20/89

SUPREME COURT OF VICTORIA

BOGDANOVSKI v BUCKINGHAM

Ormiston J

9, 11, 14 November, 16 December 1988

[1989] VicRp 80; [1989] VR 897; 9 MVR 257

MOTOR TRAFFIC – DRINK/DRIVING – BREATHALYZER OPERATOR CALLED AS A WITNESS – CERTIFICATE OF BREATH TEST NOT TENDERED – NO AVERMENT AS TO OR DESCRIPTION OF BREATH ANALYSING INSTRUMENT – WHETHER ELEMENT OF CHARGE PROVED – PRE-CONDITION FOR USE OF AVERMENTS – EFFECT OF NON-COMPLIANCE WITH REGULATIONS – WHETHER COURT SHOULD ALLOW PROSECUTOR TO CALL FURTHER EVIDENCE: *ROAD SAFETY ACT* 1986 SS3(1), 49(1)(f), 55(4), 58(4), (5).

On the hearing of a charge under s49(1)(f) of the *Road Safety Act* 1986 ('Act'), the authorised breath analysing instrument operator was called as a witness and gave evidence generally about the nature and operation of the instrument ('Breathalyzer') and the manner in which he tested the defendant. No certificate under s55(4) of the Act was tendered to the Court nor did the operator state that the apparatus used by him was a breath analysing instrument within the meaning of Part 5 of the Act nor did he state that the apparatus used by him had the word 'Breathalyzer' and certain numerals inscribed on it. Expert evidence (Bloom) was given for the defence, and at the close of the defence case an application was made by the prosecutor (which was granted) to call further evidence to rebut aspects of the evidence given by Bloom. The Magistrate found the charge proved stating that notwithstanding that the Breathalyzer did not comply with the specifications in the US patent and that the operator complied with the Regulations relating to the operation of the Breathalyzer he was satisfied that the apparatus used was a breath analysing instrument within the meaning of Part 5 of the Act. Upon order nisi to review—

HELD: Order nisi absolute. Conviction quashed absolutely.
As the operator failed to use the language contained in the averment provisions of s58(4) or (5) of the Act and failed to describe the apparatus used by him whereby the court could ascertain whether the apparatus complied with the definition of "breath analysing instrument" in s3(1) of the Act, it was not open to the Magistrate to be satisfied that the apparatus was a breath analysing instrument within the meaning of Part 5 of the Act.

Obiter:
(1) Where the prosecution seeks to rely on the averment provisions of s58(4) of the Act, the witness must use language substantially corresponding with the language of the relevant paragraph.

(2) The Regulations lay down requirements for the operation of the Breathalyzer which should be satisfied. Non-compliance with the Regulations does not automatically establish that a Breathalyzer was not in proper working order but depending on the nature and significance of the non-compliance, a defence may be made out under s49(4) of the Act.

(3) The rules concerning the discretion to allow the prosecution to call further evidence after evidence has been given for the defence apply to Magistrates' Courts. As a matter of fairness, but without deciding, in the present case the prosecution should have called all of its evidence before closing its case.

ORMISTON J: *[After setting out the grounds of the order nisi, the nature of the charge, an outline of the evidence given at the hearing and some of the relevant statutory provisions, His Honour continued]* … **[12]** These supposedly "simple" provisions have created enough difficulty of interpretation, but it is also necessary to look to other provisions which are alleged to provide an "effective means of establishing" the elements of the relevant offence. Section 58 of the Act contains a number of evidentiary provisions directed to that end, two of which have been directly relied upon in the present case. The first is contained in sub-s(4) paragraph (a) and reads as follows:-

> "Evidence by a person authorised to operate a breath analysing instrument under section 55—
> (a) that an apparatus used by him or her on any occasion under that section was a breath analysing

> instrument within the meaning of this Part...
> is, in the absence of evidence to the contrary, proof of those facts."

No dispute exists in the present case as to the authority of Constable Cornwell to operate the instrument. The second relevant provision is contained in sub-s(5) and reads:-

> "The statement in any certificate given in accordance with section 55(4) of a person authorised to operate a breath analysing **[13]** instrument under section 55 or, if he or she is called as a witness, his or her statement on oath that any apparatus used by him or her on any occasion under section 55 had written, inscribed or impressed on some portion of it or on a plate attached to it the expression 'Breathalyzer' and the numerals 2824789 in that sequence, whether with or without other expressions or abbreviations of expressions, commas, full stops, or other punctuation marks is, in the absence of evidence to the contrary, proof that the apparatus is a breath analysing instrument within the meaning of this Part."

I have referred to the latter sub-section, not because the informant relied upon proof under that sub-section, but because the applicant referred to it as a means of proof which was not adopted in the present case. As I have said, no certificate given in accordance with s55(4) was tendered in evidence. For certain purposes referred to in sub-s(1) of s58 such a certificate would have been conclusive proof of all facts and matters contained in it unless a notice was given requiring the operator to be called as a witness, which occurred in the present case. Although I doubt whether sub-ss(1) and (2) apply to a prosecution under s49(1)(f), since such a prosecution would not, within the meaning of sub-s(1), raise any "question as to the presence or the concentration of alcohol in the blood of any person", nevertheless under subs(5) the certificate might have been used for the limited purpose of proving that the apparatus was a breath analysing instrument for the purpose of any prosecution under Part 5. However, not only was the certificate not tendered, but, when Constable Cornwell was called in evidence, he did not state that the apparatus had the word "Breathalyzer" and the numerals 2824789 written, inscribed or impressed on it.

[14] It also appears that no *prima facie* evidence was given pursuant to sub-s(4)(a) of s58 in that Constable Cornwell did not give evidence in terms that the apparatus used by him was a "breath analysing instrument within the meaning of this Part". Certainly he did not give evidence to the effect that "the apparatus used by me on this occasion under s55 of the *Road Safety Act* was a breath analysing instrument within the meaning of Part 5 of the Act". It was argued, however, that Constable Cornwell did describe the apparatus as a breathalyzer and on two occasions described it as an "approved instrument". Such a description might be apposite to para (b) of the definition, although in no way did it identify which such apparatus was referred to, nor were any notices published in the *Government Gazette* tendered. It may be that the witness was referring generally to an apparatus of the kind which came within the definition, whether directly defined by paragraph (a) or approved for the purposes of paragraph (b). If so, nobody said so in the court below. It is also possible that, but for the fact that in cross-examination it appeared that Constable Cornwell had only recently been trained to use a breathalyzer, he may have been referring to the definition formerly contained in sub-s(14) of s80F of the *Motor Car Act* 1958, as introduced in 1971, but which was amended from 6th July 1982. In its unamended form the former definition defined "breath analysing instrument" as meaning "apparatus of a type approved for the purposes of this section, etc.".

Counsel for the respondent suggested that it was unnecessary to consider whether the instrument was a breathalyzer within the meaning of paragraph (a) **[15]** because, by this method of proof, it was established that it was an approved instrument and there was no evidence to controvert the fact that it was an apparatus of a defined kind. The matter is further confused by the fact that the only other gazetted instruments referred to in argument were each breathalyzers, albeit they were defined by reference to the fact that each of them bore the word "Breathalyzer" and the U.S. patent number upon the instrument. None of the gazettes were tendered in the Court below nor properly proved before me on this hearing. However it appears that on each occasion Constable Cornwell referred to this particular apparatus he described it as a "breathalyzer". He may have been referring to the same kind of instrument, whether one looks to paragraph (a) or paragraph (b), notwithstanding that "breathalyzer" is referred to in slightly different language for the purposes of each paragraph, assuming that the gazetted instruments took the form referred to in argument.

In my opinion in order for the prosecution to rely on a provision such as sub-s(4)(a) of s58 the witness must use language substantially corresponding with the language of the relevant paragraph. Sections of this kind, bearing as they do on the onus of proof in a criminal prosecution, should be construed with some strictness. However, a witness would have to adapt the words of the paragraph at least to some extent such as by substituting "Part 5 of the *Road Safety Act*" for "this Part". Moreover I have no doubt some other minor variation would not prevent reliance on the paragraph: cf. *Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596 esp at pp601-602. Nevertheless what was **[16]** said by Constable Cornwell in his affidavit, which one must assume correctly reflects his evidence, in no way suggested that the provision contained in this paragraph was thereby relied upon. It is sufficient to say that the evidence departed so much from the language of the paragraph that it cannot be treated as satisfying its requirements.

As a result the prosecution case must depend upon direct evidence that the instrument used satisfied the definition of a breath analyzing instrument. There would appear to be some difficulty about this as the informant's two original witnesses described it as a "breathalyzer" but chose not to say anything directly as to whether it corresponded with the U.S. patent specification. The case thereafter seems to have been conducted upon the basis that it was assumed that there was some evidence that it was an apparatus known as a breathalyzer but that there was an issue whether it corresponded in all details with the specification. At the end of the day I would infer that the two expert witnesses called agreed that but for the three items in issue the instrument called the "breathalyzer" complied with paragraph (a) of the definition. Certainly that was one way in which the matter was argued before the Magistrate. Unfortunately neither of the expert witnesses saw the particular instrument used, and it is by no means certain that either understood the nature of a patent specification or, if they did, that they sufficiently distinguished between the various elements of that specification.

It is necessary, therefore, to turn to that specification numbered 2824789 for the invention patented **[17]** in the United States on 25th February 1958. In this country the resulting patent operated as one arising from what is called a Convention application and the certificate tendered shows that it became open to public inspection in Canberra on 17th June 1958. For rather obvious reasons its form is not substantially different from that of a specification required under s40 of the *Patents Act* 1952 of this country. It was of course a specification which had in the first place to comply with the relevant U.S. law and in particular the relevant provisions of the United States Code (35 USC paras.111-114) and of the Code of Federal Regulations. *[His Honour then dealt with the description and specification of the invention, referred to certain variations between the original invention and the Breathalyzer used on the relevant occasion and continued]*...

[36] It follows that any apparatus which satisfies the two criteria, (1) that it is known as a "Breathalyzer" and (2) that it answers the description of the apparatus contained in the claim in specification for U.S. Patent number 2824789, will come within paragraph (a) of the definition of "breath analysing instrument". It likewise follows that, because none of the matters referred to in evidence as showing changes from the instrument described in the preferred embodiment were matters considered to be essential integers or features of the claim and thus formed no part of it, those changes cannot take the instrument in question outside the definition. Looking therefore at ground (1) as formulated on this order to review, I would have held that the Magistrate had not misdirected himself on this issue, if he had reached the conclusion that, but for these inessential variations, the instrument used on the night in question satisfied paragraph (a) of the definition in the Act. Unfortunately that is not the way in which the learned Magistrate approached the question. In so saying I have made due allowance for the difficulties which face Magistrates in determining matters of this complexity and for the fact that, as no transcript is kept, the version in **[37]** this Court of the Magistrate's reasons is frequently defective. For present purposes I must be satisfied that there was a vitiating error of law, but unfortunately there is no answering version as to any presently relevant matter, nor any affidavit from the Magistrate to correct that which is put forward on behalf of the applicant.

The learned Magistrate's reasoning proceeded in this way. He first concluded, as I would infer, that evidence had been given which would satisfy sub-s(5) of s58 of the Act, in that the operator stated that the instrument was an approved instrument and that it was not necessary for the operator to state the patent number. To that aspect of his finding I shall return in a moment. He then stated that: "The changes to the patent do not affect the operation or accuracy

of the breathalyzer. The evidence of Mr Zwolak was accepted. Although technically it does not comply with the specifications described in the patent, the instrument still operates as if it is in its original state". I should add that, before dealing with other matters, he then spent some time in discussing the conflicting evidence of Professor Bloom and Mr Zwolak, although not in a way which appears to bear on this present issue.

Thus it is apparent that the Magistrate found as a fact that the instrument did not comply with the "specifications" but that it operated as if it were the instrument originally described, although it is not clear whether he was referring to the preferred embodiment or to the apparatus described in the claim. If he were holding only that the alterations to the breathalyzer did not take **[38]** it out of the definition in paragraph (a), then I would have held him to have been correct. Unfortunately he does not appear to have addressed his mind directly to the question whether the particular instrument used to test the breath of the applicant was a breach analysing instrument of the defined kind. It is therefore necessary to turn to the second ground, as the first does not really correspond with any finding made by the Magistrate.

The second of the grounds relating to the definition of the breathalyzer asserted that the Magistrate was wrong in finding on the evidence and the weight of the evidence that he was satisfied beyond reasonable doubt that the apparatus complied with the definition. It was objected on behalf of the respondent that this merely raised a question of fact. As formulated during the hearing the ground is unsatisfactory and, if I were satisfied that all other grounds relating to proof that the instrument was a "breath analysing instrument" within the meaning of the Act had been abandoned, then I would not allow the finding to be challenged in this way.

However, the original grounds and the later course of argument indicated clearly enough that the applicant was contending, as set out in ground (a) of the order to review, "that the prosecution had failed to prove the instrument used on the occasion in question complied with paragraph (a) of sub-s(1) of s3 of the *Road Safety Act* 1986". Moreover he also asserted in the original grounds, especially grounds (b) and (c), that the prosecution had failed to prove compliance with the special averment provisions in sub-s(4)(a) and subs(5) of s58 **[39]** of the Act, and in ground (i) that it was not an "approved instrument".

The principal difficulty with the Magistrate's reasoning is that he held that, because there was evidence that it was "an approved instrument", thereby the prosecution had established that a breath analysing instrument had been used for the purposes of s49(1)(f) of the Act. It is clear from a passage towards the end of his reasoning that the Magistrate found "that the instrument was an approved one", whatever that might mean. This conclusion appears to have been supported by reasoning which appeared earlier:-

> "It was not necessary for the operator to state the patent number. (*Altman v Foley*, unreported decision 3.2.75 Victorian Supreme Court). In that case the defendant was charged with exceeding .05%. In cross-examination the operator was unable to recall the markings on the machine but stated it was an approved instrument. In that case it was held there was sufficient evidence for the Magistrate to find it was an approved instrument. In the present case as the operator said he had complied with all regulations relating to the operation of breathalyzers it follows that it must be an approved instrument."

There is some confusion here. The reference to the failure to state the patent number might appear to have been reference to the provision in sub-s(5) of s58 which enabled an operator to be called to state that the expressions "Breathalyzer" and "2824789" were written inscribed or impressed on the apparatus used by him. As I have already said, there was no evidence given to that effect and in particular there was no evidence that the machine had the expression "Breathalyzer" stamped on it, let alone the patent number. The reference to *Altman v Foley*, however, shows that the Magistrate may well have **[40]** been referring to the method of proof authorised pursuant to sub-s(4)(a) of s58. That earlier unreported decision of the Chief Justice given on 3rd February 1975 dealt with sub-s(5) of s80F of the former *Motor Car Act* which enabled *prima facie* evidence to be given that "an apparatus used by him (the operator) on any occasion pursuant to this section was a breath analysing instrument within the meaning of this section". At that time sub-s(14) of the same section defined "breath analysing instrument" in terms of an "apparatus of a type approved for the purposes of this section ...". The policeman had stated simply that the breathalyzer used by him was "an approved instrument within the meaning of s80F of the *Motor Car Act*", but did

not state the patent number which was referred to in the *Government Gazette* number 66 of 20th July 1972, whereby approval had been given to two forms of instrument one having the patent number stamped upon it. In cross-examination the policeman forgot the number and what was stamped on the particular machine but the Chief Justice held that in terms of that section the policeman had given sufficient evidence upon which the Magistrate could find that it was a breath analysing instrument.

That decision could not have assisted the prosecution in this case and, for reasons already explained, could not have converted what was an insufficient averment by the operator into that which was sufficient. I have already held that s58(4)(a) can only be invoked if language substantially identical with that appearing in the paragraph is used in evidence by the operator and it is not sufficient for the operator to **[41]** assert that the instrument was "an approved instrument". The Magistrate was thus clearly wrong in holding that there was sufficient evidence to establish that it was a breath analysing instrument, although, of course, the most that he directly stated was that it was "an approved instrument". Whether or not the operator stated the patent number was irrelevant to the present case, for there was no *prima facie* evidence that it was a breath analysing instrument within the meaning of Part 5.

Likewise I cannot accept that, because the operator said he had complied with all regulations relating to the operation of breathalyzers, it followed that it was "an approved instrument" even if that be a relevant assertion. Undoubtedly the regulations 302-304 of the *Road Safety (Procedures) Regulations* 1987 are directed to the operation of breathalyzers as defined in the Act, but it does not follow that, because a witness asserts that he properly operated a breathalyzer, at the same time he is giving evidence that it was a breath analysing instrument as defined in s3(1). Because he failed to use the language of sub-s(4) or (5) of s58 and because he failed to describe the instrument in any way which would enable the Court to ascertain whether that instrument complied with either paragraph of the definition, there was no evidence as to that critical fact. On this aspect of the case, therefore the Magistrate was wrong, whether or not he drew an inference that the instrument was an approved instrument, or whether he had gone further, as he did not, in inferring that it was a "breath analysing instrument" as defined.

[42] The Magistrate reached his erroneous conclusion on this issue on the basis I have just discussed, and it would only be if there were other evidence to support the conviction, to the effect that the instrument was a breath analysing instrument, that the conviction could otherwise be upheld on this issue. The general conclusions expressed in evidence as to the operation and accuracy of the breathalyzer although the Magistrate found it did not technically comply with the "specifications", cannot lead to the conclusion that there was sufficient evidence upon which the Magistrate could have found that it was a breath analysing instrument within the meaning of the Part. Nor, as I have pointed out, was there any other direct evidence to that effect.

I have thought carefully as to whether the argument between the two expert witnesses meant that each side was accepting that the instrument was a "breath analysing instrument" within the meaning of part (a) of the definition, but for the non-complying items. I regret to say that I do not think that is a fair conclusion, especially as it seems that neither of the two experts inspected the instrument used for the purpose of testing the applicant's breath.

Moreover I do not think that Constable Cornwell's evidence, or for that matter Senior Constable Buckingham's evidence, contained any material which would enable the Court to reach a conclusion as to the constituent elements contained in either definition. Making due allowances for the deficiencies in the material available to this Court on an order to review, no evidence appeared in the affidavits **[43]** before me upon which the Magistrate could have found that the instrument used to test the applicant's breath was a breath analysing instrument within the meaning of Part 5 of the Act. In substance therefore I would uphold grounds (a) and (i) of the order to review, which alleged that the prosecution had failed to prove that the instrument used complied with either paragraph (a) or, by implication, paragraph (b) of the definition in s3(1) of the Act.

If this were a case in which there was arguably some evidence to support a conviction, I would have made the order nisi absolute on these grounds, quashed the conviction, but remitted it for rehearing. However, because of the absence of any evidence that the instrument used to

test the applicant's breath constituted a "breath analysing instrument" within the meaning of the definition, I consider it is appropriate in this case, on these grounds, to quash the conviction absolutely.

Although this conclusion resolves the issue whether the conviction should be set aside, it is desirable to discuss at least some of the other grounds argued, since considerable time was spent on them in argument and the parties, or at least their legal advisors, saw this case as a test case for the other two orders to review which have been adjourned. *[His Honour dealt with the evidence concerning the operator's use of the standard alcohol solution and held that it was open to the Magistrate to find that the solution conformed to the definition and that the instrument used was in proper working order or properly operated. His Honour continued]* ... **[50]** The language of s95(1) relating to the regulation-making power is very broadly expressed so as to enable regulations to be made for anything required or necessary to be prescribed to give effect to the Act. Likewise Item 51 in Schedule 2 covers a wide range of matters relating to the proper maintenance and operation of breath analyzing instruments, including the "use and maintenance" of these instruments for the purposes of s55", under which the applicant's test was performed, together with "the procedures and methods to be **[51]** employed in the use" of those instruments for the purpose of "ensuring that they give accurate and reliable results".

No doubt the expression "It is a requirement for..." employs somewhat unusual language to prescribe what must be done to keep breathalyzers in proper working order and to ensure that they are operated properly. I would agree that merely because this language is used, it does not follow that non-compliance with the regulations will automatically establish that a breathalyzer is not in proper working order. That may depend on the nature and significance of the non-compliance. On the other hand, so far as the proper operation of the breathalyzers are concerned, it seems to me perfectly appropriate that the regulations should lay down what must be done by those who operate them, so that if those regulations are not complied with there will on the face of it be a failure to operate the breathalyzer properly. The word "properly" connotes that the instrument has, at the least, been lawfully operated in accordance with the regulations, although it may in addition refer to some failure to use the mechanical contrivance in an appropriate way. Certainly if the regulations lay down requirements for the operation of breathalyzers, then they should be satisfied, and if non-compliance is proved then I would consider that a defence had been made out under s49(4).

Nor am I impressed by the argument that the regulations relate only to proper operation and not to ensuring that the instruments are in "proper working order". Regulation 302(3)(a) specifically requires the operator to ascertain that the breathalyzer is in "proper **[52]** working order" by testing it with the standard alcohol solution. Notwithstanding the earlier use of the words "proper operation" it is perfectly apparent that the regulation is directing the operator to the task of ensuring that the breathalyzer is in proper order. Of course, merely because the instrument has not been tested with the standard alcohol solution does not establish that the breathalyzer was not in proper working order nor would it do so if the wrong solution had been used. Something more in each case would have to be shown to make out the defence. On the other hand, it seems clearly to be within the regulation making power to require operators to make tests both before and after the particular breath analysis relied upon. The purpose may be to ascertain whether it is in proper working order, but the operator is required by regulation to take these steps and, if he fails to do so, there would be a failure to operate the machine properly within the meaning of sub-s(4). I can see no inconsistency between the two requirements of the sub-section nor that certain steps may not lawfully be required by regulation to be carried out to achieve both purposes. Failure to comply with sub-regulation (3)(a) therefore would establish that the instrument was not properly operated on the relevant occasion.

[His Honour next dealt with a ground of the order nisi concerning the question whether the certificate had been signed by the operator and delivered to the defendant as soon as practicable and continued] ... **[54]** Before me no argument was advanced that the certificate was not delivered as soon as practicable, assuming that it contained the operator's signature. The Magistrate found that as a fact and there is no reason to doubt his decision.

[55] Moreover ground (n) in no way asserted that the certificate was deficient in the matter relied on in argument before this Court. It is apparent that this question was never raised in the Court below and if it had been, steps might have been taken to ensure that appropriate evidence

was given, if that existed. There is simply no evidence upon which to reach the conclusion that the certificate was not signed and, as it was not raised in the Court below, nor made a subject of any ground of the order nisi to review, I would refuse to allow the grounds to be amended to raise this new issue. It follows that the grounds originally relied upon (n) and (o) have not been made out.

I add only that a failure to deliver the certificate may have little bearing in a case of this kind. Section 58(1) requires compliance with s55(4) where evidence is sought to be given of the concentration of alcohol present in the blood of a person at the time that his or her breath is analyzed by a breath analysing instrument. That is not a relevant issue in a charge under s49(1)(f) for, as noted earlier, the offence is established by producing a result of an analysis as recorded or shown on the instrument, not proof that more than a prescribed concentration of alcohol is present in the accused's blood.

The fifth and final reformulated ground relied upon by the applicant reads:-

> "5. That the Magistrate was wrong in law in allowing the informant to call a new witness after the defendant had closed his case when no very special or exceptional circumstances were present and the evidence adduced by such witness was relevant to prove the **[56]** prosecution case and the need to give it should have been foreseen following cross-examination of a principal witness called by the informant during the presentation of his case."

This ground must depend in large measure on the course which the proceeding took in the Magistrates' Court. Whatever view I should properly have formed as to the power of the Magistrate to allow the prosecution to re-open its case to call Mr Zwolak or as to manner of the exercise of his discretion, I have already held that a principal ground of this order to review has been made out and that the conviction should be quashed. The significance of Mr Zwolak's evidence in the present case depends largely on the significance of the matters raised in the other grounds of this order to review, including those first grounds. In some minor respects Mr Zwolak's evidence was the only material upon which the applicant could rely for at least one of those grounds and, as to the variations from the description contained in the preferred embodiment in the patent specification, there was more than sufficient evidence of these matters in the evidence of Constable Cornwell and Professor Bloom. The materiality of those variations has turned out to be of no significance and so the Magistrate's conclusion that he preferred Mr Zwolak's evidence ultimately has no hearing on the outcome of this order to review. It therefore seems pointless to pursue the matter for, assuming that I was to reach a conclusion that the Magistrate erred in law in permitting Mr Zwolak to be called and the prosecution case to be re-opened, I would still have to determine whether those steps justified a **[57]** conclusion that the conviction should be set aside, which might very well depend upon the significance of the evidence given by the person so called.

In the end a large number of authorities were cited to me on this issue in addition to what counsel described as the leading authorities on the question, namely *Shaw v R* [1952] HCA 18; (1952) 85 CLR 365 and *R v Chin* [1985] HCA 35; (1985) 157 CLR 671; 59 ALR 1; 16 A Crim R 147; 59 ALJR 495. In the present case the learned Magistrate allowed the prosecution to re-open its case, after rejecting a submission that the various attacks made on the reliability and nature of the breath analysing instrument ought to have been reasonably foreseen by the prosecution and by finding that the prosecution had been taken by surprise. Under those circumstances it would be difficult to show that the discretion conferred on a Magistrate had miscarried, especially in the light of the specific provisions of s78(1)(d) of the *Magistrates (Summary Proceedings) Act* 1975. During the course of argument it was submitted that the statement of principle expressed by Gibbs CJ and Wilson J in *Chin's Case* at p676 was applicable to summary proceedings before Magistrates. It was there said:-

> "Although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen."

A similar principle, using the expression "exceptional circumstances" is expressed by Dawson J in **[58]** whose judgment Mason J concurred, at pp684-686. During argument I enquired

whether the principles which were there stated to be relevant to a trial before a jury were also relevant to a summary hearing before a Magistrate or Justices. At the time remarkably little authority was found but later I was supplied with a memorandum referring to a large number of appeals from courts of summary jurisdiction in which not dissimilar statements had been made.

As it is not in the end necessary to decide this question and its application to the present case, I should say only this. It would appear from my reading of those authorities that similar principles should apply in Magistrates' Courts in this State. The operation of the principle will however be affected by the fact that there is no jury and the significance of being able to call effectively the last witness may have less importance where the tribunal consists of a trained lawyer and not twelve laymen. That said, the principle is clearly founded on fairness and as Dawson J said at pp685-686, the accused is entitled to know the case which he has to meet so that he may have an adequate opportunity to determine what course he will take, whether by cross-examination of the other prosecution witnesses or by way of calling evidence on his own behalf. That principle seems equally applicable to proceedings before a Magistrate. It should be added that it is clear from both the principal judgments in *Chin's Case* that evidence may be given in reply to prove formal matters which have been overlooked in evidence in chief. Likewise it must be remembered that in proceedings **[59]** for many summary offences the onus is cast on the defendant to prove specific defences and this may for practical reasons give greater scope to Magistrates to allow the re-opening of the prosecution case to answer such material.

Making due allowance for these matters, the course which the defendant took in the present case would not appear to have produced exceptional circumstances within the meaning of the rule, but I would not like to express a final opinion on this matter. If the prosecution had made out a *prima facie* case by relying on the averment provisions in sub-ss(4) and (5) of s58 of the Act, that would have required evidence to the contrary in order to deny the *prima facie* operation of evidence to the effect that the breath analysing instrument came within the definition in the Act. However no such material was relied on by the informant and he had received a notice pursuant to sub-s(2) of s58 requiring the person to be called as a witness. In ordinary circumstances that ought sufficiently to have put the prosecution on warning that an attack was being made on the technical matters which indeed were the subject of the evidence of Professor Bloom and thereafter Mr Zwolak. As a matter of fairness, therefore in relation to the first issue, namely whether or not the prosecution had established that the instrument in question was a breath analysing instrument, the prosecution ought to have called all its evidence before the accused was called upon to put its defence. It is difficult sometimes to gauge appropriately the atmosphere of a proceeding from materials upon affidavit and it is fortunately not necessary for me to reach any final conclusion as to **[60]** whether the Magistrate's discretion miscarried in this particular case.

SUMMARY

In summary therefore only the second reformulated ground of review relied upon by the applicant is upheld:

(1) The first reformulated ground is rejected, for I have concluded that changes to the breathalyzer instrument in the form described in one part of U.S. patent specification 2824789 called the "preferred embodiment" of the invention and which contained what the inventor, Mr Borkenstein, thought in 1954 was the best method of carrying out his invention, would not take a breathalyzer outside paragraph (1) of the definition of "breath analysing instrument" in s3(1) of the Act. To satisfy that definition one must prove only (1) that the instrument is known as a breathalyzer and (2) that it answers the description of the apparatus contained in the claim in that patent specification.

(2) However, the applicant has succeeded on ground number two (in substance) because the prosecution failed to establish that the instrument used to test his breath on the night in question came within the definition, in the absence of any *prima facie* proof of that fact pursuant to sub-ss(4)(a) and (5) of s58 of the Act and of any direct proof that it satisfied the definition. On this ground only will the conviction be quashed.

(3) The third ground is also rejected because I have concluded that the fact that the prescribed standard alcohol solution has been used once and a minute change of significantly less than .002% might thereby have been **[61]** caused to the sample does not establish either that the breathalyzer was not in proper working order or that the operator failed to operate it properly. Thus

the applicant has not established a defence to the charge pursuant to sub-s(4) of s49 of the Act.

(4) The fourth reformulated ground is also rejected, as it sought to amend two grounds of the order nisi in an impermissible way, for the facts relied on relating to signature of the s55(4) certificate were not sufficiently raised in the Magistrates' Court.

(5) In the circumstances it was not appropriate to deal with the fifth ground which challenged the Magistrate's discretion to allow the prosecution case to be re-opened for the calling of an expert witness.

For the reasons I have expressed the order nisi granted by Master Barker on 23rd September 1987 should be made absolute, the conviction by the Magistrates' Court at Williamstown on 28th August 1987 should be quashed and the other orders should be set aside. Because a great deal of time was spent on irrelevant issues in respect of which I would have found for the respondent, I propose to order that the respondent pay only three quarters of the applicant's costs of and incidental to the application including any reserved costs.

Solicitor for the applicant: RC Sheen. Solicitor for the respondent: Victorian Government Solicitor.
