

23/96

SUPREME COURT OF VICTORIA

McKENZIE v McFADZEAN

O'Bryan J

14, 20 June 1996 — (1996) 23 MVR 327

MOTOR TRAFFIC – DRINK/DRIVING – PROOF OF BREATH ANALYSING INSTRUMENT – WHETHER ABLE TO BE PROVED BY CERTIFICATE – DOCUMENT PRODUCED BY INSTRUMENT HAS APPEARANCE OF CERTIFICATE IN PRESCRIBED FORM – WHETHER ADMISSIBLE TO PROVE INSTRUMENT: ROAD SAFETY ACT 1986, SS3, 58(2).

Section 58(2) of the *Road Safety Act 1986* ('Act') is concerned with the admissibility of one item, "a document", which has the appearance of "a certificate in the prescribed form produced by a breath analysing instrument". If the document produced to the court has the appearance of such a certificate, it is admissible in evidence and provides conclusive proof of "the facts and matters contained in it" such as the fact that the instrument used was a breath analysing instrument within the meaning of the Act.

O'BRYAN J: [1] This is an appeal from orders made in the Magistrates' Court at Heidelberg on 9 February 1996 whereby the appellant was convicted of a charge laid pursuant to s49(1)(f) of the *Road Safety Act 1986* (within three hours after driving a motor vehicle furnishing a sample of breath for analysis by a breath analysing instrument showing more than the prescribed concentration of alcohol present in his blood), and was fined \$750, his licence to drive was cancelled and he was disqualified from obtaining a further licence for 36 months. On the same day the plaintiff was convicted of a charge of exceeding the speed limit, fined and his licence to drive was cancelled and he was disqualified from obtaining a further licence for six months. No appeal was taken from the speeding conviction. Two questions of law arise for decision in the order of Master Wheeler dated 8 March 1996. In the course of the appeal hearing it became apparent that the learned Magistrate admitted into evidence a document tendered by the prosecution pursuant to s58(2) of the Act and held that the document provided conclusive proof that the instrument or apparatus used to analyse the plaintiff's breath was a breath analysing instrument within the meaning of the Act. In the Court below Mr Murphy of counsel, who appeared for the plaintiff, had submitted that the document was not admissible to prove an essential element of the offence namely, that the instrument or apparatus used to analyse the plaintiff's breath as a "breath analysing instrument" as defined by the Act (s3).

Mr Silbert of counsel properly conceded that oral evidence given by the informant (Senior Constable McFadzean) [2] in the Court below that the instrument or apparatus used to analyse the plaintiff's breath was, in his belief, a "breath analysing instrument" was incapable of proving the fact beyond reasonable doubt. The first question of law is no longer relevant because Mr Silbert did not wish to support the conviction upon the basis that the learned Magistrate could use the oral evidence to find that the instrument was a "breath analysing instrument". In fairness to the learned Magistrate I should add that I do not consider the case was decided by using the oral evidence in this way.

The second question of law asks:

"Was it open to the learned Magistrate to find that the document relied upon by the prosecution as a certificate of analysis was produced by a 'breath analysing instrument'?"

The circumstances of the interception of the plaintiff's motor vehicle in Princess Street, Kew on 30 April 1995 at 1.30 p.m. by the informant, and of the use of a preliminary breath testing device to indicate that the plaintiff may be in excess of the prescribed concentration of alcohol, are not in dispute nor are they relevant to the second question of law. The plaintiff was conveyed to Kew Police Station, interviewed by the informant and introduced to Senior Constable Hassett of

the Traffic Control Section, who was authorised by the Chief Commissioner of Police to operate a breath analysing instrument. The plaintiff was requested by Hassett to undergo a breath analysis test pursuant to s55 of the Act. An instrument was produced and the plaintiff furnished a sample [3] of his breath directly into the instrument. A document was printed out by the instrument in quadruplicate and each copy was signed by Hassett who had operated the instrument. Hassett then gave the plaintiff a copy of the document pursuant to s55(4) of the Act. The document showed the result of the analysis: 0.158 grams of alcohol per 100 millilitres of blood, a concentration of alcohol present in the blood more than 300 per centum in excess of the prescribed concentration of alcohol.

In the Court below objection was taken by Mr Murphy to the admissibility of the document signed by Hassett. The prosecutor submitted the document was admissible pursuant to s55(2) of the Act and provided conclusive proof of the facts and matters contained in it and the fact that the instrument used was a breath analysing instrument within the meaning of the Act. Mr Murphy submitted that the document was not admissible to prove a fact in issue, namely, whether the instrument used to produce a document was a "breath analysing instrument". The learned Magistrate held that the document was admissible pursuant to s58(2) and provided conclusive proof of the fact that the instrument used was a breath analysing instrument within the meaning of the Act.

The question of law raised in this appeal falls to be determined upon the proper construction of s58(2) of the Act. It is now desirable to identify relevant provisions in the Act. In s3 "breath analysing instrument" means -

[4] "(a) The apparatus known as the Alcotest 7110 to which a plate is attached on which there is written, inscribed or impressed the numbers '3530791' whether with or without other expressions or abbreviations of expressions, commas, full stops, hyphens or other punctuation marks and whether or not all or any of the numbers are boxed in; or (b) Not relevant."

Section 58 facilitates proof of certain elements of the offences created by s49(1) of the Act and other offences which are not relevant. It does so in ss(2) by making admissible a document of a certain type which is "conclusive proof of" facts specified in paragraphs (a) to (f) unless the accused person gives notice in writing to the informant not less than 28 days before the hearing that he or she requires the person giving the certificate to the accused person to be called. The exception is not relevant in the present case. Section 58(2) in the Act was amended as recently as December 1995 as a consequence of the decision of Hansen J in *Jones v Purcell* (unreported, 19/7/95). The amending Act was Act No. 100 of 1995. Section 58(2) (as amended) provides:

"A document purporting to be a certificate in the prescribed form 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 ss(1) and, subject to ss(2E) is conclusive proof of—

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

(b) the fact that the instrument used was a breath analysing instrument within the meaning of this Act; and [5] (c) - (f) Not relevant."

By way of background to the question of law for determination in this appeal it is necessary to explain that a certificate of analysis is printed out by a "breath analysing instrument" of the type defined in s3. In fact four copies of a certificate are printed out by the instrument. Regulation 314 of the *Road Safety (Procedures) Regulations* 1988 provides that a certificate given in accordance with s55(4) is in the prescribed form if it includes -

"(a) The serial number of the instrument; and

(b) The sample number; and

(c) The location of the test; and

(d) The name and date of birth of the person tested; and

- (e) The surname of the operator; and
- (f) The results of the self tests conducted before and after the analysis of the sample provided; and
- (g) The results of the zero tests conducted before and after the analysis of the sample provided; and
- (h) The date and time the test was taken; and
- (i) The concentration of alcohol in grams per 100 millilitres of blood indicated by the analysis to be present in the blood of the person tested."

[6] The document admitted in evidence by the learned Magistrate was in the prescribed form and no issue arises about the contents of the document. Mr Murphy's submission is that s58(2) should be construed as follows: Firstly, that the word "purporting" only governs the words "a certificate in the prescribed form". Secondly, that before "a document purporting to be a certificate in the prescribed form" is admissible in evidence, evidence must be adduced to prove a "breath analysing instrument" as defined was used to produce the document. Thirdly, that in the absence of such evidence the "conclusive proof" provisions of paragraphs (a) to (f) of s58(2) cannot be relied upon by the prosecution. In my opinion, this construction of s58(2) is erroneous. The sub-section is concerned with the admissibility of one item, "a document", which has the appearance of "a certificate in the prescribed form produced by a breath analysing instrument". If the document produced to the Court has the appearance of a certificate in the prescribed form produced by a breath analysing instrument it is admissible in evidence and provides conclusive proof of, *inter alia*, "the facts and matters contained in it; and the fact that the instrument used was a breath analysing instrument within the meaning of this Act." However, should the accused person give notice in writing to the informant not less than 28 days before the hearing that he/she requires the person giving the certificate to be called as a witness or that he/she intends to adduce evidence in rebuttal of any such [7] fact or matter the conclusivity of the facts and matters in paragraphs (a) to (f) will not apply.

The word "purporting" in ss(2) is a plain English word meaning: claiming or appearing. Were it necessary, I would accept the construction of ss(2) proposed by Mr Silbert of counsel who appeared for the defendant that "purporting" governs not only the words "a certificate in the prescribed form" but also the words "produced by a breath analysing instrument". However, I am clearly of the opinion that the intended meaning of the sub-section is that the words "purporting to be a certificate in the prescribed form produced by a breath analysing instrument" relate to one item, "a document".

The narrow construction of the sub-section advanced by Mr Murphy would render otiose para (b) in ss(2). The purpose of s58 is to facilitate proof of the concentration of alcohol indicated by a breath analysing instrument. The construction I have placed upon ss(2) is consistent with one of the purposes of Part 5 stated in s47(c) "to 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". When the legislature recently amended ss(2) of s58 consequent upon the decision in *Jones v Purcell* it is unreasonable to suppose that the legislature intended to narrow the admissibility of a certificate of analysis. On the contrary, I consider that the legislature probably intended to further facilitate the admission of a document having the appearance of being produced by a breath analysing instrument. [8] The question of law should be answered in the affirmative. For these reasons the appeal will be dismissed with costs to be taxed and paid by the plaintiff.

APPEARANCES: For the Plaintiff: Mr B Murphy, counsel. Solicitors: Slades & Parsons Pty. For the Defendant: Mr G Silbert, counsel. Solicitor: Victorian Government Solicitor.