30/94

SUPREME COURT OF VICTORIA

CHARLES v KOETSIER

Byrne J

8 November 1994 — (1994) 20 MVR 381

MOTOR TRAFFIC – DRINK/DRIVING – "SAMPLE OF BREATH" – MEANING OF – STOMACH VAPOURS IN SAMPLE – COULD CAUSE INACCURATE READING BY BREATH ANALYSING INSTRUMENT – WHETHER DEFENCE TO CHARGE: *ROAD SAFETY ACT* 1986, S49(1)(f), (4).

1. A "sample of breath" in S49(1)(f) of the *Road Safety Act* 1986 ('Act') means a sample of the air which has been exhaled from the mouth of the subject. Such a sample meets that description notwithstanding it includes gas from the stomach or air from the mouth or nasal cavity of the subject.

2. Where evidence is given to the effect that the possible presence of stomach vapours in the sample of breath could or would distort the reading, such evidence cannot show that the breath analysing instrument was not in proper working order or not properly operated so as to make out the defence under s49(4) of the Act.

BYRNE J: [1] This case raises once again for consideration that most fertile of legislative provisions: *Road Safety Act* 1986 s49. At 8.40 p.m on Thursday 18 March 1993, John Christopher Charles was intercepted by police when driving his car in Liverpool Drive, Keysborough. A preliminary sample of his breath indicated the presence of alcohol in his blood and he was required to furnish a sample of his breath for analysis. Two samples were provided and tested. The results of the sample provided at 9.53 p.m indicated a concentration of alcohol in his blood of 0.165 per cent. Mr Charles was in due course convicted of a breach of section 49(1) (f) by the Magistrates' Court of Victoria at Springvale on 14 June 1994. He appeals against this conviction pursuant to the *Magistrates' Court Act* 1989 s93.

The questions of law raised by the appeal are two:

> "1. Did the Learned Magistrate err in law in finding that the evidence of Dr P Schuijers and Dr B. Collins was irrelevant to a defence to the charge?
>
> 2. Did the Learned Magistrate err in finding that the Defendant had furnished a "sample of breath" which is required by Section 49(1)(f) *Road Safety Act* 1986."

I shall deal first with the second ground. Section 49(1) is in the following terms:

> "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 **[2]** 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;"

It will be seen that as part of its proof the informant must establish that the defendant has furnished a sample of breath. For Mr Charles it was submitted that this expression must be read down so that the sample is one capable of producing a reading which indicates satisfactorily and reliably what is the concentration of alcohol in the blood of the subject. This must depend upon how the breath analysing instrument is designed. In this case there was evidence that the instrument in question was calibrated to read blood alcohol content of an analysis of deep lung air. Accordingly, it was said the required sample of breath is a sample of uncontaminated

air from the subject's deep lung. I am unable to accept this submission. It would be absurd to construe the words sample of breath in the statute variously depending on what is the design of the instrument or, more correctly, depending on what in the given case is the evidence of that design. In my view "sample of breath" must be given its ordinary meaning, a sample of the air which has been exhaled from the mouth of the subject. Such a sample meets that **[3]** description notwithstanding that it includes gas from the stomach or air from the mouth or nasal cavity of the subject; *Johnson v Peters: ex Parte Johnson* [1983] 1 Qd R 531. The second ground therefore fails.

The first ground raises the question of the relevance of the evidence of Dr Byron Collins and Dr Peter Schuijers. Each of these men is a medical practitioner. Dr Collins is a well-known forensic pathologist with expertise in the operation of breath analysis instruments. Dr Schuijers is a general practitioner treating Mr Charles. It is necessary to put the evidence in the context of the case. Mr Charles admitted to the police that he had been drinking. He said that he commenced drinking on that day after a junior football match. Starting from either 5.15 p.m or 4.45 p.m he had "a couple of pots of beer (not light)", but he was unsure of the number. He said, and Dr Schuijers confirmed, that he suffered from a condition called gastroesophageal reflux, known colloquially as heartburn. He said that at the time he provided a sample he experienced a burning sensation in the throat. This, called waterbrash, is an indication of the presence of heartburn at that time. This condition may cause acid vapours to rise from the stomach to the back of the mouth. The evidence of Dr Collins was that the presence of these vapours in the sample of breath provided for analysis could or would cause the instrument to indicate a higher blood alcohol concentration than was the fact. This was because the instrument was calibrated to convert to blood alcohol concentration an analysis **[4]** of deep lung air only.

It is well established by authority that the offence created by section 49(1)(f) is established by proof only of the matters there set out including the instrument reading. The accuracy of the reading is no part of the informant's proofs: *Smith v Van Maanen* (1991) 14 MVR 365. To this the statute provides certain defences. One of these is contained in section 49(4):

> "(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."

It will be seen that the defendant must establish either of two situations:

> (a) the breath analysis instrument used was not on that occasion in proper working order, or
> (b) the breath analysis instrument used was not on that occasion properly operated.

There may be different ways of proving either of these matters. The question which I am asked to consider is whether the medical evidence, which I have summarised above, is relevant to either. It is possible to imagine the case where the disparity between the reading and the known actual consumption of liquor or some other objective fact indicating actual blood alcohol content of the relevant time entitles the tribunal of fact to find one or other of the two situations is present. This would be a matter of ordinary inference unless some third cause of the disparity is not excluded: *DPP v Phung* [1993] VicRp 75; [1993] 2 VR 337 at 340-1; (1993) 17 MVR 157 per Harper J. That is not the present **[5]** case. What is put here is that the possible presence of the stomach vapours in the breath sample could or would distort the reading so that it is not an accurate one. To my mind for section 49(4) to be relied upon it must appear that one or other of the two situations obtains. This may involve a consideration of the impact of the situation found to exist upon the reliability of the reading as in *Ozbinay v Crowley* (1993) 17 MVR 176, but mere unreliability without relating it to either situation is not sufficient to satisfy the sub-section.

In the present case the medical evidence cannot demonstrate that the machine was not in proper working order. Indeed, the burden of Dr Collins' evidence assumed that the machine was in proper working order. Nor does it bear upon its proper operation. Again Dr Collins' evidence was directed to the fact of an erroneous blood alcohol content may have been indicated notwithstanding the most meticulous operation of the instrument. The first ground therefore fails. The appeal will be dismissed with costs including reserved costs.

APPEARANCES: For the appellant Charles: Mr B Lindner, counsel. Cleary Ross, solicitors. For the respondent Koetsier: Mr OP Holdenson, counsel. Office of Public Prosecutions.