**18/70**

**SUPREME COURT OF VICTORIA**

# *STEELE v HOSKING*

**McInerney J**

**23 July 1970**

**MOTOR TRAFFIC – DRINK/DRIVING – NO EVIDENCE THAT THE INFORMANT WITNESSED THE BREATHALYSER OPERATOR ACTUALLY COMPILING THE SCHEDULE 7A CERTIFICATE AND THAT HE WITNESSED HIS SIGNATURE TO THE CERTIFICATE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1958, S408A(2); *MOTOR CAR ACT* 1858, S81A.**

**HELD: Order nisi absolute. Remitted to the Magistrates' Court for hearing and determination according to law.**
**Having regard to the decision in *White v Moloney* [1969] VicRp 91; [1969] VR 705, the Magistrate was in error in dismissing the charge. He was required to give effect to the words "in accordance with the provisions of subsection (2)".**

**McINERNEY J:** This is the return of an order nisi granted by Master Brett on 15 May 1970 to review a decision of the Magistrates' Court at Carlton constituted by Mr H Bennett on 16 April 1970 dismissing an information by the informant Brendan James Steele against the defendant Allan Raymond Hosking which charged a breach of s81A of the *Motor Car Act*, namely that the defendant on 29 October 1969 at Carlton, drove a motor car while the percentage of alcohol in his blood was more than .05 percentum.

At the hearing the defendant was represented by counsel and pleaded not guilty. The only witness called by the prosecution was the informant himself who gave evidence of having observed and followed and finally intercepted the defendant in the early hours of the morning of 29 October 1969. He gave evidence of having observed the defendant driving a vehicle in various streets in Carlton at speeds which varied between 50 to 55 miles an hour, and of having then taken the defendant, after a conversation in which the defendant admitted having had a couple of drinks that night, to the North Carlton Police Station where he introduced the defendant to First Constable Thompson of the Breath Analysis section.

The informant testified that in his presence First Constable Thompson took a sample of the defendant's breath. Secondly, that at the conclusion of that test First Constable Thompson handed to the informant the original and a duplicate of a certificate of what is called "the schedule 7A", which I take to mean a certificate to the effect of the form prescribed in Schedule 7A to the *Crimes Act* as amended. The informant testified further that the document which is now before me as exhibit B, and which was tendered by him to the Court of Petty Sessions on the hearing of this information, was the duplicate, one of the two documents handed to him by First Constable Thompson on that evening. He testified fourthly that he the informant compared the two documents, the original and the duplicate, and found that they were identical. That phrase must, as Mr Tadgell pointed out, be construed with some qualifications. It is not likely that the original bore the endorsement "to be handed to informant"; it is more likely that it bore as an endorsement some phrase such as appears from the report in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613 "to be handed to the person tested". It is also unlikely that it had printed on it the word "copy original". It is more likely that it had the word "original".

Fifthly, the informant testified that he, the informant, having examined and compared the two documents handed them both back to First Constable Thompson, and sixthly that First Constable Thompson then handed the original to the defendant and handed the duplicate to him, the informant.

The informant did not expressly testify that he saw First Constable Thompson compile

the two documents, or either of them, nor that he saw First Constable Thompson sign either of the documents. The document produced to Court, Exhibit B, bears, however, above the printed words "signature of authorised operator", the signature 'D.F. Thompson', and in the printed form of the document above the words "full name of operator" there occur the words "Douglas Francis Thompson", then in relation to the words "police station of branch", the words "of Breath Analysis section".

The case for the informant having been closed, defence counsel made two submissions, with the first of which I am not concerned but the second of which was as follows: that before the provisions of subsection (2)(a) of s408A of the *Crimes Act* 1958 can be implemented, the provisions of subsection (2) of that section must he proved by the prosecution. The learned Stipendiary Magistrate upheld that submission and dismissed the information, saying that the prosecution must prove the provisions set out in subsection (2) of s408A of the *Crimes Act* 1958 before subsection (2)(a) can be implemented.

The affidavit on which the order nisi was obtained goes on to say that the Stipendiary Magistrate indicated that had the informant given evidence that he witnessed the breathalyser operator actually compiling the Schedule 7A certificate and that he actually witnessed his signature to the certificate, then in those circumstances he would have admitted the certificate in evidence.

It does appear somewhat surprising that no application was made by or on behalf of the informant to recall him to give evidence, if he were able to give such evidence, that he saw First Constable Thompson compile the certificate or that he saw First Constable Thompson sign the certificate. I would be disposed to assume that if such application had been made the Magistrate would have acceded to it; certainly it might have been a somewhat imprudent course for counsel for the defendant to oppose such an application. But, however, no such application was made, and the matter must be dealt with on the footing of the evidence which I have described.

It is to be borne in mind that the matter comes before me on review on a decision given upholding a no case submission. It is stated in the affidavit on which the order nisi was granted that these submissions were made in opening the case on behalf of his client but I am disposed to assume that that is inaccurate and it must really have been a submission of no case to answer. On a submission of no case to answer the matter for enquiry before the Court is whether there is any evidence on which the Court can lawfully reach a conclusion as to the matter in controversy. So that the matter here in issue is whether on the evidence as it then stood it was open to the Magistrate to conclude that the certificate had been signed by First Constable Thompson. As at present advised, I am disposed to agree with the submission that Mr Tadgell made that it was not necessary for the informant to prove that First Constable Thompson had actually compiled the certificate, but it clearly was necessary to prove that First Constable Thompson had signed the certificate. I would refer to the observations of the High Court in *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 as to the function of a Court in dealing with a submission of no case to answer as opposed to the function of a tribunal of fact at the end of all the evidence.

Mr Tadgell in moving the order absolute submitted that the facts of this case fell fairly and squarely within the principle of the decision of the Full Court in *White v Moloney* [1969] VicRp 91; [1969] VR 705 and he relied in particular on the views expressed in that judgment at p710. Mr Larkins, for the defendant to show cause, conceded that the principles there stated were applicable to the facts of the present case and he felt unable to suggest any basis on which the facts of this case could be taken outside the principle of the decision in *White v Moloney*. I think that that was a concession that was fairly and properly made by Mr Larkins, and the decision of the Magistrate can perhaps be explained by the fact that his attention does not seem to have been drawn to the decision of *White v Moloney*, so far as one can judge by the material on which the order nisi was granted.

I apply the decision in *White v Moloney*, although I think that even apart from *White v Moloney*, I would be disposed myself if I was sitting as a tribunal of fact to say that the evidence would support an inference that First Constable Thompson had in fact signed the certificate, the duplicate of which was put in evidence.

There are some difficulties about the relationship of the form used in the present case,

which follows the form prescribed in Schedule 7A, and the language of subsections (2) and (2)(a). I am not sure myself that I would be disposed offhand to accept the submission made by Mr Tadgell that the effect of the words "in accordance with the provisions of subsection (2) of s408A" as they occur in para. 5 of the certificate is to be given the effect of proving signature and delivery of the certificate in accordance with subsection (2) of the s408A. That seems to pin a great deal onto the phrase "in accordance with the provisions of subsection (2)". I am not sure that those words are intended to attach to anything other than the words "I delivered". But it is not necessary for me to express any conclusion on that, because when one looks at the totality of the evidence, having regard to the decision in *White v Moloney*, the decision of the Magistrate in this case was clearly wrong.

In those circumstances, the order nisi must be made absolute on the third ground. I do not think it is necessary for me to expressly rule on grounds 1 and 2; I am not sure that they really raise the arguments put forward by Mr Tadgell. The formal order will be order nisi made absolute on ground three. Set aside the order of the Magistrates' Court at Carlton made on 16 April 1970 dismissing the information and remit the information to the said court for rehearing.

Mr Tadgell, in making the order nisi absolute and setting aside the order of the Court of Petty Sessions and dismissing the information, I would suppose that the appropriate order is to remit it to the Court of Petty Sessions at Carlton with the direction to hear and determine according to law. Order that the costs of this order to review fixed at $10 be paid by the defendant to the informant. Application for a certificate under s13 of the *Appeal Costs Fund Act* 1964 refused.

**APPEARANCES:** For the informant/applicant Steele: Mr RC Tadgell, counsel. State Crown Solicitor. For the defendant/respondent Hosking: Mr JG Larkins, counsel. Mr RH Dunn, solicitor.

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