IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION) **CR NO. 292/18**

R

v

ARMIN BERNHARD SCHWANDER

Date: 29 January 2019

Appearances: Mr S Baker, Solicitor-General, for Crown
Mr M Mitchell for Defendant

Decision: 29 January 2019

ORAL DECISION
OF HIS WORSHIP MR JOHN WHITTA, JUSTICE OF THE PEACE

[9:40:40]

[1] The defendant, Mr Armin Schwander, is charged with driving with a level of alcohol that exceeds the legal limit. He is charged under s 28A of the Transport Act 1966 which carries a maximum sentence of 12 months imprisonment, a maximum fine of $1000 or both. It also carries a mandatory period of disqualification from driving of 12 months.

[2] The elements of identity and location and in general terms time and place were not an issue. The defendant does not deny driving his vehicle. The only element really in dispute is whether the defendant has been proven to be driving with an excess of alcohol in his system. More specifically though the defence is contesting whether the police followed a correct and proper process in gathering the evidence to prove that element and did so beyond a reasonable doubt.

[3] The defence laid out several concerns as to the process the Police followed. They were firstly, whether the Police were legally allowed to subject the defendant to both a roadside

test and a later breath test at the Police station which resulted in this charge. Secondly, whether the breath screening device and the breath screening test had been suitably gazetted for use by the Police. Thirdly, they had issues relating to the details on the breathalyser printout and the breathalyser checklist. And fourthly, there was a dispute over the 20 minute stand down before the breathalyser test was done.

[4] The background to this matter is in the early hours of Sunday 20 May 2018, Mr Schwander was stopped at a Police checkpoint at Ruatonga. He was a subject of a breathalyser test at that location and as a result of that test was asked to accompany Police to the station for a further test for evidential purposes.

[5] The subsequent breathalyser test at the station returned a reading that indicated an excess of breath alcohol. The defendant was then given the option to request an evidential blood test but he declined. The defendant was then charged on the base of that second breath test conducted at the Police station.

[6] Before proceeding it is worth having a quick look at what is clearly a process that has been adopted by Police in relation to their frontline operations against drunk driving.

[7] The process was never in dispute and has become clearly apparent during this and other cases involving this particular charge. Police will either as a result of a checkpoint stop or perhaps a crash, ask a driver to blow into an approved breathalyser device. This sometimes occurs at the roadside or at the Police station. Frequently, in fact usually, when this happens at the roadside the breathalyser device is not used in conjunction with the printer which produces a physical recording of the reading.

[8] The Police have not as a general rule used these roadside tests to bring a charge. If the roadside test returns a reading that indicates to Police an excess level of alcohol, the Police then require the person to accompany them to the Police station where they administer another test with the same type of breathalyser device.

[9] The common difference is at the subsequent test a printer is used to produce a printed result of that test. It is worth noting that s 28F(4)(b) of the 2007 Transport Amendment does allow Police to lay a charge using "the oral evidence from the operator of the approved

device by which the proportion of alcohol on that person's breath was measured as to the breath alcohol concentration reading given by the device". That is, a printout is not explicitly required for the laying of a charge however it appears that generally this is not the practice and the Police prefer to produce a printout.

[10] On the issue of the legality of the breath screening test s 28B of the Transport Amendment Act 2016 states that where a constable has reasonable cause to suspect that a person is driving a motor vehicle, the constable may require that person to undergo a breath screening test or a breathalyser test, and if the person refuses to undergo a breath screening test as required, the constable may require the person to undergo without delay a breathalyser test.

[11] The defence argue that the inclusion of the word 'or' means that the Police are only entitled to perform one test or another but not both. It is their belief that once the defendant agreed to having the breath screening test the Police then had no power under the Act to subject them to the subsequent breathalyser test at the Police station regardless of the first result.

[12] For their part the Crown argue that this is clearly not the intention of this section. The Crown submitted that the breath screening test is a practice that allows the Police to make a roadside decision as to who may then be required to proceed to a breathalyser test for evidential purposes. The Crown also submitted that if s 28B was read in this way then the breath screening test would be redundant.

[13] By definition the word 'screen' amongst other things means to vet, evaluate, filter, sift or sort. I believe that this is clearly the intention of this breath screening test. If the intention was for no further action to be taken against a failed screening test, then what did Parliament want Police to screen for?

[14] I do not accept that the legislation intended for Police to carry out an evaluation exercise on drivers if it could serve no purpose and effectively bar Police from proceeding against a driver who failed a screening test. The wording also quite clearly allows an Officer if he or she is in a position to do so, to proceed directly to a breathalyser test without first performing a screening test. If the legislation only intended to allow one or the other then

obviously the performance of the screening test would effectively prevent the Police from any subsequent action in the event someone was over the limit.

[15] I agree with the Crown that the Police simply would not bother and it would indeed render that particular test and even its inclusion in the legislation completely redundant. I accept that it is grammatically at odds with what I believe is a purpose of the Act however it is accepted that if the intention of the legislation is sufficiently clear then strict grammatical meaning should not be allowed to obstruct this purpose.

[16] In other words strict grammatical adherence does not trump legislative intent. I am not trying to fill gaps, I am simply reading the legislation in the light of the Act's purpose, the language and terminology used, and what I firmly believe would be a contradictory turn of events if a strict grammatical meaning was followed.

[17] Finally, while I am discussing these tests it is appropriate to also address the terms passive test and evidential breath test. The defence quite rightly pointed out these terms do not appear anywhere in the legislation. They appear to be used quite frequently though in place of breath screening test and breathalyser test respectively. While I acknowledge that these terms do not exist in the legislation we should not allow this fact to muddy the waters. Police often seem to have taken the two former terms into their parlance when talking about these sorts of matters. I concede that it would be probably more appropriate to refer to them correctly in a Court environment however that does not essentially change what we are talking about.

[18] The next issue was as to whether the breath screening device and the breath screening test had been properly gazetted. The Transport Amendment Act 2016, s 2 states that a "breath screening device means a device of a kind approved by the Commissioner by notice in the Gazette and in the Police General Instructions". S 2 also states that a "breath screening test means a test carried out by means of a breath screening device in a manner prescribed by the Commissioner by notice in the Gazette."

[19] The defence argue that there is no proof of either the breath screening device or the related test being correctly gazetted. Accordingly the defendant should not have been subjected to this test.

[20] The Crown argue that because the device used in the screening test was the same as that used in the breathalyser test, it did not need to be gazetted separately. The Crown claimed that it had been approved for use by the Police without any specific limitations to that use.

[21] I am not convinced that it needs to be gazetted separately. The Alcotest 6810 is a device that has been approved by two notices in the Gazette, neither of which, as the Crown pointed out, limits its use. I accept that its use is general.

[22] As for the breath screening test there was no dispute from the Crown that this had not been gazetted. The issue then would be whether this oversight – the fact that this test has not been gazetted – is sufficient to render the entire process as fundamentally flawed.

[23] Firstly, as I have said above, I accept the legitimacy of the breath screening device.

[24] Secondly, did the result of the breath screening test adversely affect or prejudice the result obtained in the later breathalyser test? The answer to that would be no.

[25] Thirdly, I have considered whether without the breath screening test would the Officers have asked Mr Schwander to accompany them to the station or not.

[26] Both Police Officers testify that the defendant's speed was a concern as he approached the checkpoint. Constable Tuavae testified that the defendant's van almost hit two young women who were already stopped there. I believe it would be reasonable to expect that even without the screening test Mr Schwander's driving would have been enough to convince the Officers to have him accompany them to the station for the evidential test.

[27] Therefore I do not accept that the breath screening test, in spite of having not been gazetted, has sufficiently breached the defendant's rights so as to overturn the entire process. Furthermore, the use of the screening test can be viewed as an attempt to have a more objective method of evaluating drivers than perhaps a series of questions or a simple observation of driving and helps avoid unnecessarily detaining drivers who are not over the limit.

[28] There were issues relating to the breathalyser printout. The defence raised a number of issues in relation to the defendant's breathalyser test printout.

[29] Firstly, there was an issue relating to the location of the test as indicated on that printout. The defendant was stopped at the main road opposite the BTIB building in Ruatonga. The breathalyser test was carried out at the Police station. It is unclear what location was required on the printout but most logically it is meant to be where the test took place. However the location on the printout is recorded as being the Main Road, BTIB. Sergeant Bishop admitted that this was a mistake.

[30] Secondly, there was also an issue over the time the printout was made. On the printout the time of the test is recorded as 0012 hours or 12 minutes past midnight. It was generally accepted that the defendant arrived at the checkpoint at around 1.00 am and he was processed at the station sometime after that. We know this from the times given for the 10 minute consideration for the blood test. These times therefore do not mesh.

[31] Sergeant Bishop conceded this too was an error and that times used on the checklist during the breathalyser test were correct and were taken from the laptop he was using at the Police station. Both of these anomalies are disappointing. The defence posed a question to Sergeant Bishop that because the times were at odds, perhaps the breathalyser test could also be wrong. Sergeant Bishop did not agree. I can see that these mistakes are disappointing and a greater effort should have been made to avoid these unnecessary inconsistencies.

[32] The defence has not convinced me however that these are anomalies are enough to extend my dissatisfaction to the quality of the actual breathalyser test itself. The error with regards to location should not have been made however it is possible to see how that error was made. Likewise, once the anomaly with the time was noticed the Officers took the time from their office laptop. I am satisfied therefore that the breathalyser result can stand.

[33] The final issue was with the requirement for a 20 minute waiting period before testing. Further submissions were sought by the Court on this issue at a sitting on 6th November 2018. The subsequent submissions were received in written form from both parties.

[34] During the course of the trial proper the defence submitted Exhibit E, a page from the instruction manual for the breathalyser device. Under the heading 'Requirements for the person being tested', the first requirement states in the imperative, "Maintain a waiting period of at least 20 minutes after drinking alcohol". The second line under the same heading reads, "Residual alcohol in the mouth can distort the measurement".

[35] In cross examination Sergeant Bishop stated that he was aware of this requirement however this requirement does not appear on the Police breathalyser checklist. In their submissions the Crown drew the Court's attention to s 28F of the Transport Act relating to evidence which states that it shall be conclusively presumed that the result of the analysis of a breath or blood specimen taken from the defendant is correct unless the contrary is proven.

[36] This is a valid point however the result is not what is in question. What is being questioned is the process that led to the obtaining of that result. The fact that a 20 minute waiting period is a requirement was not disputed. It was not discussed at length during the hearing however I cannot ignore the fact that it is a clear instruction in the manual itself which relates directly to the accuracy of the reading.

[37] The Crown stated in submission that had Mr Schwander taken the stand they could have established a timeline and possibly proven the 20 minute gap between his last drink and the evidential test. His decision not to take the stand was his prerogative and I will draw no conclusions from that decision. I therefore looked at the sequence of events and their timing.

[38] It was established during the hearing that the stop at which Mr Schwander was detained was set up a little after 12.30 am, and this was not disputed.

[39] An exact time for when Mr Schwander was stopped was never established, but was accepted as being at approximately 1.00 am. His breathalyser test was completed by at least 1.19 am which was the start time for his 10 minute period to consider an evidential blood test. It was at this point that the Police realised the time on the breathalyser machine itself was wrong and took the time off the office laptop. This is the first reliable timestamp in the entire process.

[40] Therefore if the instruction manual was to be followed Mr Schwander would need to have consumed his last drink before 1.00 am. As I have stated earlier there was no exact time established for when Mr Schwander was stopped. It would also have to be established whether that time synchronized with the laptop to give us a reliable timeline.

[41] It is not conceivable that Mr Schwander consumed a drink just after 1.00 am and was estopped very soon after that. The test would then not comply with the instruction manual.

[42] In summary there have been number of issues to resolve in this matter. I have already dismissed the appearance of an erroneous time on the breathalyser printout as being insufficient to endanger the result of that test. The wrong location was similarly dismissed as sufficient cause to endanger the result. I have also accepted the legitimacy of the breath screening test and its place in the overall breathalyser process.

[43] With regard to the 20 minute waiting period I cannot comfortably accept that the Prosecution has demonstrated that sufficient time had elapsed from Mr Schwander's last drink. There was no obligation placed on Mr Schwander to advise when he had his last drink. There was no allowance made for a stand down after he was stopped and there were no reference points from which we can extrapolate a stand down period. The waiting period is a requirement in the manual and I believe there was an onus on the Police to demonstrate that sufficient time had elapsed.

[44] If it had been accepted that he was stopped a short time after midnight and not tested until after 1.00 am that, for me, would suffice as proof. There can be no room for doubt as to whether the instructions for the breathalyser are being followed, and I believe in this instance sufficient doubt exists to make the result fragile.

[45] I therefore find the case against Mr Schwander not proven on this issue and therefore find him not guilty. Formally the matter is now dismissed.

John Whitta, JP