IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA No. 7/15

BETWEEN	TAINA TIMOTI **Appellant**
AND	POLICE DEPARTMENT **Respondent**

Hearing:	17 November 2015
Coram:	Williams P, Barker JA, Paterson JA
Counsel:	Mr. N George for Appellant The Acting Solicitor-General, C McCarthy and P.Dengate-Thrush for Respondent
Date of Judgment:	20 November 2015

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] This is an appeal against the judgment of Doherty, J given in the High Court on 16 July 2015. The Judge had allowed an appeal by the prosecution against the acquittal by a Justice of the Peace of the Appellant on 8 May 2015 on a charge of driving with excess blood alcohol contrary to Section 28A(1)(b) and (2) of the Transport Act 1966. ('the Act')

[2] The Justice of the Peace heard the evidence on 17 February 2015 but did not deliver her decision until 8 May 2015. In her decision, she carefully recorded the facts and her reasons for acquitting the Appellant which, essentially, were based on the fact that the doctor taking the blood sample from the Appellant did not take sufficient blood for division of the blood specimen into two parts and that there were not two bottles of the blood specimen as required by Section 28D(2) of the Act.

Facts

[3] The essential facts are that early in the morning of 17 September 2014 the Appellant when driving her car near Maraerenga collided first with a motorcyclist and then with a power pole. The motorcyclist suffered significant injury. The Appellant suffered some shock and a cervical brace was placed around her neck at the scene of the accident. She was admitted to the Accident and Emergency Department of the Rarotonga Hospital with neck pains.

[4] At the hospital, at the request of a Police Officer, the doctor on duty took an evidential blood sample from her to which procedure she consented in writing. The consent form which she signed was inappropriate for her case since it was relevant to the case of a suspect unconscious at the time of the taking of the blood sample. The Appellant was not unconscious. The doctor took 2-3 mls of blood from the Appellant without any difficulty and without her suffering any adverse effect. Because of her neck pains, he subsequently arranged for her to be x-rayed. He later discharged the Appellant concluding that she was not as sick as he had first thought. In his report, one of his diagnoses was intoxication. This diagnosis was hardly surprising when the analysis of the blood sample showed 222 mgs of alcohol per 100 mls of blood. This is an exceptionally high reading, given that the limit is 80 mg.

[5] In evidence, the doctor said that a nurse at the hospital had told him, before he examined the Appellant, that her condition was stable and that she had no injuries. He candidly admitted that he did not know of a requirement in the Act for enough blood to be taken as would fill two bottles and that two bottles of the blood were required to be kept. He testified that he had explained to the Appellant why he was taking the blood sample – i.e. to ascertain whether there was alcohol in her blood. In re-examination, he confirmed that before taking the blood sample he was satisfied that taking the blood would not be prejudicial to the Appellant's health, although she seemed "a bit drowsy."

Appellant's Submissions

[6] This Court allowed Counsel for the Appellant to advance as a further ground of appeal the submission that the doctor had not properly satisfied himself that the taking of the blood specimen would not be prejudicial to the Appellant's proper care and treatment as required by s 28E(1)(a) of the Act. The argument was that, because the doctor had taken the blood sample before the Appellant was x-rayed, that, therefore, her examination had not been completed. The Act requires that the registered medical practitioner in s 28E(1)(a) "...has examined the person and is satisfied that ...the taking of the blood specimen would not be prejudicial to the person's proper care and treatment."

[7] We reject that argument. There is nothing in the legislation to say exactly when in the course of a suspect's treatment a sample can be taken. The only requirement is that the doctor be satisfied that the taking of the blood specimen would not be prejudicial to the person's proper care and treatment. The Justice of the Peace who saw and heard the doctor in evidence, was satisfied on his point. A perusal of the transcript of the hearing before her confirms her finding.

[8] The principal argument both before Doherty J and this Court is whether the fact that the blood specimen was not separated into two specimens as required by s 28D of the Act, renders invalid the evidence of the taking of the blood sample and its subsequent analysis.

[9] The obvious reason for the requirement for two samples of blood is to provide the suspect with the opportunity to obtain his/her own analysis by a competent person of the blood sample. In this case, the Appellant did not request any check testing. Neither the doctor nor the hospital laboratory manager who conducted the analysis of the Appellant's blood was aware of the requirements of s 28D for the taking and preservation of two samples of a suspect's blood. The Justice of the Peace in her judgment commented adversely on the lack of understanding of the legislative requirements thus demonstrated.

High Court Decision

[10] Doherty J considered that the principles laid down by the majority in the New Zealand Court of Appeal of *R v Shaheed [2002]NZLR337* should be applied. That required a balancing exercise between the protection of an accused's constitutional rights and the scheme and intent of the legislation sought to be enforced, namely, the bringing to account of those who are prepared to put others at risk by driving with excess alcohol in their system.

[11] Relevant extracts from Doherty J's decision are:

[12] Shaheed was a case relating to DNA evidence. It is relevant in the sense that it dealt with a breach of a guaranteed rights of privacy under the New Zealand Bill of Rights Act. A similar right is challenged in Cook Islands law by virtue of the blood alcohol regime under the Transport Act in that it provides that citizens in certain cases must submit to invasions of their body to give samples for the purpose of bringing evidence against them.

[13] The Crown rightfully accepts that that is an important principle and ought not likely to be upset. Shaheed held that when considering the admissibility of evidence in these circumstances that "the proper approach is to conduct a balancing exercise in which the fact that a breach of the accused guaranteed right is a very important but not necessarily determinative factor."

[14] The Court went on to say that this balancing exercise need not be required if the breach in question is "obviously trivial." The Crown submits that whilst the taking of a blood sample is highly invasive because of the invasion of the privacy of the individual, that in this case, all of that was done in accordance with the law and the breach of the procedure was merely one after the event relating to the separation of samples. Therefore, there was no prejudice to the defendant in this case because she did not seek to have the benefit of a separate analysis. But on that basis, the Crown submits that the breach is a minor one and "obviously trivial."

[15] There is no question in this case of any malice or negligence in this strict sense of the word in relation to the medical practitioner who frankly admitted that he did not know that he had to take two samples or divide the sample into two merely that one would do and that is what he had been doing.

[16] I do not agree with the Crown that this breach is trivial in the sense meant by Shaheed. It is a fundamental part of the procedure adopted by the Cook Islands. It is a fundamental protection to the individual to be able to challenge the might of the Crown in bringing evidence which in itself is derived from the invasion of that basic human right; the invasion of privacy occasioned by the taking of blood by a needle from the body.

[17] What Shaheed was saying is that if the breach was a mere incident or as it put it "obviously trivial" then you can ignore it. But that does not end the matter because Shaheed says that if it is more than obviously trivial then a balancing process should be occasioned or applied.

[24] All in all when I look at it, the procedures were appropriate up until the omission to divide the specimen in two. So when one weighs all of that and when one takes into account the scheme of the Transport Act as amended by this blood and breath alcohol legislation to bring to account those who are prepared to put others at risk by driving with excess alcohol in their system, I find that there is little or no prejudice to the defendant and in this case the certificate should be admitted as evidence and therefore the presumption of the alcohol level is as per the analysis.

[25] Mr George for the defendant was rightly concerned in his general submissions to the Court that Shaheed ought not to be applied so as to mean there is a continuing slippery slope. He did not use those words, they were actually used by Crown Counsel. But Shaheed does have the safeguard of the balancing procedure and there will or may well be appropriate cases where the balance is in favour of the defendant because of the greater impact upon those fundamental rights of the person when balanced against the scheme of this legislation.

[26] The Appeal is granted. I think on the basis of the evidence on the record that there would have been and there was no other defence to the charge. I set aside the decision of the Justice of the Peace and enter a conviction against the defendant.

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Analysis and Decision

[12] Shaheed was a decision of a seven Judge Court of Appeal. The judgment of the majority, delivered by Blanchard, J, reviewed the approach to be taken to the admissibility in a criminal trial of evidence obtained as a result of the breach of a right guaranteed by The New Zealand Bill of Rights Act 1990. The majority view is summarised at paragraph 26 of the Judgment as follows:

[26] In this case the Court has reviewed the approach which should be taken to the admissibility in a criminal trial of evidence obtained as a result of a breach of a right guaranteed by the New Zealand Bill of Rights Act 1990. The majority has concluded that in place of what has become known as a prima facie exclusion rule, admissibility should be determined by means of the Judge conducting a balancing exercise in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a right guaranteed to a suspect by the Bill of Rights. The Judge must decide by a balancing of the relevant factors whether exclusion of the evidence is in the circumstances a response which is proportionate to the breach which has occurred of the right in question. Account is to be taken of the need for an effective and credible system of justice. Matters which are likely to be relevant to the balancing exercise in a particular case will be the value which the right protects and the seriousness of the intrusion on it; whether the breach has been committed deliberately or with reckless disregard of the suspect's rights or has arisen through gross carelessness on the part of the police; whether other investigatory techniques, not involving any breach of rights, were known to be available and not use; the nature and quality of the disputed evidence; the centrality of the evidence to the prosecution's case and, in some cases; the availability of an alternative remedy or remedies.

[27] In the case under appeal, involving a charge of sexual violation by rape, a majority of the Court has concluded that evidence of a DNA profile obtained from a blood sample taken pursuant to a High Court order under the Criminal Investigations (Blood Samples) Act 1995 should not be admitted at the respondent's trial because he had come to attention in relation to the rape only as a result of the earlier taking of blood from him for databank purposes in circumstances which constituted a very serious breach of the 1995 Act and of s 21 of the Bill of Rights (the guarantee of freedom from unreasonable search and seizure).

[13] In Shaheed, the breach of the suspect's rights was far worse than the breach of the rights of the Appellant in this case. The police had obtained Shaheed's blood sample after misleading him that he was obliged to provide one. The majority excluded the wrongly obtained evidence.

[14] In the view of this Court, the New Zealand Court of Appeal majority decision in Shaheed should be followed in the Cook Islands. The majority's judgment traverses the law in many common law jurisdictions before arriving at its conclusion about the "balancing exercise" to be performed by the Court when faced with an infraction constitutional rights to personal liberty as against legislation involving intrusion of a person in the interests of a broad social objective. Many of the jurisdictions reviewed in Shaheed had constitutional provisions similar to those in the Cook Islands Constitution relevant to this case. At paragraph 145 – 156 the majority helpfully explained some of the important matter which will often be relevant and require to be taken into account in that exercise.

[15] The Court agrees with the approach of Doherty J quoted earlier. He rightly noted that the breach here was more than "obviously trivial" but that there was little or no prejudice to the Appellant caused by the omission to have two bottles of blood. His balancing analysis of the situation is adopted.

[16] Accordingly, the appeal is dismissed and the Appellant must now appear before the Justice of the Peace for sentencing.

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Sir Ian Barker JA

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BJ Paterson JA

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DAR Williams P
President