APPEAL COURT, HIGH COURT OF JUSTICIARY

[2012] HCJAC 168

Appeal No: XJ94/12

OPINION OF

LORD EASSIE

in

APPEAL AGAINST CONVICTION

BY STATED CASE

by

BRYAN ROBERT BARCLAY

Appellant;

against

THE PROCURATOR FISCAL, ABERDEEN

Respondent:

_____

Lord Eassie

Lord Carloway

Lord Hardie

Lord Bonomy

Lord Menzies

Appellant: Latif, Jones; Drummond Miller LLP (for George Mathers & Co, Aberdeen)

Respondent: Harper, Solicitor Advocate, AD; Crown Agent

21 December 2012

Introductory

[1] The appellant in this appeal by stated case was convicted in the sheriff court in Aberdeen of four contraventions of the Road Traffic Act 1988 - "the Act" - all of which flowed from the same road traffic incident. The first charge was a contravention of section 3 of the Act, namely careless driving. The second charge (to which he pled guilty) was a contravention of section 87 of the Act, namely driving without a licence to drive the vehicle in question. The conviction on charge 1 is no longer challenged and the appeal is now directed only to the conviction on charge 3. That conviction is a charge of contravening section 5(1)(a) of the Act. But the terms of charge 4 on the complaint - a contravention of section 7(6) - also bear on the challenge to the conviction on charge 3. The terms of those charges are as follows:

"(3) On 29 December 2010 on a road or other public place, namely A96 Aberdeen to Elgin road at Broomhill Roundabout, Kintore, Aberdeenshires, You Bryan Robert Barclay did drive a motor vehicle, namely motor car registered number SB09JWU after consuming so much alcohol that the proportion of it in your breath was 112 microgrammes of alcohol in 100 millilitres of breath which exceeded the prescribed limit, namely 35 microgrammes of alcohol in 100 millilitres of breath; contrary to the Road Traffic Act 1988, Section 5(1)(a).

(4) On 30 December 2010 at Grampian Police, Blackhall Road, Inverurie, Aberdeenshire you Bryan Robert Barclay did without reasonable excuse, fail to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State in pursuance of a requirement imposed under the Road Traffic Act 1988, Section 7; contrary to said Act, Section 7(6), and it will be shown that the said specimens of breath were required to ascertain your ability to drive or the proportion of alcohol in your breath at the time you were driving a motor vehicle namely motor car registered number SB09JWU on 29 December 2010 on a road or other public place, namely A96 Aberdeen to Elgin road at Broomhill Roundabout, Kintore, Aberdeenshire."

[2] Although the appeal is directed against the sheriff's decision to refuse a motion made in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 at the close of the prosecution case that there was no case to answer on charge 3, the issue is ultimately one of statutory interpretation and the relevant factual circumstances were largely not in dispute. They can be narrated relatively shortly by way of summary from the findings in fact in the stated case and the sheriff's note of the evidence.

[3] At about 2300 hours on 29 December 2010, the appellant was driving a car on the A96 road between Blackburn and Kintore in Aberdeenshire. On approaching a roundabout at Kintore, the appellant lost control of his vehicle which spun through 180 degrees and crashed into the barrier in the central reservation between the two carriageways of the road. The appellant was assisted from his crashed vehicle by another motorist. The police were summoned by that motorist's wife, a passenger in his car. On their attendance the appellant, having identified himself as the driver of the car, provided a roadside breath sample for the presence of alcohol in his breath. The test was positive. The appellant was then arrested and taken to the police station in Inverurie.

[4] At that police station the appellant was required in terms of section 7(1) of the Act to provide two specimens of breath for analysis by a device of a type approved by the Secretary of State, referred to in the evidence and the stated case as the "intoximeter". At 0010 hours on 30 December 2010 the appellant provided a specimen in respect of which the intoximeter provided a reading of 112 microgrammes of alcohol per 100 millilitres of breath. Thereafter, despite several attempts, the appellant failed to provide the second sample which had been earlier required. The sheriff found that the appellant had no reasonable excuse for failing to provide the second specimen of breath which had been required by the police officers. No issue is taken in the appeal respecting the sheriff's finding of the absence of any reasonable excuse. There was accordingly no second sample of breath and the prosecution upon charge 3 (the contravention of section 5(1)(a) of the Act) rested on the single specimen of breath which the appellant had provided.

[5] The thrust of the submission of no case to answer advanced respecting charge 3 was that to establish a contravention of section 5(1)(a) it was necessary, where the Crown was relying on the provision of specimens of breath, that two readings had been obtained pursuant to a requirement made under the provisions of section 7 of the Act. The procurator fiscal depute resisted that submission invoking the decision of this court in *Reid* v *Tudhope* 1986 SLT 136 as authority for the proposition that only one specimen of breath was sufficient to found a conviction under section 5(1)(a) of the Act, if the accused motorist had failed, without reasonable excuse, to provide the second specimen required pursuant to a requirement made in terms of section 7.

[6] In rejecting the submission advanced on behalf of the appellant, the sheriff considered himself bound by the decision in *Reid* v *Tudhope*. He was not referred to the decision of the House of Lords *Cracknell* v *Willis* [1988] 1 AC 450, which may be seen as inconsistent with *Reid* v *Tudhope*. In the concluding paragraph before his formulation of the questions in the stated case the sheriff indicates that had he been referred to *Cracknell* v *Willis* he might have reached a different view on the submission of no case to answer.

[7] It is in the light of the conflict between *Reid* v *Tudhope* and the decision of the House of Lords in *Cracknell* v *Willis* that this appeal by stated case has been brought before a bench of five judges of the High Court of Justiciary.

The Legislative Provisions
[8] Section 5(1) of the Act provides:

"5.- Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit.

(1) If a person -

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence."

[9] Section 6 of the Act enables a police constable to require a person "to co-operate with any one or more preliminary tests administered to the person by that constable" in certain circumstances. Those circumstances include an accident having occurred owing to the presence of a motor vehicle on the road and the constable reasonably believing that the person was driving, attempting to drive, or was in charge of the vehicle at the time of the accident. The preliminary tests are described in sections 6A, 6B and 6C, the first of these being a breath test (which was administered to the appellant). If, as occurred in this case, the preliminary breath test was positive, the police constable may arrest the motorist under section 6D. Arrest may also follow if the person in question fails to co-operate in the administration of the preliminary test.

[10] Section 7 of the Act makes provision for requiring a person to provide specimens of breath for analysis or a specimen of blood or urine for laboratory testing. Its provisions include the following:

"7. - Provision of specimens for analysis.

(1) In the course of an investigation into whether a person has committed an offence under section 3A, 4 or 5 of this Act a constable may, subject to the following provisions of this section ....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 -

(a) at a police station,

(b) at a hospital, or

(c) at or near a place where a relevant breath test has been administered to the person concerned or would have been so administered but for his failure to co-operate with it.

(2A) For the purposes of this section 'a relevant breath test' is a procedure involving the provision by the person concerned of a specimen of breath to be used for the purpose of obtaining an indication whether the proportion of alcohol in his breath or blood is likely to exceed the prescribed limit.

...

(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) specimens of breath have not been provided elsewhere and at the time the requirement is made a device or a reliable device of the type mentioned in subsection (1)(a) above is not available at the police station or it is then for any other reason not practicable to use such a device there, or

(bb) a device of the type mentioned in subsection (1)(a) above has been used (at the police station or elsewhere) 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, or

...

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 and, in the case of a specimen of blood, the question who is to be asked to take it shall be decided (subject to subsection (4A)) by the constable making the requirement.

(4A) Where a constable decides for the purposes of subsection (4) to require the provision of a specimen of blood, there shall be no requirement to provide such a specimen if -

(a) the medical practitioner who is asked to take the specimen is of the opinion that, for medical reasons, it cannot or should not be taken; or

(b) the registered health care professional who is asked to take it is of that opinion and there is no contrary opinion from a medical practitioner;

and, where by virtue of this subsection there can be no requirement to provide a specimen of blood, the constable may require a specimen of urine instead.

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

(7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution."

[11] Sections 8(1) and 8(2) provide as follows:

"8.- Choice of specimens of breath.

(1) Subject to subsection (2) below, of any two specimens of breath provided by any person in pursuance of section 7 of this Act that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded.

(2) If the specimen with the lower proportion of alcohol contains no more than 50 micorgrammes of alcohol in 100 millilitres of breath, the person who provided it may claim that it should be replaced by such specimen as may be required under section 7(4) of this Act and, if he then provides such a specimen, neither specimen of breath shall be used.

..."

[12] Finally, section 15 of the Road Traffic Offenders Act 1988 provides:

"15.- Use of specimens in proceedings for an offence under section 4 or 5 of the Road Traffic Act.

(1) This section and section 16 of this Act apply in respect of proceedings for an offence under section 3A, 4 or 5 of the Road Traffic Act 1988 (driving offences connected with drink or drugs); and expressions used in this section and sections 3A to 10 of that Act.

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by [or taken from] the accused shall, in all cases [(including cases where the specimen was not provided [or taken] in connection with the alleged offence)], be taken into account and, subject to subsection (3) below, 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.

(3) That assumption shall not be made if the accused proves -

(a) that he consumed alcohol before he provided the specimen [or had it taken from him] and -

(i) in relation to an offence under section 3A, after the time of the alleged offence, and

(ii) otherwise, after he had ceased to drive, attempt to drive or be in charge of a vehicle on a road or other public place, 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 it is alleged that he was unfit to drive through drink, would not have been such as to impair his ability to drive properly.

(4) ...

Section 16 makes provision for the use of documentary evidence, including what might colloquially be referred to as a "print-out" from the approved device, in the case of a prosecution alleging driving, or being in charge , with a proportion of alcohol to breath exceeding the prescribed limit and a certificate by an "authorised analyst", where the charge is that of driving, or being in charge of a vehicle, when the proportion of alcohol in the blood or urine - as the case may be- exceeded the prescribed limit for the fluid in question.

[13] The relevant statutory provisions regarding these matters which prevailed at the time of the decisions in *Reid* v *Tudhope* and *Cracknell* v *Willis* respectively were contained in various sections of the Road Traffic Act 1972 as substituted by the Transport Act 1981 - "the 1972 Act". The numbering of the substituted sections in the 1972 Act is different from that found in the 1988 Act and the substituted provisions in the 1972 Act carried into the Act have been amended and supplemented by additional provisions. But the essential structure or scheme of the legislative text is not materially different. Neither party to this appeal submitted or suggested that in considering the conflict between *Reid* v *Tudhope* and *Cracknell* v *Willis* anything turned on any variation in the ordering of the statutory provisions or on the additions to them, or, importantly, on any change in the wording of the text of the respective statutes. Likewise, neither party suggested that any difference in wording between the original s 6(1) of the 1972 Act and the version substituted by the Transport Act 1981 was of any relevance to the issues in the appeal. (The nature and effect of that difference were explained by the House of Lords in *Fox* v *Chief Constable of Gwent* [1986] AC 281, namely to overcome the objections taken in respect of technical deficiencies in the preliminary roadside or pre-police station procedures.)

Submissions

[14] In summary, counsel for the appellant submitted that the terms of the Act made plain that any conviction

of the offence created by section 5 in reliance upon an analysis of breath required that there be two specimens of breath provided by the accused. That was evident from section 7(1)(a), the requirement being to provide two specimens. Further, section 8(1) stipulated expressly that of the two specimens "that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded"; accordingly, unless two samples were provided and analysed the statutory provisions could not be operated.

[15] In *Cracknell* v *Willis* the questions in the appeal included whether the lower court had been correct in following *Duddy* v *Gallagher* [1985] RTR 401 and convicting the defendant of both the offence of failing, without reasonable excuse, to supply a second specimen of breath and also the offence of driving with an excess of alcohol on the basis of the single specimen of breath which had been supplied. The House of Lords, overruling *Duddy* v *Gallagher*, held that the offences of failing to provide two specimens of breath and driving with excess of alcohol were mutually exclusive, and that the defendant could not be convicted of the latter on the basis of a single specimen of breath. The reasoning of the House of Lords was, submitted counsel, to be preferred in so far as inconsistent with *Reid* v *Tudhope*.

[16] Counsel submitted that the decision in *Reid* v *Tudhope* proceeded, wrongly, on the basis that the requirement to provide two samples constituted, as respects the provision of a second sample, a benefit to the accused which the accused could waive. In the absence of reasonable excuse, the obligation to provide a second sample was not a benefit , capable of waiver, but was an action which resulted in the commission of a criminal offence.

[17] Counsel submitted accordingly that there was no basis for convicting the appellant of charge 3 on the complaint and the sheriff ought to have upheld the submission of no case to answer on that charge.

[18] The submission for the Crown was to the broad effect that a conviction under section 5(1)(a) of the Act could competently be made on the basis of a single specimen of breath. The principal foundation for that submission was the decision in *Reid* v *Tudhope*. Although recognising that they had been overruled by the House of Lords, the Crown noted that the English decisions in *Duddy* v *Gallagher*; *Burridge* v *East* [1986] RTR 328 and *Denneny* v *Harding* [1986] RTR 350 had similarly taken the view that conviction could proceed upon a single specimen of breath. *Reid* v *Tudhope* was correctly decided, the provision of the second specimen of breath being a protection for the accused. The Advocate depute highlighted that in the present case the police had acted correctly throughout; that the absence of a second specimen was the responsibility of the accused, all other safeguards being in place. The offence under section 5 of driving with an excess of alcohol was a different offence from that under section 7(6) of failing to supply two specimens of breath; and the offences occurred at different times and locations. There was, it was submitted, therefore no issue of double jeopardy in the sense of the appellant having been convicted of two charges arising out of the same factual situation.

[19] The Crown also invoked, particularly in its written submission, the provisions of section 15 of the Road Traffic Offenders Act 1988. Those provisions, it was submitted, made clear that a single specimen of breath was sufficient to found a conviction under section 5. A further contention advanced was that the sheriff was also entitled to find that the appellant was driving with the proportion of alcohol in his breath exceeding the prescribed limit by having regard to the evidence that, on being assisted from his crashed vehicle, the appellant was seen by the civilian witness seemingly to stagger, to be shaking and to be smelling of alcohol; and the evidence from the police officers that the appellant smelled of alcohol and that his speech was slurred.

Discussion

[20] In approaching the competing contentions in this appeal, I find it appropriate to begin by endeavouring to construe the relevant statutory provisions untrammelled by the earlier conflicting decisions in this jurisdiction and in England and Wales.

[21] In contrast to the offences created by section 4 of the Act of driving, or attempting to drive, or being in charge of, a motor vehicle while unfit through drink or drugs, the offences created by section 5 consist of

driving or attempting drive, or being in charge of a motor vehicle "after consuming so much alcohol that the proportion of it in [the accused's] breath, blood or urine exceeds the prescribed limit". The prescribed limits (section 11) are couched in precise terms. They vary as respects the type of specimen (breath, blood or urine), no doubt on scientific grounds resulting in what it appears is accepted as reflecting the same general consumption, absorption and elimination of alcohol in the particular individual concerned. In my view, the terms of section 5 thus indicate that a conviction under that section is postulated on the basis of a scientific analysis of breath, blood or urine producing a ratio of alcohol to breath or either of the two body fluids. Consistently with that, the succeeding sections of the Act make relatively elaborate provision for the obtaining for analysis of samples of breath or of blood or urine for laboratory testing from the suspect. Accordingly, in my opinion, looking to the wording of section 5 and the scheme and structure of the Act, any conviction under section 5 (as opposed to section 4) requires to be founded upon an analysis of a specimen of breath, blood or urine provided in accordance with the statutory procedures laid down for that purpose. In my view, it is necessary in a prosecution under s 5 of the Act for the prosecutor to specify that the excess was found in either breath or one or other of the two fluids and to specify what proportion of alcohol was found in the breath or the fluid concerned (cf *R* v *Bolton Justices, ex parte Khan* 1999 Crim L R 912). The Advocate depute's submission that evidence of the appellant's staggering, shaking or smelling of alcohol, or slurring of his speech, was relevant and admissible to prove the appellant's having contravened section 5 of the Act - which I understand to be viewed favourably by some other members of the Bench - thus appears to me to be contrary to that scheme and structure. In the present case, of course, the libel which the appellant faced in charge 3 on the summary complaint was one (entirely proper in terms of the practice required by the scheme and structure of the legislation) which alleged that the proportion of alcohol in his " breath was 112 microgrammes of alcohol in 100 millilitres of breath".

[22] Given that, in my view, an analysis of a specimen of breath, or blood or urine, obtained following a requirement made of the suspect under the Act is necessary for a conviction of one of the various offences under section 5, I turn to consider more particularly the provisions respecting samples of breath. It is to be noted that section 7(1)(a) of the Act enables a constable to require the suspect "to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State". Subsequent references in the section are to a "requirement under this section to provide specimens of breath". Thus the statute refers to the requirement in the singular but the specimens in the plural. In other words the requirement is not couched as first a requirement to produce one specimen and then a second requirement for a second sample. It is a unitary requirement. The provision of a second specimen of breath is thus in no sense optional to the suspect. Nor is the provision of the second sample in any way described as being dependent on the first sample having provided a positive analysis. Importantly, section 7(6) of the Act criminalises the failure to provide both or one of the specimens; and a contravention of section 7(6), including by failure to provide only one sample of breath, is visited with substantial penalties equivalent to a contravention of section 5 of the Act.

[23] While that is, in itself, a strong indicator that the legislature did not intend that partial completion of the procedure which it laid down for requiring the provision of two samples of breath should nonetheless furnish an evidential basis for conviction under section 5 of the Act, the matter is, to my mind, made clear by the terms of section 8(1) of the Act. For convenience I repeat the text of that provision:

"8.- Choice of specimens of breath.

(1) Subject to subsection (2) below, of any two specimens of breath provided by any person in pursuance of section 7 of this Act that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded."

The provisions are mandatory. The procedure thus requires the provision of two specimens of which the higher is to be disregarded. If a suspect (without reasonable excuse) fails to provide both specimens the provisions of section 8(1) cannot be followed. The procedure for gaining an evidential basis for prosecution under section 5 is no doubt thereby frustrated. But the suspect is, of course, subject to the substantial

penalties to which he is liable by virtue of the fact that, in frustrating the procedure by failing to supply the second specimen, he has committed an offence under section 7(6) of the Act. It must be stressed that the clear and indisputable social purpose of countering the undoubted menace of mixing drinking alcohol and driving is not in any way compromised by the case in which a motorist fails - without reasonable excuse - to perform the unitary requirement of providing two breath samples. He may, and usually will, suffer the same fate as would have befallen him had he been found guilty of a contravention of s 5 of the Act.

[24] Accordingly, simply as a matter of the proper construction of the statute, I would regard as soundly based the contention advanced at trial before the sheriff that evidence of the first, and only specimen of breath, was not sufficient to support a conviction under section 5 of the Act; though the refusal to supply the second specimen would (subject to the question of reasonable excuse which the sheriff rejected) support a conviction under section 7(6), that is to say charge 4 on the complaint, which the appellant does not challenge.

[25] I turn now to the decision in *Reid* v *Tudhope*.

[26] The appellant in that case provided, in response to the requirement to provide two specimens of breath, one such specimen which on analysis disclosed a reading of 61 microgrammes of alcohol per 100 millilitres of breath. He failed properly to do what was necessary to furnish a second specimen capable of being analysed. He was then charged by the police, in respect of that failure, with a contravention of section 8(7) of the 1972 Act, which was then the equivalent of what is now section 7(6) of the Act. Thereafter, however, the police without making any statutory requirement afforded the motorist the opportunity to provide two further samples, which he did. The lower of the two readings was 59 microgrammes and that was the proportion of alcohol to breath which was libelled in the complaint. The conviction was challenged first on the basis that the initial requirement was brought to an end when the appellant was charged by the police with having committed an offence under section 8(7) of the 1972 Acct; and thus the two specimens provided in response to the informal, further invitation were not provided in response to a requirement made in terms of the statute. The invitation, not being made in the terms of the statute, therefore necessitated that the motorist be cautioned that he was under no obligation to provide the sample. The second ground of challenge was directed to the reliance placed by the sheriff on section 10(2) of the 1972 Act - the then equivalent to what is now section 15(2) and(3) of the Road Traffic Offenders Act 1988 - as eliding any defects in the procedure for obtaining the specimens. The sheriff's approach, based on section 10(2) of the 1972 Act, is described at p 137C-D of the report as follows:

"Was there evidence in the case of an excessive proportion of alcohol in the breath specimen? If there was, it was immaterial how it had been obtained and so defects in the procedure adopted in obtaining it were not necessarily fatal to a conviction."

[27] It is to be noted that in respect of that second ground the Advocate depute did not seek to support the sheriff's reliance on section 10(2) of the 1972 Act and the Court agreed with the Advocate depute that, in invoking that provision, the sheriff was in error. Although in its written note of argument the Crown in the present case appears similarly to invoke the current equivalent of that provision, namely section 15 of the Road Traffic Offenders Act 1988, the Advocate depute before us did not at any point submit that the agreement which the Court expressed with that part of the Crown's submissions in *Reid* v *Tudhope* was erroneous. In my view that part of the Crown's submission in *Reid* v *Tudhope* and the Court's agreement with it were sound. I have had the benefit of considering the views which are expressed by Lord Bonomy respecting s 15 of the Road Traffic Offenders Act 1988 and they entirely reflect my own thinking. As I mention later, the history, purpose and effect of the predecessor of s 15 of the Road Traffic Offenders Act 1988 are discussed in *Cracknell* v *Willis* at p 460D ff., wholly consistently with those views .

[28] In response to the first challenge to the conviction which had been advanced by counsel for the appellant in *Reid* v *Tudhope*, the Crown made two submissions the second of which was endorsed by the Court as

being sound, but without further judicial discussion of it. The submission was noted in the Opinion of the Court as follows:

"It was clear from section 8(6) that only one specimen was required to establish that the proportion of alcohol in the blood was greater than the permissible limit. Of the two specimens obtained from the requirement, the one with the lower proportion was the one to be used. The other was to be discarded after its purpose for comparison had been achieved. This was one of the two provisions in subs. (6) designed to confer an advantage on the accused. Where a second specimen of breath for comparison purposes has not been secured as a result of some deliberate action by the accused, he should not be entitled to benefit from that action, and should accordingly forfeit the benefit of a second breath specimen reading which might be lower that the first reading properly obtained. On that basis the one reading available following the requirement should be accepted as the one available in evidence to test whether the accused had more alcohol in his breath than the permissible amount. The advocate-depute founded on Maxwell on *The Interpretation Of Statutes* at p.328 to support his contention that everyone has a right to waive the advantage of the law for the benefit of a private person, so long as it does not impinge on the public right, and he argued that by deliberately preventing a reading from being obtained on the second occasion following the requirement the appellant has waived the right of having a second reading which might have established a lower proportion of alcohol."

For completeness, it may be added that whereas the single reading (from the first specimen) upon which the court founded was a reading higher than that libelled in the complaint (which adopted the lower of the informally invited specimens) the court did not see that as presenting any difficulty.

[29] In my respectful view, the submission for the Crown which the Court endorsed in *Reid* v *Tudhope* is flawed. It proceeds upon the basis that the provision of a second specimen of breath in response to the single statutory requirement to provide two such samples is a benefit or advantage to an accused which he is entitled to waive. In my opinion, that involves a misreading of the statutory provisions. Had it been the intention of the legislature that the provision of a second specimen of breath be a matter of option, benefit or advantage which could be waived by the suspect, that could easily have been made clear in the legislative text. Section 8(2) of the Act exemplifies the ability of the legislature to provide the suspect with an option which may be waived. But more importantly I do not consider that a failure to fulfil a requirement laid down by statute to provide two specimens of breath by providing only one such specimen can be categorised as the waiver of a benefit when that failure entails in itself the commission of a criminal offence with the liability to substantial penalties, usually equivalent to the penalties for an offence under s 5 of the Act. At no point in the Court's Opinion in *Reid* v *Tudhope* is any reference made to the provision whereby failure to provide a second sample of breath constituted such a criminal offence.

[30] In my opinion therefore the Court in *Reid* v *Tudhope*, was in error when it endorsed and adopted the submission in question, which was material to its decision to refuse the appeal.

[31] I come now to the decision, given after *Reid* v *Tudhope,* of the House of Lords in *Cracknell* v *Willis*. The circumstances of the case were that the defendant, having been tested positive in a roadside breath test, was arrested and taken to a police station where he was required, in terms of the statute, to provide two specimens of breath. He provided one specimen which was analysed by the Lion Intoximeter as showing a proportion of 78 microgrammes of alcohol in 100 millilitres of breath. The defendant thereafter did not blow properly into the machine and, after some such further abortive attempts, refused to provide any further specimen. He was prosecuted and convicted on the basis of the one specimen with a reading of 78 microgrammes of alcohol with the offence of contravening section 6(1) of the 1972 Act (the equivalent of the current section 5(1)); and he was also convicted of contravening section 8(7) of the 1972 Act (the equivalent of the current section 7(6)), in respect of his refusal to provide the second of the two specimens. The second of the two questions in the appeal was whether the magistrates were "correct in following the case of *Duddy* v *Gallagher* [1985] RTR 401 in convicting the appellant of both the offence of failing to supply a specimen of breath and actually supplying a specimen of breath which exceeded the prescribed limit". (The first question stated by the magistrates is not relevant to the present case). In *Duddy* v *Gallagher* the facts were essentially the same

as those in *Cracknell* v *Willis* and the Divisional Court had upheld a conviction in respect of convictions under the same two provisions of the 1972 Act.

[32] In dealing with the second question in the case stated by the magistrates, Lord Griffiths, who gave the leading speech and with whom the other members of the Committee of the House of Lords agreed, described the legislative history and set out the relevant statutory provisions. At page 459 of the report of his speech his Lordship says:

"The object of the legislation is to provide a relatively simply 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 refused 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} RTR 401 was correctly decided."

His Lordship then observes, as respects *Duddy* v *Gallagher*, that the Divisional Court had there taken the view that conviction on the basis of a single specimen became permissible by virtue of section 10(2) of the 1972 Act. That was of course the provision (now to be found in section 15(2) of the Road Traffic Offenders Act 1988) relied upon by the sheriff in *Reid* v *Tudhope*, the use of which was disapproved by this Court in its decision in that case. At page 460D, Lord Griffiths then discusses the ambit and function of section 10(2) of the 1972 Act - introduced to deal with the "hip flask defence" and the error made in the use of it by the court in *Duddy* v *Gallagher*. His Lordship then goes on to say, at page 461, that he considers *Duddy* v *Gallagher* to have been wrongly decided, as was the case of *Burridge* v *East* which had also held that a motorist could be convicted of an offence under section 6(1) on the evidence of one specimen of breath. It may be added that Lord Goff of Chieveley, who had been a member of the Divisional Court in *Duddy* v *Gallagher* acknowledged the error in its decision. His Lordship states, at page 469G , that he accepts that the intention of the legislation is that:

"Evidence of a specimen of breath shall only be given where two specimens of breath had 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)."

[33] A decision of the House of Lords on the construction of a statute creating the same criminal offences throughout Great Britain is of course very highly persuasive in this jurisdiction. Additionally, however, for reasons which should be already apparent, I respectfully consider the reasoning and conclusion reached by the House of Lords in *Cracknell* v *Willis* to be correct. In a sense, the essence of the matter is encapsulated in the rhetorical question, to which Lord Griffiths refers, why Parliament should have intended the evident anomaly, if not absurdity, in its legislative scheme that the motorist who refuses to provide any specimen should be guilty of only one offence whereas the driver who provides one specimen, thereby demonstrating initial compliance, should yet be guilty of two offences should he not provide the second sample. The Advocate depute before us was, to my mind, unable to provide any satisfactory answer to that question, no doubt for the good reason that on its proper construction the statute requires the provision of two specimens of breath before any evidential basis can exist for prosecution under section 5(1) of the Act. Nor, in my respectful view, is the answer suggested by Lord Hardie in his Opinion, a satisfactory answer. Any analogy

with the possibility of conviction of a crime of perversion of the course of justice by the destruction of existing evidence additionally to guilt of the primary offence is, in my view, misplaced. One is not concerned with destruction of existing evidence, but with a refusal to provide by way self-incriminating evidence, required under statute, in circumstances in which the legislature has made specific provision equiparating the penal consequences of that refusal to that equivalent substantive offence.

[34] In these circumstances I consider that in so far as it is authority for the proposition that a single specimen of breath may found a conviction for the offence of driving when the proportion of alcohol in the breath exceeds the prescribed limit the decision in *Reid* v *Tudhope* is erroneous and should be disapproved. The conclusion reached by the House of the Lords in *Cracknell* v *Willis* is sound and must be preferred.

[35] In the course of the hearing of the appeal an issue was raised, in particular by Lord Carloway, whether, in effect, a short answer to the appeal was that in view of s 192(3) of the Criminal Procedure (Scotland) Act 1995 it was barred by some omission on the part of the defence to object to the admissibility of the evidence led respecting the partial response by the appellant to the requirement to provide two specimens. It would plainly be unsatisfactory now to decide, at an enlarged Bench, that such was a basis for refusal of the appeal. But more importantly, I consider that any point under s 192(3) of the 1995 Act is misconceived. Given that the appellant was charged with a contravention of s 7(6) of the Act, evidence of what took place in the police station in Inverurie was clearly admissible. Those acting for the then accused rightly proceeded on the basis that it was for the Crown to establish that the proper procedures had been followed which would enable the Crown to ask for a conviction under s 5 of the Act.

[36] In my view this appeal, now directed only to the conviction under s 5 of the Act, is thus well-founded and should be granted. In formal terms I therefore move your Lordships that the Court answer, of consent, question 1 in the stated case (respecting the conviction for careless driving) and question 4, (respecting the conviction under section 7(6) of failing to meet the requirement of providing two specimens of breath) in the positive. As respects the second and third questions in the stated case, which are concerned with the conviction under section 5(1)(a) of the Act, I move your Lordships that they be answered in the negative.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Eassie

Lord Carloway

Lord Hardie

Lord Bonomy

Lord Menzies

[2012] HCJAC 168

Appeal No: XJ94/12

OPINION OF

LORD CARLOWAY

in

APPEAL AGAINST CONVICTION

BY STATED CASE

by

BRYAN ROBERT BARCLAY

Appellant;

against

THE PROCURATOR FISCAL, ABERDEEN

Respondent:

_____

Appellant: Latif, Jones; Drummond Miller LLP (for George Mathers & Co, Aberdeen)

Respondent: Harper, AD; Crown Agent

21 December 2012

1. The Trial

[37] On 18 October 2011, at Aberdeen Sheriff Court, the appellant was convicted of a contravention of section 5(1)(a) of the Road Traffic Act 1988. The charge libelled that he had driven a car with a breath alcohol level of 112 microgrammes, over three times the legal limit of 35. He was also convicted of a failure to provide two specimens of breath, contrary to section 7(6) of the 1988 Act.

[38] The facts, in so far as relevant to this appeal, are that, at about 11 pm on 29 December 2010, the appellant crashed his car into the central reservation of the A96 Blackburn to Kintore road. On being approached by others on the scene, he was seen to be staggering about and smelling of alcohol. The police arrived about 10 minutes after the accident. They too noticed that the appellant was unsteady on his feet and smelling of alcohol. He was also slurring his speech. At about 11.25 the appellant provided a positive roadside breath test. He was arrested and taken to the police station.

[39] At just after midnight the appellant provided a breath specimen, which the Intoximeter machine analysed as containing the alcohol level libelled. The print-out from the machine read as follows:

	"Value Ug/100ml	Time GMT
Blank	0	23:59
Simulator Check 1	34	00:00
Blank	0	00:01
Breath Specimen1	112	00:02
Blank Breath	0	00.04
Specimen2	XXX	00.00
Blank	0	00:09
Simulator Check 2	34	00:09
Specimen 2 Incomplete"		

The appellant failed to provide a second specimen, despite being afforded 2 or 3 opportunities to do so. The evidence was that he was sucking from, rather than blowing into, the tube.

[40] No objection was taken to the evidence of the police officers, who both spoke to the results of the breath test procedures, including the content of the print-out.

[41] At the conclusion of the Crown case, the appellant's agent made a submission of "no case to answer", arguing that two samples required to be provided in terms of section 7 of the Act. The respondent replied that, following *Reid* v *Tudhope* 1986 SLT 136, only one sample was required where, as here, the accused had deliberately not produced a second sample. The sheriff repelled the submission although, in the stated case, he observes that his decision could have been different had his attention been drawn to *Cracknell* v *Willis* [1988] 1 AC 450.

[42] The appellant gave evidence which, while accepting the reading of 112 on the first sample, was to the effect that he had not deliberately failed to provide a second sample. His testimony on this issue was rejected by the sheriff.

[43] In so far as relevant to the argument presented at the appeal hearing, the questions in the stated case relative to the section 5(1)(a) conviction are: "2. On the evidence, was I entitled to repel the submission of no case to answer..." and "3. On the evidence was I entitled to convict the appellant...". A question (4) similar to the latter was posed relative to the section 7(6) contravention.

2. The Statutory Scheme

[44] The offence created by section 5(1)(a) of the 1988 Act occurs where a person drives "after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit". There is no specific manner of proof prescribed. Section 7(1)(a) enables the police to require a person to provide two specimens of breath for analysis. Section 7(6) creates the offence of failing to provide a specimen.

[45] Section 8 provides that:

"of any two specimens of breath... that with the lower proportion of alcohol in the breath shall be used and the other shall be disregarded".

Section 15 of the Road Traffic Offenders Act 1988 provides that evidence of the proportion of alcohol in a specimen shall be taken into account and it is to be assumed that the proportion of alcohol at the time of the offence was not less than in the specimen.

3. Decision

[46] The circumstances arising in the present case are similar to those in *Reid* v *Tudhope* 1986 SLT 136, in that both appellants had thwarted attempts to obtain a second breath specimen. Under the legislation then in force (Road Traffic Act 1972, ss 6, 8 and 10), it was argued by the Crown in *Reid* that, as a general principle of statutory interpretation (Maxwell: *The interpretation of Statutes* p 328), everyone has the right to waive an advantage provided by the law. By deliberately preventing a second reading, the appellant had waived the right to rely upon a second reading which might have produced a lower figure. This argument was sustained by a bench consisting of the Lord Justice Clerk (Wheatley), Lords Robertson and Brand, and the conviction, based primarily on the single reading, was sustained. A similar result was initially reached in England in *Duddy* v *Gallagher* [1985] RTR 401, in which the principal judgment was issued by Goff LJ (see also *Burridge* v *East* [1986] RTR 328).

[47] The principle that, where a person has deliberately failed to provide a second specimen, the first alone can be relied upon has been the law in Scotland for at least 27 years. It was the law when the Road Traffic Act 1988, re-enacting the relevant provisions upon which that law was based, came into force. However, by

that time, the position in England had changed. In *Cracknell* v *Willis* [1988] 1 AC 450, the House of Lords had overruled *Duddy* and *Burridge* and held that, since the offences of driving whilst over the limit and failing to provide a specimen were mutually exclusive, a person could not be convicted where only one specimen had been given. No notice was apparently taken of *Reid* v *Tudhope*. Lord Griffiths, delivering the principal speech, stated (p 460) that the two specimen procedure was designed as a protection against machine malfunction. In accordance with the statutory scheme, he concluded that only the lower of two specimens could be relied upon. Lord Goff (p 469) was persuaded that his earlier decision in *Duddy* had proceeded upon too narrow a construction of the statutory provisions.

[48] The appeal against conviction on the breath alcohol charge should be refused for several separate reasons. First, the questions posed in the case on this charge are straightforward and are whether "on the evidence" the sheriff was entitled to repel the submission of no case to answer and thereafter to convict. In that connection, it is important to note the absence of any objection to the evidence led about the content of the Intoximeter print-out. That testimony became evidence *in causa*. If it was to be argued, in terms of *Cracknell* v *Willis,* that the print-out was inadmissible as proof of the alcohol level in the appellant's breath, because there had been no second specimen provided, objection to the use of that print-out had to be taken in the first instance proceedings (Criminal Procedure (Scotland) Act 1995 s 192(3); *Macaulay* v *Wilson* 1995 SLT 1070). For this reason alone the appeal against this conviction must fail.

[49] Secondly, the answers to the two questions posed in the stated case relative to the breath alcohol offence must be in the affirmative. There was before the sheriff evidence of the print-out showing a breath alcohol level of 112. There was no basis for considering that the content of the print-out was in error. On the contrary, it contained the results of calibration checks which indicate that the machine was working properly. Furthermore, there was strong evidence from the police and lay witnesses, that, given his staggering about, slurring of speech and the odour of alcohol on his breath, the level of alcohol in his breath would exceed the prescribed limit. In that regard and following the analysis of the statutory provisions set out by Lord Hardie, the road traffic legislation does not limit the manner of proof (see *Gallagher* v *MacKinnon* 1986 SCCR 704). All that is required is that any such proof demonstrate beyond reasonable doubt that the accused does have a breath alcohol level in excess of the limit. Evidence, for example, that a person has consumed a given quantity of alcohol combined with expert evidence that this would inevitably lead to a breath alcohol level in excess of a particular proportion would be sufficient to prove the case even in the absence of an Intoximeter print-out. This is so albeit that the use of such a machine may be, by far, the most convenient method of proof because of the statutory presumption in section 15 of the Road Traffic Offenders Act 1988 relative to the breath alcohol figure produced.

[50] Thirdly, it is of course possible to argue the merits of the reasoning in the decisions in *Reid v Tudhope* and *Cracknell* v *Wills*. It is disappointing to note the absence of any regard in *Cracknell* for the decision in *Reid*. Nevertheless, the reasoning in each case is worthy of respect. This is illustrated by Lord Goff's *volte face* from *Duddy* to *Cracknell.*

[51] The law in Scotland has, for over a quarter of a century, been that set out in *Reid* v *Tudhope.* It is that, properly construed, the provision, in what is now section 8(1) of the Road Traffic Act 1988 relative to the selection of the lower reading, only bites when an accused has actually provided two samples. Had it been necessary to decide the appeal upon this issue, the reasoning in *Reid* v *Tudhope* would have been preferred because of its straightforward reading of the statutory provisions. In that regard, the clear terms of section 15 of the Road Traffic Offenders Act 1988 permit reliance on a single (and not the lower) specimen of breath. Equally, section 8 of the Road Traffic Act 1988, which provides for the disregarding of a lower proportion sample, specifically only applies where there are two specimens given. It cannot apply where the accused has provided only one. There is therefore no reason to consider it in the present circumstances.

[52] Of greater importance, however, is that the police and the respondent in this case, and no doubt in many others, have acted in accordance with the decision of the High Court of Justiciary sitting as a final court appeal. This court is being asked to alter what has been the longstanding law of Scotland on the basis of

reasoning contained in an English case of almost equal longevity but which, over many years, has not been thought to be of such import as to merit such an alteration. There is no sound reason for making that alteration now. Rather, such a radical change of direction in the evidential requirements for road traffic offences ought properly to be left to Parliament. In that event, both the prosecuting authorities and the public can have advance notice that a change is to be made and requires to be accommodated. That is the only method of achieving substantial justice in a situation such as that presently before the court.

[53] For all these reasons, questions 2 and 3 fall to be answered in the affirmative. Question 1, which relates to a matter not argued, also falls to be answered in the affirmative.

[54] Finally, on the issue of whether a person can be prosecuted for both a failure to provide a specimen and for driving with an excess of alcohol in his breath, these offences are quite distinct in the statutory scheme. They are not mutually exclusive. The offence of driving with excess alcohol is normally committed on a public road at a particular time. It is a substantive road traffic offence relating to driving. In contrast, a failure to provide a specimen is essentially an offence against the course of justice and is normally committed at a later time and at a different place, notably in a police station. The consequences of a conviction for both offences can be taken into account in determining sentence; for example, by imposing any periods of disqualification concurrently.

[55] Question 4 accordingly also requires to be answered in the affirmative.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2012] HCJAC 168

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OPINION OF

LORD HARDIE

in

APPEAL AGAINST CONVICTION

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Respondent: Harper, solicitor advocate, AD; Crown Agent

21 December 2012

[56] The details of the charges of which the appellant was convicted are outlined by your Lordship in the chair in paragraph [1] of your Lordship's opinion. Paragraph [3] of that opinion outlines the basic factual background to the offences which is supplemented by Lord Carloway in paragraph [39] of his opinion. The supplementary information provided by Lord Carloway was elicited from the findings in fact in the stated case and the sheriff's note of the evidence. That additional information, relating as it does to the apparent state of intoxication of the appellant at the scene of the accident involving his motor vehicle, seems to me to be of some significance. While these adminicles of evidence do not establish the proportion of alcohol in the appellant's breath when he was driving his motor vehicle, they tend to support the undisputed evidence that the Intoximeter was working properly and provided an accurate reading of the appellant's breath sample. Such adminicles may be taken into account in cases where the court has to determine whether it should accept as reliable the evidence of a laboratory analysis of blood or urine, where that evidence is in dispute (*Gallagher* v *MacKinnon* 1996 SCCR 704). I consider that they would be equally relevant to assist the court where the reliability of Intoximeter readings was challenged. In such cases the obvious state of intoxication of an accused and the indication given by the preliminary breath test, administered in terms of section 6A of the Road Traffic Act 1988 ("the Act"), that the proportion of alcohol in the accused's breath or blood is likely to exceed the prescribed limit might enable the court to conclude that the disputed reading was accurate at least to the extent of indicating that the proportion of alcohol in the accused's breath exceeded the prescribed limit. In this case it is unnecessary to rely upon such adminicles of evidence because the reliability of the machine and the accuracy of the reading were not challenged by the appellant.

[57] The first issue that I wish to address is whether offences created by section 5 and section 7(6) of the Act are mutually exclusive. The construction undertaken by your Lordship in the chair of the relevant statutory provisions appears to me to depend upon the correctness of your Lordship's conclusion that "any conviction under section 5...requires to be founded upon an analysis of a specimen of breath, blood or urine provided in accordance with the statutory procedures laid down for that purpose" (Paragraph [21]). I regret that I am unable to agree with that conclusion. Although your Lordship in the chair has already quoted the terms of section 5(1), for convenience I repeat the text of that provision:

"5(1) If a person -

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence".

The remaining provisions of section 5 are not relevant to this case. While there is a superficial attraction in the assumption that proof of the proportion of alcohol in breath, blood or urine will be ascertained by analysis either by an approved device in the case of breath or in the laboratory in the case of blood and urine, Parliament did not limit proof that the proportion of alcohol in a sample exceeded the prescribed limit to these methods. Undoubtedly, in the vast majority of cases proof of the level of alcohol in such samples will be determined in the way envisaged by your Lordship in the chair. In *Cracknell* v *Willis* 1988 1 AC 450 Lord Griffiths quoted the terms of section 8 of the Road Traffic Act 1972 ("the 1972 Act") (re-enacted as section 7 of the Act) and then observed at page 458:

"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".

While his Lordship does not specifically reach the same conclusion as your Lordship in the chair that the only method of proving a contravention of section 6 of the 1972 Act, as substituted by section 25(3) and Schedule 8 of the Transport Act 1981, is by evidence of the scientific analysis of samples of breath, blood or urine, such a conclusion can be inferred from the decision that the offences prescribed by section 6 and section 8(7) of the 1972 Act were mutually exclusive. Lord Griffiths' reasoning in support of that conclusion, adopted by the other members of the Judicial Committee of the House of Lords, focuses upon the statutory procedure in terms of which a police officer may require a motorist to provide a specimen of breath for analysis by an approved device. In undertaking that exercise, he fails to consider the possibility that the prosecutor might be able to establish the level of alcohol in a motorist's breath, blood or urine without reference to the analysis of the appropriate specimen.

[58] The only situation in which Lord Griffiths considers the introduction of extraneous evidence is in the context of considering the first question in the appeal namely whether the magistrates were "correct in following the case of *Hughes* v *McConnell* [1985] RTR 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". The Judicial Committee concluded that *Hughes* v *McConnell* had been wrongly decided and that it was permissible to lead extraneous evidence challenging the accuracy of the reading provided by the approved device. In his speech Lord Griffiths concluded that the legislation did not disclose a Parliamentary intention of treating the machine as "virtually infallible". In support of this conclusion his Lordship cites the following example at page 467:

"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".

I consider that similar considerations apply to the means available to the Crown to the proof of a contravention of section 5. It would be contrary to the public interest to restrict the mode of proof without Parliament expressing a clear intention to that effect, particularly when the aim of the legislation is to provide an adequate deterrent to drinking and driving and thereby to protect the public from what Lord Griffiths described as "the menace of the drink-affected driver" (page 456F). In these circumstances it would be contrary to the public interest and unjust to restrict the mode of proof of an alleged contravention of section 5 unless the legislation contained "the clearest possible wording to show that Parliament intended such an unjust result". Section 5 contains no such limitation.

[59] Parliament could clearly have restricted the methods of proof, if it wished to do so. Indeed a review of the legislation relating to breath tests provides examples where Parliament has done so. When breath tests were first introduced by the Road Safety Act 1967 section 1(1) was in the following terms:

"If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable -

[there then follows the specified penalties]".

It is clear from that provision that Parliament did restrict proof of the proportion of alcohol in a motorist's blood to the results of a laboratory analysis of a specimen of blood provided by the motorist. Section 6(1) of the 1972 Act contained an identical restriction and was in the following terms:

"If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 9 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be guilty of an offence".

In contrast, section 25(3) and Schedule 8 of the Transport Act 1981, substituted for section 6 of the 1972 Act the following provision:-

"6(1) If a person -

(a) drives or attempts to drive a motor vehicle on a road or other public place; or

(b) is in charge of a motor vehicle on a road or other public place;

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he shall be guilty of an offence".

That provision was re-enacted as section 5 of the Act, the only change being the change of tense from the future to the present at the end of the section. I do not consider that the omission of the reference to the restricted method of proving the proportion of alcohol in a motorist's breath, blood or urine can be explained by the introduction of the Intoximeter which almost simultaneously analyses the proportion of alcohol in a sample of breath. The omission of a reference to the restricted means of establishing the proportion of alcohol in a motorist's body at the relevant time has the effect of enabling the Crown to lead any competent extrinsic evidence of that fact. If Parliament wished to restrict the mode of proof to the scientific analysis of a sample produced by an accused, Parliament could have expressed its intention to do so by inserting after the word "urine" words such as "as ascertained from the analysis of breath by means of a device of a type approved by the Secretary of State or from a laboratory test of blood or urine for which he has provided a sample".

[60] If I may respectfully adopt the illustrative approach of Lord Griffiths but substitute, for his teetotal dinner companion of the two reputable clerics, a regular customer of a public house who insists upon drinking a particular brand of whisky purchased by the half bottle, stocks of which are specially purchased for him. His normal practice is to purchase a half bottle of the whisky, consume some of it in the public house and take the remainder home with him. On one occasion, having purchased a half bottle of whisky he consumes its entire contents before leaving the public house and driving off in his motor car. A concerned customer notes the registration number of his car and telephones the police. Unfortunately, the police do not succeed in locating him on his journey or at his home as he had driven to the home of a friend with whom he intended to spend a few days. From witness statements the police are able to ascertain the period of time during which he was in the public house and to obtain for analysis an identical half bottle of whisky. An

authorised analyst thereafter analyses the contents of the sample and calculates the level of alcohol that would have been in the motorist's breath, blood and urine at the time that he commenced driving upon leaving the public house. If the analysis discloses that the proportion of alcohol in his breath, blood or urine exceeded the prescribed limits specified in section 11 of the Act, is the Crown to be precluded from leading such evidence in support of a charge of a contravention of section 5 of the Act? Where the intention of the legislation is clearly to protect the public from people who drive after having consumed an excessive amount of alcohol, such a restriction upon the Crown should only be contemplated where Parliament has expressed its intention to that effect in clear language.

[61] If I am correct in concluding that a contravention of section 5 of the Act can be established without a scientific analysis of a sample of breath, blood or urine of the accused provided in accordance with the statutory procedures laid down for that purpose, there can be no justification for concluding that Parliament intended that the offences created by section 5(1) and section 7(6) of the Act should be mutually exclusive. In any event these offences are separate statutory offences. They are distinct in nature. Section 5 is concerned with a person driving or attempting to drive or being in charge of a motor vehicle on a road or other public place. It is committed on a public road or other public place at a particular time when the motorist is driving or attempting to drive or is in charge of his vehicle. In contrast, the offence under section 7(6) is committed in the course of the police investigation into whether a person has committed an offence under *inter alia* section 5. It is analogous to the common law offence of attempting to pervert the course of justice and may be seen as a statutory equivalent of such a common law charge. It can only be committed at a police station when a requirement has been made to provide specimens of breath for analysis or blood or urine for laboratory testing and the suspect refuses to do so. This offence is obviously distinct in time, place and character from an offence under section 5 and in the absence of a specific provision indicating that the two offences are mutually exclusive there is no justification based upon statutory interpretation or the application of general legal principles to conclude that it is incompetent to prosecute a motorist for both offences. The ability to do so depends upon the availability of sufficient evidence to justify both charges. This result is no different from the situation where someone is suspected of having committed a common law crime and destroys evidence to hinder the police investigation. If there is a sufficiency of evidence to justify both offences it is not in dispute that an accused may be prosecuted for the substantive common law crime and for the separate crime of attempting to pervert the course of justice by destroying evidence. For example, two men might be involved in murdering their victim and thereafter each of them might burn or otherwise dispose of his clothing worn at the time of the murder to avoid linking him to the commission of the crime. If there is a sufficiency of evidence against only one of them to charge him with murder but there is also a sufficiency of evidence to charge each of them with attempting to pervert the course of justice, is it anomalous that one can be convicted of both murder and attempting to pervert the course of justice while the other can only be convicted of attempting to pervert the course of justice? The answer is obviously no because the differentiation between the two men is based upon the availability of sufficient evidence to justify a conviction of the relevant charge or charges. This is a situation which is not uncommon and may well be the answer to what your Lordship in the chair refers to as the rhetorical question posed by Lord Griffiths (para.[33]). The simple reason why the motorist who refuses to provide any specimen is guilty of only one offence whereas the driver who provides one specimen and thereafter refuses to comply with the procedure is guilty of two offences is that there is an evidential basis for such a conclusion. There is nothing anomalous in such an outcome. Parliament would have been well aware that the conviction for any offence has always depended upon sufficient evidence being available and I do not share the same concerns as Lord Griffiths or your Lordship in the chair that different outcomes might arise in different cases. Indeed it seems to me that the awareness of such a possibility reinforces the view that the statutory offences are not mutually exclusive.

[62] The second issue is whether a single sample of breath can be sufficient for a conviction of a contravention of section 5 of the Act. This is the issue upon which different conclusions were reached in *Cracknell* v *Willis* and *Reid* v *Tudhope* 1986 SLT 136. I share Lord Carloway's regrets that *Cracknell* v *Willis* contains no reference to the earlier decision in *Reid* v *Tudhope.*

[63] With the enactment of the Transport Act 1981 Parliament authorised the introduction and use in police stations of machines for the analysis of breath samples to determine the proportion of alcohol in such samples. However, in recognition of concerns about the reliability of such innovative technology, Parliament introduced safeguards for the protection of the motorist. In *Cracknell* v *Willis* at pages 470-471 Lord Goff of Chieveley listed these safeguards 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 the 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".

He described the list as "a formidable list of protections for the motorist". In light of the answer by the Judicial Committee in that case to the first question for its consideration there should be added the additional safeguard that the accuracy of the reading may be challenged by extraneous evidence, including, but not confined to, evidence concerning the effect of consuming a specified quantity of alcohol during a particular period of time prior to the commencement of driving. In relation to the safeguards within the police station, as distinct from the additional safeguard of the availability of a challenge to the reliability of the reading by using extraneous evidence, it will be noted that only the fifth and sixth of the safeguards listed by Lord Goff of Chieveley are within the control of the motorist. If the motorist does not provide a second specimen for analysis by the machine, it is obviously impossible to determine which is the higher of two readings and also whether the lower reading contains less than 50 microgrammes of alcohol in 100 millilitres of breath which would entitle the motorist to request that the breath samples be replaced by a sample of blood or urine.

[64] The mischief which Parliament sought to address in the Road Safety Act 1967 and the following enactments up to and including section 5 of the Act was the significant damage and suffering caused to other citizens as a consequence of persons consuming an excessive amount of alcohol and thereafter driving their motor vehicles. Prior to 1967, particularly in England where such offences could be tried before juries, it was difficult for the prosecuting authorities to obtain convictions. In *Cracknell* v *Willis* Lord Griffiths postulated possible reasons for juries behaving in this way although he was unaware of the actual reason when he observed at page 456F-H:

"...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, 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 the permitted proportion of alcohol in the blood....".

If I am correct in my conclusion that Parliament did not intend the offences under section 5(1) and section 7(6) of the Act to be mutually exclusive, is it conceivable that Parliament intended that what Lord Goff of Chieveley described as "the public interest in securing convictions in the case of an offence which is known to cause so much suffering to other citizens" (page 471C) should be frustrated by the person accused of committing such an offence? The safeguards introduced to protect the public against the unreliability of a printout from a particular machine were essentially the first four requirements listed by his Lordship, the most significant of which is the mechanism built into the machine by which it tests itself. The results of that test are included in the printout. In this case Lord Carloway has noted the result of the printout (para.[38])

from which it can be seen that the procedure commenced with the machine purging itself and producing a reading of 0 microgrammes in 100 millilitres of breath. This was followed by a calibration check, recorded as "simulator check 1". The advocate depute advised us that the calibration check must produce a reading between 32 and 37 microgrammes of alcohol in 100 millilitres of breath, otherwise the machine would be deemed to be unreliable. The first calibration check in this case produced a reading of 34. That calibration check was followed by a further purging of the machine which produced a reading of 0. Thus, immediately prior to the first breath specimen it was established that the machine was operating properly and one could rely upon its analysis of samples of breath. Thereafter the first breath specimen produced a reading of 112 microgrammes of alcohol in 100 millilitres of breath and it was followed by a purging of the machine at 00.04 when a reading of 0 was produced, indicating that the machine was still operating properly. Prior to the second breath sample being provided the machine was again purged at 00.09 hours and provided a reading of 0. A second calibration check provided a reading of 34, again indicating that the machine was operating properly. No second breath sample capable of analysis was provided by the appellant. The fifth and sixth safeguards each relate to the provision of a second sample of breath. One of the consequences of the provision of a second sample of breath is that the motorist is afforded the benefit that the higher of the two samples will be disregarded and that if the lower sample contains no more than 50 microgrammes of alcohol in 100 millilitres of breath the motorist has the option of requesting that the breath samples be replaced with a sample of blood or urine, the nature of the sample being determined by the police officer in charge of the procedure. It is inconceivable that a second breath sample in the present case would have produced a reading of 50 microgrammes or less. In that event the only possible advantage to the appellant of providing a second breath sample would have been that it might have been slightly lower than 112 but would nevertheless have confirmed the conclusion to be drawn from the analysis of the first sample that the appellant was guilty of a contravention of section 5(1) of the Act. Is it seriously to be suggested that, faced with the obvious public interest in securing convictions for such offences, Parliament intended that someone in the appellant's situation could avoid conviction by refusing to provide a second sample when the first sample clearly established his guilt?

[65] It seems to me that the nature of the safeguards relating to the provision of a second breath sample lies in the obligation upon the police officer administering the breath test to afford the suspect the opportunity of producing two samples to enable the suspect to rely upon the lower of the two samples and to afford him the additional protection of requesting a blood or urine sample where the lower reading is no higher than 50 microgrammes of alcohol in 100 millilitres of breath. Insofar as that is a protection offered to the appellant in the requirement of a second sample of breath, I am of the opinion that such a benefit, conceived in favour of the suspect, can be waived or dispensed with at the instance of the suspect. In *Reid* v *Tudhope* the court reached a similar conclusion when it approved of the submission of the advocate depute in that case to the following effect:

"It was clear from s.8(6) that only one specimen was required to establish that the proportion of alcohol in the blood was greater than the permissible limit. Of the two specimens obtained from the requirement the one with the lower proportion was the one to be used. The other was to be discarded after its purpose for comparison had been achieved. This was one of the two provisions in subsection (6) designed to confer an advantage on the accused. Where a second specimen of breath for comparison purposes has not been secured as a result of some deliberate action by the accused, he should not be entitled to benefit from that action, and should accordingly forfeit the benefit of a second breath specimen reading which might be lower than the first reading properly obtained. On that basis the one reading available following the requirement should be accepted as the one available in evidence to test whether the accused had more alcohol in his breath than the permissible amount". (137H-J)

Accordingly I have reached the conclusion that the evidence of the single sample in this case was sufficient to entitle the sheriff to convict the appellant of a contravention of section 5(1) of the Act.

[66] Nor do I consider that it is a sufficient answer to the foregoing conclusion that section 7(6) of the Act creates a separate offence of refusing to provide a sample of breath or that the available penalties for that

offence are identical to those for a contravention of section 5. As I have indicated above (para [61]), the nature of each of these offences is different and the possibility of proving a contravention of section 5 without relying upon samples of breath, blood or urine provided by the accused clearly indicate that these offences are not mutually exclusive.

[67] Although it is unnecessary for my conclusion that there was sufficient evidence to convict the appellant of a contravention of section 5(1) of the 1988 Act, section 15 of the Road Traffic Offenders Act 1988 appears to me to support that conclusion. That section has, as its derivation, section 10 of the 1972 Act, introduced by section 25 and Schedule 8 of the Transport Act 1981. Section 10 of the 1972 Act included provisions which are now contained in sections 15 and 16 of the Road Traffic Offenders Act 1988. The relevant provisions of the 1972 Act were contained in section 10(2) which was considered by the Judicial Committee in *Cracknell* v *Willis* and were referred to in *Reid* v *Tudhope*. They are to the following effect:

"(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, attempt 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 equivalent provisions in section 15 of the Road Traffic Offenders Act 1988 are to the following effect:

"(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, subject to subsection (3) below, 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.

(3) If the proceedings are for an offence under section 5 of that Act or, where the accused is alleged to have been unfit through drink, for an offence under section 4 of that Act, that assumption shall not be made if the accused proves -

(a) that he consumed alcohol after he had ceased to drive, attempt to drive or be in charge of a motor vehicle on a road or other public place and before he provided a 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 4 of that Act, would not have been such as to impair his ability to drive properly".

Although there is no difference in substance between the two provisions the difference in format makes it clear that the intention of Parliament is that in all cases evidence of the proportion of alcohol in a specimen of breath shall be taken into account. Moreover, it is to be assumed that the level of alcohol in the specimen is not less than the level at the time of the alleged offence but that assumption may not be made if the conditions specified in section 15(3) are satisfied. Such an assumption is necessary because it avoids any requirement upon the prosecution to lead evidence about the effect on the analysis of the passage of time between the alleged commission of the offence and the time of the analysis. However, in cases where the accused alleges that he consumed alcohol after the time of the alleged offence but before he provided the specimen for analysis it would clearly be unfair to assume that the level of alcohol was the same at the time

of the analysis as at the time he was driving or attempting to drive or in charge of his vehicle. Thus in all cases where the accused does not invoke this particular defence the evidence of the proportion of alcohol in the specimen shall be taken into account and shall be assumed to be the same as at the time of the alleged commission of the offence. Accordingly I respectfully disagree with the court in *Reid* v *Tudhope* when it approved of the submission of the advocate depute to the effect that section 10(2) of the 1972 Act had no general application and was confined to the limited circumstances where the accused invokes the defence that he consumed alcohol between ceasing to drive, attempting to drive or being in charge of his vehicle and providing a sample of breath. Nor can I agree with the view expressed by Lord Griffiths in *Cracknell* v *Willis* that the specimen which the court is entitled to rely upon for the purposes of section 10(2) of the 1972 Act is the lower of the two specimens of breath provided by the suspect (pp.460/461). While that is undoubtedly correct where two specimens of breath have been provided because the court is enjoined to disregard the specimen with the higher proportion of alcohol in the breath (section 8(1) of the Act), Parliament did not restrict the admissibility of the evidence to the specimen of breath with the lower proportion of alcohol in it. In the absence of such restriction there is no justification for failing to take into account the evidence of the proportion of alcohol in a single specimen of breath provided by an accused. Moreover, notwithstanding his conclusion that it was impermissible for the purposes of conviction to rely upon the evidence of the analysis of the breath specimen where only one such specimen had been provided by the accused, Lord Griffiths observed at page 461B-C:

"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".

In his submissions Mr Latif accepted that, if the appellant had been charged with a contravention of section 4 of the 1988 Act, the evidence of the analysis of the single sample of breath would have been a relevant adminicle of evidence in support of the conviction. It respectfully seems to me that these observations are inconsistent with the alleged intention of the safeguards to ensure the accuracy of the machine analysing the sample of breath. If it is necessary to have two samples of breath to ensure the accuracy of the machine, as opposed to merely providing a suspect with a benefit of relying upon the lower of the two readings, assuming he complies with the requirement to produce two readings, why is it appropriate to rely upon the evidence of the analysis of a single sample for the purposes of establishing a contravention of section 4 or even for determining the appropriate penalty for a contravention of section 7(6)? Is it not also appropriate to rely upon such a sample to establish a contravention of section 5? I have no hesitation in answering that question in the affirmative. In this case, there is clear evidence that the machine was functioning properly and a reading in excess of the permitted limit was undoubtedly consistent with the other adminicles of evidence mentioned by Lord Carloway.

[68] Finally, the effect of the decision in *Cracknell* v *Willis* that the evidence of the analysis of the single sample of breath provided by the appellant could not be relied upon for the purposes of his conviction of charge 3 must mean that such evidence is irrelevant. Thus, if *Cracknell* v *Willis* is correctly decided and is to be followed in Scotland the evidence of the analysis of the breath specimen provided by the appellant was irrelevant to the issue of proof of the commission of the offence under section 5(1). Nor did it have any relevance to the proof of his contravention of section 7(6) of the Act. In these circumstances objection ought to have been taken to the admission of such evidence on grounds of relevance. In the absence of such objection the appellant is precluded from seeking to set aside his conviction for the contravention of section 5(1) by reason of section 192(3) of the Criminal Procedure (Scotland) Act 1995 which provides:

"No conviction, sentence, judgment, order of court or other proceeding whatsoever in or for the purposes of summary proceedings under this Act -

(a) shall be quashed for want of form, or

(b) where the accused had legal assistance in his defence, shall be suspended or set aside in respect of any objections to -

(i) ...., or

(ii) the competency or admission or rejection of evidence at the trial in the inferior court, unless such objections were timeously stated".

The appellant was legally represented and no objection was taken to the admission of the evidence of the analysis of the breath specimen. In these circumstances the conviction should not be set aside even if, contrary to my view, *Cracknell* v *Willis* was properly decided and should be followed in Scotland.

[69] In these circumstances I would answer each of the four questions posed by the sheriff in the affirmative.

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2012] HCJAC 168

Appeal No: XJ94/12

OPINION OF

LORD BONOMY

in

APPEAL AGAINST CONVICTION

BY STATED CASE

by

BRYAN ROBERT BARCLAY

Appellant;

against

THE PROCURATOR FISCAL, ABERDEEN

Respondent:

_____

Lord Eassie

Lord Carloway

Lord Hardie

Lord Bonomy

Lord Menzies

Appellant: Latif, Jones; Drummond Miller LLP (for George Mathers & Co, Aberdeen)

Respondent: Harper, Solicitor Advocate, AD; Crown Agent

21 December 2012

[70] While it may appear unsatisfactory that conflicting decisions of courts in Scotland and England on a provision of the Road Traffic Act 1988 ("1988 Act") in daily use should have stood for 25 years without any judicial consideration being given to reconciling them or resolving the conflict, I suspect that that is largely

because the circumstances which gave rise to these decisions have seldom arisen in the intervening period. The Advocate depute, previously a procurator fiscal depute of long experience, had not encountered such a case.

[71] Of the two questions presented to us by Mr Latif, counsel for the appellant, I find it necessary to address only one, ie whether the provision of a single breath specimen taken from an individual in terms of section 7(1)(a) of the 1988 Act is sufficient in law to found a conviction for contravention of section 5(1)(a) of the 1988 Act, since in light of the conclusion I have reached on that, the other question relating to whether the offences prescribed by section 5(1)(a) and 7(6) of the 1988 Act are mutually exclusive does not arise in this case.

[72] I have come to the view, in accordance with the judgment of the Judicial Committee of the House of Lords in *Cracknell* v *Willis* [1988] AC 450, that prosecution and conviction under section 5(1)(a) is not competent where only one specimen of breath is provided. My reason for so concluding is quite simply that that is the effect of giving the language of the relevant sections of the 1988 Act its ordinary meaning. I agree entirely with the analysis of the relevant sections of the 1988 Act set out in the Opinion of your Lordship in the chair. The provision of two specimens of breath is an essential element in a scheme that provides for prosecution in the routine case on the strength of the specimen showing the lower concentration of alcohol, with the possibility of prosecution on the basis of blood or urine samples in certain circumstances specified in section 7(3), and as an alternative under section 8 in cases where the lower breath specimen figure is below 50 microgrammes, and which also provides for prosecution under section 7(6) of the 1988 Act for failure without reasonable excuse to provide a specimen when required to do so. Whether the procedure undertaken in terms of section 7 results in prosecution on the basis of a specimen of breath, a specimen of blood, or a specimen of urine, or results in a prosecution for failure to provide a specimen without reasonable excuse, the penalties available to the court are identical. Section 8(1) of the 1988 Act provides that of "any of two specimens of breath" provided, that with "the lower proportion of alcohol" shall be used and "the other" shall be disregarded. Section 8(2) provides that, if "the specimen with the lower proportion of alcohol" contains no more than 50 microgrammes of alcohol in 100 millilitres of breath, the motorist may claim that it should be replaced by blood or urine.

[73] I also agree with your Lordship in the chair that the Crown submission endorsed by the court in *Reid* v *Tudhope* was flawed. The court effectively decided that case on the basis of the apparent waiver by the accused of his right to have the lower of two specimens used. Since the requirement of two specimens was seen by the court as a provision designed to confer an advantage on the motorist, the court considered that the motorist should forfeit the benefit of a second breath specimen reading which might be lower where its absence was the result of the obstructive conduct of the motorist. The only elaboration of the principle which may lie behind that decision was a reference to *Maxwell* on *The Interpretation of Statutes* at page 328. There the proposition is stated:

"Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."

That statement of principle does not seem to me to encompass failure to comply with a statutory requirement, which failure is itself subject to criminal sanction. That situation seems rather to fall within the proposition at page 330 of the same work:

"There can be no waiver of a statutory requirement which is imported in the public interest."

In any event I doubt whether it can be said that section 7(1)(a) was made solely for the benefit and protection of the individual in his private capacity. It seems to me to extend to ensuring the integrity of the process of investigating and prosecuting offences of driving or taking charge of motor vehicles after consuming excess alcohol, which are sadly all too common. I do not consider that what occurred in *Reid* v *Tudhope*, and in the

present case, can properly be described as waiver. It was quite simply a failure to comply with an obligatory requirement without reasonable excuse.

[74] On the other hand, I find the analysis of the statutory provisions in *Cracknell* v *Willis* highly persuasive. As Lord Griffiths pointed out in his speech at page 457 to 460, with the agreement of the other members of the court, the provisions under consideration were first introduced by the Transport Act 1981 with the effect that henceforth the breath specimen was to be the principal means of establishing the quantity of alcohol that the motorist had consumed for the purpose of a prosecution under what is now section 5(1)(a). Whereas in the case of a urine or blood sample, analysis takes time, and half the sample is available to the motorist to enable him to check the accuracy of the ultimate analysis used for prosecution, breath machines produce immediate results and it is impracticable for the specimen to be retained or subdivided. The specific requirement that there should be two specimens provides for some check on the reliability of the machine. Additional safeguards are that the machine must be of a type approved by the Secretary of State, and the option for the motorist of giving a specimen of blood or urine in place of breath if the lower breath specimen does not exceed 50 micrograms. The requirement that two specimens of breath must be taken, the lower one used and the other disregarded can be seen against that background as a precaution introduced in fairness to the motorist to guard against, for example, any variation in the performance of the machine. I agree with the view of the court as expressed by Lord Griffiths, and with your Lordship in the chair, that it follows that the statutory scheme does not envisage conviction under section 5 where only one specimen of breath is provided.

[75] On the question whether section 15(2) of the Road Traffic Offenders Act 1988 has the effect of authorising, indeed requiring, the taking into account in any prosecution under section 5(1)(a) of the result produced by a single specimen, it is my opinion that that subsection cannot be read as qualifying, indeed contradicting, the scheme set out in sections 7 and 8, and the clear literal meaning and effect thereof that, before a specimen of breath can amount to sufficient evidence of the proportion of alcohol in the breath exceeding the prescribed limit, it must be the one, of two, with the lower proportion of alcohol. The reference to "a specimen of breath, blood or urine" must be to one which is admissible as evidence supporting the Crown case. Circumstances will from time to time arise when a single specimen, including one not taken specifically with prosecution in mind, may be used as evidence in proceedings in respect of an offence where proof does not depend upon a prescribed statutory procedure being followed, such as an offence of being unfit to drive in terms of section 4 of the 1988 Act, but no such issue arises here.

[76] I agree that the appeal should be granted and the questions answered as proposed by your Lordship in the chair.

APPEAL COURT, HIGH COURT OF JUSTICIARY

Lord Eassie

Lord Carloway

Lord Hardie

Lord Bonomy

Lord Menzies

[2012] HCJAC 168

Appeal No: XJ94/12

OPINION OF LORD MENZIES

in

APPEAL AGAINST CONVICTION

BY STATED CASE

by

BRYAN ROBERT BARCLAY

Appellant;

against

THE PROCURATOR FISCAL, ABERDEEN

Respondent:

_____

Appellant: Latif, Jones; Drummond Miller LLP (for George Mathers & Co, Aberdeen)

Respondent: Harper, AD; Crown Agent

21 December 2012

[77] For the reasons given by your Lordship in the chair, I agree that this appeal should be granted.

[78] In order to secure a conviction for a contravention of section 5(1)(a) of the Road Traffic Act 1988 ("the Act") against a person who drives or attempts to drive a motor vehicle on a road or other public place after consuming so much alcohol that the proportion of it in his breath exceeds the prescribed limit, in reliance on the provisions of sections 7 and 8 of the Act relating to specimens of breath, the Crown must prove that a constable has made a requirement of that person to provide two specimens of breath for analysis by means of an approved device, that two such specimens have been provided, and that of these two specimens that with the lower proportion of alcohol in the breath exceeds the prescribed limit. The provision of two specimens of breath is a necessary requirement for a conviction for such a contravention. If a person, without reasonable excuse, fails to provide a specimen when required to do so in pursuance of section 7 of the Act, he is guilty of a contravention of section 7, but he cannot properly be convicted of a contravention of section 5(1)(a) on the basis of the proportion of alcohol in his breath unless two specimens of breath have been obtained.

[79] I reach this conclusion principally on a construction of the terms of the Act, as discussed at paragraphs [22] to [24] of the Opinion of your Lordship in the chair. I also find the reasoning of the House of Lords in *Cracknell* v *Willis* [1988] AC 450 to be persuasive. Lord Griffiths there set out the historical context for the statutory provisions then before the court (which are, for present purposes, in the same terms as now appear in sections 5, 7 and 8 of the Act), and explained that Parliament provided safeguards in face of concerns about "trial by machine". He observed (at page 457B):

"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 or 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 a 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."

[80] At page 458G his Lordship listed several safeguards for the protection of the motorist, the second of which was as follows:

"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."

[81] I agree that the submission for the Crown which the court endorsed in *Reid* v *Tudhope* 1986 SLT 136 is flawed. I do not consider that the provision of a second specimen of breath in response to the requirement to provide two such samples is optional, or that it can be categorised as a benefit or an advantage to an accused which he is entitled to waive. Rather, I consider that the provision of two specimens of breath is an essential statutory requirement. It is not something which an accused person may waive, either expressly or by implication.

[82] I regret that I cannot agree with the argument that it is not open to the appellant to argue this ground of appeal because no objection was taken before or at trial to the admissibility of the Intoximeter print-out. I do not perceive this as a question of admissibility, but rather as a question of sufficiency. The print-out from the machine was, in my view, admissible evidence in relation to one specimen of breath. The problem for the Crown was that there was no information contained on this print-out in relation to a second specimen of breath, because there was no such second specimen. It seems to me that the appellant's agent challenged this lack of sufficiency at the appropriate time, namely when making a submission of "no case to answer".

[83] Nor do I consider that the absence of the statutory requirement for a second breath specimen can be cured by looking to the other evidence in the case. Evidence that the driver of a motor car was behaving in a manner which was consistent with his ability to drive having been impaired through drink or drugs may be relevant in assessing whether there has been a contravention of another provision of the Act, but I do not consider that it can avail the Crown in the circumstances of the present case in establishing that the proportion of alcohol in the appellant's breath exceeded the prescribed limit. Such evidence cannot cure a failure to meet the requirements of the statutory scheme in sections 5, 7 and 8 of the Act.

[84] It is no doubt the case that the police, the Crown and others may have proceeded since 1985 on the basis of the decision in *Reid* v *Tudhope*. However, I regret that I cannot agree that this court should therefore not consider whether the decision in that case is erroneous and should be disapproved, or that this is an issue which ought properly to be left to Parliament. There have been several well publicised examples in the course of the last 15 years and more of courts disapproving earlier decisions on which wide-spread reliance has been placed.

[85] For these reasons I agree that the appeal should be granted and the questions answered as proposed by your Lordship in the chair.