HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER, KEANE AND NETTLE JJ

POLICE APPELLANT

AND

JASON ANDREW DUNSTALL RESPONDENT

Police v Dunstall
[2015] HCA 26
5 August 2015
A5/2015

ORDER

1. *Appeal allowed.*

2. *Set aside order 1 of the orders of the Full Court of the Supreme Court of South Australia made on 25 July 2014 and, in its place, order that:*

    (a) the appeal be allowed; and

    (b) order 1 of the orders of Kelly J made on 5 December 2013 be set aside and, in its place, order that:

        (i) the appeal be allowed;

        (ii) the order of the Magistrates Court of South Australia made on 20 August 2013 dismissing the charge be set aside; and

        (iii) the matter be remitted to the Magistrates Court for further hearing.

3. *The appellant pay the respondent's costs in this Court.*

On appeal from the Supreme Court of South Australia

Representation

M G Hinton QC, Solicitor-General for the State of South Australia with A C Moffa for the appellant (instructed by Crown Solicitor (SA))

M E Shaw QC with B J Doyle for the respondent (instructed by Caldicott Lawyers)

Interveners

N J Williams SC with G A Hill for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

Police v Dunstall

Criminal law – Evidence – Judicial discretion to admit or exclude evidence – Section 47B(1)(a) of *Road Traffic Act* 1961 (SA) created offence for person to drive motor vehicle while prescribed concentration of alcohol present in blood – Section 47K(1) of Act created presumption that breath analysis reading corresponded to blood alcohol level at time of analysis – Section 47K(1a) of Act provided presumption could only be rebutted if defendant arranged for blood sample to be taken in accordance with prescribed procedures and adduced evidence that analysis of blood demonstrates that breath analysis reading instrument gave exaggerated reading – Where respondent charged with offence against s 47B(1)(a) and pleaded not guilty – Where breath analysis reading indicated blood alcohol level above prescribed concentration – Where respondent arranged for blood sample to be taken but sample unable to be analysed through no fault of appellant or respondent – Where appellant sought to tender evidence of breath analysis reading – Whether there exists residual common law discretion to exclude lawfully obtained, probative, non-confessional evidence unaffected by impropriety or risk of prejudicial misuse where admission would render trial of accused unfair – Whether respondent's trial unfair in relevant sense if evidence of breath analysis reading admitted.

Words and phrases – "*Bunning v Cross* discretion", "*Christie* discretion", "forensic unfairness", "general unfairness discretion", "*Lee* discretion", "unfair trial".

Road Traffic Act 1961 (SA), ss 47B(1)(a), 47K.
Road Traffic (Miscellaneous) Regulations 1999 (SA), reg 11, Sched 1.

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. In South Australia, it is an offence for a person to drive a motor vehicle while the prescribed concentration of alcohol is present in his or her blood. Proof of the offence is facilitated by a statutory presumption that the concentration of alcohol indicated by a breath analysing instrument as being present in the driver's blood was the concentration of alcohol in the driver's blood at the time of the breath analysis and throughout the preceding period of two hours ("the presumption"). The presumption may only be rebutted if the defendant arranges for a sample of his or her blood to be taken by a medical practitioner in accordance with prescribed procedures and adduces evidence that analysis of the blood demonstrates that the breath analysing instrument gave an exaggerated reading.

2 The issue raised by the appeal is whether, in a case in which a medical practitioner fails to take the blood sample in accordance with the prescribed procedures, the court has a discretion to exclude evidence engaging the presumption on the ground that admission of the evidence would render the trial of the defendant unfair.

The legislative scheme

3 The offence of driving a motor vehicle with the prescribed concentration of alcohol in the driver's blood is created by s 47B(1)(a) of the *Road Traffic Act* 1961 (SA) ("the RTA"). It is a summary offence punishable by fine and mandatory disqualification from holding or obtaining a driver's licence. The amount of the fine and the length of the period of disqualification vary depending upon whether the offence falls within category one, two or three and whether it is a first, second, third or subsequent offence[1]. Relevantly, the prescribed concentration of alcohol is 0.05 grams or more of alcohol in 100 millilitres of blood[2]. A category one offence involves a concentration of less than 0.08 grams of alcohol in 100 millilitres of blood; a category two offence involves a concentration of alcohol of less than 0.15 grams, but not less than 0.08 grams, in 100 millilitres of blood; and a category three offence involves a concentration of alcohol of 0.15 grams or more in 100 millilitres of blood[3].

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1 RTA, s 47B(1), (3).

2 RTA, s 47A(1).

3 RTA, s 47A(1).

4 A police officer may require the driver of a motor vehicle to submit to an alcotest or a breath analysis or both[4]. A person must not be required to submit to a breath analysis unless an alcotest indicates that the prescribed concentration of alcohol may be present in the person's blood[5].

5 Where a person submits to an alcotest or a breath analysis and the alcotest apparatus or the breath analysing instrument produces a reading in terms of a number of grams of alcohol in 210 litres of the person's breath, the reading is taken to be that number of grams of alcohol in 100 millilitres of the person's blood[6]. A conviction or finding of guilt of the s 47B(1)(a) offence is not taken as evidence that the person was at the time under the influence of, or in any way affected by, intoxicating liquor or was incapable of driving, or of exercising effective control of, a motor vehicle for insurance or other purposes[7].

6 The presumption is provided in s 47K(1) and applies to proceedings for an offence against the RTA or the *Motor Vehicles Act* 1959 (SA), or a driving-related offence[8]. The concentration of alcohol indicated as being present in the defendant's blood by a breath analysing instrument (a "breath analysis reading") is presumed, in the absence of proof to the contrary, to be the concentration of alcohol present in the blood of the defendant at the time of the analysis and throughout the preceding period of two hours. The presumption only arises if the breath analysing instrument was operated by a person authorised by the Commissioner of Police to operate it and if the requirements and procedures in relation to breath analysing instruments and breath analysis under the RTA have been complied with. The requirements include, in sub-s (2), that the operator of the breath analysing instrument ("the operator") give a person who has submitted to breath analysis a written statement specifying the time and date of the analysis and the reading and, in sub-s (2a), that the operator give prescribed oral advice and a prescribed written notice to a person whose breath

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4 RTA, s 47E(1)(a).

5 RTA, s 47E(2ab).

6 RTA, s 47EB.

7 RTA, s 47C. See *Motor Vehicles Act* 1959 (SA), s 124A with respect to recovery by insurers.

8 RTA, s 47K(18).

analysis reading indicates the presence of the prescribed concentration of alcohol in the blood and give the person an approved blood test kit on request.

7 No evidence may be adduced in rebuttal of the presumption except evidence based on analysis of a sample of the defendant's blood that has been taken and dealt with in accordance with the prescribed procedures ("a complying blood sample")[9]. Evidence based on the analysis must demonstrate that the breath analysing instrument gave an exaggerated reading of the concentration of alcohol in the defendant's blood[10]. In practical terms, this requires the defendant to adduce expert opinion evidence based on the results of analysis of the blood sample.

8 A second, and in this instance conclusive, presumption in proceedings for a s 47B(1)(a) offence is that the concentration of alcohol present in the defendant's blood at the time of breath analysis performed within two hours of driving was the concentration of alcohol present in the defendant's blood at the time of driving[11].

9 In proceedings for an offence, the prosecution may prove by certificate subject to evidence to the contrary: that the operator was duly authorised[12]; that the apparatus used by the operator was a breath analysing instrument[13]; that the instrument was in proper order and was properly operated[14]; that the provisions of the RTA respecting breath analysing instruments and their use were complied with[15]; that the apparatus referred to in the certificate was of a kind approved under the RTA for the performance of alcotests[16]; that the person named in the

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9 RTA, s 47K(1a)(a).

10 RTA, s 47K(1a)(b).

11 RTA, s 47K(1ab), (18)(a).

12 RTA, s 47K(3)(a).

13 RTA, s 47K(3)(b)(i).

14 RTA, s 47K(3)(b)(ii).

15 RTA, s 47K(3)(b)(iii).

16 RTA, s 47K(3a).

certificate submitted to an alcotest on the date and at the time stated[17]; that the alcotest indicated the prescribed concentration of alcohol in the blood[18]; that the person named in the certificate submitted to breath analysis by means of a breath analysing instrument on the date and at the time stated[19]; that the instrument recorded the reading stated[20]; that a statement required by sub-s (2) was given to the person[21]; that the prescribed oral advice and the prescribed written notice under sub-s (2a)(a) were given to the person[22]; and that the person did not request a blood test kit, or an approved blood test kit was given to the person, as the case may be[23].

10 The content of the prescribed oral advice and the prescribed written notice is contained in Sched 1 to the Road Traffic (Miscellaneous) Regulations 1999 (SA) ("the Regulations"). The operator is required to orally advise a person whose breath analysis reading indicates that the prescribed concentration of alcohol is present in the blood that "[i]f you want to have such a blood test you will have to make your own arrangements and follow certain procedures, using a special blood test kit"[24]. The written notice sets out the procedures for the "optional blood test". The written advice states that "you must request the breath analysis operator to supply you with an approved blood test kit" and "[y]ou should then proceed promptly to a hospital or a medical practitioner ... of your choice and request that a sample of your blood be taken"[25].

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17 RTA, s 47K(3b).

18 RTA, s 47K(3b).

19 RTA, s 47K(5)(a).

20 RTA, s 47K(5)(b).

21 RTA, s 47K(5)(c).

22 RTA, s 47K(7)(b).

23 RTA, s 47K(7)(c).

24 Regulations, Sched 1 Pt A.

25 Regulations, Sched 1 Pt B.

11 The procedures for taking the blood sample are set out in reg 11 of the Regulations. There are 19 in all. A number are addressed to the medical practitioner who takes the sample. In summary, the medical practitioner is required to place the blood in approximately equal proportions in two containers that are supplied as part of the blood test kit[26]. Regulation 11(c) is of relevance to Mr Dunstall's case. This paragraph provides that each container must contain a sufficient quantity of blood to enable an accurate evaluation to be made of any concentration of alcohol present in the blood and the sample must furnish two such quantities of blood. The medical practitioner is required to seal each container with a seal that is provided as part of the kit[27]. The medical practitioner must take such measures as are reasonably practicable in the circumstances to ensure that the blood is not adulterated and does not deteriorate so as to prevent a proper assessment of the alcohol concentration in the blood from being made[28]. Further requirements are imposed on the medical practitioner as to certification of the samples[29]. Remaining prescribed procedures provide for the delivery of one sample to the person from whom the blood is taken[30] and delivery of the other sample to a police officer or approved courier[31]; the further delivery of that sample to Forensic Science SA[32]; the analysis of the sample by Forensic Science SA[33]; the completion of a certificate by the analyst[34] and the delivery of copies of the certificate to certain identified persons[35].

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26 Regulations, reg 11(b).

27 Regulations, reg 11(d).

28 Regulations, reg 11(e).

29 Regulations, reg 11(f)-(h).

30 Regulations, reg 11(i).

31 Regulations, reg 11(j).

32 Regulations, reg 11(ja)-(jb).

33 Regulations, reg 11(l).

34 Regulations, reg 11(m).

35 Regulations, reg 11(n)-(p).

Background and procedural history

12 Jason Dunstall was stopped by police while he was driving a motor vehicle in suburban Adelaide. He submitted to an alcotest, which returned a positive result. He was taken to a police station, at which he provided a sample of his breath for analysis. His breath analysis reading was 0.155 grams of alcohol per 100 millilitres of his blood. Mr Dunstall was informed of his right to have a sample of his blood taken for analysis and he was supplied with a blood test kit. The police drove Mr Dunstall to the Noarlunga Hospital, where a medical practitioner took a sample of his blood. Later attempts to analyse the sample proved unsuccessful because the blood was denatured.

13 Mr Dunstall was charged with driving a motor vehicle when there was present in his blood the prescribed concentration of alcohol[36]. He pleaded not guilty to the charge in the Magistrates Court of South Australia (Magistrate Dixon). At the hearing, over Mr Dunstall's objection, a certificate recording the breath analysis reading was admitted in evidence[37]. Further certificates were tendered in the prosecution case to establish that the operator was duly authorised and that the requirements and procedures relating to breath analysing instruments and breath analysis under the RTA, including those stated in sub-ss (2) and (2a), had been complied with. The medical practitioner who took the blood sample was called in the prosecution case. She had no memory of taking the sample and no knowledge of how the sample had come to be denatured.

14 Mr Collins, a forensic pathologist, was called in the defence case. Mr Collins considered that the likely explanation for the sample being denatured was that an insufficient quantity of blood had been taken from Mr Dunstall. Magistrate Dixon found that the blood sample was unsuitable for analysis because the medical practitioner had not taken a sufficiently large quantity of blood[38].

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36 RTA, s 47B(1)(a).

37 RTA, s 47K(5).

38 *Police v Dunstall* [2013] SAMC 25 at [14].

15 As will appear, the Full Court of the Supreme Court of South Australia has identified a "general unfairness discretion". In *R v Lobban*[39], the Full Court held that this discretion permits the court to exclude probative evidence untainted by illegality, impropriety or risk of prejudice where its admission would be unfair to the accused in the sense that it would make the trial of the accused an unfair trial.

16 In his reasons for decision, Magistrate Dixon identified as a critical issue for determination whether the inability to analyse the blood samples had resulted in unfairness to Mr Dunstall such that "the breath analysis results should not be used as evidence"[40]. His Honour referred to *Lobban* among other authorities in this respect[41]. He held that Mr Dunstall had been deprived of his ability to rebut the presumption despite having done all that he, Mr Dunstall, could do to comply with the requirements necessary to challenge the prosecution evidence[42]. The loss of the opportunity to challenge the prosecution evidence was occasioned by the apparent failure of the medical practitioner to comply with reg 11(c) of the Regulations[43]. His Honour said that, in the result, the trial of Mr Dunstall was unfair and "[a]ccordingly, the evidence of the breath analysis should be disregarded and the charge fails"[44]. The charge was dismissed.

17 As earlier explained, the prosecution case against Mr Dunstall included the certificate of the breath analysis reading and evidence satisfying all of the requirements that engage the presumption. It was, of course, open to Magistrate Dixon to review evidentiary rulings at any stage in the course of the hearing. His Honour's statement that "evidence of the breath analysis should be

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39 (2000) 77 SASR 24 at 39-45 [60]-[77] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

40 *Police v Dunstall* [2013] SAMC 25 at [5].

41 *Police v Dunstall* [2013] SAMC 25 at [15].

42 *Police v Dunstall* [2013] SAMC 25 at [16].

43 *Police v Dunstall* [2013] SAMC 25 at [14].

44 *Police v Dunstall* [2013] SAMC 25 at [16].

disregarded"[45] is to be understood as a decision to exclude the evidence in the exercise of the discretion identified in *Lobban*.

18 The police appealed[46] to the Supreme Court of South Australia constituted by a single judge (Kelly J)[47]. Kelly J held that a proper basis for the exercise of "the residual discretion to exclude the prosecution evidence on the basis of unfairness" had been established[48]. Her Honour agreed with Magistrate Dixon that the unfairness was the product of the medical practitioner's failure to comply with reg 11(c) of the Regulations. This failure had "effectively placed [Mr Dunstall] in the same position as if no blood sample had ever been taken"[49]. Her Honour held that Mr Dunstall had done all that was within his power to exercise the "statutory rights" that were given to him[50]. The appeal was dismissed.

19 The police appealed by leave to the Full Court of the Supreme Court of South Australia (Kourakis CJ, Gray and Sulan JJ)[51]. The appeal was dismissed by majority (Gray and Sulan JJ). Their Honours held that it had been open to Magistrate Dixon to exclude the certificate recording the breath analysis reading in the exercise of the "general unfairness discretion"[52]. Each of their Honours' reasons for this conclusion mirrored those of Kelly J.

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45 *Police v Dunstall* [2013] SAMC 25 at [16].

46 *Magistrates Court Act* 1991 (SA), s 42(1), (2)(b). Rule 12.05 of the Magistrates Court Rules 1992 (Criminal) (SA) provides that, where a complaint is made by a police officer in the execution of his duty, the complaint and the proceedings thereon may be entitled "Police v …".

47 *Police v Dunstall* (2013) 118 SASR 233.

48 *Police v Dunstall* (2013) 118 SASR 233 at 242 [46].

49 *Police v Dunstall* (2013) 118 SASR 233 at 242 [46].

50 *Police v Dunstall* (2013) 118 SASR 233 at 242-243 [46].

51 *Supreme Court Act* 1935 (SA), s 50(1)(a), (4)(a)(ii).

52 *Police v Dunstall* (2014) 120 SASR 88 at 124 [88] per Gray J, 144 [173] per Sulan J.

20 Kourakis CJ, in dissent, was critical of deploying "subjective discretions" to deny the prosecution the proofs which the RTA provides for the prosecution of drink-driving offences[53]. His Honour observed that the legislative scheme does not confer a procedural right to adduce evidence of blood sample analysis and that the failure to obtain a blood sample suitable for analysis had not been occasioned by police misconduct[54]. Kourakis CJ acknowledged that circumstances may arise that would make the prosecution of a defendant who is unable to adduce evidence of blood analysis an abuse of the process of the court[55]. His Honour said that this was not such a case[56].

21 On 13 March 2015, Bell and Keane JJ granted the police special leave to appeal. The appeal is brought on the ground that the Full Court majority erred in holding that evidence of a breath analysis reading obtained lawfully and without any impropriety on the part of the police should be excluded in the exercise of the "common law general unfairness discretion". For the reasons to be given, the appeal must be allowed, the orders of the courts below set aside and the matter remitted to the Magistrates Court for further hearing.

The "general unfairness discretion"

22 The Full Court was unanimous in acknowledging the existence of the common law "general unfairness discretion" to exclude evidence which was identified in *Lobban*[57]. Their Honours were divided as to the application of that discretion in the circumstances of Mr Dunstall's case[58].

23 In *Lobban*, which was concerned with the trial of a charge of possession of cannabis, at issue was the admission of certificates of analysis certifying that

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53 *Police v Dunstall* (2014) 120 SASR 88 at 111 [51].

54 *Police v Dunstall* (2014) 120 SASR 88 at 113 [57].

55 *Police v Dunstall* (2014) 120 SASR 88 at 113 [56].

56 *Police v Dunstall* (2014) 120 SASR 88 at 113 [58].

57 *Police v Dunstall* (2014) 120 SASR 88 at 102-103 [19]-[22] per Kourakis CJ, 113 [59] per Gray J, 136 [133] per Sulan J.

58 *Police v Dunstall* (2014) 120 SASR 88 at 113 [57] per Kourakis CJ (dissenting), 124 [87]-[88] per Gray J, 144 [173] per Sulan J.

material seized by the police was cannabis when the seized material was no longer in existence. It had been mistakenly destroyed by the police[59]. Martin J, with whose reasons Doyle CJ and Bleby J agreed, held that there is a common law "general unfairness discretion" which permits the court to exclude probative evidence untainted by impropriety or risk of prejudice where the reception of the evidence would be unfair in the sense that it would make the trial of the accused an unfair trial[60]. The discretion is said to apply to all forms of evidence, including "real" and circumstantial evidence[61]. The purpose served by the discretion is to ensure that the accused is not improperly convicted[62]. The interaction of a residual exclusionary discretion engaged to avoid an unfair trial with the inherent power of the court to relieve against unfairness including by staying proceedings was not explored.

24 In the event, the trial judge in *Lobban* was held not to have erred: although the accused had lost the opportunity to have the material tested by an analyst of his choice, there was no reason to doubt the reliability of the evidence[63]. Photographs of the seized material were available and the analyst had not been cross-examined on the opinions stated in the certificates[64]. In the

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59 *R v Lobban* (2000) 77 SASR 24 at 26-27 [11] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

60 *R v Lobban* (2000) 77 SASR 24 at 39-45 [60]-[77] (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]), citing, amongst other cases, *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J; [1977] HCA 43.

61 *R v Lobban* (2000) 77 SASR 24 at 39 [61], 46 [78] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

62 *R v Lobban* (2000) 77 SASR 24 at 51 [89(vii)] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

63 *R v Lobban* (2000) 77 SASR 24 at 50 [88] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

64 *R v Lobban* (2000) 77 SASR 24 at 50 [88] per Martin J (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

circumstances, Martin J said that there was no "genuine" unfairness and no risk of a miscarriage of justice[65].

25 The Full Court of the Supreme Court of South Australia constituted by a bench of five judges unanimously affirmed the existence of the "general unfairness discretion" in *Police v Hall*[66]. However, a majority held, as in *Lobban*, that the discretion had not been enlivened in the circumstances under consideration[67].

26 The exclusion of evidence in a criminal proceeding in the exercise of a "fairness discretion" is generally understood to refer to the principles explained in *R v Lee*[68] ("the *Lee* discretion"). The *Lee* discretion forms part of the special body of rules applying to the admission of confessional statements[69]. In criminal proceedings, there are two settled bases for the discretionary exclusion of non-confessional evidence, including "real" and circumstantial evidence. The first is where the probative value of the evidence is outweighed by the risk of prejudice to the defendant ("the *Christie*[70] discretion"). The second is where the evidence has been tainted by illegality or impropriety on the part of the law enforcement authority ("the *Bunning v Cross*[71] discretion"). The rationale for the latter discretion is not so much a concern with fairness to the defendant as with

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65 *R v Lobban* (2000) 77 SASR 24 at 51 [88] (Doyle CJ agreeing at 25 [1], Bleby J agreeing at 25 [4]).

66 (2006) 95 SASR 482 at 488 [24], 491 [35] per Doyle CJ (Vanstone J agreeing at 534 [215]), 497-498 [88] per Nyland J, 498-499 [94] per Bleby J, 521 [167] per Gray J.

67 *Police v Hall* (2006) 95 SASR 482 at 495 [70] per Doyle CJ (Vanstone J agreeing at 534 [215]), 504 [121]-[122] per Bleby J (Nyland J dissenting at 498 [92], Gray J dissenting at 534 [212]).

68 (1950) 82 CLR 133 at 159; [1950] HCA 25.

69 *Foster v The Queen* (1993) 67 ALJR 550 at 554 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; 113 ALR 1 at 6; [1993] HCA 80; *R v Swaffield* (1998) 192 CLR 159; [1998] HCA 1.

70 *R v Christie* [1914] AC 545.

71 (1978) 141 CLR 54; [1978] HCA 22.

the public policy of not giving the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law[72]. These three discretions correspond with the exclusionary discretions that apply in criminal proceedings under the Uniform Evidence Acts[73]. In addition to these bases for discretionary exclusion of evidence in criminal proceedings, intermediate appellate courts in other Australian jurisdictions have also identified a residual common law discretion to exclude admissible evidence on the ground of unfairness[74].

27 It will have been observed that the "general unfairness discretion" applied here excluded probative, "real", evidence that was obtained without taint of impropriety or risk of prejudicial misuse.

28 The Solicitor-General for South Australia, on behalf of the police, did not dispute the existence of a common law "general unfairness discretion" in the Full Court or in this Court. However, the Solicitor-General submits that as this is the first occasion on which this Court has been asked "to determine directly [the] existence [of the general unfairness discretion], having previously only considered it in *dicta*", it is appropriate to consider the "source and rationale" of the discretion in order to determine its "proper ambit".

29 The reference to this Court's previous consideration of a "general unfairness discretion" is to statements in decisions concerning the admission of confessional statements[75] and particular applications of the *Christie* discretion[76]. They are sourced in Gibbs J's statement in *Driscoll v The Queen*[77]:

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72 *Bunning v Cross* (1978) 141 CLR 54 at 74-75 per Stephen and Aickin JJ; *Ridgeway v The Queen* (1995) 184 CLR 19 at 38 per Mason CJ, Deane and Dawson JJ, 49 per Brennan J, 83 per McHugh J; [1995] HCA 66.

73 See *Evidence Act* 1995 (Cth), ss 90, 137, 138.

74 *R v Edelsten* (1990) 21 NSWLR 542 at 554; *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231 at 239-240 per Kelly SPJ, 241, 246 per Derrington J; *Rozenes v Beljajev* [1995] 1 VR 533 at 549; *Haddara v The Queen* [2014] VSCA 100 at [12], [16], [50] per Redlich and Weinberg JJA.

75 *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J; *Stephens v The Queen* (1985) 156 CLR 664 at 669; [1985] HCA 30.

> "Although as a matter of law a document is admissible against an accused person who has adopted it, that does not seem to me to be the end of the matter. *It has long been established that the judge presiding at a criminal trial has a discretion to exclude evidence if the strict rules of admissibility would operate unfairly against the accused*." (emphasis added)

30 The emphasised sentence is taken directly from Lord Goddard CJ's statement in *Kuruma v The Queen*[78]. In *Driscoll*[79], as in *Kuruma*[80], the statement was illustrated by reference to decisions applying the *Christie* discretion[81]. In *R v Sang*, Lord Diplock suggested that it is unlikely that Lord Goddard intended the statement to acknowledge a wider discretion than the *Christie* discretion[82]. That suggestion may apply equally to Gibbs J's adoption of the statement.

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76 *Alexander v The Queen* (1981) 145 CLR 395 at 402 per Gibbs CJ; [1981] HCA 17; *Harriman v The Queen* (1989) 167 CLR 590 at 594-595 per Brennan J; [1989] HCA 50.

77 (1977) 137 CLR 517 at 541 (Mason J agreeing at 543, Jacobs J agreeing at 543 and Murphy J agreeing at 543).

78 [1955] AC 197 at 204: "No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused."

79 (1977) 137 CLR 517 at 541 per Gibbs J.

80 [1955] AC 197 at 204.

81 *Noor Mohamed v The King* [1949] AC 182 at 192 per Lord du Parcq; *Harris v Director of Public Prosecutions* [1952] AC 694 at 707 per Viscount Simon.

82 [1980] AC 402 at 436. Lord Goddard went on in *Kuruma* to suggest that, if an item of evidence such as a document had been obtained from a defendant by trick, the trial judge might properly exclude it: [1955] AC 197 at 204. In *Sang*, Lord Diplock considered that in this passage Lord Goddard acknowledged the existence of a discretion to exclude a self-incriminatory admission obtained after the commission of the offence by means which would justify excluding an actual confession: [1980] AC 402 at 436. See also at 439-440 per Viscount Dilhorne.

31 Nonetheless, Gibbs J's statement in *Driscoll* and its repetition in decisions concerned with the *Lee* or the *Christie* discretion are cited in *Cross on Evidence* for the proposition that there is a residual discretion to reject any evidence if the strict rules of admissibility would operate unfairly against the accused[83]. As the learned author observes, putting confessions to one side, it is not easy to think of circumstances in which the grounds for the exercise of the residual discretion would not fall within the more specific principle that evidence will not be admitted where its prejudicial effect exceeds its probative value[84]. Two examples are suggested as possibly engaging this residual discretion. The first example is where the weight and credibility of evidence cannot be effectively tested[85]. The second example is where evidence is excessively inflammatory, as in the case of gruesome photographs[86]. The second example reinforces the point earlier made, as excessively inflammatory evidence may be excluded under the *Christie* discretion.

32 It is the first example on which Mr Dunstall relies. He calls in aid Gaudron J's discussion of fairness in its application to the rules of evidence in *Dietrich v The Queen*[87]:

> "Speaking generally, the notion of 'fairness' is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it

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83 *Cross on Evidence*, 10th Aust ed (2015) at [11125].

84 *Cross on Evidence*, 10th Aust ed (2015) at [11125], citing *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231 at 252 per Carter J; *Rozenes v Beljajev* [1995] 1 VR 533 at 553-554.

85 *Cross on Evidence*, 10th Aust ed (2015) at [11125], citing, amongst other cases, *Dietrich v The Queen* (1992) 177 CLR 292 at 363 per Gaudron J; [1992] HCA 57; *Rozenes v Beljajev* [1995] 1 VR 533.

86 *Cross on Evidence*, 10th Aust ed (2015) at [11125].

87 (1992) 177 CLR 292 at 363.

might place him at risk of being improperly convicted[88], either *because its weight and credibility cannot be effectively tested*[89] or because it has more prejudicial than probative value and so may be misused by the jury[90]." (emphasis added)

33 Her Honour's analysis was made in the context of the power to stay proceedings to prevent an unfair trial. The decisions cited in support of the emphasised passage concern the special principles that govern the admission of confessional statements at common law. Reference is also made to Professor Pattenden's monograph on judicial discretion for the proposition that evidence may be excluded if its weight and credibility cannot be effectively tested by the defence[91]. Professor Pattenden illustrates the proposition by reference to the decision of the Ontario Supreme Court in *R v Moore*[92]. Professor Pattenden treats evidence in this category as subject to exclusion in the exercise of the *Christie* discretion. This was the basis for exclusion of the evidence of the deceased complainant in *Moore*[93].

34 The loss of evidence, whether it may have assisted the defence to mount a positive case or to raise a doubt as to the prosecution case, would not ordinarily

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88 *McDermott v The King* (1948) 76 CLR 501 at 511-515 per Dixon J; [1948] HCA 23; *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J.

89 *McDermott v The King* (1948) 76 CLR 501 at 511-515 per Dixon J; *R v Lee* (1950) 82 CLR 133 at 144 and noting Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 233.

90 *R v Christie* [1914] AC 545 at 560; *Harris v Director of Public Prosecutions* [1952] AC 694 at 707; *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J and noting Waight and Williams, *Evidence: Commentary and Materials*, 3rd ed (1990) at 11 and Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 233.

91 Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 233.

92 Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 233, citing (1973) 17 CCC (2d) 348.

93 (1973) 17 CCC (2d) 348 at 349 per Van Camp J. Cf *Rozenes v Beljajev* [1995] 1 VR 533 at 557.

enliven the *Christie* discretion nor make the trial of the defendant unfair[94]. This is not to say that the inability to test prosecution evidence may never justify exclusion in the exercise of the *Christie* discretion but it is to question the application of a wider "general unfairness discretion" to exclude prosecution evidence in a case in which the loss of defence evidence does not engage the *Christie* discretion nor the inherent power of the court to stay proceedings.

35 While Mr Dunstall's principal reliance is upon the "general unfairness discretion", he does obliquely raise the inability to test breath analysis evidence as justifying exclusion under the *Christie* discretion. He contends that the results of blood analysis possess superior probative value to the results of breath analysis and where the presumption is relied upon without possibility of contradiction there is a risk of wrong conviction or of conviction for an offence in the wrong category.

36 The submission fails to come to terms with the legislative scheme. The Parliament has chosen to provide the prosecution with an aid to proof and to closely confine the circumstances in which rebuttal evidence may be adduced. There is no suggestion that the scheme is beyond power[95]. The prosecution proves the commission of a s 47B(1)(a) offence by proof, inter alia, that the defendant submitted to breath analysis by means of a breath analysing instrument within two hours of driving a motor vehicle and that the breath analysis reading indicated the presence of the prescribed concentration of alcohol in the defendant's blood. The category of the offence is established by proof of the breath analysis reading. Subject to the defence adducing opinion evidence based upon analysis of a blood sample taken and dealt with in accordance with the prescribed procedures, the reliability of the breath analysis reading is not an issue in the trial.

37 The majority in the Full Court relied on statements made by King CJ in *French v Scarman* for the conclusion that it was open to Magistrate Dixon to exclude the certificate recording the breath analysis reading in the exercise of discretion[96]. At the time *French* was decided, the statutory scheme imposed an

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94 *R v Edwards* (2009) 83 ALJR 717 at 722 [31]; 255 ALR 399 at 405; [2009] HCA 20.

95 *Williamson v Ah On* (1926) 39 CLR 95 at 108 per Isaacs J; [1926] HCA 46.

96 *Police v Dunstall* (2014) 120 SASR 88 at 116-117 [71] per Gray J, 134-136 [125]-[132] per Sulan J, both citing (1979) 20 SASR 333 at 337, 340-341.

obligation on the police to do all things necessary to facilitate the taking of the blood sample[97]. The police were found to have deliberately refrained from doing so[98]. As explained in *Hall*, the close connection between obtaining the breath analysis reading and the police misconduct was held in *French* to justify exclusion under the *Bunning v Cross* discretion[99]. The reliance on King CJ's analysis in *French* is misplaced. Notable in the analysis of Gray J and Sulan J below is the absence of reference to the reasoning of the majority in *Hall*.

38 The facts in *Hall* bear similarity to the facts here. Mr Hall underwent a breath analysis using a breath analysing instrument which recorded the prescribed concentration of alcohol in his blood. Mr Hall requested, and was given, a blood test kit. He attended at the Royal Adelaide Hospital to have a sample of his blood taken. Hospital staff were busy attending to patients with more pressing needs and a sample of Mr Hall's blood was not taken until it was too late for analysis to be of forensic utility. Mr Hall pleaded not guilty to a charge of driving with the prescribed concentration of alcohol in his blood. The magistrate hearing the charge found that Mr Hall had attended the hospital promptly and that it was the delay in taking the blood sample that had deprived him of the opportunity of challenging the breath analysis reading[100].

39 The majority in the Full Court considered that the admission of the proof of the breath analysis reading did not make Mr Hall's trial unfair[101]. Doyle CJ's analysis in this respect is instructive. His Honour observed that the RTA treats the breath analysis reading as reliable evidence and that the court should not hold otherwise[102]. Next, Doyle CJ observed that there had been no misconduct or

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97 RTA, s 47f(2), relevantly repealed by *Road Traffic (Drug Driving) Amendment Act* 2005 (SA), s 13.

98 (1979) 20 SASR 333 at 340 per King CJ.

99 *Police v Hall* (2006) 95 SASR 482 at 488 [23] per Doyle CJ, 499 [96] per Bleby J, 534 [216] per Vanstone J, all citing (1979) 20 SASR 333.

100 *Police v Hall* (2006) 95 SASR 482 at 487 [20].

101 *Police v Hall* (2006) 95 SASR 482 at 495 [70] per Doyle CJ (Vanstone J agreeing at 534 [215]), 504 [121]-[122] per Bleby J (Nyland J dissenting at 498 [92], Gray J dissenting at 534 [212]).

102 *Police v Hall* (2006) 95 SASR 482 at 492 [48].

impropriety on the part of the police in association with obtaining the breath analysis reading[103]. Next, his Honour observed that the RTA does not confer an enforceable right on the driver of a vehicle to have a sample of blood taken[104]. Whether analysis of Mr Hall's blood would have assisted his defence could not be known[105]. In the circumstances, Doyle CJ considered that only "in the most general of senses can [the admission of the proof of the breath analysis reading] be said to be unfair" where a blood sample is not taken or is taken after a lapse of time such that it provides no forensic assistance. Unfairness in this general sense, his Honour said, did not enliven the discretion[106].

40 Mr Dunstall seeks to distinguish *Hall*, submitting that the failure to obtain a complying blood sample rested with Mr Hall, who could have gone to another hospital or located a medical practitioner in private practice to take the sample in a timely fashion. By contrast, the failure to obtain a complying blood sample in Mr Dunstall's case was entirely due to the fault of the medical practitioner. *Hall* is not to be distinguished by attributing fault to Mr Hall. As Doyle CJ noted[107], the magistrate found by implication that Mr Hall was not at fault in relation to the time that elapsed before the sample was taken. In each case, the inability to challenge the presumption was occasioned by factors outside the defendant's control.

41 Mr Dunstall acknowledges that the loss or destruction of evidence which may or may not have assisted the defence case does not ordinarily render a trial unfair. As explained in *R v Edwards*, it is not right to characterise the loss of evidence the contents of which is unknown as a prejudice to the defendant, as it cannot be known whether the evidence would have undermined or supported the prosecution case[108]. Mr Dunstall argues that his case is to be distinguished. The loss of the capacity to adduce evidence in rebuttal of the presumption is said to make the prosecution case unassailable. And the loss of that capacity is the

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103 *Police v Hall* (2006) 95 SASR 482 at 493 [52].

104 *Police v Hall* (2006) 95 SASR 482 at 493 [55].

105 *Police v Hall* (2006) 95 SASR 482 at 493 [56].

106 *Police v Hall* (2006) 95 SASR 482 at 494 [58].

107 *Police v Hall* (2006) 95 SASR 482 at 485 [8]. See also at 497 [83].

108 (2009) 83 ALJR 717 at 723 [33]; 255 ALR 399 at 406.

product of the medical practitioner's failure to comply with the requirements of reg 11(c) of the Regulations.

42 It does not advance Mr Dunstall's case to argue as he does that, once a medical practitioner embarks on taking a blood sample using the blood test kit, the medical practitioner accepts an obligation to do so in accordance with the prescribed procedures. The medical practitioner acts on the defendant's request and is in no sense an agent of the law enforcement authorities responsible for the prosecution. Any failure by the medical practitioner to comply with the prescribed procedures does not engage the public policy considerations that inform the *Bunning v Cross* discretion.

43 A defendant does not have a "statutory right"[109] to have a sample of blood taken and dealt with in accordance with the prescribed procedures. Section 47K(1a) states a rule of exclusion with respect to evidence rebutting the presumption. The rule is subject to opinion evidence under sub-s (1a)(b) based upon analysis of a sample taken and dealt with in accordance with the prescribed procedures under sub-s (1a)(a)[110]. The onus is upon the defendant to bring himself or herself within these confines. It is evident that a defendant may fail to do so in a variety of circumstances without personal fault.

44 No principled distinction can be drawn between the inability to rebut the presumption occasioned by the medical practitioner's failure to take a sufficient quantity of blood and any circumstance (excluding misconduct of a kind that engages the *Bunning v Cross* discretion) that results in the defendant failing without fault to obtain an analysis of a complying blood sample. If the reception of breath analysis evidence is unfair in any such case the posited "discretion" will invariably apply to exclude the prosecution evidence engaging the presumption.

45 The unfairness which Mr Dunstall asserts is the product of the scheme of the RTA for the prosecution of drink-driving offences. Mr Dunstall contests that this is so by pointing to s 47K(8), which provides that a prosecution for an offence will not fail because of a deficiency in the blood test kit. It further provides that the presumption will apply despite that deficiency unless the defendant proves that the kit was delivered unopened to the medical practitioner and the medical practitioner gives evidence that because of a deficiency in the kit he or she was unable to comply with the prescribed procedures. Mr Dunstall

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109 Cf *Police v Dunstall* (2013) 118 SASR 233 at 243 [46].

110 RTA, s 47K(1a)(a), (1a)(b).

argues that sub-s (8) recognises that a prosecution engaging the presumption may fail in circumstances in which the inability to obtain a blood sample is occasioned without fault on the defendant's part.

46 It will be recalled that the presumption is conditioned on compliance with sub-s (2a), which imposes a duty on the operator to deliver an approved blood test kit to a person who requests one. It may be implicit in the obligation cast thereby that the approved blood test kit so delivered is not deficient. Contrary to Mr Dunstall's submission, the work done by s 47K(8) is to permit the prosecution to rely on the presumption notwithstanding the possible failure to comply with sub-s (2a), subject always to the defendant proving the matters specified in pars (a) and (b).

47 Kourakis CJ was right to conclude that admission of the evidence of the breath analysis reading did not make the trial of Mr Dunstall unfair[111]. This conclusion and the circumstance that neither party contested the existence of the "general unfairness discretion" make it inappropriate to determine the scope, if any, of a residual discretion to exclude lawfully obtained, probative, non-confessional evidence that is unaffected by impropriety or risk of prejudice on the ground that admission of the evidence would render the trial of the defendant an unfair trial.

48 It remains to observe that the power of the court to prevent unfairness arising from the continuation of criminal proceedings that are oppressive or unjust involves a test of fairness that requires the court to balance the interests of the defendant and those of the community[112]. Where the evidence that is sought to be excluded is critical to the prosecution case and the basis of exclusion is said to be that admission of the evidence would render the trial unfair, the remedy lies in determining whether the circumstances justify a permanent stay and not in circumventing that inquiry by the exclusion of the evidence in the exercise of a "general unfairness discretion".

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111 *Police v Dunstall* (2014) 120 SASR 88 at 113 [57].

112 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 33 per Mason CJ; [1989] HCA 46; *Williams v Spautz* (1992) 174 CLR 509 at 518-519 per Mason CJ, Dawson, Toohey and McHugh JJ; [1992] HCA 34; *Subramaniam v The Queen* (2004) 79 ALJR 116 at 122-123 [27]; 211 ALR 1 at 9; [2004] HCA 51; *Moti v The Queen* (2011) 245 CLR 456 at 463-464 [10]-[11] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 50.

49 It was an error to exclude the evidence of the breath analysis reading. The appeal must be allowed and the matter remitted for further hearing before the Magistrates Court[113]. A condition of the grant of special leave was the appellant's agreement to pay Mr Dunstall's costs in any event.

Orders

50 The following orders should be made:

1. Appeal allowed.

2. Set aside order 1 of the orders of the Full Court of the Supreme Court of South Australia made on 25 July 2014 and, in its place, order that:

   (a) the appeal be allowed; and

   (b) order 1 of the orders of Kelly J made on 5 December 2013 be set aside and, in its place, order that:

      (i) the appeal be allowed;

      (ii) the order of the Magistrates Court of South Australia made on 20 August 2013 dismissing the charge be set aside; and

      (iii) the matter be remitted to the Magistrates Court for further hearing.

3. The appellant pay the respondent's costs in this Court.

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113 *Magistrates Court Act* 1991 (SA), s 42(5)(b).

51 NETTLE J. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia (Kourakis CJ, Gray and Sulan JJ). By majority (Gray and Sulan JJ), the Court upheld the affirmation by Kelly J of a magistrate's dismissal of a charge that, in contravention of s 47B(1)(a) of the *Road Traffic Act* 1961 (SA) ("the RTA"), the respondent drove a motor vehicle while there was present in his blood a concentration of alcohol of 0.155 grams in 100 millilitres of blood.

The facts and judgments below

52 The facts and relevant legislative provisions are set out in the joint judgment and it is unnecessary to repeat them. Suffice to say that, before the magistrate, the police sought to tender a certificate issued under s 47K(5) of the RTA ("the breath analysis test certificate"). It recorded, as was the fact, that shortly after the alleged commission of the offence the respondent submitted to a breath analysis test which showed that, at that time, he had in his breath a concentration of alcohol equivalent to 0.155 grams in 100 millilitres of blood. The magistrate excluded the certificate because blood samples taken shortly after the breath analysis had denatured due to the inadequacy of their size and so could not be tested. He ruled that, because the respondent was in those circumstances unable to contest the accuracy of the breath analysis test certificate, its receipt would be productive of such unfairness as to warrant its exclusion.

53 On appeal to the Supreme Court, Kelly J upheld the magistrate's ruling. Her Honour concluded that the medical practitioner who took the blood samples failed to comply with reg 11(c) of the Road Traffic (Miscellaneous) Regulations 1999 (SA) (which specified the size of samples to be taken) and thereby "placed the respondent in the same position as if no blood sample had ever been taken"[114]. Based upon what her Honour considered to be the effect of *Police v Jervis*[115] and *R v Lobban*[116], she held that there was "scope for the exercise of the [fairness] discretion in favour of the respondent"[117].

54 On appeal to the Full Court, Gray J adopted an essentially similar approach, although he ultimately based his decision on observations of King CJ in *French v Scarman*[118] as to the unfairness of admitting a breath analysis test

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114 *Police v Dunstall* (2013) 118 SASR 233 at 242 [46].

115 (1998) 70 SASR 429.

116 (2000) 77 SASR 24.

117 *Dunstall* (2013) 118 SASR 233 at 243 [50].

118 (1979) 20 SASR 333 at 341.

certificate in circumstances where the failure of police to comply with a statutory obligation to assist the accused in obtaining a blood test had deprived the accused of means of contradicting the presumed effect of the certificate[119]:

> "The failure to take an adequate amount of blood was in direct non-compliance with the regulatory scheme. As a consequence, both samples were denatured and the defendant lost the only basis of contesting the breath analysis reading. This arose in circumstances where the defendant had taken every available step, but non-compliance with the regulations had rendered his right to the obtaining of a blood sample nugatory. I would respectfully adopt the earlier extracted observations of King CJ in *French v Scarman*:
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> > '… Factors against excluding the evidence are slight. The offence charged, although of course serious in its way, is not a grave crime. The cogency of the evidence can be of little significance in the circumstances, especially as the non-observed safeguard was directed precisely towards enabling the respondent to check the cogency of the evidence.'"

55 Gray J, however, did not refer to the later decision of a five-member Full Court in *Police v Hall*[120] in which it was held that the fact that a blood sample is not taken through no fault of the driver does not make police reliance on a breath analysis test certificate unfair.

56 Sulan J quoted[121] with apparent approval the dissenting reasons of Gray J in *Police v Hall* and concluded, as Gray J did in the present case, that the legislation laid down a procedure for enabling the respondent to obtain a blood test against which to check the accuracy of the breath analysis test certificate[122]. His Honour held that, because the procedure had not been complied with, there had been a failure to avail the respondent of the safeguards recognised by the legislature and that it justified exclusion of the certificate[123].

57 In contrast, Kourakis CJ undertook an extensive review of previous decisions of the Full Court, including *Police v Hall*, and concluded, consistently

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119 *Police v Dunstall* (2014) 120 SASR 88 at 124 [87] (footnote omitted).

120 (2006) 95 SASR 482.

121 (2014) 120 SASR 88 at 142-143 [161]-[162].

122 (2014) 120 SASR 88 at 144 [170].

123 (2014) 120 SASR 88 at 144 [172].

with that decision, that the prosecution's reliance on the breath analysis test certificate was not unfair and therefore the certificate should not have been excluded. In brief substance, his Honour reasoned as follows:

(1) A trial judge has a discretion to exclude admissible evidence if its admission would operate unfairly against the accused (in the sense of "forensic unfairness")[124].

(2) Forensic unfairness does not extend to some broad notion of fair play irrespective of the method of proof prescribed by Parliament, and it would be inimical to the rule of law for a judge to approach it as such[125].

(3) Where, therefore, a judge is asked to exclude admissible evidence on the ground of forensic unfairness, it is incumbent on the judge clearly to identify the unfairness by reference to the substantive and evidential matters in issue[126].

(4) Section 47K(1a) of the RTA does not confer any procedural or substantive right on an accused. On the contrary, the provision restricts the evidence which an accused may adduce in rebuttal of a breath analysis test certificate[127].

(5) As was decided in *Police v Hall*, there is no forensic unfairness in mere inability to collect or adduce evidence which it might be supposed could assist an accused if it were available, and that is so whether or not the accused has taken all reasonable steps to procure the evidence but has failed through no fault of his or her own to procure it[128].

(6) Regulation 11(c) does not cast a duty on medical practitioners with respect to taking a blood sample[129]. The purpose of the regulation is to prescribe the conditions precedent to the admissibility of evidence adduced pursuant to s 47K(1a)[130]. The word "must" in the regulation mandates the

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124 (2014) 120 SASR 88 at 98 [12].

125 (2014) 120 SASR 88 at 103 [22].

126 (2014) 120 SASR 88 at 103 [22].

127 (2014) 120 SASR 88 at 103 [24].

128 (2014) 120 SASR 88 at 105 [29], [33].

129 (2014) 120 SASR 88 at 105 [30].

130 (2014) 120 SASR 88 at 105 [31].

procedures which must be followed to render evidence of the blood test admissible. It does not impose an obligation on a medical practitioner to carry them out[131].

(7) *French v Scarman*, on which the majority relied, is distinguishable[132]. It was decided before amendments were made to the RTA which abrogated the statutory obligation previously imposed on police officers to "do all things necessary to facilitate the taking of the sample"[133]. Properly understood, *French v Scarman* was an application of the public policy discretion to exclude improperly obtained evidence[134]. That discretion has no application on the facts of this case.

(8) *Police (SA) v Erwin*[135], on which the majority also relied, was wrongly decided and should not be followed[136].

(9) There may be some very limited circumstances which would render the prosecution of an accused who is unable to obtain evidence of a blood analysis an abuse of process: for example, if it were shown that the prosecution had strong reason to doubt the accuracy of the breath analysis test certificate but persisted with reliance on the statutory presumption. If so, however, any stay of prosecution in such a case would be grounded in the prosecution's bad faith and consequent abuse of process as opposed to some broader notion of fairness[137].

(10) In this case, the police carried no responsibility for the respondent's choice of medical practitioner or the medical practitioner's failure to take the sample in accordance with the regulations. There is no evidence which casts any doubt on the accuracy of the breath analysis test certificate. The respondent's failure to obtain a blood sample which could be admitted in evidence was not caused by any police misconduct. Consequently, there

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131 (2014) 120 SASR 88 at 105-106 [34].

132 (2014) 120 SASR 88 at 107-108 [43].

133 See *French v Scarman* (1979) 20 SASR 333 at 334.

134 (2014) 120 SASR 88 at 107 [39]-[41].

135 (1997) 26 MVR 360.

136 (2014) 120 SASR 88 at 111 [50].

137 (2014) 120 SASR 88 at 113 [56].

is no forensic unfairness of a kind which would engage the fairness discretion[138].

58 For the reasons which Kourakis CJ gave, and those which follow, the appeal should be allowed.

The fairness discretion

59 In this case, special leave to appeal was granted because the matter was said to raise a question of general importance of whether there is discretion to exclude evidence on the ground that its reception would be unfair. There should be no doubt that there is such discretion[139]. It is the necessary concomitant of the obligation of a trial judge to ensure that an accused receives a fair trial according to law[140]. The real question is as to its nature and extent and, in particular, what counts as unfair in the relevant sense[141].

60 In *R v Swaffield*[142], Brennan CJ spoke of the fairness discretion as the discretion recognised in *R v Lee*[143] to exclude a voluntary statement when its reliability is put in doubt by reason of the conduct of a preceding police investigation or where, but for a trick or other unfair conduct on the part of the police, the statement would not have been made or made in the form it was[144]. In

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138 (2014) 120 SASR 88 at 113 [57].

139 *R v Edelsten* (1990) 21 NSWLR 542 at 554; *R v McLean; Ex parte Attorney-General* [1991] 1 Qd R 231 at 236, 239 per Kelly SPJ, 244 per Derrington J, cf at 256-257 per Carter J; *R v Chai* (1992) 27 NSWLR 153 at 172, 175-176 per Badgery-Parker J; *Rozenes v Beljajev* [1995] 1 VR 533 at 549, 553-554; *R v Lobban* (2000) 77 SASR 24 at 39-50 [59]-[86]; cf Selway, "Principle, Public Policy and Unfairness – Exclusion of Evidence on Discretionary Grounds", (2002) 23 *Adelaide Law Review* 1 at 7.

140 *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J; [1977] HCA 43; *R v Swaffield* (1998) 192 CLR 159 at 189 [54] per Toohey, Gaudron and Gummow JJ; [1998] HCA 1.

141 Weinberg, "The Judicial Discretion to Exclude Relevant Evidence", (1975) 21 *McGill Law Journal* 1 at 32 et seq.

142 (1998) 192 CLR 159 at 167 [8]-[9], 171-175 [13]-[20].

143 (1950) 82 CLR 133; [1950] HCA 25.

144 See also *Duke v The Queen* (1989) 180 CLR 508 at 513 per Brennan J; [1989] HCA 1; cf *Harriman v The Queen* (1989) 167 CLR 590 at 594-595 per Brennan J; [1989] HCA 50.

future, it would be preferable to refer to that discretion as "the *Lee* discretion" and to regard the fairness discretion as it has come to be conceived of in Australia over the last quarter century as a residual discretion to exclude evidence which, although not attracting the operation of the *Christie*[145], *Bunning v Cross*[146] or *Lee* discretions ("the recognised discretions"), would be productive of an unacceptable risk of miscarriage of justice.

61 In *R v Sang*[147], Lord Scarman proposed an alternative view that the recognised discretions are in effect merely instances of a more general or overarching fairness discretion to be exercised wherever a judge considers it is necessary to exclude evidence in order to ensure a fair trial. More recently, a majority of the Victorian Court of Appeal similarly referred to the fairness discretion as encompassing the *Christie* and *Lee* discretions[148]. In some respects, that is an attractive idea[149]. But it also faces conceptual and systemic difficulties.

62 Conceptually, the difficulty is the essentially different exclusionary bases of each of the recognised discretions and the consequent intractability of deducing an overarching principle which is capable of explaining them all. In the case of the *Christie* discretion, evidence is excluded where and because it would be unfair to an accused to admit evidence of which the capacity to lead a jury to reason correctly to a conclusion of guilt is outweighed by its capacity to lead the jury to reason incorrectly to a conclusion of guilt, and consequently would expose the accused to an unacceptable risk of being wrongly convicted of a crime of which he or she is presumed to be innocent[150].

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145 *R v Christie* [1914] AC 545.

146 (1978) 141 CLR 54; [1978] HCA 22.

147 [1980] AC 402 at 452-456; but see and compare Mathieson, "Fair Criminal Trial and the Exclusion of 'Unfair Evidence'", (2013) 25 *New Zealand Universities Law Review* 739 at 740-741.

148 *Haddara v The Queen* [2014] VSCA 100 at [50] per Redlich and Weinberg JJA.

149 See Selway, "Principle, Public Policy and Unfairness – Exclusion of Evidence on Discretionary Grounds", (2002) 23 *Adelaide Law Review* 1 at 7-8.

150 *Swaffield* (1998) 192 CLR 159 at 191-193 [62]-[65] per Toohey, Gaudron and Gummow JJ; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 577 [64] per Heydon J; [2011] HCA 47; see also *Pfennig v The Queen* (1995) 182 CLR 461 at 528-529 per McHugh J; [1995] HCA 7.

63 In contrast, the exclusionary basis of the *Bunning v Cross*[151] discretion is grounded in the public policy that it is better that a possibly guilty accused be allowed to go free than that society or the courts sanction serious illegality or other serious impropriety on the part of officials in gathering the evidence with which to convict the accused. It has less if anything to do with fairness to the accused than with protecting societal norms.

64 The exclusionary basis of the *Lee* discretion is different again in that it rests in part on concerns regarding reliability[152], and to that extent is in one sense coordinate with the *Christie* discretion, but increasingly and rightly it is regarded as grounded in the fundamental nature of the accusatorial process of the criminal law and hence concern that an accused should not be caused to forgo his or her right to silence by a trick or other unfair means. In effect, *Lee* combines notions of fairness to the accused[153] with preservation of broader societal norms[154].

65 In the result, recognition of a general fairness discretion embracing all three of the recognised discretions would necessitate a conception of fairness that includes considerations that have little if anything to do with what is fair. Rather than assisting in the clarification of principle, that would tend to complicate and so make less comprehensible important aspects of the law of evidence which are now relatively well established.

66 Systemically, the difficulty with the idea of a general fairness discretion is in the delimitation of its content. The conventional view of a residual fairness discretion is of it being directed to ensuring that the accused receives a fair trial according to law – what Kourakis CJ aptly termed "forensic" fairness – and thus the criteria of its exercise are relatively clearly delineated. In contrast, a general fairness discretion would involve an open-textured approach to fairness more

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151 (1978) 141 CLR 54 at 75-80; *Ridgeway v The Queen* (1995) 184 CLR 19 at 31-33 per Mason CJ, Deane and Dawson JJ, 60-61 per Toohey J; [1995] HCA 66; *Swaffield* (1998) 192 CLR 159 at 182-183 [28] per Brennan CJ.

152 *Duke v The Queen* (1989) 180 CLR 508 at 513; *Swaffield* (1998) 192 CLR 159 at 175 [19]-[20] per Brennan CJ, 196 [74] per Toohey, Gaudron and Gummow JJ.

153 *Van der Meer v The Queen* (1988) 62 ALJR 656 at 666; 82 ALR 10 at 26; [1988] HCA 56; *Duke v The Queen* (1989) 180 CLR 508 at 513.

154 *Swaffield* (1998) 192 CLR 159 at 175 [19]-[20] per Brennan CJ, 189-190 [53]-[54] per Toohey, Gaudron and Gummow JJ; *R v Pfitzner* (1996) 66 SASR 161 at 180; *R v Lobban* (2000) 77 SASR 24 at 37-38 [51]-[55]; *Tofilau v The Queen* (2007) 231 CLR 396 at 423 [68] per Gummow and Hayne JJ; [2007] HCA 39.

likely to invite application of idiosyncratic notions of what is just and fair and, for that reason, has been criticised as inimical to the rule of law[155].

67 There are, therefore, clear advantages to adhering to the notion that the fairness discretion is a residual discretion which applies where, although none of the recognised discretions is engaged, the receipt of otherwise admissible evidence would be productive of such unfairness as to result in an unacceptable risk of miscarriage of justice.

The criteria of the fairness discretion

68 The question remains, however, what are the circumstances in which, although none of the recognised discretions is engaged, the admission of otherwise admissible evidence would be productive of such unfairness as to result in an unacceptable risk of miscarriage of justice.

69 As Gaudron J observed in another context, "what is fair very often depends on the circumstances of the particular case" and "notions of fairness are inevitably bound up with prevailing social values"[156]. Hence, "the inherent powers of a court to prevent injustice are not confined within closed categories"[157]. But in this as in other areas of the law involving the recognition of new applications of established principle, courts are bound to approach the task by a process of legal reasoning, by deduction and therefore ultimately by analogy with decided cases, recognising that the exercise may ultimately involve a value judgment involving matters of policy and degree in a context of changing societal values or "prevailing community standards"[158].

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155 *Swaffield* (1998) 192 CLR 159 at 211 [129] per Kirby J; *Police v Dunstall* (2014) 120 SASR 88 at 103 [22] per Kourakis CJ; see also *Wong v The Queen* (2001) 207 CLR 584 at 591 [6] per Gleeson CJ; [2001] HCA 64; Bingham, *The Rule of Law*, (2010) at 51-54.

156 *Dietrich v The Queen* (1992) 177 CLR 292 at 364; [1992] HCA 57.

157 *Dietrich* (1992) 177 CLR 292 at 364.

158 *Swaffield* (1998) 192 CLR 159 at 196-198 [74]-[79], 202 [91] per Toohey, Gaudron and Gummow JJ, 211 [131] per Kirby J. But see criticism of the concept of "contemporary community standards" in Selway, "Principle, Public Policy and Unfairness – Exclusion of Evidence on Discretionary Grounds", (2002) 23 *Adelaide Law Review* 1 at 25-26.

The application of the fairness discretion

70 That leads to the question of what there is about this case which might be thought to attract the operation of the discretion. Given the residual nature of the discretion and the desirability of proceeding by deduction from decided cases, it assists to begin with why the recognised discretions are not engaged.

71 The *Christie* discretion is not engaged because, quite apart from the presumptive effect of the breath analysis test certificate and the consequent high probative value which Parliament decreed it be given, there is nothing which suggests that it was inaccurate. On the contrary, the undisputed evidence was that the breath analysis test equipment was working correctly.

72 The *Bunning v Cross* discretion is not engaged because there is no suggestion that the police or any other authority acted unlawfully or otherwise improperly. As the magistrate found, the most likely cause of the denatured sample was that the doctor failed to take a sample of adequate volume. But it was not the responsibility of the police to take the blood sample or to ensure that an adequate sample was taken. The police had nothing to do with choosing the doctor and the doctor had nothing to do with the police. The RTA required the respondent to make his own arrangements for a blood sample to be taken and it was he who chose the doctor. It may not matter in the circumstances of this case but, for completeness, it should also be noted that there was no evidence or even suggestion that the doctor's error was deliberate.

73 The *Lee* discretion does not apply because there was nothing here in the way of a confession or anything in the nature of a trick or other unfair practice causing the respondent to forgo his right to silence or other right or privilege.

74 In those circumstances, why should the admission of the breath analysis test certificate be productive of an unacceptable risk of miscarriage of justice?

75 As was earlier noticed, Gray J and Sulan J approached the problem by analogy with *French v Scarman* on the basis that, because the legislation laid down a procedure for enabling the respondent to obtain a blood sample against which to check the accuracy of the breath analysis test and the procedure had not been complied with, there had been a failure to avail the respondent of the safeguards recognised by the legislature to ensure that his trial was not unfair. As Kourakis CJ concluded, however, *French v Scarman* was distinguishable as having been decided on the basis of the public policy discretion to exclude evidence which had been improperly obtained due to the failure of police to comply with a statutory obligation, to which they were then subject, to "do all things necessary to facilitate the taking of the sample". By the time of the events in issue in this case, that obligation had been repealed. There was nothing improper about the way in which the evidence was obtained and it could no

longer be said that Parliament regarded the availability of blood test evidence as essential to ensure that the trial was not unfair.

76 Counsel for the respondent resisted the notion that the change in legislation had made any relevant difference to the exercise of the discretion. She contended that it was apparent from the extrinsic materials that the abrogation of the requirement that police assist in procuring blood test evidence was motivated by cost-cutting concerns rather than any thought of exposing an accused to the predicament of an irrebuttable breath analysis test certificate. But counsel did not seek to uphold the Full Court's judgment on the basis of the majority's reasoning. Rather, she contended that an unacceptable risk of unfairness inhered in the breath analysis test certificate being given a weight exceeding what it would naturally bear: because, through no fault of the respondent, but instead because of the doctor's breach of statutory obligation under reg 11(c), the respondent was deprived of his statutory right or entitlement to adduce blood test evidence with which to contradict the breath analysis test certificate.

77 That contention faces difficulties at several levels. To begin with, as Kourakis CJ said[159], s 47K(1a) did not confer any procedural or substantive right on the respondent but, to the contrary, had the effect of restricting the evidence which the respondent was permitted to adduce in rebuttal of the breath analysis test certificate. It was, however, still open to the respondent to adduce evidence that the breath analysis equipment had not been functioning correctly and it is notable that no attempt was made to do so.

78 Secondly, reg 11(c) did not impose a statutory duty on the doctor. Such duty as the doctor owed the respondent, if any, would be a common law duty to take care or possibly a contractual duty and, therefore, something only as between the doctor and the respondent.

79 Thirdly, despite what occurred, the respondent was given all the opportunity which the legislation afforded him to collect and adduce evidence with which to contradict the breath analysis test certificate albeit that, in the events which occurred, he was unable to collect and adduce that evidence.

80 Fourthly, although it is conceivable that the respondent's inability to collect and adduce evidence of the blood test could have been productive of an injustice, it is impossible to say that it would have done so. For all that appears, the blood test evidence may have served to corroborate the accuracy of the breath analysis test certificate.

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159 (2014) 120 SASR 88 at 104 [27].

81 Fifthly, although a loss of evidence may provide grounds for a stay of criminal proceedings where it is established that the absence of the evidence would constitute an unacceptable risk of injustice or unfairness[160], it is insufficient for that purpose to show only that absence of the evidence *could* have that effect[161]. Parity of reasoning implies that it ought not to be a sufficient basis for excluding a breath analysis test certificate on the ground of unfairness that the absence of the blood test evidence conceivably could have, but it is not demonstrated that it would have, resulted in injustice. That does not mean that a stay of proceedings should be conceived of as the only means of dealing with the risk of an unfair trial resulting from the loss or unavailability of evidence. A stay is the ultimate and last resort because it runs counter to the societal imperative that a suspected offender be brought to trial[162]. Where a fair trial can be achieved by moulding or minimising prejudice in the way suggested by Brennan J in *Jago v District Court (NSW)*[163], it should be done; and thus, where the choice comes down to one between a stay and the exclusion of evidence in exercise of the fairness discretion, the latter is likely to prevail. Even so, unless the loss or unavailability of evidence constitutes a sufficient risk of injustice to warrant a stay of proceedings, it is unlikely to, and in this case it did not, warrant exclusion of otherwise admissible evidence in the exercise of the fairness discretion.

82 Sixthly, the notion that the breath analysis test certificate was given a weight exceeding what it would naturally bear is misplaced. As Kourakis CJ said, rightly, the presumptive effect of the breath analysis test certificate is "Parliament's response to the notorious difficulties which beset the common law means of proof"[164]. For that reason, it is not to be excluded merely "because the court holds the view that the method of proof prescribed by the Parliament is inferior to common law proofs"[165]. If, as here, Parliament decrees that a particular means of proof be given a specified evidential effect then, subject to very limited exceptions which are not here engaged, it must be given that effect. Of course, it does not necessarily follow from the fact that the *Christie* discretion

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160 *Walton v Gardiner* (1993) 177 CLR 378 at 392; [1993] HCA 77.

161 *R v Edwards* (2009) 83 ALJR 717 at 720-721 [23]-[24]; 255 ALR 399 at 403; [2009] HCA 20; cf *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 74 per Lord Lowry.

162 *R v Glennon* (1992) 173 CLR 592 at 598-599 per Mason CJ and Toohey J; [1992] HCA 16; *Dupas v The Queen* (2010) 241 CLR 237 at 251 [37]; [2010] HCA 20.

163 (1989) 168 CLR 23 at 49-50, see also at 71-72 per Toohey J; [1989] HCA 46.

164 (2014) 120 SASR 88 at 112 [51].

165 (2014) 120 SASR 88 at 103 [22].

is not engaged that the fairness discretion cannot apply. The fairness discretion is a residual discretion which exists to ensure a fair trial by means of the exclusion of otherwise admissible evidence in circumstances where none of the recognised discretions responds. But, in a case like this, the fact that the probative value of the evidence is not exceeded by such prejudicial effect as it might have is a significant indicator that the receipt of the evidence is unlikely to be unfair.

83 Finally, and most importantly, the suggestion that there would be unfairness in the prosecution's reliance on the breath analysis test certificate in circumstances where the doctor's error deprived the respondent of the ability to obtain admissible blood test evidence misconceives the relevant conception of fairness. As was earlier identified, the fairness discretion exists to ensure a fair trial according to law. A fair trial according to law is a fair trial according to law as the law may be affected by statutory modification, and in particular as it may be affected by statutory modification of common law means of proof. The discretion facilitates a fair trial according to law in that sense by enabling the exclusion of otherwise admissible evidence which would be productive of an unacceptable risk of miscarriage of justice. It does not exist to give effect to idiosyncratic notions of "fair play" or of "whether the forensic contest is an even one"[166], still less to deny effect to statutory modifications of common law means of proof of which, because of idiosyncratic notions of what is fair, a judge may disapprove.

Conclusion

84 It was not open to conclude that admission of the breath analysis test certificate would be productive of an unacceptable risk of miscarriage of justice and therefore it was not open to exclude the breath analysis test certificate in the exercise of the fairness discretion.

85 For these reasons, the appeal should be allowed and orders should be made in the terms proposed in the joint judgment.

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166 *Police v Jervis* (1998) 70 SASR 429 at 446 per Doyle CJ.