24/77

SUPREME COURT OF VICTORIA

CAUGHEY v PEACHEY

Starke J

24 November 1976

MOTOR TRAFFIC – DRINK/DRIVING – DELIVERY OF 7TH SCHEDULE CERTIFICATE TO PERSON BREATHALYSED "AS SOON AS PRACTICABLE" – DELAY OF 13 MINUTES BETWEEN TEST AND DELIVERY OF CERTIFICATE – WHETHER AS SOON AS PRACTICABLE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(2).

On an information for a .05% charge, evidence revealed a discrepancy of thirteen minutes between the time of the breathalyzer test, as indicated on the certificate, (10.27pm.) and the time the certificate was handed to the defendant (10.40pm.). A submission that the certificate was not delivered to the defendant "as soon as practicable" after the test as required by s80F(2), was upheld by the Magistrate, who dismissed the case. Upon Order Nisi to Review—

HELD: Order absolute.
One should not be astute to find a means whereby the reasonable operation and application of the section are to be circumvented by too narrow an interpretation. In this case, it was proved beyond the shadow of a doubt that the certificate was given as soon as practicable after the test was taken, and in those circumstances there should have been a conviction.

STARKE J: "The argument here presented by Mr Kendall for the defendant is that by cross-examination it had been clearly indicated to the informant that the question of whether the certificate was given as soon as practicable was under challenge and it thus behoved the informant to give an account of himself in relation to the things that happened between the making of the breath test and the delivery of the certificate.

This, of course, is not what the section says. The question is, and remains throughout, whether there is evidence which establishes beyond reasonable doubt that the certificate was given as soon as practicable. I might say that in a case such as this I am in as good a position as the Magistrate was to determine this issue, because it in no way depends upon the demeanour or credibility in this case of any witness.

This section has not been without judicial consideration. In *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361 Anderson J was considering a similar problem. Amongst other things he said at p365:-

> 'In considering the purpose of the section and the rights of all concerned, I do not think one should be astute to find means whereby the reasonable operation and application of section 408A sub-section (1) are to be circumvented by too narrow an interpretation of section 408A sub-section (2).
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> There is no standard time within which the procedure must be carried out and I do not think that each operator sets a standard time for himself when on some occasion he happens to perform the procedure more quickly than on another occasion. In *Minister of Agriculture v Kelly* (1953) NI151 at p153, Lord MacDermitt LCJ said that the expression "as soon as practicable" did not mean "as soon as possible" but referred to what was "reasonable in the circumstances and appropriate to the requirements of the situation".'

Anderson J quoted from the decision of Little J in *Creely v Ingles* [1969] VicRp 94; [1969] VR 732 at p734:

> 'In that case His Honour said the phrase "as soon as practicable" 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. It is not one to be determined on some mathematical basis of adding

> together periods of time taken in relation to the various steps in the process of the breath analysis and the checking of the operation of the instrument'.

Anderson J also cited with approval the judgment of Adam J in *Jones v Groves* (unreported) 29 August 1969). In that case His Honour said:

> 'Whatever the precise meaning to be given to the expression "as soon as practicable" in this context I consider it palpably unreasonable to treat a lapse of a mere ten minutes between the conclusion of the breath test by the instrument and the delivery of the requisite certificate as offending the statutory direction that the certificate should be signed and delivered to the person tested "as soon as practicable". As the operator of the machine has, after obtaining the breath analysis from the instrument, to complete a Schedule 7A certificate with all necessary particulars, presumably to make a copy to be retained for evidentiary purposes, to satisfy himself that the instrument at the time is in proper working order; and sign the certificate, all before delivering it, the lapse of a mere ten minutes appears to me to need no justification from evidence, and a certificate delivered within such a short period could not reasonably be held to have been delivered otherwise than "as soon as practicable" within the meaning of the statutory provision'.

And finally Anderson J in *Tampion v Chiller* says at p367:

> 'I am not to be taken as saying that fifteen minutes would never be fatal, for there may be the case in which the evidence showed that the certificate was available in five minutes, but the operator deliberately, and perhaps perversely, kept the person waiting for another ten minutes; but I am not deciding that case'.

There is, of course, evidence in this case that the certificate was given as soon as practicable. Sub-section 3 of s80F provides, 'That the certificate shall be *prima facie* evidence of the facts and matters stated therein'. Whether the statement, 'as soon as practicable after the completion of a breath analysis' is a fact or not I think is open to question but it is certainly a matter, I think, within the meaning of sub-section 3, therefore there is evidence of the matter arising from the certificate itself. But also the circumstances are that only thirteen minutes elapsed between the analysis and the giving of the certificate. This is derived from the face of the certificate itself. Mr Kendall suggests that because in cross-examination the informant was given a warning that the giving of the certificate was under attack, he should have filled in what Mr Kendall regards as the gaps in the evidence. I see no such duty upon him. He may, of course, adopt that course in re-examination. He may, on the other hand, consider that the evidence already before the court is of such a nature that the cross-examination has not disturbed the *prima facie* position. I must say that although, it appears to have become the practice in Magistrates' Courts, I find it completely unhelpful that the informant had, on six other occasions, completed the course in ten minutes, whereas in this case he took thirteen minutes. To derive any assistance out of such cross-examination one would have to know what the circumstances were in each of those six cases.

It is to be borne in mind that the defendant's point is entirely unmeritorious. However, on the other hand, it is to be borne in mind that the statute is a penal statute, the provisions of which are intended to protect the defendant, it must be strictly interpreted, but I agree with the observations of Anderson J that one should not be astute to find a means whereby the reasonable operation and application of the section are to be circumvented by too narrow an interpretation. In this case, in my view, it was proved beyond the shadow of a doubt that the certificate was given as soon as practicable after the test was taken, and in those circumstances there should have been a conviction".
