be any person whose status would not have been regularised by the provision of a new certificate which would constitute proof of appointment. I reject those contentions, as absurd. It is quite apparent that the very point of the savings provisions of the 1992 and 1996 legislation was to prevent important prosecutions of breaches of safety regulations being derailed or delayed by the sort of desperate, technical, arguments which were presented to the magistrate in this case.

94. In my opinion, the savings provisions of 1992 and 1996, together, denied a defence being successfully taken in this case on the basis that Watkins was not proved to have been appointed an inspector.

(5) Presumption of regularity

95. In my opinion, the presumption of regularity could be applied in the present case. That presumption is that: "Acting in a public office is evidence of due appointment to that office, not only in civil proceedings, but also in a criminal case"[7]. At the end of the prosecution case, the

presumption, taken with the evidence as at that time, would have provided ample basis on which the magistrate could have been satisfied beyond reasonable doubt as to the fact of appointment of the informant as an inspector.

96. A person acting in a public office is presumed to be duly appointed, unless the contrary is shown: *Cassell v R*[8]. In that case the High Court was concerned with a situation where counsel for the accused man announced that the Crown was put to "strict proof" of the question whether the Commissioner of ICAC had "determined" that the Assistant Commissioner would conduct a hearing of ICAC. Cassell had been charged with perjury committed at the hearing. The majority held that counsel's demand for "strict proof" was but a rhetorical flourish. Their Honours held that it was too late for the accused man to seek to deny that the appointments had been proved, oral evidence of their appointments having been admitted without objection. The same situation arises here — oral evidence of appointment having been admitted from Watkins, and also the two documents having been tendered without objection during the prosecution case. When all the additional evidence is taken into account, albeit admitted *de bene esse*, the presumption of regularity was overwhelmingly confirmed to be correct, and not to be rebutted in the present case.

97. The presumption may be applied to prove the appointment or authority of a person holding a relatively lowly public office, for example, an analyst whose certificate is used for prosecuting a case of contaminated meat (*Hardess v Beaumont*[9]) or an inspector under the OH&S Act (*United Transport Services v Evans*[10]). As Southwell J noted in the latter case, at 247, it is always open to the person challenging the presumption to seek to rebut it. Where, however, the party seeking to rebut the presumption produces no evidence which might rebut the presumption, as was the case here, then the court should draw the presumption: *R v Turnbull*[11]; *R v Kolaroff*[12]. The learned magistrate was entitled to be confident that no rebuttal would be forthcoming in this case, given that the gap in proof which was said to exist was that caused by the loss of a document subsequent to its having been set out, in its full terms, by Hayne J in *Davis v Grocon*.

98. Insofar as it was suggested that the presumption could not apply here because there was a missing instrument of delegation, the presumption of regularity may extend to a presumption of delegation, where the power of delegation existed and appeared to have been exercised, as was the case here: *Minister for Natural Resources v NSW Aboriginal Land Council*[13]; *Pertl v Kahl*[14]; *Page v South Australia*[15].

99. Mr Lindeman submitted that the presumption of regularity could not be applied when the matter sought to be proved was a matter which was critical for the prosecution to prove. He submitted that in this case the critical issue was the authority to prosecute. In the first place, however, that is not the issue which is sought to be proved (although some of the cases suggest that that issue, too, could be proved by resort to the presumption). The issue sought to be proved is that the informant had been duly appointed as an inspector, a matter which is not critical to proof of the prosecution case, but is a matter of formality only.

100. The extent to which the presumption of regularity will apply in support of acts taken by a public official has been said to depend both on the extent to which the acts are favoured, or not, by the law, and on the nature of the fact required to be presumed: *Selby v Pennings*[16], per Ipp J, citing *Best on Evidence*, 9th Ed, 308. In the present case the fact to be proved — namely, the appointment of an inspector — and the act to which that fact relates — namely, the prosecution of a breach of workplace safety — would meet those criteria. Ipp J held that the application of the presumption might be weakened where the material before the court, in itself, cast doubt on the fact sought to be presumed. That is not the case here.

101. The presumption of regularity applied in this case, and there being no evidence whatsoever to cast doubt on the presumption that Watkins had been appointed, the presumption, of itself, proved the appointment in this case, when taken with the oral evidence of Watkins.

A MISSING DOCUMENT IS REPRODUCED IN THE LAW REPORTS!

102. No doubt the interested bystander, one bereft of the benefit of legal training, would puzzle at the contention that a document which is set out in an earlier judgment of the court, but which has subsequently been lost, should be taken to have never existed. The bystander may be even more perplexed that the absence of the document should produce days of argument, and generate

considerable legal costs. On the assumption that it was necessary for the prosecution to produce an instrument of delegation which can not now be found, it was the contention of Mr Lindeman that the magistrate could not have had regard to the fact that the document was set out in the judgment of Hayne J in *Davis v Grocon*.

103. Mr Rozenes did not contend that the learned magistrate was entitled to simply adopt the judgment of Hayne J as being proof that the missing instrument of delegation in fact existed, nor did his Worship purport to apply the judgment in that way. That is not to say, however, that the decision of Hayne J, and his Honour's reference to the document, can have no bearing on the approach which the magistrate was entitled to adopt in his evaluation of the evidence which was produced before him.

104. In *Cuthill v State Electricity Commission of Victoria*[17] the Full Court was concerned with an application pursuant to s23A of the *Limitations of Actions Act* for an extension of time to bring proceedings for personal injuries said to have been caused by exposure to asbestos dust. One matter which the applicant had to address under s23A(b) was the requirement that "there is evidence to establish the cause of action upon which he wishes to rely". The Court addressed the question whether there was any evidence as to the state of knowledge of the hazards of asbestos exposure at the time when the plaintiff was exposed. The majority of the Full Court (Starke and Anderson JJ) held that the Full Court was entitled to have regard to regulations relating to harmful vapours and dust which had first been introduced in 1945, and which had been later amended many times. Their Honours held that they could consider those regulations when assessing what the state of knowledge had been of the dust hazards as at an earlier time, even though the regulations had not been tendered in the court below.

105. Additionally, Starke and Anderson JJ held that they could rely upon a decision of a Supreme Court Judge in Queensland, which had been delivered subsequent to the decision from which the Victorian appeal arose. In that case the Queensland judge had dealt with a similar application for an extension of time, and had received evidence as to the state of knowledge of the risks of asbestos over the previous 25 years. In his judgment, the Queensland judge set out passages of the affidavit of a medical expert who deposed that the dangers of asbestos exposure had been known within the industry for over 20 years.

106. In the judgment of Starke J (with which Anderson J agreed) his Honour held[18]:

> "It is to be remembered that the exercise is to ascertain whether evidence exists to support the plaintiff's claim. Where better to find such evidence than in the judgment of a court of co-ordinate jurisdiction? The truth of the facts stated is not proved but on the probabilities the existence of such facts is proved. The paragraph of Dr Ringrose's affidavit set out above was found by the Judge to be the personal, expert opinion of the doctor. In effect he says to medical experts the danger has been known for 25-30 years and the best precautions for 20 years. Australia is not such a large country that knowledge of facts in this industrial area over a long number of years in Queensland would not have filtered over the border. On the probabilities I would infer that such knowledge was known in Victoria during the same period and either was or ought to have been known to the respondent."

107. In his judgment, Brooking J held that neither the regulations nor the Queensland decision could be utilised in the way proposed by the majority.

108. In the present case, it would not be appropriate to treat the judgement of Hayne J as proof, as a fact, of the existence, at the relevant time, of the now missing document. It would however, be relevant to the limited extent of being one factor to which the magistrate was entitled to have regard in determining whether the fact which was sought to be established by way of the presumption of regularity was a fact which was seriously in contention, and also in assessing whether the nature of the fact which was sought to be established was inappropriate for application of the presumption. His Worship would have been appropriately comforted, on both bases, that the presumption could be applied.

GROUND (C): PERMITTING THE PROSECUTION TO RE-OPEN ITS CASE

109. At the close of evidence, both for prosecution and defence, counsel for the appellant submitted to the magistrate that the authority of the informant to bring the proceedings had not been established, because there was no written evidence of his appointment as an inspector,

merely his oral evidence and the two documents, being "NA2" (the instrument of delegation under s21 of the *Accident Compensation Act*, whereby powers of the Authority under the OH&S Act were delegated to the Chief Executive of the Authority), and "NA3" (the authority to prosecute signed by the Chief Executive under s48(2) of the OH&S Act).

110. The learned magistrate heard submissions and gave comprehensive written reasons on 23 August 1999, in which he concluded that the charges had been established, but said that he would not make a final decision until the question of the authority to prosecute was resolved. In fact, having given very careful consideration to the evidence which had been tendered to that point, and to the arguments of law which had been addressed, his Worship said that he considered, as at that point, that the evidence which had been tendered was sufficient to lead to the conclusion that the informant did have the necessary authority to prosecute, but that given the fact that four days had been occupied in the case to that point — a considerable commitment of resources — he considered it appropriate to put the matter beyond any doubt. After citing appropriate authorities as to the principles governing an application to re-open, he ruled that he would permit the prosecution to re-open the case "to adduce evidence of a formal nature, which was inadvertently omitted before the case was closed". He ruled that the evidence to be called (although what it would be had not been specifically identified) which was directed to the question whether Watkins had been appointed an inspector, related to a matter which would meet the description of being "formal, technical or non contentious".

111. Counsel for the appellant did not dispute that his Worship had applied the correct test as to the principles relating to the re-opening of a prosecution case: see *Shaw v R*[19]; *R v Chin*[20]. Stripped of superfluous arguments (which inevitably arose, because the ground of appeal was so wide as to prevent identification of the actual complaint), the contention on behalf of the appellant was that the learned magistrate erred in the exercise of his discretion, in that the issue on which the evidence was to be called, namely, as to the appointment of Watkins as an inspector, was not capable of being characterised as "formal, technical or non-contentious", it being instead, so it was submitted, a key element of the offence which had to be proved.

112. It was submitted by Mr Lindeman that the only means whereby proof of the appointment of the inspector could be given was by proof under s38(2) and (3) of the Act; that is, by production of a certificate of appointment which is deemed to be conclusive proof of that matter. Proof of authority to prosecute was, so it was submitted: "in every sense the same as the proof of the substantive offence", and because the proof of appointment was a prerequisite to proof of authority to prosecute, then it was a matter incapable of being described as merely technical or formal or non contentious, so it was said.

113. To support his contention that proof of appointment was incapable of being described as a formal, technical or non contentious matter, Mr Lindeman referred to *Schultz v Virgin*[21], a decision of Walters AJ, as he then was. That case concerned a prosecution under the *Health Act* in which the prosecution led oral evidence from the informant that he was an inspector under the Act, but produced no evidence, at all, even oral, that he was authorised to bring the prosecution, although the Act provided expressly that such authority was an essential pre-requisite to prosecution.

114. The first matter to note is that the case was concerned with the authority to prosecute, not evidence relating to the question of the appointment as an inspector. At page 97, Walters AJ noted that distinction. Thus, he held that there was evidence of the appointment of the inspector, by virtue of his oral evidence, but there was no evidence at all, and nor did it flow merely from the proof of his appointment, that he had been authorised to bring the prosecution. Mr Lindeman relied on statements of Walters AJ, at 99, and his adoption of statements in *O'Sullivan v Truth and Sportsman Ltd*[22], that proof of authority to bring a charge is not a mere technicality but is a matter of substance. So it is, and the respondent did not contend otherwise. But what Walters AJ also held, at 96, was that had the prosecution applied to re-open its case to prove authority to prosecute (which it had not done) it would have been appropriate that the application be granted, the issue being properly described as being a matter of formal proof, even if the topic was one of substance and not mere technicality. Mr Lindeman submitted that those remarks were *obiter*, which may technically be correct, but they nonetheless persuasively draw the distinctions which should be drawn in this case also, and even more clearly, because the "missing" evidence here related only to proof of appointment.

115. Mr Lindeman also sought to rely on *Schultz v Virgin* for another contention, namely, that where the Act provided for a particular method of proof of appointment, ie. by the tender of a certificate under s38(2)(3), then that was the only way that the matter could be sought to be proved, and the fact that Parliament had set down a scheme for proof of the matter, of itself, demonstrated that proof of the matter, unless undertaken in the manner proposed, could not be described as technical or formal, but as an essential requirement. This argument seems to me to confuse the difference between, on the one hand, the question whether an issue can be described as being formal or technical or non-contentious with, on the other hand, the evidence which might be called to establish it.

116. Thus, Mr Lindeman contended, on the one hand, that none of the evidence which was in fact called, upon re-opening the case, was capable of proving the issue of appointment of the inspector (because that could be done only in the manner provided by s38(2)(3)), and, on the other hand, that the issue of appointment was incapable of being described as being within a recognised category which would enable the re-opening of the case, in any event. I understood counsel to also complain that even if the evidence was relevant and admissible, the re-opening should have been denied on the basis that the volume of evidence which was called was much greater than should have been permitted. This last argument led me to inquire whether it would have been appropriate, and within one of the recognised categories for the re-opening of the case, if the Crown had sought merely to tender a certificate under s38. Mr Lindeman declined to answer that question, content to merely contend that it was hypothetical. His difficulty is understandable. In a case where no jury is involved and where no prejudice can be identified, if the issue is an appropriate one for permitting re-opening it is difficult to see why the quantity of evidence could alter the characterisation of the evidence, as to whether it was formal, technical or non-contentious.

117. This argument by counsel for the appellant demonstrates a misunderstanding of what was said by Walters AJ, at 99, in *Schultz v Virgin*. Walters AJ noted that there was a requirement of strict proof of authority to prosecute and that the Act in that case merely provided "one method by which such proof can be given." His Honour was not saying, at all, that the matter could only be proved by that one method; in fact, correctly understood, the case is authority for the contrary proposition. Insofar as his Honour, at 99, stated that it would defeat the scheme of the *Health Act* to depart from the requirement of strict proof of authority to prosecute, his Honour was referring to the strict obligation that there be proof of the fact of authority, not to the method whereby that fact might be proved. His Honour did not say, nor intend to say (as is quite apparent in the judgment) that there was a strict obligation under the Act that the issue be proved only by resort to the method of proof which the Act set out.

118. Finally, on this ground, I was referred to *Hansford v McMillan*[23]. The learned magistrate had also referred to this decision. In that case a prosecution of a prisoner for attempted escape failed because the prosecution had failed to prove that he was a prisoner and that Pentridge Prison was a proclaimed gaol. Mr Lindeman submitted that it was a case in which a distinction was drawn between proof of matters on which there was genuine contention and matters which did not admit of denial, but which still had to be formally proved. He submitted that the present case was in the former category.

119. Anderson J held, at 750, that where the proposed new evidence related to a matter of "merely technical proof of an undoubted fact" that such evidence should always be permitted to be led, by re-opening the case. For reasons which are already apparent, the question of the appointment of Watkins as an inspector (as opposed to the question of his authority to prosecute) was indeed a matter within the category identified by Anderson J, at 749, as one which "really does not admit of denial". There was, in fact, no serious dispute as to that matter, merely an artificial, "putting to proof" of a matter which the appellants knew perfectly well was an undoubted fact. The ground of appeal before me related to the question of appointment, not the question of authority to prosecute.

120. It is to be borne in mind that the cases concerned with re-opening of a prosecution case are most often jury trials, of individuals charged with indictable offences. In such cases (as Dawson J observed in *Chin*, at 685) the issue of fairness predominates, and the accused requires to know the Crown case during its course, as it can affect decisions as to cross-examination, among other vital tactical matters. No such considerations applied here.

121. The decision of the magistrate to permit re-opening of the prosecution case was one involving the exercise of a discretion, and there is a presumption in favour of the correctness of such a decision: see *Australian Coal and Shale Employees Federation v Commonwealth*[24].

122. In this case, the appellant had allowed evidence of the informant to be given as to his appointment, without objection, had not submitted no case to answer at the close of the prosecution case, and could point to no disadvantage or prejudice which it would suffer, apart from the lost opportunity (which would probably not have succeeded, in any event) of seeking to defeat the prosecution case on a technicality relating to the proof of a matter – ie. the appointment – which was not seriously capable of denial. In my view, no error has been shown in the exercise of discretion to permit the prosecution to re-open the case. This ground is not made out.

GROUND (H): NO EVIDENCE TO PROVE CHARGE

123. Ground (h) complains that the Magistrate "erred in law on the facts" in finding the charge proved of a breach of reg 706(4)(a)(i) of the *Plant regulations*. The complaint was that the magistrate should not have held that the appellant failed to locate an emergency stop device in the position required by the regulations.

124. The questions of law, which were settled by a Master for determination on this appeal, were formulated by the appellant's advisers, and presented to the Master at an *ex parte* hearing. The questions of law suggested by counsel for the appellant were adopted by the Master. In my respectful opinion, this ground should not have been permitted. The ground does not amount to an allegation of error of law, at all. It was quite inappropriate that the legal advisers for the appellant should have advanced such a complaint as amounting to an error of law.

125. Insofar as it is now sought to be treated as a complaint of "Wednesbury" unreasonableness[25], it is totally without merit.

126. The evidence of Nenad Bakic was that his right shoulder was caught in the unguarded rotating coupling of the mixer as he was scraping excess fish paste from inside the mixing hopper. Photographs were tendered which showed that at the place where he was standing, when his clothing became caught, he could not reach the emergency stop button for the machine, which was located on a panel some distance away from the position where he had to stand to do his job. It was the case for the informant that the stop button was not, therefore, immediately accessible to the worker.

127. The learned magistrate gave exceptionally careful, detailed and comprehensive reasons for his decisions on all questions of law and fact which had been advanced on either side. The meticulousness and skill (not to say, admirable patience) with which he approached the case is evident in each of his Worship's written decisions. It borders on the offensive for the appellant to assert, as its last ground of appeal, that, in effect, his Worship reached a decision which no reasonable magistrate, acting reasonably, could have reached. In my view, not only was it open to the learned magistrate to reach the conclusion which he did, it is difficult to conceive how he could have come to any different conclusion.

GROUNDS (A) AND (B): WRONGLY ADMITTED REGULATIONS 12 OF THE 1985 REGULATIONS, AND AUSTRALIAN STANDARDS AS4024

128. In concluding that the appellant had committed the offence which is the first count the subject to this appeal his Worship had regard, among other matters, to Regulation 12 of the *Occupational Health and Safety (Machinery) Regulations* 1985 (the "Machinery Regulations") and to Australian Standard AS4024. Mr Lindeman submitted that neither was a matter which might properly have been considered.

129. The first count related to breaches of s21(1) and 21(2)(a) of the OH&S Act. The first of those provisions required the employer to provide and maintain, "so far as is practicable" for employees, a safe working environment. The second provision required the employer to provide "so far as is practicable" safe plant and systems of work. The Machinery Regulations had been repealed, upon the taking effect of the *Occupational Health and Safety (Plant) Regulations* 1995 (the "Plant Regulations").

130. The word "practicable' is defined in s5 of the Act. It meant practicable having regard to (a) the severity of the hazard or risk in question, and (b) the state of knowledge about that hazard or risk and any ways of removing or mitigating that hazard or risk, and (c) the availability and suitability of ways to remove or mitigate that hazard or risk. (I omit paragraph (d)).

131. Regulation 12 was tendered by the prosecution as one item of evidence relevant to the question of "practicability". It was submitted that what was practicable was to be determined objectively: *Chugg v Pacific Dunlop Ltd*[26]; *R v Australian Char Pty Ltd*[27]. The prosecution submitted that one factor relevant to the question whether something was, objectively, practicable was the state of knowledge within the industry at the relevant time. It was submitted that the regulations which had existed previously showed that there was a known hazard in the machinery which was the subject of the prosecution, and that the dangers of it were needed to be guarded against. The prosecution submitted, too, that the Standards were also capable of throwing light on the objective question of the state of knowledge of the hazard and of ways of reducing or removing it. That approach was accepted as appropriate use of the relevant standards by the Court of Criminal Appeal in the *Australian Char* case.

132. Mr Lindeman submitted that Reg 12 could not be used in that way, first, because it had been repealed. No authority was cited for the proposition that a repealed regulation might not be used to prove a state of knowledge within an industry at the time it was in operation. I see no reason why it might not be used in that way. The second objection was that the Machinery regulations were said to have adopted an approach which was different to that adopted in the *Plant Regulations*. The former adopted "prescriptive" controls, whereas the latter adopted "performance controls" so it was submitted.

133. Regulation 12 obliged an employer to completely enclose every pin of a revolving shaft. The Australian Standard showed how that could be achieved. Thus, the particular dangers and the means of eliminating the dangers could be demonstrated to have been well known in the industry long before the injury suffered by the worker in this case. In making use of the regulation his Worship was not seeking to apply its provisions, as providing the elements of the offence, instead of those set out in the new regulations. It was solely being applied as an item of evidence relevant to the question of practicability, as was the Standard. The definition of "practicable" did not change with the introduction of the *Plant Regulations*.

134. Mr Lindeman submitted that the introduction of the *Plant Regulations* was part of a new scheme for identifying and eliminating risks, which required that a three stage process be adopted involving, first, a hazard identification, secondly, a risk assessment and then, finally, control measures being put in place. It is only at the last of those steps, he submitted, that the employer has regard to Standards. By referring to the Standards, the magistrate made a departure from those Standards a breach of the Act, Mr Lindeman submitted, whereas it would just be one factor to take into account in deciding what control measures might be put in place. Regulation 12 was of no relevance, at all, because it had been part of an outdated prescriptive approach, he submitted.

135. In my opinion, it was perfectly open to the magistrate to make use of the former regulations and the Standards for the purpose which he did. The complaints made in grounds 2(a) and (b) have no substance.

GROUNDS (E) AND (F): DOCUMENTS "LL" AND "MM".

136. I have dealt with these documents in the course of my reasons.

137. Mr Lindeman submitted that document "MM", the notice of variation of duties of officers, signed by Graham Holmes on 12 April 1991, should not have been relied upon because it was not supported by proof of delegation to him from the Public Service Board, that delegation only capable of being proved by tendering of an instrument of delegation from the Board. That delegation was contained in "KK", which was objected to and not received absolutely by the magistrate.

138. As to "LL" it was contended that it could not be relied upon without proof, by tender, of the instrument of delegation from the Minister to MrHolmes, which was referred to in *Davis v Grocon*.

139. For the reasons earlier stated, in my opinion, the learned magistrate was entitled to have regard to those documents and any other material which was tendered in determining whether he was satisfied beyond reasonable doubt that the appointment of the inspector had been proved. That was so although the appointment of Watkins as an inspector was not made pursuant to the notice of variation of duties. That document was simply another item of material which the learned magistrate was entitled to have regard to in deciding whether he was satisfied that the appointment had in fact been validly made.

CONCLUSION

140. I summarise my conclusions as follows:

(a) The oral evidence of Watkins, taken together with the presumption of regularity and Exhibits "NA2" and 'NA3" were sufficient to prove, beyond reasonable doubt, that the informant, Watkins, had been validly appointed an inspector under the *Occupational Health and Safety Act* 1985;
(b) Upon tendering of Exhibit "LL" and proof that it was made by the Director General, the authority to appoint Watkins an inspector, and the valid exercise of power to make that appointment, pursuant to s37(4) of the *Public Service Act* 1974, was established;
(c) The savings provisions of the 1992 and 1996 amending legislation ensured that the validity of the appointment of Watkins as an inspector remained incapable of successful challenge, once the original appointment was proved.
(d) The learned magistrate properly exercised his discretion to permit the prosecution to re-open its case, but in the circumstances the valid appointment of the informant as an inspector had already been established beyond reasonable doubt.
(e) None of the grounds of appeal have been made out.

The appeal should be dismissed. I will hear the parties as to costs.

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[1] *Davis v Grocon* Ltd [1992] VicRp 92; [1992] 2 VR 661; (1992) 47 IR 404.
[2] Hearsay evidence, not objected to, may be acted upon by the court: *R v Radford* [1993] VICSC 237; (1993) 66 A Crim R 210, at 229-234, per Phillips CJ and Eames J.
[3] [1988] WAR 71, at 75.
[4] [1992] VicRp 14; [1992] 1 VR 240, at 247-8.
[5] *Schultz v Virgin* [1966] SASR 94, at 96.
[6] [1992] 1 VR 240, at 247-8.
[7] *R v Brewer* [1942] HCA 33; (1942) 66 CLR 535, at 548; [1942] ALR 353.
[8] *Cassell v R* [2000] HCA 8; (2000) 201 CLR 189; (2000) 169 ALR 439; (2000) 21 Leg Rep C1; (2000) 74 ALJR 535.
[9] [1953] VicLawRp 46; [1953] VLR 315; [1953] ALR 656.
[10] [1992] VicRp 14; [1992] 1 VR 240.
[11] [1907] ViclawRp 3; [1907] VLR 11.
[12] (1997) 95 A Crim R 447, at 455; 139 FLR 337; (1997) 192 LSJS 308; CCA South Australia.
[13] (1987) 9 NSWLR 154, at 157; (1987) 62 LGRA 409, per Kirby P; 164, per McHugh JA; 169, per Clarke A-JA.
[14] (1976) 13 SASR 433, at 436; (1976) 31 FLR 380; 6 ATR 238, per Walters J.
[15] [1997] SASC 6244; (1997) 95 A Crim R 25, at 28, per Bleby J.
[16] *Selby v Pennings & Ors*, [1998] WASCA 224; (1998) 19 WAR 520; (1998) 102 LGERA 253, Full Court Western Australia, *Coram*: Ipp, Wallwork, Owen JJ, 26 August 1998.
[17] [1981] VicRp 85; [1981] VR 908.
[18] [1981] VicRp 85; [1981] VR 908, at 912-3.
[19] *Shaw v R* [1952] HCA 18; (1952) 85 CLR 365; [1952] ALR 257.
[20] *R v Chin* [1985] HCA 35; (1985) 157 CLR 671 at 685; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495, per Dawson J.
[21] *Schultz v Virgin* [1966] SASR 94.
[22] (1955) SASR 85.
[23] *Hansford v McMillan* [1976] VicRp 80; [1976] VR 743, Anderson J.
[24] [1953] HCA 25; (1953) 94 CLR 621, at 627.
[25] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223 at 228-9; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[26] *Chugg v Pacific Dunlop Ltd*, unreported, Full Court, Victoria, 5 May 1989, per Kaye and Beach JJ, at 16; per Ormiston J, at 34.
[27] (1995) 79 A Crim R 427, at 436-7, per Phillips CJ, Smith and Ashley JJ.

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