03/72

SUPREME COURT OF VICTORIA

CLEMENS v PRETLOVE

Pape J

22 February 1972

MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .O5% – SURNAME OF DEFENDANT DIFFERENT FROM THAT IN THE CERTIFICATE – 'BRETLOVE' INSTEAD OF 'PRETLOVE' – DEFENDANT PLEADED NOT GUILTY TO THE DRINK/DRIVING CHARGE AND ALSO TO A CHARGE OF FAILING TO KEEP HIS VEHICLE TO THE LEFT OF THE CARRIAGEWAY – CONVICTED ON THAT CHARGE – DRINK/DRIVING CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408A.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for hearing and determination according to law.
1. If the magistrate purported to have doubts that the certificate referred to the defendant, and to have considered that it was equally possible that there had been another man whose name was Bretlove and who had been subjected to a breath test at or about the same time and that the defendant had been given a certificate which related to this mythical Bretlove, such doubts would have been unreasonable, and that in accordance with well known decisions of the Supreme Court such a decision based upon such doubts was erroneous.

2. The difference in the names Pretlove and Bretlove was minimal and having regard to the evidence that the original certificate was handed to the defendant at the police station at the conclusion of the test, the theory that there might have been another man named Bretlove whose breath was tested at the time stated in the certificate and whose certificate was handed to the defendant bordered on the fantastic. In reality the only reason that the stipendiary magistrate was asked to dismiss the information was that the defendant's name was misspelt in the certificate and in view of the evidence that he was the driver, that he was subjected to a breath analysis, and that he received the certificate after the test had been completed, the stipendiary magistrate was wrong in dismissing the information at the close of the complainant's case.

3. The order nisi was made absolute with costs to be taxed (including reserved costs) not to exceed $200. The order dismissing the said information was set aside and the information remitted to the Magistrates' Court to be determined in accordance with law.

PAPE J: On 13 July 1971 at the Magistrates' Court at Warrnambool before Mr Fitzpatrick SM the defendant Herbert George Pretlove was charged under s81A of the *Motor Car Act* with driving a motor car on 1 May 1971 at Warrnambool whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum. At the same time he was also charged on another information which alleged that he failed to keep his vehicle as close as practicable to the left boundary of such carriageway, and both informations were heard together. The defendant was present in court and pleaded not guilty. He was represented by Mr McLaughlin a local solicitor.

The evidence was given by the informant, First Constable Clemens, who said that on 1 May 1971 at 10.40 pm he saw the defendant drive a motor car west in Timor Street. At the intersection with Banyan Street the defendant stopped and then turned left into Banyan Street. As he turned left he kept close to the eastern kerb and then drifted across to the centre median strip. He travelled in this position for about 100 yards and then drifted towards the kerb. The informant signalled the defendant to stop, which he did 15 feet out from the kerb. When asked for his name and address the defendant said "Brian Pretlove, Bromfield Street." The defendant's breath smelt strongly of intoxicating liquor. He admitted that he had been drinking liquor that night, whereupon the informant invited him to accompany him to the police station and furnish a sample of his breath for analysis. He agreed to do this.

At the police station the informant introduced him to First Constable Genardini, an approved breathalyser operator, who conducted the test. At the conclusion of the test Genardini compiled

an original end duplicate copy of the certificate mentioned in s408A(2) and Schedule 7A of the *Crimes Act* 1958. The informant compared the two copies and found them identical. He thereupon returned them to Genardini who gave the original to the defendant. The duplicate certificate was tendered in evidence without objection — it showed a reading of .180. The cross-examination of the informant as set out in para 10 of the affidavit of the informant in support of the order nisi was as follows:–

"Mr McLaughlin said: What name did my client first give you?
I said: When I intercepted him in Banyan Street, 'Brian Pretlove'.
Mr McLaughlin said: No, I mean when you were at the police station?
I said: Herbert George Pretlove.
Mr McLaughlin said: You would not know what name he gave to the breathalyser officer?
I said: Yes.
Mr McLaughlin said: Why, were you present all the time?
I said: Yes. I was present at all times when he furnished a sample of his breath for analysis.
Mr McLaughlin said: What name did he give to the operator?
I said: Herbert George Pretlove.
Mr McLaughlin said: Is this the name the operator wrote on the Schedule?
I said: Yes, as far as I know.
Mr McLaughlin said: You have given evidence that you compared the duplicate and the original and found that they were identical, is that right?
I said: Yes, they were.
Mr McLaughlin said: When he drifted in Banyan Street was he travelling very fast?
I said: No, he was travelling slowly.
Mr McLaughlin said: When you signalled my client to stop he stopped immediately?
I said: Yes."
This closed the informant's case.

It appears that when examined, the certificate under Schedule 7A refers to a person named Herbert George BRETLOVE, of 133 Bromfield Street, Warrnambool, whereas the defendant was charged under the name of Herbert George PRETLOVE. Mr McLaughlin then submitted that there was no case to answer as the Schedule 7A certificate did not refer to the defendant but to someone named Bretlove. The prosecutor then submitted that an error had obviously been made in the recording of the defendant's name, and that the initial letter of the surname was obviously intended to be a "P". He further submitted that the certificate applied to a breath test which had been conducted on the defendant Pretlove and not on a person named Bretlove.

The stipendiary magistrate convicted the defendant on the second information relating to not keeping as close as possible to the left boundary of the carriageway, and fined him $10, but he dismissed the information under s81A of the *Motor Car Act*, saying that he was not prepared to act upon assumptions.

An order nisi was granted on 15 August 1971 on two grounds which were:

> "(1) That on the evidence the learned magistrate was bound to find that the details contained in the breath analysis certificate related to the defendant Herbert George Pretlove, and
>
> (2) That having regard to all the details contained in the said certificate the learned magistrate ought to have found the charge against the defendant proved."

Section 81A of the *Motor Car Act* under which the defendant was charged provides that:

> "Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood is more than .05 per centum shall be guilty of an offence."

The evidentiary provisions relating to this offence are contained in s408A of the *Crimes Act* 1958 Sub-section (1) of that section, (so far as is relevant) reads:

> "Where the question whether any person was or was not under the influence of intoxicating liquor or where the question as to the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant;

(c) Upon any hearing for an offence against s80A, s80B, s81A or s82 of the *Motor Car Act* 1958 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 percentage of alcohol indicated to be present in the blood of that person 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 this 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.

(2) 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 7A 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 was made.

(2A) A document purporting to be a copy of any certificate given in accordance with the provisions of sub-section (2) and purporting to be signed by a person authorised by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-section (1) of the facts and matters stated therein unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving a certificate to be called as a witness."

It was submitted by Mr Uren who appeared to move the order absolute that if the magistrate's decision meant that he found that there was insufficient evidence to show that the certificate referred to the defendant, such finding was not, on the evidence, open to him and was unreasonable. Although the name in the certificate was not the defendant's name, identity of name is only *prima facie* evidence of identity and here the other evidence given clearly identified the defendant with the person whose breath had been analysed.

The defendant was in court and had pleaded not guilty — the evidence of the informant related to that defendant and established that the defendant was apprehended in Banyan Street by the informant, taken by him to the police station, where his breath was analysed, and that there and then he was given the original certificate. Further, the fact that the stipendiary magistrate convicted the defendant on the second information on the evidence of the informant showed that the stipendiary magistrate was satisfied beyond reasonable doubt that the defendant was the person so apprehended and dealt with.

Section 408A(2) requires the certificate to be delivered to "the person whose breath had been analysed" and this had been established notwithstanding that the defendant's name was incorrectly spelled in the certificate. If the magistrate's decision meant that he held that by reason of the wrong name appearing in the certificate it was inadmissible, he argued that such a finding could not be upheld because the certificate was by sub-section (2)(A) only *prima facie* evidence of the facts stated therein and that the other evidence to which reference has been made clearly connected the defendant with the person whose breath had been analysed.

On the other hand, Mr O'Callaghan, who appeared to show cause argued that since the informant was relying upon the provisions of sub-section (2)(A) of s408A of the *Crimes Act* to prove the offence the stipendiary magistrate was required to make up his mind on the certificate and could not go beyond it, and the decision must mean that the stipendiary magistrate rejected the certificate. He argued that since the evidence showed that in Genardini's presence the defendant gave his name as "Pretlove" and since the informant's evidence was that as far as he knew the name "Pretlove" appeared in the certificate, the stipendiary magistrate was entitled to have doubts as to whether there was not in existence another certificate relating to "Pretlove" and as to whether the breath of a man named "Bretlove" had not been analysed and was the subject matter of the certificate.

In these circumstances he said that the stipendiary magistrate was quite entitled not to assume, as the prosecutor invited him to do, that the name Bretlove had been inserted by mistake, and he pointed out that the prosecutor had not called First Constable Genardini to explain how the name Bretlove appeared in the certificate. He said that the stipendiary magistrate was entitled to say that as the name in the certificate was not the name of the defendant, he was not satisfied to accept the other statements contained in the certificate.

In my opinion the stipendiary magistrate was wrong in dismissing this information at the close of the informant's case. The submission made by the defendant's solicitor was that the certificate did not refer to the defendant, but to a man named Bretlove. The only reason given by the stipendiary magistrate for his decision was that he was not prepared to act upon assumptions. As a statement of principle, this was unexceptionable, but it is not easy to deduce from this statement precisely what he had in mind. Mr Uren suggested that he might have meant either that he was not satisfied that the certificate related to the defendant, or that as a matter of law he decided that the misspelling of the defendant's name on the certificate invalidated the certificate.

I do not think that latter suggestion is supportable, for by no stretch of the imagination can the stipendiary magistrate's words be so construed. I think that what he must have decided was that the evidence was insufficient to connect the defendant with the certificate and that when he said, "I am not prepared to act upon assumptions", he was saying that he was not prepared to adopt the prosecutor's argument that an error had obviously been made in First Constable Genardini's recording of the defendant's name.

The question then arises as to how such a conclusion can justify the magistrate in finding that the evidence was insufficient to connect the defendant with the certificate. Mr O'Callaghan argued that a line of reasoning which could justify the magistrate in making such a finding is this that if the magistrate was not satisfied that the name "Bretlove" appeared in the certificate by mistake, (as by Genardini misunderstanding the defendant when he gave his name) it must follow that (unless Genardini knowingly and deliberately inserted a wrong name in the certificate) the person whose breath was being analysed gave the name "Bretlove". The question would then arise as to whether the person who gave the name "Bretlove" was the defendant, or whether there was another man named "Bretlove" whose breath was being analysed at the time and place stated in the certificate, and to whom the certificate related and was given, and whether there was in existence another certificate in relation to a man named "Pretlove" which related to the defendant and was different in form from the certificate put in evidence. Upon this line of reasoning it was argued that the stipendiary magistrate was entitled to say that he was not satisfied that the certificate tendered in evidence had reference to the defendant.

I am of opinion that if the stipendiary magistrate relied upon that or similar reasoning, his decision was wrong and cannot be supported. What the informant had to prove in order to make a case against the defendant was:

(1) that on the 1 May 1971 the defendant was driving a motor car in Warrnambool. This was proved by the evidence of the informant of his own observation of the defendant and his apprehension of him. The magistrate must have been satisfied of this, for he convicted him of failing to keep his vehicle as close as practicable to the left boundary of the carriage-way.

(2) That at the time aforesaid, the percentage of alcohol in the defendant's blood in grams per 100 millilitres of blood exceeded .05 per centum. This he proposed to prove by invoking s408A(1)(2) and (2)(a) of the *Crimes Act* 1958 and by tendering in evidence a copy certificate. But before the copy certificate could be put in evidence the informant had to establish firstly that the person charged, that is to say the defendant, who had been driving the motor car had undergone a breath analysis test (see sub-section (1)) and secondly, that as soon as practicable after the defendant's breath had been analysed by means of a breath analysing instrument, the defendant had been given a certificate in or to the effect of Schedule 7A 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 was made (see *Ross v Smith* [1969] VicRp 51; [1969] VR 411).

The first of these matters was proved by the informant's evidence, to the effect that after stopping the defendant in Banyan Street the informant conveyed the defendant to the police station where be observed First Constable Genardini subject him to a breath analysis test. The identity of the driver of the car with the person whose breath was analysed was thus established. The second of the matters I have mentioned was established by the informant's evidence that he saw First Constable Genardini prepare two copies of a Schedule 7A certificate that he checked both copies and found them identical, and that in his presence Genardini handed the original to the defendant, that is to say to the person who had been driving the car.

(3) That the percentage of alcohol indicated to be present in the blood of the defendant by the breath analysing instrument exceeded .05 percent. This the informant purported to do by tendering a copy of the certificate which by sub-section (2)(a) was *prima facie* evidence in any proceedings of the facts and matters stated therein. It is to be noted that the copy certificate was tendered without any objection by the defendant's solicitor to its admissibility on the ground that it did not refer to the defendant. It is also to be noted that in his cross-examination of the informant with regard to the defendant's name the certificate was not put to the witness nor was his attention drawn to the fact that the name in the certificate was Bretlove and not Pretlove.

Sub-section (2) provides that the certificate shall state the percentage of alcohol indicated by the analysis to be present in the blood and the date and time at which the analysis was made. These matters are essential to the validity of the certificate and were clearly set out in the certificate. But the sub-section also requires the certificate to be in or to the effect of Schedule 7A to the Act, and provision is made in the form in the Schedule for the name and address of the person whose breath was analysed.

I am of opinion that the certificate was in or to the effect of Schedule 7A, and that since sub-section (2)(a) provides that the certificate shall be *prima facie* evidence of the facts and matters stated therein, even if the name of the defendant is a fact stated therein, it is *prima facie* evidence only of the name of the person whose breath had been analysed, and that in this case it was clear from the other evidence that the true name of the person whose breath had been analysed was Pretlove.

I am further of opinion that if the magistrate purported to have doubts that the certificate referred to the defendant by recourse to the reasoning suggested by Mr O'Callaghan and referred to earlier in this judgment, and to have considered that it was equally possible that there had been another man whose name was Bretlove and who had been subjected to a breath test at or about the same time and that the defendant had been given a certificate which related to this mythical Bretlove, such doubts would have been unreasonable, and that in accordance with well known decisions of this Court (see *Wilson v Jones* [1915] VicLawRp 94; [1915] VLR 636; 21 ALR 490; 37 ALT 198; *Llewellyn v Reynolds* [1952] VicLawRp 24; [1952] VLR 171; [1952] ALR 358; *Quinn v Shepherd* [1921] VicLawRp 98; [1921] VLR 555 and *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301) this court may hold that any decision based upon such doubts was erroneous.

The difference in the names Pretlove and Bretlove is minimal and having regard to the evidence that the original certificate was handed to the defendant at the police station at the conclusion of the test, the theory that there might have been another man named Bretlove whose breath was tested at the time stated in the certificate and whose certificate was handed to the defendant borders on the fantastic. In reality the only reason that the stipendiary magistrate was asked to dismiss the information was that the defendant's name was misspelt in the certificate and in view of the evidence that he was the driver, that he was subjected to a breath analysis, and that he received the certificate after the test had been completed, I think the stipendiary magistrate was wrong in dismissing the information at the close of the complainant's case. As the defendant has not gone into his case, the matter must go back to the Magistrates' Court.

The order nisi will be made absolute with costs to be taxed (including reserved costs) not to exceed $200. The order dismissing the said information will be set aside and the information remitted to the Magistrates' Court at Warrnambool to be determined in accordance with law.

MR WHEELER: May it please Your Honour, I appear for the respondent in this matter. Would Your Honour grant a certificate under the *Appeals Costs Fund Act*?
HIS HONOUR: No, I will not.
MR WHEELER: If Your Honour pleases.

APPEARANCES: For the applicant Clemens: Mr AG Uren with Mr JG Larkins, counsel. Crown Solicitor. For the respondent Pretlove: Mr P O'Callaghan with Mr C Wheeler, counsel. D Madden, solicitor.