C.A. 36/76

IN THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN TOM JAMES COLTMAN of Eastbourne, student

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Coram - Richmond P.
Woodhouse J.
Cooke J.

Hearing - July 12 and 13, 1976

Counsel - R.M. Crotty for Appellant
P.W. Graham for Respondent

Judgment - July 29, 1976

JUDGMENT OF RICHMOND P.

Appellant was charged in the Magistrate's Court that on 15 June 1975 at Wellington he drove a motor vehicle while the proportion of alcohol in his blood exceeded 100 milligrams per 100 millilitres of blood. He pleaded not guilty. After hearing the parties and the evidence adduced the learned Magistrate dismissed the information. The present respondent appealed to the Supreme Court by way of case stated. The reasons why the information was dismissed by the Magistrate are set out in the case stated in the following way -

(a) Because of the incorrect address the analyst's certificate which was put before the Court pursuant to Section 58B (9) of the Transport Act 1962 did not refer to a specimen of blood analysed as being a specimen that had been taken from a person having the same name, address, and occupation as the defendant.

(b) The analyst's certificate was accordingly inadmissible.

(c) The provisions of Section 58 (2) of the Transport Act 1962 did not apply to the analyst's certificate.

By way of explanation I should add that at the time when a blood sample was taken from appellant his name, occupation and address were entered in the form of consent, which he signed, in the following way : "Tom James Coltman 44A Muratai Rd Eastbourne S$_{t}$udent".

The sample was posted by registered post to the Department of Scientific and Industrial Research at Petone by Traffic Officer Steffenson who gave evidence at the hearing and who identified defendant as being the person from whom the blood sample had been taken by the doctor. The traffic officer also gave evidence to the effect he understood from the defendant that his address was 44A Muratai Road. He may well not have heard the defendant correctly. The name of that road was mis-spelt by the traffic officer when he wrote it into the consent form - it should, of course, be Muritai Road. The result was that the certificate given by the analyst referred to the sample as having been taken from - "Coltman, Tom James Student 44A Muratai Road Eastbourne". At the hearing the father of the defendant gave evidence that his son's correct address was 440 Muritai Road, Eastbourne, and the Magistrate accepted that evidence.

Section 58B (9) of the Transport Act 1962 provides as follows :

(9) For the purposes of any proceedings for an offence under this Part of the Act, -

(a) A certificate purporting to be signed by an analyst and certifying that -

(i) Upon analysis of a specimen of blood by an analyst specified in the certificate, a specified proportion of alcohol was found in the specimen; and

(ii) No such deterioration or congealing was found as would prevent a proper analysis, -

shall be sufficient evidence, until the contrary is proved, of the matter so certified and of the qualification and authority of the person by whom the analysis was carried out; and

(b) Every analyst signing any such certificate shall, until the contrary is proved, be presumed to be duly authorised to sign it; and

(c) Where the certificate refers to the specimen of blood analysed as being a specimen that had been taken from a person having the same name, address, and occupation as the defendant, it shall be presumed until the contrary is proved that the specimen of blood was taken from the defendant.

The case on appeal was heard in the Supreme Court by Quilliam J. who held that for the purposes of subs. (9) (c) the certificate contained the "same name, address and occupation as the defendant" because it was the same name, address and occupation as had been attributed to the defendant by the traffic officer at the time when the blood specimen was taken. In so doing he followed views expressed by Roper J. and by Wilson J. in two earlier unreported decisions. He also held that in any event it was possible to apply s.58(2) of the Transport Act on the ground that the errors in the description of the present appellant were minor ones and because there was never any doubt that the person who appeared before the Magistrate as the defendant was the same person as supplied the blood specimen. Section 58(2) of the Act is as follows :

> (2) It shall not be a defence to a charge under paragraph (1) of subsection (1) of this section that any of the provisions of section 58A and 58B of this Act have not been strictly complied with, provided there has been reasonable compliance with the provisions of those sections.

Application was then made to the Judge for special leave to appeal to this Court. That application was refused as Quilliam J. took the view that the questions of law involved were not of sufficient general importance to warrant giving leave. The case now comes before us by way of a motion for special leave to appeal to this Court. We heard argument on the substantive questions involved and having done so I am of opinion that those questions are of general public importance and for myself I would grant special leave to appeal accordingly.

Turning to the several issues involved, the first question is whether Quilliam J. was right when he held that for the purposes of subs. (9) (c) it is sufficient if the analyst's certificate refers to the specimen as having been taken from a person having the same name address and occupation as was attributed to or acknowledged by the defendant at the time when the blood sample was taken. I can see at once that such an interpretation has much to commend it from the point of view of the practical working of the blood alcohol provisions of the Transport Act. It can be said that it would involve no risk of injustice as the defendant would of course have to be satisfactorily identified to the Court as the person from whom the blood sample was in fact taken.

But in my opinion the language actually used in subs. (9) (c) is not capable of being given the construction which the learned Judge put upon it and which of course was strongly urged upon us by Mr Graham. In its ordinary and natural meaning subs. (9) (c) is referring to a description of a person who has a name, address and occupation which is in fact the same as the defendant. No doubt this is the normal situation, and thus this special statutory rule of evidence is helpful to the prosecution in the great majority of cases. If it is thought necessary, in the light of experience, then it should not be too difficult for the Act to be amended in some suitable way. In my opinion however the analyst's certificate in the present case did not refer to a person having the same address as the defendant - the discrepancy was too great in the street number even if it were possible to regard the spelling mistake in the name of the road as so minor that it should be disregarded.

The next question is whether the Judge was correct in holding that s.58 (2) could be applied in the circumstances of the present case. There has been a considerable conflict of opinion between various Judges in the Supreme Court as regards this question. I do not propose to refer to all the cases which were cited to us by counsel. Two of them have been reported, namely McCombe v. Transport Department (1972) N.Z.L.R. 157 and Sharkey v. Auckland City Corporation (1975) 1 N.Z.L.R. 281. In the former case Wilson J. held that s. 58 (2) relates only to the procedure adopted for the taking of breath and blood specimens and has no reference to the standard of proof required in the presentation of a prosecution. In that case the analyst's certificate gave the name of the appellant but no address or occupation. Wilson J. held that s.58 (2) had no application to a situation of this kind. This decision was adopted by Mahon J. in Sharkey's case. More recently it was followed by Barker J. in Deed v. Otahuhu Borough Council (M. No. 406/76 Auckland Registry - Judgment 24 May 1976). On the other hand in Cross v. Ministry of Transport (M.99-101/75 Dunedin Registry - Judgment 28 August 1975 White J. took an opposite view, as also did McMullin J. in Scott v. Ministry of Transport (G.R. 99/74 Auckland Registry - Judgment July 19, 1974).

The point is not without difficulty. The Judges who have favoured the more liberal view stress that the language of s.58 (2) is expressed in wide terms in that it refers to non-compliance with "any of the provisions of ss.58A and 58B".

The Judges who have followed McCombe v. Transport Department have evidently thought that a distinction should be drawn between the provisions of those sections that relate to the procedure for proving the prosecution case and other types of provisions. After giving the matter considerable thought I have come to the conclusion that the more liberal view ought to be preferred. It seems to me very much in the public interest that s.58 (2) should be construed in a way which gives some latitude in relation to errors in certificates given either under s.58B (5) or s.58B (9). I think that the language of s.58 (2) is wide enough to embrace the provisions of those two subsections. As already mentioned, this is the view which Quilliam J. took in the present case and, with respect, I think that he was right. I should add that the decision of this Court in Police v. Smith (1975) 2 N.Z.L.R. 755 was solely concerned with certificates given under s.58D of the Act - often referred to as the "hospital situation". In that case no question arose as to s.58 (2) as it was common ground that s.58 (2) refers only to ss. 58A and 58B, and accordingly has no application to s.58D.

The remaining question is whether the actual error which took place in the present case is sufficiently serious in all the circumstances to prevent the name address and occupation of the appellant, as there described, from being a "reasonable compliance" with the provisions of s.58B (9) (c). The purpose of subs. (9) (c) is to enable the certificate to speak for itself without reference to any other evidence except such evidence as may be before the Court regarding the actual name address and occupation of the defendant. If, in the light of that evidence, the overall description in the certificate is sufficiently close to a true description to leave the tribunal in no doubt that the defendant is the person therein referred to then there will have been reasonable compliance with subs. (9) (c). The Court will then go on to consider whether, in the light of all the evidence, including the certificate, the prosecution case has been proved. This simple and obvious approach was, as I understand it, the one which found favour with Quilliam J. in the present case and with McMullin J. in Scott's case. I agree with Quilliam J. that the errors in the present certificate are minor ones; when taken along with the entirety of the particulars given in the certificate they create no real doubt as to whether the defendant is indeed the person therein referred to.

Further, the other evidence given in the case strengthens rather than weakens the statutory presumption that the specimen of blood was in fact taken from the defendant. That is as far as it is necessary to go for the purposes of the present case, and I prefer to leave open the question whether a gross disparity between a certificate and a true description of a defendant can in some circumstances be cured by s.58 (2). In practice I would think that a discrepancy of that kind would or should come to the notice of the prosecution in ample time to call the analyst to give evidence linking up the sample he received from the constable or traffic officer with the sample which he analysed.

In the present case, and for the reasons which I have given, I think that Quilliam J. was correct in holding that s.58(2) rendered the certificate admissible and in remitting the case to the Magistrate to enter a conviction and to fix penalty. No doubt the Magistrate will amend the information to show the appellant's correct address. I would accordingly dismiss the appeal.

The Court being unanimous, leave to appeal is granted but the appeal is dismissed. The respondent is entitled to costs which are fixed at $80.00.

Solicitors for Appellant: Chapman, Tripp and Co., Wellington

Solicitors for Respondent: Crown Law Office, Wellington

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BETWEEN TOM JAMES COLTMAN
of Eastbourne, Student,
Appellant

AND ALAN WILLIAM PRICE (MINISTRY OF TRANSPORT)
Respondent

Coram: Richmond P.
Woodhouse J.
Cooke J.
Hearing: July 12, 13, 1976
Counsel: R.M. Crotty for appellant,
P. Graham for respondent
Judgment: July 29, 1976

JUDGMENT OF WOODHOUSE J.

In this case two questions arise. First, what is meant in s. 58B (9) (c) of the Transport Act 1962 by the reference to "the same name, address and occupation as the defendant"? Second, if the certificate does not refer precisely to "the same name, address and occupation as the defendant" then is s. 58 (2) applicable to the situation?

I agree with the President that the questions are of general public importance and that special leave should be given to the appellant. And, concerning the first of those questions, I agree with him that the analyst's certificate in this case did not refer to a person having "the same name, address and occupation as the defendant": (my emphasis). Mr Graham submitted in effect that the words in subs. (9)(c) do not imply that the relevant descriptions of the defendant must necessarily be true and accurate in each detail: that it would be sufficient if they had been used consistently and could be related to the defendant. In making that submission he was forced to agree that if he were correct any name at all or any address could be used in the certificate provided it could be identified with the defendant.
In my opinion the language is incapable of that construction.

The second point involves two issues. The first is whether subs. (9)(c) is within the ambit of s.58(2) as follows:

> "It shall not be a defence to a charge under paragraph (a) of subsection (1) of this section that any of the provisions of sections 58A and 58B of this Act have not been strictly complied with, provided there has been reasonable compliance with the provisions of those sections."

In a number of the cases to which we were referred a distinction has been drawn between "the provisions of section 58A and 58B" that describe the steps to be followed in order to lay a foundation for a prosecution; and "provisions" that concern the means by which the necessary evidence may be brought before the Court which would justify conviction. No doubt the various provisions in those two sections can be separated out in that way but, like the other members of the Court, I do not think that the use to be made of s. 58 (2) was intended to turn upon such a distinction. In my view the presumption referred to in subs. (9) (c) will arise if there has been "reasonable compliance" with the requirement as to name, address and occupation.

The remaining question, therefore, is how should the level of reasonable compliance be tested? In terms of similarity of names? Or of geographical propinquity in terms of address? Or the extent to which letters or numbers have been misread or transposed? And if that de minimis sort of approach is appropriate how can the line be drawn? In my view the necessary (and more practical) answer is indicated by the purposes underlying the requirement of name, address and occupation. That purpose is obviously to ensure that a given specimen of blood will be identified through the certificate with the donor. With that consideration in mind I think there will be reasonable compliance with the requirement if any departure from the true name, address or occupation is explicable in terms of the information tendered to or acted upon by the officials concerned; and there is no reasonable risk of prejudice to the defendant. Obviously it would be wrong to act on the presumption raised by subs. (9) (c) in the face of a discrepancy relating to those details if there were any risk of injustice or unfairness. But I do not think the sensible interests of defendants in this class of case require the Courts to take such a technical view of the presumptive provisions of s.58B that their general purpose of avoiding unnecessary and inconvenient applications of the hearsay rule is stultified for no good or practical reason.

For those general reasons I would dismiss the appeal.

Solicitors for the Appellant: Chapman, Tripp & Co., WELLINGTON

Solicitors for the Respondent: Crown Law Office, WELLINGTON

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BETWEEN TOM JAMES COLTMAN of Eastbourne, Student

Appellant

AND ALAN WILLIAM PRICE (MINISTRY OF TRANSPORT)

Respondent

Coram: Richmond P.
Woodhouse J.
Cooke, J.

Hearing: 12, 13 July 1976

Counsel: R.M. Crotty for Appellant
P.W. Graham for Respondent

Judgment: 29 July 1976

JUDGMENT OF COOKE J.

I agree that special leave to appeal should be granted but that the appeal must be dismissed. It would be undesirable to try to formulate an inflexible rule applicable to all circumstances that may arise in respect of defects in certificates under the Transport Act 1962, s.58B (5) or (9). But as experience has shown that defects must be expected in such certificates from time to time, and as we have had the benefit of careful arguments from both sides on the whole matter, it seems to me that some indication of general principles is called for.

As to s.58B (9) (c), I agree that in requiring the certificate to refer to the specimen of blood analysed as being a specimen that had been taken from a person having the same name, address, and occupation as the defendant, Parliament must have meant the same as the defendant's true name, occupation and address. That is the natural and ordinary meaning of the words, and there is nothing in the context or the purpose of the provision warranting any other interpretation.

(Of course a person may have more than one address or occupation and in rare instances may even be commonly known by more than one name; if so, any of the correct alternatives will be enough.) If it emerges at the hearing of a charge that the information and summons have stated any of the particulars incorrectly, the information should normally be amended pursuant to s.43(1) of the Summary Proceedings Act 1957. Under subs. (5) of that section the hearing may be adjourned if the defendant would be embarrassed in his defence by reason of such an amendment. In the present case there could be no suggestion of prejudice to the defendant, who was duly served at his correct address and must have well understood that he was the person intended to be charged. When the case comes before the Magistrate again for completion, the address shown in the information can be duly amended.

But obviously the Court cannot amend an analyst's certificate. If a certificate which is an essential part of the informant's case does not strictly comply with the requirement to show the defendant's correct name or address or occupation, the defendant will have a defence to a charge under s. 58(1)(a), unless the informant can rely on s.58(2). Again I agree that s.58(2) is wide enough to apply to defects in certificates, seeing no sufficient reason to interpret the words of that subsection 'any of the provisions of sections 58A and 58B' in other than their natural and ordinary sense. To invoke s. 58(2) in any given case there must be <u>reasonable compliance</u> with the provision requiring the name, address and occupation to be correctly stated. It seems to me that the crucial words are well capable of meaning, and to give effect to the manifest purpose of the Act should be held to mean, a degree of compliance that is reasonable in all the circumstances. 'Reasonable' is a comprehensive word. As I see it, the most important question will usually be whether any errors in the particulars in the certificate are such as to raise a reasonable doubt about whether the certificate does relate to the blood of the defendant. The second question will usually be whether the persons concerned in ascertaining the particulars have acted with reasonable care. In determining these questions evidence will be admissible as to what the traffic officer and the medical practitioner recorded as the name, address and occupation of the motorist, and why they did so; as will evidence of any other relevant facts. The contents of the blood specimen consent form may be important. In this case, for instance, the form showed the defendant's address as 44A Muratai Road Eastbourne. The traffic officer's uncontradicted evidence was that he read the form to the defendant and also gave it to the defendant to read before signing it. The defendant signed it and put a ring round the answer in it 'Yes'.

Evidently he made no attempt to correct the two errors.

The cases drawn to our attention did not include any in which the discrepancies between a certificate and the true name, address and occupation were wide, but it is conceivable that there could be a wide or even total discrepancy if, for instance, a defendant were to give wrong information to a traffic officer. The greater the discrepancy, the slower the Court would be to find reasonable compliance. But if the evidence satisfactorily accounts for the discrepancy, in the sense that there is no reasonable doubt that the certificate does relate to the defendant's blood and reasonable care has been taken in obtaining the particulars, I think like Woodhouse J. that the Court would usually be entitled to find reasonable compliance. There appears to be no injustice in this approach. It is to be borne in mind that under s. 58B (13) and (14) the defence is able to require the prosecution to call the medical practitioner or the analyst. Moreover we were informed by counsel for the Ministry that, as was done in this case, it is customary to issue the motorist with a traffic offence notice showing what the traffic officer has recorded as his name, address and occupation; and normally the same would appear, as here, in any subsequent summons.

Applying the foregoing approach to this case, I have no doubt, despite Mr Crotty's argument, that on the findings of fact by the learned Magistrate and the evidence there was reasonable compliance. Paragraphs 6 and 7 of the case stated show that the Magistrate found it proved that the blood taken from the defendant was the subject of the analyst's certificate. There would be no ground for inferring any lack of reasonable care in obtaining the particulars on the part of the traffic officer or the medical practitioner. In his oral decision the Magistrate said that in all respects he would find the case proved were it not for the principles enunciated in Police v. Smith (1975) 2 N.Z.L.R. 755. For the reasons given by the President that case is distinguishable. In my opinion, therefore, s. 58(2) is available and defeats the technical defence here.

Solicitors for the Appellant: Chapman, Tripp & Co., Wellington
Solicitors for the Respondent: Crown Law Office, Wellington