IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA175/2020
[2021] NZCA 91

BETWEEN	MANINDER SINGH Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	12 February 2021
Court:	Kós P, French and Gilbert JJ
Counsel:	A J Haskett, Z E Reid and M J Mellin for Appellant C A Brook for Respondent
Judgment:	25 March 2021 at 9 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Kós P)

[1] At 11.50 pm on Tuesday 7 August 2018 police officers found the appellant, Mr Maninder Singh, asleep at the wheel of his van on Gadsby Road, South Auckland. The van was stationary, parked at an oblique angle across both kerb and carriageway, on a broken yellow line, in neutral, with its engine running. The officers removed the key from the ignition. Mr Singh smelt of alcohol, his eyes were glazed, his speech was slurred and he lapsed in and out of a stupor.

[2] The constable conducted a breath test on Mr Singh, which indicated a breath alcohol level exceeding 400 mcg of alcohol per litre of breath. The constable then took Mr Singh to Manukau Police Station for an evidential breath test (EBT), which showed a result of 986 mcg of alcohol per litre of breath — almost four times the legal limit.

[3] Mr Singh was subsequently convicted on one charge of driving with excess breath alcohol by Judge DJ Harvey in the District Court at Manukau.[1] He appealed both his conviction and the refusal to grant a discharge without conviction to the High Court. There were two stated grounds of appeal: first, that the constable lacked proper grounds to require Mr Singh to undergo an EBT, and secondly that Mr Singh should have been discharged without conviction. On 3 March 2020, Katz J dismissed the appeal.[2]

[4] Mr Singh then applied for leave to appeal to this Court. The grounds advanced were materially identical to those advanced before the High Court. The application for leave was decided on the papers. This Court declined leave on the two grounds presented.[3]

[5] Leave was however granted on a third basis, not sought by the appellant. Between Mr Singh filing his leave application and the application being decided, the Court granted the Solicitor-General leave to refer the issue of whether the wording in the procedure sheet used by police after administering an EBT (the Block J wording) complied with ss 77(3) and (3A) of the Land Transport Act 1998 (the Act).[4] That wording seemingly had been used in Mr Singh's case. Some District Court decisions had held the wording to be non-compliant, meaning EBT results were inadmissible in evidence.[5] Accordingly, and to preserve Mr Singh's position, this Court noted:[6]

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1 *New Zealand Police v Singh* [2019] NZDC 10147.
2 *Singh v New Zealand Police* [2020] NZHC 368.
3 *Singh v R* [2020] NZCA 411 [Leave judgment].
4 *Re Solicitor-General* [2020] NZCA 330.
5 Leave judgment, above n 3, at [18], citing as examples *New Zealand Police v Stewart* [2020] NZDC 11392; *New Zealand Police v Taylor* [2020] NZDC 12166; and *New Zealand Police v Koliandr* [2019] NZDC 11473.
6 Leave judgment, above n 3, at [22].

> If the approach taken in the District Court is upheld in this Court, there would likely be a miscarriage of justice in Mr Singh's case, assuming that the advice given was consistent with the Procedure Sheet. Accordingly, we consider that it is appropriate to grant Mr Singh leave to bring a second appeal in regard to this issue.

[6] After leave was granted on that limited basis in September 2020, this Court delivered its judgment in *Re Solicitor-General's Reference (No 1) of 2020* in November 2020.[7] That decision held the Block J wording conveyed the sense and effect of the warning required by s 77(3A)(a), and was to that extent compliant with the statutory requirements.[8]

Scope of leave granted

[7] Before us, in written and then oral submissions, Mr Haskett attempted a somewhat athletic, two-part argument. On the one hand, he said, the procedure sheet used by the constable was not produced in evidence. It followed the police had not proved the contentious Block J wording had been directed to Mr Singh at all, and the charges should be dismissed on that basis. On the other hand, if the evidence sufficed to show the constable had used the Block J wording, that was neither strictly nor reasonably compliant with the requirements of s 77, and the EBT was inadmissible against Mr Singh.

[8] Leave was granted in September 2020 against the possibility that *Re Solicitor-General's Reference* might find the Block J wording non-compliant. It follows the appellant's first argument: (1) was not raised in the District Court; (2) was not raised in the High Court; (3) was not raised in the application for leave; (4) was not the subject of leave granted; and (5) was not the subject of any proper application for extended leave (for which a Crown application to adduce further evidence from the police might have been entertained). In any event, the argument is difficult to make with any cogency in the face of the constable's evidence at trial. As we made clear at the hearing, we will not entertain it.

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7 *Re Solicitor-General's Reference (No 1 of 2020)* [2020] NZCA 563.

8 At [35]. It also held that the wording did not strictly comply with s 77(3A)(b). As no cases involving that provision were before the Court (involving drivers under 20 years of age, and an EBT not exceeding 150 mcg of alcohol per litre of breath), the issue of whether the Block J wording was reasonably compliant in such a case, under s 64(2) of the Act, was reserved: at [47].

[9] That left the appellant with his second alternative argument. Shorn of any ingratiating embellishments, it is nothing more nor less than an argument that this Court's decision in *Re Solicitor-General's Reference* is *per incuriam.* That is to say, very wrong indeed.

[10] It may be doubted that argument too is within the leave this Court granted in September 2020. The leave judgment was premised on protecting Mr Singh's position, on the basis he had received the Block J wording and advice (contrary to argument one), in the event this Court then held in *Re Solicitor-General's Reference* that the wording was non-compliant with the Act and the EBTs, in consequence, were inadmissible. That premise proved unfounded in the outcome. The Crown did not however take this point. We will therefore assess the merits of the *per incuriam* argument. Before doing so, however, we need to deal with the application made to adduce fresh evidence on appeal

Fresh evidence on appeal?

[11] Mr Haskett sought to adduce evidence of the history of the police drafts of the Block J wording, in its various permutations. He asked us to receive background materials that the police had given in disclosure. For the reasons given in *Re Solicitor-General's Reference* — when the Crown made a similar, unsuccessful application — we decline the application to adduce further evidence.[9] It has no relevance to the essential question of whether the words used comply with the requirements of the Act. Why they were used is quite beside the point.

Is *Re Solicitor-General's Reference per incuriam*?

[12] There are three aspects to this. First, the threshold to establish that a recent decision of this Court is *per incuriam.* Secondly, what *Re Solicitor-General's Reference* actually held (that is, what its ratio decidendi is). Thirdly, whether that ratio is so demonstrably wrong as to meet the threshold in the present case.

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9 *Re Solicitor-General's Reference (No 1 of 2020)*, above n 7, at [28].

The per incuriam *threshold*

[13] In principle the doctrine of precedent (or stare decisis) requires this Court to follow its own prior decisions. But, as with most principles, there are recognised exceptions. There are four primary exceptions. First, the Court is not bound to follow its prior decision where it conflicts with another such decision. Secondly, it is not bound to do so where the decision conflicts with a decision of a superior court. Thirdly, it is not bound to follow its prior decision if it concludes that decision was given *per incuriam.* Those three exceptions were identified in 1944 by Lord Greene MR in *Young v Bristol Aeroplane Co Ltd*,[10] and they remain true today.

[14] In New Zealand a fourth, innominate exception exists, in part because this Court has never wholly embraced the classification in *Young v Bristol Aeroplane Co Ltd*. That was apparent when the question came before the Court three years later in *Re Rayner*.[11] The fourth exception permits departure in circumstances not covered by the first three. But in practical terms it is a confined enlargement of the third exception: it permits departure from a previous decision that does not meet the more limited criteria for condemnation as *per incuriam.* This Court has resisted detailing the circumstances in which this exception applies, but has said in *R v Chilton* that its approach "will be cautious because of the need for certainty and stability in the law".[12] Moreover, as Cooke P observed in *Dahya v Dahya*:[13]

> Yet it could not be right for this Court to overrule a prior decision of its own, even when sitting on a later occasion with five Judges, merely on the ground that on a finely balanced point of statutory construction the later Bench preferred a different view. Some more cogent reason must be necessary to justify departure from such degree of certainty as the doctrine of stare decisis achieves.

[15] In *Dahya* the Court noted a number of considerations relevant to whether it should revisit a previous decision. They included whether there has been any fundamental general change of circumstance since the prior decision, whether contrary decisions have since been delivered by persuasive jurisdictions overseas, the number of judges that sat on the previous decision compared to the number sitting on the

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10 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA) at 725–726 and 729–730.
11 *Re Rayner* [1948] NZLR 455 (CA).
12 *R v Chilton* [2006] 2 NZLR 341 (CA) at [83].
13 *Dahya v Dahya* [1991] 2 NZLR 150 (CA) at 155–156.

present case, whether the previous decision had been decided by a majority, the length of time the earlier decision has stood, and the nature of the issue the case is concerned with.[14] The primacy of individual justice in criminal cases means a more flexible approach may be taken in that context.[15]

[16] It is not suggested this broader, essentially evolutionary fourth exception is engaged in this case. The indicia in *Dahya* are not relied upon. Rather, it is said that *Re Solicitor-General's Reference,* a very recent decision of the Permanent Court, is simply wrong. That engages the third, *per incuriam* exception, which now calls for a little exposition. Although the expression "*per incuriam*" defies definition, the best known examples are where a relevant statute, rule or particularly important precedent have been overlooked (and which, if taken into account, demand a different outcome).[16] There is a clear analogy here with one of the three circumstances in which a criminal decision may be recalled — where "counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance".[17]

[17] The essential point we need to make is this: more is required here than just an argument that the prior decision is wrong. To be *per incuriam* it must be wrong by reason of a fatal and fundamental omission. If so, the decision may be departed from by this Court. If not, it may only be departed from if it falls into the fourth, innominate or evolutionary category, which was not advanced here. Reversal otherwise must occur in the Supreme Court.

The ratio decidendi of Re Solicitor-General's Reference

[18] Our prior decision holds as follows: despite the Block J wording not literally conforming to the statutory language in ss 77(3) and 77(3A)(a), it nonetheless

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14 At 156–157 per Cooke P; and at 168 per Hardie Boys J.
15 *R v Chilton*, above n 12, at [103]; and *Moses v R* [2020] NZCA 296 at [44].
16 See, for example, *Young v Bristol Aeroplane Co Ltd*, above n 10, at 729; and GW Paton "Decisions Per Incuriam" (1950) 4(1) Res Judicatae 7 at 8.
17 *Uhrle v R* [2020] NZSC 62 at [22], citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

complies with those provisions because it conveys their sense and effect.[18] As we put it:[19]

> … it follows … that a degree of appreciation is available to the person exercising the statutory duty. Verbatim recitation of the statutory wording is not necessarily required for the law enforcement process itself to remain lawful.

We did however hold that the wording was non-compliant in the case of the warning required by s 77(3A)(b) in other cases involving youth motorists.[20]

[19] The ratio of the decision therefore concerns the formal compliance of wording used by police officers with the requirement in s 77 to give a warning in particular terms before an EBT result is admissible in evidence against a motorist. It does not, as the appellant's argument sought to suggest, preclude an argument that the motorist did not in fact understand his rights (either under s 23 of the New Zealand Bill of Rights Act 1990 or s 77 of the present Act).[21] As Ms Brook acknowledged on the Crown's behalf, the Court's reasoning in the decision "is not inconsistent with the Police taking extra steps to ensure an individual driver's comprehension if there are reasons to doubt she or he has understood the advice given".

Is the per incuriam threshold met here?

[20] Mr Haskett advanced 12 reasons why our previous decision was in error. A number of these were repetitive. The essential arguments were that s 77(3A)(a) requires advice of the specified consequence (that is, of a "conviction"); that the decision perpetuates an outdated objective approach, inconsistent with *Scown v Police* (a submission we have rejected in [19]); that the decision transfers a duty to engage in legal reasoning onto motorists (and that they may not reason in the manner suggested in the decision); and that the decision diverges from a 2003 decision of this Court in *Police v Tolich.*[22]

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18 *Re Solicitor-General's Reference (No 1 of 2020)*, above n 7, at [35]–[41]. In finding so, this Court followed *Boyd v Auckland City Council* [1980] 1 NZLR 337 (CA); *Barr v Ministry of Transport* [1983] NZLR 720 (CA); *Sherry v Ministry of Transport* CA99/84, 28 September 1984; and *Suluy v Ministry of Transport* [1986] 2 NZLR 380 (CA).

19 At [37].

20 At [42]–[43].

21 *Scown v Police* [2015] NZHC 106 at [22].

22 *Police v Tolich* (2003) 20 CRNZ 150 (CA).

[21] There were a number of other lesser arguments, but they all suffer from the same vice as the primary arguments. That is, they are all arguments that our prior decision is wrong, but none of them meet the threshold for, and thereby engage, either the third (*per incuriam*) or fourth (innominate) exceptions to the principle that this Court will follow its own decisions. In these circumstances, reversal, if it is to occur, must be a matter for the Supreme Court.[23]

[22] We pause to address the argument about *Police v Tolich*. Arguably it engages the first exception noted at [13]. We do not consider that authority assists the appellant. *Tolich* was one of a number of cases arising from a failure by the police after a 2001 statutory amendment to advise motorists that without a blood test, the EBT result could be "conclusive" evidence leading to a conviction. Instead the standard advice continued to be that the EBT could be "sufficient" evidence. In the High Court the motorist's appeal against conviction was allowed.[24] The prosecution's successful appeal in this Court confined itself to an argument that non-compliance with the statutory wording was excused by reasonable compliance under s 64(2) of the Act.[25] We address that provision at [46]–[48] of *Re Solicitor-General's Reference*. Three things may be noted. First, the linguistic divergence in that case arguably was more substantial than in this case. Secondly, and perhaps for that reason, neither *Boyd v Auckland City Council* nor *Barr v Ministry of Transport* were referred to or relied upon by the appellant in *Tolich.* Thirdly, where (as here) the statute requires a warning, but not explicitly in an exact form, once the true sense and effect of the requirement is conveyed, actual compliance occurs. There is no need to divert to the backstop statutory provision excusing reasonable (in place of actual) compliance. That very point was made abundantly clear by this Court in both *Boyd* and *Barr*.[26]

[23] Finally, we think it worth restating here the passage with which the Supreme Court ends its judgment in *Aylwin v Police*:[27]

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23 See [17] above.
24 *Tolich v Police* HC Auckland A175/02, 10 December 2002.
25 *Police v Tolich*, above n 22, at [15]–[16].
26 *Boyd v Auckland City Council,* above n 18, at 341–343 per Richmond P; and *Barr v Ministry of* Transport, above n 18, at 722 per Woodhouse P.
27 *Aylwin v Police* [2008] NZSC 113, [2009] 2 NZLR 1, at [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.

Result

[24] The application to adduce further evidence is declined.

[25] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent