BUNNING v CROSS

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Admissibility of Unlawfully Obtained evidence

1. Summary of Principle

(a) Per Nathan J:

> "A further development in this area of the law concerning discretionary exclusion, flows from the decisions of the High Court in *R v Ireland* [1970] HCA 21; [1970] 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, affirmed in *Bunning v Cross* [1978] HCA 22; [1978] 141 CLR 54, [1978] 19 ALR 641; 52 ALJR 561, and *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15. The first two of these cases concern themselves with the admissibility of "real" evidence and the last confirmed the application of this form of discretion to confessional statements. It is a more general discretion to exclude evidence of relevant facts ascertained or produced by improper or unlawful conduct by those whose task it is to uphold the law and the rationale of this principle is said to be found in considerations of public policy, namely, the undesirability that such conduct should be encouraged, either by the appearance of judicial approval or toleration of it or by allowing curial advantage to be derived from it. (See the comments of Deane J in *Cleland v R* at p23)."

Per Nathan J in *R v Larson & Lee* [1984] VicRp 45; [1984] VR 559; noted 9 Crim LJ 56; MC 40/1984, 7 November 1983.

(b) Per the Court:

> "The rule in [*Bunning v Cross*], as Dawson J pointed out in *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1 at p34; 43 ALR 619; (1983) 57 ALJR 15.
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> > "posits an objective test, concerned not so much with the position of an accused individual but rather with whether the illegal or improper conduct complained of in a particular case is of sufficient seriousness or frequency of occurrence as to warrant sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."

Per Young CJ, Fullagar and JD Phillips JJ in *R v Pollard* [1991] VicSC 499; (1991) 56 A Crim R 171; MC 06/1992, 20 September 1991.

(c) Per the Court:

> "17. Both at trial and in this Court the parties proceeded on the basis that the discretionary decision required by s138 did not essentially differ from that at common law save that s138 places the onus upon the prosecution to establish that the evidence should be admitted notwithstanding the impropriety or contravention. The qualified proscription in s138(1) that 'the evidence is not to be admitted unless' indicates the importance of according appropriate weight to the effect of any impropriety or unlawfulness. The exercise of the discretion calls for the balancing exercise to be undertaken that is discussed in cases such as *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and *Ridgeway v The Queen* [1995] HCA 66; (1995) 184 CLR 19; (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1.
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> 18. The discretionary judgment called for does not involve a simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, namely, the public interest in admitting reliable and probative evidence so as to secure the conviction of the guilty and the public interest in vindicating individual rights and deterring misconduct and maintaining the legitimacy of the system of criminal justice. The trial judge was right to emphasise as a relevant consideration the undesirable effect of curial approval being given to the unlawful conduct of those whose duty it is to enforce the law. In doing so he was drawing upon the implied power of the courts to protect the integrity of the judicial process."

Per Warren CJ, Buchanan and Redlich JJA in *DPP v Marijancevic & Ors* [2011] VSCA 355; MC 39/2011, 11 November 2011.

2. *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561

Section 63(1) of the *Road Traffic Act* 1974 (WA) made it an offence for which the offender could be arrested without warrant for a person to drive or attempt to drive a motor vehicle while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle. Sub-section (5) deemed a person who had at the time of an alleged offence against s63 a percentage of alcohol in his blood of or exceeding 0.15 per cent to have been under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle at the time of the alleged offence. Section 66(1) authorized a patrolman to require a person to provide a breath sample for a preliminary test where he had reasonable grounds to believe that a certain state of affairs existed. Sub-section (2) provided that if it appeared to the patrolman that the preliminary test indicated that the blood contained 0.08 per cent or more of alcohol or if the patrolman had reasonable grounds to believe that a person had committed an offence against s63

by reason of his being under the influence of alcohol, he might require that person to accompany him to a particular place and provide a breath or blood sample for analysis. Section 70 made evidence of breath and blood samples so obtained admissible in proceedings for an offence against s63.

The driver of a motor car on a public highway was stopped by a patrolman who had seen the car moving on an erratic course and at an excessive speed. The driver staggered as he stepped out of the car. The patrolman asked whether he had been drinking. He replied that he had had about three glasses of beer. Without requiring the driver to undergo a preliminary breath test the patrolman asked him to accompany him to an office of the traffic authority to provide a breath sample for breathalyzer analysis. A breathalyzer test was administered which revealed 0.19 per cent concentration of alcohol. The driver was charged with a breach of s63(1). The Magistrate rejected the evidence resulting from the breathalyzer test as inadmissible and dismissed the charge. The Magistrate found that the patrolman had not had a reasonable suspicion that the driver was under the influence of alcohol so as to be incapable of driving a car. Hence the breathalyzer evidence had been obtained unlawfully and was inadmissible on that ground.

Upon review, a judge of the Supreme Court held that the Magistrate had erred in rejecting the breathalyzer test evidence on the ground stated and remitted the case with a direction that the Magistrate should exercise his discretion whether or not to admit the evidence because of the manner in which it had been obtained. When the complaint was heard again the Magistrate rejected the evidence on the ground that he considered the circumstances in which it had been obtained to be unfair to the driver. Upon review before the Full Court of the Supreme Court it was held that the Magistrate had misdirected himself upon the criteria by which admissibility should be determined and that he had wrongly excluded the evidence. The case was again remitted to the Magistrate with directions requiring him to admit the result of the breathalyzer test in evidence. Upon appeal by the driver from the decision of the Full Court.

HELD: Decision of the Supreme Court of Western Australia (Full Court) affirmed.
Per Barwick CJ, Stephen, Jacobs and Aickin JJ, Murphy J dissenting: The evidence of the breathalyzer was admissible.

Per Barwick CJ, Stephen and Aickin JJ: The considerations affecting the reception of evidence obtained in contravention of requirements of law were not offended by admitting the evidence: the unlawful conduct of the patrolman had resulted from a mistake, not from deliberate or reckless disregard of the law. Further, the nature of the illegality had not affected the cogency of the evidence, cogency being a factor in determining the admissibility of evidence obtained illegally where the illegality arises only from mistake.

Per Jacobs J: The evidence was voluntary and thus had been obtained lawfully.

R v Ireland [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, applied.

Kuruma v R (1955) AC 197; [1955] 1 All ER 236;

Spicer v Holt (1977) AC 987; [1976] 3 All ER 71; (1976) 3 WLR 398; and

Jeffrey v Black (1978) QB 490; [1978] 1 All ER 555; [1977] 3 WLR 895; 66 Cr App R 81, considered.

Per Barwick CJ:

> "... 16. The question is whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or into the hands of the Crown that, notwithstanding its admissibility and cogency, it should be rejected. There are other conditions in which admissible evidence may be excluded by an exercise of judicial discretion: for example, where a comparison of the smallness of the probative value of the evidence with its considerable prejudice to the fair trial of the matter justifies its exclusion. But no such considerations arise in this case. Undoubtedly, the result of the test was relevant to the charge brought under s63(1) or under s64(1). It establishes the latter and is cogent in relation to guilt under the former.
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> 17. This question of the competition of the public interest in conviction with the unfairness to the applicant in connexion with the taking of the test, the magistrate did not consider. If he had, the only conclusion to which, in my opinion, he could properly have come, was that there was no unfairness to the applicant in the circumstances and manner of the obtaining of the evidence as to the alcoholic content of his blood. There was nothing whatever to out-balance the public interest in the enforcement of the law.
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> 18. I have had the advantage of reading the reasons for judgment prepared by my brothers Stephen and Aickin. I agree entirely with their observations on the proper principles to be followed in exercising a discretion to exclude admissible evidence because of the circumstances or manner in which it

was obtained or came into existence. I also agree with their conclusion as to the impropriety of the magistrate's exercise of discretion.

19. The remaining question is whether the Full Court was correct in remitting the case without a specific direction to convict the applicant. The Court, in my opinion, erred in not doing so. There remained, in my opinion, no room for the exercise of any discretion to reject the evidence. In remitting the case to the magistrate, the Full Court should have directed him to convict the applicant and to impose an appropriate penalty.

20. I would grant special leave to appeal, vary the order of the Full Court by adding a direction to convict, and dismiss the appeal."

Per Barwick CJ in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; MC 55/1980, 14 June 1978.

Per Stephen and Aickin JJ:

"... 22. Despite his Worship's citation of the relevant passage from the judgment of the Chief Justice in *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 we do not understand his discretion as in fact having been exercised by reference to the principles there expressed. The Chief Justice there said (1970) 126 CLR at p335:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

That statement represents the law in Australia; it was concurred in by all other members of the Court in *R v Ireland* and has since been applied in a number of Australian cases. Its concluding words echo the sentiments expressed long ago by Knight Bruce VC when, in a different yet relevant context, he said (*Pearse v Pearse* [1846] EngR 1195; 1 De G & Sm 12; 63 ER 950 at p957):

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, . . . Truth, like all other goods things, may be loved unwisely – may be pursued too keenly – may cost too much."

27. The contrast between these statements of principle and that enunciated in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 becomes apparent as soon as the objects sought to be attained by the exercise of the discretion, as stated in the judgment of Barwick CJ in *Ireland's Case* [1970] HCA 21; (1970) 126 CLR at p335; [1970] ALR 727; (1970) 44 ALJR 263, are examined. What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighting against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.

32. If, then, for Australia the law on this topic is as stated in *Ireland's Case* and affirmed in *Merchant v R* [1971] HCA 22; (1971) 126 CLR 414, at pp417-418; [1971] ALR 736; 45 ALJR 310, and if, accordingly, it is by reference to large matters of public policy rather than solely to considerations of fairness to the accused that the discretion here in question is to be exercised, it becomes necessary to state, with such precision as the subject will allow, criteria upon which this discretion is to be exercised. This cannot, we think, be done in the abstract but only by reference to the case in hand. Otherwise the exercise of judicial discretion may become fettered by rules, seemingly apt enough when first conceived but inappropriate to all the varied circumstances with which courts will be confronted in the future.

36. The first material fact in the present case, once the unlawfulness involved in the obtaining of the "breathalyzer" test results is noted, is that there is here no suggestion that the unlawfulness was other than the result of a mistaken belief on the part of police officers that, without resort to an "on the spot" "alcotest", what they had observed of the appellant entitled them to do what they did.

The magistrate himself described what occurred as an unconscious trick, a phrase which, whatever its precise meaning, is at least inconsistent with any conscious appreciation by the police that they were acting unlawfully. This impression is consistent with the evidence as a whole; no deliberate disregard of the law appears to have been involved. The police officers' erroneous conclusion that the appellant's behaviour demonstrated an incapacity to exercise proper control of his car may well have been much influenced by what they observed of his staggering gait. Unlike the magistrate, they were unaware that the appellant suffered from a chronic condition of his knee joints which could, apparently, affect his gait. If the unlawfulness was merely the result of a perhaps understandably mistaken assessment by the police of the inferences to be drawn from what they observed of the appellant's conduct this must be of significance in any exercise of discretion. Although such errors are not to be encouraged by the courts they are relatively remote from the real evil, a deliberate or reckless disregard of the law by those whose duty it is to enforce it.

37. The second matter to be noted is that the nature of the illegality does not in this case affect the cogency of the evidence so obtained. Indeed the situation is unusual in that the evidence, if admitted, is conclusive not of what it demonstrates itself but of guilt of the statutory offence of driving while under the influence of alcohol to an extent rendering him incapable of having proper control of his vehicle.

38. To treat cogency of evidence as a factor favouring admission, where the illegality in obtaining it has been either deliberate or reckless, may serve to foster the quite erroneous view that if such evidence be but damning enough that will of itself suffice to atone for the illegality involved in procuring it. For this reason cogency should, generally, be allowed to play no part in the exercise of discretion where the illegality involved in procuring it is intentional or reckless. To this there will no doubt be exceptions: for example where the evidence is both vital to conviction and is of a perishable or evanescent nature, so that if there be any delay in securing it, it will have ceased to exist.

39. Where, as here, the illegality arises only from mistake, and is neither deliberate nor reckless, cogency is one of the factors to which regard should be had. It bears upon one of the competing policy considerations, the desirability of bringing wrongdoers to conviction. If other equally cogent evidence, untainted by any illegality, is available to the prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker. This is not such a case, due to the mistaken reliance of the police, when they first intercepted the applicant, upon what they thought to be their powers founded upon s66(2)(c) of the Act.

40. A third consideration may in some cases arise, namely the ease with which the law might have been complied with in procuring the evidence in question. A deliberate "cutting of corners" would tend against the admissibility of evidence illegally obtained. However, in the circumstances of the present case, the fact that the appellant was unlawfully required to do what the police could easily have lawfully required him to do, had they troubled to administer an "alcotest" at the roadside, has little significance. There seems no doubt that such a test would have proved positive, thus entitling them to take the appellant to a police station and there undergo a "breathalyzer" test. Although ease of compliance with the law may sometimes be a point against admission of evidence obtained in disregard of the law, the foregoing, together with the fact that the course taken by the police may well have been the result of their understandably mistaken assessment of the condition of the applicant, leads us to conclude that it is here a wholly equivocal factor.

41. A fourth and important factor is the nature of the offence charged. While it is not one of the most serious crimes it is one with which Australian legislatures have been much concerned in recent years and the commission of which may place in jeopardy the lives of other users of the highway who quite innocently use it for their lawful purposes. Some examination of the comparative seriousness of the offence and of the unlawful conduct of the law enforcement authority is an element in the process required by *Ireland's Case* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.

42. Finally it is no doubt a consideration that an examination of the legislation suggests that there was a quite deliberate intent on the part of the legislature narrowly to restrict the police in their power to require a motorist to attend a police station and there undergo a "breathalyzer" test. This last factor is, of course, one favouring rejection of the evidence. However it is to be noted that by the terms of s66(1) the legislation places relatively little restraint upon "on the spot" breath testing of motorists by means of an "alcotest" machine. It is essentially the interference with personal liberty involved in being required to attend a police station for breath testing, rather than the breath testing itself (albeit by means of a more sophisticated appliance), that must here enter into the discretionary scales.

43. The magistrate does not appear to have considered some of the above criteria. He seems to have much relied upon what he regarded, we think erroneously, as the "inherent unfairness" of what occurred and to have stressed the prejudicial nature of the evidence, which was only prejudicial in the sense that it was by statute made conclusive of the guilt of the appellant. He also does not

seem directly to have accorded any weight to the public interest in bringing to conviction those who commit criminal offences.

44. In the end we believe that the balance of considerations must come down in favour of the admission of the evidence. We have earlier stated why, in our view, his Worship's existing exercise of discretion cannot stand. There remains the question whether this Court should now itself exercise the discretion or rather have the case once more remitted to the magistrate for him to exercise anew his discretion in accordance with law.

45. We have concluded that the first of these courses should be followed. The discretion here in question is of an unusual character and arises in quite special circumstances. It is not at all such a discretion as arises when the specific function of a primary judge is to make a discretionary judgment (see *Mace v Murray* [1955] HCA 2; (1955) 92 CLR 370, at pp378, 380) nor does its proper exercise require any further factual investigation (cf. *Pearlow v Pearlow* [1953] HCA 77; (1953) 90 CLR 70, at p83; [1953] ALR 1087). The occasion for its exercise arose only as an incident in the hearing of the charge and then only for the purpose of determining whether evidence otherwise admissible should nevertheless be rejected. Its exercise requires no new evaluation of facts but rather the adoption of the facts as already found by the magistrate and the assessment of their relative significance against the wider background provided by those public interests to which we have already adverted. Such a process is not one necessarily to be undertaken by the tribunal of first instance: it is not in any ordinary sense concerned with fact finding or the evaluation of the significance of particular testimony. There appears to us to exist no want of power on the part of this Court preventing it from an exercise of this discretion – see *Justices Act* 1902 (WA), as amended, s205. It is, then, for these reasons that we think it proper in the present case to set aside the magistrate's exercise of discretion and, in its stead, for this Court to exercise the discretion in a contrary sense. In our judgment the evidence should have been received. The case should be remitted to the magistrate with a direction that the appellant be convicted, a course which the magistrate had indicated he would have been obliged to follow had the evidence of the "breathalyzer" test been received in evidence.

46. The proper order would be to dismiss the appeal but to vary the order of the Full Court by substituting for par. 3 of that order the following: "Matter be remitted to the Court of Petty Sessions with a direction that the respondent (defendant) be convicted and that such Court consider the question of penalty and costs", leaving the balance of the order to stand. We think that in the unusual circumstances there should be no order as to costs on the appeal to this Court."

Per Stephen and Aickin JJ (Barwick CJ agreeing) in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; MC 55/1980, 14 June 1978.

3. Tape recording of telephone conversation by apparatus fitted in receiver

Per Cosgrove J:

"... The question remains of the exercise of the court's discretion to exclude evidence. If the tapes show forth, as the Crown claims they do, an act or acts of blackmail in the process of being committed, then the reception into evidence of those tapes and the playing of them to the jury cannot be said to be unfair to the accused. Nor can it be said that they have little probative value. The only ground, then, upon which the court might exercise its discretion is the large question of public policy raised in *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, and *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. On that question, the following points may be noted:

1. The tapes are the record of the very acts which the Crown designates as criminal.
2. Mr Hill, who activated the recorder on each occasion, had no intention of committing an illegal act.
3. Sergeant MacDonald has not been shown to have any such intention.
4. Sergeant McCreadie suspected that there might be some claim that the act of recording was illegal, but he regarded it as a moot point, the resolution of which should not delay police intervention. In this, he was, in my opinion, justified.
5. The objects of the recording process were (a) to prevent the successful completion of the blackmail; (b) to apprehend the criminals and more remotely, (c) to provide evidence of guilt.
6. That the evidence is cogent is not disputed.
7. The crime charged is serious.
8. The legislature did intend narrowly to restrict the police, but provided for Telecom to supply appropriate apparatus without apparent restriction. It is the use of the apparatus *without authority* which is aimed at. In summary, the illegality in this case was not intentional or reckless, (*Bunning v Cross*, (*supra*, CLR p79; ALR p662)). The acts of the police and Mr Hill involved "no overt defiance of the will of the legislature or calculated disregard of the common law". The reception of the evidence does not amount to the condonation or approval of deliberate breaches of the law by the police, and "does not demean the Court as a tribunal whose concern is in upholding the law. The tapes should not be excluded."

Per Cosgrove J in *R v Migliorini & Ors* [1981] TASRp 8; [1981] Tas R 80; (1981) 53 FLR 221; (1981) 4 A Crim R 458; (1981) 38 ALR 356; MC 36/1982, 3 August 1981.

4. Drink/driving – preliminary breath test conducted – result "indicated the possible presence of alcohol" or "may be over .05 Per cent" – requisite opinion not affirmatively proved – whether evidence of full breath test illegally obtained

Whilst driving a motor car, L. collided with a light pole. When interviewed later he said he had consumed "heaps" of alcohol over a period of approx. 9 hours. L. underwent a preliminary breath test the result of which (as stated by S., a police officer, upon the subsequent hearing) "indicated the possible presence of alcohol" and "may be over .05 per cent." The result of the full breath test was .185 blood/alcohol concentration. At the hearing, the magistrate upheld a 'no case' submission and dismissed the charge on the basis that S. had not held the opinion as required by s55(1)(a) of the *Road Safety Act* 1986 ('Act') and accordingly, the evidence of the result of the full breath test was unlawfully obtained and thereby inadmissible. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further hearing.
The word "indicates" in s55(1)(a) of the Act means "suggests" and accordingly, it was not necessary that the preliminary breath test establish or prove positively that the driver's blood contained alcohol in excess of the prescribed concentration. In any event, whilst there may have been some doubt as to whether the requisite intention had been formed, there was no evidence to show that the police officer did not hold it. However, even if it were said that the requisite opinion was not held and the result of the breath test was illegally obtained, it was not open to the magistrate (having regard to *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and the whole of the evidence) to exclude the result of the full breath test.

Hunter v Pearce [1982] VicSC 164; MC 43/1982, Vic.Sup.Ct., 12 May 1982, followed.

Per Brooking J (Fullagar and Marks JJ agreeing):

> "... After the close of the prosecution case, counsel for the defendant submitted that the charge should be dismissed on the basis that s55(1) of the *Road Safety Act* 1986 authorised a member of the police force to require the furnishing of a sample of breath only where the preliminary breath test had in the opinion of the officer making it indicated that the blood contained alcohol in excess of the prescribed concentration. It was not shown, he argued, that the necessary opinion had been formed. The learned Magistrate upheld this submission and dismissed the charge, being of the view that the informant (who had administered the preliminary test) had not held the opinion required by paragraph (a) of s55(1) and that the evidence of the breath analysis made at the police station should not be admitted since it had been unlawfully obtained. Reference was made to *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
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> ... I therefore turn to consider whether the learned Magistrate erred in excluding the evidence of the breath test at the police station. I am afraid it is plain that he did. It may be that there was evidence that the informant held the opinion referred to in paragraph (a) of s55(1) of the *Road Safety Act* 1986; I would adopt the view of Starke J that in that paragraph "indicates" means "suggests". (*Hunter v Pearce* [1982] VicSC 164, unreported, 12th May 1982.) Be that as it may, at worst from the informant's point of view there was a failure on her part to prove affirmatively that she held the requisite opinion. It was not shown that she did not hold it. The evidence of the breath test at the police station was not shown to have been illegally obtained. At best there was doubt as to whether the opinion mentioned in paragraph (a) of s55(1) had been formed. And even if it could have been said that the evidence was in the present case illegally obtained, it was not open to the magistrate, directing himself in accordance with *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 and having regard to the whole of the evidence, to conclude that it was right to exclude the result of the police station breath test."

Per Brooking J (Fullagar and Marks JJ agreeing) in *Stiles v Lamont* [1991] VicSC 495; (1992) 15 MVR 557; MC 13/1992, 3 March 1992.

5. Drink/driving – preliminary breath test conducted – opinion of informant formed – not expressed in same terms as statutory provision

At the hearing of a charge under s49(1)(b) of the *Road Safety Act* 1986 ('Act') the informant gave evidence that as a result of conducting a preliminary breath test with B., he formed the opinion that B. had consumed intoxicating liquor. The informant did not say (as required by s55(1) of the Act) that he formed the opinion that B's blood contained alcohol in excess of the prescribed concentration. The Magistrate admitted into evidence two certificates of the result of full breath tests conducted on B., but upheld a 'no case' submission and dismissed the charge on the ground that the evidence of the certificates was invalid due to the informant's failure to give evidence whether he formed the opinion as required by s55(1) of the Act. Upon appeal—

HELD: Appeal allowed. Dismissal set aside. Remitted for further determination.
(1) If there was an illegality in the way the result of the Breathalyser test was obtained, the

magistrate was required to determine whether the evidence so obtained should be excluded under the *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretion.

Stiles v Lamont [1991] VicSC 495; (1992) 15 MVR 557; MC 13/1992, applied.

(2) As the magistrate failed to exercise such a discretion he was in error in ruling that the evidence of the certificates was invalid and dismissing the charge.

Per Smith J:

> "... In his reasons, the learned Magistrate did not in terms say that the evidence was inadmissible, but said that it and the steps taken in obtaining the breathalyser test result were "invalid". It seems to me that the learned Magistrate was accepting that the evidence was admissible but took the view that he could not act upon it because the failure to comply with the requirements of section 55 rendered it "invalid". In reaching that conclusion it appears to me that the learned magistrate erred.
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> Assuming there was an illegality in obtaining the breathalyser test result, the task for the Magistrate was to determine whether the evidence so obtained should be excluded by him under the *Bunning v Cross* discretion [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; see also *Stiles v Lamont* [1991] VicSC 495; (1992) 15 MVR 557; Full Court Supreme Court 3 March 1992. If it was admissible then he had to consider it. It appears to me that the learned Magistrate applied the wrong test."

Per Smith J in *DPP v Boer* [1992] VicSC 245; (1992) 15 MVR 11; MC 24/1992, 3 June 1992.

6. Drink/driving – no evidence of requisite opinion formed or that driver required to furnish sample of breath

In view of the finding that not all of the relevant requirements of s55(1) of the Act had been satisfied, it was open to the magistrate in the exercise of his discretion to exclude the evidence of the breath test and dismiss the charge.

Per Smith J:

> "... The learned Magistrate's view that it was necessary for the informant to establish compliance with both s53 and s55(1) is supported by a substantial body of authority. The issue was recently considered by Ormiston J in a matter of *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367. His Honour stated (at p6 of the judgment):
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> > "It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1). This is implicit in the judgment of Mason CJ and Toohey J (in which Brennan J concurred) in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, see CLR esp. at pp219, 222 and 223-224, apparently approving what was said by the Full Court *sub nom. Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at p743; (1989) 9 MVR 13.
>
> ... The other basis for the learned Magistrate's decision was the exclusion of the evidence of the breathalyser reading. The appellant argued that the Magistrate purported to exercise a discretion to exclude evidence on the grounds that it would be unfair to admit it against the defendant and that such a discretion applied only to evidence of confessions: *R v Lee* [1950] HCA 25; (1950) 82 CLR 133; [1950] ALR 517; *Cleland v R* [1982] HCA 67; (1982) 151 CLR 1; 43 ALR 619; (1983) 57 ALJR 15. The learned Magistrate did not, however, in my view limit himself to that unfairness discretion. He referred in broad terms to his discretionary powers which included the power to exclude evidence obtained illegally or improperly.
>
> It was open to the learned Magistrate to exercise that discretion on the basis that the requirements of s55(1)(a) had not been satisfied and therefore, whether it was open to him to exclude the evidence on the grounds of unfairness, it was open to him to exclude the evidence in the manner in which he purported to do so. While the appellant has succeeded on the first question the decision of the Magistrate should in any event be upheld because I am satisfied that he found, and it was open to him to find, that not all the relevant requirements of s55(1) of the Act had been satisfied and, therefore, the information had to be dismissed.
>
> He also ruled, and it was open to him to do so, that the evidence of the breathalyser should be excluded in the exercise of his discretion. With that evidence excluded, the informant's case had to fail. For the foregoing reasons, the appeal should therefore be dismissed."

Per Smith J in *DPP v Paul* (1992) 16 MVR 435; MC 02/1993, 18 December 1992.

7. Fingerprints taken from suspect – suspect not informed of certain statutory provisions

(1) Before a court may order non-consensual taking of fingerprints, the suspect must be first informed of certain matters set out in s464L of the *Crimes Act* 1958. If the suspect is not informed of these matters, a police officer is not authorized to make an application to the Court.

(2) Where there was no evidence that a police officer conveyed to a suspect the relevant information under s464L of the Act prior to a court's ordering non-consensual fingerprinting, a Magistrate was not in error in ruling that the fingerprint evidence obtained as a result of the Court's order was inadmissible.

Per Tadgell J:

> "... Third, the government in implementing the general thrust of the Consultative Committee's report must be taken to have intended to create "a self contained code" relating to the taking of fingerprints; see para. 6.51 of the Committee's report. One aspect of that code is the harsh penalty imposed by s464P(1)(a) for transgressions. It would run counter to the purpose of the legislation – as revealed both by its terms and by reference to relevant extraneous material – to except from the purview of s464P(1)(a) breach of s464M(1).
>
> Fourth, because sub-division (30A) is by intent a code, imposing its own penalties for breach of its provisions, it is not helpful to consider its operation by reference to general principles relating to admissibility of unlawfully obtained evidence (eg: *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561) or to principles applicable in the case of warrants issued by courts (eg: *Murphy v R* [1989] HCA 28; (1989) 167 CLR 94; 86 ALR 35; (1989) 63 ALJR 422 at pp427-8; 40 A Crim R 361 per Mason CJ and Toohey J). ..."

Per Tadgell J in *DPP v Morrison* [1993] VicRp 41; [1993] 1 VR 573; MC 07/1993, 18 December 1992.

8. Drink/driving – breath test conducted – person asked by operator whether second test required – told by operator that second test could give higher result – second test declined

(1) The word "advise" in s55(4)(b) of the *Road Safety Act* ('Act') is to be treated as a synonym for "inform" and not "counsel". There is no obligation on an operator to provide a measure of counselling to a person whose breath has been analysed.

(2) Section 58(1) of the Act does not require strict compliance by the operator with the provisions of s55(4). Where evidence was obtained in breach of s55(4), the admissibility of such evidence was a matter for the exercise of the magistrate's discretion.

Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, applied.

(3) Where an operator asked if a person whose breath had been analysed required a second test and said that such a test could give a higher result than the first, the magistrate was in error in dismissing charges under s49(1) of the Act on the ground that the requirements of s55(4)(b) had not been strictly followed.

Per Teague J:

> "I have referred to "the discretions". I refer to the discretion to exclude improperly obtained evidence, and the discretion to exclude unfairly prejudicial evidence. As to the distinction, I refer to the detailed discussion in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, which is a case concerned with breathalyser test evidence. The evidence before me does not include any specific reference by the learned magistrate to the exercise of any discretion or any reference to any decided case. It appears that the learned magistrate adopted the position that there was no scope for his exercising any discretion, and that the effect of a breach of the requirements of s55(4)(b) was that the evidence had to be ruled inadmissible. It appears that he took that position for the reason that s58(1) included the words "subject to compliance with section 55(4)". I say that with some hesitation. Sergeant Norris states in his affidavit that the learned magistrate "expressed the view that Section 58(1) of the Act must be strictly complied with because it interferes with the rights of an individual not to provide a sample of his/her breath and if provisions are not strictly followed the evidence should be rejected". I think it more likely that the view expressed was that s58(1) required that s55(4) be strictly complied with. In either event I consider such a view to be erroneous.
>
> Put shortly, I do not accept that s58(1) is to be construed as if the word "strict" were inserted before "compliance". If that position had been intended, it could readily have been achieved by the insertion

of the word "strict". I do not accept that it is appropriate to take account, as the learned magistrate did, of the legislation's potential for interference with individual rights. *Bunning*, *Nolan v Rhodes* (1982) 32 SASR 207 and *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257 were all cases which highlighted the special character of this, or this kind of, legislation. Where the measures are somewhat drastic in character, there is a special need for taking care to achieve the right kind of balance. Where I differ from the learned magistrate is that I take the view that the consideration of interference with individual rights does operate in other ways such as in relation to the exercise of the discretions as to whether to admit evidence. I do not accept that it operates to justify a construction which effectively removes those discretions.

Sections 464A and the following sections of the *Crimes Act*, to which I have referred above, are concerned with a comparable situation, where the legislation seeks to balance important community interests and important individual rights. In *R v Pollard* [1991] VicSC 499, *R v Shaw* [1991] VicSC 610 and *R v Heaney* [1992] VicRp 85; [1992] 2 VR 531; (1992) 61 A Crim R 241 the courts were addressing a comparable dilemma of whether evidence obtained in breach of s464C would have to be ruled inadmissible, and concluded that it was a matter for the exercise of the discretion of the trial judge. I do not rely on any reasoning from those authorities, but I do reach the same conclusion based on my assessment of the proper construction to be placed on ss55(4) and 58(1) of the *Road Safety Act*.

It follows that I take the view that the correct legal position is that the conclusion as to whether or not there had been a breach of s55(4)(b) would only be a finding preliminary to the exercise of the learned magistrate's discretions. There was a potential for a degree of unfairness calling for the exercise of the discretion to exclude the evidence. There was also the potential for the exercise of the discretion to admit the evidence even though it had been improperly obtained. I am satisfied that, insofar as the learned magistrate has concluded that the provisions had not been strictly followed on the basis of how he construed the word "advise", he was in error. I am also satisfied that, insofar as the learned magistrate has concluded that evidence had to be ruled inadmissible because he had found that there was a breach of the statutory requirements, he was in error.

I am not satisfied that the consequence of my conclusion that the learned magistrate was in error is that I should determine these matters finally in favour of the appellant. Nor am I satisfied that it is appropriate for me to try to put myself in the shoes of the learned magistrate with a view to avoiding having to remit these matters to him, by making my own determination as to how the discretions should be exercised. I recognise that the result of the remission could well be that both proceedings are dismissed, for example on the basis that in Caddy giving the advice to the respondent that the learned magistrate found that he gave, Caddy could reasonably have been found to have acted unfairly in depriving the respondent of his chance to get a second analysis. However, I consider that the learned magistrate is in a better position to consider all matters relevant to the exercise of the discretions, so that the most satisfactory course is to remit the proceedings for further hearing by him."

Per Teague J in *DPP v Drage* [1993] VicSC 4; (1993) 17 MVR 390; MC 25/1993, 7 January 1993.

9. Drink/driving – police informant no longer in police force at time of hearing – certificate of breath analysis not admitted into evidence – whether magistrate had discretion to exclude certificate on grounds of unfairness

HELD: Appeal allowed.

1. There is a discretion in a criminal case to reject any evidence on the ground that to receive it would be unfair to the accused in the sense that the trial would be unfair. Accordingly, the magistrate had a discretion to exclude from evidence the certificate of analysis of breath issued pursuant to s55(4) of the Act which had been lawfully and properly obtained. Given the existence of the discretion, the question was whether it was properly exercised in the circumstances.

Rozenes v Beljajev [1995] VicRp 34; [1995] 1 VR 533; (1994) 126 ALR 481; 8 VAR 1, applied.

2. The unfairness which the magistrate perceived was not any unfairness in the conduct of the trial itself but rather if the certificate were admitted into evidence M. would be convicted and that would be an unfair result. The admission into evidence of the certificate would have had the effect that the legislation was operating as it was intended to operate and any unfairness to M. was an unfairness intended by the legislation.

3. The magistrate acted on wrong principles, was guided by irrelevant matters and did not take into account the express purpose of the legislation. For those reasons, the magistrate erred in the exercise of the magistrate's discretion.

Per Balmford J:

"... **Question 1**

12. In *Rozenes v Beljajev* [1995] VicRp 34; [1995] 1 VR 533 at 549; (1994) 126 ALR 481; 8 VAR 1, Brooking, McDonald and Hansen JJ said:

> The proposition must be accepted that there is a discretion in a criminal case to reject any evidence, whether or not a confession, on the ground that to receive it would be unfair to the accused in the sense that the trial would be unfair. So much must be accepted both on principle and by reason of the authorities. It would be wrong to regard as exhaustive the two particular discretions (that relating to probative value and prejudicial effect and that established by *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 put forward by the Attorney-General in *R v McLean & Funk* [1991] 1 Qd R 231; (1990) 47 A Crim R 240 as the only discretions available for the exclusion of evidence other than confessional evidence. But while the existence of a residual discretion must be accepted, it is not easy to think of circumstances in which grounds might exist for the exercise of that residual discretion in relation to any evidence — we are not speaking of confessions — which would not bring the case within the more specific principle whereby evidence is not to be admitted where its prejudicial effect is out of proportion to its probative value. (It may be that the admissibility of a written statement and the unavailability of its maker for cross-examination could in an appropriate case be treated as an example of such circumstances: we return to this question later.)

At VR 557 their Honours referred to admissible written statements by deceased makers, and said:

> This ... is not an example of the discretionary rejection of evidence on the ground of its unreliability, for there is no greater than usual danger that the statement is inaccurate. It is the inability to cross-examine that may in all the circumstances of a given case cause the statement to be excluded in the interests of a fair trial. It may be possible to bring the example, as Pattendon would [in *Judicial Discretion and Criminal Litigation 2nd edition*] within the "prejudice outweighing probative value" principle, but we are disposed to think it is better to say that, if such a statement is excluded, this is done to secure a fair trial.

13. In *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 at 77; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, Gaudron J said:

> Another feature attending criminal proceedings and relevant to the grant of a permanent stay thereof is that a trial judge, by reason of the duty to ensure the fairness of a trial, has a number of discretionary powers which may be exercised in the course of a trial, including the power to reject evidence which is technically admissible but which would operate unfairly against the accused. ... The exercise of the power to reject evidence, either alone or in combination with a trial judge's other powers to control criminal proceedings, will often suffice to remedy any feature of the proceedings which might otherwise render them unjust or unfair.

14. On the basis of those passages it would be difficult to maintain that there is not a residual discretion to exclude evidence on the ground that to receive it "would be unfair to the accused in the sense that the trial would be unfair". The answer to the first question accordingly should be Yes.

Question 2

15. Given the existence of that discretion, it is necessary to consider whether it was properly exercised in all the circumstances of this case. In *House v R* [1936] HCA 40; (1936) 55 CLR 499 at 504-5; 9 ABC 117; (1936) 10 ALJR 202, Dixon, Evatt and McTiernan JJ said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

16. To begin with, it should be noted that the court in *Rozenes* gave, as an example of evidence as to which the discretion is available, a written statement the maker of which is unavailable for cross-examination; and that the certificate which the Magistrate excluded in the present case was such a written statement, the person who gave that certificate being unavailable as set out in paragraph 7 above. However, it cannot be said that the Magistrate had, on the basis of the second passage quoted above from *Rozenes*, a discretion to exclude the certificate on that ground. Sub-section 58(2C) provides expressly that the effect of such unavailability is to restore the operation of sub-

section 58(2) as to the admissibility of the certificate and the proof of the matters set out in that sub-section. It cannot be said that the intention of the legislature was, in those circumstances, to confer a discretion to exclude the certificate, when the effect of the unavailability of the maker of the certificate is so precisely set out.

17. That, of course, was not the basis upon which the Magistrate excluded the certificate. There seem to be three matters which he took into account. The first was his finding that the facts of the case were "rather unusual" or "peculiar and particular". The second was his finding that the respondent "had done all the right things at the accident scene". And the third, it would seem from the passages cited above, was a view that the effect conferred upon the certificate by the presumptions set out in paragraph 48(1)(a) (relating to the charge under paragraph 49(1)(b)) and sub-section 48(1A) (relating to the charge under paragraph 49(1)(f)) was unfair to the respondent.

18. There are a number of things which can be said about the exercise of the Magistrate's discretion on those grounds.

1. The unfairness which His Worship perceived was not any unfairness in the conduct of the trial itself, which is the kind of unfairness said in the authorities to ground the discretion; his perception was that if the certificate were admitted the respondent would be convicted and that would be an unfair result.

2. It is not clear to me what he perceived as unusual or peculiar about the facts of the case, unless it was the responsible behaviour of the respondent.

3. He seems to suggest that an accused person who "did all the right things at the accident scene" — that is, complied with the law as to the exchange of names and addresses and generally behaved like a responsible citizen — should be rewarded by an acquittal.

4. The distinction drawn in the passage cited in paragraph 10 above is not clear to me. It does not appear to me that there is any difference between the facts of this case and the situation which His Worship suggests that the legislation was designed to avoid. The respondent went to his home, which was near the accident scene, in the knowledge that the police had been called, and started drinking before the police could test him. His Worship seems to have held the view that the intention of the legislature was to take into account post-accident drinking only where the purpose of that drinking was to obfuscate the result of any breath test; and that the post-accident drinking by the respondent did not have that purpose. There is no material before me to indicate that there was any evidence on that point. Further, I would find it difficult to attribute to the legislature the intention suggested; clearly the legislation could not operate effectively to achieve its purpose without some provisions such as paragraph 48(1)(a) and sub-section 48(1A).

5. The admission into evidence of the certificate would have the effect that the legislation was operating as it was intended to operate; any unfairness to the respondent is an unfairness intended by the legislature and fundamental to the purpose of Part 5 of the Act, as appearing from section 47. The background of the legislation is set out at some length by Gleeson CJ, Gummow, Kirby and Callinan JJ in *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at 155 to 157; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 and need not be repeated here.

19. In *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365, the Court of Appeal was concerned with the purpose of section 55 of the Act. Winneke P, with whom Ormiston and Batt JJ A agreed, said at VR 658-9, after referring to earlier decisions:

> The process of reasoning which seems to underlie those decisions stems not so much from an interpretation of the words "furnish a sample of breath for analysis … under s55(1)" but rather from an assumption that the legislative intent which lies behind s55(1) is to protect the interests of the motorist. This assumption has led the courts to construe more strictly the discretionary powers of "requirement" and to convert them into obligations, as distinct from powers. Thus it is said that the legislative purpose behind s55(1) is not to invest the police with a power to facilitate the objects of the statute, but rather to impose a "duty to inform" the motorist of the reason why his or her liberty is being curtailed: see, for example, *Dalzotto v Lowell* [1992] VicSC 674, above, at 8-9; *McCardy v McCormack* [1994] VicRp 73; [1994] 2 VR 517 at 522-3; (1994) 20 MVR 275.
>
> Of course the investiture of increased police power has, as its necessary corollary, an increased incursion into civil liberties. However, whilst any invasion of personal liberty is bound to provoke disquiet, the courts cannot afford to lose sight of the fact that the undisputed aim of Pt 5 of the Act is to combat and reduce a recognized social evil in a manner which can only be achieved by empowering the police, in the overriding community interest, to intrude upon personal liberties,

albeit not in a necessarily hostile or coercive way. If, as I think, the underlying purpose of s55(1) is to invest the police with facilitative powers in order that these objects can be achieved, it cannot be correct to judicially convert that purpose from "a power to require" into a "duty to inform". Yet, as it seems to me, that is what his Honour has done in these cases by accepting the process of reasoning adopted in *Dalzotto* and *McCardy*.

20. Similarly, in *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27, where the High Court was concerned with a charge under paragraph 49(1)(f) of the Act, Gleeson CJ, Gummow, Kirby and Callinan JJ said at CLR 149-50:

The language of the Act is clear and unambiguous. The duty of a court is to give effect to the purpose of Parliament as expressed in that language. That obligation is not altered because the Act is penal in character.

... even accepting that the offence provided by paragraph (f) is a far-reaching one, it is clearly enacted, as the stated purposes of the Part of the Act in which it appears make plain, to deal with a major social problem. The provision of the offence in such terms is the means by which Parliament has sought to achieve those generally stated purposes, viz to reduce the number of motor vehicle collisions to which alcohol or other drugs are causally related, to reduce the number of drivers whose driving is impaired by such causes and to provide a simple and effective means of establishing the presence in the blood of a driver of more than the legal limit of alcohol.

21. Considering the exercise of the discretion by the Magistrate in the light of the authorities to which I have referred, I am satisfied that he acted on wrong principles, and was guided by irrelevant matters, and did not take into account the express purpose of the legislation. For those reasons, his exercise of the discretion should not be allowed to stand. The answer to the second question must therefore be Yes."

Per Balmford J in *DPP v Murphy* [2000] VSC 458; MC 39/2000, 3 November 2000.

10. Drink/driving – reading 0.074% – Defendant advised by operator not to have a blood test

1. The charge under s49(1)(f) was not a nullity. The omission of the words “after having undergone a preliminary breath test” did not constitute an essential element of the offence so as to require individual particularisation in the charge.

DPP Reference No 2 of 2001 [2001] VSCA 114; (2001) 4 VR 55; (2001) 122 A Crim R 251; (2001) 34 MVR 164; MC 13/2001, followed.

2. The *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretion has a very specific role and justification in the context of broader questions of high public policy. That being so, the provision in s58(2) which renders the certificate conclusive proof of the matters listed, absent the service of a notice requiring the operator to attend court, cannot be taken to exclude the operation of that discretion. Had Parliament intended the exclusion of such a significant discretion, it would have said so expressly. Accordingly, the magistrate had a discretion to exclude the certificate from evidence where no notice under s58(2) had been properly served on the informant.

3. There was a clear nexus between the failure to obtain a blood test and the giving of advice by the operator. There was a possibility that the blood test might have produced a lower reading than the breath analysis thus giving ground for M. to dispute the finding recorded in the certificate. There was no ground on which it could be found that the Magistrate erred in the exercise of the discretion to dismiss the charge.

Per Balmford J:

"... 23. In considering the question now before me, that is, whether the *Bunning v Cross* discretion is available where no notice has been given under section 58(2), it is important to consider the principles justifying the existence of that discretion, as set out in the case itself. Stephen and Aickin JJ, with whom Barwick CJ agreed, cited from *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 the following passage from the judgment of the Chief Justice:

Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in

> the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

Their Honours then continued:

> That statement represents the law in Australia; it was concurred in by all other members of the Court in *R v Ireland* and has since been applied in a number of Australian cases. Its concluding words echo the sentiments expressed long ago by Knight Bruce VC when, in a different yet relevant context, he said (*Pearse v Pearse* [1846] EngR 1195; (1846) 1 De G & Sm 12 [63 ER 950, at p957]):
>
> > The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination, ... Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much.

Their Honours later said at pp74-5:

> What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration.
>
> Since it is with these matters of public policy that the discretionary process called for in *Ireland* is concerned it follows that it will have a more limited sphere of application than has that general discretion to which Lord Widgery refers, which applies in all criminal cases. It applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities (or, as Dixon CJ put it in *Wendo's Case* [1963] HCA 19; (1963) 109 CLR 559 at p562; [1964] ALR 292; 37 ALJR 77, unlawful or improper conduct).

24. The *Bunning v Cross* discretion thus has a very specific role and justification, in the context of "broader questions of high public policy". That being so, I do not consider that the provision in section 58(2) which renders the certificate conclusive proof of the matters listed, absent the service of a notice, can be taken, as Mr Just submitted it could, to exclude the operation of that discretion. Had Parliament intended the exclusion of such a significant discretion, it would, in my view, have said so expressly. On that basis, and relying also on what was said by O'Bryan J in *Connor* [2000] VSC 407; (2000) 32 MVR 479; (2000) 117 A Crim R 319 and the decision in *Nolan v Rhodes* (1982) 32 SASR 207, I find the answer to question (2) to be Yes.

Question (3)

25. The state of the transcript of the hearing before the Magistrate is such that it is not, in my view, possible to say that "it was not suggested that the police had acted unlawfully or improperly". Something to that effect may well have been said which does not appear in the transcript. Accordingly, I do not consider it appropriate that I deal with this question. I note, however, that in *Nolan v Rhodes* Bollen J said of the action of the operator in advising against the taking of the blood test:

> [The operator] was guilty of no unlawful conduct. There was no overt defiance of legislature or common law. He was, however, guilty of relevant unfairness in offering bad advice which had the result which I have mentioned. I think it correct to say … that he overbore the appellant's will. He did it in no sinister, hostile or dishonourable sense, but he did overbear the will of the appellant.

That passage at least indicates the view of His Honour that the action of the operator in giving the advice (see [21] above) was improper.

26. Mr Just pointed out in this context that the giving of the advice not to have a blood test, being the conduct on which the Magistrate relied as the basis for the exercise of the discretion (see [12] above), occurred after the taking of the sample of breath and production of the certificate. That being so, he submitted, there was no nexus between the giving of the advice and the evidence contained in the certificate, and thus it was inappropriate to exclude the certificate from evidence on that basis. However, there was a clear nexus between the failure to obtain a blood test and the giving of

> the advice, and that submission overlooks the possibility that the blood test might have produced a lower reading than the breath analysis, thus giving ground to the respondent to dispute the finding recorded in the certificate."

Per Balmford J in *DPP v Moore* [2002] VSC 29; (2002) 35 MVR 357; (2002) 129 A Crim R 95; MC 03/2002, 27 February 2002.

11. Decision on appeal:

1. Chernov and Eames JJ A, Batt JA dissenting: The public policy discretion discussed in *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 was available to the magistrate and was appropriately applied. Accordingly, it was open to the magistrate to rule that evidence of the breath analysis should be excluded.

2. The Court: The concept underlying the public policy discretion applies when the evidence is the product of unfair and unlawful conduct on the part of the authorities. Its rationale is to prevent the administration of criminal justice from being brought into disrepute. It is a discretion which involves the balancing of two public policy considerations, namely, the public interest in placing all relevant and admissible evidence before the court and the public interest in ensuring that law enforcement officers do not act unlawfully or improperly. Hence, in appropriate cases, courts may exercise the discretion to exclude such evidence if the price of conviction that could be obtained by reason of such evidence, would be "too high".

R v Ireland [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, and

Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, applied.

3. The Court: The general unfairness discretion may be exercised by the court to exclude evidence where it considers that it would be unfair to the accused if it were admitted in the sense that this would or might render the accused's trial unfair. Therefore, this discretion is primarily concerned with circumstances which might produce an unfair trial, carrying the potential for a miscarriage of justice. Although ordinarily there is a significant overlap in the underlying bases for the exercise of one or other of the categories of discretion to exclude evidence, considerations that may move the court to exercise the public policy discretion may not be identical to those which result in the exercise of the general unfairness discretion and *vice versa*. For example, the considerations which underpin the public policy discretion may not be accorded the same weight (and might not be deemed relevant at all) when considering the general unfairness discretion. It would have been appropriate for the magistrate in the present case to have exercised the general unfairness discretion so as to exclude the certificate from evidence. M., having been effectively divested of the opportunity of obtaining a blood test and thereby challenging the accuracy of the breathalyser instrument reading, was deprived of the opportunity of having a trial that was not unfair.

4. Chernov and Eames JJ A: It has been suggested that the public policy discretion had no operation in the present case because the improper conduct of the police officer concerning the oral advice took place temporarily after the certificate was lawfully obtained. However, having regard to the close connection between the breathalyser reading and the circumstances pertaining to the improper conduct the public policy discretion was enlivened. Clearly there is a point where events occurring after the obtaining of evidence could not bear upon the admissibility of that evidence. In the present case there was no reason why the public policy discretion should be unavailable merely because the conduct of the police officer followed immediately after the procuring of evidence rather than preceding it.

Question of Law Reserved (No 1 of 1998) (1998) 70 SASR 281; (1998) 100 A Crim R 281, distinguished;

R v Lobban [2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357, not followed.

Per Chernov JA:

> "42. In the circumstances, I consider that the conduct of the operator in this case, although not unlawful, was improper in the sense that it was, in the circumstances, of sufficient seriousness to warrant "sacrificing the community's desire to see the guilty convicted in order to express disapproval of, and to discourage, the use of unacceptable methods in achieving that end."
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> 43. It was probably because the magistrate concluded that the operator sought to dissuade the respondent from exercising his statutory right to a blood test that she considered that the public policy discretion arose for consideration and she exercised that discretion to exclude the certificate from

evidence. Thus, the questions that must now be addressed are whether the public policy discretion arose for consideration and, if it did, whether there was error in the magistrate's exercise of it.

... 51. In light of these authorities, and given the circumstances of this case, I consider that the public policy discretion arose for consideration and that, in all the circumstances, there was no relevant error on the part of the magistrate in the exercise of it.

... 56. It seems to me, however, that situations such as those in this case and in *French v Scarman* (1979) 20 SASR 333 are altogether different. In this case, there was such a close connection between the breathalyser reading and the circumstances pertaining to the improper conduct that the public policy discretion could be said to have been enlivened. The statutory right given to the respondent by s55(10) of the Act was, as King CJ recognised in *French v Scarman*, closely connected with the obligation to submit to the breathalyser test. Furthermore, the improper behaviour occurred immediately after the breathalyser reading was obtained and it had the *consequence* of enabling the police to rely *only* on the breathalyser certificate in the prosecution of charge 1 and to avoid the prospect of having to lead evidence of blood test results which might have contradicted the reading that was reproduced in the certificate. Moreover, if a blood test had been taken, the respondent might have given notice to Senior Constable Steele pursuant to s58(2) of the Act to attend court in which case, of course, the certificate would not have constituted conclusive proof of the respondent's blood alcohol content.

57. Thus, I remain of the view that, in the circumstances of this particular case, the public policy discretion was enlivened (and, as I have said, the magistrate did not relevantly err in excluding the certificate from the evidence in the exercise of her discretion).

61. If, however, I am wrong in my conclusion that the public policy discretion was available to be exercised by the magistrate, then, as Martin J has made clear in *R v Lobban* [2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357 the interests of the respondent may nevertheless be protected by the general unfairness discretion. In my opinion, it would have been appropriate for the magistrate to have exercised this aspect of the court's discretion so as to exclude the certificate from evidence. The respondent, having been effectively divested of the opportunity of obtaining a blood test and thereby challenging the accuracy of the breathalyser machine reading, was deprived of the opportunity of having a trial that was not unfair. [*R v Rich* [1998] 4 VR 44 at 47; (1997) 98 A Crim R 61 per Brooking JA with whom Winneke P and Buchanan JA agreed. See also *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 56-57; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307, per Deane J; *Dietrich v R* (1992) 177 CLR 292 at 299-300 per Mason CJ and McHugh J; *Azzopardi v R* [2001] HCA 25; (2001) 205 CLR 50 at 105 per McHugh J; (2001) 179 ALR 349; (2001) 75 ALJR 931; (2001) 22 Leg Rep C1; *Victoria Legal Aid v Beljajev* [1998] VSCA 56; [1999] 3 VR 764 at 771-772 per Winneke P; *Bayeh v Attorney-General (NSW)* (1995) 82 A Crim R 270 at 275 per Hunt CJ at CL; *Attorney-General (NSW) v X* [2000] NSWCA 199; (2000) 49 NSWLR 653 at 668-669 per Spigelman CJ, with whom Priestley JA agreed and per Mason P at 699]. In the circumstances, I consider that it would be appropriate to uphold the magistrate's decision on this alternative basis."

Per Eames JA:

"68. In the event that we concluded that the public policy discretion was not available to the magistrate a notice of contention was filed on behalf of the respondent in which it was sought to support her Worship's decision by the application of a general unfairness discretion. Given that the other members of the court disagree on the question whether the *Bunning v Cross* discretion was open to be applied by the magistrate I wish to state my own view on that issue. As will be seen, I agree with Chernov JA that the public policy discretion was available to the magistrate in this case, and was appropriately applied by her.

... 77. In my opinion, the statements of the rationale for the discretion, as emerge from the cases, are broad enough to encompass, at least, conduct such as occurred in this case. It is, with respect, no answer to say, as Martin J did, that the general unfairness discretion was sufficient to protect the interests of the accused. That might or might not be so, but if the public policy discretion is not available then the courts have no way of expressing curial disapproval of such conduct other than to the extent that public policy considerations of the kind discussed in *Bunning v Cross* might incidentally be considered when considering the unfairness discretion. If the conduct, even when strongly disapproved, did not cause the trial of the accused to be unfair then, arguably, there would be no reason for the exclusion of the evidence by application of the unfairness discretion. This point is made more apparent upon closer examination of the differences between the two discretions

78. The *Bunning v Cross* discretion is concerned with matters of high policy. As Brennan CJ noted in *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5 the securing of fairness to the accused is one relevant factor in the exercise of the *Bunning v Cross* discretion, but fairness to the accused is not its primary

focus. It is a discretion which involves the balancing of two public policy considerations, namely, the public interest in placing all relevant and admissible evidence before the court and the public interest in ensuring that law enforcement officers do not act unlawfully or improperly. Convictions obtained by relying on evidence so obtained may be achieved at too high a price. It is inappropriate, in my opinion, that the public policy discretion should be given a narrowly defined and constrained operation when it is recognised that it is but an incident of broad judicial powers which are vested in the courts in all criminal trials to ensure that justice is done, that the court processes are not abused by those charged with the task of enforcing the law, and that the administration of justice is not brought into disrepute.

83. The overlap between the public policy discretion and the unfairness discretion was acknowledged both in *Cleland* and *Swaffield*. The unfairness discretion is concerned with the question whether the fair trial of the accused has been prejudiced, but it is not confined to the question of the reliability of evidence, and once other considerations are introduced the line between unfairness and policy become blurred. Even so, "the chief object of the public policy discretion is the constraining of law enforcement authorities so as to prevent their engaging in illegal or improper conduct, although the securing of fairness to an accused is a relevant factor in the exercise of the discretion".

86. The general unfairness discretion, therefore, is primarily concerned with circumstances which might produce an unfair trial, carrying the potential for a miscarriage of justice. The considerations which underpin the *Bunning v Cross* discretion may not be accorded the same weight, and indeed might not be deemed relevant at all, when considering the general unfairness discretion. As Martin J noted, a court when considering whether to exclude evidence under the general unfairness discretion, and therefore assessing the risk of the trial being unfair, must not usurp the role of the jury as finder of fact. Thus, even if some unfairness arose the risk of a miscarriage of justice might be removed by proper directions. Martin J held that in determining the nature and extent of any unfairness the court must also have regard to the probative and prejudicial value of the evidence and its importance to the prosecution case, and such factors might not always inure to the advantage of the accused in seeking to have evidence excluded. Likewise, the range of factors which might be considered under the public policy discretion is broad. Factors such as the seriousness of the offence, the flagrancy of the conduct and the motives of the law enforcement authorities, and the importance of the evidence to the Crown case might all inure to the disadvantage of the accused when the public policy discretion was being considered. Despite the overlapping considerations which might be addressed under either discretion it is clear that the weight and significance attached to them might vary according to the category under discussion and might lead to different outcomes. In other words, although appropriate directions to a jury might be thought capable of preventing an unfair trial, thereby avoiding the exclusion of evidence by reference to the general unfairness discretion, a different outcome might result when applying the *Bunning v Cross* discretion. Where the trier of fact is not a jury, but a judge or magistrate, it may be no less possible that different outcomes would result depending on which discretion was applied.

87. Whilst there may be some significant differences in the relevant factors which fall for consideration under the two discretions one factor which would be common in both cases was that which Bollen J had identified in *Nolan v Rhodes*, and which was later also highlighted by both King CJ in *Ujvary v Medwell* and by Mullighan J in *Parker v Police*. That factor was that the conduct of the officers in those cases, albeit occurring after the breath analysis was concluded, led to the drivers being denied the only means that could have been open to them to challenge the reading in the breath test. Referring to the failure to provide proper equipment which would have produced a usable blood test result, Mullighan J said that the driver had been "deprived of a statutory safeguard about a matter central to the charge". Whilst that consideration would be relevant to the exercise of the unfairness discretion (as Mullighan J so treated it) it was of such significance that in my opinion the public policy considerations which bore upon the conduct deserved full weight be given to them, as would assuredly be the case if it was the *Bunning v Cross* discretion which was being applied.

89. In my view, the force of those observations is as relevant to the situation where unlawful or unfair conduct immediately follows the obtaining of evidence, and which conduct denies the opportunity for the accused to test the evidence, as it is to conduct which precedes the obtaining of the evidence. In either case there is an important public policy consideration which deserves to be treated as more than merely one of a range of considerations which might or might not determine the question whether the trial of the accused had been rendered unfair.

90. In the present case the learned magistrate concluded that the conduct of Senior Constable Steele was persuasive in dissuading the respondent from exercising the right given to him by s55(10) to request that arrangements be made for him to take a blood test. In proffering advice that the blood alcohol reading from a blood test result was likely to be higher than from the breath analysis the circumstances were such that it was very likely that the advice would be heeded. Because Steele did not give evidence we do not know whether (assuming he agreed that he had proffered such advice)

he genuinely believed the truth of what he said. Nor do we know whether, if it was his honest belief, there was any scientific basis for it. As I will later discuss, the answers to those questions might have been very relevant when applying the fairness discretion. However, even without knowing the answers to those questions the magistrate when applying the *Bunning v Cross* discretion was entitled to conclude that the conduct of the police officer was improper and effectively dissuaded the respondent from exercising his right under s55(10). That is conduct which should not be countenanced by the courts Notwithstanding the seriousness of drink driving offences the legislation provides a statutory safeguard by s55(10) and it is not for the law enforcement authorities to use their position to effectively withdraw that safeguard from a citizen[133].

93. Nonetheless, for the reasons given in *French v Scarman* I do not consider that those restrictions apply to the present case and there is no reason why the public policy discretion should be unavailable merely because the conduct of the law enforcement authorities followed immediately after the procuring of evidence rather than preceding it.

94. I conclude, therefore, that the learned magistrate was correct in applying the *Bunning v Cross* discretion. The substantive issue raised by ground 2 in the grounds of appeal before us is whether there was a discretion to exclude the breath test evidence and for the reasons given I conclude that both a *Bunning v Cross* and a general unfairness discretion were open to be applied. The third ground of appeal contends that the magistrate erred in the exercise of any such discretion and I conclude that no error has been established. For the reasons given by Batt JA I conclude that ground 1 has also not been made out. That would be sufficient to dispose of the appeal. I add one further matter, however.

95. Had I concluded that only the general unfairness discretion was available to the learned magistrate I would have declined to exercise it and would have referred the matter back for re-hearing. Although it might be possible to conclude that the result would have been the same had the magistrate exercised the general unfairness discretion rather than the *Bunning v Cross* discretion I consider that the learned magistrate would have had to take into account one additional factor which was of particular importance in this case in determining whether the respondent had been denied a fair trial. That was an issue which might have required the hearing of further evidence and any conclusion which we might have reached had we exercised the discretion ourselves may well have been different to that which the magistrate might have reached had she reconsidered the matter and exercised the unfairness discretion.

96. In my view, the way in which the evidence had been produced in this case was unfair to the appellant. No notice having been given under s58(2), nor any warning having been given as to the allegation which it was intended to make, it must have been known to the respondent and his legal advisers that the person who it was to be claimed had proffered the advice to the respondent not to have a blood test would not be present to answer that allegation. The absence of the operator was a forensic advantage which operated unfairly against the prosecution. In my opinion, the request of the prosecutor for an adjournment so as to call the operator to give evidence about the alleged advice should have been acceded to by the magistrate. In my opinion, the question whether there had been any relevant unfairness to justify the exercise of the general unfairness discretion could not be answered in the absence of a response from the operator as to the allegation. The magistrate ought to have known whether the allegations were admitted by Senior Constable Steele, and, if so, whether he believed the truth of what he said, and whether, objectively, there was any truth as to what he asserted. Because of the conclusion I have reached as to the availability of the *Bunning v Cross* discretion it is unnecessary for me to further consider the application of the general unfairness discretion."

Per Batt, Chernov and Eames JJA in *DPP v Moore* [2003] VSCA 90; [2003] 6 VR 430; (2003) 39 MVR 323; MC 20/2003, 29 July 2003.

12. Motor traffic – overloading – heavy haulage vehicles – proof that defendant was the registered operator of a prime mover – no proof that the semi-trailer forming part of combination was operated by defendant – breach of Privacy Act provisions

1. The registration of the attached semi-trailer was not an element of the offence that needed to be proved. It was sufficient to prove that CP/L was the registered proprietor of the prime mover. The reference in the charge-sheet to the registered number of the prime mover in the context of the language of the charges, made it clear to CP/L that it was being charged in its capacity as the registered operator of the specified registered prime mover that formed part of the allegedly overweight combination. Accordingly, the court was not in error in convicting CP/L of the charges.

2. Assuming that the firm contravened the Commonwealth *Privacy Act* and/or the State Privacy

Act, or at least on the assumption that the informant acted unfairly, having regard to the disclosure and use of the weighbridge tickets, it was open to the court in the exercise of its discretion to admit the evidence of the tickets into evidence. In performing the balancing exercise as required by *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 and *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, the court was correct in taking into account that broader questions of high public policy existed in which the unfairness to CP/L was only one factor. The court was right to consider that CP/L was a body corporate which derived no protection from the privacy legislation, there was no unfairness to CP/L and there was the strong countervailing consideration of the public importance of road safety.

3. On the basis of evidence called by the informant it was open to the court to be satisfied beyond reasonable doubt that the vehicle had been used on each charged occasion in the same configuration in respect of which it was weighed shortly thereafter.

Per Mandie J:

> "... 47. On the assumption that Inghams contravened the Commonwealth *Privacy Act* and/or on the assumption that the informant contravened the State *Privacy Act*, or at least on the assumption that the informant acted unfairly, having regard to the privacy legislation, in relation to the disclosure and use of the weighbridge tickets, I am of the view, for the reasons that follow, that it was open to the Judge in the exercise of his discretion not to reject but to admit the weighbridge tickets into evidence.
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> 48. In *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263, Barwick CJ said:
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> > "Evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible. This is so, in my opinion, whether the unlawfulness derives from the common law or from statute. But it may be that acts in breach of a statute would more readily warrant the rejection of the evidence as a matter of discretion: or the statute may on its proper construction itself impliedly forbid the use of facts or things obtained or procured in breach of its terms. On the other hand evidence of facts or things so ascertained or procured is not necessarily to be admitted, ignoring the unlawful or unfair quality of the acts by which the facts sought to be evidenced were ascertained or procured. Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."
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> 49. In *Bunning v Cross*, Barwick CJ said:
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> > "The question is whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or into the hands of the Crown that, notwithstanding its admissibility and cogency, it should be rejected."
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> 50. Further Barwick CJ agreed with the principles stated by Stephen and Aickin JJ in their reasons for judgment in that case. Stephen and Aickin JJ referred to the general discretion which in every criminal trial the Court possesses to exclude particular evidence if its reception will operate unfairly against the accused, but their Honours went on to say that the exercise of the discretion "did not turn simply upon the question of fairness to the accused, or upon unfair prejudice to the accused". They went on to say that:
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> > "[w]hat *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor, which, if present, will play its part in the whole process of consideration.
> >
> > Since it is with these matters of public policy that the discretionary process called for in *Ireland* is concerned it follows that it will have a more limited sphere of application than has that general discretion ... which applies in all criminal cases."

51. In my opinion the Judge properly exercised his discretion in performing the balancing task required by the principles stated in the above cases. The Judge emphasised that the assumed illegality related to the disclosure of personal information about an individual whereas the prosecution was not directed against the individual but rather against a body corporate. The Judge took into account that the assumed contraventions were "passing" and inadvertent. The Judge said (wrongly I think) that perhaps an offence had been committed, but considered that public policy did not require the Court to express disapproval of the "technical" breach involved.

52. Not only do I think that it was open to the Judge to so exercise his discretion, I consider, with respect, that he was correct in so doing. Although it was emphasised by Stephen and Aickin JJ in *Bunning v Cross* that the question of unfairness to the accused was not the central point of the discretionary process and that there were broader questions of high public policy in which unfairness to the accused was only one factor, in the present case I think that the Judge was right to take into account that the accused was a body corporate that derived no protection from the privacy legislation – thus there was no unfairness to the accused at all involved in the case. The position may perhaps have been otherwise had the driver been charged with an offence. In addition, although contraventions of the privacy legislation were assumed to have been committed, there was otherwise no offence of a criminal nature and the assumed contravening conduct was not actionable otherwise than pursuant to the provisions of the privacy legislation. A strong countervailing consideration to the importance of privacy principles was the high public importance of road safety.

53. Accordingly, I conclude that the Judge made no error of law nor was there any unfairness amounting to an abuse of process involved in using the evidence constituted by the weighbridge tickets."

Per Mandie J in *C Cockerill & Sons (Vic) Pty Ltd v County Court of Victoria & Anor* [2007] VSC 182; (2007) 18 VR 222; (2007) 211 FLR 452; (2007) 48 MVR 162; MC 30/2007, 31 May 2007.

13. Drink/driving – driver intercepted after driving erratically – motor vehicle thought to be stolen – driver sprayed with capsicum spray and handcuffed

R. was intercepted by a police officer after driving erratically. At the scene, the officer believed that the vehicle had been stolen and used capsicum spray and handcuffs to restrain R. After R. was conveyed to the police station, he was requested by another police officer to undergo a breath test which produced a BAC result of 0.059%. It was discovered that the informant's belief as to the vehicle's being stolen was incorrect. R. was charged with numerous driving offences including drink/driving. At the hearing, the magistrate excluded evidence of the breath analysis and dismissed the drink/driving charges on the ground that the informant acted excessively at the scene in using the spray and the handcuffs. Upon appeal—

HELD: Appeal allowed. Remitted to the magistrate for further hearing and determination according to law.

1. A magistrate has a discretion to exclude evidence on the grounds of public policy. The discretion is enlivened only where the impugned conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct. In the present case, the critical question was whether the evidence of the unlawful or improper conduct of the police was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct.

Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561, and *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323; MC 20/2003, applied.

2. The question was whether the evidence of the breath analysis was the product of unlawful or improper conduct by police. The link between the informant's conduct at the roadside and the later obtaining of the evidence was so tenuous that it could not reasonably be said that the evidence was obtained by means of that improper conduct.

3. The public policy discretion requires a balancing of competing factors in the sense of examining the comparative seriousness of the offence charged and the unlawful or improper conduct of the police. By failing to engage in such a balancing exercise, and failing to exercise the discretion by reference to relevant criteria, the magistrate's discretion miscarried.

Per Hansen J:

"... **Decision**

20. It is convenient to begin by considering the nature and scope of the public policy discretion to exclude evidence. In *R v Ireland*[9] Barwick CJ (with whom the other members of the Court agreed) said that "evidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible". However, his Honour added[10]:

> "Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

21. In *Bunning v Cross*[11] Stephen and Aickin JJ observed that the statement of Barwick CJ in Ireland represents the law in Australia. Their Honours said that[12]:

> "What *Ireland* involves is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law. This being the aim of the discretionary process called for by *Ireland* it follows that it by no means takes as its central point the question of unfairness to the accused. It is, on the contrary, concerned with broader questions of high public policy, unfairness to the accused being only one factor which, if present, will play its part in the whole process of consideration."

Their Honours went on to say that the discretion "applies only when the evidence is the product of unfair or unlawful conduct on the part of the authorities (or, as Dixon CJ put it in *Wendo's Case*[13], unlawful or improper conduct)".

22. More recently, in *DPP v Moore*[14] the Court of Appeal considered the nature of the relationship required between the impugned conduct and the evidence in order to enliven the public policy discretion. Chernov JA (with whom Eames JA agreed, Batt JA dissenting) upheld a Magistrate's decision to exclude evidence of a breath analysis in circumstances where the analysis was obtained lawfully, but subsequent to the lawful obtaining of the analysis a police officer had improperly advised the respondent not to pursue his statutory right to take a blood test, on the basis that in the police officer's experience the blood result would invariably be less favourable to him. Chernov JA reviewed numerous authorities[15] and concluded that those cases establish that "the public policy discretion is enlivened only where the impugned conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct"[16]. His Honour noted that the South Australian decisions, culminating in *R v Lobban* (which effectively overruled *French v Scarman*), held that when the impugned conduct by the authorities takes place after the evidence has been obtained, the public policy discretion ordinarily does not arise for consideration, even when it can be said there was some connection between the conduct and the evidence. Chernov JA then said "but there may be situations where the improper conduct by the law enforcement authorities so closely relates to the value and effect of that evidence that there can be no meaningful separation between the two aspects of their seemingly continuous conduct for the purpose of determining if the public policy discretion is enlivened"[17]. His Honour went on to hold that, on the facts before him, "there was such a close connection between the breathalyser reading and the circumstances pertaining to the improper conduct that the public policy discretion could be said to have been enlivened".

23. In my view, it is clear from *Moore* that the public policy discretion may be exercised even where there is no strict causal link between the relevant illegality or improper conduct of the police and the obtaining of the relevant evidence. That follows from the fact that, in *Moore*, the improper conduct held to enliven the discretion occurred after the evidence was obtained. But, as counsel correctly conceded, the mere fact that no strict causal link is required does not mean that there is no need for some connection. On the contrary, there must be a relevant connection. In the present case, the critical question is whether, to use the language of Stephen and Aickin JJ in *Bunning v Cross*, the evidence of the breath analysis was the product of unlawful or improper conduct of the police or, as Chernov JA put it in *Moore*, whether the improper conduct was the means by which the evidence was obtained or where the obtaining of the evidence involved such conduct.

24. As I have set out above, the matters initially relied on by the respondent as enlivening the public policy discretion were "the matters at the roadside", the half-hour or so period of unlawful arrest and the alleged non-compliance with s53.

25. As to "the matters at the roadside", in my view it was these matters that the Magistrate took into account in deciding that the public policy discretion arose for consideration. I reject the alternative submission that the Magistrate only took the roadside matters into account once the discretion was enlivened by the second and third points. On the contrary, it is apparent for reasons set out below that the Magistrate did not consider the second and third points as relevant factors enlivening the public policy discretion. She confined her reliance to "the matters at the roadside".

26. As to the period of unlawful detention, there is nothing in what the Magistrate said that suggests she took this matter into account in considering the *Bunning v Cross* discretion. The Magistrate confined her reference and findings to the conduct of the informant following the removal of the respondent from his vehicle, which she described as acting "excessively". Once the respondent left the scene the informant took no further role, leaving it to other police to handle the matter. His "excessive" conduct could only have occurred at the scene. As the matter of the unlawful detention was clearly raised in the submissions before the Magistrate, the fact that she confined her findings and reasons to the informant's conduct at the roadside indicates that she did not consider the period of unlawful detention as a factor relevant to the public policy discretion.

27. As to the s53 issue, there is nothing in what the Magistrate said that suggests she took that into account in exercising the discretion. The question of non-compliance with s53 was raised in the context of a no-case submission on the charge under s49(1)(f), but the Magistrate did not rule on the submission, doubtless because the issue did not arise once the evidence of the breath test was excluded pursuant to the public policy discretion. There was thus no finding that the police breached s53. In any event, it seems to me that non-compliance with s53 would only go to the sufficiency of the evidence to support the charge[18], rather than constituting illegal or improper conduct of the type that would attract the public policy discretion. I also note that counsel for the appellant made a submission (not made to the Magistrate) that s53 had been complied with, in the sense that it was the informant who required the respondent to undergo the preliminary breath test, albeit through an agent. Counsel for the respondent submitted that such an interpretation was not open on the words of s53. I was not invited to express a view on that submission and do not do so. It was mentioned to me to indicate that there is an argument on the applicability of s53 which remains to be (and should be) considered by the Magistrate in the event that the appeal is allowed and the matter is remitted to the Magistrate. It is sufficient to say that I consider that the Magistrate correctly ignored the s53 argument as a factor relevant to the public policy discretion.

28. In my view it was not open to the Magistrate to decide, on the basis of the matters at the roadside, that the public policy discretion arose for consideration. As the authorities make clear, the public policy discretion only arises for consideration when the relevant evidence is procured by means of unlawful or improper conduct. In the present case, can it be said that the evidence of the breath analysis was the product of unlawful or improper conduct by the police? Or, as Chernov JA put it in *Moore*, was the improper conduct the means by which the evidence was obtained or did the obtaining of the evidence involve such conduct? In my view, the link between the "excessive" conduct at the roadside and the obtaining of the evidence is so tenuous that it cannot reasonably be said that the evidence was obtained by means of that improper conduct. The present case is readily distinguishable from *Bunning v Cross*, where the police officer failed to administer a preliminary breath test to the defendant at the roadside but nevertheless (and in contravention of the statute) took the defendant to the police station and administered a breath analysis. In those circumstances, it could readily be said that the evidence of the breath analysis was obtained by reason of the fact that the defendant had been taken to the police station unlawfully. In the present case, the respondent was lawfully arrested and taken to the police station under suspicion of stealing the Commodore. After the respondent arrived at the police station, the police were still entitled to request the respondent to undergo a preliminary breath test, which they duly did. In effect, the informant's conduct at the roadside was overtaken by subsequent events. It simply cannot be said that the evidence of the breath analysis was obtained by means of the roadside conduct. The Magistrate thus erred in deciding that the discretion arose for consideration on the basis of the roadside matters.

29. As I have said, in my view the Magistrate did not consider the second and third points as relevant factors enlivening the public policy discretion. I note, however, the principle that, on an appeal such as the present, every reasonable presumption should be made in favour of the Magistrate's decision and that it should be upheld provided it can be supported upon any reasonable view of the evidence open to the Magistrate[19]. With that in mind, I turn to consider whether it would have been open to the Magistrate to decide that the public policy discretion arose for consideration on the basis of the second and third points.

30. It is convenient to first mention s53. As to this I have already concluded that the Magistrate correctly ignored the s53 argument as a factor relevant to the public policy discretion.

31. As to the period of unlawful detention, there is some connection between the evidence of the breath analysis and the unlawful detention, in the sense that as a result of the unlawful detention the respondent was at the police station when the preliminary breath test was requested. But even assuming that the respondent had been informed by the police that he was no longer under arrest as soon as they became aware that the Commodore was not a stolen vehicle, the respondent could have been required to undergo a preliminary breath test and then a breath analysis at that time. He may have sought to leave, or left, the police station and thereby risked committing the offence of refusing to undergo a preliminary breath test, but that was no different from the situation in which

he found himself half an hour or so later. That is to say, the breath analysis was not obtained by means of the improper conduct, but rather was obtained in circumstances where the respondent happened to have been held in custody for about half an hour more than he should have been, but where that conduct could not in any real way be said to be the means by which the evidence was obtained. It was obtained pursuant to the request, which request could as equally have been made prior to discovering that the Commodore was not stolen or subsequent to that discovery.

32. For these reasons, it would not have been open to the Magistrate to decide that the public policy discretion arose for consideration on the basis of the unlawful detention.

33. But let it be assumed that the period of unlawful detention was sufficiently related to the obtaining of the evidence so as to raise for consideration the public policy discretion. In those circumstances the discretion would have to be exercised in accordance with the principles explained by Stephen and Aickin JJ in *Bunning v Cross*. As their Honours said, the criteria guiding the exercise of the discretion cannot be defined in the abstract but only by reference to the case at hand[20]. Nevertheless, their Honours set out several factors generally relevant to the exercise of the discretion. First, the nature of the improper or unlawful conduct, whether it was deliberate or reckless, or merely an accidental non-compliance with a statutory safeguard. Secondly, the cogency of the evidence, at least where the illegality arises only from mistake, and is not deliberate or reckless. Thirdly, the ease with which the law might have been complied with in procuring the evidence in question. A deliberate "cutting of corners" would tend against the admissibility of the evidence, whereas in the circumstances of *Bunning v Cross* (where the illegality was inadvertent) the fact that the appellant was unlawfully required to do what he could legally have been required to do (namely, undergo a preliminary breath test at the roadside) had little significance as an argument in favour of rejecting the evidence. Fourthly, the nature of the offence charged. Their Honours said[21] that "some examination of the comparative seriousness of the offence and the unlawful conduct of the law enforcement authority is an element in the process required by *Ireland's Case*". As their Honours said, the factors relevant to the discretion ultimately depend on the facts of the case at hand.

34. It is clear that the public policy discretion requires a balancing of competing factors. In the present case, there is no indication that the Magistrate engaged in such a balancing exercise, in the sense of examining the comparative seriousness of the offence charged and the unlawful or improper conduct of the police, in order to conclude that the evidence should be excluded for reasons of public policy. Rather, and not disregarding the absence of transcript, it appears sufficiently that the informant's actions at the scene were the basis on which the Magistrate excluded the evidence of the breath analysis. And even if the Magistrate had based her decision on the period of unlawful detention or the s53 point (assuming either to have been open) rather than the roadside conduct, she would still have needed to exercise the discretion by reference to the factors set out above. That did not occur. By failing to exercise the discretion by reference to relevant criteria, the discretion miscarried.

35. For my part I would only add that, in the circumstances of the present case and regarding all that was said by counsel for the respondent and bearing in mind all the factors referred to in *Bunning v Cross*, the proper exercise of the discretion was to admit the evidence of the breath analysis.

36. For these reasons, the appeal will be allowed and the matter will be remitted for further hearing and determination according to law. There is at least for the Magistrate's consideration the appellant's foreshadowed argument concerning the operation of s53 and matters of penalty. I will hear counsel on the question of costs."

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[9] [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[10] At 335.
[11] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561.
[12] At 74-75.
[13] [1963] HCA 19; (1963) 109 CLR 559; [1964] ALR 292; 37 ALJR 77.
[14] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[15] *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263; *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561; *French v Scarman* (1979) 20 SASR 333 (holding that the discretion was enlivened by conduct occurring immediately after the obtaining of the evidence, namely the police refusing to allow the defendant a blood test following a breath analysis); *Nolan v Rhodes* (1983) 32 SASR 207; *Question of Law Reserved (No.1 of 1998)* (1998) 70 SASR 281; (1998) 100 A Crim R 281; *R v Lobban* [2000] SASC 48; (2000) 77 SASR 24; (2000) 112 A Crim R 357.
[16] At [53].
[17] At [53].
[18] In the sense that non-compliance with s53 would result in the prosecution being unable to prove an essential element of the charge under s49(1)(f).
[19] See *King v McLellan* [1974] VicRp 92; [1974] VR 773 per Gowans, Nelson & Anderson JJ at VR 783.
[20] [1978] HCA 22; (1978) 141 CLR 54 at 77-80; 19 ALR 641; 52 ALJR 561.

[21] [1978] HCA 22; (1978) 141 CLR 54 at 80; 19 ALR 641; 52 ALJR 561."

Per Hansen J in *DPP v Riley* [2007] VSC 270; (2007) 16 VR 519; (2007) 173 A Crim R 360; (2007) 48 MVR 261; MC 37/2007, 26 July 2007.

14. Drink/driving – discretion to exclude unlawfully obtained evidence – police entered accused's dwelling and administered a preliminary breath test – conflict of evidence as to whether police invited in

H. was charged with a drink/driving offence. At the hearing of the charge, there was a dispute on the evidence as to whether the police informant was invited into H's home or not in order to conduct a preliminary breath test on H. The informant said that he was invited to "Go inside". The evidence for H. was that a witness told the informant "I'll just go and get him. I won't be a minute." The magistrate took the view that the onus was on the prosecution to prove that an invitation was issued to the informant by the witness to enter the house and that it had to be proved beyond reasonable doubt. However, the magistrate found that the evidence of the subsequent BAC was admissible and the charge proved on the basis that the public interest in a conviction outweighed any unfairness to H. Upon appeal—

HELD: Appeal allowed. Decision set aside. Remitted to the Magistrates' Court for further hearing and determination by another Magistrate.

1. The Magistrate applied an erroneous test in assessing the conflict between the evidence of the police informant and the witness. The Magistrate took the view that the onus was on the prosecution to prove that an invitation was issued to the police informant by the witness to enter the house, and to prove it beyond reasonable doubt. However that was not the appropriate test. The onus was on the defence to establish, on the balance of probabilities, the facts on which the defence relied in order to justify the exclusion of the evidence on the *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561 discretionary ground.

2. Whilst there is an obligation on the Crown to satisfy the court, beyond reasonable doubt, that the elements or ingredients of the offence have been made out, the position is quite different in relation to a submission that admissible evidence should be excluded as a matter of discretion on fairness or public policy grounds. In the present case, the Magistrate had to identify with clarity whether H's entry to the house was to be classified as an (honest or understandable) mistake or accident, or as reckless, or as deliberate. Such an analysis or classification needed to be done in this case under the *Bunning v Cross* principles.

Per Cavanough J:

> "2. There were really only two issues below, namely whether evidence sought to be adduced by the informant by way of a certificate under s55 of the *Road Safety Act* of the result of an analysis of the appellant's breath was obtained illegally by trespass by the police into the appellant's home; and, if so, whether the certificate should be excluded in the exercise of the public policy discretion referred to in *Bunning v Cross*.[1] The Chief Magistrate ruled in favour of the appellant on the first point but against him on the second.
>
> ... 13. Although the errors made as to the burden and standard of proof might be thought to have favoured the accused (and were not referred to in the notice of appeal), they seem to have led to a situation where one cannot discern with any confidence whether or not the principles in *Bunning v Cross* were appropriately applied by the Chief Magistrate in the remainder of his reasoning. However, on balance, I am persuaded by Mr Tehan that there is sufficient indication that the principles were not appropriately applied.[7] The Chief Magistrate found an unlawful entry, and yet he did not identify in any clear way whether that entry was to be classified as an (honest or understandable) mistake or accident, or as reckless, or as deliberate. Such an analysis and classification, at least, needed to be done in this case under the *Bunning v Cross* principles.[8]
>
> 14. The respondent seeks to defend the decision by submitting that what the Chief Magistrate said sufficiently indicates a finding of innocent mistake. In particular, the respondent refers to the Chief Magistrate's comment: "This, in my opinion, is towards the more technical end of the spectrum". However, in this criminal matter, it seems to me that that does not indicate sufficiently clearly that the Chief Magistrate was satisfied that the entry was as a result of a mistaken belief on the part of Senior Constable Brannaghan[9] that he had an invitation. Moreover, the case for the prosecution below was quite starkly different from that. There was little or no room on the prosecution case for a mistake. The Senior Constable said clearly and repeatedly in his evidence that he had had an express invitation from Ms Lahogue.

15. It is true, as Mr Ryan SC says, that a magistrate can accept parts of the evidence of one side and parts of the evidence of the other side, but, if that is what the Chief Magistrate intended to do in this case, I think it behoved him to spell that out with more precision than he did.

16. One simply finds that there is insufficient explanation in the reasons for the use of the phrase "the technical end of the spectrum". It is somewhat ambiguous in itself and, as Mr Tehan submitted, where the evidence of Senior Constable Brannaghan was not accepted as to the invitation, *prima facie* one would expect a finding of either deliberate or reckless entry, although it remains possible that the facts did not appear that way to the Chief Magistrate.

17. So, although the analysis that I would apply is perhaps not completely in line with the submissions of either side, it seems to me that this is a case where it would be wrong to let the decision stand. The decision seems to have been arrived at from a fundamentally unsound original basis, namely the application of the beyond reasonable doubt test to the evidence in question. The application of that test was inapposite in the circumstances and it is not so surprising that it has led to the failure of the Chief Magistrate to make the findings that needed to be made in relation to the *Bunning v Cross* principles.

18. The decision should be set aside and the matter remitted to the Magistrates' Court. I think that, this being a credibility case, it is better that it be heard afresh by someone other than the Chief Magistrate. That is the usual order that the Court would make in such a case.[10] It is no reflection on the Chief Magistrate. In any event, the matter was heard in November last year. It is now August. It is unlikely that the Chief Magistrate would have any great recollection of it now. So there would probably be no great saving in terms of time or cost if it were to be re-heard by the Chief Magistrate himself."

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[1] [1978] HCA 22; (1978) 141 CLR 54; 19 ALR 641; 52 ALJR 561. *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263 and *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323 were also referred to and relied upon below by counsel for the appellant.
[7] Cf *XYZ v State Trustees Ltd* [2006] VSC 444; (2006) 25 VAR 402 at 415 [31]; *State of Victoria v Subramanian* [2008] VSC 9; (2008) 19 VR 335 at 340 [14]-[16] and cases there referred to.
[8] See and compare *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 55 at 78-80; 19 ALR 641; 52 ALJR 561 per Stephen and Aickin JJ (with whom Barwick CJ agreed); *Pollard v R* [1992] HCA 69; (1992) 176 CLR 177 at 203-204; (1992) 110 ALR 385; (1992) 67 ALJR 193; (1992) 64 A Crim R 393; *Ridgeway v R* [1995] HCA 66; (1995) 184 CLR 19 at 38 (1995) 129 ALR 41; (1995) 69 ALJR 484; (1995) 78 A Crim R 307; (1995) 8 Leg Rep C1; (per Mason CJ, Deane and Dawson JJ) and at CLR 51 (per Brennan J); *R v Swaffield* [1998] HCA 1; (1998) 192 CLR 159 at 212-213 [135]; (1998) 151 ALR 98; (1998) 72 ALJR 339; (1998) 96 A Crim R 96; [1998] 1 Leg Rep C5 per Kirby J; 151 ALR 98; 72 ALJR 339; *Tofilau v R* [2007] HCA 39; (2007) 231 CLR 396 at 527-528 [410]-[411]; (2007) 238 ALR 650; (2007) 81 ALJR 1688; 174 A Crim R 183; *Cross on Evidence Service*, Australian Edition, at [27295] and cases there referred to, especially *Zanet v Henschke* (1988) 33 A Crim R 51 (SA FC) and *Rowell v Larter* (1986) 6 NSWLR 21 at 25, 30. It is unnecessary to determine whether, in certain other respects identified by the appellant, the Chief Magistrate's reasoning did not take proper account of the "*Bunning v Cross* factors" (to adopt the expression used in *Tofilau* at [410]-[411]).
[9] Senior Constable Brannaghan was a police officer of some 30 years experience who acknowledged in evidence that he knew at the time that he could not enter the premises without an invitation: transcript, 23.
[10] *Wilson v County Court of Victoria* [2006] VSC 322; (2006) 14 VR 461 at 474 [55]; (2006) 164 A Crim R 525; (2006) 46 MVR 117 and cases there cited."

Per Cavanough J in *Hinneberg v Brannaghan* [2009] VSC 356; (2009) 53 MVR 354; MC 21/2009, 17 August 2009.

15. Drink/driving – driver allegedly told by operator that a blood test could take all night to arrange and could produce a higher reading – no blood test taken

T. was intercepted whilst driving his motor vehicle and underwent a breath test. Before the results of the test were automatically printed from the instrument there was a mechanical problem and it became necessary for the instrument operator to manually produce a certificate which showed a reading of 0.127% BAC. T. claimed that he queried the malfunction with the operator and was told that he could request a blood test. T. said that the operator stated that it could take all night to arrange the blood test and that blood test results are "always higher". T. said that having a blood test would be "futile" and the operator effectively "talked him out of it". At the subsequent hearings, the certificate of the instrument was admitted into evidence, the operator was not called to give evidence and T. was convicted. Appeals to the County Court and a Judge of the Supreme Court were unsuccessful. Upon appeal to the Court of Appeal—

HELD: Appeal allowed. Conviction quashed. *Terry v Johnson* MC 25/2008 overruled.
1. The authorities establish that where a defendant has suffered any unfairness or

unlawfulness, a Magistrate has a discretion whether to accept or reject the breath analysis evidence. The Magistrate must consider the competing public requirements of the public need to bring to conviction those who commit criminal offences with the public interest in the protection of the individual from unlawful and unfair treatment. Where a Magistrate found that a driver had acted on advice from a police officer which denied him evidence which could possibly have defeated the charge, the subsequent conviction was "obtained at too high a price".

R v Ireland [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263;
DPP v Moore [2003] VSCA 90; [2003] 6 VR 430; (2003) 39 MVR 323; and
Nolan v Rhodes [1982] 32 SASR 207, applied.

2. The County Court judge in the present case considered that the magnitude of the breath test reading, 0.127%, in comparison to the permitted 0.05%, was such that T. could not have been assisted by a blood test reading. Implicit in this was the judge's assumptions that the blood test would have been unlikely to show a blood alcohol content to be less than 0.05% and that, further, the recorded breath test reading was accurate, or approximately so. There was in fact no evidence to support either assumption.

3. A relevant purpose of obtaining the blood test reading was to verify or not the accuracy of the breath test reading. T. was charged with an offence contrary to s49(1)(f) of the *Road Safety Act* 1986 which depended upon a result of analysis as recorded or shown by the breath analysing instrument of breath sample taken within three hours after driving. If T. had pursued his right to have a blood test it may be that the reading would have been less than 0.05%. This would have provided a powerful basis for concluding that the breath analysis instrument was not in proper working order or properly operated, giving rise to a statutory defence to the charge based on the breath test certificate.

4. The discretion to exclude evidence on the *Bunning v Cross* principle required T. to satisfy the court that the application of the balancing exercise referred to in *Ireland's case* must favour exclusion. In the present case, the weight to be given to the fact that the misconduct of the officer caused T. to forego an important right, is established by the authorities. The County Court Judge appeared to discount the significance of this consequence by her conclusion based on assumptions which were unwarranted. Furthermore, the accuracy of the breath test reading was significant not only for the purposes of determining whether T. was guilty of the offence charged, but also with respect to the imposition of the appropriate fine and licence suspension order in the event that he was convicted.

5. In the circumstances, a judge properly applying the *Bunning v Cross* principle to the facts in evidence, must inevitably have exercised the discretion to exclude the evidence of the breath analysis certificate. In failing to do so, the judge's discretion miscarried.

Per Byrne AJA (Buchanan and Mandie JJA agreeing):

"12. The point taken on Mr Terry's behalf before the County Court judge was that the advice given by Senior Constable Warr as described in part (o) was improper and that it caused him not to exercise his right to have a blood test. On the authority of *DPP v Moore*[2] and the decisions referred to in that case, such advice was improper and of sufficient seriousness to warrant the exclusion of the evidence of the breath test reading notwithstanding that that advice was given after the breath test. The court should be prepared, it was said, to sacrifice the desire of the community to see the guilty convicted in order to express its disapproval and discouragement of such unacceptable behaviour. [3] The existence of the discretion to exclude the evidence in the circumstances of this case is well-established[4] and was not challenged before us.

16. The County Court judge considered that the magnitude of the breath test reading, 0.127%, in comparison to the permitted 0.05%, were such that Mr Terry could not have been assisted by a blood test reading. Implicit in this was her Honour's assumptions that the blood test would have been unlikely to show a blood alcohol content to be less than 0.05% and that, further, the recorded breath test reading was accurate, or approximately so. There was in fact no evidence to support either assumption.

17. As pointed out by counsel for Mr Terry a relevant purpose of obtaining the blood test reading was to verify or not the accuracy of the breath test reading. His client was charged with an offence contrary to s49(1)(f) which depended upon a result of analysis as recorded or shown by the breath analysing instrument of breath sample taken within three hours after driving. If Mr Terry had

pursued his right to blood test it may be that the reading would have been less than 0.05%. This would have provided a powerful basis for concluding that the breath analysis instrument was not in proper working order or properly operated, giving rise to a statutory defence to the charge based on the breath test certificate.[5]

18. It may, of course, provide a basis for another conclusion, namely, that the blood test reading was in some way faulty. But, the charge had to be made out to the criminal standard and the prosecution had to exclude the first possibility beyond reasonable doubt.

19. The difficulty of putting to one side such a conclusion is greater in this case where there was some evidence of malfunction in the breath analysis machine. It was put on behalf of the respondent that the malfunction concerned only the printing mechanism.[6] But there was no evidence before the court as to the nature of the malfunction. The reliability of the hearsay statement attributed to Senior Constable Warr, if admissible as truth of the fact, is somewhat diminished by his reported concession that he was unsure what had happened.

20. The discretion to exclude evidence on the *Bunning v Cross* principle requires the appellant to satisfy this court that the application of the balancing exercise referred to in *Ireland's case*[7] must favour exclusion. In the present case, the weight to be given to the fact that the misconduct of the officer caused the defendant to forego an important right, is established by the authorities. Her Honour appeared to discount the significance of this consequence by her conclusion based on the assumptions to which I have referred. These assumptions were, as I have observed, unwarranted.

21. Furthermore, the accuracy of the breath test reading was significant not only for the purposes of determining whether Mr Terry was guilty of the offence charged, but also with respect to the imposition of the appropriate fine and licence suspension order in the event that he was convicted.[8]

22. In the circumstances, we are of opinion a judge properly applying the *Bunning v Cross* principle to the facts in evidence, must inevitably have exercised her discretion to exclude the evidence of the breath analysis certificate. Her discretion has miscarried. Insofar as the primary judge took a different view, his Honour, too, fell into appellable error.

23. The appeal will be allowed and the conviction quashed."

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[2] [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.
[3] [2003] VSCA 90; (2003) 6 VR 430 at 449 [45]; (2003) 39 MVR 323, per Chernov JA.
[4] *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323; *Nolan v Rhodes* (1982) 32 SASR 207; *French v Scarman* (1979) 20 SASR 333.
[5] See s49(4).
[6] See paragraph [6] (j) above.
[7] *R v Ireland* [1970] HCA 21; (1970) 126 CLR 321; [1970] ALR 727; (1970) 44 ALJR 263.
[8] See s50.

Per Byrne AJA (Buchanan and Mandie JJA agreeing) in *Terry v Johnson* [2009] VSCA 286; (2009) 198 A Crim R 128; MC 40/2009, 9 December 2009.

Patrick Street LL B, Dip Crim
25 March 2014