

03/69

SUPREME COURT OF VICTORIA

OLIVER v PEARCE

Nelson J

30 July 1969

MOTOR TRAFFIC – DRINK/DRIVING – DRIVER UNDERWENT A BREATH TEST – AT THE CONCLUSION OF THE TEST TWO CERTIFICATES WERE HANDED TO THE INFORMANT WHO COMPARED THEM AND FOUND THEM TO BE IDENTICAL – A PERIOD OF 15 MINUTES ELAPSED BEFORE THE CERTIFICATE WAS HANDED TO THE DEFENDANT – WHETHER DELIVERED "AS SOON AS PRACTICABLE" – MEANING OF – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S81A.

HELD: Order nisi absolute. Dismissal set aside. Remitted for hearing and determination according to law.

1. In relation to the expression "as soon as practicable" in sub-section (2) of s408(a) of the *Crimes Act 1958*, the words were ordinary English words and the question whether the certificate was delivered as soon as practicable, after a sample of breath was analysed was necessarily one which was to be determined in the light of all the circumstances. It was not one to be determined on some mathematical basis, by 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. Any such approach was unreal and unwarranted by the language.

Creely v Ingles [1969] VicRp 94; [1969] VR 732; and
Slater v Williamson [1969] VicRp 91; [1969] VR 705, applied.

2. Although the question as to whether the certificate was delivered as soon as practicable after the sample was taken, was a question of fact in each case, to rely merely on a lapse of time of 15 minutes, having regard to the obvious object of the provision in the Act, as indicative that the certificate was not given as soon as practicable after the test, was clearly unreasonable.

NELSON J: This is the return of an order nisi to review the decision of a Stipendiary Magistrate sitting as a Court of Petty Sessions at Williamstown on 5 March 1969, whereby at the close of the informant's case he dismissed an information which had been laid, charging the defendant with a breach of s81A of the *Motor Car Act*, in that he did on 22 January 1969 at Williamstown drive a motor car on a highway while the percentage of alcohol in the blood expressed in grams per hundred millilitres of blood was more than .05 per centum.

According to the affidavit of the informant upon which the order nisi was granted, evidence was given that at 7.55 p.m. on 22 January 1969, one First Constable Edwards of the Breath Analysis Section arrived at the Williamstown Police Station, set up the breath analysis instrument in front of the defendant, and at the conclusion of a breath analysis test handed to the informant two certificates in the form of Schedule 7(a) to the *Crimes Act 1958*, which the informant compared and found to be identical; that he then handed them back to the operator who handed the original to the defendant, and a copy to the informant. A duplicate copy of the Schedule 7(a) form was then tendered in evidence by the informant, and apparently accepted in evidence without objection, since the Magistrate, in subsequently giving his decision referred to and relied upon its contents.

In cross-examination the informant was asked by the solicitor appearing for the defendant whether the original Schedule 7(a) form had been handed to the defendant as soon as practicable after the test, and according to the informant's affidavit he answered that he believed it was, because as soon as he had checked through the original and duplicate to see if they were the same and returned them to First Constable Edwards, the original was handed to the defendant immediately. No other evidence, according to the affidavit, was directed to the question of the time at which the test was conducted or the time when the certificate was given to the defendant or what operations had intervened or had been carried out between those two times. But the certificate itself set out over the signature of the operator that at 8.10pm he analysed a sample

of the breath of the defendant, and then in para 5 it is set out as follows, namely:

"That as soon as practicable after the completion of the breath analysis, namely, at 8.25pm on the said day, I delivered this certificate to the said defendant".

At the close of the informant's case Mr Black, who appeared as solicitor for the defendant, submitted that it was impossible for the operator to say on the original 7(a) form the time at which he handed it to the person in charge, as he would have to be in possession of the form when he signed it, and consequently the handing of it to the defendant must have been subsequent to his signing of the form. Mr Black has however informed me in this matter that that was only one of the submissions which was made at the end of the informant's case, that a number of submissions were made by both parties, and that he believes that he also submitted to the Magistrate that on the evidence the certificate had not been handed or delivered to the defendant as soon as practicable after the sample of the defendant's breath was analysed.

These matters become of importance because under s408(a) of the *Crimes Act* 1958, on a prosecution for an offence against s81A of the *Motor Car Act* evidence may be given of the percentage of alcohol indicated to be present in the blood of the defendant by a breath analysing instrument operated by a person authorised in that behalf by the Chief Commissioner of Police, and the percentage of alcohol so indicated shall, subject to compliance with the provisions of sub-section (2) of the section, be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument. And sub-section (2), which must be complied with before the percentage of alcohol indicated on the instrument shall under the section be evidence of the percentage of alcohol present in the blood of the defendant, requires that as soon as practicable after a sample of a person's breath is analysed 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(a) of the percentage of alcohol indicated by the analysis to be present in his blood, and of the date and time at which the analysis is made.

The Magistrate, in giving his decision on the submissions made at the end of the informant's case, stated that he was unable to say that the Schedule 7(a) form was handed to the defendant as soon as practicable after the breath analysis test had been taken. He went on to say, according to the affidavit, he felt that 15 minutes after the analysis of the defendant's breath was not as soon as practicable, taking into account the time for writing and completing the Schedule 7(a) form. He added,

"There is no certain time laid down by the legislature for the standard alcohol solution test, and there is no evidence whatsoever before me to show how long it takes to conduct a standard alcohol solution test after a breath test, in order to comply with the regulations. And taking into account the *Mornington Case*, I will dismiss the information".

The reference by the Magistrate to the standard alcohol solution test after the breath test followed a submission by the officer prosecuting, that under the *Crimes Breath Analysing Instrument Regulations* 1967 the operator of the breath analysing instrument was required, after completing the analysis, to ascertain that the instrument used was in proper working order by testing such instrument with a standard alcohol solution. And it was apparently put by him that that was one of the operations which had to be completed by the officer operating the instrument before he could deliver the certificate to the defendant, and one of the operations which must be taken into account in determining whether the certificate was delivered as soon as practicable after the sample of breath had been analysed.

The reference by the Stipendiary Magistrate to the *Mornington Case* I am informed was a reference to an information which he himself had heard in the Court of Petty Sessions at Mornington on 3 March 1969, in which one Slater was an informant and Geoffrey William Williamson was the defendant. That also was a prosecution under s81A of the *Motor Car Act* in which a certificate in form of Schedule 7(a) of the *Crimes Act* had been tendered in evidence and the Magistrate had held that as the form in the Schedule required the operator to certify that he had delivered the document itself to the person tested and he could not do that until after the document was delivered it was impossible for him to comply with the requirements of the Act and that sub-section (2) consequently could not be complied with. This apparently was one of the submissions which was made by Mr Black at the close of the informant's case as I have previously indicated.

The decision in *Slater v Williamson* [1969] VicRp 91; [1969] VR 705 was reviewed before the Full Court and by a judgment which was delivered on 24 April 1969, that is, some time later than the present matter came before the Court of Petty Sessions at Williamstown, the Full Court held that the Magistrate was in error in the view that he had taken of the requirements of the Act and that the certificate should have been admitted in evidence. To the extent, therefore, that the Magistrate in dismissing the information in the present case relied upon the decision that he had made in the *Mornington Case* his decision cannot be supported.

It appears, however, from the statement which the affidavit sets out as to the reasons he gave for his decision in this case that while he relied on the *Mornington case* he also dismissed the information on the ground that he was not satisfied that the certificate in the form of the Schedule 7(a) had been delivered to the defendant as soon as practicable after the breath analysis test had been taken. He does not indicate in his reasons that he is not prepared to accept any of the evidence given by the informant as to the circumstances and stages of the proceeding at which the form was in fact delivered to the defendant.

And the Magistrate's failure to find that the certificate was delivered as soon as practicable appears to rest solely on the fact that, as he says, he felt that the lapse of time of fifteen minutes which the certificate indicates had occurred from the time that the sample of breath was analysed until the certificate was delivered to the defendant was in itself indicative of the fact that the form had not been delivered as soon as practicable after the analysis of the sample of the defendant's breath.

All that he appears to have taken into account in determining whether that period was one which complied with the requirement of the Act was the time for writing and completing the Schedule form and the fact that there was no evidence before him to indicate how long it would take to make a test of the instrument after the sample of breath had been analysed. The Magistrate did not have the advantage of a decision of this Court which was given by Little J on 16 May of this year, in the case of *Creely v Ingles* [1969] VicRp 94; [1969] VR 732 where the interpretation of the expression "as soon as practicable" in this Act was involved. His Honour, in giving his reasons for decision in that case, said:

"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, by 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. Any such approach is unreal and unwarranted by the language."

In the *Minister of Agriculture v Kelly* [1953] NI 151 the Court of Appeal in Northern Ireland was called on to construe the meaning of the words "as soon as practicable" in certain regulations. And it was made clear by the Court that the words "as soon as practicable" do not mean "as soon as possible." Lord McDermott CJ at p153 of the report said:

"The word, 'practicable' is not synonymous with 'possible'. In this context it must, I think, be taken to signify what is reasonable in the circumstances and appropriate to the requirements of the situation."

And he then went on to deal with the requirements of the particular regulations with which the Court was dealing in that case. Lord Justice Black at p159 said that he thought the words "as soon as practicable" in the regulations must be construed having regard to the obvious object of the regulations and to the mode in which the regulations seek to carry that object into effect.

Turning now to the expression "as soon as practicable" in sub-section (2) of s408(a), it would appear clear that the requirement that the person operating the breath analysing instrument should sign and deliver to the person whose breath has been analysed a certificate of the percentage of alcohol indicated by the analysis to be present in his blood as soon as practicable after the sample of the person's breath is analysed is directed to ensure that there will be no undue delay between the time that the defendant's breath has been analysed and a reading which presumably may be used against him in Court has been obtained, and the time when he is informed of that reading so that he can expeditiously take whatever steps are available to him, to contest any such reading obtained, or the inferences which may be drawn from it. Although the question as

to whether the certificate was delivered as soon as practicable after the sample was taken, is of course a question of fact in each case, to rely merely on a lapse of time of 15 minutes, having regard to the obvious object of the provision in the Act, as indicative that the certificate was not given as soon as practicable after the test, appears to me to be clearly unreasonable.

The informant had stated in evidence that as soon as he had checked through the original and duplicate to see they were the same and handed them back to the constable operating the machine, the original had been handed to the defendant immediately, and he had sworn that the two documents had been handed to him by the person operating the machine at the conclusion of the breath analysis test, it appears to me clear that the Magistrate in approaching the question as to whether the certificate had been delivered as soon as practicable after the analysis of the breath, was attempting to apply the same test which Little J in *Creely v Ingles* had indicated was unreal and unwarranted by the language of the section. That fact together with the fact that the Magistrate was relying upon the decision which he had made in *Slater v Williamson* which decision was subsequently set aside by the Full Court, makes it necessary in my view that the matter should be remitted to the Court of Petty Sessions for re-hearing, in the light of the decisions of the Full Court in *Slater v Williamson*, of Little J in *Creely v Ingles* and of the reasons that I have indicated above for this decision.

The order consequently will be made absolute. The order dismissing the information will be set aside and the matter will be remitted to the Court of Petty Sessions at Williamstown for re-hearing. The defendant is to pay the costs of the informant of these proceedings to be taxed up to the statutory limitation. There will be a certificate under the *Appeal Costs Fund Act* to the defendant.

APPEARANCES: For the informant/applicant Oliver: Mr LR Hart, counsel. Mr T Mornane, State Crown Solicitor. For the defendant/respondent Pearce: Mr G Black, solicitor.
