NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No. 111/97

BETWEEN H

Appellant

AND POLICE

Respondent

NOT RECOMMENDED

Date of Hearing: 4 June 1997

Date of Judgment: 12 JUN 1997

Counsel: W.M. Johnson for Appellant
G.J. Burston for Respondent

JUDGMENT OF NEAZOR J

Solicitors: W.M. Johnson, Wellington for Appellant
Crown Solicitor, Wellington for Respondent

This is an appeal against conviction for driving with excess breath alcohol.

The information charging the appellant with committing that offence alleged that it was committed on 27th March 1996. That information was laid by being sworn on 29 March 1996. There is no distinct evidence as to when the information was filed, but I have taken that it was filed on that day since it was sworn before a Deputy Registrar.

The officer who apprehended the appellant gave evidence that the events started at 11.55 p.m. on 26 March. She then acted on information she had received and followed a motor vehicle which she identified. She followed that vehicle into a carpark where it stopped. The only person she saw was the appellant who was about 15 metres from the car walking towards a toilet.

After making enquiries of the appellant she required him to undergo a breath screening test, which he did. He produced a result described as failed general. He was required to accompany the officer to a Police station for an evidential breath test or a blood test or both. He agreed. He underwent a breath test. The machine produced a result of 492 micrograms of alcohol per litre of breath. The appellant was told of that result at 12.13 a.m. He signed the acknowledgement form Police 510 which contained the reading figure. He was informed of his rights and after the appropriate time indicated at 12.28 a.m. that he did not wish to supply a blood sample. He was given a traffic offence notice and released.

The officer's evidence was that the appellant was not when he was released given a summons under s 19B of the Summary Proceedings Act. A short time later it was realised that he had not been given a summons. Two officers then went to his house and the officer who had detained the appellant served him with a summons at 12.41 a.m. that same morning.

The appeal centres on the issue, service and content of the summons under s 19B.

That section provides that in the circumstances of this case:

> "... an enforcement officer may sign and serve on the person a summons in a form prescribed for the purposes of this section.
>
> (2) Every such summons shall require the person to appear on a day not later than 2 months after the date of the summons at the Court where the information required by subsection (3) of this section is to be filed.
>
> (3) An information under this Part of this Act in respect of the offence with which the person is charged shall be laid and filed by an enforcement officer as soon as practicable after the evidential breath test was administered, and in any event not later than 7 days after the day the test was administered.
>
> (4) It is the duty of every enforcement officer who issues a summons under this section to ensure that the information required by subsection (3) of this section is laid and filed.
>
> (5) A copy of a summons served under this section shall be filed with the information, and the copy shall bear an endorsement, signed by the enforcement officer who issued the summons, showing the fact, time, and mode of service."

Having obtained disclosure of documents from the prosecution, counsel for the appellant put photocopies of two summonses under s 19B to the officer. One is reasonably clearly endorsed "defendant's copy". The other was put to the witness as a photocopy of the copy of the summons served. It also appears likely to have been a "defendant's copy". Since he did not give evidence, it is not established what happened to the copy actually served on him.

One of the photocopies specified the offence date as 27th March 1996. The other specified the date as 26th March. Both were dated 27th March. From the evidence it appears that the copy with the 26th March offence date was the one served. There was no evidence as to what summons was on the Court file. There was no need for evidence of it because it was a Court document required by statute to be filed. At one stage during the hearing it was suggested that the officer should simply look at what was on the file and say whether that was the document a copy of which she had served. For some reason, which I must confess I do not follow, she was not allowed to do so.

There were two factual disputes - whether the officer had in fact served two summonses with different offence dates, serving the second because she had forgotten about the first, and whether the one filed correctly referred to the date of the offence, the date in the information being altered during the hearing to 26 March.

The Judge held that the appellant had received either one or two summonses. The summons on the Court file gives the date of the offence as 26 March; the other gave the date as 27 March.

Both summonses (which are in printed Form 5B prescribed by the Summary Proceedings Regulations 1958 (Reprinted SR 1980/84)) with written insertions set out the fact of the positive evidential breath test result. The printed form is then in terms (taking account of the details written in and a deletion as shown in the photocopies and a copy on the prosecution file):

> "The charge against you is that you, the said H within the space of 6 months last past, namely, on the 26th day of March 1996 at Porirua
>
> Drove [*Attempted to drive] a motor vehicle on a road while the proportion of alcohol in your breath, as ascertained by an evidential breath test, exceeded 400 micrograms of alcohol per litre of breath, in that it was . . . . micrograms of alcohol per litre of breath (being a summary offence against section 58(1)(a) of the Transport Act 1962).
>
> An information in respect of this offence will be laid and filed as soon as practicable, and in any event not later than 7 days after the day the evidential breath test was administered.
>
> YOU ARE SUMMONED to appear on Friday, the 12th day of April 1996, at 10 a.m. at the District Court (not being a Youth Court) at
>
> Porirua to answer the charge.
>
> Dated at Porirua this 27th day of March 1996."

Points relating to service of the summons and the content of the summons seem to have taken a long time to develop before the Judge, probably because cross-examination was based on photocopies of two summonses instead of the actual documents. The use of photocopies has been responsible for another uncertainty arising which was not canvassed on appeal.

The factual basis for objection (if there was any) could have been established very shortly. Either the constable had prepared and issued a summons or she had not. Her evidence was that she had. On cross-examination, when shown the photocopies, she accepted that she must have prepared and perhaps issued two.

Then, either a copy of the summons had been filed with the information as required by s 19B(5) or it had not. Unless the Court file was not in Court the answer was immediately ascertainable by looking at the file. It appears from a comment in the transcript of evidence that the file was in Court and a summons was on the file with a statement of service signed by the constable endorsed on it. With the agreement of counsel I have inspected the file. There is a Court copy of a summons endorsed as to service with the information. That summons is dated 27 March and refers to an offence on 26 March.

Then, a copy of what was on the file either had been served or it had not. On that point, the constable was quite entitled in my view to be shown that document and to confirm that she had served a copy of that document on the appellant. Indeed even without that evidence service was proved since s 29(1) of the Summary Proceedings Act 1957 provides, inter alia, that:

> "The service of any document may be proved ... where service is effected by an officer of the Court or a constable ... by an endorsement on the copy of the document showing the fact and the time and the mode of service. Any such endorsement shall be signed by the person who served the document ...."

If the defence wanted to challenge that a copy of the document on the Court file was what had been served, the simple and, as this case shows, proper way to do that (since the evidence was that a copy of one or copies of two summonses had been served on the appellant) would have been to put the copy in the appellant's possession, not a photocopy, to the officer to show that it was different from what was on the file and if necessary to call the appellant to prove his document was what was served.

The matter not covered anywhere in the argument, no doubt because there has been no reference to the prime documents, is that the copy of the summons on the Court file contains in the appropriate place (which will be addressed later) the number 492 as the reading in micrograms of the appellant's breath level, fairly evidently not written by the officer who filled in and issued the summons. It may have been written by the other officer present when the copy was served, but who can tell?

Since the actual copy of the summons served on the appellant was never produced to the officer under cross-examination or by the appellant himself, there is no evidence as to whether or not that figure was written in his copy of the summons.

Mr Johnson submitted that there was a flaw in the procedure fatal to the prosecution case because the constable in evidence could not say for certain whether she had served a copy of one or both summonses she agreed she must have prepared, and if only one, which. Thus she could not say that the summons of which she was sure she had served a copy was the one filed in the Court. Therefore he submitted, there was no proven connection between the copy of the summons served and the summons on file, and a fatal defect in the procedure since s 19B(5) required proof of that connection.

As the argument proceeded it became clear that the challenge to service could not succeed.

It was apparent that the appellant had received a summons, less than an hour after the testing procedure was completed. Section 19B does not specify the time within which the summons must be served. It is now apparent from examination of the District Court file that the copy of the summons filed had an endorsement as to service on it, so that in the absence of any evidence to raise a reasonable doubt that in fact something other than a copy of the document on file was what the appellant had received (which could only have come from him), service was proved. There was no such evidence.

The only possible deficiency for present purposes in the summons the appellant received (if he in fact received only one) was that the date of the offence was nominated in the summons as 26 March and in the information as 27 March. The Judge acting under s 43(1) of the Summary Proceedings Act amended the date in the information at the request of the prosecutor to 26 March, which accorded with the evidence that the constable had acted in respect of the appellant's driving just before midnight on 26 March. Once that had been done there was no discrepancy between the two documents.

Such a discrepancy between the documents in any event, in the absence of any basis for the Court being satisfied that the discrepancy gave rise to a miscarriage of justice, would have come within s 204 of the Summary Proceedings Act which would have provided a complete answer to the point. The Judge was satisfied that there was no miscarriage of justice. I agree.

The second point argued by Mr Johnson in respect of the summons was based on the fact that the summons served did not specify the actual breath alcohol reading returned by the appellant when the test was done i.e. 492 micrograms of alcohol per litre of breath. It is now clear that whether that was the factual position is open to question. Nor was a deletion made which would have indicated whether he was charged with driving or attempting to drive.

Mr Johnson submitted that in the circumstances that no breath alcohol figure was shown, no offence was disclosed in the summons or the summons failed fairly and fully to inform the appellant of the details of the charge to be laid against him, and that it was accordingly invalid. The information filed specified the offence as "driving" and the breath alcohol level as 492 micrograms.

For present purposes I will proceed on the basis that the figure 492 was not in the copy of the summons served. That omission from the summons had been raised at the hearing. There Mr Johnson had accepted that s 204 of the Summary Proceedings Act might apply to the omission of the figure from the summons. That concession was not in terms that would preclude the point from being raised now, but the appellant plainly does not start from a position of strength on appeal in respect of it.

The summons did in my view state an offence with which the appellant was to be charged. Section 58(1)(a) makes it an offence to drive or attempt to drive a motor vehicle while the proportion of alcohol in the person's breath, as ascertained by an evidential breath test exceeds 400 micrograms of alcohol per litre of breath. The summons as issued stated that offence; indeed it stated two offences. What was omitted was particulars of the offence in terms of the breath alcohol level.

Mr Johnson submitted that the blood alcohol level could have been important information for the appellant because of the provisions of s 30A of the Transport Act. In some cases that might be so, but not in this one because the appellant had not previously been convicted of a relevant offence.

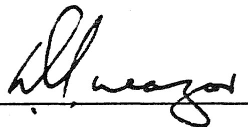
If the information had stated the offence as driving or attempting to drive, in the ordinary course the prosecution would have been required to elect which charge was to be pursued, by reason of s 16(1) of the Summary Proceedings Act. The absence of particulars of the breath alcohol level would similarly have been met, if sought, by requiring the prosecution to give particulars, but a conviction for the elected offence without those particulars would have been good.

Mr Johnson was in my view plainly right in his concession that both deficiencies in the summons were matters to which s 204 would apply as it would if the same deficiencies had been repeated in the information filed.

The onus of proving that there had been a miscarriage of justice lay on the appellant: *R v Sanders* [1994] 3 NZLR 450, 462. There is no realistic basis for suggesting in this case that there had been, particularly since the appellant had been told of the breath alcohol reading of 492 micrograms only 25 minutes before the summons was served on him at his home.

There is no substance in the appeal and it is dismissed.

It is not clear whether the disqualification from driving continued in effect after the appeal was lodged. If it did not it is to recommence from midnight on Sunday 15 June 1997.



D.P. Neazor J