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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.77/84

434

BETWEEN MENZIES
Appellant

A N D POLICE
Respondent

Hearing: 30 April 1984

Counsel: R.W. Burnes for Appellant
C.Q.M. Almao for Respondent

Judgment: 10-5-84

JUDGMENT OF GALLEN J.

The appellant was charged under the provisions of s.58 (1) (b) and s.30 (3) (d) of the Transport Act 1962 that on 1 September 1983 he drove a motor vehicle on a road while the proportion of alcohol in his blood, as ascertained from an analysis of a specimen of his blood subsequently taken from him, exceeded 80 milligrams of alcohol per 100 millilitres of blood.

The circumstances were unusual. The blood sample taken from the appellant was taken under the provisions of s.58D of the Transport Act 1962 while he was a patient in the Waikato Public Hospital. The provisions of that section establish certain requirements which must be complied with if the section

is relied upon and it was incumbent on the prosecution to prove that those requirements had been met. S.58D (3) provides that the evidentiary requirements be met by the production of a certificate, but in this case the prosecution did not produce any certificate and in fact called as a witness the person who had taken the blood alcohol sample. It seems likely that this was done because the certificate prepared at the time did not contain the name of the person from whom the blood sample had been taken. The witness concerned was Graeme Ronald Tingey. The notes of evidence make it clear that he was not identified formally as a registered medical practitioner, nor do they establish that he was in immediate charge of the examination, care or treatment of the appellant who was a person in hospital. These are necessary requirements before the procedure under s.58D can lead to a conviction. The witness, however, did indicate that he understood the person concerned had been involved in a motor vehicle accident; he gave evidence which was clearly medical in nature as to the condition of the patient concerned, but he did not formally give evidence of the matters referred to in the section. If the matter had rested there, then it is at least possible that an application to dismiss the prosecution could have succeeded on the basis that the prosecution had failed to establish those significant requirements of the section which provide the basis for the taking of a blood sample at all. However, counsel for the appellant (who was not counsel who appeared in this Court), cross-examined the witness and produced to him what purports to be a photocopy of the certificate contemplated by s.58D (3). The notes of evidence

indicate that the question was asked of the witness:-

"Q. It is correct, is it not, that you completed the certificate concerning your actions of taking blood?
A. That is correct.
Q. Is that a photocopy of that certificate?
A. Yes."

The certificate was produced through the witness as exhibit A by the defence. The learned District Court Judge held that the certificate could be produced by either the prosecution or the defence. He accepted it as a certificate for the purposes of s.58D (3) and considered that the failure to specify the person from whom the specimen was taken was not fatal because the other witnesses called during the course of the prosecution clearly identified the appellant. Effectively, then, he accepted that the doctor's evidence comprised a combination of the statutory certificate, together with the viva voce evidence and that all the procedural requirements of the section were met. He further held that if there was any doubt as to the validity of the certificate it was appropriate to apply the provisions of s.58E and that having regard to the circumstances there had been reasonable compliance with the procedures required.

The first point made by the appellant is that the certificate was not admissible because it was a photocopy. Counsel for the appellant relied upon comments to this effect contained in a decision of Speight J. in Morath v. Police (Auckland Registry) of 24 February 1975.

I agree that it would have been unsatisfactory for the prosecution to endeavour to comply with the provisions of s.58 by producing a photocopy of the certificate, but it was the defence in this case which chose to produce the photocopy. It was produced without objection and was cross-examined upon. I consider that it was clearly admissible, having regard to all the circumstances. However that does not dispose of the matter since although the document may be admissible, the effect of it is another matter altogether.

Mr Almao for the respondent, did not endeavour to argue that the photocopy produced could be regarded as a certificate for the purposes of s.58D (3), but that it contained material which was sufficient evidence to satisfy the Court that the requirements of s.58D (1) and (2) had been complied with. There were two significant matters involved. The first was the qualification of the person taking the blood sample. The second, that assuming he had been established as a qualified medical practitioner, that he was in charge of the examination, care or treatment of the appellant. I note in passing that the requirement that the person concerned should be in hospital as a result of an accident involving a motor vehicle, was clearly enough satisfied from the other evidence called during the course of the proceedings. The photocopy contains four descriptions of the person making it as a "registered medical practitioner". Each of these appear in association with the name "Graeme Ronald TINGEY", the witness

who was cross-examined. The document was put to the witness as a certificate he had made and accepted by him on that basis. I think it would be absurd to conclude that in those circumstances there was no evidence before the Court to the effect that the person taking the sample was a registered medical practitioner. The document also states that the person making the certificate is the registered medical practitioner in immediate charge of the examination, care or treatment of the person concerned. Once again, the witness was examined on the basis that he had made the certificate and he could only make it on the basis that he had that qualification.

In my view, Mr Almao is right when he says that the combination of the oral evidence of Dr Tingey, with the cross-examination on the photocopy, is sufficient to satisfy the requirements of the section. The evidence required comes not from the photocopy certificate as such, but from the questions upon it put to the witness and answered by him in such a manner as to include, as the basic assumption of both question and answer, the material contained in the certificate.

I note that the learned District Court Judge considered that any defect in the document as such could be cured having regard to the reasonable compliance provisions of s.58E. I should doubt very much whether this was the case. A failure to identify the person from whom the sample was taken in the certificate seems to me to go beyond the reasonable compliance contemplated by that section, even taking into account the views

of the Court of Appeal in Coltman v. Ministry of Transport (1979) 1 N.Z.L.R. 330. I also, however, would accept the view that a photocopy document is not a certificate contemplated by s.58D (3) because it has not been signed by the person required to verify it. It may be that an acceptance of the document in cross-examination would provide a sufficient verification, in the sense that the signature is intended as a verification, but it is not necessary for me to decide this point.

In accordance with my conclusions expressed above, the appeal will be dismissed.

Solicitors for Appellant: Messrs Burnes, Burnett and Company, Auckland

Solicitor for Respondent: Crown Solicitor, Hamilton