47/85

SUPREME COURT OF VICTORIA

CORNER v WATERMAN

Southwell J

4 October 1984 — (1984) 2 MVR 379

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – SCHEDULE 7 CERTIFICATE – TIME OF DELIVERY TO DEFENDANT OMITTED – WHETHER DELIVERED 'AS SOON AS PRACTICABLE' – WHETHER 'IN OR TO THE EFFECT OF': *MOTOR CAR ACT* 1958, SS80F, 81A.

At the hearing of a charge against W. of driving a motor car whilst exceeding .05% blood/alcohol, the Schedule 7 copy certificate was admitted into evidence. At the conclusion of the Prosecution case, a 'no case' submission was made upon the basis that the certificate did not comply with the provisions of s80F(2) of the *Motor Car Act* 1958 in that the time of handing the certificate to the defendant was omitted. The Magistrate agreed with the submission and dismissed the charge. Upon order nisi to review—

HELD: Order absolute.
(1) The Magistrate was required to be satisfied that the certificate had been handed to the defendant as soon as practicable after the breath analysis. The Magistrate should have been so satisfied in view of the informant's evidence (including the use of the word 'then' in consecutive sentences) which indicated he was referring to a series of steps occurring one after the other in the transaction with the defendant.
***Greenwood v Jack* MC39/1983, followed.**

(2) The words 'in or to the effect of' mean that the Schedule 7 certificate need not slavishly follow the form set out in the Schedule. Accordingly, omission of the time of delivery of the certificate to the defendant did not make the copy certificate inadmissible.
***Wesson v Jennings* [1971] VicRp 9; [1971] VR 83, applied.**

SOUTHWELL J: [1] This is the return of an order nisi to review the decision of the Magistrates' Court at Bendigo on the 4 August 1983. On that day, the respondent appeared before the Court upon an information laid under s81A(1) of the *Motor Car Act* 1958, charging him with "that he did, on the 26 July 1983, drive a motor car whilst the percentage of alcohol in his blood expressed in grams per hundred millilitres of blood was more than .05 per centum". The details of what occurred at that hearing are not in dispute. The informant, the applicant in these proceedings, gave evidence that the respondent had been apprehended whilst driving a motor car on the day concerned, that his breath smelled of intoxicating liquor, that he admitted to the consumption of a quantity of beer and that he was thereupon conveyed to the Bendigo **[2]** Police Station for the purposes of a breath test, which was carried out by an authorised breathalyser operator.

His affidavit goes on as follows, "At the completion of the test, Woodhatch completed a Schedule 7 in triplicate and then handed two copies to me. I compared them and found them to be identical and returned them to Woodhatch, who then handed the original to Waterman and the duplicate to me. I produce that Schedule 7. It shows that the defendant had a blood alcohol concentration of .160 per cent" and he then went on to depose as to his questioning of the defendant, as to any reason he might have for driving whilst his blood alcohol content exceeded .05 per cent. At the conclusion of the Prosecution's case, which had, of course, included, apparently without objection, a tendering of the Schedule 7 Certificate, the solicitor for the respondent submitted that the information ought to be dismissed, upon the basis that the Schedule 7 Certificate did not comply with s80F(2) of the *Motor Car Act* "because the time of handing the Certificate to the defendant had been omitted from the Schedule 7 Certificate".

After argument and reference to legal authority, the Magistrate said that the omission of the time of the Schedule 7 Certificate being handed to the defendant was fatal to the prosecution case and that he must therefore uphold the defence submission. The Stipendiary Magistrate apparently further stated that, if the operator had been called to give **[3]** evidence of the time, this would have been sufficient. The informant obtained an order nisi to review the decision of

the Magistrate, dismissing the information, on the following grounds:

> (1) the learned Magistrate erred in rejecting, as evidence of the percentage of alcohol in the respondent's blood at the relevant time, the Certificate produced to the Court tendered in evidence, being Exhibit 'B' to the said affidavit of Malcolm John **[4]** Corner, on the ground that it did not contain a notation of the time at which it was delivered to the respondent.
>
> (2) The learned magistrate ought to have found that, on the evidence before him, that a copy of the said certificate was delivered to the respondent as soon as practicable after the respondent's breath was analysed, within the meaning of section 80F(2) of the *Motor Car Act* 1958.
>
> (3) The learned magistrate ought, on the evidence before him, to have convicted the respondent of the offence referred to in the said information.

Notwithstanding that there have been large numbers of reported and unreported cases on the relevant sections, it is, I think, convenient, once again, to refer to the statutory provisions. Section 80F of the *Motor Car Act* provides that evidence, such as is here relevant, may be given of the percentage of alcohol indicated to be present in the blood by a breath analysing instrument. SS(2) of section 80F reads,

> "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 shall sign and deliver to the person whose breath has been analysed, a certificate in or to the effect of Schedule 7 of the percentage of alcohol indicated by the analysis to be present in his blood (which may be by way of an indication on a scale) and of the date and time at which the analysis **[5]** was made".

SS(3) provides that, "A document purporting to be a copy of such a certificate as is referred to in subsection (2) shall be *prima facie* evidence of the facts and matters stated therein". It should at first be observed that the words 'in or to the effect of Schedule 7' should be read as meaning 'in the form or to the effect of Schedule 7' or 'in or to the effect of the form in Schedule 7': see *Wesson v Jennings* [1971] VicRp 9; [1971] VR 83, per Menhennitt J at p85.

The certificate, in fact, tendered was upon a form **[6]** appearing to be in the form of a Schedule 7 certificate and appears to be complete except that in paragraph (5) thereof, which reads, "That as soon as practicable after the completion of the breath analysis, namely at". There then appears some dots and the letter "a.m." printed over the letters "pm". The letters "pm." are crossed out, but no time is inserted, so that the paragraph reads, "That as soon as practicable after the completion of the breath analysis, namely at a.m. on the said day, I delivered the certificate to", and then the respondent is named. As appears from that certificate, the test was taken at 1.38 a.m. The certificate, on its face, says, "That as soon as practicable after the completion of the analysis, on that day, the certificate was delivered". The words of the informant, which I have quoted above, seem to me to indicate that a series of consecutive steps was being referred to. For the respondent, Mr Larkin submitted, firstly, that before the Bendigo Magistrates' Court there was no sufficient evidence that the certificate was handed to the respondent as soon as practicable after the test was conducted, that this was a condition precedent to the admissibility of the certificate and, since the condition precedent was not met, the certificate was inadmissible and, in the absence of the certificate, there was no evidence of the blood alcohol concentration and therefore no evidence upon which the respondent could properly have been convicted.

[7] Mr Larkin referred to the case of *Ross v Smith* [1969] VicRp 51; [1969] VR 411. That case involved a situation where there was some preliminary discussion in the Lower Court as to the admissibility of the evidence that the informant was about to give and the informant, as appears from p412 of the report, said, "that he could give evidence that he had complied with the subsection, and that after the analysis he handed to the defendant a certificate". After further objections and discussions, the magistrate ruled that the informant could give evidence and he proceeded with his evidence. However, as appears from p413 of the report, he did not again refer to the giving of the certificate to the defendant. In those circumstances, Winneke CJ, after noting the penal nature of the proceeding and the requirement that in accordance with the ordinary rule strict proof was required, and after also noting that although objection was made no application was made by the prosecutor to reopen the case, held that there was insufficient evidence upon which the magistrate could draw the inference that the certificate had been given as required by the then section 408(2) of the *Crimes Act*. It was simply a case where there was no satisfactory

evidence that **[8]** as soon as practicable after the taking of the test, the certificate, or a copy of it, had been served upon the defendant and, accordingly, the certificate was not admissible in evidence.

Here, as it seems to me, there was evidence of the informant (in the portion of the affidavit to which I have referred) upon which the Magistrate could and, I believe, should have been satisfied of the point in question. Mr Larkin then referred to the fact that Mr Downing who appears to move the order absolute, had provided him with a copy of the judgment of Gray J, delivered on the 25th of August 1983, but unreported, of the case of *Greenwood v Jack* where a not identical but very similar point came before His Honour. In that case the certificate had what was clearly a mistake in it, that it had been handed to the defendant at 8.25 pm. when, in fact, the analysis was taken at 9.05 pm. The informant deposed that, in fact, the certificate was handed over at 9.25 pm. His Honour there also distinguished the case of *Ross v Smith* and at p11 of the judgment says that:

> "In this case it is clear, in my opinion, that the informant in the passages to which I have referred, was giving evidence of a routine transaction concerning himself, the breath analysis operator and the defendant. By the very nature of the transaction, it is likely to be completed within a very short period. The account given by the informant, appears to be speaking of events which followed **[9]** immediately upon each other. I can detect no satisfactory reason to justify the Magistrate in not being satisfied that the certificate was handed to the defendant as soon as practicable after the test was completed. It can certainly be said that the Magistrate did not put forward any reasons for his rejection and no adequate reasons appear to arise from the circumstances."

I respectfully agree with those observations and would add that in the present case, the use of the word 'then' appearing in consecutive sentences, in my view, compels the finding that in the absence of any other evidence, there was indeed a series of steps in the transaction occurring one after the other. The reason advanced by the Magistrate, in my view, underlines the error made because it is said that it could have been corrected by the operator being called to give evidence at the time. It would appear that the learned Stipendiary Magistrate had thought there was no evidence upon which he could be satisfied that the certificate had been handed to the respondent as soon as practicable after the analysis. Not only was there sufficient evidence to enable the Magistrate so to hold, in my view, it would not in the circumstances have been open to him without good and stated reasons to have held otherwise.

The second point argued by Mr Larkin was that the certificate in itself was not "in or to the effect of schedule 7", in that the time was missing from it. In my view, that submission may be summarily rejected. The fact that the time is not in it, does not in my view, leave it open to **[10]** a finding that it is not "to the effect of the form in Schedule. The addition of the words 'to the effect of' produces the result that the certificate need not slavishly follow the form set out in Schedule 7A in order to be an admissible certificate": *Wesson v Jennings* (*supra*) at p85. Accordingly, the order nisi must be made absolute with costs.

APPEARANCES: Mr R Downing, Counsel instructed by the State Crown Solicitor appeared for the applicant/informant. Mr A Larkin, Counsel instructed by Beck, Sheahan Quinn & Co. Solicitors, appeared on behalf of the respondent/defendant.
