

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**CORAM** : OWEN J

**HEARD** : 18 SEPTEMBER 1995

**DELIVERED** : 4 APRIL 1996

**FILE NO/S** : APPEAL SJA 1080 of 1995

**BETWEEN** : ROBERT JOHN BREEDON  
Appellant (Complainant)

AND

ANTHONY DEMETRIOUS KONGRAS  
Respondent (Defendant)

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*Catchwords:*

Appeals - Exclusion of evidence - Scope of Magistrate's ruling - Prosecution under *Fisheries Act 1905* - Measurements of Western Rock Lobsters taken with a sheridan gauge - Sheridan gauge compared with an instrument to which the common law presumption of accuracy applied - Operation of s10 of the *National Measurements Act 1960 (Cth)* - Whether measurement accords with s10 of the *National Measurements Act 1960 (Cth)*.

**Representation:**

*Counsel:*

Appellant : Mr M J Flint  
Respondent : Mr R L Le Miere QC & Mr P G Laskaris

*Solicitors:*

Appellant : State Crown Solicitor  
Respondent : Frichot & Frichot

**Case(s) referred to in judgment(s):**

Bryan v Brambles Holdings, unreported; SCt of Vic (Newton J);1968  
Mitchell v W S Kimpton & Sons Pty Ltd [1971] VR 583  
Porter v Kolodziej [1962] VR 75  
R v Phair [1986] 1 Qd R 136  
Re Appeal of White (1987) 9 NSWLR 42  
Ruljancich v Pearce, unreported; SCt of WA (Burt CJ); Library No 2810; 9  
January 1980

**Case(s) also cited:**

Mehesz v Redmond (No2) (1980) 26 SASR 244  
Zappia v Webb [1974] WAR 15

**Library Number** : 960190

**OWEN J:**

The respondent was charged under s24(1)b of the *Fisheries Act 1905* with consigning undersized Western Rock Lobsters. The matter was heard by the Magistrate in the Fremantle Court of Petty Sessions on 22 May 1995. The complaint was dismissed. During the course of the hearing the learned Magistrate ruled that certain evidence was inadmissible. The appellant has appealed against the dismissal of the complaint and seeks orders remitting the matter to the Magistrate for consideration according to law.

**Background.**

In December 1993 the respondent sent a consignment of Western Rock Lobsters to the premises of WA Seafood Exporters Pty Ltd in Osborne Park for processing and sale. On 16 December 1993 the consignment arrived at the premises. A temporary Fisheries Officer, Ms Luciana Musbah, ("the officer") was on duty on that day. She checked the consignment and found some of the lobsters to be under the legal size. By complaint dated 27 September 1994 it was alleged that:

"Anthony Demetrious Kongras without lawful authority consigned fish, namely 33 Western Rock Lobsters (*Panulirus cygnus*), one of the species mentioned in the Second Schedule to the Fisheries Act 1905, of a length less than that set opposite to the name of that fish in that Schedule and exceeding in number one twentieth of the total number of rock lobster consigned; contrary to section 24(1)b of the Act."

At the hearing before the Magistrate the prosecution opened its case by calling the officer. She testified that it was her duty to check that the consignments accorded with the specifications under the *Fisheries Act 1905*, most especially size specifications. She indicated that she had conducted her initial inspection of the lobsters with a sheridan gauge, which is an instrument used to determine whether objects, in this case western rock lobsters, are above or below a particular size. It does not provide a measurement in numerical terms of the particular object.

The officer gave evidence that on the basis of her initial assessment she detained the respondent's crates and their contents for further examination. She then checked the contents of the crate and "ended up gauging the lobsters from sized to undersized." At this stage counsel for the then defendant rose to make what he termed a "fundamental objection". His submission was that the evidence of the officer in this respect was inadmissible unless it could be shown that the measurements were taken in accordance with the *National Measurements Act 1962 (C/th)*. ("the Act") the evidence of the officer in this respect was inadmissible. Counsel for the prosecution conceded that the accuracy of the gauge would need to be established if it were the only evidence as to the size of the lobsters in question. However, he indicated that other instruments had been used on the day and at least one of those instruments fell within the operation of the common law presumption as to accuracy of instruments ("the presumption"). I will describe this presumption in more detail later. For present purposes it is sufficient to indicate that the common law presumes that the readings of notoriously accurate scientific or technical instruments are *prima facie* evidence of the facts which they purport to register.

His Worship then heard submissions on the applicability of the Act. The thrust of the defendant's submission was that the Act provides the procedure by which measurements taken for a legal purpose (in this case a prosecution under the *Fisheries Act 1905*) are to be obtained. The prosecution submitted that notwithstanding the operation of the Act the presumption continued to apply. Counsel submitted that in accordance with the common law the accuracy of the gauge could be established by reference to an instrument to which the presumption applied.

The Magistrate ruled that the Act was applicable to a prosecution under the *Fisheries Act 1905*. At p36 of the transcript his Worship said:

"Now you ask me to rule on whether or not it is necessary for the particular gauges - whether or not they fall under section 10 of the National Measurement Act. Having read that particular section, I am satisfied that it is necessary for them to meet the requirements of section 10."

The prosecution conceded that it could not establish that any of the instruments which had been used complied with the terms of the Act:

"PROSECUTOR: I suppose if you were to rule against us, it would save - I mean, we are not saying that any of the instruments used on 16 December were certified measuring instruments in accordance with section 10 and if that is what was required then we wouldn't be able to take the matter further."

On the basis of his ruling and the concession made by the prosecution counsel for the defendant made a submission of no case to answer. The Magistrate upheld the submission and dismissed the complaint. The appellant now appeals against that decision.

### **The Ground of appeal**

The sole ground of appeal is set out in the order granting leave to appeal. It is in the following terms:

"...the learned Magistrate erred in dismissing the charge in that he erred in law by ruling that compliance with s10 of the *National Measurement Act 1960 (C/th)* was required for evidence as to measurements obtained from the measuring of Western Rock Lobsters to be admissible."

Counsel for the appellant submitted that notwithstanding s10 of the Act the presumption could still be invoked to establish the accuracy of a measuring instrument. He accepted that the presumption did not apply to the sheridan gauge but argued that it applied to other instruments used on the day.

### **The National Measurements Act 1960 (Cth.)**

The objects of the Act are set out in s4:

"4 (1) The objects of the Act are:

- (a) to establish a national system of units and standards of measurement of physical quantities;
- (b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia;
- (c) to co-ordinate the operation of the national system of measurement; and
- (d) to bring about the use of the metric system in Australia as the sole system of measurement of physical quantities;

and this Act shall be construed accordingly."

It is apparent from this section that the purpose of the Act was to establish a uniform national system of obtaining measurements. The Act was intended to form the basis of national code for obtaining measurements: ss4(2) and (5).

Provision is made for the creation of national, state and local authorities which are authorised to certify instruments in accordance with the procedure set out in the Act and regulations. It is not a complicated procedure. The relevant authority issues a certificate under regulation 80A and the certificate is evidence of the matters contained in it. Once an instrument has been certified it remains so for a specified period of time.

Section 10 of the Act is in the following terms:

" When for any legal purpose, it is necessary to ascertain whether a measurement of a physical quantity for which there are Australian legal units of measurement has been made or is being made in terms of those units, that fact shall be ascertained by means of, by reference to, by comparison with or by derivation from:

- (a) an appropriate Australian primary standard of measurement;
- (b) an appropriate Australian secondary standard of measurement;
- (c) an appropriate State primary standard of measurement;
- (d) an appropriate recognized-value standard of measurement;

- (e) an appropriate reference standard of measurement;
- (f) two or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e);
- (g) a certified reference material;
- (h) a certified measuring instrument;
- (i) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e) and a certified reference material; or
- (j) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e) and a certified measuring instrument; or
- (k) one or more standards of measurement, each of which is a standard of measurement referred to in paragraph (a), (b), (c), (d) or (e), a certified reference material and a certified measuring instrument;

and not in any other manner."

The language of section 10 is clear and unambiguous. Measurements taken for any legal purpose must be taken in accordance with that section and *not in any other manner*. In my opinion s10 of the Act was designed to establish a uniform national procedure for obtaining measurements required for legal purposes. For present purposes a prosecution under the *Fisheries Act 1905* is a legal purpose for which measurements are required.

Submissions were also made on the interpretation of the words "by derivation from". His Worship ruled that evidence would be admissible if the measuring instrument could in some way be "tied back" to the Act. It was sufficient if the instrument used to take the measurement had in some way been compared to or copied from or in some way measured against an instrument which in turn was measured against or compared with one of the specified standards specified in s10.

In my opinion it cannot have been the intention of the Parliament to allow indirect derivation of measurements. When the object of the Act and the clear words of s10 are taken into account to allow the broad interpretation advanced by counsel for the appellant would be to defeat the aim of establishing a uniform system of measurements. It would also increase the potential for inaccuracies in the measuring process. In my opinion the section requires the instruments to be derived *directly* from one of the specified standards or a combination of those standards. To hold otherwise would be contrary to the object of the Act and, in particular, the proscription contained in s10 that measurements are to be taken in accordance with the section *and not in any other manner*.

At the hearing of the appeal the scope of the Magistrate's ruling was very much in issue. Counsel for the appellant submitted that the learned Magistrate had wrongly excluded all of the measurements which had been taken for the purpose of the prosecution case. Counsel for the respondent submitted that as the prosecution had only sought to tender the measurements taken with the sheridan gauge it could not now claim that other evidence had been wrongly excluded. I turn now to consider the scope of the Magistrate's ruling.

### **The Magistrate's Ruling.**

The appellant's counsel submitted that the common law presumption as to the accuracy of scientific instruments still applies notwithstanding the operation of the Act. He conceded that the presumption did not apply to the sheridan gauge because it had not been recognised as part of the class of notoriously accurate scientific instruments. However, at trial it had been the intention of the prosecution to prove the accuracy of the gauge by comparing it to an instrument to which the presumption applied. It was also intended to lead evidence of measurements which had been taken with vernier callipers, another instrument to which the common law presumption applied.

At p16 of the transcript counsel for the respondent rose to make his "fundamental objection" to the admissibility of the officer's evidence. Counsel for the appellant immediately indicated that "other evidence [would] be led as to the accuracy of this gauge and as to other instruments used." It is not clear whether this meant that other instruments were used to measure the lobsters or whether they had been used to verify the accuracy of the sheridan gauge or both. Counsel also indicated that it was his intention to lead evidence of measurements taken with a set of vernier callipers, an instrument to which the presumption applied. This evidence was to be adduced through a Mr Nye, a fisheries officer. However, on the basis of the Magistrate's ruling when Mr Nye came to give his evidence he was restricted in a way which can be seen from the following exchange:

"PROSECUTOR: Just before you go any further I will inform you of something which is going to affect your evidence greatly and that is that as a consequence of a ruling by his Worship and a concession by the complainant any evidence as to measurement of animals being rock lobsters on that evening, whether it be by a gauge or by a vernier calliper, is not admissible so to that extent that evidence will not be led?---okay."

During the course of submissions the following exchange took place:

HIS WORSHIP: The other thing: were you able to record any evidence as to the accuracy of the Sheridan gauges?

PROSECUTOR: Only by reference to an instrument which we would say the court presumes to be accurate in the absence of evidence to the contrary, as I am instructed, not be reference to any of the matters specified in section 10.

HIS WORSHIP: Of the National Measurement Act?

PROSECUTOR: Yes.

HIS WORSHIP: So you can't really relate the Sheridan gauges to the National Measurement Act.

PROSECUTOR: Not at this stage as I am instructed but of course this is all happening - I am not saying that it is not but I am not in a position to do much about it at the moment.

And then:

PROSECUTOR: But what I was indicating was that I was intending to lead evidence of the accuracy of this gauge by reference to it having been measured against an instrument---

HIS WORSHIP: Another master gauge which the Fisheries Department---

PROSECUTOR: Well, an instrument that the law says is presumed to be accurate.

DEFENCE COUNSEL: But not an instrument certified under the provisions of section 10

PROSECUTOR: And that was what I was also saying: as presently instructed, this is all happening on the run, I am not able to provide any evidence of the use of any instrument in the process that in some way complies with section 10..."

The Magistrate referred to this other instrument as a "master gauge". Looked at in the context of the discussion I think it can be inferred that his Worship, in using the term "gauges", was referring to the sheridan gauge used by the officer and the instrument which was used to confirm the accuracy of the gauge. At the conclusion of this exchange the hearing was adjourned to permit the parties to consider their respective positions.

Upon resumption of the hearing the appellant's counsel indicated that he could not adduce any proof that any of the *instruments* used on the day complied with the Act. The Magistrate said:

"If the [instruments] are not certified then any evidence based on those measurements would be inadmissible."

The Magistrate then made the ruling that the Act applies to a prosecution under the *Fisheries Act 1905* and that it would be necessary for "the particular gauges" to meet the requirements of s10. Again there is the reference to "gauges". In this respect my earlier comments are applicable.

A mere apprehension that evidence will be ruled inadmissible will not found an appeal on the basis that that evidence was wrongly excluded. In *R v Phair* [1986] 1 Qd R 136 Connolly J, who delivered the leading judgment in the Queensland Court of Criminal Appeal said, at 138:

"The only other thing that I should say is...that it is the law that where a party desires to prosecute an appeal on the basis that evidence has been wrongly excluded, the strict law is that he should tender the evidence; in other words ask the question. If the question is not admitted then he has a basis for asking this court to assess the situation and decide whether there has been an error in rejection of the evidence..."

Although it was probably understood that the evidence would have been rejected the prosecution did not seek to tender it and an intimation as to the intention of the arbitrator is purely hypothetical. In my opinion the learned Magistrate ruled that the evidence of measurement by the sheridan gauge would only be admissible if the gauge had been compared with an instrument certified in accordance with s10 of the Act.

The contention of the appellant was that notwithstanding the operation s10 of the Act the common law presumption still applied. In other words the accuracy of the gauge could be verified by comparing the gauge with an instrument to which the presumption applied. It was unclear whether this "other instrument" was a set of vernier callipers or some other sort of instrument. In any event it does not affect my conclusion. I will now consider the operation of the presumption.

### **The Common Law Presumption.**

At common law the readings of notoriously accurate scientific or technical instruments are *prima facie* evidence of the facts which they purport to register. This presumption applies to instruments that are part of the "class of instruments of a scientific or technical character which by general experience [are] known to be trustworthy, and are so notorious that the court requires no evidence to the effect that they do fall into such a class before

allowing the presumption in question to operate with regard to the readings made thereon": per Herring CJ in *Porter v Kolodziej* [1962] VR 75 at 78. It is a rebuttable presumption.

Counsel for the appellant accepted that the presumption did not apply to the sheridan gauge because it is not part of a class of notoriously accurate scientific instruments. However, counsel submitted that the presumption applied to the other instruments which had been used on the relevant day and a comparison of the gauge and the other instrument would establish the accuracy of the gauge.

In support of that proposition counsel relied on a number of cases. For the reasons set out below these decisions do not, in my opinion, support the appellant's case. In *Ruljancich v Pearce*, unreported, SCt of WA (Burt CJ); Library No 2810; 9 January 1980. Ruljancich was charged and convicted of a number of offences under the *Fisheries Act 1905*. The main ground of appeal concerned the availability of the defence of mistake under s24 of the *Criminal Code*. The other ground of appeal read as follows:

"That in the circumstances of the case and on the weight of the evidence the Magistrate was wrong in holding that the 73 rock lobsters the subject of the complaint were accurately measured."

The judgment was delivered *ex tempore*. In rejecting this ground his Honour the Chief Justice referred to and applied the presumption. There is nothing to suggest that s10 was argued before his Honour or even brought to his attention. In any event unlike the concession by counsel for the appellant in the present case the accuracy of the particular instruments (vernier callipers) in *Ruljancich* (*supra*) was not seriously challenged and on this basis the case can be distinguished.

Counsel also relied on the decision *Re Appeal of White* (1987) 9 NSWLR 42. White had been charged with a speeding offence. The arresting police officers testified that he (White) had been travelling at a speed above the 60 km/hr limit. A speedometer reading was recorded and tendered. The

accuracy of the speedometer was not challenged at trial and there was no dispute between the parties that White had been speeding. Counsel for White submitted that there was no case to answer. The court rejected the submission on two grounds. First, s10 did not and could not preclude the admission of the police officers' opinion that the appellant was speeding as that was opinion evidence in the classic sense. Secondly, the court held that until the accuracy of the instrument, in this case the speedometer, was questioned the court could accept the reading. As no challenge had been made the reading was admissible. This case is different to *White's case (supra)* because it is not based on opinion evidence.

Finally counsel relied on *Mitchell v WS Kimpton & Sons Pty Ltd* [1971] VR 583. In *Mitchell (supra)* the appellant had been charged with driving a vehicle which exceeded the specified statutory width. A standard measuring tape was used to measure the vehicle. The vehicle was approximately three feet wider than the legal limit. This evidence was led without challenge but at the conclusion of the case counsel for the appellant submitted that as compliance with s10 of the Act had not been established the prosecution had not made out its case.

The Full Court adopted the reasoning of Newton J in *Bryan v Brambles Holdings* unreported, SCt of Vic. (Newton J),1968. In that case it was held that in the absence of evidence to the contrary compliance with s10 will be presumed. In *Mitchell (supra)* the scheme of the judgment is to set out a large portion of the reasons in *Bryan's case (supra)* and to adopt them as applicable to the facts in *Mitchell (supra)*. Newton J was the trial judge in *Bryan's case (supra)* and his Honour delivered the lead judgment in *Mitchell (supra)*. At p586 of the judgment his Honour said:

"In my view the effect of s10 so far as presently material, was that if it became necessary to prove by affirmative evidence that the tape measure in question was accurate then that could be done only by comparing the tape measure against an appropriate

standard of measurement, or against some other measurement which had itself been checked against an appropriate standard of measurement. By reason of the evidentiary presumption to which I have referred, it was not necessary for the informant to prove by affirmative evidence that the tape measure was accurate. Under the presumption it was presumed that a comparison between the tape measure was accurate..."

Counsel for the respondent submitted that the effect of *Mitchell* (*supra*) was to convert the presumption into a presumption that the measurement in question accords with s10. It was submitted that the reasoning in *Mitchell* (*supra*) was flawed as it ignored the purpose for which the Act was introduced. Alternatively, counsel for the respondent submitted that if there is a presumption of compliance with s10 then that presumption had been rebutted. I am satisfied that that is this case. The appellant conceded that the sheridan gauge was not a certified instrument and that the instrument to which it had been compared was not a certified instrument or one of the other standards specified in s10. Accordingly, the measurement with the gauge had not been "derived from" an appropriate standard of measurement and there was no room for the evidentiary presumption to apply.

Even if there is room for the application of the common law presumption in the face of the Act, it would not operate to save a measurement done by the sheridan gauge. That instrument is not one to which the presumption applies. If a measurement by the sheridan gauge is to be relied upon then either the gauge itself must be a certified instrument or the gauge must be certified as accurate by reference to a standard which is within the terms of s10. This might be another certified instrument or it might be another standard in s10. It seems to me that this process of checking or certification is sufficiently proximate to qualify as direct derivation from an appropriate standard.

It would not be sufficient to check the accuracy of the instrument against another instrument or standard which, while not within s10, was

subject to the common law presumption. In my opinion, to permit certification or checking in this way would allow ascertainment of the fact of the measurement "in any other manner", something which is prohibited by s10.

**Conclusion.**

In my opinion section 10 of the Act must be complied with when measurements are being taken for any legal purpose. The language of the section is in clear and imperative terms. The evidence was, in my opinion, properly excluded and I can discern no error in the Magistrate's decision to dismiss the complaint. The appeal must be dismissed.