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SUPREME COURT OF VICTORIA

BETHERAS v NEW

Southwell J

18 June 1982

MOTOR TRAFFIC – BREATH TEST – EXHALATION OF BREATH INSUFFICIENT FOR PURPOSES OF ANALYSIS – WHETHER FAILURE TO FURNISH SAMPLE OF BREATH: MOTOR CAR ACT 1958 S80F.

Section 80F(6)(b) of the *Motor Car Act* 1958 provides (so far as relevant):

"Where a member of the police force—

(i) finds a person driving a motor car ... ; or

(ii) ... and such person behaves in a manner which, in the reasonable belief of such member, indicates that such person's ability to drive a motor car is or was impaired (as the case requires) by the consumption of intoxicating liquor the member of the police force may, instead of requiring such person to undergo a preliminary breath test require such person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force to a police station or the grounds or precincts thereof."

Section 80F(11)(a) of the *Motor Car Act* 1958 provides:

"Any person who, when required by a member of the police force pursuant to the provisions of sub-section (6) to furnish a sample of his breath for analysis or when further required to accompany a member of the police force to a police station or the grounds or precincts thereof refuses or fails to do so shall be guilty of an offence against this sub-section."

B. was intercepted driving his motor car and taken to the police station for the purpose of a breath test. When requested to undergo the test, B. put his lips to the tube of the instrument, but did not appear to blow into the tube. He was later charged with failing to furnish a sample of his breath for analysis, and was subsequently found guilty and was convicted. Upon refusal by a Master for an order nisi to review—

HELD: Appeal dismissed.

If a person, when required to furnish a sample of breath for analysis by a breath analysing instrument, fails to provide a sufficient amount of air to allow the instrument to analyse the air to determine blood/alcohol concentration, that person has not furnished "a sample of his breath for analysis" as required by s80F(11)(a) of the *Motor Car Act* 1958.

SOUTHWELL J: *[After setting out the facts, and relevant provisions of the Motor Car Act 1958, His Honour continued]:* ... [7] The matter was argued before me on the basis that the charge faced by the defendant was that he failed to furnish a sample of his breath for analysis. Mr Howard, who appeared for the defendant before me but not in the court below, submitted that where the evidence shows that some breath was supplied into the mouth-piece, it is not open for the court to be satisfied beyond reasonable doubt that the defendant "failed to furnish a sample of his breath for analysis." He submitted, so far as the facts were concerned, that it was not open to the Magistrate to hold that no air went into the chamber of the machine. For the purposes of this application I am prepared to assume, without deciding, that the latter submission is sound.

[8] If one accepts, as I do, that the relevant machine was an approved machine for the purpose of taking breathalyser tests, it seems to me to follow that a person required to furnish a sample of breath for analysis must provide enough breath to enable that machine to do the task for which it was designed, namely, to analyse the air in it in order to determine the extent or at least the approximate extent of the intake of alcohol by the person blowing into the machine. If for one reason or another the person so required does not provide sufficient air for that machine to perform the task of analysis, then, in my view, the person involved has not furnished a "sample for analysis". A quantity of air which that machine cannot analyse is not, in my view, a "sample for analysis" within the meaning of s80F(11) of the *Motor Car Act*.

It follows, in my view, that it was open to the Magistrate to convict as he did, and, indeed, it may well be – although it is not necessary to decide – that the Magistrate may have fallen into error, if upon the findings of fact which he made to the extent that he was entitled to make then, had failed to convict. [9] In the circumstances, it follows that no *prima facie* error on the part of the Magistrate has been shown, and the appeal will be dismissed. I certify for counsel.
