IN THE HIGH COURT OF THE COOK ISLANDS **JP APPEAL 1/2015**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

OLIVIA JOHNSTON

v

POLICE

Date of Hearing and Judgment: 20 March 2015

Counsel: Mr M Mitchell for Appellant
Ms C King for Respondent

ORAL JUDGMENT OF HUGH WILLIAMS, J

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[1] The Appellant, Mrs Johnston, was charged with driving her motor vehicle on 1 August 2014 at Tupapa when the proportion of alcohol in her breath exceeded the prescribed limit.

[2] The charge was heard by Justice of the Peace Carmen Temata on 4 February 2015 and at the close of the case, the Appellant was convicted, but the Justice of the Peace did not impose a penalty, noting that Mrs Johnston intended to appeal the decision. This is that Appeal.

[3] The facts of the case are not greatly in dispute and it is convenient for present purposes simply to recount what the Justice of the Peace said about the facts in her decision:

> 2. *It was alleged that on the 1st of August 2014 at 10:30pm at Pue, Tupapa, Mrs Johnston was stopped by the Police who were attending to an accident. The Police stopped her and asked her to reverse her car and to park behind the*

> *Police truck on the side of the road. In doing so, she crashed her car into the rear of the parked Police truck.*
> *Constable Ingaua, at the instructions of Acting Sergeant Taruia Ringiao attended to Mrs Johnston. She asked if the defendant had been drinking and she replied, yes. She was then told that she was required to go to the Avarua Police Station with Constable Ingaua to undergo a breathalyser test to which she agreed. Due to the unavailability of a Police truck to take Mrs Johnston to the Police station, Constable Ingaua asked Mrs Johnston if she, the Constable could drive her to the Police station in her car. She agreed to this request and moved into the passenger seat to allow the Constable to drive her car. At the Police station, a breathalyser test for alcohol was conducted on Mrs Johnston which returned a reading of 1060ugl of alcohol in her breath.*

[4] In relation to those facts, there is, however, an additional observation which merits mentioning.

[5] That is that it is a highly undesirable practice for the Police, even with consent, informed or otherwise, of a suspect in Mrs Johnston's position, to use her vehicle to transport the Appellant and her children to the Police station.

[6] Ms King, for the Police, said it was caused on this occasion by the exigencies of the accident, but it still remains undesirable. To demonstrate how undesirable it is, one merely needs to pose the rhetorical question: what would have happened had Mrs Johnston's vehicle, driven by the Police officer, been involved in another accident, with consequent damage to her vehicle and possible injury to the occupants? What could have been the effect on the Appellant's insurance cover of what occurred?

[7] The nub of the Appeal is whether the Transport Amendment Act 2007, which put in place the present breath testing and blood testing regimes, contains an omission because it does not expressly give Police officers power to require a suspect to accompany them from the site of apprehension to the Police station for the purposes of a breathalyser test. That, in its turn, requires consideration of the enabling provisions.

[8] Mrs Johnston was charged under s.28A(1)(a) with driving a motor vehicle on a road with the proportion of alcohol in her breath exceeding the prescribed limit.

[9] In the factual circumstances earlier outlined, that invoked s.28B which reads:

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.

[10] Also relevant to the matter in issue is s.28C (1)(2) which read:

28C. Who must give blood specimen - (1) A person shall permit a medical officer to take a blood specimen from the person when required to do so by a constable if –

(a) the person fails or refuses to undergo without delay a breathalyser test after having been required to do so by a constable under section 28B; or
(b) the parson has undergone a breathalyser test under section 28B and -
(i) it appears to the officer that the level of alcohol in the persons breath exceeds the prescribed limit by 150 micrograms of alcohol per litre of breath; and
(ii) within 10 minutes of being advised by the constable of the result of the test, the person advises the constable of the result of the test, the person advises the constable that the person wishes to undergo a blood test; or
(c) a breathalyser testing device is not readily available to the apprehending constable or at the nearest Police Station; or
(d) the person was arrested without a warrant and the constable has good cause to suspect that the person has committed an offence under any of sections 28 or 28A; or
(e) the person is under examination, care, or treatment in a hospital.
(2) If a person who -
(a) fails or refuses to accompany a constable to a hospital, police station or other place in order to permit a blood specimen to be taken when required to do so under this section; or
(b) having accompanied a constable to the hospital, police station or other place in order to permit a blood specimen to be taken under this section, fails or refuses to remain at that place until requested by a

medical officer to permit a blood specimen to be taken under this section;
(c) fails or refuses to permit a medical officer to take a blood specimen to be taken under this section,
commits an offence.

[11] And s.28F(2)(3) are also relevant. They read:

28F. Evidence -

(2) Evidence of the proportion of alcohol or any drug in a specimen of breath or blood provided by the defendant shall, in all cases, be taken into account and it shall be conclusively presumed that the proportion of alcohol or drugs in the defendant's breath or blood at the time of the alleged offence was not less than in the specimen taken from the defendant.
(3) It shall be conclusively presumed that the result of the analysis of the breath or blood specimen taken from the defendant is correct, unless the contrary is proven.

[12] Before dealing with the legal submissions, the Cook Islands Police drink driving checklist was put in evidence. It includes as step 14, that -" *Officer Required Driver to Undergo a Breathalyser Test – Officer Stated 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.*"

[13] Quite apart from the fact that there is now more than one Police station on Rarotonga, the form is deficient – and might arguably, be unlawful - as not following the Act and advising suspects of the two sites where, under s 28B(3), the test may be administered.

[14] There appear to be other deficiencies in the form which fails precisely to mirror the enabling legislation but they are not relevant in relation to the present matter.

[15] Mr Mitchell, for the Appellant, submitted there is a gap in the Transport Amendment Act 2007 because it fails to expressly empower Police officers to require suspects to accompany them to a Police station if the breathalyser test is not to be conducted at the point of apprehension. He further submitted it is a gap that cannot be bridged by necessary implication. In fact he suggested that to bridge the gap by that means would offend against Article 64(1)(a) of the Constitution in that taking a person from the point of apprehension to

the nearest Police station without express statutory power so to do, would be an infringement of the liberty and security of the person and accordingly would be in breach of the Article.

[16] To an extent that submission is met by Art.64(2) which reads:

> *(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands.*

[17] However, it must be acknowledged that taking a person from the point of apprehension to the Police station for a test is a deprivation of their liberty, and, potentially at least, infringes their Constitutional rights unless the provisions of the Transport Amendment Act 2007 are an enactment in force to protect the rights and freedoms of others or the interests of public safety or the general welfare of the Cook Islands.

[18] Both counsel referred to the much more detailed legislation in force in New Zealand in the Land Transport Act 1998 in relation to evidential breath testing, breathalyser and blood alcohol offences. Mr Mitchell also provided a copy of the relevant provision of the Road Transport Act 2013 of New South Wales. Caution, however, needs to be accorded to invoking much more detailed legislation enacted in other jurisdictions regulating local circumstances and it is preferable, in the Court's view, to focus on the terms of the Transport Amendment Act 2007 itself.

[19] The matter now in issue and similar provisions have been considered before. Both counsel referred to the decision of Weston, J. as he then was in *Police v Reid*[1]. That decision is of lessened assistance because it dealt with a testing regime not now undertaken, but Justice Weston did refer to Art. 64(1)(a) of the Constitution and held (para [17]) that the evidence of the breathalyser test was both unlawfully and unfairly obtained, He reached that

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[1] JP Appeal 11/08 Judgment 7/10/2008

conclusion because the matter in issue occurred directly as a result of the compulsory but unlawful use of a device not now operated by the Police.

[20] In Kelleher v Police[2] Weston, C.J. commented on his decision in *Police v Reid* and appears to have resiled to an extent from the passage in *Reid* where he had said:

> *"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.*

But, the Chief Justice said:

> *[11] As I explained to Mr Mitchell in the course of argument I thought I had there [in Reid] I 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.*
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> *[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.*[3]

[21] The code which the Transport Amendment Act 2007 enacted created - so far as is relevant to this Appeal – the offence of driving with excess alcohol in a person's breath or blood. If the charge relates to breath, the test is under s.28B earlier recounted.

[22] In favour of the Appellant's submissions is that s.28B(1) and s.28C(1)(a) require the suspect person to provide a specimen of breath for a breathalyser test "without delay". That suggests that the option in s.28B(3) should be exercised "on the spot where such person is apprehended" rather than at the nearest Police station.

[23] That interpretation is also indicated by the requirement in s.28B(2) for a person who undergoes a breathalyser to remain at the test site until the result is known. But subsection (2)

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[2] HCCI JP Appeal 1/13 Weston,CJ 11/9/2013

[3] Mr Mitchell explained during this hearing that there was no appeal in *Kelleher* as the appeal was allowed by consent.

is only marginally helpful since, whether the breathalyser test is taken at the point of apprehension or at the nearest Police station, the obligation is simply to remain at that particular site until the result appears.

[24] But those statutory indications that breathalyser tests should preferably be undertaken at the point of apprehension are neutralised by the conclusive presumption appearing in s.28F(2)..With the conclusive presumption in operation, wherever the test is undertaken, the result is conclusively presumed to indicate the proportion of alcohol in a person's breath at the time the person was driving.

[25] The matter comes down to construction of s.28B(3) and the statutory option for the breathalyser test to be taken at the point of apprehension or, optionally, at the nearest Police Station. It is agreed that the main Police station in Avarua was nearest to where the accident and Mrs Johnston's driving took place so nothing turns on that.

[26] Does, therefore, the obligation of a person to undertake a breathalyser test either at the point of apprehension or, again optionally, at the nearest Police station also necessarily give the Police power to take the person i.e. require them to accompany a Police officer, from the point of apprehension to the nearest Police station?

[27] Ms King, for the Police, said, on being questioned, that the Police in Rarotonga invariably take suspect persons to Police stations because the breathalyser testing device requires a power source to produce a result and such power sources are not available at sites of apprehension. That is a practical response but, if it is not sanctioned by statute, the Police need to find some other way of dealing with that difficulty..

[28] It is of importance to note that s.28B(3) is phrased disjunctively: it requires a breathalyser test to be undertaken at one or other place.

[29] There was an argument as to whether it was the Police, as opposed to the suspect, who had power to exercise the option the subsection gives them.That is not an issue in this appeal and can be set aside for determination in a case in which it is in issue, though, in that regard, it seems clear from the note on the checklist that the decision is always undertaken by Police officers because it is the invariable practice to take suspects to Police stations.

[30] Of itself, it may be undesirable for the Police not to exercise a choice when the choice is given them by statute, but, the issue here is not that but whether they have a power to remove a suspect from the point of apprehension to the Police station for the taking of the breathalyser test.

[31] It might have been preferable had the Cook Islands enacted a detailed statutory regime akin to that operating in jurisdictions such as New Zealand or New South Wales, but the regime here is a simplified version of the detailed statutory requirements and powers in those places and this appeal must deal with the 2007 Amendment.

[32] Statutes, even statutes involving penal consequences, need to be interpreted purposively so as to make them effective in achieving Parliament's intention and purpose in passing them, provided, of course, that their construction is within the words Parliament has used.

[33] Adopting that approach,. Parliament must have intended, in the Court's view, that once it has been decided – whether individually or generically – that the test is to be taken at a Police station, the statutory power to require the taking of the breathalyser test at the nearest Police station necessarily includes a power to take a suspect from the point of apprehension to the nearest Police station. Any other construction would fail to give proper weight to the disjunctive wording of section 28B(3) and would make the Act unworkable, especially if the suspect demurred. As mentioned, the means by which it was done in this case was undesirable, but that does not affect the principle. Put another way, if the argument for the Appellant were accepted and a suspect at the site of apprehension were given the option to which s.28B(3) refers and refused to accompany officers to the Police station and insisted on the breathalyser test being taken at the site of apprehension, that would effectively empower suspects to nullify the remedial, public interest purpose of the statute and avoid being charged. That cannot have been within Parliament's contemplation.

[34] To interpret the Amendment in that way would not seem to involve a major incursion on suspects' rights. "Require" means no more than "to ask authoritatively"[4]and "accompany" is "to remain or stay with"[5]so giving Police officers power to require suspects

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[4] Oxford English Dictionary (2nd ed) Vol XIII p 681

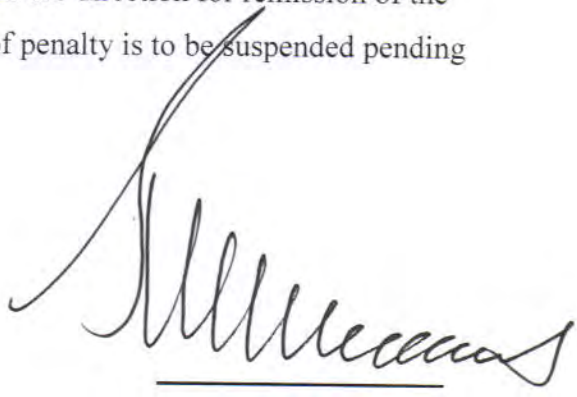
[5] Oxford English Dictionary (2nd ed) Vol I p 80

to accompany them to the nearest Police station is not an overbearing exercise of authority when set against the public purposes for which the Amendment was passed

[35] Therefore, when all those issues are taken into account, the Court's view is that a purposive interpretation of s.28(B)(3) even seen against Art.64(1)(a) of the Constitution (as modified by Art 64(2)) is that the power to administer the breathalyser test at the nearest Police station necessarily includes a power to require a suspect to accompany a Police officer from the site of apprehension to the Police station to enable the Police to conduct the breathalyser test as required by the Transport Amendment Act2007; that such an interpretation is a reasonable limitation on suspects' rights of liberty and security; and is one enacted. to augment public safety and is in the general welfare of the Cook Islands where drink-driving is so prevalent

[36] In view of all that, the view to be taken is that the Appellant was properly convicted, She has not yet been sentenced. The information is accordingly remitted to Justice of the Peace Carmen Temata on a date and time to be fixed by the Registrar for the imposition of sentence.

[37] At that point in the delivery of this judgment, Mr Mitchell advised that his instructions may be to take this matter on appeal to the Court of Appeal. If an appeal to the Court of Appeal is lodged within the requisite time, then the direction for remission of the information to the Justice of the Peace for imposition of penalty is to be suspended pending the decision of the Court of Appeal



Hugh Williams J