33/82

SUPREME COURT OF VICTORIA

BURROWS v MILLS

Starke J

27 May 1982

MOTOR TRAFFIC – DRINK/DRIVING – COPY CERTIFICATE ADMITTED INTO EVIDENCE – COURT NOT SATISFIED THAT THE CERTIFICATE WAS A COPY OF THE ORIGINAL CERTIFICATE HANDED TO THE DEFENDANT – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S80F(3).

HELD: Order nisi discharged.
The copy of a schedule seven certificate is *prima facie* evidence, if accepted. But its acceptance as a true copy of the original is a matter of fact, to be accepted or rejected by the Court, even though no notice has been given under section 80F(3) of the *Motor Car Act* 1958. In the present case it was open on the evidence for the court to have a doubt as to the authenticity of the certificate and dismiss the charge.

STARKE J: This is an Order Nisi to review the decision of a Magistrates' Court given on 14th May 1981. The respondent to these proceedings was charged under s81A of the *Motor Car Act* that he did drive a motor car whilst the percentage of alcohol in his blood expressed in grams was more than .05 per centum. The information was dismissed.

The grounds of review are these:

"(a) That upon the uncontradicted evidence for the Informant the Court should have found that the document tendered as a copy of the Seventh Schedule Certificate was a copy of the original Certificate handed to the Defendant pursuant to Section 80F(2) *Motor Car Act* 1958

(b) That the Court should have found that the document tendered as a copy of the Seventh Schedule Certificate was a document purporting to be a copy of the Certificate handed to the Defendant pursuant to Section 80F(2) *Motor Car Act* 1958 and as such was *prima facie* evidence of the facts and matters stated therein.

(c) That upon the whole of the evidence the Court was bound to find that the charge was proved beyond reasonable doubt."

It appears that the police went to the scene of an accident at about 7 p.m. on 7th April 1980 in School Road, Bayles. There the police observed a Ford utility on its side in a large drain. There was an ambulance present with a woman, apparently injured, in it. Senior Constable Fallon attended the scene and had a conversation with the defendant. Amongst other things he said, "Have you been drinking today?" and the defendant said, "I've had a bit," Later on Fallon said, "How much liquor have you consumed today?" Mills said, "Four pots." In the end he was taken to a nearby police station and he was asked if he would undergo a breathalyzer test, which request he eventually complied with. Policewoman Eabry conducted the test and it appears that a reading of .18 was obtained. Fallon was not present at the hearing but he was in the company of a Constable Cameron who gave the evidence which apparently Fallon would have given if he had been present. I might mention that there were aspects of Constable Cameron's evidence which could be the basis for a court doubting that in all respects he was telling the truth. I am not for a moment trying to judge Senior Constable Cameron's veracity because of course I have not seen him. But all I am saying is that it is not as if his evidence was entirely of such a nature that it compelled belief.

I refer, amongst other things, to the evidence in respect of the Schedule Seven certificates. He said that Policewoman Eabry handed Fallon the original and the copy original of the Schedule Seven certificates and he appeared to examine them. Cameron said, 'Whilst in Fallon's possession

I also compared the schedules and found them to be identical.' Why he bothered to do this is not plain – and perhaps he did. However, it is a matter which is capable of raising a suspicion of a tribunal of fact.

Firstly perhaps I should refer to the provisions of the *Motor Car Act* in respect of certificates. Section 80F(2) provides:

> "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 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."

Sub-section (3) of the same section provides:

> "A document purporting to be a copy of any certificate given in accordance with the provisions of sub-section (2) and purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in sub-section (1) 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."

I might say in parenthesis that no such notice was given here. Now the Crown's contention here depends on an examination of a book which is issued to the police and which contains Schedule Seven forms. There are three in number: a green form, a pink form and a white form. The evidence was that Fallon and Cameron examined the original and the copy original and then handed the certificates back to Policewoman Eabry, She handed the original to the defendant and the copy original to Fallon. The original is the green form in the book of Schedule Seven certificates; the pink is the second form and the white is the third copy. The green and the pink forms are torn out of the book after the test. The green one is handed to the person tested and the pink one is handed to the informant.

In this case a notice to produce was served on the defendant to produce the green form. But he did not produce it. Fallon was not there and presumably wherever he was he had taken the pink form with him. So the only form that was available to the police to tender under sub-section (3) was the white form which remained in the book, and in fact the whole book was tendered in evidence. Mr Neesham, who appeared for the applicant here, pointed out that all that is necessary under the Act is: "... a document purporting to be a copy of any certificate given in accordance with the provisions of sub-section (2)". Whether it is a copy or not, according to Mr Neesham, is not to the point.

In this case I have had demonstrated to me – and I have satisfied myself also – that if one writes on the top form (that is the green form) a carbon impression appears on both the pink form and the white form that remains in the book. Similarly, if one writes only on the pink form a carbon copy appears on the white form. The white form that was tendered is clearly a carbon copy of some other writing and on the face of it it purports to be a copy of a certificate under Schedule Seven. At first I was inclined to doubt whether this was sufficient. I had formed the tentative view that it had to be a document purporting to be a copy of a certificate given in accordance with the provisions of sub-section (2) that was given to the defendant to the proceedings. However, Mr Neesham pointed out that in paragraph 5 of the exhibit there appears, "That as soon as practicable after the completion of the breath analysis, namely, at 8.23 p.m. on the said date I delivered this certificate to the said Leslie Mills.' That appearing on the certificate and the document purporting to be a copy of a certificate the fact so stated, that it was handed to the defendant, is *prima facie* evidence that it was.

Accordingly, if all that was raised in this application was whether the certificate introduced into evidence was *prima facie* evidence of the contents of it I would have had no hesitation in holding that it was. That, however, does not conclude the matter. It will be observed that the contents are only *prima facie* evidence of the fact so stated. In other words, it is not conclusive, and if for any reason based, of course, on evidence the Court has a doubt, a reasonable doubt as to the contents of any part of it, then the Court would be bound to give effect to that doubt by

dismissing the information. What in fact the Court said was this:

> "We are not satisfied that the copy in the book is identical with the other two."

Now the certificate itself was not the only evidence in respect of the service of the Schedule Seven certificates. In the evidence I have already referred to Constable Cameron said that Fallon compared the two documents. Of course, that is an irrelevant piece of evidence because Fallon was not there to say what he found, but he said he also inspected the two documents and found that they were identical. As I have already said, it seems rather strange that he should do so, and I only fasten on this piece of evidence because it may have been the basis for the Court not accepting the evidence of the comparison of the certificates, and if they did not so accept that evidence it may have raised a doubt in their mind as to whether in fact, despite the *prima facie* presumption under sub-section (3), the defendant was served with a copy of the certificate. There may have been other reasons for the Court not accepting Cameron's evidence, but if whatever it was led them to have a doubt as to his evidence and if that doubt also raised a doubt as to the authenticity of the certificate, then it would have been their duty to dismiss the information, which they did.

In my opinion, this order to review raised no important issue of law at all. It is essentially a matter of fact. The submission was made that the evidence here was all one way and, accordingly, it would be perverse for the Magistrate to do other than convict the applicant. It is true in this context to remember that the applicant did not either make a statement or give evidence on oath. That, of course, in civil cases is very often a very strong factor to be taken into consideration when determining the veracity of some other witness.

In a criminal case it is also a matter to be taken into consideration but where proof is proof beyond reasonable doubt it has not got the same weight as it has in a civil case. The authority which lays down that where evidence is inherently probable and uncontradicted it is perverse for a tribunal of fact to decide in a sense contrary to that evidence is a rule of practice that must be applied with some caution. Here it was open, in my opinion, to the Court because of Cameron's evidence to have a doubt in respect of the certificate and if they had that doubt then, in my opinion, the inevitable result was that the information had to be dismissed, and that is after all what they said, and I repeat it:

> "We are not satisfied that the copy in the book is identical with the other two."

For those reasons, in my opinion, the order nisi should be discharged.
