57/83

SUPREME COURT OF VICTORIA

VOWLES v BYERS

Fullagar J

4 November 1983

MOTOR TRAFFIC – DRINK/DRIVING – BLOOD/ALCOHOL EXCEEDING .05% – SCHEDULE 7 CERTIFICATE TENDERED TO BENCH CLERK – WHETHER IN EVIDENCE – EFFECT OF CERTIFICATE: *MOTOR CAR ACT* 1958, SS80F, 80G, 81A; *MOTOR CAR REGULATIONS* 1966, R227.

Reg 227 of the *Motor Car Regulations* 1966 provides that:

"An authorized operator shall not require any person to undertake a breath analysis until he is satisfied that such person has not consumed any intoxicating liquor for a period of at least 15 minutes prior to the analysis."

When giving evidence on the hearing of the charge, the informant V. handed the Schedule 7 Certificate to the Bench Clerk; neither the Magistrate nor B.'s counsel saw the certificate. At the end of the prosecution case, B.'s counsel submitted that there was no case to answer on the ground of non-compliance with Reg 227. The Magistrate agreed and dismissed the case. On order nisi to review—

HELD: Order nisi absolute.
1. When the informant tendered the certificate by handing it from the witness box to the Bench Clerk, it was the clear duty of the Magistrate to accept it into evidence.

2. Once the certificate became evidence, it constituted *prima facie* evidence of compliance with Reg 227.
***Lloyd v Thorburn* [1974] VicRp 2; (1974) VR 12, applied.**

FULLAGAR J: *[After setting out the facts, His Honour continued]:* ... **[3]** I regard the allegation that the informant, "endeavoured to tender" the certificate, as being a virtually useless statement of ultimate fact, representing a conclusion from unstated facts and indeed, I incline to the view that the proper conclusion is that the informant did tender the certificate by handing it from the witness box to the Clerk of Courts. If it was tendered, then it was the clear duty of the Magistrate to accept it into evidence by allocating it an exhibit number in the pleadings – subject only to objection taken to it by the defence and if any objection was taken by the defence, it was the Magistrate's duty to rule upon the objection. **[4]** If the certificate were in evidence, it would – as a matter of law – constitute *prima facie* evidence that Regulation 227 had been complied with. I say as a matter of law, because this was decided by Nelson J in several cases under the name of *Lloyd v Thorburn* [1974] VicRp 2; (1974) VR at p12.

In my opinion, I should follow that decision that has stood for ten years. I observe that Mr Gillard very properly conceded that *Lloyd v Thorburn* has been followed, to his knowledge, on at least three occasions. The Full Court of this court has recently drawn attention to the great importance of preserving certainty in the law and most especially in the criminal law and has, on that ground, drawn attention to the importance of observing the principle of *stare decisis* in the Criminal law. See for example, *R v Bonollo* [1981] VicRp 63; (1981) VR 633; (1980) 2 A Crim R 431.

If the certificate was not tendered, then I should have thought that it was clear that it was not tendered as a result of inadvertence and oversight on the part of the Prosecuting Sergeant. If the certificate was tendered but did not get into evidence, I am of the opinion that the failure of the Prosecutor to ensure that it got into evidence was due to an oversight within the meaning of that expression as used by McInerney J in *Wylie v Nicholson*, [1973] VicRp 58; (1973) VR 596 at p609. Certainly it was not due to any relevant conscious election.

[5] In all the circumstances, I consider that this Court should act upon the footing that

the Prosecutor failed by readily excusable oversight, to ensure that the Schedule 7 certificate was accepted into evidence. I consider that this Court should now order that it be admitted into evidence and, subject to what is said below, propose so to order. I should say that I would do this the more readily because I think that the defendant's practitioner in the court below made submissions inconsistent with the view that the certificate had not got in to evidence, but I would do so whether or not that was so. It was suggested by Mr Gillard, who appeared before me for the respondent defendant, in the course of a full and careful argument, that if there is non-compliance with the regulation then that could go to the weight of the evidence that the blood alcohol content was over .05 per cent but I think that he merely mentioned that in passing without seeking to put much faith in the submission.

It is of course technically correct, but in the present case it most be borne in mind that the reading was .221, which is more than four times the amount referred to in the charge and secondly, that there was uncontradicted and inherently probable evidence from which the powerful inference is that at least 20 minutes elapsed before the test at 1.50, during which the defendant in fact had no alcohol. I say this because the defendant's deponent on the proceedings in the Supreme Court, corrects the **[6]** informant's account of affairs that he intercepted the respondent about 1.30 a.m. and says that the evidence was that he did intercept the respondent "at" 1.30 a.m.

That evidence may be combined with the fact that the defendant was in the company of the informant for the whole of the next 20 minutes – or at least that is the powerful inference – until 1.50 a.m., which is the time of the test as stated on the certificate. There is therefore a situation (once the certificate is in evidence) where, even if it could be said that Regulation 227 had not been complied with, nevertheless there is clearest evidence from which it could be inferred, on the present state of the evidence, that more than 15 minutes elapsed immediately before the test, during which the defendant consumed no intoxicating liquor. But this is by the way, because I consider that the Magistrate is bound, as I am bound, to hold that the "present" state of the evidence is one in which the certificate is in evidence and one in which the certificate is *prima facie* evidence of compliance with Regulation 227.

I, in the end, stopped Mr Gillard from developing his argument for the view that Nelson J's decision in *Thorburn* on the regulation point was wrong because I take the clear view that I should follow his decision. The result is that the **[7]** order nisi should be made absolute, but this court cannot decide the whole case. I wish to make it very clear that any comments that I have made about the evidence in the course of these brief reasons, must be taken as comments about the evidence as it stands now, because the matter must go to the Magistrate to complete the hearing in accordance with law and it is quite impossible for me to say what the state of the evidence will be should evidence be adduced on behalf of the defendant.

APPEARANCES: For the applicant Vowles: Mr PB Murdoch, counsel. D Yeaman, State Crown Solicitor. For the respondent Byers: Mr R Gillard, counsel. Byrne, Jones & Torney, solicitors.
