**IN THE HIGH COURT OF THE COOK ISLANDS** **CR NO. 304/18**
**HELD AT RAROTONGA**
**(CRIMINAL DIVISION)**

**POLICE**

v

**RHETT TUPUIARIKI RAUKETE HENRY**

Date of Hearing: 20 March 2019

Counsel: Mr S C Baker, Solicitor General for Police
Mr N George for Defendant

Date of Judgment: 29 March 2019

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**JUDGMENT OF HUGH WILLIAMS, CJ**

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[WILL0533.dss]

## Introduction

[1] The abovenamed defendant, Mr Henry, is currently charged with driving a motor vehicle on a road when the proportion of his breath was 510 micrograms of alcohol per millilitre of breath against a permissible limit of 400 micrograms per millilitre[1].

[2] The charge arose out of an accident on 27 May 2018 following which, in accordance with invariable Police policy, Mr Henry was breath tested. Mr Henry protested at the result because, he said, he had consumed only had two cans of Woodstock and suggested the breathalyser machine was not working correctly. He

[1] Definition of "prescribed limit" in s2 of the Transport Amendment Act 2007

therefore asked to go for a blood test at the hospital and the Police agreed, wrongly as it turns out for the reasons later discussed.

[3] The blood test was administered and showed that the specimen of Mr Henry's blood contained 122 milligrams of alcohol per 100 millilitres of blood as against the statutory maximum of 80 milligrams of alcohol per 100 millilitres of blood[2].

[4] The result of the two tests therefore showed Mr Henry was 1.275 times the prescribed limit on the breath test and 1.525 times the prescribed limit on the blood test.

**Procedure**

[5] When Mr Henry was charged with excessive breath alcohol as contrasted with excessive blood alcohol, Mr George, acting for him, applied to the Justices of the Peace to decline jurisdiction and refer the matter to this Court to decide on a question of law utilising s 105 of the Criminal Procedure Act 1980-81. His contention on Mr Henry's behalf, in both Courts, was that, as a matter of law, when Police have administered both a breath alcohol test and then a blood alcohol test to a driver and the driver fails both tests, the statute requires the Police to charge the defendant with the result of the blood test, not the breath test.

**Statutory background**

[6] Excessive breath alcohol and blood alcohol prosecutions are brought pursuant to the provisions of the Transport Amendment Act 2007, in particular pursuant to ss 28A(1) and 28C(1) which, as far as is relevant to the present matter, read:

> 28A. Driving with excessive breath-alcohol or blood-alcohol concentration – (1) A person who -
>
> (a) drives or attempts to drive a motor vehicle on a road; or
> (b) is in charge of a motor vehicle which is on a road,
>
> and has the proportion of alcohol in his or her breath or blood exceeding the prescribed limit commits an offence.

[2] See footnote 1

> 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.
>
> 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 person 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 that the person wishes to undergo a blood test;

**Discussion & Decision**

[7] The short answer to Mr George's contentions on behalf of the defendant are, as the Solicitor General for the Police pointed out, that the Police had no power to accede to Mr Henry's request following the breath alcohol test result and permit him to have a blood alcohol test. The reason for that is that Mr Henry's breath alcohol reading, 510 micrograms of alcohol per litre of breath as opposed to the permissible maximum of 400 micrograms did not give the Police power to proceed to a blood test because of the provisions of s 28C(1)(b)(i); the level of alcohol in Mr Henry's breath exceeded the prescribed limit by 110 micrograms of alcohol per litre of breath, not the 150 micrograms of alcohol per litre of breath which the section sets as the statutory threshold to entitle the Police to require the person who has failed the breath alcohol test to have a blood alcohol test.

[8] On that basis, there is no point of law for the Court to determine, or at least the point of law is not that for which Mr George contended. The reference by the Justices of the Peace accordingly fails.

[9] A number of other matters were raised in counsel's submissions.

[10] They included submissions from Mr George that the Transport Amendment Act 2007 does not entitle the Police to "pick and choose" between the respective test failure results and that, in acting as they did in this case, the Police acted unfairly and to the detriment and prejudice of the defendant. The Police should have amended the charge at an earlier stage of the matter.

[11] For the reasons mentioned, there is no force in those submissions in this case.

[12] The Solicitor General advised that the Police normally charge a person with a breath test failure first because they often lay the information prior to receiving the blood test result but that, where there is a dual failure, the normal Police procedure is to withdraw the breath test information and proceed on the blood test information in order that the Police can seek to recover the $150 analysis fee for the blood specimen test from the defendant. That may be Police practice, but is irrelevant to this matter, though, as is obvious, the breath test information was not withdrawn in this case.

[13] There is also an observation to be made that the way in which this matter proceeded involved Mr Henry's detention in Police custody longer than would otherwise have been the case and that he was subjected to the invasion of his person by the blood test, but as those matters occurred at Mr Henry's request, they would appear to have no enuring effect in this case. Further, by conducting his defence as he has, Mr Henry has lost the advantage of the complete defence he would appear to have had to a blood alcohol prosecution, but that seems necessarily the result as matters have proceeded.

**Result**

[14] The remaining question is how Mr Henry's prosecution should proceed from this point onwards.

[15] S 105 of the Criminal Procedure Act 1980-81 gives Justices of the Peace power to decline to continue a trial if a point of law arises, in which case they may "adjourn it for a retrial before a Judge." If that occurs – as it did here – s 105(3)

provides that the "retrial of that person for that offence shall thereupon commence and proceed before a Judge as if no steps … had been taken."

[16] Unusual though it may be for this Court to hear retrials of breath alcohol cases, in view of the mandatory terms of s 105(1) and (3) there seems no alternative but to direct that this information be included in the criminal callover before Potter J in the May 2019 sessions, either for arrangements to be made for the retrial or, if Mr Henry considers it appropriate, for a change of plea and sentencing.

**Hugh Williams, CJ**