43/07; [2007] VSC 406

SUPREME COURT OF VICTORIA

STONE v McINTYRE

J Forrest J

1, 19 October 2007 — (2007) 17 VR 280; (2007) 176 A Crim R 540; 48 MVR 549

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER INVOLVED IN MOTOR VEHICLE ACCIDENT – CONVEYED TO HOSPITAL – BLOOD SAMPLE TAKEN AT HOSPITAL – CHARGES LAID – CERTIFICATE OF PERSON TAKING BLOOD SAMPLE TENDERED IN EVIDENCE – STATEMENT IN CERTIFICATE THAT PERSON WAS "A REGISTERED MEDICAL PRACTITIONER OR APPROVED HEALTH PROFESSIONAL" – LETTERS MRCS AFTER WORD QUALIFICATIONS IN CERTIFICATE – WHETHER JUDICIAL NOTICE MAY BE TAKEN OF MEANING OF ACRONYM – CHARGE FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49, 56, 57.

1. It is a necessary part of the proofs for the prosecution of a charge under s49(1)(g) of the *Road Safety Act* 1986 ('Act') to establish that a doctor has taken a sample of the driver's blood pursuant to s56 of the Act.

2. Where a driver involved in a motor vehicle accident had been conveyed to hospital and had a sample of blood taken, it can be presumed that the person taking the sample was a doctor who complied with all statutory requirements. Further, the letters 'MRCS' appearing in the certificate after the printed word "qualifications" mean that a court can readily infer that the initials translate to 'Member of the Royal College of Surgeons' and accordingly, such a person was a registered medical practitioner within the meaning of the Act. In those circumstances there was evidence upon which a magistrate was entitled to conclude that a doctor had in fact taken the blood sample pursuant to s56 and to find a charge under s49 of the Act proved.

J FORREST J:

Facts

1. In the early morning of the 26th day of March 2006 the appellant, whilst driving a motor vehicle, collided with another motor vehicle at the controlled intersection of Canterbury Road and Wantirna Road, Heathmont.

2. Soon after the collision, the respondent, Constable Anne McIntyre, attended the scene. Her evidence was that there was considerable damage to the appellant's vehicle. When asked how the accident had happened, the appellant replied "I don't know, I thought the light was yellow".

3. The respondent gave the following unchallenged account of the appellant's presentation:

> "She seemed to be extremely intoxicated from alcohol. There was a very strong alcohol – and I can actually remember standing there being very concerned, very surprised that this young girl had driven, and I remember thinking how fortunate she was and indeed the people in the other vehicle that no-one had been seriously injured. Her eyes were heavily bloodshot, she was unsteady on her feet and her words were very slurred. I still remember quite clearly to this day how surprised I was. I remember standing having a conversation with her at the scene, I'm sure I said to her that I was very glad that she was OK".

4. Subsequently the appellant was taken by ambulance to the Maroondah Hospital. Both the respondent and a Senior Sergeant McGregor attended the hospital, having followed the ambulance to the hospital. At the hospital a blood sample was taken and subsequently a certificate provided to the appellant in respect of the taking of the sample. It is the contents of that certificate which form the subject of the appeal.

5. On the 31st day of August 2006 the appellant was charged with breaching s49(1)(g) of the *Road Safety Act* – the blood sample disclosed an amount of alcohol above the prescribed concentration; and also with a breach of Road Rule 59(1) – entering an intersection on a red light.

The hearing before the Magistrate

6. The charges against the appellant were heard at the Magistrates' Court at Dandenong on 14 February 2007.

7. The appellant pleaded guilty to the red light charge under Road Rule 59(1) and not guilty to the charge under s49(1)(g) of the *Road Safety Act*.

8. In the prosecution case concerning the s49(1)(g) offence, the only witness called for the prosecution was the respondent. Relevant to this appeal she gave the following evidence in answer to the prosecutor's questions:–

> "The defendant was conveyed to the hospital? And which hospital was that? Maroondah in East Ringwood.
>
> And at that location was a sample of blood taken? A sample of blood was taken. I think about 5 minutes after, Senior Sergeant and I followed the ambulance in the police vehicle behind the ambulance.
>
> Do you have a certificate of the taking of blood by a doctor? I do.
>
> I tender that, Your Honour.
>
> Magistrate: Yes, Exhibit B."

The certificate purporting to be a certificate under s57(3) of the *Road Safety Act* was, accordingly, tendered without objection from counsel for the appellant. There was no cross-examination relevant to this evidence.

9. The only witness called on behalf of the appellant was the appellant herself. She gave the following evidence:

> "After the accident you were taken to hospital, do you agree with that? Yes.
> And when you left hospital, did you leave with a sample of blood? Yes.
> And what happened to that sample of blood? I took it home and placed it in a drawer."

10. No other evidence was led from her by counsel in respect of her attendance at the hospital. In particular there was no suggestion by the appellant that the blood sample was taken irregularly or in an unauthorised manner.

11. At the conclusion of the evidence, submissions were made by the police prosecutor and counsel for the appellant as to whether the charge under s49(1)(g) of the *Road Safety Act* had been made out. The submission made on behalf of the appellant turned solely upon the adequacy of the certificate and whether it could be relied upon in establishing the case against the appellant. Mr Hardy, who appeared both before the learned Magistrate and before me, made the following submission:

> "So the prosecution, it would seem, have overcome the hurdle of proving the analysis of the blood by the tender of that certificate. What they haven't proved is that a blood sample was taken by a registered medical practitioner, because that certificate can't prove that point. It is the certificate of taking of blood that one must look to to ascertain who took it, and *that certificate does not state the blood sample was taken by a registered medical practitioner.*" (My emphasis).

12. The prosecutor relied upon the "qualifications" portion of the certificate in which several letters or acronyms were inserted apparently to establish that the certificate was completed by a registered medical practitioner.

13. After retiring to consider the submissions made by both the prosecutor and the appellant's counsel, the learned Magistrate convicted the appellant of the offences under s49(1)(g) of the *Road Safety Act* and Road Rule 59(1) and fined her an aggregate sum of $1,000 with $61 costs. In respect of the charge under s49(1)(g) of the *Road Safety Act*, the appellant's driver's licence was cancelled and she was disqualified from obtaining any licence for a period of 24 months.

14. Not all the learned Magistrate's reasons were recorded. It appears, however, that he

ultimately concluded that s57(3) of the *Road Safety Act* entitled him, in the absence of evidence to the contrary, to conclude that the sample was validly taken and therefore the charge made out.

Issues on the appeal

15. On 16 March the appellant lodged a Notice of Appeal pursuant to s92 of the *Magistrates' Court Act*. She asserted that the following questions of law were raised as a result of the decision of the learned Magistrate:

> "(1) Was there sufficient evidence before the learned Magistrate to support a finding that a registered medical practitioner took a sample of the appellant's blood pursuant to s56(2) of the Act?
>
> (2) Did the learned Magistrate err in law in convicting the appellant when the prosecution had failed to prove that a registered medical practitioner took a sample of the appellant's blood pursuant to s56(2) of the Act?"

16. The grounds of appeal are narrow and raise the same point argued before the learned Magistrate, namely, a prosecution under s49(1)(g) has as its genesis establishing that a sample of blood has been taken in accordance with s56. Section 56 requires the blood sample to be taken by a doctor (being a registered medical practitioner). The appellant contends that the certificate tendered under s57(3) – a procedural provision – did not demonstrate that the person who took the blood sample was, in fact, a registered medical practitioner.

The relevant provisions of the *Road Safety Act*

17. It is convenient to now turn to the statutory provisions.

18. The relevant parts of s49(1)(g) read as follows:

> "(1) A person is guilty of an offence if he or she— ...
> (g) *has had a sample of blood taken from him or her in accordance with section* 55, 55B, 55E or 56 within 3 hours after driving or being in charge of a motor vehicle and—
> (i) the sample has been analysed within 12 months after it was taken by a properly qualified analyst within the meaning of section 57 and the analyst has found that at the time of analysis the prescribed concentration of alcohol or more than the prescribed concentration of alcohol was present in that sample; and
>
> (ii) the concentration of alcohol found by the analyst to be present in that sample was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; or
> ..." (My emphasis).

19. Sections 55, 55B and 55E are irrelevant to the charge.

20. The relevant parts of s56 read as follows:

> "Blood samples to be taken in certain cases
> (1) In this section—
> *doctor* means a registered medical practitioner and includes a police surgeon.
> (2) If a person of or over the age of 15 years enters or is brought to a place for examination or treatment in consequence of an accident (whether within Victoria or not) involving a motor vehicle, the person must allow a doctor to take from that person at that place a sample of that person's blood for analysis.
> (3) On convicting a person, or finding a person guilty, of an offence under subsection (2) the court must, if the offender holds a driver licence or permit, cancel that licence or permit and, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for the time that the court thinks fit, being not less than—
> (a) for a first offence, 2 years; and
> (b) for a subsequent offence, 4 years.
> (4) Sub-section (2) does not apply if—
> (a) in the opinion of the doctor first responsible for the examination or treatment of the person the taking of a blood sample from that person would be prejudicial to his or her proper care and treatment; or
> (b) a member of the police force has notified the doctor first responsible for the examination or treatment of the person, in writing, that the person has undergone a preliminary breath test which did not indicate that the prescribed concentration of alcohol was exceeded; or
> (c) a member of the police force or a member of an ambulance service has notified the doctor first responsible for the examination or treatment of the person, in writing, that the person was an occupant of and was not driving or in charge of any vehicle involved in the accident; or

(d) a member of the police force or a doctor has notified the doctor first responsible for the examination or treatment of the person, in writing, that a sample of the person's blood was taken by a doctor before the person entered or was brought to the place for examination or treatment. ...
(6) If a sample of a person's blood is taken in accordance with this section, evidence of the taking of it, the analysis of it or the results of the analysis must not be used in evidence in any legal proceedings except—
(a) for the purposes of section 57; or ... ...
(7) A person must not hinder or obstruct a doctor attempting to take a sample of the blood of any other person in accordance with this section.
Penalty: 12 penalty units.
(8) No action lies against a doctor in respect of anything properly and necessarily done by the doctor in the course of taking any sample of blood which the doctor believes on reasonable grounds was required or allowed to be taken from any person under this section.
(9) A blood sample that is, after 9 December 1987, taken from a person by a doctor who honestly and reasonably believes that he or she is required to take the sample, whether or not the person consents to the taking, is deemed to have been taken by the doctor who was first responsible for the examination or treatment of that person."

21. It will be observed that the whole of s56 is directed to the taking of a blood sample by a doctor – not by any other person – and particularly not by an approved health professional.

22. Section 57 then sets out the evidentiary provisions which facilitate the use of certificates rather than requiring the attendance of expert witnesses. The relevant parts are set out as follows:

"Evidentiary provisions – blood tests ...
(2) If the question whether any person was or was not at any time under the influence of intoxicating liquor or any other drug or if the question as to the presence of alcohol or any other drug or the concentration of alcohol in the blood of any person at any time or if a finding on the analysis of a blood sample is relevant— ... ...
(c) on a hearing for an offence against section 49(1) of this Act; or ...
then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the taking, after that person drove or was in charge of a motor vehicle, of a sample of blood from that person by a registered medical practitioner or an approved health professional, of the analysis of that sample of blood by a properly qualified analyst within twelve months after it was taken, of the presence of alcohol or any other drug and, if alcohol is present, of the concentration of alcohol expressed in grams per 100 millilitres of blood found by that analyst to be present in that sample of blood at the time of analysis and, if a drug is present, evidence may be given by a properly qualified expert of the usual effect of that drug on behaviour when consumed or used (including its effect on a person's ability to drive properly).
(3) *A certificate containing the prescribed particulars purporting to be signed by a registered medical practitioner or an approved health professional is admissible in evidence in any proceedings referred to in subsection (2) and, in the absence of evidence to the contrary, is proof of the facts and matters contained in it.*" (My emphasis). "... ... ...
(7) An accused who has been served with a copy of a certificate given under this section may, with the leave of the court and not otherwise, require the person who has given the certificate or any other person employed, or engaged to provide services at, the place at which the sample of blood was taken to attend at all subsequent proceedings for cross-examination and that person must attend accordingly.
(7A) The court must not grant leave under subsection (7) unless it is satisfied—
(a) that the informant has been given at least 7 days' notice of the hearing of the application for leave and has been given an opportunity to make a submission to the court; and
(b) that—
(i) there is a reasonable possibility that the blood referred to in a certificate given by an analyst under subsection (4) was not that of the accused; or
(ii) there is a reasonable possibility that the blood referred to in a certificate given by a registered medical practitioner or an approved health professional had become contaminated in such a way that the blood alcohol concentration found on analysis was higher than it would have been had the blood not been contaminated in that way; or
(iia) there is a reasonable possibility that the blood referred to in a certificate given by a registered medical practitioner or an approved health professional had become contaminated in such a way that a drug found on analysis would not have been found had the blood not been contaminated in that way; or
(iii) there is a reasonable possibility that the sample was not taken in accordance with the Code of Practice for Taking Blood Samples from Road Accident Victims; or
(iiia) there is a reasonable possibility that the sample was not taken within 3 hours after the person who provided the sample drove or was in charge of the vehicle; or

(iv) for some other reason the giving of evidence by the person who gave the certificate would materially assist the court to ascertain relevant facts."

23. The reference to "approved health professional" within s57(3) was inserted by Act number 14 of 2000[1], so it would seem, to cover situations under s55 where in particular instances involving breath analysis a blood sample could also be taken by an approved health professional: e.g. s55(9A).

The certificate

24. Certificate number H55119 was tendered before the learned Magistrate. It reads as follows:

> "Certificate of the taking of a blood sample.
> I, Helen Cook of Maroondah Hospital A registered medical practitioner or approved health professional hereby certify that I collected a sample of the blood of Catherine Stone of 22 Folkstone Crescent at 02.55 on 26/3/06 Location Maroondah Hospital and that the code of practice and/or all the regulations relating to the collection of such sample were complied with and that such sample was placed in containers labelled with the persons name, the date and time of the taking of the sample and my signature.
> [Signature – illegible.
> Qualifications – MBChB, MRCS.]
> N.B. Consent of the patient to the taking of a sample is NOT required in any case when a person is at a place for examination or treatment in consequence of a motor vehicle accident or in accordance with the provisions of Section 55(9A), 55B of the R.S.A. 1986. In other cases consent is required and the words 'with his/her express consent' should be inserted after the asterisk."

25. The appellant could have, pursuant to s57(7) of the *Road Safety Act*, sought the leave of the Court to cross-examine Helen Cook. No such leave was sought.

Counsel's argument

26. Mr Hardy agreed with me that if Helen Cook had deleted the words "or approved health professional" from the certificate, then there would be no basis for the appeal. His point was that given the ambiguity within the certificate, as he contended, the essential requirement that the sample be taken by a doctor was missing and therefore an essential element of proof had not been established and the case should have been dismissed.

27. Mr Gyorffy, who appeared for the respondent, raised two points. Firstly that the evidence enabled the Magistrate to conclude that the person who took the sample was a doctor. Second, and in any event, he contended that the Act, for the purpose of a prosecution, did not require a doctor to take the sample – it was only necessary to establish that a sample was taken at the hospital.

Appeal on the question of law

28. At the commencement of his oral submissions, Mr Gyorffy made the point that this appeal is not a rehearing or a reconsideration of the facts established before the Magistrate. Rather, it is an appeal on the question of law under s109 of the *Magistrates' Court Act* and can only be dealt with on that basis.

29. In *Ericsson (Australia) Pty Ltd v Popovski*[2], Brooking JA (with whom Ormiston and Charles JJA agreed) said as follows:

> "But the appeal given by s109 of the *Magistrates' Court Act* is only on a question of law and it is not enough to show error of law simply to persuade a judge that the magistrate went wrong on a question of fact."[3]

30. In *Roads Corporation v Dacakis & Anor*, Batt J (as his Honour then was) stated the following principles (omitting authorities):

> "The existence of a question of law is not only a precondition to the right to appeal but also the subject matter of the appeal itself, so that the appeal does not operate as a rehearing of the whole dispute or matter. [References omitted]. Although one can, I think, discern some variation in the approach taken over the last two decades by Australian courts having jurisdiction to hear appeals on questions of law to whether a particular error is one of law or one of fact (possibly for the reasons

> referred to by Gummow J in *TNT Skypak*) those courts have, on the whole, set their face against allowing questions of fact to be dressed up as questions of law, and have thus rejected appeals on such questions as whether a particular decision was against the evidence and the weight of evidence. [References omitted]. It is, however, authoritatively established that the question whether there is *any* evidence of a particular fact is a question of law, as is the question whether a particular inference *can* (as opposed to whether it *should*) be drawn from the facts found"[4].

31. On the question of inferences, his Honour then referred to the well known decision of *Australian Broadcasting Tribunal v Bond*[5] and then said:

> "In a passage in *Bond* at 356 to which I shall also return later, Mason CJ said: 'So long as there is *some* basis for an inference - in other words, the particular inference is reasonably open - ... no error of law has taken place'. To my mind, the corollary of that proposition is that where there is *no* basis for an inference – in other words, the particular inference is not reasonably open – error of law has taken place."[6]

32. Recently, the New South Wales Court of Appeal in *Crown Glass & Aluminium Pty Ltd v Ibrahim*[7] reaffirmed that perverse or unreasonable findings of fact do not of themselves constitute errors of law. However the Court also cited with approval the following statement of the New South Wales Court of Appeal in *Ambulance Service of New South Wales v Daniel*[8], noting that the New South Wales authorities demonstrated that:–

> "A clear distinction was drawn between the situation where the finding of fact in question is made in favour of a person bearing the onus of proof, and the situation when the finding of fact is made against the person bearing the onus of proof. In the former situation, the question is not whether there is any evidence at all on the point, but rather whether the evidence on the point is sufficient, in the sense that it is evidence, which if fully accepted could properly base the finding of fact."[9]

33. In *Crown Glass & Aluminium*, the challenge raised was in respect of a finding of fact made in favour of a person who bore the onus of proof. That is the same in the present case. However it seems that in this State the test, regardless of where the burden of proof lies, in establishing an error of law is whether it was open to the Court to reach the finding which is impugned.

34. In *S v Crimes Compensation Tribunal* [10] Phillips JA said as follows:

> "It cannot be said as a matter of legal principle that a determination of fact can never give rise to an error of law, but ordinarily it will not be so unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it".

35. He went on to say:

> "Unless the ultimate conclusion of the tribunal (in relation to the application of the statute to the case of the claimant) depended upon the particular finding which was not open so that it may fairly be said in consequence that the conclusion itself was not open to the tribunal, what was otherwise no more than an error of fact will ordinarily not serve to demonstrate error of law". [11]

36. These principles have been regularly applied by Judges of this Court in considering whether a determination of fact or inference does genuinely raise a question of law. Recently in *Myers v Medical Practitioners Board of Victoria*[12] the Court of Appeal again approved the correctness of the reasoning of Phillips JA in *S*. In particular Warren CJ (with whom Chernov JA and Bell AJA agreed) said:

> "Further, not only must the Tribunal have made a finding of fact not open to it, but that finding, if it is to constitute an appellable error of law, must have played a particular role within the reasoning of the Tribunal". [13]

37. The question therefore is whether it was open on the evidence to conclude that Helen Cook was a registered medical practitioner and therefore a doctor within the meaning of s56 of the *Road Safety Act*. Of course I do not need to be satisfied that this was the correct conclusion – merely that there was evidence which enabled the learned Magistrate to reach this conclusion.

Analysis

38. After counsel's submissions it became clear that there were two primary issues that needed

to be resolved:

> (a) Was it an essential part of the prosecution case on a charge pursuant to s49(1)(g) of the *Road Safety Act* that it establish that the sample had been taken by a doctor as Mr Hardy contended? [14]
>
> (b) Assuming that it was necessary for the prosecution to establish that a doctor had taken the sample of the appellant's blood, then was there evidence available to the Court for it to be satisfied, as a matter of law, that a doctor had taken the sample?

Does the *Road Safety Act* s56 require the blood sample to be taken by a doctor?

39. At the outset it ought to be noted that there are two streams of authority concerning the interpretation of certain provisions of the *Road Safety Act*, and particularly the breath analysis provisions of that Act. One line of authority ultimately concludes with the Court of Appeal decision in *Impagnatiello v Campbell*[15]; it demonstrates the necessity for there to be strict compliance with the terms of the statute in respect of the operation of breath analysing instruments. Then there is a line of authority concluding with the Court of Appeal decisions in *DPP v Foster*[16] and *Sher v DPP*[17] which appears to encourage courts to disavow "technical defences" and to be more robust in the drawing of inferences so as to give effect to the public policy underpinning the drink driving legislation.

40. It seems to me that the following proposition of Eames JA (with whom the other members of the Court agreed) in *Impagnatiello* states the law as it currently stands in this State:

> "Mr Hardy submitted, correctly in my view, that nothing said by the Court of Appeal as to the purpose of the legislation and the desirability of discouraging merely technical defences overrode the continuing requirement that the prosecution was obliged to prove the elements of the offence".[18]

41. Mr Gyorffy contended, analogous to the argument in *DPP v Foster*, that the taking of a sample by a doctor was simply facilitative and did not amount to a proof of an essential element of the case. In *Foster* Winneke P said of s55 – the breath analysis provisions:

> "The power to make the requirements of which s55(1) speaks is obviously a power which is invested by the legislature in the police in order to effectuate the purpose and policies of the legislation. Without such powers, that purpose and those policies would be frustrated because police have no authority, from other sources, to require motorists to furnish samples of breath or blood. Because they are facilitative powers, I would have thought that it is not obligatory for the police officer to exercise them, let alone in the manner of a ritual incantation of the type which counsel for the respondent suggests. Rather, as I see it, they are powers which a police officer 'may' exercise as and when the circumstances dictate."[19]

42. I think that there is no true analogy between s55 and s56. It may well be that s55 has discretionary preconditions which are properly described as "facilitative", however the same cannot be said of the provisions of s56.

43. In my view, s49(1)(g), by its very words, requires compliance with the provisions of s56. The words "in accordance with s56" within s49(1)(g) can be given no other interpretation, particularly when the terms of s56 are considered.

44. Although s56 does not in terms require a doctor to carry out the taking of the sample of the blood, a consideration of all the provisions of s56 compels the conclusion that a doctor must take the sample. The person requiring treatment must permit a doctor to take a sample or an offence is committed. No other person can hinder or obstruct the doctor from taking the blood. Only a doctor can determine whether the person can be excused from providing a sample owing to his or her condition: s56(4)(a). All the other exceptions in s56(4) involve notification to a doctor and not any other health professional. A doctor obtains an immunity under s56(8) in relation to the taking of the sample. Section 56(6) provides a direct link to the use of a certificate provided that the blood sample is taken in accordance with this section. Section 57(2) then permits evidence to be given in the form of a certificate as to the taking of a sample of blood in respect of a charge under s49(1). Consideration of the terms of s49(1)(g), the structure of s56 and the relevant parts of s57 lead, in my view, unerringly to the conclusion that the blood sample must be taken by a doctor. I think that it forms an essential element of the offence[20].

45. I accept Mr Hardy's contention and conclude, therefore, that it is necessary for the

prosecution under s49(1)(g) of the *Road Safety Act* to establish that the blood sample taken under s56 of that Act was taken by a doctor. Absent that evidence, the prosecution must fail.

46. In the course of oral argument there was discussion of the principles stated by the High Court in *Bunning v Cross* [21]. In my view, much of that was irrelevant. The certificate was admitted before the Magistrate without objection. It is not open to the appellant on this application to agitate that it is now inadmissible. There is no need to have recourse to the principles in *Bunning v Cross*. While the facts in *Bunning v Cross* are alluringly similar to those in the present case, the issue determined by the High Court was as to the reception of evidence, rather than assessment of its probative value in the context of an appeal concerning an error of law. As I have indicated, the certificate was admitted without objection and is evidence of the facts contained therein. The appellant's point is – what facts does it disclose?

Was it open to the Magistrate to find that a doctor took the sample?

47. I turn now to that question namely whether, assuming it was necessary for it to be proved that a doctor took the sample, there was evidence available to the learned Magistrate to reach the conclusion that a doctor did, in fact, take the sample. Mr Hardy's submission is attractively simple; the certificate is ambiguous – it was either a doctor or an approved health professional. Such ambiguity, he contends, means that it was not open to the Magistrate to convict the appellant.

48. In my view that argument should be rejected. I think that there was evidence upon which the learned Magistrate could reach the conclusion that the person who took the sample was a doctor, and I think so for the following reasons.

49. First, the certificate was not the only evidence available to the Magistrate about the taking of the blood sample. The respondent gave evidence unchallenged, reproduced at para 8 herein, that she attended the hospital shortly after the arrival of the appellant and after attending the hospital she had a certificate of the taking of blood by a doctor. The appellant, upon her departure, was given a sample of her blood which she ultimately had sent off for testing. No contradictory evidence was led from the appellant.

50. Secondly, the reasoning of Lush J in *Mallock v Tabak*[22] means, I think, that the presumption of regularity can be invoked in a situation where a blood sample is taken from a patient by a person performing a public duty such as Helen Cook was. In such circumstances it can be presumed that in doing so, that person has complied with all statutory preconditions for such performance.

51. In *Impagnatiello*, Eames JA summarised the decision in *Mallock* as follows:

> "In *Mallock v Tabak* the presumption was applied where the defendant had been charged with a drink driving offence and the prosecution relied for proof of the offence on a blood test taken by a medical practitioner at a hospital the driver had attended after the accident. The legislation required a medical practitioner to take a blood sample on a person who was brought in to hospital for treatment or examination after an accident. It was contended by the defence that there was no proof that the preconditions for taking the sample had existed. Lush J held that a rebuttable presumption that he had complied with the statutory preconditions arose from the fact that the medical practitioner had taken the sample in purported compliance with his statutory duty. In that case, however, the duty which was imposed on the medical practitioner involved an invasion of the citizen's rights and the doctor only gained protection from the consequence of what otherwise would be an assault if he complied with the preconditions. It could therefore be presumed that the doctor would ensure that the preconditions existed."[23]

52. In this case, assuming the appellant's contention to be correct (as I have) that only a doctor can take the sample, then any other person would necessarily be committing an assault absent any evidence of consent (of which there was none). Although the factual situation is different to that in *Mallock* – it being accepted in that case that the sample was taken by a doctor but there was an issue as to whether the driver had been brought to the hospital for "treatment or examination" –there is, in my view, a rebuttable presumption that the person taking the sample under s56 had complied with the statutory precondition – namely, only a doctor could take the blood sample. In doing so, that person was performing a public duty and it can be assumed that Helen Cook, in this case, was complying with that precondition. In the words of Lush J in *Mallock* –

> "The mind may be satisfied of the likelihood of correct observance of [the Act] and of the unlikelihood of the lack of observance of its conditions"[24].

53. I am satisfied that it is likely that a doctor, given the totality of the provisions of s56 and, particularly, the cloak of immunity provided to a doctor by s56(8), would have taken the sample.

54. Thirdly, I think that the letters MRCS are capable of giving rise to judicial notice that such initials bespeak "Member of the Royal College of Surgeons". Neither counsel took me to any relevant authorities; each simply rhetorically arguing in support of their assertion that such notice could or could not be taken.

55. Judicial notice has been defined as follows:

> "Judicial knowledge is a knowledge of the ordinary wide awake man, used by one who is trained to express it in terms of precision"[25].

56. In my view a degree of commonsense has to be injected into this argument. The letters MRCS appear after the printed word "qualifications". It is general knowledge that a Fellow of the Royal College of Surgeons or a Member of the Royal College of Surgeons is often described by an acronym such as FRCS or MRCS. Indeed, Justices of this Court, Judges of the County Court and Magistrates in this State are referred to in terms of title by acronyms. Acronyms and their translation into words are a daily occurrence[26]. If courts can take judicial notice of the travelling times of motor vehicles to halt, that a person who has consumed 15 to 20 schooners in a few hours would be drunk[27], it seems no great leap to translate a well known acronym, MRCS, into its well known title, "Member of the Royal College of Surgeons". I would readily infer that such a person was a registered medical practitioner within the meaning of the *Road Safety Act* and therefore a doctor for the purpose of s56.

57. It is not necessary to consider, therefore, whether judicial notice could be taken of the acronym MBChB – also contained in the certificate.

58. For each of these reasons I conclude that there was evidence available to the learned Magistrate to conclude that the certificate purported to be signed by a registered medical practitioner and therefore by a doctor in accordance with s56 of the *Road Safety Act*.

59. Once that was accepted and there being no evidence to the contrary, (indeed the only other evidence – that of the respondent – pointed to the sample having been taken by a doctor) then the certificate was proof that a doctor had taken the sample and therefore the requirements of s56 were made out and the charge under s49(1)(g) proved.

60. I have only been required to determine whether there was evidence available to the learned Magistrate to found the conviction; I should add, however, that in my view His Honour was plainly correct to find that a doctor took the blood sample. There was patently sufficient evidence to do so.

Summary

61. I have reached the following conclusions:

> (a) That it was a necessary part of the proofs for the prosecution of a charge under s49(1)(g) to establish that a doctor had taken a sample of the appellant's blood pursuant to s56 of the *Road Safety Act*.
>
> (b) That there was evidence upon which the learned Magistrate was entitled to conclude that a doctor had in fact taken the blood sample pursuant to s56 and that the charge under s49 of the *Road Safety Act* was proved.

62. No error of law has been demonstrated. The appeal should be dismissed.

Orders

63. I propose to make the following order:
The appeal be dismissed with costs.

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[1] S17(5) *Road Safety (Amendment) Act* 2000.
[2] [2000] VSCA 52 at para 14.
[3] See also the cases referred to at para 13.

[4] [1995] VicRp 70; (1995) 2 VR 508 at p517.
[5] [1990] HCA 33; (1990) 170 CLR 321 at 328, 338, 335 and 359; (1990) 94 ALR 11; (1990) 64 ALJR 462; 21 ALD 1.
[6] [*Supra* at 518].
[7] [2005] NSWCA 195.
[8] (2000) 19 NSWCCR 697 at 711; (2000) 19 NSWCCR 697 Hodson CJ (in Eq).
[9] At paras 39 and 40 in *Crown Glass & Aluminium Pty Ltd v Ibrahim* [2005] NSWCA 195.
[10] [1998] 1 VR 83 at 89-90.
[11] *Supra* at p90.
[12] [2007] VSCA 163 at paras 51 - 54; (2007) 18 VR 48
[13] *Supra* at para 55.
[14] This point was not argued before the learned Magistrate by the police prosecutor.
[15] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.
[16] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[17] [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[18] *Impagnatiello* at para 13, see also *Sirajuddin v Ziino* (2005) VSC 418 at para 55; (2005) 14 VR 689; (2005) 45 MVR 21.
[19] *Supra* at para 29.
[20] See *Smith v Van Maanen* (1991) 14 MVR 365 at 371.
[21] [1978] HCA 22; (1978) 141 CLR 54 at p64-75, 77-78; 19 ALR 641; 52 ALJR 561.
[22] [1977] VicRp 7; [1977] VR 78 at 85. See also *Wright v Bastin* [1979] VicRp 35; (1979) VR 329 at 338-340.
[23] *Supra* at para 24.
[24] *Supra* at p85.
[25] *Brisbane City Council v Attorney General for Queensland* [1979] AC 411 at 423; [1978] 3 All ER 30; (1978) 3 WLR 299.
[26] See for example: *Bluegate Nominees Pty Ltd v Isaacs* (unreported 105 of 1994 WA Full Court at p11).
[27] See *Green v Tongs* [2005] ACTSC 7 at para 55; (2005) 188 FLR 363; (2005) 42 MVR 402.

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