19/73

SUPREME COURT OF VICTORIA

REYNOLDS v PAISLEY

Menhennitt J

25 June 1973

MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .05BAC – CERTIFICATE OF ANALYSIS PRODUCED TO THE COURT – OBJECTION BY DEFENCE THAT IT WAS INADMISSIBLE DUE TO THE FACT THAT THE AUTHORISED OPERATOR HAD NOT BEEN CALLED TO PROVE THE AUTHENTICITY OF THE SIGNATURE ON THE CERTIFICATE – OBJECTION UPHELD BY COURT – CHARGE DISMISSED – WHETHER COURT IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court to be heard and determined according to law.

1. The copy certificate tendered to the Court was *prima facie* evidence of the two matters as to which it was submitted on behalf of the defendant that oral evidence should be called, namely proof of the signature on the certificate by the oral evidence of the operator, and proof that the test was carried out by the authorised operator.

2. The *Motor Car Act* makes it quite clear that the copy certificate is *prima facie* evidence of those matters, and there is no necessity to call the authorised operator to prove either his signature or that he in fact was an authorised operator, or that he in fact carried out the test.

3. Accordingly, the Magistrates' Court was in error in dismissing the charge.

MENHENNITT J: This is the return of an order nisi granted by Master Brett on the 2 August 1972, to revise a decision of the Magistrates' Court at Lilydale, constituted by Messrs Seymour & Olney, Justices of the Peace, on the 9 June 1972, whereby it was ordered that an Information under s81A of the *Motor Car Act* 1958 be dismissed. On the hearing before me, Counsel has appeared for the informant to move that the Order Nisi be made absolute, but there has been no appearance for the defendant.

On the 9 June 1972, there were, before the Magistrates' Court at Lilydale, constituted by the two justices of the peace named in the Order Nisi, other informations against the defendant, with which I am not concerned. The Information with which I am concerned, which is exhibited to the affidavit in support of the order nisi, was the information of the informant who said in that information that the defendant on the 3 June 1972 at Croydon in the State of Victoria did drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum.

The informant, who was a Senior Constable of Police, was called as a witness on the hearing in the Magistrates' Court, and gave evidence that on the occasion in question the defendant's breath smelt strongly of intoxicating liquor, that his eyes were bloodshot, and the inside of the car reeked of liquor, that the defendant got out of his car and supported himself on the driver's side door of the car, and that the informant then said, "Will you come back to the Croydon Police Station and have a breath test?", and that the defendant said, "Okay". The informant then gave evidence that the defendant was conveyed to the Croydon Police Station. After being questioned about the amount of alcohol he had consumed that day, the informant introduced the defendant to Senior Constable Pearson of the Breath Analysis Section who conducted a breath test on the defendant. The evidence of the informant continued: "At the completion of the test Senior Pearson handed me an original and a duplicate of the Schedule 7 which I compared and found it to be identical. I handed the original back to Senior Constable Pearson who handed it to the defendant." The affidavit, which is that of the informant in support of the order nisi, then continues in paragraph 10 as follows:–

"At this stage Mr Robinson" (who appeared for the defendant) "objected to the production of the said

> Certificate until the proper procedure was adopted in relation to the tendering of this Certificate. Mr Robinson submitted to the Court that the authorised operator should have been present in Court to prove the authenticity of the signature appearing on the said Certificate, and further required proof that the test was carried out by the authorised operator."

The next paragraph of the affidavit in support of the order nisi deposes to the fact that efforts were made to obtain the attendance of Senior Constable Pearson without avail, that the prosecuting officer suggested that the matter be adjourned pending a decision of the Supreme Court shortly to be adjudicated, which raised exactly the same issues, but that the chairman of the court, Mr Seymour, declined to adjourn the matter, and that the informant concluded his evidence by informing the court that the defendant was duly conveyed to the Ringwood Police Station after submitting to a breath analysis test, and charged with the offences, including the one the subject of this order nisi to review.

The affidavit establishes that in cross-examination questions were asked, but not in relation to this particular offender and that the court then considered the charges and dismissed the charge of exceeding .05 per cent. The account of the proceedings which I have referred to indicates that objection was taken to production of a certificate in the form of Schedule 7 to the *Motor Car Act* 1958. Before ruling on that question, in the light of the authoritative decision of the Full Court of this court in *White v Moloney* [1969] VicRp 91; [1969] VR 705 the justices should have looked at the copy certificate which was available and sought to be tendered before ruling on the matter. On this Order to Review I myself have looked at that document. It accords with Schedule 7 to the *Motor Car Act* 1958 and it is a carbon copy and thereby purports to be a copy of a certificate given in accordance with sub-section (2) of s80F of the *Motor Car Act* 1958, and at its foot there appears what purports to be a signature followed by the printed words in accordance with the Seventh Schedule, "Signature of Authorised Operator" and there in fact follow what purports to be writing indicating the rank and the number of the person purporting to sign the document.

Not only does it appear to be a copy from the fact that it is a carbon copy, but it also bears the words in the left hand bottom corner, "Copy Original". In these circumstances the matter was covered entirely and directly by the decision of the Full Court of this court in the case of *White v Moloney* [1969] VicRp 91; [1969] VR 705 to which I have referred, which decision was given on the 24 April 1969, and was reported in the *Victorian Reports* in the November part of 1969. It is unfortunate that the justices were not familiar with that decision or that their attention was not specifically drawn to it.

That decision is in its terms with reference to s408A of the *Crimes Act* 1958; but by Act No 8143 what was s408A of the *Crimes Act* 1958 became s80F of the *Motor Car Act* 1958. Apart from appropriate amendments of cross references, the two sections are in identical terms and what was Schedule 7A to the *Crimes Act* 1958 is in identical terms with Schedule 7 to the *Motor Car Act* 1958 as amended by Act No 8143. This being so, the decision in *White v Moloney* is directly in point and it covers directly the objection which was taken on behalf of the defendant. That objection was, as I have said, that the copy certificate could not be tendered unless the authorised operator was present in court to prove the authenticity of the signature appearing on the said certificate and unless proof was given that the test was carried out by the authorised operator.

These same objections were taken in the case of *White v Moloney* and, in substance, in the other cases heard along with that case in the Full Court. That the objection was so taken appears from the passage in the judgment in *White v Moloney* at page 708, where the court said:

> "Counsel for the defendant in *Moloney's Case* submitted that the document tendered, namely the duplicate Schedule Seven A certificate, was inadmissible in evidence, and he relied in support of the submission on the decision of this Court in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613. The informant in reply referred to the amendments to the legislation effected subsequently to that decision by Act No. 7782 of 1968. The stipendiary magistrate ruled that the amendments did not affect the decision in *Hanlon's Case* in any relevant respect, and he held that before the copy certificate could be relied upon, evidence was necessary directed to prove (a) that the operator was an authorised operator, (b) that the machine was an approved machine. As there was no such evidence the magistrate dismissed the information."

The Full Court dealt with those objections in the passage in its judgment which appears

at page 710 as follows:

> "Did it then purport to be a copy of a document given, i.e. signed and delivered in accordance with sub-section (2)? In determining whether the document professes or claims by its tenor to be a copy of a certificate given in accordance with the provisions of subsection (2), it is proper and indeed necessary to have regard to the provisions of the statute as to the certificate itself. Section 408A(2) says that as soon as practicable after a sample of breath is analysed the operator shall sign and deliver a certificate in the form of Schedule Seven A. The document tendered incorporates the language of Schedule Seven A. It is, therefore, in the same form as the certificate which the Act says is to be signed by the operator and delivered by him to the person whose blood has been tested, and it includes in paragraphs 2 and 4 all the information which sub-section (2) specifically requires to be inserted in the certificate so signed and delivered. It certifies to all the facts and matters required to be established under sub-sections (1) and (2) to make a breath analysis admissible evidence, namely, that the signatory is a person authorised by the Chief Commissioner of Police to operate an analysing instrument, that he analysed a sample of the breath of the defendant on a specified date at a specified time by means of a breath analysing instrument as defined, that that instrument indicated the quantity of alcohol present in the defendant's blood per one hundred millimetres of blood expressed also as a percentage, and that as soon as practicable after the completion of the analysis he delivered the certificate to the defendant in accordance with the provisions of sub-section (2). It bears a signature which purports to be that of the authorised operator, he being the person who the Act says is as soon as practicable after the analysis, to sign and deliver to the person whose breath has been analysed a certificate to the effect of Schedule Seven A. In our opinion, accordingly, the only reasonable conclusion to be drawn from the document tendered in each of the cases with which we are concerned is that it purports to be a copy of a certificate given in accordance with the provisions of sub-section (2)."

That passage in the judgment, in my view, establishes quite clearly and authoritatively that where there is produced a copy Certificate which purports to be signed over the words "Signature of Authorised Operator" and where it contains, as Schedule 7 requires, the statement "1. That I am a person authorised by the Chief Commissioner of Police under section 80F of the of the *Motor Car Act* 1958 to operate a breath analysing instrument, then that certificate is in accordance with the provisions of sub-section (3) of s80F of the *Motor Car Act* 1953, *prima facie* evidence in proceedings including the proceedings that were in fact before the Magistrates' Court on the day in question of the facts and matters stated therein, unless the accused person gives notice in writing to the informant a reasonable time in the circumstances before the hearing that he requires the person giving the certificate to be called as a witness.

There is no suggestion that any such notice was given in the present case, and accordingly that copy certificate was *prima facie* evidence of the two matters as to which it was submitted on behalf of the defendant that oral evidence should be called, namely proof of the signature on the certificate by the oral evidence of the operator, and proof that the test was carried out by the authorised operator.

The Act makes it quite clear, as did the decision of the Full Court in *White v Moloney* that the copy certificate is *prima facie* evidence of those matters, and there is no necessity to call the authorised operator to prove either his signature or that he in fact was an authorised operator, or that he in fact carried out the test. This was all, in my view, clear, and clearly laid down by the Full Court before the decision of Gillard J in *Wiggins v Tainsh* [1973] VicRp 23; [1973] VR 245 where the decision of the Full Court in *White v Moloney* was applied in the manner in which it should have been applied in the Magistrates' Court in the present case.

In the circumstances the Magistrates' Court, composed of the two justices was in error in dismissing the relevant information that the defendant drove a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than 05 per centum. However, as the case was dismissed on the informant's evidence, it is necessary that it should go back to the Magistrates' Court for hearing. As this order to review has been made necessary by the taking of an unfounded objection on the part of the defendant, it is proper that the defendant should bear the costs of this order to review. The order of the court is as follows: The order nisi granted on 2 August 1972 by Master Brett to review the decision of the Magistrates' Court at Lilydale on 9 June 1972 referred to in the said order is made absolute. The order of the Magistrates' Court made 9 June 1972 dismissing the information that the defendant at Croydon on 3 June 1972 did drive a motor car whilst the percentage of alcohol in his blood expressed in

grams per 100 millilitres of blood was more than .05 per centum, is set aside. The information is remitted to the Magistrates' Court at Lilydale to be further heard and determined according to law.

The defendant, Gary William Paisley, is ordered to pay the informant's taxed costs of this order to review, not exceeding $200.
