

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 61/2019
[2019] NZSC 104

BETWEEN MELANIE WICHART
Applicant
AND NEW ZEALAND POLICE
Respondent

Court: Winkelmann CJ and Ellen France J

Counsel: A S P Tobeck for Applicant
R K Thomson for Respondent

Judgment: 27 September 2019

JUDGMENT OF THE COURT

- A The application for an extension of time is granted.**
- B The application for leave to appeal is dismissed.**
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REASONS

Introduction

[1] Ms Wichart was convicted of driving with excess blood alcohol after a defended hearing before Judge David Saunders.¹ She appealed unsuccessfully against conviction to the High Court.² The Court of Appeal declined her application for leave to hear a second appeal.³ She now seeks an extension of time for leave to appeal to this Court directly from the decision of the High Court.

¹ *New Zealand Police v Wichart* [2018] NZDC 13325 [DC judgment].

² *Wichart v New Zealand Police* [2018] NZHC 3069 (Gendall J) [HC judgment].

³ *Wichart v New Zealand Police* [2019] NZCA 212 (French, Miller and Lang JJ) [CA judgment].

Background

[2] Ms Wichart was stopped by police while driving on the West Coast on the morning of 1 January 2018. She failed a breath screening test. At the police station she elected to have a blood test. A nurse took the blood sample and signed the Blood Specimen Medical Certificate. Two samples were taken and stored securely at the police station until they were sent to the Institute of Environmental Science and Research (ESR) for analysis. On analysis, the sample was shown to contain 118 milligrams of alcohol per 100 millilitres of blood and Ms Wichart was accordingly charged.⁴ Ms Wichart made an application under s 74 of the Land Transport Act 1998 to have the second blood specimen provided to a private analyst. Police asked the ESR to forward the sample to the private analyst.

The proposed appeal

[3] The proposed appeal is brought on the basis that it raises matters of general or public importance. In particular, Ms Wichart wishes to argue on the appeal, first, that once the defence prove it made a request for a second blood specimen to be sent to a private analyst, the prosecution is required to prove a second blood specimen has been sent to a private analyst in order to rely on the analyst's certificate. Second, she wishes to argue that when the expiry date of the blood specimen collecting kit is put in issue, the onus should be on the prosecution to prove on the balance of probabilities that the kit has not passed its expiry date.

Assessment

[4] Because the appeal in this case is against a decision of the High Court, it is subject to s 75 of the Senior Courts Act 2016 and requires "exceptional circumstances" to be established for leave to be granted. We note, as well, that the application for leave to appeal was filed out of time. The respondent, although opposing leave, abides the decision of the Court on this latter point. We accordingly deal with the application on its merits.

⁴ The legal limit is 80 milligrams of alcohol per 100 millilitres of blood.

[5] The first proposed appeal ground arises from s 79(2) of the Land Transport Act. That section provides that an analyst's certificate 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 a private analyst in compliance with the application. While there may be scope for debate about where the onus lies in relation to this provision in a particular case, we do not see this case as raising a question of general or public importance.

[6] The first point to note is that the District Court Judge recorded defence counsel did not ask the Sergeant who gave evidence for the prosecution any question suggesting non-compliance with the request and nor did he make a submission that there was non-compliance.⁵ Rather, as Gendall J noted in the High Court, the Sergeant was asked if he had seen the relevant correspondence including a letter apparently in reply from the ESR to the police letter asking for the specimen to be sent to a private analyst.⁶ The Sergeant said he had seen the reply letter but not the letter from police.

[7] Gendall J in the High Court considered the inference was "obvious", that is, defence counsel had not suggested there was non-compliance with the request to send the sample to the private analyst because "to do so might be to mislead the Court".⁷ The only evidence is therefore that there was compliance and there is no evidence to suggest the ESR failed to comply with the letter sent by the police requesting them to send the sample to the private analyst nominated by Ms Wichart. Against this background, the argument the Court of Appeal was wrong to say that in these circumstances the defence "needed to raise the issue squarely so as to provide an evidential basis for the argument" has an insufficient prospect of success.⁸ The argument is a technical one.⁹

⁵ DC judgment, above n 1, at [21]–[23]. Nor was any application made prior to the hearing for either the author of the blood specimen medical certificate or the analyst to be present as provided for in s 74 of the Land Transport Act 1998.

⁶ HC judgment, above n 2, at [18].

⁷ At [34].

⁸ CA judgment, above n 3, at [26].

⁹ *Aylwin v Police* [2008] NZSC 113, [2009] 2 NZLR 1 at [17].

[8] On the second point, the applicant does not raise anything that might suggest there is sufficient prospect of a successful challenge to the Court of Appeal’s analysis that the current requirements for blood specimen collecting kits do not include a requirement the kits be used before a nominated expiry date.¹⁰ On this basis, even if there was an expiry date on the kit failure to use it before the date does not breach the requirements. This is, in any event, of no moment where the certificate of analysis recorded there was no “such deterioration or congealing ... as would prevent a proper analysis”.

[9] The “exceptional circumstances” test is therefore not met. We add that we see no appearance of a miscarriage of justice arising from the assessment of these issues in the Courts below.¹¹ As is apparent, we see no reason to hold an oral hearing to determine the leave application as sought by the applicant.

[10] The application for an extension of time is granted. The application for leave to appeal is dismissed.

Solicitors:
Menzies Marshall Law Ltd, Winton for Applicant
Crown Law Office, Wellington for Respondent

¹⁰ At [24].

¹¹ Senior Courts Act 2016, s 74(2)(b).