IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No.M.233/84

BETWEEN KENDALL

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 3 September 1984

Counsel: G.E. Langham for Appellant
D.J.L. Saunders for Respondent

Judgment: 13 NOV 1984

JUDGMENT OF HARDIE BOYS J

This is an appeal against conviction on a charge of driving with excess blood alcohol. The point at issue is whether there was proper proof that the blood specimen taken from the appellant had been placed in a bottle from a sealed blood specimen collecting kit. The significance of placing a specimen in such a bottle is made apparent by the statute only to a very limited extent. Section 58B of the Transport Act 1962 begins by creating the duty to permit a blood specimen to be taken: subss(1) and (1A). Section 57A(1) defines "blood specimen" as "a specimen of venous blood taken in accordance with normal medical practice". Section 58B then goes on in subs (2) to direct the medical practitioner, after he has taken

the blood specimen, to divide it into two parts and to place each part in a separate bottle, which is then to be sealed. Subs (3) authorises the addition of a preservative and an anticoagulant to the specimen in the bottles. The Act does not specify the kind of bottle that is to be used. Instead, in subs (4) it proceeds to create a presumption:

> " In proceedings for an offence against this Act, it shall be presumed until the contrary is proved, that where the bottle in which a part of a blood specimen or a blood specimen, as the case may be, was placed was received by the registered medical practitioner in a sealed blood specimen collecting kit, the bottle contained a substance and that substance was a preservative and an anticoagulant. For the purposes of this section, a combination or mixture of 2 or more substances shall be deemed to be one substance."

A "blood specimen collecting kit" is defined in s 57A(1) as:

> " ....a package having endorsed thereon or affixed or included therein a label indicating that it is a blood specimen collecting kit and that it has been supplied by or on behalf of the Department of Scientific and Industrial Research:"

This is all that is prescribed as to the procedure for collecting and storing the specimen prior to its dispatch to the DSIR for analysis in accordance with subs.(6). Subsection (5) deals with the admissibility in evidence of a certificate by the doctor who took the specimen, but it does not add to the prescription of the procedure that is to be followed, and is not in any event relevant in this case because the doctor gave evidence <u>viva voce</u>.

Thus in terms of the statute, the only consequence of placing a blood specimen in a bottle that has not come from a sealed blood specimen collecting kit is that there is no presumption that the bottle used contained a preservative and an anticoagulant. No doubt direct evidence that it did could be given, but in the absence of such evidence one is left to speculate whether the subsequent analysis must necessarily be suspect, so that a conviction could not in any event be safely entered, or whether there would merely be grounds for a defence attack on the reliability of the analysis.

This appeal was argued on the basis that without the benefit of the presumption the prosecution could not succeed, and I deal with it on that basis, leaving open the question whether it is in truth correct.

The relevant evidence was given by the medical practitioner who took the blood sample, and by the traffic officer who was present and observed him as he took it. The doctor had taken many blood specimens under the Act. He asked the traffic officer for a kit but the traffic officer did not have one. A nurse then brought him one. It came from a carton of them, kept in a cupboard nearby. The doctor referred to it as "the standard kit" and described its contents. He was shown one in Court, and said it was similar to that - but although the one he was shown is apparently the one that was, or of which part was, later, in a different context, produced as an exhibit, there was according to the transcript no evidence that it is "a blood specimen collecting kit" in terms of the statutory definition, although everyone appears to have accepted that it is. The traffic officer said

that what the doctor used was a sealed blood specimen collecting kit and that the bottles in it contained a white powder. It is clear from s 58B(4) that the bottles in a kit will contain some substance or substances, but whether that is in a powder form I do not know. Finally, there is the evidence of a Government analyst, given by certificate under s 58B(9)(a), that no deterioration or congealing, such as to prevent a proper analysis, was found in the specimen sent to him.

Although the doctor did not specifically state that the kit was in a sealed bag, the traffic officer said that it was and that the doctor tore the bag open. The doctor then began to use a hospital swab to clean the intended puncture site, but the traffic officer stopped him, and got him to use a swab from the kit. After the doctor had obtained and bottled the specimen, the officer took possession of the plastic bag which had contained the kit and placed it on his file. At the hearing, he produced to the Court from his file a plastic bag which he said was the one that he had placed there at the hospital. That bag has stuck upon it a label which reads "Manufactured by Smith-Biolab Ltd, and supplied on behalf of the Department of Scientific & Industrial Research".

Mr Langham raised several points on the appeal, and it will be convenient to deal first with that relating to this label, which does not indicate that it is a blood specimen collecting kit, and so does not satisfy the definition in s 57A(1), with the result, Mr Langham submitted, that the presumption in s 58B(4) cannot arise, and therefore, I assume, because he did not spell it out either, the subsequent analysis

of the sample cannot be relied upon. I confess that I am unable to understand why the simple statement in the definition is not printed on the label. If the Act were adhered to with care, much judicial time would be saved. The District Court Judge thought that the label was sufficient. He does not however appear to have considered the particular point put to me. The answer to it, Mr Saunders submitted, lies in the reasonable compliance provisions of s 58E, coupled with the evidence, particularly that of the doctor, that the kit he used was similar to the one produced in Court.

Section 57A(1) provides definitions in order to eliminate tautology in the operative sections. Section 58B(4) is part of such an operative section. Its purpose appears to be to remove grounds for attack on or doubt as to the reliability of the testing procedure. This purpose is achieved by the requirement that the bottles in which the blood specimens are placed shall have been prepared and stored so as (apparently) to ensure the integrity of the specimens, and in this regard the Legislature reposes complete confidence in the DSIR in regard to the preparation process, and in the fact that the bottles are kept in a sealed and labelled bag thereafter. The critical aspects are the preparation and the sealing. The labelling is for identification. The label in this case identifies the contents of the bag as having been supplied on behalf of the DSIR, but it does not identify the contents as a blood specimen collecting kit. Instead, there is the evidence of the doctor and the traffic officer, as mentioned. For the reason given, the comparison with the kit in Court does not advance the matter, but the other evidence of

these two witnesses in my opinion amounts to the necessary identification. It shows beyond almost any doubt that the plastic bag contained a blood specimen collecting kit, of the kind to which the statute refers. It was not any the less that because it was not labelled as such. The position is simply that had it been so labelled, other evidence of identity would not have been needed.

This conclusion does not depend on resort to s 58E, which I do not consider to be applicable to this situation. It deals with a failure to comply strictly, or at all, with any provision or provisions forming part of s 58A, s 58B or s 58D. No such failure is alleged here, for the issue here is whether the facts give rise to the statutory presumption.

Mr Langham's other points all related to the plastic bag in which the kit was contained when it was handed to the doctor. He contended that the prosecution had not excluded the possibility that the plastic bag the traffic officer produced in evidence was not the one which had contained the kit (which would mean there was no reliable evidence of a label at all), and that in dealing with that point the Judge had misdirected himself as to the onus of proof. The Judge dealt with the point in this way:

> " Under cross-examination Traffic Officer McClurg admitted that for a considerable period no doubt the file is out of his possession and that it comes into the hands of other persons on the Transport Department, and that I cannot for that reason be certain that the bag which he placed on the file is the one which has been produced as Exhibit "2" today. If I accept that there is any validity in that submission I would have to find that during the time that the file was out of Traffic Officer McClurg's possession some person for some unknown reason substituted the bag which

> has been produced as Exhibit "2" in place of the bag which was originally placed by Traffic Officer McClurg on the file. Again there is no evidence to support that assertion and it is so remote a possibility that I would only be prepared to entertain it if there was some evidence to support that possibility."

I think this is quite unexceptionable. The Judge had been asked to accept the substitution of one bag for another as a reasonable possibility, and he was merely stating that he declined to do that because unless there were some evidential basis to support the possibility it was in the realm of speculation. I entirely endorse that view.

Next, it was argued that the bag was inadmissible as part of the traffic officer's evidence, for it ought to have been produced by the doctor. As the traffic officer was present when the bag was opened and took possession of it once it had been opened, there is plainly no substance in this point. Indeed, the doctor probably could not have produced it himself, for it is most unlikely that he would have been able to identify it. And if he had furnished a certificate under s 58B(5)(a), he would not have had to produce the bag at all.

Finally, Mr Langham submitted that the evidence did not adequately establish that the bag was sealed when the doctor received it. It is true that in his evidence in chief he was not specific, tending rather to rely on his practice and experience. But when he was pressed in cross-examination, he finally said:

> " In as much as I can be definite about any aspect of my life I would have been the one that opened that bag."

Asked what he meant by that, the Judge interposed:

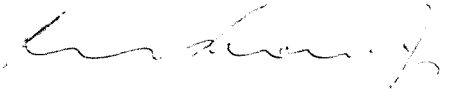
> " He is as certain as he can be that he opened the bag. He can't put it any more definitely or concisely than that."

Then the doctor added:

> " I will say now that yes I opened it and I have no doubts that anyone else [did]."

The Judge was entitled to find as a fact that he did open the bag. I would have done the same. And then the traffic officer confirmed what the doctor said.

None of the grounds of appeal is made out, and the appeal is therefore dismissed with costs of $100 to the respondent.



Solicitors:

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