49/79

SUPREME COURT OF VICTORIA

KNAGGS v COOK

McGarvie J

29 June 1979

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST ADMINISTERED – BAC IN EXCESS OF .05% – AT COURT HEARING APPLICATION BY PROSECUTOR TO TENDER DUPLICATE CERTIFICATE – OBJECTION BY DEFENCE COUNSEL – *VOIR DIRE* HELD TO DECIDE ADMISSIBILITY OF DOCUMENT – WHETHER MAGISTRATE SHOULD HAVE HELD A *VOIR DIRE* – "ADMISSIBLE" – FINDING BY MAGISTRATE THAT CERTIFICATE WAS NOT DELIVERED TO THE DEFENDANT – NO FURTHER EVIDENCE LED BY PROSECUTOR – SUBMISSION OF 'NO CASE' UPHELD – INFORMATION DISMISSED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, SS80F, 80G, 81A.

HELD: Order nisi absolute. Dismissal set aside. Remitted to the Magistrates' Court for determination in accordance with the law.

1. The word "admissible" may be used in two ways. It may be used to state whether evidence tendered in a court hearing is to be admitted into evidence. It may also be used to state whether evidence which has been admitted is admissible upon a particular issue in the case, or in other words, is competent to have probative value upon, the issue.

***Hughes v National Trustees Executors & Agency Company of Australasia Ltd* [1979] HCA 2; (1979) 143 CLR 134; 23 ALR 321; 53 ALJR 249, applied.**

2. Section 80F(1) of the *Motor Car Act* 1958 provides that before the evidence of the percentage indicated by the instrument can have probative operation as evidence which tends to establish that the defendant had more alcohol in his blood than .05 per cent another piece of evidence is required. The required other piece of evidence is evidence that the certificate was properly delivered.

3. Upon its natural interpretation the sub-section has two distinct effects. On the hearing of a charge it enables evidence to be given and admitted of the percentage of alcohol indicated by the instrument. That evidence may be given by tendering a certificate to the effect of Schedule seven or by the oral evidence of the operator or any other person who saw what the instrument indicated. It may be given in one or more of those ways. Once evidence has been given of the percentage of alcohol indicated by the instrument, that evidence is probative of the percentage of alcohol present in the blood of the defendant if, and only if, there is also evidence which establishes the proper delivery of the certificate.

***Ross v Smith* [1969] VicRp 51; (1969) VR 411;**
***Tampion v Chiller* [1970] VicRp 46; (1970) VR 361; and**
***Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596, considered.**

4. From an interpretation of the words and the structure of the provisions themselves, the admission into evidence of the duplicate certificate proposed to be tendered by the prosecutor did not depend upon its being established that the original certificate was properly served on the defendant. It follows that the objection which was taken to the admission of the duplicate certificate should have been over-ruled without the holding of a *voir dire*.

McGARVIE J: I have before me an order to review a decision of the Magistrates' Court at Frankston made by a Magistrate on 20th June 1978, dismissing a charge that the respondent, on 2nd June 1978, drove a motor car while the percentage of alcohol in his blood was more than .05 per cent. The charge was for an offence against s81A of the *Motor Car Act* 1958, which provides by sub-section (1):

> "Any person who drives a motor car while the percentage of alcohol in his blood expressed in grams per one hundred millilitres of blood is more than .05 per centum shall be guilty of an offence and shall be liable in the case of a first offence to a fine of not more than $100 or in the case of a second or any subsequent offence to a fine of not more than $200 or to imprisonment for a term of not more than one month."

Section 80F of the Act contains these provisions:

"(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—
(c) upon any hearing for an offence against … section 81A … 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 the person authorised 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) be evidence of the percentage of alcohol present in the blood of that person at the time his breath is 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 seven 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.

(3) 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."

Section 80G provides:

"For the purposes of this Division if it is established that at any time within two hours after an alleged offence a certain percentage of alcohol was present in the blood of the person charged with the offence it shall be presumed until the contrary is proved that not less than that percentage of alcohol was present in that person's blood at the time the offence was alleged to have been committed."

Mr McDermott of counsel appears for the applicant, the informant in the Court below, to move the order absolute. Mr Aizen of counsel appears for the respondent, the defendant in the Court below.

While there are conflicts in the affidavits before me as to what occurred at the hearing, there is agreement as to the course of the main events which I now summarize. Sergeant Fussell appeared to prosecute, and Mr Aizen appeared for the defendant, who pleaded not guilty. Sergeant Knaggs gave evidence of observations of the defendant's driving of the motor car, and of a conversation with him. He required the defendant to undergo a breath analysis test. The defendant was then tested by a breath analysing instrument at the Frankston Police Station by Senior Constable Fuller, who is authorised to operate such an instrument. After the test Senior Constable Fuller, by use of carbon paper, completed and signed in triplicate a certificate in the form of Schedule seven of the Act. He handed the original to the defendant, and the duplicate to Sergeant Knaggs.

At this stage of the evidence the prosecutor produced the duplicate certificate to have it identified by Sergeant Knaggs and tendered in evidence. Mr Aizen objected to the admissibility of the document, informing the Court that the defendant alleged that the certificate had not been delivered to him as required by s80F(2). Mr Aizen made application for the Magistrate to hold a *voir dire* to enable him to decide upon the admissibility of the document sought to be tendered. The Magistrate acceded to that application. A *voir dire* was then held.

The affidavits before me are, in a number of respects, in conflict as to what occurred on the *voir dire*, It is common ground that eventually after hearing some evidence on the *voir dire*, the Magistrate announced that he was not satisfied that the certificate had been delivered to the defendant, and that therefore the document which the prosecutor was proposing to tender could not be tendered in evidence. There is conflict in the affidavits as to whether the Magistrate announced this as a final decision before or after the prosecutor applied to call further evidence on the *voir dire*. The Magistrate declined to hear the further evidence.

It is clear that in the Magistrates' Court the prosecutor, counsel for the defendant, and the Magistrate, all proceeded on the basis that unless the Magistrate was satisfied on the *voir dire* that the certificate was delivered to the defendant, no evidence as to the percentage of alcohol

indicated to be present in the blood of the defendant by the breath analysing instrument was admissible in evidence. On the hearing before me Mr Aizen submitted that that basis was correct in law.

The prosecutor had no evidence to show the percentage of alcohol in the blood of the defendant at the time of the alleged offence, other than the evidence of the percentage which was indicated by the instrument. Once the Magistrate had finally announced that he was not satisfied that the certificate had been delivered to the defendant and had declined to hear further evidence on the *voir dire*, the prosecutor took the view that there was no way in which the informant's case could be established, and he closed the case for the informant. Mr Aizen then submitted that there was no evidence on which the Court could be satisfied that the percentage of alcohol in the defendant's blood exceeded .05 per cent at the time of the alleged offence. The Magistrate upheld the submission and dismissed the information.

The grounds of the order nisi are:

> "(1) The discretion of the learned Stipendiary Magistrate miscarried in that he failed to hear and determine according to law upon a *voir dire* the question of the admissibility of a document, being the Seventh Schedule of the *Motor Car Act* 1958, No. B122009.
>
> (2) The decision of the learned Stipendiary Magistrate in dismissing the information was wrong in law."

The two issues that were argued before me were, first, whether in the circumstances and on the proper interpretation of the legislation an occasion arose for the holding of a *voir dire*; and second, if so, whether the *voir dire* was conducted in an appropriate and fair way.

The contest on the first issue is as to the proper interpretation of s80F(1). The basis on which the hearing at the Magistrates' Court proceeded, and the basic submission put to me for the respondent, was that no evidence could be admitted to show what percentage of alcohol was indicated by the instrument until it was proved that a certificate to the effect of Schedule seven was delivered to the defendant in accordance with s80F(2). The submission ultimately relied on by counsel for the applicant was that evidence to show what percentage of alcohol was indicated by the instrument is admissible in evidence, but that this evidence is no evidence of the percentage of alcohol present in the blood of the defendant at the time of analysis unless the delivery of the certificate is proved.

On the interpretation of the section I was referred to decisions of this Court. I will first consider its interpretation unaided by authority.

In my opinion, the form of sub-section (1) provides substantial support for the applicant's submission. The structure and effect of the sub-section is to provide that on a charge of driving a motor car with more than .05 per cent of alcohol in the blood:

> 1. evidence may be given of the percentage of alcohol in the blood indicated by a breath analysing instrument, and
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> 2. the percentage of alcohol so indicated shall, where a certificate to the effect of Schedule seven was delivered to the defendant in accordance with s80F(2), be evidence of the percentage of alcohol present the defendant's blood at the time his breath was analysed by the instrument.

The condition that the certificate should have been delivered, is applied only to the later part of the sub-section which enables the percentage indicated by the instrument to be evidence of the alcohol in the defendant's blood. The condition is not applied to the earlier part of the sub-section which enables evidence to be given of the percentage indicated by the instrument. If Parliament intended that the condition of delivery of the certificate was to apply also to the earlier part of the sub-section, the words imposing the condition would have been introduced earlier in the sub-section so as to cover that part.

If a penal provision is reasonably capable of two interpretations the interpretation which is most favourable to the defendant must be adopted: *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at 149; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470. With the present sub-section

no occasion arises for the application of that principle because, in my opinion, its words and structure make its intention clear and unambiguous. There is no natural reading of the section which would treat the condition of delivery of the certificate as applying to the earlier part of the sub-section.

A piece of evidence may be admissible for one purpose and not for another: *Berry v SA Marylebone Borough Council* (1958) Ch 406; [1957] 3 All ER 677; *Hughes v National Trustees Executors & Agency Company of Australasia Ltd* (High Court, 20th February 1979; [1979] HCA 2; (1979) 143 CLR 134; 23 ALR 321; 53 ALJR 249); *Wigmore on Evidence* (3rd ed, 1940) Vol 1, pp299-303, Section 13; *Halsbury's Laws of England*, 4th ed, Vol 17, P7, para. 5. It may be admitted into evidence if it is capable of having probative weight for any purpose and if the law allows it to be used in that way. A piece of evidence admitted into evidence for one purpose may, if other evidence is given, become admissible, in the sense of probative for another purpose.

The word “admissible” may be used in two ways. It may be used to state whether evidence tendered in a court hearing is to be admitted into evidence. It may also be used to state whether evidence which has been admitted is admissible upon a particular issue in the case, or in other words, is competent to have probative value upon, the issue. The second use of the word is indicated by the meaning given to it in *Bouvier's Law Dictionary* (3rd revision, 1914):

> "Pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding."

Thus in a criminal trial a jury may be told that a piece of evidence before them is or is not admissible on a particular issue or a particular charge or against a particular accused person.

In my view, sub-section (1) of section 80F deals with two different things. In the earlier part it enables evidence of the percentage indicated by the instrument to be admitted into evidence at the hearing. This is done by the words:

> "... 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 authorised in that behalf by the Chief Commissioner of Police ...”

Of itself the evidence which the earlier part of the sub-section enables to be admitted into evidence is probative of no more than the indication given by the instrument. It is admissible only for that limited purpose. In its later part, the sub-section gives the evidence so admitted a further probative operation if proper delivery of the certificate is established. Where this is established, the evidence becomes probative of the percentage of alcohol in the blood of the person at the time of analysis of his breath by the instrument. In other words, if proper delivery of the certificate is established, evidence admitted into evidence under the earlier part of the sub-section becomes admissible for the purpose of proving the percentage of alcohol in the person's blood. This is the effect of the words:

> "... the percentage of alcohol so indicated shall, subject to compliance with the provisions of sub-section (2) be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument."

It is not uncommon that a piece of evidence properly admitted into evidence does not ultimately operate as evidence of guilt because of the lack of some other piece of evidence: see *Cross on Evidence*, Second Australian Edition, p25, para 1.48. Often this is because a link in the chain of proof fails. On an assault charge the prosecution may call witness A to prove that at a particular time he saw the defendant drive away from his house in a particular car, and call witness B to prove that although he cannot identify the defendant, he saw that car drive from that house at that time and then saw the car stop and the driver get out and commit the assault. If B forgets his evidence or it is not accepted by the court and there is no other evidence, the link in the chain of proof fails. This does not mean that the evidence of A was wrongly admitted. It does mean that through the lack of B's evidence, A's evidence does not operate as evidence to establish that the defendant committed the assault. Similarly a complainant in a claim for damages for non-acceptance of goods agreed to be sold to the defendant, may rely on evidence of a contract made in a conversation between the complainant and a person alleged to have acted as agent of

the defendant. In the ordinary case, evidence of that conversation is admissible in evidence but will not operate to establish the liability of the defendant unless there is also evidence establishing that the other person acted with the actual or ostensible authority of the defendant.

In my view, s80F(1) provides that before the evidence of the percentage indicated by the instrument can have probative operation as evidence which tends to establish that the defendant had more alcohol in his blood than .05 per cent another piece of evidence is required. The required other piece of evidence is evidence that the certificate was properly delivered.

Upon its natural interpretation the sub-section has two distinct effects. On the hearing of a charge it enables evidence to be given and admitted of the percentage of alcohol indicated by the instrument. That evidence may be given by tendering a certificate to the effect of Schedule seven or by the oral evidence of the operator or any other person who saw what the instrument indicated. It may be given in one or more of those ways. Once evidence has been given of the percentage of alcohol indicated by the instrument, that evidence is probative of the percentage of alcohol present in the blood of the defendant if, and only if, there is also evidence which establishes the proper delivery of the certificate.

When evidence is tendered of the percentage of alcohol indicated to be present in the blood of the defendant by a breath analysing instrument, its admission into evidence does not depend on its being established that there has been proper delivery of the certificate. It is when the sufficiency of all the evidence against the defendant is being considered that it is necessary to consider whether the evidence establishes the proper delivery of the certificate. That is the position where a submission that there is no case to answer is made upon the close of the informant's case. It is also the position at the close of all the evidence when the court considers whether all elements of the charge have been established beyond reasonable doubt.

There is another consideration which gives support to the interpretation which I have placed upon the words of the sub-section. The portion of the Act dealing with driving a motor car after having taken intoxicating liquor (s80B to s82) pays careful attention to providing simple and practical methods of establishing by evidence that a defendant had alcohol in his blood at the relevant time. It would not be expected that Parliament would have intended s80F(1) to operate so that frequently prosecutions for offences such as that charged against this defendant would involve a *voir dire*, or a trial within a trial as it is sometimes called, in order to determine the admissibility in evidence of the indication by a breath analysing instrument of the percentage of alcohol in the blood of a defendant.

I therefore conclude from my interpretation of the words and the structure of the provisions themselves, that the admission into evidence of the duplicate certificate proposed to be tendered by the prosecutor did not depend upon its being established that the original certificate was properly served on the defendant. It follows that the objection which was taken to the admission of the duplicate certificate should have been over-ruled without the holding of a *voir dire*.

Mr Aizen relied on authority in support of his submission that the certificate sought to be tendered was not admissible in evidence until it was established on the balance of probabilities, the standard appropriate to a ruling on the admissibility of evidence, that the certificate had been properly delivered to the defendant.

I was referred to the decision of Winneke CJ in *Ross v Smith* [1969] VicRp 51; (1969) VR 411. The defendant there was charged with driving a motor car while the percentage of alcohol in his blood was more than .05 per cent. The justices convicted the defendant. The relevant grounds on which the informant obtained an order nisi to review were that the Court of Petty Sessions was in error in permitting' oral evidence to be given of the contents of a document purporting to be a certificate under s408A(2) of the *Crimes Act* 1958, the equivalent of s80F(2), and that the Court was in error in holding that there had been compliance with the sub-section. On the return of the order to review, counsel for the defendant submitted first that there was no evidence of the time when the certificate was delivered, so that it had not been shown to have been done as soon as practicable. Winneke CJ upheld this submission. In the course of his reasons for doing so, he referred to the operation of the relevant sub-sections corresponding with the sub-sections in s80F. The sub-sections mentioned bore the same numbers as the present ones. He said at p412:

> "For the purpose of proving the offence charged the informant relied upon evidence of a breath analysis taken on a breath analysis instrument at the Carlton Police Station. Provision for proof of the offence charged by this means is made by s408A of the *Crimes Act* 1958, Sub-section (1) of that section provides that the reading shown on a breath analysis instrument shall be evidence of the percentage of alcohol present in the blood of the person in question at the time his breath is analysed by the instrument.
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> The provisions of sub-section (1), however are made subject to compliance with sub-section (2) of the same section. Sub-section (2) 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 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.
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> It is plain enough therefore, that the evidence which is made admissible by sub-section (1) is subjected to proof of compliance with the condition precedent contained in sub-section (2)."

Later, at p416 he said that it is the delivery to the defendant of the certificate provided for in sub-section (2)

> "which constitutes satisfaction of the condition precedent which must be complied with before evidence of the reading shown on the instrument becomes admissible evidence under sub-section (1)."

Although in that case at the hearing before the justices, counsel for the defendant had objected to any evidence being given of the breath analysis on the ground that there was no evidence of compliance with sub-section (2) that was not the point which Winneke CJ discussed or decided. He decided that before the defendant could be convicted the Court had to be satisfied beyond reasonable doubt that the certificate referred to in sub-section (2) had been delivered as required by that sub-section. As there was no evidence on which it was open to the justices to find that the certificate had been delivered as soon as practicable after the sample of breath had been analysed, he held that the first of the grounds mentioned above was made out. His Honour also expressed agreement with the second submission of counsel for the defendant that, no notice to produce having been given, oral evidence of the contents of the certificate was inadmissible in evidence.

I do not regard what was said by Winneke CJ as inconsistent with the interpretation which I have placed upon the words in s80F(1) of the *Motor Car Act*. In the last passage quoted above (from p416 of the report) the word "admissible" was, in my opinion, used in the sense of admissible on the issue of the percentage of alcohol present in the defendant's blood. It is stated in the headnote of the report that:

> "evidence of the reading shown on the breath analysis instrument is not admissible under s408A(1) unless the conditions precedent set out in s408A(2) have been strictly complied with;"

This statement is correct, only if the word "admissible" used in it, is understood in the sense of admissible on the issue of guilt as distinct from admissible in evidence.

The next case relied on before me was *Tampion v Chiller* [1970] VicRp 46; (1970) VR 361. There, on the hearing of a charge of driving with more than the permitted percentage of alcohol in the blood, the evidence was that the certificate was not delivered to the defendant until fifteen minutes after the breath analysis was made. The justices upheld a submission at the end of the informant's case that the prosecution had failed to establish that the certificate had been handed over as soon as practicable after the test, and dismissed the information. The only point which arose for decision on the return of an order to review was whether it was open to the justices to uphold the submission that the certificate was not delivered as soon as practicable. Anderson J held that in the circumstances of that case it was not open to the justices to draw the inference that the certificate was delivered other than as soon as practicable, and that therefore the informant had made out a *prima facie* case.

I was referred to a passage in His Honour's judgment at p364 where he said

> "The language of s408A(1) of the *Crimes Act*, of course, makes it clear that due compliance with s408A(2) is a necessary prerequisite, in a prosecution for a breach of s81 of the *Motor Car Act*, to using

> in evidence the result of a breath analysis on a breath analysing instrument; and the observations of Winneke CJ in *Ross v Smith* [1969] VicRp 51; (1969) VR 411, emphasised this aspect, when he said, at p414 I think also it is material to observe that the provisions of sub-section (2) stand entirely for the benefit of the defendant. They provide no benefit so far as the prosecution is concerned.'"

Passages in a judgment must be understood in the context in which they appear. Anderson J was giving a summary of the provisions in the course of considering their purpose. The words "use in evidence" lend themselves readily to the meaning of putting evidence to probative use upon the issue of guilt. Compare: *Hughes v Trustees Executors & Agency Company of Australasia Ltd* (High Court, 20th February 1979, Print p18, per Gibbs J [1979] HCA 2; (1979) 143 CLR 134; 23 ALR 321; 53 ALJR 249). Anderson J was not dealing with the question of whether tendered evidence should be admitted but with the question of whether a *prima facie* case had been made out, and the words "use in evidence"' are, in my opinion, to be understood as meaning to make probative use upon the issue of guilt, of the result shown by an instrument.

Reliance was also placed on a passage in the judgment of McInerney J in *Wylie v Nicholson* [1973] VicRp 58; (1973) VR 596. In that case on a prosecution on a charge of driving a motor car with more than the permitted percentage of alcohol in the blood no certificate or copy certificate had been tendered or sought to be tendered by the prosecutor in evidence. Senior Constable Dettman, the authorised operator of the instrument, had, however, given oral evidence of delivering to the defendant a certificate in the form of Schedule Seven, showing the date and time of the test and the percentage of alcohol indicated by the analysis. McInerney J decided that the reasons for which the Magistrate dismissed the information were incorrect, and he considered whether grounds were made out that on the evidence the Magistrate should have convicted. In the course of outlining the operation of s80F, His Honour said, at p607:

> "It is, therefore, a condition precedent to the admissibility of the evidence of percentage of alcohol indicated to be present by the breath analysing instrument that there shall have been a compliance with the provisions of s80F(2)."

In my opinion, it is clear from a later passage which I quote below, that he was there using the word "admissible" not in the sense of admissible into evidence, but in the sense of probative of the percentage of alcohol present in the person's blood. His Honour held that it was not open to Senior Constable Dettman to give oral evidence of the contents of the certificate delivered to the defendant. There was thus no proper evidence that a certificate containing the information required by s80F(2) was delivered to the defendant. At p608 His Honour said:

> "A document complying with the provisions of section 80F(3) was in fact in existence and available, so I was told, at the court below but was not tendered in evidence. It appears to me that in the absence of the tender of such a certificate or of the production of the original certificate given under sub-section (2), it was not permissible for the prosecutor to adduce, on behalf of the informant, evidence of the percentage of alcohol indicated to be present in the blood of the defendant by the breath analysing instrument and that the percentage of alcohol so indicated was not, in the absence of proof of compliance with the provisions of s80F(2), admissible evidence of the percentage of alcohol present in the blood of the defendant at the time his breath was analysed with the breath analysing instrument. I am not to be taken as saying that Senior Constable Dettman could not have given *viva-voce* evidence of the reading of .075 per cent which he had obtained on the machine. Indeed his *viva*-voce evidence would be the primary evidence of that reading; the statement in the certificate given under sub-section (3) of the reading so obtained is a hearsay statement which becomes admissible only because of the provisions of s80F(3). But although Senior Constable Dettman's evidence of the reading obtained was admissible, such evidence was not, in the absence of proof of compliance with the provisions of sub-section (2), evidence of the percentage of alcohol present in the blood of the defendant at the time his breath was analysed by the instrument."

McInerney J concluded that there was no evidence on which the Magistrate could have convicted the defendant and, accordingly, discharged the order nisi. Far from being inconsistent with the interpretation which I have placed on sub-section (1), I regard the decision of McInerney J as providing confirmation for it.

I take the view that nothing said in any of the three cases is, upon proper analysis, inconsistent with my interpretation. There was no issue upon the orders to review in any of those cases as to the admissibility in evidence of the percentage of alcohol indicated by an instrument.

If there were any statements in those decisions which were inconsistent with my interpretation of the sub-section, they would be expressions of opinion to which I would accord great respect, but would not form part of the essential reasons for decision. Ultimately it is my responsibility to interpret the sub-section: *Ogden Industries Pty Ltd v Lucas* (1970) AC 113 at 127; [1969] 1 All ER 121, [1968] UKPC 28, [1969] 3 WLR 75.

The objection taken by Mr Aizen to the admission of the document into evidence should have been over-ruled and no occasion arose for the holding of a *voir dire*. It is therefore not necessary for me to consider the second issue whether the *voir dire* was conducted in a proper and fair way.

Mr Aizen submitted that if I reached this conclusion I should not set aside the decision because the Magistrate had heard evidence on whether the certificate was delivered and had not been satisfied on the balance of probabilities that it had, so would not be likely to be satisfied of that beyond reasonable doubt. However, the prosecutor indicated to the Magistrate that the additional evidence he desired to call on the *voir dire* was that of the operator of the breath analysing instrument, Senior Constable Fuller. If he were to give evidence the Magistrate would have further evidence before him when, at the close of all the evidence he considered whether, amongst other things, he was satisfied beyond reasonable doubt that the certificate had been properly delivered as required by s80F(2). The Magistrate ought not to have upheld the objection that was taken. If the document tendered had been admitted in evidence there is nothing in the material before me which indicates that a *prima facie* case for the informant would not have been made out.

Although the grounds of the order nisi could be expressed to specify more appropriately the error of the Magistrate which I have found, there was no objection before me that the present grounds were not wide enough to cover that error. I make the following order. The order nisi is made absolute. The order dismissing the information is set aside. The information is remitted to the Magistrates' Court at Frankston to be further heard or re-heard by the Magistrate or to be re-heard by another Magistrate and to be determined in accordance with law. (Discussion ensued as to costs.) I order the respondent to pay the applicant the sum of $200, the agreed costs of this appeal. I order that the respondent be granted a certificate of indemnity under the *Appeals Costs Fund Act*.
