AUCKLAND REGISTRY M. 623/80

BETWEEN : MARK ROBERT HOOTON
Appellant

A N D : MINISTRY OF TRANSPORT
Respondent

Hearing: 3 June 1980

Counsel: Harte for Appellant.
Haines for Respondent.

Judgment: 8 July 1980

JUDGMENT OF THORP, J.

This is an appeal against conviction and sentence entered by the Papakura Magistrate's Court against the appellant Hooton for driving with excess blood alcohol, the date of the offence being 22 December 1977 and the date of the decision being 26 May 1978. The sentence of the Court was that the appellant be fined $250 and ordered to pay Court costs $5 and medical expenses $20. In addition an order was made disqualifying the appellant from holding or obtaining a driver's licence for a period of 15 months.

In a full and careful memorandum of points on appeal filed by Mr Harte as counsel for the appellant, I was advised:

(1) That there was only one point taken on the appeal against conviction, namely that there was insufficient evidence for the learned Magistrate to draw a reasonable inference that "normal medical procedures" were used in taking the blood specim and that the other three submissions made in the Magistrate's Court were abandoned: and

(2) That if the appeal against conviction failed then it

was the appellant's submission that there should be a discharge pursuant to the Court's inherent jurisdiction, and or its jurisdiction under s.42(6) of the Criminal Justice Act 1954, by reason of inordinate delay between the Magistrate's Court hearing and the making available by that Court of the documents prescribed by s.117 of the Summary Proceedings Act 1957 as being required to be forwarded to this Court b y the Magistrate's Court "as soon as possible" after the lodging of a notice of general appeal.

Considering first the point taken by way of appeal against the conviction, Mr Harte referred to two decisions of this Court namely Gillespie v. Auckland City Council, an unreported decision of Moller, J. Auckland M. 265/74 delivered 9 April 1974, and Lapwood v. Ministry of Transport an unreported judgment of Holland J. Auckland M. 1970/79 delivered 21 February 1980, in both of which a failure to give positive evidence as to the speci ens being a specimen of venous blood was considered and in the first of which was also considered the absence of positive evidence that the specimen had been taken "in accordance with normal medical procedures." In both decisions the Court heldthat the absence of positive evidence on those matters invalidated the conviction.

In the present case the medical witness covered the question of the nature of the specimen of blood taken by stating it was a specimen of venous blood, but did not specifically state that normal medical procedures were followed.

I agree with Mr Haines that the purpose of requiring that normal medical procedures be followed is to ensure that in the exercise of the statutory power to take blood, (backed by the sanction of liability to prosecution for failure to consent to blood being taken,) cruel and unusual procedures must be avoided. In the present case not only was there evidence from th

traffic officer and the doctor that a specimen was taken, the appellant himself gave evidence. Nowhere in the evidence is ther any suggestion whatsoever that the appellant was caused any speci inconvenience or indeed any inconvenience by the taking of the blood, to which he consented.

In my view the evidence was sufficient to justify an inferen that normal medical procedures had been followed, and accordingly the appeal against conviction is dismissed.

The facts relating to the second ground of appeal are that the notice of general appeal was dated 1st June 1978 and was received by the Magistrate's Court at Papakura on 2nd June 1978. The appellant advised through counsel that attempts made to obtain the prescribed documents from the Court in Pukekohe had be entirely without success. Those documents were in fact forwarded by the District Court, Papakura, as it had then become, to this Court on the 30th April 1980. With them was a memorandum by the learned District Court Judge who had heard the case 23 months previously advising that the delay in finalising the appea documents rested with him personally, and extending apologies to the Court, counsel, and the appellant.

On behalf of the appellant Mr Harte submitted:

(i) That the determination of the appellant's rights had been deferred for an inordinate period, and that if his appeal were unsuccessful and he were not discharged then of necessity he would face the commencement of 15 months disqualifica ion at this date: and

(ii) That the change in the law relating to the availability of limited licences effected by the Transport Amendment Act No. 3 1978 meant that he would lose as a result of the delay any possibility of obtaining a limited licence

immediately, and generally would have much greater difficulty than would otherwise have been the case, and would accordingly suffer actual prejudice from the delay.

He referred to the decisions in Auckland City Council v. Lincoln, a decision of Sinclair, J. Auckland M. 1613/78, delivere 3 September 1979, and Auckland City Council v. Murphy a decision of Sinclair J., Auckland M. 1412/79, delivered 3 November 1979, i each of which shorter periods of delay were considered fatal to the appeals, but correctly noted that both of these were appeals by the Crown by way of Case Stated. However he contended that factors considered in those cases included the effect of the 1978 No. 3 Amendment, and that the same principles were involved in th appeal.

As the argument proceeded Mr Harte withdrew the contention that there should be an absolute discharge, and suggested instead there should be a conviction and discharge either in terms of s.42(6) of the Criminal Justice Act 1954 or in terms of the Court inherent jurisdiction, as to which he referred me to Ministry of Transport v. Poa, Quintal and Honan, a judgment of Chilwell, J., Auckland M. 1552/77 1685/77 139/78, delivered on 15 May 1978, and to R. v. Dakers, a further judgment of Chilwell J. Dunedin T. 8/78, delivered 22 February 1978. He made the point that if a conviction were entered, even though there were a subsequent discharge, the fact of conviction would mean that in the event of any similar offence being committed by the appellant he could be liable to substantially increased penalties, so that the mere conviction would have a substantial deterrent aspect, certainly against reoffending within a period of five years.

For the respondent, Mr Haines said on this point that the Crown was itself most disturbed by the problems which had been experienced in obtaining appeal documents, not only in respect of Cases Stated by the Crown, but also in the case of general appeals, where it had endeavoured to assist appellants

embarrassed by delay. He informed me that delays in obtaining appeal papers from the Court at Papakura "had been legion," and were the cause for grave concern.

Having stated that he then noted that the decisions in Lincoln and Murphy's cases to refuse the appealing traffic authority in each case the right to appeal, were clearly distinguishable from the case of a general appeal, where the decision in the first instance had been against the accused. I gathered from this submission that it was his view that a party who had succeeded in a Court of first instance could in his view more properly complain about delays than a party who had received an unfavourable decision. I am bound to say that I do not find that argument particularly convincing.

A more convincing submission made by Mr Haines was that in the Lincoln and Murphy cases it appeared that the Court of first instance had been persuaded that the evidence justified a finding either that special reasons existed why the defendants licence should not be cancelled or that the defendant should be acquitted. From this he proceeded to argue that the point taken here that there was a possibility of prejudice by reason of the 1978 Amendment No. 3, was a point a long way further removed from the substance of the appeal that in Lincoln's and Murphy's cases. I have no doubt that there is some merit in that argument, but at the same time it is by no means clear that the appellant's submissions on this ground may not have substance. Clearly it was the appellant's intention from the outset to appeal against conviction and sentence, and there was no point in seeking a limited licence when he was able to obtain a suspension both of the sentence and the order of disqualification pending determination of the appeal.

Finally on the question of the proper action to be taken by this Court in regard to the clear breach on the part of the

Magistrate's Court of its obligations under the Summary Proceedings Act, Mr Haines submitted that the Court would no doubt be justified in taking more positive action in response to such delay in any case where the appellant showed merit than in a case where the appeal was simply on a technicality, and he referred to the unquestioned evidence of a blood alcohol level of 223 mgs of alcohol per 100 mls of blood. That submission al called for careful consideration. However, it does appear to me that the point taken by the appellant was one which was certainly arguable, the case being quite closely related to the decisions i Lapwood and Gillespie's cases, and as far as I am aware not previously considered by this Court. Certainly one could not regard this as a frivolous appeal.

For all these reasons I do not think it would be in accordance with the basic principles of justice for this Court to disregard entirely the extraordinary and unexplained delays which have occurred in the processing of this appeal.

It is a truism that justice delayed sufficiently is equivalent to justice denied. Although the nature of the appeal against conviction is in my view not such that the appellant has suffered prejudice in the determination of liability, I think it would be quite wrong to accept the possibility of prejudice arising from the new provisions as to disqualification.

I believe also that unless this Court does take some action to mark its disapproval of delays of this nature in quite unmistakable terms, the efforts which I have no doubt Crown counsel as well as counsel for defendants have made to avoid unreasonable delays will not bear fruit.

The powers of this Court under s.121 of the Summary Proceedings Act are, in the case of an appeal against sentence, set out

in subsection (3), and in the case of an appeal against an order, set out in subsection (4). Section 30(2A) of the Transport Act 1962, the provision in force at the time of the hearing of this charge relating to penalty, provided that persons convicted of breaches of s.58 of the Act were liable to imprisonment for a term not exceeding three months, or to a fine not exceeding $400, or to both, and also for the Court to make orders relating to disqualification from holding or obtaining a driver's licence. Read in relation to the format of s.121 of the Summary Proceedings Act 1957 it appears to me that the fine imposed by the learned Magistrate as he then was, should be regarded as a "sentence" to be dealt with in terms of s.121(3), and the order of disqualification and order to be dealt with in terms of s.121(4).

I note that the fact that a fine could properly be regarded as a "sentence" had the support of the Court of Appeal in R. v. Farrell (C.A. 79/75, judgment delivered 11 March 1976,) which briefly considered the inter-relationship of fines and orders.

Regarding the sentence imposed in that way it is in my view appropriate in the present case:

(i) To confirm the sentence constituted by the imposition of the fine of $250 and the orders to pay Court costs and medical expenses: but

(ii) To allow the appeal to the extent of setting aside the order for disqualification for the period of 15 months.

Despite Mr Harte's determined signification that he sought costs in the event of the appeal being allowed, it is my view that the cancellation of the order of disqualification adequately recognises any possible prejudice suffered by his client, the

appellant, by reason of the delays, including any expense which his counsel has been involved in by reason of his endeavours to bring the appeal on for hearing.

In summary, accordingly, the appeal against conviction is dismissed, the sentence involved in the imposition of the fine of $250 and requirement of the payment of $5 Court costs and $20 medical expenses is confirmed, but the appeal is allowed to the extent that the order for disqualification is set aside.

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Solicitor for Respondent: Meredith, Connell & Co., AUCKLAND