

**28/01; [2001] VSC 87**

**SUPREME COURT OF VICTORIA**

***VENEZIA v MARSHALL***

**Gillard J**

**8 March, 2 April 2001 — (2001) 33 MVR 269**

**MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE OF ANALYSIS PRODUCED BY INSTRUMENT – ERROR AS TO DATE OF BIRTH ON CERTIFICATE – ERROR CORRECTED BY OPERATOR, INITIALLED AND HANDED TO DEFENDANT – DEFENDANT CHARGED WITH DRINK/DRIVING OFFENCES – SUBMISSION THAT CERTIFICATE NOT ADMISSIBLE IN VIEW OF ERROR – SUBMISSION REJECTED – DEFENDANT CONVICTED – WHETHER MAGISTRATE IN ERROR: ROAD SAFETY ACT 1986, SS49(1)(f), 58(2).**

When a certificate of analysis was produced by a breath analysing instrument it showed an error in the date of birth of the person tested. The operator added the figures “55” after the figure “19” initialled the alteration and handed the amended certificate to the person tested. Charges were subsequently laid against V. and at the hearing it was submitted by V. that as the certificate did not comply with the provisions of the *Road Safety Act* 1986 (‘Act’) s55(4) or s58(2) it was inadmissible. The magistrate rejected this submission, admitted the certificate and convicted V. Upon appeal—

**HELD: Appeal dismissed.**

1. **There is nothing in the Act which precluded the admission into evidence of the certificate which had been altered. Nor was there anything in the Act or Regulations which precluded the admission into evidence of the certificate even if there was an error in anything recorded on it. The certificate answered the description of “a document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument”. The additional figures were not on the document as produced by the instrument and hence did not become part of the evidence. The addition of the figures did not alter the efficacy of the document as evidence admitted under s58(2). The birth date was a fact relevant to the identity of the person the subject of the charge; however, identity was not an issue and the defendant did not seek to raise it as an issue.**

2. **To exclude the certificate on the ground that an addition to it which corrected a mistake with respect to a matter of minor importance made it inadmissible would defeat and frustrate the clear purpose of the legislation set out in s47 of the Act.**

**GILLARD J:**

1. An appeal pursuant to s92 of the *Magistrates' Court Act* 1989 against a final order, made by the Magistrates' Court of Victoria sitting at Frankston, in which the appellant was convicted of a charge pursuant to s49(1)(f) of the *Road Safety Act* 1986 (“the Act”), fined, and his licence to drive a motor vehicle was cancelled.

**Parties**

2. The appellant, Francesco Venezia, is a 45 year old manager residing in Beaumaris. He was charged with three offences by the respondent, Tania Elizabeth Marshall, a senior constable of police.

**The proceeding in the Magistrates' Court**

3. The appellant was charged with three offences. First, that he drove a motor vehicle on 17 December 1999 in Beaumaris whilst having more than the prescribed concentration of alcohol in his blood contrary to s49(1)(b) of the Act.

4. The second charge was that on the same day at Moorabbin he did within three hours after driving a motor vehicle furnish a sample of breath for analysis by a breath analysing instrument which indicated that more than the prescribed concentration of alcohol being 0.05 grams per 100 millilitres of blood was present in his system contrary to s49(1)(f) of the Act.

5. He was further charged that at Beaumaris on the same date he did drive a motor vehicle in excess of 60 kilometres per hour.

6. The charges were heard on 27 June 2000 by Mr L Winton-Smith M at the Frankston Court.
7. The appellant was represented by counsel.
8. The appellant entered a plea of guilty to the charge of speeding and pleas of not guilty to the charges under s49(1) of the Act. The charges under the Act were alternative charges.
9. After the pleas were made, the magistrate was informed that there was a preliminary point as to the admissibility of the certificate provided by the operator of the breath analysing instrument which was given pursuant to s55(4) of the Act. The informant sought to tender the certificate under s58(2) of the Act.
10. For the purposes of the preliminary ruling, the certificate was placed before the court and after hearing argument the learned magistrate admitted the certificate into evidence.
11. The certificate was produced by a breath analysing instrument. After it was produced it was observed that the date of birth of the appellant noted on the certificate was incorrect in that it read "20-07-19". The operator added the figures "55" after the figure "19", initialled the alteration and handed the amended certificate to the appellant.
12. It was submitted on behalf of the appellant that the certificate did not comply with the provisions of s55(4) or s58(2) and accordingly was inadmissible.
13. For the purpose of the argument, it was accepted by counsel on behalf of the appellant that an error had been made by the operator of the instrument in that the instrument was incapable of accepting four digits for the year and that the operator should have inserted into the machine "55" instead of "19". It was also accepted that the operator added the figures in order to correct the error and make clear the year the appellant was born.
14. The magistrate ruled that the document was admissible under s58(2) of the Act and accordingly by reason of the provisions of that sub-section was conclusive proof of, *inter alia*, the facts and matters contained in it.
15. The appellant gave evidence.
16. He was convicted under s49(1)(f) of the Act, fined \$600 together with statutory costs of \$54, all licences and permits held under the said Act were cancelled and he was disqualified from obtaining any such licence or permit for a period of 16 months.
17. The alternative charge was withdrawn.

**Question of law**

18. In accordance with the Rules of Court application was made to the Master who on 3 August 2000 ordered that the following question of law be decided —

"Are there any (and if so what) circumstances that a certificate, which has been produced by a breath analysing instrument and then altered prior to service on a person whose breath has been analysed, is (*sic*) admissible in evidence? (See sub-s55(4), 58(1), (2), (2D), (2E) of the *Road Safety Act 1986* and Regulation 203 of the *Road Safety (General) Regulations 1999*)."

**Issue on appeal**

19. The issue on the appeal was whether the certificate as amended was admissible in evidence pursuant to s58(2) of the Act. Whether or not it was admissible in evidence is a matter of construction of the sub-section.

**Construction of provisions**

20. In seeking to determine what a provision in an Act means, the court determines what was the intention of Parliament. The primary source of that intention is the words of the provision construed in their usual and normal meaning subject to any definitions in the Act and after considering the context and reading the Act as a whole.

21. The court is required to give effect to the purpose or object of the Act. See s35(a) of the *Interpretation of Legislation Act 1984*.

22. Legislation concerning drinking and driving and offences of driving with a certain level of alcohol in the blood have been on the statute books in excess of 30 years. The legislation has been amended from time to time.

23. Part 5 of the Act is concerned with "OFFENCES INVOLVING ALCOHOL OR OTHER DRUGS".

24. The purposes of the Part are set out in s47 and in addition to the object to reduce the number of car collisions of which alcohol is a cause, another important purpose of Part 5 is to–

"(c) Provide a simple and effective means of establishing that there is present in the blood of a driver more than the legal limit of alcohol." (Emphasis added).

25. A number of important amendments were made by the *Road Safety (Amendment) Act* 1994.

26. Pursuant to the amending legislation, a new breath analysing instrument was used in Victoria known as an Alcotest 7110.

27. This instrument is self-contained and not only does it analyse the breath for alcohol but also prints out four copies of the result of the test. The operator using a keyboard, keys in the necessary information that has to appear on the certificate.

28. Attached to these reasons is a photostat copy of the certificate issued in respect of the appellant.

29. The Minister for Public Transport when reading the Bill for a second time described the changes brought about by the legislation and the new machine.

30. He said –

"The Bill involves major changes in three areas and minor changes in a number of others. The first major change is to provide police with a new breath analysing instrument to measure the blood alcohol concentration of the drivers of motor vehicles and boats. The new instrument is the Drager 7110 designed and manufactured by Drager Australia in Melbourne. It has recently been purchased for the police using funds from the Transport Accident Commission, and replaces the Smith and Wesson Breathalyser Model 900 which has been used since first introduced in 1961. The new instrument is fully automated. Once an analysis is commenced, nothing an operator can do will influence the result. The instrument uses two different kinds of technology to analyse a sample of breath and produces a result only if the two results are the same."

31. Mr Trapnell of Counsel who appeared for the respondent emphasised what the purposes of Part 5 were and that they were designed "to deal with a major social problem" or "a recognised social evil".

32. In the case of *Thompson v His Honour Judge Byrne and Others* [1999] HCA 16; (1999) 196 CLR 141 at pp149-50; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27 the High Court commented on the purpose of the provisions when it said –

"Secondly, even accepting that the offence provided by paragraph (f) is a far reaching one, it is clearly enacted, as the stated purposes of the part of the Act in which it appears make it plain, to deal with a major social problem. The provision of the offence in such terms is the means by which Parliament has sought to achieve those generally stated purposes, viz to reduce the number of motor vehicle collisions to which alcohol or other drugs are causally related, to reduce the number of drivers whose driving is impaired by such causes and to provide a simple and effective means of establishing the presence in the blood of a driver of more than the legal limit of alcohol. As demonstrated in *Mills v Meeking* [1990] HCA 6; (1990) 169 CLR 214; (1990) 91 ALR 16; (1990) 64 ALJR 190; (1990) 45 A Crim R 373; (1990) 10 MVR 257, the Ministerial remarks made during the passage of the Bill which became the Act cannot be determinative. They do not contradict the construction which was preferred by the majority. The adoption of that construction certainly gives effect to Parliament's purpose to overcome technical defences which had been raised before the offence provided by paragraph (f) was enacted." (Emphases added).

33. Section 49(1)(f) is indeed far reaching. It is to be compared with the offence established by s49(1)(b) which is concerned with driving or being in charge of a motor vehicle whilst the prescribed

concentration of alcohol present in the blood of the driver or person in charge is exceeded. The gravamen of that charge is driving the motor vehicle or being in charge of same.

34. But the charge under s49(1)(f) is not concerned with the driving but is concerned with the fact that a person furnishes a sample within three hours after driving or being in charge of a motor vehicle for analysis by an instrument and the result as recorded indicates that the prescribed concentration of alcohol is exceeded and is not due to any drinking after the driving or being in charge of a motor vehicle.

35. The elements of the offence are set out in a number of cases and I refer by way of example to *DPP v Foster* [1999] VSCA 73; [1999] 2 VR 643 at 652; (1999) 104 A Crim R 426; (1999) 29 MVR 365 per Winneke P.

36. In the Court of Appeal decision of *Furze v Nixon*, 2000 VSCA 149; (2000) 2 VR 503; (2000) 113 A Crim R 556; (2000) 32 MVR 547, delivered 21 August 2000, the Court of Appeal said at paragraph 32 –

"But an offence against s49(1)(f) is quite different. Unlike s49(1)(b), paragraph (f)(i) does not refer, relevantly, to the concentration of alcohol in the blood; the offence is constituted directly by the indication given by the machine (albeit as to blood alcohol concentration) – and no more than that; see *Meeking v Crisp* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1; *Bracken v O'Sullivan* [1991] VicRp 94; [1991] 2 VR 573; (1990) 13 MVR 91; *R v Williams* [1986] HCA 88; (1986) 161 CLR 278; (1986) 66 ALR 385; 28 A Crim R 1; 60 ALJR 636, *Thompson v Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27. (We are putting aside paragraph (f)(ii) which requires that the concentration of alcohol indicated by the machine 'was not due solely to the consumption of alcohol after driving' et cetera; or as was said earlier it is not presently relevant.) Under paragraph (f)(i), one must show that within three hours after driving, the driver furnished a sample of breath for analysis by a breath analysing instrument and that 'the result of the analysis as recorded or shown by the breath analysing instrument indicated' the presence of 'more than the prescribed concentration of alcohol' in the blood. The actual concentration of alcohol present in the blood is irrelevant; the criterion of criminality under s49(1)(f) is quite different, as the High Court pointed out in *Thompson*."

37. The offence attaches to the consequences of the result of the recording by the breath analysing instrument.

38. Under s55(4) the operator is obliged to give a signed certificate as soon as practicable after the sample is analysed containing prescribed particulars. Compliance with this sub-section is a condition precedent to the admissibility of the evidence of the concentration of alcohol indicated to be present in the blood of a person whose breath has been analysed by the instrument – see s48(1) but is not a necessary element in the proof of an offence under s49(1)(f).

39. In *Furze v Nixon*, *supra*, the Court of Appeal said at paragraph 41 –

"Thus, however it is approached, we think we must reject the argument of the appellant that the respondent had to prove compliance with s55(4) before being able to rely upon the certificate in evidence, Exhibit 'A', on the prosecution of the appellant for an offence against s49(1)(f). In our opinion compliance with s55(4) was irrelevant on such a prosecution. If so, it cannot matter whether the certificate given to the appellant was or was not 'in the prescribed form' as mentioned in s55(4) or, accordingly, that the certificate which was in evidence had not been compared by the operator or the informant with that which was given to the appellant."

40. Section 58(2) of the Act makes the certificate produced by the machine admissible in evidence and subject to notice being given by the accused person or the informant adducing evidence to explain any fact or matter in the certificate, is conclusive proof of the facts and matters contained in it and other matters – see s58(2), s58(2D), s58(2E).

41. In a prosecution under s49(1)(f) the certificate of analysis is not an ingredient of the offence but is merely a means of proving the ingredients of the offence.

42. In *Furze v Nixon*, *supra*, the Court of Appeal said at paragraph 10 –

"As for the rest of s49(1)(f), we draw attention to the fact it makes no mention of any certificate of

analysis as such and, as will be seen, the certificate which is central to the questions reserved by way of this case stated is purely evidential. At least as written, the offence created by s49(1)(f) is independent of any certificate. So far as presently relevant, the offence depends only upon 'the result of the analysis as recorded or shown by a breath analysing instrument': nothing more and nothing less." (Emphasis added).

43. The particulars which must be contained in the certificate were prescribed and are found in the *Road Safety (General) Regulations 1999*.

44. Regulation 203 provides –

"A certificate under s55(4) of the Act must, in addition to the matters referred to in that section, contain the following prescribed particulars—

(a) ... (b) ... (c) ... (d) the name and date of birth of the person whose breath is analysed; and"

45. All told, there are eight categories of prescribed particulars. There is no provision that the particulars have to be accurate. Both sections 55(4) and 58(2) require the certificate to contain the prescribed particulars but neither require that the particulars be accurate. The requirement is that the document purports "to be a certificate containing the prescribed particulars". In *Houston v Harwood* [1975] VicRp 69; (1975) VR 698 Gowans J dealing with the same question in respect of the then legislation stated at VR p702 –

"In regard to this matter, it is with the nature of the matter set out and its form and not the truth or accuracy of what is set out, that the requirement is concerned."

46. In that case an error was made on the certificate in respect of the defendant's name. His Honour held that the certificate was admissible.

#### **Admission or not?**

47. The certificate concerning the appellant contained all the particulars required by the regulation including his date of birth.

48. It is clear on the evidence that an error was made in relation to the notation of the year of birth and that the error was corrected by the operator and initialled by him before handing the certificate to the appellant.

49. The operator did not alter anything that was written on the certificate produced by the instrument. He added in handwriting two figures which had the effect of changing the year of birth from "19" to "1955". As produced by the instrument and in context, the certificate indicated the year of birth date as 1919.

50. It is with that background that the court turns to s58 which is concerned with the evidentiary provisions relating to breath tests.

51. Sub-section (1) relevantly provides –

"(1) If the question as to the presence or concentration of alcohol in the blood of any person at any time or if a result of a breath analysis is relevant—

(a) ... (ab) ... (b) ... or (c) on a hearing for an offence against s.49(1) of this Act—

then, without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the concentration of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorised to do so ... and the concentration of alcohol so indicated is, subject to compliance with s55(4), evidence of the concentration of alcohol present in the blood of that person at the time his or her breath is analysed by the instrument."

52. The important provision is sub-s(2) which provides –

"(2) A document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument of the concentration of alcohol indicated by the analysis to be present in the blood of a person and purporting to be signed by the person who operated the instrument is admissible in evidence in any proceedings referred to in sub-s(1) and, subject to sub-s(2E) is conclusive proof of—

(a) the facts and matters contained in it; and"



The sub-section enumerated, in addition to paragraph (a), five categories of factual evidence including conclusive proof that the certificate was "given to the accused person as soon as practicable after the sample of breath was analysed."

53. It is submitted on behalf of the appellant that on a proper construction of s58(2), the certificate cannot be admitted into evidence if it is in any way altered after it has been produced by the instrument.

54. The short point is that once the certificate is changed it cannot answer the description of "a certificate produced by a breath analysing instrument".

55. The means by which the charge is proven is a matter for the informant. The legislature has facilitated the proof. The informant may rely upon the certificate of analysis produced by a breath analysing instrument under s55 of the Act pursuant to s58(1) by tendering the document pursuant to s58(2).

56. Once admitted into evidence, the certificate is conclusive proof of, *inter alia*, the facts and matters contained in it.

57. The informant may adduce evidence to explain any fact or matter in the certificate, and if he or she does so, the certificate ceases to be conclusive proof of that particular fact – see s58(2E). But it is clear that the balance of the certificate is conclusive evidence.

58. The additional evidence would have to be evaluated like any other evidence. It follows that if the certificate contained an error, other evidence could be admitted to correct it if it was thought necessary in proving the charge.

59. Whilst the prosecution has the benefit of this method of proof the rights of the accused person are protected. The accused may give written notice to the informant that he or she requires the instrument operator to be called as a witness or "that he or she intends to adduce evidence in rebuttal of any fact or matter" set out in s58(2). See latter part of s58(2).

60. The accused must give the notice within a certain period and importantly the notice must specify any fact or matter which is in issue – see s58(2A). The accused must also give notice if expert evidence is to be called and the nature of it – *ibid*.

61. The effect of giving notice is dealt with by s58(2D). It provides that the certificate is still admissible in evidence but is no longer conclusive evidence of the matters set out in s58(2). In other words, it is to be assessed as part of the evidence like any other evidence adduced by the court.

62. In *Furze v Nixon*, *supra*, at paragraph 19, the Court of Appeal emphasised that whilst the evidence was no longer conclusive it was not to be treated as *prima facie* but was to be treated like any other evidence.

63. The court said –

"The effect of sub-section (2D) is not to replace the words 'conclusive proof' in sub-section (2) with the words 'prima facie evidence' in a case where the accused gives the requisite notice. The language of sub-section (2D) is not apt to extend the evidentiary effect of the certificate beyond its contents. The word 'remains' was intended only to refer to the fact that the certificate was to have residual evidentiary value, a value depending then upon the contents of the document rather than upon the provision dealing with its conclusive effect in the absence of notice."

64. In the present proceeding the appellant did not give notice under s58(2) and hence did not put in issue any matter which was the subject of conclusive evidence once the document went into evidence. The appellant, through his counsel, objected to it being admitted at the outset.

65. In my opinion, the certificate was admissible in evidence under s58(2) and the Magistrate was correct in so admitting it.

66. First, it is noted that there is nothing in the Act which precludes the admission into

evidence of a certificate which has been changed in any way by the operator.

67. Secondly, there is nothing in the Act or Regulations which precludes the admission into evidence of a certificate even if there is an error in anything which is recorded on it. If there was an error, it is still conclusive evidence of what it states unless the informant utilises the right under s58(2E) and calls evidence in relation to any particular matter stated therein or the accused gives notice under s58(2).

68. Thirdly, the certificate is admitted in evidence under s58(2) if it answers the description in the sub-section, namely, "a document purporting to be a certificate containing the prescribed particulars produced by a breath analysing instrument".

69. Clearly, the certificate was a document which answered that description. The additional figures were not on the document as produced by the instrument and hence do not become part of the evidence. The certificate is admitted into evidence but the added figures are ignored. The addition of the figures does not alter the efficacy of the document as evidence admitted under s58(2).

70. Finally, to exclude the certificate on the ground that an addition to it which corrected a mistake with respect to a matter of minor importance made it inadmissible, would defeat the purpose of the legislation set out in s47 of the Act as discussed and stated by the High Court in *Thompson's case*, *supra*. Ever since the first case of *Hanlon v Lynch* [1968] VicRp 80; (1968) VR 613 which considered the admissibility of a certificate in respect of a breath test, there has been a stream of cases raising issues as to the admissibility of evidence. The legislature over the years has amended the relevant legislation a number of times to overcome the decisions which excluded the evidence. Some of the decisions were based on very technical grounds.

71. The structure of the present legislation is eloquent testimony to the efforts of the legislature to put a stop to technical points. The legislation provides means to ensure that matters of substance are raised as issues and that problems concerning proof can be overcome by the admission of other evidence.

72. Justice is a two-way street. The public have a very important interest in the outcome of criminal proceedings which may affect the well-being of members of the community.

73. Driving whilst affected by the consumption of alcohol is a major social problem which sometimes has catastrophic effects on innocent people.

74. The court should not frustrate the clear intention of Parliament which is to deal with the major social problem and to overcome technical points concerning admission of evidence.

75. That is not to say that the statutory prerequisites to the admission of evidence should not be complied with – see *Hanlon v Lynch*, *ibid*.

76. To uphold the submission that the certificate should not have been admitted into evidence because there was an alteration to the certificate which had little to no effect in respect of the commission of the offence by the appellant would be to frustrate the clear purpose of these provisions.

77. The certificate does in fact contain an error. It has the appellant born in the year 1919 and not 1955. The birth date is no doubt a fact relevant to the identity of the person who allegedly contravened s49(1)(f) and the person the subject of the charge before the court. There is no doubt that the appellant's name was correct on the certificate, as it was on the charge, and that he was present at the hearing and represented by counsel who announced his appearance on behalf of the defendant as named. Identity was not an issue and the defendant did not seek to raise it as an issue. The evidence given by and on behalf of the informant clearly established that the defendant before the court was the same person who had provided the sample of breath for analysis and was the person present in court.

78. Further, the appellant did not give notice pursuant to s58(2) so once admitted the certificate

was conclusive proof of the facts and matters contained in it including the birth date of the appellant.

79. In addition, the appellant gave evidence and there could be no doubt about the issue of identity. It follows that he was properly convicted of the charge under s49(1)(f) of the Act.

80. It follows that the appeal fails.

81. Subject to any submissions from counsel I propose to make the following orders –

(i) That the appeal against the final order of the Magistrates' Court of Victoria sitting at Frankston whereby the appellant was convicted of a charge pursuant to s49(1)(f) of the *Road Safety Act 1986* is dismissed.

(ii) The appellant pay the costs of the respondent including reserved costs.

**APPEARANCES:** For the appellant DPP: Mr C Ryan, counsel. Peter Wood, Solicitor for Public Prosecutions. For the respondent Connor: Mr P Lawrie, counsel. Mahonys, solicitors.

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