842

NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

11/6

AP No. 46/93

BETWEEN KEVIN JAMES JELLYMAN

Appellant

NOT RECOMMENDED

A N D POLICE

Respondent

Hearing: 12 May 1993

Counsel: K B Campbell for Appellant
M T Lennard for Respondent

Judgment: 01 June 1993

JUDGMENT OF GREIG J

This is an appeal against the conviction of the appellant in the District Court on 1 February 1993 on a charge under the Transport Act 1962 that the appellant drove a motor vehicle while the proportion of alcohol in his blood was in excess of the statutory limit contrary to s 58 (1) (c) of the Act.

The conviction followed a defended hearing and the sole issue in the case was whether the evidence of the evidential breath test and of what followed was admissible in law, it being contended that there was a breach of the appellant's rights as provided in s 23 (1) (b) of the New Zealand Bill of Rights Act 1990. To make the issue clear the learned District Court Judge was satisfied on the evidence before him that the constable concerned in the matter -

> " ... was justified at law in requiring the defendant to undergo a breath screening test; that that test was properly undergone; that a positive result was obtained; that the defendant was properly required

> to accompany the constable for an evidential breath test, a blood test, or both; that an evidential breath test was properly undergone and provided a result which entitled the defendant to elect that a blood specimen be taken; that the defendant did so, and he was then properly required to supply a specimen of blood; that that was duly taken; that a specimen of his blood was sent to the DSIR (as it then was) for analysis, and on analysis a proportion of 120 milligrams of alcohol per 100 millilitres of blood was found in the specimen. "

The issue under s 23 (1) (b) of the Bill of Rights Act arose in this way. The only evidence given in the matter was that of the constable who had undertaken the testing and, on the other hand, that of the appellant. The constable said that before the evidential breath test was administered he had told the defendant of his right to consult and instruct a solicitor without delay and the defendant had responded that "he did not need a lawyer, that he had been through it before." On the other hand the appellant gave evidence that he had never been given any advice about his rights under the Act. The Judge expressed himself as having absolutely no reason to doubt the veracity of the constable but was unable, in the circumstances, to reject entirely the appellant's evidence on the critical issue. In those circumstances the Judge made a finding that the allegation that the advice of the appellant's rights was given to him was not proved beyond reasonable doubt but he did find that that allegation was proved on the balance of probabilities. In making that finding the Judge emphasised that it was not, as he put it, "on the mere balance of probabilities" but on a high standard in accordance with the statement of that standard made by Smellie J in *R v Dobler* [1992] 8 CRNZ 604. On that basis there was an implicit finding that there was no breach of the appellant's rights and the evidence therefore was all admitted and the conviction entered.

When this matter was argued before me it was done on the basis of the decisions in the High Court, including *Dobler's* case, *R v Mallinson (No. 2)* (1992) 3 NZBORR 149, *R v Bowlin* (unreported, High Court, Wanganui Registry, T No. 8/91, 24 February 1992, Greig J), *Beatson v Police* (unreported, High Court, Wellington Registry, AP No. 313/92, 15 March 1993, Ellis J), *R v Howard and Pomare* (1992) 3 NZBORR 39. Since then, however, the Court of Appeal has delivered its judgment in *R v Te Kira* (unreported, CA No. 280/92, 14 May 1993) which deals directly with this matter. That

resolves the difference in the High Court in favour of the balance of probabilities test as stated by Smellie J in *Dobler*. Cooke P, at p 7, says:

> " Bill of Rights issues fall to be decided by Judges conscious of both the importance of the Bill of Rights and the need to apply it in a realistic way. When the issue is a grave one no Judge should find against the person whose rights are in question if the issue is finely balanced. .... Where the facts are such that the onus falls on the prosecution to negative a breach, satisfaction of the Judge on the balance of probabilities, the gravity of the issue being borne in mind, should be enough for the purposes of any of these provisions. "

Richardson J, at p 19, says:

> " I am not persuaded that the balance of probabilities standard, which recognises that the degree of satisfaction required varies with the subject matter, is not sufficient in the public interest for Bill of Rights decisions of this kind. "

Hardie Boys J expressed himself at p 5 in this way:

> " For completeness and certainty I add that I agree with other members of the Court that once there is an evidential foundation for an allegation of breach of rights, it is for the prosecution to prove there was no breach, the standard being on the balance of probabilities, as with any other issue arising incidentally during a trial. "

In those circumstances the learned District Court Judge chose the right standard and his decision therefore as a matter law is unassailable.

It was submitted that even on that standard of the balance of probabilities there was no or no sufficient evidence to support a finding that the constable's evidence satisfied that standard. That, I think, is untenable. This is a matter in which the questions of credibility are for the Judge hearing the witnesses. The constable clearly impressed the Judge and his veracity

was not in doubt. The circumstantial nature of his evidence tended to confirm the matter, particularly his recollection of the appellant's reply. There was a note recorded by the constable confirming that the appellant's rights had been explained to him. There was a question as to whether that was an immediately contemporary note or one which had been made some hours later, but that still made it a contemporary note which tended to confirm the evidence. It was not suggested that this was a fabrication by the constable or an addition to his notes at some much later time.

The final contention on the facts was that there was no evidence that the appellant had any actual understanding of his rights, a reference being made to the words of McGechan J in *Mallinson* at p 155:

> " The Bill of Rights entitlement to advise is not satisfied by words wasted on the desert air in some empty ritual. "

That contention, however, is answered by the acceptance of the recollection of what was, in effect, the appellant's waiver in circumstances in which the Judge was apparently prepared to accept that the appellant was not so affected by alcohol as to have no understanding but on the contrary appeared to have understood and conversed with the constable about various matters.

In the circumstances, then, the appellant was rightly convicted and the appeal must be and is dismissed.

There was no appeal against the sentence which was one of three months' periodic detention. I direct that the appellant make his first report to the Upper Hutt Work Centre on Friday, the 11th day of June, 1993, and thereafter as specified by the warden.

Solicitors: Grubi and Newell, UPPER HUTT, for Appellant

Crown Solicitor, WELLINGTON, for Respondent