IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2018-409-000078
[2018] NZHC 3069

BETWEEN	MELANIE WICHART Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 22 November 2018

Appearances: ASP Tobeck for Appellant
P A Norman for Respondent

Judgment: 23 November 2018

JUDGMENT OF GENDALL J

Introduction

[1] The appellant, Melanie Wichart, was convicted on a charge of drink driving following a defended hearing before Judge Saunders in the District Court in July 2018. On her behalf counsel Mr Tobeck challenges the conviction, arguing the prosecution failed to prove first, that the blood specimen kit used to test her blood sample had not passed its expiry date, and secondly, that the second blood sample taken had been properly sent to a private analyst.

[2] Ms Wichart has an automatic right of appeal against conviction.[1] This Court must allow the appeal if it finds that the Judge erred in his assessment of the evidence to such an extent that a miscarriage of justice has occurred, or that a miscarriage of justice has occurred for any other reason.[2] Miscarriage of justice is defined as any

1 Criminal Procedure Act 2011, s 229 and 244.
2 Criminal Procedure Act, s 232(2).

error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[3]

Facts

[3] On 1 January 2018, Ms Wichart failed an alcohol breath screening test after her vehicle was pulled over by Police. She was taken to the Police Station, where an evidential breath test was administered. After this returned a result in excess of the 400 microgram limit, Ms Wichart elected to undergo an evidential blood test. A nurse came to the station to administer the test. Two samples were taken, and kept in a locked cabinet until 4 January 2018 when they were sent to Wellington for analysis. The sample was shown on analysis to contain 118 milligrams of alcohol per 100 millilitres of blood, and Ms Wichart was charged accordingly.

Issue one: blood specimen kit expiry date

[4] This issue arises out of the failure on the part of Sergeant Cross, the officer who ordered the blood test, to fill out one of the sections on the Blood Specimen Medical Certificate. No details are recorded under the heading "Blood Specimen Collecting Kit number(s)". Mr Tobeck says this is a material defect because it means the Court cannot be sure that the blood specimen kit used had not passed its expiry date.

[5] In the District Court, Mr Tobeck cross-examined Sergeant Cross on this point. Sergeant Cross admitted he had "no idea" what the batch number was, nor did he know what the expiry date on the kit was.

[6] Mr Tobeck submits that he put the expiry date of the kit in issue, and that the prosecution's failure to satisfy the Court on that matter should result in the certificate being deemed inadmissible.

[7] This submission was also one made before Judge Saunders in the District Court. His Honour disposed of the argument in the following terms:

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3 Section 232(4).

> [32] [That the Sergeant left the kit number blank] does not however lead me to the conclusion that the samples were not sent in an approved medical kit. I note that the analyst could not have made the statement "no such deterioration or congealing was found that would prevent a proper analysis" if the samples had arrived in an unsealed blood specimen container.
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> [33] The safeguard to the defence is the ability to have the second sample examined and tested by a private analyst.
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> [34] If there were some irregularity in the result or container in which the sample was sent, then that would be an appropriate ground for giving notice or making application for the analyst to be called.
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> …
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> [40] In respect of the failure to specify the medical kit batch number by the officer, I again fall back on the fact that the ESR procedure of giving the Certificate of Analysis would not occur if the sample received was not capable of analysis.

Analysis

[8] In support of this argument, Mr Tobeck referred to the case of *Hardyment v Police*, in which it was submitted that a breath test was invalid because the Court could not be sure that the Constable administering the test had checked that the breath tester was not past its expiry date.[4] The Constable gave evidence in that case that the type of breath tester he used came in a sealed box which had an expiry date over the seal. When cross-examined on the expiry date, the Constable was somewhat unclear whether he checked the expiry on that particular breath tester. The District Court Judge held that there was no requirement in the legislation that the device not have exceeded its expiry date. On appeal, the High Court upheld the conviction on the basis that the Constable's evidence was sufficiently clear that he did check the expiry date. However, the Court was of the view that, if the manufacturer of the device puts an expiry date on the tester, the expiry date must not have elapsed at the time of use. It followed that "if the issue is raised at the prosecution, the constable should be in a position to establish that the expiry date of the Drager Alcotest he or she uses is still current".

[9] Responsibly, Mr Tobeck brought to the Court's attention a later case in which the High Court reached the same conclusion as the District Court Judge in *Hardyment*.

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4 *Hardyment v Police* HC Auckland AP289/96, 17 December 1996.

This was *Morgan v Police* where Hansen J was of the view the Court should be careful "not to usurp legislative intent by implying into legislation requirements that are not expressly provided for on the face of the section".[5] He also opined that "mere technical defences" are contrary to the "wide purpose of ensuring our roads are free of motorists who are affected by alcohol". He also noted that the device was used merely for a screening test, and not the final evidential basis for a conviction.

[10] One immediate problem with Mr Tobeck's submission is that, unlike the situation in *Hardyment* and *Morgan*, in this case there is no evidence before the Court to suggest that the type of Blood Specimen Collecting Kit used has an expiry date at all.

[11] Putting that to one side, however, this ground of appeal cannot succeed, in my view, for other reasons. Mr Tobeck's submission is that "the prosecution failed to prove the expiry date of the blood specimen kit" and that *therefore* "the blood analyst's certificate ought to have been deemed inadmissible". As I see it, that does not follow. Section 75 Land Transport Act 1998 relevantly states that:

> production of a certificate to which this section applies in proceedings for an offence against this Part is sufficient evidence, in the absence of proof to the contrary, of such of the matters as are stated in the certificate

[12] As such, the only way in which the certificate fails to be sufficient evidence of its contents here is if there is proof to the contrary. There has been no proof that the result contained in the certificate is wrong, there has merely been questions posed from the bar. This point was made by the Court of Appeal in *Dodgson v Police* when met with an almost identical submission.[6] In that case the batch number had been recorded, however this obviously did not dispose of the question relating to the expiry date. The Court said:

> [10] The essence of s 75 is that, subject to s 79, the certificate is sufficient proof of the matters in the certificate. In this case the prosecution elected to rely upon the s 75 certificate. During the hearing in the District Court the applicant's counsel asked the police officer some questions about the blood specimen collecting kit. The Judge in the High Court identified the exchange in this way:

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5 *Morgan v Police* (1997) 15 CRNZ 147 (HC).
6 *Dodgson v Police* [2011] NZCA 428.

> [31] In cross-examination of the police officer, counsel for Ms Dodgson asked the officer who obtained the kit. The officer replied that he had not obtained the kit because the nurse knew that the kits were kept in the cupboard in the medical room at the police station. The officer said the medical room was opened with a set of keys. Counsel asked the officer if he had looked at the materials for taking the blood. The officer said that it comes in a box and has a plastic wrapper with a batch number around the outside of it. The officer was asked if he knew what the batch number was and what the wording was on the box. The officer said that '[f]rom memory I'm not sure'. He was asked what the expiry date was and he gave the same answer."
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> [11] The applicant's case is that once the applicant had challenged the police officer in evidence about the blood specimen collecting kit then such a challenge constituted proof to the contrary in s 75(1).
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> [12] Thus, counsel for the applicant says given his challenge there is proof to the contrary of some of the matters in the s 75 certificate. This in turn means the s 75 certificate could no longer be relied upon by the prosecution.
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> [13] This submission is based on a false premise. Counsel's questions, unless accepted by the witness, are not evidence. Here, the applicant put a series of propositions to the police officer about the blood specimen collecting kit to which the police officer could not respond. He did not know the answers to the questions. The result was that counsel for the applicant established nothing other than the officer's lack of knowledge. He did not "prove to the contrary" any of the details of the certificate. The s 75 certificate remained as evidence and established the matters contained in the certificate. We agree with Mallon J this challenge has no prospect of success.

[13] In the present case, it is difficult to see how putting in question the expiry date can in any way rebut the presumption. It is not evidence. As Ms Norman for the Crown submits, the appropriate procedure for rebutting the presumption would have been for the appellant to file an affidavit, sworn by a private analyst, attesting to the fact that the specimen was not suitable for analysis.[7] No such application was made or evidence produced by the appellant.

[14] In my view, this disposes of the issue. However I note that, had I to decide the matter on an alternative basis, I prefer the analysis of Hansen J in *Morgan* over that in *Hardyment.* The legislation sets out the requirements carefully, and the courts should be slow to read in further obstacles. Appeals on technicalities like this rarely attract much sympathy from the courts. That is especially so in cases like the present where two breath screening tests and then a blood test have all shown the appellant well over the alcohol limit, and where there is nothing but an assertion of an administrative oversight on which the appeal is based.

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7 As per the procedure set out in s 79(4).

[15] This view is also supported by the case of *R v Morunga*,[8] cited by Ms Norman. In that case the Court of Appeal dismissed a similar ground of appeal, saying that the legislative reference to 'blood specimen collecting kit' contains no reference to an expiry date. In that case the analyst's statement that "no such deterioration or coagulation was found as would prevent proper analysis" was enough to be satisfied of the tests reliability. An identical statement is here contained in the analyst's certificate.

Issue two: the second blood specimen

The appellant's position

[16] This second issue relates to a request by the appellant for the second sample to be sent to an independent analyst for testing.

[17] Section 79(2) states that an analyst's certificate (such as the one the Crown relies on in this case) is not admissible if an application has been made by the defence under s 74 for the second blood specimen to be sent to a private analyst and, for whatever reason, the specimen has not been sent to the private analyst in compliance with the application.

[18] At trial, the defence did not call any evidence. However, Mr Tobeck cross-examined Sergeant Cross about an application Mr Tobeck said had been made pursuant to this section. Mr Tobeck asked the Sergeant whether he was aware that a request was made for the second blood specimen to be sent to a private analyst, to which he answered yes. Mr Tobeck then asked whether he had seen the letter that the police sent to the ESR asking for the second specimen to be forwarded to a private analyst, and a letter that was apparently in reply from the ESR to the Police. Mr Tobeck showed the Sergeant the letters, although neither were exhibited as evidence. The Sergeant said in answer to Mr Tobeck's questions that he had seen the reply letter but not the letter from the Police.

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8 *R v Morunga* [2009] NZCA 292.

[19] Mr Tobeck submits that this line of questioning establishes as a matter of fact that a request had been made pursuant to s 74. He says that this raised the issue, and that it placed an onus on the Police to prove that they had indeed sent the sample to an independent analyst. Section 75(6) provides that if an analyst produces a certificate certifying that the sample has been sent in accordance with s 74, that is adequate absent proof to the contrary. No such certificate was produced in this case.

[20] Mr Tobeck relies on the case of *Farry v Police* for the proposition that when the prosecutor is aware that an application has been made under s 74, the prosecution must prove compliance.[9]

The Crown's position

[21] Ms Norman accepts that a compliant application was made pursuant to s 74(5).

[22] She notes that no pre-trial challenge was made by the appellant with regard to the ESR analyst's certificate, and no application was made under s 79(3) for the ESR analyst to appear as a witness. Nor was it put to Sergeant Cross in cross-examination that the specimen *had not been* sent. The District Court Judge, in disposing of this issue, said:

> [22] No submission was advanced to me that there has been non-compliance with any request for the second sample at ESR not being made available for testing by a private analyst.
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> [23] In short, there was not any question put to the witness that revealed a failure to comply with the request.

[23] Ms Norman says that likewise here Mr Tobeck has not made a submission that there was any failure to comply with the request, and that presumably this is because the Police *did* make the appropriate request to ESR and the specimen *was* sent to the nominated private analyst.

[24] Ms Norman correctly identifies that the crux of this ground of appeal is whether the fact that the prosecution did not produce an ESR certificate of compliance as per 75(6) is fatal to the prosecution.

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9 *Farry v Police* HC Dunedin AP46/00. 19 December 2000.

[25] Again, Ms Norman says the starting point is s 75(1) – that absent proof to the contrary the approved analyst's certificate is proof of its contents. In order for the prosecution to have to prove compliance, Ms Norman says the appellant was obliged to raise it as an issue under s 79(2).

[26] Ms Norman explains that in *Farry*, the District Court Judge made an order allowing the prosecution to adduce further evidence to prove compliance four months after the closing of the prosecution case as "rebuttal evidence", following *Murray v Ministry of Transport*.[10] On appeal Hansen J held that this was not rebuttal evidence, but rather evidence to repair an omission in proof. *Murray* was distinguished on the basis that in that case the prosecutor was not aware that there had been a request for the sample to be sent, as under the old legislation such requests were sent straight to the analyst. Hansen J held that in *Farry,* the prosecutor knew, and was obliged to prove compliance.

[27] Ms Norman submits that it is unclear from the decision in *Farry* when it can be said that the prosecution is "put on notice" such that it has a burden to prove compliance with a s 74(5) request. In *Farry*, the prosecution argued that they did not bear such a burden unless that matter is put to a prosecution witness by the defence. Hansen J rejected this, saying that the prosecutor had been "put on notice" and had "specifically set his face against the need to prove the sending of the second sample". Ms Norman submits that it does not necessarily follow from *Farry* that the simple fact that a second sample was requested to be sent triggers a challenge under s 79(2) to the admissibility of the certificate.

[28] Ms Norman notes that the Supreme Court made it clear in *Aylwin v Police* that the lower courts should not strain the statutory language to breathe life into technical or unmeritorious defences.[11] She says that here no submission has ever been made by the defence that s 79(2) applies because of non-compliance. Even when the Judge

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10 *Murray v Ministry of Transport* CA 113/83, 1 March 1984.

11 *Aylwin v Police* [2008] NZSC 113, [2009] 2 NZLR 1. (*Alwyn* was mentioned in the subsequent Supreme Court decision of *Birchler v NZ Police* [2010] NZSC 109 referred to me by Mr Tobeck for the appellant, but I am satisfied *Birchler*, relating as it does to different considerations, makes little difference here. This is the case, too, with the Court of Appeal decision in *Haines v Police* [2018] NZCA 323, referred to me only in supplementary submissions provided by Ms Norman for the respondent).

sought to clarify the issues being raised by Mr Tobeck at trial, his responses centred on a spelling mistake in the address of the hospital – it was never intimated that there had been non-compliance.

[29] She refers to the Court of Appeal's decision in *Murray*, where it said in relation to the equivalent provisions in the previous legislation:[12]

> The scheme envisaged by subs (5), (6), (7), (8) and (9) of s 58B does not contemplate that a prosecuting authority is to anticipate a challenge to the admissibility of the certificate in every case. If it were otherwise, the administrative convenience of the certificate procedure would be lost. But once a challenge is made to the point that a specimen has been requested and not sent (and it may be made by prior notification or by a challenge to the admissibility of the certificate at the time of its production or by the calling of evidence from the defence) proof of the sending of the specimen to the private analyst will be in issue and the prosecution must prove that there has been compliance with subs (8). Until, however, a challenge to its admissibility is made on the footing that the sample has both been requested and not sent the certificate is admissible in evidence.

[30] Ms Noman submits that it would be absurd to expect the prosecution to anticipate and prove the admissibility of evidence where there is a pre-existing presumption of admissibility where it is known by both parties that the basis for a challenge does not exist , and where no such challenge has been raised by the Court.

Analysis

[31] This issue distils to whether the prosecution is obliged, when it knows a request for the second sample to be sent to an independent analyst has been made, to come to trial with a certificate of compliance prepared, or whether it only needs to produce such evidence if a submission is made on behalf of the defence that there has not been compliance.

[32] On the one hand, I disagree with Ms Norman that to require the prosecution to always have such evidence is particularly onerous. It is a simple matter of obtaining a certificate in each case where such a request has been made, just as the prosecution already has to proffer a Blood Specimen Medical Certificate and Approved Analyst's Certificate in each case (or otherwise call evidence from the nurse and analyst).

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12 At 8.

[33] On the other hand, I agree that this ground of appeal is within the class of technical, unmeritorious, defences that the Supreme Court in *Aylwin* has specifically directed the lower Courts to refrain from entertaining where possible. The legislative regime is complicated, even when it is trying to make the process simpler, and the Courts have been met constantly with technical arguments like this when it is quite clear to all involved that there has been no real possibility of any injustice.

[34] Despite numerous opportunities to do so, as I understand the position, Mr Tobeck has not once suggested that the request to send the specimen has not been complied with. The inference is obvious – he has not done so because to do so might be to mislead the Court.

[35] There is clearly a reading of the legislation which is available which avoids the possibility for such defences as this to be advanced. That is to the effect that no burden is placed on the prosecution to prove compliance until the defence makes a submission that the analyst's result relied on by the prosecution is invalid by virtue of s 79(2) because there has been no compliance. In my view, this interpretation is readily available.

[36] The problem with that interpretation, however, is that it is inconsistent with this Court's previous decision in *Farry*. The situation in that case, as I see it, was different. The issue concerned whether the evidence of compliance proffered by the prosecution was rebuttal evidence or not. However, I do not think the case is distinguishable on its facts. The Court in that case, by treating the evidence of compliance as evidence to repair an omission in proof, made it clear that it thought the evidence of compliance formed part of the positive case required to be put forward by the Crown to secure a conviction. To adopt the interpretation I have suggested above would be to say that evidence of compliance *can be* rebuttal evidence, because it only becomes a relevant matter of proof for the Crown once positively raised by the defence.

[37] In my view, *Farry* was wrongly decided. I note also that *Farry* predates the Supreme Court's comments in *Aylwin,* since which the courts have adopted less technical interpretations of what is a very complicated legislative scheme.

[38] In my view, the proper position is for this Court to hold that the prosecution is only required to proffer evidence of compliance if compliance is directly challenged by the defence. If that only arises at trial, the prosecution should at that point be able to adduce further evidence in rebuttal of the defence submission.

[39] None of that has happened in the present case. No error occurred here in the decision of the District Court Judge on either of the grounds of appeal advanced by the appellant as outlined at [1] above.

[40] I also note that this Court can only allow the appeal if there is a real risk that a miscarriage of justice has taken place. There is no real question here of any miscarriage of justice. If the appellant were to be successful it would be on a mere technicality.

Conclusion

[41] For all the reasons I have outlined above, this appeal is dismissed.

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Gendall J

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