

15/73

## SUPREME COURT OF VICTORIA

**QUIGLEY v GOULD**

Anderson J

21 May 1973

**MOTOR TRAFFIC – DRINK/DRIVING – EXCEED .05 (.135BAC) – CERTIFICATE OF ANALYSIS TENDERED IN EVIDENCE SHOWING BREATH TEST TAKEN AT 12.50AM – POLICE INFORMANT GAVE EVIDENCE THAT TEST WAS CONDUCTED AT 1.35AM – WHEN CHALLENGED INFORMANT STATED THAT HIS NOTES SET OUT THE TIME AS 1.35AM – FURTHER THAT HE MUST HAVE CONFUSED THE TIME WITH THE READING OF .135 – MAGISTRATE ACTED ON THE CERTIFICATE AND IMPOSED A CONVICTION – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958 S81(A).**

**HELD: Order nisi discharged.**

**The Magistrate was entitled to accept the statement of time set out in the certificate as evidence upon which he could act and impose a conviction.**

***White v Moloney* [1969] VicRp 91; [1969] VR 705, applied.**

**ANDERSON J:** This is an order to review the decision of the Magistrates' Court, consisting of a Stipendiary Magistrate, at Brighton on 20 April 1972, when the defendant was charged with a breach of s81A of the *Motor Car Act*, in that he did drive a motor car at a time when the percentage of alcohol in his blood exceeded .05 percent, and the only issue that there is in defence turns upon a certificate of a test that was accepted in evidence, and the only point in regard to the certificate is one which depends upon certain evidence which is given as to the time.

The certificate itself, in its terms sets out that the breath analysis test was taken at 12.50am. The informant, however, in the course of his evidence, stated that the defendant submitted to an analysis of the breath at 1.35am and, after a submission had been made that the certificate did not comply with s80(f) sub-section (ii) of the *Motor Car Act* because the time set out was inaccurate, leave was given for the informant to be recalled, and he then stated that he had no independent recollection of the time when the test was taken, but that his notes set out the time as 1.35am, and that he had – or must have confused – the breathalyser reading of .135 with the time when the test was taken.

It is submitted by Mr Briglia, under s80(f) sub-section (ii) the certificate must set out not only the percentage of alcohol, indicated on the analysis but the date and time at which the analysis was made; and that that Section requires an accurate statement in the certificate of the actual date and the actual time at which the analysis was made, and if that date and time are, in fact, not accurate in the certificate, then there has been a non-compliance with that sub-section (ii) and, consequently, the evidence of the percentage of alcohol present in the blood at the time is inadmissible under sub-section (1) and any document, purporting to be a copy of the certificate, in accordance with sub-section (ii) is inadmissible and is not *prima facie* evidence for the purposes of sub-section (iii).

The first matter to be determined, however, is a simple matter of fact before one comes to the question of interpretation of section (iv) and that is whether there was evidence before the magistrate that the time set out in the certificate was an accurate statement of the time, as Mr Briglia contends, as required under sub-section (ii). As Mr Graham has indicated, the only evidence as to time is the evidence of the informant and the statement in the certificate itself, if that can be accepted as *prima facie* evidence as to one of its own conditions as to admissibility.

While there are certain logical difficulties, it seems to me in accepting as evidence on an issue of admissibility statements in the document itself, the admissibility of which is in question, it seems to have been accepted by the decision in *White v Moloney* [1969] VicRp 91; [1969] VR 705 that a document purporting to set out these matters is itself *prima facie* evidence in the proceeding

which would refer not merely to the question of guilt or otherwise of the offence, but also to the preliminary question as to admissibility of evidence directed to that issue, and once one gets to the position the magistrate was entitled to accept the statement of time set out in the certificate as evidence upon which he could act even in relation to the issue of admissibility, then it seems to me that Mr Briglia's only hope of succeeding in this application would be if he were to satisfy me that the evidence of the informant *viva voce* evidence of the informant having been given as to time, that the magistrate, as a matter of law could not accept the time given in the certificate as the time at which the test was in fact taken.

I am unable to see any sound basis upon which I could be so satisfied. There was an explanation and as given is not fundamentally unlikely to explain the time which was given by the informant in evidence, and if the magistrate, in consequence of that explanation was not prepared to accept the informant's evidence as to the time when the test was taken, then the statement in the certificate assumed a much greater significance – and, in my view, there is no reason why the magistrate should not accept the statement in the certificate as the time on which it was given in the absence of any evidence at all other than evidence of the informant, to suggest that that was not the correct time.

In those circumstances, it seems to me that the magistrate was entitled to find that the time set out in the certificate was, in fact, the time at which the test was taken and that, consequently, the certificate did comply with sub-section (ii) and that it was not inadmissible but, on evidence contained in the certificate, the magistrate was entitled to record a conviction. The order nisi consequently will be discharged. I will make the order that costs be taxed within the statutory limit.

**APPEARANCES:** Mr D Graham appeared on behalf of the Informant Quigley. Mr Briglia appeared on behalf of the defendant Gould.

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