IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CRI 2009-412-000031

MICHAEL THOMAS GASSON (POLICE)
Informant

v

NAOMI LEE ANDREWS
Defendant

Hearing: 19 November 2009

Counsel: C M Hay for Informant
A W Belcher for Defendant

Judgment: 24 November 2009

JUDGMENT OF FOGARTY J

Introduction

[1] This is a case stated by District Court Judge, G A Rea. In a reserved decision given on 14 August last the Judge dismissed a charge against Ms Andrews of driving with excess blood alcohol, applying s 77(1) of the Land Transport Act 1998. That section provides:

> **77 Presumptions relating to alcohol-testing**
>
> (1) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it is to be conclusively presumed that the

> proportion of alcohol in the defendant's breath at the time of the alleged offence was the same as the proportion of alcohol in the defendant's breath indicated by the test.

[2] The Judge found that there was a two and a half hour gap between the time Ms Andrews was driving the vehicle and the time that she had administered to her a breath test.

[3] He had found that at 11.30 pm on Wednesday, 21 January, the police officer attended an accident scene at Blackhead Road in Dunedin discovering crash debris and a damaged vehicle some 500 metres away, the damage to which was consistent with the crash debris found at the accident scene. The officer identified the woman from an adjacent house who acknowledged being involved with the motor vehicle accident and having driven the vehicle. At the time the officer discussed the matter with her the woman was drinking beer. She smelt strongly of alcohol. Her speech was slurred. She claimed she had drunk four bottles of Steinlager since arriving home and later she said six. She agreed that she had consumed two bottles before the accident. At 12.05 am the officer required her to undertake a breath test but the device was faulty. She finally took a breath test at 12.46 am.

[4] There was doubt as to when the accident occurred. The defendant admitted that she had left the tavern at 9.30 pm. The Judge found a two and a half hour plus delay between driving and the administration of the breath test. The Judge applied, amongst other matters, a decision of the Court of Appeal in *Wynn-Williams v Police* CA400/03 15 June 2004 in this manner reasoning:

> [35] In *Wynn-Williams v Police* CA400/03 – 15 June 2004 the Court of Appeal held that driving some 20 – 35 minutes before the test was not sufficiently proximate to trigger s.77. There is a clear inference from the Court of Appeal judgment in that case that where there has been an accident less proximity is required than where reliance is placed on a Defendant being a driver or somebody attempting to drive a motor vehicle on a road.

His reasoning continued:

> [36] There have been a number of cases where on their own facts times longer than 20 to 35 minutes had been held to be sufficiently proximate. In *Siegel v Ministry of Transport* – High Court Whangarei, 14 February 1989 Tompkins J held that a delay of 47 minutes was acceptable. In *Mehrtens* a period of one hour since the accident was held not to be too long for a breath

test to be required and for the presumption to apply. In *Police v Hazlett* – District Court Upper Hutt – 12 May 2007 Judge Harrop held in an accident case that a delay of perhaps a little less than one and a half hours was acceptable and the presumption applied against the Defendant.

[37] All of these cases that have ended in a favourable result for the prosecution have had considerably less than the 2½ hours plus gap between the driving and the testing that this case has. Depending on all of the circumstances reasonable people may differ as to whereabouts the line should be drawn. Even though there is considerable doubt in my mind about the truthfulness of the Defendant's explanations to Constable Tuten about how much she had to drink I have concluded that the delay in this case is such as to invalidate the presumption under s.77 and therefore there is no proof as to the Defendant's breath alcohol level at the time she last drove the vehicle. On that basis the charge of excess breath alcohol is dismissed.

[5] The question stated in the opinion of the Court was whether the Judge's reliance on s 77 was erroneous in point of law.

[6] The case for the Police was that s 77 means what it says, that it has been in the law for a long time and that it has been amended only to strengthen it, adding the word "*conclusively*".

[7] Ms Hay for the police argued that the District Court Judge had misunderstood the case law. She drew attention to s 68 of the same Act which provides:

68 Who must undergo breath screening test

(1) An enforcement officer may require any of the following persons to undergo a breath screening test without delay:

(a) A driver of, or a person attempting to drive, a motor vehicle on a road:

(b) A person whom the officer has good cause to suspect has recently committed an offence against this Act that involves the driving of a motor vehicle:

(c) If an accident has occurred involving a motor vehicle,—

(i) The driver of the vehicle at the time of the accident; or

(ii) If the enforcement officer is unable to ascertain who the driver of the motor vehicle was at the time of the accident, a person whom the officer has good cause to suspect was in the motor vehicle at the time of the accident.

> (2) An enforcement officer may not require a person who is in a hospital or doctor's surgery as a result of an accident involving a motor vehicle to undergo a breath screening test.
>
> (3) A person who has undergone a breath screening test under this section must remain at the place where the person underwent the test until after the result of the test is ascertained, and an enforcement officer may arrest the person without warrant if the person refuses or fails to remain at that place.
>
> (4) If an enforcement officer is entitled to require a person to undergo a breath screening test, the officer may also require that person to undergo a test using a passive breath-testing device, which test is one where the officer holds a passive breath-testing device near the person's mouth for the purpose of ascertaining whether or not there is any alcohol in the person's breath.
>
> (5) The use or non-use of a passive breath-testing device does not of itself affect the validity of a breath screening test.

[8] She emphasised reference to the threshold obligations in subs (1) that the requirement be made "*without delay*" in respect of a person whom the officer has good cause to suspect has "*recently*" committed an offence. She argued that while delay can be important, it is considered in the context of the justifications to require a breath test contained in s 8 of the Land Transport Act. If the criteria in s 68 are satisfied so that an enforcement officer can require a person to undergo a breath screening test then the presumption in s 77 applies to the result of that test.

[9] I agree with the Crown's reading of the law. When examining delay in *Wynn-Williams* the Court of Appeal were examining delay with reference to the criterion in s 68(1)(b). This can be demonstrated by paragraph [30] of that decision:

> [30] It cannot have been the purpose of the legislation to allow a breath screening test to be required of a person at home, for example, merely on the basis that they were the driver of a car some hours previously. This would be particularly harsh given the presumption in s77(1) and points away from an expansive definition of driver being intended. It would also arguably render otiose s68(1)(b), which provides that a person whom an officer has good cause to suspect has recently committed an offence against the Act involving driving may be required undergo a breath test.

[10] Mr Belcher for the defendant considered he was unable to defend the judgment. He agreed with the analysis of the Crown.

Conclusion

[11] The decision was erroneous in point of law. The fact of delay is relevant to the application of s 68 and in particular to sub-paragraph (b). Delay of itself can never be a reason for refusing to apply s 77.

[12] In this case there was a substantial argument that s 68 criteria were not met by reason of the substantive delay. Counsel for the informant advised that were this Court to find the judgment an error of law the police did not suggest that the matter be sent back to the District Court for retrial. Accordingly, the question is answered on the case stated. But the result that the charge of excess breath alcohol is dismissed remains in place.

Solicitors:
Crown Solicitor, Dunedin, for Police
A W Belcher, Dunedin, for Defendant