

# MOHAMMED KAMALU DEAN SAHU KHAN

v.

## THE STATE

[HIGH COURT, 1996 (Sadat J) 19 April

### Appellate Jurisdiction

**B** *Traffic- refusing to supply specimen of breath- absence of liability when requesting officer not qualified to make the request. Traffic Act (Cap. 176) Section 48.*

**C** After police officers reasonably suspected the appellant driver of consuming excessive alcohol he was taken to a police station where he was requested to supply a sample of breath. The High Court HELD: that in the absence of evidence that the requesting officer was able to satisfy the requirements of Section 48(3) of the Act he had no authority to make the request and accordingly refusal in such circumstances was not an offence.

Cases cited:

**D** *The Mason* [1987] 3 All ER 481  
*R v. Plymouth Magistrates Court, ex parte Driver* [1985] 2 All ER 681  
*Sanders v. Hill* [1965] L.M.D.814 (S.A. Sup. Ct.)  
*Sang* [1980] AC 402

Appeal against conviction in the Magistrates' Court.

**E** *S D Sahu Khan and N Sahu Khan* for the Appellant  
*S Senaratne* for the Respondent

**Sadat J:**

The appellant was charged at the Magistrates' Court Ba of the following offences

### "FIRST COUNT

#### Statement of Offence

Driving motor vehicle whilst under the influence of drink or drugs: Contrary to Section 39 of Traffic Act Cap 176.

#### Particulars of Offence

**G** Mohammed Kamalu Dean Sahu Khan s/o Abdul Hussein Sahu Khan on the 21st day of September, 1992 at Ba in the Western Division drove a motor vehicle on Kings Rd. Ba Bridge, whilst under the influence of drink or drug to such an extent as to be incapable of having proper control of the said motor vehicle.

## SECOND COUNT

Refusing to undergo breath test under Police Officer's direction:  
Contrary to Section 48(8) of Traffic Act as inserted by Section 2 of  
Traffic (Amendment) Act 20 of 1986.

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## Particulars of Offence

Mohammed Kamalu Dean Sahu Khan s/o Abdul Hussein Sahu Khan  
on the 21st day of September, 1992 at Lautoka in the Western  
Division, refused to undergo breath test in accordance with the  
direction of police officer namely Acting IP Hari Krishna requiring  
the said Mohammed Kamalu Dean Sahu Khan to undergo a breath  
test under Section 48 (3) (a) of Traffic Act Cap 176.

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## THIRD COUNT

C

Dangerous Driving: Contrary to Section 38 of the Traffic Act Cap  
176.

## Particulars of Offence

Mohammed Kamalu Dean Sahu Khan s/o Abdul Hussein Sahu Khan  
on the 21st day of September, 1992 at Ba in the Western Division  
drove a motor vehicle on Kings Road, Ba Bridge in a manner which  
was dangerous to the public having regards to all the circumstances  
of the case.

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On 18th October 1994 the appellant was acquitted on Count 1. He was convicted  
on Count 2 and was fined \$75 in default 75 days imprisonment and on Count 3 he  
was instead convicted of careless driving and was fined \$25 in default 28 days  
imprisonment.

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The appellant has appealed against the convictions on Counts 2 & 3 on the  
following grounds which could be summarized as -

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- (a) that the appellant was at all material times in unlawful custody;
- (b) that the screening tests (breath tests) should have been carried  
out at the scene;
- (c) that the police officer who requested for the breath test had  
no powers to do so;
- (d) that the appellant for medical reasons was not in a position to  
submit to a breath test;
- (e) that the learned Magistrate erred in law in convicting the  
appellant for the offence of careless driving.

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Grounds (a), (b), (c) & (d) relate to second count while ground (e) relates to the third count.

A The material facts not in dispute were that PW1, (Cpl. 870 Sada Nand) and PW2 (P.C. 2290 Penieli Seva) were travelling in a police motor vehicle driven by PW2. They crossed the old Ba bridge and when they came to the Lautoka end of the bridge they saw the appellant sitting in a car registered No. BQ055 which had stopped near a traffic island which is at the entrance to the bridge. PW1 said this car BQ055 was almost in the centre of the road and he went and spoke to the appellant who was driving this car. There were other motor vehicles in front of BQ055. When the lights turned green the other vehicles entered the bridge followed by appellant's car. PW1 said he kept watch on appellant's car which travelled for a distance and then part of the vehicle went off the bridge - both the front wheels and rear left wheel went off the bridge. PW1 went and helped the appellant get out of the vehicle. The time was about 6am on 21/9/92. B PW1 said the appellant smelt of alcohol. The appellant was first taken to Ba Police Station then to Lautoka Police Station. PW3 (Sgt. 482 Hari Krishna) said at 6.40am on 21/9/92 he saw the appellant at Lautoka Police Station. C

PW3 said, "I was in the office when PW1 brought accused in at 6.45am on 21/09/92 and informed accused that I wanted to test him on D.S.190 and he refused by saying that he didn't want to be tested by this machine, which he refers to D.S.190. Again I told him that I wanted to test him on Dragger 7110 and he also refused to be tested by that machine. When he refused to be tested by both machines, I told PW1 to take him back because I cannot test him since he refused to be tested on both machines." The appellant was under arrest. The appellant was taken back to Ba Police Station at 7.45am. The appellant was interviewed. He was kept in custody for some time before he was released on bail. D E

As far as ground (a) of appeal is concerned that the appellant was unlawfully arrested and was in unlawful custody - it is in general no defence to a criminal charge to show that the accused was illegally arrested or brought before the court as a result of any other improper devices - R v. Plymouth Magistrates Court, ex parte Driver [1985] 2 All ER 681; Sang [1980] AC402. The court is merely concerned with the question of guilt or innocence, as determined from admissible evidence. As far as illegally, improperly or unfairly obtained evidence is concerned, the general rule is that such evidence remains admissible in law. It has been said many times that it would be dangerous obstacle to the administration of justice if we were to hold, because evidence was obtained by illegal means, it could not be used against a party charged with an offence. There is of course an exception in relation to confessions; but even here, technical irregularities will not necessarily render a confession inadmissible. F G

Discretionary exclusion of prosecution evidence is another matter. Courts would exclude such evidence if it considers that its use would have such an adverse effect on the fairness of the proceedings that the court ought not to admit

it. This clearly does not require the courts to exclude cogent or reliable evidence when the only complaint against it is that some minor technical irregularity took place when it was obtained but the courts would exclude such evidence in cases where it has been obtained by oppression, deceit or trickery - Mason [1987] 3 All ER 481.

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One might expect a similar approach to be adopted in drink - driving cases, so that an irregularity in the procedure by which evidence is obtained would have no significance unless the Court considered that the defendant might have been unfairly prejudiced by it. The actual position, however, is rather less straightforward.

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The Traffic Act Cap. 176 contains two quite distinct drink-driving offences. The first, contained in section 39 is one of driving, attempting to drive or being in charge of a motor vehicle whilst incapable to drive through drink or drugs. The second contained in section 48 is one of driving etc. after consuming so much alcohol that the proportion of it in the breath or blood exceeds the limit prescribed by the Act.

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A police officer, as stated by the learned Magistrate, had all the powers under section 39 (3) of the Act to "arrest without a warrant any person reasonably suspected" of being under the influence of alcohol. And in fact the appellant was charged under that section - first count.

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Ground (a) of the appeal thus fails.

As for ground (b) of the appeal that the tests should have been carried out at the scene - there is no provision that says so. There is nothing in the Act which says that the suspect is obliged to furnish the sample at the scene or in the vicinity of the place where the driving or being in charge occurred in respect of which the requisite belief has been formed or at the police station nearest to that place.

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It should be noted that the driving or being in charge of a motor vehicle that is referred to is that in respect of which the member of the police force has formed the necessary belief and no other. In a prosecution for refusal to furnish the sample evidence of the formulation of that belief and so as to the time and place of driving the subject of that belief is required to establish those matters.

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Section 48 of the Traffic Act (as inserted by Act No. 20 of 1986) provides by sub-section (1), (2), (3), (4), (5), (6), (7), (8), (9) & (10) as follows -

"48-(1) A person who whilst there is present in his breath or in his blood a concentration of alcohol equal to or in excess of the prescribed limit -

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- (a) drives a motor vehicle;
- (b) attempts to drive a motor vehicle; or
- (c) is in charge of a motor vehicle on a road or other public place, is guilty of an offence.

(2) It is a defence for a person charged with an offence under paragraph (1)(c) to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath or in his blood remained likely to exceed the prescribed limit.

(3) A police officer may require -

- (a) the driver of a motor vehicle;
- (b) a person who that officer has reasonable cause to believe is attempting to drive a motor vehicle;
- (c) a person who that officer has reasonable cause to believe is in charge of a motor vehicle on a road or other public place;
- (d) a person who that officer has reasonable cause to believe -
  - (i) was the driver of a motor vehicle within the last 2 preceding hours; and
  - (ii) has behaved whilst driving that motor vehicle in a manner which indicates that his ability to drive the motor vehicle is impaired; or
- (e) a person who that officer has reasonable cause to believe was the driver of a motor vehicle that, within the last 2 preceding hours was involved in an accident,

to undergo a breath test in accordance with the directions of that police officer.

(4) Any police officer may upon reasonable grounds, enter upon any premises without a warrant for the purpose of making a requisition pursuant to subsection (3).

(5) Where -

- (a) it appears to a police officer in consequence of a breath test carried out by him on a person under subsection (3) that the device by means of which the test was carried out indicates that there may be present in that person's breath a concentration of alcohol of more than the prescribed limit; or
- (b) a person required by a police officer under subsection (3) to undergo a breath test refuses to undergo that test in accordance with the directions of that officer.

that officer may thereupon arrest that person without warrant and take him or cause him to be taken, with such force as may be necessary to a police station or such other place as that officer considers desirable and there detain him or cause him to be detained for the purposes of the following provisions of this section.

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- (6) A police officer may require a person who has been arrested under subsection (5) to submit in accordance with the directions of that officer, to a breath analysis.

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- (7) A police officer shall not require a person to undergo a breath analysis -

- (a) if that person has been admitted to hospital for medical treatment, unless the medical practitioner in immediate charge of that person's treatment has been notified of the intention to make the requisition and the medical practitioner does not object on the grounds that compliance with the requisition would be prejudicial to the proper care or treatment of that person; or

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- (b) if it appears to that police officer that it would by reason of injuries sustained by that person, be dangerous to that person's medical condition to undergo a breath test or submit to a breath analysis.

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- (8) A person who when required by a police officer to undergo a breath test under subsection (3) refuses or fails to undergo the breath test in accordance with the directions of that officer, is guilty of an offence and is liable on conviction to a fine not exceeding \$200.

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- (9) A person who -

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- (a) upon being required under subsection (6) by a police officer to submit to a breath analysis, refuses or fails to undergo that analysis in accordance with the directions of that officer; or

- (b) between the time of the event referred to in paragraph (1)(a), (1)(b) or (1)(c) in respect of which he has been required by a police officer to undergo a breath test and the time when he undergoes that test or, if he is required by an officer to submit to a breath analysis, the time when he submits to that analysis, wilfully does anything to alter the concentration of alcohol in his breath, is guilty of an offence.

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- A (10) (a) Subject to paragraph (10)(b) it is a defence for a person charged with an offence under subsection (8) or paragraph (9) (a) to prove that at the time he is alleged to have committed that offence he was unable on medical grounds to undergo a breath test or to submit to a breath analysis, as the case may be.
- B (b) The defence referred to in paragraph (10)(a) shall not be available to a person unless -
- C (i) forthwith upon refusing or being unable to undergo a breath test or breath analysis in accordance with the directions of a police officer, he consented to a sample of his blood being taken for analysis in accordance with paragraph (10)(c) and he co-operated in allowing that blood sample to be duly taken without any delay on his part; and
- D (ii) where the substantive medical grounds relied on in a defence under paragraph (10)(a) are that he was not then capable of supplying sufficient breath for test or for analysis, he made a genuine attempt to supply a specimen of breath for test or for analysis by complying to the best of his ability with the directions of the police officer.
- E (c) Where a sample of blood is taken for analysis pursuant to this subsection, it shall be taken by a medical practitioner nominated by a police officer and it shall be taken in the presence of that police officer at a hospital or other place nominated by the officer.
- F (d) A medical practitioner by whom a sample of a person's blood is taken pursuant to this subsection, shall hand that sample of blood, enclosed in a suitable sealed container to the police officer present at the time the sample was taken.
- G (e) In proceedings for an offence under subsection (1) evidence may be given of the concentration of alcohol present in the blood of the person charged, as determined by an analysis made of the blood taken pursuant to this subsection, and the concentration of alcohol so determined shall



be deemed to be the concentration of alcohol in the blood of that person at the time of the occurrence of the event referred to in paragraph (1)(a), (b) or (c) as the case may be where the blood sample was taken within 2 hours after the relevant event unless the defendant proves that the concentration of alcohol in his blood at the time of the relevant event was less than the prescribed limit."

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There may well be a situation where there was a long pursuit or course of observation is followed concerning a driver. It should be noted that the place where the suspect driver is apprehended has no relevance unless it is in the course of driving or being in charge in respect of which the requisite belief has been formed. Thus a man who has evaded pursuit or who has been observed and lost, and then apprehended at home or in some other place where he is no longer driving or in charge of his car is obliged to furnish his sample not in relation to the place where he was apprehended, but in relation to the course of driving or being in charge which formed the subject of requisite belief.

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A person who is required as aforesaid to furnish a sample of his breath for analysis shall not be obliged to do so except within two hours after the driving or being in charge of the motor vehicle in respect of which a police officer has such belief as aforesaid.

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The appellant was arrested in Ba where the accident took place and then taken to Lautoka Police Station for test. I agree with the learned Magistrate that there was nothing wrong with this. There is no requirement as suggested by the defence that tests should have been carried out at the scene. The ground (b) of the appeal also fails.

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As for ground (c) of the appeal that the police officer who requested for the breath test had no powers to do so - the informant here was PW1, Cpl 870 Sada Nand and not Acting I.P. Hari Krishna (PW3) as stated in the charge - Count 2. PW3 said the appellant refused to be tested on the machines - "D.S.190" and "Dragger 7110". Under Traffic (Breath Tests) Regulations 1991 the "Dragger Alcotest 7110" means a Dragger Alcotest 7110 with automatic print outs, used for breath analysis". PW1 had not requested for "breath analysis" as required under section 48(6). The appellant was charged under section 48(8) which deals with refusal to undergo a "breath test" under section 48(3). The machine D.S.190 is for "breath test" under the Regulations which PW3 had correctly referred in his evidence. However, PW3 was only the operator of the breath testing device. In my view Count 2 was not properly framed. This Count should have been framed as PW1 being the informant and not I.P. Hari Krishna.

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It is not sufficient to constitute an offence if no more appeared than that of a member of the police force, having the belief on reasonable grounds required by



A subsection (3), required the suspect "to undergo a breath test," using in substance at least those words, and the suspect refused. This is a provision designed to procure from a suspect, under penalty if he refuses, evidence which may incriminate him, though it is true that it may also exculpate him. It is by no means the only example in the law which may result, in effect, in compulsory self-incrimination. Instances are to be found also in the law relating to bankruptcy and taxation, to mention only two well-known cases. But such provisions cut across the ordinary common law principle against self-incrimination, and should be strictly construed.

B On a reading of subsections (3), (4), (5), (6), (7), (8), (9) & (10) various questions at once arise as to what the draftsman means. For example, (1) must the officer say "I want a sample of your breath for analysis by a breath analysing instrument or breath testing device". Or (2) must he say "an approved breath analysing instrument". (3) Must he say it expressly, or is it enough if he so requires by inference from his words or actions as by pointing to a machine or (4) is it enough if he merely says "I want a sample of your breath for analysis or testing", having himself at the time the intent and purpose of having the sample analysed by an approved instrument though he does not so state. That is to say, do the words "to undergo a breath test in accordance with the directions of that police officer" in subsection (3) prescribe what he must say, or only what his own purpose must be. See, for example, the words of subsection (8) which creates the offence - "required by a police officer to undergo a breath test", without any reference to the further words as to an instrument, which occur in other subsections.

E When he makes a request (whatever it must be), (a) must an approved instrument be there at the time. Or (b) is it enough if an instrument can be made available within the limits as to time laid down by subsection (3). Or (c) need there be no instrument shown to be there or even available, if the suspect refuses a sample otherwise than on that very ground?

F It is obvious from the foregoing that numerous alternatives are available as possible constructions of the legislation. It is my task, I consider, to say what the legislation means.

G It is possible to adduce some arguments in favour of each of the various alternatives which I have summarized above. But in a case of this kind, where Parliament has not been precise in defining its meaning, I propose to construe the language in the way in which I think common sense requires, having due regard to the principle that one is not to cut down a person's common law rights against self-incrimination without clear language. In my opinion -

- (1) The officer, having the necessary belief on reasonable grounds referred to in subsection (3) must clearly ask the suspect to furnish a sample of his breath for the stated purpose of testing by an approved breath testing device. For example he may

say expressly, "I require you to furnish a sample of your breath for testing by an approved breath testing device" or he may point to such an instrument and say, "I require you to furnish a sample of your breath for testing by this instrument" provided it is in fact so approved.

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- (2) There must be an approved instrument present at the time of the requirement. That is to say the appropriate operator must be there and available if the refusal is made the subject of proceedings for an offence under subsection (8)

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I have rejected any notion of applying to this legislation the concept of anticipatory breach or refusal. I know it can be said that the police may be put to inconvenience in having an instrument brought to a police station in order to make a request for a sample, whereupon the suspect may refuse it or that if the suspect says, "It is no use bringing a breath testing device, I will not take a test under any circumstances", it is useless labour to have one brought. That is a matter for police administration but if the correct instrument is not there at the time, it merely means that no offence can be committed under subsection (8).

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Acting I.P. Hari Krishna (PW3) had the breath testing device (D.S.190) there at the time when he made the request to the appellant for breath test but he was only the operator. PW3 was only the operator of the device.

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The appellant succeeds on ground (c). The appeal as far as Count 2 is concerned is allowed. The conviction is quashed and the sentence is set aside. The fine if paid is to be refunded.

As for Count 3 regarding conviction of careless driving the learned Magistrate said - "As to Count 3, after taking into consideration that the road was clear, it was dry, the accused's speed, I find that he should have stopped his vehicle which had power steering to retrieve his ventolin pump. I find him not guilty of dangerous driving but guilty of careless driving and convict him accordingly to the lesser charge under Section 169(2) of the Criminal Procedure Code".

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In the case of Sanders v. Hill [1965] L.M.D.814 (S.A. Sup. Ct.) - a motor car collided with the rear of a stationary vehicle parked in a street. The driver was charged with driving without due care or attention. It was accepted on his trial that he suffered concussion in the collision and remembered nothing of it. No other evidence was available as to the circumstances of the collision. It was held that a prima facie case was made out calling for an explanation as to how the collision occurred. Although the driver had not been able to offer an explanation he had shown satisfactorily that there was no explanation within his knowledge and the evidence was insufficient to prove the charge beyond reasonable doubt.

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In the instant case the learned Magistrate found as fact that the appellant was suffering from asthma and needed ventolin pump. He found as fact the appellant

- A was trying to retrieve the pump when the car hit the side of the bridge. The learned Magistrate stated that the appellant should have stopped his vehicle. It was one-way bridge with motor vehicles following appellant's vehicle. Here the appellant had given an explanation which the learned Magistrate had accepted as the reason for the car hitting the side of this one-way bridge. Here the circumstances are such that would exculpate the appellant. The test of liability no doubt is an objective and impersonal one. In my view there was insufficient evidence in the circumstances to convict the appellant of the offence of careless driving. The appeal is accordingly allowed. The conviction of careless driving is quashed and the sentence is set aside. The fines if paid are to be remitted to the appellant.
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*(Appeal allowed; convictions quashed.)*

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