10/04; [2004] VSC 20

SUPREME COURT OF VICTORIA

DPP v HORE and ANOR

Kaye J

13, 23 February 2004 — (2004) 41 MVR 278

MOTOR TRAFFIC – DRINK/DRIVING – EXPERT EVIDENCE CALLED ON HEARING OF DRINK/DRIVING CHARGES – EVIDENCE GIVEN TO EFFECT THAT BAC READING WOULD HAVE BEEN LOWER AT TIME OF TEST – EVIDENCE ACCEPTED BY MAGISTRATE – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS49(1)(f), (4) (6).

On the hearing of drink/driving charges, expert evidence was called by the defence to show that at the time of the test, the blood/alcohol concentration of each person was lower than the result recorded by the breath analysing instrument. The magistrate overruled objections by the prosecution that such evidence was inadmissible and dismissed the charges. Upon appeal—

HELD: Appeals dismissed.

1. The question whether the expert's evidence was admissible in each case depended on the proper construction of s49(4) and s49(6) of the *Road Safety Act* 1986 ('Act'). If s49(4) of the Act were considered in isolation from s49(6) it would be clear that the expert's evidence would not only be relevant and admissible but would be of fundamantal importance to discharging the onus of proof by an accused person under s49(4) of the Act. On the other hand, s49(6) if given its ordinary meaning would render inadmissible the evidence as to the consumption of alcohol on the day in question and the expert's evidence as to the effect that that consumption of alcohol had on the blood alcohol content of the defendant.

***Campbell v Renton* MC39A/1988; and**

***DPP v Phung* [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157, followed.**

2. In general, where there is an ambiguity in the language of a penal statute, the doubt or ambiguity is to be resolved in favour of the subject. Parliament has provided a defence under s49(1)(f) to protect innocent persons from conviction where the reading was the product of faulty operation of a breath analysing instrument or a defect in the instrument itself. Such a defence would be illusory if s49(6) were construed literally so as to exclude the type of evidence sought to be adduced from the expert. Accordingly, s49(6) did not render inadmissible evidence which would otherwise be relevant and admissible to establish a defence under s49(4) and the magistrate did not err in admitting the expert evidence adduced by the defendants.

KAYE J:

1. These appeals concern two proceedings which came before the Magistrates' Court at Moe on 8 August 2003. The appeals raise the one identical issue, namely, the admissibility of the evidence of an expert witness in proceedings for an offence under s49(1)(g) of the *Road Safety Act* 1986 ("the Act").

Molesworth v Hore – Magistrates' Court Proceedings

2. At 10.10pm on 2 October 2002 Senior Constable Molesworth intercepted a motor vehicle driven by the appellant Russell Hore in Trafalgar. Senior Constable Molesworth administered a preliminary breath test to Mr Hore which indicated the presence of alcohol in Mr Hore's blood. Mr Hore was then accompanied to the Moe Police Station for a breath test. That test was conducted at 8.40pm by Sergeant Nathan Prowd, an authorised operator of a breath analysing instrument. The test produced a reading of 0.07 grams of alcohol per 100 millilitres of blood (that is 0.070 per centum). Mr Hore was charged with offences under s49(1)(b) and s49(1)(f) of the Act. His solicitors served a notice on the informant pursuant to s58(2) of the *Road Safety Act* requiring the attendance of the operator of the breath analysing instrument at the hearing at the Magistrates' Court.

3. The hearing of the charges against Mr Hore commenced in the morning of 8 August 2003. After the informant gave evidence, Sergeant Prowd gave evidence. He stated that, to his

understanding, if anything was wrong with the machine, it would not produce the certificate. In cross examination he conceded that the machine might not give any indication to the operator that it was not operating properly. At the conclusion of the evidence called on behalf of the informant, Mr Hore gave evidence as to his consumption of alcohol on the evening in question. He called a number of witnesses who supported his account of how much alcohol he had consumed.

4. Counsel for Mr Hore then called Mr Graeme Young, a consulting analytical chemist. The prosecutor objected to Mr Young's qualifications to give evidence. After hearing further evidence about Mr Young's qualifications, the Magistrate overruled that objection. In the course of his objection the prosecutor pointed out that, if he was qualified, the expert could only give evidence under s49(1)(b) of the Act, and not s49(1)(f).

5. Mr Young then gave evidence that he had conducted tests on Mr Hore replicating the type and quantity of alcohol which Mr Hore stated that he had drunk on the night in question. Mr Young gave evidence concerning the rate at which Mr Hore absorbed and eliminated alcohol from his blood stream. He stated that, based on the quantity of alcohol which Mr Hore said he had drunk, he would have expected a blood alcohol level of 0.034% at the time of testing on 2 October 2002. Counsel then asked Mr Young to explain the difference between the result which he obtained when testing Mr Hore, and the result which was obtained by Sergeant Prowd. Mr Young stated that such a variation could be accounted for by any breath sample containing more alcohol than it should have because of a number of possible causes including temperature variations, contamination, possible contamination from mouth alcohol, or bringing up from the stomach. In such an event the machine would not give a correct indication of the actual blood alcohol content. Mr Young also stated that, of course, the differential might be due to understatement by the subject of the amount he had been drinking.

6. At the conclusion of the evidence, the prosecutor contended that Mr Young's evidence was not admissible in relation to the charge under s49(1)(f) of the Act. The Magistrate rejected that submission. His Worship accepted the evidence given by Mr Hore and his other witnesses as to the quantity of alcohol consumed by Mr Hore. He held that he accepted that the operator had properly operated the machine. However, his Worship concluded that, on the evidence of Mr Young, a doubt was raised in his mind that the reading indicated by the machine was not an accurate indicator of Mr Hore's blood alcohol level at the relevant time. Accordingly His Worship dismissed both charges.

Uwins v Askwith; Magistrates' Court Proceedings

7. At 8.43pm on 24 October 2002 Senior Constable Uwins intercepted a motor vehicle driven by the respondent, Simon Askwith, in Drouin. The preliminary breath test administered to Mr Askwith indicated the presence of alcohol in his blood. Mr Askwith accompanied the informant to Warragul Police Station. There, Senior Constable Clark, an authorised operator of a breath analysing instrument, administered a breath test to Mr Askwith at 9.24 pm. That test produced a reading of 0.052 gms of alcohol per 100 mls of blood (0.052%). Mr Askwith was charged with offences under s49(1)(b) and s49(f) of the Act. His solicitor served a notice pursuant to s58(2) on the informant requiring the attendance of the operator of the breath analysing instrument, Senior Constable Clark, at the hearing on 8 August 2003.

8. The hearing of the proceedings against Mr Askwith commenced shortly after the conclusion of the proceeding against Mr Hore. Mr Clark gave evidence that the machine operated properly. In cross examination he was asked if he agreed with the evidence given by Sergeant Prowd in the Hore proceedings, that the breath analysing instrument can make mistakes but does not recall them. Senior Constable Clark stated that he could not answer that question because he did not know. At the conclusion of the evidence called on behalf of the informant, Mr Askwith gave evidence as to the amount of alcohol he had consumed on the day on which he was intercepted and tested. Mr Young was then called to give evidence. The prosecutor reiterated his objection to Mr Young's qualifications. The Magistrate overruled that objection. Mr Young gave evidence that he had conducted tests on Mr Askwith based on the amount of alcohol which Mr Askwith had stated that he had consumed on the night in question. Mr Young gave evidence as to the elimination and absorption rates of alcohol in Mr Askwith's bloodstream. Based on the amount of alcohol Mr Askwith stated he had consumed, Mr Young concluded that Mr Askwith's blood alcohol content was less than 0.03% at the time which he had been tested by Senior Constable Clark. When

asked why there was a discrepancy between the reading recorded by Senior Constable Clark and the conclusions drawn by Mr Young, he reiterated the same reasons which he had given in the matter of Hore.

9. At the conclusion of that evidence, the Magistrate gave his decision. He held that there was nothing in the evidence to suggest that the machine was not properly operated. The magistrate accepted the evidence of Mr Young and, implicitly, the evidence of Mr Askwith. He therefore concluded that there was a doubt that the reading indicated on the certificate accurately reflected Mr Askwith's blood alcohol level at the time of testing. Accordingly he dismissed the two charges against Mr Askwith.

Appeals

10. In each proceeding Master Wheeler made orders dated 25 September 2003. In each order the one question of law was identified, namely:

> "Did the Magistrate err in law in admitting and acting upon the evidence of Graeme Barry Young in considering the charge brought pursuant to s49(1)(f) of the *Road Safety Act* 1986?"

11. In the course of submissions it became clear that the sole point made on behalf of the appellant in each case concerned the actual admissibility of the evidence of Mr Young. In other words no point was made that, even if the evidence was admissible, it ought not to have been acted upon by the Magistrate. Further, no point was made by the appellant as to whether the evidence adduced on behalf of the defendant in each case, including the evidence of Mr Young, was sufficient to discharge the onus on the defendant to establish that the breath analysing instrument was in proper working order. In particular, although the evidence of Mr Young is, perhaps, equivocal in this respect, no point was taken that the evidence did not establish that the instrument itself was not in proper working order. At the Magistrates' Court, the only point taken by the prosecutor concerned the admissibility of the evidence of Mr Young in respect of the s49(1)(f) charges. Quite properly, Mr Beale, who appeared on behalf of the appellant, did not seek to expand the attack on the Magistrates' Court's findings beyond the point taken by the prosecutor at the Magistrates' Court.

The *Road Safety Act* 1986

12. Section 49(1)(b) of the Act provides that a person is guilty of an offence if he or she drives a motor vehicle or is in charge of a motor vehicle while the "prescribed concentration of alcohol" or more than the prescribed concentration of alcohol is present in his or her blood. Section 3 of the Act defines the "prescribed concentration of alcohol" to mean a concentration of alcohol of 0.05 grams per 100 millilitres of blood.

13. Section 49(1)(f) provides that it is an offence if, within 3 hours after driving or being in charge of a motor vehicle, a person furnishes a sample of breath for analysis by a breath analysing instrument and—

> (i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her blood; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle.

14. Section 48(1A) of the Act provides that for the purposes of an alleged offence against (*inter alia*) s49(1)(f), it must be presumed that the concentration of alcohol indicated by an analysis to be present in the blood of the person charged was not due solely to the consumption of alcohol after driving or being in charge of a motor vehicle unless the contrary is proved by the person charged on the balance of probabilities.

15. Section 58(2) provides that a document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument is admissible evidence and is conclusive proof of the matters stated in it and (*inter alia*) of the fact that the instrument was in proper working order and properly operated, unless the accused person gives notice in writing to the informant not less than 28 days before hearing that he or she requires the person giving the certificate to be called as a witness. In *Furze v Nixon*[1] the Court of Appeal held that where such a notice is given, the certificate remains *prima facie* evidence of the matters contained in it.

***Road Safety Act* 1986 – Section 49(4) and 49(6)**

16. The question whether Mr Young's evidence was admissible in respect of the charge under s49(1)(f) in each case depends on the proper construction of s49(4) and s49(6) of the Act. Those sub-sections provide:

> "(4) It is a defence to a charge under paragraph (f) of sub-section (1) for the person charged to prove that the breath analysing instrument used was not on that occasion in proper working order or properly operated. .....
>
> (6) In any proceedings for an offence under paragraph (f) or (g) of sub-section (1) evidence as to the effect of the consumption of alcohol on the defendant is admissible for the purpose of rebutting the presumption created by s48(1A) that is otherwise inadmissible."

17. If s49(4) were considered in isolation from s49(6), it would be clear that evidence of the type which was adduced in each case from Mr Young would not only be relevant and admissible, but would be of fundamental importance to discharging the onus of proof by an accused person under s49(4) of the Act. In the ordinary course, it would be difficult for an accused person to establish, by cross examination of the authorised operator of a breath analysing instrument, either that the operator had not operated the machine properly, or that the machine was not in proper working order. The most which might be achieved in cross examination is the type of general concession made by Sergeant Prowd in the matter of Hore. It is unlikely that, save in the rarest of cases, an accused person would be in the position to give evidence himself or herself that the instrument was not in proper working order or was not properly operated. The best evidence which could be adduced on behalf of an accused, in support of such a defence, would be the type of evidence called on behalf of the defendants in the present cases In other words, the accused would seek to show that, based on the amount of alcohol that he or she had consumed, the results produced on testing at the Police Station were anomalous. Indeed, even in the rare case where the accused was able to establish, either through cross examination or through his or her own evidence, some defect in the instrument or in the manner in which it was operated, evidence of the type led in the two present cases would nevertheless be important to enable the accused person to satisfy the onus of proof under sub-section (4).

18. On the other hand, s49(6), if given its ordinary meaning, would render inadmissible the expert evidence which was adduced from Mr Young in both cases. The evidence of the two defendants, and, in the case of Mr Hore, of his supporting witnesses, was as to the consumption of alcohol on the day in question. The evidence of Mr Young in each case was as to the effect that that consumption of alcohol had on the blood alcohol content of the defendant. In other words, the evidence of Mr Young was evidence "as to the effect of the consumption of alcohol on the defendant", if that phrase, as it appears in s49s(6), is to be given its plain ordinary meaning in isolation from s49(4) of the Act.

19. In support of the appeals Mr Beale contended that if s49(6) did not render inadmissible the type of evidence adduced from Mr Young, then s49(6) would be rendered nugatory. The offence prescribed under s49(1)(f) is established by proving that, within three hours after driving, the accused person had furnished a sample of breath for analysis by breath analysing instrument and the result of that analysis indicates that that person has a blood alcohol content equal to or in excess of the prescribed level. Where a defendant is charged under s49(1)(f), it is irrelevant for the defendant to prove that, based on the amount of alcohol that he or she had consumed on the day in question, his or her blood alcohol content would have been lower than the amount indicated on testing by the Police. Thus, Mr Beale contended that, if s49(6) does not render inadmissible evidence of the type adduced from Mr Young, it has no other work to do.

20. One possible answer to Mr Beale's contention is that s49(6) was included in the legislation as an overabundance of caution. In other words, s49(6) was included to emphasise that it is irrelevant, and therefore inadmissible, for a defendant simply to establish that his or her blood alcohol content was, on the day in question, different to that indicated by the breath analysing instrument. I do not find that explanation to be particularly satisfactory. First, the meaning of s49(1)(f) is quite clear and does not need buttressing by provisions such as s49(6). Further, if any such buttressing was required, one would expect that s49(6) would not render the type of evidence in question inadmissible, but simply irrelevant and to no effect.

21. Accordingly the appeals in this case give rise to the question, whether the plain reading should be given to s49(6) so as to render, to all intents and purpose, the defence under s49(4) ineffective, or whether s49(6) should be construed other than in its plain and ordinary sense, so as to accommodate the calling of the type of evidence which was adduced in this case in support of the defence under s49(4). In considering this question I shall first turn to the authorities on the construction of s49(4) and s49(6) which have been referred to by counsel.

Authorities

22. In support of his submissions on behalf of the appellants Mr Beale relied on the decision of Fullagar J in *Leishman v O'Connor*[2] and also on the decision of McDonald J in *Giankos v Ellison*[3].

23. In *Leishman v O'Connor*[4] the defendant was charged with offences under s49(1)(b) and s49(1)(f) of the *Road Safety Act* 1986. He sought an adjournment of his hearing before the Magistrate on the grounds that an analytical chemist, who conducted tests on the defendant to ascertain his absorption and elimination rates of alcohol, was not available to give evidence. The Magistrate refused to grant the adjournment. The defendant was convicted of an offence against s49(1)(f). The defendant appealed. Fullagar J dismissed the defendant's appeal. He did so on the basis that the appellant had not given written notice to the informant under s58(2). Accordingly the certificate served on him was conclusive, and therefore the defendant had not shown that he had suffered any prejudice by the refusal of the adjournment (p502). In the course of his judgment Fullagar J also noted that the charge on which the defendant was convicted was under s49(1)(f), and not 49(1)(b). His Honour stated:

> "Section 49(6) provides that, in proceedings for an offence under sub-section (1)(f): 'evidence as to the effect of the consumption of alcohol on the defendant is inadmissible for the purpose of establishing a defence to the charge.' It is true that by sub-section (4), it is a defence to prove that the analysing machine was not in proper working order or not properly operated. I think the better view is that the chemist's evidence about the effect of alcohol on the applicant was not relevant to the matters referred to in s49(4). However, even if that view were wrong, it is clear that s58(2) of the Act ... made the certificate to which s58(2) refers conclusive proof of the matters referred to in it ..." (page 501).

24. It is clear that the views of Fullagar J, in relation to the interrelationship of s49(4) and s49(6), were *obiter dicta*, and indeed Mr Beale, in referring me to the decision, did so on that basis. Further, it is, with respect to his Honour, difficult to understand how the chemist's evidence would not be relevant to the matters referred to as s49(4). The critical issue is not the relevance of such evidence but rather whether it has been rendered inadmissible under s49(6). In any event, Fullagar J made it clear, on the next page of his judgment, that he determined the question before him on the basis that the refusal of adjournment occasioned the appellant no prejudice because of the failure of the appellant to serve a notice under s58(2) of the Act.

25. Mr Beale then referred me to the decision of McDonald J in *Giankos v Ellison*[5]. In that case the defendant was charged under s49(1)(f) of the *Road Safety Act.* He sought to call evidence as to his consumption of alcohol leading up to and, in particular, subsequent to the accident. The Magistrate ruled that the evidence was not admissible. The defendant appealed. McDonald J dismissed the appeal. In support of his submissions, the appellant contended that the purpose of calling evidence as to the consumption of alcohol after the accident by the defendant was to establish that that drinking would have affected the amount of alcohol in the defendant's blood at the time that it was analysed. Accordingly, so it was submitted, the defendant would have rebutted the *prima facie* evidence of the analysis of his breath, and would have thus required the prosecution to establish that at the time of the defendant's driving his blood alcohol concentration exceeded the prescribed level. McDonald J rejected that submission. He pointed out that the relevant time for determining the blood alcohol content of the defendant, for the purposes of s49(1)(f), was not the time of driving, but the time of testing. Accordingly his Honour determined that the evidence which the defendant had sought to adduce was not relevant to an offence under s49(1)(f) of the Act. He noted, but did not rule upon, an alternative argument that the evidence in any event would have been inadmissible under s49(6) of the Act (page 110). Accordingly, his Honour's decision does not provide any direct assistance on the correct instruction of s49(6).

26. In response Mr G Hardy on behalf of the respondents relied on the decision of Marks J in *Campbell v Renton*[6] and the decision of Harper J in *DPP v Phung*[7].

27. In *Campbell v Renton*[8] the defendant was intercepted while driving a motor vehicle in Hamilton at about 11.00 am. His breath test at 12.14am produced a reading of .090%. At that time the legislation provided for a second test to be administered upon request. The defendant requested such a test. The second test was taken at 12.36pm and resulted in a reading of .095%. The defendant gave evidence, which was supported by four witnesses, that he had not consumed any alcohol since the previous evening. Mr Young gave evidence as an expert. He stated that most persons attained their maximum reading within 40 to 45 minutes of cessation of consumption of alcohol, and that the longest time for attaining a maximum reading after cessation of consumption of alcohol is two hours. Accordingly, the fact that the second test produced a higher reading than the first indicated an anomaly. At that point the Magistrate held that the evidence of Mr Young was inadmissible under s49(6). He convicted the defendant. The defendant appealed. Marks J allowed the appeal.

28. In his judgment Marks J pointed out that the critical fact, on which the expert's evidence was based, was that the defendant had not consumed alcohol during the period of at least two hours before the test was administered. In those circumstances, the evidence of Mr Young as to the rise and fall of the alcohol content in human beings meant that the higher level recorded in the second test led to the inference that the breath analysis instrument was either defective or not properly operated. Thus, his Honour concluded, the evidence of Mr Young about the time taken for alcohol to reach a peak level in the blood of human beings was not evidence of the effect of consumption of alcohol on the defendant within the meaning of s49(6). In this respect, the decision of his Honour does not bear directly on the issues of this case. However, at the conclusion of his judgment, Marks J expressed the following view:

> "Even if by some stretch of meaning, which I would not adopt, evidence of times of peak level and commencement of the elimination process reasonably to be expected to apply to the applicant is of 'the effect of the consumption of alcohol on him' (which I do not think it is), I would read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4). This is because Parliament must have intended by providing the defence under s49(4) to entitle an accused to adduce all evidence going to its establishment." (BC8800454F10).

29. That view was adopted and followed by Harper J in *DPP v Phung*[9]. In that case, the respondent, Mr Phung, was intercepted while driving a motor vehicle at 1.13am. He gave evidence, accepted by the Magistrate, that he had not consumed any alcohol after 10.30pm. A first breath test at 2.04am, produced a reading of .120%. A second test, at 2.30am, produced a higher reading of .135%. Mr Phung was charged with an offence under s49(1)(f) of the Act.

30. At the hearing, an expert, Mr Michael Crewdson, gave evidence which was accepted by the Magistrate. Mr Crewdson's evidence had two facets to it. First, Mr Crewdson was asked to assume Mr Phung's account of the amount of alcohol which he had consumed during the evening in question. Based on that evidence, Mr Crewdson gave evidence that, in his opinion, all the alcohol would have been eliminated from the blood of Mr Phung at the time of the two tests. The second aspect of Mr Crewdson's evidence was similar to the evidence given by Mr Young in *Campbell v Renton*[10]. In essence, Mr Crewdson stated that, given that Mr Phung had not consumed alcohol after 10.30 pm, his blood alcohol content would have been falling, not rising, between the times at which the two tests were conducted on him. The Magistrate accepted Mr Crewdson's evidence in its totality. It appears that in argument both before the Magistrate and before Harper J, no distinction was drawn between the two different types of evidence given by Mr Crewdson. On appeal, the Director of Public Prosecutions contended that the evidence of Mr Crewdson was inadmissible under s49(6) of the *Road Safety Act.* Harper J rejected that submission and held that the evidence of Mr Crewdson was admissible. It is significant for my purposes to note that, in so concluding, Harper J ruled that the whole of the evidence of Mr Crewdson was admissible, and not only the evidence which was of the same type as that adduced in *Campbell v Renton*[11]. In other words, Harper J ruled that s49(6) did not render inadmissible the evidence of Mr Crewdson as to the postulated blood alcohol content of Mr Phung at the time at which the tests had been conducted, based on Mr Phung's evidence as to the amount of alcohol consumed by him on the night in question.

31. In reaching his conclusion, Harper J noted that, apart from s49(6), the logic of the Magistrate's reasoning was unimpeachable. Once the Magistrate accepted the evidence of Mr Phung and Mr Crewdson, it followed that the result of the analysis of Mr Phung's breath as recorded by

the breath analysing machine was wrong. From this it followed that the instrument was either not in proper working order or not properly operated. (page 339). Nevertheless the Director of Public Prosecutions relied on s49(6). The Director of Public Prosecutions contended that the evidence of Mr Crewdson, even if confined generally to the effect of consumption of alcohol on human beings, must inevitably be evidence as to the effect of alcohol consumption on the defendant, otherwise it would be irrelevant. Accordingly, the Director argued that the evidence was inadmissible under s49(6). Harper J rejected the submission in the following terms:

> "The submission is nevertheless fundamentally unattractive. If accepted, it will result in the conviction of persons for an offence against s49(1)(f) although the tribunal of fact is satisfied that those charged had nowhere near the prescribed concentration of alcohol in their blood. In this case it will, if accepted, result in the conviction of Mr Phung although the Magistrate was (as I understand his reasons for judgment) satisfied not only that the breath analysing instrument used to analyse his blood was either not in proper working order or was not properly operated, but also that the relevant defect resulted in an inaccurate analysis. Given the presence in the Act of s49(4), this would be a very strange result indeed. Clearly, injustice might be done if someone could be convicted on the basis of an analysis of his or her breath where that analysis had been performed by a malfunctioning machine. Equally clearly, the legislature wish to avoid such injustice. Hence s49(4). But the construction of s49(6) for which the Director of Public Prosecutions contends would deprive s49(4) of nearly all its practical effect: a person charged with an offence against s49(1)(f) would rarely be in a position 'to prove that the breath analysing instrument used was not ... in proper working order or properly operated' unless evidence of the kind tendered through Mr Crewdson in this case were admissible. There are two means by which a machine might be shown not to be in proper working order or not properly operated. One, of course, is the direct approach: a defendant might demonstrate that the operating procedure was flawed, or might establish that the machine itself was defective. But it would not necessarily follow that the default thus revealed had resulted in an inaccurate analysis: *Ozbinay v Crowley* (unreported, Byrne J, 16 April 1993). Before one can properly reach that conclusion, it is, as his Honour there pointed out, necessary to show not merely a fault in procedure or in the instrument itself, but also that the result of the analysis was unreliable. It is also possible to demonstrate fault in the operation of a breath analysing instrument, or a fault in the instrument itself, by examining the results of an analysis against the known or established facts concerning the consumption of alcohol by the person whose breath is analysed. Such an approach will not, of course, accord with strict scientific method. As a check on the accuracy of the analysis performed by the instrument, it would only be of use where the divergence between the results of the analysis and the consumption is so marked that either the defendant is an abnormal human being in relation to the absorption and elimination of alcohol, or the machine must have produced a wrong result. It follows that there is, in principle, good reason why s49(6) should not be construed in a way which would prevent a defendant from calling expert evidence to the effect of that given by Mr Crewdson in this case." (Page 340)

32. Harper J then referred to *dictum* of Marks J in *Campbell v Renton*[12], which I have quoted above, that he would "read down s49(6) as not precluding the establishment of facts relevant to a defence under s49(4)". Harper J agreed with that view. He also rejected the contention that *Campbell v Renton*[13] might be distinguished from the facts before him in *Phung*. Harper J stated that the facts in the two cases were relevantly the same. His Honour concluded:

> "... in particular, the Magistrate, on the material before me, was entitled to find that Mr Crewdson's evidence was limited in its particularity in the same way as was the expert's evidence in *Campbell's* case." (Page 341)

33. As I have observed, there is a difference between the expert evidence called in *Campbell's case* and the evidence adduced in *Phung's case*. In the former case, the evidence was restricted to the general proposition as to the absorption and elimination of alcohol from the blood stream of human beings. However, in *Phung's case*, Mr Crewdson's evidence was not so confined; Mr Crewdson also gave evidence as to Mr Phung's postulated blood alcohol content at the time he was tested by the breath analysing instrument, on the basis of Mr Phung's stated consumption of alcohol. It seems clear that Harper J held that both categories of evidence given by Mr Crewdson were not inadmissible pursuant to s49(6).

Conclusion

34. The net result of the above considerations is as follows. First, the evidence which was adduced from Mr Young, as to the tests he had conducted on each of the respondents and the results of those tests, was clearly relevant to establish a defence on behalf of each respondent under s49(4) of the Act. Indeed, such a defence would, in the ordinary case, be of little utility to

a defendant if such evidence could not be adduced on his or her behalf. Second, if s49(6) were to be construed literally and without limitation, such evidence would be rendered inadmissible by s49(6). Third, if s49(6) were not accorded its literal meaning, it would have little or no work to do. Fourth, there is thus clearly a tension or a conflict between the two sub-sections. There are two authorities of this Court in which that tension or conflict has been resolved by according s49(4) precedence over s49(6).

35. It is correct, as Mr Beale contends, that *Campbell v Renton*[14] is distinguishable, in that the decision was based on evidence of the effect of the consumption of alcohol on people in general and not in particular. Nevertheless, Marks J expressed the clear view (albeit by way of *obiter dictum*) that he would, if necessary, read down s49(6) as to not preclude the establishment of facts relevant to a defence under s49(4). Further, the decision in *DPP v Phung*[15] was not confined to the admissibility of evidence as to the effective consumption of alcohol of people in general. Harper J held that evidence of the expert, Mr Crewdson, was also admissible in relation to tests conducted by the expert on the defendant and the results of those tests. His Honour adopted and followed the view of Marks J that in those circumstances s49(4) should take precedence over s49(6).

36. The approach expressed by Marks J in *Campbell v Renton*[16] and adopted by Harper J in *Phung's case* are, with respect, supported by basic principles of statutory construction applicable to penal sections. In general, where there is an ambiguity in the language of a penal statute, the doubt or ambiguity is to be resolved in favour of the subject: *Beckwith v R*[17] and *Trenerry v Bradley*[18]. That principle is particularly applicable in the present case. On its face s49(1)(f) has a strict operation. Under that provision a person is guilty of an offence regardless of his or her blood alcohol content at the time of driving, and indeed also regardless of his or her blood alcohol content at the time of the test. It is sufficient, to sustain a conviction, that the test administered under s55, within three hours of driving, indicates that the blood alcohol content of the driver equals or exceeds the prescribed limit. No doubt the section was intended to operate in a strict and, indeed, draconian, manner. However, in that setting, it is relevant that Parliament provided a defence under s49(1)(f) to protect innocent persons from conviction where the reading was the product of faulty operation of a breath analysing instrument or a defect in the instrument itself. Such a defence would be illusory if s49(6) were construed literally, so as to exclude evidence of the type sought to be adduced from Mr Young. In construing subsections (4) and (6), it is, in my view, a fundamental consideration that Parliament could not have intended the defence provided under subsection (4) to be no more than a "Clayton's" defence. Thus, I consider that s49(6) does not render inadmissible evidence which would otherwise be relevant and admissible to establish a defence under s49(4).

37. Accordingly, I have come to the conclusion that the Magistrate, did not err in admitting the evidence of Mr Young adduced by the defendants in order to establish a defence under s49(4) of the Act. For those reasons I uphold each decision of the Magistrate, and dismiss each appeal.

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[1] [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[2] (1991) 13 MVR 499.
[3] (1988) 7 MVR 104.
[4] - [5] *supra*.
[6] (unreported, 18/8/88; BC 8800454).
[7] [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157.
[8] *supra*.
[9] [1993] VicRp 75; [1993] 2 VR 337; (1993) 17 MVR 157.
[10] - [16] *supra*.
[17] [1976] HCA 55; (1976) 135 CLR 569 at 576; (1976) 12 ALR 333; 51 ALJR 247; 28 ALT 39 (Gibbs J).
[18] [1997] NTSC 82; (1997) 115 NTR 1 at 5; (1997) 6 NTLR 175; (1997) 93 A Crim R 433 (per Martin CJ).

APPEARANCES: For the appellant DPP: Mr C Beale, counsel. Solicitor to the Office of Public Prosecutions. For the respondents: Mr G Hardy, counsel. Tyler Tipping and Woods, solicitors.
