19/83

SUPREME COURT OF VICTORIA

GRIFFITHS v DREW

Fullagar J

17 March 1983

MOTOR TRAFFIC – DRINK/DRIVING – APPARENT DISCREPANCY IN 7TH SCHEDULE CERTIFICATE – EFFECT: *MOTOR CAR ACT* 1958, SS80F, 80G, 81A.

D. was intercepted driving a motor car whilst his blood/alcohol level exceeded .05%. He was charged, and when the matter came on for hearing, a copy of the 7th Schedule certificate was tendered in evidence. It appeared on the certificate that the time between the analysis of breath and the time of delivery of the certificate to D. spanned a midnight; that is, the analysis took place at "11.58p.m." and the delivery took place at "12.08 a.m. on the said day." The magistrate agreed with the submission that the *prima facie* provisions of the certificate were "invalid", and he dismissed the charge. Upon order nisi to review—

HELD: Order nisi absolute.
What a document says by necessary implication it says expressly. In the circumstances, the necessary implication from the certificate was that the delivery took place at the time stated which next occurred after the time of the analysis, and not before it and not 24 hours later than it.
***Blain v Witton* (unreported 19 March 1976, Gillard J) (MC 65/1976), followed.**

FULLAGAR J: *[After setting out the facts and referring to the certificate, His Honour continued at p4]:* … I have come to the conclusion that the proper analysis of the contents of the certificate is that there is nothing whatever from which to deduce any inaccuracy except the presence in Clause 5 of the words "on the same day". If the document were looked at in a complete vacuum it might be appropriate to conclude that the reliability of the whole of its contents, and at the very least of all times mentioned, was weakened to a point where a Court would be justified in saying that it was not satisfied beyond reasonable doubt that the certificate contained the date and time at which the analysis was made.

However, the document cannot be viewed in a vacuum. As I have pointed out, its printed portion, including the words in Clause 5 "on the said day", is a reproduction of the 7th Schedule to the *Motor Car Act* 1958. The printed form, like the Schedule itself, does not make those quoted words optional or provide any alternative. The form cannot provide accurate information in any case where the two actual times bestride the hour of midnight, unless one departs from the printed form by striking out the words "on the said day", or at least the word "said" and by substituting another word, such as "next", or other words. If a person conscientiously set out to fill in the form as accurately as possible in a midnight-spanning case, without departing at all from apparently non-optional printed words, the result would appear precisely as the certificate in the present case now does. In my opinion the document should be approached by the Court in the light of these circumstances.

If one accepts that all else in the certificate is correct, except the presence of printed words which must be inaccurate in every case which, like the present one, involves a spanning of midnight, as necessarily appears from Clause 2, then all difficulty, ambiguity and incongruity disappears. The inference is, in my opinion, irresistible, and is, indeed, the only inference available, that the constable's watch or other the material timepiece showed 11.58 p.m. at the time of the analysis and showed 12.08 a.m. at the time of delivery of the certificate. In other words, I consider that anyone who thoughtfully viewed the certificate when seeking information, rather than seeking faults or errors, would conclude at once that there was one, and only one, error in it, namely the printed expression "on the said day", because this is a midnight-spanning case, which is the only class of case where those words are inapposite to sit with the earlier words "as soon as practicable after".

In my opinion the certificate says, by necessary implication, that the delivery took place

at 12.08 a.m. on the next day, that is to say at that 12.08 p.m. which next occurred after the time of the analysis, and not before it and not 24 hours later than it. There is much authority to show that what a document says by necessary implication it says expressly. The certificate was therefore *prima facie* evidence of all the matters required to prove the offence charged.

The decision of Gillard J in *Blain v Witton* (unreported 19th March 1976, numbered O/R 7161) is, in my opinion, to the same effect and precisely in point, and I think I should follow that decision, in any event, even if I did not agree with it; but I entirely agree with it. The facts in that case were completely indistinguishable from those in the present case, the times there being 11.56 p.m. and 12.04 a.m. At p4 of his typed reasons His Honour said:-

> "When one looks at the expression 'on the said day', it must refer back to 29th January 1975, being the date of the examination. It appears that the examination was at 11.56 p.m. on 29th January 1975. It is, therefore, reasonably apparent that the certificate was given at 12.04 a.m., not on 29th January 1975, but on 30th January 1975, the day of the certificate. In consequence I reject the ground advanced by the magistrates for the dismissal of the information. They should have acted upon the statutory conditions to give evidentiary effect to the document."

I draw attention again to the oral evidence, which I have earlier recited, as to time of apprehension. In my opinion the order nisi should be made absolute. A question arises whether I should direct the magistrate to enter a conviction or whether I should send the matter back for re-trial before the magistrate who has so far heard it or before some other magistrate.

[NOTE: His Honour decided to deal with the defendant, heard a short plea from the defendant's counsel and then reserved the question of appropriate orders until the following day. Upon resuming the matter, His Honour said (at p23ff.]: ... The reason why I reserved my decision until this morning was that I proposed to fix upon some suitable term of imprisonment for the respondent without the option of a fine. The respondent is aged 23 years, and he already has two prior convictions for exceeding .05 per cent of blood alcohol content. His first conviction was at Geelong on 14th February 1978 when his blood alcohol content was .225 per cent and when he was fined $100- and had his licence cancelled for 12 months. His second conviction was at Moonee Ponds, on 13th August 1979, when his blood alcohol content was .13 per cent, and he was then fined $600- and had his licence cancelled for two years. He is now convicted by me for an offence committed at Daylesford on 6th March 1982 when his blood alcohol content was .09 per cent.

It is obvious that the penalties of the past have done nothing to deter the respondent from repeating this very serious offence, and I have given very careful consideration to a gaol sentence of three or four months, without the option of a fine, which I think is the penalty most likely to bring him to his senses. However, after prolonged and anxious consideration, I have decided to give the respondent one last chance to reform himself and to refrain from endangering the lives and property of his fellow citizens. I hope it will be clear to him how very close he has come to the prison gates on this occasion. With some misgiving, I propose to order a heavy fine, instead of a gaol sentence, but coupled with a long period of disqualification. If the respondent ever comes up for sentence again, for an offence against the same section, he must realise that he will almost certainly face a substantial gaol sentence without the option of a fine.

[His Honour then imposed a fine of $1000 in default 3 months' imprisonment, granted a stay of payment for one month, cancelled the defendant's licence to drive and disqualified him from obtaining a licence for a period of 4 years].

APPEARANCES: Mr G Nash, counsel for Informant. Mr J Kaufman, counsel for Respondent.
