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|  | **CASE SUMMARIES 2013** |
| **1** | **Use of unregistered vehicle – Proof by Certificate – Absolute liability offence**  In *Tsolacis v McKinnon* MC 01/13, Cavanough J determined an appeal against a magistrate’s finding a charge of driving an unregistered vehicle proved. The alleged offence was proved by production of a Certificate from Vic Roads which did not fully comply with the provisions of the *Road Safety Act* 1986 and the *Regulations* made thereunder. Also, the question of whether the offence was one of absolute liability and whether the defence of honest and reasonable mistake of fact applied was considered by His Honour. Upon appeal—  HELD: Appeal allowed. Magistrate's order quashed and the charge dismissed.  1. As the language of s84(1) of the Act showed, the certificate in question could only have been properly issued under that subsection if, among other things, the matter certified “appear[ed] in or [could] be calculated from the records kept by the [Roads] Corporation or the Department of Transport or a delegate of the Corporation or the Department of Transport”.  2. The certificate itself did not expressly assert that the alleged unregistered status of the vehicle on 22 July 2009 was a matter that appeared in or could have been calculated from any of the specified records. Nor, for that matter, was the author of the certificate an officer of the Roads Corporation or of the Department of Transport, although it was true that as Assistant Director of the Records Services Division of the Victoria Police the author was apparently not incapable of being authorised by the Roads Corporation for the purposes of s84.  3. The defect was not a mere failure to comply with obligations imposed only by subordinate legislation. Rather, the defect was a failure to comply with s84 of the Act itself. Each of subsections (1), (3) and (4A) of s84 referred to a certificate “containing the prescribed particulars”. Where particulars had been prescribed, a certificate which could only be issued under subsection (1), (3) or (4A) that did not contain all of the prescribed particulars failed to comply with the Act itself.  4. So far as relevant, reg 6(1) of the *Road Safety (General) Regulations* 2009 provided that a certificate under s84(1), (3) or (4A) of the Act must, in addition to the matters referred to in s84(1), (3) or (4A), contain the expression “Certificate under section 84(1)”, “Certificate under section 84(3)” or “Certificate under section 84(4A)”, as the case may be. The very point of this requirement was to ensure that, where a certificate was to be issued under subsection (1), (3) or (4A) of s84, it expressly identified on its face which of those three subsections was claimed to be the source of the power to issue it. The present certificate did not do that. Nor did it do anything similar, or anything “to the like effect”. It could not be safely assumed that the certificate was intended to be issued under s84(1), much less that it was proper to issue it under s84(1). The legislative command was that the necessary information be spelt out on the face of the document, and, in this case, that was not done. It mattered not that all the other requirements for an effective certificate may have been satisfied. The relevant requirement was additional and separate, and was not complied with at all.  5. Accordingly, the prosecutor’s certificate was not “sufficient in law”. It was not “in or to the like effect of the prescribed form”. The defect was not trifling or *de minimis*. Hence the certificate was inadmissible and the charge should have been dismissed outright.  6. *Obiter:* In relation to the criteria for determining whether the defence of honest and reasonable mistake of fact is available, the first criterion is consideration of the words of the statute creating the offence; the second criterion is consideration of the subject matter of the statute. The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute. The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability.  *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, applied.  7. In relation to the first criterion, the language of s7 of the Act as a whole strongly indicated that an offence against s7(1)(a) was one of absolute liability.  8. In relation to the second criterion, the Act was concerned with road use, registration of vehicles and trailers and licensing. Issues of public safety will often arise which indicated that the subject matter of the offence was a matter of social seriousness but did not involve grave moral fault and was not criminal in any real sense.  9. The third criterion was whether absolute liability would assist in the observance of the statute. The fact that the legislature had chosen to penalise drivers who may not have owned the vehicle they were driving indicated a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicated that the purpose of s7(1) of the Act as a whole was to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose was furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should have encouraged drivers who had doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of its registration. On the other hand, if the defence were available, the prosecution of the offence could have become very difficult.  10. In relation to the fourth criterion, there was no doubt that the object which the Act was designed to achieve was to secure the public welfare and to promote the safety of the public. The legislature must have been taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, was to give way to the public interest. If no current registration label was affixed, the prudent course was not to drive the vehicle. Further, the monetary penalty was a moderate one and no stigma attached to a conviction for this regulatory offence. Finally, no prison sentence was prescribed for the offence.    11. Having regard to these matters, an offence against s7(1)(a) of the Act was an offence of absolute liability for which the defence of honest and reasonable mistake was not available.  *Pilkington v Elliott* MC 20/97, followed. |
| **2** | **Speeding charge in a school zone ­– elements of the charge**  In *Foster v Harris* MC 02/13, a charge of speeding failed to specify the time when the speed zone applied to drivers or when the alleged offence occurred. The Magistrate found the charge proved. HELD: Appeal dismissed.  1. It had been established that the two essential ingredients of the charged offence to be included in the charge were the alleged facts that the vehicle was driven by F. and that she drove it over the speed-limit applicable to her on that particular section of the street. It was not necessary to include in the charge express reference to the factual basis on which the applicable speed-limit was to be determined, such as that she was driving on a declared school day or during the period referred to on the school zone sign. Such matters, and other relevant requirements of the *Road Safety Road Rules* might have been the subject of requests of particulars of the alleged applicability of the 40 km per hour speed-limit to F.  *Ciorra v Cole* [2004] VSC 416; (2004) 150 A Crim R 189; (2004) 42 MVR 547; and  *DPP v Kirtley* [2012] VSC 78, applied.  2. There was no uncertainty as to the offence charged nor was the offence created by r20 of the *Road Safety Road Rules* 2009 ambulatory in nature. Accordingly, the Magistrate was not in error in finding the charge proved.  3. The certificate tendered to the Court was in the prescribed form and was signed and there was no ambiguity in the reference to Regulation 5 in the context of the certificate replete with references to the Regulations.  4. In relation to the argument that the description of T.M. Mulcare as a testing officer was conclusory as it did not state the basis for that description and did not indicate which paragraph of the definition of ‘testing officer’ in reg 5 of the Regulations applied, the certificate was in the prescribed form and the prescribed form did not include a reference to the signatory’s qualification as a testing officer. Nevertheless, the description of T.M. Mulcare in the certificate established that (in the language of s83 of the Act) it was one ‘purporting to be signed by a person authorised to do so by the Regulations’, namely, a ‘testing officer’.  5. Accordingly, the Magistrate was correct to accept the certificate as valid and as constituting proof of the requisite testing and sealing of the speed detector, in the absence of evidence to the contrary, as s83 permitted her to do. |
| **3** | **Bail application – reverse onus – exceptional circumstances**  In *R v Ramazanoglu* MC 03/13 an accused charged with several serious offences applied to Coghlan J for bail.  HELD: Application for bail refused.  1. The real issue is this application was whether or not the accused was receiving appropriate treatment for his Post Traumatic Stress Disorder. Although it was accepted he did suffer from that disorder, there had been a partially differential diagnosis of Cluster B personality disorder with prominent medication seeking although the two conditions were not mutually exclusive. Prior to his incarceration, the accused appeared to have coped reasonably well in the community notwithstanding his diagnosis of Post Traumatic Stress Disorder including his involvement in the present offences. He at times availed himself of treatment and at other times disregarded it.  2. Having regard to all of the evidence including the medical evidence in relation to the accused, exceptional circumstances were not shown. Also, the risk of the accused failing to answer his bail was unacceptable.  3. It was recommended to Corrections Victoria that appropriate steps be taken to ensure that the accused’s post traumatic stress disorder was being appropriately addressed at the Metropolitan Remand Centre. |
| **4** | **Application for bail – reverse onus – exceptional circumstances**  In *R v Redenbach* MC 04/13, Coghlan J dealt with an application for bail in respect of charges allegedly committed whilst on bail and in relation to a commercial quantity of drugs.  HELD:Application for bail refused.  1. The question of delay in this case did not amount to exceptional circumstances. The circumstances of the applicant’s family were unfortunate but not of themselves or in connection with delay exceptional.  2. The accused was on a suspended sentence. He had breached one set of bail. The material found at his home included a false licence and a false handgun licence. There was material relating to a passport and a birth certificate although in the name of a female. One of the licences found had been stolen in December 2011 and could not possibly have had anything to do with the earlier offending.  3. The accused was an unacceptable risk of answering his bail even subject to the offering of a surety and/or re-offending. Accordingly, the application for bail was dismissed. |
| **5** | **Witness summonses issued to journalists – legitimate forensic purpose**  In *McKenzie & Anor v Magistrates’ Court of Victoria & Anor* MC 05/13, a Magistrate held that witness summonses requiring journalists to give evidence were valid. On appeal. HELD: Application for judicial review dismissed.  1. If the Magistrate approached the matter correctly and in accordance with established principles in relation to the decision-making process, the fact that the consequence may have required the Plaintiffs to reveal their sources was not to the point. This case was not about the protection of sources by journalists. It was assessment as to whether correct procedures were followed and the law was complied with and not the substantive correctness of the Ruling.  2. The Magistrate clearly approached the application on a broader basis than that submitted by the Plaintiffs. He did not regard the legitimate forensic purpose for which evidence was sought as being restricted to officers of the AFP. If this was the case it could be argued (and this was the foundation of the Plaintiffs’ case on this ground) that having identified this restricted legitimate forensic purpose his Honour ignored or did not properly or adequately deal with the conclusive and uncontradicted evidence of Peter Bartlett and in particular paragraph 5(d) of Bartlett’s affidavit.  3. The Magistrate's ruling did not give rise to an error of law because he did not confine the legitimate forensic purpose in a way that was inconsistent with the evidence. His Honour‘s approach was much broader and in fact consistent with the evidence given by Bartlett. Everyone agreed that the identification of this broader category of people may have been relevant to any submission concerning the interests of justice point.  4. As the relevant pages of the transcript made absolutely clear every effort was made by the Magistrate to inform the Plaintiffs’ Senior Counsel of the relevant issues and context. The Plaintiffs’ Senior Counsel had the transcript of 10 December 2012 in his brief and participated fully in the argument on 20 December 2012. No adjournment was sought and there was an adequate and sufficient understanding of the relevant issues and in particular the context in which the sources were relevant.  5. Having regard to the transcript of the day, it provided context to the reasons and the Ruling and in fact directly informed the Ruling. It was a continuous transcript and his Honour assumed that by delivering his Ruling with limited reasons immediately after argument it was not necessary to repeat or rehearse all of the arguments made earlier in the day, and which were familiar to all. With the transcript there was an adequate basis set out as to why the decision was reached. Although the Ruling was not sequential or compendious, given the nature of the application it was in the circumstances adequate.  6. The nature and subject matter of the Ruling was important. His Honour was not resolving issues of fact on the evidence but was called upon to make an assessment as to whether evidence could be relevant. The Article by the journalists and Bartlett’s affidavit provided a sufficient basis for such determination and this emerged from the reasons and the transcript. In the context of an interlocutory application involving a non-party in relation to a permissible evidence gathering exercise the reasons given in the transcript were adequate.  7. The submissions were not ‘mere speculation’ and as such an impermissible foundation (and hence irrelevant consideration) to assess whether there was a legitimate forensic purpose. The submissions were made and various matters were raised in relation to the interests of justice point. Having been identified, although not necessarily established, it was permissible to endeavour to gather any further evidence that may have been helpful or directed to the submissions. The sources of the Article may well have been helpful and in making such a determination his Honour did not take into account any irrelevant consideration.  8. Accordingly, there was no error made by the Magistrate on the face of the record. |
| **6** | **Civil proceeding – summary judgment granted**  In *Velissaris v The Magistrates’ Court of Victoria & Anor* MC 06/13, an Associate Justice granted an application for summary judgment in respect of a Magistrate’s decision. HELD: Appeal from the order of the Associate Justice dismissed.  1. In respect of the claim for cost of repairs, the Magistrate found the plaintiff’s evidence contained substantial contradictions and that those contradictions, together with her assessment of the plaintiff during the course of the hearing, gave rise to considerable reservations as to the reliability of his evidence. She found that the repairer ultimately conceded that he could not dispute that the work was done for $2,216.50. The magistrate was not satisfied that the evidence established that the cost of repairs exceeded that sum.  2. In relation to the cost of replacement car rental, the Magistrate found that the claim made by the plaintiff at the hearing for that cost was inconsistent with his prior claim as set out by MLC Lawyers on 16 September 2011. In the absence of any documentary evidence to support payment for car rental, and in the face of those inconsistencies and her assessment of Mr Velissaris’ reliability as a witness, she was not satisfied that the cost as claimed had been incurred.  3. On the question of the legal expenses paid to MLC Lawyers, she noted that Mr Velissaris himself said he had not paid the lawyers’ account. The account was not produced in evidence. Her Honour was not satisfied the cost had been incurred. Likewise, a claim by Mr Velissaris that he had paid a member of counsel the sum of $750 for advice was held not to be substantiated. In any event, the magistrate held that legal costs incurred prior to instructions to issue proceedings did not form part of compensable loss.  4. On the question of the claimed loss of earnings, although the magistrate noted that copies of letters purportedly confirming employment of Mr Velissaris were tendered without objection, she further noted that no other witness was called and no further documentation was produced on the subject. She observed that a loss of earnings was only compensable if it resulted directly from the plaintiff’s loss of use of his vehicle and concluded that the available evidence did not establish to the requisite standard that the plaintiff had suffered any loss of income as a result of the loss of use of his car.  5. Far from there being no evidence upon which the Magistrate could have made the findings that she did, there was an evidentiary basis for each of her findings. Given the requirements which Mr Velissaris had to satisfy in order to demonstrate jurisdictional error it was plain that his claims upon the ground of there being no evidentiary basis for the findings, or that the magistrate erred in law in making the findings she did, could properly be described as 'hopeless' or, at the very least, having no real prospect of success.  6. Accordingly, the associate judge was correct to summarily dismiss Mr Velissaris’ judicial review proceeding. |
| **7** | **Bail – risk of re-offending – bail granted with conditions**  In *Re Mitchell*, MC07/13, T Forrest J dealt with an application for bail where there was a risk of re-offending. HELD: Application for bail granted with conditions.  1. The legal principles to be applied in this application were clear enough. The question of whether the applicant was an unacceptable risk of re-offending was not a discrete question in an application, nor was it necessarily determinative. It had to be considered with all the other factors relevant to bail against the background that the applicant was *prima facie* entitled to bail.  2. Whilst there was a real prospect that the applicant would re-offend whatever conditions were imposed, it was unlikely that she would be sentenced to a longer term than the period served on remand. The applicant had stable accommodation available to her and she was expected to become a mother again in April 2013.  3. Taking into account the applicant's Aboriginality as required by s3A of the *Bail Act* 1977 and other relevant matters, bail was granted with conditions. |
| **8** | **Making a condition of a Bond that defendant pay an amount to a nominated charity**  In *Brittain v Mansour* MC08/13, a Magistrate released a defendant on a bond with a condition that he pay the sum of $2500 to the St Vincent de Paul organisation. On appeal - HELD: Appeal allowed. The Magistrate was not authorised to impose the condition of the undertaking that the defendant make a payment of $2500 to St Vincent de Paul.  1. Special conditions imposed in an undertaking on an offender being released under s75 of the *Sentencing Act* 1991 ('Act') must be consistent with the purposes of making an order under Part 3B Division 2. The condition that the offender pay $2,500 to St Vincent de Paul was not directed to achieving any of the five purposes that are set out in s70 of the Act. It was not contended that the payment required was nominal and it was a payment that appeared to be within the range that would be considered for a fine. The sentencing purposes dictated by s70 of the Act for adjournments as sentences would not ordinarily permit the imposition of a monetary payment as a special condition, because it was, in substance, the imposition of a fine, a punishment that was not nominal or a display of mercy. A purpose of the special condition was as a penalty or punishment. The limitations on the power to impose special conditions in undertakings are found in s70 of the Act and, in this instance, those limitations were exceeded.  2. Once the sentencing court determines that imposing some financial consequence is an appropriate purpose for the sentence, that purpose cannot be achieved by a dismissal, discharge, or adjournment. The requirement for a monetary payment as a special condition effectively imposes a fine or a form of monetary impost of a kind that the Act requires to be imposed as a fine. Applying s5(7) of the Act, the court must impose a fine in accordance with Part 3B Division 1 of the Act.  3. Accordingly, the magistrate erred when he required the defendant to make a payment to St Vincent de Paul as a condition of the undertaking because such a condition was beyond his powers and was not a sentence passed in accordance with Part 3BA Division 1 (Adjournment) or Part 3B (Fines) of the *Sentencing Act*. |
| **09** | **Whether person may appear in Court with a power of Attorney**  In *Waddington v Magistrates’ Court of Victoria and Kha* MC09/13, a Magistrate declined to allow a person with a power of Attorney to represent a defendant in Court. On appeal - HELD: Proceeding dismissed.  1. An Associate Judge has clear power to hear and determine a summary judgment application in respect of an application pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005. This jurisdiction is conferred by r77.01(2)(iiia) of the Rules which confers power on an Associate Judge to hear and determine any application under the *Civil Procedure Act* 2010.  2. The conferral of power by r77.01 is subject to the exceptions contained within r77.02, but the power to grant summary judgment is not within any such exception. In particular, such an order is an interlocutory order, not an order at trial, notwithstanding that it brings the proceeding to an end, and so does not fall within that exception to the powers of an Associate Judge.  3. The words “empowered by law” in s100(6)(b) of the *Magistrates’ Court Act* must be interpreted in the light of the usual power of a court to control its own proceedings. If they were to be read as contended for by W. (the plaintiff), a party in proceedings would be at liberty to appoint any person, whatever the skills, qualifications or abilities of that person, to represent that party. That is, how the party was to be represented would be entirely within the control of the party, not the court. This would be inconsistent with the necessary control over its own proceedings that any court must have. A solicitor or barrister admitted to practise is subject to the overriding control of the Supreme Court and the relevant licensing bodies and is required to have appropriate training and personal qualities so as to afford confidence in that person’s ability to appear in court. It is for this reason that, traditionally, courts hear only from parties themselves or legal representatives for a party.  4. The reference to “law” in the phrase in s100(6)(b) “empowered by law” must mean statute law or case law of general application, and accordingly “empowered by law” means empowered by such law of general application to represent a party, rather than by act of a particular party in accordance with law. Accordingly, there is no real issue to be tried as to whether a person appointed by a power of attorney, notwithstanding that the power of attorney is pursuant to the *Instruments Act*, falls within s100(6)(b).  5. Section 107 of the *Instruments Act* does not advance W.'s argument. It merely provides that the attorney has authority to do on behalf of the donor anything which the donor “lawfully” can do by an attorney. Thus, there is a degree of circularity in reliance on this definition. W. would first need to establish that he can lawfully be represented in court proceedings by an attorney, which would require some other specific provision for the attorney to be entitled to represent the plaintiff before the Magistrates’ Court. Section 107 refers to a body of other law as to what an attorney may do, without specifying those powers. An argument that s107 created the necessary empowerment for the purpose of s100(6)(b) had no real prospect of success.  6. In relation to the submission that the Magistrate displayed actual bias or a perception of bias, actual bias requires evidence of same. Perception of bias is not the subjective perception of the party, but must be established on the basis of what a reasonable person in that party’s position would perceive. On a reading of the whole of the transcript it showed at most that the magistrate was abrupt. But there was no real prospect of success in W.'s contention that the transcript showed either any actual bias or that objectively, that is to a reasonable person, the magistrate appeared biased against the plaintiff. On the contrary, the magistrate immediately permitted Mr McDonald to be a McKenzie friend for the plaintiff, on the plaintiff’s request, and also immediately moved on the plaintiff’s application for adjournment.  7. In relation the Magistrate's order for allowing costs for the whole day, the matter was listed before the Magistrate for hearing, which would ordinarily require the practitioner to have allocated the full day to the matter, even if in the event it did not take that long. Similarly, the award of costs on the adjournment, as opposed to reserving such costs or ordering that they be in the proceeding, would generally not amount to any error of principle. Indeed, adjournments are commonly granted only on the basis that the party seeking the adjournment pay the costs thrown away. The fact that the costs were ordered in a sum above scale, if that was the case, may in some circumstances suggest an error of principle, if the reason for doing so were not set out. W. did not set out the facts on the basis of which he asserted the costs were wholly solicitors’ costs and above scale. The solicitor for the second defendant said that the costs awarded included travel costs for the second defendant and so the amount may have been explicable on that basis.  8. W.'s claim had no real prospects of success within s63, and there was no reason pursuant to s64 by reason of which it should nevertheless have proceeded to trial. Accordingly, the proceeding was dismissed. |
| **10** | **Toll enforcement – Duties of Magistrates**  In *Victoria Police Toll Enforcement & Ors v Taha; State of Victoria v Brookes*, MC 10/13, the duties that Magistrates are required to carry out when an application is made in relation to outstanding fines was dealt with by the Court of Appeal. HELD: Appeal dismissed.  Nettle JA:  1. In the case of a s160 hearing, there is an obligation on a Magistrate to consider the application of ss160(2) and (3) of the Act regardless of whether the possibility of their application has been raised by the infringement offender.  2. The extent of inquiries which may need to be made in a given case is largely a matter for the Magistrate based on the facts and circumstances of the case. Because of the ‘unified nature’ of s160, a Magistrate must have regard to ss160(2) and (3) when exercising the discretion under s160(1); and so must at least make such inquiries as seem to the Magistrate to be reasonable in the circumstances of the case. Here, the Magistrate evidently failed to have any regard to ss160(2) and (3) and, as a result, apparently failed to consider whether any and if so what inquiries were required.  3. The jurisdiction of the Magistrate to make an imprisonment order was conditioned on consideration of the requirements of sub-ss160(2) and (3). Because of what Mr Houston told the Magistrate about the circumstances of Ms Brookes, there was sufficient before the Magistrate to raise the possible application of s160(2). In view of the obligations which would apply to an administrative decision maker in such circumstances, it was incumbent on the Magistrate to be satisfied that the exemption in s160(2) did not apply.  4. The obligation was upon the Magistrate to undertake his task, regardless of Ms Brookes’ submissions, and to that end to satisfy himself as best he was reasonably able that s160(2) did not apply. By ignoring the issue, the Magistrate made an error which went to the exercise of his jurisdiction.  Tate JA:  5. The interpretation adopted by the Magistrate of s160 of the Act was unfaithful to its intended meaning, as ascertained by ordinary principles of statutory interpretation and incompatible with the right to liberty, the right to a fair hearing and the right to equal protection of the law under the Charter.  6. There was nothing to suggest that in the case of Ms Brookes the Magistrate turned his mind to whether the requirements of sub-ss (2) or (3) were met. Nor was there anything to suggest that this was the case with respect to Mr Taha. Both Mr Taha and Ms Brookes were most likely to be eligible for orders made under sub-ss (2) or (3), alleviating the impact of their default in relation to the fines imposed upon them, yet the Magistrate did not make such orders but rather imposed on both the maximum period of imprisonment applicable. The judge’s inference that the Magistrate had not considered whether to exercise his powers under sub-ss (2) or (3) of s160 was clearly open.  7. The circumstances were aggravated by the failure of the Magistrate to adjourn the proceeding of his own motion. If he was to insist upon documentary proof, which Tate JA considered he was wrong to do, he exacerbated his error by failing to make an order adjourning the hearing of his own motion so that Ms Brookes, about whose mental illness he had already been told, could gather the materials he (wrongly) considered were necessary. Having been put on notice from the duty lawyer that Ms Brookes might well be mentally ill and thus satisfy the conditions for a discharge of her fine, in whole or in part, and be eligible for a reduction in the period of imprisonment she might have to serve, the Magistrate should have allowed Ms Brookes the opportunity to obtain the evidence he required. He was wrong not to do so. The fact that Ms Brookes did not seek an adjournment did not detract from the errors committed by the Magistrate in wrongly inserting into the Act a requirement that did not exist, and in failing to provide an opportunity to Ms Brookes to satisfy him in the form of proof upon which he had wrongly insisted.  8. Accepting that the Magistrate was under a direct obligation, by reason of s6(2)(b) to give effect to the right to a fair hearing under s24(1), he acted incompatibly with the Charter in failing to consider, before making an order for the imprisonment of Mr Taha and Ms Brookes, whether there were special or exceptional circumstances which would justify the making of orders of less severity. The direct nature of the obligation imposed by s6(2)(b) reinforced the conclusion that the obligation did not fall upon Mr Taha or Ms Brookes to raise their circumstances in court before the Magistrate had a duty to consider whether alternative orders could be made.  Osborn JA:  9. Section 160 of the Act should be read as a unified whole and that it should be understood as conferring a set of optional powers, each of which must be taken into account before any order is made. The Magistrates’ Court was obliged to inquire into the particular circumstances of Mr Taha and Ms Brookes to determine whether orders alternative to imprisonment should be made in their cases.  10. Once the issue of Ms Brookes’s mental health was squarely before the Magistrate, the Magistrate owed a duty to ensure that the implications of her mental fitness were fully resolved before him before making an order adverse to Ms Brookes. The Court could properly call for documentary evidence before resolving its conclusions relating to the mental health issue, but it could not properly leave it to the penalty defaulter to decide whether the issue should be taken further or not before a self-executing order for imprisonment was made. |
| **11** | **Contract of sale – whether GST payable**  In *Duoedge Pty Ltd v Leong & Anor* MC 11/13, a Magistrate held that a contract of sale contained an implied term entitling a purchaser to a refund of GST paid. HELD: Appeal allowed. Magistrate's order quashed and the claim dismissed.  1. It was not open to the magistrate to find that there was an implied term of the contract that, if GST did not apply to the sale, DP/L would refund the GST amount of $83,272.73 and then to rectify the contract to give effect to the implied term. A contract is either rectified to accord with the true agreement, or properly construed to identify the true agreement it records.  2. The plain meaning of the contract was that the GST risk lay with the vendor. That this was the contractual intention appeared from the particulars of sale that the agreed contract price was GST inclusive, although adding those words after the price was not the correct way to complete the standard form of contract. The absence of the words ‘plus GST’ in the box confirmed the handwritten addition of the words ‘GST inclusive’. The parties expressed the intention that the purchaser had no obligation to make a further payment in respect of any GST assessment that might later follow. In other words, the parties plainly intended that the risk that GST might need to be remitted to the Tax Office lay with the vendor. If the transaction did not involve a taxable supply, that risk was abated to the benefit of the vendor, who retained the full price that it contracted to receive for the property. Objectively assessed, this was what the terms relating to GST showed to be the intention of the contracting parties. This construction was neither uncertain nor ambiguous.  3. The magistrate erred in finding that the vendor DP/L breached the contract by not refunding $83,272.73 when it was determined that the sale was not a taxable supply because there was no term to be implied into the contract that the vendor was so obliged.  4. Rectification was pleaded and was an issue at trial. L. bore the onus to show that the clearly predominant intention of both the vendor and the purchaser was of an actual agreement as described. The magistrate’s finding that the parties ‘effectively took the view’ that the agreed price inclusive of GST was not a finding of a clear predominant intention that the vendor had agreed not to retain any more than $832,727.27 as the price. That the agreed price was inclusive of GST could only support an inference that the common intention was the purchaser had no further obligation to pay if the transaction was a taxable supply. Such a finding could not sustain an entitlement to rectification of the contract.  5. Not having made appropriate findings, it was not open to the magistrate to rectify the written contract and in so ordering, the primary court fell into error. |
| **12** | **Whether oral contract to be preferred over a written Deed**  In *Lewis v Lambides*, MC 12/13 the parties entered into a written deed in relation to repairs and restoration work done on a vintage motor vehicle. Subsequently the parties agreed orally which raised the question whether the conditions of the Deed were spent. A Magistrate found that the oral agreement was enforceable. HELD: Summons dismissed.  1. When the car owner agreed to pay the remuneration without an agreement in writing but by a handshake, the parties abandoned the arrangements set out in the Deed in favour of the oral agreement between them for the ongoing restoration of the motor vehicle.  2. As a result, the provisions in the Deed as to the cost of any further work had to include any storage charge, the non-waiver provision and the indemnity for reasonable legal fees were spent.  3. It was open to the magistrate to find that the agreement supplanted the Deed and the appellant failed to establish that the only basis upon which the magistrate could have come to her decision was to adopt the provisions in the deed.  4. Further, the magistrate was entitled to make an order for costs and that the operation of cl 7 of the deed in relation to the indemnity for costs was spent. |
| **13** | **Traffic infringement fines – whether penalties enforceable**  In *Macdonald v County Court of Victoria & Anor*, MC 13/13 a judge of the County Court upheld a Magistrate’s decision to make infringement fines payable. On appeal - HELD: Originating motion dismissed.  1. The system of verification of utility meters used for trade is contained in Part VA of the *National Measurement Act* 1960 Act (Cth). However, a speed camera is not a utility meter for the purposes of Part VA. Part VI contains the provisions (ss19A, 19AAA and 19AB) which do not require the doing of anything. Rather, they provide for the making of regulations, specifically for or in relation to the examination, approval and verification of ‘patterns’ of measuring instruments, for the issuing of certificates in respect of the approval and verification of patterns of measuring instruments and for the reception in evidence of documents purporting to be such certificates.  2. The *National Measurement Regulations* are largely permissive in character. A person may apply for approval or certification of a pattern or of an individual measuring instrument, but it is not mandatory.  3. Having regard to the Regulations, there is no requirement that speed camera types or individual speed cameras be certified, verified, calibrated or otherwise approved under the *National Measurement Act* or the *Regulations*. There is no specific requirement in the *National Measurement Act* or the *Regulations* that speed cameras be approved, verified or certified either individually or more generally as to pattern.  4. Accordingly, the County Court was not prevented from finding the charges proven in the absence of approval, verification or certification under the *National Measurement Act* of either the pattern of the speed cameras or the individual speed cameras, as there was no such requirement.  5. It is not clear if or how the defendant sought to avail himself of the protections of *Magna Carta* or if or how he contended there was a failure to afford him these protections. The judge did not err in warning the defendant that the *Magna Carta* did not have the force or effect for which was sometimes contended. In this case, the County Court was bound to give effect to the provisions of the *Road Safety Act*. The express terms of the *Road Safety Act* enabled the County Court to find the charges against the defendant proven, based upon the certificates produced under ss83 and 83A of that Act. His Honour’s refusal to countenance lengthy argument that would have required him, in essence, to ignore the express terms of the *Road Safety Act* did not reflect any bias or prejudgment on his part or otherwise amount to a denial of procedural fairness.  6. As the recipient of infringement notices for excessive speed infringements, the defendant had no right to internal review under Division 3 of Part 2 of the *Infringements Act* as the relevant provisions of the *Infringements Act* were inapplicable.  7. In relation to the Judge's refusal to allow the hearing to be adjourned in order to sub-poena a documentary about speed cameras, there was no error in the approach taken by the judge. The refusal of the adjournment did not prevent the defendant from presenting his case as fully as necessary within the limits of the law, in circumstances where the adjournment was sought for the purpose of gathering evidence that was likely to be neither admissible nor relevant.  8. There is no requirement that the s83A certificates be produced in accordance with a ‘prescribed process’. In any event, even if the legislation referred to a ‘prescribed process’ for the production of s83A certificates by the authorised person, but no process was in fact prescribed, the certificates would have legal effect, providing that they otherwise complied with the legislation.  9. The protection afforded by s27(2) of the *Charter of Human Rights and Responsibilities Act* is, in substance, a protection against the retrospective operation of laws that are harsher than the laws in force when the offence was committed. The focus of s27(2) is ‘the penalty that applied to the offence’ when the offence was committed. The penalty that applied to the offence at the time that it was committed is the penalty specified in or authorised by the legislation or rules in force at that time.  10. The defendant failed to establish that the County Court imposed a penalty on him that it was not authorised to impose under the laws in force at the time of the offences. |
| **14** | **Transfer of criminal proceeding for a summary hearing in the Magistrates’ Court**  In *DPP v Batich*, MC14/13, a judge of the County Court had transferred a criminal proceeding to the Magistrates’ Court for summary hearing. Bell J held that the judge was not in error. Upon appeal - HELD: Appeal dismissed. The DPP to pay the respondent's costs on an indemnity basis.  1. An order to transfer proceedings to the Magistrates’ Court would not be ‘appropriate’ and would be made for an improper purpose if the sole or actuating motive for doing so was to avoid the operation of s27(2B) of the *Sentencing Act*. That is not to say that the presence or absence of a sentencing option may not be a relevant factor in deciding whether transfer is appropriate.  2. A transfer would not become appropriate merely because the very bottom of the range fell within the Magistrates’ Court’s jurisdiction. To then order a transfer would remove the sentencing magistrate’s ability to impose a sentence that fell within most of the range that was reasonably open. The magistrate would be prohibited from re-transferring the matter in those circumstances. Unless a judge is of the view that a sufficient portion of the range fell within the Magistrates’ Court's jurisdiction so that the range of sentences available to the magistrate was adequate, it was not appropriate to make such an order.  3. Allowing the sentencing practice for this offence was to be as dictated in *Winch v R* [2010] VSCA 141, one reasonable view of the circumstances of the offence and matters personal to the respondent left open that a sentence of two years or less was within a sound exercise of the sentencing discretion. That was the opinion of the judge who ordered the transfer. On the basis of the narrow argument pressed before Bell J, his Honour rightly reached that conclusion. Therefore the Director’s narrow basis for impugning the judge’s decision to order that the charge be heard summarily failed as also did the Director’s modified submission that because part of the range fell outside the Magistrates’ Court’s jurisdiction, no transfer could be made. |
| **15** | **Family Violence Orders – Intervention order made**  In *AA v BB*, MC15/13, Bell J dealt with an appeal against a Magistrate’s order that an intervention order should be made against the appellant. HELD: Appeal dismissed.  1. The intervention order under the Victorian *Family Violence Protection Act* which the appellant contravened was not invalid for being inconsistent with the parenting order under the federal *Family Law Act*. The State intervention order and the federal parenting order sat side by side and harmoniously dealt, on the one hand, with the protection of the protected person from family violence of the appellant and, on the other hand, with the relationship between the appellant and the protected person in relation to their child. Further, the *Family Violence Protection Act* and the *Family Law Act* have been carefully designed to operate compatibly together according to a common plan. There was no inconsistency between the State and federal Acts and the provisions of the State Act were not invalid under s109 of the *Constitution*.  2. Applying the tests stated by the High Court of Australia, the intervention order and the provisions of the *Family Violence Protection Act* under which it was made were not invalid by reason of the implied constitutional freedom of communication about governmental and political matters.  3. The intervention order limited the appellant’s capacity to communicate about government and political matters. The protected person was a candidate for election to the Australian Parliament in the upcoming federal election. Because the intervention orders prohibited the appellant from publishing any material about the protected person and from providing information about that person’s personal, family or professional interests to third persons, the order prevented the appellant from commenting on the suitability of the protected person for election to federal Parliament. Public discussion of the suitability of a candidate for election to federal Parliament is a central feature of the democratically representative political system which is enshrined in the *Constitution*.  4. The intervention order was made for the legitimate purpose of protecting the protected person from family violence of the appellant. In limiting the appellant’s capacity to publish material about the protected person and provide information about that person’s personal, family and professional interests to third parties, the order was reasonably appropriate and adapted, and proportionate, to the achievement of that purpose. In making the order, it was necessary for the magistrate to balance, on the one hand, the appellant’s right to free speech in the context of the upcoming federal election as protected by the implied constitutional freedom of communication about government or political matters and, on the other hand, the protected person’s right to be protected from family violence of the appellant, which the protected person did not lose by reason of being a parliamentary candidate in that election. The magistrate properly carried out that balancing judgement and the appellant had not shown that his Honour erred in law in doing so. In making the order, the magistrate did not inhibit the capacity of the appellant publicly to discuss issues of policy or political matters not concerning the protected person or to provide information about such issues or matters to third parties.  5. The appellant’s contention that the intervention order was invalid for being inimical to public policy and for uncertainty was rejected.  6. The magistrate did not err in law or jurisdiction in convicting and sentencing the appellant for contravening the intervention order. The appellant’s appeal was dismissed.  7. The application of the respondent and the protected person, supported by the appellant, for complete suppression of the proceeding and this judgment as that would be contrary to the principle of open justice was rejected. However, it was appropriate to protect the identities of the appellant, the protected person and their child, as was the case under the *Family Violence Protection Act* in the substantive proceeding in the Magistrates’ Court and under the *Family Law Act* in the related proceeding in the Family Court. Therefore this judgment has been produced in gender neutral and anonymous terms and the appellant and the respondent have been given pseudonyms. Under s18 of the *Supreme Court Act* 1986 (Vic), and consistently with s166 of the *Family Violence Protection Act* and s121 of the *Family Law Act*, orders were made prohibiting the publication of any account of the proceeding, or any part of the proceeding, that identified the appellant, the respondent, the protected person or the child or of any particulars likely to lead to the identification of those persons. |
| **16** | **Contempt of Court** |
|  | In *DPP v Green and Magistrates’ Court of Victoria* MC16/13, an appeal was launched in respect of a decision by Pagone J setting aside a Magistrate’s decision in respect of contempt of court proceedings. HELD: Appeal dismissed.  1. Strict compliance with the demands of procedural fairness is required to ensure not only that a court provides a just and open-minded hearing, but also that this is apparent to the accused and to the world.  2. The differences that exist between s133 and s134 of the *Magistrates' Court Act* 1989 are ultimately superficial and do not support the proposition that the procedural steps identified in *Zukanovic v Magistrates' Court* are inapplicable to the forms of contempt recognised in s134. This is so for the very reason that those steps are no more than an expression of the fundamental principle that where the rules of procedural fairness apply, as they do here, ‘the party liable to be directly affected by the decision is to be given the opportunity of being heard’ and this entails being given the opportunity to address the decision-maker on those issues which are to be determinative of the allegation against him.  3. No doubt J Forrest J in *Zukanovic* did not intend that the procedural steps he identified were to be treated as a set of rigid prescriptive rules that bore no capacity to adapt to the circumstances of a proceeding. The steps set out in *Zukanovic* were no more than an expression of the principle in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128 that ‘no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him’.  4. The failure by the magistrate to articulate any charge against Green at all, and to consider laying a charge only after he had determined the charge proven, together with the absence of any opportunity afforded to Green to be heard in relation to the charge before being held in contempt, demonstrated that the magistrate acted in breach of the rules of natural justice. The trial judge was correct to so hold.  *Green v Magistrates' Court of Victoria and Anor* [2011] VSC 584, approved; and  *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; (2011) 32 VR 216; applied. |
| **17** | **Application to set aside witness summonses**  In *McKenzie and Baker v Magistrates’ Court of Victoria and Anor* MC17/13, two journalists had been sub-poenaed to give evidence in a committal proceeding. The Court of Appeal allowed the appeal and set aside both witness summonses.  1. On this appeal hearing, the applicants no longer sought to have the witness summonses directed to them set aside because they were the victims of breaches of natural justice, or upon the basis of errors on the face of the record, or because the magistrate’s reasons were insufficient. Rather, they contended that one of the accused had an illegitimate purpose in seeking to adduce the evidence to which each summons referred. He wished to use that evidence in support of an application that, in the interests of justice, the magistrate dismiss the charges against him. But, the applicants (joined by the prosecution) submitted, this was something which a magistrate presiding over a committal proceeding had no power to do. Nothing in the Code conferred such power.  2. Committal proceedings do not constitute a judicial inquiry, but are conducted in the exercise of an administrative or ministerial function. And the power to dismiss is quintessentially a judicial, not an administrative or ministerial, power. A magistrate cannot allow the receipt of evidence the only relevance of which is to make good an application to dismiss charges in the interests of justice which the magistrate has no power to grant.  3. Section 141(4) of the *Criminal Procedure Act* prescribes what a magistrate presiding at a committal hearing must do at the conclusion of the evidence and submissions. He or she is limited by that legislation to one of three courses of action: the presiding magistrate may discharge the accused; or may commit the accused for trial on the charges brought; or may adjourn the committal to enable the informant to lay a further charge for another indictable offence and then commit the accused for that offence.  4. In view of the fact that in no other circumstances did a magistrate have jurisdiction to dismiss a charge in the interests of justice, it followed that, had the accused Leckenby been charged as an accessory he could not, at his committal, properly have raised his present complaints about police malpractice in their investigations, or biased selection of documents, or saturation prejudicial publicity, as a basis for a decision by the magistrate to dismiss in the interests of justice the charge against him. |
| **18** | **Application for a rehearing of a civil proceeding**  In *Cheok v Papanastassis* MC18/13, a Magistrate refused to set aside an order made by default. Held: Application dismissed.  1. In relation to the submission by C. that the Magistrate took into account C.s failure to attend for cross-examination, nothing in the Magistrate's reasons suggested that the failure of C. to attend for cross-examination was taken into account against her. When one examined the whole of the reasons for decision, and in particular what was said on the topic of C.s failure to attend, there was no basis for saying that the Magistrate took into account, for the purpose of deciding the application, C.s non-attendance at the hearing of the application.  2. An applicant who seeks to invoke the discretion of the court to set aside a default judgment that was entered regularly must demonstrate to the Court grounds upon which the discretion ought to be exercised in his favour. The primary consideration for the judge is that there are merits in the defences to which the Court should pay heed. If there are merits in one or more of those defences the Court will ordinarily exercise its discretion in favour of allowing the matter to pass to final adjudication, provided that the applicant shows that he has an adequate explanation for his failure to file a defence. It is not for the judge, on an application of this nature, to determine the merits of the defence for himself or to seek to resolve factual issues which might at that stage appear to exist on the materials before him.  *Lau v Citic Australia Commodity Trading Pty Ltd* [1999] VSCA 34, applied.  3. The Magistrate did not purport to embark upon a trial of the facts; nor did she impermissibly cross the line in the way described in *Lau*. Having identified that there were matters in dispute between the parties on the affidavits filed, her Honour then analysed whether there were merits in the defences to which the court should pay heed.  4. In relation to the *non est factum* defence, The Magistrate was well justified in concluding that on a proper examination of the plaintiff’s own material, the *non est factum* defence had no real prospect of success. However, even if the *non est factum* defence had some arguable prospects (on the basis that almost anything can be said to be arguable), that fact alone was not the end of the exercise. Questions of delay and explanations for the delay remained relevant considerations to be taken into account.  5. The Magistrate performed a careful analysis of all of the issues raised in this case, and then determined the application correctly by reference to accepted principles.  6. Accordingly, C.s application was dismissed. |
| **19** | **Drink/driving – Request for a Breath test**  In *DPP v Skafidiotos* MC19/13, a driver was requested to undertake a breath test but the type of test was not specified by the police informant. The Magistrate dismissed the charge. Upon appeal, HELD: Appeal dismissed.  1. The Magistrate did not conclude that the word 'preliminary' must be used in every case when a requirement is made under s53(1) of the *Road Safety Act* 1986.  2. Each case must be determined on its own facts. The evidence capable of establishing the offence may vary from case to case. No particular form of words must be used to make the requirement under s53(1), the refusal of which will found an offence under s49(1)(c). It may not be necessary to use the word ‘preliminary’ when referring to the required test. Factors such as whether or not the preliminary breath-testing device was presented to the driver and whether the driver had been stopped at a preliminary breath testing point will be relevant to the determination as to what would be reasonably sufficient to communicate the requirement in the context under consideration. Proof of the offence is not dependent upon proof of recitation of the words of the relevant provision.  3. In the present case, what the informant said was ambiguous in all the circumstances. Notwithstanding the early hour, the location, the previous exchange between the informant and the respondent’s flight, the informant might reasonably have been taken to have been requiring the respondent either to undergo a preliminary breath test under s53(1) or to provide a breath sample under s55(2), (at the police car or at a police station, without having undergone a preliminary test). There was no specific mention of a preliminary breath test or of the fact that the police officer was going to the police car to obtain a preliminary breath testing device in order to administer one. Nor had the respondent been stopped at a preliminary breath testing station whilst driving.  4. In the circumstances of this case, it would not have been open on the evidence to conclude beyond reasonable doubt that the respondent was told sufficient to know that it was a preliminary breath test he was being required to undergo in all the circumstances. Such a conclusion would have involved impermissible speculation on the part of the Magistrate.  5. A refusal of a requirement under s53(1) of the Act might be proved by what the appellant characterised as ‘anticipatory refusal’, if the circumstances were such that it could be concluded that sufficient had already been said or done to communicate, in the circumstances, that it was that requirement which was about to be made. In relation to the insufficiency of the evidence of the necessary requirement indicated that this was not such a case, even though the Magistrate was satisfied that the informant had intended to require the respondent to undergo a preliminary breath test.  6. Section 49(1)(c) is a penal provision and courts should not take a ‘near enough is good enough’ approach to the application of such legislation, notwithstanding the community’s interest in the promotion of the Act’s stated objectives. The obligation remains upon the prosecution to prove the elements of the alleged offence. It is refusal of a requirement under s53(1) for a preliminary breath test which is a fundamental element of the s49(1)(c) offence.  7. Accordingly, the Magistrate did not err and the appeal was dismissed. |
| **20** | **Application for a rehearing of a civil proceeding**  In *Sevdalis v Marcs Automobiles Pty Ltd* MC20/13, a Magistrate refused an application for rehearing without giving the applicant an adequate opportunity to respond to something said by the Magistrate. Upon appeal, Appeal allowed. Remitted for hearing by another Magistrate.  1. It was not contended on behalf of S. that the Magistrate had prejudged an issue, or had unjustifiably entered the arena by defining and elevating an issue that was not so defined between the parties. While there may be room for debate as to the limits of judicial intervention, there are circumstances in which a judicial officer is justified in moving beyond the confines of the issues formulated by the parties. The *Civil Procedure Act* 2010 expressly authorises active judicial intervention in the course of case management. But care must be taken to ensure that if a new issue is raised by the judge, the parties are given an adequate opportunity to address it. Additional evidence might be necessary, requiring an adjournment.  2. Procedural fairness in the present case required the Magistrate to at least permit counsel for S. to advance submissions to explain his client’s connection with the vehicle.  3. The Magistrate’s refusal to hear from counsel for S. could not be excused on the grounds that the apparent denial of procedural fairness was immaterial. It was the Magistrate who had elevated the absence of an explanation concerning possession of the vehicle into a contentious issue that he described as a ‘smoking gun’. After all, counsel for Marcs Automobiles had proceeded on the assumption that possession of the vehicle was not contested. While it was unclear whether counsel for S. had also proceeded on that basis, possession of the vehicle became an issue of great importance to the Magistrate, and determinative of the application.  4. While it was true that counsel for S. had, at the outset, been given an opportunity to remedy any deficiencies in his affidavit material, the issues changed with the intervention of the Magistrate. Procedural fairness required the Magistrate to give counsel an opportunity to respond to the issue. He ought to have permitted counsel for S. an opportunity to persuade him that possession of the vehicle by his wife, and perhaps more importantly, the absence of material directed to that topic, did not so undermine the credibility of the defence as to justify refusing S. an opportunity to advance his defence at a trial.  5. Furthermore, on becoming aware of the significance to the Magistrate of possession, S. might also have sought an opportunity to rectify the obvious deficiency in his affidavit material.  6. The decision of the Magistrate to dismiss the application for re-hearing was set aside and the application for a rehearing was remitted to the Magistrates’ Court for hearing and determination by another magistrate. |
| **21** | **Application for adjournment of Compulsory Examinations**  In *Marwah v Magistrates’ Court of Victoria & Anor* MC21/13, an application for an adjournment of orders for compulsory examinations was refused. Upon appeal, the application for review was dismissed.  1. As the validity of the Baiada charge-sheet was not an issue for determination by the Magistrate, the plaintiffs’ submission that the substance of their application was about the jurisdiction of the Magistrates’ Court to conduct the compulsory examinations was rejected.  2. The plaintiffs’ submission that, in the circumstances that prevailed at the hearing of their application, the only order that the Magistrate could properly make was an order granting the adjournment sought by them was rejected. In substance and in form, the plaintiffs’ application sought a discretionary order, namely an adjournment of the orders for examination. By definition, the seeking of a discretionary order does not involve an automatic entitlement to the order, but the exercise of a discretion which involves the balancing of factors for and against the granting of the order.  3. The Magistrate was obliged to consider all the factors upon which the plaintiffs relied in support of their application and all the factors upon which the Informant relied in opposing that application. The plaintiffs did not allege that the Magistrate took into account any irrelevant considerations or that she failed to take into account relevant considerations. The transcript indicates that her Honour engaged with the parties during argument on the various issues that they raised and that, at the conclusion of final addresses, she adjourned the hearing briefly to consider the issues. Although her Honour’s ruling was brief, it did not indicate that she failed to properly consider the issues raised by the parties.  4. It was appropriate for the Magistrate to take into account: her assessment of the likelihood of Baiada’s strike-out application succeeding; whether there was any prejudice to the plaintiffs from a refusal to grant an adjournment; and whether there was any prejudice to the Informant from the granting of an adjournment. The conclusions that the Magistrate reached on these issues were open to her. The plaintiffs failed to satisfy the Court that her Honour made any vitiating error in relation to them.  5. Accordingly, the application for review was dismissed. |
| **22** | **Hearsay rule – Newspaper article alleged to contradict witness’ evidence**  In *Matthews v SPI Electricity & Ors (Ruling No 17)* MC22/13, a newspaper article was sought to be tendered in order to demonstrate that a witness had made a prior inconsistent statement. Held: The newspaper article was inadmissible.  1. First, the admission of a document under s45(3) is discretionary. A court should, in exercising its power under s45(3) of the Act to permit the tender of the article as a whole, be extremely cautious about the admission of such untested and potentially dubious material especially where the contents of the article go far beyond that of the alleged prior inconsistent statement. If allowed, the tender of the article on the basis that it contained a prior inconsistent statement meant that the whole of the document was received as evidence of the asserted facts contained within it. So the author’s statements as to the reasons for the decision to abandon the 2009 crop could, at least potentially, have become evidence of the fact. Of itself, this was good reason to refuse the tender.  2. Second, counsel contended that the statements attributed to the vigneron were hearsay and therefore not admissible. He relied on s45(4) of the Act which requires the Court to ensure that the document is admissible by reason of Chapter 3 of the Act. The quote concerning the smoke attributed to the vigneron was, at the least, first-hand hearsay – but that did not mean that it was inadmissible.  3. Section 60 of the Act permitted the admission of such evidence for a non-hearsay purpose, such as the proof of a prior inconsistent statement pursuant to s45, provided it met the test of relevance set out in s55(1). However, in this case, the balance of the article was replete with hearsay (which was neither background nor explanatory to the alleged prior inconsistent statement) and material not germane to the alleged prior inconsistent statement.  4. Accordingly, the article was inadmissible. |
| **23** | **Chinese medicine – acupuncture said to be carried out by person not registered**  In *Penev v County Court of Victoria and Ors* MC23/13, a person who held herself out to be a registered practitioner was found guilty of charges laid against her. Held:  The orders set aside and the charges remitted to be heard and determined according to law.  1. The County Court erred when it failed to make findings as to whether ‘laser acupuncture’ was a health service usually provided by registered practitioners of Chinese medicine and simply accepted that it was a form of acupuncture and therefore a regulated health service. It was not permissible, given the express terms of the HPR Act and the definition of ‘regulated health service’, to conclude from the fact that s80(2) made it an offence to take or use the title ‘acupuncturist’ with or without another word, that ‘laser acupuncture’ was something that the legislature intended to regulate under the HPR Act and that, as soon as P. used the word ‘acupuncture’ in her advertising, she was exposed to the prohibitions and sanctions in the HPR Act. It was also impermissible for the court to simply rely on the fact that in one or more of her advertisements, P. described laser acupuncture as ‘acupuncture without needles’ to conclude that laser acupuncture was a form of acupuncture and therefore subject to regulation by the CM Board under the HPR Act.  2. Furthermore, in order to find charges proven under s80(1), it was necessary for the County Court to consider whether members of the public would or could reasonably understand P's advertising of laser acupuncture to indicate she was a practitioner in the health profession regulated by the CM Board or amount to holding herself out to be registered under the HPR Act. That was not a question that could be answered simply by construing the statute. It required attention to the circumstances in which the advertising took place, including such matters as the context and content of the offending advertisements and whether, indeed, ‘laser acupuncture’ was something that was usually provided by registered practitioners of Chinese medicine.  3. It was not an offence for P. to use the word ‘acupuncture’ – with or without other words – unless the other elements in s80(1)(b)(i) and s80(1)(c) were established, that is, that P. offered or advertised laser acupuncture in circumstances where it would be understood to indicate that P. was a practitioner registered by the CM Board (or other responsible board) to carry out acupuncture or its use amounted to a claim to be registered or a holding out that P. was registered under the HPR Act.  4. The County Court misinterpreted the relevant provisions of the HPR Act and, as a result, misunderstood what was required by those provisions and failed to conduct the inquiries necessary to find the elements of the offences proven. It failed to grapple with whether ‘laser acupuncture’ was usually provided by practitioners of Chinese medicine and whether a naturopath in P.s position advertising and offering ‘laser acupuncture’ could be reasonably understood to be representing that he or she was registered with the CM Board as a practitioner of Chinese medicine.  5. In adopting the short form reasoning as described, the County Court fell into error. The errors were material in that, had they not occurred, the County Court might have reached a different decision on the charges.  6. Accordingly, the orders of the County Court were set aside and the charges remitted to the County Court to be heard and decided according to law. |
| **24** | **Committing an indecent act in the presence of children**  In *Azadzoi v County Court of Victoria and Anor* MC24/13, charges of wilfully committing an indecent act in the presence of three children were found proved by a judge. Upon appeal,  HELD: The application for judicial review in respect of the convictions and sentences on the charges relating to the first and second complainants was dismissed. In relation to the conviction on the charge relating to the complainant who did not see the indecent act, the conviction and sentence were quashed and the charge remitted to the trial judge for consideration according to law.  1. Whether intention or knowledge apply to elements of a statutory offence turns on the interpretation of the provision in question. Whether honest and reasonable mistake of fact is a defence also raises a question of statutory interpretation. According to the applicable principles, there is an interpretative presumption that intention and knowledge must be proved in respect of all of the elements or, if not that, then honest and reasonable mistake is a defence, subject to Parliament’s plain contrary intention. When considering whether that plain contrary intention is indicated, the court examines the subject matter and the purpose of the legislation, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake as a defence, would promote observance of the legislative scheme.  2. After examining these matters, the trial judge was correct in deciding that, in respect of the age ingredient, intention and knowledge were not elements of the offence and honest and reasonable mistake was not a defence. The purposes of s47(1) of the *Crimes Act* 1958 are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts in places where children might be. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. Those purposes and promoting observance of the legislative scheme (among other things) plainly indicate that Parliament intended the offence to be one of absolute liability in relation to the age ingredient. Persons who commit indecent acts in places where children might be do so at their own peril.  3. In reaching this conclusion, the Court took into account that it is possible for potential offenders to take reasonable precautions to avoid criminal liability. On the interpretation which was plainly intended by Parliament, it was not possible to offend against s47(1) by accident. To be convicted, the accused must have intended to commit an indecent act. Potential offenders can avoid liability by not committing such acts in places where children might be. So interpreted, the provision imposes on persons an obligation to take greater than usual care to avoid criminal liability. Parliament has deliberately imposed that obligation to take greater than usual care in order to protect children from others and also to protect children from themselves. This interpretation accords not just with Parliament’s plain intention but also with decisions of the Full Court of the Supreme court in relation to similar statutory provisions.  4. The plaintiff committed the indecent act in the steam room of the sauna, spa and steam room area of a public aquatic centre. He did the act at his peril. Although that area was reserved for persons over the age of 16 years, it was foreseeable that children under that age who looked older might obtain unauthorised access to the area, which the complainants did. The judge did not err in jurisdiction or law in convicting him on the charges relating to the presence of the first and second complainants. Accordingly, the application for judicial review in respect of those charges was dismissed.  5. In relation to the third complainant, a charge against s47(1) can only be established if the accused committed the indecent act ‘with or in the presence’ of the underage child. The prosecution relied only on ‘presence’. The plaintiff did not commit the indecent act ‘with’ the third complainant (or the other two).  6. Properly interpreted, the ‘presence’ element in s47(1) required physical proximity between the accused and the complainant. In this case, it was not to the point that the third complainant was not aware of what the plaintiff was doing. It was not to the point that she did not participate in or consent to the indecent act in any way. It was not to the point that there was no physical contact or association between the two of them. If the accused and the third complainant were in the physical proximity of each other when the act was committed, none of that would matter. But the undisputed facts were that, at the material time, the third complainant was in the sauna and the plaintiff was in the steam room. There was a space in between. It was not possible for the third complainant to see into the steam room or for the plaintiff to see into the sauna. Those facts could not fall within the statutory concept of ‘presence’ and accordingly, the judge erred in jurisdiction and law in convicting the plaintiff on the charge in respect of that complainant. |
| **25** | **Contempt of Court – refusal to appear by video link**  In *Mansell v Mignacca-Randazzo* MC25/13, an appeal was made in respect of a person who had been found guilty of contempt of court when failing to appear by video link to answer charges of theft. Held: Appeal dismissed.  1. The magistrate decided that it was appropriate to deal with the alleged contempt summarily. In those circumstances, he had the power to issue a summons or warrant, however it was unnecessary to do so as the appellant was in custody. There was no requirement for a prosecution notice; the only requirement was that the magistrate orally inform the appellant of the nature and particulars of the alleged contempt. In this case the magistrate did more than that: he prepared and had delivered to the appellant a written notice of the alleged contempt. No doubt he did so to ensure that the requirements of procedural fairness were met. That was an entirely appropriate course in the circumstances.  2. A contempt of the type alleged in this case was clearly criminal in nature. This was confirmed by the fact that s16(4) of the *Magistrates' Court Act* 2004 (WA) ('MCA') provides that a person guilty of a contempt under s15 is liable to a fine of not more than $12,000 or imprisonment for not more than 12 months or both. It was unlikely that the legislature intended to exclude such potentially serious matters from the ambit of the *Criminal Appeals Act* 2004 (WA) ('CAA'). This supports a conclusion that the word 'charge' as used in s6(c) of the CAA bears its ordinary meaning; that is, a formal allegation, either orally or in writing, that a person has committed a criminal offence and which carries with it the consequence that the allegation will be dealt with by a court. Whilst contempt is not referred to in the MCA as an offence, it is certainly analogous to one. On this basis, the appellant was convicted on a charge of contempt and had a right of appeal under s7 of the CAA.  3. The phrase 'in the face of the court' is not defined in the MCA but it is one that is familiar in the common law context. On one view, the phrase may be limited to matters where all the issues of fact are in the personal knowledge of the presiding judge: *McKeown v The Queen* (1971) 16 DLR (3d) 390, 408. However, a broader view was taken in *Balogh's* case.  4. In the present case the phrase appears in s15(1)(e) without any words that would suggest that a limited meaning was intended. The phrase should be interpreted having regard to its use as developed over time. Accordingly, s15(1)(e) should be interpreted as referring to acts which interfere with the conduct of proceedings that are in progress or imminent. It is not limited to acts which are seen or heard by the presiding magistrate. It may include acts which occur outside the courtroom so long as those acts are proximate to the proceedings and have the effect of, or tendency to, interfere with them.  5. In this case, a number of the theft charges which came before the Magistrates’ Court on 16 December 2011 were indictable. As a consequence an appearance by the appellant was required: s38 and s39 CPA. The circumstances in which the court can proceed with indictable charges in the absence of the accused are limited: s140 CPA. The appellant's refusal to appear on the video link had the effect of preventing the court from taking necessary procedural steps in respect of those charges on that day. A direction to appear by video link was, in these circumstances, both lawful and appropriate: s77 CPA.  6. On 16 December 2011 the matter was stood down to enable the appellant to comply with the direction. His non-compliance was clearly connected to those continuing proceedings and had the effect of interfering with them. The refusal to comply with the direction was proximate to those proceedings and was, therefore within the meaning of the term 'in the face of the court'.  7. If the appellant was under the mistaken impression that he had both a right to appear personally and a right to refuse to comply with a direction from a magistrate to present himself on video link then he was wrong. Any such mistake was an error of law and could not excuse his non-compliance.  8. Furthermore, whilst it was possible to understand how the appellant may have had an expectation that in light of s77(2) he would be brought before the Magistrates’ Court to appear personally on the first appearance, it was more difficult to understand how he could have believed that he was justified in defying a specific direction from a magistrate to appear by video link. There was no doubt on the evidence that the direction to appear by video link was conveyed to the appellant and that he made a deliberate decision to refuse to comply with it. He persisted in that refusal despite receiving legal advice that he must comply.  9. To the extent that the appellant suggested that he was not in contempt because he did not intend to so act, his argument was misconceived. Intention to commit contempt in the face of the court is not an element of the offence under s15(1)(e) of the MCA.  10. An apology by a contemnor is a matter to be taken into account when imposing punishment. An apology necessarily incorporates an acceptance of the wrongfulness of the conduct. An apology, therefore, cannot be a defence to an allegation of contempt: rather it is a matter relevant to penalty.  11. The steps taken by the Magistrate accorded procedural fairness to the appellant.  12. Having regard to the nature of this contempt, its effect upon the proceedings and the persistence of the appellant's refusal to comply despite being given opportunities to do so, a sentence of 1 month's imprisonment was well within the discretionary range. It was important to also ensure that the penalty acted as a deterrent both to the appellant and to others who might be inclined to act in a similar way in the future. There was no proper basis for a claim that the sentence in this case was manifestly excessive. |
| **26** | **Customs offence – importation of prohibited import**  In *Wright v Chief Executive Officer of Customs* MC26/13, a person was charged with importing an electric shock device and making a false statement in respect of it. Upon appeal, Held: Appeal dismissed.  1. The sole question which the Magistrate was called upon to consider was whether the attempted importation of electric shock devices with certain missing components which rendered them temporarily inoperable constituted an offence against s233(1)(b) of the *Customs Act* as alleged.  2. W. had submitted that the items were not within the schedule because they were incomplete or only parts or were not immediately capable of administering an electric shock, arguments which were all variations of the essential substantial submission that they were not prohibited imports. Accordingly, a finding that notwithstanding that the items found in the appellant's luggage were incomplete or not immediately functional they nevertheless were prohibited imports was a finding on the essential question of whether, notwithstanding the absence of some components, the items imported were prohibited imports. Accordingly, this proposed particular could not be made out even if taken at its broadest ambit.  3. The evidence relating to W. and his travelling companion, both when departing Australia and returning, and the discovery of the pins and capacitor coils in the companion's luggage on arrival at Perth Airport was directly relevant, and so admissible, with regard to the second charge against the appellant.  4. It was clear from the Magistrate's reasons for decision, although not expressly stated, that her Honour inferred that when the items were purchased at Pattaya they were entire and that they had been partially dismantled and the missing pins and capacitor coils carried in the companion's luggage deliberately. In those circumstances, the Magistrate had plainly concluded that there was, at the very least, a significant risk that the items in the condition in which they were found in W.s luggage at Perth Airport were, as they were found to be, prohibited imports and that any statement made by him on the Incoming Passenger Card to the contrary was made reckless of the substantial risks that the items were, as they turned out to be, prohibited imports. |
| **27** | **Failure to vote at a federal election**  In *Horn v Australian Electoral Commission* MC27/13, a voter refused to vote at an election because the voting booth was insufficiently private. Held: Appeal in respect of the conviction dismissed.  1. In relation to the issue of whether the voting alcoves used in the 2010 election complied with s206 and s233 of the *Commonwealth Electoral Act*, the evidence before the magistrate was that these screens were in the same form as those used in previous years and, in particular, in 2007. The claim by H. that these types of screens did not comply with the *Commonwealth Electoral Act* had been raised and rejected on previous occasions. His interpretation of the *Commonwealth Electoral Act* as requiring that each voter be in a separate compartment with a closed door which completely screens them from view had been previously rejected. The magistrate was correct to conclude that she was bound by those previous decisions.  2. H. never clearly articulated the reasons for his feelings of intimidation. If it was a morbid fear of electoral alcoves, then his behaviour would appear to be inconsistent. But his explanations for those feelings appeared to relate entirely to his view that the alcoves did not comply with the law and that he was not adequately screened from view when casting a vote. When seen in this light the findings of credibility were unimportant because such views could not possibly have provided a valid and sufficient reason for not voting. |
| **28** | **Finding of fact in relation to a loan agreement – reasons for judgment**  In *Helou v Shaya* MC28/13, a Magistrate found on evidence given by a plaintiff that a loan agreement had existed and the loan had not been repaid. Held: Appeal dismissed.  1. Nothing prevented the Magistrate from concluding, as a matter of fact, that on the evidence given by the respondent, there was a $15,000 loan which was repayable and which had not been repaid. No point of law arose. The question was entirely factual. The Magistrate was entitled to make the conclusions of fact that were made in the reasons for judgment.  2. Reasons can almost always be more perfectly expressed. This is particularly so in a busy court like the Magistrates’ Court with a large press of business. Undoubtedly, the reasons in the present case could have been more explicit. That said, the reasons disclosed a sufficient and adequate path of reasoning.  3. Any suggestion that the Magistrate somehow improperly entered the arena and became an advocate must be rejected. At worst, the transcript disclosed that the Magistrate was endeavouring to make the conduct of the trial before him more efficient by hastening counsel towards the issues that were disclosed in the material put before him. In modern trial management, such an approach was to be lauded. |
| **29** | **Obtaining financial advantage from Centrelink**  In *DPP (Cth) v Keating* MC29/13, the High Court of Australia was required to determine a case where a person failed to comply with notices sent by Centrelink.  HELD: Prosecution remitted to the Magistrates’ Court for hearing on the basis of the notices referred to in Question and Answer 3.  1. Section 66A of the *Administration Act* does not create a duty, from 20 March 2000, for the purposes of s4.3(b) of the *Commonwealth Criminal Code*, such that a failure to inform the Department of the occurrence of an event or a change of circumstances as required by s66A of the *Administration Act* amounts to “engaging in conduct” for the purposes of s135.2(1)(a) of the *Commonwealth Criminal Code.*  2. The notices issued to the defendant were, in each case, capable of creating a duty for the purposes of s4.3(b) of the Code such that a failure to perform the act or acts required by the notice or notices amounted to “engaging in conduct” for the purposes of s135.2(1)(a) of the Code.  3. The recipient of an information notice is under a legal duty to comply with the notice. What is required in order to discharge the duty will depend upon the terms of the notice. The intentional failure to comply with the notice, where the failure results in the recipient obtaining a financial advantage from a Commonwealth entity knowing or believing that he or she is not eligible to receive the financial advantage, is an offence contrary to s135.2(1) of the Code.  4. The use of the present tense in s4.3(b) is important. The exception to the general principle for which it provides applies to the failure to act where there is a presently existing legal duty to act. Criminal responsibility under s4.3 is confined to the failure to do a thing that at the time of the failure the law requires the person to do. The obligation is coincident with the failure to discharge it.  5. To observe that s 66A of the *Administration Act* operates with retrospective effect is not to conclude that the deemed duty it imposes engages with s135.2(1)(a) and s4.3 of the Code so as to render the latter nugatory in the case of an omission to inform the Department of an event or change in circumstances on and from 20 March 2000 to 4 August 2011, the date on which the Amendment Act received the Royal Assent.  6. Accordingly, s66A did not apply to Keating's conduct because at the time of that conduct it was not the law – the amending Act had not received Royal Assent. However, the legal duty to inform the Department may arise from information notices served on the defendant. |
| **30** | **Employer/employee agreement – no work no pay principle**  In *Mendelsons Lawyers Pty Ltd v Hanlon* MC30/13, the question arose whether an employer was required to pay an employee certain monies when the employee was unable to perform work. HELD: Appeal allowed. Magistrate's order set aside and the matter remitted to the Magistrate for determination of certain issues.  The agreement which the parties reached by the exchange of emails did not constitute an agreement by the employer to make continuing payments for the car lease, or the book allowance, or any of the other payments, independently of the employee's ability to work. The agreement reached between the parties contemplated that the employee would work for his employer and provided for how the employee was to be remunerated for that work. The consideration for the employee's work was in part to be by what was described as a base salary and in part by, amongst other things, payment of the car lease. No part of the agreement constituted the assumption of an obligation by the employer separate from the employee's ability to work. Each of the promises given by the employer were in return for the employee's work and dependent upon it. |
| **31** | **Guarantee & indemnity – whether guarantee enforceable**  In *Goldsmith v Macquarie Leasing Pty Ltd* MC31/13, the question arose as to whether the financier was a disclosed principal. HELD: Appeal allowed in relation to order made that the principal and agent be entitled to judgment. Otherwise appeal dismissed.  1. The magistrate was properly able to conclude on the evidence that Owner referred to the financier Macquarie. Corporate was the agent of a disclosed principal, but even if the magistrate was in error in that finding, a creditor may enforce a guarantee as an undisclosed principal. It has been established that a principal can step in and take over the benefit of a contract made by an agent who has not previously disclosed the existence of a principal, subject to any rights that the third party may have against the agent.  *Mooney v Williams* [1905] HCA 34; (1905) 3 CLR 1, applied.  2. The magistrate found that Corporate, in its capacity as trustee for the Corporate Finance Unit Trust, entered into a written agency agreement with the financier Macquarie, by which Macquarie appointed Corporate as its agent to enter into financial agreements. Corporate submitted applications to Macquarie, but did so in its capacity as trustee for the Corporate Finance Unit Trust. It was open to the magistrate to find that the relationship between Corporate and Macquarie proceeded as if governed by the agency agreement.  3. The magistrate was justified in finding that Corporate had actual authority to take the guarantees with the finance facility for Macquarie. Corporate intended to enter the facility on behalf of Macquarie. Nothing in the terms of the contract or in the evidence of the surrounding circumstances that was before the court below, either expressly or by implication, excluded Macquarie’s right to take the benefit of the guarantee.  4. The magistrate was entitled to infer that Mr Goldsmith gave his signed guarantee to Mr Alexander and later received a copy of it, with a set of facility documents, and to comfortably draw that inference because of the absence of any evidence from the other party, Mr Goldsmith. |
| **32** | **Lay person not allowed to represent a party in civil proceedings**  In *Waddington v Magistrates’ Court of Victoria and Kha (No 2)* MC32/13, Emerton J dealt with an appeal against a Magistrate’s decision to refuse a party to be represented by a lay person in a civil proceedings. HELD: Application for judicial review dismissed.  1. W. failed to pay attention to the words, ‘[except] where a statute prevents it’ in the passage to which he referred the Court. Section 100(6) of the Act prevents his agent from appearing in a civil proceeding in the Magistrates’ Court unless the agent falls into one of the categories of persons whom it allows to appear. Moreover, if W. is correct about the issue being one of simple agency, the power of attorney given to Mr McDonald under the *Instruments Act* would be superfluous, as would s100(6) of the Act. A party could simply inform the court that another person was acting as his or her agent, and that person would have the right to appear on the first person’s behalf in court.  2. In enacting s100(6) of the Act, the legislature did not intend to give any person authorised by a party the right to appear on that person’s behalf in civil proceedings in the Magistrates’ Court. The words ‘empowered by law to appear for the party’ do not mean empowered (in the sense of ‘authorised’) by the party to appear on his or her behalf. Although a person may appoint an attorney to do a great many things on his or her behalf, that does not include a thing for which specific provision is made that it be done by specified persons or categories of persons. An appearance in the Magistrates’ Court of Victoria on behalf of a party is one such thing. In specifying who may appear in court on behalf of a party, s100(6) operates to limit representation to those categories of persons.  3. The purpose of s100(6) is to ensure that only legal practitioners and certain very limited classes of non-lawyers are eligible to appear for parties in civil proceedings in the Magistrates’ Court.  4. In the circumstances, the magistrate did not refuse to exercise his power to control the processes in his court in the interests of justice and the exercise of any discretion to hear from Mr McDonald did not miscarry.  5. There was no basis upon which an allegation of actual bias could have been made out based on what occurred at the hearing in the Magistrates’ Court. Furthermore, a fair-minded lay observer would not have apprehended that the magistrate might not have brought an impartial mind to the resolution of that question or to the adjudication of the civil claim brought by W.  6. In relation to the order for costs against W., although the amount of $1,800 awarded for costs thrown away seemed high, there was no evidence to suggest that those were not the actual costs or expenses incurred by the second respondent. There was no reason to conclude that in making an order compensating the defendant for his costs thrown away as a result of the adjournment, the magistrate applied the wrong principle, took into account an irrelevant consideration, failed to take into account a relevant consideration, or made a decision that was so unreasonable no reasonable decision-maker could have made it. |
| **33** | **Drink/driving – whether breath analysing instrument in proper working order**  In *Wilson v County Court of Victoria and Anor (No 2)* MC33/13, an appeal was heard by Emerton J in respect of the finding of a drink/driving charge proved by a County Court judge. HELD: Application for review dismissed. 1. The circumstances of giving the breath sample were such that it was reasonable to assume that Mr Wilson would say something about having suffered from a bout of reflux while giving the sample. Mr Wilson had just finished answering a series of questions that were plainly directed to ensuring that he gave a readable and reliable sample. On his own evidence, there was about a minute between the time that he finished giving the sample and the time that he was informed about the reading and cautioned. In those circumstances, it was not a breach of his right to silence to call into question Mr Wilson’s credibility on the basis that he said nothing about belching and made no complaint about the eruption of his condition at the time of testing.  2. In the circumstances described, there was no interference with Mr Wilson’s right to silence. The judge commented that his conduct at the time of giving the sample was not consistent with the evidence that he gave at trial about suffering from heartburn and belching. This was part of her Honour’s function in assessing his evidence.  3. Assuming that the defence under s49(4) was capable of being made out if Mr Wilson belched into the instrument, the onus lay on Mr Wilson to satisfy the court that he belched into the breath analysing instrument so as to cause the instrument not to be ‘in proper working order’. On the evidence before the County Court about how the breath analysing instrument operated and its capacity to detect mouth alcohol, Mr Wilson had to satisfy the court that he belched into the instrument at a particular point in time. In the circumstances, the timing of the belch (and not merely the fact of the belch) was important to making out his defence.  4. Having regard to the difficulties discerning exactly what Mr Wilson was describing from time to time, it was open to the judge to find that Mr Wilson did not give a consistent account of when he belched. There was evidence that Mr Wilson told Professor Hebbard in 2004 that he could not remember when he belched into the instrument, although Professor Hebbard said that he did not ask Mr Wilson about regurgitation. Mr Wilson’s evidence in chief before the judge was that he belched at the end of the test, but when taken by the prosecutor to the evidence he gave in the first County Court appeal, Mr Wilson said there were in fact two incidents of belching.  5. It was open to the judge to find that Mr Wilson gave inconsistent evidence about when he belched and to find the charge proved. |
| **34** | **Refusal to allow blood sample to be taken**  In *DPP v Dover and The County Court of Victoria* MC34/2013, a conviction was imposed upon a driver who was charged with refusing to allow a doctor to take a blood sample. The defendant sustained a severe head injury whilst driving. The question arose as to whether liability attached for an act that was not voluntary. The Court of Appeal (Maxwell P, Tate JA and Garde AJA:  HELD: Appeal dismissed.  1. The authorities establish, and it is consonant with principle, that an accused person is not guilty of a crime if the deed which would constitute it was not done in the exercise of a will to act.  *Ryan v R* [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488;  *Kroon v R* (1990) 55 SASR 476; (1990) 12 MVR 483; (1990) 52 A Crim R 15; and  *Edwards v Macrae* (1991) 14 MVR 193, followed.  *Wallin v Curtain* (1998) 27 MVR 356; (1998) 100 A Crim R 506; and  *Hammond v Lavender* (1976) 11 ALR 371; (1976) 50 ALJR 728, considered.  2. Section 56(2) of the *Road Safety Act* 1986 ('Act') imposes a positive obligation to allow the taking of a blood sample and it does not in its terms specify whether a contravention involves a ‘failure to allow’ or a ‘refusal to allow’.  3. The DPP was unable in this appeal to demonstrate that the presumption that the criminal law only punished conduct which was voluntary had been displaced in the context of s56(2) of the Act. To ‘allow’, in the context of the section, meant to ‘permit’, and it necessarily involved a person acting consciously and voluntarily. The Parliament has not made manifestly clear an intention to override the strong and long-established presumption of voluntariness in relation to criminal offences.  4. The presence of the exception in sub-s(5), which provided that a person is deemed to allow the taking of blood if unconscious or unable to communicate, reinforced this point: it was because the person was incapable of conscious or voluntary action that he or she must have been deemed to allow the taking of blood in order to avoid any legal consequences which might accrue to the doctor for taking a person’s blood in those circumstances. This subsection provided an exception to the general rule that, in this context ‘a choice was presented’ — the person may, consciously and voluntarily, elect to allow the taking of a blood sample or refuse to allow the doctor to take a sample.  5. Accordingly, the appeal judge was correct in concluding that voluntariness was an element of the offence created by s56(2) which, if raised as a fact in issue by the defence, had to be established beyond reasonable doubt by the prosecution. |
| **35** | **Drink/driving – whether drive in charge of vehicle**  In *Halley v Kershaw* MC35/2013, the driver of a motor vehicle was found slumped over the steering wheel of his motor vehicle with the engine running. The Magistrate found the drink/driving charges proved.  HELD: Appeal allowed. Magistrate's order set aside and the charges dismissed.  1. The terms of s48(1)(b) of the Act are clear and unequivocal. By its express terms, s48(1)(b) specifically provides that, for the purposes of Part 5 of the Act, a person is not to be taken to be in charge of a vehicle unless that person is a person to whom sub-paragraphs (a) to (d) of s3AA applies. There is no warrant for construing s48(1)(b) other than according to its plain terms.  2. In determining whether the Magistrate was satisfied that the appellant was ‘in charge of’ the vehicle for the purposes of s49(1)(b) of the Act, the magistrate was obliged to, but did not, consider whether he was satisfied that the case came within one of the four categories of circumstances specified in sub-paragraphs (a) to (d) of s3AA(1) of the Act. Instead of doing so, the magistrate considered that he was not bound to determine whether the case fell within one of those four categories, but, rather, he concluded that the appellant was ‘in charge of’ the vehicle because, when he woke up, he was in the driver’s seat, with the engine running. That conclusion did not, alone and without more, bring the case within any of the categories specified in subparagraph (a) to (d) of s3AA(1). In that way, with respect, the magistrate made an error of law.  3. The Magistrate did not make any finding whether the police informant, at the relevant time, believed that the appellant intended to drive the vehicle, and, further, made no finding as to whether there were reasonable grounds for any such belief, if it was so held by the police informant.  4. Further, the police informant did not give any express evidence as to his belief as to that matter, and as to any grounds upon which he might have held such a belief. The principles relating to the proof of those matters have been discussed in a number of authorities.  *DPP v Farmer* [2010] VSC 343; (2010) 56 MVR 137, referred to.  5. At most the evidence, by the informant, as to the requisite belief, was ambiguous. On the view most favourable to the informant, the evidence was not sufficiently clear and unequivocal to enable a conclusion that the Magistrate was bound to conclude that the informant held the belief, on reasonable grounds, that the appellant was then intending to drive his vehicle.  6. In those circumstances, the conviction should not stand. The magistrate having reached the conclusion on the basis of an erroneous proposition of law, it followed that the conviction was quashed. |
| **36** | **Speeding charge – Evidence of speed detector inadequate**  In *Challis v Williams* MC36/13, an excessive speeding charge proceeded by way of preliminary brief. The brief did not contain a certificate to the effect that the speed detector device had been tested and sealed within 12 months prior to its use. The charge was found proved  HELD: Appeal allowed and conviction quashed.  1. The evidence relied on by the prosecution would have been admissible if there had also been proof that the device been tested and sealed in the prescribed manner under r45 of the *Road Safety (General) Regulations* 2009, that is, within 12 months prior to its use.  2. The preliminary brief contained only a certificate to the effect that the device had been tested and sealed in accordance with the Regulations on 11 July 2012, one month after the date of the alleged offence on 15 June 2012.  3. In the circumstances the Magistrate could not have been satisfied beyond reasonable doubt that the appellant was travelling 45 kilometres per hour over the applicable 80 kilometres per hour speed limit on the Maroondah Highway at the point at which he was intercepted. The use of the summary procedure in the absence of the defendant did not entitle the prosecution to obtain a conviction without proper proof of the elements of the charge.  *Hannon v Norman* [2006] VSC 228; (2006) 45 MVR 520, applied. |
| **37** | **Costs on dismissal – order for “reasonable costs”**  In *Paper Australia Pty Ltd v Victorian WorkCover Authority* MC37/13, a Magistrate ordered that the unsuccessful party pay reasonable costs but made no order as to the method or basis on which the costs would be calculated.  HELD: The applicant's entitlement to costs be assessed on the current Supreme Court scale for the work performed.  1. The authorities make it clear that while a successful defendant should not generally be out of pocket as a result of being required to defend the proceeding, this does not provide a “blank cheque” to a defendant to run up legal costs unreasonably, secure in the knowledge that if they are successful they are fully indemnified for costs. The touchstone is one of reasonableness.  *Brown v Glen Eira City Council* [2012] VSC 198; MC 18/2012, applied.  2. The order made by the Magistrate was for "reasonable costs", not an order for indemnity costs, or all costs, or some other formulation.  3. Given that the matter was a serious one with serious financial and reputational consequences, the current Supreme Court scale was the appropriate basis for recovery of costs. |
| **39** | **Bail conditions in relation to serious charges**  In *DPP v Basic* MC39/13, a Magistrate fixed bail with reporting conditions to a Police Station three times per week but suspended those conditions to allow the accused to attend a family wedding in Croatia. Upon appeal:  HELD: Appeal allowed. Magistrate's bail order set aside. Accused released on different conditions not including travel outside Australia.  1. The charges the accused faced were serious ones and if convicted, there was a real prospect that he would be sentenced to a not insignificant term of imprisonment.  2. If the accused was permitted to travel to Croatia, then, notwithstanding the fact that he had previously answered his bail and complied with bail conditions, there was a not insignificant risk that he might not answer bail in respect of the charges with which he had been committed for trial. Further, the material disclosed that attempting to extradite the respondent from Croatia might be problematic.  3. Having regard to the seriousness of the charges upon which the accused had been committed, the Magistrate correctly ordered reporting to the police three times a week and the surrendering of the respondent’s passport. This was not a case to then permit the accused to travel out of Australia and away from the supervision entailed in the reporting condition. The order made by the Magistrate permitting this to occur was, in the language of the authorities in this area, manifestly the wrong order to make. |
| **39** | **Accident compensation – claimant’s claim refused**  In *DiNatale v Sweeney Research* MC39/13, a Magistrate refused a claimant’s claim for compensation where the claimant stated that she could perform all of the relevant duties and cope with all identified demands. Upon appeal:  HELD: Appeal dismissed.  1. During the cross-examination of the claimant, counsel for the respondent put to the claimant each of the identified duties and demands of an inquiry officer. The effect of the cross-examination was that the claimant agreed that she could perform all of the relevant duties and cope with all the identified demands.  2. While the claimant was cross-examined about the “physical/psychological demands” associated with the position of an inquiry officer, no questions on this point were asked of the claimant's general practitioner Dr Navani. That said, it was difficult to see, in the light of Dr Navani’s evidence, how he could have expressed an opinion as to sitting and standing at times, or working within timeframes and meeting deadlines, that was inconsistent with the claimant's evidence. Certainly, there was no re-examination on this issue by counsel for the claimant at trial; nor was any submission made by counsel for the claimant below that the respondent’s counsel had failed to put any relevant matters to Dr Navani.  3. The Magistrate was entitled, on the evidence, to accept that the position of inquiry officer existed and was available to the claimant. Further, his Honour was entitled to conclude that the duties of that position were duties, on the evidence, which could be performed by the claimant. Indeed, the ability of the claimant to perform the duties of an inquiry officer was accepted by the claimant during her cross-examination.  4. The circumstances of this case did not require the Magistrate to set out and deal with each line in the tendered medical reports that might be capable of supporting the general proposition that the claimant had (or has) some relevant incapacity for work. The Magistrate carefully set out significant parts of the relevant evidence. Having done so, there was no doubt that his Honour accepted that the claimant was able to perform the identified tasks of an inquiry officer. Acceptance of this proposition mandated the dismissal of the claimant’s proceeding.  5. It is a rare case in which it cannot be said that a court could have said more in its reasons for arriving at a particular conclusion. However, that was not the test. The question was whether the reasons adequately disclosed a path of reasoning enabling the Court on appeal and the parties to know why the particular result was reached. The Magistrate’s reasons in this case satisfied that test. |
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