IN THE HIGH COURT OF NEW ZEALAND 6/9 No AP 173/92
AUCKLAND REGISTRY

BETWEEN FOSTER

1644

Appellant

AND THE POLICE

Respondent

Date: 20 August 1992

Counsel: Mr Denholm for appellant
Ms Evans for respondent

Judgment 21 August 1992

(ORAL) JUDGMENT OF HILLYER J

This is an appeal against conviction entered in the District Court at Otahuhu by Bouchier DCJ. The appellant was convicted that without reasonable excuse she imported a prescription medicine, namely Androgens listed in Part 1 of the Schedule of the Medicines Regulations 1984 contrary to s43(1) of the Medicines Act 1981. She was fined $250 plus Court costs $85 and Analyst's fee $955.50. There was an appeal against sentence which has been abandoned by Mr Denholm.

I am obliged to Ms Evans for a careful chronology, which is accepted by Mr Denholm as setting out the facts accurately.

The respondent arrived back in New Zealand from the USA on 1 November 1991 and the prosecution arises out of events which occurred thereafter as follows:

At 8.35 am a Customs Officer, William Solomon, on instructions from his supervisor Mr Croft, approached the appellant in a Customs search lane at the Auckland

International Airport. He spoke to the appellant at a search bench and asked her a series of questions prior to searching her luggage. During the conversation, Officer Solomon, asked the appellant if she wished to declare anything, and the appellant replied "No". The Officer commenced a search of the appellant's luggage at 8.40 am. During the search he went to pick up a pair of running shoes and the appellant told him to be careful because they had glass ampoules inside. Each shoe contained six ampoules and were marked "Percutacrine Thyroxinique 20 mg". Officer Solomon also found a book entitled "Underground Steroid Handbook" and some pills. He asked the appellant if she had any steroids on her person or in her baggage to which she replied "No."

Officer Robert Wilshire and Officer Simon Williamson arrived at the airport together at 10.35-40 am. Officer Wilshire spoke to Officer Solomon who showed him the running shoes, the 12 ampoules, the underground steroid handbook and some other tablets and leaflets. At 10.50 am Officer Wilshire introduced himself to the appellant and asked her to accompany him to an interview suite located within the Customs baggage hall area. Immediately on entering the interview suite, Officer Wilshire informed the appellant that she had been detained under s213 of the Customs Act 1966 for the purposes of a personal search. That section is as follows:

> "(1) Subject to this section, if any officer of Customs or any member of the Police has reasonable cause to suspect that any person has, for any unlawful purpose, secreted about his or her person any dutiable, restricted, or uncustomed goods, or any controlled drugs or other forfeited goods, the officer of Customs or member of the Police may cause that person to be detained and searched, and such force as may be reasonably necessary may be used against that person to effect such detention or search.
> (2) Any person so detained may, before being searched, demand to be taken before a Justice of the Peace or the Collector.

> (3) The Justice of the Peace or Collector may order the person so detained to be searched, or may discharge him without search.
> (4) A woman or girl may be detained as aforesaid but shall not be searched except by a female searcher appointed by the Collector, either generally or for the particular case.
> (5) No person shall be searched under this section unless he has first been informed of his right to be taken before a Collector or Justice of the Peace as aforesaid."

Officer Wilshire then explained to the appellant the provisions of s213 and also the Bill of Rights Act. He did this by placing two documents, Exhibits 8 and 9 in front of the appellant as she sat at a table. Officer Wilshire read through the forms to the appellant and explained them in simpler terms. Officer Wilshire said to the appellant, "You have the right to instruct and consult a lawyer without delay. Furthermore, you have the right to refrain from making any statement." He then asked the appellant if she understood, and she replied "Yes".

After the documents were explained to the appellant but before the appellant actually read them herself, the appellant advised Officer Wilshire that she wished to consult with a Rotorua based solicitor. Officer Wilshire told the appellant that there would be no problem in complying with that request, but he initially asked her to read the documents. He then said to the appellant "Are you carrying any more steroids?" to which she replied, "No, I don't want to say anything." At 10.55 am the appellant advised Officer Wilshire that she wished to consult a lawyer before making the choice in terms of the s213 option.

At 11 am Officer Williamson spoke to the appellant. He told her that he understood that she wanted a lawyer, to which she replied, "Yes". The appellant was told by Officer Williamson that they were making arrangements for her to contact a lawyer, however, he explained to her

that this would not stop her from being subject to a personal search and that there were other avenues open to her in law that she should go down if she believed she should not be searched. The appellant was asked if she understood that, to which she replied "Yes". At that stage Officer Williamson left the room.

Between 10.55 and 11.05 am Officer Wilshire left the interview room and left the appellant in the company of a female officer while he looked for some phone books. While he was doing that he was advised by the female officer that the appellant wished to see him. He returned to the interview room where the appellant advised him that she wished to consult with a lawyer before opting for the search.

Officer Wilshire advised Officer Williamson of the appellant's request and together the officers spent the next 5-6 minutes clearing a Customs office of both documents and persons to enable the phone call to take place.

At 11.05 am Officers Williamson and Wilshire accompanied the appellant to the Customs office to enable her to use a telephone. Officer Williamson telephoned a Rotorua number. He told the receptionist the reason for his call and was advised that Mr Edwards was in Court. Officer Williamson then handed the phone to the appellant and she spoke on the phone. At the conclusion of the conversation the appellant told Officer Williamson that a lawyer would be ringing back in five minutes. He told her that they would wait for her lawyer to ring.

At 11.20 am no phone call had been received from the appellant's solicitor so Officer Williamson telephoned the Rotorua number and spoke to the receptionist again. He advised her that the matter was serious and that he needed to contact Mr Edwards urgently. He was advised

that Mr Edwards was in Court but attempts were being made to contact him urgently.

At 11.30 am Officer Williamson received a call from a male person who identified himself as Mr Edwards, a solicitor from Rotorua. Officer Williamson identified himself and advised Mr Edwards that he had the appellant with him and that they were at the Auckland International Airport in the Customs arrival hall. He advised Mr Edwards that the appellant had arrived that morning on a flight from Los Angeles and that Customs had found in her baggage a quantity of prescription medicines. Under s43 of the Medicines Act it was an offence to import them into New Zealand. He further advised Mr Edwards that Customs were proposing to proceed under s213 of the Customs Act as he believed he had reasonable cause to suspect that the appellant was carrying a further quantity of prescription medicine. He advised Mr Edwards that they were complying with s23 of the Bill of Rights Act and that he would put the appellant on the phone shortly. Before that he pointed out to Mr Edwards that if the appellant wished to argue whether reasonable cause under s213 existed either a Justice of the Peace or a Collector of Customs adjudicated in such matters. He also advised Mr Edwards that if either one of those two persons held there was such reasonable cause, the appellant could be searched forcibly. Officer Williamson told Mr Edwards that he was not going to leave the appellant alone in the room to talk to him on the grounds that he believed it would erode any search of her person in accordance with s213. Officer Williamson handed the phone to the appellant at 11.32 am.

At 11.40 the appellant finished speaking to Mr Edwards and handed the phone to Officer Williamson. Mr Edwards advised Officer Williamson that he was coming to Auckland and asked if Officer Williamson would wait until he got

there before proceeding with the s213 procedure. Officer Williamson told Mr Edwards that he would not wait.

At 11.46 the appellant informed Officer Wilshire that she wished to be taken before a Justice of the Peace. At 11.47 Officer Wilshire cautioned the appellant.

At 11.54 am appellant read and signed both exhibits 8 and 9. Mr Goldsbury a Justice of the Peace arrived at the airport. Officer Williamson spoke to him upon his arrival. At 12.50 Mr Goldsbury spoke to the appellant. Officer Williamson observed the appellant speaking to Mr Goldsbury but could not hear their conversation.

At 12.55 Officer Williamson had another conversation with Mr Goldsbury, who advised him that he had adjudicated in the matter and was satisfied that reasonable cause existed in Officer Williamson's mind to subject the appellant to a s213 search.

At 12.57 Officer Williamson advised the appellant that the JP had adjudicated in this matter and determined that he had reasonable cause to suspect that the appellant was carrying about her person forfeited goods. Officer Williamson advised her that she was going to be subjected to a personal search. He then instructed Customs Officer Fraser to undertake the search. Customs Officer Fraser entered the search suite at the Auckland International Airport at 1.00 pm where the appellant was waiting with another Customs Officer. Prior to commencing the search the appellant handed Officer Fraser a blue body pouch from around her waist. Officer Fraser examined the pouch and found that it contained 6 x 30 blister-packs of moneras tablets, two moneras information leaflets, one percutacrine thryoxinique information leaflet and a plastic bag containing a large quantity of yellow tables. Officer Fraser asked the appellant what they were and the appellant stated that the moneras tablets were for

asthma, but could also be used as fat burners. She stated that the yellow tablets were Windstrol tablets, that they were steroids and that there were 800. Officer Fraser then conducted a personal search of the appellant. No further forfeit goods were located. The search was completed at 1.05 pm. At 1.15 Officer Fraser handed the exhibits to Officer Wilshire.

At 1.35 pm Officer Williamson returned to the interview room in which the appellant was seated and advised her that it was her right not to say anything and that they would shortly be taking her over to the Police Station for charging. At 2 pm the appellant was arrested by Constable Christine O'Connor on two charges of importing prescription medicines.

At 2.10 pm Officer Williamson telephoned Mr Edwards' office and left a message on the answer machine advising him that the appellant had been arrested and charged with two offences under s43 of the Medicines Act. He also advised Mr Edwards that a s213 of the Customs Act search had been completed after a JP had adjudicated as to cause and during that search a further quantity of prescription medicines had been found. He also advised that the appellant had elected not to make any statement in the matter.

On behalf of the appellant, Mr Denholm submitted that there had been breaches of s23(1)(b) of the Bill of Rights Act, 1990, and of s213 of the Customs Act 1966.

He submitted that the Customs Officers failed to advise the appellant without delay of her rights under s23(1)(b) which provides:

> "(1) Everyone who is arrested or who is detained under any enactment -
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right."

In particular the appellant submits that although a request was made to consult a lawyer at 10.55 am on 1 November, the officer failed to make any such arrangement until 11.05 am, a delay of 10 minutes.

The initial instruction was given following the document which is referred to as exhibit 9. This deals with the provisions of s213 of the Customs Act, but it goes on to say in bold type:

> "You have the right to instruct and consult a lawyer without delay".

Not only is that right clearly set out in that document which was put before the appellant immediately on her entering the interview suite, but Officer Wilshire read through the forms to the appellant, and explained them in simpler terms. A person asked to accompany a Customs Officer for the purpose of personal search under the provisions of s213 of the Customs Act, 1966, has clearly been detained pursuant to an enactment, and the provisions of s23(1)(b) would apply.

Mr Denholm suggested that the reference to the right to instruct and consult a lawyer without delay should not have been in the same form as the details relating to s213 and referred to an unreported decision *R v Dobler* High Court Auckland, T21/92, 8 July 1992 of Smellie J. In that case however, the situation was entirely different. The detainee had limited English and the Judge was not satisfied that the matter had been explained to him adequately. Here the officer not only read through the forms to the appellant, he explained them to her in simpler terms. I am unable to imagine what more could have been done to advise the appellant of her rights, and indeed as appears quite clear, she understood the situation because she not only said that she understood,

but advised the officer that she wished to consult with a Rotorua based solicitor.

The officer asked her "Are you carrying any more steroids?" and she replied "No, I don't want to say anything." Mr Denholm criticised that as being cross-examination. In my view it was not cross-examination. Further, the answer given by the appellant demonstrated that she knew her rights and was not inculpatory.

The 10 minutes delay of which Mr Denholm complains was adequately explained by the Officer when he said that after the request was made to consult the lawyer in Rotorua, he spent 5-6 minutes clearing a Customs office of both documents and persons to enable the phone call to take place. He said "There were only 2-3 phones that we could use. As I say the others were in restricted areas, but the one we used was in a Customs Office, but it was in use at the time and the person or persons had to move along with all their documents and so on and so forth, and that took a few minutes to arrange."

I can see no basis for an allegation that there was any delay in either advising the appellant of her rights, or in permitting her to consult with a lawyer.

Mr Denholm then submitted that the appellant was deprived of her rights in that three officers remained in the interview room while the appellant spoke to her solicitor, Mr Edwards, on the telephone.

In the first place the officer explained to Mr Edwards that he was not going to leave the appellant alone in the room to talk to him, on the grounds he believed it would erode any consequential search of her person. In cross-examination the officer was asked why he did not keep the door open and keep the appellant under scrutiny from a distance, as he did when she was talking with the Justice

of the Peace. He replied that based on his experience, on three occasions he had seen persons swallow goods in an attempt to defeat the purposes of such a search. Leaving a person too great a distance away could lead to such an event occurring. He said:

> "I am well aware of the privilege question based on my experience, however, when faced with the type of activity, particularly at an international airport, I state once again that it would have been an erosion of the purpose of the power (of search) had I left the defendant alone."

The solicitor knew the situation and that a search under s213 was contemplated. What he was saying would not be overheard. In my view the officers were well justified in staying sufficiently close to the appellant to prevent any possible attempt to dispose of illegal goods. This is the sort of thing that was referred to by the learned President of the Court of Appeal in the case of *R v Butcher and Burgess* CA 227/91 and CA 228/91 25 October 1991 when he referred to s5 of the Bill of Rights Act, which is as follows:

> "**Justified Limitations** - Subject to s4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

At p17 of the unreported decision the President said:

> "The New Zealand rights affirmed in general terms by the 1990 statute cannot be hard and fast in their operation. As indicated in *Kirifi*, there may be circumstances in a particular case where, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence. For example there might be circumstances falling within or analogous to the concept embodied in s5 - 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Or the breach of the Act might be trivial or inconsequential. The Bill

> of Rights Act has to be applied in our society in a realistic way."

I do not consider that the fact that the Customs Officers were close to the appellant while she was speaking to a solicitor on the telephone, was an erosion of her rights under s23(1)(b), but if it was, then such an erosion would in my view, have been minor and well justified in all the circumstances.

Mr Denholm submitted that the appellant by not having the freedom to consult and instruct her lawyer was placed at a disadvantage in handling the situation which had arisen with her detention for a personal search under s213. But Mr Edwards knew the situation, and that the officers were present with the appellant, and that the s213 search was contemplated. He could have given such advice as he thought fit to the appellant in those circumstances.

I must confess I had difficulty in understanding exactly what prejudice the appellant suffered, and although I asked Mr Denholm to set it out for me, he just said words to the effect that the appellant could have told the JP that the JP had discretion, and that "She could have more fully represented her case to the Justice of the Peace. I am sure the Justice of the Peace knew he had a discretion, and anything that the appellant wanted to say to him or that her solicitor could have advised her to say, could have been adequately conveyed to her in the circumstances.

In my view therefore, there is no breach of s23(1)(b) of the Bill of Rights Act.

I turn then to the allegation that there was a breach of s213 of the Customs Act, 1966.

Mr Denholm submitted that the Customs Officer did not have reasonable cause to suspect that the appellant had

any dutiable goods secreted around her person. The Officer gave evidence that he had advised the Justice of the Peace that he did suspect the appellant had forfeited goods on her person, and he said he told the Justice that the grounds were as follows:

> "1. That information had been received indicating that the defendant would be importing a quantity of forfeited goods, namely anabolic steroids upon her return to this country.
>
> 2. That the defendant had been subjected to a baggage search. During that search a quantity of what I believe to be prescription medicines in the form of 12 glass vials had been located. Those vials from my experience, I believe to contain a steroid liquid which was prescription medicine and illegal to import into New Zealand.
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> 3. That I had personally been involved on 20 October 1991 with the apprehension at Auckland International Airport of a male passenger known to me as Philip Anthony Nelson and that the information that had been received about this defendant also related to Philip Anthony Nelson and that information had been proven. Further, that during the apprehension of Nelson at Auckland International Airport he had a quantity of anabolic steroids contained within two purple distinctive sports shoes. [They were] identical except for their size [with the] two purple sports shoes found within the defendant Foster's luggage and [in] both cases there was within a quantity of prescription medicines. In the case of Nelson I advised Mr Goldsbury a consequence s213 search had out-turned a further quantity of steroids, albeit that they were contained within his pockets at a baggage search lane. The consequent 213 search I should advise, was negative, but he was carrying about his person prior to that, steroids.
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> 4. Based on my experience and my Officer's experience I was concerned with the demeanour of the defendant in that my observations of her together with the observations and instructions received from my Officer Wilshire led me to believe that

> she was nervous and concerned as to future procedures."

Typing errors in paragraph 3 are amended by putting in the words in square brackets.

Mr Denholm's point was that the goods found in the 12 glass vials were not steroids as was confirmed by the DSIR analysis subsequently carried out. He said that the most compelling of the grounds put forward by the Customs Officer to the Justice of the Peace was that the goods were steroids, and that was incorrect evidence.

That however, is not quite what the Officer said, as appears from the quotation from his evidence I have set out above. He said he believed that they were, and that of course was correct. All the Officer has to have is reasonable cause to believe that a person has secreted on his or her person any dutiable restricted or uncustomed goods, and here the Justice had adequate grounds, in my view, for finding that the Officer did have such reasonable grounds on the basis of paragraphs 1 - 4 as set out above. It was in fact illegal to bring the substance in the 12 glass vials into the country, as they were prescription medicines even if they were not steroids.

The appellant was acquitted on the charge of bringing those prescription medicines into the country, because the learned District Court Judge held, although she did have considerable suspicion regarding the particular item, she was not satisfied that there was sufficient proof that the appellant knew these items were a prescription medicine. Accordingly she did not find the charge of importing the substance in the 12 glass vials had been proved.

That does not mean that the fact they were found concealed in the shoes would not give the Officer

reasonable cause for belief or suspicion, and the order made by the Justice of the Peace was well justified. That order resulted in the discovery of the substances in respect of which the appellant was convicted.

It is also of significance that the prescription drug found during the body search would have been admissible even if there had been a breach of the Bill of Rights Act, because as referred to by Cooke P in the *Butcher and Burgess* case, the prescription medicine would have been found in any event. At p20 of the unreported decision the learned President said, after referring to the Canadian case of *Black v R* (1989) 70CR (3d) 97:

> "But the decision is relevant in another way. It was held that real evidence, the discovery by the police of a knife, should not be excluded even though obtained after a Charter violation. Wilson J said at 117, referring to comments of Lamer J in another case, that the knife would undoubtedly have been discovered by the police, as a result of a search of the appellant's apartment, in the absence of the Charter breach and the conscription of the appellant against herself.
>
> So too here, I would accept that the police would have made in any event a thorough search of the house and garden where Burgess was living and would have discovered the air pistol and the shotgun."

In my view the appellant did not make any admissions which resulted in the finding of the steroids in respect of which she was convicted, and in any event those steroids would have been found in the course of the body search, pursuant to s213 of the Customs Act, 1966.

In those circumstances the appeal is dismissed.

This decision having been given in open Court, Ms Evans sought costs. Mr Denholm pointed to the fact that the analyst's fees were substantial. This hearing, although it was said it would take no more than 1½ hours has taken

a full half day, and required careful preparation. I am of the view costs are properly awardable to the Crown, and I fix them in the sum of $1000 payable by the appellant to the respondent.

.....
P.G. Hillyer J

Solicitors
Denholm & Co for appellant
Crown Solicitor for respondent