**08/72**

**SUPREME COURT OF VICTORIA**

# *WINTER v KOST; MORLEY v WITHERIDGE*

**Crockett J**

**9 May 1972**

**MOTOR TRAFFIC – DRINK/DRIVING CHARGES – CERTIFICATES OF ANALYSIS TENDERED IN EVIDENCE – NO CERTIFICATE THAT THE OPERATOR WAS AUTHORISED BY THE CHIEF COMMISSIONER OF POLICE WAS TENDERED IN EVIDENCE – SUBMISSIONS MADE THAT CASES SHOULD BE DISMISSED – SUBMISSIONS UPHELD – CHARGES DISMISSED – WHETHER MAGISTRATES IN ERROR: *CRIMES ACT* 1958, S408A; *MOTOR CAR ACT* 1958, SS80F, 81A(1).**

**HELD: Orders nisi discharged in each case.**
**Having regard to the statutory provisions in operation at the time of the charges being heard, if reliance was sought to be made upon the evidence of a breath analysis, it was not possible to achieve a successful prosecution of persons who had provided a breath sample for analysis before 1 August 1971 and the prosecution of whom had taken place after 1 August 1971 but prior to 30th November 1971.**

**CROCKETT J:** I have in these cases to deal with the return of two orders nisi to review decisions of magistrates. The point upon which the orders nisi were granted is precisely the same in each case, and the magistrate in each instance upheld the submission of the respondent/defendant. By consent, the two orders to review have been heard together by me.

In each case the respondent was charged with the offence created by s81A(1) of the *Motor Car Act* 1958. That offence is to drive a motor car while the percentage of alcohol in the blood of the driver expressed in grams per 100 millilitres is more than .05 per centum.

Each respondent, after apprehension had been taken to a nearby police station, one at Ararat and the other at Prahran, where a breath analysis test was conducted. In neither case was the constable who conducted the test and who subsequently completed the certificate setting out the results of the test called to give evidence in the ensuing Magistrates' Court proceedings.

In each set of proceedings the informant sought to rely on evidentiary provisions which, it seems, at the time of each hearing, believed to be found in s408A of the *Crimes Act* 1958. So far as relevant, those provisions in their final amended form before that section was repealed (the fact and circumstances of which I shall shortly hereafter refer to) were as follows:

> "(1) Where the question whether any person was or was not under the influence of intoxicating liquor or where the question as to the percentage of alcohol in the blood of any person at the time of an alleged offence is relevant (a) ... (b) ...
> (c) upon any hearing of an offence against s80A, s80B, s81A or s82 of the *Motor Car Act* 1958—
> then without affecting the admissibility of any evidence which might be given apart from the provisions of this section, evidence may be given of the percentage of alcohol indicated to be present in the blood of that person by a breath analysing instrument operated by a person authorized in that behalf by the Chief Commissioner of Police, and the percentage of alcohol so indicated shall, subject to compliance with the provisions of sub-section (2) of this section, be evidence of the percentage of alcohol present in the blood of that person at the time his breath was analysed by the instrument.
>
> (2) 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 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.
>
> (2A) A document purporting to be 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 breath analysing instruments shall be *prima facie* evidence in any proceedings

> referred to in sub-section (1) of the facts and matters stated therein 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.
>
> (3)(a) A certificate purporting to be signed by the Chief Commissioner of Police that a person named therein is authorised by the said Chief Commissioner, to operate breath analysing instruments shall be admissible in evidence of the authority of that person."

In each case a certificate to the effect of schedule 7A of the *Crimes Act* had been completed as is provided for by sub-section (2). That certificate was at each hearing tendered by the informant and received in evidence subject to objection. In neither case was a certificate as referred to in sub-section (3)(a) put in evidence.

At the closing of the informant's case in each of the proceedings, counsel for the respective defendants successfully submitted that there was no proof of an essential ingredient as the informant's case, namely, the authority of the signatory of the certificate to operate breath analysing instruments".

It might be added that in the case of *Winter v Kost* it appears that the magistrate would have been prepared to allow the case to be re-opened to admit a certificate signed by the Chief Commissioner of Police had the certificate been available. As it was not, the information was dismissed.

Each informant obtained an order nisi to review the order of dismissal on grounds identically expressed in each case as follows:

> "1. That the Magistrates' Court was in error in holding that before a copy certificate in the form of Schedule 7A of the *Crimes Act* 1958 (as amended) was admissible in evidence pursuant to sub-section (2A) of s405A of the said Act, it was necessary for the informant to prove by other admissible evidence —
>
> (a) that the signatory of the certificate was actually authorised by the Chief Commissioner of Police to operate breath analysing instruments; and
>
> (b) that the certificate was signed by a person who was actually authorised by the Chief Commissioner of Police to operate breath analysing instruments.
>
> 2. That the Magistrates' Court should have admitted in evidence the copy certificate which was tendered on behalf of the informant in the circumstances deposed to in the said affidavit and should have convicted the defendant accordingly of the offence with which he was charged upon the said information."

I was told that there are other cases in which the same point has been successfully taken for a defendant and that proceedings for review have been commenced. Also, that there is a great number of other prosecutions being held in abeyance whilst awaiting a ruling of this court on this point. The authorities responsible for the administration of this legislation, I was informed, were therefore anxious to obtain authoritative guidance on the point raised in the orders nisi. Perhaps they are, but it is difficult to understand the existence of such concern as presumably the ground for making such a submission could be removed by the prosecution simply putting in evidence a certificate of the Chief Commissioner of Police and relying upon the sub-section that renders such a certificate admissible in evidence as proof of the authority of the breath analysing instrument operator.

At all events, the rights and interests of the two defendants are, of course, of no less concern than those of informant. That concern involves the maintenance of the dismissal of the informations against them. If they can uphold those dismissals on any ground other than that actually taken in the courts below, then they are free to do so. This in fact was attempted to be done before me by counsel who appeared for the defendant Kost by reliance upon an argument that if successful, would equally compel the discharge of the order nisi in the case of the defendant Witheridge who did not appear before me either personally or by counsel. In fact, Mr Hassett who appeared for the defendant Kost to show cause, relied upon yet another submission peculiar to his client to the effect that the dismissal of the information was justified on the ground of absence

of oral proof of the signing by the breath analysing instrument operator of the certificate tendered in evidence. This submission, in my view is without foundation and need not again be referred to.

The principal contention relied upon by Mr Hassett to justify the order of the magistrate, apart from the ground upon which the magistrate actually relied, is one that logically, it appears to me, should be examined and ruled upon before turning to the grounds of the order nisi. This I now proceed to do. In order to appreciate the significance of counsel's contention it is essential to set out certain relevant dates. These are as follows:

Morley v Witheridge: The offence was alleged to have occurred on 4 July 1971. The information was laid on 22 July 1971 with the summons returnable on 17 August 1971 and the hearing actually taking place on 31 August 1971.

Winter v Kost: The offence was alleged to have occurred on 17 July 1971. The information was laid on 10 August 1971 and the hearing took place on 19 August 1971 being the return date of the summons.

As I have already said all concerned appear to have proceeded at each hearing as if s408A of the *Crimes Act* was still in force. In fact that section was repealed by s11 of the *Motor Car (Driving Offences) Act* 1971, being Act No 8143 assented to on 4 May 1971 and which came into force on 1 August 1971. However, the same Act introduced a similar section into the *Motor Car Act* 1958 as from 1 August 1971. That section is now s80F and the schedule referred to in sub-section (2) is the Seventh Schedule of that Act. It may be observed that whilst the evidentiary provisions of the former s408A are faithfully reproduced in s80F the entire section is not simply lifted unaltered from one Act to another. Occasion was taken in the translation of those provisions from the one Act to the other substantially to enlarge the section. For instance, s80F contains (whereas s408A did not) provision for submission of motor car drivers to preliminary breath tests, and it also enlarges the grounds upon which the provision of a breath sample may legitimately be avoided.

Now, at the time of each of the hearings the prosecution wished to prove the percentage of alcohol in the blood of the respective defendants by producing a copy certificate containing such information. The documents in question could not be given in evidence by virtue of s408A(2A) of the *Crimes Act*. At the time of the hearing there was no such section. So counsel for the informants, on the return of the orders nisi, argued that the documents could be made evidence by virtue of the like power conferred in the equivalent sub-section of the relevant *Motor Car Act* section, namely sub-section (3). But the documents were not, of course, brought into existence by reason of any legislative power or authority contained in sub-section (3) of s80F, or any other part of that section, because that section did not exist when the certificates in question were brought into existence. By reason of these considerations, counsel showing cause contended that the documents were denied any evidentiary value. On the other hand, counsel moving the orders absolute pointed out that s80F(3) speaks of a "certificate given in accordance with the provisions of sub-section (2)".

It plainly was not given pursuant to sub-section (2). As pointed out, that sub-section did not exist at the material time, But "in accordance with" is different from "in pursuance of". It may be sufficient if the certificates prove at the time of the hearings to be "in accord with" the provisions of sub-section (2) – that sub-section then being in existence.

Support for this view may be found in some observations of the Full Court in *White v Moloney* [1969] VicRp 91; [1969] VR 705 at 710. The Full Court being concerned with the question whether a copy certificate purported to be a copy of a document that was in accordance with sub-section (2) said that it was necessary to look at both the copy certificate and the sub-section itself (although, of course, the court was then speaking of s408A).

If it is to be seen on such an examination that the copy certificate fulfils the requirements of sub-section (2) then it may be said that the copy certificate is what it purports to be, namely, a copy of a certificate given in accordance with that sub-section. In *White v Moloney* there was no doubt that if the copy certificate was in accordance with sub-section (2) of s408A, it was a copy of one <u>given</u> in accordance with the same sub-section.

In the present cases, assuming (but not for the moment deciding) that such a comparison may reveal that the copy certificates are in accordance with sub-section (2) of s80F, does it follow that the originals of those copies were given in accordance with that sub-section? For myself, I find it difficult to understand how something may be given in accordance with a non-existent provision, even though it may subsequently prove, when the provision comes into existence, that that which was earlier given is in fact in accordance with (ie. fulfils the requirements of) such provision.

Accordingly, it would not have been, in my opinion, reasonably open to the magistrates had they addressed themselves to this point to find that the certificates tendered were admissible.

Further, could it be said, it being contended by Mr Hassett that it could not, that on making such an examination to which I have just referred, the originals of such copy certificates were shown to fulfil the requirements of, ie be in accordance with, the provisions of sub-section (2) of s80F. One of the requirements of that sub-section is that there shall be signed and delivered to the person whose breath has been analysed a certificate in or to the effect of Schedule 7 of the percentage of alcohol indicated by this analysis to be present in his blood and of the date and time of the making of the analysis. Yet, strangely enough, the form of certificate set out in Schedule 7 is designed to certify a great many other things. It is in the area of the scheduled draft form that goes beyond that which sub-section (2) requires to be certificated that there is to be found in each of the copy certificate the informant relies upon, such statements, as for example, the operator certifying that he is authorised under s408A of the *Crimes Act* 1958 to operate a breath analysing instrument.

There are other similar instances in which facts are certified by reference to s408A of the *Crimes Act*. Mr Tadgell, appearing for the informants to move the orders absolute, persuasively argued that such references are not such as to prevent the certificates from being to the effect of Schedule 7 of the *Motor Car Act*. Mr Tadgell pointed out that there is no distinction in reality between the authorisation conferred by the two statutes because they both provide an identical method of conferment of authority, namely authorisation by the Chief Commissioner of Police, and that there is no other means of becoming authorised.

Such an argument may be applied to the remaining similar references to s408A with the exception of a reference to the breath analysis instrument that was used. In that part of the certificate there is a reference to regulations made under s408A. Those regulations are not in evidence nor are those made under s80F – if in fact there were any at the date of the hearings. But in relation to this matter, Mr Tadgell called in aid s80F(14). That sub-section is in these terms:

> "In this section breath analysing instrument means apparatus of a type approved for the purposes of this section or any corresponding previous enactment by the Governor-in-Council by notice published in the *Government Gazette* for ascertaining by analysis of a persons's breath what percentage of alcohol is present in his blood."

In the result, counsel was able to point to there being no demonstrable or possible distinction or variation between any of the matters certified, regardless of whether they were certified under the *Crimes Act* or the *Motor Car Act*. Thus, it was contended that the certificate, a copy of which was before the court, given under the powers conferred by the *Crimes Act*, was to the effect of Schedule 7 of the *Motor Car Act*.

Despite a certain attraction that this argument has, I do not think I should accede to it. There remains something startling about the proposition that, for example, certification by an operator that he is authorised under one Section of an Act of Parliament, can be said to be to the effect of a statutory schedule that requires that the certification be as to authorisation under a different Act of Parliament. This is not the less so when the relevant section of the former Act of Parliament is not even in existence when the occasion for curial examination of the certificate arises.

In the result, I feel constrained to conclude that for this reason also the magistrate would be prevented from accepting the copy certificates in evidence. The result, of course, is that vital proofs of the informant's case in each prosecution would be absent, compelling the magistrate in each instance to dismiss the information as indeed each did for the quite different reason to

which I have already referred. The view that I have expressed renders it unnecessary to examine or rule upon the validity of the magistrate's reasons for ruling that the information be dismissed, and accordingly I forbear from doing so.

I should add that I am fortified in coming to the conclusion that I have expressed by reason of two considerations, the first is that the provisions that have fallen for construction, although themselves only evidentiary, are so closely related to and integrated with penal provisions that they should receive the strict construction applicable to penal enactments.

If the interpretation I have employed be not that which the ordinary rules of construction would produce, then at least I think it may be said that the true meaning is one of doubt or ambiguity. Accordingly, in construing the provisions that have been referred to, the defendant should be entitled to the benefit of that doubt.

The second consideration is this. The *Motor Car (Breath Tests) Act* 1971, being Act No 8197 was enacted on 30 November 1971. By s4 it is provided that: "After sections 80G of the Principal Act there shall be inserted the following section—

> "80H The provisions of s408 and s408A of the *Crimes Act* 1958 in force immediately before the commencement of the *Motor Car (Driving Offences) Act* 1971 with respect to any sample of blood or any sample of breath taken or furnished in pursuance of those provisions for analysis shall continue to apply to and in relation to those samples and in relation to any proceedings referred to in those sections in the same manner and to the same extent as if those sections had not been repealed."

Thus a somewhat belated transitional provision was introduced into the *Motor Car Act* in order to preserve cases subject to the temporal difficulties that apply to the two cases with which I am concerned from the fate that I have concluded must befall them.

It has not, of course, been suggested that s80H of the *Motor Car Act* can operate retrospectively so as to assist the informants in the present cases. I agree with Mr Tadgell that the mere fact itself of the enactment of such a transitional provision does not mean that the informants were necessarily unable in the present circumstances to establish their cases. The task of interpretation and construction of the provisions remains to be undertaken. But I think that in performing that task this much assistance is gained, namely, that in enacting Act No 8197 Parliament must have considered that the legislative previsions as they stood prior to 30 November 1971 were at least of doubtful applicability to situations encompassed by the facts disclosed in the present two cases.

It would follow from the opinion I have expressed that it is not possible, if reliance is sought to be made upon the evidence of a breath analysis to achieve a successful prosecution of persons who have provided a breath sample for analysis before 1 August 1971 and the prosecution of whom has taken place after 1 August 1971 but prior to 30th November 1971.

The orders nisi will be discharged in each case with costs fixed at $200 in the case of *Winter v Kost*.

**APPEARANCES:** For the informant Winter: Mr RC Tadgell, counsel. Crown Solicitor. For the defendant Kost: Mr JT Hassett, counsel. Messrs Russell, Kennedy & Cook, solicitors. The defendant/respondent Witheridge was not represented by counsel.

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