04/01; [2000] VSCA 149

SUPREME COURT OF VICTORIA — COURT OF APPEAL

FURZE v NIXON

JD Phillips, Batt and Buchanan JJ A

10 April, 21 August 2000

(2000] 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547

MOTOR TRAFFIC – DRINK/DRIVING – OFFENCE UNDER S49(1)(f) OF *ROAD SAFETY ACT* 1986 – OPERATOR OF INSTRUMENT CALLED AS A WITNESS – EVIDENTIARY EFFECT OF THE FACTS AND MATTERS STATED IN CERTIFICATE – WHETHER *PRIMA FACIE* EVIDENCE – WHETHER CERTIFICATE ADMISSIBLE – NO EVIDENCE GIVEN THAT INSTRUMENT NOT IN PROPER WORKING ORDER OR PROPERLY OPERATED – WHETHER PART OF PROSECUTION CASE TO PROVE SUCH MATTERS – ONUS ON PERSON CHARGED – COMPLIANCE WITH S55(4) CONDITIONAL UPON ADMISSIBILITY OF CERTIFICATE UNDER S58(1) – NATURE OF OFFENCE UNDER S49(1)(f) – WHETHER COMPLIANCE WITH S55(4) RELATES TO OFFENCES UNDER S49(1)(f) – WHETHER PROSECUTION CAN RELY UPON CERTIFICATE WHERE S55(4) NOT COMPLIED WITH: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(4), 58(1), 58(2), 58(2D).

1. Where a person gives written notice to the informant that the person giving the certificate of analysis is required to be called as a witness, the certificate remains admissible in evidence but ceases to be conclusive proof of the facts and matters in it. The word "remains" does not connote that the certificate remains as *prima facie* evidence of the matters stated in it but only refers to the fact that the certificate is to have residual evidentiary value – a value depending then upon the contents of the document rather than upon the provision dealing with its conclusive effect in the absence of notice.

2. Where a certificate provided no evidence at all of the fact that the breath analysing instrument was "properly operated" the operator of the instrument would have been entitled to give such evidence orally. Where no such evidence was given, it would not have been open to a court to find that the instrument on the relevant occasion was "properly operated". The certificate was not evidence of anything beyond the facts and matters set forth within it. However, it was no part of the prosecution case to prove that on the relevant occasion the instrument was either in proper working order or properly operated. By virtue of s49(4) of the Act the person charged carried the onus of proving that the instrument on the relevant occasion was not in proper working order or properly operated.

3. S58(1) of the Act provides that if the blood-alcohol level indicated by a breath analysing instrument is to constitute evidence of the actual concentration of alcohol present in the blood, compliance with s55(4) must be shown. S58(2)(f) provides that the certificate is proof that the certificate was identical in its terms to another certificate produced by the instrument. Where neither the operator nor the informant actually checked to see that the certificates corresponded, the certificate tendered in evidence was not evidence of the fact that the certificates were identical. Therefore the certificate was of no assistance in demonstrating "compliance with section 55(4)" as required by s58(1) of the Act.

4. The concluding words of s58(1) of the Act are concerned only with evidence of the actual concentration of alcohol present in the blood. The offence under s49(1)(f) of the *Road Safety Act* 1986 ('Act') depends only upon "the result of the analysis as recorded or shown by a breath analysing instrument". S49(1)(f) does not refer to the concentration of alcohol in the blood; the offence is constituted directly by the indication given by the breath analysing instrument (albeit as to blood alcohol concentration) and no more than that. The actual concentration of alcohol present in the blood is irrelevant. On the proper construction of s58(1) the words which expressly require compliance with s55(4) relate only to the use of the certificate to prove the actual concentration of alcohol in the blood and not to its use to prove the result of the breath analysis as recorded or shown by the instrument employed. Therefore the tendering of the certificate in evidence under s58(2) is not conditional upon compliance with s55(4) of the Act. The prosecution did not have to prove compliance with s55(4) before being able to rely upon the certificate tendered in evidence.

JD PHILLIPS, BATT and BUCHANAN JJ A:

1. This is a case stated under ss446 and 447 of the *Crimes Act* 1958. On 27 March 1997, William Robert Furze (to whom we shall refer as "the appellant") was convicted after a defended hearing in the Magistrates' Court of an offence on 21 August 1996 against s.49(1)(f) of the *Road Safety Act* 1986 ("the Act")[1]. He was fined $420 with statutory costs of $48.50, all licences and permits were cancelled and he was disqualified from obtaining a licence for 11 months. On the day of his conviction, the appellant appealed to the County Court under s82 of the *Magistrates' Court Act* 1989. That appeal was heard on 30 and 31 October 1997. On 5 December 1997 the appeal was dismissed and the sentence imposed below affirmed.

2. On 12 December 1997 counsel for the appellant asked the judge to reserve for this Court certain questions of law which his Honour had determined adversely to the appellant. The judge was of opinion that, had such questions been determined in favour of the appellant, he would have been entitled to an acquittal, and so his Honour acceded to counsel's request, stating this case on 12 October 1998. As will be seen, the questions at issue turn upon the evidentiary effect under the legislation of a certificate of analysis produced by a breath analysing instrument. That certificate showed a concentration of alcohol in the appellant's blood of 0.113 per cent, which was well above the prescribed limit. The appellant's contention, which the judge rejected, was that in the circumstances of this case that certificate was evidence of nothing: hence the case stated.

3. It is convenient to set out immediately – and before attempting to explain their significance any further – the questions which were reserved. They are to be found at the end of the case stated:-

> "(i) In the circumstances where a notice is served pursuant to s58(2) of the *Road Safety Act* 1986 and in the circumstances where the said certificate remains admissible in evidence pursuant to s58(2D) of the said Act but ceases to be conclusive proof:
>
> (a) is the said certificate evidence of any of the matters certified or contained in it and/or
>
> (b) any and which of the matters set out in Section 58(2) of the Act?
>
> (c) was there any evidence upon which I could have been satisfied beyond reasonable doubt that the breath analysing instrument was properly operated by the witness Senior Constable Edwards?
>
> (d) was there any evidence upon which I could have been satisfied beyond reasonable doubt that:
> (i) the requirements of Section 55(4) had been satisfied?
> (ii) the certificate (being exhibit A) was identical to the certificate sworn to have been delivered to the Appellant?
> (ii) Was the Decision of the Court to convict the Appellant correct in law?"

The case stated

4. Although described as in the matter of s446 of the *Crimes Act*, the case stated depends equally upon s447. Section 446(1) authorises a County Court judge if "on the hearing of any appeal in a criminal proceeding to the County Court from the Magistrates' Court any question of difficulty in point of law has arisen", not to state a case, but to reserve such question of law "for the consideration and determination of the Court of Appeal". The power in subs(1) of s446 may be exercised only after conviction[2] but, when exercised, the Court is required by s447 "thereupon [to] state a case, setting forth the question or questions of law which has or have been so reserved with the special circumstances upon which the same has [sic] arisen".

5. There is considerable learning upon the stating of a case, albeit in a number of different legislative contexts. Mention may be made of some of them: *R v Rigby*[3], *Bailey v Victorian Soccer Federation*[4], *Clissold v Country Roads Board*[5], *R v Assange*[6] and *Wallin v Judge Curtain*[7]. Suffice it for present purposes to recall first the following from the judgment of Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ in *Rigby* at 150-151:-

> "It is desirable in view of what has happened to restate some of the principles regulating the contents of cases stated. Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. The question may be

one of the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate fact for the purpose of that question. But that is not a common case: see *Humphryis v Spence* [1920] VicLawRp 84; [1920] VLR 407, and cf. *Coughlin v Thompson* [1913] VicLawRp 77; [1913] VLR 304; 19 ALR 268; 35 ALT 1. The general rule is clearly stated by Isaacs J in the three following passages:

> 'It cannot be too clearly understood that on a "case stated" the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless the power is, by express words or by necessary implication, specially conferred by some enactment'- *Mack v Commissioner of Stamp Duties (NSW)* [1920] HCA 76; (1920) 28 CLR 373, at p381; 27 ALR 146.
>
> 'Unless care is taken to distinguish between "inference" and "implication", confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts' – *The Merchant Service Guild of Australasia v The Newcastle and Hunter River Steamship Co. Ltd. [No.1]* [1913] HCA 76; (1913) 16 CLR 591, at p624; 19 ALR 422.
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> 'It has been authoritatively decided by this Court in several cases that no inferences of fact can be drawn by the Supreme Court or this Court in such circumstances ...' – *Dickson v Commissioner of Taxation (NSW)* [1925] HCA 29; (1925) 36 CLR 489, at p497."

6. In this instance, the case stated contains seven paragraphs the first six of which are wholly introductory, setting out the course which led from the hearing in the Magistrates' Court to the stating of the case by the County Court judge when the appeal was dismissed[8]. While such an introduction is of course very helpful by way of background in order to show the significance of the questions which are for determination, the essence of the case stated will ordinarily lie in the findings of ultimate facts in conjunction with the questions which are to be determined upon those ultimate facts. Unfortunately his Honour has not only set out in paragraph 7 what might properly to be regarded as findings of fact; he has also set out a description of some of the more important portions of the evidence, leaving it uncertain (if we may say so) how far such evidence was accepted. Moreover – as is not uncommon – the reasons for judgment have been "annexed hereto and marked 'A'"[9] and, although it is not expressly declared that the reasons form part of the case stated, paragraph 7 of the case, which itself contains some 13 sub-paragraphs, commences with these words:-

> "My findings of fact are contained within my reasons but can be relevantly summarised as follows".

While this may serve to carry the implication that the reasons for decision form part of the case stated, it is undesirable for the critical facts, upon which a determination of the questions of law must depend, to be left for culling from the reasons for judgment, if only to avoid uncertainty. Further, if conflict arises between the judge's "summarising" of the findings in paragraph 7 and the evidence as recounted in the reasons for judgment, how is that conflict to be resolved? The limits on the Court's power on a case stated were emphasised by Isaacs J in this passage in *Dickson v Commissioner of Taxation (NSW)*[10] at 497:-

> "In the absence of explicit statement of facts, including inferences, the Court engaged in dealing with the case stated may perhaps gather the necessary facts from the construction of the case itself as stated, in the way expounded by Lord Atkinson in *Usher's Wiltshire Brewery Ltd. v Bruce* (1915) AC 433, at pp449, 450. Beyond that, the Court cannot go unless specially authorized. I must, therefore, disclaim any attempt to find facts for myself, even by way of inference, and confine myself to such facts as I can ascertain to have been found by the Court of Review."

7. Thus, it is important to find set out clearly and with particularity the ultimate facts upon which a "question of difficulty in point of law has arisen" within the meaning of s446 of the *Crimes Act*. Ordinarily, there will be no reason to include the evidence. One exception is if the question is of the admissibility of a particular item of evidence; another when the question of law is whether there is evidence to support a particular and critical finding which was made; but otherwise it will be both necessary and sufficient to set out only the ultimate facts. In this instance it might be thought that questions (i)(c) and (d) fall within the second exception but on examination they do

not. The reasons make it clear that the judge decided the issues mentioned in those two questions because of the certificate in evidence. The case stated might therefore ask whether that certificate was indeed proof of the facts but, if it was not, it cannot properly be asked, in a general way, whether there was any other, and if so what, evidence to support the finding that was made. That is how we read these questions (i)(c) and (d) and so we would not answer either of them[11].

8. All this serves to emphasise that on a case stated such as is required under s447, the Court must express its opinion on questions of law on the basis of the facts set out in the case stated, and not otherwise. Ordinarily the questions will not fall to be determined on the evidence and on that account the procedure by way of case stated is sometimes criticised. As Dixon CJ said in *Potts v Thompson*[12]

> "It is natural in the case of a tribunal from which there is no general appeal but from which a case stated may be obtained to serve as an appeal on matters of law that parties should try to use the procedure to obtain so far as possible the views of an appellate Court on the whole case, fact and law. Again speaking for myself, I have never found in the course of my experience that an attempt to give a partial appeal results in an appellate Court being able to do justice between the parties. It nearly always results in the appellate Court necessarily being concerned mostly in a discrimination between its functions and the functions of the Court of first instance and in the probable disappearance of the substantial question which originally the parties came to litigate."

It is well established now that the procedure by way of case stated is no substitute for a full appeal and cannot be so treated[13]; the *Magistrates' Court Act* 1989 s91 makes it plain enough that in this instance no appeal lay to the Court of Appeal from the County Court's decision on appeal from the Magistrates' Court. On that account alone, question (ii) as posed by the County Court judge in this instance cannot draw any response from this Court. We doubt if asking whether "the decision of the Court to convict the appellant [was] correct in law" could be justified on a full appeal; it is certainly inapt in a case stated.

9. Finally on this aspect, while we have pointed to some of the problems arising from the way in which this case was stated, we acknowledge that it is rare indeed to find a case stated which escapes all formal criticism. Commonly the difficulties, which are to some extent inherent in the procedure, emerge when the matter is being argued before the tribunal charged with answering the questions posed. It is particularly important, therefore, that the terms of the relevant statutory provision under which the case is stated are followed faithfully and with due regard to the numerous authoritative expositions governing cases stated and much of the responsibility in this regard must rest with counsel for the party applying, who not uncommonly has the carriage of the first draft.

The offence under s49(1)(f)

10. We turn then to consider the questions (i)(a) and (b) which ask directly, if somewhat generally, about the evidentiary effect of the certificate which went into evidence as Exhibit "A". The offence constituted by s49(1)(f) was this:-

> "(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(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".

Sub-paragraph (ii) was not relevant at all in this case. As we follow it, nothing was made of it below and certainly it does not figure in the case stated, so for present purposes it may be ignored. (There is occasion later to refer to it in passing when we deal with s55(4).) As for the rest of s49(1)(f), we draw attention to the fact it makes no mention of any certificate of analysis as such and, as will be seen, the certificate which is central to the questions reserved by way of this case stated is purely evidential. At least as written, the offence created by s49(1)(f) is independent of any certificate. So far as presently relevant, the offence depends only upon "the result of the analysis as recorded or shown by a breath analysing instrument": nothing more and nothing less.

11. In that context we turn to the first of the "findings of fact" which are "summarised" in paragraph 7 of the case stated. These commence as follows:-

> "(a) On Wednesday the 21st of August, 1996 the Respondent, Constable Nixon [the informant] was on duty at a preliminary breath testing station (`booze bus') located at Latrobe Terrace, Geelong South. At approximately 9.20 pm the Appellant's motor vehicle was directed into the booze bus site and the Appellant underwent a preliminary breath test, the result of which indicated to the Respondent that there was alcohol in his blood.
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> (b) The Appellant was requested to accompany the Respondent to the booze bus for the purpose of a breath test, and the Appellant did so accompany the Respondent. Inside the booze bus the Respondent was introduced to Senior Constable Edwards, an authorised operator of breath analysis instruments, and the Respondent supplied a sample of his breath into a breath analysing instrument, the result of analysis as recorded or shown indicated that there was 0.113 grams of alcohol per 100 millilitres of blood, which expressed as a percentage is 0.113%."

12. As it was common ground that "the prescribed concentration" of alcohol in the blood was .05 per cent, the findings just set out seem to resolve the question of the appellant's guilt of the offence charged. It is true that s49(1)(f) refers to the furnishing of a sample of breath for analysis by a breath analysing instrument "under section 55(1)" but that subsection merely sets out the procedure to be followed when taking such samples for analysis (after a preliminary breath test under s53) and it was not suggested that that procedure had not been followed. The findings of fact that we have quoted state "the result of the analysis as recorded or shown" by the breath analysing instrument into which the appellant supplied a sample of his breath and, given that that result as recorded or shown was "more than the prescribed concentration of alcohol", the offence charged is surely established. There is no need for anything further in relation to the reading and in particular no need for any certificate, given the findings expressed so plainly in paragraphs 7(a) and (b). In short, those findings appear to recite the appellant out of court on this case stated.

13. Strictly speaking, it follows then that we should return the case to the judge to be amended under s448 of the *Crimes Act*. Presumably if that step were to be taken, paragraph 7(b) would be qualified in some fashion, perhaps by being expressly made subject to what follows in the way of further findings – and perhaps we could treat paragraph 7(b) as already so qualified by implication. Certainly the parties appeared to proceed in argument upon that footing. As will be seen, we think that the arguments put to us by Mr Billings do not avail the appellant and so there seems no point in having the case restated to cure any irregularity in paragraph 7(b). We proceed therefore on the basis that paragraphs 7(a) and (b) were meant to, and do, only provide a background for what follows in the case stated.

The certificate as evidence

14. In paragraph 7 the judge's "findings" continued thus:–

> "(c) During her evidence the Respondent sought to tender a certificate of analysis. My attention was drawn to the provisions of ss58(2) and (2D) of the Act. It was accepted and conceded by the Respondent that a notice had been served by the Appellant in accordance with s58(2) of the Act, but that the certificate remained admissible pursuant to s58(2D) of the Act, albeit that it was no longer conclusive proof of the facts and matters in it or those deemed to be proved by it under s58(2) of the Act. The certificate was duly received by me into evidence as Exhibit A. Exhibit A is annexed hereto and marked with the letter 'B'."

Again we think it implied that that certificate was to form part of the case stated.

15. In order to understand the import of paragraph 7(c) something must be said of the legislative context in which the certificate fell to be considered. That is found in s58(2) of the Act. Section 58(1) is an evidentiary provision to which we must refer in more detail later; for the present, suffice it to say that it refers to, *inter alia*, "a hearing for an offence against section 49(1) of this Act". Section 58(2) then commences thus:–

> "(2) A document purporting to be a certificate in the prescribed form 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 …

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

(f) ...".

The paragraphs (b), (c) and (d) which we have omitted mention, as facts of which the certificate is conclusive proof, that the instrument was a breath analysing instrument, that the person who operated it was authorised to do so by the Chief Commissioner of Police under s55 and that all relevant regulations relating to the operation of the instrument were complied with. We are directly concerned only with paragraphs (e) and (f). We set out paragraph (f) later[14]; for the moment we focus attention wholly on part of paragraph (e), rendering the document purporting to be a certificate "conclusive proof" of the fact that the breath analysing instrument was *inter alia* "properly operated".

16. That that was so by virtue of s58(2) was subject, however, to the appellant's not giving notice under the subsection; for s58(2) concluded as follows:-

> " ... 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."

As disclosed by paragraph 7(c) of the case stated, it was common ground below that the appellant had indeed given notice under this provision, a step which immediately made relevant the subsections that followed, and in particular subs(2D). That read:-

> "(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."

The question at issue was simply the meaning and effect of this subsection in relation to the certificate in evidence.

17. As is apparent from the terms of case stated, there was no contest below over whether Exhibit "A" satisfied the introductory words of s58(1). That document contained all the particulars listed in reg 314 of the *Road Safety (Procedures) Regulations* 1988 (as amended by SR 110 of 1994, with effect from 1 August 1994) and apparently it was therefore common ground that Exhibit "A" was "a document purporting to be a certificate in the prescribed form 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". The contest was over what Exhibit "A" proved. Thus, in relation to the proper operation of the breath analysing instrument paragraph 7(h) of the case stated declared:-

> "(h) In the event Counsel for the Appellant submitted at the conclusion of the Appellant's case the following:
> (i) That there was no (or no sufficient) evidence upon which the Court could be satisfied beyond a reasonable doubt that the breath analysing instrument was `properly operated'."

As appears from the reasons for judgment, the judge was of opinion that, the relevant notice having been given by the appellant under s58(2), the certificate ceased to be *conclusive* proof of the facts and matters set out in that subsection but remained none the less *prima facie* proof of all those things, including the facts stated in paragraph (e) of the subsection. Accordingly, in the absence of any other evidence on the point his Honour concluded that there was sufficient evidence to establish that the breath analysing instrument was, on the relevant occasion, "properly operated".

18. Before us appellant's counsel repeated the submission he put below, that once notice had been given under s58(2) and the certificate ceased on that account to be conclusive proof of the facts and matters referred to in subs(2), the certificate became no proof at all of anything – neither of the facts and matters contained within it (as described in paragraph (a)) nor of any of the several facts later mentioned in paragraphs (b) to (f). The respondent sought to uphold the judge's view of subs(2D) that the certificate was *prima facie* proof of everything set forth in subs(2). We think that neither side is right.

19. Once notice has been given under s58(2) the document purporting to be the certificate

described in the subsection ceases to be conclusive proof of anything; so much is provided expressly by subs(2D). It remains, however, "admissible in evidence" which means, in our opinion, that it is to constitute evidence of the matters stated in it. The word "remains" does not connote that, while no longer being conclusive evidence of the matters set out in sub-s(2), the certificate remains as *prima facie* evidence of those matters. The effect of sub-s(2D) is not to replace the words "conclusive proof" in sub-s(2) with the words "*prima facie* evidence" in a case where the accused gives the requisite notice. The language of sub-s(2D) is not apt to extend the evidentiary effect of the certificate beyond its contents. The word "remains" was intended only to refer to the fact that the certificate was to have residual evidentiary value, a value depending then upon the contents of the document rather than upon the provision dealing with its conclusive effect in the absence of notice. Unless the document had that residual evidentiary value, subs(2D) would appear to leave the certificate admissible to no purpose; while anything more, would be to rewrite that subsection quite impermissibly.

20. Accordingly, in the present case the document purporting to be the certificate provided evidence of its contents, which included that a sample of the appellant's breath was analysed at 9.45 pm on 21 August 1996 and that the analysis disclosed that the appellant's blood contained 0.113 grams of alcohol per 100 millilitres of blood[15]. But because it contained no statement to such effect, Exhibit "A" provided no evidence at all of the fact that the breathalysing instrument was "properly operated". This conclusion in particular is consistent with the subsections of s58 that appear after subs(2D), which contain a number of further evidentiary provisions. For example, s58(4) expressly enables "a person authorised to operate a breath analysing instrument under section 55" to give evidence "that the breath analysing instrument was on that occasion in proper working order and properly operated by him or her"[16]. Once the certificate ceased to be evidence of that fact by reason of the notice given under subs(2), the operator of the instrument on this occasion would have been entitled to give such evidence orally, but (according to paragraph 7(e) of the case stated) no such evidence was given. The parties contented themselves below with arguing over the meaning and effect of subs(2D).

21. The foregoing has been directed to the point raised by the appellant that there was no sufficient evidence that the breath analysing instrument was "properly operated" on the occasion in question. That is a fairly narrow point and one would have expected that to be reflected in the questions reserved for consideration by the Court of Appeal. But questions (i)(a) and (b) are much more loosely drawn, as will have been already observed[17], and are scarcely confined to the matters in issue. For the moment we are concentrating on paragraph (e) of s58(2); the other issue before us focussed on s58(2)(f) and we deal with this in a moment. So far as s58(1)(e) is concerned, it would surely have been sufficient had this Court been asked whether the certificate in evidence was evidence of the fact that the instrument was "properly operated". Had that been the question, the answer must have been No. That is not one of the matters actually set forth in the certificate and, notice having been given under subs(2D), the certificate is not evidence of anything beyond the facts and matters set forth within it.

22. The conclusion just expressed is, however, subject to a most important rider; for in our opinion 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:-

> "(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."

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. 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. We simply add that if and in so far as it was decided otherwise in *Entwistle v Parkes*[18] that decision should not be followed on the legislation as it now stands.

23. Paragraph 7(g) of the case stated reads thus, in part:-

> "There was no evidence elicited on behalf of the Appellant which suggested in any way that the breath analysing instrument was not operated correctly ....".

Because the contrary was no part of the prosecution case, it cannot be said that the question which was reserved, in so far as it relates to s58(2)(e) of the Act, was a "question of difficulty in point of law [which] has arisen" on the hearing of the appeal to the County Court. It follows that to that extent at least the question of law was not properly reserved and need not be answered[19].

Compliance with s55(4)

24. That brings us to the second issue debated below and before us. We have quoted part of paragraph 7(h) already; the other part was as follows:

> "(h) In the event Counsel for the Appellant submitted at the conclusion of the Appellant's case the following: ...
> (ii) That there was no (or no sufficient) evidence upon which the Court could be satisfied beyond a reasonable doubt that s55(4) of the Act had been proved to have been complied with."

Again the judge rejected the submission, this time on the basis that the certificate in evidence was *prima facie* proof of the facts in s58(2)(f). By virtue of that paragraph, s58(2) makes the "document purporting to be a certificate" conclusive evidence, unless notice is given as already described, of the following:-

> "(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".[20]

In order to understand the significance of these facts, it is necessary to trace a fairly convoluted path through the legislation.

25. As argued, the source of the concern with s55(4) was s58(1). Section 58(1) provides, *inter alia*, that "if a result of a breath analysis is relevant ... on a hearing for an offence against s49(1)" –

> "... 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.*"[21]

Thus, under s58(1) if the blood-alcohol level indicated by a breath analysing instrument is to constitute evidence of the actual concentration of alcohol present in the blood, compliance with s55(4) must be shown. Correspondingly, said the appellant, non-compliance with s55(4) rendered the certificate inadmissible in evidence.

26. We turn then to s55. Section 55(1), as already noted, describes the obligations of a person to furnish a sample of breath for analysis by a breath analysing instrument after first undergoing a preliminary breath test. The powers of the police, among others, to have a person go to a police station and the like for the purpose are all set out, either in subs(1) or in the following subsections. Mention is made too of the taking of a sample of blood, which can be required either by the person requiring the sample of breath or by the one required to furnish it. In that context subs(4) occurs, which reads as follows:-

> "(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 in the prescribed form* produced by the breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in his or her blood."[22]

The requirement for such a certificate to be given to the person furnishing the sample of breath is readily understood[23]: in some circumstances it can be a precursor to his or her seeking to have a

sample of blood taken for analysis[24]. However that may be, it is subs(4) which provoked attention in this instance on the ground, it was said, that compliance was essential to admissibility of the certificate under s58.

27. The question which was debated below, and before us, was whether there was evidence to establish compliance with s55(4), and in particular whether it was shown that the appellant had been given "a certificate in the prescribed form produced by the breath analysing instrument". Here, the case stated did not set out the findings of ultimate fact, but only described the evidence given by the informant and the operator of the machine. The evidence so described (particularly in paragraphs 7(d) and (f) of the case stated) was that the instrument, an Alco Test 7110[25], produced four certificates; that the operator signed each certificate as it was produced; and that the operator gave one to the informant (the present respondent), one to the appellant and kept the other two copies, neither of which was produced in evidence. It is clear from the case stated that the certificate given to the informant was that which went into evidence as Exhibit "A" and, as we have said, there was apparently no dispute that at least that document purported to be "a certificate in the prescribed form". But there was also evidence given to the County Court judge that the informant did not check that the certificates (that is, all four certificates) were identical, nor did the operator. Of the operator's evidence in particular, the judge added this at the end of paragraph 7(f):-

> "Under cross-examination Senior Constable Edwards [the operator of the machine] conceded that he had not compared all four certificates and that he could not verify that Exhibit A was identical to the certificate given to the Appellant. He further conceded that he personally had never verified that the instrument always produced exact copies, *but that in the course of his training and experience in this instrument he had been told it did.*"[26]

28. We note in passing that this last is not on all fours with the evidence as described in the reasons for judgment. There it is said of this witness:-

> "Senior Constable Edwards was cross-examined and amongst other things he stated that these breath analysis machines (i.e. Alco testers) can give 'error messages' but in effect they either operate correctly or not at all. He added that the machine did not appear to him to malfunction in any way. Edwards stated that he did not compare all four certificates. He added that the instrument, if operating correctly, produced four exact copies — he had been told this *and believed it to be so from his experience and learning in relation to the machines*. He confirmed that Exhibit A was the certificate he had given to Constable Nixon on the night."[27]

The belief last mentioned (which is italicised) appears to be independent of what the witness had been told and might therefore have been regarded as sufficient in context to establish that the machine did indeed produce four identical copies. But we are not in the position of the judge below and as there appears to be some slight conflict in this regard between the reasons for judgment and paragraph 7(f) of the case stated, we proceed upon the footing that the latter contains the relevant description of the operator's evidence.

29. It may well be correct to imply from the terms of the case stated that the judge accepted the evidence of the police about the machine and the certificates. Not only is this evidence described in the case stated as though accepted, but according to the reasons for judgment his Honour "totally rejected the evidence of the appellant and his wife" that little had been consumed in the way of alcohol and accepted the evidence of the police witnesses –

> ". . . particularly in regard to the number of preliminary breath tests carried out, the way in which the appellant was treated between the preliminary test and the actual test, the number of breath analysis machines in the booze bus, the location of the single machine within the booze bus, the number of breath tests administered etc.".

Ultimately, however, despite the absence of any direct evidence that the four copies of the certificate had been compared by either of the police witnesses on this occasion, his Honour concluded that there had been compliance with s55(4) because of s58(2)(f). As before, the certificate in evidence could not be treated as conclusive proof, but his Honour regarded it as *prima facie* proof of, *inter alia* –

> "the fact that the certificate is identical in its terms to another certificate produced by the instrument in respect of the sample of breath … "

Identity was thus established between the certificate in evidence and the certificate given to the appellant according to the evidence of both the operator and the informant, notwithstanding that neither had actually checked to see that they corresponded. It followed that because Exhibit "A" was in the prescribed form (as, it appears, was common ground), the certificate given to the appellant was also in the prescribed form as required by s55(4).

30. By reason of what has been said about s58(2)(e), we accept the appellant's contention that his Honour erred in the way in which he applied s58(2)(f) in the light of s58(2D). With respect, we cannot regard the certificate Exhibit "A" as any evidence at all of the fact set out in s58(2)(f), once the appellant had given notice under s58(2). Therefore the certificate was of no assistance in demonstrating "compliance with section 55(4)" as required by s58(1). Nevertheless, it does not follow that the appellant succeeds on this case stated. That is because, as we read it, s58(1) does not, in a case like this, make s55(4) relevant. That portion of s58(1) which is "subject to compliance with section 55(4)" concerns evidence of the actual concentration of alcohol present in the blood; on a prosecution for an offence against s49(1)(f) there is no need – and indeed no warrant – to use or have resort to such evidence and so that portion of s58(1) which refers to s55(4) is of no consequence at all.

31. It is critical to this reasoning that the concluding words of s58(1) are indeed concerned only with evidence of the actual concentration of alcohol present in the blood; but so much seems plain enough. Section 58(1) may of course be called into play not only in relation to the hearing of an offence against s49(1) of the Act, but also, *inter alia*, on a trial for negligently causing serious injury arising out of the driving of a motor vehicle and on a trial for an offence against s318 of the *Crimes Act* 1958 – that is, the offence of culpable driving causing death which may be constituted by the driving of a motor vehicle "whilst under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle". Such offences may well attract evidence of the actual concentration of alcohol in the blood, and it is similar on a hearing for an offence against s49(1)(b) of the Act (the *Road Safety Act*); for that offence is constituted by the driving of a motor vehicle "while more than the prescribed concentration of alcohol is present in [the driver's] blood". Wherever evidence of the actual concentration of alcohol present in the blood is relevant, either directly or indirectly, to the commission of an offence mentioned in s58(1), that subsection is no doubt a useful evidentiary tool, providing as it does for evidence to be given "of the concentration of alcohol indicated to be present in the blood ... by a breath analysing instrument"[28]. The indication given by the machine will become evidence of the actual concentration of alcohol in the blood "subject to compliance with section 55(4)".

32. But an offence against s49(1)(f) is quite different. Unlike s49(1)(b), paragraph (f)(i) does not refer, relevantly, to the concentration of alcohol in the blood; the offence is constituted directly by the indication given by the machine (albeit as to blood alcohol concentration) – and no more than that: see *Meeking v Crisp*[29], *Bracken v O'Sullivan*[30], *R v Williams*[31], *Thompson v Judge Byrne*[32] at para. [24]. (We are putting aside paragraph (f)(ii) which requires that the concentration of alcohol indicated by the machine "was not due solely to the consumption of alcohol after driving" etc.; for as was said earlier it is not presently relevant[33].) Under paragraph (f)(i), one must show that within three hours after driving, the driver furnished a sample of breath for analysis by a breath analysing instrument and that "the result of the analysis *as recorded or shown* by the breath analysing instrument *indicates*" the presence of "more than the prescribed concentration of alcohol" in the blood. The actual concentration of alcohol present in the blood is irrelevant; the criterion of criminality under s49(1)(f) is quite different, as the High Court pointed out in *Thompson*[34].

33. As the appellant's argument to us about non-compliance with s55(4) depended upon the requirement for such compliance in s58(1)[35], the argument must fail once that requirement is seen to be irrelevant on a prosecution under s49(1)(f)[36]. When the certificate of analysis from the breath analysing instrument was tendered in evidence, its value was *not* made by s58(1) "subject to compliance with section 55(4)" because it was not tendered as "evidence of the concentration of alcohol present in the blood of the [appellant] at the time his ... breath [was] analysed by the instrument" that was used to test the breath sample given. The certificate was tendered under s58(2) as evidence of what was indicated by "the result of the analysis as recorded or shown by the breath analysing instrument", on which criminality under s49(1)(f) depends. That is not to say that s58(1) is altogether irrelevant on such a prosecution; far from it. First, the certificate was tendered under s58(2) (albeit in this instance in conjunction with s58(2D)) and that could

be justified only if the proceeding for an offence against s49(1)(f) was within the expression "any proceedings referred to in sub-section (1)", to which the operation of s58(2) is expressly confined. A proceeding for an offence against s49(1)(f) is such a proceeding, however, since the words "or if a result of a breath analysis [is relevant]" were added to s58(1) by amendment in 1990, expressly to overcome the decision of the Full Court in *Bracken v O'Sullivan*[37].

34. Before the 1990 amendment, s58(1) operated only in proceedings in which it was relevant "whether any person was or was not at any time under the influence of intoxicating liquor" or "the presence or the concentration of alcohol in the blood" was relevant. In *Bracken* the Full Court pointed out that these words did not extend to an offence against s49)(1)(f) for the reason already explained: s49(1)(f) depended only upon the result of a breath analysis, as distinct from the actual concentration of alcohol in the blood. Section 58(1) was soon amended (by Act No 66 of 1990[38]) to add the words "or if a result of a breath analysis" immediately before the words "is relevant" – and after that there could be no doubt that a proceeding for an offence against s49(1)(f) was within its compass of s58(1). The declared purpose of the amending Act, which contained only four sections, was "to make sure that certificate evidence is admissible in all drink driving cases"[39] (and the like amendment was made to both s57(2) and s58(1)) and s58 does now bring about that result, even on a prosecution under s49(1)(f). On such a prosecution, plainly "a result of a breath analysis is relevant" and so, according to s58(1), –

> "... evidence may be given of the concentration of alcohol *indicated to be present in the blood of [the defendant] by a breath analysing instrument* operated by a person authorised to do so by the Chief Commissioner of Police under section 55 ..."[40].

That is as far as we need read; for the rest of s58(1) is relevant only in proceedings other than for an offence against s49(1)(f). The words just quoted find reflection in s49(1)(f) which speaks of what "the result of the analysis, as recorded or shown by the breath analysing instrument *indicates*" by way of blood-alcohol concentration, and s58(1) may be seen as opening the door to the court's using "a document purporting to be a certificate etc." under s58(2), as evidence of what indeed was indicated as to blood-alcohol concentration by the relevant breath analysis. That s58(1) should have that effect is consistent with the avowed purpose of the 1990 amendment.

35. Thus far we have dealt with the appellant's argument as presented to us on the hearing. After the hearing concluded, however, we invited counsel to make further submissions in writing, if they wished, on the possible relevance of compliance with s55(4), independently of the express mention made to such compliance in s58(1). We were mindful of the possibility that in the context of this very complicated legislation some other argument might perhaps be devised to support the need for such compliance beyond that derived immediately from the words in s58(1); but in his further submissions appellant's counsel did no more than rely directly upon what he described as the mandatory terms in which s55(4) was couched. It may be accepted readily enough that s55(4) is in mandatory terms: in some cases the delivery of a certificate to the defendant may lead to his or her requesting the taking of a blood sample under s55(10), which could be important – though not on a prosecution against s49(1)(f), when only the result recorded or shown by the breath analysing instrument is relevant. In this proceeding the mandatory form of s55(4) would avail the appellant only if it could properly be concluded that the tendering of the certificate in evidence under s58(2) was conditional upon compliance with s55(4). And in our opinion it cannot be so concluded.

36. We say that for more than one reason. First of course, the conclusion we reject would run counter to what we have said so far: that on the proper construction of s58(1) the words which expressly require compliance with s55(4) relate only to the use of the certificate to prove the actual concentration of alcohol in the blood, and not to its use to prove the result of the breath analysis as recorded or shown by the instrument employed. Had more been intended, s58(1) could easily have so provided: and see and compare *Marine Act* 1988 s32(1) where the division between these two aspects of the whole is made even plainer by the use of paragraphs. Secondly, while s58(1) now contains the only express reference to s55(4), that was not always so. As noted in *Bracken*, s58(2) then referred not to a "document purporting to be a certificate in the prescribed form", but to a "document purporting to be *a copy of a certificate given in accordance with section 55(4)* "[41]. The words in italics were altered, first by the omission of "a copy of" by Act No 17 of 1994[42] (an amendment which took effect on 1 August 1994 when the new Alco Test 7110 came into use) and

then by Act No 100 of 1995[43] which removed the reference to s55(4) (retrospectively as from 1 August 1994). Nothing in s58(2) now refers expressly to s55(4) and what Parliament has removed cannot lightly be reinserted by judicial decision. Thirdly, Act No 100 of 1995 not only removed from s58(2) the words "given in accordance with section 55(4)"; at the same time it altered paragraph (f) of s58(2) to read as it does now[44], thus making the certificate conclusive evidence (subject to subs.(2D) of course) of the very facts upon which compliance with s55(4) depends. It would be quite inconsistent with this to require that compliance with s55(4) be demonstrated *before* the certificate becomes admissible under s58(2) (which may well explain the simultaneous removal of those words in the opening, "given in accordance with section 55(4)"[45]).

37. The principal amendments to the *Road Safety Act* made by Act No.100 of 1995 (which was assented to on 5 December 1995) were to ss55(4), 58(2) and 58(2E)[46]: see s51. These amendments were no doubt precipitated by judgment in *Jones v Purcell* (Hansen J, 19 July 1995, unreported)[47], as witness the express saving in s52(b) of the parties' rights in that case. That was an appeal from the Magistrates' Court after the appellant's conviction for offences against s49(1)(b) *and* (f) (the former making directly relevant the requirement in s58(1) of "compliance with section 55(4)"). Hansen J had to consider s58(2) as amended by Act No.17 of 1994 and a number of arguments were canvassed, arising from the recasting of s58(2) by that Act. One argument that might have been, but was not, raised by the appellant Jones was that in its then form s58(2) made admissible only one document – the certificate actually given to the defendant under s55(4). After all, with the removal of the expression "a copy of" from after the phrase "purporting to be", the opening words of s58(2) ("a document purporting to be *a certificate given* in accordance with section 55(4)") suggested as much; and so did the then paragraph (f) ("the fact that *the certificate was given* to the [defendant]") and the reference in the concluding portion of the subsection to calling the person "*giving the certificate*" as a witness. None the less in *Jones v Purcell* it seems to have been not in dispute that s58(2) made admissible any one of the four certificates produced by the Alco Test 7110, not just the one given to the defendant. That is more obviously so under s58(2) as it was after amendment by Act No 100 of 1995, with paragraph (f) then describing as "another certificate" that given to the defendant under s55(4).

38. For these reasons, on the statute as it stood at the date of the appellant's offence (21 August 1996) we do not consider that compliance with s55(4) was shown to be a necessary condition to the respondent's relying upon the certificate which became Exhibit "A". Nor, we add, in case it be thought that we have overlooked it, do we consider that the appellant's argument to the contrary is any stronger if regard is had to the regulations. As mentioned already, it seemed to be common ground in the County Court that (subject to the argument over compliance with s55(4)) Exhibit "A" was "a document purporting to be a certificate in the prescribed form" within the meaning of s58(2). The phrase "in the prescribed form" sends one to the regulations, but the only regulation which might be thought relevant is that already referred to[48]: reg. 314 of the *Road Safety (Procedures) Regulations* 1988 as amended by SR 110 of 1994 with effect from 1 August 1994. Regulation 314 lists a number of things which are to be included in any certificate to which it relates, declaring that, if they are included, the certificate is "in the prescribed form". Exhibit "A" did contain the things listed in reg 314, but that regulation, which is headed "Certificate under section 55(4)," commenced:-

> "A certificate given in accordance with section 55(4) is in the prescribed form if it includes ... "

39. On the face of it, therefore, reg 314 did not relate directly to a certificate tendered under s58(2) – and as there was no other regulation which did refer expressly to s58(2), it might be thought to follow *either* that there is no prescribed form at all for a certificate tendered under s58(2) *or* that such a certificate must itself satisfy the description "a certificate given in accordance with section 55(4)" (which is, of course, the appellant's contention about compliance with s55(4) put in another way). But we think that neither of these alternatives is a correct interpretation of the regulation. Of course so long as s58(2) itself used the words "given in accordance with section 55(4)", there could be no difficulty; quite apart from any question of compliance with s55(4) the prescribed form of "a certificate given in accordance with s55(4)" as laid down in reg 314 necessarily determined the contents of the certificate to go into evidence under s58(2). It was only when the express reference to s55(4) was removed in 1995 (albeit with effect from 1 August 1994) that any tension emerged with the regulations; for then s58(2) referred to "a document purporting to be certificate in the prescribed form etc.", while reg 314 still referred only to a "certificate given in accordance with section 55(4)".

40. But the difficulty is surely more apparent than real (which is no doubt why counsel did not mention it). Section 58(2)(f) makes a document to which it relates conclusive evidence (subject to subs(2D)) of "the fact that the certificate [in evidence] is identical in its terms to another certificate produced by" the relevant breath analysis instrument "and that it" (meaning, we think, that other certificate) was signed by the operator and given to the defendant in circumstances satisfying the requirements of s55(4). Given that paragraph (f) posits that the two certificates are identical it must follow that what is "the prescribed form" of the one must be the "prescribed form" of the other. That was probably the assumption made below, and we think it correct: indeed it is in line with the decision of Beach J in *Buzzard v Walsh*[49] where his Honour rejected the argument that there was no "prescribed form" relevant to a certificate tendered under s58(2). It matters not that paragraph (f) has no operation in a case like the present because notice was given by the appellant under s58(2) calling subs(2D) into play; nor does it matter that even if no notice had been given by the appellant paragraph (f) would have not been needed if, as we think, compliance with s55(4) was no part of the prosecution case. For present purposes all that matters is that Parliament saw the two certificates mentioned in s58(2) as identical (merely providing in s58(2) a ready proof of it whenever necessary, in the absence of notice from "the accused person"), and any apparent tension between s58(2) and reg 314 then disappears[50].

41. Thus, however it is approached, we think we must reject the argument of the appellant that the respondent had to prove compliance with s55(4) before being able to rely upon the certificate in evidence, Exhibit "A", on the prosecution of the appellant for an offence against s49(1)(f). In our opinion compliance with s55(4) was irrelevant on such a prosecution. If so, it cannot matter whether the certificate given to the appellant was or was not "in the prescribed form" as mentioned in s55(4) or, accordingly, that the certificate which was in evidence had not been compared by either the operator or the informant with that which was given to the appellant. The prosecutor did not need to rely upon s58(2)(f) and it follows that in our opinion the questions reserved for the consideration of this Court – that is, questions (i)(a) and (b) – in so far as they asked after the effect of the certificate in evidence in relation to the fact described in s58(2)(f), were not relevant[51]. To that extent, neither of those questions is a "question of difficulty in point of law [which] has arisen" on the appeal to the County Court and, as the only other point to them was whether the breath analysing instrument was "properly operated" (with which we have already dealt), questions (i)(a) and (b) should not have been reserved for our consideration at all.

Conclusion

42. On his appeal to the County Court the appellant had his conviction and sentence in the Magistrates' Court affirmed and the appeal dismissed. The case stated was intended to raise points of difficulty which were perceived, no doubt by the appellant, to affect that decision. The judge himself considered that the two points argued were met by the certificate in evidence as we have explained, but his Honour did not consider whether that was necessary to the Crown case. So much was made plain in the reasons for judgment when his Honour said:

> "I accept that the Crown must prove the two matters relied on by the defence: i.e., that the breath analysis instrument was properly operated and that a certificate in the prescribed form was given to the appellant etc. Whether these two matters constitute elements of the offence and whether the level of proof has to be 'beyond reasonable doubt' are questions that I do not consider I have to decide."

For the reasons we have given we think that neither of the two points argued was relevant to the Crown case under s49(1)(f). As therefore the questions reserved could not be said to have affected the appellant's conviction, none of them should be answered by this Court. We then have no ground upon which we could interfere with the decision below. If it matters, we can see no reason to suppose that the result in the County Court on appeal was inappropriate.

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[1] See Reprint No.4 (to 19 June 1997).
[2] *Doidge v Craig* (1994) 19 MVR 508.
[3] [1956] HCA 38; (1956) 100 CLR 146.
[4] [1976] VicRp 2; [1976] VR 13 at 15-17.
[5] [1981] VicRp 29; [1981] VR 259.
[6] [1996] VICSC 60; [1997] 2 VR 247; (1996) 88 A Crim R 185.
[7] (1998) 100 A Crim R 506; (1998) 27 MVR 356.
[8] These first six paragraphs were the source of the recital above.
[9] Paragraph 4 of the case stated.

[10] [1925] HCA 29; (1925) 36 CLR 489.
[11] Moreover, as will be seen, we do not consider that either of these questions raises an issue that was material to the conviction of the appellant.
[12] 22 October 1958 unreported, quoted in *Clissold v Country Roads Board* [1981] VicRp 29; [1981] VR 259 at 262-3.
[13] For example, *Wallin v Judge Curtain* (1998) 100 A Crim R 506; (1998) 27 MVR 356 at 357 per Tadgell JA.
[14] See paragraph [24].
[15] These things were among those listed in reg 314 of the *Road Safety (Procedures) Regulations* 1988, as amended by SR 110 of 1994.
[16] On s58(4), see *Matosic v Hamilton* (1991) 13 MVR 171.
[17] See paragraph [3].
[18] (1992) 16 MVR 349 (approving *Curmi v Matthews*, County Court, 23 April 1991, unreported), two cases unaffected by the changes made to ss55(4) and 58(2) by s22 of Act No.19 of 1991: see s22(4)(a) and (b).
[19] Also question (i)(c).
[20] Emphasis added.
[21] Emphasis added.
[22] Emphasis added.
[23] Compare *Nicholl v Hunter* (1994) 20 MVR 384 at 388-9. The Act has since been amended.
[24] But, in relation to an offence against s49(1)(f), contrast *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141 at 153-4, para [30]; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[25] The introduction of this instrument, manufactured by Drager Australia in Melbourne, was the occasion for the substantial amendments made to ss55, 57 and 58 of the *Road Safety Act* by ss10, 11 and 12 of the *Road Safety (Amendment) Act* 1994 (Act No.17 of 1994). In Parliament the Alco Test 71107 was described as "fully automated", always analysing two samples of breath and thereby making unnecessary any request for a second analysis. The Minister said: "Once an analysis is commenced, nothing an operator can do will influence the result": Hansard (Legislative Assembly, 7 October 1993) vol.414 p.102.
[26] Emphasis added.
[27] Emphasis added.
[28] See, for example, *R v Williams* [1992] VicRp 24; [1992] 1 VR 374; (1991) 13 MVR 271; (1991) 52 A Crim R 267.
[29] [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1, affirmed by the High Court *sub nom Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257.
[30] [1991] VicRp 94; [1991] 2 VR 573 at 575; (1990) 13 MVR 91.
[31] [1992] VicRp 24; [1992] 1 VR 374 at 379-380; (1991) 13 MVR 271; (1991) 52 A Crim R 267 where the Full Court distinguished *Mills v Gilmore* [1989] VicRp 39; [1989] VR 413; (1988) 9 MVR 149.
[32] [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[33] but see also s48(1A) and s.49(6).
[34] paras. [24] and [38]; see also para. [30] concerning s57(2).
[35] Counsel did refer us to the decision of Ormiston J in *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367 to establish that compliance with s55(4) was a necessary ingredient of an offence against s49(1)(f), but *Webb* is of no assistance in that regard. His Honour was dealing only with ss53 and 55(1): s9(1)(f) refers specifically to s55(1) and s55(1) refers to s53. As to s55(1) see now *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643; (1999) 29 MVR 365 at 375, 379; 104 A Crim R 426 at 437-8, 442.
[36] In *Webb* at 407 Ormiston J quoted what Tadgell J said in *Smith v Van Maanen* (1991) 14 MVR 365 at 371 were the essential ingredients of an offence against s49(1)(f) and compliance with s55(4) was not one of them. Compare *DPP v Foster supra*.
[37] [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91.
[38] *Road Safety (Certificates) Act* 1990, s4 of which expressly saved the rights of the parties in *Bracken v O'Sullivan* in the Supreme Court. We note that, since the added words do not refer expressly to a person, the references to "that person" in the operative parts of s58(1) which follow are awkward where the relevant alternative condition is that introduced by the amendment; but the intention of Parliament is clear and a theoretical foundation for giving effect to that intention can be found in, for instance, implying words such as "in respect of any person" at the end of the added words.
[39] See s1.
[40] Emphasis added.
[41] *Nicholl v Hunter* (1994) 20 MVR 384 was also decided while s58(2) was in this form and it was common ground that s55(4) had to be satisfied, as noted at 386. (The case involved an offence committed on 30 August 1993; it was determined on 15 July 1994.)
[42] *Road Safety (Amendment) Act* 1994 s12(2)(a).
[43] *Miscellaneous Act (Omnibus Amendments) Act* 1995 s51(5).
[44] Quoted in paragraph [24] above.
[45] These words were removed also from s58(2E) and "referred to in sub-section (2)" substituted.
[46] In s55(4) the word "deliver" was replaced with "give". As for s58(2E) see last footnote.
[47] *McKenzie v McFadzean* (1996) 23 MVR 327 at 329 per O'Bryan J.

[48] In paragraph [17].
[49] (1996) 24 MVR 568. The offence was committed on 17 September 1995 and judgment was given by Beach J on 5 September 1996.
[50] Both the section and the regulation have been changed since 5 December 1997 when this County Court appeal was determined. As amended (as from 1 May 1999) by s4(5)(a) of the *Road Safety (Amendment) Act* 1998 (Act No.57 of 1998) s58(2) no longer refers to a document "purporting to be certificate in the prescribed form" but to one "purporting to be a certificate containing the prescribed particulars". Reg 314 was lost with the repeal of the *Road Safety (Procedures) Regulations* 1988 and their replacement (as from 1 May 1999) with the *Road Safety (General) Regulations* 1999, reg. 203 of which provides that "a certificate under section 55(4) must ... contain the following prescribed particulars" which it then lists after the fashion of the former reg. 314.
[51] So too question (i)(d).

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