IN THE SUPREME COURT OF NEW ZEALAND SC 116/2009

MATTHEW JOHN BIRCHLER

Appellant

v

NEW ZEALAND POLICE

Respondent

Hearing:	11 August 2010
Coram:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	R M Lithgow and L A Scott for the Appellant J C Pike and A C Walker for the Respondent

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CRIMINAL APPEAL

MR LITHGOW QC:

Your Honour pleases, I appear with my learned friend, Ms Scott, for the appellant.

ELIAS CJ:

Yes, thank you, Mr Lithgow and Ms Scott.

MR PIKE:

If it please the Court, I appear with Ms Walker and the Crown Law Office for the respondent.

ELIAS CJ:

Thank you, Mr Pike, Ms Walker. Yes, Mr Lithgow. I'm not sure where you were going to start, Mr Lithgow, but if you're right in the principle – well, if you're right in the argument that this is not an evidence matter, section 108 doesn't bite, does it? So might it be sensible to start with that?

MR LITHGOW QC:

Whether it is or isn't an evidence matter?

ELIAS CJ:

Yes, and whether it's a statutory code or…

MR LITHGOW QC:

Well, if I have the Crown correctly – it's not the Crown – if I have the police correctly, they don't think it's got anything to do with the Bill of Rights Act 1688 or, if it has, they'd like that to –

ELIAS CJ:

Section 30.

MR LITHGOW QC:

– wait for another day. The Bill of Rights Act 1688, they seem to –

ELIAS CJ:

Yes.

MR LITHGOW QC:

– sort of kind of avoid that. But they accept –

ELIAS CJ:

Well, you do too, don't you?

MR LITHGOW QC:

Well, I believe, on the original case stated, that if they were right about what the original case stated was about, it should never have been allowed to be filed, because I opposed it, that the Judge would even sign it. And it's a section which is in our loose leafs as honoured in the breach. I'm not – in the end that's very interesting,

but it's Mr Birchler's interests, and the Crown appear to prefer or accept, if you like, the route that it must be an antecedent condition and it's better to deal with it that way than to recycle it as an evidence matter and put it through the, run the ruler of section 30 over it. If that is not correct then, in any – even by the time it's been through reasonable compliance and failed, the Crown appear to accept that it couldn't survive a section 30(a) ruling, because we're really talking about the same issues and the same public interest and the same weightings to be given to things.

BLANCHARD J:

But it couldn't be unreasonable compliance and then be validated under section 30, surely.

MR LITHGOW QC:

No, no, and that's what the Crown say, and I agree with that. So, leaping ahead, their basic proposition is that the case stated is all mucked up anyway, so it can't go anywhere. So, really, there's a lot of appropriate common ground, if the Court wish to look at that. I would like to look at 108, apparently it's got the mark of death on it from the criminal simplification, because there's going to be a lot of changes in that whole area, but the decisions which have allowed these kinds of appeals by the police in, particularly, drink drive matters, in my submission are just wrong, and they shouldn't carry on in the meantime. But the critical issue seems to be agreed, and whether the condition antecedent is to be determined beyond reasonable doubt or satisfied or, on balance of probabilities, isn't going to change the outcome of the case. Now, I don't know if that's helpful to any – or are you, wish to proceed?

BLANCHARD J:

Well, it would mean that the appeal isn't barred by section 108, because this is not only a matter of admissibility of evidence.

MR LITHGOW QC:

If that was correct.

BLANCHARD J:

Mmm, but that's what the appeal's about.

MR LITHGOW QC:

That's what it's become about.

TIPPING J:

Is not the issue here whether there was actual or reasonable compliance with the statutory provisions, antecedent to the taking of the blood?

MR LITHGOW QC:

Well, the Judge's proposition as a finding was with a total failure to…

TIPPING J:

Well, never mind the Judge. Is not the true issue simply whether there has been actual or reasonable compliance? If there has, the test result is binding, if there hasn't, isn't not.

MR LITHGOW QC:

Well, that is – because that's not stated in the case stated, that would require that the case stated be restated, because it's not a general appeal.

TIPPING J:

Well, that may well be so, Mr Lithgow, but I'm simply asking you whether you agree that ultimately – never mind the paperwork – that is the true issue in the case?

MR LITHGOW QC:

It can –

TIPPING J:

It may not be, but that's what I prima facie see as the true issue.

MR LITHGOW QC:

That would have been the simplest way to do it in the District Court.

TIPPING J:

Yes.

YOUNG J:

But not only the simplest, the correct way, the only way.

MR LITHGOW QC:

To having – having decided that there was a complete failure to recognise the fact that a breath screening was available, to then decide whether that was capable of reasonable compliance.

YOUNG J:

You put it, as Sir Robin Cook put it in *Police v Mangos* [1981] 1 NZLR 86 (CA), rather pejoratively, posed the question, but a simple approach for the Judge would have been to say, "Well, there was a breath screening test readily available, I now have to decide whether, in the context of the case as a whole, there was reasonable compliance. I must be satisfied of that only on the balance of probabilities, and the criminal standard is irrelevant, and I will now address that issue." And he may or may not have found in your favour, but he did go down the wrong path. It may not, probably doesn't matter now, because Mr Pike has thrown the towel in.

MR LITHGOW QC:

It may – there is a quirk to this hearing in that the loose leaf parts to the drink drive texts, part of the law of transport, was missing from the library, and the Judge looked at whatever the District Court Judge looks at, so was looking at different bits. There is one case I now see that is directly on point, if Your Honour is correct that it should have been dealt with purely and simply under reasonable compliance, and that is the case here of *Police v Gollop* (HC Wellington, CRI-2006-091-253, 16 April 2007, Miller J) a decision of Miller J, and I apologise for not finding it but, I suppose, also observe that –

ELIAS CJ:

Madam Registrar.

MR LITHGOW QC:

– Luke, Cunningham & Clere, who were the solicitors for that case, didn't give it to Justice Williams either, and that, starting at paragraph 22, is exactly on point as to what perhaps should have happened in the High Court.

BLANCHARD J:

What had happened in this case, can you give us the facts?

MR LITHGOW QC:

The type of breath testing machinery produced a printout which also showed whether it had been used as a breath screening test. That printout had been the subject of disclosure, et cetera, and had never been given and was probably now lost. The Judge determined that to be unfair, but there was an actual challenge to whether or not there'd ever been a breath screening test, and that was the second part of it and that starts at paragraph 22, as to whether or not reasonable compliance provisions even apply to a failure to do a breath screening test altogether, and that's what the Judge looks at, so that's very similar to this situation. And his position was, which is probably correct, was that of course theoretically sometimes it could, but it's such a complete failure that's it not tenable to imagine how, even though the Judge didn't do it in that way, it's impossible to see how –

TIPPING J:

But here, in this case, there was a screening test, but at the wrong location, it might be said.

MR LITHGOW QC:

Well, they – oh, in our one?

TIPPING J:

In the present case, yes, so this case is rather different from what I understand you to be telling us about *Gollop.*

MR LITHGOW QC:

Well, there is, the difficulty with that is that the prerequisite for the evidential breath test, is that there be a breath screening test under the Act and there is no power under the Act to have a breath, to start the whole process again.

TIPPING J:

You must be arguing implicitly that the breath screening test, active or passive, must be at the roadside and you can't take someone away somewhere else, unless and until you've gone through that test in that location?

MR LITHGOW QC:

Yes, because if you have to take them away, you forget about screening tests, you get straight onto evidential. It's in the nature of the failure of a breath screening test for various reasons, that you forget it.

TIPPING J:

And that is implicit, although not expressed in the scheme, the legislative scheme.

MR LITHGOW QC:

Well, it flows naturally, I think it's pretty explicit really. It's not put in those terms, but as you go through the options and you then see that that jumps to evidential breath test, you just cut out those other –

TIPPING J:

And the argument here, I would have thought, is simply whether getting the motorist to go with the constable has fallen outside the scope of reasonable compliance.

MR LITHGOW QC:

So the, avoiding the issue of the breath screening test at the roadside and getting them to go to the police station to do it all, was the reasonable compliance that you would look at.

TIPPING J:

Well, I was saying, your argument is that that goes beyond reasonable compliance, presumably. Mr Pike's argument presumably is that it doesn't and that is the fulcrum on which this case turns.

MR LITHGOW QC:

I had understood, for example, Justice Young hypothesising that the reasonable compliance would simply look at the failure of the, of the acknowledgement that there was, the test reasonably available and look at that, was reasonableness around there somewhere.

TIPPING J:

I don't think there's any material difference between Justice Young and me on this point.

YOUNG J:

It didn't, wouldn't have made, it may not have made much different to Mr Birchler whether the constable waited, possibly for some time, for a screening test to be provided from a central police station, or whether she went directly there. It may be that what she was doing would have been quicker and resulted in a lesser duration detention, although an ambulatory one, than the course that you suggest should have been taken. Now, all of that, I mean, I don't really have a view about it because the Judge hasn't expressed a view. It's not reflected in the case stated. Justice Joseph Williams hasn't addressed it and it's not on the table for us, other than as being the course that should have been taken in the District Court.

MR LITHGOW QC:

Well, the Crown have kind of raised it as if, as if that kind of has been misunderstood, but if we just perhaps spend a couple of minutes on this.

ELIAS CJ:

Well, do you, is your position that we shouldn't go there, because it isn't before us?

MR LITHGOW QC:

Well, you shouldn't go there, because they're all factual things which in its case is stated, but the Crown did go there and have kind of left the impression that it's a bit of a try on.

ELIAS CJ:

But we don't need to, we don't need to. You're making the point, are you not, that there is a different way of looking at the statutory scheme so that the reasonable compliance can't jump ahead to further steps. The reasonable compliance has to be in, has to focus on the step that was not undertaken, is that right?

MR LITHGOW QC:

Yes, yes.

BLANCHARD J:

Well, it's whether the omission of a step completely –

ELIAS CJ:

Yes, yes.

BLANCHARD J:

– can be reasonable compliance, or the argument that it can, I suppose, is because section 64(2) says, "Has not been strictly complied with, or has not been complied with at all," and it's whether those "or has not been complied with at all" can apply in a situation where a step of this consequence has been omitted completely.

MR LITHGOW QC:

Yes, the Act, the reasonable compliance section, clearly allows the consideration of things that haven't been done at all, that's what it says.

YOUNG J:

Here it was done, but done in the wrong place.

MR LITHGOW QC:

Well, we say no it wasn't done, because when you then move on to the ability to have a breath screening, an evidential breath test, this just, this persuading him to go the police station just isn't in there, that's not one of the ways in which you can ask a person to –

TIPPING J:

She purported to do the evidential at the police station didn't she?

MR LITHGOW QC:

She purported to start the whole thing again, a passive.

TIPPING J:

Yes.

MR LITHGOW QC:

Then a breath screening test. Then she requires him to go walk two paces, requires him to accompany over to the evidential breath test. So she, it's really a charade repeat of something which is just not anticipated in the Act.

TIPPING J:

But it's a function of place and time, as my brother Young says. The time might well have been identified. The place may be said to be irrelevant.

MR LITHGOW QC:

Yes, if he crashed into the police station.

TIPPING J:

Well now, Mr Lithgow...

MR LITHGOW QC:

But the accompaniment, the getting them to go from the roadside is what *Mangos* has made important and which the Crown accept is important.

TIPPING J:

I think you have a very good argument that there isn't reasonable compliance here, because the policy of this legislation is to have as much, or as little intrusion as possible at the start, and it's only once you are triggered by the evidential, that you should move from beside your car.

MR LITHGOW QC:

Yes.

TIPPING J:

That's the argument against reasonable compliance. The argument in its favour is that in this particular case, it made not much difference because it was a matter of either waiting or going.

MR LITHGOW QC:

Well, with these kinds of cases, I mean, they are always going to be argued on the basis that there was a blood sample there to be captured, else you wouldn't be having a case.

TIPPING J:

I, like other members of the Court, I'm a bit concerned about taking on this essentially factual or mixed fact and law, when there's absolutely no foundation for it in this Court. I mean this case went off the rails from the very start, continued off the rails until comparatively recently.

MR LITHGOW QC:

It started out with a simple challenge to the failure to provide a breath screening test at the scene. It was clear at the hearing that the police officer was very well versed in the Act and knew exactly what the issue was herself. For some reason the police prosecutor insisted on taking her on a meandering journey through all kinds of irrelevancy. But she knew what she was doing. I, perhaps wrongly, overstressing the Evidence Act, allowed her to make all kinds of submissions as part of her evidence as to what she thought about reasonably available. It was coming up to lunchtime, the prosecutor indicated, and he was a police officer, but had a law degree, but they had accepted that clearly a breath screen test was reasonably available. That's because the policewoman had indicated that she knew, even when she was driving to the scene, that they didn't have one. They were at the scene for about 45 minutes. It was a non-injury accident. They were just taking numbers and talking to people. There was no big drama. It was quite close to central Wellington and there would have been police cars roaming around. So, that part of it, that just sort of fell apart naturally.

Then there was, I think, lunchtime, the Judge went away and looked at some cases and started with the prosecutor discussing whether or not he'd gone voluntarily, which had come out of the blue. He hadn't, he hadn't given evidence at this stage. The whole thing was just sort of done as a, well that's had it, that's dead and away it went. Do you want a, do you want to read some decisions, no.

ELIAS CJ:

Why do we need this explanation really Mr Lithgow? The fact is that there wasn't a determination of the important matter.

MR LITHGOW QC:

Yes, I don't agree with the proposition that it miscarried from the beginning. It got out of sync when the police sought to, having told the Judge they didn't want a reasoned decision –

TIPPING J:

Well, look Mr Lithgow, I didn't mean the literal beginning, I meant from an early stage if you'd prefer that?

MR LITHGOW QC:

All right, well if the Court's prepared to indicate and often you don't, that you will be adopting the Crown's proposition that whatever else happens it won't be going back, then we could perhaps attempt to cover a number of aspects, for example whether the Court of Appeal are correct to suggest that these things should be done in the District Court by announcing a challenge to the admissibility of the blood certificate, and thereby having –

YOUNG J:

What case was that, the *Gallichan* [2009] NZCA 79 case?

MR LITHGOW QC:

Yes, having a voir dire.

YOUNG J:

But that was a Bill of Rights case, it wasn't an admissibility case.

MR LITHGOW QC:

Yes, but as Mr Pike has indicated in his submissions, he doesn't imagine that they're almost ever done that way and then in ordinary cases, absolutely no reason why that can't all be sorted out at the end of the police case as a matter of simple way of handling a summary case.

TIPPING J:

The Crown doesn't want your client retried. Surely all we need to do is simply say that what should've happened was such and such, but we don't go on and make the final determinative step.

MR LITHGOW QC:

Right. Was there anything –

TIPPING J:

I don't know, that's just a suggestion Mr Lithgow.

MR LITHGOW QC:

No well if that's what's going to happen I've obviously, my –

ELIAS CJ:

You're happy?

MR LITHGOW QC:

Well, it's the client's business, I think – I don't think these cases stated should be done, I think they should be corrected in the same way with *Stichting Lodestar,* you put an end to the nonsense about appeals being not really appeals by way of rehearing but other things. I would like the Court to say that this is not a process by which section 30 arguments are rehashed, and the words mean what they say.

ELIAS CJ:

But section 30 isn't reached.

MR LITHGOW QC:

Well, on the way that the Crown put it and the way that I put it on the case stated arguments, but on the way in which the case stated was permitted to be stated, over objection and over a series, a hearing on that objection, it still went to the –

ELIAS CJ:

But if we were to come to the view and express it, that the case stated was misconceived, that's really as far as we could go isn't it?

MR LITHGOW QC:

Well you could go further and say that *Police v Gray* (1991) 6 CRNZ 701 (HC) which it is, and –

ELIAS CJ:

But those circumstances aren't before us. Is that the Court of Appeal decision that – no that's *Gollop* is it?

TIPPING J:

No *Police v Gray* is Henry J.

ELIAS CJ:

Oh yes, yes, yes.

TIPPING J:

With what is said to have been a very narrow appeal in section 108, or favourable to the –

ELIAS CJ:

But our position here will be that section 108 had nothing to do with it.

MR LITHGOW QC:

Well that's fine because it's Mr Birchler's appeal.

YOUNG J:

Section 108 would apply, it does apply to general appeals doesn't it?

MR LITHGOW QC:

No. That's - only one Judge has ever suggested it did, but on the modern analysis of the Interpretation Act where you take meaning from the divisions of the Act et cetera, it clearly is in a part 4 of the Summary Proceedings Act that deals solely with case stated and part 5 – yes part 5 it –

ELIAS CJ:

It doesn't infect part 5.

MR LITHGOW QC:

No.

ELIAS CJ:

Really that's what you're saying isn't it?

MR LITHGOW QC:

One Judge has said it, but no one else has ever said that.

YOUNG J:

Who said it did?

ELIAS CJ:

Justice Henry.

YOUNG J:

No not Justice Henry, another, um –

TIPPING J:

I've never heard it suggested that it did Mr Lithgow, for what little that's worth.

BLANCHARD J:

Well we can rule Justice Tipping out as the guilty party.

TIPPING J:

Oh I hope so.

MR LITHGOW QC:

In *Grootjans v Patuawa* (1981) 4 CRNZ 474 (HC) in Dunedin, it was a closed – I think Casey J – yes I think it's that one, that's the only judgment that's suggested applies to general appeals. But what has happened is that by the mechanism of Henry J's decision as tidied up by Fisher J, even though he points to the obvious flaws, he makes it work better, the inherent flaws, the police believe they can state cases on any failed drink drive.

YOUNG J:

They are all in the same part, they're under different headings.

MR LITHGOW QC:

Not in the same part.

YOUNG J:

I thought they were all under part 4.

MR LITHGOW QC:

No part –

ELIAS CJ:

The Summary Proceedings Act.

MR LITHGOW QC:

I've got the latest printout of the Summary Proceedings Act and I don't know what it does on the screen, but part 3 starts at section 88 and goes up to 106F.

YOUNG J:

Yes.

MR LITHGOW QC:

And then part 4 deals with –

YOUNG J:

107.

MR LITHGOW QC:

Sorry 4 deals with 107 and then, but the subheading, sorry, you're right, the subheading is appeals on points of law only by way of case stated, and then you have a separate division that says, "General appeals."

YOUNG J:

So they're all in the same part but under different headings.

MR LITHGOW QC:

Yes, and I would say that the Interpretation Act assists in the proposition that that doesn't apply to general.

BLANCHARD J:

I haven't got it in front of me, but when I looked at it, it seemed to me pretty obvious that section 108 was intended to go with the immediately preceding section?

MR LITHGOW QC:

Yes.

TIPPING J:

And the history of it would strongly support the view that it applies only to points-of-law only appeals. Mixed appeals, it's all on.

MR LITHGOW QC:

Yes. Because it was around long before there were general appeals.

TIPPING J:

But of course the Crown couldn't bring a general appeal.

MR LITHGOW QC:

No.

TIPPING J:

So this was limited to a Crown appeal.

MR LITHGOW QC:

They still can't.

TIPPING J:

No, they can't.

YOUNG J:

When did the appeal by way of complete rehearing come into the summary process?

MR LITHGOW QC:

Mr Pike whispered to me '57, but I'll see if it's –

YOUNG J:

No, no, that's when it stopped.

MR LITHGOW QC:

Sorry, when did the –

YOUNG J:

I mean up until 1957 an appeal from a decision of a stipendiary magistrate on the facts was a complete rehearing, the evidence was called again.

MR LITHGOW QC:

Yes, and it's supposed to be again now.

YOUNG J:

I remember it well.

MR LITHGOW QC:

Thanks to *Stichting Lodestar*.

YOUNG J:

And it was in 1957 that the Summary Proceedings Act brought it back to a more conventional appeal by way of rehearing.

MR LITHGOW QC:

Well you're against your own Court now on that, because *Stichting Lodestar* says that rehearing means rehearing, it may be –

YOUNG J:

It doesn't mean the first – all the evidence is recalled though. Which is what –

TIPPING J:

Procedurally it started de novo. It didn't affect the mental attitude if you like, other than by implication.

MR LITHGOW QC:

So prior to '57 the witnesses all turned up at the High Court –

TIPPING J:

Yes.

MR LITHGOW QC:

Even if the Judge did not order a rehearing of the matter.

TIPPING J:

It was by statute a rehearing and that de novo sent.

MR LITHGOW QC:

Yes because we have – because one of the options under the current set-up is that the Judge, although it's supposed to be a rehearing, the Judge can order a rehearing and hear all the witnesses there, which seems a strange duplication, but solved

thankfully by *Stichting Lodestar* for our purposes. I mean the questions in this are Bill of Rights Act 1688, which has been avoided rightly or wrongly, it doesn't matter. There's the question of whether it is an evidential issue, and the Crown –

ELIAS CJ:

Sorry what provision of the 1688 Bill of Rights Act?

MR LITHGOW QC:

Paragraph 1.

YOUNG J:

No pretending, or dispensing – no dispensing power is it.

ELIAS CJ:

Oh right.

MR LITHGOW QC:

No person acting under Regal authority and this can dispense with the law, so when Henry J said it's outlived its use by date, that was none of his business and when Parliament continue to decline, say, to take the lead on that, it became less and less appropriate for that to inure. Now just for the sake of completeness, and to correct my own lack of proof reading, I have written the submissions in relation to Holland J's decision and I called it, "Barnett" but if you've read *Barnett* you'll see it doesn't – although it is about the topic, it doesn't really take it anywhere. The correct case and the one that was raised in the High Court, is –

ELIAS CJ:

What paragraph of your submissions?

BLANCHARD J:

22.

ELIAS CJ:

Thanks.

MR LITHGOW QC:

Sorry, it's the *Police v Marc Ellis,* which is another decision of Holland J where he actually goes into it in detail, and that's the case where he uses the expression, for the sake of comity, I'll go along with Justice Henry, even though there are inherent contradictions in all of this. So, it's Holland J in *Ellis* and Fisher J who have allowed that *Police v Gray* to gain legs, coupled with the refusal of the Court of Appeal to look at it in *R v Craven* (unreported, CA 77/05, 22 September 2005) on the difficult legal basis that it was a longstanding interpretation.

ELIAS CJ:

Where do you want to take us now?

MR LITHGOW QC:

Just one other thing, and that is that I had alighted upon the wording of this Court in *Aylwin v Police* [2009] 2 NZLR 1. This is my paragraph 88. Now, *Aylwin* is what I describe as aspirational in its attempt to, as many courts have attempted to do, but when it comes from the Supreme Court it's going to, it clearly has bitten and is reflected in the, loosely, that the Courts don't want unmeritorious defences. It's been said many times and in many countries, but in *Aylwin* they simply said at paragraph 6, "At a minimum, all that is required for proof is to establish first that the defendant underwent a breath screening test, having lawfully been required to do so," and secondly, "That the proportion of alcohol," et cetera.

Now, I've taken that literally, that that is correct and that that indicates that the provisions related to a breath screening test, because they are set out in the statute, are requirements. That's perfectly, that's different from worrying about what standard of proof et cetera, et cetera, but that that part of it, the core statutory regime, not breath test notices, not manual of instructions, not how, sort of Mastermind quiz on the traffic officer, police officer, as to how they did it all, but the fundamental that the breath screening test was undergone, having lawfully been required to do so, was not a mistake in *Aylwin*, but the correct statement of the law and –

BLANCHARD J:

It certainly wasn't a mistake. It was in there deliberately as I recall.

MR LITHGOW QC:

Well, I don't know how it was argued, but for the purpose of this case that must be right.

TIPPING J:

"According to law", it was designed to signal that there had to be either actual, reasonable compliance, amongst other things, -

MR LITHGOW QC:

Yes, and it's almost inherent as to whether it's reasonably available, even if you didn't have reasonable compliance, reasonably available has been used to in itself analyse all of that. I don't know if there's any other matter that?

ELIAS CJ:

No, that's fine, thank you Mr Lithgow. Mr Pike, is there anything that you want to be heard on?

MR PIKE:

Well, excuse me, I suppose really an apology for having pulled the rug out from under the questions that were really reserved for the Court.

ELIAS CJ:

Oh, I think we're grateful for the Crown for fronting up to what was clearly an error in the Lower Courts.

MR PIKE:

Yes the, no, with all respect the –

ELIAS CJ:

The police I should say.

MR PIKE:

– it could be suggested and if the Court has been put into a difficulty by having to render judgment in a matter in which there's no real cause, well possibly a radical suggestion it could – one issue could be to decide to reverse the leave on a Crown undertaking, it would have to be a Crown one this time, that we will stay the

prosecution, because it's still live in the High Court in a sense, we would stay it obviously, so there would be no suggestion of it going on as we've said. Or it –

ELIAS CJ:

But is there not though a point of some importance that section, that the provisions of the Act must be complied with and that it isn't an evidential matter only?

MR PIKE:

Yes, I would submit that the Court could and, respectfully, usefully make that point and the point is one that can be simplified. I would suggest by –

ELIAS CJ:

You could dictate something to us.

MR PIKE:

– by an indication that in any case where section 64(2) can be applied to the facts, that is, that the matter in issue involves a question of compliance with the statutory provisions in section 64(2), then 64(2) alone is the path to the answer in the trial Court.

I think we've always, with respect, gone down that track and it has to be said that there have been one or two judgments in the High Court which indicated well, despite that, now we've got the Evidence Act and we've formalised section 30 and we've got a statutory balancing test, it's become attractive to look at the question of saying that what is really happening is that when a traffic officer, or the police rather, proffer a certificate of result, it's evidence which may be admitted or excluded according to admissibility rules, not any other factor, it's really an issue, is it admissible. Well, with respect we don't agree.

YOUNG J:

But sometimes that is the right question.

MR PIKE:

It is the right question Sir, with, if it's collateral, if it's an issue of the Bill of Rights Act. I mean, the two cases are classically, Justice Tipping's paragraph 15 of *Livingston v R* [2001] NZLR 167 (CA), the paragraph 15 there sets out exactly what the process is, it's never been doubted and that is, of course, that the matters of a sufficient test,

manner and form, are part of the pre-conditions. It doesn't matter if you call them an actus reus or analyse them to death, the fact of the matter is they are a pre-condition of conviction, not of admissibility, because the statute still retains in 64(2), the section of core 64 is headed "Defences", 62(2) has always been read as to say there is no defence of, there is no defence that there has been inadequate compliance, unless that compliance has been so poor that it is not reasonable compliance, in which case by natural implication, it follows that there is a defence and has always been a defence recognised by Parliament.

TIPPING J:

Would it not be helpful Mr Pike for it to say simply this, that unless it is a true admissibility issue, in the sense that we've just been discussing.

MR PIKE:

Yes.

TIPPING J:

The question is not balancing under section 30, but whether there's been reasonable compliance in terms of section 64(2).

MR PIKE:

Yes.

BLANCHARD J:

And if there hasn't been reasonable compliance, the pre-condition is not met –

MR PIKE:

Yes.

BLANCHARD J:

– and that's an end of it.

MR PIKE:

That's a defence and Parliament recognises it.

BLANCHARD J:

You can never get to section 30?

MR PIKE:

No, it's the end of the trial.

TIPPING J:

And if it is reasonable compliance, you don't, similarly, you don't get to section 30?

MR PIKE:

No.

TIPPING J:

And I would have thought it would be pretty helpful to say that.

MR PIKE:

Yes.

TIPPING J:

As simply and as clearly as possible, because it seems that, it's odd, but it seems that there's still some sort of mystique in this area, which one had hoped that various decisions had resolved, but they obviously haven't.

MR PIKE:

No.

ELIAS CJ:

Well, is it perhaps not sufficiently appreciating that the offence is, is inextricably linked with the process prescribed by Parliament, it doesn't sort of –

MR PIKE:

Yes, the English have –

ELIAS CJ:

– separately exist?

MR PIKE:

– done away with it and we have retained it. Parliament here still retains the approach that there is a defence, it recognises a defence to a charge of excess breath or blood alcohol that there was no sufficient compliance with the statute, ie the

ingredients, which are proved by the prosecution on the balance of probabilities, cannot be made out because there has been not only error but an immitigable error in the getting of the sample, and the integrity of the Act is undermined. The Courts will simply say that 64(2) is not satisfied, if the integrity of the Act has been so undermined by what was done that the result shouldn't, that it shouldn't stand. It's a defence, we don't go on to balance anything, we simply dismiss the information.

McGRATH J:

Mr Pike, sometimes the language is used in terms of extent, as to, that reasonable compliance can't go beyond a certain extent. But it's not really extent, is it? It's a question of statutory purpose, and reasonable compliance not be available if the statutory purpose is run into, in effect.

MR PIKE:

No, certainly it's not an extent issue, Sir, I agree, it's a matter of judgment in the end –

McGRATH J:

Yes.

MR PIKE:

– for the trial Judge to sit back and look at the situation. Take the facts of this case. Obviously, the Court has indicated, well, the police officer took the appellant away from the scene. There's no power to do that in New Zealand, to cart them to a police station, so almost ex facie there's a breach of the Act, there's no power to do it. The question really would be, though, it would be approached on the basis, is the integrity of the Act so undermined that this couldn't stand? Now, I don't want to submit one way or the other, but the approach should be simply, I would submit, that you start with a proposition that the person at the side of the road was not detained any longer than they might have been, that we can see that as a reasonable inference –

McGRATH J:

There's one way of – sorry, Mr Pike – but is one way of looking at this to say that the judicial power to excuse error for reasonable compliance is not available if that's contrary to the purpose of the provisions of the Act?

MR PIKE:

If it's certainly contrary to the purpose of the Act – and I understand Justice Tipping's point of course that we do say that you cannot be taken from the roadside, I mean, you go into custody, it's called a, it's a statutory detention, required to accompany. You cannot be plucked from the side of the road and required to accompany unless you've undergone a proper – with however that might be managed – a proper breath screening process. Here, this has happened, there hasn't been one. The only argument would be that the integrity of the Act is not undermined, because plainly on the record the appellant was three sheets in the wind and there's no suggestion at all that this person would not have been taken to the police station to be breathalysed, though you can't say that, with –

TIPPING J:

That's rather –

MR PIKE:

– very many other persons you can't say that. But here he's smashed into a number of cars, he's staggering around on the footpath. We would say, we would indicate, as I've indicated in the factum, he could have been lawfully arrested and taken back. So you've got to weigh all these things, –

McGRATH J:

We've got all of that, yes, but –

MR PIKE:

– you'd weigh all these things, say, "Is the integrity of the Act undermined by the police constable possibly getting it wrong in his getting consent, to take him to the police station?" Is that such an undermining of the integrity, the value being freedom from arbitrary interference, without a proper breath test? In this case, there'd be the argument – I don't want to say what the answer is – the argument would be, if the Court accepted he was so obviously drunk that he would undoubtedly be taken to a breath-testing place under detention, does it matter? That's –

YOUNG J:

It's not that different from *Mangos.*

MR PIKE:

No, indeed, it's not.

YOUNG J:

Where reasonable compliance was applied.

MR PIKE:

In that sense it's not. It's not –

YOUNG J:

Oh, no, readily available was, it was held that it wasn't readily available.

MR PIKE:

Yes, in their case certainly, Sir Robin Cooke in that case made it clear that *Mangos* was not to be over-read. His Honour, with respect, made it clear that if the police flagrantly and persistently decided, "We're not going to carry breath screening devices and so on," this Court's not going to stand for that. But he did go so far as to say, of course, that a careless omission on a case to actually carry one wouldn't necessarily mean that there was a lack –

McGRATH J:

Yes, he had a liberal approach –

MR PIKE:

He did.

McGRATH J:

– but there's nothing to indicate that he wanted this approach to allow reasonable compliance to interfere with the purpose of the Act. And what concerns me a bit –

MR PIKE:

No.

McGRATH J:

– about your reference to the circumstances of the case and the circumstances of the particular driver is, it does seem to me, that we may be licensing a degree of subjective evaluation by the police, which would enable them to bypass the

requirements in respect of the roadside breath test, bypass the statutory threshold. Simply, you may say, “This is a very strong case,” but we have to think about what the precedent effect of our decision would be.

MR PIKE:

Well, certainly, but the Court wasn’t drawn to actually give an opinion as to the rectitude of the behaviour. I mean, the hapless –

ELIAS CJ:

Reasonableness.

MR PIKE:

– police constable thought she had this person’s consent, she may well have done. The District Court took the view that, “It’s all rather murky and it should have been under s69(1)(d) and I’m not satisfied by a narrow margin that you had true consent and so on,” but I mean, as I say, these are matters which a Court can safely be left to adjudicate, with respect. It would have been open to the Court to go the other way and to say, “Look, we think there was consent,” and that protects the one element of this case or this procedure which is important or the greatest importance, and that is the liberty of the subject not to be taken into custody for a breath test when they haven't properly been evaluated as likely over 400, that's the value to be preserved. In this case that value wasn’t at risk. In other cases, where the value is at risk, no, I’d never suggest that, with respect, police officers could make a call and say, “Oh, near enough is good enough,” certainly not, Sir. But here we really just want to make a black line distinction which can be drawn between the use of 64(2), which we say, we regretfully say now, we should have done in the –

ELIAS CJ:

District Court.

MR PIKE:

– District Court.

ELIAS CJ:

Yes.

MR PIKE:

We should have done that in the District Court, we should have picked it up as the case floated through the process for this case stated, we didn't. But the police certainly are comfortable on instructions. They say that they don't want to be burdening the CT scan with section 30 arguments, they don't want their officers to be thinking about, "Oh, section 30 of the Evidence Act, well, this'll get in, that's all right," they don't want them doing that. What they do want them to do is compliance, compliance, compliance, "Here's our sheets which we had in *Aylwin*, page after page, get it right." So, oddly enough, the police stand here and say, "Please don't."

BLANCHARD J:

Where that gets to then is that you accept that the questions in the case stated were the wrong questions –

MR PIKE:

I do.

BLANCHARD J:

– and that when the Judge answered them, "Yes," he gave the wrong answer anyway?

MR PIKE:

Yes.

YOUNG J:

We just allow the appeal, don't we?

MR PIKE:

Yes.

YOUNG J:

I mean, there is an issue. I mean, the case should not have been sent back to the District Court on the basis that it was sent back.

MR PIKE:

No.

YOUNG J:

And you're not seeking any other basis, so –

MR PIKE:

No.

YOUNG J:

– end of story.

TIPPING J:

So, we quash the order for remission.

MR PIKE:

Yes.

ELIAS CJ:

Yes. Yes, Mr Lithgow.

MR LITHGOW QC:

There's been a number of propositions canvassed as to what the Court could usefully do and quintessentially that's up to you, but can I just invite you to consider repeating paragraph 6 of *Aylwin* –

BLANCHARD J:

I can't hear you when you turn away like that.

MR LITHGOW QC:

I'm sorry. I invite you to consider repeating paragraph 6 of *Aylwin*, and I also invite you to consider identifying that, in an ordinary course, having a voir dire in the District Court would be unnecessary to the purposes of what's required, that it can be done according to the traditional manner although observing, obviously, that's been held many times, that if necessary a voir dire can be held in a Judge-alone District Court summary, purely summary, hearing, because, with respect, I think that's got legs out of *Gallichan* in a way that it shouldn't have for all drink drives because of the propositions that it's all admissibility issues.

YOUNG J:

But they don't say that in the *Gallichan,* do they?

MR LITHGOW QC:

I think they do say.

YOUNG J:

Because they're only dealing with a Bill of Rights challenge.

MR LITHGOW QC:

The only issue is whether or not – the only issue is whether or not the certificate, which is of blood or the breath printout, is admissible, you have to announce in advance that you're challenging that and if you want to challenge it, then you have a voir dire, and you have to tell in advance everybody what the problem is and you do it that way. As Mr Pike observes, and I suggest is correct, the existing situation is, should be – should remain. The police run through their case and unless it's a special situation, you argue all this at the end of the police case and then you decide what to do.

YOUNG J:

But you haven't really engaged with the point I'm making. The Court of Appeal judgment is about a true admissibility challenge, where this one isn't.

ELIAS CJ:

Which case were you referring to?

YOUNG J:

Gallichan, I'm not sure how you pronounce it, *Gallichan – Gallichan*.

BLANCHARD J:

What were the facts in that case?

YOUNG J:

It's a Bill of Rights issue. It's whether the form was given, complied.

ELIAS CJ:

It's about free legal advice, is that the one?

YOUNG J:

Yes, and the constable administered the standard roadside test and had not brought home to him his right to a lawyer at no cost. So it was a straight admissibility issue wasn't it?

MR LITHGOW QC:

Well that's the application. Whether or not he'd received rights which other previous Court of Appeal decisions had considered appropriate. The – from paragraph 13, they deal with the fact that Mr Mohammad is wrong you can't have voir dires in summary hearings. Admissibility issue can be challenged, and then, "15. We suspect many defence counsel share this misunderstanding. The police officer read his evidence, contained evidence about breath screening tests et cetera."

TIPPING J:

I'm very surprised to hear that this idea of voir dire in the District Court summary jurisdiction is starting to become very much more extensive, so it's seems to be suggested, than is normal, because frankly I would've thought it's extremely rare that you'd have to have a voir dire in the District Court with the Judge sitting alone, extremely rare.

MR LITHGOW QC:

Well if we look at paragraph 18 is really where I think the Court overstated and I think perhaps I can hear Justice Gendall talking, "The defence tactic, the wrong defence tactic was adopted. A submission that no case to answer was doomed once the analyst certificate had come into evidence."

TIPPING J:

Where are we?

MR LITHGOW QC:

18.

TIPPING J:

18.

MR LITHGOW QC:

"Mr Gallichan did not challenge the accuracy of the certificate's contents with the consequence that once it was admitted, far from there being no case to answer, there was no defence. Mr Mohammad should have been challenging the admissibility, although of course it would've been too late to do that after the prosecution case had closed." And yet that is the normal way in which it's been done for many, many –

YOUNG J:

But that's not – that's the ambush approach though of course, which, for myself, I'm not very enthusiastic about.

MR LITHGOW QC:

Well there's two things being talked about. One is the "don't ask anything and then say it wasn't done", but what, with respect, they're really talking about here is the practice that you –

YOUNG J:

I think it's the voice of Justice Chambers, not Justice Gendall here actually, but –

ELIAS CJ:

It comes through loud and clear.

YOUNG J:

What he's saying is a good practice is that the whole issue is out on the table, is dealt with properly on a fully informed basis, rather than on the wing, or on the fly.

MR LITHGOW QC:

Well what he says must be wrong that it's too late to make a challenge when the case is closed, because if the Judge thought that there was an injustice you can easily reopen the case. It should, as Mr Pike has identified as the existing position, be perfectly correct to thrash that all out, once the police have said everything they want to say. If you haven't put it as the Evidence Act now requires, if you're expecting to use the old omission ambush system, then you're of luck, that's fine, but that's got nothing to do with what is said here, that there's some kind of one-way ratchet eel's teeth that you can't get away from, and that, if that's a

misunderstanding, I suggest it's quite a widespread one because of the way in which paragraph 18 is written.

TIPPING J:

You're focussing on the words, "The Judge could then have conducted a voir dire at which the constable and Mr Gallichan presumably would have given evidence and been cross-examined."

MR LITHGOW QC:

Yes, but it starts earlier than that by saying you can't challenge –

TIPPING J:

Yes, I understand that point, but we're talking now about voir dire. And then you're saying that that gives the suggestion implicitly that that's what the proper practice would've been.

MR LITHGOW QC:

Well he goes on in the next sentence to say that, "Voir dire would have been restricted to the point in issue, namely the circumstances in which the constable had given Mr Gallichan his rights, and Mr Gallichan's response on each occasion, the Judge would have given his ruling as to admissibility of the analyst certificate." So that is a classic voir dire way of doing it.

YOUNG J:

Where I agree with you, is they were wrong to say that the admissibility of the dock on the certificate couldn't be challenged after the prosecution case was closed, plainly it can. But the corollary of that, I would think, is the case has just been reopened on the anti-ambush approach and given that that's going to happen, the sensible course of action is to put cards on the table, have a hearing where the issue is properly dealt with rather than, as I said on the fly.

MR LITHGOW QC:

Well with respect, everything else about the way in which the Court is moving is to say that that is inherently necessary now, because of the putting the case. You just can't –

ELIAS CJ:

But we don't need to go into that in this case.

MR LITHGOW QC:

Well it would be –

ELIAS CJ:

I know you've been asked about it, but there's no basis for us to embark upon this, because this is a section 30 inquiry that's being discussed here.

MR LITHGOW QC:

Well whether it is or it isn't, I just invite the Court to say there's nothing the matter with the existing way conducting the case, and that challenges can be made at the end of the police case in the ordinary course of the case.

TIPPING J:

It's not conventional to refer to voir dires where there's no jury.

MR LITHGOW QC:

Well it has been since *Kidwell*.

TIPPING J:

Has it grown up as a process now?

ELIAS CJ:

It has grown up.

TIPPING J:

Has it.

ELIAS CJ:

I tend to agree that it's not helpful.

TIPPING J:

No.

YOUNG J:

Unless the defendant wants to give evidence, and in the course of that admits guilt.

TIPPING J:

Yes. Well never mind. This all arose because you said you wanted to say something about voir dires in the summary jurisdiction, Mr Lithgow.

MR LITHGOW QC:

Well because of what's been said in the Court of Appeal, which is with respect, wrong and disruptive, so I invite you to just clarify that.

TIPPING J:

Well you can do it but I mean your point is there's no need to do it.

MR LITHGOW QC:

They're suggesting that is the way, the way to do it. Now there may be cases in which that's the only way to do it fairly. In the vast run of cases the ordinary method is perfectly adequate for the purpose. Because there's only a Judge, a police officer and two lawyers there, or a lawyer and a police prosecutor.

TIPPING J:

Does it make much – does it matter much?

MR LITHGOW QC:

Well the voir dire business is very clumsy and it's repetitious.

ELIAS CJ:

In a case where it squarely arises, maybe this Court will have something to say about it, but I can't see why it would be proper for us to say anything in this case.

MR LITHGOW QC:

Because you get a rare insight into something that's gone wrong and you can very simply identify that in a related case, and it would be functionally useful. Whereas at the moment, *Gallichan* is the idea, and you've got to do, go through all this stuff, and if we're concerned about time and judicial resources, it would be easily fixed by simply pointing out the shortcomings of that as the only approach and that wouldn't do any harm to process I don't think. Is there any other matter?

ELIAS CJ:

No, thank you Mr Lithgow. Thank you counsel. For the reasons to be given later, the appeal is allowed. The order made in the High Court remitting the matter for consideration in the District Court is quashed.

COURT ADJOURNS:11.00 AM