

10/69

## SUPREME COURT OF VICTORIA

**ZERVAAS v RALPH**

Starke J

6 October 1969

**MOTOR TRAFFIC – DRINK/DRIVING – OPERATOR FAILED TO MENTION IN EVIDENCE THAT HE CORRECTLY OPERATED THE BREATH ANALYSING INSTRUMENT – CHARGE DISMISSED BY COURT – WHETHER COURT IN ERROR: CRIMES ACT 1958, S408A.**

**HELD:** Order nisi absolute. Dismissal set aside. Remitted to the Court to be heard by another Bench.

1. The police officer who tested the defendant was called as a witness and gave evidence in the witness box of various matters, but did not give evidence either to the effect that the instrument was in proper working order or that it was properly operated by him. However, a certificate purporting to be a certificate in the form of schedule 7A referred to in ss2(a) was tendered in evidence. That certificate insofar as it was relevant, set out the blood/alcohol content of the defendant's breath at .185.

2. The words 'with respect to the breath analysis concerned' were words of wide and general application, and the proper operation of the machine by the informant and the fact that it was in proper working order were both matters which were with respect to the breath analysis and in those circumstances the certificate in the form of schedule 7A having regard to the provision of subsection 2(a) covered the operation of the machine within the meaning of the sub-section and the certificate was *prima facie* evidence of those facts.

*Durston v Mercuri* [1969] VicRp 62; [1969] VR 507, applied.

3. In those circumstances, there was evidence that the machine was in proper working order and there was evidence that it was properly operated by the police informant.

**STARKE J:** On 15 April 1969 the defendant, who is the respondent before me, was charged at the Court of Petty Sessions at Northcote, with three offences, namely, (1) driving a motor car on a highway carelessly, (2) failing to notify the officer in charge of the Motor Registration Branch of change of address and forward the current licence within 7 days of such change, (3) driving a motor car whilst the percentage of alcohol in the driver's blood expressed in grams per hundred millilitres of blood was more than 05 percent.

The defendant was convicted of the first two offences and they do not concern me in any way. However, the information for exceeding .05 maximum blood alcohol, was dismissed and the Chairman of Bench in dismissing the information said this

"The information for exceeding .05 blood alcohol will be dismissed and the defendant will be convicted on the other two charges".

On 26 May 1969 Master Brett granted an order nisi to review the dismissal of the information relating to the .05 blood/alcohol. The two grounds which concern me are grounds 3 and 4; 3 being "The Court was wrong in law in holding that the prosecution's case was defective in that the operator failed to mention in evidence-in-chief that he correctly operated the machine", and 4 "The Court should have held there was *prima facie* evidence that the operator correctly operated the machine".

The relevant statutory provisions at the time were s408(A) of the *Crimes Act*, and in particular sub-sections (2), and (2)(a) which was introduced by Act No.7546 of 1967. Section 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 7(A) 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 2(a) provides.

"A copy of any certificate given in accordance with the provisions of sub-section (2) and purporting to be signed by a 'person authorised by the Chief Commissioner of Police to operate an analysing instrument shall be *prima facie* evidence in any proceedings referred to in sub-section (1) of the facts and matters therein stated with respect to the breath analysis concerned and the delivery of a certificate thereof to the accused person, 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".

In this case the police officer who tested the defendant was called as a witness, indeed, was the informant, and is the applicant before me. He gave evidence in the witness box of various matters, but did not give evidence either to the effect that the instrument was in proper working order nor that it was properly operated by him. However, a certificate purporting to be a certificate in the form of schedule '7'A referred to in ss2(a) was tendered in evidence. That certificate insofar as it is relevant, set out the blood/alcohol content of the defendant's breath at .185 and proceeded:

"And I further certify that the said instrument was in proper working order and properly operated by me in accordance with the regulations and then I delivered this certificate to the person whose breath was analysed".

The short point here in my judgment is whether or not the certification by the informant that the 'instrument was in proper working order', and 'was properly operated by him', amount to facts and matters with respect to the breath analysis.

Now Mr Segal for the defendant has argued that for various reasons, the certificate as to these two matters, was not a certificate with respect to the breath analysis. Firstly he points to the fact that the words "With respect to the breath analysis concerned and the delivery of a certificate thereof to the accused person" were repealed subsequent to the hearing of this information and he suggests that the reason for this repeal was that until such repeal took place, the only matter that could be taken as evidence of the facts and matters contained in the certificate, were those matters relating to the actual percentage of blood alcohol in the defendant's blood.

I am unable to speculate in this way. I think there has been quite a little authority relating to these matters in the Full Court in recent months and I am not able to draw any assistance in interpreting ss2(a) in the way that Mr Segal has urged me to do.

Mr Segal also submits that ss(b) of s406(A) supports his argument. I am unable to gain any benefit whatever from this sub-section. This sub-section is directed to formalities of proof in relation to oral evidence and has no relation whatever to the certificate.

In my view, the words 'with respect to the breath analysis concerned' are words of wide and general application, and the proper operation of the machine by the informant and the fact that it was in proper working order are both matters which are with respect to the breath analysis and in those circumstances, in my judgment, the certificate in the form of schedule '7A' having regard to the provision of subsection 2(a) covers the operation of the machine within the meaning of the sub-section and the certificate is *prima facie* evidence of those facts. In those circumstances I am of opinion that there was evidence that the machine was in proper working order and there was evidence that it was properly operated by the defendant.

I am fortified in the view it which I have arrived by the decision of Menhennitt J in *Durston v Mercuri* [1969] VicRp 62; [1969] VR 507. At p513 His Honour firstly sets out the ground of review with which he is considering; he says this:

"There was no sufficient evidence on which the Magistrate could properly have held that the breath analysing instrument which was used to make an analysis of the defendant's breath, was on that occasion in proper working order or was properly operated. I have held that the copy certificate was properly admitted in evidence to prove the contents of the original. Once admitted in evidence, it was

also admissible for the purposes of s408(A)(2)(a) of the *Crimes Act*. That sub-section provides that the copy of the certificate should be *prima facie* evidence and any proceedings referred to in ss(1) of the facts and matters stated therein with respect to the breath analysis concerned. Part of certificate which follows the language of schedule 7 is in the following terms:

'I further certify that the said instrument was in proper working order and properly operated by me in accordance with the regulations.

Accordingly, there was before the Magistrate *prima facie* evidence that the breath analysing instrument was on the occasion in question, in proper working order and was properly operated. It was therefore open to the Magistrate to hold to that effect".

With those observations I respectfully agree. Accordingly, the order nisi will be made absolute and I think the proper thing I should do is send the matter back to the Court of Petty Sessions to be heard before another Bench. I order that the appellant's costs be taxed and when taxed paid by the respondent, not exceeding the sum of \$120. ... [I]n the exercise of my discretion I refuse an indemnity certificate.

**APPEARANCES:** For the informant/applicant Zervaas: Mr J Larkins, counsel. Thomas F Mornane, Crown Solicitor. For the defendant/respondent Ralph: Mr H Segal, counsel. William M Serong, solicitor.

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