06/93

SUPREME COURT OF VICTORIA

DALZOTTO v LOWELL

Ashley J

7, 8, 18 December 1992

MOTOR TRAFFIC – DRINK/DRIVING – PRELIMINARY BREATH TEST ADMINISTERED – POSITIVE RESULT – DRIVER DIRECTED TO GO TO POLICE STATION – NOT INFORMED OF REASON – WHETHER FAILURE TO INFORM FATAL TO CHARGE – NO EVIDENCE THAT OPERATOR AUTHORIZED AT TIME OF TEST – CERTIFICATE OF AUTHORITY NOT PRODUCED – WHETHER FATAL TO CHARGE – OMISSION BY OPERATOR TO STATE THAT TWO REGULATORY REQUIREMENTS WERE OBSERVED – WHETHER FATAL TO CHARGE: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55, 58(3).

(1) By virtue of s55(1) of the *Road Safety Act* 1986 ('Act') a police officer is obliged to inform a person found driving who has undergone a preliminary breath test why that person is being required to attend a police station. Where there is direct evidence of a failure to comply with s55(1), it would be open to a court to dismiss the charge. Where, after administering a preliminary breath test, a police officer told a driver to "leave your car and come with me to the Ballarat Police Station," it was not open to a magistrate to conclude that there had been relevant compliance with s55(1) of the Act.
***Robertson v Smith* MC33/83; and**
***Matosic v Hamilton* (1991) 13 MVR 171; MC8/91, explained.**
***DPP v Walker* MC20/92, doubted.**

(2) Where a Breathalyser operator stated that at the time of giving evidence he was authorised to operate a breath analysing instrument but did not produce or tender a certificate of authority pursuant to s58(3) of the Act, it was open to the magistrate to infer that the operator was relevantly authorised at the critical time.
***Robertson v Smith* MC33/83, distinguished.**

(3) Where a Breathalyser operator omitted to state in evidence that in conducting a breath test he waited at least 15 minutes before commencing the test or that he provided for the person's use a fresh mouthpiece from a sealed container, it was open to the magistrate to be satisfied that having regard to all the circumstances, the operator complied with the requirements of the relevant Regulations.

ASHLEY J: [1] The appellant, Lawrence Dalzotto, was convicted at the Magistrates' Court at Ballarat on 11 June 1992 of a charge under s49(1)(f) of the *Road Safety Act* 1986. The offence was alleged to have been committed in the early hours of Sunday 17 November 1991. This appeal is brought under s92 of the *Magistrates' Court Act* 1989. That section authorises an appeal on a question of law. Master Wheeler made orders on 7 August 1992 in which certain questions of law were framed.

The facts of the matter may be shortly stated. The informant intercepted the appellant's vehicle when it was travelling along Creswick Road in the Ballarat area at 12.30 a.m. on 17 November 1991. The respondent was asked if he had consumed any intoxicating liquor during the evening and he replied "yes". A preliminary breath test was performed and the result was positive. The informant required the appellant to accompany him and get into the police car. The purpose for which the informant required the appellant to accompany him was not disclosed. He did not give evidence that he told the appellant that the result of the preliminary breath test was positive. At the police station the informant required the appellant to undergo a breathalyzer test pursuant to s55 of the *Road Safety Act*. The test was undertaken and a reading of 0.095% was obtained.

A charge having been laid, the appellant gave notice in writing to the informant under s58(2) of the *Road Safety Act* 1986 requiring the breathalyser operator, **[2]** who had given a certificate under that sub-section, to be called as a witness. In those circumstances the certificate was not admissible. Had the certificate been admitted its contents could have conclusively established, *inter alia*, the authority of the operator, Jeffrey Cole, to operate a breath analysing instrument for

the purposes of s55 of the Act. No certificate under s58(3) of the Act was tendered in the course of the prosecution case. Such a certificate would have been admissible in evidence of Cole's authority to operate the breathalyser. In the course of his *viva voce* evidence, Cole said: "I am a person authorised to operate a breath analysing instrument." This evidence was not subject to objection, nor to cross examination.

Cole gave evidence that he had conducted a standard alcohol solution test prior to breath testing the appellant, that he had then tested the appellant and thereafter conducted a second alcohol solution test. He gave evidence that there was nothing to indicate that he did not operate the instrument correctly. He denied that, shortly prior to the appellant being tested, he had said that the instrument had faulted. He conceded that he had not followed recommended guidelines for the setting up of the breathalyzer prior to the respondent being tested.

The appellant gave evidence. Relevantly, there were two aspects of his evidence. First, he said that, **[3]** following a preliminary breath test, the informant had said to him "leave your car and come with me to the Ballarat Police Station" but the informant had not told him why, nor did he tell him the result of the preliminary test. He said that he believed he was being taken to the Police Station for speeding. Second, he said that whilst he was at the Police Station, waiting for the breath test, he heard the operator call out words to the effect that he needed another instrument because this one was faulty; and that thereafter the operator called out not to worry, that he had fixed it. The Magistrate said that he did not believe anything the defendant had said. Presumably he was referring to evidence pertinent to the charge laid. Counsel for the appellant did not seek to challenge this conclusion.

Michael Crewdson, who described himself as a Consulting Forensic Scientist and Clinical Psychologist, gave evidence on behalf of the appellant. It was not in question that the witness was an expert witness in the field of breath analysis. He identified a manufacturer's Manual pertinent to the breath analysis instrument used by Cole. He drew attention to the failure by Cole to ensure compliance in Step 3 of a number of steps under the heading "Preparing the Equipment for Operation". He said that the accuracy of the machine might be affected if Step 3 was not followed, and that it was not the proper procedure. The standard alcohol solution test was only an indicator of how the machine was operating at the time of testing. He said:

> **[4]** "It does not indicate what happens in between the two tests, one prior to the breath analysis and one directly after".

He also said:

> "It may be assumed that the instrument is operating correctly if the results of the standard alcohol solution tests are within tolerance".

However, he gave evidence that the assumption was not a safe one because something could happen in between the two tests. He said in cross examination that the assumption to be derived from the standard alcohol solution tests was "only an assumption which may be erroneous". At the conclusion of the hearing before the Magistrate an issue arose as to whether it was necessary for the prosecutor to tender the *Road Safety (Procedures) Regulations* 1988. The prosecutor was given an opportunity to tender the regulations and he chose not to do so.

The first question of law has three parts. Each is framed as an evidentiary question. The question whether there was any evidence upon which a reasonable man might make a finding that an element of an offence had been established is a question of law. *Transport Accident Commission v Hoffmann & Ors* [1989] VicRp 18; [1989] VR 197; (1988) 7 MVR 193 is not, contrary to the submission of Mr Gebhardt for the respondent, an authority to the contrary. See also *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at 351; (1961) 19 LGRA 232 and *Verbaken v Dowie* (Hedigan J, (1992) 16 MVR 461, Judgment 12 October 1992 at p5).

The first of the three evidentiary matters raised by the first question relates to s55(1) of the **[5]** Act. Where a preliminary breath test is apparently positive then:

> "The member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for the purpose may further require the person to accompany a member of the police force ... to a police station or other place where the sample of breath is to be furnished ... "

Counsel agreed that the requirements for compliance with that provision were accurately stated by Coldrey J in *DPP v Blyth* (unreported, Judgment 28 April 1992). His Honour held that an element of the s49(1)(f) offence which must be proved is the communication to the person to be tested of the requirement to undergo a test by means of a breath analysing instrument and, where appropriate, the need to accompany a police officer to a police station for that purpose. His Honour's reasoning makes it plain that the purpose for which a person is to be required to accompany a police officer to a police station or other place must be disclosed at the time when the requirement is imposed. That is, it would not be enough to require a person to accompany a police officer to a police station for a reason then undisclosed. His Honour accepted as a correct statement of principle the judgment of Southwell J in *Rankin v O'Brien* [1986] VicRp 7; [1986] VR 67; (1985) 2 MVR 503 where it was concluded that proof of a demand by a precise recital of the words of the Act was not required. Rather, the question was whether the evidence as it stood was such as to prove that the person **[6]** eventually charged was given reasonably sufficient information to know what was required of him and why. Coldrey J therefore concluded, consonant with that approach, that an informal explanation of what was required would be sufficient, but it was nonetheless essential that a defendant know precisely what was required of him or her.

The issue in *Blyth* was whether compliance with s55(1) had been sufficiently made out by evidence of the informant that, following a preliminary breath test which proved positive, he then conveyed Blyth to the Preston police station for the purpose of conducting a breath test. There was a concession on behalf of the Director of Public Prosecutions in the case that no explicit evidence was led by the prosecution of any specific communication by the defendant to the respondent of what was required pursuant to s55(1). The question then became one whether proof of compliance could be proved by inferences drawn from the whole of the evidence. His Honour concluded that proof of compliance could be so proven, and circumstances of that case justified the drawing of such an inference.

The present case raises a somewhat different problem. A preliminary breath test was conducted and it proved positive. The appellant was required by the informant to accompany him to the Ballarat police station. Nothing was specifically said as to why the informant was imposing this requirement upon the appellant. Later, at the police station, the appellant was required to undergo **[7]** breath analysis. The question, then, is whether the informant's failure to specify the reason why he required the appellant to attend the police station fatally flawed the prosecution case. Or, more correctly in terms of the question of law that has been raised, whether it was open to the Magistrate to find on all the evidence that there had been a relevant compliance with s55(1).

The Magistrate disbelieved the appellant when he said that he believed he was required to attend the police station because of the speeding offence. It is readily understandable in the circumstances why the Magistrate so concluded. Had the appellant been asked when at his car in Creswick Road why he was being required to attend the police station he may well have replied that it had to do with the preliminary breath test that had been just undertaken. But even disbelieving the appellant's evidence and even assuming that the appellant may have understood why he was being required to attend the police station, was it open to the Magistrate to conclude in the face of the informant's evidence that the appellant had been informed why he was being required to attend the police station?

There is a point to the obligation imposed by s55(1) upon a member of the police force to articulate the purpose for which he requires a member of the public to accompany him to a police station or other place. The member of the public is effectively being deprived of his or her liberty, albeit in a transitory way. In these circumstances the legislature has required the police **[8]** officer to convey to a member of the public the purpose for which the requirement to attend the police station is being imposed.

Mr Gebhardt did not submit that there was any evidence that the purpose of the requirement had been directly communicated to the appellant. He contended, however, that it had been open to the Magistrate to reach a conclusion on all the evidence that the requirements of s55(1) had been made out. He referred me to the judgment of Nathan J in *DPP v Walker* (unreported, judgment 7 May 1992). There his Honour adopted the approach taken by Beach J in *Matosic v Hamilton* ((1991) 13 MVR 171, judgment 8 February 1991) as to what inference might be drawn in the event of failure by a police witness to swear a particular matter affirmatively. In *Matosic*

the inference sought to be drawn was as to a matter where a positive onus lay upon the accused; the failure by a police witness to swear positively to such a matter was held not to authorize a positive inference to the contrary. In *Walker*, Nathan J extended the approach to a matter where the informant carried the onus of proof. His Honour rejected the approach of Nicholson J in *Robertson v Smith* (unreported, judgment 27 July 1983) concerning the interrelationship between drawing of inferences and failure to cross-examine.

In my opinion the judgments in *Robertson* and *Matosic* are not at odds. The former concerned a situation where the onus of proof lay upon the prosecution. The **[9]** latter, see above, raised the converse problem. The critical question is whether an accused's failure to cross-examine upon a matter is of any significance where thereafter the informant seeks to establish that matter by inference. In my opinion it is of no relevance. *Matosic* does not decide to the contrary. It appears to me, with respect, that the extension in *Walker* of what Beach J said in that case to a situation where the informant carried the onus of proof was not warranted. In the present case it was, in my opinion, not open to the Magistrate to conclude by resort to inference that there had been a relevant compliance with s55(1) where the direct evidence told to the contrary.

The likely circumstance that the appellant was aware why he was being required to accompany the informant to the police station does not stand in substitution for the duty to inform imposed by s55(1). It would be all too easy for such a substitution to be judicially authorized. In some instances this Court has criticized reliance on technical defences in the context of breath analysis prosecutions; see *Rankin v O'Brien* (*supra*) at pp72-3 and *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740 at p744; (1989) 9 MVR 1. There has also been judicial criticism of a type of cross-examination of police witnesses in such prosecutions as seems to have occurred in the present case; see per Beach J in *Matosic* (*supra*). But the fact is that the prosecution was required by s55(1) to prove that certain information had been provided to the appellant. The evidence did not do so. No favourable inference was **[10]** available. *Iskov v Matters* [1977] VicRp 26; [1977] VR 220 and *Mallock v Tabak* [1977] VicRp 7; [1977] VR 78, which were referred to and distinguished by Nicholson J in *Robertson* (*supra*) were not cited in argument. I have nonetheless considered them. For reasons set out by Nicholson J, which in my opinion are equally applicable in the present case, those decisions do not assist the respondent. Care was required of the informant to see that s55(1) was complied with. That is the remedy for the problem which lack of care created; not judicial legislation.

The second part of the first question of law asks whether it was open on the evidence to the Magistrate to find that the operator of the breath analysing instrument was relevantly authorised in the absence of a certificate of authority pursuant to s58(3) being produced and tendered. The question was intended to raise the issue whether, there being no certificate pursuant to either s58(2)(3) in evidence, there was evidence upon which the Magistrate might have found that the operator was relevantly authorised. That was the way in which the matter was argued and it is on that basis that I determine it. The witness, Cole, said:

> "I am a person authorised to operate a breath analysing instrument".

Initially, counsel for the appellant submitted that the witness should have given evidence as follows;

> "I am a person authorised by the Chief Commissioner of Police to operate a breath analysing instrument under s5 of the *Road Safety Act* 1986".

[11] (Later this was in substance varied into the form "I <u>was at the time of conducting the test</u> upon the defendant authorized ..."). Counsel then conceded that the only section under which a breath analysis test could be conducted was s55 and in consequence that it was unnecessary for the witness to have referred to s55 of the *Road Safety Act* 1986. He next submitted that the Chief Commissioner of Police might delegate his power to authorise an operator to a Deputy Commissioner of police; see s6(1) of the *Police Regulation Act* 1958. And in consequence that the witness Cole could either have said he had been authorised by the Chief Commissioner, or alternatively that he had been authorized by the Chief Commissioner or a Deputy Commissioner as was the case.

In my opinion this submission is devoid of substance. When Cole gave evidence that he

was authorised to operate a breath analysing instrument he could only have been saying that he was authorised for the purposes of s55. That authority necessarily derived from the Chief Commissioner or a Deputy Commissioner. In the absence of cross examination I see no reason why the Magistrate should have considered the proof deficient. It was submitted by counsel for the appellant that the evidence of authority was actually of hearsay character, and was therefore valueless. It appears likely that authorization was in writing (see the discussion at T.27-28). The observations of Hogarth J in **[12]** *Samuels v Leech* [1970] SASR 60 at p67 concerning the usefulness of oral evidence of written authorization which is admitted without objection are in point. The Magistrate was not bound, in the absence of objection (there was none – as counsel for the appellant conceded) to treat Cole's evidence on the matter as entirely lacking weight.

The further argument for the appellant was that Cole's evidence did not establish that he was authorized to operate a breath analysing instrument at the time of testing; but only that he was so authorized at the time of his giving evidence. It is the earlier time that is relevant; see ss55(1)(3), 49(1)(f) and see also s58(1)(2)(3) and Regulation 314(a) of the *Road Safety (Procedures) Regulations* 1988.

Counsel for the respondent conceded that no direct evidence of authority at the relevant time had been given. But he submitted that, in the absence of cross examination, an inference of authority at the relevant time could be drawn from authority at the time of giving evidence and from the operator's further evidence that he had completed a police training course and that he had conducted a number of previous tests with a breathalyzer. Counsel for the appellant said, in this context, that it was common knowledge that the way an operator becomes authorized is to complete a course and then receive some written authorization.

In *Robertson* (*supra*), Nicholson J considered whether upon the facts of that case the Magistrates' Court **[13]** could have inferred the existence of authority in the absence of direct evidence of the same and in the absence of cross examination directed to the point by counsel for the defendant. It was there unsuccessfully submitted that an inference could be drawn upon the basis of the presumption of regularity. *Robertson* was a case decided upon its own facts. In my opinion the facts in evidence in the present case entitled the Magistrate to draw an inference that Cole was relevantly authorized at the critical time. The Magistrate had evidence of present authority, a past course of study and previously conducted tests. He was entitled to infer that Cole had not commenced testing until the course of study was complete, and that he would not have been undertaking tests had not study been successfully concluded and authority granted.

I turn to the second main question of law raised on the appeal. I do so because the third sub-part of the first question is largely subsumed within the second main question. In the course of argument it became apparent that what I have described as the second main question imperfectly disclosed what the appellant sought to argue. Following discussion I granted leave to the appellant to amend this question of law, subdividing it into two questions as follows:

> "B. Was it open to the Magistrate on the evidence to find in absence of the tender of the *Road Safety (Procedures) Regulations* 1988 (the Regulations) that the preliminary breath **(14)** test had been performed using a machine of the type prescribed by those Regulations?
> C. Was it open to the Magistrate on the evidence to find that the requirements of Regulations 303 and/or 304 of the Regulations 1988 had been complied with?"

I offered Mr Gebhardt the opportunity of adjournment in order to meet the questions thus framed. He sought no adjournment. In relation to question B, counsel for the appellant submitted that no evidence had been given by the informant that the Lion Alcolmeter used by him to preliminary breath-test the appellant was a prescribed device; see ss55(1) and 53(1). He conceded that, had Regulation 301 of the Regulations been tendered in evidence, the evidentiary gap would have been filled. But he noted that the prosecutor had specifically decided not to tender the Regulation and he contended that in these circumstances I should not, in the exercise of a discretion, now permit tender. Mr Gebhardt did not concede that in all cases relating to breath analysis it would be necessary for the prosecution to tender Regulations. Nor did he concede that the oral evidence with respect to the preliminary breath test device did not suffice. But he nonetheless sought to tender Regulation 301.

I resolve this matter simply by concluding that, whether or not it is strictly necessary that

the Regulation be in evidence, I should exercise my discretion to permit its tender. Winneke CJ exercised his discretion in such a way in *Schuett v McKenzie* [1968] VicRp 24; [1968] **[15]** VR 225; see at pp228/9. The circumstances in which McInerney J declined to exercise his discretion in *Reddy v Ross* [1973] VicRp 46; [1973] VR 462 – see at pp468/9 – are not mirrored in the present case. The fact that the prosecutor chose not to tender Regulation 301 is not in the circumstances of this case decisive against an exercise of discretion in favour of the respondent.

I turn to question C. Regs 303 and 304 are in this form:

> "303. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator does not require a person to undertake a breath analysis until the operator is satisfied that the person has not consumed any intoxicating liquor for a period of at least 15 minutes before the analysis".
>
> 304. It is a requirement for the proper operation of a breath analysing instrument that the authorised operator—
> (a) provide a fresh mouthpiece for use by each person submitted to breath analysis; and
>
> (b) use only a mouthpiece which has been kept in a sealed container until required for carrying out the analysis".

Where, in respect of a hearing for an offence under s49(1) of the Act, a question for determination is the concentration of alcohol in the blood of a person, s58(1) provides that evidence of the concentration indicated by a breathalyser test is admissible "subject to compliance with s55(4)". A certificate given in accordance with s55(4) is admissible pursuant to s58(2) subject to its being challenged in the terms of the latter sub-section. **[16]** The prosecution in the present case was denied reliance given a certificate made in accordance with s58(2). Such a certificate may encompass matters dealt with by s58(4)(a)(b)(c). It was still open to the witness Cole to have given evidence in accordance with s58(4)(b)(c). If he had given evidence in that shorthand form an evidentiary presumption would have arisen. It would have been unnecessary for him to give evidence *in extenso* of the matters referred to in that sub-section.

Section 58(4) is directed to various matters which the prosecution must prove to establish an offence under s49(1)(f). Thus, that the breathalyser which was used fell within the definition of "breath analysing instrument" in s3(1); and that it was in proper working order and properly operating (s49(4) is relevant in that context). Further, the regulations impose particular requirements pertaining to proper operation; see regulations 302-304. Those requirements do not exhaust what is required to prove proper operation and proper working order. S58(4)(c) seems designed to enable proof of compliance with all regulations; the verbiage is very broad. It was not in dispute that Cole did not give evidence specifically referring to the matters embraced by regulations 303-304. The issues were whether he gave shorthand evidence to relevant effect (see s58(4)) or whether an inference of compliance with those regulations could have been drawn. **[17]** Insofar as Cole gave any evidence of "averment" character it was as follows:

> Q. "Was there anything to indicate that you did not operate the instrument correctly?"
> A. "No."

The substance of this evidence was an averment by Cole that he had operated the instrument correctly. I see no real distinction between "correctly" and "properly"; (cf. *Bogdanovski v Buckingham* [1989] VicRp 80; [1989] VR 897 at p704; (1988) 9 MVR 257 per Ormiston J). In that event Cole made part of the averment contemplated by s58(4)(b). But there was no averment in terms of the balance of s58(4)(b) or in terms of s58(4)(c). Insofar as the evidence then stood it proved proper operation of the instrument in the absence of evidence to the contrary. Cole was then cross-examined by counsel for the appellant. He was asked to describe the procedure he adopted in carrying out the test on the appellant. His answers showed compliance with the requirements of regulation 302; but there was no reference at all to the requirements imposed by regulations 303 and 304. No specific questions directed to those requirements were put in cross-examination. But there was cross-examination directed to specific aspects of operation of the machine. Those aspects were the subject of evidence of the expert witness, Crewdson, called for the defendant. **[18]** In re-examination Cole was asked what was indicated by the result of tests conducted before and after the appellant was breath-tested. He replied "That the machine was operating correctly". That evidence did not bear upon regulations 303 and 304.

The final submissions made on the defendant's behalf made no reference to an alleged failure of proof that the requirements of regulations 303 and 304 had been abided; but there was a general submission directed to the matters of proper working order and proper operation. It is in my view clear that the want of proof of compliance with regulations 303 and 304 which is now alleged was never raised in the Magistrates' Court by counsel for the appellant. Only after leave to amend the questions of law was granted and argument proceeded was this unsatisfactory situation made apparent. Fortunately the fate of the appeal does not depend upon the resolution of the issue raised by question C in its amended form.

Regulations 303 and 304 are couched in terms of requirements "for the proper operation of a breath analysing instrument". It appears to me that an averment under s58(4)(b) that an instrument was properly operated would extend to the matters dealt with by those two regulations. Despite the existence both of s58(4)(b) and (c) there is no reason why an averment under sub-section 4(b) should be read to exclude requirements relating to proper operation which are encompassed by sub-section (4)(c) where those requirements fall within the wording of the earlier sub-section. My conclusion is compatible with **[19]** what Ormiston J said concerning regulations 302 and 304 in *Bogdanovski* (*supra*) p916, Lines 36-37.

On an assumption that an averment that an instrument was properly operated extended to the requirements of regulations 303 and 304 the question is whether the evidentiary presumption created by s58(4) was displaced. "Evidence to the contrary" may be supplied by cross-examination. In the present case Cole failed on cross-examination to specify compliance with the requirements of the two regulations. But that was very much in the context of a challenge directed to other matters. In my opinion the Magistrate was entitled to act on the basis that, *vis à vis* the matters raised by the two regulations, the evidentiary presumption remained intact. If I was wrong about the evidentiary presumption establishing compliance with regulations 303 and 304 I would still conclude that it was open to the Magistrate to be satisfied of compliance with the requirements of those regulations.

Regulation 303 deals with the "satisfaction" of the operator as to a state of affairs. It may be equated with the "belief" considered by Murray J in *Iskov v Matters* (*supra*). There was, in my opinion, evidence from which the operator's satisfaction could be inferred. Cole was introduced to the appellant at the police station. It was open to the Magistrate to infer that he would have known that the appellant had been required to attend the station by virtue of s55(1). That presupposed a time elapse during which it was inconceivable that the appellant would have consumed **[20]** alcohol. There must also have been some period of time at the police station before Cole was introduced to the appellant (as indeed was Cole's assumption); and there was the time occupied during setting up and testing the instrument. In the absence of cross-examination an inference was available that the operator was satisfied that the requisite 15 minutes had elapsed.

Cole's evidence that (in substance) he had operated the instrument properly, together with his description of how he had gone about the task of setting up, testing and operating the instrument in my opinion permitted a Magistrate to infer compliance with regulation 304. His failure to mention use of a fresh mouthpiece during cross-examination had to be viewed contextually. I should mention, next, the third sub-part of the first question of law. It enquires whether it was open to the Magistrate on the evidence to find that the breath analysis instrument was operated properly. As I said earlier, this question interrelates with the question pertaining to compliance with regulations 303 and 304. To that extent it must fail.

A further matter was raised. It was submitted that the Magistrate had not read or referred to a breathalyser instruction manual tendered through Crewdson, the expert witness called for the appellant. The manual explained Cole's admission that he had not followed recommended procedure in setting up the instrument. It was said for the appellant that the Magistrate should have read and turned his mind to the manual. **[21]** There is nothing to the point. Had the Magistrate read the document it could have done no more than reinforce Cole's concession. Having regard to the entirety of Cole's evidence, and to Crewdson's evidence overall, it remained a matter for the Magistrate whether he was satisfied that the instrument had been properly operated notwithstanding a variation from recommended set-up procedures. The evidence entitled him to be so satisfied, particularly having regard to test results that were in fact obtained. In the end result, the appellant succeeds only on the issue raised by the first sub-part of the first question

of law. There is no basis for remitting the matter for re-hearing. The appeal should be allowed, the Magistrate's order convicting the appellant be set aside and in lieu thereof it be ordered that the information be dismissed.

APPEARANCES: For the applicant Dalzotto: Mr PJ Billings, counsel. Elisabeth A Einsiedel, solicitor. For the respondent Lowell: Mr SP Gebhardt, counsel. JM Buckley, Solicitor to the DPP.
