IN THE HIGH COURT OF THE COOK ISLANDS **CR NO: JP 1/2015**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

POLICE

v

TAINA TIMOTI

Date: 16 July 2015

Counsel: Ms P Dengate-Thrush for the Police
Mr N George for Defendant

DECISION OF THE HONOURABLE MR JUSTICE COLIN DOHERTY

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[1] On 8 May 2015, Justice of the Peace Temata delivered a decision following a defended charge of driving with excess blood alcohol pursuant to s 28(a) of the Transport Act 1966.

[2] The Justice of the Peace determined that there had been a flaw in the procedure in the taking of a blood specimen from the defendant. The specimen had been taken by a doctor pursuant to s 28E of the Transport Act. She had been taken to hospital following an accident.

[3] There was an attack on the threshold of taking of that blood sample at the hearing. The defence had argued that the doctor had not properly satisfied himself that taking of the blood specimen would not be prejudicial to the defendant's proper care or treatment as required by s 28E(1)(a). The point was that the doctor may or may not have properly examined the defendant to satisfy that test.

[4] That was not an issue dealt with by the Justice of the Peace. She determined that the flaw in the procedure was the procedure pursuant to s 28(D) of the Transport Act. That section provides that when a blood specimen is taken from a person the medical officer shall cause the specimen to be divided into two parts. This is in s 28D(2) of the Act.

[5] The purpose of this is to enable one of the divided specimens to be analysed for the purpose of evidence and the second to be available to the defence, should the defence require a separate and independent analysis to be taken.

[6] The evidence of the doctor had been that he invariably prepared only one sample and he candidly admitted that he did not know of the requirement to divide it into two parts.

[7] The Justice of the Peace's decision also referred to the evidence of the Laboratory Manager who analysed the specimen and that person confirmed that generally there is always one bottle of blood and he did not understand the need for two.

[8] The important part of the Justice of the Peace's decision reads:

> *"In my opinion there is a lack of understanding of the legislative requirements for the taking of blood specimens by the medical professions.*
>
> *I am satisfied that the taking of blood specimen from the defendant is unlawful because it was not taken according to the provisions of the Act. Similarly, I ruled the analysis of the blood specimen invalid. Clearly the procedure has been breached.*
>
> *Prosecution has not proven all the elements of this case beyond reasonable doubt, therefore I find the defendant Ms Timoti not guilty."*

[9] The Crown have appealed that decision on the basis that the decision to acquit was wrong in law. The Crown relies primarily upon the decision of the New Zealand Court of Appeal in the *Queen v Shaheed [2002]NZLR337.* The Crown accepts that the blood specimen was not prepared and separated into two specimens as required by s 28D, however, the Crown says that the analysis of the sample which showed a blood alcohol level of 222 micrograms of alcohol, per 100 millilitres of blood as an appropriate certificate and one that ought to have been admitted to evidence. The Crown also submits that as the certificate was admitted in to evidence pursuant to s 28F(2) of the Act means that the level or proportion of

alcohol in the blood specimen is a conclusive presumption that that was the level at the time of the alleged offence.

[10] The Crown says that the defence could have challenged and rebutted that but as the certificate went in and that did not happen then that should be the conclusive evidence.

[11] Counsel for the defence argued that this was relatively new law in the Cook Islands and that there was the need for ensuring that there is proper compliance and slip-shod practices should not prevail. Therefore, it was important that the Court reinforce the strict provisions of the blood sampling and analysis procedure. His argument was that *Shaheed* should not apply.

[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.

[18] The Crown quite properly does not rely on another New Zealand case *Alwyn v. Police [2009] NZLR 1* which interpreted the change in the law of blood specimen and breath alcohol specimen taking, to provide for a reasonable compliance test. Effectively that case said that now following that amendment in New Zealand it is very hard to run technical defences. As Ms Dengate-Thrush properly points out that provision is not in the Cook Islands Legislation. And so to use the balancing test in *Shaheed* is a proper way at determining whether or not, whatever the breach is, it is such as to mean that the evidence of alcohol level in either breath or blood, should be determined inadmissible. In effect, the certificate under the Act not being admitted into evidence.

[19] In applying that balancing test I take into account firstly that the procedure under s 28E was an appropriate one. This person had been in hospital for the purposes of examination, care or treatment. I think it can be concluded on the evidence when one reviews the transcript that the threshold of satisfaction under s 28E(1) was attained.

[20] There is no issue about the consent because that was given or at least the evidence shows that that was not seriously challenged in any way.

[21] Third, the extraction of the blood appears to have been normal in the sense that there was no exceptional trauma involved.

[22] Next, the doctor said that he took the minimum amount that was required. In fact, if he had known that he was required to divide the specimen in two, he would have taken more blood and therefore there would have been a greater invasion of privacy.

[23] The defendant was not prejudiced in her defence in any way because there was never a request for analysis of the second sample.

[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.

[27] The matter will be remitted back to the Justice of the Peace's Court for sentence at a date to be arranged by Counsel and the Registrar.

Colin Doherty, J