NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

S/4

AP.82/93

1955
~~1873~~

BETWEEN MANIHERA

Appellant

AND POLICE

Respondent

Hearing: 9 September 1993

Counsel: M. J. Sharp for Appellant
D. J. McDonald for Respondent

Judgment: DELIVERED THIS 27 day of SEPTEMBER 1993 AT 9AM

JUDGMENT OF BLANCHARD, J.

This is an appeal against conviction for driving with excess breath alcohol imposed after a defended hearing in the District Court at Taupo on 17 June 1993. The basis for the appeal is said to be that the evidence of the evidential breath test should not have been admitted at the hearing. The appeal in part is against findings by the learned District Court Judge that the appellant did at the relevant time comprehend (a) advice provided to him about his right to consult and instruct a lawyer (s.23(1)(b) of the New Zealand Bill of Rights Act 1990) and (b) the reason for his detention on that occasion (s.23(1)(a) of that Act). Counsel for the appellant submitted that the reasons given for these findings indicated that the Judge might not have properly applied his mind to the issues before him and had proceeded to his

conclusion on an incorrect legal basis. It was further said that the issues were not properly put to the appellant in cross-examination and accordingly that this Court on appeal is not bound by those findings. It was said that there was sufficient evidence to suggest that the advices were in fact not comprehended by the appellant. It has also been submitted that the words and conduct of the police officer led the appellant to believe that he was under an obligation to carry out the evidential breath test. (The true position is that an evidential breath test is not compulsory, the person being processed having the right to proceed straight to a blood test which then becomes compulsory.)

At the hearing of the appeal counsel for the appellant did not pursue the contention that the appellant had failed to comprehend the advice provided in terms of s.23(1)(b), though it was said that his judgment about whether to take advantage of his right to consult and instruct a lawyer was impaired because he had been unable to understand what was said to him by the traffic officer when the officer required the appellant to accompany him to the Taupo Police Station for the purpose of being tested. It was submitted that, because the appellant misunderstood the purpose of the detention, he did not have an adequate basis for taking a decision about whether or not to get legal advice. This decision on his part was also affected, it was said, by his failure to appreciate the non-compulsory nature of the breath test. If the appellant had understood the true position he might have sought legal advice and might then have been advised that there was good reason for declining the evidential breath test: see ***Keni v Police; MOT v Batistich*** (1992) 9 CRNZ 374 at 383-384.

The only witness called for the prosecution in the District Court was the police constable who, acting on a complaint from a member of the

public, had stopped a car being driven by the appellant in Taupo. The police constable said that Mr Manihera smelt of liquor and admitted having consumed alcohol. A positive reading was obtained upon a breath screening test. The police constable cautioned the appellant and advised him that he had "the right to consult with and instruct a lawyer or solicitor without delay". When asked if he understood this, the appellant nodded his head. The police constable then requested Mr Manihera to "accompany me to the Taupo Police Station for the purpose of an evidential breath test, a blood test or both" and the appellant agreed to do so. According to the evidence of the police constable, he had stopped the vehicle and the foregoing procedure had commenced at about 10.10 p.m. After about five minutes they were in the police station and the evidential breath testing procedure was commenced. The appellant was advised of the reading of 500 micrograms of alcohol per litre of breath at 10.27 p.m. He elected not to request a blood test.

The appellant is a 20 year old whose occupation was given in the information as a labourer but who stated when he gave evidence that he was unemployed.

Under cross-examination the police constable said that the appellant did not appear heavily intoxicated and was able to control himself physically. He was cautioned and given advice of his rights under the Bill of Rights while still in the street and before being requested to accompany the police constable to the police station. After being advised of his rights under the Bill of Rights he was asked if he understood and he nodded. It was straight after that that the constable required him to accompany the constable to the police station.

The following passage appears in the transcript of the cross-examination:

> *"Q. Now, he will also say that he did not understand any advice as to being able to contact a solicitor. Any comments on that?*
>
> *A. Other than that the defendant nodded when I asked him if he understood it. As I said before he was not heavily intoxicated and appeared to be coherent and comprehending.*
>
> *Q. He would also say that he didn't comprehend the reason why he had to accompany you to the Police Station, ie. for breath and blood tests?*
>
> *A. It was quite clear the reason."*

I pause to observe that at this point in the cross-examination of the prosecution witness it is quite plain that the defence was taking the point that the appellant had not understood why he had to go to the police station. It is also quite clear that the prosecution witness did not accept that the appellant had failed to understand why he was being taken to the police station.

The cross-examination then proceeded to what occurred immediately before the evidential breath test. The following passage appears in the notes of evidence:

> *"Q. When you took him to the Intoxilyzer machine what did you say to him about supplying a sample of breath? Do you remember? In general terms, if you can't remember specifically?*
>
> *A. I can't remember specific words but again it is part of my standard practice in dealing with any drunk driving matters to explain procedure as I go along so that the persons may understand the procedure.*

Q. So what would you normally say to a person in this situation?

A. I would normally identify the device being used to that person there, explain what the requirement was and again explain procedure step by step as it is undertaken.

Q. What would you say about supplying a sample of breath?

A. In terms of the Intoxilyzer 5000 he would have been advised that as per the instructions on the machine which was to follow that he was to blow through the tube attached to the device until a steady tone is achieved through the machine. This indicates a sufficient sample has been received by the machine. The defendant obviously understood the requirement because he completed the test without any problems."

Mr Manihera was called as the only witness for the defence. He said that he had consumed a dozen beers between Raetihi and Taupo but was not intoxicated and could control what he was doing. He said that the alcohol had no effect on his memory of the events in question. He had never previously been processed for drink driving and thought when he went to the police station with the constable that he was going to be "locked up and put away for the night". He assumed that he would be "prosecuted the next day", after he had "slept it off for the night". When he was in the police station and was asked to do another breath test he did it as he was asked. He thought he had no choice in the matter. When asked why he thought he had no choice he said that he did not know.

The examination-in-chief concluded with the following passage:

"Q. In general when the Police Officer was talking to you on that evening were you in general able to understand most of the things that he was saying?

A. No.

Q. Why was that?

A. It wasn't coming through clear enough for me to understand.

Q. What do you mean it wasn't coming through clear enough?

A. Well, like on the side of the road it went so fast that I didn't understand a word he was saying."

The cross-examination commenced as follows:

"Q. Your last comment Mr Manihera, on the side of the road it went so fast you didn't understand what was happening to you?

A. Well, when he come up to me I hopped out of the car and I went to the back and when he was talking to me I didn't quite understand what he was talking about.

Q. Was he using words that you didn't understand, legal jargon, was that the problem?

A. No."

A little later he said that he had "felt a bit confused".

The learned District Court Judge referred to the evidence given by the police officer about the advice given to the appellant at the roadside, including the appellant's apparent acknowledgment, by nodding, of having understood what was being said about his rights. The Judge thought that it was appropriate in the circumstances for the constable to have taken the defendant's response at face value. In so far as the appellant had said in evidence that he could not remember being told about his right to consult and instruct a lawyer without delay, the Judge said that he thought that it was "not a case of the defendant not comprehending what was being said to him but simply not remembering" and he noted that the defendant had

consumed one dozen cans of beer. I mention again that no point has been pursued in this appeal concerning whether he was given advice in terms of s.23(1)(b) or concerning his understanding of that advice immediately following its being given.

The learned District Court Judge a little later referred to the appellant's evidence about his decision not to ask for a blood test after the evidential breath test had proved to be positive ("I thought about it and decided to go with the machine"). The Judge commented:

> *"Now that indicates a rational application of intelligence to an issue which he had again comprehended quite adequately. I am satisfied that, and it is understandable I might say that a person in unfamiliar procedures a little tense and particularly having consumed alcohol that his memory cannot be relied upon for every detail about what had occurred in these procedures but that is not to say that he was not fully advised and properly dealt with and fully comprehended what was going on at the time. I am satisfied he did. He was able to comprehend, he did comprehend, he was able to make an informed choice at the relevant times. In the same comment if I might say just because the submission has been made applies to what is now suggested as his failure to understand the reason for going to the Police Station. I don't believe that is the truth of the matter on the night at all..."*

So the Judge has made a finding of fact that the appellant understood why he was asked to accompany the police constable to the police station. I am asked now to disturb that finding of fact. On the one hand, the police officer had testified that he asked the appellant to accompany him "for the purpose of an evidential breath test, a blood test or both". On the other hand, the appellant had said that, although he agreed to accompany the officer, he did not understand that it was for the purpose of being tested. Nevertheless, when within five minutes he was confronted with the evidential breath testing device, he did not express surprise or

make enquiry about why he was being asked to undergo further testing instead of simply being locked up for the night, as he now says he anticipated. He himself says that he was not heavily intoxicated. He appears to have been able to take rational decisions. It seems to me that, subject to a point about to be mentioned, it was open to the Judge to find that the appellant must have understood, at least in general terms, that he was being asked to go to the police station for further testing.

But it is said that, because the appellant was not cross-examined about his understanding on this point, the Judge ought not to have made a finding against him upon it. On the facts of this case I reject the argument. It had been put to the police constable in cross-examination by Mr Sharp that the appellant would say in evidence that he did not comprehend the reason for having to accompany the officer to the police station. The constable had replied that the reason was quite clear. Plainly, then, the prosecution, through its only witness, was alleging that the appellant must have understood. When the appellant was cross-examined he was asked about his statement that he had not understood what was happening to him. He was further asked by the prosecutor whether legal jargon had been used which he did not understand and to that latter question he gave a negative response. This part of the cross-examination does not appear to have been restricted to the issue of the right to a lawyer. It was about the whole of what the police officer said to the appellant at the roadside.

In support of his argument that the Judge's finding should not have been made Mr Sharp referred me to the unreported oral judgment of Fisher, J. in ***Lloyd v Ministry of Transport*** (2 September 1991, AP.160/91 Auckland Registry) although he was unable to supply me with a copy of that judgment and, I gather, had not read it. I have now obtained it. In his judgment

Fisher, J. expressly said that he did not want to indicate any suggestions of general principle. The area of dispute in that case was about whether there had been any request for legal advice. So it concerned whether a positive act had been taken by the defendant. Here, in contrast, the matter presently in issue is one entirely internal to the defendant - his state of mind, which had been addressed in his own evidence as well as in the evidence of the police constable. In ***Lloyd*** Fisher, J. thought that the situation at the end of the defendant's evidence-in-chief was that he had "certainly stated that he had made the request for legal advice before the evidential breath test but on the other hand his evidence had not been amplified in any great detail". There was, therefore, the possibility that if there had been cross-examination the defendant's story about what he had done or said might have come out in greater and more convincing detail. For this reason Fisher, J. quashed the conviction and remitted the matter back to the District Court for rehearing.

I regard that decision as a borderline case, while accepting that it was no doubt correct in the particular circumstances: it may be compared with ***Hewinson v Police*** (1987) 3 CRNZ 27 in which stress was laid on whether the defendant had been put on notice that his credibility on the point in issue was being impeached. For the reasons which I have indicated, I think that the circumstances in the present case are rather different from those in ***Lloyd*** and that it was proper for the learned District Court Judge to make the finding against the appellant. It must have been obvious that his contention about his lack of understanding was being impeached and in fact he had been generally cross-examined in relation to it. I am not prepared to disturb the Judge's finding, which is that Mr Manihera, contrary to his own evidence, did understand why he was asked

to accompany the police officer to the police station. He therefore sufficiently understood the reason for his detention.

Then it is said that the words and conduct of the police officer led the appellant to believe that he was under an obligation to carry out the evidential breath test and that, therefore, there were breaches of ss.10 and 22 of the Bill of Rights and that, despite the finding that he had a general understanding of the reason for his detention, there was still a breach of s.23(1)(a) of that Statute. I therefore look again at the evidence to see what the police officer told the appellant about the evidential breath test. I have earlier quoted the relevant portion of the cross-examination of the police constable. He was unable to remember precisely what he had said on this occasion but described the things he would normally say to a person being processed. He said he would normally "explain what the requirement was and again explain procedures step by step as it is undertaken". In other words, he gave evidence that he would have told the appellant of two things. The first was the "requirement" relating to an evidential breath test and the second was the step by step procedure. Much was made by counsel of the fact that, in the answer which the constable gave when asked what he would have said about supplying a sample of breath, the constable referred to the instructions on the machine. However, it is clear to me looking at the notes of evidence that the constable was in that answer concentrating solely on the second element and was describing how he would have explained to the appellant the step by step procedure. He was not cross-examined about the "requirement". I am satisfied that it is safe to assume that the constable's reference to the "requirement" would have been to a form of words consistent with, and probably in the exact terms of, s.58B(4) of the Transport Act. That section says that:

> *"Where any person ... has accompanied an enforcement officer to any place pursuant to a requirement under this section ... an enforcement officer may* ***require*** *the person to undergo forthwith at that place an evidential breath test..."*

In ***Keni v Police*** at p.385-386 I dealt with a similar point, made in relation to a written form, which was said to have contained an implication that the evidential breath test was compulsory. I agreed that a statement that a person is "required" to undergo an evidential breath test - following the language of the Act - would strongly suggest that the breath test was compulsory. But I said that, if the use of the words in the Act would have this effect, I did not think it was of significance that a slightly different form of wording might also convey that impression. Obviously I thought then, and I think now, that a police officer cannot be criticised for using the exact language of the Act. My decision in ***Keni*** has recently been the subject of an appeal judgment (3 September 1993, CA.98/93). That judgment does not explore the detail of the argument concerning the alleged inadequacies of the form which had been used in that case. The Court of Appeal was content to say that each of the complaints about the form had been considered extensively by me, that I had concluded that they were without substance and that the Court agreed with my assessment. I adhere to my view on this point. Accordingly, I find that there was no inadequacy in what was said to the appellant about the evidential breath test.

The appeal is dismissed.

Solicitors: Christiansen Royfee Partners, Taupo for Appellant
Crown Solicitor, Rotorua for Respondent

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