

13/75

## SUPREME COURT OF VICTORIA

**PAVLOVIC v KRIZMAN**

Gowans J

20 May 1975

**MOTOR TRAFFIC – DRINK/DRIVING – BLOOD SAMPLE TAKEN FROM DRIVER – LATER ANALYSED – FOUND TO EXCEED LIMIT – CERTIFICATE STATED THAT THE MEDICAL PRACTITIONER COMPLIED WITH THE REGULATIONS RELATING TO THE COLLECTION OF SUCH SAMPLE – STATEMENT BY MEDICAL PRACTITIONER THAT SUCH SAMPLE WAS PLACED IN TWO CONTAINERS – REQUIREMENT OF REGULATION THAT THE SAMPLE SHOULD BE DIVIDED INTO THREE PARTS – EFFECT OF CERTIFICATE – NON-COMPLIANCE WITH REGULATIONS – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, S80D(3).**

The defendant was injured in an accident and taken to hospital where a compulsory blood sample was taken. He was charged with exceeding .05 and driving under the influence of intoxicating liquor. The certificate of the doctor as to the taking of the blood sample was as follows:—

"Sixth Schedule Motor Car Act 1958. No. 1555. Certificate of Medical Practitioner of the taking of blood sample.

"I, Marjorie Cross of Central Gippsland Hospital, a legally qualified medical practitioner hereby certify that I collected a sample of the blood of Joseph Krizman, 111 Holmes Road, Morwell, at 4.10 p.m. on 20.7.74, and that all the regulations relating to the collection of such sample were complied with and that such sample was placed in two containers labelled 'Joseph Krizman, 20.7.74 4.10 p.m. Marjorie Cross.'

Signature Marjorie Cross.

Qualifications, M.B.B.S. date 20.7.74"

The Magistrate dismissed the charge. Upon order nisi to review—

**HELD: Order absolute. Dismissal set aside. Remitted to the Magistrate for hearing and determination in accordance with the law.**

1. The meaning of the word 'collection' where used in Schedule Six was wide enough and apt enough to cover more than the taking of the blood and to include the dividing of the blood into parts and its containerizing.

2. Once it was accepted that the certificate provided *prima facie* proof of the statement that 'all the regulations relating to the collection of such sample were complied with' and that that included compliance with Clause 223, and once it was apprehended that the force of the added statement 'and that such sample was placed in two containers and labelled ... ' was to provide evidence of identity, it was open to take the view that the word 'sample' in this latter statement referred not to the whole sample but to so much of it as was placed in the labelled containers, it still not losing its character as 'the sample'.

3. In relation to the submission that a person who had a blood sample taken when he was in hospital and may not have been in a condition of awareness was entitled to have strict compliance with the regulations, that consideration could not make the observance of the regulations obligatory and a condition precedent to the receipt of evidence if the legislature had not thought fit to give those matters that effect.

4. A failure to divide the blood taken into three parts and to retain one in some unspecified manner and dispose of it in some unspecified manner, and the division instead into two parts (if that took place) could not in any way go to the weight of the evidence.

**GOWANS J:** ... The Stipendiary Magistrate's reasons for dismissal proceeded on a triple basis –

(1) The facts stated in the certificate of the doctor that 'all the regulations relating to the collection of such sample were complied with' did not cover clause 223 of the regulations as to dividing the samples into three parts and placing each of two in a container and therefore did not provide *prima facie* evidence of that fact.

(2) In any case the words in the certificates 'and that such sample was placed in two containers labelled Joseph Krizman', provided evidence that the sample had not been divided into three parts but into two.

(3) The failure to comply with the Regulations in this regard had the effect that the certificate was not evidence of the percentage of alcohol in the blood within section 80D (3).

As to the first of these matters I am of opinion that the words, 'the collection of such sample', should be treated as covering the division of the sample into parts and the placing of parts into containers. My reasons are based partly on the ordinary use of language and the context in which the particular language is found in the Act and the relevant schedule and partly on more general considerations.

In the first instance, the primary use of the word 'collection' is a 'gathering together'. It is wide enough, however, to include not only the acquisition of the subject matter but the arrangement and immediate disposition of what is collected. For example, 'stamp collection' would include the arrangement, say in an album, for the purpose of exposition and comparison. A 'collection in church' would include the process of gathering the money in different parts by different individuals and putting the notes in one place and the coins in another. Apart from that permissible usage of the word 'collection' a survey of the associated sections of the Act show a use of the terms 'taking' and 'collected' or 'collecting' or 'collection' which although not always consistently so indicates that the word 'taking' is only part of the process of collection. References may be found in s80D(1)(c) ('taking'); s80D, sub-s(10) ('collected' and 'collection'); s80D, subs(11) ('collected' and 'collection'), s80D(2) sub-s(14)(i) ('in collecting') (ia) ('taken'), (ib) ('taken'). Unless the power to make regulations as to the methods and conditions to be observed by legally qualified medical practitioners in collecting the blood samples includes the power to make regulations as to division into parts and putting into containers, there would in my view be no power to make it under Clause 223 of the Regulations.

I do not think that paragraph (iii) in referring to transmitting the samples of blood to an analyst for analysis uses language apt for the purposes. At all events, 'collection' is apt enough to cover the immediate disposition of the sample taken. This permissible understanding of the word 'collection' when it appears in the form set out in Schedule six of the Act does not, in my view, require to be read down in that Schedule by the appearance in it of the words which follow:— '... and that such sample was placed in two containers labelled ...' They do not involve a derogation from the sense of the words which precede them — 'and that all the regulations relating to the collection of such samples were complied with.' Properly understood, these additional words constitute merely an additional statement of fact for the purpose of identification of the blood sample. In other words, the statement of that identifying fact does not mean that the 'regulations relating to collection' could not have dealt in their proper meaning with the dividing of the sample and the placing of the sample into containers.

So taking all these things into consideration, in my view, the meaning of the word 'collection' where used in Schedule six is wide enough and apt enough to cover more than the taking of the blood and to include the dividing of the blood into parts and its containerizing.

Once it is accepted that the certificate provided *prima facie* proof of the statement that 'all the regulations relating to the collection of such sample were complied with' and that that included compliance with Clause 223, and once it is apprehended that the force of the added statement 'and that such sample was placed in two containers and labelled ...' is to provide evidence of identity, it is, I think, open to take the view that the word 'sample' in this latter statement refers not to the whole sample but to so much of it as is placed in the labelled containers, it still not losing its character as 'the sample'. That construction requires some straining, but it is, I think, a permissible view, and I think it ought to be adopted rather than take the statement provided for in the statutory form as denying for force of what preceded it in the statutory form.

[One of the grounds of the order to review was that, even if the doctor had not complied with the Regulations, the certificate was still admissible. On this aspect his Honour stated:—] ... The ground in its paragraph (b) aspect has recourse to the fact that there is nothing in the Act to require compliance with the regulations as a condition precedent to the acceptance of the certificate and the evidence, and has recourse also to a number of recent authorities. Those authorities are *Hindson v Monahan*

[1970] VicRp 12; [1970] VR 84; *Wylie v Nicholson* [1973] VicRp 58; [1973] VR 596 at pp604-5 and *Lloyd v Thorburn* [1974] VicRp 2; [1974] VR 12 at pp16-17. Last week, on May 21, in *Collins v Mithen* (unreported), I applied these authorities by stating:

'There is one other matter that might need to be mentioned, and that is that there are certain regulations with respect to the taking of blood. But there is nothing in the provisions of the Statute itself to make it obligatory for the medical practitioner to comply with those regulations as a condition of establishing an offence or of evidence being given with respect to the analysis of blood; nor is there any obligation on the part of a police officer to comply with any part of the regulations with respect to the keeping of blood.'

I have not been given any reason justifying a change of mind as to this. It has been submitted that a person who has a blood sample taken when he is in hospital and may not be in a condition of awareness is entitled to have strict compliance with the regulations. But that consideration cannot make the observance of the regulations obligatory and a condition precedent to the receipt of evidence if the legislature has not thought fit to give those matters that effect. That is a matter for the legislature.

Nor can I see that the failure to divide the blood taken into three parts and to retain one in some unspecified manner and dispose of it in some unspecified manner, and the division instead into two parts (if that took place) could in any way go to the weight of the evidence. ...

Order absolute. Dismissal set aside. Information remitted to the Magistrates' Court to be determined according to law...

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