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Judgment: 5.11.87

HOUSE OF LORDS

CRACKNELL
(APPELLANT)

v.

WILLIS
(RESPONDENT)
(ON APPEAL FROM A DIVISIONAL COURT OF
THE QUEEN'S BENCH DIVISION)

LORD KEITH OF KINKEL

My Lords,

Lord Keith of Kinkel
Lord Brandon of Oakbrook
Lord Griffiths
Lord Oliver of Aylmerton
Lord Goff of Chieveley

I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Griffiths. I agree with it, and for the reasons he gives would allow the appeal to the extent which he proposes, and dismiss it as regards the conviction under the substituted section 8(7) of the Road Traffic Act 1972.

LORD BRANDON OF OAKBROOK

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Griffiths. I agree with it, and for the reasons which he gives I would allow the appeal to the extent proposed by him.

LORD GRIFFITHS

My Lords,

On the 13 February 1986 the appellant was followed by the police because of the speed at which he was driving. When he stopped outside his house he was asked by the police to take a

roadside breath test. The test proved positive, he was arrested and taken to Orpington Police Station. At the police station he was asked to provide a specimen of breath on a Lion intoximeter. He provided a specimen which gave a reading of 78 microgrammes of alcohol in 100 millilitres of breath, a reading well above the permitted maximum. When he was asked to give a further specimen the appellant did not blow properly into the machine which aborted the test. The police sergeant conducting the test explained to the appellant that he should blow continuously into the mouthpiece and asked for a further specimen. The appellant did not follow this instruction: at the next and subsequent attempts, he blew so that some of his breath went into the machine and some escaped through his hands. Four such attempts to obtain a specimen were aborted by the machine. The appellant then refused to provide a further specimen.

On these facts he was convicted on 7 April 1986 by the Bromley magistrates of the offence of driving a motor vehicle on a road with excess alcohol in his breath contrary to section 6(1) of the Road Traffic Act 1972 as substituted by the Transport Act 1981 for which he was fined £150 and disqualified from driving for 18 months and of the offence of failing to provide a specimen of breath contrary to section 8(7) of the Road Traffic Act 1972 as substituted by the Transport Act 1981 for which he was also fined £150 and disqualified for driving for 18 months.

At the request of the appellant the magistrates stated a case for the opinion of the High Court upon the following two questions:

> "1. Whether we were correct in following the case of Hughes v. McConnell [1985] R.T.R. 244 in prohibiting the appellant from adducing evidence of the amount of alcohol which he had consumed, in order to show that the Lion intoximeter machine was defective, and
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> 2. Whether we were correct in following the case of Duddy v. Gallagher [1985] R.T.R. 401 in convicting the appellant of both the offence of failing to supply a specimen of breath and actually suplying a specimen of breath which exceeded the prescribed limit."

The Divisional Court upheld the decision of the magistrates and answered both questions in the affirmative. In so doing they followed the previous decisions of the Divisional Court in Hughes v. McConnell [1985] R.T.R. 244 and Duddy v. Gallagher [1985] R.T.R. 401. The appellant now appeals to your Lordships' House and submits that both these previous decisions were wrongly decided.

It will be convenient to deal first with the second question. It is common knowledge that in times past juries were very reluctant to convict motorists of the offence of driving a motor vehicle on a road when unfit to drive through drink or drugs. Why this should have been so I do not know, perhaps the public conscience had not yet fully awoken to the menace of the drink-affected driver, perhaps too many jurors in those days thought that they might one day be in the same predicament as the defendant and were over confident of their own ability to drink and drive,

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CORRIGENDA

Page 18, line 22 from top: Delete "reliable" insert "unreliable"

perhaps the public did not yet realise that relatively small quantities of alcohol seriously affect the reaction times of most people. Whatever the reasons, those with experience of such cases know that they were invariably bitterly contested and it was unlikely that a conviction would be secured unless the defendant was very drunk. As the law was clearly failing to provide an adequate deterrent to drinking and driving, Parliament decided to introduce in the Road Safety Act 1967 an absolute standard and to provide that it would in future be an offence to drive with more than a permitted proportion of alcohol in the blood, and to make provision for laboratory tests of blood or urine to establish the proportion of alcohol in the blood. The level of alcohol consumption which corresponded to the level at which Parliament set the limit, although no doubt justifying the view that anyone exceeding the limit should not be driving, was undoubtedly much lower than that required to secure a conviction of the old offence and much easier to prove. When the Act of 1967 was replaced by the Road Traffic Act 1972 the old offence remained as section 5 and the new offence became section 6 of the Act. In practice from that time onward nearly all cases of drunken driving have been prosecuted under section 6 rather than section 5 of the Act of 1972. For some years the offence was proved by producing an analysis of a blood or urine sample provided by the motorist, but then a new device was invented that enabled the proportion of alcohol in the breath to be determined by immediate analysis. Provided that such a machine is reliable it has obvious advantages over the use of urine or blood samples. It can be operated by a trained police officer and prints out an immediate analysis of the breath, cutting out the delay involved in the laboratory analysis of urine and blood samples and the attendance of a doctor in the case of a blood sample. But the motorist is at the mercy of the machine in the sense that he has no means of checking its performance, whereas in the case of a urine or blood sample, the statutory provisions require that the sample is divided into two, and one half given to the motorist who can, if he wishes, have it analysed himself to check the accuracy of the analysis provided by the prosecution. It was no doubt with these considerations in mind that Parliament provided certain safeguards to protect the motorist when it introduced the use of breath testing devices by the Transport Act 1981.

Section 25(3) of the Transport Act 1981 substituted the sections set out in Schedule 8 of the Act for sections 6 to 12 of the Act of 1972.

Section 6 now makes it an offence to drive with more than the prescribed limit of alcohol in breath, blood or urine. It is no longer necessary for an analyst to equate the percentage of alcohol in the urine to the alcohol in the blood. Section 12 provides that the prescribed limits are 35 microgrammes of alcohol in 100 millilitres of breath, 80 milligrammes of alcohol in 100 millilitres of blood and 107 milligrammes of alcohol in 100 millilitres of urine.

The substituted section 8 I must set out in full:

"8.(1) In the course of an investigation whether a person has committed an offence under section 5 or section 6 of this Act a constable may, subject to the following provisions of

this section and section 9 below, require him - (a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State; or (b) to provide a specimen of blood or urine for a laboratory test.

(2) A requirement under this section to provide specimens of breath can only be made at a police station.

(3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless - (a) the constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required; or (b)at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) is not available at the police station or it is then for any other reason not practicable to use such a device there; or (c) the suspected offence is one under section 5 of this Act and the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug; but may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath.

(4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, except that if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine.

(5) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(6) Of any two specimens of breath provided by any person in pursuance of this section that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded; but if the specimen with the lower proportion of alcohol contains no more than 50 microgrammes of alcohol in 100 millilitres of breath the person who provided it may claim that it should be replaced by such a specimen as may be required under subsection (4), and if he then provides such a specimen neither specimen of breath shall be used.

(7) A person who, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of this section shall be guilty of an offence.

(8) On requiring any person to provide a specimen in pursuance of this section a constable shall warn him that a failure to provide it may render him liable to prosecution.

(9) The Secretary of State may by regulations substitute another proportion of alcohol in the breath for that specified in subsection (6)."

The terms of subsection (3) make it clear that henceforth the breath specimen is to be the principal means of establishing the quantity of alcohol that the motorist had consumed for the purpose of a prosecution under section 6. It is only if a reliable machine is not available for use at the police station or there are medical reasons why the motorist cannot supply a specimen of breath that the police can demand a specimen of urine or blood. But there are the following safeguards introduced for the protection of the motorist:

1. The device must be of a type approved by the Secretary of State (subsection (1)).

2. Two specimens of breath must be taken and the specimen with the lower proportion of alcohol in the breath used and the other disregarded (subsection (6)). This is a precaution obviously introduced to give the motorist the benefit of the doubt in the case of any variation in the performance of the machine; and in my view it must follow that it was not intended that a motorist should be convicted on the evidence of only one specimen of breath.

3. If the machine indicates that the motorist is over the prescribed limit, but not excessively so, then the motorist can opt to give a specimen of blood or urine which replaces the breath specimens and neither breath specimen shall be used (subsection (6) and subsection (4)). This provision coupled with the provision that only the lower specimen should be used appear to indicate a recognition of the fact that "trial by machine" is an entirely novel concept and should be introduced with a degree of caution.

4. That the particular machine used should be reliable, which I take to be implicit in the wording of subsection 3(b) and which must, in any event, be read into the section for it would be unthinkable that it could be intended that anyone should be convicted by an unreliable machine. See the decision of the Divisional Court in Newton v. Woods [1987] R.T.R. 41 to this effect.

The other relevant section is section 10:

"10.(1) The following provisions apply with respect to proceedings for an offence under section 5 or section 6 of this Act.

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen; but if the proceedings are for an offence under section 6 of this Act, or for an offence under section 5 of this Act in a case where the accused is alleged to have been unfit through drink, the assumption shall not be made if the accused

proves - (a) that he consumed alcohol after he had ceased to drive, attempted to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) That had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings are for an offence under section 5 of this Act, would not have been such as to impair his ability to drive properly."

The object of the legislation is to provide a relatively simple way of establishing whether a motorist is driving after drinking too much, and if he is doing so to punish him. The motorist can of course frustrate the procedures by refusing to provide the necessary specimen. But if he does so without reasonable excuse he commits an offence under section 8(7) and is in effect treated as though he had driven when exceeding the prescribed limit, being subject to the same penalties as if he had committed an offence under section 6.

The appellant submits that the two offences were intended to be alternatives and that the act should be construed so as to provide that they are mutually exclusive. Otherwise, as the appellant points out, the man who refuses to give a specimen because he knows he has drunk far too much, is better off than the man who has drunk much less and to his surprise finds he is over the limit on the first breath specimen and then panics and refuses the second specimen. The first man can only be prosecuted and convicted for a section 8(7) offence but if the present decision is right the second man can be convicted and punished under both section 6 and section 8(7). I am unwilling to think that such a result can have been intended when the Act of 1981 was passed. I must therefore consider whether Duddy v. Gallagher [1985] R.T.R. 401 was correctly decided.

The facts of that case were that the defendant was stopped when he was driving the wrong way down a one way street. His breath smelt strongly of alcohol. Despite three attempts he failed to provide a sample of breath for a roadside breath test. He was arrested and taken to the police station. He gave a specimen of breath on the Lion intoximeter 3000 which displayed a reading of 55 microgrammes the significance of which was explained to the defendant. The defendant then failed to provide a second specimen of breath. He was convicted of failing to provide a specimen of breath for the roadside breath test contrary to section 7 of the Act of 1972 as amended, of driving when the proportion of alcohol in his breath exceeded the prescribed limit in breach of section 6(1), and failing to provide a specimen of breath contrary to section 8(7). The Divisional Court upheld these convictions accepting the submission of the prosecution that provided the first specimen of breath was taken in accordance with the statutory procedure laid down in section 8 of the Act of 1972, it then became admissible to establish the section 6 offence by virtue of the provisions of section 10(2).

My Lords, I am unable to accept this construction of the Act. As Lord Bridge pointed out in Fox v. Chief Constable of Gwent [1986] A.C. 281, at p. 297 section 10(2) was introduced by the Act of 1981 in order to deal with what had become known as the "hip flask defence." A motorist fearing that he was about to

be breathalysed would drink from a flask after he had stopped driving and then claim that the subsequent analysis of blood or urine reflected this intake of alcohol and was not a reliable guide to the alcohol in his system at the time he was driving. In many cases the prosecution had difficulty in satisfying the magistrates that they had discharged the burden that lay upon them to show that despite this extra drink the accused nevertheless must have already been over the limit when he was driving. The effect of section 10(2) is to reverse the burden of proof if an accused raises this form of defence. The magistrates must first determine the proportion of alcohol in the relevant specimen, and having done this they are to assume that at the time of the offence, i.e. when he was driving or in charge of a motor vehicle, he had not less than that proportion of alcohol in his breath, blood, or urine. This assumption can however be displaced if the motorist proves that but for the extra alcohol he had drunk after the alleged offence he would not have been over the prescribed limit or unfit to drive. The specimen which the magistrates take into account, for the purpose of determining the proportion of alcohol in his breath, blood or urine, must be a specimen which it was intended should be relied upon by the court pursuant to the provisions of section 8. I have already pointed to the safeguards in section 8 which are designed to give protection to the motorist against possible malfunction of the machine. One of these is that two specimens of breath should be taken and only the lower specimen should be used. The specimen which the magistrates are entitled to rely upon for the purposes of determining the proportion of alcohol in the breath under section 10(2) is the lower of the two specimens. If only one specimen of breath has been taken it is not to be relied upon for the purposes of a conviction, and is not a specimen which the magistrates are entitled to take into account under section 10(2).

I therefore consider that Duddy v. Gallagher [1985] R.T.R. 401 was wrongly decided and that Burridge v. East [1986] R.T.R. 328 which also held that a motorist could be convicted of an offence under section 6(1) on the evidence of one specimen of breath was also wrongly decided.

I would therefore hold that the appellant ought not to have been convicted under section 6(1) in the present case. I would add, however, that in assessing the penalty to be imposed for refusing to provide a specimen of breath the magistrates are entitled to take into account any evidence that indicates the motorist's consumption of alcohol and this would include the result of the analysis of the first breath specimen if he unreasonably refuses to provide a second specimen.

I turn now to the first question in the case, which to my mind raises far greater difficulties and may have disturbing consequences. The question is how far, if at all, and by what evidence is a motorist entitled to challenge the reliability of the machine which analysed his breath. In the present case the appellant wished to give evidence of his consumption of alcohol prior to his arrest for the purpose of attacking the reliability of the machine. Presumably he was going to submit that as he had drunk so little the magistrates should draw the inference that the machine which, on the first specimen had shown his breath to contain over double the prescribed limit of alcohol, must have

been unreliable and inaccurate. In his printed case the appellant puts it thus:

> "Such evidence would have tended to show that the reading given in respect of the single breath sample was suspect and that the machine was defective, thereby providing support for the defendant's case that the malfunctioning of the machine was the cause of his supplying only one specimen of breath."

The magistrates who had heard no technical evidence to suggest that the machine was not working correctly held themselves bound by Hughes v. McConnell [1985] R.T.R. 244 and refused to allow the appellant to give evidence of the alcohol he had consumed.

In Hughes v. McConnell [1985] R.T.R. 244 the magistrates had acquitted the defendant of a charge of driving with more than the prescribed limit of alcohol in his breath contrary to section 6(1). It was a remarkable decision in the light of the facts set out in the stated case, which were as follows:

> "The justices heard the information on 18 April 1984 and found the following facts. (a) On 16 September 1983 the defendant went to the Dun Cow, Trench where he consumed a number of coca-colas (non-alcoholic drink), and then three pints of bitter shandy in the company of his wife and another couple, Mr. & Mrs. Allen. (b) The defendant left the public house with his wife between 10.34 p.m. and 10.50 p.m. and drove his car home. (c) At 11.05 p.m. a police constable on mobile patrol duty, together with a special constable noticed the defendant's car, a blue Avenger, several times swerve across the white lines in the middle of the road then swerve back and clip the kerb. The constable stopped the defendant's car and on speaking to the driver noticed that the defendant's breath smelt of intoxicating liquor and that his speech was slurred. The constable requested the defendant to get out of the car and asked him to provide a specimen of breath for a breath test. The device used by the constable was an Alcotest (R) 80, tube and plastic bag. (d) The defendant's breath test was found to be positive and he was cautioned then conveyed to Wellington police station to provide a specimen of breath for analysis. The arresting officers considered he was drunk, one saying he was very drunk. (e) At the police station at 12.03 a.m. the defendant provided two specimens of breath in the Lion Intoximeter 3000 device and the following readings were produced:
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> First calibration check: 34
> BLANK 0
> First reading: 125
> BLANK 0
> Second reading: 120
> BLANK 0
> Second calibration check: 35
>
> "The station sergeant operating the device considered that the defendant was very drunk; he particularly remembered him as he was so drunk. (f) The defendant was then placed

in a police cell and was reported and released from the police station at 03.40 a.m. having at that time provided a negative breath test on the Alcotest (R) 80 device. (g) The defendant had only drunk coca-cola and three pints of bitter shandy. (h) The defendant was sober when he called at his father's house in Brookhill Crescent, Ketley, in the early hours of the morning after his release from the police station. (i) The defendant's driving was normal when he drove from his father's house back to his home in Haybridge Avenue, Hadley, and on the subsequent journey to Anglesey the defendant was awake and talking. (j) Having heard expert evidence on behalf of the prosecutor, the justices found the following facts: (i) that to attain a reading of 120 microgrammes on the Lion Intoximeter 3000 the subject would have had to consume between four and five pints of beer beyond the 1½ apparently consumed; (ii) that, based on the information received in this particular case, that the defendant had only had three pints of bitter shandy - 1½ pints of beer - then in the expert's opinion the defendant could not be over the legal limit of 35 microgrammes; (iii) that a subject who gave a reading of 120 on the Lion Intoximeter 3000 device would be so under the influence of alcohol as to be in a stupor, and at the earliest would be sober at 9.00 a.m., but more likely not until 1.00 p.m.

. . . .

Upon hearing the evidence of the defendant and his witnesses the justices could not be satisfied that the reading produced by the Lion Intoximeter 3000 device was accurate and therefore, were not satisfied beyond all reasonable doubt that the defendant had consumed so much alcohol as to exceed the prescribed limit; they, therefore, dismissed the information.

. . . . .

The question for the opinion of the court was: 1. Where a defendant is charged with driving a motor vehicle on a road after consuming so much alcohol that the proportion of it in his breath exceeds the prescribed limit contrary to section 6 of the Road Traffic Act 1972, as substituted by section 25 of, and Schedule 8 to, the Transport Act 1981, may he challenge the validity of a statement automatically produced by an authorised device, by which the proportion of alcohol in a specimen of his breath was measured, by inferentially suggesting that it could not have been possible for the defendant to have consumed so much alcohol as would have been required to produce this figure by reason of: (1) evidence of the amount of alcohol he had consumed prior to providing the specimen; (ii) evidence that he provided a negative specimen of breath for a breath test within a few hours of providing a positive specimen; (iii) evidence that he appeared sober within a few hours of providing a positive specimen; and (iv) expert evidence that if the matters set out at (i) to (iii) were correct, it was impossible that the measurement was correct? 2. On the facts as found in the case was the court entitled to conclude that the validity of the statement of the proportion of alcohol in the defendant's blood was put in doubt?"

It is not surprising that the Divisional Court were disturbed by this decision of the justices. The findings of fact based on the one hand on the prosecution evidence and on the other on the defence evidence, appear to be quite irreconcilable. For example, the finding of a positive roadside breath test, the erratic driving, the opinion of all the police that the defendant was drunk, and the expert evidence showing a consumption of five-and-a-half to six-and-a-half pints of beer; contrasted with a finding that the defendant had only drunk one-and-a-half pints of beer. The prosecution did not however attack the decision of the magistrates upon the ground of perversity but upon the ground that the defence evidence was inadmissible to challenge the accuracy of the analysis of the specimen of breath. In upholding this submission Watkins L.J. [1985] R.T.R. 244, 249-250 said:

> "With great respect to Mr. Halbert, who has stoutly endeavoured to support the justices in the manner in which they permitted this case to be conducted, I perceive very considerable danger arising from a failure to recognise that a device of this kind, which is properly approved, can only be shown to be defective by evidence which goes directly to the defective nature of the instrument itself. Proof of defect cannot be produced by means of an inference drawn from such facts as I have been describing. True it is, of course, that it may be difficult for a defendant to produce evidence of an acceptable kind, the more so when he is denied access to the record of maintenance of the machine on which a defendant has taken a test. However, nowadays a defendant is otherwise not left without a defence for he is enabled to have a blood or a urine test immediately following a test upon such a machine as a Lion Intoximeter 3000.
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> My answer therefore to the question asked by the justices in this case is that the validity and accuracy of the printout from the Lion Intoximeter 3000 cannot be challenged by reason of (1) evidence of the amount of alcohol consumed prior to arrest, (2) a defendant's appearance before arrest (3) the fact that the test taken on an Alcotest (R) 80 just before release from a police station is negative, that (4) a defendant apparently was, according to witnesses, sober within a few hours of the test on the Lion Intoximeter 3000 and (5) the kind of expert evidence given in this case.
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> As I have indicated, the only way in which the effectiveness of the Lion Intoxmeter 3000 could have been attacked here was by direct evidence of imperfection.
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> As to the second of the questions, namely, on the facts as found in the instant case was the court entitled to conclude that the validity of the statement of the proportion of alcohol in the defendant's blood was put in doubt, it must follow, from what I have already said, that the answer to that is the validity of the printout could not be put in doubt in the manner in which the justices sought to do. Accordingly I would allow this appeal and remit this case to the justices with a direction to convict."

Shortly thereafter the Divisional Court again reconsidered the same question in Price v. Nicholls [1986] R.T.R. 155. The facts were that the defendant was arrested after a positive roadside breath test. At the police station he provided:

> "specimens of breath for analysis by a Lion Intoximeter 3000 device. The printout revealed that self-calibration was properly achieved and readings of 170 and 171 microgrammes of alcohol in 100 millilitres of breath were recorded. He was tried on a charge of driving contrary to section 6(1)(a) of the Road Traffic Act 1972 as substituted. The defendant gave evidence that he had had a course of treatment for alcohol addiction two years previously, that he had not taken alcohol for some months and that, before driving, he had consumed three glasses of barley wine and a glass of wine in the course of 3½ hours. He adduced a letter from the Home Office Forensic Science Laboratory that that amount of drink would have been likely to result in a breath-alcohol level below the prescribed limit and that the printout readings would require minimum rapid consumption of three-quarters of a bottle of spirits or equivalent. The justices, in view of the defendant's evidence and the letter, were not satisfied that he had more than the prescribed limit of alcohol in his breath, rejected the printout evidence and dismissed the information."

The Divisional Court allowed the prosecutor's appeal, relying both upon Hughes v. McConnell [1985] R.T.R. 244 and upon the wording of section 10(2) Watkins L.J. said, at p. 160-161:

> "Mr. Curran, never lacking in courage has endeavoured in effect to cause this court to reconsider its decision in Hughes v. McConnell [1985] R.T.R. 244. He very stoutly maintains that there are good reasons why we should not follow that decision. Broadly speaking, he contends that the evidence which comes from the Lion Intoximeter 3000 in the form of a printout is merely evidence which is capable of being rebutted by evidence from a defendant of the amount of drink which he had taken, the more so if his account of the matter is supported by other persons or by some such information as is contained, for example, in the letter from the forensic scientist to whom I have already referred. It is evidence which the court is enjoined, he reminds us, to take account of by section 10 of the Act of 1972, as amended. It is not bound to accept the evidence of the printout, it merely takes account of it as it takes account of any other admissible form of evidence which comes before it.
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> There is, in my view, an obvious flaw in that argument. Parliament has not simply enjoined a court to take account of that evidence, it has gone further and stated that 'it shall be assumed that the proportion of alcohol in the accused's breath . . . at the time of the alleged offence was not less than in the specimen.' So there is a direct assumption to be made by the court that the specimen shall be the indication of the amount of alcohol which was on the breath of the defendant at the time when he was driving.

However, the highest hurdle in the way of Mr. Curran is the decision in Hughes v. McConnell [1985] R.T.R. 244. It is abundantly clear that the attempt being made in this case, as was made in Hughes v. McConnell, is to take this court and courts below back to former days when there were long drawn out battles between on the one hand the prosecutor and on the other the defence as to the amount of drink taken by a defendant as compared with an analysis, usually produced as a result of the taking of a sample of urine. Parliament has by the legislation of more recent times set its face against contests of that kind and has, in my estimation, clearly indicated that when a device of the nature of the Lion Intoximeter 3000 shows on its face that its self-calibrating exercise has properly been gone through and has produced readings of the amount of alcohol in the breath those readings, unless there is direct evidence of some malfunction in the machine itself, are to be regarded as conclusive of the amount of alcohol on a defendant's breath at the relevant time.

For those reasons, I would allow this appeal and send this case back to the justices for them to convict the defendant."

In Lucking v. Forbes [1986] R.T.R. 97 the facts were as follows:

"The defendant, a motorist, provided two breath specimens in compliance with the requirement under section 8(1) of the Road Traffic Act 1972 as substituted. They were analysed by a Lion Intoximeter 3000 device and the printout revealed breath-alcohol of 54 and 58 microgrammes in 100 millilitres. Some 10 minutes thereafter he was charged with driving after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 6(1). He accepted a proffered opportunity to provide a blood sample for analysis, it was taken some 80 minutes after he had been charged and one half was given to him. At the hearing of the information the prosecutor produced the printout and a statement by a forensic scientist that the analysis of the defendant's blood found it to contain not less than 87 milligrammes of alcohol in 100 millilitres of blood. The defendant adduced the evidence of an analytical chemist who used a chromatograph to analyse the defendant's part sample of blood for four readings, which varied between 79.17 to not more than 81.2 milligrammes of alcohol in 100 millilitres of blood. The defendant challenged the accuracy of the Lion Intoximeter 3000 device's breath analysis. The justices were of opinion that, since they could not reconcile the various readings of the printout and the blood analyses in the light of the evidence of the analytical chemist called by the defendant, the reliability of the device was impugned and they dismissed the information."

On appeal by the prosecutor, on the question whether the justices could have found the defendant not guilty of driving after

consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, the Divisional Court upheld the finding of the justices upon the ground that the defence was entitled to impugn the Lion Intoximeter 3000 by reference to a blood or urine test carried out immediately. In giving judgment Lloyd L.J. took into account a Home Office circular (No. 32/84) which had advised the police that during the introductory period of operation of the Lion Intoximeter they should offer a motorist the option of giving a blood or urine sample even though the reading exceeded the figure of 50 microgrammes per 100 millilitres of breath. It will be remembered that if there is a reading between 35 and 50 microgrammes the police are under a statutory obligation to offer a blood or urine specimen and, if accepted, this replaces the breath specimen - section 8(6). The material part of the circular (paragraph 6) reads as follows:

> "It is expected that in these cases the prosecution will proceed on the basis of the breath test printout as happens at present in cases over 50 microgrammes. The difference will be that the defendant will have available to him the certificate of analysis of the blood/urine sample and he will be free to apply to introduce this as evidence at his trial if he wishes to do so. The police have been advised that where this option is exercised a decision as to whether to proceed with prosecution should take account of the results of both tests . . . ."

In McGrath v. Field 1986 (The Times, 20 November) the Divisional Court held that a failure by the police to provide a defendant with this non-statutory option to provide a blood or urine sample, did not prevent the justices relying upon a breath specimen when the reading was over 50 microgrammes.

My Lords, I share the dismay of Watkins L.J. at the prospect of putting the clock back to the days when every drink and driving charge turned upon voluminous conflicting evidence as to the activities and alcoholic consumption of the defendant before he was stopped by the police and as to his condition after arrest. But I have the greatest difficulty in seeing any indication in the statutory provisions that point to only one type of evidence being admissible to challenge the reliability of the breath testing device used in a particular case. As matters now stand in the light of the decision of the Divisional Court only "direct" evidence of the malfunction of the machine is admissible - although as the Divisional Court has pointed out such evidence will rarely be available to a motorist. However, a specimen of urine or blood which indicates a lower level of alcohol than the reading in the breath testing machine is treated as "direct" evidence. It is not of course "direct" evidence of malfunction but merely evidence from which it is reasonable to draw the inference that the machine is not working properly. Whether or not the motorist has such evidence available to him will in any case when the reading is over 50 milligrammes depend upon whether or not the police chose to offer him the opportunity of providing a blood or urine specimen.

I am unable to agree with the Divisional Court that the wording of section 10(2) gives any support for the view that Parliament intended any challenge to the reliability of a device to

be limited to a particular type of evidence. The assumption in section 10(2) is not an assumption that the device is working correctly but an assumption that the proportion of alcohol in the relevant specimen was not less than the proportion of alcohol at the time of the offence. The specimen may be a breath, urine or alcohol. Before making the "assumption" for the purposes of section 10(2) the magistrate will have to be satisfied, in the case of a urine or blood specimen, that they can rely upon the analysis of the specimen, and they may have to choose between the analysis supplied by the prosecution, and that supplied by the defence. In such a case they obviously cannot "assume" that the prosecution specimen is the reliable one because such an assumption would render nugatory the statutory requirement that the motorist should be provided with half the specimen so that he can have his own analysis carried out. In the case of a breath specimen there is of course a presumption that the machine is reliable but if that presumption is challenged by relevant evidence the magistrates will have to be satisfied that the machine has provided a reading upon which they can rely before making the "assumption."

We all know that no machine is infallible and, if despite this knowledge Parliament had intended that breath testing devices should be treated as virtually infallible I would have expected such an intention to be expressed in clear and direct language. I say virtually infallible because that is the effect of limiting a challenge to "direct evidence of malfunction" which the motorist cannot, in practice, obtain, or a blood or urine test which the police are entitled to refuse unless the reading is below 50 microgrammes. Nowhere in the legislation can I find any indication that Parliament intended such a result.

Suppose that a teetotaller after dining with people of the highest repute, two bishops if you will, forgets to turn on his lights and is stopped by the police. He is asked to take a roadside breath test and indignantly but inadvisedly refuses. He is arrested and taken to the police station. There he thinks better of his refusal. He agrees to supply two specimens of breath and the machine to his astonishment shows very high readings. He asks to be allowed to prove the machine wrong by supplying a blood or urine specimen. The police agree and he gives a blood specimen. An analysis shows no alcohol in the specimen. It is virtually certain that the police would accept the analysis and he would not be prosecuted. But if he were prosecuted it is equally certain that the magistrates would prefer the analysis and he would be acquitted. But now suppose that the police refused his request to supply a blood or urine specimen because the reading on the machine was over 50 microgrammes. Is he to be convicted without the opportunity of calling the two bishops as witnesses to the fact that he had drunk nothing that evening and inviting the magistrates to draw the inference that the machine must have been unreliable. If he can invite the magistrates to draw such an inference from the work of the analyst, why should he not invite them to draw the inference from the word of the bishops.

In my view it would require the clearest possible wording to show that Parliament intended such an unjust result. If Parliament wishes to provide that either there is to be an irrebuttable presumption that the breath testing machine is reliable or that the

presumption can only be challenged by a particular type of evidence then Parliament must take the responsibility of so deciding and spell out its intention in clear language.

Until then I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible. I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defenants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by Hughes v. McConnell [1985] R.T.R. 244 before being persuaded that it is not safe to rely upon the reading that it produces.

My Lords for these reasons I feel compelled to hold that Hughes v. McConnell and Price v. Nicholls [1985] R.T.R. 155 were wrongly decided, they should not have been followed in the present case, and the Divisional Court should have answered the first question in the negative and held that the magistrates were wrong in refusing to allow the appellant to adduce evidence of the amount of alcohol he had consumed.

However although the magistrates erred in refusing to admit this evidence, it provides no ground for quashing the appellant's conviction for refusing, without reasonable excuse, to provide a specimen of breath contrary to section 8(7). The fact that a motorist does not believe that he has drunk more than the prescribed limit does not provide a reasonable excuse entitling him to refuse to provide a specimen of breath. The appellant in the present case himself proved that the machine would provide a reading by blowing into it properly for the first specimen. Thereafter the machine aborted because the appellant did not blow into it properly but allowed his breath to escape from his hands. There was no evidence either given or offered to suggest that this failure was in anyway connected with the amount of alcohol in his breath, it was due solely to the appellant's persistent refusal to supply enough breath for a specimen to be taken. If evidence had been given of the amount of alcohol the appellant had consumed it could have provided no excuse for his behaviour when asked to give the second specimen and his ultimate refusal to give it.

For these reasons I would allow this appeal to the extent of quashing the appellant's conviction under section6(1)(a) of the Act of 1972 but the conviction under section 8(7) must stand.

LORD OLIVER OF AYLMERTON

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Griffiths. I agree that, for the reasons which he has given, the appeal should be allowed to the extent which he has indicated.

LORD GOFF OF CHIEVELEY

My Lords,

I add a few words to the speech of my noble and learned friend Lord Griffiths, if only because your Lordships' House is deciding, in my opinion rightly, to overrule a decision, Duddy v Gallagher [1985] R.T.R 401, to which I myself was party and indeed in which I delivered the leading judgment of the court. The question in that case was whether the defendant, having provided one specimen of breath which showed a reading over the prescribed limit but having failed to provide a second specimen, could be convicted not only of an offence under section 8(7) of the Act of failing without reasonable excuse to provide a specimen of breath, also of an offence under section 6(1) of having driven a motor vehicle on a road having consumed alcohol in such a quantity that the proportion of alcohol in his breath exceeded the prescribed limit. The Divisional Court held that the defendant could properly be convicted of both offences. Section 10(2) of the Act provides that "evidence of the proportion of alcohol . . . in a specimen of breath . . . provided by the accused shall, in all cases, be taken into account . . . ." Such a specimen must have been provided pursuant to the provisions of the Act: see Howard v. Hallett [1984] R.T.R 353. We were satisfied that the first specimen of breath had been provided pursuant to the provisions of the Act; and further that, since two specimens of breath had not been provided, no question arose of disregarding the specimen with the higher proportion of alcohol in it as required in such circumstances by section 8(6). However, I have now been persuaded by Mr. Knight that this approach involves too narrow a construction of the Act. I accept his submission that the broad intention of the Act is that evidence of a specimen of breath shall only be given where two specimens of breath have been provided and the one with the higher proportion of alcohol has been disregarded, it being sufficient where the defendant has without reasonable excuse failed to provide more than one specimen that he should be convicted of the offence under section 8(7).

On the second and more fundamental question in the case, I too can see no escape from the conclusion reached by my noble and learned friend Lord Griffiths. The crucial provision in the Act, as I see it, is section 10(2), to which I have already referred. The opening sentence provides that:

> Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen . . . "

The function of that provision, as I see it, is that, where a specimen has been taken in accordance with the provision of the Act, evidence of such a specimen (given in accordance with the provisions of the Act) shall be admissible in evidence, and furthermore shall be evidence not only of the proportion of alcohol

in the defendant's breath, blood or urine (as the case may be) at the time when such specimen was taken, but also of such proportion at the time when the defendant was driving, attempting to drive or in charge of a motor vehicle. That of course is why the statutory assumption is required to be made; and that is also why the exception relating to the so called "hip-flask" defence is here relevant. Such evidence, being so admissible, has, if tendered, to be considered by the court in all cases under section 5 or section 6 of the Act; it has, as the statute provides, to be "taken into account." But it is one thing for evidence to have to be taken into account, and it is another thing for such evidence to be conclusive. For a court may take evidence into account, and yet reject it as unreliable. This may plainly occur in cases under the statute where the defendant has provided a specimen of blood or urine. In such cases, it is expressly provided by section 10(6) that one part of the specimen shall be provided to the defendant. This must be to enable him to obtain an independent analysis of his part of the specimen, thereby avoiding any possibility of a conviction on the basis of a mistaken analysis presented in evidence by the prosecution. But if conflicting analyses are in such a case put in evidence before the court, the court has to decide whether to reject that presented by the prosecution; and if it does so, then, although it will have complied with its duty under section 10(2) to take such evidence into account, it will also have acted properly in rejecting it.

It must follow that, since section 10(2) provides equally for evidence relating to specimens of breath, blood or urine, evidence relating to a specimen of breath may likewise be rejected if the court comes to the conclusion that the print-out from the particular machine is unreliable. I have considered carefully whether any distinction can properly be drawn between specimens of breath on the one hand, and specimens of blood or urine on the other, having regard to the many safeguards built into the Act in relation to specimens of breath. These safeguards are as follows. First, specimens of breath have to be analysed by means of a machine. Second, such a machine has to be a device of a type approved by the Secretary of State. Third, as is well known, the relevant approved device has built into it a mechanism by which it tests itself, and prints out the results of such a test on the statement automatically produced by it, each time it analyses a person's specimen of breath. Fourth, a requirement to provide a specimen of breath can only be made at a police station. Fifth, two specimens have to be given, and that with the higher reading has to be disregarded. Sixth, if the specimen with the lower reading contains less than a specified quantity of alcohol, the defendant may ask that it be replaced with a specimen of blood or urine, in which event, if he provides such a specimen, no specimen of breath shall be used. This is a formidable list of protections for the motorist. Having so provided, it was open to Parliament to consider whether a specimen of breath so provided should constitute conclusive evidence of the quantity of alcohol in the defendant's breath at the time of driving, attempting to drive or being in charge of a motor vehicle, or whether it should be conclusive subject only to certain specified limited defences (such as the "hip-flask" defence), possibly coupled with the safeguard that the motorist should in every case be given the opportunity of providing a specimen of blood or urine in substitution for his specimen of breath. Parliament might have decided so to provide

on the ground that the public interest in securing convictions in the case of an offence which is known to cause so much suffering to other citizens was so great that a defence founded, for example, on an allegation that the defendant had drunk so little that the print-out from the particular device could not be accepted as reliable, should not be permitted. But in my opinion, on a true construction of the present Act, no such provision has been enacted. It has been enacted only that evidence of the proportion of alcohol in a specimen of breath taken in accordance with the statute shall be taken into account; and the exception to the statutory assumption relating to the "hip-flask" defence is not expressed to be the only defence and is only here referred to because it relates to drinking during the period between driving, attempting to drive or being in charge of a motor vehicle and providing the specimen, and is concerned to place the burden of proof upon the defendant who raises the "hip-flask" defence. Once it is accepted, as in my opinion it must be, that evidence of the proportion of alcohol in a specimen of breath, blood or urine is not conclusive but can be rejected by the court as unreliable, I can, like my noble and learned friend, see no basis in the statute for limiting the ground on which the court may reject the evidence as reliable in the manner decided by the Divisional Court in Hughes v. McConnell [1985] R.T.R 244. Take the following example. Suppose that a specimen of breath is provided by the defendant which is shown by the print-out to contain just over 50 microgrammes of alcohol in 100 millilitres of breath. The defendant asks that it should be replaced by a specimen of blood or urine. He has no right to this under section 8(6) of the Act. The police officer, however, causes a urine specimen to be taken and provides the defendant with part of the specimen. The defendant has his part of the urine specimen analysed; the analysis shows that he was not over the limit. Under the Act, evidence of the proportion of alcohol in the specimen of breath is nevertheless admissible. Like my noble and learned friend Lord Griffiths, I find it difficult to believe that, upon the defendant tendering in evidence the analysis of his part of the urine specimen, it should not be open to the magistrates to reject the print-out relating to the specimen of breath as unreliable.

I fear that I do not share the optimism of my noble and learned friend that motorists will desist from seeking to persuade magistrates to reject evidence from print-outs as unreliable on the ground that they have drunk so little that the reading cannot be right. It is notorious that there is an industry devoted to assisting motorists in defeating charges brought under section 6 of the Act; and once the decision in the present case is reported, attention will rapidly be drawn to this new possibility. Furthermore, the consequences of a conviction can be so serious for many motorists that there is a great temptation to grasp at any straw which may assist them in their defence. I have little doubt that the point will be taken time and time again. I place greater faith in the good sense of magistrates who, with their attention drawn to the safeguards for defendants built into the Act to which I have referred earlier in this opinion, will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a print-out, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure. Even so, I anticipate that the responsible authorities will be keeping the situation arising from the decision of your

Lordships' House under very careful review, in order to consider whether the provisions of the Act require to be strengthened in the public interest.

Cracknell (Appellant)

v.

Willis (Respondent) (On appeal from a Divisional Court of the Queen's Bench Division)

JUDGMENT

Die Jovis 5° Novembris 1987

Upon Report from the Appellate Committee to whom was referred the Cause Cracknell against Willis, That the Committee had heard Counsel on Wednesday the 8th day of July last, upon the Petition and Appeal of Robert Peter Cracknell, of 45 Widecombe Road, Mottingham, London, SE9, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of a Divisional Court of the Queen's Bench Division of Her Majesty's High Court of Justice of the 20th of October 1986, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; and Counsel having been heard on behalf of Police Constable Willis (on behalf of Her Majesty), the respondent to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of a Divisional Court of the Queen's Bench Division of Her Majesty's High Court of Justice of the 20th day of October 1986 complained of in the said Appeal be, and the same is hereby, **Set Aside**; That the conviction at Bromley Magistrates' Court of an offence under section 6(1) of the Road Traffic Act 1972, as amended by the Transport Act 1981, of the 7th of April 1986 be **Quashed** and that the conviction of an offence under section 8(7) of that Act, as amended, be **Affirmed**; that the first certified question be answered in the negative; and that the second certified question be answered in the affirmative : And it is further Ordered, That the Costs incurred by the said Appellant in the Court below and also the Costs incurred by him in respect of the said Appeal to this House be paid out of central funds pursuant to section 16 of the Prosecution of Offences Act 1985, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

Cler: Parliamentor: