IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 245/95

BETWEEN JONES

Appellant

A N D POLICE

Respondent

Hearing: 22 November 1995

Counsel: W.M. Johnston for appellant
A.G.W. Webb for respondent

Judgment: 22 November 1995

JUDGMENT OF DOOGUE J

This is an appeal against conviction in respect of a breath alcohol offence. The appellant took four points before the District Court judge. Before this Court one point only has been pursued with vigour and that is whether or not at the time that the police officer advised the appellant of his rights under the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act") she was required to advise him not only that he was to accompany her to the Lower Hutt police station for the purpose of an evidential breath test, blood test, or both, but that the evidential breath test proposed was conclusive.

It is simplest to deal quickly with the other two points which were not pursued with vigour or at all.

The second point taken on behalf of the appellant related to a particular aspect of compliance with the Bill of Rights Act and it was not pursued.

The third point was that the police officer was not in full uniform when dealing with the appellant although she was clearly in police uniform. It was suggested in the District Court and in this Court that the view could be taken that s. 68B of the Transport Act 1962 ("the Transport Act") required the officer to be in full uniform. The Transport Act is not worded in that way. The decision in Transport Ministry v Quirke [1977] 2 NZLR 497 does not lead to that consequence. There is no substance in that point.

The first point taken, however, does have some support from obiter dicta in two decisions of the District Court. Before referring to those cases, however, and the submissions of the appellant in any detail, it has to be noted that the rights of the appellant in respect of the Bill of Rights Act arose because the police officer required the appellant to accompany her to a place where it was likely that the appellant could undergo an evidential breath test or a blood test or both in terms of s. 58B(1) of the Transport Act. It was because of the proposed detention that the appellant was entitled to be made aware of his rights. There is nothing in the Transport Act or the Transport (Breath Tests) Notice (No. 2) 1989 imposing any criteria for the use of evidential as opposed to conclusive evidential devices. There is nothing in the Transport Act or that Breath Tests Notice requiring an officer to advise a person being required to accompany that officer of the

nature of the specific test to be carried out. The rights of the appellant or a person in his position which are to be advised under the Bill of Rights Act relate to legal advice before the detention occurs. Should the appellant have sought to take advantage of that right, it may be the legal adviser would have advised the appellant of the position in respect of the difference between evidential and conclusive evidential devices for the purposes of the right to a blood test or not.

The rights under the Bill of Rights Act are not to be confused with the right to advice as to the position of the appellant under the Transport Act. That is a matter for the lawyer, if any, advising the appellant or the person in the position of the appellant. It is not a matter for the officer requiring the appellant or the person in his position to accompany the officer to the police station or elsewhere for the purposes of the requisite test.

The submission is made, however, upon the basis of dicta in decisions in Police v Wilde (CRN 4085013647, Wellington District Court, 24 May 1995) and Police v Hoare (CRN 5044005795, North Shore District Court, 16 October 1995) that the person in the position of the appellant is entitled to be advised of the nature of the device which it is intended to be used by the officer so that the person in the position of the appellant can obtain adequate advice if legal advice is sought.

I prefer the reasoning of the District Court judge in the present case. He took the view that the constable in this case discharged the obligations in respect of the Bill

of Rights Act when she required the appellant to come to the police station. He took the view that the advice given to the appellant complied with the requirements of both the Bill of Rights Act and the Transport Act as the reasons why the appellant was being required to return to the police station were advised in terms of the provisions of the Transport Act.

There is nothing about this case which is different from any other case where a person is being required to accompany an authorised officer. It is not for the authorised officer to advise the person in the position of the appellant of each and every of the consequences of accompanying the officer to the place where the test is to be carried out. That is the reason for the person in the position of the appellant to be advised of the right to legal advice.

It is said for the appellant that information as to whether the test device to be used is of a conclusive nature or not relates to a matter of fact. So do many other aspects of the testing regime relate to matters of fact. It is, however, a question of law as to the consequences of the use of the different devices and those are matters for legal advice or not as the person in the position of the appellant chooses. I see no substance in the approach taken in the dicta in the two cases referred to. The appellant was properly advised of his rights under the Bill of Rights Act. It is not a question for the person advising him of those rights to advise the person in the position of the appellant of each and every consequence of accompanying the officer to

the police station. That is the reason why the advice in respect of the Bill of Rights Act is given, so that such advice can be obtained from a lawyer if requested and required. It is certainly true that the officer must facilitate access to the advice if sought, but that is an entirely different issue.

The appeal is dismissed.