

IN THE MAGISTRATES COURT OF FIJI  
AT LABASA

CRIMINAL JURISDICTION

Traffic Case No. 8 of 2016

STATE

v.

DHIREN CHANDRA

**Appearances :** Constable A. Lal *for the State*  
Dhiren Chandra *in person*

**Date of Trial:** 21 May 2019

**Date of Judgment:** 4 June 2019

**JUDGMENT**

1. You are charged with **Failure to undergo breath analysis in accordance with the direction of a Police Officer** contrary to section 103 (1)(b) and (2) and 114 of the **Land Transport Act 1998**.
2. The particulars of your offence are that you “on the 30<sup>th</sup> day of December 2015 at Labasa in the Northern Division upon being required by a police officer namely PC 3533 Ravneet to supply a sufficient sample for breath analysis, failed to supply sufficient sample for breath analysis in accordance with the direction of PC 3533 Ravneet.”
3. You entered a plea of not guilty, as is your right in law, on 9 October 2018. Your trial commenced on 21 May 2019. On that day, the State called one witness – Corporal 3533 Ravneet Nand of the Fiji Police Force.
4. He testified that on 30 December 2015, the vehicle you were driving was stopped during the course of a joint Land Transport Authority/Fiji Police Force operation along Naseakula Road. He said night had long fallen by this point.
5. Your vehicle was initially stopped by Mr. Sumeet Kumar of the Land Transport Authority who then called him over after conversing with you. When Corporal Nand, then a Police Constable came over, he noticed the same thing that Mr. Kumar had,

namely that your breath smelled like alcohol. He tested you there by the roadside and you came up positive for alcohol. He arrested you and you were conveyed immediately to the Labasa Police Station for further testing. Night had fallen and they saw cars by aid of the street lamps that were on at the time, Cpl. Nand testified.

6. You were tested within 30 minutes of your arrest on Alcotest 7110, a machine properly calibrated and a machine which he was properly authorised to operate. He took you to the charge room and there he instructed you on the use of the machine, he asked you to blow into the machine and you failed to provide a sufficient sample for breath analysis during that procedure he said.
7. He testified that you failed to breathe in to the machine once, blocked the reading with your tongue a second time, and failed to breathe in to the machine a third time despite his clear instructions. He testified that he knew you had not breathed into the machine on those two occasions because the Alcotest did not register a breath at all. None of the bars moved an inch. He testified he knew that you had blocked the machine with your tongue on your second go because a reading of "blowing not allowed" is clear signal of an obstruction to the entry of the mouthpiece. By necessary implication, your tongue got in the way.
8. At the conclusion of his evidence, I explained the nature of the State's allegations to you and I informed you that you had the right to remain silent, the right to testify and the right to call witnesses in full pursuant to section 179 of the **Criminal Procedure Act 2009**.
9. You indicated that you understood the nature of the allegations against you; that you wished to testify on your own behalf and that you did not wish to call any witnesses after that. You testified that you had been stopped along Naseakula Road at around 6.00pm on your way to dropping your mother and daughter off at a family farewell function for them. You testified that you were required to leave them there in your family car and that you were taken to the Labasa Police Station where you were kept waiting for 3 hours before they would open up the Charge Room and take your test.
10. You said that you were made to sit far from the machine. Conversely you also said that the room was small and cramped. You said that the mouthpiece went into your mouth but that mouthpiece was attached to a machine. Obviously, so your account went, there had been a mechanical defect. If you are to be believed, then you were blowing into that mouthpiece for all you were worth. It was not your fault the machine was not able to pick up your breath sample, you said.
11. The matter was then adjourned to 28 May 2019 at your request for your closing submissions. You submitted it and we adjourned to today for judgment.

### ***Presumption of Innocence***

12. I remind myself that you are presumed innocent until proven guilty.

### ***Burden & Standard of Proof***

13. Moreover, I remind myself that the burden of proving your guilt rests with the State and it never shifts.

14. To be precise, Section 57 of the **CRIMES ACT 2009** makes clear that the prosecution bears the legal burden of proving *every element of an offence relevant to the guilt of the person charged* and section 58 of the **CRIMES ACT 2009** makes clear that this legal burden must be discharged by the prosecution beyond reasonable doubt.

### *Elements of the Offence*

15. The elements that the State have to prove beyond reasonable doubt are as follows:
- (i) You
  - (ii) Failed to undergo a breath analysis
  - (iii) When required to do so
  - (iv) By a Police Officer.

### *Analysis*

16. Identification was not in dispute. You and Corporal 3533 Ravneet Nand are in substantial agreement about what transpired that night save that you say that the breath analysis was attempted 3 hours after you were first stopped along Naseakula Road, and he says it took place within 30 minutes of your being stopped; and you say that the machine was faulty and that you had indeed blown into that machine and he said that the machine worked perfectly that night and that you had made no effort to blow into that machine at all.
17. Identification is proven beyond reasonable doubt.

### *Failed to under a breath analysis When Required to do so by a Police Officer*

18. First, I pause to consider whether this is a strict or an absolute liability offence or whether a fault element is implied.
19. In **State v. Hong Kuo Hui** [2005] FJHC 732; HAC 40.2004 (2 May 2005) the High Court of Fiji, per Winter J., laid out this helpful guidance:

“It is of utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as an element of a crime, the defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind: Lord Goddard CJ in **Bren v Wood** [1946] 62 TLR 462 cited by Lord Evershed in delivering the opinion of the Judicial Committee in **Lim Chin Aik v The Queen** [1963] AC 160, 173. That view is reflected in New Zealand in **R v Howe** [1982] 1 NZLR 681. The Court in Millar (at 668) expressed clearly that the modern position was that absolute liability offences ought to be rare, that Parliament ought to provide statutory defences for such offences and that the Courts should find absolute liability only when it is imposed in express terms or by necessary implication.

In order to determine whether an offence is one of strict or absolute liability, the following are also determinants:

Where absolute liability may be a necessary implication, for example in tax law where failing to file a tax return automatically elicits liability

otherwise a range of excuses could be used to defer the filing of a return in time. See *IRD v Thomas* [1989] 13 TRNZ 697.

- The presence of an evaluative term in the actus reus, such as "fair" or "reasonable" as such terms cannot be determined with sufficient certainty in advance and problems of fair warning arise.

- The absence of words such as "knowingly" or "willfully" indicating in context the absence of a mens rea component.

- Absolute liability should be threatened in clear terms, so that the defendant knows in advance what the boundaries of the offence are. See *Re Wairarapa Election Petition* [1988] 2 NZLR 74, 117.

- The severity of the penalty prescribed for the breach should not be too high. "It is contrary to sense and justice that a person should be subject to the ultimate penalty, no matter how careful or innocent he may be", *Re Wairarapa Election Petition*, at 117.

- If the statute itself specifies a defence, this points to there being an absolute liability offence. See *McLaren Transport Ltd v MOT* [1986] 2 NZLR 81, 83.

- If the statute expressly describes an offence as being one of strict liability, or provides that it need not be proved that a defendant "intended" the relevant conduct, this supports the availability of the defence of a total absence of fault: *Buchanans Foundry Ltd v Department of Labour* [1996] 3 NZLR 112.

20. Section 103 (1)(b) and (2) of the **Land Transport Act 1998** provides:

“103 (1) A person who –

(b) fails or refuses to undergo a breath test or breath analysis when required to do so by a police officer,

commits an offence.”

(2) A person who is convicted of an offence under subsection (1) is liable to the prescribed penalty.”

21. Pursuant to section 114 of the **Land Transport Act 1998**:

First offence: \$2000.00/2 years imprisonment and mandatory disqualification from 3 months to 2 years.

Second offence: \$5000/5 years and mandatory disqualification from 6 months to 4 years.

Third offence within 5 years: \$10, 000/10 years and mandatory disqualification from 12 months to 5 years.

22. I find that this is an offence of absolute liability.

23. The purpose of this offence is interlinked with section 103 (1)(a) of the **Land Transport Act 1998** *i.e.* **Driving or Attempting to Drive a Motor Vehicle Whilst more than the Prescribed Limit of Alcohol is Present in the Blood**. No one is to circumvent culpability for that offence by the mere expedient of *failing to blow into a properly calibrated breath test or breathe analysis machine*. It is worthwhile noting that the punishment schedule refers the reader back to the punishment for section 103

(1)(a) of the **Land Transport Act 1998** when one searches for the punishment for this present offence.

24. Section 103 (1) (a) of the **Land Transport Act 1998** is a crime of absolute liability. In the circumstances, I find that this offence, *namely* **Failure to undergo breath analysis in accordance with the direction of a Police Officer** is similarly a crime of absolute liability.
25. Corporal 3533 Ravneet Nand testified that Alcotest 7110 had been calibrated and he had received the Calibration Certificate for the Machine for that year. Moreover, he testified that the Machine had been in sound working order on the night you were tested. He said:

“You were not the only person tested on that machine that night. Others had been brought in and tested alongside you at the time of your testing. The results for them were perfect. The machine was working fine.”
26. I find it highly improbable that the Charge Room of the Labasa Police Station would be locked on any given occasion and even more improbable that it would be locked on the night of an interagency operation. I find that you were tested within 30 minutes of your arrest as Corporal 3533 Ravneet Nand said.
27. Moreover, you admitted that the mouthpiece had been inside your mouth. I reject your evidence that the distance between the mouthpiece and the Alcotest 7110 affected the analysis procedure in any way. By your own admission that room was small and full at the time you were tested. Moreover, Corporal 3533 Nand testified that the chord between the Alcotest 7110 was long and able to accommodate the space between you and it.
28. I accept Corporal 3533 Nand’s testimony of what transpired on that night and I reject your version of events. Corporal 3533 Nand came across as forthright, cogent and honest in a way that you did not.
29. Corporal 3533 Nand testified that he had been clear about his instructions that night. He said you engaged with him and asked him questions that signalled to him that you clearly understood what was required of you.
30. Corporal 3533 Nand said that it was clear that you made no effort to blow into that mouthpiece because the Machine picked up not a single breath. The bars on the Machine showing that breath had been registered did not move at all, he testified. Moreover, at one point the mouthpiece was obstructed by your tongue.
31. I find that you were making a concerted effort *not* to provide a sample of breath for analysis that night.
32. I accept Corporal 3533 Nand’s testimony in its totality, and in particular those portions which I have set out in paragraphs 6 and 7 of this judgment, and I find beyond reasonable doubt that you failed to provide sufficient sample of breath for breath analysis when instructed to do so by Corporal 3533 Nand *then* Police Constable 3533 Nand on 30 December 2015.

### ***Conclusion***

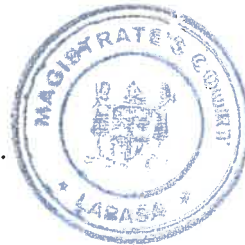
33. In the result and for the reasons articulated above, I find that the State has proven its Charge against you beyond reasonable doubt.

34. I find you guilty as charged and I convict you of *failure to undergo breath analysis in accordance with the direction of a police officer* contrary to section 103 (1)(b) and (2) and 114 of the **Land Transport Act 1998**.

35. I will now receive your plea in mitigation.



Seini K Puamau  
**Resident Magistrate**



Dated at Labasa this 4<sup>th</sup> day of June 2019.