45/69

SUPREME COURT OF VICTORIA

DURSTON v MERCURI

Menhennitt J

7, 11 March, 11 April 1969 — [1969] VicRp 62; [1969] VR 507

MOTOR TRAFFIC – DRINK/DRIVING – CERTIFICATE OF OPERATOR PRODUCED IN EVIDENCE – CARBON COPY OF THE ORIGINAL WHICH WAS HANDED TO THE DEFENDANT – OBJECTION THAT ORIGINAL NOT PRODUCED – OBJECTION THAT THE BREATH ANALYSING INSTRUMENT NOT PROPERLY OPERATED AND/OR NOT IN PROPER WORKING ORDER – SUBMISSION REJECTED BY MAGISTRATE – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Order nisi discharged.

1. Subject to the issue as to proof of the contents of the original certificate, all relevant matters were proved by the evidence of the police officer. That the police officer was an authorized operator was proved by the Chief Commissioner's certificate and, in accordance with s408A(3)(b)(i) of the *Crimes Act* 1958, the police officer's evidence that the sample of breath was furnished into the approved breath analysing instrument was *prima facie* evidence that it was an approved breath analysing instrument.

2. The document produced was a carbon copy of the original and contained everything that was in the original including the signature. Thus it was in one sense an original. The same hand using the same pen produced at the same time the writing on both the original and the carbon copy. In the case of the original the writing was left by the ink from the pen; in the case of the carbon copy it was left by the carbon from the carbon paper. But the words written were both produced by the same writing. In these circumstances, a carbon copy of a document which is a complete copy in every respect including the signature is for all purposes equivalent to the original and is admissible in evidence as prime evidence of the contents of the original.

3. Accordingly, the magistrate correctly admitted the carbon copy in evidence.

4. There was admissible evidence upon which it was reasonably open to the magistrate to conclude that the breath analysing instrument had been tested with a standard alcohol solution and had properly set and checked before being so used. Accordingly, the third ground of the order nisi was not made out.

MENHENNITT J: This is the return of an order nisi to review a decision of a Court of Petty Sessions at Carlton consisting of a Stipendiary Magistrate. The defendant was charged that on 10 April 1968 at North Carlton he did drive a motor car whilst the percentage of alcohol in his blood expressed in grams per 100 millilitres of blood was more than .05 per centum contrary to s81A of the *Motor Car Act* 1958. On 14 October 1968 the defendant was convicted and fined $25 and his licence was cancelled for three months.

In the proceedings in the Court of Petty Sessions the defendant was present and was represented by a solicitor. The only witness was First Constable Thompson who was called for the informant. In the course of his evidence he produced a certificate signed by the Chief Commissioner of Police authorizing him to operate breath analysing instruments and a certified extract of the *Government Gazette* wherein certain types of breath analysing instrument are approved and a copy of the *Crimes (Breath Analysing Instrument) Regulations* 1967. He gave evidence of a conversation with the defendant. He then gave evidence that the defendant furnished a sample of his breath directly into the approved breath analysing instrument, that he then analysed that sample and obtained a reading of 0.160 per cent blood alcohol and that as soon as practicable after taking the test he handed the defendant a written and signed statement in the form of Schedule Seven A to the *Crimes Act* 1958 showing the date and time of the test and the amount of alcohol as indicated by analysis to be present in his blood.

At this stage the solicitor for the defendant objected to any evidence of the contents of the certificate being given or the copy certificate being tendered in evidence until the original certificate was produced. He based his objection on the fact that no notice to produce the original had been given. He also submitted that evidence of the reading on the machine could not be given until it was proved that a true copy of the reading on the breath analyser was on the original certificate. The prosecutor called on the solicitor for the defendant to produce the original certificate. The solicitor said he did not produce it. The magistrate ruled that this oral notice to produce was sufficient and that the witness could produce the copy of the certificate and he allowed evidence of the reading of the machine to be given. The copy certificate was then tendered in evidence.

The constable then gave evidence of a further conversation with the defendant as to the effect of the analysis. This was objected to by the defendant's solicitor but the magistrate ruled that it was admissible. The constable was then cross-examined and gave evidence to which I shall refer subsequently. At the end of the cross-examination the magistrate asked the constable how many copies of the Schedule Seven A he made and what happened to them and the constable said: "I made it out in triplicate and handed the original to the defendant and the pink copy to the informant. I retained the white triplicate copy myself." The magistrate then asked the constable how he made the copies. The constable said: "The pink and white copies were carbon copies of the original." The carbon copy of the certificate which was put in evidence follows, in its printed parts, Schedule Seven A to the Crimes Act. All the spaces to be completed, including the signature and date, are completed in writing which has the appearance of having been produced by the use of carbon paper.

The issues raised on this order to review turn on the provisions of s408A of the *Crimes Act* 1958 as amended. The relevant portions of subs(1), subs(2), subs(2A) and subs(3) thereof are in the following terms:–

> "408A. (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—...
>
> (d) upon any hearing for an offence against subs(1) of s81A 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 subs(2) of this section be evidence of the percentage of alcohol present in the blood of that person at the time his breath is analysed by the instrument.
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> "(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 A 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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> "(2A) A copy of any certificate given in accordance with the provisions of subs(2) and purporting to be signed by a person authorized by the Chief Commissioner of Police to operate breath analysing instruments shall be *prima facie* evidence in any proceedings referred to in subs(1) of the facts and matters stated therein with respect to the breath analysis concerned and the delivery of a certificate thereof to the accused person 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.
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> "(3) (a) A certificate purporting to be signed by the Chief Commissioner of Police that a person named therein is authorized by the said Chief Commissioner to operate a breath analysing instruments shall be admissible in evidence of the authority of that person.
>
> (b) Evidence by a person authorized to operate a breath analysing instrument pursuant to this section—
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> (i) that an apparatus used by him on any occasion pursuant to this section was a breath analysing instrument within the meaning of this section;
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> (ii) that the breath analysing instrument was on that occasion in proper working order and properly operated by him;

> (iii) that in relation to the breath analysing instrument all regulations made under this section with respect to breath analysing instruments were complied with—
> shall be *prima facie* evidence of those facts."

The first ground of the order to review is:–

> 1. That in the circumstances of the case the magistrate was wrong in law in permitting a copy of a document handed to the defendant by Constable Thompson to be tendered in evidence to prove that the document so given to the defendant was a certificate in or to the effect of Schedule Seven A of the *Crimes Act* 1958, as amended, which had been duly and accurately completed by the person who operated the breath analysing instrument as required by s408A of the said Act.

It was decided by the Full Court in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613 at p617, that "before a copy of a certificate can be admitted in evidence under subs(2A), it must be proved that there existed an original certificate of the kind required by subs(2), signed and delivered in accordance with that sub-section". In the present case, subject to the issue as to proof of the contents of the original certificate, all those matters were proved by the evidence of Constable Thompson. That Constable Thompson was an authorized operator was proved by the Chief Commissioner's certificate and, in accordance with s408A(3)(b)(i) of the *Crimes Act* 1958, Constable Thompson's evidence that the sample of breath was furnished into the approved breath analysing instrument was *prima facie* evidence that it was an approved breath analysing instrument.

It was decided by the learned Chief Justice in *Ross v Smith* [1969] VicRp 51; [1969] VR 411, that before it is permissible to give parol or other secondary evidence of the contents of an original certificate delivered pursuant to s408A(2) of the *Crimes Act*, it is necessary to give to the defendant notice to produce the original. In that case oral evidence had been given of the contents of the certificate and his Honour decided that that evidence was inadmissible. In the unreported decision of *Nolan v White*, decided on 27 February 1969, the learned Chief Justice decided that before secondary oral evidence may be given of the contents of an original certificate delivered pursuant to s408A(2) notice to produce the original must be given a reasonable time beforehand and that the provisions of s11 of the *Evidence Act* apply only if the defendant personally is in court at the time when he is asked to produce the document and is shown to be able to produce the document. In that case also only oral evidence of the contents of the original certificate had been given. In the present case no prior notice to produce was given.

However, in order to prove the contents of the original certificate, the informant relies on the copy of the certificate made pursuant to s408A(2A) of the *Crimes Act* which was tendered in evidence and proved to be a carbon copy of the original. For the defendant it was submitted before me that, as no prior notice to produce had been given to the defendant, the copy certificate was not admissible in evidence on the ground that it was secondary evidence of the original certificate and not the best evidence available. For the informant it was submitted that as the copy certificate was made out pursuant to s408A(2A) of the *Crimes Act* and was a carbon copy of the original, it was admissible in evidence to prove the contents of the original on the basis that it was not secondary evidence, but prime evidence. This issue did not arise for decision in either of the cases decided by the learned Chief Justice to which I have referred, because in those cases the only evidence of the contents of the original certificates was oral evidence, the copy certificates not having been tendered in evidence.

I turn, accordingly, to consider whether the carbon copy of the original certificate was admissible in evidence to prove the contents of the original, not as secondary evidence but as prime evidence. In *Cross on Evidence*, 3rd ed, p497, it is stated that

> "there are cases where, as between the parties to the proceedings, the copy of a bill or invoice may, in effect be treated as a duplicate original because it is unnecessary for the person producing it to account for the original". It is earlier stated that "an unsigned carbon copy of a letter or one produced by means of a duplicating machine, is not the original when the contents of the signed top copy are in issue".

The authority cited in support of this proposition, *Nodin v Murray* [1812] EngR 241; (1812) 3 Camp 228; 170 ER 1363, deals with a copy produced by a copying machine. As to a carbon copy,

the statement is made in relation to an unsigned carbon copy. In the present case the carbon copy was a carbon copy of the whole of the original certificate including the signature.

In *Taylor on Evidence*, 12 ed., vol. 1, pp310, 311, para 449 reads:

> "In seven cases notice to produce is not necessary. The first is, where the instrument in the possession of the adversary, and that tendered in proof, are either duplicate originals, or are counter-parts, and the part offered in evidence has been executed by the adversary, or by some person through whom he claims. Here no notice is necessary, because, as before stated, the instrument produced is considered, not as secondary, but as primary evidence."

In *Phipson on Evidence*, 10th ed., p681, para. 1707 (a) reads:

> "Notice to produce the original is not necessary:—(a) Where the document tendered is a duplicate original, or a counter-part executed by the opponent, since here the evidence is primary and not secondary."

In *Jory v Orchard* (1799) 2 Bos and P 39; [1799] EngR 854; 126 ER 1143, it was decided by Lord Eldon CJ, and two other members of the court of Common Pleas that where two papers were made out precisely similar purporting to be demands of a copy of a warrant and both were signed and one was delivered to the defendant, the other was admissible in evidence, in effect, as a duplicate original. In *Philipson v Chase* [1809] EngR 254; (1809) 2 Camp 110; 170 ER 1097, Lord Ellenborough decided that a copy of an attorney's bill made at the same time as the original was admissible in evidence. It appears to me that his Lordship based his decision on two grounds, first, that it was a duplicate original and, secondly, that it came within the exception that secondary evidence may be given of a document which is itself a notice without giving notice to produce: see *Phipson on Evidence*, 10th ed., para. 1707(b); *Cross on Evidence*, 3rd ed., p500.

In *Colling v Treweek* (1827) 6 B and C 394; [1827] EngR 36; 108 ER 497; [1824-34] All ER Rep 586, Bayley J, delivering judgment for the Court of King's Bench followed and applied *Philipson v Chase* on the second of these grounds, namely, that the attorney's bill was a notice and, accordingly notice to produce that notice need not be given. That was also the basis upon which *Kine v Beaumont* (1822) 3 Brod and Bing 288; [1822] EngR 327; 129 ER 1295, had been decided.

In *Andrews v Wirral Rural District Council* [1916] 1 KB 863, a decision of the Court of Appeal, Lord Reading CJ said, at p871, that *Philipson v Chase* was really decided upon the principle that notice to produce a notice need not be given. His Lordship did not accept the decision in so far as it was based upon the view that the document was admissible in evidence as a counter-part and said at p872: "There is really only one original, namely, the document that is sent to the party. It may be that a most excellent copy is kept, so good that it is a facsimile of the document itself, but it still remains not the document which was sent." In that case it would appear that the Court of Appeal was dealing not with a carbon copy which contained a carbon copy of the signature but with a counterpart signed original in the same terms as the original.

In the present case I am concerned with a document which is a carbon copy of the original and contains everything that was in the original including the signature. Thus it is in one sense an original. The same hand using the same pen produced at the same time the writing on both the original and the carbon copy. In the case of the original the writing was left by the ink from the pen; in the case of the carbon copy it was left by the carbon from the carbon paper. But the words written were both produced by the same writing. In these circumstances, I am disposed to think that a carbon copy of a document which is a complete copy in every respect including the signature is for all purposes equivalent to the original and is admissible in evidence as prime evidence of the contents of the original. This is the view of the law that has been taken in New Zealand and in the United States. In *Buckley v Macken* [1961] NZLR 46, McGregor J, in the Supreme Court of New Zealand, held that carbon copies of invoices and of a receipt are admissible in evidence as primary and not secondary evidence of the contents of the original. After referring to what Lord Ellenborough said in *Colling v Treweek*, *supra*, as to contemporary counterparts being both originals, McGregor J said, at p48:

> "It would seem to me that the carbon copies of invoices and the duplicate carbon receipt are admissible without notice to produce under this exception."

In *International Harvester Co v Elfstrom*, 101 Minn 263; 112 NW 252 (part of the judgment in which is set out in *Wigmore on Evidence* 3rd ed., vol. 4, p448, para. 1234), Elliott J decided that a carbon copy of a contract on which the signature was reproduced by the carbon paper was admissible in evidence and he contrasted the position of letter-press copies of writings and duplicate writings. He pointed out that letter-press copies are produced by a distinct and subsequent act. As to carbon copies his Honour said:—

> "But all the numbers of a writing result from the completion of the legal act of the parties, although aided by mechanical devices or chemical agencies, meet the requirements of originals. If the reproduction is complete, there is no practical reason why all the products of the single act of writing the contract and affixing a signature thereto should not be regarded as of equal and equivalent value. In this instance the same stroke of the pen produced both signatures. The argument that the recognition of these instruments as duplicates would encourage fraudulent practices does not touch the principle involved."

It is unnecessary for me to decide in the present case whether in all circumstances a carbon copy of a document which includes the signature is admissible in evidence as prime evidence of the contents of the original. I am disposed to think that it would. However, in the present case there are additional considerations which cause me to conclude that the carbon copy of the certificate, tendered in evidence before the Court of Petty Sessions, was admissible in evidence as prime evidence of the contents of the original. In addition to the evidence that it was a complete carbon copy of the original including the signature, there is the significance given to a copy certificate by s408A(2A) of the *Crimes Act*. That subsection contemplates that a copy of the certificate may be made. If such copy is made, and the original was made and signed and delivered to the defendant, then that copy is given special significance. In any proceedings the copy shall be *prima facie* evidence of the facts and matters stated therein with respect to the breath analysis concerned and the delivery of a certificate thereof to the accused person. In *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613, whilst it was decided that there must be independent proof of the making, signing and delivery of the original certificate to the defendant, the Full Court nonetheless said, at p617: "The copy certificate may nevertheless be a significant item of evidence of delivery". The special significance given by Parliament to a copy certificate, coupled with the fact that in the present case the copy certificate was proved to be a carbon copy of the original including the signature, leads I think to the conclusion that the copy certificate was admissible in evidence as prime evidence of the contents of the original certificate. Accordingly, I conclude that the magistrate correctly admitted the carbon copy in evidence and that the first ground of the order nisi to review fails.

The second ground of the order nisi to review was as follows:–

> 2. That there was no sufficient evidence on which the magistrate could properly have held that the breath analysing instrument which was used to make an analysis of the defendant's breath was on that occasion in proper working order or was properly operated.

I have held that the copy certificate was properly admitted in evidence to prove the contents of the original. Once admitted in evidence it was also admissible for the purposes of s408A(2A) of the *Crimes Act*. That sub-section provides that the copy of the certificate shall be *prima facie* evidence in any proceedings referred to in subs(1) of the facts and matters stated therein with respect to the breath analysis concerned. Part of the certificate, which follows the language of Schedule Seven A, is in the following terms: "I further certify that the said instrument was in proper working order and properly operated by me in accordance with the regulations." Accordingly, there was before the magistrate *prima facie* evidence that the breath analysing instrument was on the occasion in question in proper working order and was properly operated. It was, therefore, open to the magistrate to hold to that effect. Accordingly, the second ground of the order nisi fails.

The third ground of the order nisi to review was as follows:–

> 3. That there was no evidence that the breath analysing instrument used to analyse the breath of the defendant had been tested with a standard alcohol solution and had been properly set and checked before being so used.

The statement in the certificate that the instrument was in proper working order is *prima*

facie evidence that the instrument had, among other things, been tested properly and properly set and checked. In cross-examination Constable Thompson was asked, *inter alia*, if he had tested the thermometer in the instrument. He replied: "No, but the instrument was operating correctly." He was asked how he knew that. He said: "By the standard alcohol test which was reading true." He said that he did not have any chemical qualifications and was not a pharmacist but had attended a course of instruction at the Melbourne University in the operation and use of the breathalyzer and the absorption distribution and elimination of alcohol from the human body. He was asked what the standard alcohol solution consisted of and he said: "Ethyl alcohol in distilled water." He was then asked the proportions and said: "4.26 millilitres of ethyl alcohol with sufficient distilled water added to make 1000 millilitres of solution." He was asked who made up the solution and he said: "I did under supervision of a chemist from the Forensic Science Laboratories." He was asked how he knew it was ethyl alcohol he was using to which he said: "It was in a bottle labelled 'Ethyl Alcohol' and the chemist told me that it was. After making up the standard alcohol solution I tested it for accuracy on a breathalyzer instrument at the Forensic Science Laboratory".

A submission along the lines of those in ground 3 of the order nisi to review was made to the magistrate and he ruled that the evidence was all acceptable and that the presumption of regularity covered the situation.

The function of this Court on an order to review was stated by the Full Court in *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346, at p351, as follows: "This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come." In my opinion, there was admissible evidence upon which it was reasonably open to the magistrate to conclude that the breath analysing instrument had been tested with a standard alcohol solution and had properly set and checked before being so used. This conclusion accords with the decision of Gowans J in *Borowski v Quayle* [1966] VicRp 54; [1966] VR 382. Accordingly, in my opinion, the third ground of the order nisi was not made out.

The fourth ground of the order nisi was a drag-net ground. Accordingly, all the grounds of the order nisi have failed. The order nisi will be discharged and the defendant is ordered to pay the informant's taxed costs of the order to review not exceeding $120.

Solicitors for the defendant: Blashki and Co.
Solicitor for the informant: Thomas F Mornane, Crown Solicitor.
