**31/77**

## SUPREME COURT OF VICTORIA

# *BUIJS v THORBURN*

**Dunn J**

**17 November 1976**

**MOTOR TRAFFIC – DRINK/DRIVING – CONFLICT OF DATES MENTIONED IN 7TH SCHEDULE CERTIFICATE – WRONG YEAR INSERTED IN PARA 2 – CORRECT YEAR INSERTED IN PARA 5 – WORDS OF S80F(2) OF *MOTOR CAR ACT* 1958 "IN AND TO THE EFFECT OF 7TH SCHEDULE" NOT APPROPRIATE TO COVER A MISTAKE IN DATE – CONTRA IF YEAR LEFT BLANK: *MOTOR CAR ACT* 1958, S80F(2).**

In compliance with s80F(2) of the *Motor Car Act* 1958 the 7th Schedule certificate was handed to the defendant completed and accurately filled in except that in paragraph 2 relating to the date and time of the analysis, the date was wrongly stated, viz. by inserting the wrong year, 1975 instead of 1976. Paragraph 5 of the certificate (which refers to the delivery of the copy certificate to the defendant) had the correct date/year inserted. A submission, that the requirements of s80F(2) had not been complied with because the year had not been accurately stated and in consequence of which evidence of the reading of the breath analysis instrument was not admissible, was upheld by the Magistrate and the charge dismissed. Upon Order Nisi to review—

**HELD: Order nisi discharged.**

**1. The words 'to the effect of' are not appropriate to cover a mistake in the date. If the year had been left blank in the second paragraph of the certificate it could be said the certificate was to the effect of Schedule Seven because the final date would be sufficiently effective. A conflict in dates is a different matter when the date which is wrongly stated is the date on which the analysis was done.**

**2. In the result, the Magistrate was correct in holding that this certificate did not comply with the requirements of ss(2) of s80F and that evidence of the reading of the breath analysing instrument was not admissible.**

**3. Because of the language used in ss(1) of s80F the result of the analysis was not made evidence unless the conditions presented in ss(2) were complied with. If they were not complied with, then there was no evidence of the result of the analysis. Unless there was a plea of guilty or an express admission of the result of the analysis pursuant to the provisions of s149A of the *Evidence Act* 1958, that lack of evidence was fatal. There was no such admission and no such plea of 'guilty' in this case and the plea of 'not guilty' put all the elements of the offence in issue.**

**DUNN J:** If the language of the last part of s80F(2) ss(1) is grammatically arranged then it reads:

> 'Subject to compliance with the provisions of sub-section (2) the percentage of alcohol so indicated shall be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument'.

That language makes compliance with s80F(2) a condition precedent to making the reading of the instrument admissible evidence. See *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596 at p608; *Wiggins v Tainsh* [1973] VicRp 23; (1973) VR 245 at p246.

It is necessary to consider what compliance with ss(2) entails. It entails:

(1) That as soon as practicable after the analysis the operator sign and deliver to the person whose breath has been analysed a certificate.

(2) That the certificate be in or to the effect of Schedule Seven.

(3) That the certificate be:

(a) Of the percentage of alcohol indicated by the analysis to be present in his blood, and

(b) Of the date and time at which the analysis was made.

It is clear from that part of the certificate in Schedule Seven previously set out and from the terms of ss(2) that the operator is required to date and sign the certificate before he delivers it to the person concerned, so that the date of the analysis and the date at the end of the certificate should be identical unless perchance the events overlapped from New Year's Eve to New Year's Day, or over some other midnight. Where there has been a mistake in the insertion of the date on which the analysis was made can it be said there has not been compliance with the requirements of ss(2)?

In *Houston v Harwood* [1975] VicRp 69; [1975] VR 698, Gowans J at p702 quoted from an unreported judgement of Pape J this passage:

> '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 in (sic) time at which the analysis was made. These matters are essential to the validity of the certificate ...'

The judgment of Pape J went on to bear the words 'in or to the effect of Schedule Seven' as applying only to the other parts of the certificate. That was what he was concerned with. Both in that case and in *Houston v Harwood* the surname of the defendant had been mis-spelt in the certificate. It was held in both cases that they did not invalidate the certificate or amount to non-compliance with the requirements of ss(2).

In *Wesson v Jennings* [1971] VicRp 9; [1971] VR 83 Menhennitt J applied the words 'in or to the effect of Schedule Seven' to the requirement to state the percentage of alcohol indicated by the analysis. He held a certificate was in compliance with ss(2) if it stated the quantity of alcohol per 100 millilitres but left blank the actual percentage. The substantial reason upon which this decision was based was 'that what is left blank is so obvious and inevitable that the certificate is just as effective without the percentage stated as if it were stated'.

I have considered the present certificate to determine whether it could be properly held that the mistake in the first date is immaterial for the reason that it must be the date at the end of the certificate that is the vital one because of the obligation to give the signed certificate to the person whose breath has been analysed as soon as practicable after the analysis.

In my opinion, it could not be so held. The words 'to the effect of' are not appropriate to cover a mistake in the date. If the year had been left blank in the second paragraph of the certificate it could be said the certificate was to the effect of Schedule Seven because the final date would be sufficiently effective. A conflict in dates is a different matter when the date which is wrongly stated is the date on which the analysis was done.

In the result, I think the learned Stipendiary Magistrate was correct in holding that this certificate did not comply with the requirements of ss(2) of s80F and that evidence of the reading of the breath analysing instrument was not admissible. The first and third grounds on which the order nisi was granted have not been sustained.

Because of the language used in ss(1) of s80F the result of the analysis is not made evidence unless the conditions presented in ss(2) are complied with. If they are not complied with, then there is no evidence of the result of the analysis. Unless there was a plea of guilty or an express admission of the result of the analysis pursuant to the provisions of s149A of the *Evidence Act* 1958, that lack of evidence is fatal. There was no such admission and no such plea of 'guilty' in this case and the plea of 'not guilty' puts all the elements of the offence in issue. The second ground of the order nisi was therefore not made out.

What has appeared already in these readings is sufficient to dispose of the fourth ground of the order nisi. The evidence that the analysis was carried out on 23 January 1976 was clearly admissible. What was not admissible as evidence was 'the percentage of alcohol present in the blood' of the defendant at the time his breath was analysed."

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