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IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

M. 390/70.

BETWEEN WARREN RAYMOND HALLORAN
APPELLANT

AND POLICE
RESPONDENT

Hearing: 21st July, 22nd July and 26th August, 1970.

Counsel: Murphy for Appellant.
Nicholson for Respondent.

Judgment: 25th January, 1971.

JUDGMENT OF MOLLER, J.

This is an appeal from a decision of Mr. N.M. Izard, S.M., sitting in the Magistrate's Court in Auckland.

The appellant was convicted in respect of a charge that he drove a motor-car in Commerce Street while the proportion of alcohol in his blood exceeded 100 milligrams of alcohol per 100 millilitres of blood. He was fined $75, ordered to pay certain other expenses, and disqualified from holding or obtaining any motor-driver's license for one year, any such license then issued to be endorsed for three years. The appeal was originally against both conviction and sentence, but, at the hearing before me, that against sentence was abandoned.

There seems to be no dispute about the basic facts. On 21st February 1970, at about 8.30 p.m., a Sergeant Gunst and a Constable Field were passengers in a police car travelling in Commerce Street. They then observed a Valiant motor-car make a right-hand turn into that street from Tyler Street. It was being driven somewhat erratically, and, as I understand it, it is not suggested in this appeal that the policemen did not have good cause to suspect that the driver (who, of course, was the appellant) had committed some offence falling within those enumerated in section 58 B (1) of the Transport Act 1962.

The Valiant was stopped, and Sgt. Gunst spoke with the appellant; but no test of the appellant's breath could be made at the scene because the police did not have a testing device with them. The result of all this was that, at 8.30 p.m., Sgt. Gunst required the appellant to "accompany (him) to the Police Station for the purpose of a breath test due to the consumption of liquor." The Sgt. in evidence further said:- "The defendant was quite co-operative. The Valiant was driven back to the Police Station." It is, however, necessary to record that the Police Station referred to was not the Central Police Station in Auckland but was the Wharf Police Station in Quay Street. After arrival at this Police Station Constable Field, at 8.35 p.m., requested the appellant to undergo a breath test. It took about 2 minutes from then to complete the test, and the result was positive. Then, however, at 8.55 p.m. (20 minutes after the first request for a breath test), a second test was required. For reasons given by Constable Field this took longer to complete than did the first one and occupied about 4 or 5 minutes. It too was positive. The appellant was then taken to the Central Police Station where Constable Field required him to provide a specimen of his blood, and to this the appellant agreed. The specimen was taken at the Central Station at 9.22 p.m. by a Dr. Marshall.

Mr. Murphy, for the appellant, first made a general submission of principle to the effect that "each one of the procedural steps as to the taking of breath and blood tests laid down in ss. 59 B and 59 C must be complied with in precise detail." (See Wild, C.J., in Stewart v. Police [1979] N.Z.L.R. 560.); and he then contended that this had not been done because (a) the Wharf Police Station (at which the breath test was taken) was not a Police Station "where a specimen of blood may be taken", and (b) the first breath test "was not one contemplated by section 59B", with the result that the second breath test, "required" by the Constable because the earlier one had been positive, "was not one which was conducted in accordance

with section 59B".

I shall deal with (a) first.

Section 59B (2) provides (inter alia) that if, as in this case, an approved "breath-testing device .....is not readily available" at the scene, a constable "may require" the suspect "to accompany him to a police station, a registered medical practitioner's surgery, a hospital or any other place where a specimen of blood may be taken." Then subsection (4) provides that where any person has "pursuant to a requirement under subsection (2) of this section, accompanied a constable .....to a police station, a registered medical practitioner's surgery, a hospital, or any other place where a specimen of blood may be taken.....he shall at that place, and not less than twenty minutes after the time when he was required under subsection (2).....to accompany a constable....to that place... provide forthwith on being so required by a constable.....a specimen of his breath for a breath test....." (Although my decision on this point will not in any way turn upon it I draw attention to the fact that in subsection (4) (a) a comma appears between the word "hospital" and the phrase "or any other place where a specimen of blood may be taken", but that no such comma appears in subsections (2) or (3). This may of course arise from a printer's error in the relevant volume of the New Zealand Statutes.)

Put shortly Mr. Murphy's submission was that the words "where a specimen of blood may be taken" qualify not only "any other place", but also "a police station", "a registered medical practitioner's surgery", and "a hospital"; that the Wharf Police Station was not specially equipped, as was the Central Police Station, for the taking of specimens of blood; that therefore the breath tests had not been taken in accordance with the legislation; and that the procedural steps had not been complied with in precise detail.

I have given careful consideration to Mr. Murphy's quite lengthy arguments in connexion with this part of the case and

have, equally carefully, perused the cases and texts to which he referred me. I have also taken into consideration the fact that Mr. Nicholson, in his submissions, was to some extent inclined to accept that there appeared to be some ambiguity in the provision under examination, though he also, of course, argued strenuously that the proper interpretation was that the limiting phrase qualified only the words "any other place".

In the end I have reached the view that Mr. Nicholson's submissions must be accepted and those of Mr. Murphy rejected. From this it follows that, in my opinion, the suspect may be taken to any Police Station, whether it is specially equipped for the taking of blood samples or not, and may, at that station (or, in the words of the Act, "at that place"), be required to provide a specimen of his breath. Here the appellant was taken to a Police Station, and, "at that place", was asked to undergo a breath test. Consequently on this point the appeal must fail.

(During the morning on which I completed the draft of this judgment there arrived on my table Part 22 of The New Zealand Law Journal 1970 in which there is noted, amongst "Catchlines of Recent Judgments" the case of Blucher v. Young, from which it appears that Wilson, J., may have had to consider a problem somewhat similar to this. At all events the learned Judge seems to have held that there is nothing in the Act requiring the blood specimen to be taken at the place where the final breath test has been administered.)

I have already summarised Mr. Murphy's second submission earlier in this judgment, the wording then used by me being, in part, an extract from a memorandum very considerately supplied to me before the hearing setting out the points upon which he would rely. He of course elaborated on this summary during his argument in Court.

As I understand Mr. Murphy's submissions on this aspect of the matter they were:-

(a) that the first test was required by Constable Field

only 5 minutes after the appellant was required to accompany the constable to the Police Station;

(b) that the first test was therefore required less than 20 minutes after the requirement to accompany the constable to the Station;

(c) that the first test was, therefore, "unlawful";

(d) that the second test was required because the first test was positive, and the time of the second requiring was fixed by relation to the time of the requiring of the "unlawful" first test, (that is to say, exactly 20 minutes after the first requiring);

(e) that the timing of the second requiring should have been fixed by relation to the time of the requirement to accompany the constable to the Police Station;

(f) that, if this had been done, the second test would have been required at 8.50 p.m., 5 minutes earlier than the requirement was, in fact, made, and 10 minutes or so earlier than the time at which the second test was completed;

(g) that the requiring of the second test, made because of the positive result of the first test and not because of the original good cause for suspicion, was made unlawfully;

(h) that, because of this, "the statutory chain", as Mr. Murphy called it, had been broken; and

(i) that therefore there had not been compliance in precise detail with all the procedural steps prescribed by the legislation.

It is necessary to enlarge somewhat upon these submissions.

In the course of the argument I pointed out to Mr. Murphy that the statutory provisions did not make it mandatory that a suspect, in a case such as this, should provide a specimen of his breath at a point of time exactly 20 minutes from a requirement to accompany a constable to a Police Station. It seemed to me that the specimen could be provided at any time at all, as long as it followed a requiring by a constable made not less than 20 minutes after the time of the requirement to accompany. Mr. Murphy

conceded that this was so and also that the second test here was taken after the expiry of the 20 minute period. But he argued that the time at which the breath test is required must not be influenced, in any way at all, "by some unlawful reason". He said that, if a constable puts it out of his power to administer a test at a time when he could, as a matter of right, have administered it, and does so because he has chosen to take as the commencement of the 20 minute period a point of time later than the time of the requirement to accompany any test taken under those circumstances cannot meet the demands of the legislation. He said that this was because, as I have already recorded, there had been a break in "the statutory chain", and he added that such a procedure could result in prejudice to a suspect, that it did in this case result in "a dead period" (as he called it) between 8.50 p.m. and 9 p.m.,and that a test taken during those 10 minutes might have returned a negative result. Mr. Murphy said that the police, to use his own words, "shut the door" on his client for 10 minutes "for no acceptable reason". He then referred to Rendell v. Hooper [1970] 2 All E.R. 72, in which, in a somewhat different context, Lord Parker, C.J., dealt with "good faith and reasonableness", and he submitted that, although there was no question in the present case of bad faith, the constable was acting unreasonably in delaying the test in the way that he did.

Looking at the terms of our legislation in New Zealand I agree with Mr. Nicholson that the state of mind of a constable when he administers a breath test, in such a case as this, is not relevant to the question whether or not the test complies with the statutory provisions. What is relevant is whether or not the specimen was provided at some time not less than 20 minutes after the requirement to accompany, and that that requirement to accompany should have been made because a constable had, at the scene, good cause to suspect that an offence of the kind mentioned in section 59B had been committed. Mr. Nicholson emphasised this by showing that there is nothing in subsection (4)

to make it mandatory for the breath test to be administered by the same constable who, at the scene, had the original good cause for suspicion or made the requirement to accompany. In my view once the suspect had been brought to the Police Station following compliance with the statutory provisions that govern the situation up to that point, the requirement of a breath test and the administering of the test may be done by any constable at all. In the end Mr. Murphy, in his reply, was forced to the position wher he had to concede all this, except that he still argued that the constable had to do his "honest best" to see that the procedure laid down in the Act was complied with. (These quoted words he borrowed from Lord Diplock in Director of Public Prosecutions v. Carey /1969/ 3 All E.R. 1662.) He finally said that he could not assert here that, if one looked at the matter in a subjective way, the constable had not done his "honest best", but he added that, if one looked at it in an objective way, what the constable did do was "as bad as if he had taken the second test inside the statutory 20 minutes period."

Mr. Nicholson argued that the first test was a nullity, that there had been no break in "the statutory chain" because the appellant had been properly brought to the Police Station and the specimen had been required and provided after the expiry of the prescribed time, and that, in those circumstances, it did not matter what motivated the constable in taking the second test or from what point of time it may appear that he chose to start a period of 20 minutes, as long as it was not prior to the making of the requirement to accompany.

With this I agree, and I should have reached that decision from my own consideration of the matters involved without the guidance of precedent. But I have also had the opportunity of perusing the unreported oral judgment of Haslam,J., in the case of Barone v. Police delivered on 18th September 1969, where the learned Judge was faced with facts very similar to those that I have to consider, and where he accepted a submission by counsel for the Police that the first test was a nullity. The learned Judge said:-

"Therefore I agree with Mr. Stone's contention that it is the second test that mattered, the other was innocuous and of no importance." Mr. Murphy strove to distinguish Barone's case from the present one on two grounds, neither of which I find valid; and, indeed, it appears to me from a reading of the judgment that in Barone's case the period of 20 minutes was probably calculated from the time of the first test. The requirement to accompany was made at 11.25 p.m. and the first test was taken, on arrival at the Police Station, at 11.30 p.m. This test Barone failed. After setting out these facts Haslam, J., continued:- "Twenty-five minutes or so later (at least there is no dispute about the time being in excess of 20 minutes), a second test was carried out and the appellant failed again."

With respect I consider that Barone's case was rightly decided, and I acknowledge the assistance that it has given me in reaching my present decision.

Mr. Murphy's second argument is therefore rejected.

But that is not the end of the matter, because Mr. Murphy put forward a third argument which was, however, of a very different nature from the ones that I have so far considered. It was based on sections 195 and 59 C (4) of the Transport Act 1962.

Section 195 reads as follows:-

"In any proceedings for an offence punishable on summary conviction against any Act, regulation, or bylaw relating to the use of motor vehicles, the Court may dismiss the information if it is satisfied that the person charged has been prejudiced in his defence by any unreasonable delay in instituting the proceedings or in notifying him of the time, place, and nature of the offence."

Section 59 C (4) is in these terms:-

"Where under subsection (3) of this section both parts of a specimen of blood or both specimens of blood are sent to the Dominion Analyst or a Government Analyst, he shall, on application in writing by the person from whom the blood was taken or by his solicitor or counsel made within twenty-eight

days after the taking of the blood, supply one of those parts or specimens to an analyst specified by that person or by his solicitor or counsel."

By way of introduction, however, I must also record

(a) that section 59 C (2) requires that every specimen of blood taken from a suspect shall be immediately divided into two parts, or, if the specimen is insufficient to be so divided, a further specimen shall be taken, and each part or specimen, as the case may be, shall be placed in a separate container which shall be sealed; and

(b) that section 59 C (3) requires that a constable or a traffic officer shall forthwith deliver or cause to b delivered both parts of that specimen or both those specimens to the Dominion Analyst, or a Government Analyst, or to an officer of the Department of Scientific and Industrial Research on his behalf, for analysis of one of the parts of specimens, and for the custody of the other.

I must now also set out certain further facts. These are:-

(1) The specimens of blood were taken on 21st February 1970;

(2) The Information was sworn on 26th March 1970;

(3) It was sworn before a Deputy Registrar of the Magistrate's Court in Auckland. (Although the learned Magistrate did not advert to the matter in his judgment it seems to be a reasonable and proper inference that the information was therefore filed on 26th March as well as sworn on that day.);

(4) The summons was served on the appellant personally on 6th or 7th April;

(5) The date for the hearing appeared in the summons as 27th April. (In fact the hearing did not take place until 7th May, but nothing turns upon this.)

(6) The service of the summons upon him on 6th or 7th April was the first notification received by the

appellant that he was to be charged with an offence;

(7) On 15th April the solicitors for the appellant (not being Mr. Murphy's firm) wrote a letter to "The Prosecutions Department, Central Police Station, Auckland", which letter contained the following paragraph:-

> " Mr. Halloran was served with the summons on Tuesday the 7 April which was well in excess of the 28 day limit set out in the Act, but nevertheless he would be grateful if you would arrange for the second sample to be supplied to T.J. Sprott & Associates, Auckland, for analysis."

(It is to be noted that this letter of application was sent to the Police and not to the Dominion Analyst or a Government Analyst);

(8) On 17th April a Sergeant in the Prosecution Section wrote to the solicitors a letter with which was enclosed a copy of the official analyst's certificate (the solicitors had also requested this), and which read, inter alia, as follows:-

> " In relation to your request for a blood sample to be supplied, it will now be necessary for yourself or Mr Sprott to contact the D.S.I.R. in this respect. The samples are retained under refrigeration by D.S.I.R. and will have to be uplifted from there as a result of your own arrangements."

(There is no evidence as to when this letter was received by the solicitors, but 17th April 1970 was a Friday, and it was probably Monday 20th April before it reached them.);

(9) On 22nd April the solicitors wrote to the Department of Scientific and Industrial Research;

(10) On 24th April the Government Analyst in Auckland wrote

to the Solicitors saying:-

" Although the Transport Act imposes upon me the duty to supply a specimen of blood on written request within four weeks, we at first held them for up to three months as a helpful gesture in case of unavoidable delays or where the application was inadvertently made out of time. However, we later found it necessary (largely through limitations on refrigerated space) to dispose of specimens after approximately two months, which is still regarded as a very reasonable gesture.

The specimen referred to in your letter of 22 April was destroyed earlier this week. Had the notice sent to the police on 15 April been sent here, or had we been informed even verbally, the specimen would still have been available on your request even though out of time. I note that the blood was taken on 21 February received here on 23 February and my certificate was issued on 24 February; evidently the police were unable to act and issue a summons until 7 April.

It is regretted that the specimen is no longer available. I must, however, in fairness to ourselves emphasise that we extend the time twice as far as the 'within twenty-eight days' of the Act; I am sure you will appreciate the position and convey it to your client."

In addition to these facts there was important evidence given under cross-examination by Mr. Groom, who was the analyst at the Department of Scientific and Industrial Research and who was called by the prosecution. This shows that the letter from the solicitors to the Department dated 22nd April followed a verbal request by telephone from one of Dr. Sprott's staff requesting the appellant's

specimen and that that telephone call was probably made on 21st April. Although Mr. Groom admitted that the appellant's specimen was destroyed by a technician under his control and at his direction, he somewhat surprisingly stated that he was unable to say whether or not it was so destroyed after the telephone request was made by Dr. Sprott's employee, and conceded that it may have been. Mr. Groom seemed to seek justification for whatever did happen in the fact that, as he put it, "This request was not from a professional man", and again in the fact that "we had no written advice, and we act on written advice." It is true that section 59 C (4) requires that an application for a suspect's specimen be made in writing, but I should like to think that no responsible officer of the Department, aware of a request by telephone from an employee of a private analyst, would permit, let alone direct, the destruction of a sample for either of the reasons advanced by Mr. Groom, at least until a reasonable time had elapsed during which a written application could be made, even though the period of twenty-eight days had passed. Not unexpectedly Mr. Murphy criticised the Department's action in this respect, and, with understandable asperity, drew attention to the conflicting views expressed, on the one hand, by Mr. Groom under cross-examination and, on the other hand, by the Government Analyst in his letter, as to the way in which oral requests should be treated.

Mr. Murphy's submission on these facts was that no statutory right of any kind is given to the Dominion Analyst or to a Government Analyst or to any officer of the Department to destroy a suspect's sample of blood at any time at all. Section 59 C (3) simply says that, when such a sample is delivered to any such person, it is "for.....custody". It was Mr. Murphy's contention that this imposed upon the person concerned a duty to keep it in custody indefinitely, or at least until it was known whether or not a prosecution was to follow the results of the analysis, and, if it was, until the proceedings had been dealt with. He said that sub-section (4) gave to the suspect the opportunity of obtaining his sample <u>as of right</u> if the necessary notice was given within the

time mentioned, but that, if such notice was not given, he should still be in the position where he could, in a proper case, obtain it for the purposes of his prosecution by some form of application to the Court. I think Mr. Murphy is, in a general way, correct and it may be that the section should be amended to make the respective rights and duties of both the official analyst and the suspect absolutely clear. Be that as it may, counsel submitted that the fact that the appellant's sample had, in this case, been destroyed under the circumstances shown by the facts that I have outlined meant that the appellant's analyst could not investigate the blood taken from him, that this clearly prejudiced the appellant in his defence, and that the learned Magistrate should have exercised the discretion given to him by section 195 in favour of the appellant and dismissed the information.

Mr. Murphy criticised the Magistrate's approach to this whole question (1) in so far as he seemed to think that the official analyst's duty was to hold the second sample for only twenty-eight days; (2) in so far as he based his decision, to some extent, upon the fact that the appellant knew at the Police Station that he had failed the breath tests and was then aware of the probability of a prosecution; and (3) in so far as he said that it "behoved him..... in his own interests, if he wished to have a blood sample, to apply for it in the proper manner within the 28 days provided by the Act." I think there may well be some force in these criticisms. I have already discussed the question of what the analyst's duty may be under the legislation as it stands, and, as Mr. Murphy very properly pointed out in respect of the second criticism, there is no point in applying for the second sample and incurring the expense of an analysis for the sole reason that the suspect has the knowledge that breath tests have been failed, because it might, and no doubt often does, subsequently appear from the official analyst's investigations that the amount of alcohol in the blood does not justify a prosecution.

The learned Magistrate finally said on this subject:-

" There is no question that there was any prejudice or any

unreasonable delay in instituting the proceedings or notifying him of the time and place and nature of the offence. That was, of course, well-known to the defendant as he was taken to the Police Station. In my opinion this Section 195 is designed to meet the case where there is a long delay or any case where the defendant has not been stopped and physically charged with the offence at the time of its commission."

Mr. Nicholson was prepared to base his argument on the propositions that the learned Magistrate had a discretion in the matter; that he had exercised it in a judicial way; that he had made a finding of fact that there was no unreasonable delay of the nature described in section 195; that he had made a finding of fact that there was no prejudice to the appellant; and that I should not interfere with what he did.

In view of the way in which, as set out above, the learned Magistrate approached the matter, I believe that I have the right to examine the exercise of his discretion, and come to a different view, if, on a different approach (which I consider to be the correct one) I feel bound to do so.

To justify a Court in exercising the discretion given it by section 195 in favour of a defendant it must be "satisfied" in respect of two things:-

(1) that the person charged has been prejudiced in his defence; and

(2) that that prejudice has arisen because of some unreasonable delay in instituting the proceedings or in notifying him of the time, place, and nature of the offence.

I think that there was unreasonable delay in the present case in instituting the proceedings. It seems to me that the Police should keep very much in the forefront of their minds that the suspect has only twenty-eight days from the taking of the blood sample to obtain his specimen as of right, and that they should do everything possible to ensure that proceedings under this legislation

are commenced, or at least that ample notification of an intention to prosecute is given to the suspect, at the earliest possible opportunity. Here, the Government Analyst issued his certificate, which showed that prosecution would be amply justified, on 24th February, one day after the specimens were delivered to his Department, and three days after the samples were taken. And yet the information was not sworn until 26th March, over a month later. I consider that there was unreasonable delay in instituting proceedings, and that, since the summons was not received by the appellant until some 12 days later, there was also unreasonable delay in notifying him of, at least, the nature of the offence.

However, for Mr. Murphy's argument to succeed, the Court must be satisfied that this unreasonable delay caused the prejudice to the appellant. Therefore, assuming for the purpose of counsel's argument, but not expressly finding it to be so, that the appellant was prejudiced in his defence through Dr. Sprott's inability to obtain and analyse the second specimen of blood, I must now ask myself this question: Did that prejudice arise because of the unreasonable delay that I have found occurred? I do not think it did. Different facts in some other case may call for a different answer, but, in this instance, the second sample had not been destroyed by the time the proceedings were instituted or by the time the appellant was served with the summons. It would be reasonable to infer from the evidence that the destruction took place on 20th or 21st April, almost 4 weeks after the proceedings were commenced and about a fortnight from the date of service. We do not know how soon after service of the summons upon him the appellant first consulted his solicitors, but their first step in an attempt to obtain the specimen was taken apparently on 15th April, and they lost valuable time in applying to the Police Department instead of to the official analyst; and unfortunately Mr. Groom directed the destruction of the second specimen in circumstances that may be open to unfavourable criticism. In the light of all this I think that the Magistrate would have been entitled to say, even if he had found that prejudice existed, that, although there

was unreasonable delay, he was not satisfied that that prejudice had been caused by it.

Consequently I am of the opinion that Mr. Murphy's final submission cannot succeed, although my reasons differ somewhat from those given by the Magistrate.

The appeal is therefore dismissed both as to conviction and sentence. The respondent is entitled to an order for costs, but I have not heard counsel upon the subject, and this may be advisable considering the length of the hearing. I reserve the point for submissions later should this become necessary.

Solicitors: Grierson, Jackson & Partners, Auckland, for Appellant.
Crown Solicitor, Auckland, for Respondent.