IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA No. 3/15
(JP Appeal No. 1/14)
(CR No. 369/14)

BETWEEN OLIVIA JOHNSTON

Appellant

AND THE POLICE DEPARTMENT

Respondent

Coram: Williams P, Barker JA, Paterson JA

Counsel: Mr M Mitchell for Appellant
Mrs C McCarthy (Solicitor General) for Respondents

Hearing: 16 November 2015

Date of Judgment: 20 November 2015

JUDGMENT OF THE COURT OF APPEAL

Introduction – Leave to Appeal

[1] This is an Appeal from an oral judgment of Hugh Williams, J given in the High Court on 20 March 2015. The learned Judge dismissed an appeal against a decision of a Justice of the Peace given on 3 February 2015 in which the Appellant had been convicted of driving a motor vehicle when the proportion of alcohol in her breath exceeded the prescribed limit contrary to s.28A(1)(a) of the Transport Act 1966, ('the Act').

[2] The hearing of the Appeal from the Justice of the Peace by Hugh Williams, J was premature in that the Justice of the Peace had not sentenced the Appellant. Section 16(3) of the Judicature Act 1980-81 stipulates that no appeal against conviction shall be brought until the person convicted has been sentenced.

[3] Consequently, when the Appellant sought to appeal the decision by Hugh Williams J, the usual procedures for filing such an appeal could not apply in view of the premature nature of that decision. Because the irregularities were not the fault of the parties, this Court took the step of granting Special Leave to appeal to the Appellant pursuant to Article 60(2) of the Constitution. Although special leave under that provision is normally reserved for cases of special public importance, the power of the Court is sufficiently flexible to accommodate unusual situations in order to make a person's right to appeal meaningful.

[4] Accordingly, on 26 August 2015, this Court granted leave to the Appellant to appeal to this Court the judgment of Hugh Williams J. Justices of the Peace are reminded that they should complete any criminal case where a conviction has been entered by passing a sentence or taking some other step authorised by the legislation such as convicting and discharging.

[5] The relevant facts are as follows. The Appellant was stopped by the Police at around 10:30pm on 1 August 2014 at Tupapa. She was directed by a Police Officer to reverse into a driveway and collided with a Police vehicle. After admitting to an officer that she had been drinking, she was driven in her own car with her three children to the Avarua Police Station (1.2 kilometres) when she was given an evidentiary breath test. This showed that her reading was 1060. The limit is 400.

[6] The Justice of the Peace found that the Appellant was told by the officer that she was required to accompany him to the Avarua Police Station to undergo a breath test. Because of the unavailability of a Police vehicle, the officer drove the Appellant and the children to the station. The Justice of the Peace also found that the Appellant had consented both to the request to accompany and to the request for the officer to drive her to the Police Station in her car.

[7] Before discussing the principal submissions of Counsel for the Appellant, the Court notes its agreement with Hugh Williams J that it is a highly undesirable practice, even with informed consent or otherwise, to transport a suspect to a Police station in the suspect's own vehicle. That said, the Court cannot hold that the transport of the Appellant in her own car to the Police Station with her consent tainted the breath-testing procession so as to render it nugatory on this ground. No doubt the exigencies of the situation caused_by the unavailability of a Police vehicle at the site of the accident plus the necessity of getting three children away from the scene and on their way home, dictated the decision to use the Appellant's car to transport her to the Police station.\

Appellant's Submissions

[8] The crux of the appeal lies in the omission in the legislation of an express power for a Police Officer to require a suspect to accompany him from the site of apprehension to a Police Station for the purpose of a breathalyser test.

[9] Section 28(b) of the Act was part of a legislative package inserted into the Act in 2007 which introduced to the Court Islands the blood/breath testing of drinking drivers. The legislation appears to have been in part copied from similar New Zealand legislation, although there are some differences, notably in provisions not reproduced. Section 28(B) and Section 28(C) read as follows:

> *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.

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

[10] Mr Mitchell for the Appellant submitted that there was a gap in the Act because it failed to empower a Police officer to require the suspect to accompany him/her to a Police station if the breath test is not to be taken "on the spot where such person was apprehended" which S.28C (3) provides as the other alternative venue for the administration of the breathalyser test.

[11] Counsel submitted that the gap could not be filled by necessary implication and that any filling of the gap would offend against Article 64(1)(a) of the Constitution. Taking the suspect to a Police Station without express statutory authority would be a deprivation of liberty and security of the person which is provided for in that part of the Constitution.

[12] Counsel noted that s.29C(2)(a) creates an offence of a suspect failing to accompany an Officer to a nominated destination for a blood test. Yet there is not comparable provision for a failure to accompany for a breathalyser test as is found in the New Zealand legislation.

[13] Reliance was placed in two decisions of Weston J, (as he then was). In Police v. Reid (JP Appeal 11/08 – Judgment 7 October 2008), he 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."*

[14] In Kelleher v. Police (JP Appeal 1/13 – 11 September 2013), Weston CJ said;

> *[11] As I explained to Mr Mitchell in the course of argument I through 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.*
>
> *[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 a the conclusion that the Act provides for compulsion when it comes to requiring a person to attend at the Police station.*

High Court Judgment

[15] Hugh Williams, J noted in the Appellant's favour that ss.28B(1) and 28C(1)(a) require the suspect to provide a specimen of breath "without delay" which suggested that the breath test should be exercised "on the spot where such person is apprehended" rather than at the Police station. The requirement is s.28B(2) for the suspect to wait until the result of the test is known assists that interpretation.

[16] The Judge however concluded that these indications are neutralised by the conclusive presumption in s.28F(2) that, wherever the test is undertaken, the result is conclusively presumed to indicate the proportion of alcohol in the suspect's breath at the time of driving.

[17] He mentioned but did not decide whether it was the suspect and not the Police who had the power to exercise the venue option.

[18] This Court considers that the venue of the test must be the decision of the Police officer based on factors such as the availability at the site of breath-testing equipment.

[19] The determinative portion of the judgment under appeal reads as follows:

[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 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

Analysis and Decision

[20] The Court agrees with the result achieved by Hugh Williams, J. Contrary to the Appellant's submissions and the views expressed by Weston, J, the Court can and in this case should make the legislation workable by implying a requirement that the suspect accompany the officer to a Police station as was done in this case. There is a very comprehensive review of the occasions where this sort of implication can be made in "Statute Law in New Zealand" (4th ed) by Burrows and Carter at pp305 – 317. Of the many examples given, the following quotation from Lord Diplock in Jones v Wrotham Park Settled Estates Ltd, (1979) 1All ER 286, 289. is helpful in the present situation:

My Lords, I am not reluctant to adopt a purposive constructive where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it. Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.

[21] The present situation covers Lord Diplock's above test.

Clearly, the legislation sought to deal with the mischief of drunken driving by requiring compulsory breath and/or blood tests. The draftsman had omitted to specify that suspects required to undergo a breath test must accompany a Police officer in the same way as the Act required suspects to undergo blood tests. It is possible to state with certainty the additional

words that would have to have been inserted. There are words similar to those in s.28C(2)(a) relating to blood tests.

[22] Another route to the same result is found in Northland Milk Vendors Association Inc v Northern Milk Inc (1988) 1NZLR 530,534 where the New Zealand Court of Appeal filled in the gaps to make legislation workable. That authority has been followed often.

[23] The text also states at 313. "Statutes conferring powers on officials are often held to imply other powers that are necessary to make the original powers effective." In Director of Public Prosecution v Carey (1970) AC 1073 the House of Lords held that a power of traffic officers to administer a breath test implied a power to require the suspect to remain until a satisfactory test could be administered.

[24] Further cases could be cited but the cases above of high authority demonstrate that it is not correct to say in a blanket fashion the Court will not 'fill in' gaps in legislation.

[25] Article 64(2)(a) of the Constitution makes it clear that even where the constitutional rights of the subject are made subject prima facie engaged, these rights are made subject to limitations imposed in the intents of public safety. Consequently, a purposive approach such as that taken by the Judge is warranted.

[26] The Court agrees with Hugh Williams, J that purposive construction of the Act means that her constitutional provisions do not nullify this legislation which can be seen as a reasonable limitation of the rights of suspects to liberty and security.

[27] In the result, the appeal is dismissed and the case is remitted to the Justice of the Peace for the imposition of penalty.

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Sir Ian Barker JA

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BJ Paterson JA

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DAR Williams P
President