49/89

SUPREME COURT OF VICTORIA

ADDICOAT v DILLON

Gray J

23 June, 8 August 1989

MOTOR VEHICLES – DRINK/DRIVING – BREATH TEST CONDUCTED – PRESCRIBED CERTIFICATE DELIVERED – PERSON CHARGED – SURNAME IN CERTIFICATE DIFFERENT FROM SURNAME OF PERSON CHARGED – WHETHER CERTIFICATE ADMISSIBLE – WHETHER OTHER EVIDENCE OF IDENTITY ADMISSIBLE: *ROAD SAFETY ACT* 1966, SS49(1)(f), 55(4)(a).

The copy of the prescribed certificate disclosed that the person tested had a surname different from that of the person charged before the court. The magistrate accepted a submission that as the certificate was conclusive proof of the facts and matters contained in it, it proved that the person charged was not the person tested, and accordingly there was no case to answer. Upon order nisi to review—

HELD: Order absolute. Remitted for further hearing.
1. If the magistrate was not satisfied that the certificate referred to the person charged, the certificate was inadmissible as it was irrelevant. However, apart from the certificate, there was evidence from the police informant and the operator whereby the magistrate could find that the result of the analysis as recorded by the instrument was proved.

2. If the magistrate was satisfied that the certificate related to the person charged, the recording of a different surname did not prove conclusively that the person tested was not the person charged. Whilst a name may provide some evidence of identity, there was evidence before the magistrate that the person tested was the person charged.

GRAY J: [1] This is the return of an order nisi to review an order made by the Magistrates' Court at Oakleigh on the 9th September 1988. The Court dismissed an information laid under s49(1)(f) of the *Road Safety Act* 1986. Section 49(1)(f) provides –

> "(1) A person is guilty of an offence if he or she—
> (f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55(1) and the result of the analysis as recorded or shown by the breath analysing instrument indicates that more than the prescribed concentration of alcohol is present in his or her blood."

The hearing of the information began on 7th September 1988. The applicant gave evidence that on Saturday 21st May 1988, at 11.40 pm., the respondent was driving south in Stephensons Road, Mount Waverley when his speed was checked by the applicant at 130 kph. The respondent was then intercepted by the applicant. The respondent gave his name as Robert Anthony Dillon and his address as 3 Turner Court, Glen Waverley. He produced a motor car licence bearing the same name and address. The respondent was subjected to a preliminary blood alcohol test which gave a positive result. He was then taken to Glen Waverley Police Station and questioned about his drinking prior to his interception. The respondent was then introduced to Senior Constable Warnock, who conducted a breathalyzer test which produced a reading of .200 per cent alcohol in the blood. A certificate in the prescribed form was delivered to the respondent at the completion of the test. This is required by s55(4) (a) of the *Road Safety Act* which provides -

> **[2]** "(4) 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 must—
> (a) sign and deliver to the person whose breath has been analysed a certificate in the prescribed form of the concentration of alcohol indicated by the analysis to be present in his or her blood (which may be by way of an indication on a scale) and of the date and time at which the analysis was made."

Evidence was given by Senior Constable Warnock. He produced his authority to operate breath analysing instruments. He said that he was introduced to the respondent at 11.45 pm. on the 21st May 1988 and at 12.05 a.m. on the 22nd May he conducted the breath test upon

an approved breathalysing instrument. He complied with all relevant regulations. After the test he prepared a certificate in the prescribed form and handed the original to the respondent. He otherwise complied with all statutory requirements in relation to the certificate. A copy of the certificate was tendered by the prosecutor. The certificate recites that the operator analysed a sample of breath of "Robert Anthony Little of 3 Turner Court, Glen Waverley". When cross examined, Senior Constable Warnock said that he thought the respondent gave his surname as Little. He said that the slurred speech of the respondent may have occasioned the error. At the close of the prosecution case, Counsel for the respondent submitted that there was no case to answer. After hearing argument, the learned magistrate rejected the submission. He then adjourned the further hearing until 9th September 1988.

[3] Upon the resumption of the hearing, Counsel for the respondent was permitted to renew his submission of no case to answer. The gist of the renewed submission was that s58(2) of the *Road Safety Act* makes the certificate relating to the breath test "conclusive proof of the facts and matters contained in it". Therefore, it was argued, the statement that the person tested was Robert Anthony Little conclusively proved that Robert Anthony Dillon was not the person tested. This was said to lead to the conclusion that there was no evidence that the defendant had committed an offence under s49(1)(f). This submission apparently found favour with the learned magistrate because he thereupon dismissed the information. The informant, being aggrieved, obtained an order nisi to review the learned magistrate's ruling upon a number of grounds. These grounds, although expressed in various ways, amount to an allegation that the learned magistrate was in error in concluding that there was no evidence to support the charge laid under s49(1)(f). With very little hesitation, I have reached the conclusion that the ruling of the learned magistrate was wrong.

If the learned magistrate's ruling meant that he was not satisfied that the certificate referred to the respondent, the certificate was inadmissible because it was irrelevant. In that event, there was ample evidence of the commission of the offence by the respondent quite apart from the certificate. There was evidence of the applicant that the respondent was introduced to Senior Constable **[4]** Warnock for the purpose of a breathalyzer test within three hours of the respondent driving his motor car. There was evidence from Senior Constable Warnock that the person introduced to him by the applicant, that is to say the respondent, was tested within three hours of the time he was proved to be driving a motor car. All the evidentiary requirements of s58 ss(3), (4) and (5) were satisfied. The result of the analysis as recorded by the instrument was proved. The result indicated that more than the prescribed concentration of alcohol was present in the respondent's blood.

If, on the other hand, the learned magistrate was satisfied that the certificate related to the respondent, the certificate provided "conclusive proof of the facts and matters contained in it". Section 54(4) provides that the certificate must be delivered "to the person whose breath has been analysed". If that person was the respondent, the certificate proves conclusively that the name of the person tested was recorded as Robert Anthony Little. But upon the present assumption, namely that the learned magistrate was not satisfied that there was evidence that the certificate related to the respondent, the recording of the respondent's name as Little did not prove conclusively that the person tested was not the respondent. A name may provide some evidence of identity but, upon the present assumption, the identity of the person tested had been proved to be the respondent.

Although the point was not argued before me, there may be some question whether s58(2) applies to the proof of offences under s49(1)(f). It is to be noted that **[5]** s58(1) is concerned only with a situation where the relevant question is whether, at a given time, a person is under the influence of intoxicating liquor or as to the presence or concentration of alcohol in his blood. The proof of the offence created by s49(1)(f) does not appear to require proof of the actual concentration of alcohol in the defendant's blood. Compare s81(A) of the *Motor Car Act* 1958. Section 49(1)(f) merely requires proof that the result of the analysis as recorded indicates that a certain concentration of alcohol is present in the defendant's blood. The actual concentration appears to be an irrelevant matter. It is "the result of the analysis as recorded" which is the essential fact to be proved.

It is, to my mind, arguable that the evidentiary provisions of s58(1) and (2) have no application to proceedings under s49(1)(f). If this is so, the certificate of the analysis would not

be admissible under s58(2). If this tentative view is correct, the result is doubtless unintended. Some consideration of this point might usefully be undertaken by the legislature. In this case the point does not call for decision. Because of the evidence given by Senior Constable Warnock the prosecution evidence established a case to answer without reliance upon the certificate. In my opinion, the order nisi should be made absolute with costs, including reserved costs. The information will be remitted to the Oakleigh Magistrates' Court further hearing according to law.

APPEARANCES: For the applicant Addicoat: Mr GJ Maguire, counsel. Gordon Lewis, Victorian Government Solicitor. For the respondent Dillon: Mr M Crennan, counsel. Cleary Ross, solicitors.
