N2LR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 138/97

BETWEEN G

Appellant



AND POLICE

Respondent

**Hearing:** 2 July 1997

**Counsel:** W M Johnson for appellant
M J Bodie for respondent

**Judgment:** 2 July 1997

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## JUDGMENT OF EICHELBAUM CJ

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Solicitors
Crown Solicitor, WELLINGTON for respondent

This is an appeal against conviction on a charge of excess breath alcohol for a person under 20, Section 58(1)(f) Transport Act 1962. The appellant was stopped during a random check. The constable stated he could smell alcohol, and that the driver, the appellant, admitted to having consumed beer. A breath screening test gave a reading of "fail/youth", indicating that the breath alcohol had exceeded a reading of 150. The following evidence, to which defence counsel objected, was then given:

> "... I asked the defendant how old he was and he said 20 years of age. On further questioning he then admitted that he was going to be turning 20 in a couple of weeks time. I informed him that due to him being under 20 years of age that this was a positive breath screening test and explained the situation to him. He then said to me "can't you let me off, I will be 20 years in a couple of weeks".

The constable required the appellant to accompany him to a "booze bus" for purposes of an evidential breath test, a blood test or both. The appellant underwent an evidential breath test resulting in a reading of 325. The appellant declined the offer of a blood test, and was charged with the offence of which he was ultimately convicted.

Three issues arise on the appeal and I will deal with them in the order set out in the points on appeal. The first two relate to the challenged evidence of the appellant's admission of age. The officer agreed that he had "cross-examined" the appellant about his being 20 years old. He could not remember his exact words (he did not take any note) but said the appellant's response was "Well actually OK I'm not 20. I'm going to be 20 in a couple of weeks."

Under further cross-examination the officer said:

> "When he said he was 20 you weren't prepared to let him go on his way at that point were you... I wanted to confirm his age.
>
> You didn't want to let him go did you... Well I hadn't finished with him, no.
>
> So if he had have said he wanted to go you wouldn't have let him would you... First of all I would want to confirm his age.

> You wouldn't have let him go would you... It never got to that because when I asked him that question, just to confirm his age, that's when he straight away told me "I'm actually going to be turning 20 in a couple of weeks".

On behalf of the appellant it is submitted that the appellant was being detained and was in a form of constructive custody, that he was being cross-examined, and further that the conduct was unfair, because the constable did not make notes of the questions asked. In his decision the Judge dealt with these aspects saying there was no infringement of the appellant's civil liberties, that the officer was making enquiries which he was obliged to make, and that in terms of *Po v Ministry of Transport* [1987] 2 NZLR 756 the officer had a reasonable time for such purpose.

It is not disputed that the constable was in uniform, and entitled to stop the appellant. Under Section 66(2)(b)(i) the constable was entitled to demand, among other things, the appellant's date of birth. In terms of *Po v Ministry of Transport* he was entitled to detain the driver for as long as was reasonably necessary to enable him to check whether there was good cause to suspect the recent consumption of drink and to carry out any other applicable statutory powers. Clearly there was evidence entitling the Judge to find that the officer had not gone any further than he was entitled to do, and I see no reason for disagreeing with the Judge's conclusion in this respect. As stated in *Po* this can only be a matter of fact and degree, and on the evidence the "cross-examination" could be viewed as not amounting to any more than identifying the appellant's age in a more precise way. Understandably no particular point was taken of the fact that the constable asked for the appellant's age as distinct from his date of birth. As to fairness there is no evidence to raise any issue of unfairness on the part of the constable. The conversation was brief and the absence of note taking is insufficient to raise any issue.

The next point, which Mr Johnson put at the forefront of his oral submissions, relates to subsection (1A) of Section 58B of the Act which provides:

> [[(1A) For the purposes of subsection (1) (aa) of this section,-
> (a) An enforcement officer is entitled to regard a person as being under 20 years

of age if-

(i) The person produces a driver's licence showing that the person is of such an age; or

(ii) The person produces a driver's licence showing that the person is of or over 20 years of age, but the officer has good cause to suspect that the licence has been issued in respect of some other person or is invalid or that the person is under 20 year of age; or

(iii) The person fails to produce a driver's licence and is unable to satisfy the officer by some other means that the person is of or over 20 years of age:

(b) An enforcement officer is not obliged to take any further steps, other than requiring the production of a driver's license, to ascertain the age of a person.]]

Mr Johnson's submission was that having regard particularly to para (b) the provision imposed an obligation on an enforcement officer to require production of a driver's licence. He said that the provision constituted a duty not a power while Mr Bodie argued the contrary. It is common ground that in the present case the officer did not make any request for the production of a licence.

For present purposes the governing provision under Section 58B is subsection 1(aa) which provides that an enforcement officer may require a person to accompany him to any place where it is likely that he can undergo an evidential breath test or a blood test or both if:

[[(aa) It appears to the officer that the person is under 20 years of age and that a breath screening test undergone by the person pursuant to a requirement under section 58A of this Act indicates that there is some alcohol in the person's breath;]]

Subsection (1A)(a) prescribes a process by which an enforcement officer *is entitled* to regard a person under 20 for purposes of Section 58B(1)(aa). It does not say that the enforcement officer is entitled so to regard the suspect if *and only if* one or other of the requirements of the subsection are met. It is a provision designed to facilitate fulfilment of the requirements of what I have described as the governing provision. I do not read subsection (1A) as a code excluding proof of age by other normal evidentiary methods. It is facilitatory not exhaustive.

In *Smith v Police* [1969] NZLR 856 McCarthy J held that where in a prosecution the age of a person is significant, that fact may be proved by any lawful evidence. Further, the evidence of a person as to his or her own age, even if founded on what that person has been told, for example by parents, has been so widely accepted in practice in this country that this exception to the hearsay rule should be expressly recognised. I propose to follow those holdings.

Mr Johnson in his written submissions further contended that the appellant's statement about his age was equivocal, but the Judge was entitled to proceed on the basis that the appellant would have known whether or not he had reached his 20th birthday.

Accordingly, I reject the contention that there was insufficient evidence to invoke the power to require the appellant to accompany the officer, as provided under Section 58B(1)(aa).

The third point is founded on Section 58(4) of the Act. This provides that except under subsection 5 ( relating to conclusive evidential breath testing devices) the results of a positive evidential breath test shall not be admissible for an offence against subsection 1 if the person who underwent the test is not advised, forthwith after the result is ascertained, that it was positive and that if the suspect does not request a blood test within 10 minutes:

> "In the case of a positive test that indicates that the proportion of alcohol in the person's breath exceeds 150 but does not exceed 400 micrograms of alcohol per litre of breath, the test could of itself, *unless the person is of or over 20 years of age*, be sufficient evidence to lead to that person's conviction for an offence against this Act."

In Mr Johnson's submission the inclusion of the italicised words has the result that that information is part of the advice to be given to the driver. He said that it was important advice the driver was entitled to have, although counsel was unable to say how in relation to a person who had admitted he was under 20 receipt of the advice could make any

difference to his decision whether not to exercise the right to a blood test. Mr Johnson drew my attention to *Barr v Ministry of Transport* [1983] NZLR 720 where it was held that while an enforcement officer must communicate the nature of the advice contemplated by Section 58(4) in a clear and sufficient form of words, no specific formula need be used. Once the sense and effect of Section 58(4) had been conveyed there was an actual compliance with the requirements of the subsection.

For purposes of this case it is unnecessary to decide whether Mr Johnson is correct that the words italicised earlier are part of the information required to be given to the suspect and whether it is mandatory to give advice to that effect. Assuming without deciding that that is the position, on the evidence in this case the information was given. The constable deposed that in the "booze bus" he explained to the appellant that the reason his result was positive was because he was under 20 and had exceeded a count of 150 and that for anyone aged 20 or over it would not have been a positive result. In terms of *Barr* there was actual compliance with the requirements. At one with the Judge I am satisfied that the appellant could not in any way have been misled because he had been given the information required in a manner consonant with what was contemplated in *Barr v Ministry of Transport.*

The appeal is dismissed. As there may be difficulty in notifying the appellant of the outcome of the appeal immediately, I direct that the period of disqualification is run from midnight tomorrow, 3 July 1997.

[illegible] CJ