9/95

SUPREME COURT OF VICTORIA

NICHOLL v HUNTER

Smith J

5, 15 July 1994 — (1994) 20 MVR 384

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST TAKEN – SAMPLE ANALYSED – CERTIFICATE GIVEN TO PERSON TESTED 17 MINUTES LATER – "AS SOON AS PRACTICABLE" – MEANING OF – WHETHER CERTIFICATE GIVEN AS SOON AS PRACTICABLE: *ROAD SAFETY ACT* 1986, S55(4).

1. The certificate of analysis referred to in s55(4) of the *Road Safety Act* 1986 ('Act') should be given to the person tested within a short period of time after the first test so that the person tested can be informed of the result and advised that a second sample may be requested. The greater the gap in time between the first and second tests the more difficult, if not impossible, it becomes to compare the results in any meaningful way.

2. Where a period of 17 minutes elapsed between the conducting of the first test and delivery of the certificate and there were no practical reasons why the certificate could not have been given to the person tested within 7-8 minutes of the sample being taken, it was not reasonably open to a magistrate to find that the certificate had been signed and delivered as soon as practicable after the taking of the sample. Accordingly, as the provisions of s55(4) of the Act were not complied with, evidence of the reading was not admissible and the charge should have been dismissed.

SMITH J: [1] Graham David Nicholl, the appellant, has appealed to this Court from an order made in the Magistrates' Court at Lakes Entrance recording his conviction on a charge of exceeding .05 in breach of s49(1)(f) *Road Safety Act* 1986 (the Act). In the order made by Master Kings on 15 April 1994 giving directions for the appeal, the question of law identified for decision on this Appeal was stated in the following terms:

> "Did the Magistrate err in finding that the informant had, pursuant to s55(4) *Road Safety Act* 1986, delivered a certificate as soon as practicable when a period of 19 minutes had elapsed between the conducting of the test and delivering of certificate?"

It appears that the respondent had intercepted the appellant while driving a motor vehicle in Colquhoun Road, Lakes Entrance on 30 August 1993. The appellant was asked to undertake a preliminary breath test. It showed a positive result and he was then asked to undergo a breathalyser test at the Lakes Entrance Police Station. At the hearing in the Magistrates' Court, the respondent gave evidence about the testing procedure and said that a reading was obtained on the breathalyser instrument of .210 grams per millilitre. In his evidence in chief, the respondent also stated that he handed the appropriate certificate to the appellant as soon as practicable after the test was conducted. The respondent was cross-examined about the events that transpired between the taking of the breath analysis sample and the delivery of the certificate to the appellant.

There is a dispute in the affidavit material filed in this appeal about the evidence given by the respondent as **[2]** to the time at which the breathalyser reading was obtained. The appellant swore an affidavit stating that the respondent gave evidence indicating that the reading was obtained at 4.25 pm. The respondent in his affidavit said that he did not give evidence that he obtained the reading at 4.25 pm. He stated that he gave evidence that at 4.25 pm he switched the control knob of the breathalyser from "take" to "analyse". He also stated in his affidavit that no evidence was given about the time when the reading was obtained.

I consider it appropriate to apply the general rule of practice that where, in an appeal such as this, there is a conflict about the evidence placed before a Magistrate, that conflict is to be resolved by accepting the evidence of the party supporting the decision below. It is not disputed that the respondent gave evidence that he had substantially completed the certificate while he was

waiting for the reading to be produced by the machine and that the latter process can take one and a half to two minutes. Thus taking a view of the evidence most favourable to the respondent, the evidence before the learned Magistrate was that the reading had been obtained by 4.27 pm at which time the certificate was already substantially completed. It appears to be common ground that the certificate was handed to the appellant at 4.44 pm. Thus some 17 minutes elapsed between the obtaining of the reading and the provision of the certificate to the appellant.

The respondent gave evidence that during the period in question he probably made the appellant a cup of tea and gave it to him. He gave evidence that this could have taken as long as 10 minutes. He said that he generally treats **[3]** people the way they treat him and the appellant had behaved like a gentleman. He gave evidence that he would not have left the appellant just sitting there. He also gave evidence that prior to the delivery of the certificate to the appellant, he conducted a test of the machine, a testing which, as I understand it, is required by the regulations made under the Act. He said that that testing would have taken about five minutes. It appears to be common ground that that testing of the machine was required to be done before the certificate could be delivered to the appellant. This result would appear to flow from the Act and the Regulations. The informant respondent offered no other evidence to explain what had happened in the intervening period. He did say, however, that finalising the certificate after the result was obtained consumed a very short period of time, probably around one minute. Thus, on the respondent's evidence, six of the 17 minutes spent in the intervening period were explainable as time spent by the respondent in carrying out statutory and regulatory requirements that had to be met before the delivery of the certificate to the appellant.

At the conclusion of the informant's case, counsel for the appellant submitted that the Crown had not made out its case in that the provisions of s55(4) of the Act had not been complied with. That sub-section requires:

> "(4) 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 must
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> (a) sign and deliver to the person whose breath has been analysed a certificate in the prescribed form of the concentration of alcohol indicated by **[4]** the analysis to be present in his or her blood (which may be by way of an indication on a scale) and of the date and time at which the analysis was made; and
>
> (b) advise the person whose breath has been analysed that he or she may request that a second sample of his or her breath be analysed if the certificate indicates that more than the prescribed concentration of alcohol is present in the person's blood; and
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> (c) analyse a second sample of that person's breath if the person requests a second analysis immediately after being so advised; and
>
> (d) sign and deliver to the person a certificate in the prescribed form of the concentration of alcohol indicated by the second analysis to be present in his or her blood (which may be by way of an indication on a scale) and of the date and time at which the second analysis was made, if a second analysis is carried out."

Compliance with that sub-section is required if the informant is to be able to give evidence of the blood alcohol level reading given by a breath analysing instrument and if a certificate of the result of the test is to be admissible (s58(1) and s58(2) of the Act). It seems that it was common ground below, and it is common ground before me, that unless the requirements of s55(4) were satisfied, the Crown case had to fail because evidence of the reading and evidence in the form of the certificate would not have been admissible.

The learned Magistrate held that the certificate had been, in all the circumstances, delivered as soon as practicable after the analysis of the breath. Mr Cash, who appeared at the hearing for the appellant, then asked the learned Magistrate whether he made a finding as to whether or not the informant had made a cup of tea for the appellant **[5]** between the taking of the sample of breath analysis and the giving of the certificate to the appellant. The learned Magistrate said that he made no findings one way or the other about that aspect. I interpret that statement as a statement that he was not able to make a finding. This would be consistent with the evidence given by the informant respondent who did not recall what he had done but assumed that he

had probably provided tea to the appellant. The learned Magistrate made no findings about the events during the relevant period. He held, however, that in all the circumstances there had been a delivery of the certificate as soon as practicable after the completion of the relevant breath test. The learned Magistrate then convicted the appellant, cancelled his licences and disqualified the appellant from driving for a period of 42 months and imposed a fine of $960.00 with a stay of one month.

To succeed on this appeal, the appellant must satisfy me that it was not reasonably open to the learned Magistrate to conclude that a certificate had been delivered as soon as practicable after the sample of breath had been analysed. (Compare *Creely v Ingles* [1969] VicRp 94; [1969] VR 732, at 734). I note that the burden of proof on the issue rested with the respondent (*Tampion v Chiller* [1970] VicRp 46; [1970] VR 361, at 366). The standard of proof was presumably on the balance of probabilities. Before reaching a decision on the question posed, it is necessary to consider the meaning of the expression "as soon as practicable" in s55(4) of the Act.

I was referred by counsel to authorities which considered a predecessor of the current legislative **[6]** provisions (s408A(2) *Crimes Act* 1958). Those authorities established that the question whether a certificate was delivered as soon as practicable after the breath sample was analysed was one to be determined in the light of all the circumstances (*Creely v Ingles* [1969] VicRp 94; [1969] VR 732). Further,

> "the question is whether what was done was reasonable and appropriate in the circumstances. For 'as soon as practicable' does not mean 'as soon as possible'; it refers to what is reasonable in all the circumstances and appropriate to the requirements of the situation", (per Anderson J in *Tampion v Chiller* [1970] VicRp 46; [1970] VR 361 at 365 citing Lord MacDermitt LCJ *in Minister of Agriculture v Kelly* [1953] NI 151 at 153: the above passages cited with approval by Hayne J in *Dickson v Kimber*, (1992) 16 MVR 164, 8 July 1992)."

I note also that in *Tampion v Chiller*, Anderson, J quoted with approval a passage from the reasons of Little, J in *Creely v Ingles* in which, *inter alia*, his Honour stated the following:

> "It [the question] is not one to be determined on some mathematical basis of adding together periods of time taken in relation to the various steps in the process of the breath analysis and the checking of the operation of the instrument. Any such approach is unreal and unwarranted by the language."

This passage appeared in the context of his Honour's statement that the issue of whether the certificate was delivered as soon as practicable was to be determined in the light of all the circumstances. Thus, it was not a matter of mere mathematics. That having been said, however, mathematics cannot be completely avoided because it is necessary to analyse the time that elapsed and what occurred in that time.

In *Tampion v Chiller*, a period of 15 minutes elapsed between the testing of the defendant's breath and the delivery of the certificate. Evidence was given of various **[7]** steps that were taken and his Honour appears to have concluded that on the evidence it was not possible to reach any conclusion about aggregate time in performing the required steps between the taking of the sample and the delivery of the certificate. His Honour concluded that in the circumstances of the case before him- (at p366)

> "the delivery of a certificate in 15 minutes could not be said, in the absence of evidence of culpable delay, to have been delivered otherwise than as soon as practicable. It does not appear from any of the cross-examination that the constable was occupied in any other pursuit than matters associated with the testing, the checking, the making out of, and the delivery of the certificate. Though the onus is on the prosecution to satisfy the court that the certificate was delivered as soon as practicable, the circumstances may be such – and I think they are so in this case – that the proper inference to be drawn from the evidence is that the period of 15 minutes was such that it should be assumed that, unless there was some circumstance that suggested something to the contrary, the certificate was delivered as soon as practicable, and that a prima facie case had been made out".

In *Creely v Ingles* it appears that 15 minutes elapsed between the analysis and the handing the certificate to the defendant. The informant in that case gave evidence in lengthy cross examination of steps he had taken during that period which each took 90 seconds to perform. He also said there had been a delay of five minutes resulting from the fact that his book of blank

certificates had been exhausted and he had to go and find another Constable from whom he could borrow a book (at 733). His Honour concluded that there was – (at p734)

> "nothing in the evidence to suggest that in the interval of time between the commencement of the analysis and the delivery of the certificate the police officer was engaged otherwise than in doing what was required to be done as part of or incidental to the analysis and the completion **[8]** and furnishing of the certificate. Indeed, the whole tenor of the evidence is to the contrary."

Accordingly, his Honour held that the only reasonable finding was that the certificate was given to the defendant as soon as practicable after the sample of his breath had been analysed. I note that in the unreported decision of Adam J in *Jones v Groves* (29 August 1969) the evidence was that a period of 10 minutes had elapsed. Having regard to the matters that had to be attended to by the operator after obtaining the reading, his Honour rejected the suggestion that a 10-minute delay was otherwise than "as soon as practicable". There does not appear to have been evidence led in that case as to precisely what happened.

In *Ross v Smith* [1969] VicRp 51; [1969] VR 411, Winneke CJ had to consider a case where no evidence was given before the justices as to the time at which the certificate had been delivered to the defendant and for that reason the conviction was quashed. In the recent decision of Hayne, J in *Dickson v Kimber* (above), the person tested prevented the operator complying with the legislation by leaving the police station before a certificate could be prepared. It was delivered the next morning when the officer came on duty. Thus the construction of the section in the present context was not considered.

In determining the meaning of the expression "as soon as practicable" the purpose or purposes behind the requirement need to be borne in mind. In *Ross v Smith*, above, Winneke CJ stated that the provision (s408A(2) *Crimes Act* 1958) appeared to be intended "as a safeguard for **[9]** the person whose breath is analysed". His Honour did not elaborate. Anderson J in *Tampion v Chiller*, (above), (at 365) considered what evil was intended to be addressed by that provision. To the extent that His Honour might appear to have been limiting the objective to one of fairness, it seems to me that his approach is too narrow if applied to the present legislation.

The *Crimes Act* provision required a certificate to be given of the result but no subsequent actions were made dependent upon it. The present section, however, has the effect that the requirement of giving the certificate is the first of a series of steps to be taken "as soon as practicable" after the analysis by the person operating the instrument:

(a) The first, (para(a)), is the signing and delivery of the certificate;

(b) The second, (para(b)), is the giving of the advice that the person whose breath has been analysed may request that a second sample be analysed "if the certificate indicates" the presence of more than the prescribed concentration of alcohol in the blood;

(c) The third, (para(c)), is the analysing of that sample, if requested, "immediately" after the request;

(d) The fourth step, (para(d)), is the signing and delivery of a further certificate relating to the second analysis.

Each of these steps is subject to the requirement that they be carried out as soon as practicable after a sample of breath is analysed and clearly the steps are to be done in series. In particular, the obligation to advise the **[10]** person of his or her rights arises after the certificate is completed and delivered (Hayne, J in *Dickson v Kimber* (above) at 8). Thus the requirement for the delivery of the certificate after the first analysis appears to be intended to enable the person tested to be officially informed of the result by means of a signed certificate and to enable that person to make an informed decision about whether to request a second sample. The certificate also performs the important function of providing an official statement of the first reading which is placed in the hands of the person tested before the second test is carried out and with which the result of the second test can be compared. The second sample procedure appears to have been included to provide a double check. I note that Hayne, J in *Dickson v Kimber*, (above), commented that the right to have a second test,

"is an important right designed for the protection of the defendant and in that sense, it may be seen as a safeguard to him ..." (at 8).

An examination of *Hansard* reveals that concern about human error in the operation of the breathalyser prompted the enactment of s55(4). The Opposition of the time did not think that the legislation went far enough to protect persons being tested (*Hansard*, Legislative Assembly, 12 November 1986, 2005 and 2006). Having regard to provisions such as s48(1A), s49(1)(f) and s49(4), s50 and s58(1) and s58(2) of the Act, it is understandable that some such protection should be afforded to persons tested. Such provisions depart significantly from what has been the traditional approach to the detection, trial and punishment of criminal offences. They create **[11]** presumptions to assist the prosecution (48(1A)), reverse the onus of proof (49(4)), impose mandatory penalties (s50), abolish common law evidentiary requirements and make the certificate conclusive evidence in the absence of a seven day notice (58(1) and (2)). The accuracy of the reading and of the certificate became critical.

I mention the above sections because it is in the context of them that Parliament provided the safeguard in s55(4). (Cf *Pacillo v Hentschke* (1988) 47 SASR 261; (1988) 7 MVR 244.) Its operation should not be diminished by interpretation. The test prescribed by Parliament is not difficult to satisfy. Accepting that the provisions of s55(4) are designed to enable the person tested to be informed and advised and to double check by means of a second test, ideally the certificate should be given to the person tested within a short period of time after the first test; for it is important that any second test be done in close proximity with the first test. The greater the gap in times, the more difficult, if not impossible, it becomes to compare the results in any meaningful way. It should also be noted that the procedures required to be carried out after obtaining the sample can, on the evidence before the learned Magistrate, occupy seven or eight minutes. Thus, while plainly some time will inevitably elapse between the obtaining of the sample and the giving of a certificate, that inevitable loss of time heightens the need to avoid unnecessary further loss of time.

The protection given, however, is to be determined according to the terms of the legislation. The key words chosen to give effect to the scheme are "as soon as **[12]** practicable". They will not ensure in all cases that the various steps are taken in the shortest time (see for example *Dickson v Kimber* above). They present a compromise which should ensure in most cases that a meaningful second test can be done. The words "as soon as practicable" do not defy definition (cf *Creely v Ingles*, above, at 734). "As soon as " means "at the very time or moment when". "Practicable" means "capable of being carried out in action" (*Shorter Oxford Dictionary,* 1973). They do not mean "within a reasonable time". At the same time the words quoted do not impose a standard of perfection but require the practicalities to be considered and for the certificate to be given to the person at the moment when the circumstances of the given situation allow it to be done. A reasonable approach is to be taken in assessing any given case.

Each case must be determined in the light of its evidence. In the present case, 17 minutes elapsed after the reading was obtained and there is an unexplained loss of time of about 10 minutes. This lost time is in addition to the time which elapsed while the operator carried out the various tests and filled in the certificate. It is not one or two minutes but about 10 minutes. The respondent could not explain the loss of time except on the basis that he may have made the appellant a cup of tea and sat down and talked with him. If that was what happened, that courtesy is to be commended. Regrettably, however, the respondent could have given the appellant the signed certificate before doing that.

Any making of tea and conversation would not constitute relevant circumstances that could affect the practicality of signing and delivering the certificate. It is not suggested **[13]** that the respondent was carrying out other actions required by the Act or Regulations or that any emergency occurred that prevented him from observing the statutory procedure. On the evidence, there were no practical reasons why the signed certificate could not have been given to the appellant within seven or eight minutes of the sample being taken (or 5 or 6 minutes after the result was obtained). It may be that no harm was in fact done to the appellant but that is not the test. The test is whether the certificate was signed and delivered "as soon as practicable" after the sample of breath was analysed. The question for me to determine is whether it was reasonably open to find that the certificate had been signed and delivered as soon as practicable after the taking of

the sample. In my view, on the evidence before the learned Magistrate, such a finding was not open. If the presumption of regularity is applicable, it would not assist the respondent in all the circumstances. The appeal should be allowed.

APPEARANCES: For the appellant Nicholl: Mr P Cash, counsel. PJ Roscoe, solicitor. For the respondent Hunter: Mr SP Gebhardt, counsel. JM Buckley, Solicitor to DPP.