

26/71

## SUPREME COURT OF VICTORIA

**HASSELL v DAY**

Smith J

15 November 1971

**MOTOR TRAFFIC – DRINK/DRIVING – DEFENDANT UNDERWENT BREATH TEST – OFFICER REQUIRED TO SIGN THE CERTIFICATE AND DELIVER IT TO THE PERSON WHOSE BREATH HAD BEEN ANALYSED – CERTIFICATE HANDED TO THE DRIVER'S HUSBAND – NOT HANDED TO DEFENDANT PERSONALLY – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: MOTOR CAR ACT 1958, s81a.**

**HELD: Order nisi dismissed with costs.**

1. There was, on the evidence, no attempt to put the certificate into the defendant's personal possession and there was no evidence that she, by passivity with knowledge of what was going on, or in any other way, authorised her husband to receive the certificate on her behalf.

2. No doubt the document was likely to be brought to her notice at some later stage and no doubt the Police Officers assumed that that would happen, but it was clear that there was no evidence that the document was either delivered to her personally, or delivered to anyone who had authority to receive it on her behalf.

3. Accordingly, the order nisi was dismissed with costs.

**SMITH J:** This is the return of an Order Nisi to review a decision of the Magistrates' Court at Brighton on 11 May 1971, dismissing an information laid by a Police Officer against one Dorothy Selma Day, charging that contrary to s81A of the *Motor Car Act* she drove a motor car whilst the percentage of alcohol in her blood expressed in grams per hundred millilitres of blood was more than 05 per centum.

The only point raised on the Order Nisi is that the Magistrate acted upon an erroneous construction of s408A of the *Crimes Act* 1958 which provides that 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 7A.

In the present case the only evidence as to the percentage of alcohol in the blood was provided by a certificate in the form of the Schedule 7A which was put in evidence at the hearing. On behalf of the defendant the point was taken that there had been no delivery of the certificate to the defendant after her breath had been analysed. The magistrate upheld that submission and in consequence dismissed the information.

Having regard to the circumstances in which sub-section (2) of s408A must, at times, come to be acted upon, there may be difficulty in defining the precise limits which were intended by the legislature to attach to the word "deliver" as used in the sub-section. In the present case, however; it does not appear to me that any problems of that kind arise because here I consider that, on the evidence, it was clear before the Magistrate that there had in no sense been any delivery to the defendant of the certificate.

Taking the version in the answering affidavit, which it is conceded is the proper course for me to adopt in the present case, what happened in relation to the certificate was this; the defendant was crying and her husband had his arm around her; the Constable who had prepared the certificate came up behind her back and handed it to the husband; the husband asked "What do I do with this?"; and a Constable who was the informant said, "You can please yourself, you can tear it up, frame it or throw it in the garbage can."

There was, on the evidence, no attempt to put the certificate into the defendant's personal possession and there was no evidence that she, by passivity with knowledge of what was going on, or in any other way, authorised her husband to receive the certificate on her behalf. No doubt, as the Magistrate said, the document was likely to be brought to her notice at some later stage and no doubt the Police Officers assumed that that would happen, but in my view it is clear that there was no evidence that the document was either delivered to her personally, or delivered to anyone who had authority to receive it on her behalf. The point may not be a very meritorious one, but it seems to me to be clearly well founded in law. The result is that the Order Nisi is dismissed with costs.

**APPEARANCES:** For the applicant Hassell: Mr P Heerey, counsel. John Downey, State Crown Solicitor. For the respondent Day: Mr P Martin, counsel. Mr DL McNamara, solicitor.

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