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SUPREME COURT OF SOUTH AUSTRALIA

McDONALD v CAMEROTTO

Cox J

7, 27 March, 7 May 1984 — [1984] 36 SASR 66; [1984] 14 A Crim R 1

PRACTICE AND PROCEDURE – FORMAL DOCUMENTARY PROOF OMITTED – CERTIFICATE AS TO BREATH ANALYSIS INSTRUMENT – REQUEST TO RE-OPEN PROSECUTION CASE REFUSED – RE-OPENING CASE – FACTORS DISCUSSED: *ROAD TRAFFIC ACT* 1961 (SA) S47g(4)(b).

C. was charged with driving a motor car whilst exceeding .08% blood/alcohol (reading .17%). He pleaded not guilty, and during the prosecution case, certain documentary proofs were tendered by the prosecutor; however, he failed to tender the usual certificate to the effect that the breathalyzer was in good order and properly operated by the technician at the relevant time. After the close of the prosecution case but before any further evidence was given, the Magistrate drew attention to the omission of the tender of the certificate, and after hearing argument on the matter, refused to allow the prosecutor to re-open the case to remedy the omission, and dismissed the charge. On appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further hearing.
As (i) the statutory certificate was of a routine kind and an obvious piece of evidence in such a prosecution;

(ii) the contents of the certificate were not in dispute;

(iii) the certificate could have been regarded as being peripheral or procedural in character;

(iv) no prejudice would have been caused to the defendant by the late tender of the certificate;

(v) the late tender of the certificate would have caused merely a momentary interruption of the defendant's counsel's opening address;

(vi) the omission to tender was due to the prosecutor's inexperience and inadequate understanding of the requirements of s47g of the *Road Traffic Act* 1961 (SA): and

(vii) there was no suggestion that the omission of this kind was prevalent in drink/driving prosecutions, and that the Magistrate did not consider the seriousness of the offence,

the exercise of the Magistrate's discretion miscarried in refusing to allow the prosecutor to re-open the case.

COX J: *[After setting out the facts and the Magistrate's reasons, His Honour continued]:* … **[14 A Crim R]** On the hearing of the appeal I had the advantage of a more thorough discussion of the authorities. There was a time, of course, when pleadings were very strict and any deficiency in proof was irretrievable. Those times have passed. The emphasis now is upon the justice and reasonableness of the case. Here it was a matter of the want of a certificate. The special magistrate had to decide whether he would allow the prosecutor to reopen his case in order to get the certificate in. Matters to be taken into account in reaching his decision included the nature of the evidence in question, whether it related to a topic upon which there was likely to be any real dispute between the parties, the reason for the prosecutor's failure to tender the certificate at the proper time, the stage of the trial at which the application to reopen was made, whether allowing the prosecutor to reopen was likely to prejudice the defence, and whether there were any broad policy reasons such as the encouragement of bad prosecution habits that should be taken into account.

Having regard myself to all those matters I am of the opinion, with all respect to the special magistrate, that he came to the wrong decision. There is a large body of case law on this subject. The cases I have examined show that the courts will usually allow a prosecutor to reopen to **[5]** make good an omission where it results from an oversight or misunderstanding and there is no

question of the defendant's case being thereby prejudiced. I start with a few decisions from other jurisdictions.

In *Middleton v Rowlett* [1954] 1 WLR 831, the prosecution sought to reopen its case on a dangerous driving charge to prove that the defendant was the driver of the car. It made its application when the defence solicitor submitted that there was no case to answer because of that deficiency. The justices refused the application, and the Queens Bench Division was not disposed to say that they were wrong. It appears that it would have been a matter of calling oral evidence to establish the identity of the driver. The court did not regard it as a matter of merely technical or formal evidence which did not touch the substance of the dispute between the parties.

Price v Humphries [1958] 2 QB 353; [1958] 2 All ER 725; (1958) 3 WLR 304 is one of a number of cases that deal with the absence of proof of the consent of a Minister or other officer to a prosecution. The point was taken at the close of the prosecution case. It was held on appeal that the justices should have allowed the prosecution to reopen. *Middleton v Rowlett* was distinguished. The difference was between an objection which went to the merits and one which went only to procedure. In *Royal v Prescott-Clarke* [1966] 1 WLR 788, the defendants were charged with a driving offence. The prosecution should have proved that an official notice had been made relating to the status of the road upon which the offence was allegedly committed. The point was first referred to during the opening address of defence counsel.

The justices refused to give the prosecutor an adjournment in order to provide the necessary evidence. They dismissed the information. An appeal by the prosecution was upheld. The justices should have granted the adjournment. It was not a matter of the prosecution being given a further opportunity to go out and scout about for evidence to strengthen their case, but merely of searching a newspaper for a public notice, "and in the absence of any conduct on the part of the prosecution, which might properly be described as misconduct or election not to call other evidence, equally in the absence of any grave potential prejudice to the accused, there would only be one way in which the discretion could properly be exercised". The case was remitted to the justices.

In *Williams v Berini* [1960] WAR 21 the dismissal of an assault complaint was set aside on appeal. A point of identification was evidently assumed by the prosecutor, only to find that the magistrate took a different view of the matter. Wolff CJ held that the magistrate should have allowed the prosecution to reopen its case to call additional evidence to put the point beyond doubt. *Whitford v Barbarich* [1976] WAR 209 is closer to the case at bar. The magistrate dismissed a drink driving charge on grounds that Jackson CJ, on appeal, considered inadequate. However, the Chief Justice referred to certain deficiencies in the prosecution evidence including the need to prove that the apparatus used was breath analysing equipment within the meaning of s65 of the *Road Traffic Act* 1974 (WA) and possibly the need to prove that the constable who tested the defendant was an authorised person under the *Road Traffic Act*. The appeal was allowed and the complaint remitted to the magistrate, "and if he is not satisfied as to the proof of these matters as to **[6]** which objection was taken or may be taken at the rehearing, then the complainant should be allowed to reopen his case to call further evidence".

Youngberry v Hetherington [1977] Qd R 15 was the case of a prosecution for slaughtering an animal in a place other than a licensed knacker's yard or boiling down works. The prosecution failed to prove that the defendant's premises were not licensed, and the magistrate dismissed the complaint. It was held by the Full Court of Queensland that he should have allowed the complainant to reopen his case to supply the necessary proof. In *Hansford v McMillan* [1976] VicRp 80; [1976] VR 743, the Supreme Court overruled the discretion of a County Court judge who declined to allow the prosecution to re-open its case, on a charge against the defendant of attempting to escape from prison, for the purpose of proving that the place was in fact a prison. Anderson J referred to several Victorian cases in which short shrift had been given to that kind of procedural rigidity. In *Hansford v McMillan* the informant's counsel appears not to have realised that he needed to prove the status of the prison until he had closed his case and the defendant (who was unrepresented) had pointed this out to him.

Henning v Lynch [1974] 2 NSWLR 254 has much in common with the present case. On a prosecution against a motorist for exceeding the 0.08 limit, the informant did not prove that the

breath test had been conducted on an approved device, that is, one bearing the word "alcotest". The magistrate erroneously took the view that this was vital to the success of the prosecution and he raised the point during defence counsel's submission that there was no case to answer on a different ground. He refused to allow the prosecutor to reopen his case to prove that the device used had been approved, and he dismissed the information. On appeal, it was held that he was wrong about the law and that he had also erred in the exercise of his discretion. On the latter question Jeffrey J said at 258-259:

> "But even if it had been a necessary part of his case for the informant to prove that the device used in the course of conducting the procedure which in evidence he described as an 'alcotest' was one bearing thereon that word, the learned magistrate should, in his discretion, have allowed him to reopen his case in order to do so and the exercise of his discretion against that course was sufficiently unwarranted to have caused him to commit an error in law. Justices have a discretion, after the case for the prosecution has closed, to permit the prosecutor to reopen his case for the purpose of supplying a technical defect in the evidence for the prosecution. Here it was plain that any omission actually to say that the device bore on it the vital word was an inadvertence, and it was equally plain from the evidence which Constable Henning actually gave about the defendant undergoing an alcotest what his evidence about the nature of the device would be. There is a distinction between such a failure to tender evidence and an election not to tender it; and it is no doubt important to respect the principle that the prosecution should stand or fall by the evidence it chooses to lead and should not be allowed to support its case by calling fresh evidence to meet the case for the defendant which contradicts it. But that principle had no application here. The applicable principle is one which in the circumstances obtaining here strongly favours the reopening of the prosecution case: where the defendant's case has not been gone into and there is ready to **[7]** be tendered some additional evidence which by accident, mistake or want of foresight has not been tendered before the prosecution case is closed it is – to use the word of Cave J in *Hargreaves v Hilliam* [1894] 58 JP 655 'a very fit and proper thing to allow the evidence to be given unless there is some very good reason'. And in *Duffin v Markham* [1918] 88 LJKB 581, at 582 the Divisional Court spoke disapprovingly of justices who 'availed themselves of a mere oversight on the part of the prosecution to dismiss the informations'. The spirit of these utterances has been echoed in this State: *Kench v Bailey* [1926] HCA 5; [1926] 37 CLR 375."

I turn to the local decisions. *Schulz v Virgin* [1966] SASR 94 was a *Health Act* prosecution. The complainant failed to prove that he had been duly authorised to make the complaint, and at the close of the prosecution case the defendant submitted that the complaint should for that reason be dismissed. No application was made by counsel for the complainant to reopen his case to enable the authority to be proved. The justices convicted the defendant, but the conviction was set aside on appeal. The authority of the complainant should have been proved. Walters AJ observed that an application to reopen the case, when the objection was taken, could be expected to have succeeded, but in fact no such application was made.

In *Crnisanin v Logan* [1972] 4 SASR 340, the defendant was charged under s8 of the *Mining Act* 1971 (SA) with unauthorised mining. At the close of the prosecution case counsel for the defendant submitted that there was no case to answer. The special magistrate allowed the prosecutor to reopen his case to prove an extract from the mining register, a certificate of amalgamation, and a certified copy of the registration of a claim. The defendant was convicted, On appeal, Sangster J rejected the submission that the special magistrate's discretion had miscarried. He dealt with the supplementary documents by saying:

> "These related to matters the truth and accuracy of which were not in any way disputed. They were, therefore, in relation to the real issues peripheral and technical, and in my opinion the proper subject of leave to reopen. The learned special magistrate clearly acted within proper scope and I can see no reason to disturb his exercise of his discretion. Indeed, had he refused to reopen the case it might well have been contended that I should reverse his decision: *Royal v Prescott-Clarke* [1966] 1 WLR 788."

Turner v Tsaousis [1974] 7 SASR 488; (1974) 30 LGRA 372 was another authority to prosecute case. A summary prosecution under the *Health Act* was dismissed when the defendant's counsel successfully submitted that there was no case to answer because the necessary authority had not been proved. Hogarth J set aside the order of dismissal on the ground that the special magistrate had exercised his discretion wrongly. He should have allowed the complainant to reopen his case for the purpose of proving the authority. The special magistrate had said that it would be unfair to the defendant to give leave to reopen, but no special facts appeared which suggested that the defendant would have been improperly prejudiced by the mere giving of leave

to call further evidence. If that course had made an adjournment necessary, any prejudice caused thereby to the defendant could have been met by an order as to costs.

[8] I was referred to the judgment of Wells J in *Reid v Kerr* [1974] 9 SASR 367. That case dealt principally with questions of expert evidence and the rule in *Brown v Dunn* and the calling of evidence in rebuttal. However, the special magistrate there had permitted the prosecutor to reopen his case at a very late stage, after the evidence had been completed and addresses made and judgment reserved. Wells J held that, notwithstanding the unusual circumstances, the prosecution should not have been allowed to reopen its case, and His Honour said of that matter at 367:

> "The power of the court to allow one side to reopen its case is based upon considerations of natural justice where, owing to inadvertence, misunderstanding or other similar cause, a party who has closed his case without covering a point now seen as necessary to be covered, is permitted, in the interest of justice, to make good the deficiency."

In *Leydon v Tomlinson* [1979] 22 SASR 302; (1979) 4 ACLR 93, the defendant to a charge under s67 of the *Companies Act* 1962 (SA) submitted that there was no case for him to answer on the ground, *inter alia*, that it had not been proved that the Minister consented to the prosecution. The special magistrate gave leave for the complainant to reopen his case in order to tender the necessary evidence. Zelling J held that this was a wrong exercise of the magistrate's discretion. His Honour distinguished the decision in *Turner v Tsaousis* because of the special nature of the consent under s382(2) of the *Companies Act* 1962 (SA). Allowing the prosecutor to reopen deprived the defendant of a defence that the complaint against him was statute-barred. In His Honour's view, it was not a mere matter of procedure. Furthermore, it was clear from the transcript that defence counsel had let the prosecution know right at the start of the case that he was taking all available questions of time. As to that His Honour said at 309:

> "That should have been a very relevant question in the exercise of the magistrate's discretion. It is one thing to allow the prosecution to reopen a case to prove a mere matter of form, a pure technicality which nobody had attached any importance to until the end of the Crown case, when counsel for the defence pounces for the first time. It is a very different matter when counsel for the defence announces at the outset that a point is going to be in issue in the case and the Crown still fails to prove an essential point which they have been put on notice is a matter in dispute in this case. In such a case, whilst not wishing to fetter the discretion of magistrates in any way, I think that that is a very cogent argument against exercising the discretion to reopen the case. No one wants accused persons to be let off on mere technicalities. On the other hand, the onus does lie on the Crown in every prosecution to prove its case and if they are put on notice that a certain matter is in issue, then they have to prove it, and generally speaking there should be no second bite of the cherry, unless it is a matter which could not have been foreseen at the opening or did not appear to be put in issue by the defence either by statement or cross-examination and that is not this case."

Next, there is the decision of Mitchell J in *Harrison v Flaxmill Road Foodland Pty Ltd* [1979] 22 SASR 385. The defendant was prosecuted under s18 of the *Packages Act* 1967 (SA). It was necessary for the complainant to prove the regulations made under that Act. The prosecutor **[9]** put in a set of regulations but they were the wrong set. They were regulations that did not come into operation until after the date of the alleged offences. At the close of the prosecution case, counsel for the defendant submitted that there was no case to answer, because the right regulations had not been tendered. Counsel for the prosecution thereupon applied to reopen his case in order to tender the relevant regulations. That application was rejected and the special magistrate dismissed the complaint. Mitchell J, held that he had exercised his discretion wrongly. She set aside the order of dismissal and remitted the complaint to the special magistrate for further hearing. Included in her review of the authorities was a reference to *Hargreaves v Hilliam* [1894] 58 JP 655. In that case (which was also cited by Jeffrey J in *Henning v Lynch*) Cave J, dealing with the refusal by justices to allow an informant to reopen his case to prove a consent to prosecute said at 655:

> "I may say, so far from its being the practice that a case shall not be reopened, my practice is always distinctly to the contrary, and that I am always ready to hear any evidence which is there ready to be tendered, and which, owing to any accident or mistake or want of foresight if you like on behalf of the counsel or parties, has not been given before the case is taken to be closed."

The latest of these cases of which I am aware is *Maddison v Coombe* [1981] 26 SASR 523. On a prosecution under s18 of the *Noise Control Act* 1976 (SA), the prosecutor closed his case

without tendering the *Government Gazette* which contained a proclamation declaring what were "domestic premises" for the purposes of the Act. It was held by Jacobs J that the special magistrate ruled correctly in allowing the prosecutor to reopen his case, before the defence began, for the purpose of proving the proclamation.

I return to the present case. Whether the special magistrate should have allowed the prosecutor to reopen his case in order to tender the s47g(3)(b) certificate was a matter for his discretion. So far as an appeal against his decision is concerned, it is not a matter of a judge of this Court merely substituting his opinion for that of the special magistrate. If there was material upon which the special magistrate's decision may be justified, and he took into account all the relevant facts and only the relevant facts and applied the correct legal principles, then his decision must stand. What is in dispute is whether there is any material here upon which the refusal to allow the prosecutions to reopen could reasonably be based.

I start with the fact that the supplementary evidence which the prosecution needed to get in was a statutory certificate of a routine kind in a prosecution under s47b of the *Road Traffic Act* 1961 (SA). I mean by that, not that it was unimportant or that proof of the matters dealt with in the certificate may be treated in a perfunctory fashion, but that such a certificate is an obvious piece of evidence in a s47b prosecution and one which is almost always led in this manner and the exact nature of which the defence is able to foresee from the outset. It contains no surprises. Furthermore, it must be a relatively uncommon case these days in which the defence actually challenges the matters asserted in one of these certificates, namely, that the breathalyzer was in good order and was operated properly by the technician and that the provisions of the Act with respect to such **[10]** instruments were complied with.

No doubt counsel will always be alert to any deficiency in proof of this kind, but finding something worth exploiting in this well-trodden field will ordinarily, I should think, be an unexpected bonus. It is obvious that no such defence was being raised in the present case. It is agreed, as I understand it, that no one, including defence counsel, had noticed the omission of the usual certificate until the learned special magistrate drew attention to it. He did that during the course of defence counsel's opening address. That, too, is important. It has not been suggested that any prejudice, in the relevant sense, would have been suffered by the respondent had the prosecutor been allowed to reopen his case at that stage. It appears that the case was about to be adjourned to another day, in any event, and even had that not been the case any additional expense that might have been caused to the respondent could have been met by an order that the complainant pay the costs of the adjournment. The learned special magistrate laid much emphasis upon the importance of these statutory requirements; indeed, I am not sure that he did not mislead himself in emphasising them as he did. There was no question here of the prosecution ignoring the requirements of strict proof that were emphasised by Legoe J in *Weerts v Daire*.

The very purpose of the application to reopen was to supply that strict proof in this case. The method chosen, namely, the tender of a certificate under s47g(3)(b), would have involved no more than a momentary interruption of defence counsel's opening address, and the likelihood is that the matters dealt with in the certificate would then not have received any further attention from anyone. Some of the cases in the books distinguish procedural matters from those going to the heart of the dispute between the parties. Of course, these criteria can never be completely satisfactory. Any element of a charge may become the particular focus of a defence attack, and there is obviously a sense in which one element cannot be regarded as more or less important than another. However, as a matter of common sense and experience one is able to say that, generally speaking, certificates of the s47g(3)(b) kind are not disputed. In that sense they may be regarded as peripheral, even procedural, in character. There will be exceptional cases in this respect, but no one has suggested that this was one of them.

It is hardly surprising that an inexperienced prosecutor should have lost his way while attempting to negotiate the complexities of the drink-driving provisions of the *Road Traffic Act*. No doubt the courts and defendants are entitled to expect that prosecutors will get these things right, and I dare say this particular prosecutor has learnt something from his experience. I thought at first that it might be relevant that what the prosecutor in his affidavit called inadvertence was really a matter of inadequate understanding of the requirements of s47g. It was not the case of a man absent-mindedly forgetting to tender a document, the nature of which he well understood and which he had always intended to submit in evidence before he closed his case. On reflection,

however, I do not think that the distinction is very important. The fact is that the learned special magistrate drew attention to the deficiency and the party affected thereupon sought to put matters right. That sort of thing happens from time to time, as we all know, in all jurisdictions. I do not think that the special magistrate should have been too anxious about any encouragement to slackness in prosecution techniques **[11]** that might have resulted from exercising his discretion in favour of the complainant here. It would be a different matter, perhaps, if slips of this kind were prevalent, particularly in drink-driving prosecutions, but that has not been suggested. If it was proper to take that consideration into account, the special magistrate should also have had regard to the seriousness of the charge that he was hearing.

I have referred to the distinction that is sometimes drawn between formal or procedural points and those going to the real merits of the dispute. The learned special magistrate picking up the language of one of the cases, spoke of matters that are peripheral and technical. Looking at the language of decided cases is helpful, and the considerations I have just mentioned will often be relevant, even important. However, features of a case that are seen by a judge to be worth emphasising with respect to one set of facts cannot be given a universal application as though they were the words of a statute. There are no rules of thumb in this area. In the end, it is a matter of what the justice of the case in hand requires. The circumstances of the present case so regarded, lead me to the conclusion that there were no grounds upon which the learned special magistrate's decision could reasonably be based. In my opinion, his discretion miscarried. The appeal must be allowed, and the order of dismissal and consequent orders set aside. The case will be remitted to the learned special magistrate for further hearing.
