IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 169/94

94/1374

BETWEEN KAREN MARIKO ROBB

Appellant

Set 7.

A N D THE POLICE

Respondent

B/R p3 → check cases in only

Hearing: 10 August 1994

Counsel: W.M. Johnson for the appellant
M.T. Lennard for the respondent

Judgment: 10 August 1994

JUDGMENT OF DOOGUE J

This is an appeal against conviction in respect of a blood alcohol offence. Two points are taken on behalf of the appellant. The first is a challenge to the validity of the blood test upon the basis that there was no evidential breath test carried out in accordance with law prior to the blood test. The second challenge is upon the basis that there was a breach of the provisions of the New Zealand Bill of Rights Act 1990 in that, whilst the appellant was advised of her rights to legal advice, she was not advised of her rights to privacy in respect of such advice. This, incidentally, is a case where the appellant chose not to exercise her rights to seek legal advice.

The first point is a narrow one. It is accepted that the provisions of s. 58(6) of the Transport Act 1962

could save the validity of the subsequent blood test so long as it is established that an evidential breath test was carried out with an approved evidential breath test device. The issue is whether in this case the police officer in question used an appropriate evidential breath test device.

For the appellant it is said that because of uncertainties on the part of the officer in question as to the reading of the language on the read-out given by the device the prosecuting authority did not establish that an evidential breath test device coming within the provisions of the Transport (Breath Tests) Notice (No. 2) 1989 was used.

It is common ground that in this case the officer used a "Seres" device for the purposes of the Notice just referred to. That "means a Seres Ethylometre, model S 679; and includes any device having the trade name 'Seres" and associated with the number 679."

The District Court judge was satisfied from the exhibit in front of him that the device used by the officer was indeed a Seres Ethylometre, model 679, device. I am in effect being asked to set aside the District Court judge's finding of fact because of the difficulties of counsel for the appellant and the officer relating to the case to read the language on the print-out from the machine. Upon my reading of the exhibit, it was entirely open to the District Court judge to find as he did and, given the provisions of s. 68(6) of the Transport Act 1962 and the decision of the Court of

Appeal in Falesiva v Ministry of Transport [1987] 1 NZLR 275, to find that the blood test of the appellant was appropriately sought.

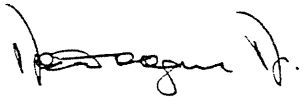
The second issue is also a narrow one. There is no dispute that the appellant was advised as to her rights to legal advice. It is said for her, however, that unless she was also advised that she could exercise such rights in private there was not a true advice as to her rights and there was non-compliance with the provisions of the New Zealand Bill of Rights Act 1990. That submission is made in reliance upon certain dicta in a decision of this Court in Prescott v Police (unreported, AP 130/93, Wellington Registry, 17 December 1993, McGechan J). That, however, was a different case, where the appellant had sought legal advice but was not advised as to his rights as to privacy. This case has more in common with the dicta of Neazor J in Jones v Police (unreported, AP 132/93, Wellington Registry, 18 October 1993) and, more importantly, the decision of the Court of Appeal in Keni v Police; Batistich v Ministry of Transport (1993) 10 CRNZ 623, 628. In the latter case, after recording the evidence of a traffic officer that privacy would have been denied to the particular appellant, the Court went on to say:

> "It can be seen from that exchange that it does not touch the fundamental issue of whether the officer's conduct affected the appellant's decision not to seek legal advice. The officer's final affirmation was confined to his own conduct and he clearly did not grasp the import of the hypothetical question about a theoretical response of the appellant. We accept that a different situation could have arisen had there been evidence from Ms Batistich about the

> matter or a more detailed inquiry into the situation so as to have it rooted in the reality of the case as opposed to the ethereal realm of hypothesis. There is simply no evidential foundation in this case to support the allegation of a breach of the important right to privacy or its having an effect on the appellant's waiver of her right to a solicitor" (p 628)

In this case, like that, there was no evidence from the appellant to establish any evidential foundation that the absence of advice as to the right to privacy had any effect on her waiver of her right to a solicitor.

The appellant has accordingly failed to make out either of the points taken on her behalf and the appeal must be dismissed.



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