37/07; [2007] VSC 270

SUPREME COURT OF VICTORIA

DPP v RILEY

Hansen J

14 June, 26 July 2007

(2007) 16 VR 519; (2007) 173 A Crim R 360; (2007) 48 MVR 261

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INTERCEPTED AFTER DRIVING ERRATICALLY – MOTOR VEHICLE THOUGHT TO BE STOLEN – DRIVER SPRAYED WITH CAPSICUM SPRAY AND HANDCUFFED – DRIVER CONVEYED TO POLICE STATION – THERE REQUESTED BY ANOTHER POLICE OFFICER TO UNDERGO BREATH TEST – BAC READING OF 0.059% – DRIVER CHARGED WITH NUMEROUS OFFENCES – FINDING BY MAGISTRATE THAT BECAUSE OF THE OCCURRENCE OF MATTERS AT THE ROADSIDE THE POLICE INFORMANT ACTED EXCESSIVELY – MAGISTRATE SATISFIED THAT THE EVIDENCE OF THE BREATH ANALYSIS SHOULD BE EXCLUDED – DRINK/DRIVING CHARGES DISMISSED – NATURE AND SCOPE OF THE PUBLIC POLICY DISCRETION TO EXCLUDE EVIDENCE – WHETHER FACTS ENLIVENED MAGISTRATE'S DISCRETION – WHETHER MAGISTRATE IN ERROR IN EXCLUDING EVIDENCE: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f), 53.

R. was intercepted by a police officer after driving erratically. At the scene, the officer believed that the vehicle had been stolen and used capsicum spray and handcuffs to restrain R. After R. was conveyed to the police station, he was requested by another police officer to undergo a breath test which produced a BAC result of 0.059%. It was discovered that the informant's belief as to the vehicle's being stolen was incorrect. R. was charged with numerous driving offences including drink/driving. At the hearing, the magistrate excluded evidence of the breath analysis and dismissed the drink/driving charges on the ground that the informant acted excessively at the scene in using the spray and the handcuffs. Upon appeal—

HELD: Appeal allowed. Remitted to the magistrate for further hearing and determination according to law.

1. A magistrate has a discretion to exclude evidence on the grounds of public policy. The discretion is enlivened only where the impugned conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct. In the present case, the critical question was whether the evidence of the unlawful or improper conduct of the police was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct.

***Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, and**
***DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323; MC20/03, applied.**

2. The question was whether the evidence of the breath analysis was the product of unlawful or improper conduct by police. The link between the informant's conduct at the roadside and the later obtaining of the evidence was so tenuous that it could not reasonably be said that the evidence was obtained by means of that improper conduct.

3. The public policy discretion requires a balancing of competing factors in the sense of examining the comparative seriousness of the offence charged and the unlawful or improper conduct of the police. By failing to engage in such a balancing exercise, and failing to exercise the discretion by reference to relevant criteria, the magistrate's discretion miscarried.

HANSEN J:

1. This is an appeal on a question of law pursuant to s92 of the *Magistrates' Court Act* 1989 brought by the Director of Public Prosecutions ("the appellant") on behalf of the informant, Detective Senior Constable Peter David McGuffie, against orders of the Magistrates' Court at Sunshine made on 27 March 2006 dismissing two charges against Adam Stuart Riley ("the respondent") under s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986 ("the Act"). The orders were made in consequence of the decision of the Magistrate to exclude evidence of the respondent's breath test showing the concentration of alcohol in the respondent's breath, on the basis that the informant had acted "excessively". The Magistrate also made orders disposing of a further 13 charges, and from which there is no appeal.

2. The notice of appeal raises two questions of law, namely:

(a) whether the Magistrate erred when she excluded the evidence of the concentration of alcohol in the respondent's breath on the ground that that evidence had been obtained unfairly or unlawfully; and

(b) whether the Magistrate erred when she invoked the *Bunning v Cross*[1] discretion to exclude the evidence of the concentration of alcohol in the respondent's breath.

3. In seeking to uphold the Magistrate's orders counsel for the respondent contended that there were several aspects of unlawful and/or improper behaviour by the police which attracted the discretion to exclude the subject evidence and that, in the circumstances of the case, it was open to the Magistrate to exercise the discretion so as to exclude the evidence and dismiss the charges.

4. Before referring to the submissions of counsel in greater detail, it is convenient to set out the background facts, as to which counsel were essentially agreed. I note that while the evidence and submissions were transcribed, there is no transcript of the Magistrate's reasons for decision. However the appellant's solicitor and the prosecuting police officer, Sergeant Jim Currell, swore affidavits in which they deposed to the Magistrate's reasons based on Currell's notes and recollection of the Magistrate's findings and reasons for decision. The respondent swore an affidavit in which he stated that the information contained in those affidavits is substantially correct, save for several matters which he elaborated. Any relevant differences in these accounts of the facts are mentioned below.

Background

5. At about 1.45pm on 1 November 2004 the informant was alone and driving an unmarked police vehicle on the Western Ring Road, when he saw in the lane to his right a Commodore sedan driven by the respondent who was accompanied by a passenger James Edwards. The Commodore was unregistered[2], unroadworthy[3], and the respondent was an unlicensed driver. The respondent was travelling within one car length of the vehicle in front of him, which was travelling at the speed limit of 100 km/h. Suddenly, the respondent cut across to the far left hand lane in an erratic manner lurching from left to right. In doing so, he cut in front of the informant who had to brake to avoid a collision. The informant conducted a vehicle check and was informed that the Commodore had been reported as stolen[4]. He took up a position behind the Commodore and conducted a speed check by following the vehicle for about 400 metres. He ascertained that the Commodore was travelling at between 130 and 140 km/h. The informant observed that the Commodore suddenly moved rightward, without indicating, across two lanes of traffic into the far right hand lane. The other vehicles in those lanes had to brake suddenly to avoid a collision with the Commodore, which lurched from side to side during this manoeuvre and fish-tailed as it entered the far right hand lane. The Commodore continued at a high speed (the Magistrate found that the respondent drove at speeds of up to 150km/h) until it approached the turn-off onto the Westgate Freeway at which point it slowed to about 100 km/h and, without indicating, drove onto the Westgate Freeway, moving leftward in an erratic manner to do so. The informant continued to follow the Commodore. He communicated his observations over the police radio system and other police vehicles were called to assist in intercepting the Commodore. The Commodore ultimately exited the Westgate Freeway at Millers Road, having suddenly moved left across two lanes without indicating to get to the exit ramp, and then came to a stop behind other vehicles at a red traffic light. The informant stopped his vehicle behind the left hand quarter of the Commodore. He was aware that other police units were on their way to assist, and decided to make an arrest while the Commodore was stationary and in a controlled situation. This was less likely to endanger the public than a pursuit. The informant then left his vehicle and approached the Commodore.

6. There was some difference in the evidence as to the precise circumstances of the arrest of the respondent. The informant gave evidence that he stepped out of his car, punched on the rear of the Commodore and, with his police badge in his left hand and his pistol in his right hand, he held the badge under the muzzle of the pistol and approached the driver's window. He stood about a metre away from the driver's door and yelled out, "Police, Don't move". The respondent put his hands up, and the informant directed him to get out of the car and get down on the ground, which he did. He lay face down on the ground. The passenger Edwards, on the other hand, verbally abused the informant and said "that's not a real gun". The informant told Edwards to stay in the

car, but he stepped out of the passenger side of the car and walked around the front of the car towards the informant in an aggressive manner, verbally challenging him and disobeying orders to back off and get down on the ground. At this time the respondent yelled at Edwards "Take it easy. Just do what he says. Get down on the ground". At this point an off-duty police officer, Senior Constable Barry Thorpe, approached to offer assistance[5]. The informant said in evidence that Edwards kept yelling out "show me some ID", as to which the informant told Thorpe to "show him some ID", at which point the informant "pulled out my ID again and told them to back off". Edwards continued to disregard police directions and the informant ultimately brought out an O/C Spray canister and sprayed Edwards with the capsicum spray from a distance of about 10 metres. It appears that Edwards went down and Thorpe completed his arrest, as the informant had also been affected by the spray and felt a burning sensation in his nose and mouth and his eyes started to water. The informant said that at that point he knew Edwards was under control. He then turned around and saw (albeit he was squinting and said he could not see much) that the respondent "was in a sort of push up motion". The informant said that he thought the respondent was either going to run off or "have a go at me" so he quickly ran up and sprayed the respondent from a distance of "probably an arm's length". He then hand-cuffed the respondent. The informant accepted in cross-examination that the respondent had complied with everything asked of him up to that point, had not threatened to assault him, and that he (the informant) did not warn the respondent to get back down otherwise he would be sprayed, and that he did not tell the respondent that he was under arrest. It appears that other police units arrived within a minute of the arrest and the informant was taken to a house nearby to wash the spray off his face. Meanwhile, the respondent and Edwards were put in a divisional van driven by Constable Bailey. It would appear that they were in the van at the scene from 1.55pm to 2.03pm before leaving to arrive at the North Altona police station at 2.09pm. It appears that no assistance was given to the respondent in relation to the effects of the spray until after he arrived at the police station. The informant decided that, given his earlier confrontation with the respondent, the ensuing investigation should be carried out by another police officer.

7. The respondent's evidence of the arrest was, relevantly, that (a) the informant did not identify himself as a police officer when he approached the car, (b) the informant placed the handcuffs on him extremely tightly and had his knee in his back, and (c) that when he was taken to the divisional van he received a blow in the stomach which he believed was a punch.

8. It is convenient at this point to state the Magistrate's findings as to the circumstances of the arrest, as stated in the appellant's affidavits. The Magistrate is first recorded as saying that she was not satisfied that the informant did not identify himself as a police officer. She then noted the evidence of Thorpe, who said that he heard the informant twice say "Get out of the vehicle" but did not confirm that the informant had identified himself as a police officer. I interpolate as to this that in his answering affidavit the respondent said that he believed that the Magistrate did not accept that the informant identified himself as a police officer, but that he could not say whether she had made a positive finding that the informant had not identified himself. Although this is very close to the appellant's account of what the Magistrate said, for the purpose of the appeal counsel for the appellant proceeded on the basis that the informant did not identify himself as a police officer.

9. Continuing with her reasons, the Magistrate considered that the informant was under enormous pressure, being alone and believing that he was intercepting a stolen vehicle. She found that the informant "acted excessively" following the removal of the respondent from the vehicle. She did not make the same finding regarding the informant's dealing with Edwards, who was hostile as a witness and it was not difficult to see that hostility manifesting itself at the scene. She accepted that the respondent received an injury to the stomach, but was unable to say if this was deliberate or sustained otherwise. She said that her criticism of the informant was tempered by the fact that he was acting under certain beliefs. It was reasonable for the informant to believe that the car was stolen and to assume that the respondent was a thief. She said that it was not reasonable that Victoria Police or the responsible person did not correct the status of the vehicle on the LEAP database.

10. Returning to the chronology of events, the respondent arrived at the police station at 2.09pm. After his arrival it was discovered that the respondent was the lawful owner of the Commodore. There was some uncertainty as to the time at which this occurred. The police prosecutor conceded

before the Magistrate that it occurred some time between 2.25pm and 2.37pm. At 3.00pm Detective Senior Constable Keating advised the respondent that he was no longer under arrest but that he still wished to interview him in relation to his earlier driving. He also requested the respondent remain for the purpose of taking a preliminary breath test. The respondent complied and the test, conducted by Constable Reilly, indicated the presence of alcohol. The respondent was then required to accompany Keating for the purpose of a breath test, which was conducted by Senior Constable McDonald, an authorised operator of a breath analysing instrument. The analysis disclosed a blood alcohol concentration of 0.059%.

11. The informant subsequently brought 15 charges against the respondent. Apart from the two charges under s49(1)(b) and s49(1)(f) relevant to the appeal, there were also charges of unlicensed driving, driving an unregistered vehicle, driving an unroadworthy vehicle, speeding, dangerous driving, failing to keep a safe distance behind a vehicle, failing to indicate, careless driving, driving at a dangerous speed, and failing to have proper control of a vehicle. The respondent pleaded guilty to the charges of unlicensed driving, driving an unregistered vehicle, and driving an unroadworthy vehicle. He pleaded not guilty to the remaining charges.

Submissions before the Magistrate

12. First, counsel for the respondent made a no-case submission[6] in relation to the charge under s49(1)(f), on the basis that in requesting the respondent to undergo the preliminary breath test the police had not complied with s53 of the Act, compliance with which was an essential element of the offence. The non-compliance lay in the fact that whereas s53 required that the police officer who found the respondent driving should have required the respondent to undergo the preliminary breath test, the test was requested by Constable Reilly (or perhaps Keating) who had no authority to do so as they had not found the respondent driving.

13. Secondly, counsel submitted that the Magistrate should exercise her discretion to exclude the evidence of the breath analysis, on the basis of unfairness to the respondent or because of unlawful or improper conduct by the police. He referred to the public policy discretion in *Bunning v Cross* as requiring the Magistrate to analyse the nature of the police conduct and "ultimately make a decision as to whether or not that conduct was of such a nature that the law will not allow the fruits of that conduct, regardless of how cogent that might be, to be used as evidence". Counsel relied on three areas of police conduct as enlivening the discretion. First, there was the conduct at the roadside. Most importantly, the informant's use of capsicum spray on the respondent was disproportionate to any lawful arrest, and in circumstances where the respondent was unarmed and had, on the informant's evidence, complied with all instructions after the car stopped[7]. Of lesser importance, but still relevant to the roadside conduct, there was no evidence that any police officer at the scene told the respondent he was under arrest. Further, the respondent was left in the back of the police van at the scene for eight minutes without any treatment for the spray, and the handcuffs remained on at this time despite there being no evidence from the police that that was necessary. There was also the respondent's evidence that he received a blow to the stomach. And the informant did not identify himself as a police officer, though counsel said this was not the critical issue. Secondly, at the police station there was a period of about half an hour during which the police had no power to hold the respondent (by virtue of their becoming aware that the car was not stolen) yet no effort was made to release him or tell him he was free to leave. Thirdly, there was non-compliance with s53 of the Act as set out above.

14. The prosecutor did not concede there was any illegal or improper conduct by the police, but submitted that even if there had been, it was not such as would justify exercising the discretion to exclude the evidence. Relevant factors to weigh in the balance were that the police did not deliberately flout the law, indeed the informant did his best in a difficult situation, and that drink driving is now considered a serious offence. Further, the circumstances of the respondent's arrest did not override his statutory obligation to provide a sample of his breath.

Magistrate's decision

15. The Magistrate ruled that she was satisfied that the evidence of the breath analysis should be excluded. This was warranted by the conduct of the informant, as to which she stated the findings set out at [8]-[9] above. As noted, the Magistrate found that the informant "acted excessively" after the respondent got out of his vehicle. Apart from dealing specifically with the matter of an injury to the stomach, and in a way that must have excluded it as an ingredient of

acting excessively, the Magistrate did not state what matters constituted the excessive acting. The respondent deposed in his affidavit that he could not recall the specific things that the Magistrate found the informant had done and whether she stated which matters she regarded as excessive. Further, he could not recall, but did not believe, that she made reference to whether she took into account the conduct of the other police and the conduct of the police at the police station.

16. The Magistrate ultimately dismissed eight of the charges against the respondent, convicted him of seven charges (including the three to which he pleaded guilty) and, following a plea in mitigation, imposed an aggregate fine of $500.00 with statutory costs in the sum of $59.80, and ordered that the respondent be disqualified from driving for twelve months. As I said before, the appeal concerns only the dismissal of charges 1 and 2, being the offences against s49(1)(b) and (f) of the Act.

Submissions on appeal

17. The appellant submitted that there was no basis on which to exercise the *Bunning v Cross* discretion at all. Alternatively, if there was an arguable basis, no reasonable Magistrate would have exercised the discretion to exclude the evidence of alcohol in the respondent's breath. Counsel submitted that the Magistrate's non-specific finding that the informant "acted excessively" could only have related to the use of the spray and the subsequent hand-cuffing. Counsel emphasised that the arrest of the respondent was lawful, given the informant's reasonable belief that the Commodore was stolen, even if there was some impropriety committed by the informant during the arrest. Further, the evidence of the breath analysis was not illegally obtained. The informant could have required the respondent to undergo a preliminary breath test at the roadside and no complaint could have been made about that. And even if the arrest had been unlawful, or the informant's conduct had been "excessive", that did not affect the statutory power to require the respondent to undergo a preliminary breath test. And as to the breath analysis ultimately obtained, there was no simply no connection between the obtaining of that evidence and the behaviour of the informant upon which the Magistrate relied to invoke the discretion.

18. Counsel for the respondent submitted that it was open to the Magistrate to exercise the *Bunning v Cross* discretion to exclude the evidence of the breath analysis. The submission was put thus:

(a) In deciding that the discretion arose to be exercised the Magistrate should be understood to have taken into account:
(i) "the matters at the roadside", by which counsel meant principally the informant's use of capsicum spray on the respondent, but also the nature of the hand-cuffing and the failure to provide the respondent with any relief from the effects of the spray while he was in the police van;
(ii) the period of unlawful arrest of half an hour or so after the police became aware that the Commodore was not stolen and before they asked the respondent to undergo a preliminary breath test;
(iii) illegality in the sense of the non-compliance with s53.

(b) While acknowledging that it was not apparent from her reasons that the Magistrate took the second and third matters into account, counsel relied on the fact that these matters had been relied on before the Magistrate. Therefore, he submitted, the Magistrate "must have taken them into account in deciding whether or not she was in a position to exercise a *Bunning v Cross* discretion". I note that counsel conceded that the s53 point went only to the charge under s49(1)(f).

(c) Alternatively and seemingly in preference to (a), the Magistrate should be understood as not having relied on the excessive behaviour at the roadside in deciding that the discretion arose but only in deciding to exercise the discretion. On this basis the second and third matters established unlawful or improper conduct so as to trigger consideration of the discretion. Once triggered, the excessive behaviour at the roadside and the second and third matters justified the exercise of the discretion to exclude the evidence.

(d) Counsel referred to the appellant's argument that the excessiveness at the roadside could not trigger the *Bunning v Cross* discretion because it was not causative of the breath test coming about. He conceded that that may be so, but if so the Magistrate had also taken into account the second and third points which established that the evidence was obtained as a result of unlawful

or improper conduct of the police. I note that this concession and submission discloses the reason for the alternative submission (c).

(e) Counsel submitted that the *Bunning v Cross* discretion did not require, as a pre-requisite to its exercise, a strict causal link of a but for nature between the relevant illegality or improper conduct of the police and the obtaining of the relevant evidence; see *DPP v Moore*[8]. He did however concede that there needed to be "some connection".

(f) Finally, counsel submitted that if the appeal were allowed, the charge under s49(1)(f) should not be remitted to the Magistrate because it was bound to fail in light of the non-compliance with s53.

19. I note that both counsel agreed that no question of unfairness arose in the present case. Counsel for the respondent also accepted that the Magistrate exercised her discretion to exclude the evidence on the ground of public policy rather than any perceived unfairness to the respondent. In my view, counsel's concession is correct. On no view was there any unfairness in the case before the Magistrate.

Decision

20. It is convenient to begin by considering the nature and scope of the public policy discretion to exclude evidence. In *R v Ireland*[9] Barwick CJ (with whom the other members of the Court agreed) said that "evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible". However, his Honour added[10]:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

21. In *Bunning v Cross*[11] Stephen and Aickin JJ observed that the statement of Barwick CJ in Ireland represents the law in Australia. Their Honours said that[12]:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."

Their Honours went on to say that the discretion "applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities (or, as Dixon CJ put it in *Wendo's Case*[13], unlawful or improper conduct)".

22. More recently, in *DPP v Moore*[14] the Court of Appeal considered the nature of the relationship required between the impugned conduct and the evidence in order to enliven the public policy discretion. Chernov JA (with whom Eames JA agreed, Batt JA dissenting) upheld a Magistrate's decision to exclude evidence of a breath analysis in circumstances where the analysis was obtained lawfully, but subsequent to the lawful obtaining of the analysis a police officer had improperly advised the respondent not to pursue his statutory right to take a blood test, on the basis that in the police officer's experience the blood result would invariably be less favourable to him. Chernov JA reviewed numerous authorities[15] and concluded that those cases establish that "the public policy discretion is enlivened only where the impugned conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct"[16]. His Honour noted that the South Australian decisions, culminating in *R v Lobban* (which effectively overruled *French v Scarman*), held that when the impugned conduct by the authorities takes place after the evidence has been obtained, the public policy discretion ordinarily does not arise for consideration, even when it can be said there was some connection between the conduct and the evidence. Chernov JA then said "but there may be situations where the improper conduct

by the law enforcement authorities so closely relates to the value and effect of that evidence that there can be no meaningful separation between the two aspects of their seemingly continuous conduct for the purpose of determining if the public policy discretion is enlivened"[17]. His Honour went on to hold that, on the facts before him, "there was such a close connection between the breathalyser reading and the circumstances pertaining to the improper conduct that the public policy discretion could be said to have been enlivened".

23. In my view, it is clear from *Moore* that the public policy discretion may be exercised even where there is no strict causal link between the relevant illegality or improper conduct of the police and the obtaining of the relevant evidence. That follows from the fact that, in *Moore*, the improper conduct held to enliven the discretion occurred after the evidence was obtained. But, as counsel correctly conceded, the mere fact that no strict causal link is required does not mean that there is no need for some connection. On the contrary, there must be a relevant connection. In the present case, the critical question is whether, to use the language of Stephen and Aickin JJ in *Bunning v Cross*, the evidence of the breath analysis was the product of unlawful or improper conduct of the police or, as Chernov JA put it in *Moore*, whether the improper conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct.

24. As I have set out above, the matters initially relied on by the respondent as enlivening the public policy discretion were "the matters at the roadside", the half-hour or so period of unlawful arrest and the alleged non-compliance with s53.

25. As to "the matters at the roadside", in my view it was these matters that the Magistrate took into account in deciding that the public policy discretion arose for consideration. I reject the alternative submission that the Magistrate only took the roadside matters into account once the discretion was enlivened by the second and third points. On the contrary, it is apparent for reasons set out below that the Magistrate did not consider the second and third points as relevant factors enlivening the public policy discretion. She confined her reliance to "the matters at the roadside".

26. As to the period of unlawful detention, there is nothing in what the Magistrate said that suggests she took this matter into account in considering the *Bunning v Cross* discretion. The Magistrate confined her reference and findings to the conduct of the informant following the removal of the respondent from his vehicle, which she described as acting "excessively". Once the respondent left the scene the informant took no further role, leaving it to other police to handle the matter. His "excessive" conduct could only have occurred at the scene. As the matter of the unlawful detention was clearly raised in the submissions before the Magistrate, the fact that she confined her findings and reasons to the informant's conduct at the roadside indicates that she did not consider the period of unlawful detention as a factor relevant to the public policy discretion.

27. As to the s53 issue, there is nothing in what the Magistrate said that suggests she took that into account in exercising the discretion. The question of non-compliance with s53 was raised in the context of a no-case submission on the charge under s49(1)(f), but the Magistrate did not rule on the submission, doubtless because the issue did not arise once the evidence of the breath test was excluded pursuant to the public policy discretion. There was thus no finding that the police breached s53. In any event, it seems to me that non-compliance with s53 would only go to the sufficiency of the evidence to support the charge[18], rather than constituting illegal or improper conduct of the type that would attract the public policy discretion. I also note that counsel for the appellant made a submission (not made to the Magistrate) that s53 had been complied with, in the sense that it was the informant who required the respondent to undergo the preliminary breath test, albeit through an agent. Counsel for the respondent submitted that such an interpretation was not open on the words of s53. I was not invited to express a view on that submission and do not do so. It was mentioned to me to indicate that there is an argument on the applicability of s53 which remains to be (and should be) considered by the Magistrate in the event that the appeal is allowed and the matter is remitted to the Magistrate. It is sufficient to say that I consider that the Magistrate correctly ignored the s53 argument as a factor relevant to the public policy discretion.

28. In my view it was not open to the Magistrate to decide, on the basis of the matters at the

roadside, that the public policy discretion arose for consideration. As the authorities make clear, the public policy discretion only arises for consideration when the relevant evidence is procured by means of unlawful or improper conduct. In the present case, can it be said that the evidence of the breath analysis was the product of unlawful or improper conduct by the police? Or, as Chernov JA put it in *Moore*, was the improper conduct the means by which the evidence was obtained or did the obtaining of the evidence involve such conduct? In my view, the link between the "excessive" conduct at the roadside and the obtaining of the evidence is so tenuous that it cannot reasonably be said that the evidence was obtained by means of that improper conduct. The present case is readily distinguishable from *Bunning v Cross*, where the police officer failed to administer a preliminary breath test to the defendant at the roadside but nevertheless (and in contravention of the statute) took the defendant to the police station and administered a breath analysis. In those circumstances, it could readily be said that the evidence of the breath analysis was obtained by reason of the fact that the defendant had been taken to the police station unlawfully. In the present case, the respondent was lawfully arrested and taken to the police station under suspicion of stealing the Commodore. After the respondent arrived at the police station, the police were still entitled to request the respondent to undergo a preliminary breath test, which they duly did. In effect, the informant's conduct at the roadside was overtaken by subsequent events. It simply cannot be said that the evidence of the breath analysis was obtained by means of the roadside conduct. The Magistrate thus erred in deciding that the discretion arose for consideration on the basis of the roadside matters.

29. As I have said, in my view the Magistrate did not consider the second and third points as relevant factors enlivening the public policy discretion. I note, however, the principle that, on an appeal such as the present, every reasonable presumption should be made in favour of the Magistrate's decision and that it should be upheld provided it can be supported upon any reasonable view of the evidence open to the Magistrate[19]. With that in mind, I turn to consider whether it would have been open to the Magistrate to decide that the public policy discretion arose for consideration on the basis of the second and third points.

30. It is convenient to first mention s53. As to this I have already concluded that the Magistrate correctly ignored the s53 argument as a factor relevant to the public policy discretion.

31. As to the period of unlawful detention, there is some connection between the evidence of the breath analysis and the unlawful detention, in the sense that as a result of the unlawful detention the respondent was at the police station when the preliminary breath test was requested. But even assuming that the respondent had been informed by the police that he was no longer under arrest as soon as they became aware that the Commodore was not a stolen vehicle, the respondent could have been required to undergo a preliminary breath test and then a breath analysis at that time. He may have sought to leave, or left, the police station and thereby risked committing the offence of refusing to undergo a preliminary breath test, but that was no different from the situation in which he found himself half an hour or so later. That is to say, the breath analysis was not obtained by means of the improper conduct, but rather was obtained in circumstances where the respondent happened to have been held in custody for about half an hour more than he should have been, but where that conduct could not in any real way be said to be the means by which the evidence was obtained. It was obtained pursuant to the request, which request could as equally have been made prior to discovering that the Commodore was not stolen or subsequent to that discovery.

32. For these reasons, it would not have been open to the Magistrate to decide that the public policy discretion arose for consideration on the basis of the unlawful detention.

33. But let it be assumed that the period of unlawful detention was sufficiently related to the obtaining of the evidence so as to raise for consideration the public policy discretion. In those circumstances the discretion would have to be exercised in accordance with the principles explained by Stephen and Aickin JJ in *Bunning v Cross*. As their Honours said, the criteria guiding the exercise of the discretion cannot be defined in the abstract but only by reference to the case at hand[20]. Nevertheless, their Honours set out several factors generally relevant to the exercise of the discretion. First, the nature of the improper or unlawful conduct, whether it was deliberate or reckless, or merely an accidental non-compliance with a statutory safeguard. Secondly, the cogency of the evidence, at least where the illegality arises only from mistake, and is not deliberate

or reckless. Thirdly, the ease with which the law might have been complied with in procuring the evidence in question. A deliberate "cutting of corners" would tend against the admissibility of the evidence, whereas in the circumstances of *Bunning v Cross* (where the illegality was inadvertent) the fact that the appellant was unlawfully required to do what he could legally have been required to do (namely, undergo a preliminary breath test at the roadside) had little significance as an argument in favour of rejecting the evidence. Fourthly, the nature of the offence charged. Their Honours said[21] that "some examination of the comparative seriousness of the offence and the unlawful conduct of the law enforcement authority is an element in the process required by Ireland's Case". As their Honours said, the factors relevant to the discretion ultimately depend on the facts of the case at hand.

34. It is clear that the public policy discretion requires a balancing of competing factors. In the present case, there is no indication that the Magistrate engaged in such a balancing exercise, in the sense of examining the comparative seriousness of the offence charged and the unlawful or improper conduct of the police, in order to conclude that the evidence should be excluded for reasons of public policy. Rather, and not disregarding the absence of transcript, it appears sufficiently that the informant's actions at the scene were the basis on which the Magistrate excluded the evidence of the breath analysis. And even if the Magistrate had based her decision on the period of unlawful detention or the s53 point (assuming either to have been open) rather than the roadside conduct, she would still have needed to exercise the discretion by reference to the factors set out above. That did not occur. By failing to exercise the discretion by reference to relevant criteria, the discretion miscarried.

35. For my part I would only add that, in the circumstances of the present case and regarding all that was said by counsel for the respondent and bearing in mind all the factors referred to in *Bunning v Cross*, the proper exercise of the discretion was to admit the evidence of the breath analysis.

36. For these reasons, the appeal will be allowed and the matter will be remitted for further hearing and determination according to law. There is at least for the Magistrate's consideration the appellant's foreshadowed argument concerning the operation of s53 and matters of penalty. I will hear counsel on the question of costs.

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[1] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[2] The registration had expired on 1 September 2004.
[3] There were eight particulars of unroadworthiness.
[4] The Commodore was recorded as stolen on the police LEAP database, having been reported stolen on 16 October 2004. The respondent was actually the lawful owner, having recovered the Commodore on 1 November, but the police database had not yet been updated. The Magistrate found that the informant was under a reasonable belief that he was pursuing a stolen vehicle.
[5] Thorpe was on his way to work and was wearing police trousers and shoes but, with a plain sweater on top, he (Thorpe) agreed that he was not readily identifiable as a police officer.
[6] Counsel conceded that the submission did not affect the charge under s 49(1)(b).
[7] Counsel properly conceded that the arrest was lawful, as the informant believed on reasonable grounds that the respondent had committed an indictable offence. See *Crimes Act* 1958, s459.
[8] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[9] [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[10] At 335.
[11] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[12] At 74-75.
[13] [1963] HCA 19; (1963) 109 CLR 559; [1964] ALR 292; 37 ALJR 77.
[14] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[15] *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263; *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; *French v Scarman* (1979) 20 SASR 333 (holding that the discretion was enlivened by conduct occurring immediately after the obtaining of the evidence, namely the police refusing to allow the defendant a blood test following a breath analysis); *Nolan v Rhodes* (1983) 32 SASR 207; *Question of Law Reserved (No.1 of 1998)* (1998) 70 SASR 281; (1998) 100 A Crim R 281; *R v Lobban* [2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357.
[16] At [53].
[17] At [53].
[18] In the sense that non-compliance with s53 would result in the prosecution being unable to prove an essential element of the charge under s49(1)(f).
[19] See *King v McLellan* [1974] VicRp 92; [1974] VR 773 per Gowans, Nelson & Anderson JJ at 783.

[20] [1978] HCA 22; (1978) 141 CLR 54 at 77-80; 19 ALR 641; 52 ALJR 561.
[21] [1978] HCA 22; (1978) 141 CLR 54 at 80; 19 ALR 641; 52 ALJR 561.

APPEARANCES: For the appellant DPP: Mr CJ Ryan SC, counsel. Angela Cannon, solicitor for Public Prosecutions. For the respondent Riley: Mr R O'Neill, counsel. Robert Stary & Associates, solicitors.
