

CITATION: *Marinov v Lamb* [2007] NTMC 022

PARTIES: IVAN MARINOV

v

WARREN ANDREW LAMB

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20610681

DELIVERED ON: 24 April 2007

DELIVERED AT: Darwin

HEARING DATE(s): 1 November 2006, 23 March 2007

JUDGMENT OF: Ms Sue Oliver SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiff:	Mr T Smith
Defendant:	Mr Rowbottom

*Solicitors:*

Plaintiff:	Department of Public Prosecutions
Defendant:	Withnals

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 022
Number of paragraphs:	23

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

No. 20610681

BETWEEN:

**IVAN MARINOV**  
Plaintiff

AND:

**WARREN ANDREW LAMB**  
Defendant

REASONS FOR DECISION

(Delivered 24 April 2007)

Ms SUE OLIVER SM:

1. The defendant is charged with driving a motor vehicle whilst having a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood, namely 99 milligrams of alcohol contrary to section 19(2) of the *Traffic Act*.
2. The prosecution called First Class Aboriginal Community Police Officer Jarrod Williams who gave evidence that he conducted a breath test on the defendant at a random breath testing station and that on receiving a positive reading informed his partner Constable Nowak and the defendant was arrested for the purpose of a breath analysis test and conveyed to the Palmerston station where Constable Nowak conducted the test.
3. Constable Nowak was not called by the prosecution. A Certificate on Performance of Breath Analysis was tendered. That Certificate is in the correct form under the Regulations and by virtue of section 27 of the Act is admissible and prima facie evidence of the matters stated in the certificate

and the facts on which they are based. The certificate states that the result of the breath analysis conducted on Mr Lamb by Constable Nowak was that he had a concentration of alcohol in his blood of 99 mgs per 100 mls.

4. The defendant did not give evidence himself but called two witnesses, Mr Geoffrey Horwood whose evidence is referred to below and Constable Nowak. Constable Nowak confirmed that he performed the test and was the author of the Certificate on Performance of Breath Analysis that had been tendered by the prosecution. He was questioned about his observations in relation to the calibration sticker and the version of the machine that was used.
5. Two matters are raised in contest to the charge.

1. **Whether the Drager Alcotest 7110 MK V is a prescribed breath analysis instrument.**

The first issue is whether the breath analysis instrument used to analyse the concentration of alcohol in the defendant's blood and on which the certificate of analysis relied on as evidence of that concentration, was a prescribed breath analysis instrument as defined in *Regulation 56* of the Traffic Regulations. It is submitted that I must be satisfied beyond a reasonable doubt that the test was conducted by use of a prescribed breath analysis instrument and that the instrument prescribed is a Drager Alcotest 7110 whereas the evidence from Mr Horwood is that the machine calibrated by him and used by Constable Nowak to conduct the breath analysis was a Drager Alcotest 7110 MK V. I note that neither the Certificate of Accuracy of Breath Analysis tendered by the Defence (D2) nor the Certificate on Performance of Breath Analysis (P1) refer to the Model number i.e. Mk V.

This issue was recently considered by His Honour Dr Lowndes in *Brennan v Benjamin* (29 March 2007). His Honour concluded that although there was a fundamental difference between the infra red/electro-chemical process employed by the Drager Alcotest Mk V to analyse a sample of a person's breath and the purely infra red process employed by the Mk 1 and 11 models, that difference does not result in the instrument used ceasing to be a prescribed instrument. No such evidence was called in this matter; it is simply put that the difference of Model number means that I cannot be satisfied that the test was conducted on a prescribed breath analysis instrument. I have read and respectfully agree with Dr Lowndes' conclusion in *Brennan v Benjamin*. At its highest *Regulation 56* only requires the court to be satisfied that the characteristics of the instrument used substantially conformed to the prescribed instrument. I adopt Dr Lowndes reasoning in arriving at that conclusion and would add nothing further. There is nothing in the evidence before me that raises any doubt that the machine used was a prescribed instrument, that is, of the type known as a Drager Alcotest 7110.

**2. That the breath analysis instrument was not used in accordance with the Regulations and the evidence of breath analysis cannot therefore be relied upon.**

The second argument is that in order for the court to be able to rely on the evidentiary certificate it must be satisfied that the instrument was properly used. It was submitted by Mr Rowbottom that "use" involves not just the taking of the breath sample for analysis by an authorised operator (of which there is no contest) but that proper use of the machine involves a combination of processes, being the calibration and testing of the instrument followed by, on each

relevant occasion in accordance with section 23, the testing of a sample of breath by a prescribed breath analysis instrument.

6. Section 27 of the *Traffic Act*, providing for the receipt of evidence by way of an evidentiary certificate, is in the following terms:

**27. Evidence by certificate**

(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.

7. The certificate to be used depends on the process by which an analysis of blood alcohol has been made that is, analysis by way of breath analysis or by way of blood sample. The forms prescribed by *Regulation 61* correspond with these methods of analysis. Form 1 is a certificate on performance of breath analysis, Form 3 is a certificate by a member of staff of a hospital on taking of blood sample and Form 5 is a certificate on completion of blood test.<sup>1</sup>
8. The proper use of a prescribed breath analysis instrument is provided by Section 29 of the Act by empowering the making of regulations.

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<sup>1</sup> Forms 2 and 4 relate to refusal or failure to provide breath or blood sample.

## **29. Breath analysis instrument**

- (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.

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 correct assessment of the concentration of alcohol in a person's blood.

- 9. Three regulations relate to the use of a prescribed breath analysis instrument - *Regulations 57, 58 and 59.*

*Regulation 57* deals with the preparation of the machine and the requirement that the person carrying out the analysis must be satisfied that the person being tested has not consumed alcohol in the last 15 minutes.

*Regulation 58* deals with the conduct of the breath analysis and requires the provision of an unused mouthpiece and that the result may be provided by the printed statement from the machine.

No contest is raised as to these matters having been complied with, indeed the printed statement of analysis provided to the defendant was tendered by Mr Rowbottam (D4).

*Regulation 59* is in the following terms:

### **Authorised operators**

- (1) The Commissioner may, by notice in the *Gazette*, authorise a member of the Police Force who is, in the opinion of the Commissioner –
  - (a) trained in the use of a prescribed breath analysis instrument; and
  - (b) capable of using that instrument correctly,

to use that instrument for the purposes of the Act.

(2) A person must not carry out a breath analysis for the purposes of the Act unless the person –

- (a) is a member of the Police Force;
- (b) uses a prescribed breath analysis instrument;
- (c) is authorised by the Commissioner under subregulation (1) to use the instrument; and
- (d) complies with these Regulations relating to the proper use of the instrument for the purposes of the Act.

10. The defendant contends that there has not been a proper use of the machine because it has been used by way of testing and calibration by a person who is not a member of the Police Force, namely Mr Geoffrey Horwood, contrary to the requirements of *regulation 59(1)*. Mr Horwood was called as a witness by the defendant.
11. Mr Horwood is a technician with the Northern Territory Police Force. He is not a member of the Northern Territory Police Force. Mr Horwood's job involves testing and maintenance of various devices used by Police. Relevant to this matter, Mr Horwood is involved in the periodic testing and calibration of breath analysis instruments. He is qualified by the manufacturer Drager Australia to calibrate and test the accuracy of a breath analysis device. Through Mr Horwood a Certificate of Accuracy of a Breath Analysis Device was tendered (D2) by which document Mr Horwood had certified that the "Drager Breath Analysis unit type Drager 7110 serial number MRPF-A004" was calibrated on 2 December 2005 . This is the instrument used to test the defendant's breath sample and there is no argument that the test took place within the calibration period of six months for accuracy of the instrument. The certificate signed by Mr Horwood is not one prescribed by the Regulations and is not an evidentiary certificate for the purposes of section 27 of the Act. The certificate may be presumed to

be one created for internal police purposes to verify the calibration periods for instruments. For similar purposes it seems Mr Horwood is notified in the *Gazette* as being a person approved to test the accuracy of “Drager Alcotest 7110 MKV Evidentiary Breath Analyser devices”. A photocopy of a Gazette Notice<sup>2</sup> (D3) was also tendered through Mr Horwood. The Gazette notice is said to have been made in pursuance of section 29(1) of the *Traffic Act*. Section 29(1) does not relate to approval of persons to test the accuracy of breath analysis instruments but confers a power to make regulations for prescribing a breath analysis instrument and for the proper use of it. There is no provision in either the Act or the Regulations relating to or requiring the periodic testing of an instrument for accuracy or the appointment of persons for that purpose.

12. What is submitted is that I cannot be satisfied that the instrument in question, the Drager 7110 serial number MRPF-A004, was properly used in accordance with the Regulations relating to its use. This is because Mr Horwood’s evidence was that the machines must be properly calibrated for use and that Mr Horwood tested it and calibrated it. It is put therefore that calibration and testing is a use of the machine for the purposes of the Act and that as Mr Horwood is not a person qualified to use the machine, because he is not a member of the Northern Territory Police Force, and therefore could not be authorized by the Commissioner under *Regulation 59(1)* the machine has not been properly used in accordance with the *Regulations*.
13. It is submitted that this must be the correct interpretation of *Regulation 59(1)* because otherwise there would be no need for *Regulation 59(2)*. In other words that “use” in *Regulation 59(1)* is different than “carrying out a breath analysis” in *Regulation 59(2)* so that “use” has a more expansive meaning which includes the testing and calibration of the machine. Mr Rowbottam submitted that the entire process was essentially one of

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<sup>2</sup> No G24, 15 June 2005

preparation and use. If the machine has been “used” by a person who is not and cannot be authorised under *Regulation 59(1)* then the Court cannot be satisfied that the machine has been used in accordance with the Regulations.

14. No authorities for the proposition were provided to me, indeed I was informed that the argument is unique.
15. The term “purposes of the Act” is one which may commonly be found in legislation, often used in conferring a regulation making power. It is used in section 29 of the Act to confer the power to make Regulations for the proper use of a prescribed breath analysis instrument. Regulations 57, 58 and 59 are made pursuant to section 29 and their scope confined by these empowering words rather than having been made pursuant to the more general and expansive power contained in section 53(1)(b) to make regulations “necessary or convenient to be prescribed for carrying out or giving effect to this Act”. The consequence is that the words “to use that instrument for the purposes of the Act” in *Regulation 59(1)* can be given no greater meaning by a consideration only of the words used in *Regulation 59* than is intended by the words “for the purposes of the Act” in the regulation making power conferred by section 29.
16. The term “purposes” may be used in two senses, one is to describe generally the policy or “evil” that the legislation seeks to remedy.
17. In *James v Cowan*<sup>3</sup> Isaacs J described this as the “abstract” purpose of an Act as opposed to what he called the “concrete” purpose of the Act .

“The underlying fallacy in the respondent’s contention is that it substitutes the purpose (abstract) of Parliament in legislating for the purpose (concrete) of the Act as passed. Frequently the phrase “the purposes of the Act” is employed to denote the general object sought to be achieved, the amelioration of the evil...In that abstract sense “purpose” means no more than policy....The analogous point here is that it is no part of the direct purposes of the Act that the Minister

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<sup>3</sup> (1930) 43 CLR 386 at 410,411

should have carte blanche control of inter-State trade. The “purposes of the Act” which justify compulsory acquisition are always direct purposes, that is directly authorized. In *Lyoyd on Compensation*, 6<sup>th</sup> ed., at p.5, it is stated quite plainly, and as an axiomatic principle, that “The purposes of the special Act are those only which are pointed out by it. Such a purpose is what *Burton J* in *Warburton v Loveland*, terms the “declared purpose of the statute”.”

18. In *Keneally v Berman*<sup>4</sup> Fullagher J considered the validity of a Regulation that had been made by the Melbourne Harbour Trust Commissioners prohibiting the holding of meetings on property under the control of the Commissioners.
19. His Honour found the regulation to be invalid as ultra vires the regulation making power given by the *Melbourne Harbour Trust Act*.

“Finally, I am of the opinion that the regulation cannot be supported under the general power to make regulations “generally for carrying out the object and purposes of the Act”. The meaning of such expressions as “purposes of the Act” in various contexts is discussed at great length by *Isaacs J* in *James v Cowan* [1930] 43 CLR 386 at pp 404-414, in a judgement subsequently described by the Privy Council as “convincing”: [1032] AC 542 at 561. It is no part, I think, of the purposes of the Melbourne Harbour Trust Act to control the behaviour of persons within the port. It may be very desirable that that the Commissioners, in whom the port is vested, should have such control, and specific power is given by paragraph (q).....But purposes in such a context means “direct purposes” see 43 CLR 386 at 410-1. **The words do not in my opinion include as a purpose any and everything which may tend indirectly to the more efficient conduct of commercial activities in the harbour**” (emphasis added by me)

20. The same may be said for the scope of regulations “for the proper use of a prescribed breath analysis instrument for the purposes of this Act” authorised by section 29.
21. No objects clause is provided in the *Traffic Act*. The long title describes it as an “Act to regulate traffic”. It does so by providing for the most part

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<sup>4</sup> [1949] VLR 362 at 364

different types of traffic offences. Part V of the *Traffic Act* provides for offences of driving under the influence of alcohol or drugs or with a high alcohol blood content. High alcohol blood content may be determined either by breath analysis or blood test. It is for the former purpose, that is ascertainment of alcohol blood content by breath analysis that section 29 enables the making of regulations both for the prescription of a device for the carrying out of a breath analysis and for its proper use. That use in my view is confined to that directly set out in the Act, that is in direct relationship to the conduct of a breath analysis by a prescribed blood alcohol instrument. The Regulations are directly concerned with the manner in which the breath analysis is to be conducted including preliminary steps in relation to the machine (*Regulation 57(2)*) and the persons who are authorised to conduct that analysis. When an analysis has been conducted in accordance with the Regulations evidence of the finding is admissible by certificate under section 27. No mention is directly made of any requirement at any time for a prescribed blood alcohol instrument to be periodically tested or calibrated. Such a process is therefore not something required by the Act and in my view cannot be said to be a “use” for the purpose of the Act. It is ancillary to the direct purpose of the provisions of Part V – ascertainment of blood alcohol content by conduct of breath analysis by a prescribed breath analysis instrument.

22. I do not therefore accept that periodic testing and calibration of a prescribed breath analysis instrument are uses of the instrument for the purposes of the Act. *Regulation 59(1)* provides for the **qualifications** of a person whom the Commissioner of Police authorises to use a machine for the purposes of the Act. *Regulation 59(2)* is aimed at ensuring additional requirements for the conduct of a breath analysis, that is that it is conducted on a prescribed machine and in accordance with the other Regulations directing its use for that purpose. That there is some duplication with *Regulation 59(1)* may be explained by the preliminary steps required by *Regulation 57* regarding

preparation for use and *Regulation 58* providing for subsequent actions following analysis. In the absence of *Regulation 59(1)* the preliminary steps could be done by a person not trained in the use of the prescribed instrument or capable of using it correctly as *Regulation 59(1)* requires. The Regulation as a whole in my view is aimed at ensuring the integrity of the process of breath analysis but does not extend to use in relation to periodic testing and calibration.

23. I am satisfied beyond a reasonable doubt on the evidence produced by the prosecution that the defendant is guilty of the offence as charged.

Dated this            day of April 2007.

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**Ms Sue Oliver**  
STIPENDIARY MAGISTRATE