IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CRI-2018-425-000035
[2019] NZHC 140

BETWEEN	PURO NATHAN COLEMAN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 4 February 2019

Appearances: S Claver for the Appellant
S N McKenzie for the Respondent

Judgment: 13 February 2019

JUDGMENT OF NATION J

Introduction

[1] On 4 October 2018, Judge Marshall convicted Mr Coleman of one charge of driving with an excess breath alcohol level (third or subsequent) following a defended hearing. He appeals this conviction on the basis the Judge was incorrect in finding reasonable compliance with his 10 minute period in which to elect a blood test. The 10 minute period had been interrupted by a Police officer talking to Mr Coleman at some length as to matters concerning his mental state and welfare.

District Court decision

[2] Judge Marshall found that there had been reasonable compliance with the 10 minute period under s 64(2) of the Land Transport Act 1998 (the Act). His Honour considered that the interruption was poorly timed but nevertheless made in good faith, and important enough for the Senior Constable to consider an interruption necessary.

His Honour held that Mr Coleman's election was not prejudiced by the interruption because his 10 minute period was recommenced, he was given his Bill of Rights on three occasions, and his mind had been redirected to his blood test election by a printout of the result of his evidential breath test. As all other matters had been conceded, the Judge found the charge proved.

Principles on appeal

[3] Section 232 of the Criminal Procedure Act 2011 provides that the High Court may only allow an appeal against conviction if satisfied that the trial Judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred", or that "a miscarriage of justice has occurred for any reason." A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[1]

Submissions

Appellant's submissions

[4] Mr Claver submitted that, with a "three quarter of an hour interruption" to the 10 minute period for electing whether to require a blood test, there had not been reasonable compliance under s 64(2) of the Act. On that basis, the evidence as to his alcohol level from the breath alcohol test would not have been admissible and Mr Coleman's conviction would have to be quashed.

[5] Mr Claver submitted it was important that a person who was required to elect whether to have a blood test would have 10 minutes uninterrupted time after being given the required advice as to his right to make an election, as referred to in ss 70A and s 77(3)(a) of the Act. He submitted it was important this advice be given immediately prior to the commencement of the 10 minute period for making the election so that, where there had been an interruption to the 10 minute period, there could not be reasonable compliance through the Police officer giving the person a

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1 Section 232(4).

further 10 minutes to make the election when that was not also accompanied by the advice referred to in ss 77A and s 77(3)(a).

[6] Counsel submitted the Judge had put insufficient weight on the importance of an uninterrupted 10 minute period, as Dunningham J had emphasised in the case of *R v Keen*.[2]

[7] While Mr Claver did not take any issue as to the motivation for the Police officer to interrupt the 10 minute period to speak to Mr Coleman, he submitted that, in assessing whether there was reasonable compliance, the evidence did not establish that there was a need for the Police to speak with Mr Coleman at the point the interruption occurred and the interruption was not required because of the urgency of the situation.

[8] In his written submissions, Mr Claver suggested that, at the time the interruption occurred and the Police officer was speaking to Mr Coleman, Mr Coleman was being detained in the Police Station for the purpose of making his election as to whether he wished to undergo a blood test. If he had been free to make his election and had elected not to have a blood test, he would have been summonsed and then free to go. Mr Claver submitted, on that basis and with the interruption that occurred, Mr Coleman was being unlawfully detained at the Police Station, so the evidence as to the election he ultimately made at the end of that period of submitted unlawful detainment should have been ruled inadmissible. This was not a submission he advanced further or emphasised in oral submissions.

[9] Mr Claver also submitted that the prosecution had failed to produce a certified copy of the certificate of compliance for the breath testing device, as required by s 75A(2) of the Act, so that evidence as to the result of the breath test should have been ruled inadmissible. The submissions were neither emphasised nor developed before me in oral submissions.

[10] The submissions from Ms McKenzie for the Police are reflected in my analysis below.

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2 *R v Keen* [2016] NZHC 373.

Discussion

[11] I do not consider there is any strength to the argument that evidence as to the result of the breath test should have been ruled inadmissible on the basis Mr Coleman had been unlawfully detained at the Police Station. It was accepted that he had been lawfully required to go to the Police Station in accordance with the prescribed procedures under the Act and, at the time he was spoken to by the Police officer during the interrupted 10 minute period, he was being lawfully detained to give him the time to make an election as to whether he wished to undergo a blood test.

[12] Although Senior Constable Kotua spoke to Mr Coleman because of concerns she had, Mr Coleman was still being lawfully detained in accordance with the procedures provided for under the Act. Consistent with that, at the end of the interruption and after a further 10 minutes, Mr Coleman indicated he did not wish to undergo a blood test.

[13] There was no error in the prosecution not producing a copy of the certificate of compliance for the breath testing device. The transcript of evidence from the hearing indicates the prosecution produced as an exhibit, by consent, the breath and blood alcohol procedure sheet and the result of the evidential breath test. Pursuant to s 9 Evidence Act 2006, the defence also admitted, without proof:

> All matters and procedures requiring proof that the proportion of alcohol in the defendant's breath was 718 micrograms of alcohol per litre breath but not the defendant's rights under section 70A(1) of the Land Transport 1998.

[14] No objection was raised at trial as to the above two matters.

[15] The only issue I need to consider further is the argument over the Police interruption to the 10 minute period for Mr Coleman to elect whether he would require a blood test.

[16] Relevantly, s 70A(1)(a) states:

> **70A Right to elect blood test**
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> (1) A person has the right, within 10 minutes of being advised by an enforcement officer of the matters specified in section 77(3)(a)

> (which sets out the conditions of the admissibility of the test), to elect to have a blood test to assess the proportion of alcohol in his or her blood, if the result of that person's evidential breath test appears to be positive, and—
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> (a) the result of the person's evidential breath test indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath

[17] Mr Coleman was stopped when driving on the main street in Mataura at 11.56 pm on 19 May 2018. He told Constable Vollweiler he had been drinking "heaps". A breath screening test was positive for a level over 400 micrograms of alcohol per litre of breath. Mr Coleman was told he was required to accompany the Constable to the Gore Police Station to undergo an evidential breath test or blood test or both. He was told of his rights under the New Zealand Bill of Rights Act 1990 (NZBORA), including the right to remain silent, rights with regard to legal advice, and that the rights would continue "throughout the breath or blood alcohol testing procedures". Mr Coleman agreed to go to the Gore Police Station at 12.00 midnight.

[18] At the Police Station, Mr Coleman was again told of his NZBORA rights with advice that he had been detained for the purpose of breath or blood alcohol test procedures. He indicated he did not wish to speak to a lawyer.

[19] At 12.23 am, Mr Coleman was told he was required to undergo an evidential breath test without delay and of consequences associated with that, as required by s 69(4A). He again indicated he did not wish to speak to a lawyer. There was a space on the form for the officer to note that Mr Coleman had acknowledged that he had been advised of the reason for his detention and of his rights and obligations under the NZBORA and with regard to evidential breath testing. The officer noted that Mr Coleman refused to sign but the advice had been given at 12.23 am.

[20] Mr Coleman then participated in the evidential breath test with a result in excess of 400 micrograms, 718 micrograms of alcohol per litre of breath being recorded. That all happened between 12.35 am and 12.41 am.

[21] Constable Vollweiler then gave the advice required by s 77(3) and the result of the evidential breath test. He told Mr Coleman that if he did not within 10 minutes

request a blood test the results of the evidential breath test would be conclusive evidence against him and that if he did undergo a blood test the results of the evidential breath test could not be used as evidence but the result of the blood test might be used to support a charge. Also that, if he elected to have a blood test, he would be liable for the blood test fee and associated medical costs, whether or not the test established that an offence had been committed. Mr Coleman was given a document with the result of the evidential breath test. The Constable asked Mr Coleman several times to sign the form acknowledging he had been given this advice. He refused to do so. The Constable noted that all of this happened at 12.43 am.

[22] Mr Coleman was then given further NZBORA advice prior to the start of a 10 minute period. That advice included that he had been detained for the purpose of breath or blood alcohol test procedures for alcohol, he had the right to remain silent, could speak to a lawyer and his rights would continue throughout the breath or blood alcohol testing procedure. Constable Vollweiler said he asked Mr Coleman several times if he would sign the form acknowledging he had received the advice. He refused to sign. This was at 12.45 am.

[23] Mr Claver confirmed there was no suggestion that the advice given to Mr Coleman at various stages of the whole process was inadequate.

[24] The Constable then took Mr Coleman to an interview room for the purpose of giving him a 10 minute period to consider the option of blood testing. He said he told Mr Coleman that he had a good 10 minutes to consider the option of a blood test. He recorded the 10 minutes as beginning at 12.49 am. Constable Vollweiler then left Mr Coleman in the interview room.

[25] During the evidential breath alcohol procedure, when they were waiting for the evidential breath testing machine to warm up, Constable Vollweiler had asked Mr Coleman whether he had been going to try and drive away from the Police when he was first pulled up, because his driving had been erratic. He said Mr Coleman told him that he had thought about pulling off down a particular street, driving off the bank into the Mataura River and "going out via suicide by cop".

[26] Constable Vollweiler went to look at information the Police held about incidents involving Mr Coleman and saw their references to recent incidents regarding self-harm and suicidal thoughts. Because of this and the information on the National Intelligence Application (NIA), he discussed what Mr Coleman had said to him with Senior Constable Kotua. After this, Senior Constable Kotua entered the interview room and talked to Mr Coleman. Senior Constable Kotua had been working with Mr Vollweiler in a patrol car when Mr Coleman was first stopped.

[27] Senior Constable Kotua said she had talked to Mr Coleman for at least half an hour. The conversation was about his feelings and her concern was that, with his having been driving erratically, he was contemplating killing himself and he was not thinking straight. In cross-examination she confirmed that, during the conversation, she had not discussed evidential breath testing procedures or the option of taking blood, and the matters discussed were more of a personal nature. She said there had been two reasons for her speaking to Mr Coleman: to establish his capacity to reason and to make a sound decision, and because of her concerns for his life and welfare.

[28] Constable Vollweiler was conscious that what Senior Constable Kotua did was an interruption to the 10 minute period. After Constable Kotua left the interview room, Constable Vollweiler went straight in and informed Mr Coleman that he would give him another good 10 minutes to consider the option of blood testing. He said Mr Coleman was quiet, did not say anything and was quite reserved. Senior Constable Kotua had satisfied herself that Mr Coleman was capable of making sound decisions. Constable Vollweiler waited 11 minutes before going back into the interview room. At 1.34 am Mr Coleman said he did not want blood taken.

[29] At 1.40 am, the Constable handed Mr Coleman a summons to appear in Court, explained the summons, gave him a 28 day driver licence suspension form and explained that to him. He said he and Constable Kotua then took Mr Coleman to his home in Mataura, where they talked to his niece and partner and informed them about Mr Coleman's mental health issues regarding self-harm, and received an assurance they would keep an eye on him.

[30] No evidence was called for the defence.

[31] That is the evidential context in which I must consider whether there was reasonable compliance with the requirements of s 70A of the Act.

[32] Mr Claver submitted that this determination should be made based on what the reasonable man on the Clapham omnibus might think but I consider the issue requires a judicial determination, having regard to the provisions and scheme of the Land Transport Act as to the procedure for evidential breath testing and the admissibility of evidence that is obtained as a result of such testing. I accept that Senior Constable Kotua's motivation for going into the interview room and speaking with Mr Coleman was for bona fide and good-faith reasons. I also accept that she was not in any way seeking to interfere with the breath or blood testing process, or to influence the decision Mr Coleman had to make as to whether he would undergo a blood test.

[33] I am also satisfied that, at the time Senior Constable Kotua went into the room, Mr Coleman would have had a clear understanding that he had 10 minutes to decide whether or not he wanted a blood test, the rights he had to seek legal advice as to that, and what the evidential consequences would be if he chose to have or not have a blood test. That would have been clear from the advice he had been given by Constable Vollweiler on several occasions, the importance of which had been emphasised through the discussion Constable Vollweiler had with Mr Coleman in asking him to sign the form acknowledging he had received such advice. The need for him to carefully consider that advice and to make his decision would also have been emphasised through the way Mr Coleman was physically taken to an interview room and then left there on his own to think about the advice he had just been given and to decide what he wanted to do. There was no evidence as to precisely how long he was in the interview room before Senior Constable Kotua went in to talk to him but it was long enough for Constable Vollweiler to leave the room, go to his computer, find information about Mr Coleman on the NIA and then to talk to Senior Constable Kotua about that information and about the conversation which had occurred while they were waiting for the breath testing device to warm up.

[34] The discussion which took place between Mr Coleman and Senior Constable Kotua was not of a nature that would have been likely to intrude on or colour the advice Mr Coleman had received. The discussion was not about the evidential breath

testing or blood testing procedures or the whole procedure that Mr Coleman was subject to. Mr Coleman must have understood that Senior Constable Kotua was concerned for Mr Coleman's safety and welfare.

[35] I accept it has long been recognised that a suspect is entitled to an uninterrupted 10 minute period in which to make a decision as to whether or not to request a blood test and that the 10 minute reflection period is designed to ensure that a suspect has a reasonable and uncluttered period of time in which to consider whether to progress to the blood test stage.[3]

[36] The mere fact that there has been an interruption to the 10 minute period for reflection after the initial advice has been given, does not of itself mean there has been a failure to comply with the requirements of s 70A. The 10 minute period for reflection can be interrupted by the suspect obtaining the legal advice to which he is entitled. In that event, the time taken up with obtaining such legal advice is not to be computed as part of the 10 minute period that must be allowed for reflection and for the making of the election.

[37] Where there has been an interruption, what is necessary is not that the suspect is again given all the advice as to his right to elect a blood test and the consequences of either declining or making such an election, but further time to make the election so that he has the full 10 minutes for reflection and the making of that election. Thus, in *De Jong v Police*, Wild J, referring to *Kaisuva v Police*, said:[4]

> The focus in Kaisuva was on the interruption to the 10-minute period. The case establishes the principle, since widely followed, that a suspect is entitled to an uninterrupted 10-minute period in which to make a decision as to whether or not to request a blood test. If the period is interrupted, for example in order to enable the suspect to obtain legal advice, then the "clock" must be stopped while [legal] advice is taken, and started again once [legal] advice has been obtained.

[38] In *Sullivan v Police*, Davidson J observed:[5]

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3 *De Jong v Police* [2000] 18 CRNZ 128; *Kaisuva v Police* [1993] 11 CRNZ 151; *Leota v Police* HC Auckland CRI-2009-404-373.

4 *Kaisuva v Police*, above n 3 at [13].

5 *Sullivan v Police* [2018] NZHC 397 at [32].

> Rarely there will be any prejudice to a defendant who is allowed *more* "uncluttered" time in which to consider their choice. In fact, the opposite is true, as the alcohol in the blood if anything slowly reduces rather than increases and the defendant gets more time to work through the options.

[39] Here, whatever distraction there may have been through Senior Constable Kotua talking to Mr Coleman ended when she physically left the interview room, a move which clearly marked the end of any consideration or discussion as to matters she had been concerned about. Mr Coleman was then on his own in the situation that he had been left to reflect on the election he had to make. Constable Vollweiler then went into the interview room and told Mr Coleman that he would be giving him another good 10 minutes to consider the option of requiring a blood test. The reference to 10 minutes and his need to consider whether he would exercise his option to have a blood test all referred back to the advice he had been given as to s 70A matters before initially being placed in the interview room. Mr Coleman still had the document informing him of the result of the evidential breath test.

[40] Given all the circumstances as to how matters had proceeded earlier, at least three occasions on which Mr Coleman had received NZBORA advice, and the specific advice he had received just prior to being placed in the interview room as to his rights to elect a blood test and the consequences of his election, I am well satisfied that he would have understood that he was being given a further 10 minutes to make his election and that he was aware of and mindful of the required advice which he had been given earlier.

[41] Mr Coleman then had 11 minutes on his own to reflect on the election he had to make. At the end of that period, Constable Vollweiler went back into the room and asked if he wanted to have blood taken. When asked if he wanted to have blood taken, there was no evidence to suggest Mr Coleman did not understand what was being asked of him. He was clear that he did not want to have blood taken.

[42] I am well satisfied that the Police gave Mr Coleman the required advice as to why he was being detained after being advised of the positive evidential breath test, his right to request a blood test, his rights associated with this and the consequences of the election he was being asked to make, and that he was allowed 10 minutes' uninterrupted time to consider whether he would exercise the option of a blood test.

[43] Because of the interruption that occurred, Mr Coleman did not have the right to make the election "within 10 minutes of being advised by an enforcement officer of the matters specified in s 77(3)(a)". I am nevertheless satisfied there was reasonable compliance with the requirements of s 70A.

[44] In *R v Aylwin*, the Court of Appeal expressed the test as to whether there had been reasonable compliance as follows:[6]

> The test as to whether there has been reasonable compliance has been seen as involving the consideration of two questions, as set out in *Soutar v Ministry of Transport* [1981] 1 NZLR 545 at 550 (CA) and *Aualiitia v Ministry of Transport* [1983] NZLR 727 at 729 (CA). The first question is whether the extent of the non-compliance gives rise to a reasonable doubt about the correctness of the result. The second question is whether there is a risk of the defendant suffering injustice or unfairness. The need for this test to be applied liberally was reiterated by this Court in *Shaw v Police* CA212/95 21 September 1995. Accordingly, where the non-compliance does not create the possibility or likelihood of error, it should be saved by reasonable compliance.

[45] I am satisfied that the interruption to the initial 10 minute period for Mr Coleman to make his election did not give rise to a reasonable doubt about the correctness of the result of the evidential breath test. I am satisfied there was no risk the defendant suffered an injustice or unfairness. I am thus well satisfied evidence as to the result of the evidential breath test was rightly admitted, there was no error at Mr Coleman's trial and there was no error with his conviction.

[46] The appeal is dismissed.

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6 *R v Aylwin* [2008] NZCA 154 at [41], citations omitted.