CITATION: *Brennan v Benjamin* [2007] NTMC 005

PARTIES:	MICHAEL DAVID BRENNAN
	v
	DEBBIE BENJAMIN
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Criminal
FILE NO(s):	20609482
DELIVERED ON:	23 January 2007
DELIVERED AT:	Darwin
HEARING DATE(s):	28 November 2006, 6 December 2006
JUDGMENT OF:	Dr J A Lowndes

CATCHWORDS:

Traffic Act 1987 (NT) – Requirement to Submit to Breath Test and Breath Analysis – Random Breath Testing – Admissibility of Certificate – Good Working Order of Breath Analysis Instrument – Discretion to Exclude Illegally Obtained Evidence – *Traffic Act* s23, s27, s28 – *Traffic Regulations* Reg 113

Director of Public Prosecutions (VIC) v Blyth (1992) 16 MVR 159 followed

Bunning v Cross (1978) 141 CLR 54 applied

Stiles v Lamont (1992) 15 MVR 557 applied

Henning v Lynch [1974] 2 NSWLR 254 considered

Thomson v Andrews (1992) 16 MVR 421 considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr T Smith
Defendant:	Ms J Truman

Solicitors:

Plaintiff:	Department of Public Prosecutions
Defendant:	Tooheys Chambers

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 005
Number of paragraphs:	91

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

No. 20609482

BETWEEN:

MICHAEL DAVID BRENNAN
Plaintiff

AND:

DEBBIE BENJAMIN
Defendant

RULING

(Delivered 23 January 2007)

Dr J A Lowndes SM:

1. Ms Truman, who appeared on behalf of the defendant, challenged the admissibility of a certificate on performance of breath analysis sought to be tendered by the prosecution. She opposed the tender on three grounds. The first was that the police officers who apprehended the defendant had no proper basis for requiring the defendant to submit to a roadside breath test. The second was that the police officer who conducted the breath test had no basis for requiring the defendant to undergo a breath analysis at the police station. It was submitted that for those reasons the certificate should not be admitted into evidence, in the exercise of the court's discretion to exclude illegally or improperly obtained evidence. The third ground was that the certificate was inadmissible pursuant to s 27 of the *Traffic Act* because the statutory prerequisites for the tender of the certificate had not been satisfied.

The evidence relating to the issues raised by the defence and findings of fact

2. The prosecution called only one witness, constable Natalie Watts. The constable gave evidence that on 24th March 2006 she was on patrol with Constable Lebass in the Palmerston area. Constable Watts heard the screeching of tyres and observed a white motor vehicle speeding out of a car park. The police patrol vehicle followed that vehicle and apprehended the driver of that vehicle, the defendant. Constable Lebass spoke to the defendant regarding the manner of her driving. Constable Watts told the court that she performed a roadside breath test which indicated a positive result. She stated that the defendant was then conveyed to Palmerston Police Station for the purposes of undergoing a breath analysis. Constable Watts said that she explained to the driver where they were going and what would happen when they got back to the station. At the station the defendant took part in a breath analysis which produced a positive result. The defendant was informed that she would be summonsed in relation to the matter.

3. During cross examination Constable Watts was asked about the power she was purporting to exercise in requiring the defendant to submit to a breath test. She replied that she was exercising a power under the *Traffic Act*, but she was unable to specify the provision pursuant to which the power was exercised. However, she said that the breath test was carried out on the basis of the observations made by herself and Constable Lebass as to the manner in which the defendant was driving her vehicle. Constable Watts proceeded to give evidence that the road side test produced a positive result. She denied conducting a breath test on the defendant three times. However, the evidence indicates that as the defendant was having difficulty blowing into the breath test instrument the defendant had to be instructed about three times as to the correct procedure before producing a result. According to constable Watts the end result was positive, that is to say, the defendant was over the limit. Constable Watts rejected the suggestion that she had told the defendant that as she was not blowing correctly into the instrument a result

could not be obtained and that she would have to come back to the police station.

4. I am satisfied beyond reasonable doubt that constable Watts performed a preliminary breath test on the defendant. Although there was no evidence of any specific conversation that took place between the constable and the defendant during which the constable required the defendant to submit to a breath test, it can be reasonably inferred from the constable's evidence that she required the defendant to submit to a breath test. It is a reasonable inference open on the evidence that the defendant had undergone the preliminary test as a consequence of a requirement to submit to a breath test.[1] It is clear from the tenor of the cross-examination that the defendant did not dispute undertaking a breath test. Furthermore, part of the cross-examination was predicated upon the constable having asked the defendant to undertake a breath test. There was a lack of relevant cross-examination tending to cast doubt upon the officer having required the defendant to submit to a breath test. Finally, there was no evidence tending to rebut the inference that the officer had required the defendant to submit to a preliminary breath test.

5. The evidence clearly establishes that in performing the preliminary test constable Watts was relying on a power under the *Traffic Act*. However, the constable was unable, in her evidence, to point to the specific power. It is also clear on the evidence that what brought the defendant to the attention of the police officers was her manner of driving and it was on that basis that the officers decided to conduct a preliminary breath test.

6. I am satisfied beyond reasonable doubt that, notwithstanding that the defendant had difficulty in blowing into the breath testing instrument at

[1] As to the propriety of drawing inferences of this type see Director of Public Prosecutions (Vic) v Blyth (1992) 16 MVR 159.

the road side test and that it became necessary for constable Watts to give her instructions on three occasions as how to blow correctly into the apparatus, only one preliminary breath test was performed. In that regard I accept the evidence given by constable Watts. I reject the hypothesis advanced, on behalf of the defendant, that the constable had told the defendant that as she was not blowing correctly into the apparatus she would have to come back to the police station. According to that hypothesis the preliminary breath test did not yield a result. For the reasons that follow I find that the test did yield a result.

7. I am satisfied beyond reasonable doubt that the preliminary test produced what constable Watts described as a "positive result". During cross-examination the constable seemed to be saying that the test indicated the defendant was "over the limit" and that amounted to a "positive reading".

8. Finally, I am satisfied beyond reasonable doubt that following the preliminary breath test the defendant was conveyed to the police station for the purposes of undergoing a breath analysis. I am further satisfied to the requisite standard that constable Watts explained to the defendant where she was being taken and what was going to occur at the station. I am similarly satisfied that the defendant underwent a breath analysis at the police station.

The absence of grounds for requiring the defendant to submit to a breath test

9. Section 23(1) of the *Traffic Act* sets out the circumstances under which a police officer may require the driver of a motor vehicle to undergo a roadside breath test or breath analysis. It was clear that none of those conditions applied in the present case, as the evidence showed that the police officers involved purported to exercise their power to conduct a breath test "because of the manner in which the defendant was driving out of the car park".

10. Section 23(2) of the Act provides that notwithstanding subsection (1) a member of the police force may require a person who is driving a motor vehicle on a public street or in a public place to undergo a breath test or breath analysis, or both, and for the purpose of enabling a member to make such a request that member may direct that person, by signal or otherwise, to stop the vehicle that person is driving. Subsection (4) provides that such requirement or direction may be made whether or not there are grounds for suspecting that the person has consumed intoxicating liquor.

11. Ms Truman submitted that the breath test had been conducted unlawfully for a combination of reasons. It was submitted that the power to conduct a breath test pursuant to s 23(2) and (4) of the Act did not extend to randomly testing the driver of a motor vehicle under the circumstances that pertained here, that is, the occupants of a moving police vehicle pulling a driver over and requiring him or her to submit to a breath test. It was submitted that the power to randomly test drivers could only be exercised by establishing a random breath testing station whereby members of the police force would, at random, signal drivers to stop and enter the station for the purpose of undergoing a breath test. Furthermore, it was submitted that the police officers involved were not consciously exercising the random breath testing power conferred upon them by s 23(2) and (4), and were purporting to exercise a fictional power predicated upon the manner in which the defendant's vehicle was being driven. According to that submission, it was necessary for the police officers to specify the power that they were exercising in order to validate the breath test, and the fact that they had failed to identify the specific statutory power they were purporting to exercise, as well as purporting to exercise a power that had no statutory sanction, rendered the breath test invalid, and likewise the subsequent breath

analysis.[2]

12. In my opinion the submission that a breath test as contemplated by s 23(2) and (4) can only be conducted in a random breath testing scenario cannot be sustained. The language used in subsection (2) is clear and unambiguous. The provision empowers members of the police force to require a motorist to undergo a breath test or breath analysis, and in order to make such a request they are empowered to direct, by signal or other means, the motorist to stop the vehicle he or she is driving. The power is expressed in the broadest of terms and no attempt is made to circumscribe the circumstances under which the power to randomly breath test motorists is to be exercised. The wording of the section is wide enough to sanction a breath test conducted at a random breath testing station, as well as a breath test conducted at random occasioned by members of a moving police vehicle directing a motorist to pull over and stop his or her vehicle. Apart from the breadth of the language used in the subsection, the phrase " by signal or otherwise" provides an important textual clue as to how the power ought to be construed. The phrase not only contemplates a direction effected by a signal given by a member, manning a random breath testing station, but also a direction given by an alternative means such as the activation of a police siren on a moving police vehicle.

13. It is worth comparing s 23(2) of the present Act with s 8D of the *Traffic Act*, as in force prior to 1987. The latter section read as follows:

> (1) A member of the Police Force may require a person to submit to a breath test or breath analysis if he has reasonable cause to suspect that –
>
> (a) the person has committed an offence against section 8 or an offence of culpable driving;

[2] See the following submission which appears on page 1 of Ms Truman's written submissions:
" …there must be evidence that the person was required in accordance with a provision of s 23 of the Act, in order for the court to be able to determine whether the requirement was lawful. If it is not a requirement made in accordance with the provisions of the particular section relied upon, then it is unlawful and should not be admitted into evidence."

(b) the person was the driver of a motor vehicle at the time of the occurrence of an accident on a public street or public place in which the motor vehicle was involved;

(c) the person was in an accident upon a public street or public place owing to the presence of a motor vehicle and that person has, or had at the time of the accident, alcohol in his blood.

(1A) A member of the Police Force may require a person to submit to a breath test or breath analysis if –

(a) he calls on the person to stop a motor vehicle that is travelling –

(i) on the carriageway on which a breath testing station is set up; and

(ii) in the direction in which the vehicle that is parked at the breath testing station is facing;

(b) the person stops such a motor vehicle; or

(c) it reasonably appears to him that the person may have taken action to avoid being called on to stop such a motor vehicle,

at or near the breath testing station.

14. It will be readily seen that former s 8D established a random breath testing regime which utilised breath testing stations as the sole means for carrying out breath tests on motorists. The section did not permit random breath testing by any other means, for example roving breath testing patrols. However, present s 23(2) makes no reference at all to breath testing stations and leaves the mechanism for the conduct of random breath tests at large. The linguistic differences between the previous s 8D and the current s 23(2) is significant, for it indicates that had Parliament intended to confine the conduct of breath tests, as permitted by s 23(2), to tests conducted through the use of random breath testing stations, then it would have done so by using language comparable to that used in the previous s 8D.

15. As a result of her researches, Ms Truman unearthed a body of extrinsic material, consisting principally of parliamentary debates, which, she submitted, could be considered by the court with a view to determining the

purpose and scope of s 23(2). She submitted that the extrinsic material supported her construction of the section, that is to say, that random breath testing could only be carried out by utilising a random breath testing station.

16. According to s 62B of the *Interpretation Act,* it is permissible for a court to have regard to extrinsic material to construe a particular provision of an Act to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act. However, extrinsic material must not be used to alter the construction that the court would have placed upon the provision under consideration, without the aid of that material.

17. Section 62B also permits a court to have regard to extrinsic material to determine the meaning of the provision when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text of the provision, taking into account its context and the purpose or object underlying the Act, leads to a result that is manifestly absurd or is unreasonable.

18. It is important to bear in mind that s 62B, like its counterparts in other jurisdictions, does not replace common law principles governing the admissibility of extrinsic materials, and in some respects the common law has a wider application than s 62B.[3]

19. In that regard, it will be noted that, unlike s 15AB of the *Acts Interpretation Act* 1901, s 62B of the *Interpretation Act* (NT) does not permit consideration of parliamentary debates in interpreting a statutory provision. However, the common law as applicable in the Northern Territory would appear to permit recourse to such material: *R v Liquor Commr of Northern Territory; Ex parte Djana* (1984) 31 NTR 25 at 32-43; *Taylor v Territory Insurance Office* (1991) 77 NTR 13 at 15; *Maynard v O'Brien* (1991) 78 NTR 16 at 19-21;

[3] Pearce and Geddes *Statutory Interpretation in Australia* (Butterworths , Australia 2001) p 61, [3.12].

Salmon v Chute (1994) 94 NTR 1 at 20 – 1; *KP Welding Construction Pty Ltd v Herbert* (1995) 102 NTR 20 at 41.[4]

20. In my opinion s 23(2) of the *Traffic Act* is neither ambiguous nor obscure. Furthermore, taking account into its context and underlying purpose or object, the ordinary meaning of the provision does not produce a result that is manifestly absurd or unreasonable. Therefore, it is not permissible to have regard to the extrinsic material which Ms Truman provided to the court.

21. Furthermore, to the extent that the extrinsic material suggests an alternative meaning – the meaning contended for by Ms Truman - to the literal meaning of s 23(2), that material cannot be used to alter that literal meaning. In other words, the broad construction of s 23(2) arrived at by the court should not be departed from and should remain.

22. However, even if the preconditions in s 62B had been met, it is doubtful whether the extrinsic material would have been sufficient to establish the construction of s 23(2) contended for by Ms Truman. It is conceded that the material makes reference to random breath testing stations and to the need to amend the legislation to remove technical defences relating to the location of such stations. But in my opinion, the content of the extrinsic material does not conclusively exclude the application of s 23(2) to other random breath testing scenarios, such as roving breath testing patrols.

23. Therefore, the conclusion I have reached is that s 23(2) permits members of the police force to require a motorist to submit to a breath test under circumstances other than through the establishment and operation of a random breath testing station. The means by which the defendant was required to submit to a breath test was entirely lawful.

24. However, that is not the end of the matter. Ms Truman submitted that even if s 23(2) sanctioned a random breath test of the type conducted in the present

[4] Pearce and Geddes, n 3, p 55, [3.5].

case, then the power to require the defendant to submit to a breath test had been unlawfully exercised because the requirement was not made in the exercise of the power conferred by s 23(2) of the Act. The evidence was to the effect that police officers exercised their power to conduct a breath test "because of the manner in which the defendant was driving out of the car-park". There is nothing in s 23 that permits a breath test to be conducted on such a basis.

25. In reply to the defence submission, it should be noted that it is only s 23(1) that requires evidence as to the state of mind of a member of the police force as a prerequisite to the exercise of the power contained therein. There needs to be evidence as to a reasonable suspicion on the part of the member as to the existence of one of the three states of affairs enumerated in the section. Section 23(2) creates an exception to subsection (1), and does not require any evidence as to the state of mind of a member as a prerequisite to the exercise of the power conferred by the provision. That is reinforced by the provisions of subsection (4). Absent s 23(2) and (4), it would have been necessary for the police officers in the present case to give evidence as to their reasonable suspicion as to one of the prescribed states of affairs, as set out in s 23(1), in order to validate their exercise of the power to require the defendant to submit to a breath test. Alternatively, if subsection (2) had required a particular state of mind on the part of the member of the police force as a precondition for the exercise of the power contained therein, then it would have been necessary for the officers to give evidence as to their state of mind at the material time. The nature of that evidence would have depended upon whether they were requiring the defendant to submit to a breath test under s23(1) or under 23(2). In my view, it is of no moment that the police officers failed to give evidence that they were exercising the power conferred by s23(2) because the lawful exercise of that power does not require evidence of any precondition having been met. It is equally immaterial that the police officers were purporting to exercise the power

based on their observations of poor driving on the part of the defendant, because those observations are mere surplusage in the context of the power conferred by s 23(2). The fact that the police officers were unable to convey to the court the precise source of the power they were purporting to exercise when they required the defendant to submit to a breath test, and proffered an irrelevant justification for requiring the defendant to submit to a breath test, does not, in my view, render the breath test unlawful. All that matters is that s 23(2) empowers members of the police force to conduct a random breath test without justification, and objectively viewed the police officers were exercising that power when they required the defendant to submit to the breath test.

26. It is worth adding that nothing in s 23 requires a member of the police force to communicate to a motorist the reason for requiring him or her to submit to a breath test; nor is there any requirement that the member inform a motorist of the particular provision pursuant to which that member is purporting to exercise the power to conduct a breath test. If it were otherwise, then there might be some substance to the defence submission. However, in the absence of any such requirements, the actions of the police officers in requiring the defendant to submit to a breath test amounted to a lawful exercise of a statutory power.

27. The defence submission that the certificate on performance of breath analysis should not be admitted into evidence on account of an unlawful exercise of the power to require a motorist to submit to a breath test cannot be sustained.

28. However, if for any reason I have erred in concluding that the police officers acted lawfully in requiring the defendant to submit to a breath test and should have found that the officers had acted unlawfully, then I would not have considered any such illegality to warrant the exclusion of the

certificate, in the exercise of the court's discretion to exclude illegally or improperly obtained evidence.

29. The factors or considerations governing the discretion were enunciated in *Bunning v Cross* (1978) 141 CLR 54, which was concerned with the exercise of the discretion in relation to evidence of the result of a breathalyser test.

30. Applying the relevant considerations to the instant case, I would not have considered that the conduct of the police officers in requiring the defendant to submit to a breath test under the circumstances they described evinced "a deliberate or reckless disregard of the law".[5] I would have found that the police officers were acting under a mistaken belief that their observations of poor driving on the part of the defendant entitled them to require the defendant to submit to breath test, being at the time unaware that they were able to exercise the broad random breath testing power conferred by s 23(2) of the *Traffic Act*. So, if any illegality arose out of the actions of the police officers, then it consisted of failing to consciously direct their minds to the wide power available to them by virtue of s 23(2), a power that they could have exercised without having to satisfy any justifying condition. It would not have been a case of police officers acting in a way for which there was no legal basis; nor a case of deliberate cutting of corners to facilitate the police task.[6] The mischief would have been confined to failing to advert to, and exercise, a power they were legally entitled to exercise with ease. To my mind, any illegal conduct on the part of the police officers would have been characterised as technical rather than substantive, and would have been of a relatively minor nature. Accordingly, the nature of the illegality would not have favoured exclusion of the certificate.

31. Secondly, I would have found that any illegality attaching to the actions of the police officers would not have affected the cogency of the evidence so

[5] *Bunning v Cross* (1978) 141 CLR 54 at 78.
[6] This consideration is related to the ease with which police officers could have acted lawfully.

obtained, that is the evidence of the result of the breath test and subsequent breath analysis. Again, that would have been a factor favouring admission of the certificate.

32. Thirdly, drink driving offences are treated as relatively serious offences because of the general impact they have on the community.[7] The creation of such offences serves the social purpose of reducing road accidents.[8] The relative seriousness of the offence charged would have favoured admission of the certificate.

33. In considering that discretion it would have been clear that I had formed the opinion that compliance with s 23(2) is not mandatory in the sense that any failure to comply with the provision renders the breath analysis evidentially worthless.

34. I would add that if I have erred in construing the power conferred by s 23(2) of the Act, and should have interpreted the provision in such a way as to confine the power to breath test motorists to a random breath testing scenario, I would not have considered that the actions of the police officers were such as to warrant exclusion of the certificate. Again, I would have found that the police officers were acting under a mistaken belief that they were able to require the defendant to submit to a breath test by reason of their observations of the manner in which the defendant was driving her motor vehicle. Furthermore, I would have found that the unlawful conduct of the police officers would not have affected the cogency of the evidence. Finally, the relative seriousness of the offence would have favoured the admission of the certificate into evidence.

35. Again in exercising that discretion, it would be clear that I had concluded that compliance with the provisions of the subsection was not mandatory.

---

[7] See Ligertwood *Australian Evidence* (3rd edition Butterworths, Sydney 1998) p 370 [5.125]:
" … the nature of the offence charged is a significant factor, and driving under the influence of alcohol [is] not regarded as a trivial offence."

[8] *Bunning v Cross* (1978) 141 CLR 54 at 80.

36. Although the point was not specifically taken up by Ms Truman, s 23(2) seems to require evidence that a person was required to submit to a breath test as a precondition for the conduct of such a test. As stated above,[9] I am satisfied that the defendant was required by constable Watts to submit to a breath test.

37. However, if I have erred in finding that the requirements of s 23(2) had been satisfied by the evidence, it would certainly be the case that the evidence did not show that constable Watts did not require the defendant to submit to a breath test: see *Stiles v Lamont* (1992) 15 MVR 557 which dealt with the requirement that a police officer form the opinion that a driver was over the prescribed concentration of alcohol as a precondition for requiring that driver to undergo a breath analysis. In that case the Court held that unless the defendant established that the requisite opinion had not been formed by the police officer concerned the validity of the process could not be challenged. Accordingly, following the approach taken in *Stiles v Lamont* (supra) any failure on the part of prosecution to prove that constable Watts had required the defendant to submit to a breath test would not have impugned the process in such a way as to lay the foundation for the exclusion of the certificate on performance of a breath analysis.

38. In the event that the approach taken in *Stiles v Lamont* (supra) does not represent the law under the *Traffic Act* (NT), then I would not have considered that any non-compliance with the provisions of s 23(2) would have been such as to lead me to exclude the certificate in the exercise of the court's discretion to exclude illegally or improperly obtained evidence. According to the evidence, I would not have characterised the non-compliance as evincing a deliberate disregard for the law. I would have treated it as an oversight. I could not see how the cogency of the evidence would have been affected by the non-compliance. Furthermore, the relative

[9] See above, p 3.

seriousness of the offence would have favoured the admission of the certificate into evidence.

39. In exercising that discretion, it would be apparent that I would not have considered compliance with the provisions of s 23(2) to be a necessary element or precondition for proof of the offence with which the defendant was charged, such that non-compliance would inevitably lead to an acquittal.

The absence of grounds for requiring the defendant to undergo a breath analysis

40. Ms Truman made the following submission:

> That in the alternative, if the court finds there is power to randomly test a citizen pursuant to s 23(2) despite the fact that this was not a random testing station, there is no evidence before the court that after that preliminary test there was an appearance to police from the results of the test that there was a concentration of alcohol equal to or exceeding 50 mg of alcohol per 100mL of blood, and therefore any subsequent arrest or conveyance of the defendant for analysis was unlawful and any result there from should not be admitted into evidence.[10]

41. In making that submission reliance was placed upon *DPP (Vic) v Paul* (1992) MVR 435.

42. Section 23(6) provides:

> Where, after requiring a person to undergo a breath test in accordance with this section, a member of the Police Force reasonably believes that alcohol is present in that person's blood, whether as a result of such test or not, that person is liable to submit to a breath analysis.

43. Subsection (7) (a) reads:

> Where it appears to a member of the Police Force from the results of a breath test on a sample of a person's breath that there is present in the person's blood –

[10] See p 2 [4] of Ms Truman's written submissions.

1. any alcohol, where the person is a person referred to in section 19(5), (7) or (9) or

2. a concentration of alcohol equal to or exceeding 50 mg of alcohol per 100mL of blood,

a member of the Police Force may arrest that person without warrant and the member or another member may take that person to a police station or police stations or such other place as the member considers desirable and there detain or cause that person to be detained for the purpose of carrying out a breath analysis.

44. Although Ms Truman correctly submitted that there was no evidence before the court that the police officer, who conducted the preliminary breath test, formed the opinion that "there was present in the defendant's blood a concentration of alcohol equal to or exceeding 50 mg of alcohol per 100mL of blood", the officer did give evidence that the result of the preliminary breath test was "positive", that is there was an indication that the defendant was over the limit. A finding was made in those terms.[11]

45. In my opinion, there is no need for there to be evidence of strict compliance with the provisions of 23(7)(a) of the Act. In other words, it is not necessary for a police officer to give evidence that he had formed the opinion that there was "present in the person's blood a concentration of alcohol equal to or in excess of 50mg of alcohol per 100mL of blood". It is sufficient if the evidence shows that as a result of the breath test it appears to the officer that the person has alcohol present in their blood in the prescribed concentration. Accordingly, the evidence given by constable Watts meets the required standard. It can be reasonably inferred from the constable's reference to "positive result" and "over the limit" that the constable had formed the requisite opinion which would authorise her to proceed to the next stage of the breath testing process, referred to in s 23(7) of the Act.

[11] See above, p 4.

46. However, if I am found to have erred in finding that the requirements of subsection 23(6) and (7)(a) had been satisfied by the evidence, it would certainly be the case that the evidence did not show that the requisite opinion had not been formed by constable Watts: see *Stiles v Lamont* (1992) 15 MVR 557.[12] Consistent with the approach taken in *Stiles v Lamont* (supra) any failure on the part of the prosecution to prove that the constable had formed the requisite opinion would not have impugned the process in such a way as to lay the foundation for the exclusion of the certificate on performance of breath analysis.

47. In the event that the approach taken in *Stiles v Lamont* (supra) does not represent the law under the *Traffic Act* (NT), then I would not have considered that any non-compliance with the provisions of s 23(6) and (7)(a) would have been such as to lead me to exclude the certificate in the exercise of the discretion to exclude illegally or improperly obtained evidence.[13] Again, I would not have considered that compliance with the two statutory requirements is a necessary element or precondition for proof of the offence with which the defendant was charged, such that non –compliance would inevitably lead to an acquittal.

48. Although not explicitly raised by the defence as an issue, I should consider whether or not there is sufficient evidence that, following the formation of the requisite opinion, constable Watts properly exercised the power to arrest the defendant and take her to a police station and detain her at such place for the purpose of undergoing a breath analysis.

49. In my opinion, the only reasonable inference open on constable Watts' evidence is that she exercised the power to arrest and detain for the purpose

[12] See above, p 14.
[13] On the evidence I would have characterised the non-compliance as only partial and relatively minor. Certainly I would not have treated the non-compliance as evincing a deliberate disregard for the law. I could not see how the cogency of the evidence would have been affected by the non-compliance. Furthermore, the relative seriousness of the offence would have favoured admission of the certificate into evidence.

of carrying out a breath analysis in accordance with s 23(7) of the Act. That inference is drawn from the evidence given by constable Watts, namely that:

a) the defendant had been the subject of a preliminary breath test which produced a positive result;

b) she had formed the opinion that the defendant had in her blood the prescribed concentration of alcohol;

c) subsequently she conveyed the defendant to the police station for the purpose of carrying out a breath analysis and en route explained where she was taking the defendant and what was going to happen at the station; and

d) that a breath analysis was conducted at the police station.

50. A similar situation arose in *Director of Public Prosecutions (Vic) v Blyth* (1992) 16 MVR 159. There the Court was dealing with s 55(1) of the *Road Safety Act* 1986 (Vic), which was in similar terms to s 23(7) of the *Traffic Act* (NT). The Court held that the only reasonable inference open on the evidence was that there had been compliance with s 55(1) and that the respondent had undergone a breath test as a consequence of compliance with the procedures laid down in s 55(1).

51. Consistent with the approach taken in *Director of Public Prosecutions (Vic) v Blyth* (supra), I am satisfied beyond reasonable doubt that in the present case the defendant underwent the breath analysis, which was conducted at the police station, as a consequence of compliance with the procedures set out in s 23(7) of the *Traffic Act* (NT).

52. However, if I have erred in concluding that there was sufficient evidence to affirmatively prove compliance with the provisions of s 23(7), then clearly the defendant had failed, in accordance with the approach taken in *Stiles v Lamont* (supra), to establish that the procedures were not followed.

53. Again, if *Stiles v Lamont* does not represent the law in the Northern Territory, I would not have considered that any non-compliance with the provisions of s23(7) would have been such as to warrant the exclusion of the certificate in the exercise of the court's discretion to exclude illegally or improperly obtained evidence.[14] In exercising that discretion, I would have been of the opinion that compliance with the prescribed procedures is not an element or precondition for proof of the offence.

The failure of the prosecution to meet the statutory prerequisites for the tender of the certificate

54. Ms Truman objected to the tender of the Certificate on Performance of Breath Analysis on two grounds. She submitted that where the prosecution seek to rely upon evidence by certificate, pursuant to s 27 of the *Traffic Act*, in order to prove an offence contrary to the drink-driving provisions of the Act, the Certificate on Performance of Breath Analysis must certify that the instrument was in good working order at the time the analysis was conducted, or contain a statement by the operator that he or she satisfied themselves that the instrument was in in good working order at the material time. Ms Truman argued that s 29(2) of the Act cast a burden on the prosecution to prove that the instrument was in good working order and the subsection operated upon s 27 in such a way that the certificate must, by necessary implication, contain the certification or statement asserted. In the alternative, Ms Truman submitted that it was necessary for the prosecution to prove by collateral evidence – for example from the breath analysis operator – that the instrument was in good working order as a precondition for the admissibility of the certificate. In other words, there must be evidence as to good working order, in addition to the matters contained in the certificate, in order to make the certificate admissible.

[14] The fact that the non-compliance was of a partial and minor nature would have favoured admission of the certificate. It is difficult to see how the non-compliance would have affected the cogency of the evidence. Finally, the relative seriousness of the offence would have favoured admission of the certificate.

55. Ms Truman submitted that the certificate was not admissible because it did not contain the certification or statement that it was required to contain. In the alternative, she submitted that it ought not be admitted into evidence because the prosecution had failed to adduce collateral evidence as to the good working order of the instrument.

56. The starting point is s 27 – the evidence by certificate provision – which provides as follows:

> (1) In any proceedings in a court, a certificate in the relevant prescribed form purporting to be signed by –
>
> a) a person authorized by the Commissioner under this Act to use a prescribed breath analysis instrument for the purposes of this Act;
>
> b) a member of the staff of a hospital; or
>
> c) an authorized analyst;
>
> is prima facie evidence of the matters stated in the certificate and the facts on which they are based.
>
> (2) For the purposes of subsection (1), the Regulations may prescribe forms of certificate to be used by different persons on different occasions.

57. Section 27 of the Act differs from comparable provisions in other Australian jurisdictions. The usual approach is to set out in the body of the evidentiary provision the matters that are required to be stated or certified in the certificate in order for the certificate to be prima facie evidence of the matters stated or certified therein. However, the Northern Territory legislature has opted to address the contents of the certificate by reference to a form of certificate prescribed in the Regulations.

58. Regulation 61 of the Traffic Regulations deals with prescribed forms:

> For the purposes of Section 27 of the Act, a form of certificate set out in Schedule 2 may be used by the person and on the occasion indicated in the following table.

59. For present purposes the Table indicates that Form1 – the Certificate on Performance of Breath Analysis - may be used by a person authorized by the Commissioner to use a prescribed breath analysis instrument for the purposes of the Act after that person has performed a breath analysis using that instrument.

60. The Certificate on Performance of Breath Analysis, as appears in Schedule 2, assumes the following form:

> I, (operator name) , a member of the Police Force who is authorized by the Commissioner to use a prescribed breath analysis instrument known as a Drager Alcotest 7110 for the purposes of the *Traffic Act*, certify that –
>
> 1. At the time of am/pm on the date of I performed an analysis on a sample of breath supplied by
>
> (full name and address of person)
>
> ("the subject")
>
> whose occupation is and who is years of age
>
> 2. Before performing the analysis I satisfied myself that the subject had not consumed any alcohol within the preceding 15 minutes.
>
> 3. Before carrying out the analysis I prepared the breath analysis instrument for use in the prescribed manner.
>
> 4. I provided an unused mouthpiece for use by the subject in giving the sample.
>
> 5. The result of the analysis shown on and recorded by the breath analysis instrument was %.
>
> 6. By application of Regulation 58 of the Traffic Regulations, I assessed that the concentration of alcohol in the blood of the subject, expressed as milligrams per 100 mL of blood was mg/100mL.
>
> 7. Within 1 hour of performing the analysis I signed and delivered to the subject a statement as required by regulation 58(2).
>
> Signed
>
> At the time of on the date of

61. The certificate which the prosecution proposed to tender, and which was made available to the Court for its perusal to assist it in determining its admissibility, accorded with prescribed Form 1 and was duly completed and signed.

62. Neither the prescribed form nor the proposed exhibit contains a statement to the effect that the instrument was in good working order at the time of the analysis or that the operator satisfied himself that the instrument was in good working order.

63. The first difficulty with the defence submission is that there is no requirement in s 27 of the Act that a Certificate on Performance of a Breath Analysis contain such a statement. Nor is there such a requirement under the Traffic Regulations. Furthermore, the prescribed form does not require the certificate to include such a statement.

64. Section 27 is immediately distinguishable from comparable provisions in other jurisdictions where there is a requirement that the certificate state that the instrument was in good working order: see for example section 16A (15) (c) of the *Traffic Act* (Qld), as discussed in *Bartlett v Harrsion , ex parte Bartlett* 1975 QD R 325. Where there is such a requirement and the certificate does not contain such a statement, the certificate is inadmissible unless the court can be persuaded that the statements required to be contained in the certificate are not to be treated as a composite state of affairs and can be read disjunctively, such that “the presence in a certificate of all the statements is not necessary for any one or more of them to be given probative force”- in other words, the certificate, although not complete, is admissible to provide “prima facie evidence of its contents so far as they are stated”: see *Henning v Lynch* [1974] 2 NSWLR 254.

65. The combined effect of s 27 and the form of certificate prescribed by Regulation 61 of the Traffic Regulations is that a Certificate on Performance of Breath Analysis, sought to be relied upon as evidence in court

proceedings, should contain the matters set out in the prescribed Form 1; and a duly completed and signed certificate that accords with the prescribed form is prima facie evidence of the matters contained in that certificate and the facts on which they are based. The overall effect is the same as that achieved in other jurisdictions where the statutory counterpart of s 27 itself sets out the matters that are required to be stated or certified in certificate in order for the certificate to provide prima facie evidence of those matters.

66. In my opinion, there is no basis for excluding the certificate by reason of it failing to contain a statement or certification that the instrument was in good working order or that the operator satisfied himself that it was in good working order. The certificate contains all of the matters that it is required to contain. The certificate (including its contents) sought to be tendered meets the statutory description, that is to say, it contains "particulars answering each of the statutory categories",[15] and is therefore admissible and to be given the probative force afforded to it by s 27 of the Act.

67. However, that does not entirely dispose of the argument advanced by Ms Truman. Ms Truman submitted that by reason of s 29(2) of the Act the certificate must by necessary implication contain a statement that the instrument was in good working order or that the operator satisfied himself or herself that the instrument was in good working order at the material time, notwithstanding that the prescribed form does not require the inclusion in the certificate of such a statement. In the alternative, she submitted that there must be evidence as to "good working order" – for example from the breath analysis operator – in addition to the matters contained in the certificate, in order to render the certificate admissible.

[15] See *Henning v Lynch* [1974] 2 NSWLR 254 at 261 per Jeffrey J.

68. Section 29 of the Act provides :

> (1) The Regulations may provide –
>
> (a) that a device for the carrying out of a breath analysis is a prescribed breath analysis instrument; and
>
> (b) for the proper use of a prescribed breath analysis instrument for the purposes of this Act.
>
> (2) A court shall not receive evidence that a prescribed breath analysis instrument, when in good working order and used in accordance with the Regulations relating to its use, does not give a true and correct assessment of the concentration of alcohol in a person's blood.

69. The immediately striking feature of s 29 (2) is that it is expressed in prohibitive and negative terms. The intent of the section is to prevent a free ranging challenge to the accuracy and reliability of breath analysis instruments. The provision is intended to prevent defendants from calling expert evidence with a view to showing that "measuring the amount of alcohol in the blood by means of a breath analysing instrument is unreliable, erratic, prone to error or otherwise deficient".[16] Unlike s 27, which is an evidentiary provision which facilitates proof of certain matters, s 29(2) is an exclusionary evidentiary provision. Accordingly, s 29(2) needs to be construed in that context.

70. The effect of s 29(2) is that a breath analysis instrument, in good working order and properly operated, is presumed to produce a true and accurate assessment of a person's alcohol/blood content. A person can only challenge the accuracy or reliability of the result of a breath analysis by adducing evidence tending to show that the breath analysis instrument used on the occasion in question was not in good working order or that the instrument was not properly operated. The section confines the defences open to a person who seeks to challenge the result of a breath analysis.

[16] See Brown *Traffic Offences and Accidents* (3rd edition Butterworths, Sydney 1996), p 165 [10.47].

71. Although s 29(2) is a defence-oriented provision, the question that remains is whether the prosecution bear any burden of establishing that the breath analysis instrument was in good working order at the material time.

72. It is clear that the prosecution must prove that the instrument was properly operated, that is, used in accordance with the regulations. That is clear from Regulation 113. It is also clear from the prescribed Certificate on Completion of Breath Analysis. It would also seem to be the case that the certificate is inadmissible if it fails to contain a statement to the effect that the instrument was prepared for use in the prescribed manner. Of course, a certificate containing such a statement is only prima facie evidence that the instrument was properly operated, and it is open to a defendant to adduce evidence, in accordance with s 29(2), to the effect that the instrument was not properly operated or was not in good working order on the occasion in question, despite the enormity of that task.

73. There is no explicit provision in either the Act or the Regulations requiring proof that the instrument was in good working order. So what, if any, obligation is placed on the prosecution to show that the instrument was in good working order at the material time.

74. One possible construction of s 29(2) is that it presumes, in somewhat muted terms, that a prescribed breath analysis instrument is in good working order unless and until there is evidence to the contrary. According to this view of s29(2), an evidential burden is cast on the defence to adduce evidence that the instrument was not in good working order. In the event of such evidence being adduced it then falls on the prosecution to satisfy the court that the instrument was in good working order at the time the analysis was carried out.

75. The second possible construction of the provision is that, by implication, a burden is imposed on the prosecution to show that the instrument was in good working order at the material time.

76. The second construction of s 29(2) is to be preferred for the following reasons.

77. The phrase "when in good working order and used in accordance with the Regulations relating to its use" connotes a condition precedent: see Stroud's *Judicial Dictionary Volume 3* (7th edition Sweet & Maxwell, London, 2006), p 3008. The words "if" or "provided" could be readily substituted for the word "when". The language of the section indicates the need for there to be evidence that the instrument was in good working order and that the instrument was properly operated at the time the analysis was conducted.

78. According to this construction of the provision, in order to establish that the instrument was properly operated – that is used in accordance with the regulations relating to its use - the prosecution can rely on a certificate which contains a statement to the effect that the instrument was prepared for use in the prescribed manner, and was therefore properly operated.[17]

79. However, the fact that the instrument was in good working order is a matter outside the scope of the certificate and is provable other than by way of tender of the certificate.[18] The state of affairs that the instrument was in good working order can be circumstantially established by relying upon a reasonable inference that an instrument which was properly operated, that is used in accordance with the requirements of Regulation 113, and which produced a result – both of which circumstances are referred to in the prescribed certificate - was in good working order at the material time.[19]

---

[17] However, there is no impediment to the prosecution calling the operator to give evidence that the instrument was used in accordance with the Regulations relating to its use in lieu of relying upon a Form 1 Certificate: see *Thomson v Andrews* (1992) 16 MVR 421. Alternatively, the prosecution could rely upon both the certificate and the operator's evidence to establish proper operation of the instrument: see *Thomson v Andrews* (supra).

[18] In *Thomson v Andrews* (supra at 425) it was noted that certain requirements of the Act not covered by the certificate must be proven by other evidence in order to secure a conviction.

[19] As to the propriety of drawing such an inference, see *Director of Public Prosecutions (Vic) v Blyth* (1992) 16 MVR 19. It should be noted that the prosecution could also establish that the instrument was in good working order by calling the operator: see *Thomson v Andrews* (supra).

80. Section 27 and s 29(2) perform different functions. The admissibility of a certificate is governed by s 27 and the Regulations together with the prescribed Certificate on Completion of Breath Analysis. Section 29(2) is concerned with another issue, namely, the accuracy and reliability of the assessment of the concentration of alcohol in a person's blood. Although s29(2) casts a burden on the prosecution to adduce evidence to the effect that the instrument was in good working order, that requirement has no bearing on the admissibility of the certificate. That burden is capable of being discharged by merely tendering a certificate, in admissible form, under s 27 of the Act. The defendant then carries the evidential burden of adducing, or pointing to, evidence relating to the condition and/or operation of the instrument that was used in the breath analysis with a view to raising a reasonable doubt as to the accuracy or reliability of the alcohol/blood assessment.

81. The statutory scheme created under the *Traffic Act* is as follows:

1. a certificate, which is in the prescribed form (Form 1), is prima facie evidence of the matters contained therein, in particular the assessment of the concentration of alcohol in the person's blood;

2. the certificate provides prima facie evidence that the instrument was properly operated at the material time;

3. it can be inferred from the matters contained in the certificate that the instrument was in good working order at the material time and such inference provides prima facie evidence of that fact; and

4. if a defendant wishes to challenge the accuracy or reliability of the blood/ alcohol assessment contained in the certificate then he or she must adduce, or point to, evidence that indicates that the instrument was not properly operated or was not in good working order at the material time.

82. In my opinion the statutory scheme does not require a Form 1 certificate to contain a statement that the instrument was in good working order or a statement that the operator satisfied himself or herself that the instrument was in good working order at the time the analysis was carried out. Section 29(2) does not interact with s 27 so as to require the certificate to contain either of those statements. It is clear from the terms of s 27 and the contents of the prescribed form of certificate that the certificate does not have to contain either of those statements. If the legislature had intended that the certificate contain a certification that the instrument was in good working order at the material time or that the operator had satisfied himself or herself that the instrument was in good working order, then it could have quite easily carried that intention into effect by including such a certification in the prescribed form in Schedule 2. The legislature could have implemented that intention with equal ease by requiring by way of a statutory provision - such as s 27 of s 29 – that the certificate must contain such a certification. It is difficult to fathom why the legislature would have chosen to use s 29(2) as a vehicle for mandating the inclusion of such a statement in a Form 1 certificate when it could have simply and easily achieved that objective by adopting either of the suggested methods. In my view, those circumstances tell against a legislative intent that a Form 1 certificate can only be received into evidence pursuant to s 27 of the Act if it contains the subject certification.

83. As stated earlier,[20] Ms Truman submitted, in the alternative, that the certificate should not be admitted into evidence, in the absence of collateral evidence as to the good working order of the instrument. In my view, that submission flies in the face of the rationale and purpose of certificate provisions such as s 27 of the *Traffic Act* (NT). Furthermore, it is completely at odds with the decision in *Thomson v Andrews* (1992) 16 MVR 421.

[20] See above, pp 19 – 20.

84. Certificate provisions are designed to avoid the need for formal proof of the matters contained therein by calling the person who would otherwise be in a position to give viva voce evidence about those matters. In the context of "excess blood alcohol level" offences, the certificate provision commonly renders the matters contained in the certificate prima facie evidence of those matters, including the result of a breath analysis. The usual statutory plan is to include in the certificate all matters that are required to be proved under the Act or Regulations in relation to the conduct of the breath analysis and the result thereof. The *Traffic Act* (NT) does not deviate from that blueprint:

> The procedure (referring to s 27 of the Act) negates the necessity for the breath analysis operator to prove the matters contained in the certificate.[21]

85. If it were necessary for the operator to give evidence as to the good working order of the instrument in order to make a Form 1 certificate admissible, then it would be necessary in every case for the prosecution to call the operator, which would in turn require the prosecution to give appropriate notice of their intention to call that witness. That would defeat the facilitative purposes of s27. Furthermore, the language used in s 28 not only shows that the calling of the operator is optional, but that a certificate may be received under s 27, without calling the operator:

In any proceedings in a court, where a party intends to call as a witness a person whose evidence may be received under section 27, (emphasis added) that party shall –

(a) give not less than 14 days notice in writing of that intention to the other party; and

(b) call the person in accordance with the procedures of the relevant court to give his or her evidence.

[21] See *Thomson v Andrews* (1992) 16 MVR 421 at 423.

86. Although it was acknowledged by Angel J in *Thomson v Andrews* (supra at 423) that the prosecution could call the operator to give evidence (provided the requisite notice was given in accordance with s 28 of the Act) as well as relying upon the prima facie evidence provided by a certificate received in accordance with s 27, there is nothing in the observations made by His Honour regarding the statutory scheme that would lend weight to the defence submission – indeed they show that the certificate is admissible without collateral oral evidence from the operator or any other witness:

> If the breath analysis instrument operator is called as a witness the certificate is still an item of real evidence admissible as prima facie evidence of the matters stated in it – it is not secondary evidence and objection may not be taken to its admissibility once the court is satisfied upon inspection that it is in the relevant prescribed form and is purportedly signed by any of the people referred to in s 27(1)(a)(b) or (c). That is not to say that oral evidence may not be led covering the matters in the certificate. Oral evidence of those matters may be led irrespective of whether a certificate goes into evidence or not, and there is no reason why the certificate could not be employed for the purpose of refreshing the witness's memory in the usual way…

87. It is conceded that in *Thomson v Andrews* (supra) His Honour was not dealing with the specific point taken by Ms Truman. However, I adopt the observations made by His Honour as providing a complete answer to the defence submission in the present case.

The explication of an apparent anomaly

88. Although the point was not raised by the defence, it is worth mentioning that Form 2 entitled "Certificate on Refusal or Failure to Submit to or Provide a Sample of Breath Sufficient for Completion of Breath Analysis" contains, inter alia, the following two paragraphs numbered [7] and [9]:

> [7] I prepared the breath analysis instrument for use in the prescribed manner and satisfied myself that the instrument was in *good working order* (emphasis added)
>
> [9] I said to the subject "This is a prescribed breath analysis instrument. I am authorised to use it for the purposes of the *Traffic Act* . *It is in good*

working order and ready for use. (emphasis added). I require you to submit to a breath analysis.

89. At first glance it might be thought that the contents of Form 2 lend weight to the defence submission that the Form 1 certificate, in order to be received into evidence, must contain a statement to the effect that the instrument was in good working order or a certification by the operator that he satisfied himself or herself that the instrument was in good working order. However, on a proper construction of the Act and its various provisions, it would appear that Parliament deliberately chose to deal with the means of proof of the elements of different offences in different ways, for reasons best known to itself.

The legislative history

90. There is nothing in the legislative history of the present *Traffic Act* nor its predecessor that would support the various arguments put forward by Ms Truman on behalf of the defendant. If anything, the legislative history lends support to the conclusions reached by the Court.

Formal ruling

91. Having rejected the defence submissions, I rule that the certificate on performance of breath analysis is admissible. I admit the certificate into evidence, which will become Exhibit P1.

Dated this day of January 2007.

_____

Dr John Lowndes
STIPENDIARY MAGISTRATE