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

MISC NO: 18/2016

CRN'S: 720/14 & 656/14

IN THE MATTER	of an application to strike out the charge of driving while under the influence of drink causing injury
AND **IN THE MATTER**	of Section 25(1) & (2) Transport Act 1966 and Transport Amendment Act 2007 Section 28A (1) & (2)
AND **IN THE MATTER**	of the Doctrine of Double Jeopardy under sections 63(3) (4), 67 & 67 of the Criminal Procedure Act 1980-81
AND **IN THE MATTER**	of the Crown filing an alternative charge of careless driving causing injury pursuant to Section 15(1) Criminal Procedure Act 1980-81 and Section 26 of the Transport Act 1966 and section 4 of the Transport Amendment Act 2007
BETWEEN	**Taina Timoti,** Bank Executive, Avarua
	Applicant
AND	**The Crown**
	Respondent

Counsel: Mr N George for Applicant
Mesdames A Mills and T Koteka for Prosecution

Date: 23 May 2016

ORAL JUDGMENT OF HUGH WILLIAMS, J

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[1] Currently the accused, Ms Timoti, is charged with one count under the Transport Act 1966 25(1) namely that on 17 October 2014 she drove a motor vehicle on the main road at Tupapa in a manner dangerous to the public and caused injury to Taiakapu Metuaariki.

[2] Following the events described later in this judgment, the Crown has now decided to apply to substitute for the charge under s.25(1) a charge under s.25(2) to the effect that on the same date Ms Timoti drove her motor vehicle while under the influence of drink to such an extent as to be incapable of having proper control of her vehicle and thereby caused injury to Mr Metuaariki.

[3] The withdrawal of the charge under s.25(1) and the substitution of the charge under 25(2) is not opposed by Mr George, counsel for the, accused, and is permitted by s.47 of the Criminal Procedure Act 1980-81.

[4] There will therefore be an order withdrawing the s.25(1) charge and substituting the s.25(2) charge.

[5] However, a consequence of that change in the count faced by the accused is that Mr George has raised what he described be an aspect of Double Jeopardy. He submits that the amended charge should not be able to proceed.

[6] In raising that issue it is pertinent to note that s.63 of the Criminal Procedure Act 1980-81 empowers the entry of the special pleas of previous acquittal, previous conviction or pardon in addition to the customary guilty or not guilty charges. The remainder of s.63 and ss. 64, 65, and 66 relate to procedural issues concerning the management of the trial where special pleas under s.63 are raised.

[7] Section 67(1) provides:

> *67.Where an information charges substantially the same offence as that with which the defendant was formerly charged, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment the previous acquittal or conviction shall be a bar to the information.*

[8] That becomes relevant because Ms Timoti was charged with a further information arising out of the same accident which gave rise to the charges before this Court.

[9] In the Justices' of the Peace Court, she was charged with driving her motor vehicle on the main road at Tupapa while the proportion of alcohol in her blood exceeded the prescribed limit. She was acquitted initially in that Court largely because of the way of which the blood sample had been taken from her following the accident and what were alleged to be deficiencies in the certificate of the analyst.

[10] The Crown appealed against the dismissal of that information and on 16 July 2015 Doherty J allowed the appeal and entered a conviction on the charge against Ms Timoti.

[11] The accused, however, appealed to the Court of Appeal but in a Judgment delivered on 20 November 2015 [CA 7/15] the Court unanimously upheld the decision of Doherty J and reached the conclusion that the conviction was rightly entered. In doing so, the Court relied substantially on the decision of the New Zealand Court of Appeal in *R v. Shaheed [2002] 2 NZLR337.*

[12] As a result of that judgment in the Court of Appeal Ms Timoti's case for driving with excess with blood alcohol was remitted to the Justices' of the Peace Court. She was sentenced there but has appealed against that sentence and by chance her appeal is in the list of business to be dealt with during the current sessions of the Court.

[13] The current position in short therefore is that Ms Timoti has been convicted on the charge of driving with excess blood alcohol on 17 October 2014 and has appealed not against the conviction, but solely against the sentence, while as a result of the substitution of the Transport Act charges earlier granted, she currently faces a charge of driving under the influence of drink to such an extent as to be incapable of having proper control of her car and causing injury to Mr Metuaariki. Her trial on the latter charge is currently set down to commence in 2 days time.

[14] The authorities show that consideration as to whether a special plea should be admitted in cases such as this is largely whether the later charge is a second accusation adding intent or aggravation.

[15] That question can be approached either strictly as a matter of statute or as an aspect of abuse of process. It should be noted that the provisions discussed in a number of the New Zealand cases shortly to be dealt with in this judgment have now been replaced by the Criminal Procedure Act 1980-81 in this country, but terms of the principle governing autrefois acquit or autrefois convict and abuse of process have been definitively laid down by the House of Lords in *Connelly [1964] 1254*[1]*.* In the principal judgment of Lord Morris of Borth-y-Gest the relevant passage is cited in

[1] Connelly v DPP [1964] A.C. 1254

Garrow & Turkington's Criminal Law. Of New Zealand (para CR 1358.2 p.24,111-2) as follows:

> *" In my view both principle and authority establish –*
>
> *(i) that a man cannot be tried for a crime in respect of which he has previously been acquitted or convicted;*
> *(ii) that a man cannot be tried for a crime in respect of which he could on some previous indictment have been convicted;*
> *(iii) that the same rule applies if the crime in respect of which he is being charged is in effect the same or is substantially the same as either the principal or a different crime in respect of which he has been acquitted or could have been convicted or has been convicted;*
> *(iv) that the one test whether the rule applies is whether the evidence which is necessary to support the second indictment, or whether the facts which constitute the second offence, would have been sufficient to procure a legal conviction on the first indictment either as to the offence charged or as to an offence of which, on the indictment, the accused could have been found guilty;*
> *(v) that this test must be subject to the proviso that the offence charged in the second indictment had in fact been committed at the time of the first charge; thus, if there is an assault and a prosecution and conviction in respect of it, there is no bar to a charge of murder if the assaulted person later dies;*
> *(vi) that on a plea of autrefois acquit or autrefois convict a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the Court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same or is substantially the same as one in respect of which he has been acquitted or convicted or as one in respect of which he could have been convicted;*
> *(vii) that what has to be considered is whether the crime or offence charged in the later indictment is the same or is in effect or is substantially the same as the crime charged (or in respect of which there could have been a conviction) in a former indictment and that it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings;*
> *(viii) that apart from circumstances under which there may be a plea of autrefois acquit a man be able to show that a matter has been decided by a Court competent to decide it, so that the principle of res judicature applies;*
> *(ix) that apart from cases where indictments are preferred and where pleas in bar may therefore be entered the fundamental principle applies that a man is not to be prosecuted twice for the same crime:"*

[16] It should immediately be noted that the test outlined by Lord Morris in paragraphs (iv) and (v) were not thought by some of the other Law Lords with whom he was sitting to

be definitive, a comment that has been picked up and confirmed in New Zealand in *R v. Brightwell [1995] 12 CRNZ 642.*

[17] There are a number of authorities to which counsel have helpfully drawn the Court's attention bearing on the issue as to the identity of the substituted charge with the excess blood alcohol charge or whether it is merely the addition of a circumstance of intention or aggravation. Perhaps the most helpful is that of the New Zealand Court of Appeal in *Brightwell.* The facts are completely distinct from the facts in Ms Timoti's case but as the Court of Appeal said (at 647);

> *The underlying principle is that a person is not to be prosecuted twice for the same crime. The special plea, however, does not operate where two distinct offences are committed by the one act. The question is not whether the facts or the evidence relevant to both are the same, but whether the offences are the same or substantially the same.*

[18] The Court was there referring to *Connelly The Queen v Barron* [1914] 2 KB 570.

[19] Of the authorities to which reference was made, one of particular assistance in this case is the *Ministry of Transport v Hyndman (1990) 6 CRNZ 148* where the Respondent was driving with both charging with excess breath alcohol and driving whilst under the influence of drink so as to be incapable of having proper control of a vehicle. The first information was dismissed and the question was whether the second information should also be dismissed. On Appeal, Hillyard, J. held that the second information could stand. The learned Judge holding at page 151:

> *..."with respect, the fact that one charge can be withdrawn after conviction on the other does not in my view indicate that the two charges are the same."*

[20] Hillyard, J. was referring to Graham's Law of Transportation which said the laying of another information arising out of the same conduct was a proper procedure, as it gave the sentencing judge a more complete view of the extent of the defendants actual impairment. "In my view however, it does not necessarily mean the charges under s.58(1)(e) are the same as charges under 58(1)(c)". The two provisions of the then New Zealand Transport Act 1962 were reflected in the charges the accused faced.

[21] The judge then went on (at 152) to consider what "same in whole or in part" might mean and held that "the special plea is available when the ingredients of one of the offences are wholly comprehended in the other." He held that the defences of excess breath alcohol and driving under the influence were separate and distinct charges with the latter not being wholly comprehended with the former.

[22] The judge then went on to consider the phrase "all proper amendments" and held (at 153) that meant "any amendment necessary to make good the offence charge (sic.) so as to ensure the charge was decided upon its merits but did not extend to substituting a different offence."

[23] The decision in *Hyndman* was also referred to in *Brightwell* and similarly the conclusion that the two offences were not identical or included matters of intention or aggravation was also upheld in *Ngaamo v The Ministry of Transport* (HC Hamilton AP 117/86 5/12/1986 Gallen, J). Of interest too is a further decision of the New Zealand Court of Appeal in *R v Lee* [1973] NZLR 13 at 16. When dealing with the question as to whether "all proper amendments" had been made, the Court of Appeal held;

> *.." it deals with cases in which the charges presently preferred against the accused are not precisely the same as those upon which he was previously acquitted or convicted but are 'substantially' the same, the only difference lying in the fact that in the second prosecution he is charged with a graver offence owing to the inclusion in the allegations of an element of intention or aggravation omitted in the definition of the offence with which he was originally charged."*

[24] Turning then to the precise issue in this case, in the Justices' of the Peace Court, Ms Timoti was convicted of driving her vehicle while the proportion of blood alcohol exceeded the prescribed limit. All that the Prosecution needed to prove in that case as the elements of that offence were that the accused was driving a motor vehicle and whilst she was driving the motor vehicle the proportion of alcohol in her blood exceeded the prescribed limit.

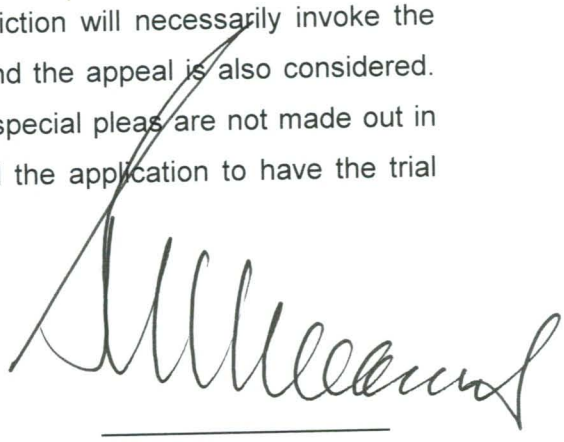
[25] Under the charge now substituted she is charged with driving the vehicle on the same occasion whilst under the influence of drink to such an extent as being incapable of having proper control of the vehicle.

[26] To an extent, the excess blood alcohol charge is at least partially comprehended in satisfaction of those elements, but as *Hillyard, J.* pointed out in *Hyndman*, it is possible at least to contemplate that a person could be driving with excess blood alcohol but not to such an extent as to be incapable of having proper control of the vehicle they were driving. There is no stipulation in the excess blood alcohol provision that a person who is guilty of driving whilst the proportion of alcohol in her blood was above the prescribed limit was deemed to be incapable of having proper control of the vehicle. Control of the vehicle allied with the drink is merely an element of proof.

[27] An element of the substituted charge is also that she caused bodily injury to Mr Metuaariki whilst driving a vehicle under the influence of drink and being incapable of having proper control. Further injury, of course, is not an element of the excess blood alcohol charge. Many persons are convicted of driving with excess blood alcohol in non-injury accidents. So the elements of the two charges are plainly not the same – and given the two comments just made, they are not even substantially the same. Further, to add the necessity for the Crown to prove an incapability of proper control of a vehicle and to prove injury being caused by driving a vehicle in that manner are not additions of statements of intention or aggravation.

[28] It must follow therefore, that the prosecution of the substituted charge is not barred by the conviction entered against Ms Timoti on the excess blood alcohol charge.

[29] True, if convictions on both charges ultimately result, that fact alone may impact on sentencing because the entry of the second conviction will necessarily invoke the totality principle when sentence is contemplated and the appeal is also considered. But for the present, the decision must be that the special pleas are not made out in this case in respect of the substituted charge and the application to have the trial aborted on that ground is accordingly dismissed.



Hugh Williams, J