

04/91

## COUNTY COURT OF VICTORIA

**CURMI v MATTHEWS**

Judge Shillito

25, 26 February, 17 April 1991

**MOTOR TRAFFIC – DRINK/DRIVING – OPERATION OF BREATH ANALYSING INSTRUMENT – REGULATORY REQUIREMENTS FOR PROPER OPERATION OF – NECESSITY TO FOLLOW INSTRUCTION MANUAL – EVIDENCE THAT REGULATORY REQUIREMENTS ONLY FOLLOWED – WHETHER CERTIFICATE THEREBY INADMISSIBLE – WHETHER DEFENCE MADE OUT – "IN ACCORDANCE WITH THE REGULATIONS": ROAD SAFETY ACT 1986, SS49(1)(f); 55(4), 58(2); ROAD SAFETY (PROCEDURES) REGULATIONS 1988, RR302-304, 314.**

Regulation 314 of the *Road Safety (Procedures) Regulations* 1988 ('Regs') provides (so far as relevant):

"A certificate for the purposes of section 55(4)(a) or (d) of the Act is in the prescribed form if it includes (in addition to the things mentioned in section 55(4) of the Act)—

(d) a statement that the instrument was in proper working order, and was properly operated;"

**HELD:**

**1. Reg 314(d) is of an unqualified nature in that no limitation is placed upon the manner in which an operator is to operate a breath analysing instrument. Accordingly, where, in a certificate an operator stated that the instrument was properly operated "in accordance with the Regulations" such additional words were not mere surplusage or substantial compliance with the Regs, but were such as to render the certificate as not being "in the prescribed form" and accordingly, inadmissible in evidence.**

**2. More is required for the proper operation of a breath analysing instrument than the provisions as set out in the Regs, e.g. the observance by the operator of certain waiting times as specified in the Breathalyzer Instruction Manual. Accordingly, where an operator stated that the instrument was operated properly "according to the Regulations" it was open to find that a provision in the instruction manual had not been observed, that the instrument was not properly operated, that the defence under s49(4) of the Road Safety Act 1986 made out and to dismiss the information.**

[Note: See now s22 of the *Road Safety (Drivers) Act* 1991 making specific provision of a Form of Certificate (Schedule 6) and the rights of the parties in the present case. Ed.]

**JUDGE SHILLITO: [1]** The appellant, Andrew Gajeton Curmi, has appealed against orders made by the Magistrates' Court at Box Hill on 5 June, 1990, whereby he was convicted of an offence under Section 49(1)(f) of the *Road Safety Act* 1986 in that on 24 February, 1988, he did within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument pursuant to Section 55(1) of that Act the result of which analysis indicated more than the prescribed concentration of alcohol was present in his blood. He was fined \$600 with \$19 costs, all licences and permits held by him under the Act were cancelled and he was disqualified from obtaining the same for a period of 20 months effective from 5 June, 1990. He was given permission to drive pending his appeal.

At the hearing he pleaded not guilty and has prosecuted this appeal against both conviction and sentence. The informant Sergeant Matthews, gave evidence that about 3 a.m. on the 24 February, 1988, he was present at the scene of an accident in Ringwood in which a Holden Commodore Registration No. CNE 621 was involved. Whilst he was there he spoke to the appellant who identified himself and admitted that he had been involved in the accident. In a subsequent conversation he admitted that he had been the driver of the vehicle referred to and that the accident had occurred about 2.50 a.m. In the same conversation he informed Sergeant Matthews that he had been at the Flemington Race Course and had consumed 5 8oz. glasses of beer and a glass of red wine. At the scene he was subjected to a preliminary breath test by Sergeant Matthews because he considered that he detected a strong smell of intoxicating liquor on his breath. The result of that test was in the Sergeant's opinion positive. The appellant advised

him that he did not require medical attention at that stage although he appeared to be unsteady on his feet. [2] Upon request the appellant accompanied the Sergeant to the Ringwood Police Station where, about 3.36 a.m. he introduced him to Sergeant Cummins who was called as a witness at the hearing. Upon being sworn his authority under Section 55 of the *Road Safety Act* 1986, to operate Breath Analysis Instruments as a member of the Police Force, signed by then "Deputy Commissioner Kelvin Glare", was tendered through him and admitted in evidence as Exhibit "A(1)". The then current "*Road Safety (Procedures) Regulations* 1988" were also admitted as Exhibit "A(2)". He then engaged the appellant in a short conversation in which the appellant informed him that he had previously consumed 5 "normal" glasses of beer at the Flemington Race Course, that he had consumed the first of those drinks at 7.30 p.m. and the last at 10.30 p.m. and that he had driven 25 kilometres after he had consumed the last drink.

Sergeant Cummins then deposed that he conducted a breath analysis by means of a breath analysis instrument at 3.41 a.m. and signed and completed the original forms of certificate which he handed to Sergeant Matthews who checked them and then handed them back to Cummins who gave an original copy to the appellant at 3.51 a.m. He then informed him that the instrument indicated that the quantity of alcohol present in the blood was 0.200 grams of alcohol per 100 millilitres of blood which expressed as a percentage was 0.200 per centum and asked him if he wished to comment. Upon receiving a negative response he then advised him that he could request a second sample of his breath to be analysed to which the appellant replied that he wished to go to hospital as he "felt bad". The Sergeant deposed that the breath analysing instrument which he used was a breath analysing instrument under Section 3 of the Act and bearing the word "Breathalyzer" and the number 2824789 "as provided under the Regulations." He further deposed as follows "The instrument was working correctly" and added "I operated it properly according to the Regulations." [3] The copy original of the certificate numbered 0027113 was tendered and admitted into evidence as Exhibit "C". The only other witness called was Constable Atkinson who corroborated the evidence of Sergeant Matthews concerning the events which occurred at the accident scene and the nature of the Sergeant's conversation with the appellant at the Ringwood Police Station. The prosecution then closed its case.

It is clear that the primary way in which the prosecution had sought to prove the commission of the offence charged was to rely on the evidentiary provisions contained in Section 58 of the *Road Safety Act* 1986 which, to use Counsel's expression, operated to "relax" the rules of evidence which would ordinarily apply in cases of prosecution for summary offences where the readings on an instrument designed for analysis were relevant to prove the commission of the offence. In particular reliance was primarily based on the provisions of Section 58(2) which has application when dealing with an offence charged under Section 49(1) of the Act. That sub-section is in the following terms:

"(2) A document purporting to be a copy of a certificate given in accordance with Section 55(4) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments under Section 55 is admissible in evidence in any proceedings referred to in sub-section (1) and is conclusive proof of the facts and matters contained in it unless the accused person gives notice in writing to the informant not less than 7 days before the hearing that he or she requires the person giving the certificate to be called as a witness."

A certificate given in accordance with Section 55(4) must, because of the provisions of sub-section (a), be one which is "in the prescribed form" and which is signed and delivered by the person [4] operating the breath analysing instrument in question to the person whose breath has been analysed. Mr Hardy at the close of the prosecution case first submitted that there was "no case to answer" because, neither in the legislation nor in any regulation made under it, had any "form" been prescribed in the sense that a printed document had been specified in or scheduled to either the relevant Act or Regulations in the way commonly found in legislation, regulations or statutory rules. Upon receiving a plain intimation from me that I would be unprepared to so interpret the phrase "in the prescribed form" used in Section 55(4)(a) of the Act, he did not further press this submission. I interpolate that, in my view, the form of a certificate is able to be "prescribed" by a provision in an act or regulation which specifies in its text what matters the certificate must contain; indeed, in the case of this legislative and regulatory scheme, Regulation 314 of the *Road Safety (Procedures) Regulations* 1988 plainly does just that by setting out what a certificate under Section 55(4) must contain if it is to be "in the prescribed form".

Mr Hardy then developed an alternative submission that the certificate Exhibit "C" did not come within the description of one "given in accordance with Section 55(4)" and, in order to bolster his legal submission by giving it, at least in part, a factual support, elected to go into evidence by calling as a witness Mr Scott Campbell Fabb an analytical chemist by profession. He gave evidence concerning his qualifications and also his experience in using, operating and testing instruments for breath analysis over a period of ten years and conducting experiments and engaging in research into the proper use and operation in particular of the Smith & Wesson Breathalyzer Model 900 which it was common ground was the type of instrument in fact used by Sergeant Cummins in analysing the sample of the appellant's breath on the relevant occasion.

[5] In the result, after hearing his further evidence (to which some reference will be subsequently made), I am satisfied to accept the witness as having been qualified as an expert in the proper use and operation of the instrument in fact used in this matter. The witness in the course of his evidence produced and identified an Instruction Manual published by Smith & Wesson/General Ordinance Equipment Company, the manufacturer of Model 900 which was tendered and admitted into evidence as Exhibit "I". Mr Hardy's "legal" submission was that the certificate (Exhibit "C") was not admissible in evidence under Section 58(2) of the Act nor did it afford "conclusive proof of the facts and matters contained in it" because, on the evidence led by the prosecution, it was not a certificate given in accordance with Section 55(4) in that it was not one "in the prescribed form" which had been signed and delivered to the appellant by Sergeant Cummins a "person operating the instrument". In support of this contention he relied on the terms of Regulation 314 which appears in the *Road Safety (Procedures) Regulations 1988* under a heading "Certificate under Section 55(4)" and provides as follows in its relevant parts:

"314 A certificate for the purposes of Section 55(4)(a) or (d) of the Act is in the prescribed form if it includes (in addition to the things mentioned in Section 55(4) of the Act)—

(d) A statement that the instrument was in proper working order and was properly operated."

The certificate (Exhibit "C") in paragraph 3 text, *inter alia*, contained the following statements:

[6] "3. The breath analysing instrument I used in this analysis was— ...

(b) an instrument in relation to which all regulations made under the said Act with respect to breath analysing instruments were complied with.

(c) in proper working order and properly operated by me in accordance with the regulations."

Mr Hardy's submission was that the addition of the words "in accordance with the regulations" limited and cut down the width and ambit of the preceding words "properly operated" which Regulation 314(d) required to be included in a certificate "in the prescribed form" by way of a statement to that effect. Reference to the Regulations shows that, under the heading "Operation of Breathalyzers", Regulations 302, 303 and 304 each specify a number of requirements "for the proper operation of a breath analysing instrument" which are to be observed by an authorised operator. In my view the evidence of Mr Scott Campbell Fabb, supported by what appears in the Instruction Manual (Exhibit I), clearly shows that the matters required for the proper operation of the instrument are not confined to those set out in Regulations 302, 303 and 304. I will return to this subject matter later in these reasons for my decision.

As previously stated the evidence of Sergeant Cummins with respect to his proper operation of the instrument was similarly qualified when he deposed with reference to the instrument that "I operated it properly according to the Regulations". Indeed generally speaking his evidence when analysed appears to contain a resume of what appears on the printed form of the certificate; a resume which is in some respect inaccurate. [7] However, it was, at first sight, difficult to find an explanation for the addition of the words "according to the regulations" in paragraph 3(c) of the certificate when they are conspicuous for their absence from the language used in Regulation 314(d). However further research reveals that a possible explanation for the appearance of those words in the paragraph of the certificate is to be found in certain provisions of the *Motor Car Act 1958* which were in force until they were repealed on the 1 March 1987, and replaced by the relevant provisions of the *Road Safety Act 1986* which, together with the *Road Safety (Procedures) Regulations 1987*, came into operation as and from that date. Section 80F(1) of the *Motor Car*

Act 1958 (as amended) had provided that evidence of the alcohol concentration in the blood of a person charged with an offence under Section 81A(1) indicated to be present by a breath analysing instrument operated by a duly authorised person, might be given "subject to compliance with the provisions of sub-section (2)".

Sub-section (2) required the operator, as soon as practicable after the analysis, to "sign and deliver" to the person tested "a certificate in or to the effect of Schedule Seven" of the Act as to the percentage of alcohol present in the blood tested as indicated by the analysis. A perusal of the form of certificate set out in the Seventh Schedule shows that, apart from the fact it is headed "Schedule Seven" while Exhibit "C" bears no such heading and the further fact that the references to enabling legislative provisions in it are to relevant sections of the *Motor Car Act 1958* instead of to relevant sections of the *Road Safety Act 1986*, the operative "statements" in the paragraphs in each form of certificate are couched in identical language.

As previously stated the *Road Safety (Procedures) Regulations 1987* came into operation on the 1 March 1987. They were, however, revoked and replaced by the *Road Safety (Procedures) Regulations 1988* as and from 1 March, 1988. [8] Both sets of regulations contained regulations numbered 302, 303 and 304 which were worded in identical terms and were exhaustive of the regulatory "requirements for the proper operation of a Breathalyzer" defined in the enabling legislation. Both sets of regulations also contained a regulation numbered 314, which, again in identical terms, set out the requirements which the certificate had to fulfil if it was to be "in the prescribed form for the purposes of Section 55(4)(a)" of the *Road Safety Act 1986*. The terms of Section 55(4)(a) in requiring the signing and delivery of a "certificate in the prescribed form" did not contain any qualification of the absolute nature of this requirement such as had been present in the language used in Section 80F(2) of the *Motor Car Act 1958* where the signing and delivery of a certificate "in or to the effect of Schedule Seven" constituted sufficient compliance with the provisions of that sub-section.

It would appear likely that the draftsman of the "police form" of certificate used in this case simply adopted the text of the certificate authorised by the "old" Seventh Schedule to the *Motor Car Act 1958* without advertent to the unqualified nature of the requirements of Regulation 314(d) of the *Road Safety (Procedures) Regulations 1988*. Mr Marshall of Counsel, who appeared as Prosecutor, submitted firstly that the words "according to the regulations" appearing in that paragraph should be treated as mere surplusage and disregarded accordingly. I am unable to adopt such an approach having regard to the legislative and regulatory evidentiary scheme set out specifically and in a connected fashion in the Act and Regulations made under it. To do so would, in my view, involve me in a usurpation of the legislative and executive function in order to cure what appears to have been an administrative error in the drafting of the form of the certificate. [9] Alternatively he submitted that where Section 55(4)(a) required the operator of a breath analysing instrument to sign and deliver to the person whose breath had been analysed by it "a certificate in the prescribed form" it should be read as if it provided for such a signing and delivery of a "certificate substantially in the prescribed form".

Since the hearing I have been referred by Counsel to the judgments of the members of the Full Court of the Supreme Court of South Australia in [*Shearer v Hills* (1989) 51 SASR 243; (1989) 9 MVR 555] and in particular to what appears in the judgment of Jacobs J at MVR pages 561 and 562 concerning the need to strike a balance between the liberty and rights of the individual and the compelling public interest in detecting and punishing offenders. What the Full Court was considering there (when being asked to interpret a legislative prerequisite to the admissibility of evidence) was whether the words used by an operator constituted compliance with a procedural requirement as to the form of a warning required to be given as a pre-condition for the admissibility of a certificate or whether on the facts there was merit in an argument that there had been a substantial compliance with that legislative requirement. If the statement required to be contained in a certificate "in a prescribed form" was that an instrument was "operated properly in accordance with the regulations" and it was shown that there was failure to strictly comply with a regulation which purported to govern the operation of the instrument but in such a way as to make it appear that the failure had no significant effect on the validity or probative value of an analysis made, it might then be a proper approach to investigate whether, on the facts in this case, there had been "substantial" compliance with the need to operate the instrument "properly in accordance with the regulations". The matters here under consideration however, do not involve



that sort of situation, and I reject the second branch of Mr Marshall's submission. [10] As a matter of interpretation of the Act and the relevant Regulations made under it, even without taking into account certain evidence given by Mr Scott Campbell Fabb concerning what an operator of the instrument Model 900 needs to do or not do in order to "properly operate" it, I am prepared to rule and I do rule that the certificate (Exhibit "C"), in the light of its contents and the evidence given by its operator, was not given in accordance with Section 55(4) of the Act and was accordingly not admissible in evidence under Section 58(2) and that it did not afford conclusive proof of the facts and matters contained in it.

It is to be noted in this context that there was no evidence that the appellant gave notice in writing to the informant that he required the person giving the certificate to be called as a witness within the time prescribed in Section 58(2) or at all. However, certain evidence given by that witness concerning what is involved in the proper operation of such an instrument affords additional support for Mr Hardy's submissions in these regards if any is needed. At page 5 of the Instruction Manual (Exhibit "I") there appears a heading "Operating the 900 Breathalyzer", under which the following text is set forth "The following description relates to the sequence shown on the Breathalyzer Operational Check List". Instructions concerning the "Preparation" of the instrument are then given followed, under a sub-heading "Purge" on page 7, by instructions which set out the steps the operator should take in "clearing" the air in the instrument before commencing the analysis of the sample to be received from the subject to be breath-tested. In particular a waiting time of one and a half minutes between the appearance of a "red empty signal" appears and the turning on of the "photometer lamp".

Again, under the heading "Analysis" on page 8, instructions set out the steps which the operator should take in analysing a sample when one of 52.5cc's volume had been received. Again it is provided that a waiting time of one and a half minutes should elapse between the appearance of [11] the "red empty signal" and the turning on of "light balance". At page 9 of the Instruction Manual Check List appears a "Breathalyzer Operational Check List" which, again under the headings of the "Purge" sequence and the "Analysis" sequence the respective requirements to wait one and a half minutes before proceeding to the next steps referred to in the list. In the opinion of Mr Scott Campbell Fabb, observance of both instructions concerning "waiting times" is necessary for the proper operation of the instrument which is used in the breath analysis in that observance operates to assure the integrity of the sample to be tested so that the results of the analysis can be regarded as accurately measuring the degree of alcohol concentration. Failure to observe the instructions concerning the duration of the waiting times, in his opinion is likely to produce variable and inaccurate results depending on the nature and extent of the failure in these regards.

I accept that evidence and am prepared to act upon it. No requirement to observe those "waiting" requirements during the operation of the instrument is to be found in the *Road Safety (Procedures) Regulations* and in particular to Regulations 302, 303 and 304 to which reference has been made. It follows in my view that, for this reason alone, more is involved in the proper operation of the breathalyzer used in the subject analysis than its proper operation "in accordance with the regulations". There is no independent evidence that the operator observed either of these "waiting" requirements in the operation of the instrument during the subject breath analysis and in fact Sergeant Cummins' evidence is inconsistent with any proposition that he did so.

This circumstance gives factual support and confirmation to my expressed view that the certificate (Exhibit "C") was not "given in accordance [12] with Section 55(4)" because it was not in the "prescribed form" as required by sub-section (a) thus is neither admissible under Section 58(2) nor does it afford the conclusive proof referred to in that sub-section. Moreover Section 58(1) of the Act provides that on the hearing of an offence under Section 49(1) if the result of a breath analysis is relevant "then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under Section 55 and the concentration of alcohol so indicated is, subject to compliance with Section 55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument".

If I am correct in holding that a copy certificate of the sort referred to in Section 58(2) is rendered inadmissible because in the circumstances found to exist in this case, it was not "given in accordance with Section 55(4)", by a parity of reasoning, the evidence in the form of a certificate signed and delivered by an authorised operator, who had not complied with Section 55(4), as to the concentration of alcohol indicated on the instrument as a result of a breath test would not under the sub-section be "evidence of the concentration of alcohol present in the blood of that person at the time his or her breath "was so analysed" by virtue of the provisions of Section 58(1) and I so rule.

Mr Marshall has however submitted that he is entitled to rely on the evidence of Sergeant Cummins as to the results of the breath test conducted by him by reason of the principles relating to the admission of evidence which operates under the common law. [13] It appears to me that the words previously quoted above from Section 58(1) namely "without affecting the admissibility of any evidence which might be given apart from the provisions of this Section" would permit him to attempt to rely on the common law principles applicable in the circumstances of this case. The difficulties which confront him in attempting to do so would however appear to be formidable.

Mr Marshall's primary submission was that the evidence given by Sergeant Cummins that the result of the analysis of a sample of the appellant's breath which was made as a result of the use of the Breathalyzer Model 900 was to establish an alcohol concentration in his blood of .200 grams of alcohol per 100 millilitres of blood which expressed as a percentage was .200 per centum. As Mr Hardy pointed out in reply, the evidence given by that officer was not to that effect. What the witness deposed to was not the actual result in fact but that he told the appellant that that was the result of the breath analysis and then asked the appellant if he wanted to make a comment to which the appellant replied in the negative. There was in fact no specific evidence of the result of the analysis apart from that afforded by the certificate.

Assuming for the purpose of argument, however, that I am entitled to draw the inference that that percentage of alcohol was in fact present in the sample tested by the use of the machine from the fact that the Sergeant so informed the appellant I now turn to consider the submission made by Mr Marshall that what was described in the judgment of the Chief Justice in *Porter v Kolodzeij* [1962] VicRp 11; (1962) VR 75 at p78 as "the well-known evidentiary presumption of the working accuracy of scientific or technical instruments" applied in the case of breathalysing instruments. To do so, in the view of His Honour the Chief Justice, they needed to belong "amongst a 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 that they fall into [14] such a class before allowing the presumption to operate with regard to readings thereon".

Now in the case before His Honour, it appears that it was conceded by the Solicitor-General that the breath analysis instrument upon which the tests were taken did not, in 1962, "take its place within the notorious class". The view of His Honour, the Chief Justice was that "consequently evidence was required before the presumption could be called in aid in respect of readings made upon it as a result of breath analysis tests". At page 79, His Honour went on to say, speaking of the nature of the evidence required to raise the presumption, "It is sufficient if it is established that it is of a scientific or technical character and that, if properly operated it is an instrument of a kind which is likely to produce accurate results" and added that "the evidence to establish what is necessary may well, I should think, be given by a Senior Constable without any professional qualification though it would depend of course upon his knowledge, training and experience in the handling of the instrument, the source of his knowledge, and also upon the qualifications of his instructors".

It is pertinent to point out that no evidence was given in this case that the instrument used here was of a scientific or technical character and that, if properly operated, it is of a kind that is likely to produce accurate results. The most that can be said of the evidence here is that Sergeant Cummins was identified as "a member of the Police Force of Victoria authorised under Section 55 of the *Road Safety Act* 1986 to operate breath analysing instruments" and that he deposed that the instrument which he used was a "Breathalyzer" as described in Section 3 of the Act and appropriately numbered as such and further that the instrument "was working correctly" and that he "operated it properly according to the Regulations". In the judgment referred to, His Honour, the Chief Justice went on to express the view that such instruments might, in the fullness

of time, be expected to qualify for the "notorious class". [15] In this context it is of interest to note that in his dissenting judgment in *Shearer v Hills* (*supra*) at pp558-559, His Honour Chief Justice King was invited to find by the Solicitor-General of South Australia that "the time had come" to include breathalysers in the class of instrument whose accuracy is assumed without evidence. This invitation was however, firmly refused by His Honour.

However that may be, even if the situation now is that breathalyzers are currently recognised as being included in that class of "notorious instruments", the evidentiary and probative value of any reading produced in an analysis made by such an instrument must at common law depend on there being evidence of the proper operation of it in the course of the relevant analysis. Such an instrument does not produce an analysis of its own motion. It must be operated by a person and operated properly if it is to produce an accurate result. The same can be said of the evidence of Sergeant Cummins, assuming that it can be regarded as amounting to proof that the instrument is of a kind that is likely to produce accurate results in the sense referred to by His Honour the Chief Justice in *Porter v Kolodziej* (*supra*) at p79; namely "That it is an instrument of a scientific or technical character and that, if properly operated, it is an instrument of a kind which is likely to produce accurate results". In my view the Sergeant's evidence cannot be so regarded and in any event, the accuracy of any reading produced by its use in an analysis must in the last resort depend on there being acceptable evidence of its proper operation in the course of making the relevant analysis.

The evidence of Sergeant Cummins, if accepted, afforded proof that he operated the instrument used in the analysis of the appellant's breath sample, "properly in accordance with the regulations". It does not amount to evidence that the instrument was "properly operated" and ought not to be construed as amounting to such. [16] In the result I rule that the admissible evidence relied on by the prosecution is insufficient to establish to my satisfaction beyond a reasonable doubt that "the result" of the analysis relied upon "as recorded or shown by the breath analysing instrument" indicated "that more than the prescribed concentration was present in that sample."

Accordingly I allow the appeal and set aside the conviction and sentence. If, contrary to my ruling, there had been sufficient admissible evidence to found a *prima facie* case that the appellant was guilty as charged it would have been necessary to consider the provisions of Section 49(4) of the Act in the light of the whole of the evidence placed before me. I say this because a defence was taken under that Section that, on the occasion when the relevant analysis of a sample of the appellant's breath was made, the breath analysing instrument used on that occasion was "not properly operated". As I have already found, Mr Scott Campbell Fabb's evidence, which has been accepted by me and upon which I am prepared to act, is that, for the instrument to be properly operated, the two, one and a half minute "waiting periods" described in the Instruction Manual which relates to it and, also referred to in the "check list", needed to be observed by the operator.

The *Road Safety Act (Procedures) Regulations* 1988 by Regulations 302, 303 and 304, as has been previously pointed out, lay down the detailed requirements for the proper operation of a "Breathalyzer" by an authorised operator but do not contain any requirement that the "waiting periods" referred to above be observed by him or her. In such circumstances I would have taken the view that Sergeant Cummins' evidence that he operated the instrument on the occasion in question "properly in accordance with the regulations" is inconsistent with him having in fact observed the two "waiting periods" referred to in the body of the instructions and the check list contained in the Manual (Exhibit "I").

[17] I indicate accordingly that, in any event, I would have been satisfied on the probabilities that on the relevant occasion the instrument was not "properly operated" and, if it had been necessary, I would have been prepared to hold that the defence taken by the appellant under Section 49(4) of the Act had been made out.