

CO/1450/2003

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Monday, 23rd June 2003

B E F O R E:

LORD JUSTICE ROSE
(Vice President of the Court of Appeal, Criminal Division)

MR JUSTICE DOUGLAS BROWN

ELAINE JONES

(CLAIMANT)

-v-

CROWN PROSECUTION SERVICE

(DEFENDANT)

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MR M MURRAY appeared on behalf of the CLAIMANT
MR D POTTER appeared on behalf of the DEFENDANT

J U D G M E N T
(As Approved by the Court)

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Monday, 23rd June 2003

1. MR JUSTICE DOUGLAS BROWN: This is an appeal by way the case stated from the Macclesfield Justices in respect of their decision on 6th January 2003 when they convicted the appellant, Elaine Jones, of an offence of driving a car with a proportion of alcohol in her blood of 90 microgrammes of alcohol in 100 millilitres of blood.
2. On 17th May 2002, the appellant was arrested in Knutsford, having failed a breathalyser test, and was taken to Wilmslow police station. This appeal concerns the procedure at that police station when blood specimens were taken from the appellant with her consent.
3. The facts of the case are conveniently found in a few paragraphs of the stated case and at (h), the evidence that I refer to begins with a reference to Dr Lloyd, the police surgeon:

"(h) Dr Lloyd was satisfied that blood could be taken. He took a blood specimen from the appellant and the specimen was divided into two samples. The appellant was asked which of the two samples she wanted. The appellant pointed to one of the samples. She never physically took hold of this sample. Both samples were sealed and placed in the refrigerator in the presence of the appellant at 0238 hours. Dr Lloyd then left the police station.

(i) The appellant was seated in the custody area until Sergeant McGeoghan completed the remainder of the paperwork. The appellant was released from the police station at 0250 hours.

(j) On leaving the police station, the appellant did not ask for the sample of blood she had pointed to earlier, which was at this stage in the refrigerator".

4. The short and straightforward findings of fact give rise to two questions for the opinion of the court:

"[1] Were we right, bearing in mind the facts as we found them, to come to the conclusion that the appellant had actually made a request to be supplied with a blood sample? [2] Bearing in mind that we found as facts --

(a) that the appellant had in effect requested one of the two samples of blood

(b) the a sample was never physically handed to the appellant at any stage, but was kept in the police station refrigerator thereafter, but was available for the appellant to collect at any time thereafter

Were we right to conclude that the concept of supply as we found came within and satisfied Section 15(5)(b) [of the Road Traffic Offenders Act 1988]"?

5. That subsection reads in this way:

"(5) Where, at the time a specimen of blood or urine was provided by the accused, he asked to be provided with such a specimen, evidence of the proportion of alcohol or any drug found in the specimen is not admissible on behalf of the prosecution unless —

(a) the specimen in which the alcohol or drug was found is one of two parts into which the specimen provided by the accused was divided at the time it was provided, and

(b) the other part was supplied to the accused".

6. This is an important provision which protects the interests of an accused person, enabling him or her, if they choose, to have their own sample for analysis.
7. The scheme of the section is clear. At the time when the sample was blood is provided, it is for the accused to ask to be provided with a specimen of his or her blood. When he so asks, the specimen of blood provided by him must be divided at the time it is provided and the other part supplied to him. Failure in either respect renders the evidence of the proportion or alcohol or drug in the blood inadmissible.
8. The submissions of Mr Murray, counsel for the appellant, were firstly there was an implied request for the specimen by the appellant and this arose from her pointing to one of the two samples offered to her. Secondly,

thereafter, there was no supply, as required by the Act, and therefore the evidence of analysis is inadmissible and the conviction must go.

9. It was not sufficient for her merely to point out the sample. It had to be supplied to her and this meant putting it into her possession, either initially or when she left the police station on release on bail. He said that accused persons in the position of this appellant were not usually aware of their rights and it was up to the police to remind her to take her sample with her on being released on bail.
10. He referred to several cases which offer some, if limited, assistance, except for one which I shall refer to shortly. He referred to Sharp [1968] 3 All ER 82, a decision of the Court of Appeal Criminal Division which was concerned with the very similar provision in the Road Traffic Act 1962, section 2(4).
11. That case is of very limited assistance because physical supply took place the next morning and the case is authority for the proposition that the supply must take place within a reasonable time. He referred to Jones [1974] RTR 117, which contained the proposition that the question of supply is a question of fact in each case.
12. He referred to a judgment of Maurice Kay J in McCormack, which is a transcript 7th February 2002, in the course of which the judge referred to and quoted from Walton v Rimmer [1986] RTR 31, a decision of this court, and I will return shortly to Walton v Rimmer.
13. Mr Potter for the respondent submitted that there was no evidence that the appellant had requested a specimen and the Justices were wrong in regarding acceptance as being in their words "equivalent" to a request for a specimen.
14. Secondly, if there had been a request, there had been a supply. The appellant was offered one of two specimens and had pointed out one of them, and that was a sufficient supply and it was immaterial that the sample was then put in refrigerated storage. The onus was on her either to take hold of it at the time or collect it on release.
15. In my view, Mr Potter's submissions are correct in both respects. There must be a request by the accused to be provided with a specimen. The scheme of the Act is clearly that this triggers the process of dividing the specimen. It may be that the specimen, as here, was divided without a request, but without a request, the provisions of section 155 do not engage.
16. The Justices were in my view wrong to come to the conclusion that there had been a request.
17. The Justices said in paragraph 6 of the case:

"(c) The offer to supply the sample and the acceptance of that offer by the appellant is the equivalent of the appellant requesting the sample".
18. If the Justices were there drawing an inference, it was not one in my view which they were entitled to draw.
19. On the question of supply, I return to the case of Walton v Rimmer, which is not concerned with the same wording, but with very similar and analogous wording. In that case, there was a requirement that a copy of the document produced by the device measuring a specimen of breath had to be handed to the accused when the document was produced. Reading from the headnote in that case, section 10(5) of the Road Traffic Act 1972 "clearly provided that the document produced by the device measuring a specimen of breath either had to be handed to the defendant, that is tendered to him at the time of production, or served thereafter".
20. In my view, the same amount should be given to "supply" in section 15(5)(b). The combined effect of the offer of one of two samples and of the appellant pointing to a sample specimen amounted to a tendering of the sample to her. If she did not immediately take up the offer and take hold of her chosen specimen, or take it with her when she left the police station, or return shortly afterwards to collect it, she cannot later be heard to say that it was not supplied to her.
21. It follows that question 2 must be answered in the affirmative, and there was supply within the meaning of section 15(5)(b) of the Act and I would dismiss this appeal.
22. LORD JUSTICE ROSE: I agree. Accordingly, this appeal is dismissed.

23. MR POTTER: My Lords, the respondent would say that the costs of this appeal are to be borne by the appellant. My instructing solicitor has very helpfully provided an assessment of those costs. May I show them firstly to my learned friend and then pass them up to your Lordships?
24. (Handed).
25. LORD JUSTICE ROSE: Mr Murray, first of all, what do you say about the principle in relation to costs?
26. MR MURRAY: My Lord, I cannot really argue against the general principle that costs follow the event.
27. LORD JUSTICE ROSE: What do you say about the proposed summary assessment figure having been supplied to you about 30 seconds ago?
28. MR MURRAY: I certainly would not argue with the veracity or reasoning behind reaching those figures. I certainly could not do that, my Lord.
29. All I can say really is that, as far as Miss Jones is concerned, she is a lady of not limited means, but certainly not substantial means. She had to bear the costs of the hearing below in the Magistrates' Court.
30. I appreciate the consequences of appeals being dismissed.
31. LORD JUSTICE ROSE: Are you resisting summary assessment, or not?
32. MR MURRAY: I cannot, my Lord.
33. LORD JUSTICE ROSE: In that case, the appellant will pay the respondent's costs in the sum of £1,927.