



NEUTRAL CITATION NUMBER [2004] EWHC 2468 (Div)

Case No: CO/3566/2004

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1st November 2004

Before :

THE HONOURABLE MR JUSTICE SILBER
THE HONOURABLE MR JUSTICE GIBBS

Between :

MAHMOOD ZAFAR

Appellant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Nigel Ley (instructed by **Vickers and Co**) for the Appellant
Hugo Charlton (instructed by **Crown Prosecution Service, London**) for the Respondent

Hearing date : 20 October 2004

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Mr Justice Silber:

I Introduction

1. Mahmood Zafar (“the appellant”) appeals by way of case stated against a decision made on 29 March 2004 by the Inner London Crown Court dismissing his appeal against his conviction by Tower Bridge Magistrates Court for an offence of driving a motor vehicle having consumed excess alcohol contrary to section 5(1)(a) of the Road Traffic Act 1988 as amended (“the RTA”).
2. This appeal raises the question of what is meant by the word “breath” in that section as the case stated by the Crown Court for this court is

“Is the meaning of the word “breath” in s. 5 of the Road Traffic Act 1988 and s15 (2) of the Road Traffic Offenders Act 1988 to be confined to deep lung air only, or does it include all of that which is exhaled?”

3. The appellant says that the answer is that the word “breath” means “deep lung air” only while the respondent contends that the word “breath” means all that is exhaled.

II The Statutory Provisions

4. Counsel agree that of the two provisions set out in the case stated, the only relevant statutory provision for the purpose of this appeal is section 5(1)(a) of the RTA, which insofar as is material, provides that: -

“If a person – (a) drives ... a motor vehicle on a road ... after consuming so much alcohol that the proportion of it in his breath ... exceeds ... the prescribed limit he is guilty of an offence”.

5. No specific submissions were made in relation to the other statutory provision referred to in the case stated, which is section 15(2) of the Road Traffic Offenders Act 1998, which 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”.

III The Crown Court Proceedings

6. In the Case Stated, the Crown Court set out the facts, which they found and they are that: -

“(i) On 25 March 2002 at 23.30 the appellant was driving his car in Streatham in such a way as to attract the attention of a patrolling police officer.

(ii) His car was stopped. He was spoken to. The officer smelled alcohol on his breath. He was required to give a breath specimen. He said he had had one pint of Stella Artois lager to drink. After a wait of 20 minutes by the

roadside a breath-test kit was brought and the usual procedures were followed. Although given three opportunities he failed to provide a breath specimen.

- (iii) He was arrested and taken to Kennington police station and the formal breath-test procedure was followed. After several attempts he provided two specimens of breath appropriate for analysis on an Intoximeter. The readings showed 79 and 75 microgrammes respectively: the legal limit is 35. The machine was in everyday use and appeared to the police officer, Sgt. Lyons to be working properly.
- (iv) We were shown the custody suite video. His demeanour was uncooperative, he repeatedly failed to give his name and address, and his voice was emphatic and slurred.
- (v) The appellant gave evidence. He is a medical doctor by profession and has no previous convictions. He said he had drunk only one pint of Stella Artois lager that evening. We did not accept this evidence on this point. He said, and we accept, that he suffered from heartburn causing occasional reflux of the stomach contents to the mouth and he recollected that evening feeling discomfort in the stomach and something in the back of the throat. He took a medication – Ventadine – for this condition. He remembered discomfort just before he blew into the machine at the police station.
- (vi) Professor Makin (Emeritus Professor of Clinical Chemistry at St. Bartholomew’s Hospital) explained that the Intoximeter is designed to detect alcohol in “deep lung air” as opposed to alcohol “mouth alcohol” in the mouth or upper respiratory tract. If mouth alcohol is detected the machine is designed to print out the message “mouth alcohol – unsatisfactory specimen”. He made it plain that he found the Intoximeter an inadequate machine for this purpose. He has tested, countrywide, 125 of these machines – 40% of those in use – grading the results. He asserted that only a grad “A” result was satisfactory, and he had encountered only one machine that could be described as grade “A”. This particular machine he had tested with colleagues on 19 December 2000 and graded it “E” – very poor”.

7. The Crown Court also said that they accepted that: -

“The appellant suffers from heartburn and may have had reflux at the material time and the Intoximeter cannot always be relied on to recognise mouth alcohol”.

- 8. In the Crown Court, the appellant contended that the prosecution were obliged to show that the reading from the Intoximeter related solely to “deep lung alcohol” and not in any respect to “mouth alcohol” and therefore the appeal should be allowed. The Crown Court rejected this submission because it considered that neither section 5 of the RTA nor any other statutory provision to which it had been referred distinguished between “deep-lung alcohol” and “mouth alcohol”, both of which form components of the term “breath”.
- 9. The conclusion of the Crown Court was that they should accept the argument of the prosecution first that although the Intoximeter was designed to make the distinction between “deep lung breath” and “mouth alcohol”, such a distinction was not required

by section 5 of the RTA and second that the word “breath” in that provision does not distinguish between the two meanings.

III The Submissions and Discussion

10. The basic submission of Mr. Ley for the appellant is that the word “breath” in section 5 of the RTA does not include all of what is exhaled, but that it is limited to “deep lung air” and therefore it excludes “mouth alcohol”. Mr. Charlton for the respondent disagrees as he contends that the word “breath” includes mouth alcohol as it includes any exhaled air.
11. The result of this appeal depends on the construction of the word “breath” in section 5 of the RTA and in section 15(2) of the RTOA. It is a relevant starting point that the New Shorter Oxford English Dictionary’s main definition of the word “breath” is “air exhaled from any thing”. This definition confirms my view of how the word “breath” is used and understood in normal parlance and Mr. Ley does not appear to dispute this. Thus, neither the dictionary definition nor the normal use of the word “breath” limits its meaning to “deep lung air”, which is the way in which Mr. Ley says that it should be defined. In my view, unless there is any contrary intention expressed in the statutory provision, that definition of the word “breath” should be adopted in construing the statutory provisions referred to in the Case Stated.
12. Mr. Ley contends correctly in my view that in ascertaining the meaning of the word “breath”, it is necessary for the court to ascertain the intention of the legislature (see, for example, Viscountess Rhondda’s Claim [1922] AC, 339, 397). He points out that the problem of mouth alcohol has long been recognised and that as long ago as in 1970 Lord Diplock noted that “the alcohol remaining in the mouth will cause a falsely high indication of the true blood alcohol level”(Webber v. Cary [1970] AC 1072, 1096).
13. This statement, Mr. Ley submits, indicates that Parliament was aware of the effect of “mouth alcohol” on blood alcohol level when it enacted section 5 of RTA and it must have had “mouth alcohol” in mind. That might be so but what is important is that Parliament chose not to limit the normal and natural meaning of “breath” in this way, but instead it used the word “breath” without specifying any limitation on its meaning.
14. The second submission made by Mr. Ley is that the Home Secretary has approved the use of Intoximeters, which are designed to detect alcohol in “the deep lung air” as opposed to “mouth alcohol” in the mouth or in the upper respiratory tract. As I have explained, Professor Meakin’s evidence, which was accepted by the Crown Court, was that if “mouth alcohol” is detected, the Intoximeter is designed to print out the message “mouth alcohol – unsatisfactory specimen”. Thus, Mr. Ley says that this shows that the intention of Parliament was to regard “mouth alcohol” as constituting unsatisfactory breath specimens.
15. However, the approval given by the Home Secretary to Intoximeters apparently occurred after section 5 was enacted; in any event, it does not throw any light on the interpretation of the statutory provisions with which this appeal is concerned. The court’s task is to ascertain the intention of Parliament and not of the Home Secretary at the time when section 5 was enacted. Therefore the way in which the Executive decides that breath should be measured is irrelevant in ascertaining that Parliamentary intention, especially if that decision, as appears to be the case here, is taken after the legislation is enacted.
16. Third, Mr. Ley contends that his interpretation of the word “breath” is supported by what was said by Baroness Blatch, who was then the Minister of State at the Home

Office on 26 June 1999, during the debates in the House of Lords on Amendment No. 67 of the Parliamentary Bill, which later became inserted in section 7(3) of the RTA and which provides that: -

“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:-

...

(bb) a device of the type mentioned in subsection (1)(a) above has been used at the police station but the constable who required the specimens of breath has reasonable cause to believe that the device has not produced a reliable indication of the proportion of alcohol in the breath of the person concerned”.

17. The Minister said that: -

“My Lords, I beg to move that the House do agree with the Commons in their Amendment No. 67.

The new clause ensures that the police can make full use of new evidential breath testing equipment, which will shortly be available, but continuing to be able to exercise their existing discretion to require blood or urine samples from suspected drink drivers in certain situations. It makes similar provision in the Transport and Works Act which provides a scheme for dealing with railway employees suspected of exceeding the alcohol limit.

The existing breath testing equipment at police stations was introduced in 1983 and we need to plan ahead for its replacement. Technology has moved on since 1983, as have the international standards on breath testing. The new equipment therefore incorporates some new software which enables it to identify and flag up automatically certain situations which are currently catered for by operational arrangements. Put simply, these cover situations where it is suspected an interfering substance may be present, or the alleged offender produces mouth alcohol or the difference between the reading for two breath samples is greater than 15 per cent. In such situations, the machine will advise the operator and the constable should then be able to require a blood or urine sample as an alternative.

The existing provisions in Section 7 of the Road Traffic Act 1988 do not currently allow specimens to be required in a situation where a properly working machine indicates such readings. The new clause therefore extends the police’s existing discretion to allow specimens to be taken in such situations”.

18. The decision of the House of Lords in *Pepper v Hart* [1993] AC 539 shows that there are only limited circumstances in which the courts can use parliamentary debates to

decide on a question of statutory construction. Mr. Ley attaches importance to the comments of Lord Griffiths, who said at page 617, that:-

“The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reasons not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry”.

19. The limited circumstances in which a party can rely on Parliamentary statements by Ministers in interpreting statutes were explained by Lord Browne-Wilkinson, with whom the majority of the Appellate Committee agreed. He said at page 640 that:-

“I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear. Further than this I would not be prepared to go”.

20. In my view, the appellant cannot rely on the statements of Baroness Blatch as an aid to construing the sections with which the Case Stated is concerned because first the word “breath” in section 5 of the RTA is not ambiguous, second the statement of Baroness Blatch was not made in relation to section 5, which is the section under review and third, here statement was made not by the promoter of section 5 but as the promoter of an amendment, which was made eight years later.

21. Thus Mr. Ley cannot derive any assistance from Baroness Blatch’ comments and I move on to his fourth point, which is to seek to derive assistance from comments made in two recent decisions of this Court, namely DPP v Texeira [2003] RTR 395 and Memery v. DPP [2003] RTR 249. In neither of these cases was the meaning of the word “breath” the subject of either of the Cases Stated or of any of counsel’s submissions. Thus, I am unable to derive any help in answering the present Case Stated from either of those cases, which were dealing with different issues.

22. Therefore, I conclude that there is nothing in the RTA or in the RTOA, which suggests that the word “breath” should have a special meaning or that the dictionary definition of “breath” should not apply. It is noteworthy that the statutory provision refers to “breath” and not to “deep lung air”. What Mr. Ley is seeking to persuade us to do is to rewrite the statutory provision and that is not correct.

23. I should mention that very late in his submissions, Mr. Ley sought leave to amend the Case Stated in order to challenge the decision of the Crown Court to convict the appellant. We then said that we would deal with this application to amend in our judgments, which we now do. In my view this application at this very late stage should be refused because to accede to it would mean that the matter would have to be remitted to the Crown Court so that they could deal with this matter and set out their reasoning on this issue in greater detail. That would lead to further delay and in

addition the prospects of success on this point would not justify the decision to allow the amendment, which in any event has not been formulated in writing. Furthermore, this application for a case stated on this issue raised by the proposed amendment is well out of time because an application for a case stated must be made within 21 days of the decision subject to a discretion to extend. Thus I would reject that application to amend.

IV Conclusion

24. I would answer the question raised in the Case Stated:-

“Is the meaning of the word “breath” in s. 5 of the Road Traffic Act 1988 and s15 (2) of the Road Traffic Offenders Act 1988 to be confined to deep lung air only, or does it include all of that which is exhaled?”

with the word “no”.

Mr. Justice Gibbs:

I agree.