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## SUPREME COURT OF VICTORIA

***BLAIN v WITTON***

Gillard J

19 March 1976

**MOTOR TRAFFIC – DRINK/DRIVING – DELIVERY OF SCHEDULE 7 CERTIFICATE – CERTIFICATE TENDERED IN EVIDENCE – EFFECT OF CERTIFICATE – CERTIFICATE STATED THAT IT WAS DELIVERED TO THE DEFENDANT 'ON THE SAID DAY' – TEST HELD AT 11:56PM – CERTIFICATE DELIVERED AT 12:04AM – CERTIFICATE COULD NOT BE DELIVERED ON THE SAID DAY BECAUSE THAT WOULD HAVE BEEN BEFORE THE OFFENCE HAD BEEN COMMITTED – CHARGE DISMISSED BY MAGISTRATES' COURT – WHETHER COURT IN ERROR: MOTOR CAR ACT 1958, S80F.**

On a charge of exceeding .05% blood alcohol, evidence was given of the breath test taken at 11.56 pm. on 29th January, that on completion of the test both copies of the schedule 7 were handed to informant who compared them and found them identical. No oral evidence was given of delivery. The certificate produced in Court indicated that delivery occurred at 12.04 am. 'on the same date'. The Justices upheld a submission that there was no proof that the copy produced in court was, in fact, a copy of the original certificate. Upon Order Nisi to review—

**HELD: Order absolute. Dismissal set aside. Remitted to the Magistrates' Court for re-hearing.**

1. Having regard to the provisions of s80F of the *Motor Car Act 1958* the statement as to the delivery of the certificate to the defendant became *prima facie* evidence. Accordingly, there were two statements in that piece of evidence. First of all, it stated that as soon as practicable after the completion of the breath analysis, the authorized operator delivered a certificate to the defendant and, secondly, that at 12.04 a.m., on the said day, she delivered the certificate to the defendant.

2. When one looks at the expression "on the said day" it must refer back to the 29th January 1975, being the date of the examination. It appeared that the examination was at 11.56 p.m. on the 29th January 1975. It was, therefore, reasonably apparent that the certificate was given at 12.04 a.m. not on the 29th January 1975, but on the 30th day of January 1975, the day of the certificate. In consequence, the ground advanced by the Justices for the dismissal of the information was rejected. They should have acted upon the statutory conditions to give evidentiary effect to the document. On its face it was clearly stated that the certificate was delivered to the defendant.

3. The Certificate stated that the delivery was made at 12.04 a.m. "on the said day". This was clearly erroneous and anybody reading the certificate would not give credence to that statement. The certificate was *prima facie* evidence and the court should look at the whole of that evidence, giving weight only to that portion of the evidence which it found acceptable. Accordingly, it could not be accepted that the certificate was delivered to the defendant at 12.04 a.m. on the 29th January 1975, at a time when the offence had not been committed.

4. Once the document purported to be a copy of the certificate, then it had an evidentiary value and it could not be rejected as a document merely because it contained some patent error.

**GILLARD J:** ... I have examined the document that was produced to the Magistrates, and despite the earnest argument of Mr Dane who has appeared here to show cause, I am satisfied that on its face it purports to be a Certificate of an Authorized Operator of Breath Analysing Instrument in accordance with the provisions of the *Motor Car Act*. Accordingly, under the provisions of s80F, sub-s(3) *Motor Car Act 1958* the document purporting to be a copy of the certificate and purporting to be signed by a person authorized by the Chief Commissioner of Police to Operate breath analysing instruments was *prima facie* evidence of the facts and matters stated therein. Under the provisions of that sub-section it was open to the defendant to give notice in writing to the informant in reasonable time in the circumstances before the hearing that he required the person giving the certificate to be called as a witness. I think it can be accepted that no such notice was given by the defendant.

Looking at the document produced, it sets out that on the 29th January 1975 at 11.56p.m. at North

Carlton police station the authorized operator analyzed a sample of the breath of the defendant by means of a breath analyzing instrument. It further sets out that the instrument indicated the quantity of alcohol present in the blood of the defendant at the time and place referred to was .170 grammes of alcohol per hundred millilitres of blood which expressed as a percentage is .170 per centum. The certificate further stated, and I quote:-

"That as soon as practicable after the completion of the breath analysis, namely at 12.04 a.m. on the said day I delivered this certificate to the said Wesley James Witton in accordance with the provisions of subsection (2) of the said section 80F."

Finally, the document is dated 30th day of January 1975 and purports to be over the signature of an authorized operator. Having regard to the provisions of s80F the statement which I have read out in full as to the delivery of the certificate to the defendant becomes *prima facie* evidence. Accordingly, I have really two statements in that piece of evidence. First of all, it is stated that as soon as practicable after the completion of the breath analysis, the authorized operator delivered a certificate to the defendant and, secondly, that at 12.04 a.m., on the said day, she delivered the certificate to the defendant.

When one looks at the expression "on the said day" it must refer back to the 29th January 1975, being the date of the examination. It appears that the examination was at 11.56 p.m. on the 29th January 1975. It is, therefore, reasonably apparent that the certificate was given at 12.04 a.m. not on the 29th January 1975, but on the 30th day of January 1975, the day of the certificate. In consequence, I reject the ground advanced by the Magistrates for the dismissal of the information. They should have acted upon the statutory conditions to give evidentiary effect to the document. On its face it is clearly stated that the certificate was delivered to the defendant.

In this court Mr Dane, however, sought to uphold the dismissal on the ground that there was no *prima facie* evidence of the fact of delivery. I do not accept such submission. The certificate sets out that it was delivered. It is true there is a difficulty arising from the time set out, but one must construe the document from its date when it was uttered. It was uttered on the 30th January 1975, it referred to an analysis which took place four minutes before midnight on the 29th — the day before; it sets out that as soon as practicable after that completion of the breath analysis the certificate was delivered to the defendant. The only reflection upon the evidence is that it stated the delivery was made at 12.04 a.m. "on the said day". In my view, this is clearly erroneous and anybody reading the certificate would not give credence to that statement. The certificate is *prima facie* evidence and the court looks at the whole of that evidence, giving weight only to that portion of the evidence which it finds acceptable. In my opinion, it could not accordingly be accepted that the certificate was delivered to the defendant at 12.04 a.m. on the 29th January 1975, at a time when the offence had not been committed.

Having regard to the views that I have expressed, in *Wiggins v Tainsh* [1973] VicRp 23; (1973) VR 245 at 247, and the views expressed by the Full Court in *White v Moloney* [1969] VicRp 91; (1969) VR 705 at p708, it seems to me that once the document purports to be a copy of the certificate, then it has an evidentiary value and it cannot be rejected as a document merely because it contains some patent error.

Earlier this week I had to determine whether a certificate was available as evidence since it did not, in the same clause as I read in this case, contain the then defendant's surname. I held that, in my view, that was a matter of error only and did not go to affect the admissibility of the certificate, but that the statements in the certificate had to be read in accordance with the whole tenor of the certificate. I believe the same process should be adopted in the present case.

Accordingly, the order nisi must be made absolute, the dismissal of the information set aside and the information remitted to the Magistrates' Court at Carlton for re-hearing. The defendant will have to pay the costs of the information, to be taxed. I grant a certificate to the defendant under the provisions of the *Appeal Costs Fund Act*.