IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.131/83

No Special Consideration

See Police v Ramzan (CA) report

BETWEEN PATRICK EDWIN ADAMS
Appellant

AND N. Z. POLICE
Respondent

Hearing: 13th April, 1983

Counsel: Miss Anderson for Appellant
Mr Ruffin for Respondent

Judgment: 29th April 1983

JUDGMENT OF SINCLAIR, J.

This Appellant was convicted on a charge of smoking a Class 'C' controlled drug, namely cannabis plant.

The short facts are that the Appellant was driving a motor vehicle in Onehunga which was stopped by the Police. As a result of the constables smelling what was thought to be cannabis smoke in the vehicle, a search was made and three cigarette butts were found in the vehicle. Later the Appellant admitted smoking the cannabis. One of the other occupants of the vehicle was a man named Twigden who was arrested by Constable Smith and that constable took possession of the cigarette butts, placing them in a safe and marking them with the name Twigden. The origin of the butts which were in the package so marked plainly was the Appellant's vehicle.

Subsequently a certificate purporting to be signed by an analyst was produced to the Court and the package was described as having the name Twigden marked upon it.

There were four grounds of appeal, but only two need be referred to in view of the conclusions I have come to. The first ground was that the prohibited substances which

were submitted for analysis referred to a third person, namely Twigden, who was not called to give evidence, and thatthe certificate purporting to be signed by the analyst and earlier referred to, having no reference therein to the Appellant, could not be used in evidence against him. Like the District Court Judge, I simply do not accept that submission. As pointed out earlier, the substances which were submitted for analysis and which were subsequently analysed came from the Appellant's vehicle and the name Twigden was placed on the envelope in which the cigarettes were placed so as to enable identification to be maintained of these particular cigarette butts.

There is a direct link in the evidence between the name Twigden and the Appellant and I agree with the District Court Judge's conclusion that there is no substance to this submission at all. It would have mattered little if instead of placing a name on the envelope in which the cigarettes had been placed, some code number had been placed upon it, so long as evidence was available to link that code number with this particular Appellant then the evidence would have been receivable. That is sufficient to dispose of that particular ground of appeal.

The second ground of appeal centred around the form of the analyst's certificate which was on a letter-head of the Department of Scientific and Industrial Research. It reads as follows:

> "CERTIFICATE OF ANALYSIS
> (Misuse of Drugs Act 1975)
>
> On 14 June 1982 Margaret Myrle Behrent, an employee of the Department of Scientific and Industrial Research authorised by the Dominion Analyst to receive, in sealed packages or by registered post, substances, preparations, mixtures or articles on my behalf, received from Constable M. Bartlett personally, a sealed standard drugs envelope, labelled inter alia "TWIGDEN/PHILIP/ROGER" containing 3 butts containing plant material in a cigarette packet.

"Upon analysis it was found that the plant material contained resin and was the Class C controlled drug cannabis plant.

(Signed Lyn Murray
Lyn Vivienne Murray
Analyst. "

It was submitted on behalf of the Appellant that the form of the certificate was such that it was not receivable by the Court pursuant to the provisions of S.31 of the Misuse of Drugs Act 1975 in that the person signing the certificate had not sufficiently identified herself as falling within the definition of the word "analyst" as contained in subsection (1) of S.31 of the statute.

In support of that submission reference was made to an unreported decision of Ramzan v. Police, M.434/82, Christchurch Registry, judgment 4 February 1983. The certificate produced was almost identical in form to that now under consideration. From the decision of the Court it appears that a memorandum was directed to counsel by the Judge who heard the appeal referring to the fact that the person who had signed the certificate described himself simply as an analyst, but that such a person must come within the definition of that term in S.31(1). The Judge expressed his tentative view as being that such a certificate must be signed by a person who specifically designated himself as "Dominion Analyst", "Government Analyst" or "an Officer of the Department of Scientific and Industrial Research authorised to make the certificate" or perhaps in the latter case, "a duly authorised Officer of the Department of Scientific and Industrial Research". The judgment goes on to refer to the fact that the Crown submitted that having signed the certificate as "an analyst" it could there be inferred that the person signing it was within one of the categories of analyst specified in subsection (1) of S.31.

The Court went on to say that it could not adopt that reasoning, stating simply that the certificate did not purport

to be signed by "an analyst" as defnined in the subsection and therefore could not be used as proof of the fact stated. On this particular point the judgment is very short and no authorities were referred to.

During the course of argument before me reference was made to an unreported decision of Brooks v. Collins, M.1552/80, Auckland Registry, 18 March 1931. Speight, J. dealt with this particular matter in the course of his judgment. While his observations were obiter, nevertheless they are worthwhile quoting:

> "I acknowledge what Mr Haines has submitted supported by Mr Gibson is correct, namely, that if the man says he is the analyst that would be sufficient because under Section 31 (2) (b) once he makes that claim to that title then the authority for him to so sign cannot be questioned, but he would then have declared himself to be an analyst and an analyst has a special definition under sub-section (1)."

When one reads the whole of subsections (1) and (2) of S.31 of the statute I would have thought that the interpretation placed upon them by Speight, J. was the correct interpretation. But for the sake of completeness I set out both subsections of the statute:

> "31. Evidence of analysis -
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> (1) For the purposes of this section the term 'analyst' means the Dominion Analyst or a Government Analyst or an officer of the Department of Scientific and Industrial Research authorised in that behalf by the Dominion Analyst or a Government Analyst, either generally or in any particular case.
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> (2) Subject to subsections (3) and (4) of this section, in any proceedings for an offence against this Act a certificate purporting to be signed by an analyst, and certifying that, on a date stated in the certificate, the substance, preparation, mixture, or article to which the certificate relates was received by him personally in any case or (where the substance, preparation, mixture, or article was delivered in a sealed package or by registered post) by any other employee of the Department of Scientific and Industrial Research authorised by the Dominion Analyst to do so, from the member of the Police or officer of Customs named in the certificate, and

> "that upon analysis that substance, preparation, mixture, or article was found to be or to contain a particular controlled drug (whether of specified or unspecified weight), or a particular prohibited plant, or a particular part of a particular prohibited plant, or a seed or fruit of a particular prohibited plant, specified or described in the certificate, shall until the contrary is proved be sufficient evidence -
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> (a) Of the qualifications and authority of the person by whom the analysis was carried out; and
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> (b) Of the authority of the person who signed the certificate to sign that certificate; and
>
> (c) Of the facts stated in the certificate."

Thus, for the certificate to be receivable s-s.(2) specifically provides that it must be one purporting to be signed by an analyst and that is precisely what has occurred in the instant case. Once a certificate is produced purporting to be so signed, it is evidence of the qualifications and authority of the person by whom the analysis was carried out and it is evidence of that person's authority to sign the certificate and is evidence of the facts contained in the certificate.

Having in this case described herself as an analyst, Miss Murray has declared herself to be of that occupation and until the contrary is proved the Court can accept it that she is an analyst within the meaning of s-s.(1).

In coming to that conclusion I am fortified by an earlier decision of the Court in Ministry of Transport v. Carstens (1972) N.Z.L.R. 531, which was a case concerned with s-s.(9) and s-s.(10) of S.58B of the Transport Act 1962 as those subsections stood at that time. The purport of s-s.(9) and s-s.(10) relating to the receiving of a certificate concerning blood analysis was of similar effect to that contained in s-s.(2) of S.31 of the Misuse of Drugs Act. S-s.(10) contained the definition of the word "analyst" and it is precisely the same as in the statute presently under consideration. S-s.(9)(b) provided that every analyst

signing any such certificate was, until the contrary was proved, presumed to have been duly authorised to sign it. The certificate in that case read as follows:

> "Analyst's Certificate under section 58B(9) Transport Act 1962
> This is to certify that a specimen of blood that has been taken from Robson Hills Carstens Clerk
> 57A McKinley Cres, Brooklyn, Wellington
> and submitted in a sealed container supplied by the Department of Scientific and Industrial Research, and delivered by Traffic Officer R A Skinner personally on 3 May 1971 was found upon analysis by Mr J F Lewin analyst, to have a proportion of 248 milligrammes of alcohol per 100 millilitres of blood; and that no such deterioration or congealing was found in the specimen as would prevent a proper analysis.
> (Signed)
> (H M Stone)
> Authorised officer of the Department of Scientific and Industrial Research."

At page 533 Roper, J. directed himself to one of the questions which was posed in a case stated for the opinion of the then Supreme Court, that question being whether the certificate in the above form, having been signed by a person purporting to be an authorised officer of the Department of Scientific and Industrial Research, was admissible under the provisions of the Transport Act. It is to be noted that the person signing the certificate was not even the analyst who carried out the analysis. I quote from the judgment as follows at page 533:

> "Mr H. M. Stone, the signing officer, obviously purported to sign as an 'analyst' as defined in subs (10) because only analysts as defined in that subsection can sign such certificates and the fact that he may not have designated himself with the particularity Mr O'Regan would wish is of minor significance when one has regard for the whole of the certificate. It is specifically stated to be a certificate for the purposes of s 58B(9) of the Act and certifies as to the matters contained in that subsection. In those circumstances the clear and only inference is that the authority the signing officer purported to hold was as an analyst in terms of subs (10), not the authority to perform other functions of the Dominion or Government Analyst.
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> "Mr Stone, referring now to counsel for the appellant, applied a substitution test which I think puts the seal on the matter. If one substitutes for the word 'analyst' in subs (9)(b) the words of definition in subs (10) we would have: 'The Dominion Analyst or a Government Analyst or an officer of the Department

> "of Scientific and Industrial Research authorised in that behalf by the Dominion Analyst or a Government Analyst signing any such certificate shall, until the contrary is proved be presumed to be duly authorised to sign it.' If subs (9)(b) has no effect until there is some other proof that the person signing is 'an analyst' as defined in subs (10), then even if the certificate was signed by some person purporting to be the Dominion Analyst or a Government Analyst, proof that the person signing held that post would be necessary, and that cannot be the position. Mr H. M. Stone 'purported' to be 'an analyst' by signing the certificate and gave himself a designation which supported that he was an analyst. Pursuant to subs (9)(b) his authority to so sign is presumed."

Those comments are very apt to the present certificate and I adopt them as setting out what is the correct position in law and, of course, that result is in conformity with the obiter statement of Speight, J. in Brooks v. Collins (supra).

Accordingly in my view the certificate was receivable by the Court and there being no evidence to the contrary, the Court could act upon the contents of the certificate which it obviously did.

Before disposing of this appeal I draw attention to the fact that this particular aspect of the case was not raised in the District Court and it is a matter of evidence which the Crown contended ought not to be considered by this Court on appeal on the grounds that within the decided cases, there having been a failure to take this particular evidential point in the District Court, that failure amounted to a waiver of irregularity in the mode of proof. See R v. Matthews and Ford, (1972) V.R. 3.

Had it not been for the fact that there was some apparent confusion existing by reason of the different decisions which were referredto me, I might have been inclined to uphold the Crown's submission in this regard, but in the circumstances which existed here I considered it more appropriate, if possible, to try and settle the issue rather than dispose of it in a technical sort of way. However, Appellants have

to be on their guard that if it is desired to raise on appeal an evidential matter which was not raised in the District Court, they may find themselves in some difficulty in trying to persuade this Court to consider that particular aspect on appeal.

Accordingly this appeal is dismissed with costs to the Respondent of $100.

P.D. Smith J.

SOLICITORS:

M. S. Gibson, Auckland for Appellant
Crown Solicitor, Auckland for Respondent