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

JP APPEAL NO. 3/16
(CR NO. 719/16)

POLICE

v

PETER METCALFE

Date: 15 March 2017

Counsel: Ms A Mills for the Appellant
Mr N George for the Respondent

Date of Decision: 15 March 2017

DECISION OF HUGH WILLIAMS, CJ

[3:13:26]

Preliminary Facts

[1] Though it will be necessary to itemise the charge in rather greater detail later in this judgment, to commence the judgment it is to be noted that the Respondent Mr Metcalfe is charged with driving with excess blood alcohol.

[2] On 10 November 2016[1] the Justice of the Peace presiding that day purported to discharge Mr Metcalfe, on his counsel's application, for want of prosecution. The discharge was said to have been based on s 111 of the Criminal Procedure Act 1980-81[2].

[3] This judgment is an appeal by the Crown as a matter of law on the basis that the Justice had no power to dismiss the charge against Mr Metcalfe as she purported to do.

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[1] All dates in this judgment are 2016 dates unless otherwise specified.

[2] All statutory references in paras [2]-[20] of this judgment are to the Criminal Procedure Act 1980-81

[4] The information against Mr Metcalfe charges that "on the 19th day of September 2016 at Matavera Peter Metcalfe… did drive a motor vehicle, namely a light blue Carol, registration 9265, on the public road in Matavera and has proportion of alcohol in your blood exceeding the prescribed limit." The information plainly has some grammatical infelicities but they do not affect the issues before the Court on this occasion.

[5] The information was sworn out against Mr Metcalf on 14 October summonsing him to appear in the Justices of the Peace court on 20 October. On that date it was adjourned for a week because the summons had not been served. On 27 October the defence sought an adjournment to allow them to "review disclosures". The case was adjourned by consent to 10 November when, at the beginning of the events that day relevant to Mr Metcalfe, a plea of not guilty was entered.

[6] It is clear from the transcript of what ensued on 10 November that no evidence was called. Mr George for the defence submitted that the blood alcohol certificate was so deficient that no charge was made out against his client and the Justice of the Peace then said, as recorded in the transcript, "under s 111 of the Criminal Procedure Act 1980-81 this Court is granting the application to dismiss the charge for want of prosecution." It is against that decision that the Crown appeals.

When informations may be dismissed

[7] As Ms Mills for the Appellant submits there are several ways in which charges against accused persons can be dismissed.

[8] The process of prosecuting somebody begins with the laying of an information under s 10 of the Criminal Procedure Act. S 13 requires the information to be in the prescribed form, Form 3. Form 3, so far as is relevant to this case, says that the information shall state "I, [full name], of [address, occupation], say on oath that I have reasonable cause to suspect and do suspect that (* within the space of 12 months last past, namely) on the blank day of blank 19 at [full name] of [address, occupation], [here set out the substance of the offence] [here add section and statue applicable], following which is the signature of the informant".

[9] The requirement to state the "substance of the offence" is also mirrored by s 16 (1) of the Criminal Procedure Act, which requires informations to "contain such particulars as will fairly inform the defendant of the substance of the offence with which he is charged". The particulars under subs (2) are required to use "the words of the enactment creating the offence". And under subs (3) the particulars shall include the "time and place of the alleged offence and the person (if any) against whom or the thing (if any) in respect of which it was committed".

[10] If it is thought that the information is insufficiently particularised, further particulars can be ordered under s 17 of the Criminal Procedure Act and if that is not sufficient, objections can be taken to the information under s 18.

[11] Under ss 55 to 59 of the Criminal Procedure Act the powers of the Court are set out depending on the certain circumstances. Under s 55 where the defendant but not the informant appears, the section prescribes what action the Court can take. Section 56 deals with the position when only the defendant appears; s 57, when neither the informant nor the defendant appears, and s 59, when both appear and says the Court may "proceed with the trial".

[12] The Court has power to dismiss an information for want of prosecution under s 55(c) but that applies only where the defendant and not the informant appears, and such was not the case in Mr Metcalfe's situation.

[13] The second power to dismiss informations appears in s 111 ff of the Criminal Procedure Act. S 111 reads:

> **111. Power to discharge defendant after committal for trial**
>
> (1) Where any person is committed for trial under section 99 of this Act,-
>
> (a) The Judge may in his discretion, after a perusal of the written statements tendered for the trial, direct that the defendant shall not be arraigned on the information laid and direct that the defendant shall be discharged;
>
> (b) The Judge may in his discretion, at any stage of the trial, whether before or after his verdict, direct that the defendant be discharged.
>
> (2) A discharge under this section shall be deemed to be an acquittal.
>
> (3) The provisions of subsection (3) of section 112 of this Act shall extend and apply to a discharge under this section.
>
> (4) Nothing in this section shall affect the power of the Court to convict and discharge any person.

[14] And s 112 provides:

> **112. Power to discharge defendant without conviction or sentence**
> (1) The Court, after inquiry into the circumstances of the case, may in its discretion discharge the defendant without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.
> (2) A discharge under this section shall be deemed to be an acquittal.
> (3) Where the Court discharges any person under this section, it may, if it is satisfied that the charge is proved against him, make an order for the payment of costs, damages, or compensation, or for the restitution of any property, that it could have made under any enactment applicable to the offence with which he is charged if it had convicted and sentenced him, and the provisions of any such enactment shall apply accordingly.
> (4) Nothing in this section shall affect the power of the Court to convict and discharge any person.

[15] It is notable, as Ms Mills submitted, that s 111 gives a Judge power to direct that a person not be arraigned or that he or she be discharged, but that power resides only in a Judge. Under s 2 of the Act a Judge is defined as a "Judge of the High Court" in contradistinction to a "Justice" who is defined separately in s 2.

[16] Under ss 111 and 112 Justices of the Peace, being Justices of the Court, therefore only have the power to discharge a person without conviction or sentence under s 112(1) and then only "after inquiry into the circumstances of the case". They have no power to discharge defendants under s 111.

[17] There was no enquiry into the "circumstances of the case" in the sense of evidence being produced on 10 November in Mr Metcalfe's prosecution. The only aspect of the matter on 10 November which could be said to be an "inquiry" were Mr George's submissions supported by him giving the Justice of the Peace the certificate of the blood alcohol level which the prosecution had disclosed.

[18] That certificate is deficient in the sense that, although it contains date and person and place of the taking of the blood specimen, it says "the analysis revealed that the specimen contained milligrams of alcohol per 116 millilitres of blood." It is clear that the person who completed the certificate failed to fill out all the entries required by the template from which the certificate was taken.

[19] It was Mr George's submission that the certificate was so deficient as to be inadmissible and, that because of that and the fact that the information did not contain a blood alcohol reading, the prosecution was unable to proceed and the charge should be dismissed.

[20] The Justice of the Pease acceded to that submission but nothing occurred on 10 November which could have been regarded as an "inquiry into the circumstances of the case" so as to satisfy s 112(1). The Justice of the Peace therefore had no power, in the way in which this matter proceeded, to dismiss the information at the stage she did, whether for want of prosecution or any other way. The appeal must therefore be allowed on that point.

Must an information for driving with excess blood alcohol state the blood alcohol reading?

[21] Mr George's second submission was that the wording of the information failed to comply with requirements for the contents of that document and that informations for excess blood alcohol ("EBA") driving should contain the reading of blood alcohol obtained by whatever means it has been obtained.

[22] The information against Mr Metcalfe is laid under the Transport Amendment Act 2007[3], s 28A(1) which reads:

> A person who (a) drives or attempts to drive a motor vehicle on a road… and has the proportion of alcohol in his or her breath exceeding the prescribed limit commits an offence".

Again, there appear to be some grammatical infelicities not affecting the outcome of this case.

[23] It is clear from the wording of s 28A(1)(a), the section under which Mr Metcalfe is charged, that the "substance" of the offence which the information must contain is an allegation that a person drove or attempted to drive a motor vehicle on a road and that at that time he or she had a proportion of alcohol in their blood exceeding the prescribed limit.

[24] Under s 28F are set out the evidential procedures which provide one route by which the prosecution can prove the case against the defendant. Section 28F(2) – (3) deal with the

[3] All statutory references in paras [22]-[28] are to the Transport Amendment Act 2007

conclusive presumptions that the sample as taken has the same alcohol level as the sample at the time of driving and that the proportion of alcohol must be taken into account in the prosecution. Section 28F(4) sets out how evidence of the proportion of alcohol or drug in a person's breath or blood may be adduced.

[25] Subsections 4(a) and (b) are inapplicable in this case as they apply to breath alcohol offences, but subs 4(c) makes admissible "a certificate signed by an approved analyst as to the proportion of alcohol or any drug found in a specimen of blood provided by the defendant as identified in the certificate."

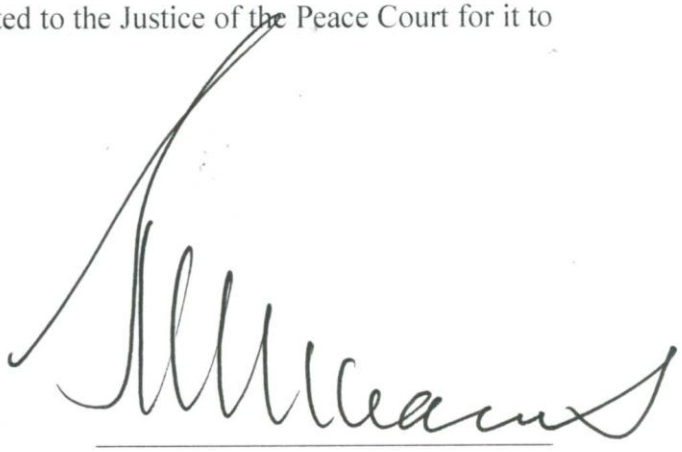
[26] When this matter goes to trial it is clear the prosecution may have some difficulties with the wording of the certificate which has been disclosed in Mr Metcalfe's case, but it is crucial to note that s 28F(4) is permissive. It uses the word "may". It permits evidence of the proportion of alcohol in a person's breath or blood to be given by one of the means set out in the section, but it is not exclusive. What the section essentially provides is a shorthand method of proof in breath or blood alcohol cases but it does not say that evidence by certificate is the only method of proof. So, if the section can be complied with, actual proof of the way in which the breath or blood alcohol level is established can be dispensed with, and certificates or notices adduced under the section.

[27] Here the prosecution may encounter some problems when this matter goes to trial with the wording of the certificate as it is at the moment. It is possible that the certificate will not be admitted as evidence but, given that s 28F(4) is permissive, it will still be open to the prosecution to endeavour to prove, by means other than the certificate of analysis if that is ruled inadmissible, that Mr Metcalfe was driving with excess blood alcohol on the night in question.

[28] It is sufficient for the purposes of this appeal to note that the information in the form in which it was sworn against Mr Metcalfe complies with the provisions of the Criminal Procedure Act, s 13, in setting out the "substance" of the offence. The section under which Mr Metcalfe is charged, s 28A(1)(a), does not require anything more to be stated than an allegation of driving or attempted driving on a road whilst the proportion of alcohol in the breath or blood exceeds the prescribed limit. It does not require informations for offences under the section to state the blood/alcohol reading, as that is a matter of evidence. The reading is not one of the elements of an offence under s 28A(1)(a).

Result

[29] The conclusion is therefore that the appeal is allowed, the purported dismissal of the information is set aside and the prosecution remitted to the Justice of the Peace Court for it to continue in the usual way.



Hugh Williams, CJ