CITATION: *Sims v Galletti* [2006] NTMC 003

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| PARTIES: | ERICA ANN SIMS<br><br>v<br><br>MICHAEL JOHN GALLETTI |
| TITLE OF COURT: | Court of Summary Jurisdiction |
| JURISDICTION: | Justices Act (NT); Traffic Act (NT) |
| FILE NO(s): | 20510862 |
| DELIVERED ON: | 16 January 2006 |
| DELIVERED AT: | Darwin |
| HEARING DATE(s): | 2, 12 December 2005 |
| JUDGMENT OF: | Jenny Blokland SM |

**CATCHWORDS:**

Traffic offences – Fail or refuse to supply sufficient breath for analysis – Whether Offence known to law – Whether direction proven.

*Traffic Act (NT)* ss20, 23, 29*; Road Safety Act* (VIC) s55(5)

*Shirley June McDermott* (1995) 78 A Crim R 116; *Chew* (1992) 173 CLR 626

Brown, "Traffic Offences and Accidents" 3rd ed Butterworths, 1996

**REPRESENTATION:**

*Counsel:*

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| Complainant: | Ms Baohm |
| Defendant: | Mr Gillies |

*Solicitors:*

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| Complainant: | ODPP (Summary Prosecutions) |
| Defendant: | David Storey |

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| Judgment category classification: | B |
| Judgment ID number: | [2006] NTMC 003 |
| Number of paragraphs: | 29 |

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20510862

BETWEEN:

**ERICA ANN SIMS**
Complainant

AND:

**MICHAEL JOHN GALLETTI**
Defendant

REASONS FOR DECISION

(Delivered 16 January 2006)

JENNY BLOKLAND SM:

**Introduction**

1. The Defendant is charged and has pleaded not guilty to one count against section 20(1) of the *Traffic Act (NT),* namely that he "failed to provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for the completion of the breath analysis". This matter has raised a number of issues concerning the nature of the offence charged and its elements; whether it is an offence drafted so vaguely that it is to be regarded as an offence not known to law; the clarity of directions given and the effect of certain other matters of disputed evidence.

**Rulings on the Certificates**

2. At the commencement of the hearing objection was taken to the Form 2, *"Certificate on refusal or failure to submit to or provide a sample of breath*

*sufficient for completion of breath analysis."* That certificate, at paragraph 11 states, "the Defendant put the mouth piece up to his mouth and made not (sic) attempt to blow into the mouth piece". Over objection I ruled that the certificate was admissible. The argument on behalf of the Defendant was that this certificate was not admissible because the Defendant was charged with "fail" to provide a sufficient sample in accordance with the directions of the person carrying out the breath analysis pursuant to s20(1)(b) rather than a failure to submit to the breath analysis or refuse to submit or provide. Mr Gillies argued that s20 of the Traffic Act creates four offences, namely to refuse to submit; fail to submit; refuse to provide a sample of breath sufficient for completion of the breath analysis and fail to provide a sample of breath sufficient for the completion of the breath analysis. As I understand the argument put, the evidence of the certificate was said to be irrelevant as it goes to proving a refusal rather than a failure, alternatively, the evidence of the certificate is relevant only to a charge of refuse or fail to submit, not to the provision of an insufficient sample.

3. Although I thought there was some attraction in this argument, I rejected the construction of s20 *Traffic Act* as submitted on behalf of the Defendant. The weight of authority including authority that I am bound by is against such a construction. Although the primary consideration in the case of *Shirley June McDermott* (1995) 78 A Crim R 116 was the defence under s20(2) of the *Traffic Act,* His Honour Justice Kearney made some observations about the structure of offences in s20. His Honour stated *"I add that it is difficult to draw a practical distinction between "refuse" and "fail" in s20(1); and that although s20(1) distinguishes the offence of refusing or failing to submit to a breath analysis from the offence of refusing or failing to provide a sufficient sample of breath for breath analysis, it is questionable whether in reality these are separate and distinct offences".* (at 120-121)

4. In the ruling at the hearing I also referred to the discussion by Mr Douglas Brown in *Traffic Offences and Accidents,* (Butterworths, 1996, 3rd Edition),

where on the basis of his review of a number of the Traffic Acts in the various jurisdictions he states: "*the terms "refusing" and "failing" have the same meaning in both offences. In general, the term "refuse or fail" in this context in used conjunctively and not disjunctively"*. In the discussion concerning the requirement to undergo a preliminary breath test Mr Brown says the same principals apply (at 149), namely:

> "There is no authority for the proposition that two separate offences of first, "refusing" and second "failing" are created. There maybe an express refusal on the part of the driver. Alternatively his refusal may be implied from his conduct. His conduct may be such that refusal may be inferred without difficulty. Again his conduct may be such that he makes a half hearted attempt to provide a sample of breath so that it can be inferred that he is either refusing or failing to provide a sample".
>
> (and at 150) "in this context the term "fails" has its ordinary meaning, namely that the driver does not do what he is required to do. The word "fails" means "does not" (*Adair v Gough* (1990) 10 MVR 558). The term "refuses" suggests the existence of a prerequisite order which the driver either expressly or impliedly does not obey. Both terms mean non compliance with a duty.
>
> The refusal or failure may relate to any of the directions which the police officer gives to the driver. The onus of proving the lawfulness of a direction is upon the prosecution (*Galic v Talbot* (1991) 30 MVR 320 (SA)). A direction not to smoke during the test is valid. There may be a breach of two or more directions constituting a single offence. In *Schield v Rees* (1990) 11 MVR 553 (QLD)) the driver was told to blow into an instrument until told to stop and was told to exhale into the instrument for as long as possible. The failure to comply with either direction was an offence. The direction must be clear and unambiguous (*Brown v Ludlow* (1988) 7 MVR 452 (WA)) in normal circumstances".

5. Notwithstanding the certificate effectively describes a "refusal", in my view the certificate is admissible as proof of the charge laid, notwithstanding the charge itself identifies "failure" and is not a charge for refusing to submit. I concluded during the hearing and adhere to that ruling that the certificate is relevant to the charge under *s 20(1)(b) Traffic Act.*

6. I was asked to rule on the admissibility of a further certificate concerning a further failure or refusal. The argument raised in relation to that certificate was that by construction of the *Traffic Act,* the Defendant was not legally obliged to undertake the second analysis. I agreed with the construction of the *Traffic Act* asserted on behalf of the Defendant to the effect that there was a power to require a person to submit to a further analysis once a breath analysis had been obtained: *(s 23(9) Traffic Act);* indeed in that situation the person themselves may request a further analysis: *(s 23(10) Traffic Act).* In the circumstances of this case, and given a failure or refusal is noted on the first certificate that I have admitted, it appears there is not an express power to require compliance with a second attempt. I took the view during the hearing that the second certificate was not admissible and I ruled accordingly.

**Evidence called by the Prosecution**

7. At the commencement of the hearing all parties in these proceedings watched a CD made from the surveillance tape of the breath analysis room at the Darwin Police Office on 7 May 2005 showing the procedure administered by police to the Defendant: (*Ex P6).*Reference will be made to that exhibit in the discussion as is relevant.

**Albert Cubillo**

8. Aboriginal Community Police Officer Albert Cubillo said during his patrol of the Casuarina area on the 7$^{th}$ May 2005 at around twenty past twelve he called into the Hibiscus shops to see if other police officers needed assistance; that the other officers present were officers Woosnam and Buganey; he said there was a discussion between the shift supervisor (Sergeant James) and the defendant, (at that time in the back of the police van), concerning whether he had consumed any beers that night; that the defendant Mr Galletti was under the influence of alcohol; that the Defendant repeated himself a few times when he was asked questions. In cross

examination ACPO Cubillo agreed he had not identified Sergeant James anywhere in his statement; he said he was *pretty sure* it was Sergeant James; he agreed that police were talking amongst themselves; he reiterated that he wasn't sure who the shift supervisor was; he said that he was not confusing this matter with another case he was involved in.

**David James Buganey**

9. Constable Buganey told the Court he received a call from police communications concerning an incident at 5 Outlook Court on the 7th of May 2005; that he received information the person of interest had left the premises driving a Toyota Prado; that he saw the Prado outside Hibiscus Shopping Centre; that Constable Woosnam, (who was driving), pulled into the Hibiscus Shopping Centre behind his vehicle; he said the Toyota Prada appeared to be having trouble negotiating corners and the brake lights kept coming on and off; Constable Woosnam activated the lights and apprehended the vehicle outside Dolly O'Reillys. He told the Court Constable Woosnam had a conversation with the driver but he did not hear it; he asked the Defendant if he had any alcoholic drinks and the Defendant replied "yes about three"; he asked him what sort of drinks and the Defendant replied "two beers and one wine"; he said he asked the Defendant how long since his last alcoholic drink and he replied "approximately twenty minutes". The Defendant was asked to submit to a road side breath test which he did and Officer Buganey said it indicated a blood alcohol concentration higher than the legally prescribed amount. Officer Buganey said Mr Galletti's speech appeared to be slurred and he had a strong smell of intoxicating liquor; that when Constable Woosnam asked him to get out of his vehicle the Defendant appeared to be unsteady on his feet; that Constable Woosnam grabbed his left arm and informed him that he was under arrest for the purposes of a breath analysis. Officer Buganey also noticed that Acting Sergeant Anthony Williams and Albert Cubillo had

arrived on police motorbikes and later he said believed Sergeant James arrived but he couldn't recall seeing him.

10. Officer Buganey said Mr Galletti, Constable Woosnam and he all walked into the breath analysis room at Darwin Watch House; he said Constable Woosnam gave "clear instructions" on how to supply a sufficient sample; he told him that "we need a long continual breath and there would be sixteen stars displayed on the screen and when the stars are all displayed that means that there is a sufficient sample"; that Constable Woosnam went through the operators logbook asking the Defendant procedural questions; he said Constable Woosnam handed Mr Galletti the breath analysis hose and that Mr Galletti appeared to put the hose up to his mouth and it appeared that he "inhaled" which resulted in a insufficient sample being displayed on the screen. Officer Buganey said Mr Galletti was informed his sample wasn't sufficient and Constable Woosnam said the machine would be prepared for another attempt; he said Mr Galletti said that he would not make another attempt unless he spoke to a Sergeant; that Sergeant Virginia Reid came and had a conversation with the Defendant; that Constable Woosnam then gave him clear instructions again with a new mouth piece and demonstrated how much air would have to be blown and exactly what was expected or what was required for a sufficient sample; he then read through the logbook details again and read out the prescribed operative; he then passed the hose to Mr Galletti and Mr Galletti put it up to his mouth and gave a short puff of air into the machine. He said it resulted in an insufficient sample. He said Constable Woosnam informed the Defendant he was under arrest for failing to supply a sufficient sample. He said he remained to fill out the record of the breath analysis.

11. Officer Buganey was asked in cross examination whether he agreed that there was nothing in his statement about Constable Woosnam giving clear directions regarding a long continual breath; Officer Buganey agreed with that proposition. He also agreed with the proposition that there was nothing

in his statement concerning Constable Woosnam talking about sixteen stars; he agreed that the stars and the long continual breath were not referred to elsewhere. Officer Buganey said that it was his standard practice to tell people they should give a "long continual breath"; he said he was an approved operator; he said that was his own practice to say those things and he had "picked that up" from Constable Woosnam. He was asked why he didn't write anything down about the long continual breath and the sixteen stars in his statement and he replied that he didn't think it was necessary as Constable Woosnam had to do a statement because he was the officer who performed the breath analysis procedure; he agreed that he had a conversation with the prosecutor after it became apparent that Constable Woosnam could not be called to give evidence; he disagreed with a suggestion that he had to "fill in the gaps"; he disagreed with the proposition that the direction concerning the long continual breath and sixteen stars was an after thought; in relation to the sixteen stars he said Mr Galletti was not asked to look at the machine; he said Mr Galletti was informed that the sixteen stars "from arrow to arrow" indicates the sufficient sample; he said that from where Mr Galletti was sitting it was hard for him to see the screen; he said Mr Galletti was asked if he would like to stand up and take the test but he refused.

12. Officer Buganey said that he did not make notes about this incident; Officer Buganey was then shown his notes and agreed that he had made some notes but he said that he did not recall making the notes. Officer Buganey said that in his notes he had written "refused to blow, got aggressive"; Officer Buganey said that part of his notes refer to the second attempt; he agreed that his notes indicated that on the first occasion the Defendant inhaled; Officer Buganey said he believed that was an insufficient sample rather than such action meaning that there would be no breath going into the machine; Officer Buganey said for anything to register on the machine the Defendant must inhale and exhale a little bit of air and in his opinion he had submitted

to a breath analysis but in Officer Buganey's observation the Defendant was appearing to inhale; he was asked to comment on Constable Woosnam's observation that the Defendant made no attempt to blow and Officer Buganey replied that it appeared like that. Officer Buganey was also cross examined at length about the apprehension of the Defendant but did not agree with the various propositions put by defence counsel to him. Officer Buganey told the Court at the time of hearing he had carried out approximately ten breath analysis procedures since he was gazetted as an operator in April of 2005; he said his own "patter" relates to the sixteen stars; he said he developed that from the College and also Constable Woosnam; he said he was not taught about the sixteen stars at the College; he qualified that saying he was taught about the sixteen stars at College but was not taught to explain that to an offender; he said that the breathalyser that has the sixteen stars is the Drager 7110; he could not recall whether the Drager has different marks such as a mark 3 or mark 4. Officer Buganey's notes were also tendered (Exhibit P3).

13. Over objection I found a prima facie case. I note that one of the submissions was that the offence of fail to supply a sufficient sample for the purposes of breath analysis was not an offence known to law for the reason that it is "incomplete". It was submitted that the offence was incomplete as the statute does not specify what sample of breath is sufficient for the completion of a breath analysis nor what the directions are that need to be given to a person who is obliged to give a sample of breath. Mr Gillies drew my attention to section 55 of the *Road Safety Act 1986 (VIC),* s55(5) that reads as follows "a person who furnishes a sample under this section must do so by exhaling continually into the instrument to the satisfaction of the person operating it". Mr Gillies' submission was that without some statutory measure of a basic kind it was impossible for people to know whether they could fulfil their obligations.

14. I acknowledged during the hearing that although s20 *Traffic Act* relating to *failure to supply a sufficient sample* is open ended and circular, and it does leave the formulation of the direction up to the operator, in my view there is enough of a structure in the statute and there was still a prima facie case of failure to supply a sufficient sample. The prosecution need only prove prima facie a failure to supply a sample of breath sufficient for the completion of the breath analysis and a failure prima facie of non compliance with the directions.

**Evidence Called on Behalf of the Defendant**

**Michael Galletti**

15. Mr Galletti told the court that earlier on the day in question (around 9.00pm), police volunteered to drive him to a friend's place; he agreed that prior to that time he had been drinking; he agreed that he had drunk two glasses of draft beer and a bottle of Lambrusco – he said that this was when police had escorted him from his home. He said the friend who he was going to stay with was not at his home and he went to the Tavern to see if he could find his friend; he gave evidence he did not drink at the Tavern; he returned to his home and found that he was locked out of his home; he said that he needed to use the toilet so that is why he drove to Hibiscus Shopping Centre. He said that because of the way he had parked he reversed out doing a 180 degree turn and he drove around a concrete verge; that as he was approaching Baroalba Street he saw police officers had activated their lights; he said he could only think of four instances where he would have used his brakes and could not really understand the evidence of his brake lights coming on and off; he said Officer Buganey administered the breath test and was told he had a significant reading and then Officer Woosnam spoke to him; Mr Galletti said Officer Woosnam said to him "I have had enough of your shit tonight. Get out of the car"; he disagreed that his speech was slurred; he disagreed he repeated himself; he said he was asked only a

minimal amount of questions; he said he didn't need to support himself when he came out of his Toyota Prado; he said Constable Woosnam did not take hold of him but "ushered him". He said that at the Darwin Police Office he was given a mouth piece and Officer Woosnam told him to blow into it until he told him to stop; he said as the mouth piece was being handed to him he inhaled and then commenced exhaling once the tube was in his mouth; he disagreed with evidence that he was inhaling with the tube in his mouth; he denied that any reference at all was made to there being sixteen stars on the screen and that when the stars are displayed there is a sufficient sample; he said there was no mention of stars whatsoever.

16. In cross examination Mr Galletti agreed with Ms Baohm that it would have been about 9 o'clock when he went to the caravan park; he was asked whether before he had consumed alcohol; he told Ms Baohm that the two drinks were around 3pm and following that he drank bottle and a half of Lambrusco; he said he waited at the caravan park for about an hour and a half; he said he walked up to the Tavern and waited there for about twenty minutes for a cab; he said that he had nothing more to drink; he agreed that he didn't have access to the house and that a glass of Lambrusco he consumed was on the table downstairs; he disagreed his driving was impaired by the time he went back to Hisbiscus Shopping Centre to use the public toilets. He was asked why when he pulled over he drove onto a grass verge; he said he realised police were behind him and wanted him to pull over; he said he couldn't stay parked in the exit area and just wanted to clear the exit area; he disagreed he was angry at being pulled over but he said he was upset from the events earlier in the day; he said it was amicable when he submitted to the roadside breath test; he disagreed that there were physical signs concerning his intoxication. He was asked about his evidence that he had previously used a breath analysis machine; he said his recollection on that occasion was that he was told "blow until I tell you to stop". He was asked why he inhaled and he said that he was anticipating he

was going to be told to blow so he took a deep breath and then exhaled; he reiterated he was told to blow until he was told to stop; he said there was nothing confusing about the instructions. He disagreed that he intended to inhale contrary to the direction he was given; he said he expired all the air in his lungs, was told the test was effectively over and was told to hand the mouth piece back to the officer; he disagreed that it was his intention to ensure the machine didn't work; he reiterated that there was no talk of stars.

17. By consent, tendered in the defence case are the instructions for the Drager ALCO test 7110 (exhibit D8).

**Summary of submissions**

18. Ms Boehm submitted that the facts could support either a charge of refusing or failing to provide in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for the completion of the breath analysis. She reiterated her submission that it was not necessary to prove particularly whether it was a *fail* or *refuse*. Ms Boehm said her interpretation was bolstered by s 20(7) of the *Traffic Act* that reads "*for the purposes of subsection (1), a person shall be deemed to have failed to submit to a breath analysis if that person by that persons actions or inactions, in any way, prevents a member of the police force from requiring that person to submit to a breath analysis*". Further, Ms Boehm reminded me that a failure can be through an action or inaction or a failure can be as a result of an act or omission. She reminded me of the references that have been discussed previously concerning the conclusions in Brown on *Traffic Offences* where the learned author effectively states that failing or refusing are one and the same offence.

19. In relation to the argument that the offence is not one known at law Ms Boehm submitted that a common sense approach must be taken to the wording of the section and that a direction such as "blow until told to stop" is a clear direction and was understood by this Defendant, but the problem

was that he inhaled. Ms Boehm's submission was that the direction was sufficiently certain; the direction did not need to be particularised but there was also evidence from Officer Buganey concerning the sixteen stars in reference to the operation of the Drager. In terms of an anticipated defence submission that the video evidence showed police officers at the end of the procedure huddled around the breath analysis unit that may raise a doubt as to whether the machine was operating properly, Ms Boehm said that she relied on the certificate of accuracy before the Court and on s 29(2) *Traffic Act* that reads: "*a Court shall not receive evidence that a prescribed breath analysis instrument when it is in good working order and used in accordance with the regulations relating to its use, does not give a true and accurate assessment of the concentration of alcohol in a persons blood*". Ms Boehm submitted that the evidence concerning all the officers around the machine was capable of a variety of interpretations. Ms Boehm's submission was that there are wide powers to compel a person to submit to a breath test under s 23(2) *Traffic Act.* Although there may have been inconsistencies in some aspects of the evidence it is clear there was a positive reading through the road side test, the Defendant was required to submit to a breath analysis and that he failed to comply with the direction given.

20. On behalf of the Defendant it was submitted again that s 20(1) of the *Traffic Act* creates four offences namely "refuse to submit"; "fail to submit"; "refuse to provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for completion of the breath analysis" and "fail to provide in accordance with the directions with the person carrying out the breath analysis, a sample of breath sufficient for the completion of , the breath analysis". It was submitted again that the "fail" to provide… in accordance with directions… a sufficient sample of breath… was not an offence known to the law. It was submitted that in this instance the Court is not dealing with a charge of failing or refusing to submit to a breath analysis but is dealing with a failure to provide sufficient

sample. It was submitted that on that basis s 20(7) *Traffic Act* could not be called in aide of the prosecution's interpretation as s 20(7) *Traffic Act* relates only to a failure to "submit" under s 20(1)(a).

21. It was submitted that during the course of the hearing it had been conceded that police had the power to require a breath analysis under s 23(2) *Traffic Act* and it was submitted that evidence in relation to intoxication was therefore irrelevant. It was submitted that the prosecution must prove that the Defendant had failed to provide a sample of breath and that the failure had to relate to the directions of the person operating the breath analysis unit. It was submitted that there should be a strict construction as the offence could in theory be committed with all good compliance and good intentions. It was submitted it was impossible to know what a sufficient sample of breath was and it was impossible to know when the breath analysis was complete. It was submitted by virtue of observation of the video tape that was played in Court that it gave the impression that the Defendant was blowing. It was suggested that it was apparent the Defendant was blowing for six seconds; it was submitted I could not exclude beyond reasonable doubt that the machine was not operating properly; it was also submitted in this regard that the body language of the four police at the end of the procedure milling around the machine was not normal.

22. It was also submitted that the *Traffic Act* is silent on the definition "failure". For example, it could have defined "failure" by reference to asterisk on the machine. In relation to the evidence from Officer Buganey about the asterisk, it was submitted there was no statutory endorsement of what the machine indicates is insufficient.

23. In relation to Exhibit D8 (instructions for the Drager 7110), reference was made to page 14 "*minimum volume not achieved*" indicating that delivery of the breath sample has to be repeated; the instructions note: *a total of two unsuccessful attempts are admitted for one measuring cycle*. My attention

was also drawn to "*blowing time to short*" that reads "*for breath samples with a too small exhalation volume as well as a too short exhalation time the fault message concerning the breath volume is shown".* After a third insufficient attempt the measuring cycle is stopped with the remark "*test aborted*". It was submitted there was no evidence from Officer Buganey that there was a "*test aborted*" remark. It was submitted that from the *machines point of view* unless the second and third attempts within the same cycle are made, there would not be an insufficient sample; it was submitted that there may have been an indication of insufficiency before the measuring cycle was complete in terms of the instructions for use. It was submitted that the prosecution have to negative beyond reasonable doubt that these instructions do not apply in this case.

24. In relation to the evidence that there was a direction involving looking at sixteen asterisks, it was submitted that on the video it doesn't look as though the Defendant is watching to see if the stars come up; it was submitted that it was Constable Woosnam who gave the directions and that Officer Buganey was transporting his own experience of what he himself says on these occasions; it was submitted that the evidence was that officers are not taught to tell motorists submitting to a breath test about these sixteen stars. It was submitted that if a person does what they are told but the machine does not provide a reading then the person should be found not guilty. It was submitted that there is an assumption in the legislation that the direction would be correct, however here there is conflict on what the direction was and if it was accepted that the direction was "a long continual breath", there was compliance as it is clear from the CD made from the surveillance tape there was a six second blow. It is drawn to my attention in the CD that Constable Woosnam does not demonstrate how to blow the first time he instructs the Defendant but shows him the second time. It is also submitted that the Certificate Evidence indicates that the Defendant "refused" because the certificate states "not attempt". It is submitted

however that he is not charged with “refuse” even though there is some evidence that supports a refusal. It was also submitted that in relation to s 29(2) of the *Traffic Act* concerning the prohibition on the Court receiving evidence that a prescribed breath analysis when it is in good working order does not give a true and correct assessment of the concentration of alcohol in a persons blood does not apply to this charge as s 29(2) *Traffic Act* only relates to an assessment of concentration of alcohol in a person’s blood, that is, to offences committed against s19 and not those committed against s 20 *Traffic Act.*

**Discussion of the Submissions, Evidence and Conclusions**

25. I have revisited my ruling on the admissibility of the certificate (Exhibit P3) and adhere to that ruling. Even though I have not re-checked the various interstate legislative regimes referred to by the learned author Mr Brown in “Traffic Offences and Accidents”, my memory of these parallel interstate provisions is that they are not so diverse that I would necessarily find a different conclusion. Further as I mentioned in my ruling on admissibility, the case of *Shirley June McDermott* and the discussion my His Honour Justice Kearney is obviously binding on me. I confirm that I have concluded that nothing turns on the choice of “refuse” or “fail” in relation to this offence.

26. On behalf of the Defendant it has been suggested that the offence in question under s21(b) of the *Traffic Act* is so vaguely drafted as to be considered not an offence known to the law. Although I have reconsidered this matter since ruling on the prima facie case, despite the fact that some cases dealt with under the section illustrate circularity and ambiguity in the section, it is not to the level that I would confidently rule that it was an offence not known to law. In my view the rights and obligations of citizens can be protected in this instance by proper use of the principle of legality manifest in the principle that statutes imposing criminal liability should be

strictly construed - ambiguity or uncertainty should be resolved in favour of the Defendant: (for example as expressed in *Chew* (1992) 173 CLR 626).

27. Having said that, the case must still be proven beyond reasonable doubt. The prosecution relies correctly on the Form 2 Certificate as *prima facie evidence*, however that is not the end of the evidence and there are a number of other considerations. There have been issues in this case that raise doubt on precisely what occurred at different points. I should say that I accept completely and it was not in any real contention that police had a valid reason to require the Defendant to submit to a breath analysis procedure. It would appear from the CD played before the Court that the Defendant did indeed *submit* to the breath analysis and according to the counter on the CD, had the tube in his mouth for six seconds. That the prosecution must prove that the directions were given under *s 20(1)(b)*, is necessarily implicit in the statutory regime. Not only is that a fair reading of the section, but given the "Form 2" at points 10 says "I then gave the subject directions as to how the subject was to provide a sample of breath sufficient for the performance of the breath analysis" that indicates the directions given would be sufficient for the performance of the breath analysis. Officer Buganey said that Constable Woosnam told the Defendant there needed to be a long continual breath and there would be sixteen stars displayed on the screen. Officer Buganey did not put this direction in his statement but he said it was generally his own practice and Officer Woosnam's practice to talk about the sixteen stars; he also said the direction concerning the stars was not something he had been taught to say. From the video tape I agree with the defence submission that it does not look like the Defendant is looking at the machine; the Defendant says there was nothing said about the stars. On the whole of the evidence about the circumstances of the procedure, I find myself having some doubt as to precisely what direction was given by Officer Woosnam; I did not have the benefit of Officer Woosnam's evidence; there is no documentation by way of notes at the time as to what

actually was said; the defendant was not seated in a way consistent with observing the machine to watch for the asterisks, nor does he seem to be looking at the machine.

28. In terms of the response of the Defendant to the directions, the observations of the two officers appear to vary. The certificate signed by Constable Woosnam states “the Defendant put the mouth piece up to his mouth and made not attempt (sic) to blow into the mouth piece”, whereas Officer Buganey’s evidence is that the Defendant appeared to “inhale”. I agree that it is possible that the two officers had a different yet honest interpretation of the event. As mentioned, the Defendant on the CD appears to have the instrument in his mouth for six seconds. Although I wouldn’t venture to make a positive finding that he was definitely blowing, the CD played in court does not assist the prosecution case and does not resolve an apparent inconsistency in the evidence.

29. Before the Court is a certificate of accuracy of a breath analysis device (Exhibit P4). I have been asked to infer that there may have been something wrong with the breath analysis machine on the basis that the officers came in and out of the breath analysis room and at the end of the procedure four officers were crouched around the unit. I do not think it is safe to draw such an inference. Nor have I relied a great deal on what the Defendant has said about his sobriety at the time, the Court knows from his evidence that he had been drinking earlier on the day in question and in my view all the indicators were that he exhibited some of the indicia of intoxication but I would be unable to say to what degree. In terms of whether the Drager was operated in accordance with the manual (Exhibit D8), I note that the points raised from the manual and suggested to the Court were not put to Officer Buganey who is a qualified operator. I am not prepared to make any adverse findings on that point. Overall however, those factors tend to raise a doubt on whether everything was occurring in line with expectations of standard practice. Having considered all the issues raised, I find myself having a

doubt on what the proper directions are to ensure a sufficient sample is achieved and what directions were in fact given in this case. It is necessarily implicit in the charge that these matters be proven. It is therefore appropriate in this case that the charge be dismissed.

Dated this 16 day of January 2006.

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**JENNY BLOKLAND**
STIPENDIARY MAGISTRATE