IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2008
[2008] NZSC 113

	BETWEEN	ALISDAIR BRUCE AYLWIN Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing: 2 December 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: F P Hogan for Appellant
J C Pike and A M Powell for Respondent

Judgment: 19 December 2008

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Wilson J)

Introduction

[1] Mr Aylwin, an off-duty police officer, failed a breath screening test after being stopped while driving. He refused to accompany the Police Officers who had stopped him to a Police Station to complete an evidential breath test or a blood test, and was forcibly required to do so. At the Police Station, Mr Aylwin failed an evidential breath test. He was advised of his right to request a blood test but did not do so.

[2] Mr Aylwin was charged under s 59(1)(b) of the Land Transport Act 1998 with failing to accompany an enforcement officer when required to do so and under s 56(1) of the Act with driving with excess breath alcohol. The convoluted passage of the proceedings through the District Court and the High Court is set out in the judgment of the Court of Appeal,[1] and need not be repeated.

[3] The issues before the Court of Appeal were whether, in relation to both offences, it was necessary for the Crown to prove compliance with the procedure specified in the relevant *Gazette* Notice. The Court of Appeal held that it was not; "it is not fatal if the prosecution fails to give evidence of the manner in which the breath screening and evidential breath tests were administered".[2] The Court held that it is sufficient for the prosecution to lead evidence that a test was administered and a result obtained. Section 64(4) and (5) of the Act, which apply to the excess breath alcohol charge but not to that of failing to accompany, then preclude any defence on the basis of error, and the right to elect a blood test operates to protect any dissatisfied motorists who consider that there has been an error. The Court of Appeal thus upheld Mr Aylwin's conviction on both charges. He subsequently obtained leave to appeal to this Court.

The failing to accompany charge

[4] The provisions of the Land Transport Act relevant to this charge are:

> **59 Failure or refusal to remain at specified place or to accompany enforcement officer**
>
> (1) A person commits an offence if the person—
>
> …
>
> (b) Fails or refuses to accompany without delay an enforcement officer to a place when required to do so under section 69;
>
> …

---

1 *R v Aylwin* [2008] NZCA 154 (Glazebrook, Hammond and O'Regan JJ). This was however a summary prosecution; the Crown has never been a party to it. The correct respondent is therefore the New Zealand Police.

2 At para [66].

> **69 Who must undergo evidential breath test**
>
> (1) An enforcement officer may require a person to accompany an enforcement officer to a place where it is likely that the person can undergo an evidential breath test or a blood test (or both) when required to do so by the officer, if—
>
> (a) The person has undergone a breath screening test under section 68 and it appears to the officer that the test indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath;
>
> …
>
> **68 Who must undergo breath screening test**
>
> (1) An enforcement officer may require any of the following persons to undergo a breath screening test without delay.
>
> (a) A driver of, or a person attempting to drive, a motor vehicle on a road.
>
> …

Section 2 of the Act defines a "breath screening test" as "a test carried out by means of a breath screening device in a manner prescribed in respect of that device by the Minister of Police, by notice in the *Gazette*". The notice currently in force is the Transport (Breath Tests) Notice (No 2) 1989.[3] It specifies in paragraph 6A the manner of carrying out preliminary or roadside breath screening tests by means of an *Alcotech AR 1005* device. Three steps are set out. First,[4] the enforcement officer shall attach a mouthpiece to the device. Secondly,[5] the manner in which the test is to be taken is specified. Thirdly,[6] the possible results are set out, including a provision that, if the display panel shows "FAIL GENERAL", "the result shall be taken to indicate that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath".[7]

[5] On the facts, Mr Aylwin plainly committed an offence under s 59(1)(b) if he came within s 69(1)(a), because he refused to accompany the Police Officers to the Police Station. Mr Hogan, for the appellant, submitted that in order to establish the

---

3 SR 1989/389.
4 Para (a).
5 Para (b).
6 Para (c).
7 Sub-para (iii).

offence the Police must prove that the "breath screening test" required by s 69(1)(a) was administered in compliance with the relevant Notice. Mr Hogan relied on the definition of "breath screening test" in s 2, and on the proposition that the legislature must have contemplated evidence of the manner of compliance when it provided in s 64(2) that it is no defence that a provision forming part of ss 68 to 75A and 77 has not been complied with, provided that there has been "reasonable compliance".

[6] We do not accept that submission. In order to establish that Mr Aylwin did come within s 69(1)(a), the prosecution was required to establish first that Mr Aylwin underwent a breath screening test, having been lawfully required to do so, and secondly that it appeared to the officer administering the test that the proportion of alcohol in his breath exceeded 400 micrograms of alcohol per litre of breath. In the absence of challenge by cross-examination or evidence to the contrary, the first of these elements could simply be established by the officer saying that a breath screening test was undertaken by a driver. Where Police Officers in their evidence refer to a term which is defined in the Act, such as a "breath screening test", they should be taken, in the absence of cross-examination about what they meant, to have been referring to the expression as defined, thereby incorporating the elements of the definition. Thus they can be taken to be referring to a test carried out by means of a prescribed device in a prescribed manner. All that proof of the second element required, in the absence of challenge, was a simple statement that it appeared to the officer that the test indicated that the proportion of alcohol in Mr Aylwin's breath exceeded 400 micrograms of alcohol per litre of breath, or words to similar effect.

[7] The prosecution evidence established both those elements and was not challenged in any material respect, although there was extensive cross-examination on other issues and evidence was called for the defence. One of the Police Officers who stopped Mr Aylwin told the District Court that he assembled an *Alcotech AR1005* breath testing device, "placed the assembled device in front of the driver [and] he blew a sufficient sample and the result was 'failed general'".[8] That was obviously a reference to paragraph 6A(c)(iii) of the Notice.[9]

---

8 Notes of Evidence, p 4.

9 See para [4] above.

[8] On the failing to accompany charge the defence had every right to test in cross-examination, and to call evidence, on the questions of whether the test had been conducted in compliance with the detailed requirements of paragraph 6A(a) and (b) of the Notice,[10] and as to the result of the test. It was not, however, open to the defence to refrain from any challenge to evidence which was sufficient to establish the requirements of s 69(1)(a), and then to submit that the evidence did not meet these requirements because of the absence of further detail which was not sought in cross-examination.

The excess breath alcohol charge

[9] In relation to the excess breath alcohol charge, Mr Hogan again argued that "manner compliance" evidence is an essential element of proof of the offence. He drew a distinction between the substantive and procedural elements of the offence, and submitted that a procedure-based defence is still available under the Act.

[10] Section 56(1) makes it an offence to drive a motor vehicle on a road while the proportion of alcohol in the driver's breath, as ascertained by an evidential breath test carried out under s 69, exceeds 400 micrograms of alcohol per litre of breath. Section 64(4) then provides:

> (4) It is no defence to proceedings for an offence against this Act in respect of the proportion of alcohol in a person's breath –
>
> (a) That there was or may have been an error in the result of the breath screening test or evidential breath test; or
>
> (b) That the occurrence or likely occurrence of any such error did not entitle or empower a person to request or require an evidential breath test.

[11] The legislative intent is clear: the subsection precludes any challenge to the result of a breath screening test or an evidential breath test, and any claim that an evidential breath test should not have been undertaken because of an error in a prior test. It is irrelevant whether the error was a machine error or an operator error. The right of election to have a blood test and the right to be advised of that right,

---

[10] See para [4] above.

conferred by s 70A, must be regarded as providing effective protection against the consequences of an error in a breath screening test or an evidential breath test.

[12] There is nothing novel about this interpretation of s 64(4), which applies equally to the corresponding provision in s 64(5) relating to blood alcohol charges. In their joint judgment in *Falesiva v Ministry of Transport* addressing a materially identical provision in the Transport Act 1962, Cooke P and Hillyer J observed:[11]

> In our opinion s 58(5) should be held to apply to errors or possible errors in the results of preceding evidential breath tests, howsoever occurring. The cause of the error or possible error is immaterial. For example the officer may have made a mistake in endeavouring to follow the steps in the Notice or may even have inadvertently omitted a step. Or the device may have malfunctioned. These examples are not meant to be exhaustive. The legislature has evidently acted on the view that a blood test, taken by a registered medical practitioner with the result scientifically analysed, is the motorist's ultimate protection and a reliable basis for a conviction. If the procedure has reached that stage it does not matter that there may have been some defect in the earlier administration of the evidential breath test possibly vitiating the result of that test. One has to bear in mind also that from the outset there has been the added safeguard of a breath-screening test.
>
> This means that in s 58(5) the words "the evidential breath test" are not limited to such tests carried out correctly or substantially correctly. Naturally the definition of evidential breath test in the interpretation section, s 57A, contemplates a test carried out by a duly approved evidential breath-testing device and in a manner prescribed; but, like other statutory definitions, that one is expressed to apply "unless the context otherwise requires". We think that the context of s 58(5) in the Act and the evident purpose of that subsection do require a wider interpretation there. Section 58(5) should be held to refer to evidential breath tests carried out in fact and in good faith, even though to a degree which may be considerable they fail to comply with the correct procedure.

To like effect, McMullin J stated:[12]

> The phrase "error in the result of the evidential breath test" is a wide one. The error is not limited to one which has occurred in a particular way. An error in the result of an evidential breath test may occur in a number of ways; for instance from a defect in the testing device, or a failure on the part of the enforcement officer to observe the proper procedure or the making of a wrong reading during the taking of the prescribed steps. It may result from a mechanical failure or a human failure. If any one of these defects, mistakes or failures results in an error in the result of the evidential breath test then that will be an error falling within s 58(5). The wording of the subsection is wide enough to encompass all these matters.

---

11 [1987] 1 NZLR 275 at p 279. Section 64(5) was then s 58(5), in substantially the same form.

12 At p 282.

[13] Contrary to Mr Hogan's argument, this reading of s 64(4) and (5) is in no way inconsistent with the "reasonable compliance" provision in s 64(2). Subsections (4) and (5) apply to any alleged error in a breath screening test or an evidential breath test in prosecutions for breath alcohol and blood alcohol charges. They do not apply in relation to other offences. Conversely, subs (2) applies to any issue in breath alcohol and blood alcohol prosecutions which is unrelated to possible error and also applies to all other offences pertaining to the sections referred to in that subsection, such as failing to accompany. If necessary, the Police could in the present proceedings have invoked s 64(2) on the failing to accompany charge.

[14] It follows that, in order to establish the charge under s 56(1) against Mr Aylwin, the prosecution was required to establish only:

(a) The fact that a breath screening test was conducted;

(b) The fact that an evidential breath test was conducted;

(c) The results of these tests; and

(d) That Mr Aylwin was advised of his right to have a blood test.

We have already referred[13] to the evidence of the fact and the result of the breath screening test which, in terms of s 69(1)(a),[14] provided the justification for conducting an evidential breath test. It has never been suggested that the Police acted in bad faith in relation to either of these procedures. Further evidence was given, and not challenged, that Mr Aylwin had at the Police Station undertaken an evidential breath test on an *Intoxyliser 5000* device which was assembled in accordance with the Notice and for which was produced a certificate of compliance under s 75A of the Act.[15] Mr Aylwin provided a sufficient sample and the analysis returned a result of 578 micrograms of alcohol per litre of breath.[16] The appellant was advised of his right to request a blood test but did not do so.[17] The prosecution

---

13 At para [7] above.
14 Set out at para [4] above.
15 Notes of Evidence, p 10.
16 Notes of Evidence, p 10.
17 Notes of Evidence, p 11.

proved all that it was required to prove: the fact and the result of the breath screening test and the evidential breath test, and advice of the right to a blood test.

Result

[15] The appeal is dismissed.

[16] As a consequence, the case is remitted to the District Court for entry of a conviction on both charges and sentencing.

Comment

[17] Every driver of a motor vehicle on the roads of this country should by now be aware that driving after consuming more than a small amount of alcohol is dangerous, illegal and socially unacceptable. The great majority of drivers comply with their obligations in this respect. A small minority do not. Parliament has legislated to ensure that these drivers do not escape responsibility through technical and unmeritorious defences. The Courts must give full effect to that clear Parliamentary indication.

Solicitors:
Crown Law, Wellington