IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

6/9

AP.147/91

HIGH PRIORITY

1646

BETWEEN ANDREW ALBERT NOORT
Appellant

A N D MINISTRY OF TRANSPORT
Respondent

Hearing: 10 July 1991

Counsel: K.I. Jefferies and Shaw for Appellant
J.C. Pike for Respondent

Judgment: 03 SEP 1991

JUDGMENT OF GALLEN J.

The appellant faced a charge in the District Court that being a person who did not hold a driver's licence entitling him to drive a motor vehicle of the class that he was driving, did drive such a motor vehicle on a road while the proportion of alcohol in his breath exceeded 150 micrograms of alcohol per litre of breath, the alleged level being 1,000 micrograms of alcohol per litre. The appellant pleaded not guilty and at the conclusion of the evidence his counsel made only one submission to the effect that there had been a breach by the traffic officer of the defendant's rights referred to in

s.23 (1) (b) of the New Zealand Bill of Rights Act 1990 which is in the following terms:-

> "(1) Everyone who is arrested or who is detained under any enactment -
>
> .....
>
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right;....."

The appellant through counsel contended that the evidential breath test result upon which the prosecution was founded was inadmissible because it was obtained in violation of the rights referred to in the section and that accordingly the prosecution could not succeed. The Judge called for written submissions and having considered them delivered a reserved decision on 7 May 1991. Having considered the submissions raised before him, in a carefully reasoned judgment he arrived at the conclusion that there were no grounds upon which he could exclude the evidence of the evidential breath test and accordingly having been satisfied that all other elements of the offence had been proved, he convicted the appellant. The appellant now appeals against that decision.

Mr Pike who appeared for the Crown conceded that for the purposes of s.23 (1) (b), the appellant at the appropriate time was to be regarded as having been detained and also conceded that the appellant was neither informed of his rights under s.23 (1) (b), nor given the right to consult or instruct a lawyer without delay. He also conceded that in the

circumstances of this case the presence of a lawyer might have had some bearing on the decisions of the appellant and provided him with some assistance in the situation in which he found himself. As far as the last concession is concerned, I should in any event have been prepared to accept that the technical nature of the legislation is such that coupled with the compliance which is required, a person who finds him or herself in a situation where the penal provisions of the Act are liable to be invoked, might well obtain some advantage from the presence of a competent legal advisor.

Counsel in submissions referred to a number of situations where the complexity of the legislation has led to harsh consequences for persons confronted by it and where access to a legal advisor may well have had some significance, but it might also be observed that the complexities at least to some extent arise from the fact that Parliament has endeavoured bearing in mind the nature of the legislation, to import safeguards of a technical nature into the legislation itself in order to give some protection to persons confronted with it.

In that situation two questions arise. The first is whether the failure of the traffic officer or the police to meet the requirements of s.23 (1) (b) is relevant for the purposes of a prosecution brought under s.58B (1) of the Transport Act 1962 and secondly, if it is so relevant, what is the effect of such failure?

The provision in s.23 (1) (b) of the Bill of Rights Act is very similar to s.10 of the Canadian Charter of Rights and Freedoms and although the wording differs slightly between the two provisions, there is no suggestion that those differences are significant for the purposes of the matter in contention before me. In R. v. Therens et.al. (1985) 45 C.R. 3d. 97, the Supreme Court of Canada had to deal with a case where an accused person had lost control of his motor vehicle, as a result of which a collision occurred. A police officer made a demand for a breathalyser test under the equivalent Canadian legislation dealing with such matters, that is s.235 (1) of the Criminal Code. The accused accompanied the police officer to the police station and there supplied samples of breath. At no time was he informed of any rights to retain or instruct counsel. The Judge at first instance held that the accused had been detained and that his right under s.10 (b) of the Canadian Charter of Rights and Freedoms had been violated and that the breathalyser certificate should be excluded. Those rulings were upheld by the Saskatchewan Court of Appeal and the Crown then appealed to the Supreme Court of Canada. The Court held that the situation amounted to a detention for the purposes of the Canadian Charter. The Courts therefore held that there was a right to counsel and that the evidence obtained in the case was rightly excluded. Nine Judges sat and there was some disagreement between them as to certain aspects of the decision, but not as to the principal point on detention, nor as to exclusion although the reasons for

exclusion differed. The case also needed to be considered in the context of the Canadian statutory provision under which the prosecution was brought. S.235 (1) of the Criminal Code is in the following terms:-

> "Where a peace-officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding two hours has committed, an offence under section 234 or 236, he may, by demand made to that person forthwith or as soon as practicable, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician referred to in subsection 237 (6) are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the peace officer for the purpose of enabling such samples to be taken."

It should be noted that the person required to provide the breath samples is required to provide them "then or as soon thereafter as is practicable".

In Thomsen v. R. and Attorney-General of Canada (1988) 63 C.R. 3d. 1, the Supreme Court of Canada had to consider a situation where a police officer engaged in spot checks of motor vehicles in Ontario, stopped the appellant's vehicle because it had a defective headlamp. The officer detected the odour of alcohol on the appellant's breath and having formed a reasonable suspicion that the appellant had alcohol in his blood, made a formal demand that the appellant provide a sample of breath for the roadside screening device. The appellant refused. The officer then asked the appellant to accompany him to the officer's car and to sit in the car where

he remained for some 15 minutes while the officer wrote in his notebook and prepared an appearance notice. The officer explained the reason for the demand and gave the appellant two further opportunities to comply with the demand, but the appellant again refused. At no time did the officer inform the appellant that he had the right to retain and instruct counsel without delay. In the Provincial Court the charge was dismissed on the grounds the appellant's rights to be informed of his rights to retain and instruct counsel without delay had been infringed. On appeal the acquittal was set aside and a new trial ordered on the grounds that a finding as to detention had been made before the evidence was complete. The view was also expressed that the appellant had not been detained. That decision was then taken to the Supreme Court of Canada where the decision was given by Le Dain J. who had given the principal decision in the Therens case. The Court accepted that there had been a detention. The Judge explained that in the Therens case, he and Estey J. were of the view that there was a significance in the fact that in the provisions of s.234.1 (1) of the Criminal Code, Parliament had used the word "forthwith" without qualification, but that in s.235 (1), the words used were "forthwith or as soon as practicable".

The provisions of s.234.1 (1) are as follows:-

> "Where a peace officer reasonably suspects that a person who is driving a motor vehicle or has the care or control of a motor vehicle, whether it is

> in motion or not, has alcohol in his body, he may, by demand made to that person, require him to provide forthwith such a sample of his breath as in the opinion of the peace officer is necessary to enable a proper analysis of his breath to be made by means of an approved road-side screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of his breath to be taken."

S.235.01 is set out supra.

He also drew attention to the fact that there was a 2 hour operating limit under the provisions of s.237 (1) for a breathalyzer test which period afforded a possibility of contact with counsel prior to compliance with s.235 (1). In the end result in Thomsen, the Court held that an individual investigated by a police officer in those circumstances was detained within the meaning of s.10 of the Charter. Further, s.234.1 requiring as it did compliance "forthwith", violated the right of an individual to retain and instruct counsel without delay and to be informed of that right but that violation was justified by s.1 of the Canadian Charter dealing with limitation and therefore not inconsistent with the Constitution Act of 1982.

S.1 of the Charter subjects all Charter rights "only to such reasonable limits prescribed by law.....".

The net result of the two Canadian cases would therefore seem to be that in Canada a person required to submit to the corresponding breath alcohol legislation in that country, is detained for the purposes of s.10, that a failure

to inform the person concerned of his or her right to retain and instruct counsel without delay involves a violation of the Charter but because of the provisions of s.1, that violation is not inconsistent with the Constitution Act at least in respect of s.234.1 (1). The Courts came to this last conclusions for reasons expressed by Le Dain J. in the following terms:-

> "The important role played by roadside breath testing is not only to increase the detection of impaired driving, but to increase the perceived risk of its detection, which is essential to its effective deterrence. In my opinion the importance of this role makes the necessary limitation on the right to retain and instruct counsel at the roadside testing stage a reasonable one that is demonstrably justified in a free and democratic society, having regard to the fact that the right to counsel will be available, if necessary, at the more serious breathalyzer stage".

In New Zealand, the question of whether or not the Bill of Rights Act applied to the appropriate sections of the Transport Act was referred to by Barker J. in Terekia v. Ministry of Transport (unreported judgment, Auckland Registry AP.32/91, judgment delivered 13 May 1991), but he accepted that the Bill of Rights Act did not have retrospective application and therefore the point did not arise in the case before him.

The point was directly considered by Doogue J. in Curran v. Police (unreported judgment, Auckland Registry,

AP.97/91, judgment delivered 27 June 1991). Having referred to the decision in Thomsen, Doogue J. said at pp.16-17:-

> "It went on to note that there was an implication arising from the statute under consideration that in respect of a roadside test to be administered "forthwith" there was an implication there was to be no opportunity for legal advice.
>
> I accept that the requirements of ss 58A, 58B and 58C are to enable a test to be taken as close as possible to the time of driving to give as accurate an indication as possible of alcohol consumption of the driver. It is impossible for ss 58A, 58B and 58C to be given an interpretation consistent with the application of s 23(1)(b) Bill of Rights Act. In my view, having regard to the emphasis and purpose of ss 58A, 58B and 58C of the Act, they are inconsistent with the provisions of s 23(1)(b) Bill of Rights Act. I accept the fundamental submission of Mr Ruffin that there is an inconsistency between the purpose of those sections which is to ensure the safety of persons and vehicles on the roads of New Zealand and the provisions of s 23(1)(b) Bill of Rights Act enabling a lawyer to be consulted in every instance where a person is detained in respect of the steps to be taken under the Act in relation to breath and blood alcohol testing. By implication the time requirements and limitations of the Act oust the right to legal advice at least to the completion of the testing procedures."

The Judge then specifically accepted the decision in the District Court in this case. Having reached that conclusion the Judge pointed out that in the particular case, it was difficult for the appellant to rely upon any breach of s.23 (1) (b) in the circumstances of that case. He went on to find that in any event even had there been a breach of the statutory code, that led to a judicial discretion as to whether or not evidence obtained as a result of a breach was admitted.

In this case Judge Hobbs said at pp.9-10:-

"What needs to be borne in mind in this case, however, is the unusual nature of s.58, s.58A and s.58B of the Transport Act. Underlying those provisions of the Transport Act is a conflict between the aim of Parliament to protect society and reduce the road toll and the preservation of individual rights and liberties. Powers are given to traffic officers in the Act which necessarily curtail some of those rights and liberties. Sections 58A and 58B with their provisions for step by step procedures towards breath or blood alcohol testing allow the detention of a suspect before arrest and the taking of blood would technically amount to assault if taken without consent. These provisions evidence a clear intention by Parliament to limit individual rights in the interest of society as a whole.

Professor Paciocco goes on to say:

> ".....a reformist judiciary could hold that statutes should not be interpreted so as to create the mischief of compromising those fundamental rights and freedoms affirmed in the Bill unless this was the manifest intention of the legislators." (p375 supra)

In the case of the Transport Act it does appear to be the manifest intention of the legislature to limit motorists rights under the blood alcohol testing procedures in favour of the protection of society in general."

In this Court Mr Jefferies for the appellant put an emphasis on the significance of the Bill of Rights Act and drew attention to the fact that New Zealand was a signatory to a number of international instruments on human rights, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and The Optional Protocol to the International Covenant on Civil and Political Rights. He pointed out that the long title to the New Zealand Bill of Rights Act 1990 specifically states that it is an Act

"To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights". I accept all those contentions and also accept specifically that the Bill of Rights Act 1990 is relevant to detentions occurring under the provisions of the Transport Act, but its relevance must be considered in terms of ss.4 and 5 of the Bill of Rights Act itself. I accept that no part of the Transport Act 1962 has been impliedly repealed or invoked or is invalid or ineffective as a result of the passing of the Bill of Rights Act so that the provisions in particular of s.58B (1) of the Act remain in full force and effect.

The Judge in this case and Doogue J. in Curran v. Police accepted that the wording of the appropriate sections of the Transport Act, coupled with the clear public purpose of those sections, made it impossible to interpret the sections in such a way as to import literally the provisions of s.23 (1) (b) of the Bill of Rights Act. It is said those provisions which require compliance forthwith and the procedures imposed by them would be negated if the administering authorities were required to wait while the services of a lawyer were obtained.

Mr Jefferies relates his submissions to both s.58A and s.58B, but he also draws a distinction and draws attention to the fact that under s.58B an evidential test is involved which can of course be used against the person detained and I accept that that strengthens the argument as to the application of the Bill of Rights Act and he also pointed out that there

are no time limits prescribed between the completion of the breath screening test and the carrying out of the evidential test. He submits therefore that while s.58B (4) does allow an enforcement officer to require a person to undergo forthwith an evidential breath test, that power arises only after the person concerned has been required to accompany the officer to a place where it is likely that an evidential breath test or blood test can be undergone, or that person has been arrested pursuant to the section and he draws attention to the fact that there may frequently be a considerable lapse of time between a breath screening test and the carrying out of an evidential breath test. He submits that that brings the situation at least under the provisions of s.58B closer to the situation which existed in Canada in the Therens case. That submission is not without substance. It would also conform to the comments of Le Dain J. in Thomsen's case referred to above. In Canada a distinction was clearly drawn between the situation where a requirement was to be complied; with "forthwith" and one which was not so qualified. Nevertheless I am satisfied that looked at overall the scheme and purpose of the legislation is such that the section could be frustrated if the evidential aspect were to be dependent upon the availability of legal advice. The case for the Department which has been made on each occasion this argument has been raised is that the efficacy of the sections concerned, designed as they are to reduce the road toll, depend upon an orderly progression through a rigidly determined series of stages. It is I think accepted that involves an interference with individual rights quite apart from those

which have been formalised in the Bill of Rights Act and in recognition of that fact, Parliament has built a considerable number of safeguards into the sections concerned. I have already referred to this above.

In my view the sections involve a statutory code designed to deal with a particular situation in a particular way. It is recognised by Parliament that the rights of citizens are involved and the sections have built into them protections designed to ensure that there is a minimum deleterious effect on individual rights. The system is a self-contained one. To now add the general right contained in the Bill of Rights Act to a specific situation carefully worked out without reference to it, would be I think to disturb the structure and basis of the blood and breath alcohol legislation and for that reason the general right upon which the appellant relies must in my view be regarded as subordinate.

The situation in Canada differs and that may be sufficient of itself to arrive at a different result from that which was the case in Therens, but in any event for the reasons I have set out above I should if necessary come to a different conclusion in the New Zealand setting.

I accept the point made by Mr Jefferies that the onus of excluding the application of the Bill of Rights Act is on the respondent in this case, but I find in the circumstances that onus has been discharged. I do not see this as a matter

of evidence and accept the comments of Le Dain J. set out above which appear to reflect an overview of the particular situation and I note too that it is a view which commended itself to Doogue J. in Curran.

It follows therefore that in following the procedures contemplated by s.58 (1) (b) and indeed other similar sections where similar considerations apply, the administering authorities do not commit any breach of the provisions of s.23 (1) (b) of the Bill of Rights Act by failing to advise the person subject to those procedures of their rights in respect of a lawyer, whether by way of direct interpretation of the legislation concerned, or because the particular right may be regarded as limited in terms of s.5 of the Bill of Rights Act.

Having said that, I also express the view that the provisions of the Bill of Rights Act including that under consideration here will apply to the Transport Act generally where no such exclusion appears on interpretation or there is no limitation.

That would be sufficient to dispose of the appeal which on the basis of that conclusion must be dismissed, but for the sake of completeness I also deal with the question of remedy.

Mr Jefferies argued that if the provisions of s.23 (1) (b) of the Bill of Rights Act did apply to a situation involved in this appeal, then following on the importance of the right as expressed and the obligation of New Zealand under its international commitments, the result must be that the material obtained in breach of it must be excluded. That contention receives support from the decision of the Supreme Court of Canada in Therens (supra), but was not accepted by the Judge in the District Court in this case, nor was it accepted by Doogue J. in Curran v. Police (supra). A similar view was expressed by Henry J. in R. v. Butcher and Burgess (unreported ruling, Auckland Registry, T.2/91, ruling delivered 11 June 1991) and Doogue J. also referred to the comments of Hillyer J. in R. v. Edwards (unreported ruling, Auckland Registry T.273/90, ruling delivered 28 February 1991) in which reference was made to the practice already existing in New Zealand to exclude evidence as a matter of discretion which has been unfairly obtained. Doogue J. also referred to the decision of the Court of Appeal in Police v. Hall (1976) 2 N.Z.L.R. 678 in which case the Court of Appeal considered that medical evidence unfairly obtained should be excluded and the comments of Somers J. in the Court of Appeal in R. v. Coombs (1985) 1 N.Z.L.R. 318 at p.321. Those cases all preceded the passing of the Bill of Rights Act. They lead however towards the perception of a general pattern that in New Zealand, evidence obtained contrary to a statutory prohibition where the Statute itself does not contain any consequences of exclusion, will be admitted or not as a matter of discretion.

Mr Pike referred to the fact that under the Canadian Charter with its Constitutional significance, the test is whether admitting the evidence will bring the justice system into disrepute. Clearly therefore even under that system there is no general bar. The point will need to be argued in a case which directly raises the point. In this case the Judge expressed the view that having regard to the absence of Constitutional entrenchment and the omission of any remedies clause, it would be inappropriate for the Court to provide a prothsesis for a statute which he described as being more crippled than debilitated. While I understand the reasons why the Judge made those remarks, I do not accept them. I do not think it is appropriate to describe the Act as more crippled than debilitated. Where it is not specifically excluded by a particular statute or impliedly limited by it, then it is my view that the statute does apply. The absence of constitutional entrenchment and any provisions which over-ride individual statutes, does mean that the Bill of Rights Act in New Zealand does not give rise to the overall control of legislation which the Canadian Charter possesses, but that does not mean that the Act lacks significance. It is already proving a significant factor in statutory interpretation and I have no doubt that the Courts will use it and the rights and values which it enshrines as a significant factor in disputed matters before the Courts of any nature where it is not specifically or impliedly excluded by relevant statutory material.

Mr Jeffries puts an emphasis upon the fact that interpretation is dealt with in s.6 of the Act whereas s.3 provides for application. I accept that there is a distinction which may in appropriate cases be one of substance and it is a distinction which would apply here if it were not for the views I have already set out above. I note too that in terms of interpretation the Court of Appeal in Flickinger v. The Superintendent of Mt. Eden Prison and The Crown Colony of Hong Kong (1991) 1 N.Z.L.R. 439, was prepared to accept the Bill of Rights Act might well be sufficiently strong to set aside accepted interpretations of long-standing. Nor do I think that the absence of a specific remedies clause is a weakness in the Bill of Rights Act.

In New Zealand the question of whether or not evidence unfairly obtained should be excluded, is in my view still a matter of discretion but where rights contained in the Bill of Rights Act are concerned, there must be a strong weighting against admission. However if I were wrong in my conclusion on the first point in this case, I should have considered as the Supreme Court in Canada did, that the social significance of the sections under consideration here was such that weighed in the balance against the general right contained in the Bill of Rights Act, the evidence in a case such as this should be admitted unless there are other facts which make it unfair to do so.

The appeal must accordingly be dismissed and it is dismissed.

Solicitors for Appellant: Messrs Salek, Turner, Cuttance, Wellington

Solicitor for Respondent: Crown Solicitor, Wellington