

23/77

SUPREME COURT OF VICTORIA

LAVERTY v KUBEIL

Starke J

23 November 1976

MOTOR TRAFFIC - DRINK/DRIVING - DELIVERY OF 7TH SCHEDULE CERTIFICATE TO PERSON BREATHALYSED "AS SOON AS PRACTICABLE" - DELAY OF FIVE MINUTES - WHETHER CERTIFICATE DELIVERED AS SOON AS PRACTICABLE: MOTOR CAR ACT 1958, S80F(2).

There was a difference of five minutes between the time of the test indicated on the certificate and the time of handing the defendant his copy. It was submitted that the certificate was not delivered to the defendant "as soon as practicable" after the test as required by s80F(2).

HELD:

1. **The mere fact that something is done which prudence may dictate, which is not directed to be done by the statute, does not at all mean that the document has not been handed over as soon as practicable. The expression 'as soon as practicable' does not mean 'as soon as possible'.**

2. **Looking at the two times mentioned in the Certificate, namely 1.25 and 1.30 and on the facts of this case to hold that a delay of five minutes in handing over the certificate resulting in it not being handed over as soon as practicable within the meaning of the statute would bring the judicial process into contempt. There is no doubt in this case that the statute was complied with and a conviction should have been recorded.**

STARKE J: "The certificate in this case shows that the test was conducted at 1.25 and that the certificate in form of Schedule 7 was handed to the defendant at 1.30. In other words, five minutes elapsed between the testing of the applicant and the handing over of the certificate. It is impossible to tell from the certificate itself whether the time 1.25 is the beginning of the test or the end of the test. But at all events a considerable number of matters have to be filled in on the certificate before it is handed over, and it would seem to me that any person without ordinary competence with a pen and pencil might take the better part of five minutes in filling out this form alone.

Mr McDermott for the defendant submitted that the certificate was not handed over as soon as practicable because it appears that the tester, Constable Birthisel, handed the original and copy of the certificate to Constable Laverty with a purpose of the latter checking the one with the other; he, having done this and found them to be identical, handed them back and it was only then that Birthisel handed the certificate over to the defendant.

The mere fact that something is done which prudence may dictate, which is not directed to be done by the statute, does not at all mean that the document has not been handed over as soon as practicable. As has been pointed out in cases the expression 'as soon as practicable' does not mean 'as soon as possible'. It was, I think, conceded that, whilst if the document is not handed over as soon as practicable it is inadmissible, the Court may nevertheless look at it to ascertain what the time of the testing was and what the time of the handing over was. This appears to be supported by the decision of the Full Court in *White v Moloney* [1969] VicRp 91; (1969) VR 705. But it is said that the only things I can look at in that certificate are the facts stated so in it and amongst those facts is not the expression in paragraph 5 that 'as soon as practicable after the completion of the breath analysis', and so on. For the purposes only of this judgment I will assume that I cannot look at that expression for the purpose of determining the fact, but I can and do look at the two times mentioned, namely 1.25 and 1.30 and on the facts of this case to hold that a delay of five minutes in handing over the certificate resulting in it not being handed over as soon as practicable within the meaning of the statute would, I think, bring the judicial process into contempt. I have no doubt in my mind that the statute was complied with in this case and a conviction should have been recorded".