16/03; [2003] VSCA 81

SUPREME COURT OF VICTORIA — COURT OF APPEAL

LUFF v DPP

Callaway, Vincent and Eames, JJ A

15 May, 24 June 2003 — (2003) 38 MVR 362

MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE GIVEN BY OPERATOR OF BREATH ANALYSING INSTRUMENT – STATEMENT THAT OPERATOR NOT FAMILIAR WITH RELEVANT REGULATIONS – UNABLE TO SAY WHETHER REGULATIONS COMPLIED WITH – CHARGES DISMISSED BY MAGISTRATE – MAGISTRATE NOT SATISFIED THAT RESULT OBTAINED BY PROPER OPERATION OF INSTRUMENT – WHETHER MAGISTRATE IN ERROR – DECISION OF COURT OF APPEAL IN *FURZE v NIXON* MC 04/01 – WHETHER CORRECTLY DECIDED: *ROAD SAFETY ACT* 1986, SS49(1)(b), (f); 55, 58(4).

L. was charged with offences of drink/driving under s49(1)(b) and (f) of the *Road Safety Act* 1986 ('Act'). At the hearing, the operator of the breath analysing instrument was called to give evidence. In cross-examination when asked what regulations he complied with he said: "I don't know the exact regulations and what they say." When asked whether he complied with the regulations in conducting the breath test, the operator said: "I can't say." In dismissing both charges, the magistrate said: "…the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorised officer and those .05 charges will be dismissed accordingly." Upon appeal to a judge of the Supreme Court, the appeal was allowed, the dismissals set aside and remitted to the magistrate for further determination. See (2001) 34 MVR 78; MC 19/01; [2001] VSC 260. Upon appeal—

HELD: Appeal dismissed. Decision of trial judge affirmed. Remitted to the Magistrates' Court for further consideration.

1. In relation to the charge under s49(1)(f) of the Act, it was no part of the prosecution case to prove that on the relevant occasion the breath analysing instrument was either in proper working order or properly operated. S49(4) reverses the onus of proof and evidences a clear intention that the results of the analysis are to be accepted for the purposes of s49(1)(f), unless on the balance of probabilities the person charged establishes either that the instrument was not in proper working order or that it was not properly operated.

***Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547; MC 04/01, applied.**

2. In relation to the charge under s49(1)(b) of the Act, the prosecution bears the onus of establishing that the concentration of alcohol present in a driver's blood equals or exceeds the prescribed concentration. However, there is no requirement that a breath analysing instrument be used to ascertain that concentration. It may be ascertained by other means. Nor is there any obligation cast upon the prosecution, in a case where a breath analysing instrument is employed, to prove that the instrument was properly operated. If a reasonable doubt can be seen to exist concerning the reliability of the analysis, a magistrate may well not be satisfied that the commission of the offence has been established. That is not because there is an onus cast upon the prosecution to establish that the instrument has been properly operated but because they have failed to prove the presence of an essential element of the offence itself.

3. The interpretation of s49(1)(f) adopted by the Court of Appeal in *Furze v Nixon* not only stands as the view of this Court to be followed until overturned in accordance with proper practice but was clearly correct.

CALLAWAY JA:

1. I have had the advantage of reading in draft the reasons for judgment prepared by Vincent JA. I agree with his Honour, for the reasons he gives, that the appeal should be dismissed. There are only three points that I wish to add.

2. Counsel for the appellant submitted that the statement from the joint judgment of this Court in *Furze v Nixon*[1] set out below at [28] was obiter or that it was *per incuriam* on the footing that the Court may not have been referred to the regulations. In either event the Court as presently constituted could decline to follow it but, in my respectful opinion, the statement was clearly correct for the reasons given in the joint judgment and the reasons given by Vincent JA.[2]

3. A number of affidavits were filed as to the proceedings in the Magistrates' Court, some of them based on the deponents' notes or recollection, but the passage set out at [9] below was tape-recorded. A little before, the learned magistrate described it as "the crux of this case". I agree with Vincent JA that it clearly identifies the foundation for her decision, relieving us of the need to consider some of counsel's submissions and requiring us to affirm the order made in the Trial Division that the matter be remitted to the Magistrates' Court.

4. On remitter it will be for the Magistrates' Court to decide whether the charge under s49(1)(b) of the *Road Safety Act* 1986 is proved beyond reasonable doubt, applying that provision in the manner explained by Vincent JA at [27] below, and, in relation to the charge under s49(1)(f), whether the affirmative defence afforded by s49(4) is made out. In view of some of the affidavit material, the judgment of Hedigan J in *Verbaken v Dowie*[3] and the course of argument, I am unwilling to say that there was no evidence upon which the magistrate could find, on the balance of probabilities, that the instrument was not properly operated.[4]

VINCENT JA:

5. At about 12.30am on Friday 5 December 1997, the appellant was driving a Toyota Utility motor vehicle in a northerly direction along Osborne Street, South Yarra, when it mounted the kerb outside a house at 61 Osborne Street and knocked to the ground the steel front gates and gate posts of that property. It then travelled through an adjacent wooden side fence on to the next property, damaging a 60 centimetre high brick wall before coming to rest in the front garden. The appellant reversed onto the roadway of Osborne Street, and proceeded forward, turning left in Fawkner Street and then into Nicholson Street where he parked near a laneway which ran behind his home at 57 Osborne Street.

6. This occurrence was reported to the police by local residents, in consequence of which the utility was located and the name of its registered owner was ascertained. Constable Cole, who subsequently became the informant in charges laid against the appellant arising from his driving on that night, in company with another police member then attended at the appellant's home. A preliminary breath test was conducted, after which he went with them to the Prahran Police Station. An analysis of the appellant's breath, conducted at 3.07am by an authorized operator of a breath analyzing instrument, indicated the presence of a blood alcohol concentration of 0.189%.

7. In due course, the appellant appeared before the Magistrates' Court at Melbourne on the following charges:

> "Charge 1 - Driving or being in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his blood contrary to s49(1)(b) *Road Safety Act* 1986;
>
> Charge 2 - Being within three hours after driving or being in charge of a motor vehicle and furnishing a sample of breath for analysis by a breath analysing instrument under s55(1) *Road Safety Act* 1986 and result of the analysis recorded or shown by the breath analysing instrument indicated more than the prescribed concentration of alcohol was present in his blood contrary to s49(1)(f) *Road Safety Act* 1986;
>
> Charge 3 - Careless driving contrary to section 65 *Road Safety Act* 1986;
>
> Charge 4 - Failing to stop after an accident causing damage to property contrary to section 61(1)(a) *Road Safety Act* 1986;
>
> Charge 5 - Failing, after an accident causing damage to property, to give his name and address to the owner of the damaged property contrary to section 61(1)(c) *Road Safety Act* 1986; and
>
> Charge 6 - Failing, after an accident causing damage to property, to report the accident to the police contrary to section 61(1)(f) *Road Safety Act* 1986."

8. He pleaded not guilty and after a hearing which extended over three days[5], charges 1 and 2 were dismissed and on charges 3, 4, 5 and 6, which were found proved, the appellant was ordered to pay, without conviction, an aggregate fine of $500 and statutory costs in the sum of $53.

9. With respect to the matters that were dismissed, the magistrate stated:

> "As I say, I am perfectly satisfied that he is the driver.[6] I am not however perfectly satisfied that he had a breath alcohol reading of 0.189. This is why I say it's a most unusual case. Let me just read some of the evidence directly that [the operator] gave. You will recall that when he gave his evidence I gave the witness permission to refer to his statement which contained the proforma – we'll call it the proforma proof part of a breath operator's statement. I gave him that permission over objection from counsel and I still – I certainly don't believe that that was improper. I think it's perfectly proper to give leave to a witness to refer to his statement, however there was an objection at that time. He continued with his evidence and then in cross-examination he said that he had read his notes before he gave evidence, though there was a lot of the formal matters that he was unable to recall. He agreed that the last page of his notes contained the formal proofs. He disagreed that his mind went blank in evidence in chief just before he got to those important parts. He denied a number of other suggestions which we don't have to – I don't have to bother about. He did say that he had had a blank and that's why he hadn't been able to recall the - which led, of course, for me giving him leave. He couldn't remember the numbers on the machine, though he remembered the machine. He was asked – he gave evidence that he complied with the regulations. He then gave this piece of evidence when asked. He was asked what were the exact regulations he complied with. He said, 'I don't know the exact regulations and what they say. I can't remember the exact one. I can't recall which ones they are and if I have complied.' When put to him this question, 'You can't give evidence that you did comply with them', he said, 'That needs to be assessed by the court', and he denied he was being evasive on that point. He wasn't being evasive. He had been cornered and the reality is if he doesn't know what regulations he complied with, I can't be satisfied he complied with the regulations. He doesn't know what they are, he couldn't say what they are. It leaves me in the position where I cannot be satisfied that the test result obtained was obtained as a result of a properly operated machine by an authorized officer[7] and those 0.05 charges will be dismissed accordingly. As I have indicated, I find no difficulty in the fact that – well, I have no difficulty in finding that the defendant was the driver on the night and the remaining charges are found proved."

10. An appeal to the Trial Division of this Court against the orders dismissing charges 1 and 2 was instituted by the Director of Public Prosecutions, purportedly on behalf of Senior Constable Cole.

11. On 2 August 2001, the appeal was allowed, the order of the Magistrates' Court was set aside and the judge directed that the matter be remitted to the Magistrates' Court. A consequential order for costs was also made.

12. The appellant now seeks to overturn that decision on the following grounds:

> "[T]hat the learned judge of the Trial Division (hereafter referred to as 'the trial judge') erred in law as follows;
> 1. By holding that under the circumstances the appeal was competent pursuant to section 92 of the *Magistrates' Court Act* 1989.
> 2. By failing to hold that under the circumstances there was no evidence that section 92(2) of the *Magistrates' Court Act* 1989 had been complied with insofar that:
> (a) there was no competent evidence before the Court that the informant 'wished to appeal'; and/or
> (b) there was no competent evidence before the Court that the appeal was brought by the Director of Public Prosecutions on behalf of the informant.
> 3. By holding (if she did so hold) that:
> (a) it could be assumed under the circumstances that (a stranger to the proceedings) the Deputy Commissioner (Operations) of Police did not of his own accord initiate the request to the Director of Public Prosecutions to bring the appeal on behalf of the informant; and/or
> (b) that it was open to infer that the informant brought the matter to the attention of the Deputy Commissioner in order that the procedure laid down by section 92(2) of the *Magistrates' Court Act* 1989 for an appeal might be set in motion; and in so doing the learned trial judge applied the wrong test.
> 4. By failing to hold that in the absence of evidence to the contrary it was not open to assume or infer that:
> (a) the informant 'wished to appeal'; and/or
> (b) the appeal was not brought by a stranger to the proceedings; and/or
> (c) the requirements of section 92(1) of the *Magistrates' Court Act* 1989 had been complied with; and/or
> (d) the requirements of section 92(2) of the *Magistrates' Court Act* 1989 had been complied with.
> 5. By holding that: (a) the informant had shown by his initiation of the appeal process laid down under the *Magistrates' Court Act* 1989 that he 'wishes to appeal'; and
> (b) no other conclusion was possible on the facts; and in so doing the learned trial judge applied the wrong test.
> 6. By failing to hold that under the circumstances it was not open to find that:
> (a) the informant had in fact initiated the appeal process; and/or
> (b) 'wished to appeal'; and/or

(c) the appeal had not been brought by a stranger or strangers to the proceedings (to wit, the prosecutor in the lower Court and/or the Deputy Commissioner of Police); and/or
(d) the Director of Public Prosecutions had brought the appeal on behalf of the informant.
7. By holding that (under the circumstances) the Court had jurisdiction to hear the appeal. ...
10. By holding (if she did so hold) that under the circumstances with respect to the charge under section 49(1)(f) of the *Road Safety Act* 1986, there was an onus on the defence to establish that the relevant regulations were not complied with, and such onus had not been discharged, and in so doing the learned trial judge applied the wrong test.
11. By holding (if she did so hold) that:
(a) proper operation of the breath analysing instrument is a relevant consideration only to the defence of a charge under section 49(1)(f) of the *Road Safety Act* 1986; and/or
(b) proper operation of the breath analysing instrument is not a relevant consideration to the defence of a charge under section 49(1)(b) of the *Road Safety Act* 1986; and in so doing the learned trial judge applied the wrong test.
12. By holding that the learned magistrate misdirected herself as to the onus of proof regarding the operation of the breath analysing instrument.
13. By failing to hold that in all the circumstances:
(a) the learned magistrate had not misdirected herself as to the onus of proof regarding the operation of the breath analysing instrument; and/or
(b) that it was open to the learned magistrate to make the finding that she did; and/or
(c) that it was open to the learned magistrate to find that the instrument was not properly operated; and/or
(d) that it was open to the learned magistrate not to be satisfied beyond a reasonable doubt that the relevant regulations had been complied with.
14. By holding (if she did so hold) that it was not open to the learned magistrate to entertain a reasonable doubt as to the proper operation of the instrument on both or either charge, and in so doing the learned trial judge applied the wrong test.
15. By holding (if she did so hold) that it was not open to the learned magistrate in the circumstances on all the evidence to find that:
(a) she was not satisfied beyond a reasonable doubt that the charge under section 49(1)(b) had been proved by the prosecution; and/or
(b) she was not satisfied beyond a reasonable doubt that the charge under section 49(1)(f) had been proved by the prosecution; and in so doing the learned trial judge applied the wrong test.
16. By holding (if she did so hold) that it was not open to the learned magistrate as a matter of law in the circumstances on all the evidence to find that:
(a) she was not satisfied beyond a reasonable doubt that the charge under section 49(1)(b) had been proved by the prosecution; and/or
(b) she was not satisfied beyond reasonable doubt that the charge under section 49(1)(f) had been proved by the prosecution; and in so doing the learned trial judge applied the wrong test."

13. No argument was advanced with respect to two grounds (8 and 9) which therefore need not be addressed.

Grounds 1 to 7

14. The contentions advanced in support of these grounds, which can be conveniently considered together, rest upon the provisions of s92 of the *Magistrates' Court Act* 1989. That section reads:

"92. *Appeal to Supreme Court on a question of law*
(1) A party to a criminal proceeding (other than a committal proceeding) in the Court may appeal to the Supreme Court on a question of law, from a final order of the Court in that proceeding.

(2) If an informant who is a member of the police force wishes to appeal under sub-section (1), the appeal must be brought by the Director of Public Prosecutions on behalf of the informant."

15. It was, the argument proceeded, necessary for the Court to have jurisdiction to entertain an appeal pursuant to s92 for there to be credible evidence that the informant personally wished to appeal and there was no such evidence adduced before the judge in the Trial Division in this case.

16. To support the contention that the judge fell into error in proceeding to hear the matter, our attention was directed to authorities dealing with the differently worded s155(1) of the *Justices Act* 1958[8] and s88(1) of the *Magistrates' Courts Act* 1971. The Full Court in *Day v Hunter*[9] stated, with respect to the former provision, that:

> "The terms of this sub-section make it clear that there is no magic in the words `any person who feels aggrieved' and that so far as criminal and quasi criminal matters are concerned, any party to the proceedings in the court below falls within them if he is dissatisfied with the decision given in that court. Consequently, if the informant or defendant in any such proceedings seeks an order to review the decision given therein, he takes his place as a `person who feels aggrieved', because by so doing he shows in the most unequivocal manner his dissatisfaction with the decision sought to be reviewed. What brings him within the class is the fact that he is a party to the proceedings below and, therefore, really interested therein, combined with the fact that he has shown by his application for an order *nisi* to review his dissatisfaction with the order sought to be reviewed."

In the later case of *Jennings v Newlan*[10], an Order to Review was sought by the police prosecutor and *not* the informant in a charge laid against the respondent in the Magistrates' Court. Tadgell J held that the prosecutor had not been "shown to have had any special interest in the proceedings or their outcome"[11] and therefore did not fit the statutory description of "a person who feels aggrieved" by the dismissal of the information. After rejecting, for a number of reasons, an application made by the applicant in the proceeding to substitute as the "aggrieved" party the informant in the court below, he concluded by saying:

> "Quite apart from all that, there is no evidence of any kind which indicates the attitude of the informant to his now being joined. I do not know why he did not apply for an order to review in the first place. The omission might have been accidental but I am not to assume that it was. Indeed, I know nothing of the informant at all."[12]

17. Contrary to the submissions of the appellant's counsel, I consider that little assistance can be derived by the appellant from either of these judgments.

18. Considered against the background of the personal involvement of the informant in the present case in the appeal process, in my view the decision in *Day v Hunter* lends support to the respondent. Just as there was "no magic" in the words "any person who feels aggrieved" that were considered by the Court in *Day v Hunter*, there is none, in my opinion, in the words "If an informant who is a member of the police force wishes to appeal". I agree with the view expressed by the judge in the Court below that "[a] statement on oath that Senior Constable Cole" wishes to appeal "is unnecessary". The most that is required in such cases is that the Court can be satisfied on the balance of probabilities that the informant, in whom the right of appeal vests, has demonstrated a desire to exercise that right. I will return to this aspect.

19. With respect to the judgment of Tadgell J in *Newlan v Jennings*, his Honour found that there was nothing before the Court in that matter which suggested that, in the context of an application to substitute the informant as a party, the informant was aware that the proceeding had commenced, wished to participate in it or even regarded the decision of the magistrate as possibly wrong. I do not understand his Honour to have been expressing any view in his remarks as to the nature of the "evidence" which the Court would require in determining whether, in the event that it was appropriate to do so, such an application should be granted or as to the standard of satisfaction which had to be met.

20. In the present matter, Adrian Castle, a solicitor employed in the Office of Public Prosecutions, on 4 October 2000, swore an affidavit stating:

> "1. I am a solicitor employed in the Office of Public Prosecutions, Victoria and my duties include receiving on behalf of the Director of Public Prosecutions, requests by the Deputy Commissioner (Operations) of Police on behalf of members of the police force, to bring appeals to the Supreme Court on questions of law pursuant to section 92(1) *Magistrates' Court Act* 1989.
> ...
> 3. The Director of Public Prosecutions has been asked by the Deputy Commissioner (Operations) of Police to bring an appeal on behalf of the Informant under section 92(1) *Magistrates' Court Act* 1989 from the final order made on 6 September 2000 by Ms J Crowe, Magistrate whereby she dismissed charges 1 and 2 in this matter.[13]
>
> 4. I have been directed by the Director of Public Prosecutions to bring an appeal on behalf of the informant under section 92(1) *Magistrates' Court Act* 1989 from the final order made on 6 September 2000 by Ms J Crowe, Magistrate whereby she dismissed charges 1 and 2 in this matter."

21. In a further affidavit, sworn 23 November 2000, Mr Castle stated that he had forwarded

that affidavit and certain other relevant documents to Constable Cole with a letter directing that they be served personally upon the then respondent on or before 27 October 2000.

22. Constable Cole swore in an affidavit, on 27 November 2000, that he had perused both of the affidavits of Mr Castle and that, as a consequence of an inability to effect personal service upon the respondent as directed, he had contacted Mr Castle from whom he received further instructions as to the manner in which personal service might be effected.

23. There can be no doubt on the basis of these affidavits that Constable Cole was aware of the assertion made on oath that the proceeding had been instituted on his behalf and, through his conduct, it may reasonably be inferred that he accepted the truth of that assertion.

24. In any event, the Court is entitled to accept as a general proposition that the Director of Public Prosecutions, whose only right to institute an appeal in such circumstances is effectively as the representative of the informant in the Magistrates' Court, will not unlawfully arrogate to himself the rights of that informant. As Lush J remarked in a different context in *Mallock v Tabak*[14]:

> "It is to be expected in the context that the persons on whom the duty is imposed are instructed in and know their duty and the conditions of its exercise.
> ...
> The situation is one in which the mind may be satisfied of the likelihood of correct observance of [s92], and of the unlikelihood of lack of observance of its conditions."

25. There was, in my opinion, a clearly adequate basis for the finding by the judge in the Trial Division that the informant wished to appeal and there was no error in proceeding to hear the matter.

Grounds 10-16

26. These grounds may also be conveniently considered together. They challenge the finding by the judge in the Trial Division that the magistrate fell into error in approaching the matter on the basis that it was necessary before the appellant could be convicted of an offence under s49(1)(b) or s49(1)(f) that the prosecution establish beyond reasonable doubt that the breath analysing instrument, which recorded the concentration of alcohol present, was properly operated.

27. As earlier mentioned, the incident in Osborne Street occurred at about 12.30am and the analysis of the appellant's blood was not conducted until 3.07am, that is, a little less than three hours later. He was charged with two offences subject to present consideration:

First, driving a motor car in circumstances encompassed by s49(1)(b) of the *Road Safety Act* 1986.

That provision reads:

> "(1) A person is guilty of an offence if he or she— ...
> (b) 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;"

It is to be noted that under this provision the prosecution bears the onus of establishing that the concentration of alcohol present in a driver's blood equals or exceeds the prescribed concentration.[15] However, there is, of course, no requirement that a breath analysing instrument be used to ascertain that concentration. Indeed, it may be ascertained by other means.[16] Nor is there any obligation cast upon the prosecution, in a case where a breath analysing instrument is employed, to prove that the machine was properly operated. If, however, a reasonable doubt can be seen to exist concerning the reliability of the analysis, a magistrate may well not be satisfied that the commission of the offence has been established. That is not because there is an onus cast upon the prosecution to establish that the instrument has been properly operated but because they have failed to prove the presence of an essential element of the offence itself.

Second, he was charged with an offence under s49(1)(f) which applies to a driver who:

> "(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath

> for analysis by a breath analysing instrument under section 55 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;
> ...
> (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."

28. The question of the onus of proof with respect to s49(1)(f) was considered by this Court in *Furze v Nixon*[17] where it was held that:

> "... it was no part of the prosecution case to prove that on the relevant occasion the breath analysing instrument was either in proper working order or properly operated. We have set out already s49(1)(f) which constitutes the offence with which the appellant was charged. Section 49(4) reads as follows: '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.' *This seems to be a plain legislative prescription casting upon the person charged the onus of proving that the breath analysing instrument was not, on the relevant occasion, in proper working order or properly operated.*[18] We have said why, in our opinion, the certificate which was tendered in evidence was not (contrary to the judge's opinion) even prima facie evidence that the machine was properly operated; but in the light of s58(4), if the contrary was to be proved, it was a matter for the appellant."

29. Evidence of the concentration of alcohol in the blood of the person can be given in the form of a certificate satisfying the requirements of s58(2) and, subject to certain exceptions with which we are not here concerned, the certificate constitutes conclusive proof, unless the accused person gives notice in writing in accordance with the sub-section. Such notice was given in the present case.

30. In those circumstances, the certificate remained admissible in evidence but ceased to be *conclusive* proof of the facts and matters asserted by it. Accordingly, the operator of the breath analysing instrument gave evidence pursuant to s58(4).[19] In view of the matters set out in her statement of reasons[20][9], the magistrate regarded that evidence as unsatisfactory.[21]

31. Counsel for the appellant conceded that it was not necessary for the prosecution in order to secure a conviction under s49(1)(b) to establish that the breath analysing instrument was properly operated, and contended that the magistrate's remarks, considered in context, should be interpreted as indicating no more than that, on the basis of the evidence taken as a whole, she was not satisfied beyond reasonable doubt of the appellant's guilt on this charge. She was not compelled by s58(4) to act on the basis of evidence that she regarded as hopelessly unsatisfactory, but if some "contrary" evidence was required to challenge the evidence of the operator, it was to be found in his own answers in cross-examination and re-examination, the argument proceeded. It was, counsel submitted, a relatively straightforward case in which the magistrate was singularly unimpressed by the evidence of the operator and, in consequence, was not satisfied beyond reasonable doubt that the elements of either an offence against s49(1)(b) or s49(1)(f) had been established.

32. This argument may well have been sustainable, in my opinion, were it not for the clear identification by the magistrate of the foundation for her decision. It is not necessary, in the circumstances, to determine whether it was open to her to arrive at the conclusions she did or to explore by reference to the authorities the manner or extent to which averments of the kind encompassed by s58(4) must be depreciated before they cease to have effect as proof of the facts averred. Whilst, as Ormiston J held in *Binting v Wilson*[22], an averment made under this provision retains validity unless and until evidence to the contrary is presented to the court, the making of empty or clearly unreliable assertions of the matters set out in s58(4) would be likely to require little rebuttal in my view. However it is, I consider, evident that the magistrate simply did not reason about the matter in this fashion, which was ingeniously ascribed to her by counsel. There is little room for doubt that she regarded proof that the breath analysing instrument was properly operated as being essential before a finding of guilt could be made on either charge. In this context, I observe that when delivering reasons for dismissing the charges, and after remarking upon the

various deficiencies in the evidence of the operator, she said:

> "It leaves me in the position where I cannot be satisfied that the test result was obtained as a result of a properly operated machine by an authorized officer."[23][9]

The judge in the Trial Division correctly found that in determining the matter on this basis, her Worship fell into error.

33. With respect to the charge under s49(1)(f) and confronted with the obvious departure by the magistrate from what was held to be the proper approach in *Furze v Nixon*, counsel for the appellant submitted that that decision should not be followed. Setting to one side the possible inappropriateness of the adoption of that course without the matter being considered by a specially constituted bench of five members of the Court, I can see no good reason for so doing.

34. As I understand the contentions advanced by him, they rest upon the proposition that s49(1)(f) is draconian in character and the legislature cannot be presumed to have intended that it would operate in an arbitrary and potentially unjust fashion. Accordingly, it is said that, because the question whether an offence under this provision has been committed is determined by (*inter alia*) the result of the analysis recorded or shown by a breath analysing instrument, it is implicit before an individual could be found guilty of committing the offence that the result can be accepted as reliable. Whilst the certificate in the present matter was acknowledged to be admissible in evidence, at most it constituted an averment the value of which, viewed in the light of the cross-examination of the operator, had to be regarded as negligible and clearly incapable of supporting a finding of guilt beyond reasonable doubt, the argument proceeded.

35. There are, I consider, major obstacles lying in the path of the adoption of this line of reasoning. First, if the legislature intended that proof of the proper operation of the breath analysing instrument was an element of the offence created by s49(1)(f), then it is remarkable that this was not explicitly stated. Second, the legislature has made specific provision by s49(4) for the possibility that the instrument may not have been in proper working order or properly operated on the occasion in question. If it had been contemplated that proof beyond reasonable doubt of these matters was required in any event, any such provision would be otiose. However, s49(4) reverses the onus of proof with respect to these matters and evidences a clear legislative intention that the results of the analysis are to be accepted for the purposes of s49(1)(f), unless on the balance of probabilities the person charged establishes either that the instrument was not in proper working order or that it was not properly operated.

36. Finally, in this context, it must be borne in mind that the purposes for the introduction of Part 5 of the *Road Safety Act* 1986 set out in s47 are:

> "The purposes of this Part are to –
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
>
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
>
> (c) provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol."

37. There is no need to dwell upon the concern which has been experienced in this community over the death, injury and damage occasioned by persons whose driving has been affected by the ingestion of alcohol or drugs. A variety of different approaches have been taken to address this situation, including the adoption of the legislative scheme set out in Part 5. It is evident that Parliament directed a great deal of attention to the question of the manner in which the concentration of alcohol in a driver's blood was to be established. The interpretation of s49(1)(f) adopted by the Court in *Furze v Nixon* not only stands as the view of this Court to be followed until overturned in accordance with proper practice, but, in my respectful opinion, it was clearly correct.

38. It follows from what I have said that I would dismiss this appeal. This would have the effect of affirming the order made in the Trial Division that the matter be remitted to the Magistrates' Court.

EAMES JA:

39. I have had the advantage of reading in draft the reasons of Vincent JA and, for the reasons given by his Honour, I agree that the appeal should be dismissed. I agree, too, with the observations made, additionally, in the reasons of Callaway JA, which I have also had the benefit of reading in draft.

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[1] [2000] VSCA 149; (2000) 2 VR 503 at [22]; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[2] I do not overlook the more explicit language of s48(1AC) and (1A), inserted some years after s49(4) was enacted. In England such questions are complicated by the European Convention for the Protection of Human Rights and Fundamental Freedoms. See, for example, *Sheldrake v DPP* [2003] 2 All ER 497 and *Attorney-General's Reference No. 4 of 2002* [2003] EWCA Crim. 762; [2004] 1 All ER 1. Counsel informed us that leave to appeal to the House of Lords has been granted in both those cases. Paragraphs [9]-[10] of the former and para. [23] of the latter strongly support the construction of s49(4) adopted in *Furze v Nixon.*
[3] (1992) 16 MVR 461 especially at 467-468.
[4] Compare the reasons in the Trial Division at [27].
[5] The proceeding which was conducted over 24, 25 and 26 May 2000 was tape-recorded but the recordings were preserved for only three months in accordance with the policy of the Court. There is some conflict in the affidavits before this Court concerning the precise state of the evidence that accordingly cannot be resolved. The situation is rendered more uncertain as, for some unexplained reason, the magistrate did not deliver judgment until 6 September 2000 and, it appears, did not have complete notes.
[6] The appellant asserted that he could not recall whether he had driven the car on the night in question although there was evidence that he had admitted that this was the case when initially spoken to by Constable Cole at his home.
[7] It had been conceded in the course of the hearing that the operator was duly authorized and I do not understand that it has ever been suggested that the instrument itself was not in proper working order.
[8] These sections respectively conferred upon "a person who feels aggrieved" a limited right to apply to a judge of the Supreme Court for an Order to Review convictions entered or orders made in the Court of Petty Sessions (*Justices Act*, s155(1)) or the Magistrates' Court *(Magistrates' Court Act* 1971).
[9] [1964] VicRp 109; [1964] VR 845 at 847-48.
[10] [1982] VicRp 49; (1982) VR 489.
[11] At 491.
[12] At 492.
[13] The judge in the Court below reasonably found in relation to this passage that
"it can be assumed that the Deputy Commissioner (Operations) of Police did not of his own accord initiate the request to the Director of Public Prosecutions to bring this appeal on behalf of the informant .... The informant was the person within the Victoria Police responsible for the matter. It can be inferred that it was he who was initially responsible for the matter being brought to the attention of the Deputy Commissioner in order that the procedure laid down by sub-s92(2) of the *Magistrates' Court Act* for an appeal might be set in motion."
[14] [1977] VicRp 7; [1977] VR 78 at 85.
[15] Under s48(1)(a) however:
"(1) For the purposes of this Part—
(a) if it is established that at any time within 3 hours after an alleged offence against paragraph (a) or (b) of section 49(1), a certain concentration of alcohol was present in the blood of the person charged with the offence it must be presumed, until the contrary is proved, that not less than that concentration of alcohol was present in the person's blood at the time at which the offence is alleged to have been committed;"
The presumption with respect to the concentration of alcohol present in the blood of the charged person does not arise unless identified concentration is established as present within the prescribed period. It may well be in the present matter that, dependent upon the conclusions ultimately reached concerning the reliability of the analysis, that no such presumption would arise.
[16] In practice however, and by way of the combined operation of s50 and Schedule 1 of the Act which relate to the penalties to be imposed according to the concentration of alcohol present, a breath analysing instrument is likely to be used.
[17] [2000] VSCA 149; (2000) 2 VR 503 at 513; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[18] My emphasis.
[19] "s58(4) Evidence by a person authorised to operate a breath analysing instrument under section 55— (a) that an apparatus used by him or her on any occasion under that section was a breath analysing instrument within the meaning of this Part; (b) that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her; (c) that, in relation to the breath analysing instrument, all regulations made under this Part with respect to breath analysing instruments were complied with—
is, in the absence of evidence to the contrary, proof of those facts."
[20] See [9].
[21] I suspect that the operator who, it appears, gave evidence on such matters for the first time, may have been quite overawed by the experience. That possibility, whilst understandable, does not alter the effect or reliability of the evidence given by him.
[22] Unreported, 19 December 1989.
[23] At [9] above.

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