**27/03; [2003] VSCA 154**

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

# *IMPAGNATIELLO v CAMPBELL*

**Callaway, Buchanan and Eames JJ A**

**1, 26 September 2003 — (2003) 6 VR 416; (2003) 39 MVR 486**

**MOTOR TRAFFIC – DRINK/DRIVING – NOTICE GIVEN REQUIRING OPERATOR OF BREATH ANALYSING INSTRUMENT TO GIVE EVIDENCE – NOTICE NOT SPECIFIC IN RELATION TO MATTERS IN DISPUTE – NO DIRECT EVIDENCE GIVEN BY OPERATOR THAT THE APPARATUS USED BY THE OPERATOR WAS A BREATH ANALYSING INSTRUMENT WITHIN THE MEANING OF THE ACT – WHETHER PRESUMPTION OF REGULARITY APPLIED – WHETHER INFERENCES COULD BE DRAWN – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *ROAD SAFETY ACT* 1986, SS3, 47, 49(1)(f), 55, 58.**

I. was charged with the offence of drink/driving under the *Road Safety Act* 1986 ('Act') s49(1)(b) and (f). Notice under s58(2) of the Act required the operator of the breath analysing instrument to be called as a witness. The notice was general in its terms and did not spell out any technical or substantive defence which was proposed to be taken in answer to the certificate. At the hearing the operator did not give evidence that the instrument he used on the relevant occasion was one authorised by the Act. The magistrate (and subsequently the Judge on appeal) held that inferences could be drawn that the instrument complied with the Act. Upon appeal—

**HELD: Appeal allowed. Order of magistrate and judge set aside and in lieu the charge dismissed.**

**1. The issue in this case was whether it was open to the magistrate to be satisfied that the instrument on which the breath analysis was conducted was one defined and authorised by the Act. Conviction for an offence under s49(1)(f) requires merely that a sample of breath furnished for examination by a breath analysing instrument recorded, indicated or showed the presence of more than the prescribed concentration of alcohol in the blood. It is that result which constitutes the offence and therefore it is an essential element of the offence that it was a "breath analysing instrument" within s3 of the Act.**

**2. Parliament has provided two ways in which the prosecution may establish that the instrument was one authorised by the Act. First, pursuant to s58(4)(a), the operator of the instrument may simply give evidence that the instrument was a breath analysing instrument within the meaning of the Act. Alternatively, pursuant to s58(5), the operator might state that the instrument used had written inscribed or impressed on some portion of it certain expressions. In this case the operator did not adopt either course.**

**3. In the present case proof that the instrument complied with s3 was central to the offence and the presumption of regularity could not be relied on (directly or indirectly) as proof in itself that the instrument complied with the Act. Assuming that the operator was acting under a public duty when conducting the breath test, a presumption of regularity would not establish that the instrument he used was one which duly complied with the definition in the Act.**
***Dillon v R* [1982] AC 484, applied.**

**4. The inferences drawn by the magistrate (and Judge) were not properly drawn in that the conclusions amounted to mere speculation. The conclusions drawn left room for conflicting conjectures or hypotheses and did not establish that the instrument used complied with the Act. Accordingly, there was no proof of an essential element of the offence and the magistrate (and Judge) were in error in concluding otherwise.**
***Impagnatiello v Campbell*, (2001) 35 MVR 181; MC27/2001, reversed.**

**5. The requirement of the notice under s58(2) of the Act is to oblige the defence to spell out any technical or substantive defence proposed to be taken at the hearing of the charge. The notice must state what matters are addressed by s58(2(a) to (f) are challenged and as to what fact or matter. In view of the lack of specificity of the notice in the present case it was appropriate to order that both parties should pay their own costs in the Magistrates' Court proceedings.**

**CALLAWAY JA:**

1. I agree that this appeal should be allowed and orders made as proposed by Eames JA. I do so substantially for the reasons his Honour has given, which I have read in draft form. So far

as the presumption of regularity is concerned, I am content to say that it did not apply here, for the reason given by the Privy Council in *Dillon v R*[1], and that, without its support, the charge under s49(1)(f) of the *Road Safety Act* 1986 was not proved to the requisite standard.

**BUCHANAN JA:**

2. I would allow the appeal for the reasons stated by Eames JA. I would also make the orders for costs proposed by his Honour.

**EAMES JA:**

3. The respondent, a senior constable of police, conducted a breath analysis on the appellant at Oakleigh police station on 7 September 2000. Upon completion of the test a reading of .095 grams of alcohol per 100 millilitres of blood was obtained. On 18 October 2000 the respondent laid two charges against the appellant arising out of his driving at Oakleigh on 7 September 2000. The first charge, under s49(1)(b) of the *Road Safety Act* 1986 ("the Act") charged that he drove whilst more than the prescribed concentration of alcohol, being .05 grams per 100 millilitres of blood, was present in his blood. The second charge was brought under s49(1)(f) being an offence of furnishing a sample of breath for analysis by a breath analysing instrument pursuant to s55(1) of the Act within three hours after driving a motor vehicle, the result of such analysis indicating that he had more than the prescribed concentration of alcohol in his blood. The two charges were fixed for hearing at the Magistrates' Court at Dandenong on 7 May 2001. On 14 February 2001 the appellant, by his solicitors, gave notice under s58(2) of the Act that the appellant required the operator of the breath analysis machine to be called as a witness.

4. The notice pursuant to s58(2) was signed by the solicitor for the appellant and was addressed to the informant. It read as follows:

> "TAKE NOTICE that the abovenamed Defendant requires the person giving the Certificate of Breath Analysis in these proceedings to be called as a witness and further gives notice that the Defendant intends to adduce evidence in rebuttal of the facts and matters sworn to by such witness. AND FURTHER TAKE NOTICE that the Defendant takes issue with all matters required to be proved by or on behalf of the Informant as constituting the elements of the offence(s) charged and all matters going to the proof of each such element including but without limiting the generality of the foregoing takes issue with: (a) the method of proof of the offence referred to in the Certificate of Breath Analysis operator by a breath analysis instrument as referred to in the said Certificate; (b) the proper operation of the breath analysing instrument used on the occasion in question; (c) whether the instrument used was on the occasion in question in proper working order; (d) the authority of the breath analysis operator; (e) the correctness of the result obtained by any breath analysing instrument used on the occasion in question.
> Dated 15 February, 2001 _____ Michael Rickards Solicitor for the Defendant"

5. When the matter came for hearing the police prosecutor made application to the magistrate that the s58(2) notice should be "set aside". He complained that the notice failed to comply with the sub-section because –

> "It doesn't specify ... the nature of the specific fact or matter in dispute and as a matter of fairness to the prosecution so, it is my submission that in fact it should be more specific and the Parliament very intentionally introducing the legislation, specially 58(2) was to force defence if you like for want of a better term to be more specific as specified in the defence (sic) as opposed to prosecution by ambush so to speak."

The prosecutor contended that the sub-section was introduced in order to address technical defences being taken in such cases and to oblige the defence to give specific notice of such points as were proposed to be taken. Counsel for the appellant who was also counsel before the magistrate submitted that the notice was adequate and that no obligation was cast on the defence to be more specific in the notice that was given. In any event, counsel submitted:

> "In terms, in paragraph (a) we throw into issue the conclusive presumption as to the method of proof, the instrument and the certificate itself, which is a reference to the opening words of s58(2)."

6. The magistrate ruled that he had no power to strike out the notice, but even if he had the notice complied with s58(2). The respondent was called as a witness and gave evidence, in the course of which he said that he told the appellant that he was required "to undergo a breath test pursuant to s55 of the *Road Safety Act* 1986". He said that he was a qualified breath analysis

instrument operator and produced a certificate of authority and said that the breath analysis instrument which he operated was operated in accordance with the regulations and in accordance with the procedures laid out in the breath test operations manual and that he operated the machine correctly. The following exchange occurred:

> "Q: Does the breath analysis machine you used have any identifying serial number or mark on it? A: Yes it does, the serial number on our machine is 0032."

The respondent said that he operated the machine in compliance with the regulations.

7. In the course of the respondent's evidence the certificate of analysis was tendered without objection and at the top of the certificate the following appeared:

> "VICTORIA POLICE ROAD SAFETY ACT 1986 DRAGER ALCOTEST 7110 SERIAL-NO.: MRFK-0032 SAMPLE-NO.: 00856"

8. Further evidence was called by the prosecution which is not relevant for present purposes. The appellant gave evidence in his own defence but that, too, is not relevant for present purposes. At the conclusion of all evidence counsel for the appellant submitted that the offence had not been proved beyond reasonable doubt. He submitted:

> (a) there was no evidence that the apparatus used by the respondent was a breath analysing instrument within the meaning of the relevant provisions of the Act;
>
> (b) there was no evidence that the device used had written, inscribed or impressed on it, or on a plate attached to it the expressions 'Alcotest 7110' and '3530791', as required by s.3 of the Act;
>
> (c) there was no evidence that the apparatus was one which fell within s.3 or Part V of the Act.

9. The learned magistrate rejected the submissions made on behalf of the appellant. He convicted the appellant on the charge under s49(1)(f), fined him $800, with $33 statutory court costs, cancelled his driving licence and disqualified him from obtaining a licence for 18 months. The charge under s49(1)(b) was dismissed under s76 of the *Sentencing Act* 1991.

10. In rejecting the arguments made by counsel for the appellant the magistrate said that there was sufficient proof that the machine was an authorised breath analysing instrument. Against that decision the appellant appealed, on questions of law, pursuant to s92 of the *Magistrates' Court Act* 1989. Although a number of grounds of appeal and questions of law were separately identified essentially the issue for the judge was whether it was open to the magistrate to be satisfied that the instrument on which the breath analysis was conducted was one defined and authorised under the Act.

11. The learned judge concluded that it was open to the magistrate to be satisfied that the instrument was one authorised under the Act. Against that decision the appellant appeals to this court. Not all of the grounds in the notice of appeal were pressed before us and it is unnecessary to set out the grounds in full. The relevant grounds of appeal to this court may be summarised as amounting to a contention, generally, that the judge erred in law in concluding that it was open to the magistrate to be satisfied that the instrument complied with the Act, and, more specifically, that the judge erred in law in finding that various inferences were open to be drawn by the magistrate in proof of the offence and/or that a presumption of regularity could be called in aid in proof of the offence.

12. The relevant provisions of the Act are as follows:–

> "3. <u>Definitions</u>
> (1) In this Act— ....
> "breath analysing instrument" means—
> (a) the apparatus known as the Alcotest 7110 to which a plate is attached on which there is written, inscribed or impressed the numbers "3530791" ...
>
> <u>49. Offences involving alcohol or other drugs</u>
> (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 more than the prescribed concentration of alcohol is present in his or her blood; or ....
(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(1) and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that 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; ....

55. Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force . . . under section 53 to do so and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's blood contains alcohol; ...
any member of the police force ... may require the 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 ... for the purposes of section 53 to a police station or other place where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath and been given the certificate referred to in sub-section (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner. ...
(3) A breath analysing instrument must be operated by a person authorised to do so by the Chief Commissioner of Police.
(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must sign and give to the person whose breath has been analysed a certificate containing the prescribed particulars produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood.

58. Evidentiary provisions – breath tests
(1) If the question whether any person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood of any person at any time or if a result of a breath analysis is relevant— ...
(c) on a hearing for an offence against section 49(1) of this Act—
then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under section 55 and the concentration of alcohol so indicated is, subject to compliance with section 55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument.
(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 blood 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 ... 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.
(2A) A notice under sub-section (2) must specify any fact or matter with which issue is taken and indicate the nature of any expert evidence which the accused person intends to have adduced at the hearing...
(2D) A certificate referred to in sub-section (2) remains admissible in evidence even if the accused person gives a notice under that sub-section but, in that event, the certificate ceases to be conclusive proof of the facts and matters referred to in that sub-section. ...
(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.
> (5) The statement on oath of a person authorised to operate a breath analysing instrument under section 55 when called as a witness that any apparatus used by him or her on any occasion under section 55 had written, inscribed or impressed on some portion of it or on a plate attached to it the expressions "Alcotest 7110" and "3530791" ... is, in the absence of evidence to the contrary, proof that the apparatus is a breath analysing instrument within the meaning of this Act."

13. The learned judge accepted that the judgment of Ormiston J in *Bogdanovski v Buckingham*[2] stood in the way of upholding the conviction. In that case Ormiston, J. held that proof that an instrument was an approved instrument under the Act was a matter which had to be strictly established by the prosecution.[3] That decision has been followed by many judges: see *Lisiecki v Grigg*[4], *Cummins v Dalton*[5], *Robertson v Smith*[6], *Entwistle v Parkes*[7], *Jones v Purcell*[8]. Her Honour accepted that the requirements of strict proof imposed by Ormiston J and in the other cases to which reference was made were not met in this case. She concluded, however, that the Court of Appeal in *DPP v Foster*[9] and *Sher v DPP*[10] reflected a change of approach by the courts to the interpretation of this legislation, that change of approach having been assisted by the introduction of s58(2D) in 1994, which had permitted the certificate to be tendered in evidence notwithstanding that a notice had been given under s58(2). The Court of Appeal, her Honour concluded, had emphasised the importance of the courts giving effect to the purpose of the legislation, and the discouragement of technical defences[11]. Her Honour, it seems, took the view that in achieving the purpose of the legislation the Court should endeavour to find a basis to uphold convictions in such circumstances. Mr Hardy submitted, correctly in my view, that nothing said by the Court of Appeal as to the purpose of the legislation and the desirability of discouraging merely technical defences over-rode the continuing requirement that the prosecution was obliged to prove the elements of the offence.

14. In addition to reliance on a certificate under s58(2), Parliament has provided two ways in which the prosecution may establish that the instrument is one authorised by the Act. First, pursuant to s58(4)(a), the operator of the machine may simply give evidence that the machine was a breath analysing instrument within the meaning of the Act. Alternatively, pursuant to s58(5), the operator might state that the instrument which he or she used had written inscribed or impressed on some portion of it or on a plate attached to it the expressions "Alcotest 7110" and "3530791". In this case the operator/respondent did not adopt either course.

15. As noted earlier, when asked the relevant question by the prosecutor for s58(5), namely, whether the instrument had any identifying serial number or mark on it, the informant said it did and that it had the serial number 0032. The prosecutor did not take the matter further by asking additional questions about the markings on the machine. Furthermore, the informant was not asked whether the instrument was a breath analysing instrument within the meaning of the Act, nor did he volunteer that to be so. Thus the approach under s58(4)(a) was also not adopted. Mr Hardy submitted that the failure of the prosecutor to ask those questions expressly of the witness entitled the court to draw a *Jones v Dunkel*[12] inference, that either the witness was unable to give any evidence as to those matters or else that the answers would not have advanced the prosecution case. In my opinion, it is not necessary to consider whether such an inference arose so as to provide positive evidence that the instrument did not comply with the Act. It is clear, in my opinion, that the absence of the relevant evidence was fatal to the prosecution case.

16. In *Bogdanovski v Buckingham* Ormiston J said of such significant omissions in the evidence given by a prosecution witness:

> "Because he failed to use the language of subs.(4) or (5) of s.58 and because he failed to describe the instrument in any way which would enable the court to ascertain whether that instrument complied with either paragraph of the definition, there was no evidence as to that critical fact."[13]

17. Conviction for an offence under s49(1)(f) required merely that a sample of breath furnished for examination by a breath analysing instrument recorded, indicated or showed the presence of more than the prescribed concentration of alcohol in the blood. It is that result which constituted

the offence[14] and therefore it is an essential element of the offence that it was "breath analysing instrument" within s3 of the Act.

***The approach taken by the judge to proof of the element of the offence***

18. The learned judge concluded that on the totality of the evidence it was open to the magistrate to infer that the instrument was a breath analysing instrument within the meaning of the Act. Her Honour did not expressly say what items of evidence and inferences from the evidence she accepted as supporting the conclusion that the instrument complied with the Act, but it may be presumed that the following matters and discrete inferences, which she highlighted from the submissions of counsel for the respondent, were adopted by her:

19. (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 s3.

(b) The respondent was authorised under s55(3) as a person who could operate a breath analysing instrument and by virtue of his certification in that respect the magistrate was entitled to infer that he would not be a person who would use an instrument which did not comply with the Act.

(c) The respondent's evidence that "the serial number on our machine is 0032" implied that the machine was one used at Oakleigh police station and it could be inferred that Victoria Police would not use an instrument which did not comply with the Act.

(d) The certificate which had been produced by the instrument was a document which was made admissible in evidence by virtue of s58(2) which, in turn, referred to "a document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument". The magistrate could, therefore, infer that the certificate must have been produced by a breath analysing instrument as defined by the Act, because it could not otherwise have been admissible.

20. (e) The inferential conclusion in paragraph (d), above, would appear, if correct, to provide the complete answer to the appeal. Her Honour, however, immediately followed that discussion by identifying another, more limited, evidentiary effect of the certificate. Thus, although the certificate ceased to be conclusive proof of the matters stated in s58(2)(a) to (f), when notice under s58(2) was given, it remained evidence as to the contents of the certificate[15]. Accordingly, the certificate was evidence that the machine was a Drager Alcotest 7110 and had a serial number MRFK-0032.

(f) The magistrate would be able to more confidently draw the inference that the instrument complied with the Act by virtue of the evidence of the respondent that the instrument was in proper working order, was operated in accordance with the procedures laid down in the manual, was operated correctly and in accordance with the regulations.

21. Ms Judd, counsel for the respondent, conceded that there was no direct evidence that the instrument conformed with the definition in s3 of the Act, but submitted that the learned judge was correct in concluding that it was open to the magistrate to infer that it was such an instrument. In reaching that conclusion by way of inferential reasoning it was submitted that the magistrate had been entitled to draw and rely on a series of discrete and cumulating inferences, and also on the presumption of regularity.

22. The appropriate inferences, Ms Judd submitted, were those set out in par[16], above. Those discrete inferences and findings did combine to provide a sound basis for the drawing of a final inference that the instrument complied with the Act. Additionally, Ms Judd submitted that the judge was entitled to rely on the presumption of regularity. Ms Judd accepted that that presumption could not of itself prove the relevant element of the offence, namely, that the instrument was authorised under the Act, but she submitted that the presumption was one additional supporting factor to which the magistrate could have had regard.

23. I deal first with the presumption of regularity.

**24. *The presumption of regularity***

25. The learned judge did not herself refer to the presumption of regularity, but Ms Judd

submitted that the decision could have gained some support by reference to that presumption. As I have said, it was not contended that the presumption of regularity could of itself provide proof that the instrument complied with the Act, but it was said that it would have provided some additional confirmatory support for the magistrate to conclude that he was satisfied beyond reasonable doubt that this element of the offence had been proved.

26. Ms Judd submitted that in conducting the breath test the respondent was performing a public duty and that it could therefore be presumed that in so doing he had complied with all statutory conditions for such performance. Counsel relied primarily on *Mallock v Tabak*[16], (as supported by *Wright v Bastin (No.2))*[17].

27. In *Mallock v Tabak* the presumption was applied where the defendant had been charged with a drink driving offence and the prosecution relied for proof of the offence on a blood test taken by a medical practitioner at a hospital the driver had attended after an accident. The legislation required a medical practitioner to take a blood sample on a person who was brought into hospital for treatment or examination after an accident. It was contended by the defence that there was no proof that the pre-conditions for taking the sample had existed. Lush J held[18] that a rebuttable presumption that he had complied with the statutory pre-conditions arose from the fact that the medical practitioner had taken a sample in purported compliance with his statutory duty. In that case, however, the duty which was imposed on the medical practitioner involved an invasion of the citizen's rights and the doctor only gained protection from the consequences of what otherwise would be an assault if he complied with the pre-conditions. It could therefore be presumed that the doctor would ensure that the pre-conditions existed.

28. In the present case, even assuming that the respondent was indeed performing a public duty, rather than exercising a mere discretion, there was nothing in the circumstances of the performance of that duty that would give rise to a presumption that he would comply with the condition that he used a machine which had the appropriate identification under s3. This was not, therefore, a situation such as Lush J described, where "the mind may be satisfied of the likelihood of correct observance of (the Act) and of the unlikelihood of the lack of observance of its conditions"[19]. In *Wright v Bastin (No. 2)* Menhennitt J agreed with the approach of Lush J. It is unnecessary to discuss that case in more detail.

29. As those cases demonstrate there can be a place for the operation of the presumption in a criminal case[20]. In my opinion, however, there is direct authority against the operation of the presumption in proof of an element such as we are concerned with in this case, for an offence such as that under s49(1)(f).

30. In *Scott v Baker*[21] Lord Parker CJ, Waller and Fisher JJ held that proof that a breath analysing instrument had been approved by the Secretary of State could not be established by reliance on the presumption of regularity. The correctness of that approach was confirmed by the Privy Council in *Dillon v The Queen*[22]. In that case the defendant, a police constable, was charged with negligently permitting a person to escape from lawful custody, the escape being from a police lock-up. The Judicial Committee held that the Crown could not rely on a presumption that since the detained person had been in custody it must have been lawful custody. Their Lordships held:

> "Their Lordships are of opinion that it was essential for the Crown to establish that the arrest and detention were lawful and that the omission to do so was fatal to the conviction of the defendant ... The lawfulness of the detention was a necessary pre-condition for the offence of permitting escape, and it is well established that the courts will not presume the existence of facts which are central to an offence: see *R v Willis* (1872) 12 Cox CC 164; *Scott v Baker* [1969] 1 QB 659; [1968] 2 All ER 993; [1968] 3 WLR 796."[23]

31. In the present case proof that the instrument complied with s3 was central to this offence[24]. In my opinion, not only could the presumption not be relied on as proof in itself that the instrument complied with the Act (which Ms Judd accepted) it could not be relied on indirectly. Thus, I reject the submission advanced on behalf of the respondent that whilst the presumption could not provide proof beyond reasonable doubt as to that element "the Court may be assisted in reaching the requisite level of satisfaction by recourse to the presumption of regularity."

32. Additional recourse to the presumption was sought to be made to establish that the

respondent, being a person under a duty, might be presumed to have exercised his duty by complying with the statutory prerequisites for its exercise: see *Mallock v Tabak*[25]. Although Mr Hardy contended that the respondent had a mere power, or discretion, to conduct a breath analysis with a breath analysing instrument, and was not under an obligation or duty to do so, it is not necessary to determine that question. Even assuming that the respondent was acting under a public duty when conducting the breath test on the appellant a presumption of regularity would not establish that the instrument he used in purported performance of his duty was one which duly complied with the definition in the Act. That is an element of the offence and a matter on which strict proof was required.

***Inferences***

33. As to the "inferences" which the judge considered could be drawn towards proof beyond reasonable doubt that the instrument complied with the Act, I agree with Mr Hardy that each was an instance of mere speculation and was not a finding of fact which was capable of being drawn by inferential reasoning. I will deal with those suggested inferences, in turn, and in so doing will adopt the re-formulation of those inferences as suggested was appropriate by Ms Judd during argument:

> (a) 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 pre-requisites which were obliged to be proved under the Act, had been met, including that the instrument complied with s3;
>
> (b) The fact that the machine was operated by a member of the Victoria Police who was duly authorised to conduct breath analyses under the Act was not capable of leading to a conclusion, beyond reasonable doubt, drawn by inference, that when he performed this analysis he used a machine which was authorised under the Act. He may well have fully intended to use an authorised machine and did not appreciate that it did not bear the required marking;
>
> (c) That the machine was one used at Oakleigh Police Station in a room dedicated to such tests could not lead to an inference beyond reasonable doubt that it was properly authorised;
>
> (d) The tender of a certificate pursuant to s58(2) as a document which purported to be a certificate "produced by a breath analysing instrument" could not, by virtue of the tender, thereby prove that the instrument was duly approved as required by s.3. Section 58(2)(b) expressly provided that the certificate was conclusive proof that the instrument used was "a breath analysing instrument within the meaning of this Act". The very fact that there was such a specific provision serves to emphasise that the certificate did not otherwise have the effect which its mere tender is now suggested to convey. In *Furze v Nixon*[26] the Court addressed the question whether upon the giving of a notice under s58(2) the certificate continued to provide some proof, albeit not conclusive, of the matter stated in s58(2)(e). The Court concluded that upon the giving of notice the certificate provided no evidence at all of the fact stated in s58(2)(e). By parity of reasoning precisely the same conclusion must be drawn as to s58(2)(b). Thus, the certificate provides no evidence, at all, that the instrument that produced it was one authorised under the Act, although it otherwise constitutes some evidence of the facts stated within its terms.
>
> (e) Evidence from the certificate that the machine was a Drager Alcotest 7110 with a serial number MRFK 0032 was incapable of leading to a conclusion that it also bore the numbers 3530791. Indeed (although it is not necessary for us to go so far), there would be no reason why the conclusion might not more reasonably be drawn (having regard to the question to the respondent which elicited his answer that the machine bore the serial number 0032) that *instead* of bearing the number 3530791 which was required under s.3 it bore the marking MRFK 0032, and was not compliant with s3;
>
> (f) As Ormiston J held in *Bogdanovski v Buckingham*[27], proof that the instrument had been operated in accordance with the procedures laid out in the regulations did not establish that it was an authorised instrument, nor, in my opinion, could that evidence support an inference that the machine was duly authorised. The regulations did not purport to provide proof as to the matters in the s3 definition.

34. Thus, none of the suggested inferences were, in fact, capable of being drawn and their individual incapacity in that respect was not overcome when they were combined. I agree with Mr Hardy, that 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, i.e. 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[28].

***Conclusion and Proposed Orders***

35. The conclusion is inescapable, therefore, that there was no proof of an essential element of the offence. The charge ought to have been dismissed, and the learned judge was in error in concluding otherwise. The appeal should be allowed, and the orders of the judge made on 8 November 2001 should be set aside.

36. The charge under s49(1)(b) was found proved but dismissed by the magistrate pursuant to s76 of the *Sentencing Act* 1991[29]. Because it was dismissed, rather than struck out, it is not possible for the charge to now be revived[30]. Ms Judd said that the respondent did not seek to argue otherwise.

37. The conviction imposed by the magistrate under s49(1)(f) and orders made on 7 May 2001 should be set aside and, in lieu, the charge should be dismissed.

38. We heard argument about costs. In my view, the respondent should pay the costs of the appeal and also the costs of the appeal before the judge. In my opinion, however, there should be no order as to the costs of the hearing in the Magistrates' Court. I would decline to order costs of the Magistrates' Court hearing because in my opinion the probability is that the point on which the appellant has now succeeded would not have been successful had the notice under s58(2) specifically identified the issue. For the purpose of the substantive argument on the appeal Ms Judd did not seek to contend that the notice failed to comply with s58(2), but on the question of costs the generality of the notice was relied on.

39. In my opinion, the notice in this case was little more than a scattergun approach to the identification of matters under challenge. It is, of course, quite likely that the point which was finally taken, and has now been successful, was one which was not anticipated in advance of the conclusion of all evidence. Given his vast experience in such cases Mr Hardy (who also appeared before the magistrate) was no doubt waiting to pounce on any slip by the prosecution, and to that extent a notice which said, in reality, "everything is in dispute" reflected his state of readiness.

40. The requirement of notice under s58(2) and (2A) is, in my opinion, to oblige the defence to spell out any technical or substantive defence which was to be taken in answer to the certificate. Sub-section 2(A) requires there be notice of "any fact or matter with which issue is taken". In my opinion, the notice under sub-s.(2) must state what matters addressed by s58(2)(a) to (f) are challenged, and as to what fact or matter.

41. Curiously, although a scattergun approach was attempted here the notice in fact did not expressly, or in terms, state that a challenge was made as to (b), i.e. "the fact that the instrument used was a breath analysing instrument within the meaning of the Act". As is noted in par [3], above, when the prosecutor at the outset of the hearing complained at the lack of specificity in the notice the response by Mr Hardy still did not state in clear and unambiguous terms that the matter in s8(2)(b) was in issue.

42. In my opinion, it would be consistent with the intended purpose of the provisions as to notice that specificity should be required. It is not necessary in this case to consider whether, given the failure to more precisely identify in the notice the defect on which the case was said to founder, counsel for the appellant should have been precluded from taking the point. As I have said, the respondent did not seek to argue that proposition before us. In my opinion, however, the lack of specificity is a decisive consideration on the question of costs in this case, with respect to the Magistrates' Court hearing. But it is not just that there was a lack of specificity in the notice; in my view there was no notice given of this point, at all. In my opinion, when technical points are to be relied upon the penalty for the failure to be precise in the terms of the notice given may redound on the question of costs. And so it should here. Both sides should pay their own costs of the Magistrates' Court proceedings.

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[1] [1982] AC 484 at 487E. See also *Selby v Pennings* (1998) 19 WAR 520.

[2] [1989] VicRp 80; [1989] VR 897; (1988) 9 MVR 257.
[3] See p904 and p916.
[4] (1990) 10 MVR 336 at 340, per Marks J.
[5] Unreported decision of Crockett J 10 February 1982.
[6] Unreported decision of Nicholson J 27 July 1983.
[7] Unreported decision of Hedigan J 25 September 1992.
[8] Unreported decision of Hansen J 19 July 1995.
[9] [1999] VSCA 73; [1999] 2 VR 643; (1999) 104 A Crim R 426; (1999) 29 MVR 365.
[10] [2001] VSCA 110; (2001) 34 MVR 153; (2001) 120 A Crim R 585.
[11] Her Honour referred to s15 of the *Interpretation of Legislation Act* 1984, and noted that the High Court had also emphasised the public policy purpose of the legislation: see *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141, at 149-150; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[12] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395; and see *R v GEC* [2001] VSCA 146; (2001) 3 VR 334, at [41]; *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, at 418; (1991) 6 ANZ Insurance Cases 61-042.
[13] *Bogdanovski* at 916.
[14] See *Furze v Nixon* [2000] VSCA 149; (2000) 2 VR 503 at [10]-[12], [32]; (2000) 113 A Crim R 556; (2000) 32 MVR 547.
[15] See *Furze v Nixon,* at [19].
[16] [1977] VicRp 7; [1977] VR 78, at 85.
[17] [1979] VicRp 35; [1979] VR 329, at 338-340.
[18] At 85.
[19] At 85.
[20] See too *Luff v DPP* [2003] VSCA 81, at [24]; (2003) 39 MVR 277; *Yamasa Seafood Australia Pty Ltd v Watkins* [2000] VSC 156, at [95]-[101].
[21] [1969] 1 QB 659, at 673-675; [1968] 2 All ER 993; [1968] 3 WLR 796.
[22] See *Dillon v R* [1982] AC 484, at 487; *Scott v Baker* [1969] 1 QB 659, at 673; [1968] 2 All ER 993; [1968] 3 WLR 796.
[23] At 487.
[24] *Furze v Nixon*, at [10].
[25] [1977] VicRp 7; [1977] VR 78, at 85.
[26] At [19]-[21], [30].
[27] At 916.
[28] As to the drawing of inferences, contrasted with mere conjecture, see *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470, at 476, 480-481.
[29] That section gives the court power to dismiss a charge without conviction notwithstanding a finding of guilt.
[30] cf *DPP v Moore* [2003] VSCA 90; (2003) 6 VR 430; (2003) 39 MVR 323.

**APPEARANCES:** For the appellant Impagnatiello: Mr GA Hardy, counsel. Michael Rickards, solicitors. For the respondent Campbell: Ms K Judd, counsel. K Robertson, solicitor for Public Prosecutions.

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