IN THE SUPREME COURT OF NEW ZEALAND

SC 116/09
[2010] NZSC 109

MATTHEW JOHN BIRCHLER

v

NEW ZEALAND POLICE

Hearing:	11 August 2010
Court:	Elias CJ, Blanchard, Tipping, McGrath and William Young JJ
Counsel:	R M Lithgow QC and L A Scott for Appellant J C Pike and A C Walker for New Zealand Police
Judgment:	11 August 2010
Reasons:	30 August 2010

JUDGMENT OF THE COURT

The appeal is allowed and the order made by the High Court remitting the case for further consideration in the District Court at Wellington is set aside.

REASONS

(Given by Blanchard J)

Introduction

[1] The District Court at Wellington dismissed a charge against Mr Birchler of driving with excess blood alcohol. The police appealed by way of case stated under

s 107 of the Summary Proceedings Act 1957. The High Court allowed the appeal and remitted the case for further consideration in the District Court. This Court gave leave to Mr Birchler to appeal directly against the High Court's decision. Mr Pike, appearing for the police, signalled in his submissions that the police were no longer seeking to have the matter sent back to the District Court. At the end of the hearing we allowed Mr Birchler's appeal and quashed the order of the High Court. We said that we would give our reasons later. We now do so.

[2] A vehicle driven by Mr Birchler had an accident in Tinakori Road in central Wellington on 24 September 2007. He was convicted of careless driving in respect of that incident. But he also faced a charge of driving with excess blood alcohol under s 56 of the Land Transport Act 1998 and the problems which have emerged relate to that prosecution, which arose from the same event.

The Land Transport Act provisions

[3] Before describing what occurred it is convenient to outline the relevant provisions in Part 6 of the Land Transport Act. The Act prescribes a number of steps which normally must be taken before an evidential blood test is given to a driver. They begin with a breath screening test, which is almost always administered at the roadside. Under s 68 an "enforcement officer", including a sworn member of the police, may require, inter alia, the driver of a vehicle involved in an accident to undergo a breath screening test "without delay".[1] In four circumstances s 69 authorises such an officer to require the driver to accompany the officer to a place where it is likely that the driver can undergo an evidential breath test or a blood test (or both). The first and commonest of these circumstances is where the driver has undergone a breath screening test under s 68 and it appears to the officer that the test indicates that the proportion of alcohol in the driver's breath exceeds 400

[1] Section 68(1). A test using a passive breath-testing device (held by the officer near the driver's mouth) may also be required by the officer: s 68(4). The use or non-use of a passive device does not itself affect the validity of a breath screening test: s 68(5).

micrograms of alcohol per litre of breath.[2] A requirement to accompany can also be made where the driver could be required to undergo a breath screening test but cannot be tested because either a breath screening device is "not readily available" or for any reason a breath screening test cannot then be carried out, and there is good cause to suspect that the driver has consumed "drink".[3]

[4] Under s 69(4), if a driver has accompanied an officer to a place of the kind described in s 68, he or she may be required to undergo without delay an evidential breath test (whether or not there has already been a breath screening test). But of course there must first have been a lawfully given requirement to accompany. A driver must accompany the officer to a place when required to do so and can be arrested without warrant if he or she does not comply with a lawful requirement.[4]

[5] If the evidential breath test is failed there is then a procedure for the driver to elect to take a blood test in substitution for it.[5]

[6] Lastly, mention should be made of s 64(2):

> It is no defence to proceedings for an offence that a provision forming part of sections 68 to 75A, and 77 has not been strictly complied with or has not been complied with at all, provided there has been reasonable compliance with such of those provisions as apply.

The facts

[7] With that background we can turn to the facts. Right from the outset this case was dogged by mistakes. The police officer who came to the accident scene and who dealt with Mr Birchler was Constable Thompson. She

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2 Section 69(1)(a).

3 Section 69(1)(d). "Drink" is defined in s 2 as alcoholic drink. The other circumstances allowing a requirement to accompany are first where the driver appears to be younger than 20 and the breath screening test indicates some alcohol in the driver's breath, and, secondly, where the driver fails or refuses to undergo a breath screening test without delay after being required to do so under s 68: s 69(1)(b) and (c).

4 Section 69(5) and (6).

5 Sections 70A and 72.

observed that he smelt of alcohol and was unsteady on his feet. But she had forgotten to bring with her any breath screening device. She accepted in evidence that she could have radioed to have a device brought to the scene from the Wellington Central Police Station, which was only a relatively short distance away. Instead she took Mr Birchler to the police station, where he successively failed a passive breath screening test, a breath screening test, an evidential breath test and a blood test. Curiously, after the breath screening test the constable formally required Mr Birchler to accompany her to the police station at which they were already present.

The District Court hearing

[8] The focus of attention at the defended hearing in the District Court[6] came to be the circumstances in which Mr Birchler and the constable went from Tinakori Road to the police station. Judge Broadmore held that because a breath screening device was readily available to be brought to the scene, the constable had no power to require Mr Birchler to accompany her under s 69(1)(d). Although the constable had said in her evidence that Mr Birchler was detained by her and that she had therefore advised him of his rights under the New Zealand Bill of Rights Act 1990, she also claimed that he had voluntarily come with her to the police station. The District Court Judge understandably found that this was not so; that the police had not demonstrated to the standard of beyond reasonable doubt that Mr Birchler accompanied the constable voluntarily. The Judge therefore dismissed the charge.

[9] On the application of the police, the Judge stated a case to the High Court under s 107 of the Summary Proceedings Act 1957 on the following questions of law:[7]

> (a) Whether I should have made a determination as to whether the evidence obtained at the police station was, on the balance of probabilities, improperly obtained for the purposes of s 30 of the Evidence Act 2006; and

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6 *Police v Birchle*r DC Wellington CRI-2007-085-007784, 27 August 2008.
7 *Police v Birchler* DC Wellington CRI-2007-085-007784, 31 March 2009.

(b) Therefore whether I was bound to have undertaken the balancing process envisaged in s 30(2)(b) and (3) of the Evidence Act 2006 to determine the admissibility of that evidence.

The Judge did this over the objection of Mr Lithgow QC, appearing for Mr Birchler, who drew attention to s 108 of the Summary Proceedings Act:

> **108 No appeal on ground of improper admission or rejection of evidence**
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> No determination shall be appealed against by reason only of the improper admission or rejection of evidence.

The High Court judgment

[10] Unfortunately, the role of s 64(2) (reasonable compliance) in the scheme of Part 6 of the Land Transport Act was not addressed either in the District Court or when the case stated appeal was heard by Joseph Williams J in the High Court.[8] The argument and the judgment concentrated on whether s 108 barred the appeal and whether, if it did not, the District Court Judge should have considered the admissibility of the blood test evidence under s 30 of the Evidence Act 2006. Joseph Williams J concluded that s 108 did not present an obstacle to the appeal because, in his view, the real issue was "whether the preliminary step of effecting a lawful breath screening test in terms of s 69(1) of the Land Transport Act is an element of the offence of driving with excess blood alcohol or whether the lawfulness of the breath screening test is an ancillary procedural safeguard but not an element of the offence". If the former, he said, the lawfulness of what occurred must be proved beyond a reasonable doubt. If the latter, proof of the legality of the breath screening test was required only on the balance of probabilities and the evidence obtained after an unlawful test might still be admitted under the balancing test in s 30.[9]

[11] Joseph Williams J referred to the opinion of the Court of Appeal in *R v Mangos*[10] that, if such a question was raised by a defendant with an evidential

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8 *Police v Birchler* HC Wellington CRI-2009-485-83, 25 November 2009.
9 At [28].
10 *R v Mangos* [1981] 1 NZLR 86 (CA).

foundation, it was for the prosecution to prove that no breath screening device was readily available in terms of the Act and that this unavailability was for proper reasons under the Act. The standard to be met by the prosecution had been said by the Court of Appeal in that case to be one beyond a reasonable doubt. That had been the approach adopted at first instance in the present case. However, as the Judge said, the Court of Appeal in *R v Livingston*[11] did not follow the decision in *Mangos*. It had held that any procedural steps required to be fulfilled, up to and including an evidential breath test under s 69, were not ultimate ingredients of the offence. Rather, they were matters of "an incidental or qualifying kind", akin to questions of admissibility. The standard of proof for these "procedural issues" was the balance of probabilities, the onus being on the prosecution.

[12] The Judge referred also to the decision of this Court in *Aylwin v Police*.[12] He said that, in accordance with that case, the prosecution must establish on a blood alcohol charge that:

(a) A breath screening test has been conducted.

(b) An evidential breath test has been conducted.

(c) A blood test was elected.

(d) The result was higher than the statutory maximum.

In the present case, the Judge said, all of those elements were proved against Mr Birchler. The question then was whether the requirement of good faith which this Court had implied in *Aylwin* was intended to exclude procedural improprieties such as unlawful detention during the course of evidence collection. While there had been at least a reasonable doubt about whether Mr Birchler's detention at the Wellington Police Station was voluntary, there was no evidence or argument suggesting that Constable Thompson had detained Mr Birchler in bad faith.

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11 *R v Livingston* [2001] 1 NZLR 167 (CA).

12 *Aylwin v Police* [2008] NZSC 113, [2009] 2 NZLR 1.

[13] The Judge took particular note of a passage in *Aylwin* which suggested to him that unlawfulness alone might in some circumstances be sufficient to render the breath screening test element unproved. This Court had said:[13]

> 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. (Emphasis added)

[14] Joseph Williams J took the view, however, that, as a consequence of the decision in *Aylwin* (although s 30 of the Evidence Act was not addressed in that case), procedural legality and propriety ("as originally conceptualised by the Court of Appeal in *Livingston*") in breath and blood alcohol cases now fell to be dealt with pursuant to s 30. Illegality alone in the testing process was not enough to render that element of a blood or breath alcohol offence unproven.[14]

[15] The Judge therefore gave an affirmative answer to both of the questions on the case stated and remitted the matter back to the District Court for further consideration in accordance with the view he had expressed.

Discussion

[16] This Court gave leave for a direct appeal because it then appeared that, following its decision refusing leave on the interpretation of s 108 in *Craven v R*,[15] the Court of Appeal might again decline leave in the present case. On closer examination, however, it became apparent that s 108 is simply not engaged in this case. It would not have presented a barrier to an appeal by the police if the case stated had been appropriately framed.

[17] We say this because a failure to comply with s 69(1) means that a prescribed pre-condition for requiring a person to accompany an officer in order to undergo an evidential breath test has not been met. There has not been compliance with s 69.

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13 At [6].
14 At [46].
15 *Craven v R* CA 77/05, 22 September 2005.

Such non-compliance will provide a defence to a breath or blood alcohol charge under s 56 unless, in terms of s 64(2), there has been "reasonable compliance."[16] There can be reasonable compliance where there has not been "strict compliance" and even, in some circumstances, where the section in question (here s 69) "has not been complied with at all". The short point is that, if what has occurred does not pass muster as strict or reasonable compliance with s 69, there was no lawful basis for the breath screening test and what followed thereafter. The statutory scheme provides in s 64(2) for its own limited dispensation from the very specific requirements of Part 6 and it would be quite inconsistent with s 64(2) if, notwithstanding a finding of a lack of reasonable compliance, and therefore of the existence of a defence, the Court could nevertheless proceed as if there had been simply a question of admissibility of the breath or blood test evidence obtained following the breath screening test, and have resort to s 30 of the Evidence Act.

[18] In qualifying what it said in *Aylwin* in the passage to which Joseph Williams J referred, set out in [13] above, this Court recognised that, in order to justify a decision to require a driver to undergo an evidential breath test, the prior breath screening test must have been lawfully required in terms of s 68. In the later passage at [14] of *Aylwin* setting out what the prosecution was required to establish to prove the charge under s 56 it was assumed that any necessary pre-requisites for requesting the breath screening and evidential breath tests had existed because there had been strict compliance or reasonable compliance with ss 68 and 69. No such matter was in issue in *Aylwin* where the argument unsuccessfully raised for the appellant related to the manner in which the testing was conducted, rather than whether a pre-requisite step had been followed.

[19] What has occurred in the present case is that those framing the case stated have confused two things. The first is proof of compliance with a necessary step in the statutorily prescribed process for obtaining an evidential test, where s 64(2) may dispense with the need for strict compliance in favour of reasonable compliance, thus removing a defence which might otherwise exist. The second is a question of admissibility of evidence to which s 30 may apply. This case involves only the

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16 See [6] above.

former. Therefore s 30 could not apply, as it could do in a case like *R v Gallichan*[17] where the issue was not about compliance with the Land Transport Act but about the adequacy of a police officer's explanation to a driver of the right to receive legal advice under s 23(1)(b) of the New Zealand Bill of Rights Act.

Final comments

[20] An appeal by way of case stated under s 107 may be brought on a question of law only. Matters of fact are for determination in the District Court. Therefore, if this matter was being remitted for further consideration, it would not have been appropriate for us to express any view on whether there may have been reasonable compliance with s 69 in this case. Nor should we do so when, as we have already indicated, the police understandably did not seek to have the matter sent back to the District Court, so that the prosecution is now at an end.

[21] Before leaving the case we do however advert to something which was drawn to our attention by counsel and which appears in the Court of Appeal's decision in *Gallichan* at [18]. It is the dictum that a challenge to admissibility of evidence is made too late if made only after the prosecution case has closed. We were told this dictum has been causing concern and it seems to us to be wrong. It is enough to say that in our view the judge is entitled, indeed obliged, to determine a question of admissibility even if it is raised after the prosecution case is closed. If necessary the judge may hear further evidence bearing on that point.

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[17] *R v Gallichan* [2009] NZCA 79.