IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

JP APPEAL: 2/10

IN THE MATTER	of an application for Leave To Appeal
BETWEEN	**TERERETITI KURETA** of Rarotonga (Applicant)
A N D	**COOK ISLANDS POLICE** of Rarotonga (Respondent)

Hearing Date:	20 April 2010
Court:	Weston J
Appearances:	Senior Sergeant T Manavaroa for Police Ms Lavenia Rokoika for Applicant

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ORAL JUDGMENT OF WESTON J

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[1] This is an appeal from a conviction entered by a Justice of the Peace against the defendant on 9 February 2010. The defendant was subsequently sentenced to a fine of $500.00 and ordered to pay Court costs of $30.00. The decision of the Justice can be found in the transcript at pages 9 and 10; she is to be commended for her endeavour to give reasons for her decision, something not always undertaken in this jurisdiction.

[2] During the course of her decision Her Worship said "prosecution has proven beyond reasonable doubt that the defendant was involved in a motor

accident from which he sustained the injuries and his blood count is in excess of legal limits".

[3] I heard argument on this appeal this morning. I have had the benefit of detailed written submissions, both from Ms Rokoika and from the Police. These submissions were full and very helpful.

[4] The defendant was charged with breaching Section 28A of the Transport Amendment Act 2007. The information alleged that he "did drive a motor vehicle namely a Suzuki pickup truck registration plate number 5946 on the main road and the proportion of alcohol in his blood exceeding the prescribed limit".

[5] There was a defended trial before the Justice. At that trial the prosecution called two witnesses, the first of these was Mr Tou the Lab Manager employed by the Ministry of Health. He gave evidence of the result of a blood sample test. It became clear during cross examination that he had not undertaken the test himself. There was no evidence before the Court as to whom had undertaken the test and it is not clear why the actual tester did not ultimately give evidence.

[6] These appeared to be significant flaws and on another day may have been sufficient of themselves to set aside a conviction. However, that was not formally argued and I mention the issue but do not decide it.

[7] During the cross examination of Mr Tou it became apparent, also, that he had had no contact with the defendant or any medical practitioner who may have taken the relevant blood sample. Exhibit A was the certificate signed by Mr Tou, which clearly assumed that the analysis was conducted on "a specimen of blood provided by ...." the defendant. But there was no evidence in support of that proposition. Clearly it was assumed to be the case and, for all I know, it may be correct but the Court can only rely on evidence properly before it and there was no evidence that the specimen, as tested, was that actually provided by or taken from the defendant.

[8] I conclude this is a fatal flaw. The failure to prove the blood sample was taken from the defendant is so fundamental that nothing can overcome its omission. There was simply no evidence directed to this topic. There could be no argument, for example, that defence counsel failed to cross examine on this topic. Other than raising the issue with Mr Tou, which she did, there was no one else to question about it.

[9] The second Police witness was the Officer in Charge, Senior Sergeant Matapo. At page 6 of the transcript, we can find references to the taking of a statement from the defendant. As I will discuss shortly, the statement as prepared was never signed by the defendant and there is no formal acknowledgment by him that the statement was his. At page 6 of the transcript the Officer said that he cautioned the defendant and then told him to tell the Officer what happened on the night. On the same page the Officer is recorded as saying he just made notes in his note book. He then told the defendant that this would be put on paper and it would be brought back to be signed. That is all he says about it. There is no evidence that he accurately recorded what the defendant told him.

[10] Despite pressing from the defence counsel, there was no explanation forthcoming as to why the statement was not signed Exhibit B before the Court was the unsigned statement. If its contents were true, it would clearly amount to an admission by the defendant that he was drinking and driving. As with the certificate (Exhibit A, already discussed), it may well be correct, but there is no formal evidence before the Court sufficient to reach such a conclusion. Nevertheless, the statement appears to have been influential for the Justice because there is no other evidence before the Court that I have been able to ascertain that the defendant was the driver of the car in question.

[11] It cannot simply be assumed that the unsigned statement is accurate. It may well be that these flaws of themselves would also amount to sufficient reason to allow the appeal. I mention it for completeness but make no concluded finding one way or the other.

[12] The appellant places principal reliance on Section 28E of the Transport Act which is entitled "protection of patients". I have already found there was no evidence that the blood sample which was tested by the Lab was a blood sample taken from the defendant. Consequently it is not strictly necessary for me to consider Section 28E; however, in case the matter is taken further I make some brief observations.

[13] Section 28E provides that where a person is in hospital for care or treatment (and this appears to be the case here or so I assume for the purposes or argument) a blood sample may only be taken by a Registered Practitioner if the patient is informed that the blood specimen "is being or was taken under this section for evidential purposes": Section 28E (1)(c). I believe that the giving of this information by the Registered Medical Practitioner is an element that must be proved by the prosecution. It cannot simply be assumed that the advice was given. I do not believe this is some minor technicality that can be overlooked by the Court. It is clear that it is a fundamental protection for the patient; otherwise it can be asked rhetorically, why would the Legislative have provided for it in the statute. I believe Section 28E is consistent with the provisions of the Constitution, particularly in Article 64.

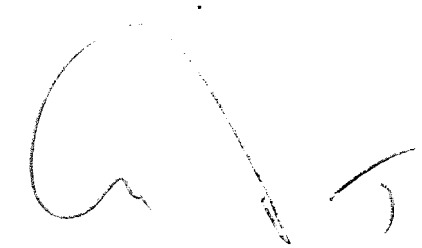
[14] In my view, the fundamental problem in this case comes back to the absence of any evidence from a Registered Medical Practitioner. In future prosecutions it would seem that this deficiency could be easily overcome by the Police calling that practitioner to say he or she gave the necessary advice and then took the blood specimen. It would of course still be necessary to show that the blood sample taken was that ultimately tested but that is a straight forward chain of evidence problem.

[15] I wish to say something briefly about the Supreme Court decision in *Aylwym v the New Zealand Police*. This was referred to the Justice and a copy of the judgment was handed up by the parties during the course of this appeal. I understand that paragraph [17] of the judgment was read out to the

Justice. This is a concluding comment made by Justice Wilson on behalf of the Supreme Court. It is important that it must be read in context. It is not some general direction whereby technicalities can be overlooked. Having read the case carefully it seems to me it is a decision about statutory interpretation. The Court was examining quite different statutory provisions to those presently before the Court. It is also to be noted that in New Zealand there are specific statutory provisions, perhaps they can be called escape routes, whereby errors and defects of procedure on the part of the Police are not necessarily fatal to a subsequent prosecution. There do not appear to be similar provisions in the Cook Islands and I was not pointed to any during the course of argument.

[16] Great respect, of course, must be accorded to a decision of the Supreme Court and it has been a useful and helpful reminder of the importance of statutory interpretation when it comes to examining blood alcohol cases. I believe it focuses attention upon the mandatory provisions of Section 28E which I have already discussed above.

[17] For the reasons set out already, I allow the appeal and I set aside the conviction against the defendant.



Weston J