Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

11 August 2023

MEDIA RELEASE

CHEYMAN LEE MITCHELL v NEW ZEALAND POLICE

(SC 116/2021) [2023] NZSC 104

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

At 2.47 am on 19 September 2019, Mr Mitchell was pulled over by the police on Brougham Street, Christchurch. An evidential breath alcohol test showed a sample of his breath contained 649 micrograms of alcohol per litre of breath.

Procedural history

On 3 November 2019, Mr Mitchell was charged under ss 32(1)(b) and 56(1) of the Land Transport Act 1998. The s 32(1)(b) charge was that he drove a motor vehicle on a road with breath containing alcohol while subject to a zero alcohol licence. The s 56(1) charge was that he drove a motor vehicle on a road with a breath alcohol level exceeding 400 micrograms of alcohol per litre of breath.

Mr Mitchell attempted to plead guilty to both charges. The District Court Judge however invited him to enter a guilty plea to only one of the charges. A conviction was entered on the s 56(1) charge and a special plea of "previous conviction" was entered on the remaining s 32(1)(b) charge, pursuant to s 46(1)(b) of the Criminal Procedure Act 2011. Section 46 provides that if a plea of "previous conviction" is entered, the court must dismiss the charge if satisfied that the defendant has been convicted of (a) "the same offence as the offence currently charged, arising from the same facts" or (b) "any other offence arising from those facts". It is (b) that was in issue in this appeal. Section 26(2) of the New Zealand Bill of Rights Act 1990 was also relevant, providing that: "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."

On 10 February 2020, a different District Court Judge held that the plea of "previous conviction" applied to the s 32(1)(b) charge. The two offences—ss 32(1)(b) and s 56(1)—shared a common punishable act, that is "the defendant driving on a road having alcohol in his system and having drunk alcohol before driving". The s 32(1)(b) charge was later dismissed and Mr Mitchell was sentenced on the s 56(1) conviction.

The Police were granted leave to appeal in the High Court, which allowed the appeal, concluding that the Judge erred in finding that the plea of "previous conviction" applied to the s 32(1)(b) charge. The two offences did not arise from "the same facts" as required for a special plea.

Mr Mitchell obtained leave to appeal to the Court of Appeal but his appeal was dismissed. That Court held the fact the two offences shared some common facts did not engage the special plea in s 46(1)(b), and dual convictions under ss 32(1)(b) and 56(1) remained permissible and appropriate.

The appeal

Leave to appeal to the Supreme Court was granted on the question of whether the Court of Appeal was correct to dismiss the appeal. The issue before the Supreme Court was whether, having been convicted of the s 56(1) charge, s 46(1)(b) precluded Mr Mitchell's conviction on the s 32(1)(b) charge.

Mr Mitchell submitted the "the same facts" rendered him liable under both charges—driving with breath containing 649 micrograms of alcohol per litre of breath. The Police submitted that the presence of distinguishing, additional elements in ss 32(1)(b) and 56(1) necessarily meant that different offences, which could not arise from the same facts, were in play.

Result

The Supreme Court unanimously dismissed the appeal. Winkelmann CJ, O'Regan, Williams and Kós JJ held that the Court's task was to construe s 46 in light of its purpose and context, which included s 26(2) of the Bill of Rights. Section 46(1)(b) requires an examination as to whether the facts that make the second charge punishable are substantially the same as for the first charge. The focus is on whether the physical acts committed (or omitted) by the defendant which render them liable to punishment under each charge are substantially the same. Where the facts underlying each charge differ substantially, the special pleas will be displaced.

Here there was a sufficient difference between the common punishable acts of the two charges so that the special plea was clearly displaced. The common facts of the two charges were that (1) Mr Mitchell was driving a motor vehicle on a road and (2) did so with breath containing alcohol. The difference lay in the remaining facts making him liable to punishment on either (but not both) of the charges: (3) that his breath alcohol level specifically exceeded 400 micrograms per litre of breath and (4) his holding of a zero alcohol licence at the time he drove with breath containing alcohol. These factual differences were fundamental, lying at the core of the two charges. There would be nothing unlawful in Mr Mitchell being convicted of both charges and then being sentenced in an appropriate way.

Ellen France J made three points in her concurring judgment. First, it was doubtful whether there would have been any issue in terms of s 46, if, instead of what transpired, the District Court Judge had taken Mr Mitchell's proffered pleas and entered convictions simultaneously. Second, in most cases the elements of the offence will at least provide a helpful starting point in defining the necessary facts for the purposes of s 46. And finally, Ellen France J had some reservations about an approach that would largely ignore facts which are mental elements.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613