**30/69**

**SUPREME COURT OF VICTORIA**

# *TAMPION v CHILLER*

**Anderson J**

**10, 26 November 1969 — [1970] VicRp 46; [1970] VR 361**

**MOTOR TRAFFIC – DRINK/DRIVING – EVIDENCE GIVEN BY OPERATOR OF THE BREATH ANALYSING INSTRUMENT – CERTIFICATE OF THE RESULT HANDED TO THE DEFENDANT 15 MINUTES AFTER THE TIME OF THE TEST – "AS SOON AS PRACTICABLE" – MEANING OF – WHETHER CERTIFICATE HANDED OVER AS SOON AS WAS PRACTICABLE – NO CASE SUBMISSION MADE TO THE JUSTICES – SUBMISSION UPHELD – CHARGE DISMISSED -– WHETHER JUSTICES IN ERROR: *MOTOR CAR ACT* 1958, S81A(1).**

**HELD: Order nisi absolute. Dismissal set aside. Remitted for rehearing.**
**1. The use of the expression "as soon as practicable" indicated that Parliament recognized that there would or could be some interval between the making of the analysis and the delivery of the certificate. It was open to the legislature, had it thought otherwise, to stipulate that the certificate was to be delivered within a specific time, as had been done in the proviso to s281(1)(a) of the *Health Act* 1958, where service upon the vendor of notice that the purchaser had purchased the food for analysis was deemed to have been given forthwith if written notice was sent by registered post to the vendor not later than the next day after purchase, and in s11 of the *Fertilizers Act* 1958, where the purchaser who intended to have fertilizer purchased by him analysed was required to give to the vendor notice in writing of his intention within 14 days of the purchase.**

**2. The question whether a certificate has been given as soon as practicable is in each case a matter of fact and depends on the circumstances.**

**3. In the circumstances of the present case the delivery of a certificate in 15 minutes could not be said, in the absence of evidence of culpable delay, to have been delivered otherwise than as soon as practicable. It did not appear from any of the cross-examination that the constable was occupied in any other pursuit than matters associated with the testing, the checking, the making out of, and the delivery of the certificate. Though the onus was on the prosecution to satisfy the court that the certificate was delivered as soon as practicable, the circumstances were that the proper inference to be drawn from the evidence was that the period of 15 minutes was such that it should be assumed that, unless there was some circumstances which suggested something to the contrary, the certificate was delivered as soon as practicable, and that a *prima facie* case had been made out.**

**4. Accordingly, the justices were mistaken in their adoption of the arguments put to them by the defendant's solicitor.**

**ANDERSON J:** This is the return of an order nisi to review a decision of the Court of Petty Sessions at Geelong, consisting of three honorary justices, which on 27 February 1969 dismissed an information laid by the informant, First Constable Peter John Tampion, charging the defendant, William John Chiller, that on 14 June 1968, at Norlane, contrary to s81A(1) of the *Motor Car Act*, he did drive a motor car on a highway, to wit Sparks Road, while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood was more than .05 per cent.

Evidence was given before the justices by the informant that he intercepted the defendant on the date and at the place indicated in the information, and that the defendant was conveyed to the Geelong police station where a breath analysis of the defendant was made by First Constable Tompsett. Evidence of the breath analysis was given by First Constable Tompsett who said that at 9.30 p.m. on that day the defendant furnished a sample of his breath directly into the breath analysing instrument and a reading of .160 per cent blood alcohol was obtained. He further said that at 9.45 p.m. on the same day he handed to the defendant the original of the certificate, Schedule Seven A, which is required by s408A(2) of the *Crimes Act* to be given "as soon as practicable after a sample of a person's breath is analysed by means of a breath analysing instrument". A carbon

copy of the certificate in question in the prescribed form was admitted in evidence and it recited that First Constable Tompsett "did on 14 June 1968, at 9.30 p.m., analyse a sample of the breath" of the defendant, that the percentage of alcohol present in the breath of the defendant whose breath was analysed "was .160 grams of alcohol per 100 millilitres of blood, which expressed as a percentage is .160 per cent", and that he, Tompsett, delivered the certificate to the defendant at 9.45 p.m. on the said day.

Section 408A(1) of the *Crimes Act* provides that in respect of certain offences, which include charges under s81A of the *Motor Car Act* 1958, evidence may be given of the percentage of alcohol indicated to be present in the blood of the defendant by a breath analysing instrument, and the percentage of alcohol so indicated shall "subject to compliance with the provisions of subs(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".

The only point which arises for decision in this order to review is whether the constable analysing the defendant's breath gave to him "as soon as practicable" the certificate as required by s408A(2) which, in its amended form, is as follows:

> "(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 Seven A 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."

In this matter a real difficulty arises because of contradictory accounts of what happened before the justices. The affidavit in support of the order nisi was sworn by the sergeant of police who prosecuted on behalf of the informant. He swore his affidavit on 25 March 1969, and application for the order nisi was made the following day to Master Brett. On that occasion the application was adjourned *sine die*, and it was not until 2 July 1969 that eventually the order nisi was granted. The delay was explained to me by Mr Hart, counsel for the informant, as being due to the fact that there were one or more other orders to review pending in which the same or a similar point had arisen, and the outcome of these other orders to review was being awaited before the application in the present case was further proceeded with.

While this may have been considered a sufficient reason for not proceeding in the ordinary way to obtain an order nisi within a month of the making of the order being challenged, the delay in this instance had the unfortunate result that the defendant was not served with the order nisi until 16 July 1969, nearly five months after the justices gave their decision, by which time it is not unreasonable to assume that the defendant and his legal advisers who had been in court at the time had turned their minds to other matters and much of what had happened at the hearing was only vaguely remembered or forgotten by them. The complaint voiced in his affidavit by the solicitor for the defendant, who appeared for him before the justices, that he believes the defendant to be prejudiced may not be entirely without justification.

This Court, too, is embarrassed because two answering affidavits filed on behalf of the defendant, while challenging in some respects the affidavit in support of the order nisi, do not assist in making clear the reasons which moved the justices to dismiss the information, except that, apparently, the prosecution had failed to establish that, having regard to the evidence of First Constable Tompsett, the Schedule Seven A certificate had not been handed over as soon as practicable after the test.

Before coming to a decision the justices retired to consider a submission to that effect by the solicitor for the defendant, and in consequence of their upholding the submission the information was dismissed without the defendant giving any evidence.

It becomes necessary, therefore, to consider the basis of the submission made by the solicitor for the defendant, and difficulties immediately arise because of the contradictions in the accounts of what happened before the justices. These contradictory accounts relate to the evidence of First Constable Tompsett both in his evidence-in-chief and when cross-examined, and to the submission made on behalf of the defendant by his solicitor. On this account a somewhat confused picture is obtained of the proceedings.

There is a rule of practice in orders to review, whereby, in cases of conflict, the version of the party who supports the challenged ruling or order is accepted as being correct (*Larkin v Penfold* [1906] VicLawRp 90; [1906] VLR 535, at p540; 12 ALR 337), but this rule is not an inflexible one (*Thomson v Cross* [1954] VicLawRp 89; [1954] VLR 635; [1955] ALR 154 *Rogers v Ventura* [1955] VicLawRp 26; [1955] VLR 139; [1955] ALR 410; *Lindgran v Lindgran* [1956] VicLawRp 34; [1956] VLR 215; [1956] ALR 731), and may be departed from in particular circumstances, where the conflict may be resolved in some other way which the court is satisfied will produce, or be better calculated to produce, a just result.

One practice availed of on some occasions is for the court to inquire of the magistrate what he recollects of the matter. In the present case, I think that such a course would probably prove to be unsatisfactory, as it was in *Lindgran's Case*, *supra*, for such a long period has elapsed since the hearing of the information that it is unlikely that the recollection of the justices would be any better than that of the solicitor for the defendant who has made his affidavit. However, having given some thought to the matter, I do not think that the inconsistencies in the affidavits are such as to require the wholesale rejection of parts of either the affidavit in support of the order nisi or those filed in opposition, for while the latter challenge in some parts or supplement the former, a fairly clear composite picture may be obtained of proceedings in the court below.

I think it emerges reasonably clearly from an examination of all the material available what the submission of the solicitor for the defendant was, and that is was that submission which was acted upon by the justices. In substance, the submission to the justices was that First Constable Tompsett had not delivered to the defendant the required certificate "as soon as practicable" after the test of the defendant's breath had been made. The witness, as well as stating that he made the test of the defendant's breath at 9.30 p.m., and delivered the certificate at 9.45 p.m., also described a number of procedural steps required to be taken to ensure that the breath analysing instrument had been functioning satisfactorily, and he enumerated the steps so taken and assigned times to some but not all of those steps. In particular, four such steps, he said, each took 90 seconds. (One or other of the steps mentioned appeared to have been taken prior to the taking of the test at 9.30 p.m. and on the evidence it seems impossible to reach any conclusion as to any aggregate time taken in performing the required steps between the taking of the sample and the delivery of the certificate.)

In cross-examination the witness was shown either one or two other certificates (there are contradictions as to the number) which in another case or cases he had issued to one or two other persons whose breath he had tested. One, or if there were two, both of these showed that the time between the analysing of the sample and the delivery of the Schedule Seven A certificate was five minutes. The witness was cross-examined at length in relation to the procedures of taking samples, checking the instrument and delivering the certificate. Nothing emerged to throw any light upon the reason for the disparity between the certificates, the witness maintaining, in effect, he had on the occasion in question followed the procedure he always followed.

Having regard to the lines along which the defence was conducted. I do not think that any detailed analysis of the several affidavits is necessary to arrive at what would be entirely speculative explanations as to how or why the procedures involved took different times on different occasions. The use of the expression "as soon as practicable" indicates, I think, that Parliament recognized that there would or could be some interval between the making of the analysis and the delivery of the certificate. It was open to the legislature, had it thought otherwise, to stipulate that the certificate was to be delivered within a specific time, as has been done in the proviso to s281(1)(a) of the *Health Act* 1958, where service upon the vendor of notice that the purchaser has purchased the food for analysis shall be deemed to have been given forthwith if written notice is sent by registered post to the vendor not later than the next day after purchase, and in s11 of the *Fertilizers Act* 1958, where the purchaser who intends to have fertilizer purchased by him analysed is required to give to the vendor notice in writing of his intention within 14 days of the purchase.

There have been numerous decisions on the expression "as soon as practicable" in English legislation corresponding to s41 of the Victorian *Workers Compensation Act* 1958, and these show that this expression is quite flexible in application. Because of the context in which the expression appears in both English and Victorian workers compensation legislation, these decisions do not

afford much assistance in the present case, but it does appear from a number of such decisions that the question whether notice has been given as soon as practicable is in each case, a matter of fact, and depends on the circumstances: *Hayward v Westleigh Colliery Co* [1915] AC 540; *Thomas v Baglan Engineering Co Ltd* (1934) 27 BWCC 81.

The language of s408A(1) of the *Crimes Act*, of course, makes it clear that due compliance with s408A(2) is a necessary prerequisite, in a prosecution for a breach of s81 of the *Motor Car Act*, to using in evidence the result of a breath analysis on a breath analysing instrument; and the observations of Winneke CJ in *Ross v Smith* [1969] VicRp 51; [1969] VR 411, emphasized this aspect, when he said, at p414:

> "I think, also it is material to observe that the provisions of subs(2) stand entirely for the benefit of the defendant. They provide no benefit so far as the prosecution is concerned."

*Ross v Smith*, *supra*, was a case in which no evidence had been given before the justices as to the time at which the certificate had been delivered to the defendant, and for this reason the conviction was quashed. His Honour further said: "Subs(2) appears to be intended as a safeguard for the person whose breath is analysed", and one readily understands the desirability that a person whose breath has been analysed should promptly be informed of the result of the test and what is alleged against him. While it is clear that the provisions of s408A(2) are designed for the protection of the defendant, to my mind one must look at all the circumstances of the particular case and consider just what evil it is that the defendant is guarded against by the provisions of s408A(2).

It is not as though there could be some deterioration in the validity of the test if the certificate were to be delivered as long as 15 minutes after the test. There is no particular critical point beyond which a person will necessarily be prejudiced if the certificate has not been delivered to him. On the other hand, of course, as a matter of fairness, the person involved is entitled to know, as the section recognizes, as soon as practicable what the test showed, and he is not to be subjected to any undue delay by having to wait for notification of the result of the test. Unless some other alleged offences are involved, his obligation to attend the police station for a test is at an end when he has furnished breath for the test, and one reason for the prompt delivery of the certificate is to avoid the person concerned being subjected to the refined torture of having to wait a substantial and unnecessary time until the uncertainty of his position is resolved by the delivery of the certificate. I do not think that an inconsequential or casual interruption which did not substantially interfere with or interrupt the carrying out of the constable's duties—such as a brief 'phone call or the answering of a question asked of him by someone or some other trivial incident—would involve his failing to comply with the obligation to deliver the certificate as soon as practicable.

In considering the purpose of the section and the rights of all concerned, I do not think one should be astute to find means whereby the reasonable operation and application of s408A(1) are to be circumvented by too narrow an interpretation of s408A(2).

There is no standard time within which the procedure must be carried out and I do not think that each operator sets a standard time for himself when on some occasion he happens to perform the procedure more quickly than on another occasion. In *Minister of Agriculture v Kelly* [1953] NI 151, at p153, Lord MacDermitt LCJ, said that the expression "as soon as practicable" did not mean "as soon as possible" but referred to what was "reasonable in the circumstances and appropriate to the requirements of the situation".

This is not a case in which the question has to be determined as to whether Constable Tompsett handed to the defendant a certificate at any particular time or within any particular period. It is a case in which, to my mind, the question is whether what was done was reasonable and appropriate in the circumstances.

May I say, I concur, with respect in the observation of Little J in *Creely v Ingles* [1969] VicRp 94; [1969] VR 732, at p734, where he said, in a case where s408A(2) was under consideration:

> "The phrase 'as soon as practicable' is one which defies definition. The words are ordinary English words and the question whether the certificate was delivered as soon as practicable after a sample of

> breath was analysed is necessarily one which is to be determined in the light of all the circumstances. It is not one to be determined on some mathematical basis of adding together periods of time taken in relation to the various steps in the process of the breath analysis and the checking of the operation of the instrument. Any such approach is unreal and unwarranted by the language. It appears to have been, in part at least, the approach made by the solicitor for the defendant in the Court of Petty Sessions. Before me, Mr Gillard, who appeared for the defendant to show cause, valiantly sought to support it, and relied on the fact that whilst in cross-examination the operator gave evidence as to the time two steps took, he gave no evidence as to the time taken in performing other steps. Similarly it was contended that the time which elapsed in finding another constable and obtaining from him a book of Schedule 7A certificates was to be disregarded in determining whether the Schedule 7A certificate was handed to the defendant as soon as practicable. I think that argument, also, is quite untenable. That fact was plainly, in my opinion, one of the relevant circumstances to be taken into account."

And may I say likewise that I concur, with respect, in the observations of Adam J in *Jones v Groves* (unreported, 29 August 1969) in which his Honour, in dealing with the expression "as soon as practicable" in s408A(2) said:

> "Whatever the precise meaning to be given to the expression 'as soon as practicable' in this context I consider it palpably unreasonable to treat a lapse of a mere ten minutes between the conclusion of the breath test by the instrument and the delivery of the requisite certificate as offending the statutory direction that the certificate should be signed and delivered to the person tested 'as soon as practicable'. As the operator of the machine has, after obtaining the breath analysis from the instrument, to complete a Schedule 7A certificate with all necessary particulars, presumably to make a copy to be retained for evidentiary purposes, to satisfy himself that the instrument at the time is in proper working order, and sign the certificate, all before delivering it, the lapse of a mere ten minutes appears to me to need no justification from evidence, and a certificate delivered within such a short period could not reasonably be held to have been delivered otherwise than 'as soon as practicable' within the meaning of the statutory provisions."

No doubt there would be a period of time after which it may well be said that the delay was so substantial that justification would have to be shown for such delay before it could be said that the certificate had been given as soon as practicable. For instance, the defendant may not have been in a fit condition to be given the certificate, or, if free to leave the police station, he may have left before the certificate had been completed and had to be followed.

Little J has pointed out that it is not necessary to make a mathematical calculation to determine what constitutes a time which is "as soon as practicable"; I do not think, simply because on one, or even more occasions, a constable has delivered a certificate within no more than five minutes after the test and on another occasion has taken longer that, therefore, he has failed on the latter occasion to deliver the certificate as soon as practicable. Adam J has said that delivery in 10 minutes in the case he was considering would constitute delivering the certificate as soon as practicable, and I am constrained to say in the circumstances of the present case that the delivery of a certificate in 15 minutes cannot be said, in the absence of evidence of culpable delay, to have been delivered otherwise than as soon as practicable. It does not appear from any of the cross-examination that the constable was occupied in any other pursuit than matters associated with the testing, the checking, the making out of, and the delivery of the certificate. Though the onus is on the prosecution to satisfy the court that the certificate was delivered as soon as practicable, the circumstances may be such—and I think they are so in this case—that the proper inference to be drawn from the evidence is that the period of 15 minutes was such that it should be assumed that, unless there was some circumstances which suggested something to the contrary, the certificate was delivered as soon as practicable, and that a *prima facie* case had been made out.

I cannot escape the feeling that in this case the justices arrived at their decision in the belief that the period of 15 minutes was of itself necessarily too long to satisfy the requirements of s408A(2). There seem to be two reasons for this misconception; first, it appeared that the constable on one or more other occasions had taken no more than five minutes in which to do the things which on this occasion took 15 minutes, and, secondly, the solicitor for the defendant informed the justices that Stipendiary Magistrates at Geelong had, in certain circumstances, dismissed cases where a certificate had been delivered 15 minutes after the breath analysis in the absence of any explanation to account for the period. As I have indicated, an operator does not establish

for himself a "course record" which thereafter he is required to maintain; further, the reference to 15 minutes being a fatal period in the absence of some explanation sets a precise limit and excludes the consideration of the individual facts of each case.

I was informed during the course of argument that the case of *Creely v Ingles* [1969] VicRp 94; [1969] VR 732, was one of the cases to which the solicitor for the defendant was referring and that the case of *Jones v Groves* (Adam J, unreported, 29 August 1969) was another. In *Creely v Ingles*, *supra*, where the period was 15 minutes, part of the time was explained by the circumstance that the constable had to obtain from another part of the police station a book of certificate forms. Little J regarded this particular interruption as immaterial. In *Jones v Groves*, *supra*, it appears that the period was 10 minutes, not 15 minutes, between the testing and the giving of the certificate.

Whether *Creely v Ingles*, *supra*, and *Jones v Groves*, *supra*, were the cases which the solicitor for the defendant was referring to probably does not matter, except that in each case the decision of the court below was reversed on review. These decisions on review, however, to my mind, fortify the view I have sought to express, namely, that in the circumstances of this case the informant had made out a *prima facie* case, and that the justices were mistaken in their adoption of the arguments put to them by the solicitor for the defendant.

I am not to be taken as saying that 15 minutes would never be fatal, for there may be the case in which the evidence showed that the certificate was available in five minutes, but the operator deliberately, and perhaps perversely, kept the person waiting for another 10 minutes; but I am not deciding that case, and should it arise, it, too, will be determined in the light of all the circumstances.

In this case, therefore, the order of the court below is set aside and the matter is remitted to the Court of Petty Sessions at Geelong for rehearing. The defendant is ordered to pay the informant's taxed costs. I am prepared, I might say, to give the necessary certificate under the *Appeal Costs Fund Act*. I will make that order.

**APPEARANCES:** For the informant/applicant Tampion: Mr LR Hart, counsel. Thomas F Mornane, Crown Solicitor. For the defendant/respondent Chiller: Mr A Nicholson, counsel. Harwood and Pincott, Geelong, solicitors.

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