IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2013
[2013] NZSC 47

SIMON MCGRATH

v

NEW ZEALAND POLICE

Court: Elias CJ, William Young and Chambers JJ

Counsel: A J Haskett for Applicant
A Markham and M R L Davie for Respondent

Judgment: 8 May 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Simon McGrath, the applicant, was convicted under s 56(2) of the Land Transport Act 1998 of driving in April 2009 while the proportion of alcohol in his blood exceeded the legal limit of 80 milligrams of alcohol per 100 millilitres of blood. The police produced at trial a certificate under s 75(2) certifying, among other things, that the specimen of blood was taken by a medical officer (a nurse) in accordance with normal medical procedures. Section 79 confers a right to challenge s 75 certificates in advance of a hearing, but Mr McGrath did not avail himself of that right. Because he did not give notice under s 79, the police did not need to and did not call the nurse who took the blood specimen.

[2] In the Court of Appeal, Mr Haskett, for Mr McGrath, submitted that the defence had established that the specimen had not been taken in accordance with normal medical procedures, with the consequence that the certificate was inadmissible and the charge was not proved. The Court of Appeal disagreed.[1] The Court noted that Mr McGrath had not put the police on notice that the nurse's certificate was to be challenged. Nor had the defence called any expert evidence as to normal medical procedures. The only evidence for the defence came from Mr McGrath himself. The Court of Appeal said his evidence, although confirmed in some respects by the constable who had conducted the breath testing procedures on him, "did not come close to discharging the onus on [him] of proving that the blood specimen had not been taken in accordance with normal medical procedures, as certified by [the nurse]".[2]

[3] Mr Haskett further submitted in the Court of Appeal that evidence relating to the taking of the blood specimen should have been ruled inadmissible under s 30 of the Evidence Act 2006, having been obtained in breach of s 21 of the New Zealand Bill of Rights Act 1990 (unreasonable search or seizure). The seizure was said to be unreasonable because the blood specimen was taken in a "booze bus" parked at a police checkpoint in circumstances where Mr McGrath's entitlement to privacy was inadequately respected. The Court of Appeal rejected this submission.[3]

[4] Mr Haskett, on this leave application, seeks to advance both arguments again. The first argument is entirely factual. The Court of Appeal carefully considered the evidence on which Mr Haskett relied for his submission that the defence had proved the certificate erroneous. The proposed appeal on this ground does not raise a matter of general or public importance.

[5] Nor does the Bill of Rights point raise such a matter. This again is no more than a factual dispute as to what happened. We note that no objection to the evidence was taken at trial on s 30 grounds. Had there been an objection, no doubt the prosecution would have called the nurse for the purposes of an admissibility

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1 *Police v McGrath* [2013] NZCA 3.
2 At [24].
3 At [30] and [33].

hearing.[4] Once again, this proposed ground of appeal does not raise a matter of general or public importance.

[6] We are also far from satisfied that a substantial miscarriage of justice might occur if we do not hear the appeal.

Solicitors:
Legal Defence Service Ltd, Auckland for Applicant
Crown Law Office, Wellington for Respondent

[4] *Gallichan v Police* [2009] NZCA 79 at [12]–[20], as qualified by *Birchler v Police* [2010] NZSC 109, [2011] 1 NZLR 169 at [19] and [21].