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

JP APPEAL NO. 1/13
(CR 296/13)

IN THE MATTER	of Section 76(1) of the Judicature Act 1980-81
AND **IN THE MATTER**	of an Application to appeal a decision of a Justice of the Peace on conviction of an offence under the Transport Act 1966
BETWEEN	**TIARE DOLLY KELLEHER** of Rarotonga, Cook Islands Appellant
AND	**COOK ISLANDS POLICE** of Rarotonga, Cook Islands Respondent

Hearing: 11 September 2013

Appearances: Ms M Henry for the Crown
Mr M Mitchell for the Defendant

Judgment: 11 September 2013

JUDGMENT OF WESTON CJ

Appeal

[1] On 26 March 2013 the Appellant Ms Kelleher was found guilty (following a trial before a single Justice of the Peace) of refusing to undertake a breathalyser test on 1 February 2013 in breach of s 28B(4)(a) of the Transport Amendment Act 2007 ("the Act"). She was subsequently convicted and sentenced.

[2] The Appellant then appealed the conviction. In her Notice of Appeal she raised a number of grounds of appeal. In advancing her case today, Mr Mitchell structured these slightly differently to both the Notice of Appeal and his written submissions. In the end, though, there are two fundamental grounds raised by him which are, first, a constitutional challenge and, secondly, and as an alternative, that it

would be unsafe to convict in the circumstances of this case. Both of these arguments hinge on the prior point that the learned JP erred in her written decision.

[3] During the course of the hearing it became common ground that the reasons which are set out in paragraph 3 of the JP's written decision do not support the conclusions reached by her. Consequently the Police accepted that the appeal must succeed and the real issue was what would be the consequences thereafter.

[4] Neither counsel wanted me to remit the case for further consideration by a JP. Both argued that I should fully resolve the matter on the basis of current materials.

The Facts

[5] I now set out a brief summary of the facts.

[6] On the night in question, the Appellant was stopped at the Avana bridge. There was a Police roadblock there and, for material purposes, two male police officers were conducting the roadblock. The Appellant was allowed to proceed and the two officers, for reasons that they had explained in evidence (but which were less than compelling), followed after her. She was then stopped for a second time and told that she would need to go to the Police station at Avarua for a breathalyser test. She requested that a female constable accompany her and the Police arranged for one to attend. There was then a discussion between the Police officer and the Appellant before she went to the station with the female constable. The core factual issues focus on what happened at the Police station when the female constable and the Appellant arrived there.

[7] The evidence clearly establishes that the Appellant accompanied the female constable to the station because she believed she would otherwise be arrested. The Appellant was subsequently arrested at the station some time after her arrival.

The Legislation

[8] I now set out s 28B (1), (2), (3) and (4) and also s 29 (1) of the Act.

> 28B. Who must undergo breathalyser test - (1) Where a constable has reasonable cause to suspect that a person –

(a) is driving or attempting to drive or is in charge of a motor vehicle on a road; or
(b) has recently been driving or attempting to drive or has been in charge of a motor vehicle on a road; or
(c) was the driver or person in charge of a motor vehicle which was involved in a motor vehicle crash,

the constable may, subject to section 28F, require that person to provide without delay a specimen of breath for a breathalyser test.

(2) A person who undergoes a breathalyser test shall remain at the place where the person underwent the test until after the result of the test is ascertained.

(3) The breathalyser test referred to in subsection (2) shall be conducted on the spot where such person is apprehended or at the nearest police station.

(4) A person who –

(a) refuses to undergo a breathalyser test; or
(b) refuses to remain at the place pursuant to subsection (2),

commits an offence.

29. Power of arrest - (1) A constable may arrest a person without warrant if the constable has reasonable cause to suspect that that person has reasonable cause to suspect that that person has committed an offence under the following sections -

(a) section 28(1)(a);
(b) section 28(l)(b);
(c) section 28A(a);
(d) section 28A(b);
(e) section 28B(4);
(g) section 28C(3);

The Constitutional Argument

[9] The essential issue put in dispute by Mr Mitchell is whether there is a statutory right on the part of the Police to compel a driver to come with them to the Police station if there is a requirement that they attend there for a breathalyser test (rather than at the roadside where they are stopped). He accepts there is a power for the breathalyser test to be undertaken at the station but says there is a gap in the legislation because it does not provide for a power to compel the driver to be taken to the station to have the test administered.

[10] This argument was not raised by Mr Mitchell before the JP but I am satisfied he can raise it as a fresh argument now because there are no factual matters which would have needed to have been proved for it to be advanced. Mr Mitchell made a strong argument that this was a gap in the legislation and it was not one that could be

filled in any legitimate way by the Court. In support of that submission, he referred to an earlier decision of mine given in the *Police v Reid* and he quoted an extract from it which I now repeat:

> "Drink driving legislation such as the Transport Amendment Act is highly prescriptive. If there are gaps in the procedure the Act should be interpreted in a way consistent with important rights as recognised in the Constitution rather than by trying to assist the Police to make the process work".

[11] As I explained to Mr Mitchell in the course of argument I thought I had there put the matter slightly clumsily. My point, which I think is apparent, is that the invasive requirement to provide a breathalyser test was the reason why drink driving legislation was required to be prescriptive. In the Cook Islands this proposition must be strengthened by the strong constitutional provisions and particularly those set out in Article 64(1)(a) about freedom and security of the person.

[12] I have little doubt that the Court is not here to fill gaps in the legislation if such gaps exist. It seems to me that the issue for the Court is whether there is such a fatal gap in this section or whether by a proper means of construing s 28B and s 29(1) it is possible to arrive at the conclusion that the Act provides for compulsion when it comes to requiring a person to attend at the Police station.

[13] It is accepted that if Mr Mitchell's constitutional point succeeds then everything that follows is tainted by the failure at that point. Mr Mitchell argues that the Appellant was threatened at the roadside with arrest and only went to the station because of that. He relied on two particular statutory provisions to illustrate his point. The first of these comes from the same amending Act and is s 28C(2) which specifically provides (deleting irrelevant text):

> "every person who fails or refuses to accompany a constable to a hospital, police station, to permit a blood specimen to be taken commits an offence."

[14] He submitted that the legislature specifically referred to the very eventuality that s 28B is silent on. Therefore the gap in 28B is apparent by contrast with s 28C

[15] Secondly, he referred to the New Zealand legislation being the Land Transport Act 1998, s 69 and 72, which appears to go even further. The relevant

sections provide affirmatively that a person must accompany an officer to the required place and, as a second step, that they may be arrested if they do not.

[16] Mr Mitchell then went on to submit that the current section, s 28B, could overcome the current failure by adding a further provision to s 28B(4) in the following terms:

> "refuses to accompany a constable to the nearest Police station when required to do so".

[17] He says that the absence of a provision in those terms is fatal and that if I were to imply a right to compel attendance I would be filling a gap in the legislation that should not be filled for the reasons already described.

[18] During the course of argument I put to Mr Mitchell the following scenario. I asked him to assume that a driver had been stopped by a constable in terms of s 28B(1) and had been required to provide a specimen of breath for a breathalyser test. In conjunction with subsection (3) the Police officer had requested the driver to provide the breathalyser test at the nearest Police station. While I have set that out as if it were several different propositions I imagine that the request would be made all in the one. Indeed that appears to be how the standard Police checklist in clause 14 would put it. The point there is set out:

> "I require you to accompany me to the Police station at Rarotonga for the purpose of undergoing an evidential breath test, blood test or both."

[19] That, it seems to me, would be a lawful requirement in terms of s 28B. If the driver refused to accompany the constable at that point, it seems to me clearly the case that the driver would be refusing to undergo a breathalyser test in terms of subsection (4). That being the case, the powers of arrest in s 29(1)(e) would be engaged and the driver would be liable to be arrested.

[20] Mr Mitchell argued that that was to take too broad an interpretation of s 28B(4) (a) which speaks in terms of *"refuses to undergo a breathalyser test"*. Mr Mitchell emphasised that the words did not refer to the conveyance of the person to the place of the breathalyser test, but simply the breathalyser test itself. This I think is very much at the heart of this issue.

[21] The Crown submitted that, by necessary inference, the power to require a breathalyser test at the nearest Police station must also include a power to compel attendance at the Police station for that very purpose.

[22] Mr Mitchell's arguments were persuasive and have given me considerable pause for reflection. As I said to counsel at the outset of the hearing, my provisional view was that this was not a large gap in the Act and there was scope to see how by necessary implication one could arrive at the conclusion that compulsion was inherent within the Act. I have found the references by Mr Mitchell to s 28C and to the New Zealand legislation powerful arguments to the contrary.

[23] Ultimately, and on balance, I have concluded that this is not a large gap. I believe that by necessary implication the power to require a breath test at the Police station must include the power to compel attendance for the purposes of undertaking that breath test. Specifically, I reject Mr Mitchell's argument at [20] above. That then disposes of the first point raised by Mr Mitchell.

[24] There was what might be called a sub-point in which Mr Mitchell argued that by reference to the wording in s 28B(1) the constable who formed the view necessary to stop the driver and then require the breathalyser must be the same constable who attends right the way through the process. I do not think that is right. It seems to me that the constable who has reasonable cause to suspect that a person is driving must be the constable who requires the breath test then to be taken. Other than that, though, it does not seem to me a requirement that the constable who conducts the actual breathalyser test at the station needs to be the same constable. I cannot state that as an absolute in every case because there may be circumstances in which the change of personnel would be important. However, in the present case, I cannot see any problem with that which would result in a finding favourable to the Appellant.

Evidence: Conviction unsafe

[25] I therefore turn to the second issue on appeal which is whether the decision is unsafe. At this point I set out the finding of the JP in paragraphs numbered 3.1 and 3.2 of her written decision:

> "3.1 Was the defendant informed and made aware that she was to undertake a breathalyser test?
>
> Ms Kelleher in her evidence told the Court that when stopped the second time, Acting Sergeant Tararo told her that she will have to undergo a breathalyser test, he produced a tube that she has to blow in but then she refused and instead requested for a female Police officer which the Acting Sergeant Tararo complied to her request.
>
> 3.2 That the relevant checklist, Drink Driving Checklist, for undertaking breathalyser test was not completed
>
> Constable Tatakura did not complete the relevant checklist because the defendant refused to give the relevant information without her lawyer. Ms Kelleher was given the opportunity to call her lawyer instead she rang home. Refusing to provide the relevant information therefore did not allow for Constable Tatakura to complete the checklist."

[26] It seems to me the JP correctly identified the core issue which was whether the defendant was informed and made aware she was to undertake a breathalyser test, which requirement she then refused. However, and with respect, the reasoning given by her in the first ground focuses at the wrong point of time and also mis-records the actual evidence given by the witnesses at page 26 of the transcript. The JP is focussing on what happened at the roadside whereas she should have focussed on what was happening at the Police station.

[27] The second reason given by the JP focuses on the standard Police checklist which, in this case, the female constable did not utilise. I will talk about that shortly. The second sentence of her reasons which refers to an opportunity for the Appellant to call her lawyer seems to me, with respect, beside the point and I do not address it further.

[28] I have set out the Justice of the Peace's key reasoning. This is a relatively small part of a two-page written decision produced by her within an hour or so of the hearing concluding. I commend her diligence and the arrangement of the arguments as set out in her written decision. There is much there to commend and I endorse the current process of the JPs that they should produce written decisions of this dimension.

[29] Having said that, though, it is common ground that the reasons given by her in this case do not address the core issue which is what happened at the Police

station. There is therefore no finding as to that. That is material because the evidence of the female Police constable on the one hand and the evidence of the Appellant on the other are completely at odds.

[30] On the one hand the constable is quite clear that she requested the Appellant to take the necessary breath test at the Police station. This can be seen at pages 13 and 14 of the transcript. Notwithstanding cross-examination she remained firm on this.

[31] But equally the Appellant was clear that she was not requested to give a breath test at the Police station and, although she was cross-examined on that, she, too, remained firm. This can be seen at pages 27 to 29 of the transcript.

[32] I do not think I am able to resolve this conflict in the evidence simply by reading the transcript. I did not hear the witnesses and in the absence of a finding by the JP I think it would be wrong for me to substitute some finding on the basis only of that transcript. What I have done is look at the wider picture to see whether there are other factors which might help me form a view.

[33] First, Mr Mitchell referred to the fact that the constable did not fill in the usual checklist which is required by the Police for use in these circumstances. He produced a copy of this checklist which has the following words at the head of it:

> "This document is intended to be used as notes made at the time by the enforcement officer therefore it should be filled out contemporaneously".

[34] The constable was cross-examined as to why she did not fill in this form and she came up with the reason that she did not know the name of the driver of the car and that the Appellant would not provide those details. Consequently, she said, in the absence of these preliminary details, she could not go on and complete the form. With respect, that is an unacceptable answer. There was no good reason given by her as to why she could not fill in the form. If she had done so and had made notes contemporaneously with her actions that would have been powerful evidence supporting the evidence that she gave under oath.

[35] Secondly, I have already referred to clause 14 of this checklist. I draw attention to clause 16 as well. This refers to the powers under s 28C to require a

blood test if a person refuses to give a breathalyser test. In this case it is clear that the Appellant was not asked to give a blood test which would be the usual process if a driver had refused a breathalyser test. This also was relied on by Mr Mitchell and seems to be another factor in his client's favour.

[36] The third matter relied on by Mr Mitchell was that, in addition to the checklist, which I have just mentioned, there was no other contemporaneous record kept by the female Police constable which would support her side of the argument.

[37] Finally, Mr Mitchell referred to the subsequent arrest of his client by the female Police constable. He noted that there was conflict in the evidence given by her as to why she had done that. Her evidence fluctuated between an arrest because the Appellant had failed to give a breathalyser test on the one hand and because she was making threatening movements towards her on the other.

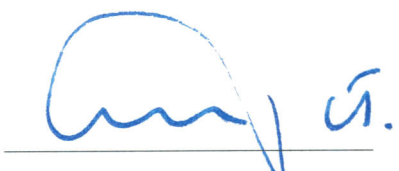
[38] As part of this Mr Mitchell noted that Police job sheet made no reference to the arrest.

[39] It seems to me that these various factors combined powerfully support Mr Mitchell's argument that a conviction would not be safe. In other words, is there evidence that one could rely on to assume that the case had been proved beyond reasonable doubt? I do not believe there is.

Result

[40] For these reasons I allow the appeal and set aside the conviction on the grounds that it would be unsafe to find the Appellant guilty of the charge for which she was originally convicted. The sentence imposed upon her is vacated.

[41] I will receive memoranda as to costs: Mr Mitchell's within 2 days and Ms Henry's in another 2 days thereafter.



Tom Weston
Chief Justice