34/92

SUPREME COURT OF VICTORIA

DICKSON v KIMBER

Hayne J

3, 8 July 1992 — (1992) 16 MVR 164

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST CONDUCTED – RESULT OBTAINED – PERSON LEFT POLICE STATION – TESTING OF BREATHALYSER NOT COMPLETED – CERTIFICATE DELIVERED 2.5 DAYS LATER – WHETHER DELIVERED "AS SOON AS PRACTICABLE" – PERSON NOT INFORMED OF RIGHT TO A SECOND TEST – WHETHER SUCH FAILURE AFFECTS ADMISSIBILITY OF CERTIFICATE: *ROAD SAFETY ACT* 1986, SS49(1)(f), 55(4).

1. After conducting a full breath test, a Breathalyser Operator is required to test the instrument to ascertain that it is in proper working order. When this test has been conducted, the operator is required to sign and deliver a certificate of breath analysis to the person who has undergone the breath test and inform the person of a right to a second test.

2. Where a person (having undergone a breath test) left the police station before the operator had had the opportunity to fulfil the above requirements, a magistrate was not in error in:

(i) concluding that the certificate was delivered "as soon as practicable" (notwithstanding its delivery approximately 2.5 days after the test);
(ii) concluding that because of his conduct in leaving the police station, the person could not rely on the operator's failure to inform the person of a right to a second test;
(iii) admitting the certificate of analysis into evidence; and
(iv) finding the charge under s49(1) of the *Road Safety Act* 1986 proved.

HAYNE J: [1] On 29th June 1991 at about 4.20 p.m. the appellant was driving a motor car in Bacchus Marsh when he was observed by the respondent, a policeman attached to the Traffic Operations Group, not to be wearing a seat-belt. The respondent intercepted the appellant and conducted a preliminary breath test which indicated that the appellant's blood contained alcohol in excess of the prescribed concentration of alcohol. The appellant accompanied the respondent to the Melton Police Station where an authorised breathalyser operator asked him to provide a sample of breath pursuant to s55 of the *Road Safety Act* 1986. The appellant provided a sample of breath and asked the operator what his reading was. When he was told that it was .15 the appellant asked, or perhaps demanded, to leave the police station. The respondent asked the appellant to stay for a few minutes but the appellant replied, "No, you've got what you want, I want to go". The breathalyser operator then asked the appellant to stay so that he could give him a certificate of analysis but again the appellant asked, or demanded, that he be allowed to go. One or other of the police officers then asked the appellant if he wanted to speak to a sergeant about the way that he had been treated. The appellant replied no and, because he was not under arrest, the officers showed him the way out of the police station shortly after 5.00 p.m. They did not know where he went.

After the appellant had left the police station the breathalyser operator again tested the machine, as he was required to do by Reg 302(3)(a) of the *Road Safety (Procedures) Regulations* 1988 by testing it with a standard **[2]** alcohol solution. This took about five to six minutes to complete by which time the appellant had left the police station.

The respondent ceased duty at 6.00 p.m. that day and was not on duty again until 7.00 a.m. on 2nd July 1991. The respondent and the breathalyser operator went to the appellant's home shortly after 7.00 a.m. on 2nd July 1991. The breathalyser operator then and there completed a certificate of analysis by adding to the form that had been partly completed on 29th June, the time, the date and his signature. The appellant approached the two officers and the respondent gave the appellant the certificate, a summons and information and a notice of immediate suspension of licence or permit under s51 of the *Road Safety Act*. (Some days later a further summons and information together with a further notice were served on the appellant but nothing turns on

this.) The information came on for hearing at Broadmeadows Magistrates' Court on 26th March 1992. In essence the appellant took two points:

> – that the person operating the breathalyser had not signed and delivered to him the certificate in the prescribed form "as soon as practicable after a sample [of his] breath [was] analysed" as required by s55(4)(a) of the *Road Safety Act*; and
>
> – that the person operating the breathalyser had not at any time advised him "that he ... may request that a second sample of his ... breath **[3]** be analysed" as was required by s55(4)(b) of the Act.

The Magistrate ruled that the certificate had been delivered as soon as practicable and that the delay in delivering it had been caused by the appellant "bolting after hearing of his reading" when the police had asked him to remain for the purpose of receiving his certificate. The appellant was convicted, fined, his driver licence cancelled and he was disqualified from obtaining a driver licence for 30 months.

The appellant appeals under s92 of the *Magistrates' Court Act* 1989 and although the questions of law stated in the Master's order made under r58.09 are more broadly stated, the appellant relied in support of his appeal upon two points that I have described earlier.

Section 55(4) of the *Road Safety Act* provides, so far as presently relevant that:

> "(4) As soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument the person operating the instrument must—
> (a) sign and deliver to the person whose breath has been analysed a certificate in the prescribed form of the concentration of alcohol indicated by the analysis to be present in his or her blood (which may be by way of an indication on a scale) and of the date and time at which the analysis was made; and
>
> (b) advise the person whose breath has been analysed that he or she may request that a second sample of his or her breath be analysed if the certificate indicates that more than the prescribed concentration of alcohol is present in the person's blood ..."

[4] The requirement to supply a person whose breath is analysed with a certificate recording the results of the analysis has long formed part of the legislation governing compulsory breath testing in Victoria. Thus s408A(2) of the *Crimes Act* 1958, as in force in 1969 and 1970, was in terms not materially different from s55(4)(a) of the *Road Safety Act*. (Although the appellant sought to make some point of the difference between the use of "shall" in the *Crimes Act* provision and "must" in the *Road Safety Act* provision, suggesting that the latter was of greater force than the former, I regard the difference as attributable only to drafting style and in no way leading to any different effect.) Section 408(2) has been considered by the Court in at least three reported cases: *Ross v Smith* [1969] VicRp 51; [1969] VR 411; *Creely v Ingles* [1969] VicRp 94; [1969] VR 732 and *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361. Each of those cases considered the question of whether a certificate had been delivered "as soon as practicable" upon a basis described by Little J in *Creely v Ingles* [1969] VicRp 94; [1969] VR 732 at 734 in the following terms:

> "The phrase 'as soon as possible' is one which defies definition. The words are ordinary English words and the question whether the certificate was delivered as soon as practicable after a sample of breath was analysed is necessarily one which is to be determined in the light of all the circumstances."

To put the question in the language adopted by Anderson J in *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361 at 365:

> "The question is whether what was done was reasonable and appropriate in the circumstances for 'as soon as practicable' does not mean 'as soon as possible'; it refers to what is 'reasonable in all the circumstances and appropriate to the requirements of the **[5]** situation.' *Minister of Agriculture v Kelly* [1953] NI 151 at 153 per Lord MacDermitt LCJ."

The appellant contended that the certificate could have and should have been delivered to him before he left the Melton Police Station and that the failure to do that, meant that no evidence could be given, whether orally or by certificate, of the breath analysis that had been made. The respondent contended that the certificate could not have been delivered before the appellant left the police station because the operator had not by that time "ascertained" that the breathalyser is in proper working order by testing it with a standard alcohol solution" (Reg 302(3)(a)). He contended that it was open to the Magistrate to conclude that the certificate had been delivered

as soon as practicable. The respondent contended further that even if there had been a failure to deliver the certificate as soon as practicable that failure would only preclude the prosecution from relying upon the certificate, it would not preclude the prosecution from relying, as it did in this case, upon oral evidence given by the breathalyser operator.

The certificate required by s55(4)(a) provides, in part that:

> [full name of operator] certify that:
> 3. The breathalysing instrument I used in this analysis was— ...
> (c) in proper working order and properly operated by me in accordance with the regulations..."

[6] The certificate is to be signed by the authorised operator. As I have already noted, the regulations require:

> "... for the proper operation of a breathalyser that the authorised operator of a breathalyser -
> (a) before a person's breath is analysed, and after competing such analysis, ascertains that the breathalyser is in proper working order by testing it with a standard alcohol solution ..."
> (Reg 302(3)(a) emphasis added.)

Thus the certificate which the operator must give to the person whose breath has been analysed is a certificate that the operator has, amongst other things, ascertained after completing the analysis that the breathalyser is in proper working order by testing it with a standard alcohol solution. Thus, in the present case, the breathalyser operator could not state as a fact one of the matters set out in the certificate until he had carried out that step of testing the machine.

The appellant sought to meet this difficulty by submitting that the operator was not bound to certify that the contents of the certificate were true: that he could, in effect, simply sign the certificate regardless of the truth or falsity of its contents. I consider that such a startling conclusion should not be reached unless there is a clear legislative indication that that is the intended result. Far from that being so, I am of the view that the evidentiary weight given to the certificate in the absence of a request that the operator attend to give evidence is the strongest possible indication that it is intended that the certificate do as its name suggests, namely certify – in the sense of **[7]** attest in an authoritative manner – to the truth of the contents of the certificate.

The appellant sought to make good the proposition it put in this regard by reference to *Houston v Harwood* [1975] VicRp 69; [1975] VR 698 where Gowans J held that the bare fact of error in a certificate did not mean that the certificate was no longer "in or to the effect of" the relevant schedule to the legislation. In that sense, it is true to say that a certificate need not contain only facts objectively demonstrable to be true but in my view that is a long way short of the proposition for which the appellant contended: that it was open to the operator in this case to give a certificate notwithstanding that one of the steps which the certificate would say had been done had in fact not been done.

It is of course clear that the appellant was never told that he might request that a second sample of his breath be analysed. Again s55(4) requires that this be done "as soon as practicable after a sample of a person's breath is analysed" and the appellant contended that this requirement was separate from and not dependent upon the requirement to supply a certificate. Thus, so the argument went, the appellant should have been told of his right to a second test before he left the police station. Section 55(4)(b) makes it clear that it is not in every case that a person must be advised of a right to a second test. That advice must be given "if the certificate indicates that more than the prescribed concentration of alcohol is present in the person's blood".

In my view it follows that the obligation **[8]** to give the advice of the right to a second test arises only upon delivery of the certificate about the first test. The subsequent paragraphs of s55(4) and in particular the requirement for a further certificate of the second test reinforce that conclusion. No doubt the right to have a second test is an important right designed for the protection of the defendant and in that sense it may be seen as a safeguard to him just as much as were the blood test provisions of the South Australian legislation that were considered in *Pacillo v Henschke* (1948) 47 SASR 261; (1988) 7 MVR 244. However, in my view the extent of the protection given by this legislation is to be determined according to its terms. Section 55(4)(6) requires that there be a certificate showing a particular result before advice of the kind in question must be

given. Thus, if in this case no certificate could be given to the appellant before he left the police station, no complaint may now be made that he was not told at the police station of his right to a second test.

The debate between the parties on the appeal centred upon whether the certificate should have been given at the police station. Little or no attention was directed to whether the certificate was thereafter given to the appellant as soon as was practicable. In my view that is a question of fact and degree. In the peculiar facts of this case I consider it was open to the Magistrate to conclude, as he did, that the certificate was delivered as soon as practicable. Given the time at which the certificate was delivered, it would have been pointless to inform the appellant of the right to take a second test. And the **[9]** appellant has, by his conduct disabled the respondent from complying with the provision. That being so the appellant cannot now rely on this failure. It was therefore in my view open to the Magistrate to reach the conclusions that he did. In the circumstances it is not necessary for me to express any concluded view upon the respondent's argument that a failure to comply with s55(4)(a) would go only to the admissibility of the certificate in evidence. In my view it was open to the Magistrate to conclude that there was no failing to comply with s55(4)(a). In my opinion the appeal should be dismissed.

APPEARANCES: For the appellant Dickson: Mr P Billings, counsel. JA Clements Pty, solicitor. For the respondent Kimber: Mr SP Gebhardt, consel. JM Buckley, Solicitor for the DPP.