47/10; [2010] VSC 437

SUPREME COURT OF VICTORIA

DPP v EASWARALINGAM & ANOR

Pagone J

9 September, 1 October 2010

PRACTICE AND PROCEDURE – ROAD RAGE INCIDENT – MAIN PROSECUTION WITNESS NOT AVAILABLE ON DATE SELECTED FOR HEARING – WITNESS ADMITTED TO HOSPITAL TO UNDERGO EMERGENCY SURGERY TWO DAYS BEFORE HEARING – WITNESS DISCHARGED FROM HOSPITAL ONE DAY BEFORE HEARING – WITNESS GROGGY AND UNDER INFLUENCE OF MEDICATION – APPLICATION BY PROSECUTION FOR AN ADJOURNMENT – DEFENDANT INFORMED OF APPLICATION FOR ADJOURNMENT DAY PREVIOUS TO HEARING – DEFENDANT ALSO INFORMED THAT IF ADJOURNMENT NOT GRANTED APPLICATION WOULD BE MADE FOR WITNESS' STATEMENT TO BE ADMITTED PURSUANT TO SECTION 65 OF THE *EVIDENCE ACT* 2008 – ADJOURNMENT APPLICATION REFUSED BY MAGISTRATE – FAILURE BY MAGISTRATE TO WEIGH THE CONSEQUENCE OF REFUSAL AGAINST THE FACTORS TENDING AGAINST AN ADJOURNMENT – WHETHER MAGISTRATE IN ERROR – APPLICATION TO ADMIT WITNESS' STATEMENT REFUSED – QUESTION OF REASONABLE NOTICE – FAILURE BY MAGISTRATE TO CONSIDER WHETHER WITNESS WAS NOT AVAILABLE TO GIVE EVIDENCE – WHETHER MAGISTRATE IN ERROR – WHETHER TO REMIT THE MATTER TO A DIFFERENTLY CONSTITUTED COURT: *EVIDENCE ACT* 2008 (VIC), SS65, 67.

The prosecution's main witness was unable to attend court because she had undergone emergency surgery two days before the date of hearing of charges arising from a road rage incident. It was said that the witness was groggy and apparently under the influence of medication. The defendant was notified of a pending application for an adjournment and in the event the adjournment was not granted, given notice that an application would be made to rely upon the witness' statement pursuant to s65 of the *Evidence Act* 2008 (Vic) ('Act').

When the matter came on for hearing, the application for adjournment was made and refused by the magistrate on the ground that the prejudice to the defendant was far outweighed by any prejudice to the public interest. In relation to the application to admit the witness' statement under s65 of the Act, the magistrate in refusing the application said that the notice of the application was deficient in relation to the time of service and the detail contained within it. Also, the magistrate stated that the application for admission was an abuse of process. Upon appeal—

HELD: Appeal allowed. Remitted to the Magistrates' Court for hearing and determination.

1. There may be many circumstances when refusing an adjournment will be justified in the exercise of a discretion even though the practical effect of a refusal to adjourn the hearing will result in the dismissal of a proceeding. However an application for an adjournment which is likely to have that effect should not be refused without considering that consequence and taking it into account as a factor to be weighed against others. In this case the only evidence against the defendant was of the one single witness who was not able to give oral testimony because of unexpected surgery only a few days before. The matters put against the adjournment might all have been accommodated by a relatively short adjournment although the Magistrate did not explore or explain whether or not that was possible. The inability of the witness to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted in evidence by her under s65 of the Act, however the Magistrate did not consider whether the effect of ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of the witness had been admitted in evidence). The Magistrate did not weigh that consequence against the factors tending against an adjournment. An adjournment, all things being equal, may more readily be refused where a hearing may still be conducted meaningfully upon evidence. It may even be refused in some cases where the effect of a refusal may lead inevitably to a party not being able to present a case, but it should not be refused without taking that into account. The Magistrate ought to have considered whether the consequences of the refusal of the adjournment were warranted by those matters put to her as bearing against the adjournment.

2. In relation to the admissibility of the statement pursuant to s65 of the Act, the Magistrate failed to consider whether a condition of s65 was satisfied namely, that the witness was "not available to give evidence about an asserted fact".

3. The Magistrate was in error in concluding that the notice had not been served within a reasonable time or had not given sufficient detail of the matters required to be provided by the Act. What constitutes reasonable notice is something which must depend upon all of the circumstances of the case. In this case notice of an intention to rely upon the written statement was given to the defendant's legal representatives promptly as soon as the unavailability of the witness became known. Section 67(3) provides that the notice must state "the particular provisions" of the division "on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence". In this case the written notice formally served on 24 February 2010, but reliance upon which was conceded to have been conveyed on 23 February 2010, identified s65 as the section upon which reliance was placed and, on page 2 of the notice, there was express statement of an intention to rely upon s65(2)(a) or (b) or (c) or (d), s65(3)(a) or (b) or 65(8)(a) or (b). Some of these provisions may not have sustained the application but there was asserted the provisions on which reliance was placed. The Magistrate's conclusions to the contrary were not sustainable.

4. Observations in relation to whether or not the matter should be referred to a differently constituted Magistrates' Court.

PAGONE J:

1. Two proceedings were commenced by the Director of Public Prosecutions ("the DPP") to challenge decisions made by a Magistrate on 24 February 2010. The first proceeding is an appeal on a question of law brought pursuant to s272 of the *Criminal Procedure Act* 2009 (Vic) to which the Magistrates' Court is not a party, the second is an originating motion to which the Magistrates' Court is a defendant. The complaints in each proceedings are substantially the same and the issues raised in each of them are also substantially the same, although in one the material upon which the appellant may be able to rely is narrower than the other.

2. Each of the DPP's complaints is about two decisions made by the Magistrate on the day appointed to hear a number of charges against Mr Easwaralingam. The first decision was a refusal by the Magistrate to adjourn the proceeding on the informant's application sought on the basis of the unexpected unavailability of the informant's principal witness, Ms Kelly Venner, to give evidence. The second decision was a refusal to admit in evidence the written statement of that witness under s65 of the *Evidence Act* 2008 (Vic).

3. Mr Easwaralingam had initially been charged with four counts arising from events involving a Ms Venner on 26 October 2007. Each charge involved Ms Venner and proof of each charge depended upon her evidence. The first charge was of unlawful assault upon Ms Venner, the second charge was of use of indecent language to her in a public place, the third charge was of stalking her in a way that could reasonably be expected to arouse apprehension or fear, and the fourth charge was of behaving in an offensive manner in a public place. The only people present at the events which gave rise to the charges were Ms Venner and Mr Easwaralingam. Without her evidence the charges would fail.

4. It is not necessary to recount all of the facts alleged against Mr Easwaralingam. It is sufficient to note the main allegations to see that the evidence of Ms Venner was critical to the charges. The account she had given to the police concerned an incident beginning at about 9.00pm on 26 October 2007 soon after she had finished shopping at the Knox City Shopping Centre in Wantirna. Her account was that she had driven her car on to the right hand lane on Stud Road. She was heading towards Rowville and another car (which is alleged to have been driven by Mr Easwaralingam) pulled in behind her with high beams on. There were other cars around her and she could not immediately move from the right to the left lane. Her account was that she was travelling within the speed limit and moved to the left lane when she could. At some point she looked over to her right and saw a person in a car in the right lane (alleged to be Mr Easwaralingam) yelling at her and "sticking his finger up". Once the two cars reached the intersection at Ferntree Gully Road she drove into the left hand turning lane and the other driver pulled up beside her continuing to yell at her although she could not then hear what he was saying. Soon afterwards the traffic lights changed to green and both cars turned right. She was in the left lane and the other driver was in the right lane. At one stage the other driver pulled in front of her and travelled very slowly. This continued until the cars reached Jells Road at Glen Waverley when another car got in between them. Once Ms Venner reached the intersection of Wellington Road at Mulgrave the driver alleged to be Mr Easwaralingam was stopped at the red lights. She turned left into the slip road and saw the other driver reverse back and turn left as well. He followed her and sped up beside her. At some point he drove his car in front of her cutting her off. She was not able to drive

past him, felt scared but got out of the car to ask what his problem was. Her account of what then happened was that he jumped out of his car and walked over to her yelling abuse at her saying, "you slut, you whore, fucken slut, fucken dirty whore". He then spat at her and continued to use abusive language. She pushed him away, said she would call the police, got into her car, made a note of his registration number and eventually the two went in different directions. She spoke to a friend for advice and some time later was taken by the friend to the Glen Waverley police station where she reported the matter to the police. That occurred on the same day as the incident and a statement appears to have been taken from Ms Venner at 11.34pm on the day of the incident. Ms Venner and Mr Easwaralingam do not appear to have met or known of each other until this incident.

5. I will not recount the evidence of the interviews which the police officers had with Mr Easwaralingam after the incident on 26 October 2007. For present purposes it is sufficient to note only that on 29 October 2007 the informant and Senior Constable Perry attended his home to speak with him. On 11 February 2008 he attended unexpectedly at the Glen Waverley Police Station accompanied by his wife, his brother and another person.

6. On 11 March 2008 the informant issued the charges against Mr Easwaralingam based upon the evidence of Ms Venner and served them personally upon Mr Easwaralingam on that day. The proceedings were mentioned in the Magistrates' Court on 28 July 2008, 8 September 2008 and 31 October 2008 and were listed by the Court for a contest mention on 10 March 2009. On 10 March 2009 the Court was advised that the third charge (that of stalking) would be withdrawn. The remaining charges were then set down for a contest hearing on 7 August 2009. Sometime during March the informant was advised that Ms Venner would be overseas on 7 August 2009 and a new hearing date was obtained of 24 August 2009. There was no suggestion of any fault on the part of anyone about the choice of date for the hearing or the inability of Ms Venner to attend on the date given by the Court for the hearing. The fact was that she was not able to give evidence on the date given by the Court for the hearing and an adjournment of that date was sought. Notice of an application for an adjournment of the hearing from 7 August 2009 to 24 August 2009 was served upon Mr Easwaralingam at 7.20am on 25 March 2009 by a police officer. However, on 30 July 2009 the solicitor acting for Mr Easwaralingam advised the police that he was not aware of the new hearing date and that the application for an adjournment would be opposed. On 7 August 2009 the application for adjournment to 24 August 2009 was granted by Magistrate Bryant. The proceeding was then adjourned to be heard on 24 February 2010.

7. On 22 February 2010 (two days before the matter was due to be heard as a contested hearing) the informant received a message to the effect that Ms Venner would not be able to attend Court on 24 February 2010. The reason for this was that the day before, 21 February 2010, Ms Venner was admitted to hospital to undergo emergency surgery on 22 February 2010. She was discharged from hospital on 23 February 2010. On 24 February 2010 the informant telephoned Ms Venner and detected that she was groggy and apparently under the influence of medication. Counsel who appeared for Mr Easwaralingam at the Magistrates' Court hearing (Mr C. Davis) conceded that he had been notified on the 23rd of the unavailability of Ms Venner for the following day and that on the following day an adjournment would be sought. He was also informed that if an adjournment was not granted an application would be made to rely upon Ms Venner's statement pursuant to s65 of the *Evidence Act* 2008 (Vic). The formal written notice of intention to adduce hearsay evidence under s65 was dated 22 February 2010 and was formally served upon Mr Davis' instructor on 24 February 2010.

A. Adjournment application

8. It was in these circumstances that the informant sought an adjournment of the contested hearing on 24 February 2010. The Magistrate was referred to *Brimbank Automotive Pty Ltd v Murphy*[1] where Kaye J said:

> [12] The guiding principle for the exercise of the discretion is that a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise. Thus, in *Walker v Walker* Simon P stated:
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> "... Where the refusal of an adjournment would result in a serious injustice to the party requesting

> the adjournment, the adjournment should only be refused if that is the only way that justice can be done to the other party ... ."
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> [13] In determining whether to grant an adjournment, a court is entitled to take into account, as a relevant circumstance, the exigencies of case management. However, that consideration should not be permitted to prevail over the rights of the parties before the court, and in particular it should not predominate over the right of a particular party to be able to present its case properly to the court. The exercise by the court of its discretion in such a case is not the occasion to punish a party, or its practitioners, for oversight, mistake or tardiness. Rather, the overriding requirement is that the court must do justice between the parties. The point was stated in authoritative terms in the joint judgment of Dawson J, Gaudron J and McHugh J in *The State of Queensland & Anor v JL Holdings Pty Ltd*, as follows:
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> > "In our view the matters referred to by the primary judge were insufficient to justify her Honour's refusal of the application by the applicants to amend their defence and nothing has been made to appear before us which would otherwise support that refusal. Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."[2] (footnotes omitted)

Her Honour considered these passages and decided not to grant the adjournment sought expressing her reasons briefly:

> At the end of the day, however, the adjournment decision is a matter within the discretion of the Magistrate taking into account all the circumstances of the case. And it is my view – my clear view – that this matter will not be adjourned today. The prejudice to the accused is far outweighed by any prejudice, in my view, to the public interest. The witness – the principal witness – was absent on the first hearing date, and the absence, in my view, has not been clearly explained to the Court. But, having said that, it's of no matter today. Her absence today would appear to be on medical grounds. Certainly the material I have confirms that she's not medically fit to appear in Court between 21 and 23 February.
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> I am concerned – and it's no criticism of the informant – but I am concerned that VicPol don't have the necessary back up so that witnesses can be notified by someone other than the informant, if the informant is on leave, to confirm the presence of a witness for a hearing which is fixed at this Court. And it would appear that may not be prioritised, and it ought to be. And, so, I am not going to grant the adjournment application.

9. It is not for an appellate or reviewing court to re-exercise a discretion reposed in the primary decision maker. In *House v The King*[3] it was said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[4]

It is therefore not for me to consider whether I would have exercised the discretion differently but, rather, to consider whether the exercise of the discretion was wrong in law.

10. There were many circumstances which counsel for Mr Easwaralingam had put to the Magistrate, which I have not yet recited, that were said to weigh in favour of refusing the

adjournment. Mr Davis, Mr Easwaralingam's counsel before the Magistrate, pressed upon her Honour such circumstances as the need to have the matter finally determined so that he could "move on" in life. Amongst those circumstances was the deferral and delay of an application by him for citizenship pending finalisation of the charges. In addition he was pursuing an MBA course which involved significant expenditure and his ability to take advantage of HECS payments was being affected by the proceedings not being finalised. The Magistrate was told that Mr Easwaralingam had no previous convictions and that the charges were causing him great detriment with significant legal expense. These matters were not rehearsed by the Magistrate in her economically expressed reasons but they were the matters which had been put to her as outweighing the prejudice to the public interest in favour of granting an adjournment. Earlier in her reasons the learned Magistrate recited the submissions which had been made in opposition to the application to adjourn the proceeding. Her Honour noted that the submissions were multiple and were based on the premise that the accused was prejudiced by any further adjournment. She recited the submissions which had been relied upon to establish the prejudice to Mr Easwaralingam and her Honour's conclusions (which I have set out above) are plainly directed to a weighing of those matters by her Honour against the public interest.

11. It is well established that an appellate court may interfere with the exercise of a discretion to refuse an adjournment where its refusal may prevent a party from presenting a case in circumstances constituting an injustice.[5] There may be many circumstances when refusing an adjournment will be justified in the exercise of a discretion even though the practical effect of a refusal to adjourn the hearing will result in the dismissal of a proceeding. However an application for an adjournment which is likely to have that effect should not be refused without considering that consequence and taking it into account as a factor to be weighed against others. In this case the only evidence against Mr Easwaralingam was of the one single witness (Ms Venner) who was not able to give oral testimony because of unexpected surgery only a few days before. The matters put for Mr Easwaralingam against the adjournment might all have been accommodated by a relatively short adjournment although the learned Magistrate did not explore or explain whether or not that was possible. The inability of Ms Venner to give oral evidence might conceivably not have been fatal to the outcome of the case if the written statement she had made had been admitted in evidence by her under s65 of the *Evidence Act* 2008 (Vic), however the learned Magistrate did not consider whether the effect of ruling against the adjournment would be to insist upon a hearing in which no evidence would be called with the consequence of dismissal of the charges. The refusal of the adjournment would have had, and did have, the effect of denying the informant the opportunity to present his case (unless the written statement of Ms Venner had been admitted in evidence). The learned Magistrate did not weigh that consequence against the factors tending against an adjournment. An adjournment, all things being equal, may more readily be refused where a hearing may still be conducted meaningfully upon evidence. It may even be refused in some cases where the effect of a refusal may lead inevitably to a party not being able to present a case, but it should not be refused without taking that into account. The learned Magistrate ought to have considered whether the consequences of the refusal of the adjournment were warranted by those matters put to her as bearing against the adjournment.

12. The DPP also relied upon some observations made by her Honour about VicPol lacking back up to confirm the presence of a witness for a hearing. The DPP contended that these observations revealed that her Honour's decision not to grant the adjournment was based upon an irrelevant consideration. The expression of a concern about VicPol's lack of the necessary back up to confirm the presence of a witness for a hearing is fairly to be understood as a passing observation not figuring in the exercise of her discretion. It is plain from the sentence preceding the expression of the concern that the absence of Ms Venner on 24 February 2010 was accepted and understood to have been her medical condition which came to be known in the particular circumstances that had occurred in the preceding days. A fair reading of the whole of the transcript of the proceeding before her Honour makes clear that the expression of concern did not lead her Honour to consider that there was any operative failure of any lack of back up in the case before her. It is not uncommon for judicial officers to express views in the context of hearings which may be thought to be of assistance to litigants, especially to frequent litigants.

B. Admissibility of statement

13. Her Honour then stood down the proceeding temporarily and upon its resumption an application was made under s65 of the *Evidence Act* 2008 (Vic) to admit in evidence the statement

which Ms Venner had made on the night in which the events occasioning the charges occurred. That application proceeded with the learned Magistrate first hearing submissions in opposition before those in support of the application.

14. The dispute concerning the admissibility of the statement was conducted on behalf of Mr Easwaralingam before the Magistrate on a basis quite different from the way in which it was sought to be conducted before me. In the proceeding before me it was submitted for Mr Easwaralingam that the statement was not admissible in evidence under the section. Counsel for Mr Easwaralingam before the Magistrate had contended, however, that reliance upon s65 of the *Evidence Act* was an abuse of process in view of the Crown's inability to have the proceeding adjourned. It was said that the application was an attempt to circumvent the Court's ruling on the adjournment application by seeking to proceed in another way when the sworn evidence of Ms Venner was not available. That, on one view, might be thought a curious submission since the ability to tender evidence under s65 might in some circumstances be a reason to justify a refusal to grant an adjournment where a witness would not otherwise be available. In any event, the first argument raised by counsel for Mr Easwaralingam before the Magistrate was that reliance upon the section was an abuse. It was then contended that the form of the application was insufficient because it failed to provide any foundation or argument to the accused as to why the statement should be admitted. No more general submissions were put to the Magistrate about the inadmissibility of the evidence of the kind which senior counsel for Mr Easwaralingam attempted to argue before me. It was the arguments as put before the Magistrate which were addressed for the informant in support of the admissibility of the witness statement.

15. The learned Magistrate decided not to admit Ms Venner's written statement. In doing so she began by noting a submission which seems not to have been made. The learned Magistrate said:

> The evidence I have heard this morning is that the witness isn't here, that she's been contacted today but she's not coming, and that yesterday she was in hospital and probably was released from hospital yesterday. And the sworn evidence I have heard is that there was a cyst situation, and I don't know anything more than that. The submissions of counsel in opposition are that, firstly, the notice hasn't been served within a reasonable time, as required by the legislation. The legislation makes it perfectly clear in section 67 that the notice must be served within a reasonable time. And it must also detail certain facts and circumstances that it relies upon. And, again, the notice is deficient in that regard.

Contrary to what the learned Magistrate said, or perhaps only implied, there was no submission that the notice had not been served within a reasonable time. Indeed, it would not be surprising that no such submission was made. Ms Venner was admitted to hospital on Sunday 21 February 2010 to undergo emergency surgery. The following day (22 February 2010) a message was left by her with the informant that she would not be available to give evidence on 24 February 2010. The day after the message was left for the informant (23 February 2010) the informant had notified counsel for Mr Easwaralingam of Ms Venner's unavailability and on the day of the hearing a formal notice was served upon his solicitors. There was (unsurprisingly) no submission that notice in these circumstances had not been served within a reasonable time.

16. The learned Magistrate then turned to the arguments which had been put about the application being an abuse and about deficiencies in the form of the notice. In that regard the Magistrate said:

> A more concerning submission of counsel is that this is an abuse of process. Now, that submission is put on the basis that a court ordered that the prosecution application for an adjournment would not be granted this morning because the evidence that the informant that the witness wasn't here. The prosecution has then sought to rely on s65. The witness isn't here, so I'll seek to adduce the hearsay evidence in accordance with the new Evidence Act. And it's put that that subverts the ruling of this court. It's also put that, if the Court were to allow the application, it would be prejudicial to the accused if the accused were not given time to address the issues that arise from the application. And one of the main issues is that it's deficient because it doesn't prescribe the basis upon which it's made. And I think that's also a reasonable argument, and a fair argument.
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> This court must conduct its hearings in a just and timely way, and the fairness of the proceeding is critical. In my view, the notice is deficient. It has not been served within a reasonable time, it does not have the necessary detail that's prescribed for in the legislation, and it would require an

> adjournment for those deficiencies to be addressed which would, therefore, result in the outcome that is originally sought by the prosecution. And, accordingly, I do consider that to be an abuse, and I consider that to be unfair to the accused. Accordingly, the notice of intention to adduce hearsay evidence is noted and refused.

In reaching these conclusions the learned Magistrate was in error.

17. Section 65 of the *Evidence Act* 2008 (Vic) applies in a criminal proceeding if a person who made a previous representation "is not available to give evidence about an asserted fact". The learned Magistrate erroneously concluded that what was meant by not available was not defined in the legislation. In fact, s4(g) in pt 2 of the dictionary defines when a person is taken not to be available to give evidence for the purposes of the Act. Amongst the circumstances in which a person is taken not to be available to give evidence is where "the person is mentally or physically unable to give evidence and it is not reasonably practicable to overcome that inability". The learned Magistrate simply failed to consider whether that condition had been satisfied. Her Honour seems not to have concluded that Ms Venner was available within the meaning of s65, however, her failure to consider the definition appears to have had an impact on her Honour's view of the underlying policy of the provision when concluding that the application for admission of the evidence under the section was an abuse. The adjournment had been sought because of circumstances which might have satisfied one of the criteria to trigger the application of the section, namely that the person who had made the statement was not available. Whether or not the facts were sufficient to enliven the application of the section, the statutory definition of a person's availability (upon which the provision depends) ought to have been considered in deciding whether reliance upon the provision could be an abuse. The policy of the section (and in particular the definition of a witness being unavailable) might be thought to provide for situations including that with which the learned Magistrate was concerned. On that view, and given her Honour's decision not to grant an adjournment, an attempt to rely upon the section could hardly have been an abuse. Indeed, it was not until her Honour's decision not to grant an adjournment that the condition for reliance upon s65 arose.

18. Putting that matter to one side, however, the learned Magistrate was in error in concluding that the notice had not been served within a reasonable time or had not given sufficient detail of the matters which were required to be provided by the legislation. Section 67(1) requires that reasonable notice be given of a party's intention to adduce the evidence. What constitutes reasonable notice is something which must depend upon all of the circumstances of the case. In this case notice of an intention to rely upon the written statement was given to the accused's legal representatives promptly as soon as the unavailability of the witness became known. Section 67(3) provides that the notice must state "the particular provisions" of the division "on which the party intends to rely in arguing that the hearsay rule does not apply to the evidence". In this case the written notice formally served on 24 February 2010, but reliance upon which was conceded to have been conveyed on 23 February 2010, identified s65 as the section upon which reliance was placed and, on page 2 of the notice, there was express statement of an intention to rely upon s65(2)(a) or (b) or (c) or (d), s65(3)(a) or (b) or 65(8)(a) or (b). Some of these provisions may not have sustained the application but there was asserted the provisions on which reliance was placed. Her Honour's conclusions to the contrary were not sustainable.

19. In the proceedings before me it was contended that the statement was, in any event, inadmissible. In that regard it was contended, for instance, that the statement having been made after the events occurred would not come within the policy ambit encompassed by s65.[6] However, the Magistrate did not decide the case on that basis and the arguments to her did not address those points or the facts which might bear upon them. The parties conducted themselves on quite a different basis and in my view it would be wrong to entertain arguments which were not put to the Magistrate and in respect of which there might have been other facts or evidence led one way or another. Indeed some of the submissions made to the Magistrate by counsel for Mr Easwaralingam on the day were to the effect that the defence had been "caught on the hop somewhat" and that in dealing with the evidence sought to be tendered under s65 it "would probably require fairly extensive thought and research as to what might be allowed by consent in this situation, if there were consent, to be put before the jury, so to speak, and what might not be". What is clear is that forensic decisions were made about the basis upon which to challenge the admissibility of the evidence sought to be tendered under s65. That decision having been made it would be wrong to review the Magistrate's decision as if there had been a wider enquiry

upon the erroneous hypothesis that there had been additional and further facts tendered and other submissions made.

C. Constitution of Court in remitting matter

20. Counsel for the DPP submitted that I should order that in the event of a favourable outcome the matter be remitted to a differently constituted court. In that regard I was referred to the decision of *DPP v Nicholls*[7] in which Beach J decided:

> During the course of argument, an issue arose as to whether (in the event I concluded that the orders below must be quashed and the matter remitted for re-hearing) the matter should be remitted to the Magistrates' Court as originally constituted. The appellant submitted that the matter should be remitted to a differently constituted court because the Court as originally constituted expressed the view that what the prosecutor was trying to do in using s65 was "clever", and done in an attempt to "circumvent" the policy behind s18. In the end, counsel for the respondent was content, if the matter was to be remitted, for it to be remitted to a differently constituted court. Having regard to the views of the Magistrate expressed when the matter was first heard, I think it desirable for the matter to be remitted to a differently constituted court.[8]

It was contended that, by parity of reasoning, I should similarly order that the proceeding be remitted back to the Magistrates' Court differently constituted. In this case it was submitted that observations by the learned Magistrate indicated "that in this particular case the Magistrate had a bent against the prosecution". I am unable to accept that submission. The learned Magistrate considered legal arguments about a balance of convenience on whether to grant an adjournment and legal argument concerning the application of s67 in circumstances where an adjournment had been sought and not granted. It was contended that the learned Magistrate had made a finding that the application made under s65 was "in effect a device to circumvent her decision to not grant the adjournment and that was an abuse of the Court's process". The conclusions of the learned Magistrate were a legal characterisation of a formal application based upon legal arguments and were not the expression of views upon the merits of the case or the bona fides of the informer. In my view a fair reading of the Magistrate's decision does not indicate a bent against the prosecutor in this case or an indication that the Magistrate would not properly discharge her judicial duty to act in accordance with the law.

21. In *Davidson v Fish*[9] I dealt with an analogous submission made in relation to a decision of a medical panel. In that case I said:

> Counsel for Mr Davidson submitted that I should refer the medical questions back to the Convenor of medical panels for determination by a differently constituted panel in accordance with a practice that may have developed in this jurisdiction. A frequently cited authority for that course is the decision of Ormiston J in *Body Corporate Strata Plan No. 4166 v Stirling Properties Ltd (No. 2)* where his Honour said, in relation to reasons which were held partly to be defective, that an order compelling the delivery of further and better reasons "would have an air of unreality about it. Such an order would merely give a tribunal an opportunity to patch up what has been shown to be defective in circumstances where it is more than likely that the tribunal overlooked the issue altogether."
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> This dicta has been followed in a number of cases over 20 years although it is important that his Honour's dicta should not be taken out of context. His Honour did not suggest that a body charged with a statutory duty would not, or could not, be relied upon to discharge its duty to give reasons for a decision. The "unreality" referred to by his Honour is that necessarily implicit in an exercise of requiring a decision maker to give reasons in circumstances where it was found, or was likely, that its decision had not taken into account a matter. In those circumstances it would be unreal to require reasons about something which was likely not to have been operative in the decision: it is unreal to ask a decision maker to explain a decision by reference to something which the decision maker had not taken into account. The "patch up" his Honour warned against was the undesirable exercise, in that context, of seeking to have a decision maker explain how its conclusion might be reached by taking into account a matter which, on the hypothesis of the example, is supposed to have been entirely "overlooked". In other words, that it is undesirable for the Court to order the giving of reasons for a decision where it is likely that some matter had not been taken into account: in that case justice requires that the matter be looked at afresh. In this case I have no reason to assume that the medical panel would "patch up" something shown to be defective or that the same panel would do anything other than diligently exercise its statutory duty according to law.
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> His Honour in *Stirling Properties* distinguished cases where "reasons are partly defective, in the sense that not all issues have been dealt with", from those cases where "no reasons at all are given by a

tribunal required to state reasons". It was in the former class of case that his Honour expressed the view that an order compelling the delivery of further and better reasons would "have an air of unreality about it", whilst in "the case of total absence of reasons," the object of an obligation to give reasons "is better served by compelling the delivery of reasons rather than by the outright quashing of the decision". In *Northern NSW FM Pty Ltd v Australian Broadcasting Tribunal* Davies and Foster JJ dealt with the appropriate orders to be made when remitting a decision for rehearing and said:

> If a decision has been set aside for error and remitted for rehearing, it will generally seem fairer to the parties that the matter be heard and decided again by a differently constituted tribunal. This is because the member constituting the tribunal in the original inquiry or hearing will already have expressed a view upon facts which will have to be determined in the rehearing. The aggrieved party may think that a rehearing before the tribunal as originally constituted could be worthless, for the member's views have been stated. Thus, if a decision of the Administrative Appeals Tribunal has been set aside and the matter remitted for rehearing, the President of that tribunal ordinarily allocates to the rehearing a different member of the tribunal. There are, of course, cases where it is convenient for the tribunal as previously constituted to deal with the matter. And occasionally the Court itself expresses such a view, so as to make it clear that it would not be improper for the tribunal as previously constituted to consider the matter again.

These observations were, of course, made in respect of a decision set aside for error and remitted for "rehearing" rather than a decision set aside for failure to give adequate reasons. The situation considered in that case was different from the setting aside of a decision on the ground that the reasons were defective in the sense considered by Ormiston J, and different again from the situation where the relevant order be one that reasons be provided where none had been given. The observations, however, do point to the general desirability of fresh minds being brought to bear in decision making where possible.

The relief that is appropriate in any particular case must "depend on all the circumstances of the case" and I do not think it desirable for any fixed rule to be developed in substitution for a careful evaluation of all the facts of each case. It is easy to conceive of situations where an error identified in an opinion by a medical panel is of such a kind that it would be entirely appropriate, and in the interests of fairness and justice, that it be referred to the same medical panel, just as it may be easy to identify cases where the error, or other circumstances, be such that fairness would best be served by the matter being remitted to a differently constituted panel.

Orders by the Court about the composition of a medical panel to which the questions may be remitted should also bear in mind that there may be administrative, technical or logistical difficulties caused by an order to exclude some members from the composition of any newly constituted panel. Panels are constituted at the discretion of the Convenor of the medical panels under s63(4) of the Act. The Convenor constitutes panels of not more than five members on a case by case basis after considering, presumably, administrative needs, availability, urgency and the expertise required and relevant to each particular case. The members are chosen from a list of members appointed by the Governor-in-Council under s63(2) of the Act. In this case the medical panel which made the decision which is the subject of this proceeding was made up of five members including an occupational physician, an orthopaedic surgeon, a rheumatologist, a psychiatrist and a gastroenterologist. The earlier panel was composed of three different members being an occupational physician, an orthopaedic surgeon and a gastroenterologist. It is the Convenor who has the statutory power to convene a panel, but he was not a party to this proceeding and neither set of counsel before me were able to inform me about the number of people on the lists, the category of people on the lists, or the administrative or practical consequences of an order which might exclude the panel members who had sat on this medical panel from reconsidering the opinion remitted back to the convenor. This case was not brought on the basis of actual or apprehended bias nor was there any suggestion that the panel members, if required to give reasons, would do anything other than act in accordance with the law in reaching the correct decision and expressing their reasons accurately when doing so. [10] (footnotes omitted)

The reasons which led me to the conclusions in *Davidson v Fish* in relation to a statutory office holder are, in my view, stronger in relation to a judicial officer and to courts. The present case is one in which the application to refer the matter to a differently constituted Magistrates' Court is made by a law enforcement officer in relation to a judicial officer. Such applications against judicial officers charged to uphold and apply the law should, in my view, not be made lightly by those charged with the task of bringing cases for judicial determination and such applications, if made, ought not to be accepted lightly. In this case the views expressed by the learned Magistrate were the legal characterisation about the legal arguments put to her and the language used by her Honour was in conformity with, and addressed, the submissions put by the parties. The matters relied upon by the DPP in the submission in this case does not justify a specific order that the

learned Magistrate not hear the matter if the ordinary business and management of that Court would have the matter go back to her Honour.

D. Orders

22. Accordingly I propose to allow the appeal and remit the matter to the Magistrates' Court and will otherwise hear the parties on costs.

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[1] [2009] VSC 26 (Unreported, Kaye J, 10 February 2009).
[2] Ibid [12]-[13].
[3] [1936] HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202.
[4] Ibid 504-5 (Dixon, Evatt and McTiernan JJ).
[5] *McColl v Lehmann* [1987] VicRp 46; [1987] VR 503; (1986) 24 A Crim R 234; *R v Alexandroaia* (1995) 81 A Crim R 286, 289-290 (Hunt CJ at CL, Grove and Dunford JJ); *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390, 403; (1981) 37 ALR 55; (1981) 55 ALJR 701 (Brennan J).
[6] See, *Williams v R* [2000] FCA 1868; (2000) 119 A Crim R 490, 502 [46], [48] (Whitlam, Madgwick and Weinberg JJ).
[7] [2010] VSC 397 (Unreported, Beach J, 6 September 2010).
[8] Ibid [30].
[9] [2008] VSC 32; 28 VAR 179 (Pagone J, 18 February 2008).
[10] Ibid [14] – [18].

APPEARANCES: For the appellant/plaintiff DPP: Mr D Trapnell SC, counsel. Director of Public Prosecutions. For the respondent/first defendant Easwaralingam: Mr P Nash QC and Mr C Mandy, counsel. Access Law Lawyers.
