33/05; [2005] VSC 418

SUPREME COURT OF VICTORIA

SIRAJUDDIN v ZIINO

Hargrave J

6, 21 October 2005 — (2005) 14 VR 689; (2005) 45 MVR 21

MOTOR TRAFFIC – DRINK/DRIVING – PBT CONDUCTED – POSITIVE RESULT – BREATH TEST LATER CONDUCTED – BAC READING OF 0.082% – CHARGE LAID – CERTIFICATE TENDERED IN EVIDENCE – REFERENCE IN CERTIFICATE TO "GRAMS IN 210 LITRES OF BREATH" – REFERENCE IN *ROAD SAFETY ACT* 1986 TO "GRAMS PER 210 LITRES OF EXHALED AIR" – WHETHER MATERIAL DIFFERENCE – WHETHER CERTIFICATE PROVED THIS ESSENTIAL ELEMENT OF THE OFFENCE – NO MENTION BY POLICE OFFICER AT HEARING THAT PBT WAS CONDUCTED USING A PRESCRIBED DEVICE – WHETHER OPEN TO MAGISTRATE TO INFER THAT THE PBT HAD BEEN CONDUCTED USING A PRESCRIBED DEVICE – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED: *ROAD SAFETY ACT* 1986 SS3, 47, 49(1)(f), 53, 55.

S. was intercepted whilst driving his motor vehicle. Following tests, S. was charged with an offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act'). At the hearing the police informant gave evidence that S. underwent a PBT. No mention was made that the PBT had been conducted on a prescribed device. Under s58(2) of the Act a certificate was tendered in evidence which stated that the result of the test was "0.082 grams of alcohol in 210 litres of breath". The relevant provision in the Act referred to "grams per 210 litres of exhaled air". S. was convicted. Upon appeal—

HELD: Appeal upheld. Conviction set aside.

1. It was contended that because of the material difference in the wording of the Act and the certificate, the certificate did not prove an essential element of the offence. It is clear that Parliament intended that the breath of a person is to be sampled by the person exhaling sufficient air to enable a breath analysing instrument to measure the concentration of alcohol in the breath of that person. Accordingly, Parliament did not, by referring to "exhaled air" in the definition of prescribed concentration of alcohol, intend to draw any distinction between breath and exhaled air. The whole purpose of the provisions under consideration is to provide, in the words of s47(c) of the Act, "a simple and effective means of establishing that there is present in the ... breath of a driver more than the legal limit of alcohol". The reference to "exhaled air" means nothing more, less or different than a person's breath which is exhaled into a breath analysing instrument within the meaning of the Act. Accordingly, the certificate was conclusive proof under s58(2) of the Act that the result of the analysis of a sample of S.'s breath indicated that more than the prescribed concentration of alcohol was present in the breath of S.

2. It was submitted that there is a material difference between a reading of 0.082 grams of alcohol *in* 210 litres of breath and 0.082 grams of alcohol *per* 210 litres of breath. Accordingly, it was submitted that the certificate did not prove that there was more than the prescribed concentration of alcohol in the breath of the appellant. This argument was based upon a submission that, in order to measure the concentration of alcohol *in* 210 litres of breath, it would be necessary to require a driver to physically furnish 210 litres of breath for analysis and that this is a physical impossibility because no person can actually furnish a sample of breath of that size. The reference in the certificate to there being 0.082 grams of alcohol *in* 210 litres of the appellant's breath is a reference to the proportion of alcohol in the sample of breath supplied by the appellant, as required under s55 of the Act. The word "in" has many meanings. According to the *Concise Oxford English Dictionary*, one of them is "as a proportionate part of". That is how the word "in" should be read in the certificate. It is absurd to give it any other meaning because, as was submitted on behalf of the appellant, it is not possible for a person to continuously exhale 210 litres of breath into a breath analysing instrument. As the provisions of sub-ss55(2A) and 55(5) of the Act indicate, the Act requires a driver who is required to provide a sample of breath to provide, by "exhaling continuously", a sufficient sample to enable the breath analysing instrument to measure the concentration of alcohol present in the sample.

3. It was not open to the magistrate to infer that the PBT had been conducted by a prescribed device. The magistrate's conclusion amounted to mere speculation and left room for conflicting conjectures or hypotheses and could not establish beyond reasonable doubt that the PBT was conducted with a prescribed device. Accordingly, the PBT was not conducted under s53 as required by s55 of the Act and the magistrate was in error in finding the charge proved.

Chisholm v Mathews **MC42/1992; (1992) 16 MVR 447, not followed.**
Impagnatiello v Campbell **MC27/03; [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486, followed.**

HARGRAVE J:

1. The appellant was intercepted by the respondent, a member of the Victoria Police force, on 2 September 2004 whilst driving a motor vehicle in Narre Warren North. There is no dispute that the appellant had been drinking alcohol. Following tests of the breath of the appellant, he was charged by the respondent with an offence against s49(1)(f) of the *Road Safety Act* 1986 ("the Act"). The charge was heard and determined at the Magistrates' Court at Dandenong on 5 August 2005. The appellant was convicted and fined $360 and his licence was cancelled for a period of six months.

2. Pursuant to s92 of the *Magistrates' Court Act* 1989 (Vic), the appellant has appealed to this Court raising two questions of law. In order to understand the two questions of law raised by the appeal, it is necessary to set out the relevant provisions of the Act and to refer to some of the evidence given at the hearing before the Magistrates' Court.

3. The charge against the appellant was laid pursuant to s49(1)(f) of the Act. Section 49(1)(f) provided at the time of the offence:

> "**49. Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she—
> (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 or breath; and
>
> (ii) the concentration of alcohol indicated by the analysis to be present in his or her blood or breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle;...."

4. The term "breath analysing instrument" is defined in s3 of the Act. Insofar as relevant, that definition provided at the relevant time:

> "'**breath analysing instrument**'
> (a) ...
>
> (b) apparatus of a type approved for the purposes of section 55 ... for ascertainment by analysis of a person's breath what concentration of alcohol is present in his or her blood or breath."

5. The term "prescribed concentration of alcohol" is defined in s3 of the Act. Insofar as relevant, the definition provides:

> "'**prescribed concentration of alcohol'** means— ... (a) ...
> (b) In the case of any other person—
> (i) ...; or
>
> (ii) a concentration of alcohol present in the breath of that person of 0.05 grams per 210 litres of exhaled air."

6. As can be seen, conviction of an offence against s49(1)(f) does not depend upon the actual concentration of alcohol in a person's blood or breath. A conviction depends upon the result of the analysis of the breath of the driver of a motor vehicle, as recorded by a test of the driver's breath "by a breath analysing instrument under s5"[1].

7. At the time of the offence alleged against the appellant, s55(1) of the Act relevantly provided:

> "**55. Breath analysis**
> (1) If a person undergoes a preliminary breath test when required by a member of the police force or an officer of the Corporation or of the Department of Infrastructure under section 53 to do so and—
> (a) the test in the opinion of the member or officer in whose presence it is made indicates that the

person's blood or breath contains alcohol; or

(b) ...
—any member of the police force or, if the requirement for the preliminary breath test was made by an officer of the Corporation or of the Department of Infrastructure, any member of the police force or any officer of the Corporation or of the Department of Infrastructure may require the person to furnish a sample of breath for analysis by a breath analysing instrument..."

8. I note that since 1 January 2005 there have been amendments to the Act to remove the references to "blood" from ss49(1)(f), 55(1)(a) and the definition of "breath analysing instrument" in s3. These amendments are of no relevance to this appeal.

9. As can be seen from the opening words of s55(1), a driver can only be required to furnish a sample of breath for analysis by a breath analysing instrument under that sub-section if the driver has first undergone a preliminary breath test under s53 of the Act.

10. Section 53(1)(a) of the Act provides:

"**53. Preliminary breath tests**
(1) A member of the police force may at any time require—
(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; ...
to undergo a preliminary breath test by a prescribed device."

11. As can be seen, a preliminary breath test under s53 is described by reference to such a test conducted "by a prescribed device". Regulation 201 of the *Road Safety (General) Regulations* 1999 (Vic) provides a list of the devices which are prescribed for the purposes of s53.

12. The Act contains evidentiary provisions relating to the proof of the results of breath tests. Section 58(2) provides:

"(2) A document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the breath of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceedings referred to in sub-section (1) and, subject to sub-section (2E), is conclusive proof of—
(a) the facts and matters contained in it; and

(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and
(c) the fact that the person who operated the instrument was authorised to do so by the Chief Commissioner of Police under section 55; and

(d) the fact that all relevant regulations relating to the operation of the instrument were complied with; and

(e) the fact that the instrument was in proper working order and properly operated; and

(f) the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath and that it was signed by the person who operated the instrument and given to the accused person as soon as practicable after the sample of breath was analysed--unless the accused person gives notice in writing to the informant not less than 28 days before the hearing, or any shorter period ordered by the court or agreed to by the informant, that he or she requires the person giving the certificate to be called as a witness or that he or she intends to adduce evidence in rebuttal of any such fact or matter."

13. The appellant did not serve a notice under s58(2) before the hearing of the charge against him by the Magistrates' Court.

14. The evidence before the Magistrates' Court which is relevant to the questions of law raised on the appeal before me was oral and documentary. The respondent gave oral evidence as follows:

"... I intercepted that vehicle... I spoke to the driver. He produced a full Victorian driver's licence. He underwent a PBT the result indicating in my opinion that his breath contained alcohol. I put a demand on him to come back to the booze bus which he said he was happy to do. He came back and

> I went through a series of questions. He admitted drinking three scotch and cokes at the Fountain Gate Hotel with his partner Andrea. Consequently I introduced him to Senior Constable Bova and put the demand on him for a breath test pursuant to s55 of the *Road Safety Act*."

15. The respondent then produced a certificate under s58(2) of the Act which was tendered in evidence ("the certificate"). The certificate states the results of the breath test performed on the appellant in the following terms:

> "Result: 0.082 grams of alcohol *in* 210 litres of *breath*." (Emphasis added.)

16. At the conclusion of the evidence, counsel for the appellant submitted to the Magistrate that the charge should be dismissed because there was no evidence that a prescribed device had been used for the preliminary breath test. The Magistrate rejected this submission on the basis that the evidence of the respondent was sufficient to entitle him to require the appellant to attend and furnish a sample of breath for analysis by a breath analysing instrument under s55. Other submissions on behalf of the appellant were also rejected by the Magistrate. Accordingly, the appellant was convicted of the charge, was fined and had his licence cancelled for a period of six months.

17. No point was taken before the Magistrate about the form of the certificate.

18. In the notice of appeal to this Court, two questions of law are identified. First, it is contended that it was not open to the Magistrate to find, on the evidence before him, that the preliminary breath test conducted on the appellant was performed using a "prescribed device". Accordingly, it is contended that the preliminary breath test was not conducted under s53, as required by s55.

19. Second, it is contended that the certificate does not establish that the appellant had more than the "prescribed concentration of alcohol" present in his breath. As I have said, no argument was addressed to the Magistrate about the form of the certificate. However, as will appear, the respondent did not object to the second ground of appeal being raised in this Court. To the contrary, the respondent encouraged me to hear and determine the second ground of appeal because it has the capacity to be of general application.

APPLICATION FOR LEAVE TO ABANDON THE SECOND GROUND OF APPEAL

20. Before I deal with the two grounds of appeal, I note that Mr S Hardy, who appeared on behalf of the appellant, sought leave to abandon the second ground of appeal. This application was opposed by counsel for the respondent.

21. The application for leave to abandon the second ground of appeal was made after Mr Hardy had been addressing me for some time on the second ground of appeal. Mr Hardy frankly conceded that the application for leave to abandon was made by him because of an apprehension that, by reason of matters which I had canvassed with him in argument, he was not confident of success on the second ground of appeal. In these circumstances, Mr Hardy submitted that he should be given leave to abandon the second ground of appeal so that the issue raised thereby could be determined in an unrelated appeal to this Court raising the same issue, which is listed for hearing in February 2006 ("the *Bleakley* appeal").

22. A previous application to have the hearing of the appeal in this matter adjourned for hearing with the *Bleakley* appeal was refused by the Listing Master. At the time of the application for that adjournment, the respondent consented to it. However, having regard to the fact that the appellant's conviction had been stayed pending the hearing of this appeal, which stay had been granted by another judge on the basis of the hearing date fixed for this appeal, the Listing Master refused the consent adjournment which was sought. There was no appeal from the Listing Master's refusal of the application for an adjournment by consent. This was because the respondent withdrew his consent. Accordingly, a re-hearing of an application for an adjournment would no longer be by consent and was not pursued.

23. Mr Hardy explained that he wished to have the benefit of the preparation of the *Bleakley* appeal by counsel engaged in that appeal. He put this forward as another reason as to why he should be granted leave to abandon the second ground of appeal in this case.

24. I asked counsel for both parties whether the existence of the argument on which the second ground of appeal is based, and which is the subject of the *Bleakley* appeal, has been the cause of any prosecutions under s49(1)(f) of the Act being adjourned in the Magistrates' Court pending the resolution of the issue in this Court. I was informed by both counsel that this was the case.

25. In my view, the public interest required that I refuse to grant the appellant's application for leave to abandon the second ground of appeal. In my opinion, when an issue such as the one raised by the second ground of appeal is placed before the Court, and the Court is aware that there are other prosecutions which have been adjourned pending the resolution of that issue, the issue should be heard and determined as soon as possible. If the ground of appeal is a good one, then the sooner that Parliament knows about its existence the better. It will then be a matter for Parliament to consider whether it intended that such a point could be taken. Accordingly, I refused the application for leave to abandon the second ground of appeal. However, having regard to the history of this matter, I granted Mr Hardy leave to file further submissions in writing in support of the second ground of appeal. In the result, Mr Hardy did not avail himself of the leave which I gave him to make further submissions in support of the second ground of appeal.

26. I intend to deal with the second ground of appeal first. As I have said, it raises an issue of general importance to a number of outstanding prosecutions which have been adjourned pending direction as to the issue from this Court.

SECOND GROUND OF APPEAL: DID THE CERTIFICATE PROVE THAT THERE WAS MORE THAN THE PRESCRIBED CONCENTRATION OF ALCOHOL PRESENT IN THE BREATH OF THE APPELLANT?

27. As I have set out, the prescribed concentration of alcohol in the breath of a person is defined in the Act in terms of "grams *per* 210 litres of *exhaled air*" (emphasis added). However, the certificate refers to the result of the breath test of the appellant by reference to "grams *in* 210 litres of *breath*" (emphasis added). On behalf of the appellant, it is contended that there is a material difference between these two things and that, accordingly, the certificate does not prove this essential element of an offence under s49(1)(f) of the Act.

28. It was submitted on behalf of the appellant that s49(1)(f)(i) of the Act should be read as if there were substituted for the words "the prescribed concentration of alcohol" the words "0.05 grams per 210 litres of exhaled air". It was submitted that this necessarily follows from the definition of "prescribed concentration of alcohol" in s3 of the Act. Mr Hardy submitted that s49(1)(f)(i) should be read in the following way:

> "(i) The result of the analysis as recorded or shown by the breath analysing instrument indicates that ***0.05 grams per 210 litres of exhaled air*** or more than ***0.05 grams per 210 litres of exhaled air*** is present in his or her breath." (Emphasis added.)

29. This submission does no more than draw attention to the question which arises for determination on the second ground of appeal. Did Parliament intend there to be any difference between the concentration of alcohol in a person's breath and the concentration of alcohol in a person's exhaled air? In my opinion, when resort is had to Part 5 of the Act as a whole, it is absurd to attribute to Parliament an intention to distinguish between the concentration of alcohol in a person's breath and the concentration of alcohol in a person's exhaled air.

30. I start with the purpose of Part 5 of the Act, in which the provisions under consideration are to be found. Section 47 expresses those purposes in the following terms:

> "**47. Purposes of this Part**
> 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 or breath of a driver more than the legal limit of alcohol..."

31. I turn next to the provisions of s49(1)(f)(i) of the Act. These have already been quoted in full by me. The first thing to note is that, as I have said, the offence is committed if the result of the analysis of the breath of a driver of a motor vehicle, as recorded by a test of the driver's

breath "by a breath analysing instrument under s55", is more than the prescribed concentration of alcohol. The offence is stated in terms which speak only of the concentration of alcohol which is present in the breath of a driver. There is no mention of exhaled air. The only permitted method of measuring the concentration of alcohol in a person's breath is by a breath analysing instrument under s55.

32. The definition of "breath analysing instrument" has been set out above. It says nothing about measuring the concentration of alcohol in a person's exhaled air. In order to qualify as a breath analysing instrument within the meaning of s3, the apparatus must be of a specified type or of a type approved by the Minister:

> "... for ascertainment by analysis of a person's breath what concentration of alcohol is present in his or her breath."

Again, there is no reference to exhaled air.

33. Against this background, the use of the term "exhaled air" in the definition of "prescribed concentration of alcohol" requires explanation. In my opinion, that explanation appears in s55 of the Act. It is s55 which provides that a person may be required to furnish a "sample of breath" for analysis by a breath analysing instrument.

34. In this context, sub-ss55(2A) and 55(5) explain the purpose of Parliament referring to the concentration of alcohol in "exhaled air" in the definition of "prescribed concentration of alcohol". Those sub-sections provide:

> "(2A) The person who required a sample of breath under sub-s(1), (2) or (2AA) may require the person who furnished it to furnish one or more further samples if it appears to him or her that the breath analysing instrument is incapable of measuring the concentration of alcohol *present in the sample, or each of the samples, previously furnished in grams per 210 litres of exhaled air because the amount of sample furnished was insufficient*...." (Emphasis added.)

> "(5) A person who furnishes a *sample of breath* under this section must do so *by exhaling continuously* into the instrument to the satisfaction of the person operating it." (Emphasis added.)

35. In my view, it is clear that Parliament intended that the breath of a person is to be sampled by the person exhaling sufficient air to enable a breath analysing instrument to measure the concentration of alcohol in the breath of that person. Accordingly, I conclude that Parliament did not, by referring to "exhaled air" in the definition of prescribed concentration of alcohol, intend to draw any distinction between breath and exhaled air. The whole purpose of the provisions under consideration is to provide, in the words of s47(c) of the Act, "a simple and effective means of establishing that there is present in the... breath of a driver more than the legal limit of alcohol".

36. In my view, the reference to "exhaled air" means nothing more, less or different than a person's breath which is exhaled into a breath analysing instrument within the meaning of the Act.

37. The second ground of appeal raises a further ground of criticism of the certificate. It was submitted on behalf of the appellant that there is a material difference between a reading of 0.082 grams of alcohol *in* 210 litres of breath and 0.082 grams of alcohol *per* 210 litres of breath. Accordingly, it was submitted that the certificate did not prove that there was more than the prescribed concentration of alcohol in the breath of the appellant. This argument was based upon a submission that, in order to measure the concentration of alcohol *in* 210 litres of breath, it would be necessary to require a driver to physically furnish 210 litres of breath for analysis and that this is a physical impossibility because no person can actually furnish a sample of breath of that size.

38. I reject this submission on behalf of the appellant. In my opinion the reference in the certificate to there being 0.082 grams of alcohol *in* 210 litres of the appellant's breath is a reference to the proportion of alcohol in the sample of breath supplied by the appellant, as required under s55 of the Act. The word "in" has many meanings. According to the *Concise Oxford English Dictionary*, one of them is "as a proportionate part of". That is how the word "in" should be read

in the certificate. It is absurd to give it any other meaning because, as was submitted on behalf of the appellant, it is not possible for a person to continuously exhale 210 litres of breath into a breath analysing instrument. As the provisions of sub-ss55(2A) and 55(5) of the Act indicate, the Act requires a driver who is required to provide a sample of breath to provide, by "exhaling continuously", a sufficient sample to enable the breath analysing instrument to measure the concentration of alcohol present in the sample.

39. Accordingly, the certificate was conclusive proof under s58(2) of the Act that the result of the analysis of a sample of the breath of the appellant, as recorded or shown by the breath analysing instrument used, indicated that more than the prescribed concentration of alcohol was present in the breath of the appellant. It follows that the second ground of appeal fails.

40. I note that counsel for the respondent directed my attention to the explanatory memorandum and the second reading speech in respect of the *Road Safety (Amendment) Bill* 2003 which was enacted as the *Road Safety (Amendment) Act* 2003. That amending Act introduced amendments to the Act, including to the definition of "prescribed concentration of alcohol", to enable the results of analysis of a person's breath to be expressed in terms of the concentration of alcohol in breath, as opposed to measuring an equivalent concentration of alcohol in blood. Although it has been unnecessary for me to consider this extrinsic material in order to reach a conclusion as to the issues raised by the second ground of appeal, I note that a review of that extrinsic material reinforces the view which I have reached.

FIRST GROUND OF APPEAL: NECESSARY PROOF OF COMPLIANCE WITH S53

41. As appears above, the only evidence given by the respondent before the Magistrate concerning the preliminary breath test performed on the appellant was that the appellant "underwent a PBT the result indicating in my opinion that his breath contained alcohol". There was no express evidence that the "PBT" was conducted using a "prescribed device" as required by s53 of the Act.

42. A review of the authorities establishes that the prosecution must prove that a PBT was conducted pursuant to s53(1) in order to establish an offence under s49(1)(f). In *Smith v Van Maanen*[2] Tadgell J (as he then was) said:

> "It seems to me that the necessary ingredients of s49(1)(f) to be proved by the prosecution are these: that the defendant has been driving a motor car within the last three hours relevant to the time of the alleged offence; that a preliminary breath test has been undergone pursuant to sub-s. (1) of s53; that the defendant has been duly required and has furnished a sample of breath for analysis; and that the result of analysis of the same as recorded by the breath-analysing instrument indicates that more than the prescribed concentration of alcohol was present in his or her blood."

43. *Smith v Van Maanen* was followed by Ormiston J (as he then was) in *DPP v Webb*[3], where his Honour said:

> "It is apparent from the juxtaposition of these provisions that compliance with both s53 and s55(1) is a necessary pre-condition for a conviction under s49(1)(f) in that the prosecution must have validly required each of the breath tests permitted under s53(1) or (2) and under s55(1)...
>
> Consequently compliance with these sub-sections is not merely a question as to the admissibility of the evidence of the tests which may be rejected on a discretionary basis if they have been illegally required: it is an essential part of the case which the prosecution must make out."

44. In *DPP v Foster*[4] the Court of Appeal of this Court cited with approval these passages from the judgments of Tadgell J in *Van Maanen* and Ormiston J in *DPP v Webb*.

45. In *DPP Reference No 2 of 2001*[5], the Court of Appeal of this Court applied *DPP v Foster* as authority supporting a conclusion that, in a prosecution under s49(1)(f), the prosecution must prove that a motorist has been required to furnish a sample of breath for analysis under s53.

46. However, none of the above authorities considered the specific question which I must decide in this case as to whether, in establishing that a motorist has validly undergone a preliminary breath test under s53, the prosecution is required to lead evidence that the test was conducted on a prescribed device. This specific question was considered by Hayne J in *Chisholm v Mathews*[6].

47. The evidence before the Magistrate in *Chisholm v Mathews* as to the conduct of the preliminary breath test was given in similar terms to the evidence before the Magistrate in this case. In summary, the informant gave evidence that he intercepted the appellant and said to the appellant "I will require you to undergo a PBT" and that "the defendant subsequently underwent a PBT". As in this case, the informant did not give express evidence that the preliminary breath test was conducted on a prescribed device.

48. Hayne J accepted, on the basis of the decision of Tadgell J in *Van Maanen*, that the fact that a preliminary breath test had been conducted pursuant to s53 was a necessary element that needed to be proved for a conviction under s49(1)(f). However, Hayne J expressed some doubt as to whether the prosecution was required to go so far as to prove that the preliminary breath test was conducted using a "prescribed device". His Honour said:[7]

> "The reference made in s55 to s53 might be said to be a reference intended only to require identification of the circumstances said to authorise the making of the requirement under one or other of para (a), (b) and (c) of s53(1) for at least at first sight the words 'under section 53' when used in s55 appear to relate to the expression 'required by a member of the police force' rather than to the expression 'undergoes a preliminary breath test.' Indeed ss53 and 55 appear to treat 'a preliminary breath test' and the manner of its administration ('by a prescribed device') as separate matters and thus it might be said that the 'test' is distinct from the manner of its taking."

49. In the circumstances of the case, Hayne J did not decide whether, in order to secure a conviction under s49(1)(f) of the Act, the prosecution was required to prove that a preliminary breath test was conducted using a prescribed device. This was because Hayne J was of the view that it was open to the Magistrate to conclude from the evidence of the informant that the "PBT" to which the informant referred had been conducted using a prescribed device. This was notwithstanding that there was no express evidence to this effect. In this regard, his Honour said:[8]

> "Thus, when the informant spoke of requiring a preliminary breath test I consider that it was open to the magistrate to conclude that by that evidence he meant that he had conducted a preliminary breath test in accordance with s53. That it was open to the magistrate to conclude that the informant was giving evidence using the expression preliminary breath test as a term of art: see *Reeves v Beaman* [1992] ACL Rep 425 Vic 13... Of course the burden of proving the essential elements of the charge rests upon the prosecution and it may well be thought desirable that a point of this kind be dealt with expressly and directly in evidence but equally I do not think that some unduly narrow construction should be put upon the evidence given by the informant."

50. In my view, the doubts expressed by Hayne J in *Chisholm v Mathews* as to whether the prosecution is required to prove, in order to secure a conviction under s49(1)(f), that a preliminary breath test was conducted on the driver using a "prescribed device" were resolved by the decision of Ormiston J in *DPP v Webb*. As I have said, that decision has been endorsed by the Court of Appeal in *DPP v Foster* and *DPP Reference No2 of 2001*. If it is necessary to prove that a "validly required" preliminary breath test occurred under s53, as stated by Ormiston J in *DPP v Webb*[9], then the words of s53 require that a test by a prescribed device is the only test which will meet that description.

51. That leaves for consideration the issue of whether it was open to the Magistrate, on the evidence before him, to conclude that the preliminary breath test conducted on the appellant was conducted by a prescribed device, as required by s53 of the Act. In this regard, it was conceded on behalf of the appellant that the facts of this case were not distinguishable from the facts in *Chisholm v Mathews*. However, it was submitted that the reasoning of Hayne J in *Chisholm v Mathews* is inconsistent with the reasoning of the Court of Appeal in *Impagnatiello v Campbell*[10].

52. The question before the court in *Impagnatiello* was whether or not the prosecution had established that the breath test under s55(1) had been conducted on a "breath analysing instrument" within the meaning of the Act. It was uncontroversial in that case that a conviction under s49(1)(f) requires the prosecution to prove that the breath test under s55(1) was conducted on a "breath analysing instrument" as defined in the Act. The only question was whether the informant's evidence was adequate to prove this fact.

53. The Act provides specific methods by which the prosecution can establish that the device used to conduct the breath test under s55(1) was a breath analysing instrument, as defined. First,

the prosecution can rely on a certificate of analysis under s58(2) of the Act. This is the usual method. In circumstances where that certificate is challenged by the defence, as was the case in *Impagnatiello*, the prosecution can call the police officer who conducted the test to give evidence that either:

> (1) the apparatus used by him or her was a breath analysing instrument, as defined;[11] or
>
> (2) the apparatus used by him or her had written, inscribed or impressed on it the markings "Alcotest 7110" and "3530791"[12].

54. In *Impagnatiello*, the informant gave evidence that he told Mr Impagnatiello that he was required "to undergo a breath test pursuant to s55 of the *Road Safety Act* 1986". The informant then gave evidence about his authority and ability to operate a breath analysing instrument. When asked whether the instrument used to conduct the test under s55(1) had any markings on it, the informant gave evidence to the Magistrate that the instrument used for the test under s55(1) had the number "0032" imprinted on it. Clearly, this evidence did not satisfy the requirements of either ss58(4) or 58(5) of the Act. However, the Magistrate found that there was sufficient evidence to infer that the machine was an authorised breath analysis instrument.

55. On appeal before a single judge of this Court, it was held that it was open to the Magistrate to make this finding on the basis of inferences that were available on the evidence before the Magistrate. The trial judge was apparently encouraged in this approach by statements of the Court of Appeal of this Court in *DPP v Foster*[13] and *DPP v Sher*[14] which emphasized the importance of the courts giving effect to the purpose of the Act, and discouraged technical defences to drink driving charges. The Court of Appeal in *Impagnatiello* said that nothing said by the Court of Appeal in those decisions as to the purpose of the legislation and the desirability of discouraging technical defences circumvented the need for the prosecution to prove its case[15].

56. In *Impagnatiello*, Eames JA dealt with each of the inferences that were said to be open to the Magistrate in turn. The first inference is the only one of relevance to this case. That inference was described as follows:[16]

> "(a) The fact that the respondent said to the appellant that he was required to undergo a breath test 'pursuant to s55 of the Act' entitled the Magistrate to infer that only an instrument which was compliant with the Act would have been used, because a breath analysis under s55(1)(a) was to be conducted with a 'breath analysing instrument', which, in turn, was an instrument as defined in s. 3."

57. This inference is substantially the same as the inference that Hayne J concluded was open to the Magistrate in *Chisholm v Mathews*, to the effect that it could be inferred that the preliminary breath test in that case had been conducted by a prescribed device.

58. In *Impagnatiello*, Eames JA said of such inferential reasoning:[17]

> "The fact that it was a test conducted pursuant to s55 of the Act, as the respondent stated in evidence, did not establish that it was in fact an approved instrument as would be required for a test under that section to be valid. To infer otherwise would merely be a circular argument whereby the conduct of a test would be treated as proof, by inference, that all prerequisites which were obliged to be proved under the Act, had been met, including that the instrument complied with s3."

59. Eames JA concluded:[18]

> "Thus, none of the suggested inferences were, in fact, capable of being drawn... the conclusions sought to be drawn amounted to mere speculation, and were not properly drawn inferences. The conclusions drawn left room for conflicting conjectures or hypotheses and even if the inferences were capable of being drawn if the standard of proof was the civil one, ie on the balance of probabilities (a proposition which I doubt, in any event) could certainly not establish beyond reasonable doubt, either as discrete inferences or as a final conclusion when all are drawn together, that the instrument was compliant with s3."

60. It follows, in my view, that the decision of Hayne J in *Chisholm v Mathews* cannot stand with the decision of the Court of Appeal in *Impagnatiello*. Accordingly, I decline to follow and apply it.

61. In the result, I must uphold the first ground of appeal. The conviction of the appellant must be set aside and, in lieu, the charge should be dismissed. This is an unfortunate result. The certificate clearly demonstrates that the appellant was driving with more than the prescribed concentration of alcohol in his breath.

62. I will hear counsel as to the precise form of orders and as to costs.

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[1] *Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[2] (1991) 14 MVR 365 at 371.
[3] [1993] VicRp 82; [1993] 2 VR 403 at 407; (1992) 16 MVR 367.
[4] [1999] VSCA 73; [1999] 2 VR 643 at [34], [35]; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[5] [2001] VSCA 114; (2001) 4 VR 55 at [23]; (2001) 122 A Crim R 251; (2001) 34 MVR 164.
[6] (1992) 16 MVR 447.
[7] (1992) 16 MVR 447 at 451.
[8] (1992) 16 MVR 447 at 451.
[9] [1993] VicRp 82; [1993] 2 VR 403 at 407; (1992) 16 MVR 367.
[10] [2003] VSCA 154; (2003) 6 VR 416; (2003) 39 MVR 486.
[11] Section 58(4) of the Act.
[12] Section 58(5) of the Act.
[13] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[14] [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[15] [2003] VSCA 154; (2003) 6 VR 416 at [13]; (2003) 39 MVR 486, per Eames JA, Callaway and Buchanan JJA agreeing.
[16] [2003] VSCA 154; (2003) 6 VR 416 at [18]; (2003) 39 MVR 486.
[17] [2003] VSCA 154; (2003) 6 VR 416 at [30]; (2003) 39 MVR 486.
[18] [2003] VSCA 154; (2003) 6 VR 416 at [31]; (2003) 39 MVR 486.

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