IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

JP Appeal 6/17
CR No 561 & 562/16

BETWEEN	**TIARE DOLLY KELLEHER**
	Appellant
AND	**COOK ISLANDS POLICE**
	Respondent

Hearing: 1 December 2017 (CIT)

Counsel: Mr Mitchell for the Appellant
Ms Mills for the Respondents

Judgment: 8 January 2018 (NZT)

DECISION OF GRICE J
APPEAL AGAINST JUSTICE OF THE PEACE JUDGMENT DATED 29 SEPTEMBER (CONVICTION AND SENTENCE)

Summary

a) The conviction on the charge of refusing to undergo a breathalyser test is set aside. The sentence on that charge is accordingly quashed.

b) The appeal against conviction on the charge of dangerous driving is unsuccessful. That conviction is upheld and the sentence is varied to impose on the appellant a fine of $300 and court costs of $50. In addition the appellant is disqualified from holding or obtaining a motor vehicle drivers licence for a period of 12 months.

Introduction

[1] This is an appeal against conviction and sentence from a decision of Justice of the Peace (JP) Carmen Temata dated 29 September 2017.[1] The appellant was convicted on charges of dangerous driving and refusing a breathalyser test.

[2] The background to is set out in the judgment:[2]

> "**Background**
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> [2] In the early hours of Thursday 23rd of June 2016, the defendant was driving her white SangYong pickup truck, registration 8098, along the main road into Titikaveka. As she drove past from Ngatangiia heading towards Aorangi direction, a police patrol coming in the opposite direction saw the vehicle with its headlights off. The defendant was driving erratically, on the road swerving from side to side of the road.
>
> [3] The police then turned around and took pursuit of the defendant's truck and stopped her in front of the Akapuao Store. The police noticed that she has recently consumed alcohol. She was then required to accompany the police to the police station for breathalyser test or blood test. The defendant verbally abused the police and declined to accompany them to the station.
>
> [4] At the police station she continued to be hostile and uncooperative and still refused to undergo a breathalyser test and subsequently arrested. The defendant was very drunk and defecated in the police truck."

The Charges

[3] Ms. Kelleher was charged with driving a motor vehicle "on a public road at Titikaveka and which having regards to all circumstances of the case is or might be dangerous to the public or any person."[3] She was also charged with refusing to undergo a breathalyser test at Avarua.[4]

[4] She pleaded not guilty to both charges and the matter went to a defended hearing before JP Carmen Temata on 8 August 2017. The decision delivered on 29 September 2017 convicted Ms. Kelleher on both charges.

[5] The notation on Information CR 561/16 purported to be signed by Her Worship on the charge of refusing to undergo a breathalyser test reads:

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[1] Police v Kelleher CR number 561 – 562/17. 29 September 2017. Carmen Temata JP.
[2] Supra at [2] – [4].

[3] Case on Appeal Information p 08.
[4] Case on Appeal Information p 05.

> "29.9.17 Reserved decision. Def is found guilty. Convicted and fined $500 and $50 court cost. Disqualified from driving and holding a MPV driver's license for 12 months. Sentence is suspended till the outcome of the Appeal.
>
> C Temata"

[6] A similar notation appears on Information CR 562/16 relating to the dangerous driving charge, except the court cost figure is $30.00 not $50.00.

[7] These notations become relevant when it comes to whether the sentence imposed on each charge included a period of disqualification. I will return to this issue later.

The Defence

[8] The defendant argued that part of the evidence in support of the prosecution case was improperly obtained and therefore inadmissible. That evidence was tainted because the officer used physical force to move Ms. Kelleher from her vehicle, into the police vehicle. . She was then detained and taken to the police station. She had not been arrested at the time, therefore the force was illegal and so Ms. Kelleher's fundamental human rights and freedoms were breached. The submission is that the evidence following the removal of Ms. Kelleher from her vehicle was improperly obtained. Her refusal to give a breathalyser test was inadmissible as it was obtained after the illegal act.

[9] This argument was not accepted. Her Worship relied on the Court of Appeal judgment in *Johnston* to admit the evidence in support of the conviction.[5]

[10] There the Court of Appeal read into the statutory provisions allowing the police to administer a breathalyser test at the nearest police station, the right to require a suspect to accompany a police officer from the site of apprehension to the police station to conduct the breathalyser test under the s28B of the Transport Act as amended by the Transport Amendment Act 2007.[6]

[11] Ms. Kelleher was convicted on both charges. Her Worship concluded:

> **"Conclusion**
>
> [65] Based upon that above the Court is satisfied that prosecution has proven, beyond reasonable doubt, that the defendant is guilty on both charges CR 561/16 – Refusing to undergo a breathalyser test and CR 562/16 – Dangerous Driving.
>
> [66] The police patrol vehicle saw the defendant driving dangerously without the headlights and accordingly she is found guilty of both charges.

[5] Johnston v Police [2015] CKCA 3\15. 20\11\2015.
[6] Johnston supra at [19], quoting from the judgment of the High Court with approval.

> [67] This is the defendant's first appearance for sentencing therefore she is convicted and fined $300 for each charge.
>
> [68] The defendant is also ordered to pay $50 court costs for each charge totalling $400.
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> [69] In addition, a 12 months disqualification from holding and/or obtaining a driver's license is imposed.
>
> [70] the defendant is also required to surrender her current driver's license to the Registrar.
>
> [71] the sentence imposed today will be suspended, pending the outcome of the appeal which I am informed by Counsel will be filed today."

[12] The grounds for appeal are that the evidence supporting the appellant's failure to undergo a breathalyser test was improperly obtained as the use of force by the police was illegal. It was common ground that Ms. Kelleher was not arrested until she refused to undergo a breathalyser test at the police station.

The Notice of Appeal

[13] While the Judicature Act does not specify what a Notice of Appeal must contain, it is strongly arguable that the Notice is not complete until the grounds of appeal, even in general terms, are provided. The grounds were not provided until well after the expiry of the appeal period. No issue in that regard was taken by the Crown. Therefore, I proceed on the basis that the Notice of Appeal can be taken as sufficient and that any defect has been waived. I deal with the appeal based on the grounds set out in the submissions filed on 28 November.

[14] The submissions do not list the grounds of appeal, but are in the form of submissions. The points may have summarized: [7]

- Failure to Arrest (para 5): the appellant was not arrested when apprehended at the roadside. She was later arrested at the police station for failing to undergo a breath test (para 6).

[7] References to the relevant paragraphs of the written Submissions for Appellant appear in brackets.

- Force was used "at various stages". This was illegal. The appellant was not under arrest so evidence of "anything done or not done thereafter" could not be used against the appellant. (Para 7 & 8) Reference is made to *Police v Cassidy*[8]]

- The request to give a breath test was not lawful because it occurred after illegal force had been used at a time when the appellant had not been arrested nor read her rights (para 15):

    - The fundamental human rights and freedoms preserved in the Constitution – Article 64: "the right of the individual to liberty – the right not to be deprived thereof, except in accordance with law." (para 16)

    - There is not a permissible form of custodial restraint by the police falling short of arrest.

- *Johnston* may be distinguished as there was no use of force in that case. There the appellant cooperated and went to the police station. The issue there was that the police had used Ms. Johnston's own car to take her and her children to the police station. (para 17).[9]

[15] It is common ground that Ms. Kelleher was not arrested until she had been taken from her car, transferred to the police station, cleaned up and, following explanation to her of the procedure, refused to undertake a breathalyser test.

[16] The appellant showed signs of intoxication when she was pulled over by the police. She would not cooperate with the officer's request so she was "manhandled' to the police vehicle by a police woman. The force applied was not extreme. However, the police officer, when tested on the point in cross examination, agreed that she had "manhandled" the appellant.

[17] There were no resultant injuries or indication that the force was more than was necessary to move Ms. Kelleher from one vehicle to the other. There was some dispute about whether the level of assistance given to Ms. Kelleher to walk from the police vehicle to the police station was in fact "force" or assistance. This is not relevant for the purposes of this appeal.

[8] Police v Cassidy NZDC. 13 December 2000, 376
[9] Johnston v Police supra.

[18] While the level of force applied at the site of the apprehension was at the lower end of the spectrum, it is common ground that it was more than a request. To this extent it is distinguishable from *Johnston*.

[19] The officers could not have left the appellant at the roadside. She had been stopped because she had been driving erratically without her headlights on at night. When the officer approached Ms. Kelleher, she observed that she smelt strongly of alcohol, was uncooperative and abusive.[10] Ms. Kelleher did not respond, her eyes were red, her face was flushed and she was uncoordinated. She was unstable and would not walk to the police vehicle. It was then that she was "manhandled" by Acting Sgt Tapoki. The officer grabbed Ms. Kelleher and pulled her into the police vehicle about 2m away. Ms. Kelleher fell asleep on the way to the police station. She was awoken when they arrived at the station. The appellant had defecated in the vehicle but willingly walked into the station once she was awoken. The appellant was assisted in cleaning herself up at the station by an officer.[11]

[20] For the appellant Mr. Mitchell in the course of argument conceded that the facts on which evidence was adduced in support of the dangerous driving charge took place before the alleged intervening illegal action by the police. Her Worship therefore had sufficient evidence to convict on the dangerous driving charge without relying on the tainted evidence following Ms. Kelleher's removal from her vehicle. There was no contest on the facts that gave rise to the dangerous driving charge. Ms. Kelleher was observed driving erratically in the dead of night without headlights on a public road. She was stopped and her keys were confiscated. The evidence outlined the reasons for the officers' belief that Ms. Kelleher was driving under the influence of alcohol. Her Worship was satisfied that the dangerous driving charge was made out.[12]

[21] Therefore, ample evidence supports the conviction for dangerous driving and it is not tainted by any alleged illegality. It must stand. I will deal with the sentence on that conviction below.

Failure to Arrest

[22] The appellant argued that the police officers were not entitled to use any degree of force at all to compel Ms. Kelleher to accompany them to the police station.

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[10] Case on appeal transcript Examination in Chief Senior Sergeant Pouao at 13.
[11] Supra page 14, 15 and 17
[12] Supra. Judgment of Temata JP at [56].

[23] Her Worship found the charge of refusing to undergo a breathalyser test was proved. She referred to the decision in *Johnston*[13] In that case the Court of Appeal upheld the decision of Justice Hugh Williams that the power to administer a breathalyser test at the nearest police station necessarily included a power to require a suspect to accompany a constable from the site of apprehension to the police station.[14]

[24] Her Worship also referred to s42 of the Crimes Act 1969 which allows for justification or protection in executing or assisting an arrest or other process.[15] She noted the offence of obstructing a police officer in the execution of his duties.[16] However neither of those provisions are relevant here as Ms. Kelleher was not charged with obstruction nor was the officer attempting to arrest Ms. Kelleher.

[25] It is common ground that an amendment to s28B of the Transport Act provided for the new offence of refusing to accompany a constable to the police station. However, this did not come into force until four days after this incident and does not apply here.

[26] Mr. Mitchell relied on *Cassidy*[17] as authority for the proposition that the failure by an officer to inform the suspect of her rights under the New Zealand Bill of Rights Act and failing to arrest her before forcibly removing her from her motor vehicle to put her in the police car was illegal.[18]

[27] The District Court Judge held that there was no evidence of arrest. In the absence of the cooperation of the suspect, the only lawful process was to arrest her. There the suspect was violently seized from her car, and after a struggle she stumbled to the ground and was put into a half nelson hold. His Honour concluded that there was no halfway house between cooperation and arrest. He said legitimizing compulsion short of arrest would blur the statutory procedure in a way which:

> "all too readily can lead to abuse. It is important to keep in mind that the task of the police is not merely to enforce the law but also to uphold it. In a sense the best expression of the law ought to be the proper manner of which it is enforced."[19]

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[13] Johnston v Police CA 3/15, 20 November 2015.
[14] Supra at [35] citing [19] from the judgment of Hugh Williams J.
[15] Sections 74(1)(a) of the Police Act.

[17] Supra
[18] In the Cook Islands the relevant rights are contained in the Constitution.
[19] Supra Cassidy at 381 [16].

[28] The Judge noted he was not particularly sympathetic to the defendant but nevertheless the police must observe the obligations of the law in dealing with suspects.[20] He succinctly set out the reasons for this approach:

> [17] The importance of the formalities of an arrest is that the person being arrested is given a clear understanding of their predicament, of their obligations. That is why the law has long been that there must either be words of arrest accompanied by the physical act of taking control of the person being arrested – traditionally a hand on the shoulder but that is not an obligatory form – or words of arrest accompanied by the acquiescence of the person being arrested to the fact of arrest. (Police v Thompson [1969] NZLR 513):[21]

[29] *Cassidy* dealt with a specific statutory provision under which the police purported to require the evidential breath test. It provided that the person must either accompany the officer or be arrested and taken to the prescribed place (the police station). If either of these prerequisites were not carried out the evidence of the breath test was held inadmissible.[22]

[30] There are no such prerequisites in the equivalent statutory provisions here. The Cook Islands legislation does not specifically require the person to accompany the constable or to be arrested. Ms. Kelleher was charged under the Transport Amendment Act 2016 which provides: s.28(B):

> 28B **Who must undergo breath screening test or 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
>
> …
>
> 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 the person is apprehended or at the nearest police station.
>
> (4) A person who—
>
> (a) refuses to undergo a breathalyser test; or

[20] Supra at 382 [19].
[21] Supra 382 [17].
[22] Supra at [20]. Referring to s.69(4) of the Land Transport Act 1998 (NZ).

(b) …
(c) refuses to remain at the place pursuant to subsection (2)

commits an offence.

(5) A person that contravenes a provision of this section is liable on conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding $1,000 or both, and the Court shall, in addition to any other penalty, order him or her to be disqualified with or without condition from holding or obtaining a driver's licence for a minimum period of 12 months.

(6) In addition to the penalties specified in subsection (5), the Court may also upon conviction impose the sentence of community work."

[31] Amendments to the legislation which took effect four days after the incident introduced "reasonable compliance" provisions which mitigated the strict process compliance requirements for breath and blood alcohol testing. It is doubtful that even had these been in force they would have applied to the matters complained of here. However, that is not an issue here.

[32] In *Johnston*[23] the Court of Appeal read into the present legislation that the constable could require a suspect to accompany them to the police station for a breathalyser test. That requirement or request is a different matter to physically compelling a suspect to move. The application of force introduces a much greater incursion on a person's liberty.

[33] While the Constitution recognises that personal freedoms exist as well as counterbalancing duties it says:[24]

FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

[Fundamental human rights and freedoms

64 (1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, colour, religion, opinion, belief, or sex, the following fundamental human rights and freedoms-

(a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law

[23] Supra
[24] The Constitution. Article 64(1)(a)

Interpretation

[34] The Court of Appeal in *Timoti* adopted a purposive approach to the interpretation of the drink-driving legislation. It quoted with approval the comments of Doherty J in the High Court.[25]

> [10] Doherty J considered that the principles laid down by the majority in the New Zealand Court of Appeal of R v Shaheed [2002] NZLR 337 should be applied. That required a balancing exercise between the protection of an accused's constitutional rights and the scheme and intent of the legislation sought to be enforced, namely, the bringing to account of those who are prepared to put others at risk by driving with excess alcohol in their system.
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> [11] Relevant extracts from Doherty J's decision are:
>
> > [32] Shaheed was a case relating to DNA evidence. It is relevant in the sense that it dealt with a breach of a guaranteed rights of privacy under the New Zealand Bill of Rights Act. A similar right is challenged in Cook Islands law by virtue of the blood alcohol regime under the Transport Act in that it provides that citizens in certain cases must submit to invasions of their body to give samples for the purpose of bringing evidence against them.
> >
> > [33] The Crown rightfully accepts that that is an important principle and ought not likely to be upset. Shaheed held that when considering the admissibility of evidence in these circumstances that "the proper approach is to conduct a balancing exercise in which the fact that a breach of the accused guaranteed right is a very important but not necessarily determinative factor."
> >
> > [34] The Court went on to say that this balancing exercise need not be required if the breach in question is "obviously trivial." The Crown submits that whilst the taking of a blood sample is highly invasive because of the invasion of the privacy of the individual, that in this case, all of that was done in accordance with the law and the breach of the procedure was merely one after the event relating to the separation of samples. Therefore, there was no prejudice to the defendant in this case because she did not seek to have the benefit of a separate analysis. But on that basis, the Crown submits that the breach is a minor one and "obviously trivial."
> > [35] There is no question in this case of any malice or negligence in this strict sense of the word in relation to the medical practitioner who frankly admitted that he did not know that he had to take two samples or divide the sample into two merely that one would do and that is what he had been doing.
> >
> > [36] I do not agree with the Crown that this breach is trivial in the sense meant by Shaheed. It is a fundamental part of the procedure adopted by the Cook Islands. It is a fundamental protection to the individual to be able to challenge the might of the Crown in bringing evidence which in itself is derived from the invasion of that basic human right; the invasion of privacy occasioned by the taking of blood by a needle from the body.
> >
> > [37] What Shaheed was saying is that if the breach was a mere incident or as it put it "obviously trivial" then you can ignore it. But that does not end the matter because Shaheed says that if it is more than obviously trivial then a balancing process should be occasioned or applied.

[25] *Timoti* supra at [19] quoting from the High Court judgment [32]–[34].

> [34] All in all when I look at it, the procedures were appropriate up until the omission to divide the specimen in two. So when one weighs all of that and when one takes into account the scheme of the Transport Act as amended by this blood and breath alcohol legislation to bring to account those who are prepared to put others at risk by driving with excess alcohol in their system, I find that there is little or no prejudice to the defendant and in this case the certificate should be admitted as evidence and therefore the presumption of the alcohol level is as per the analysis.
>
> [35] Mr. George for the defendant was rightly concerned in his general submissions to the Court that Shaheed ought not to be applied so as to mean there is a continuing slippery slope. He did not use those words, they were actually used by Crown Counsel. But Shaheed does have the safeguard of the balancing procedure and there will or may well be appropriate cases where the balance is in favour of the defendant because of the greater impact upon those fundamental rights of the person when balanced against the scheme of this legislation.
>
> [36] The Appeal is granted. I think on the basis of the evidence on the record that there would have been and there was no other defence to the charge. I set aside the decision of the Justice of the Peace and enter a conviction against the defendant.

[35] In the High Court in *Kelleher*[26] the Chief Justice found that the power to require a breath test at the police station necessarily implied a power to "compel attendance" for the purpose of undertaking that breath test. However, His Honour noted that to go any further would engage the power to arrest:

> [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. [27]

[36] In this case the power of arrest was reached however it was not exercised by the officer.

[37] Where force is permitted in the exercise of official duties it is subject to specified safeguards. The use of force by the police when arresting a person or undertaking lawful process requires safeguards including advising a person of their rights.[28]

[38] This was recognised in *Johnston*.[29] In that case, while a purposive interpretation ensured the legislative objective was achieved and the constable could require the suspect to accompany them to the station, there was no suggestion that this extended to allowing the constable to apply force to the

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[26] Kelleher CKHC JPAPP 1\13. 11\9\13. Weston CJ

[1] [27] Kelleher supra at [19]. In Kelleher for other reasons the appeal was allowed and the conviction was set aside on the ground that it would be unsafe to find the appellant guilty of charge.

28 Section 74 of the Police Act (obstruction); section 42 of the Crimes Act 1969 (protection and course of arrest). t

[29] Supra (34) –(35)

suspect. The act of requesting or requiring someone to accompany does not imply a right to use force.

[39] In *Timoti* the JP had acquitted the appellant on a blood alcohol charge. The appeal challenged the refusal to admit as evidence the appellant's blood alcohol level certificate. The doctor taking the blood sample had failed to separate the sample into 2 parts – as required under the legislation. One part is tested and the other made available should the defendant require an independent analysis. That was not required in this case. The Court of Appeal upheld the High Court decision to admit the evidence. It quoted Justice Doherty's comments with approval and adopted the balancing exercise he had undertaken.[30]

> [12] Shaheed was a decision of a seven Judge Court of Appeal. The judgment of the majority, delivered by Blanchard, J, reviewed the approach to be taken to the admissibility in a criminal trial of evidence obtained as a result of the breach of a right guaranteed by The New Zealand Bill of Rights Act 1990. The majority view is summarised at paragraph 26 of the Judgment as follows:
>
> > [26] In this case the Court has reviewed the approach which should be taken to the admissibility in a criminal trial of evidence obtained as a result of a breach of a right guaranteed by the New Zealand Bill of Rights Act 1990. The majority has concluded that in place of what has become known as a prima facie exclusion rule, admissibility should be determined by means of the Judge conducting a balancing exercise in which, as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a right guaranteed to a suspect by the Bill of Rights. The Judge must decide by a balancing of the relevant factors whether exclusion of the evidence is in the circumstances a response which is proportionate to the breach which has occurred of the right in question. Account is to be taken of the need for an effective and credible system of justice. Matters which are likely to be relevant to the balancing exercise in a particular case will be the value which the right protects and the seriousness of the intrusion on it; whether the breach has been committed deliberately or with reckless disregard of the suspect's rights or has arisen through gross carelessness on the part of the police; whether other investigatory techniques, not involving any breach of rights, were known to be available and not use; the nature and quality of the disputed evidence; the centrality of the evidence to the prosecution's case and, in some cases; the availability of an alternative remedy or remedies.
> >
> > [27] In the case under appeal, involving a charge of sexual violation by rape, a majority of the Court has concluded that evidence of a DNA profile obtained from a blood sample taken pursuant to a High Court order under the Criminal Investigations (Blood Samples) Act 1995 should not be admitted at the respondent's trial because he had come to attention in relation to the rape only as a result of the earlier taking of blood from him for databank purposes in circumstances which constituted a very serious breach of the 1995 Act and of s 21 of the Bill of Rights (the guarantee of freedom from unreasonable search and seizure).

[30] Timoti CKCA supra at [11] citing the High Court [12] –[26] and [12]

[40] The Court of Appeal in *Johnston* held that it was lawful for a constable to request a suspect to accompany them to the police station for an evidential breath test. It held that such a request was a reasonable limitation on a person's right to liberty and security under the Constitution.[31]

The Use of Force

[41] The issue now becomes whether a further incursion into a person's liberty, i.e. the use of force, is also a reasonable limitation on a person's liberty and security. The respondent argued that because of the minor degree of force applied to the appellant it was a legitimate use of force. It says that the appellant was requested three times to accompany the officer and that these requests were lawful. Therefore the appellant, by refusing to undergo a breathalyser test, was in breach of section 28B(c) and so was susceptible to arrest. The respondent further submitted that the issue is whether the detention was unlawful and therefore rendered the evidence obtained after that detention inadmissible. It distinguished *Cassidy* by reference to the degree of force involved. In this case it says that the force was not excessive and the appellant had been advised that she was required to accompany the officer. In *Cassidy* the suspect was not so advised. In addition *Cassidy* was decided before *Shaheed*.[32]

[42] The respondent relied on the New Zealand Court of Appeal decision in *Yoganathan*[33] . There the appellant had suffered serious injuries at the hands of the police following his apprehension for driving while under the influence. He was detained for some time, not arrested and the police failed to warn him of the requirement to accompany them. The evidence was excluded following a balancing exercise now codified in section 30 of the Evidence Act (NZ).[34]

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[31] Johnston supra at (35).

[32] R v Shaheed [2002] NZLR 337. Cited with approval by the Cook Islands Court of Appeal in *Timoti* CKCA 7/15, 20 November 2015. Nicolas CKHC 2016 and before s 30 of the Evidence Act 2006 (NZ) was enacted.

[33] Yoganathan v R [2017] NZCA 225.

[34] **30 Improperly obtained evidence**

(1)This section applies to a criminal proceeding in which the prosecution offers or proposes to offer evidence if—
(a)the defendant or, if applicable, a co-defendant against whom the evidence is offered raises, on the basis of an evidential foundation, the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue; or
(b)the Judge raises the issue of whether the evidence was improperly obtained and informs the prosecution of the grounds for raising the issue.
(2)The Judge must—
(a)find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
(b)if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.
(3)For the purposes of subsection (2), the court may, among any other matters, have regard to the following:
(a)the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
(b)the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:
(c)the nature and quality of the improperly obtained evidence:
(d)the seriousness of the offence with which the defendant is charged:
(e)whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:
(f)whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:
(g)whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:
(h)whether there was any urgency in obtaining the improperly obtained evidence.

[43] The more fundamental the right the greater the weight given to the breach. To avoid the "slippery slope" to which the Crown had referred in *Timoti* requires a line to be drawn somewhere. In my view, physical force may provide that line. A gentle guiding hand accompanying a request to accompany a constable may not cross the line, but any more than that and certainly "manhandling' even without causing injury crosses that line. In this case there was no attempt to arrest the appellant.

[44] It is not clear from the evidence exactly what she was told at the road side other than being asked to accompany the officer. This did not extend to advising the appellant of her rights nor of the likelihood of arrest if she did not comply. There was no suggestion of bad faith and it seemed that the officers were doing their best to get Ms. Kelleher off the road. She was intoxicated. The obvious and simple option was to arrest her. There was ample justification to do so. She would have been given her rights and the officers would have been entitled to exercise such force as was reasonable in the circumstances to move her from her car to the police vehicle and then to the Police station for the breathalyser test.

[45] On the evidence it is clear the appellant was manhandled then unlawfully detained having been put in the police vehicle, and then to the police station. Similar circumstances existed in *Yoganathan*.[35] In that case the Court of Appeal found that the force applied to make the appellant comply and his subsequent detention were unlawful.

[46] The issue here is whether the evidence relied on by the prosecution subsequent to the "manhandling" should be excluded as improperly obtained evidence. This requires consideration of the balancing exercise which was referred to in *Shaheed*.

[47] In that exercise the interests of the community that justice be done are weighed against the interest of the individual whose rights have been breached. The starting point is that[36] "appropriate

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(4)The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.
(5)For the purposes of this section, evidence is **improperly obtained** if it is obtained—
(a)in consequence of a breach of any enactment or rule of law by a person to whom section 3 of the New Zealand Bill of Rights Act 1990 applies; or (b) in consequence of a statement made by a defendant that is or would be inadmissible if it were offered in evidence by the prosecution; or (c)unfairly.
(6)Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[35] *Yoganathan* NZCA at [25].

[36] *Shaheed* supra at [26]

and significant weight is given to the fact that there has been a breach of a right guaranteed by the Bill of Rights". Here these rights are guaranteed by an entrenched Constitution.

[48] The *Shaheed* principles that are relevant in this case are:

a. The breach of rights and seriousness of the intrusion on them: the application of force and subsequent detention is a serious breach of an individual's right to liberty and security. The respondent submitted that the nature of the right, being the right to liberty was significant, but the deprivation was minor. It says the appellant was uncooperative and abusive and the force used was minimal. The use of force would have been justified if she had been arrested. Further it submitted that the appellant had been fully advised of what was happening and what the police intended to do, that the police officers did not act in bad faith and they had serious concerns about the appellant's driving.

b. The nature of impropriety: in this case as I have said there is no suggestion of bad faith on the part of the police. Why the officers did not arrest Miss Kelleher is not clear from the transcript. There was some suggestion that the police required an "arresting" officer to undertake this process or that the officers did not consider that they had sufficient evidence to arrest Ms. Kelleher. If the latter were the case (which it is not) it provided further reason that they should not have used force on her. If Ms. Kelleher was not susceptible to arrest or other lawful process of detention then she should certainly not have been subject to physical compulsion. An arrest in this case was the way to deal with her lack of cooperation.

    i. The officers were doing their best and from the evidence it appears that, apart from the "manhandling" incident, acquitted themselves well in the circumstances. However a systemic process failure (no "arresting" office available) or a lack of knowledge of the grounds for arrest are serious defects in the process. Such defects should not be condoned by allowing the police to "manhandle" suspects rather than arrest them according to law. There is no evidence that the officers misunderstood the law here but rather were ignorant of it. The process involved in making an arrest provides safeguards to protect the

constitutional rights of the individual. There was no reason to circumvent the statutory and constitutional requirements here.

c. The nature of the failure: it was not a minor technical breach but went to the heart of the safeguards provided in the Constitution against the use of force by the authorities. While the balancing exercise is not primarily designed to deal with draw police procedural defects, a factor to been taken into account is the nature of the impropriety. This necessarily involves consideration of the reason for the impropriety. The reason in this case weighs in favour of exclusion of the evidence. The assessment of the right and nature of the breach necessarily focuses on the facts of the case. In *Yoganathan* the suspect was seriously injured and detained for the duration of a ride to the police station and questioning before he was arrested. There was a suggestion that Mr. Yoganathan had hurt himself, but this was not accepted by the judge.[37] In that case the significance of the rights involved and seriousness of Mr. Yoganathan's injuries lead to the court excluding all the evidence subsequent to his unlawful detention. The Court was not satisfied that any other statutory factors such as the seriousness of the offence, counted against exclusion. The appeal against conviction succeeded as the other available evidence did not support the prosecution case to the required standard.

d. Other techniques: the option to arrest the appellant was always available. This was not difficult.

e. The reliability, cogency and probative value of the evidence obtained in breach of a right: the relevant evidence was the refusal to undergo a breathalyser test. There was no dispute that the evidence was reliable, cogent and probative.

f. Seriousness of the crime: driving while under the influence is a serious offence. Driving related offences have been on the increase and have attracted judicial comment recently. The prescribed penalties are a maximum fine of $1,000 dollars, together with a maximum term of imprisonment of 1 year as well as disqualification from holding or obtaining a motor vehicle driver's license for a maximum period of 12 months.

[37] *Yoganathan* at [30]

g. The dangerous driving conviction stands separately. It is not tainted by the improperly obtained evidence which affects the conviction of refusal to undergo a breathalyser test. The evidence supporting the conviction for dangerous driving occurred before the tainting event.

h. Importance and centrality to the case: the evidence concerned is crucial to the offence of refusing the breathalyser test. It was not crucial nor central to the dangerous driving charge.

[49] The *Shaheed* balancing exercise requires me to weigh a serious breach of rights against the admission of probative evidence which is crucial to support a conviction for refusing to undergo the breathalyser test. There was a straightforward and readily available process, i.e. arrest, which carried with it important constitutional safeguards and supported the constitutional and statutory rights of suspects. Additionally, the failure to arrest appears to have occurred to fill a procedural gap. This should not be condoned. Even if that were not the case the evidence suggests that at least one of the officers was aware that physical force should not have been applied without engaging the appropriate arrest processes. There is no suggestion that there was a life-threatening situation which required immediate or urgent action to secure the safety of the appellant or others. The arrest could have been made or at least Ms. Kelleher's car keys could have been taken off her. She was in no state to drive but at the same time was not an immediate danger to herself or anyone else.

[50] The respondent pointed out that the violence inflicted on Mr. Yoganathan when he was unlawfully detained by the police was much more serious than the "manhandling' of Ms. Kelleher. Mr. Yoganathan suffered broken bones as a result of his ordeal. The other statutory factors did not count against exclusion of the evidence in *Yoganathan*. There were no apparent injuries suffered by Ms. Kelleher. Nevertheless her right to liberty and to be free from a law unlawful detention are the same as those breached in *Yoganathan*.

[51] In this case while the injuries were not serious the rights breach was significant and it is clear that a degree of force sufficient to pull Ms. Kelleher out of her vehicle and into the police vehicle was applied by the police. It was the police officers themselves who described it as "manhandling'. This have must have involved reasonable force. While Ms. Kelleher was abusive and uncooperative she offered no real physical opposition to the officer. Her failure to physically engage to deflect the officer fortunately obviated the need for any further action by the police officers. By the time she

reached the police station Ms. Kelleher was apparently cooperating – she moved from the police vehicle to the police station and cleaned herself up. Although she still refused to undertake the breathalyser test there was no evidence of any physical opposition. The officers may have gained her cooperation earlier if she had been arrested following the correct procedures including advising her of her rights.

[52] The offence while significant is not at the most serious end of the spectrum of criminal offending.[38] The evidence in question was probative and crucial to the conviction on the breathalyser charge. Nevertheless the proper procedure involving arrest was readily achievable.

[53] The balancing exercise referred to in *Shaheed*[39] is a process for determining whether or not the exclusion of the evidence is proportionate to the impropriety. This is carried out through a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective credible system of justice. An effective and credible system of justice relies on the system incorporating appropriate safeguards against unbridled police power and protects the individual's constitutional rights.

[54] In this case the rights breached were significant, force was used, the detention lasted for some time, there was a readily available legal process for dealing with the appellant, there was no urgency and the impropriety was apparently to fill the gap caused by either lack of knowledge by the relatively senior officers involved or a systems failure. These factors outweigh the statutory factors in favour that would count toward admitting the evidence. The exclusion of the evidence here is proportionate to the impropriety in this case.

Alternative basis for conviction

[55] The respondent says the refusal to undertake a breathalyser test was complete when the appellant refused to go to the police station at the point she was apprehended in the Titikaveka area. That was not the basis that the prosecution ran its case in the lower court. The Information itself states that the offence occurred at Avarua. This was not where the appellant was apprehended. Additionally the evidence recorded in the transcript as to what occurred at the roadside is sketchy. Senior Sgt Pouao says he asked Ms. Kelleher to get out of her car.[40] Acting Sgt Tapoki says she asked she asked Ms. Kelleher to accompany her to the police vehicle and that she told Ms. Kelleher that she needed to

[38] S 28B (5) the Transport Act provides for a penalty of a maximum fine of $1000 and/or 12 months imprisonment as well as mandatory disqualification from holding or obtaining a motor vehicle license for a period of 12 months.
[39] Now codified in section 30(2) of the Evidence Act 2006 (NZ)
[40] Case on Appeal 14\5 – Notes of Evidence

undergo a "breath test and blood". She says the appellant was trying to phone someone but there was no reply apparently. The appellant refused to get out of her car so Sgt Tapoki "manhandled" her out of the car.[41] It was not until Ms. Kelleher was at the police station in Avarua that the process was explained to her and she was then arrested for refusing the breathalyser test.

[56] Her Worship was asked to consider the offence that took place at the police station in Avarua. She was not required to nor did she make any comments or findings in relation to an offence committed at the site of apprehension. The Information and the prosecution were directed to proving the offence occurred at the police station in Avarua. The evidence as to what exactly was said and the advice given by the police officers at the roadside was not the subject of cross-examination to the extent it might have been had the allegation been that the offence occurred at the site of apprehension. In *Yoganathan* the court commented on the need for careful consideration of such evidence. It said:

> '[22] We accept Mr. Haskett's submission that there was insufficient evidence Constable Morgan made Mr. Yoganathan aware of the need to accompany him immediately or without delay following the positive result from the breath screening test. The officer's evidence was simply that he requested Mr. Yoganathan to accompany him and, in the absence of a response or comment, he physically removed him from the car. There is no requirement on a person to accompany an officer immediately; he or she is entitled to a reasonable amount of time to comply. 27 And a logical corollary is that an officer should warn the person of the consequences of refusing to comply with the request in order to avoid misunderstanding and to obtain informed cooperation.28
>
> [23] We are satisfied that Judge Russell's finding that Mr. Yoganathan refused Constable Morgan's request to accompany him to the police station, upheld by Edwards J, is unsupported by the facts. There is no evidence that Constable Morgan discharged his obligation to inform Mr. Yoganathan that he must accompany him without delay while permitting a reasonable time for that purpose.
>
> [24] Moreover, Constable Morgan did not purport to arrest Mr. Yoganathan in exercise of his s 69(6) powers. Mr. Yoganathan was never charged with the offence of failing to accompany without delay. 29[42]"…

[57] In the circumstances it is not appropriate for me to reconsider the case afresh on the basis of the alternative version of the offence as proposed by the respondent. It would be unfair to the appellant and in any event it involves a different offence which is not before the court.

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[41] Case on Appeal pages 22 – 23- Notes of Evidence

[42] Yoganathan v R [2017]NZCA 225 [22]-[24] footnotes excluded.

Sentence

[58] Her Worship sentenced the appellant without seeking separate submissions, a sentencing hearing, or calling for a probation report. No issue was taken with that process. She said:

> "…
> [67] This is the defendant's first appearance for sentencing therefore she is convicted and fined $300 for each charge.
>
> [68] The defendant is also ordered to pay $50 court costs for each charge totalling $400.[43]
>
> [69] In addition, a 12 months disqualification from holding and/or obtaining a driver's licence is imposed.
>
> [70] the defendant is also required to surrender her current driver's license to the Registrar.
>
> [71] the sentence imposed today will be suspended, pending the outcome of the appeal which I am informed by Counsel will be filed today."[44]

[59] The appellant points to [69] of the decision and submits that it is not clear that the disqualification applies to each charge/conviction and not merely to the charge of refusing a breathalyser test which carries a mandatory term of 12 months disqualification. The notes recorded on the Informations indicate disqualification of 12 months imposed on each of the charges.

[60] In my view as a matter of interpretation of the judgment the period of disqualification applies to each of the convictions. While it might have been useful and avoided this argument if Her Worship had included at the end of [69] that the 12 month disqualification applied to each charge/conviction it is apparent from context and reading the sentencing provisions as a whole that the fines were imposed on each charge. The court costs were imposed on each charge and the clear implication is that when the sentence is that the period of disqualification is 12 months on each charge to operate concurrently.

[61] I therefore would dismiss the appeal as it relates to an appeal against sentence on the dangerous driving charge on the basis that the sentence is clear from the judgment.

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[43] The total of $400 is incorrect. The total amount of fines amounts to $600 together with $100 in court costs. In turn, this amount differs from the amount recorded in the notation on the 2 Informations. These referred to a $500 fine on each charge and in one $30 and in the other $50 court costs, a total of $1000 in fines and $80 in court costs. The signed judgment takes priority. In any event for present purposes no issue was taken with the level of the fines. The appeal proceeded on the basis that the fines and court costs were as recorded in the judgment and totalled $600 in fines and $100 in court costs.
.

[44] Supra at [65]-[69].

[62] However in case I am wrong in this interpretation that the sentence included the 12 months disqualification then I vary the sentence to make an order for disqualification of the appellant from holding or obtaining a motor vehicle driver's licence for a period of 12 months. In addition to a fine of $300.00 and court costs of $50.

[63] Driving offences are taken seriously in the Cook Islands. This court has noted in similar cases that it must take into account Parliament's clear indication that appropriately firm penalties should be imposed on offenders.

[64] Many of the sentences imposed in recent driving offences dealt with by this Court have related to careless or dangerous driving causing injuries. The court has commented that in cases where aggravating factors, such as the presence of alcohol are present, the starting point will be imprisonment. The Court of Appeal in *Boyle* recently upheld the conviction and sentence in a case of careless driving causing injury. Justice Doherty in the High Court said:

> [9] The Courts have said that Parliament's recent response to increasing the maximum sentence for this offending means that the Courts have to take heed of that and look very closely at all of this offending but, like other cases, there are no tariffs for it because each case generally relies on its own facts and it is the degree of carelessness that is important.[45]

[65] The Court of Appeal added:

> [28] A wide range of circumstances might give rise to a charge of careless driving causing injury or death. At the lower end of the spectrum would be instances where the offender has caused an accident through a moment's inadvertence. More serious cases might involve such factors as excess speed, alcohol/other substances or serious carelessness. The consequences are also an important factor to be taken into account by the sentencing judge. These may range from minor injuries to the victim to more serious injuries or death.
>
> [29] The Court may also take into account factors such as an early guilty plea, reparation made to the victim, remorse as well as matters relating to the personal circumstances of the offender. While not prescribed these are factors which are generally taken into account in sentencing by the Court.[46]

[45] Police v Boyle (2017)CKHC 26. Boyle v Police (2017)CKCA 5
[46] Boyle CKHC supra at [28]-[29].

[66] There was ample evidence in this case which pointed to the serious nature of the dangerous driving in this case. The appellant was driving at night without headlights, her driving was erratic and when she was pulled over she showed significant signs of intoxication which were observed by the officer before the "manhandling' incident. An aggravating factor here was the intoxication of the appellant. A fine together with a reasonable period of disqualification is within the range albeit at the low end of penalty for this type of offence by a first offender

[67] In mitigation, Her Worship took into account that it was Ms. Kelleher's first offence. .[47] She cannot claim the benefit of an early guilty plea. Therefore my view a fine of $300, an award of court costs of $50 together disqualifying the appellant from holding or obtaining a motor vehicle driver's licence for a period of 12 months is the minimum sentence available in the circumstances. I vary the sentence accordingly.

Conclusion

[68] The conviction on the charge of refusing to undergo a breathalyser test is set aside. The sentence on that charge is accordingly quashed.

[69] The appeal against conviction on the charge of dangerous driving is unsuccessful. That conviction is upheld and the sentence is varied to impose on the appellant a fine of $300 and court costs of $50. In addition the appellant is disqualified from holding or obtaining a motor vehicle drivers licence for a period of 12 months.

Grice J

[47] I have assumed that this is correct based on the comments of the Justice of the Peace at [67] and the police Summary of Facts (Case on Appeal at 10).