AUCKLAND REGISTRY M. 407/78

N.Z.L.R.

No Special Consideration

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BETWEEN : DOUGLAS HENRY SHEA

Appellant

A N D : AUCKLAND CITY COUNCIL

Respondent

Hearing: 1 June 1978

Counsel: M. Harte for Appellant.
G.M. Harrison for Respondent.

Judgment: 13th June 1978

JUDGMENT OF PERRY, J.

The appellant in this matter was convicted under two counts; the first was that on 26 April 1978 contrary to S.58(1)(a) of the Transport Act 1962 he drove a motor car while the proportion of alcohol in his blood exceeded 100 milligrammes of alcohol per 100 millilitres of blood. The second was that on the same date he used a motor car on Orakei Road carelessly. This count was laid under S.60 of the Transport Act 1962. He had filed two notices of appeal.

One appeal is against the sentence imposed by the learned Magistrate in respect of the careless use charge, and in particular in respect of the disqualification period of nine months imposed in respect of that. Mr Hart for the appellant said that this period of disqualification was unusually long for a careless driving charge in his experience. Whether that be so or not, the fact is that the appellant, while driving a Volkswagon car along Orakei Road at 1.55 a.m. in the morning, allowed his vehicle to cross the road to collide with a pole on the opposite side of the road to his direction of travel. The car was damaged, and the accused himself suffered injuries. The danger to people using the road when a motorist drives in this way is so obvious that the Magistrate was well justified in taking the view that he did, when he disqualified the appellant

from driving for this period of nine months. I would dismiss the appeal against sentence. In no way can this part of the sentence be considered excessive.

The other appeal is against his conviction on the blood alcohol charge as set out in the points of appeal in the following words:

> "That there was a valid request made pursuant to Sub section (7) of Section 58 B of the Transport Act 1962 but that request was not complied with because the D.S.I.R. did not supply the independent analyst with a "specimen". It is submitted that it follows from this failure means exhibit 5 (the analyst's certificate) is inadmissible as evidence (see sub section (8))"

Mr Harte for the appellant has traversed the relevant sections of th Transport Act 1962.

The evidence showed that the appellant accompanied the officer who attended the scene of the collision and then went to the appellant's home, to the Civic Administration building where h was asked for and refused a breath test. Eventually he did agree that a specimen of his blood should be taken and there was exhibited to the Court a certificate by Dr. Goodey who took the blood and there is also the usual blood specimen form. Doctor Goodey's certificate shows that he took the specimen and then divided this into two parts, each of which he placed and sealed in a separate container. There was evidence by Traffic Officer Tevita that after the blood was extracted by Dr. Goodey at 3.55 a.m. and placed in the two bottles, the bottles were labelled, then the schedules from the blood specimen medical certificate, they were sealed, initialled by the doctor and selotape was wrapped around them. They were then placed in a foam container which was then put into a cardboard packet. The doctor printed the initials and the name of the defendant and this was handed to the officer. He then went to the communications roo which is manned 24 hours a day by a senior officer of the Department. He there obtained a key with which he unlocked the

refrigerator and he put the defendant's blood inside. He locked it and returned the key back to the communications room.

There was further evidence that on the 26th April Traffic Officer Kemp went to the radio communications room, obtained the key to the locked surgery in which there is a locked refrigerator. Upon opening the previously locked refrigerator, he took from it a number of cardboard packages, one of which related to this alleged offence. On opening this particular cardboard package he took from it two glass bottles each of which had around the outside of it a white paper label bearing a name, an address, and an occupation which he copied into his notebook as number 900, and he identified this as that of the appellant. He described the way in which each bottle was sealed and labelled, and then also how he posted the two specimens in their cardboard boxes to the D.S.I.R. Private Bag, Petone, by registered airmail. And he produced the receipt for the letter. He also produced a certificate received from the D.S.I.R. Petone, certifying that the specimen of blood was found to contain 250 mg of alcohol per 100 ml of blood. This certificat was produced to the Court.

Mr Templeton was the solicitor at that time acting for the appellant. On the 27th May he wrote to the Chemistry Division of the D.S.I.R. asking that the analyst forward his client's blood specimen taken on the 26th April 1977 to T.J. Sprott and Associates in Auckland for private analysis. This request was complied with on 1st June 1977 when the Dominion Analyst wrote to Mr Templeton saying that as instructed his client's blood sample had been sent to T.J. Sprott and Associates. There is on the file also a copy of the Dominion Analyst's letter to T.J. Sprott and Associates enlcosing the sample.

Evidence was given for the defence by a Mr Sweetman, who is employed as an analytical chemist by that firm. He deposed that

on 7th June. his firm received a blood sample labelled "Douglas Henry Shea". He did not personally receive the sample. There is someone else, a Miss Ruth who "takes them in" and specimens so received he said were kept in a refrigerator. He proceeded to analyse what was received, some eight days after it was received. The seal was intact and the package was intact and there was no leakage, but the blood had coagulated with the result that he could not analyse it.

As I understand the point made by counsel for the appellant, it is that what was received by T.J. Sprott and Associates cannot be regarded as a specimen of the appellant's blood because it was incapable of analysis. The Magistrate in his decision points out that eight days had elapsed before the specimen was analysed and there is no evidence of the condition of the blood when it was actually received by T.J. Sprott and Associates as it was not then examined. Eight days elapsed before its condition was ascertained.

Mr Harte was not able to point to any way in which any of the officers concerned had not complied with the requirements of S.58(B) and the short point is whether the bottle of blood received by T.J. Sprott and Associates could be regarded as a specimen of the blood because it could not be analysed eight days later. I found great difficulty in following this submission. S.58B(2) empowers the registered medical practitioner to take a specimen of a person's venous blood for the purpose of analysis and in accordance with normal medical procedures. The person is required to permit a specimen of blood to be so taken from him forthwith at the request of the registered medical practitioner.

Next the Act directs by S.58B(2) that every specimen of blood so taken is to be divided into two parts. And it further provides that when a specimen is divided into two parts as aforesaid each such part shall be deemed to be a specimen of blood for the

purposes of this Act.

Mr Harte referred me to a definition in the Shorter Oxford dictionary but I find this of little use as I am confronted with the specific provisions of the Act which specifically says that on the division of the taken blood into two parts - each part "shall be deemed to be a specimen of blood for the purposes of the Act". What was then sent to the Department and what was sent by the Department to T.J. Sprott and Associates is accordingly a "specimen" of the appellant's blood because of the specific provisions of the Act. The Act does provide that if the request had not been complied with and the sample had not been sent, then the Government analyst's certificate is not admissible in evidence. But here it was sent and consequently the certificate was admissible. There is no provision in the Act that if the specimen is incapable of being analysed that it is nota specimen. It is a specimen from the time it is taken, divided and placed in a container.

There are other protections to a person who is under suspicion or in fact charged with such an offence. They are contained in subsections 13 and 14 of S.58B but none of the requests permitted under these subsections was made by the appellant. In my view there is no substance in the appeal which must fail. The appeal is dismissed. Counsel may submit a memorandum on the question of costs.

Clifford Perry J.

Solicitors for Appellant: Messrs Sellar, Bone & Partners, AUCKLAND.

Solicitors for Respondent: Messrs Butler, White & Hanna, AUCKLAND.