

KEVIN FRANCIS JAMES CASEY

v

THE QUEEN

Court: Elias CJ, McGrath and Wilson JJ

Counsel: B J Hart for Applicant  
A Powell for Crown

Judgment: 5 December 2008

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JUDGMENT OF THE COURT

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**The application for leave to appeal is dismissed.**

REASONS

[1] The applicant has been charged in the District Court with the offence of driving with excess breath alcohol. He has been committed for trial and has elected to be tried by a jury. The present application concerns a challenge to a pre-trial ruling that the result of his evidential breath test was admissible. The Court of Appeal gave the applicant leave to appeal against the ruling but, in a judgment delivered on 1 September 2008, dismissed the applicant's appeal. He applies for leave to appeal to this Court.

[2] The applicant was driving a motor vehicle and was stopped by a police officer and told to wait while another police officer came to the scene. He arrived

four to six minutes after the applicant had been stopped and administered a passive breath test, followed by a breath screening test. The applicant's proposed grounds of appeal are, first, that s 114 of the Road Transport Act requires that the officer who exercises the power to carry out breath tests must be the officer who stopped the person concerned. Secondly, the applicant challenges the lawfulness of the direction that he should await the arrival of the second police officer, saying that he was unlawfully detained. The third proposed ground of appeal related to the method of breath screening. The applicant takes a point in relation to a stipulated step in the process which it is said was omitted by the second officer based on an omission in his evidence at depositions.

[3] The first two arguments are related and are based on a strained interpretation of the empowering legislation. On the first point the Court of Appeal decided that the legislation allowed an officer to exercise relevant powers following a request to stop and wait made by a different officer. We are satisfied this conclusion, based on a purposive interpretation, was indisputably correct so that it is not in the interests of justice to allow an appeal on the ground.

[4] It is also our view that it is not arguable that there was an unlawful detention. The second ground is accordingly also without merit and raises no question that in the interests of justice requires the Court to hear on appeal.

[5] On the third ground, the Court of Appeal pointed out the officer had made a general statement that a breath screening test was conducted in accordance with the stipulated procedure and that counsel had not challenged the statement in cross-examination. We do not consider that these circumstances raise a question which is appropriately addressed in a second appeal to this Court. In that context it does not give rise to a question which it is in the interests of justice for this Court to decide.

[6] The application for leave to appeal is accordingly dismissed.