**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CRI-2011-485-23**

**PETER GRAEME RYAN**
Appellant

v

**NEW ZEALAND POLICE**
Respondent

Hearing: 19 July 2011

Counsel: S J Iorns for the appellant
A A McCubbin-Howell for the respondent

Judgment: 27 July 2011 at 3:00 PM

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 3pm on the 27th day of July 2011.

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**RESERVED JUDGMENT OF MACKENZIE J**

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[1] Mr Ryan appeals against his conviction on a count of dangerous driving which was entered after a defended hearing before Judge Mill in the District Court at Upper Hutt on 4 March 2011.

[2] On 9 April 2010, a car in which Mr Ryan was travelling (car A), and the complainant's car, were driving on State Highway 2 between Melling and Upper Hutt. The two vehicles came close together at a number of points in the journey. The complainant was so concerned about the standard of driving of car A that she alerted the Police. The Police responded and found car A recently stopped at the

address of a Mr Stanley in Upper Hutt. Police understood that Mr Stanley had been the driver of car A and required him to undergo a breath alcohol test. Mr Stanley was charged with driving with excess breath alcohol.

[3] Mr Stanley defended that charge before Judge Treston on 5 August 2010. He did not give evidence. He called Mr Ryan who said that he was the driver of the vehicle on the day in question, that he had taken Mr Stanley from Upper Hutt to Lower Hutt and returned him there, and had dropped him off and gone on home without going inside the house. Judge Treston was clearly troubled by that evidence. He said:[1]

> I have got to say that there are significant unsatisfactory aspects of the defence case, because there is the question of whether or not there was more than one person in the vehicle, or whether or not it was the defendant who was driving was never taken up with the defence witnesses. Counsel for the defence submits that there was no need to do that, but I demur from that because in my view the defence case should have been put to the prosecution witnesses.
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> Secondly, I have heard from the prosecution witness, Mr Ryan, who said that if it was he who was the driver and he had taken the defendant down to Lower Hutt and back. I have got to say that his evidence was contradictory in one respect where he referred to a note of the date in question, the car in question and the time that he alleged he was at Queensgate with the defendant. He referred to that.

[4] The Judge noted that the complainant had "unequivocally identified" Mr Stanley as the driver but reminded himself of the danger of relying on identification evidence. He accordingly found the charge against Mr Stanley not proven and it was dismissed.

[5] Police then laid a charge of dangerous driving against Mr Ryan. At his first appearance on that count, Mr Ryan entered a plea of not guilty through the duty solicitor and it was recorded that he was to instruct counsel prior to the status hearing on 6 December 2010. Mr Ryan has sworn an affidavit in support of the appeal in which he says that he took steps to instruct a barrister but the fee he was quoted was beyond his means as he is a bankrupt. He appeared in person at the status hearing. He says that he does not recall exactly what happened at the status hearing but the Judge set the matter down for a defended hearing on 4 March 2011. He heard

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1 *New Zealand Police v Stanley* DC Upper Hutt CRI-2010-078-00521, 5 August 2010 at [4]–[5].

nothing further on the matter for some time. He received the briefs of evidence from the Police a week or so before the hearing. The complainant's brief stated that she currently resided in Australia. From that brief Mr Ryan was under the impression that the Police were not going to be able to produce their witness and no-one had contacted him to tell him otherwise.

[6] When he attended Court on 4 March 2011 he describes himself as shocked to discover that the witness had been flown in from Australia. When his case was first called, he says that he advised the Judge that he was seeking an adjournment and asked that a lawyer with expertise in land transport law be appointed to act for him as he could not pay for a lawyer and did not feel he could present his own case. He says that the Judge told him that as his was the only case ready to go ahead and a witness had been flown in from Australia, the case would proceed. The Judge told him he could speak to the duty solicitor before they started and Mr Ryan thinks he had a ten or fifteen minute discussion with the duty solicitor. He telephoned Mr Stanley and asked that he come to Court. When his case was again called he had a discussion with the Judge. He explained to the Judge that he had never been in that kind of situation before and that he did not know a witness was appearing.

[7] The trial then began, the transcript indicates at 10.43am. The prosecutor advised the Judge of the earlier charge against Mr Stanley and the issue about identity. The Judge had a discussion with Mr Ryan to explain the procedure, including advising him that he was not obliged to give evidence and no adverse inference could be drawn. One police officer was present solely to give evidence that he had heard Mr Ryan's evidence at the earlier hearing that he was the driver. The Judge asked Mr Ryan whether he was prepared to admit that he was the driver of the car so that the officer would not need to give evidence. Mr Ryan agreed. The complainant gave evidence and Mr Ryan cross-examined her. The officer-in-charge also gave evidence. Mr Ryan then called Mr Stanley to give evidence for the defence. He did not himself give evidence.

[8] Judge Mill in his judgment referred to the complainant's evidence and to Mr Stanley's evidence. He noted that Mr Stanley did not have a detailed recall of the trip which he said was uneventful. Because Mr Ryan was only charged in November

2010, after the case against Mr Stanley was dismissed, Mr Stanley had not had to think about events of April insofar as the standard of driving was concerned in the meantime and had difficulty in remembering some of the details. The Judge found, on the basis of the complainant's evidence, that the charge was proved.

[9] Mr Iorns advances Mr Ryan's appeal on grounds of breaches to his rights to legal representation and a fair trial pursuant to ss 24 and 25 of the New Zealand Bill of Rights Act 1990 (BORA). The first point of appeal arises from the refusal of Mr Ryan's request for an adjournment to enable counsel to be instructed. The second point of appeal asserts that, whether or not Mr Ryan's rights under s 24 where breached, he was denied a fair trial and a serious miscarriage of justice may have occurred due to his inability to present his own defence. Counsel refers to Mr Ryan's admission that he was driving. He submits that the Judge at Mr Stanley's hearing ought to have been aware of the possibility of an alternative charge of dangerous or careless driving against the driver of the vehicle, and that he ought to have cautioned Mr Ryan on his right to refuse to answer any question which might incriminate him. Counsel also draws attention to other aspects of the case which he submits would have been handled differently had counsel been instructed.

[10] At the commencement of the hearing, Mr Ryan made it clear that he felt unable to represent himself and that he wished to have legal representation. In ordinary circumstances, had the witness been local, I have no doubt that the Judge would have granted an adjournment. This case did not have a long history of adjournments. There had been no delays attributable to Mr Ryan. Mr Ryan's explanation as to what he had done to obtain legal representation was not unreasonable. The fact that the witness had been flown from Australia was clearly a powerful factor weighing against an adjournment. However, Mr Ryan's expectation that the witness would not have been brought from Australia was not unreasonable. It had not been brought to his notice, beyond the address in the witness statement, that the witness would be brought from Australia.

[11] Mr Ryan clearly did need legal representation. There are several issues which Mr Ryan, as an unrepresented litigant, could not be expected to address adequately. The first was the identity of the driver. It is not necessary to consider

whether a warning against self-incrimination should have been given in the earlier hearing. There was no danger of self-incrimination in the relation to the charge then before the Court, that of driving with excess breath alcohol against Mr Stanley. At Mr Ryan's trial, the implications of admitting his earlier self-incriminating statement that he was the driver is a matter which counsel might have explored. Mr Ryan's admission at his trial that he was the driver might have been differently handled by counsel.

[12] There is a further point about the identity of the driver which could have been exploited. The complainant had at the earlier trial been positive in her identification of Mr Stanley as the driver. That was an issue that clearly went to her credibility and should have been explored in cross-examination, had counsel been instructed.

[13] Further, counsel may well have given different advice on the issue of whether Mr Ryan should have given evidence. The Police case was based entirely on the evidence of the complainant. Competent counsel would, at the very least, have obtained a brief from Mr Ryan of his version of events, and used that to cross-examine the complainant, so as to make a decision whether or not to call Mr Ryan, depending on the complainant's responses.

[14] A further aspect which counsel could have explored is why, if the circumstances justified a charge of dangerous driving against Mr Ryan, a similar charge was not laid against Mr Stanley. That could have been explored with the officer responsible for that prosecution.

[15] It appears that Mr Ryan was at no stage aware that he could apply for legal aid. It is not clear whether he would have been eligible, or whether aid is likely to have been granted. But in circumstances where, on the morning of the hearing, Mr Ryan appreciated that he did need legal assistance, the fact that he was unaware of his ability to apply for legal aid was a significant consideration.

[16] Under s 24 of BORA, everyone who is charged with an offence has the right to receive legal assistance without cost if the interests of justice so require and the person does not have sufficient means to provide for the assistance. Mr Ryan did not

have sufficient means, and there was no proper investigation of whether the interests of justice required legal assistance. As the Supreme Court held in *R v Condon*,[2] the common premise in the jurisprudence is that representation by a lawyer at trial is nearly always necessary in order for a trial for a serious offence to be fair.[3] Further, the right to a fair trial, affirmed by s 25(a), is an absolute right.[4] If, because the accused had no lawyer, or for any other reason, the trial is fundamentally flawed, the accused will not have had a fair trial and the conviction must be quashed. A substantial miscarriage of justice will have occurred.

[17] These principles are not engaged in every summary offence. The offence with which Mr Ryan was charged carries a maximum penalty of three months imprisonment, and mandatory disqualification. For the reasons I have given, I consider that, when the circumstances are viewed as a whole, this process has miscarried to the extent that this Court cannot be satisfied that Mr Ryan has had a fair trial.

[18] The appeal is allowed and the conviction is set aside.

**"A D MacKenzie J"**

Solicitors: Stephen Iorns, Barrister, Upper Hutt for the appellant.
The Crown Solicitor, Wellington for the respondent.

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2 *R v Condon* [2006] NZSC 62; [2007] 1 NZLR 300.
3 At [73].
4 At [77].