46/69

SUPREME COURT OF VICTORIA

WESSON v JENNINGS

Menhennitt J

17 June 1970 — [1971] VicRp 9; [1971] VR 83

MOTOR TRAFFIC – DRINK/DRIVING – BREATHALYZER USED – CERTIFICATE OF THE RESULT HANDED TO THE DEFENDANT – THE CERTIFICATE SPECIFIED THAT THE DEFENDANT HAD A CERTAIN NUMBER OF GRAMS OF ALCOHOL PER 100 MILLILITRES OF BLOOD BUT OMITTED TO STATE WAS THE PERCENTAGE WAS – WHETHER CERTIFICATE WAS A CERTIFICATE TO THE EFFECT OF THE ACT – CHARGE FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *MOTOR CAR ACT* 1958, S81A.

HELD: Orders nisi discharged.
1. The certificate left blank the concluding words of CL4 as found in Schedule Seven A, namely, "expressed as a percentage is...per centum". However, it was plain from the other facts stated in CL4 that the figure to be inserted in the blank space was clearly and could be only .110.

2. The certificate was to the effect of Schedule Seven A in that it otherwise complied with the Schedule and supplied all the information which enabled the Schedule to be completed. Another way of stating the matter was that what was left blank was so obvious and inevitable that the certificate was just as effective without the percentage stated as if it were stated. The certificate was given in accordance with the provisions of s408A(2) of the *Crimes Act*, and that, accordingly, it became *prima facie* evidence and admissible in evidence pursuant to s408A(2A).

3. Accordingly, the ground of the order nisi was not made out and all the necessary proof to justify a conviction were given by the certificate which was tendered in evidence and the other evidence.

MENHENNITT J: This is the return of an order nisi to review a decision of the Court of Petty Sessions at Chelsea constituted by a Stipendiary Magistrate given on 24 June 1969. On that date the informant brought before the court an information in which he said that the defendant, Gerald Kingsley Jennings, on 18 March 1969 at Chelsea 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 cent contrary to s81A of the *Motor Car Act* 1958. At the conclusion of the hearing the court convicted the defendant.

The order nisi to review granted by a master on 5 August 1969 calls upon the informant to show cause why the order of the Court of Petty Sessions should not be set aside on the following ground, namely, that the Stipendiary Magistrate was wrong in law in admitting as evidence a certificate which purported to be in the form of Schedule Seven A of the *Crimes Act* 1958 and being exhibit "B" to the affidavit of the defendant.

There was tendered in evidence in the proceedings a certificate which was headed "Schedule Seven A – *Crimes Act* 1958". The certificate was completed with various particulars and the only respect in which it was contended that the certificate failed to comply with Schedule Seven A of the *Crimes Act* was in respect of CL4 which read as follows: –

> "4. That the said instrument indicated that the quantity of alcohol present in the blood of the said Gerald Kingsley Jennings at the time and place referred to was .110 grams of alcohol per 100 millilitres of blood which, expressed as a percentage, is...per centum;".

For the defendant it was submitted in the Court of Petty Sessions and before me that in that form the document was not a certificate in or to the effect of Schedule Seven A of the *Crimes Act*.

The relevant legislative provisions are as follows, to the extent to which they are relevant in this case. Section 81A of the *Motor Car Act* 1958 provides by subs(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...".

The relevant portions of the relevant sections of the *Crimes Act* are as follows: -

"408A. (1) ...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...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.

"(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.

"(2A) A document purporting to be 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 sub(1) of the facts and matters stated therein unless...".
The section goes on to deal with an irrelevant exception.

The effect of these provisions is that for a certificate or a document which purports to be a copy of a certificate to be admissible in evidence pursuant to s408A(2A) of the *Crimes Act*, it must be a certificate given in accordance with the provisions of subs(2) of that section. A certificate given in accordance with the provisions of subs(2) must be a certificate in or to the effect of Schedule Seven A of the percentage of alcohol indicated by analysis to be present in his blood.

It was decided by the Full Court in *Smith v Ferguson* [1967] VicRp 93; [1967] VR 757 at p763, as follows:

"As it is the percentage of alcohol in the blood expressed in grams per 100 millilitres of blood and a percentage expressed in no other formula which is relevant to the offence created by s81A(1), it is an inevitable conclusion that the legislature itself treated 'the percentage of alcohol in the blood', with which s408A was concerned, as meaning the same as the percentage of alcohol in the blood described in s81A(1) of the *Motor Car Act* 1958...".

The certificate tendered in evidence stated that the breath analysing instrument indicated that the quantity of alcohol present in the blood of the defendant was .110 grams of alcohol per 100 millilitres of blood. The consequence of the statement of the Full Court in *Smith v Ferguson*, to which I have referred, is that that statement is a statement of the percentage of alcohol indicated by the analysis to be present in the blood within the meaning of s408A(2) of the *Crimes Act*. The question remains whether the certificate is in or to the effect of Schedule Seven A, which is another requirement of subs(2).

As has been pointed out by counsel for the informant, the words "in or to the effect of Schedule Seven A" are strictly ungrammatical and I agree that they must be read to mean either "in the form or to the effect of Schedule Seven A" or, alternatively, "in or to the effect of the form in Schedule Seven A". The addition of the words "to the effect of" produces the result that the certificate need not slavishly follow the form set out in Schedule Seven A in order to be an admissible certificate.

In the present case the certificate leaves blank the concluding words of CL4 as found in Schedule Seven A, namely, "expressed as a percentage is...per centum". However, it is plain from the other facts stated in CL4 that the figure to be inserted in the blank space is clearly and can be only .110. This follows from the statement of the Full Court in *Smith v Ferguson* as to the effect

of the reading in conjunction of s81A of the *Motor Car Act* and s408A of the *Crimes Act*.

Section 408A(2) of the *Crimes Act* requires that the percentage of alcohol indicated by the analysis to be present in the blood shall be stated and the statement that the quantity of alcohol present in the blood at the time and place of the taking of the test was .110 grams of alcohol per 100 millilitres of blood is, in the light of the two sections, such a statement because the facts actually stated are and can be nothing other than a percentage of .110. In these circumstances, it appears to me that the certificate is a certificate to the effect of Schedule Seven A of the *Crimes Act*.

In reality the concluding words of CL4 "expressed as a percentage is...per centum" are a repetition of something that has already been stated. Section 81A(1) of the *Motor Car Act* does not itself require the stating of the percentage but provides for an offence if the percentage of alcohol in the blood expressed in grams per 100 millilitres of blood is in fact more than .05 per cent and this the certificate establishes in the present case. Accordingly, as the certificate tendered in evidence does state all the essential facts to establish both what s408A(2) of the *Crimes Act* requires and also what, by s81A(1) of the *Motor Car Act*, needs to be proved to establish an offence, it appears to me that the certificate is to the effect of Schedule Seven A in that it otherwise complies with the Schedule and supplies all the information which enables the Schedule to be completed. Another way of stating the matter is that what is left blank is so obvious and inevitable that the certificate is just as effective without the percentage stated as if it were stated.

The conclusion I have reached is, I think, pointed to by the reasons for judgment of Isaacs and Gavan Duffy JJ in *Crowley v Templeton* [1914] HCA 6; (1914) 17 CLR 457, at p466; 20 ALR 51, at p53. The High Court had under consideration the provisions of the *Transfer of Land Act* that the proprietor of freehold land under the operation of the Act may lease the same for a specified period by signing a lease thereof in the form in the Ninth Schedule thereto. The words "to the effect of" were not then included in the *Transfer of Land Act*. None the less, in their joint judgment, their Honours said: "Slavish adherence to the forms is not demanded. Technical and immaterial departures from them do not deprive the dealing of efficacy. Substantial compliance is sufficient." That being said of a legislative provision which was confined to the words "in the form", it seems to me that, where there are the additional words "to the effect", substantial compliance with the Schedule is sufficient.

This conclusion is also in accordance with what the Full Court said in *Hanlon v Lynch* [1968] VicRp 80; [1968] VR 613, at p617, where speaking of the relevant legislative provisions in their present form the Court said: "... a certificate cannot be described as 'given in accordance with' that sub-section [i.e. subs(2)] unless its substance, signature and delivery are such as are provided for in that sub-section." The use of the word "substance" was, it appears to me, a recognition of the effect of the words "to the effect of", in subs(2), and in the present case I conclude that the certificate was in substance as provided for by s408A(2).

Accordingly, I conclude that the certificate was given in accordance with the provisions of s408A(2) of the *Crimes Act*, and that, accordingly, it became *prima facie* evidence and admissible in evidence pursuant to s408A(2A). Accordingly, the ground of the order nisi is not made out and even if other matters were raised, and they are in fact not raised by the order to review, all the necessary proof to justify a conviction was given by the certificate which was tendered in evidence and the other evidence. For all of those reasons, the order nisi will be discharged.

Solicitors for the defendant: Purves and Purves.
Solicitor for the informant: John Downey, Crown Solicitor.
