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RM

Sawtell v Mot 5.7.88

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

M 22/88

SET 2

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21 NOV 1988
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BETWEEN KEVIN STANLEY SAWTELL

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 5 July 1988

Counsel: R Stevens for appellant
C T Gudsell for Crown

Judgment: 5 July 1988

ORAL JUDGMENT OF EICHELBAUM J

After a defended hearing the appellant was convicted of an excess blood alcohol charge, S 58(1)(b) Transport Act 1962 and on a further charge of careless use, S 60. He has appealed against both convictions. The first point taken on the appeal relating to the blood alcohol charge was that the prosecution had failed to prove that the blood specimen was divided forthwith after being taken, S 58D(4). In another but analogous context "forthwith" has been held to mean as soon as reasonably practicable, Scott v Ministry of Transport [1983] NZLR 234. In Greer v Ministry of Transport M 15/84 Palmerston North Registry judgment 19 March 1984, it was held that on the facts the evidence did not justify the inference that the division which undoubtedly had occurred was made as soon as reasonably practicable after the sample was taken. It may have been but on the other hand the evidence did not exclude the reasonable possibility of a significant lapse of time. That decision was followed in Down v Ministry of Transport M 313/84 Hamilton Registry judgment 1 October 1984. As in Greer's case the evidence as recorded gave the impression of an unbroken sequence of events but in Greer I accepted the

defence submission that that was no more than an impression created by the sequence of questions and answers. It seems that a similar position arose in Down's case with the same result. In the present case the evidence as recorded read as follows:

> "Dr was lady Dr J- Leanne Bekahn. I was present. Dr spoke to defendant asked him for request for blood sample. He consented to specimen. It was taken in my presence. Divided into 2 bottles sealed and labelled and handed to me. Dr completed blood specimen and medical certificate. (Exhibit 2).

No times are given other than the time at which the traffic officer arrived at the scene at Riwaka, 9.25 pm and the time when the formalities were completed at the Nelson Hospital Accident and Emergency Department, namely 10.57 pm. In themselves those times do not assist to exclude the possibility of a significant gap before the division occurred.

I now have to refer to the fact that no transcript of the taped evidence taken at the hearing was available. The notes before the Court are a transcript of the Judge's handwritten notes which, having regard to the fact that the evidence was being recorded on tape, were for the Judge's own assistance and not intended, at any rate primarily, to serve as a transcript for purposes of an appeal. Nevertheless in terms of S 119(2)(a) of the Summary Proceedings Act 1957 they are in fact a copy of a note made by the District Court Judge. In a situation such as the present where a tape is taken as well the position is that more than one note is "made" by the Judge. The transcript has therefore properly been put before the Court pursuant to S 119. Nevertheless by virtue the proviso to ss (2) the Court might in its discretion re-hear the whole or any part of the evidence and by virtue of the same provision is directed to do so if the Court "has reason to believe that any note

of the evidence of that witness made by the Judge is or may be incomplete in any material particular". There is no doubt, and this is entirely understandable, that as to portions of the Judge's notes, they are either incomplete or the authenticity of the transcription is in doubt. However, on its face the critical passage is coherent and ostensibly complete. The particular issue relating to division of the blood specimen "forthwith" has I think become fairly well known since the cases of Greer and Down were decided in 1984. I think it is proper to assume that the experienced District Court Judge would have been perfectly aware of the point and had further evidence been given that bore on it, would have faithfully recorded it as he did with the rest of the evidence dealing with this point in the sequence of events. On that basis some expression dealing with the timing of the division, such as "then" or "immediately", is missing from the prosecution case just as it was in Down and Greer. I do not think that there is any basis for believing that on this point the note of the evidence is or may be incomplete in any material particular.

There is a further difficulty in this case in that for the reasons already mentioned no transcript of the Judge's decision is available either. I should like to record that in those circumstances it is always possible for counsel, whose duty it is to take a note of the Judge's reasons, to endeavour to agree on a version of the Judge's decision. That has not been done in this case but by reason of the nature of the points taken it does not prevent the Court from reaching decisions on the issues arising. So far as the "forthwith" point is concerned my conclusion is that the situation is indistinguishable from Down and Greer in that there simply was no evidence enabling the inference to be drawn that the prosectuion had established this necessary element in the offence, necessary as the law stood at the time. I should add that no attempt was made to fill the gap by reliance on S 58E. Accordingly on this issue the appeal on the blood alcohol charge succeeds. As Hillyer J said in Down v Ministry of Transport the necessity for strict compliance

in blood alcohol matters does not always result in an outcome which might appear to be sensible. Having regard to the view I have reached I do not need to deal with Mr Stevens's alternative argument based on post-accident drinking on the appellant's part.

I turn now to the appeal on the second charge of careless use. Briefly, the facts were that the appellant's motor cycle left the road on a bend and collided with a power pole. Of course the maxim res ipsa loquitur is not applicable in relation to driving offences but the facts may be so strong that the only inference is that there has been careless driving unless and until something is suggested by a defendant by way of explanation, Police v Chappell [1974] 1 NZLR 225. Various matters were canvassed in the evidence here but all were rejected by the traffic officer in cross examination. Photographs produced to the Court showed that while the accident certainly occurred on a bend of some severity, it was on a fully sealed and marked stretch of highway. On the evidence I am of opinion that the Judge was fully entitled to regard the inference of carelessness on the appellant's part as irresistible. Accordingly, the appeal on the careless use charge fails and is dismissed.

The appeal on the breath alcohol charge having succeeded the conviction and penalty imposed in respect of that charge will be quashed. So far as the penalty on the careless driving charge is concerned it was put in terms that the appellant came up for sentence within six months if called upon. That period has since expired. Accordingly as I see the position no further action in respect of the penalty imposed on that charge is required or indeed possible. The appeals will be disposed of accordingly.

Solicitors for appellant: Stevens Patel & Co, Wellington

Crown Solicitor, Nelson