

33/90

## THE COUNTY COURT OF VICTORIA

*Re BOLTON*

Judge Mullaly

31 August 1990

**MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE ADMITTED INTO EVIDENCE – "IN THE PRESCRIBED FORM" – NO PRE-WRITTEN DOCUMENT PRESCRIBED – DETAILS SPECIFIED IN REGULATIONS – WHETHER "IN THE PRESCRIBED FORM": ROAD SAFETY ACT 1986, SS49(1)(f), 55(4), 58(1)(2); ROAD SAFETY (PROCEDURES) REGULATIONS 1988, R314.**

**A certificate which contains the specific details as set out in Reg 314 of the *Road Safety (Procedures) Regulations* 1988 paras (a) to (h) together with the things mentioned in s55(4) of the *Road Safety Act* 1986 is "in the prescribed form" and admissible on the hearing of an offence under s49(1)(f) of the Act.**

**JUDGE MULLALY:** [1] About 5.20 a.m. on 5th March 1988 the appellant was apprehended while driving a motor car in the Preston area. Whilst she was out of the vehicle the appellant was observed to lack co-ordination in her movements, she appeared to trip without reason, she dropped her sunglasses. Her breath smelt of alcohol and her eyes were bloodshot. A preliminary breath test indicated it was appropriate that she be further tested and she accompanied police to the Preston Police Station. There she gave her age as 22 years and told police of her consumption of liquor during the preceding evening and early morning. She admitted to drinking Moselle and orange juice in two different establishments during a period of some six hours. At that police station at 6.53 a.m. she gave a sample of breath for analysis and was handed a signed certificate of the concentration of alcohol present in her blood. The concentration of alcohol present in her blood was 0.140 grams [2] of alcohol per 100ml of blood, which expressed as a percentage, is 0.140 per cent.

The appellant was charged with an offence contrary to the *Road Safety Act* 1986, s49(1)(f). On the hearing of the appeal a copy of the signed certificate was tendered in evidence. At the conclusion of the respondent's case, Mr Gebhardt, Counsel on behalf of the appellant, submitted that the appellant had no case to answer. In essence, this submission assumed that the certificate relied upon by the respondent was not "in the prescribed form" because no such form had ever been prescribed. The significance of the expression "in the prescribed form" emerges, according to Mr Gebhardt, from an analysis of the relevant sections of the *Road Safety Act* 1986. He pointed out that the respondent was seeking to rely upon the evidentiary provisions of s58 of that Act but he submitted that the certificate relied upon was not, and could not be, a certificate such as is referred to in s58.

In order to understand this argument it is necessary to refer to the precise terms of s58(1) and (2). Section 58(1):

"If the question whether a person was or was not at any time under the influence of intoxicating liquor or if the question as to the presence or the concentration of alcohol in the blood of any person at any time is relevant—

- (a) on a trial for manslaughter or for negligently causing serious injury arising out of the driving of a motor vehicle; or
- (b) on a trial or hearing of an offence against s318(1) of the *Crimes Act* 1958; or
- (c) on a hearing of an offence against s49(1) of this Act—

then without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by [3] a breath analysing instrument operated by a person authorised to do so by the Chief Commissioner of Police under s55 and the concentration of alcohol so indicated is, subject to compliance with s55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument."

Section 58(2):

"A document purporting to be a copy of a certificate given in accordance with s55(4) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments under s55 is admissible in evidence in any proceedings referred to in ss(1) and is conclusive proof of the facts and matters contained in it, unless the accused person gives notice in writing to the informant not less than 7 days before the hearing that he or she requires the person giving the certificate to be called as a witness"

Mr Gebhardt pointed out that evidence of blood alcohol concentration in relation to the offences enumerated in s58(1) was admissible only if there had been due compliance with s55(4). No point was taken that the instant offence was not referred to in s58(1). He submitted there had not been due compliance with s55(4). He conceded that the copy certificate tendered before me did purport to be given in accordance with s55(4) but argued that that was not of any significance if, in fact, there had not been compliance with s55(4). Mr Gebhardt argued that a strict and literal interpretation of s55(4) indicated that the certificate to which the sub-section referred must be in a particular form, that is, it must have been "prescribed" in the sense that its form was the result of a Governor-in-Council approval of a pre-written document. He pointed to the wide variety of such "prescribed forms" in legislation and regulation. Section 55(4) provides:

[4] "As soon as practicable after a sample of a person's breath is analysed by reason of 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 breath; and

(c) analyse the second sample of that person's breath if the person requests a second analysis immediately after being so advised; and

(d) sign and deliver to the person a certificate in the prescribed form of the concentration of alcohol indicated by the second 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 second analysis was made, if a second analysis is carried out."

[5] It is to be noted that s55(4) requires the breath analysis instrument operator to do only the things mentioned in paragraphs (a) and (b) or, to do all the things mentioned in paragraphs (a), (b), (c) and (d), dependent upon the circumstances. The requirement to do the things referred to in paragraphs (c) and (d) only arises if the person being tested requests the second analysis. I find that this appellant did not request a second analysis and accordingly, what the operator was required to do was confined to the things mentioned in paragraphs (a) and (b). Accordingly the only certificate, "in the prescribed form", necessary in this case was that referred to in paragraph (a). It is common ground that no prescribed form of the type for which Mr Gebhardt contended was in existence. There is no pre-written and Governor-in-Council approved document or form.

However, the respondent contends that Regulation 314 of the *Road Safety (Procedures) Regulations, 1988*, gives a wider meaning of "prescribed" than that for which the appellant contends. Regulation 314 provides:

"A certificate for the purposes of s55(4)(a) or (d) of the Act is in the prescribed form if it includes (in addition to the things mentioned in s55(4) of the Act)—

(a) a statement that the person who operated the breath analysing instrument was authorised to operate a breath analysing instrument; and

(b) a statement that the breath analysing instrument used was an approved one; and

(c) a statement that the regulations relating to the use of the breath analysing instrument were complied with; and

(d) a statement that the instrument was in proper working order, and was properly operated; and

(e) the name and the signature of the operator; and

- (f) the place at which the analysis was made; and
- (g) the name and address of the person providing the sample of breath for analysis; and
- (h) a statement that a copy of the certificate was provided to the person providing the sample of breath for analysis."

[6] It is noteworthy that Regulations 315, 316 317 and 318 all adopt the same technique to deal with the statutory requirement of "the prescribed form" in connection with the various certificates, statements and notices referred to in this legislation. The scheme of Regulation 314 is to advance the object of the road safety legislation by removing from litigation arguments based on technicality whilst preserving the duty to disclose relevant information. What Regulation 314 does is, in effect, to deem as "prescribed" certificates which contain the specific detail referred to paragraphs (a) to (h) inclusive, together with "things mentioned in s55(4) of the Act". The respondent contends that this present certificate does comply because it in fact includes those matters referred to in paragraphs (a) to (h) inclusive, together with detail as to the date and time at which the analysis was made and that the advice referred to in s55(4)(b) was given.

In the appellant's reply to the respondent's argument, it was submitted that the certificate did not, as required refer to the things mentioned in paragraphs (c) and (d) of s55(4). Events which have never happened cannot be described as "things" in a context such as that of s55(4) and Regulation 314. In this case, the things referred to in Regulation 314 were limited to those referred to in s55(4)(a) and (b). Whilst the word "prescribed" may sometimes mean "pre-written" as the appellant contends, that is not the only meaning of that word. It may also mean, "to lay down in writing or otherwise a rule or course to be followed" or "to ordain or enjoin". (See the *Shorter Oxford Dictionary* and the *Macquarie Dictionary*.)

[7] I am satisfied that the certificate tendered in this case complies with Regulation 314 and is therefore in "the prescribed form" as that expression is used in s55(4). I am satisfied of compliance with s55(4). Accordingly the evidence was properly admitted and there is a case to answer. I reject the submission.

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