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

CR NO: 325 – 330/2013

POLICE

v

NGATI-TANE VANO

Date: 24 July 2014

Counsel: Ms K Saunders for the Crown
Mr N George for the Defendant

DECISION OF THE HONOURABLE MR JUSTICE COLIN DOHERTY J

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[1] Mr Vano is charged pursuant to Sections 176 and 180(2) of the Crimes Act with three charges of manslaughter.

[2] It is alleged that he did cause the death of three individual passengers in his motor vehicle when he failed to observe a legal duty, namely by driving that motor vehicle in a manner that he failed to take reasonable precautions against and to use reasonable care to avoid danger to a human life and thereby committed manslaughter.

[3] In the alternative, he faces three charges pursuant to Sections 25(1) (3) of the Transport Act; dangerous driving causing death.

[4] The Crown alleges that in the early hours of 7 July 2013, a car driven by Mr Vano left the road at Nikao and hit a tree. Three of the five occupants were killed. Mr Vano and his front seat passenger survived. Mr Vano was admitted to hospital with injuries which whilst relatively serious were not life threatening.

[5] About 45 minutes after the accident, a blood specimen was taken from him by a local doctor, for the purposes of analysing the level of alcohol in his blood. The certificate of analysis of that blood sample records that his blood contained 169.8 milligrams of alcohol per 100 millilitres of blood. That is approximately a little over twice the legal limit for driving with alcohol in one system in the Cook Islands.

[6] There were difficulties with the methodology taken for the blood sample and the Crown acknowledges that the statutory process which is set out in the Transport Act was not complied with. Firstly, in contravention of Section 28C(1) (e), a Constable had not required a medical officer to take the blood specimen. In this case the medical officer was acting on his own initiative and knowing that one was likely to be requested at some time, he took the blood sample. Effectively he put the cart before the horse. Second, he did not inform Mr Vano that the blood specimen was being taken for evidential purposes and that is contrary to Section 28E(1)(c). Third, when the sample was taken it was not dealt with in accordance with Section 28D(2)(a) in that the blood specimen taken for the evidential purpose was not divided into two parts and placed into separate bottles. So on significant matters the appropriate regime was not followed.

[7] However, there was compliance with some aspects of that process. Firstly, the blood sample that was taken for the evidential purpose was clearly labelled as being taken from Mr Vano and its sealing and security complied with Section 28D(2)(a). Second, the sample was analysed by an approved analyst and a certificate of analysis was prepared in accordance with Section 28F(4) (c). The analysis was done within approximately two hours of the taking of the sample and or the accident. Third, there is no question about the accuracy of the diagnostic equipment as it is calibrated weekly and there are daily checks made to ensure its accuracy. So in terms of the integrity of the blood sampled evidential purposes, the statutory regime was complied with.

[8] The defence has objected to the admissibility of both the certificate and the evidence relating to the level of alcohol in Mr Vano's blood. The issues which the Court needs to determine have been identified by the Crown as;

(i) "Is the failure to comply with all statutory requirements fatal to the admissibility of the certificate of analysis, when the charge the accused

faces is not a charge pursuant to Sections 28 or 28A of the Transport Act (driving under the influence of drink and driving with excess blood alcohol concentration) and the Crown does not seek to admit it as conclusive proof

(ii) Is the certificate of analysis and or the evidence as to the procedure followed and the result of the analysis admissible pursuant to Section 3 of the Evidence Act 1968"

[9] The Transport Amendment Act 2007 introduced breath and blood alcohol to the current breath and blood alcohol regime into this country. Generally, it provides a code for the detection of alcohol impaired driving and sets out mandatory procedures, for the testing of specimens of breath and or of blood. It allows for the taking of blood specimens from impaired drivers including those like Mr Vano who are in hospital; Section 28D and Section 28E govern that. Section 28F of the Transport Act provides a conclusive but rebuttable presumption about the level of breath or blood alcohol as identified, in the case of blood, by a certification process. That is, the proportionate alcohol in the blood is for evidential purposes that is set out in the certificate and the certificate is all the evidence that need to be tendered to prove it.

[10] As I have said the Crown has accepted that the procedure leading up to the production of the certificate was not complied, but applies nevertheless to admit the certificate or the evidence that it relates to. The purpose of the Crown adducing this evidence is to bolster other evidence of Mr Vano having been drinking shortly before the accident, and also to counter evidence by way of a statement given by him to the Police which minimises his drinking.

[11] The accused Mr Vano did admit that he consumed alcohol that night from about 7pm bearing in mind this accident happened around midnight. But the Crown submits that he minimised that and when he was interviewed by the Police he said that he was the sober driver and had shared one or two cans of beer and a bourbon mixed with others.

[12] The front seat passenger who survived the accident has contrary evidence and his statement to the Police is that there was much more drunk than that even though the

occupants of the vehicle and others had been sharing alcohol. His opinion was, Mr Vano was drunk at about 10pm and certainly was at about 11pm when he exited from a local nightclub. The statement of the witnesses said: "that is when Ngati came outside drunk and I do not know what they were drinking while inside." A nurse who attended the scene of the crash and who examined Mr Vano has also observed: "I know that he was drunk because I can smell heavy alcohol coming from his breath and he kept closing his eyes feeling sleepy" and later "he was very intoxicated, the smell of alcohol coming from him was very strong". There is also evidence of one of the medical practitioners who examined Mr Vano in hospital, who made observations at about 1.30am on the Sunday morning that Mr Vano smelt of alcohol. He did however say that he was coherent and could answer questions correctly and that his memory of time and place he assessed as being normal.

[13] There is no doubt that the certificate and the evidence would be inadmissible if this charge was for an offence against either Section 28 or 28A of the Transport Act, as the procedure must comply with the code in the Act. Of relevance is that, that Section 28F is confined to proceedings for an offence under Section 28 or Section 28A. That is, the entire focus of the scheme under that Section is for proof of alcohol concentration for charges under either of those Sections. And the real issue here is whether or not it can be admissible for other offences.

[14] Where the certificate is a conclusive but rebuttable presumption of evidence as to its contents and the reading, attributable to a blood alcohol level and presumed to be so at the time of the offending rather than the time of the test, and is specifically focused on charges under Section 28 and 28A, it cannot in my view have been the intention of the legislature that such evidence and its effects be admissible in the same way for other offences, either under the Transport Act or generally because Parliament would need to have explicitly allowed for that and it has not.

[15] The same issue arose in the comparable New Zealand legislation in *Queen v AhChong* High Court of New Zealand Auckland Registry CRI 2004-004-010735. That was a judgment of Justice Stevens who was considering the comparable legislation in New Zealand, Section 75 of the Land Transport Act. That was a case where Mr AhChong had been charged with manslaughter, the unlawful acts being dangerous driving and driving with the excess of blood alcohol. So that was this specific charge of driving with blood alcohol and that is the context

in which he was looking at the admissibility in similar circumstances. He referred in his judgment to cases that I have also been referred to by the Crown here in particular a case called *Queen v Dodunski* and that was a case which was distinguished by Justice Stevens, and he said this at paragraph 24 "*whilst the New Zealand Movers and Dodunski cases are distinguishable from the present, I am unable to interpret Section 75(1) as meaning that the certificate is admissible for present purposes. In my judgment in the face of clear wording limiting the application of the certificate to "proceedings for an offence against this part" it is a strained construction to say that, because the unlawful act comprising an offence under the LTA needs to be established in proving a charge of manslaughter under the Crimes Act 1961, the evidential provisions of that Part also apply*".

[16] Section 75 of the Land Transport Act in New Zealand is slightly different from Section 28F that we are dealing with here. Section 28F is even more focused on only Sections 28 and Section 28A offences whereas the New Zealand provision is slightly wider and relates to offences under that part of the Act. So effectively, Justice Stevens and I have come to the same conclusion on separate but similar legislation. What that means is that on the face of it, the certification and presumptive aspects of this certificate do not apply in this case.

[17] But that does not make the evidence itself necessarily in admissible in other proceedings and specifically for the offences that Mr Vano faces. In other proceedings it might be possible for it to be adduced under the best evidence rule and that is the second leg of the Crown's application; can this Court invoke the discretion under Section 3 of the Evidence Act.

[18] The Evidence Act provides a wide discretion and says "subject to the provisions of this Act the Court may in any proceeding admit and receive such evidence as it thinks fit and accept and act on such evidence as it thinks sufficient, whether such evidence is or is not admissible or sufficient at common law."

[19] The Crown agree that there is very little authority in this Court in relation to the exercise and its discretion and has referred me to the case of *Police v Brown* and the Police Department. There was a case relating to the calibration certificate of a speed radar.

[20] Mr George for the defence submits that Section 3 must of course be subject to the Constitution and in particular the fundamental human rights and freedoms articles under Section 64(1)(b), that is the right of the individual to equality before the law and for the protection of the law and Section 65(1)(d) where no enactment shall be construed or applied so as to deprive any person of the right to a fair hearing in accordance with the principles of fundamental justice. His overarching submission is that to admit this evidence would be in contravention of those articles. However, the discretion under Section 3 must always be exercised keeping in mind the elements of balance and fairness and prejudice to an accused person. And in my view the proper exercise of that discretion ought not breach those articles.

[21] The Crown advises from the bar that there is some difficulty with the records held by the Department of Health or its equivalent in relation to what happened during the analysis of Mr Vano's blood sample, however, the analyst is and would be available to give evidence.

[22] It seems to me that absent any exception to a documentary hearsay rule, the certificate itself is not admissible as a document of proof of its contents. Even if it was, its purport would be only to be evidence of the level of alcohol in the blood of the accused at the time of the taking of that blood and /or the test depending upon what the evidence was, and it would not be evidence of the "before the accident "or" at the time of the accident" levels of alcohol if any in his system. It is evidence contrary to the interest of the accused taken after the event, and from a sample of blood given by him in ignorance of its ultimate use.

[23] Can Section 3 be used to admit it? It seems to me that Section 3 is akin to Section 7 of the Evidence Act in New Zealand and the test ought to be firstly whether the evidence is relevant and incidental to that as its probative value and second, what is the prejudice and third, does the probative value of the evidence outweigh that prejudice so as to enable it to be admissible.

[24] Taking relevance. In this case alcohol impaired driving could be at least supporting evidence of dangerous driving. It is relevant in that it is evidence of the level of alcohol in Mr Vano's blood shortly after the accident and is clearly relevant to any potential impairment, although the Crown might need to lead expert evidence as to that. The fact that he had been driving and drinking is supported by other evidence and I have referred to that. It is also relevant because evidence of the level of alcohol in his system shortly after the

event, could go to rebut his evidence by way of the statement to the Police which the Crown says minimised his level of drinking that night. So in my view taking those matters into account that it is clearly relevant.

[25] What about its probative value? The integrity of the sample and the chain of evidence of it is preserved so its reliability in that respect is high. The level of alcohol analysed and recorded as being in the sample is also highly probative. As I say there might need to be evidence of the likely level of alcohol at the time of the offending but that is another matter.

[26] The real question I think is whether or not evidence that is highly relevant and highly probative outweighs any prejudice to Mr Vano. I think Ms Saunders was correct to say that any evidence brought by the Crown is prejudicial to an accused person. That is true, there is always prejudice.

[27] Mr George for the defence says that one of the prejudices here is to divert the jury into thinking that if there was alcohol in Mr Vano's system that impaired his driving and that is the only factor.

[28] The defence is that the accident was caused not by driving but the actions of the front seat passenger and the defence submits that to admit the level of alcohol which he accepts the certificate shows as being high, would divert a jury from those real issues. He says also that there is a prejudice here caused by the fact that this was not a specimen taken in accordance with the law, and there was no consent or informed consent at least by Mr Vano to its being used for this purpose.

[29] When looking at prejudice of this evidence, one should keep in mind that this is not the only evidence of alcohol impairment and that is not the only evidence upon which the Crown could found this aspect of its case.

[30] The Crown also says that the rights of Mr Vano have been impinged upon in a sense that the procedures under the Transport Act for the taking of blood for the purposes of Section 28 and 28A were not complied with. But it should be kept in mind that his consent for such blood to be given is not a requirement, he merely needed to be informed. And there is evidence that there was no impairment of Mr Vano's understanding of what happened. He

was described by the medical people as being coherent; he knew that blood was being taken from him for analysis purposes but he did not know that it was being taken for evidential purposes. As I say consent was never an issue under the Transport Act and nor did he refuse at any time to have his blood taken.

[31] The Crown therefore submits that the breach of any of his rights is not so fundamental so as to count against the exercise of a discretion to admit of the evidence under Section 3.

[32] When I stand back and weigh it all, it seems to me that the probative value of this evidence does outweigh any prejudice to Mr Vano. It is a case where three people lost their lives. It is a case where there is high probative and relevance value in the evidence. It would need to lead as viva voce chain of evidence. The issue of the certificate could possibly be used as an aide memoir but is certainly not admissible in itself as documentary hearsay.

[33] The application to lead the evidence in the respect that I have just outlined is granted.

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Colin Doherty J