IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

AP 33/97

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BETWEEN D

Appellant

AND POLICE

Respondent

Hearing: 18 June 1997

Counsel: T.V. Barclay for Appellant
J.P. Temm for Respondent

Judgment: 2 July 1997

JUDGMENT OF ANDERSON J

SOLICITORS

Tim Barclay (Rotorua) for Appellant
Davys Burton (Rotorua) for Respondent

On 29 April 1997, following a defended summary hearing in the District Court, the appellant was convicted of an offence against s 58(1)(c) of the Transport Act 1962 in that he drove a motor vehicle on a road while the proportion of alcohol in his blood exceeded 80 milligrams of alcohol per 100 millilitres of blood. He appeals against conviction.

Two principal grounds of appeal were advanced, although ultimately the first ground was not pursued. That ground related to the granting of leave to the prosecutor, following the closing of the prosecution case, to produce a blood specimen medical certificate issued pursuant to s 58G(1) of the Transport Act 1962. The certificate was on the prosecutor's bench and his omission formally to produce that document was merely improvident. In all the circumstances the alternative to granting leave would undoubtedly have been a dismissal of the information without prejudice to its again being laid pursuant to s 68(1) of the Summary Proceedings Act 1957. Since the only oral evidence adduced by the prosecution was that of the apprehending and processing police constable, the case would have proceeded imminently with the relevant certificate then being produced. Understandably appellant's counsel was not minded to pursue the point throughout the appeal, particularly since even on the appeal the information could have been dismissed without prejudice and remitted for rehearing with consequential cost and inconvenience to all. The appeal therefore fell to be determined on a point going to the merits.

The appellant was aged 21 years at the time he was detained after failing a breath screening test administered following a collision between his car and another. He accompanied the police officer to Rotorua Police Station where he undertook and failed an evidential breath test using an Intoxilyzer 5000 device which returned a level of 554 micrograms of alcohol per litre of breath. The appellant was then advised of his right to a blood test and within the 10 minute

period provided for that purpose he elected to have a blood test. He failed this, giving rise to the laying of the information.

It is common ground that at the road side, at the Police Station before the evidential breath test, and at the Police Station before the election to give a blood sample, the appellant was advised of his rights including his right pursuant to s 23(1)(b) of the New Zealand Bill of Rights Act 1990 to consult and instruct a lawyer without delay. An exhibit produced by the prosecution was a document setting out in a clear and helpful way all relevant rights. The terms of the document are as follows:-

ADVICE PURSUANT TO
NEW ZEALAND BILL OF RIGHTS ACT 1990

To: [redacted]

(address)

Rotorua *Baker*

"You are advised that you have the right to consult and instruct a lawyer without delay and to carry out that right in privacy."

"You also have the right to refrain from making a statement."

"These rights will continue throughout the breath/blood alcohol procedures. A telephone will be made available for that purpose as soon as practicable and before you undergo an evidential breath test, blood test, or both."

"You will have a reasonable time to consult and instruct a lawyer from the time a telephone is made available."

Person Advised:

Time: *1937 & 1949* Date: *12/10/96*

Place: *Roadside - Station*
(Place advice given)

Signed: *G.I. Jackson*
(Name of officer giving advice)

I have been advised of my right to consult and instruct a lawyer without delay and in private and my right to refrain from making a statement. I understand that my rights will continue throughout these procedures.

*Signed:

*Refused to sign

*Delete what is not applicable

Advised at 2008 and again at 2019 hrs after blood requested

There is evidence from the appellant at trial, which is not necessarily confirmed by but was not contradicted by the processing constable, that after reading the form the appellant asked how much a lawyer would cost to bring down to the station and that the constable said he did not know but that they charged by a quarter hourly rate and that they all vary. The appellant's evidence was that he replied "well there's no doubt that I can't afford it." He gave evidence that he wanted to contact a lawyer; that he thought he could not afford to get one down to the Police Station; that he had no money on him at the time; and that he had never been inside a Police Station before. His evidence was that he mentioned twice to the constable that he could not afford a lawyer, once before the evidential breath test and once before electing blood. He gave evidence about his subjective financial circumstances sufficient to indicate that the cost of a lawyer was a significant consideration for him.

The police constable was unable specifically to recall any inquiry about cost but acknowledged that the appellant could have inquired. He said that he recalls being asked about cost on more than one occasion, obviously in the course of his duties generally, and giving advice that as far as he was aware lawyers charged per quarter hour. He could not recall the appellant saying he could not afford a lawyer but acknowledged that such a comment may have been made. He said that he would not find it surprising since although he knew the appellant was in paid employment he knew that the appellant's car was uninsured. He did not advise the appellant of the Police Detention

Scheme and said that it would not have occurred to him to advise the appellant of that possibly because he was in paid employment and in a position to pay.

The evidence in respect of that scheme is succinct, presumably because its existence seems to be known in the legal environment of Rotorua. I was informed by counsel from the bar that the scheme is operated by the Legal Services Board and functions in a way which permits persons detained by the police to avail themselves of at least a telephone call to a lawyer on a list, free of professional charge to the detainee. The evidence on the point at trial is contained in the cross-examination of the constable, and is in the following terms:-

> Did you advise him about the detention, Police Detention Scheme, in fact it wouldn't cost anything.....No, it wouldn't have occurred to me to advise him of that. Possibly because he was in paid employment and in a position to pay.

The learned District Court Judge refers to the issue in terms indicating familiarity with the scheme as one where a lawyer could be contacted free of charge. Although tenuous, the evidence is in the circumstances sufficient to indicate that at the times he was advised of his right to consult and instruct a lawyer without delay the appellant, if he had been aware of it, could have obtained free legal advice at least by telephone, from a lawyer, pursuant to a scheme whereby such a service is provided to persons in police detention, and that although generally aware of such a scheme the police constable did not bring this matter to the notice of the appellant.

In commenting upon that omission by the police constable, I emphasise that the omission was entirely the result of inadvertence and that in dealing with the appellant the constable was assiduous in advising the appellant that he had a right to consult and instruct a lawyer without delay and that this could be done in private. In the result, however, the appellant, although informed of the existence of the right, was inhibited in the exercise of it by financial

considerations in circumstances where he would have availed himself of the right if he had known of the free scheme. The critical issue on this appeal is whether in the circumstances of the case there was a breach of the right to consult and instruct a lawyer, assured by s 23(1)(b) of the New Zealand Bill of Rights Act 1990.

In dealing with that issue the learned District Court Judge observed that, as indicated by *R v Barber* (1993) 10 CRNZ 301, there may be circumstances when a police officer imparting advice under the New Zealand Bill of Rights Act 1990 is required to go somewhat further and give advice as to how that right might be facilitated, but he nevertheless determined that there is no general duty in that regard and that each case must turn on its own facts.

In the present case the learned District Court Judge held that the appellant could not have been prejudiced by his failure to consult and instruct a lawyer on the night. He found that if the appellant had not elected to have a blood test, legal advice may have been of some assistance to him in determining whether or not to elect to have the blood test but that in the circumstances the result would have been the commission of an offence of driving with excess breath alcohol instead of driving with excess blood alcohol. He rejected a further submission on behalf of the appellant that without the benefit of legal advice the appellant had made himself subject to a greater penalty and that medical expenses and analyst's fees may flow as part of the penalty. The reason for rejecting that submission was not given. In the result the evidence of the breath and blood test was admitted and a conviction was entered.

With respect to the learned District Court Judge, I consider that the appellant was prejudiced by the absence of legal advice in a way which goes beyond the jeopardy of a blood alcohol as opposed to a breath alcohol offence. The availability of legal advice in the processing of suspected offences in relation

to driving and alcohol is a right in which the subject as well as the community has a real interest. As far as the community is concerned, the counsel of a professional lawyer can have the benefit of placating or re-assuring a subject undergoing the necessary detention and compulsory procedures. Wise counsel to comply with the evidential breath test would be valuable advice to a subject. As far as private interest is concerned, it is noted that in the case of a person whose breath alcohol level entitles them to elect a blood test, advice to the effect that the election can be made any time up to the expiry of the 10 minute period, whereas an election to undergo a blood test made at whatever point in that period is likely to be binding, is valuable advice. Furthermore, the taking of blood is an invasive bodily process which the subject need not undergo and if the subject does there is more than a risk, there is a high probability, that costs will be incurred in the form of doctor's fees and analyst's fees. The Court has power to order the payment of such costs and their quantum would be no trifling amount for the average person. I think it plain that the right to consult and instruct a lawyer, as well as the right to be informed of that right, is something of value in terms of basic rights and something which also facilitates the orderly processes of justice. I think it also important to bear in mind that generally persons who may be most dependent upon and most likely to benefit from legal advice may be those least able to afford it. The question then is whether in the particular case the appellant was deprived of that valuable right.

In *R v Tunui* (1992) 8 CRNZ 294 (High Court, Auckland) it was held that a subject had not been effectively accorded an opportunity to exercise his right to consult and instruct a lawyer because of physical restraint. The present case is concerned not with inhibiting physical constraint but a combination of financial constraint and ignorance of a free service which was available, and which was known about in a general way by the processing police officer. In *R v Barber* (supra), a detained person was found to have wished to exercise

his right to consult and instruct a lawyer without delay but felt unable so to do, and indicated his inability so to do, by reason of financial difficulties. At the time he was being processed a Law Society scheme was operative, although it was not necessarily a free service as in the present case. The High Court found that the list of available solicitors ought to have been given to the detainee and in the circumstances of the case the statement elicited from him was excluded.

In *R v Mallinson* [1993] 1 NZLR 528 at 531, the Court of Appeal held that informing persons arrested of their s 23(1)(b) rights ordinarily carries with it the obvious implication that they are entitled to exercise those rights. It was further held that any duty on the part of the police to facilitate the manner of its exercise is not triggered until there is an indication by the person arrested of the desire to consult a lawyer, and that what, if anything, is then required of the police will depend on the particular circumstances. The Court of Appeal emphasised that the Bill of Rights Act 1990 is not a technical document and has to be applied in our society in a realistic way, the question being whether what was done gives practical effect in the particular circumstances of the protected rights. In *R v Grayson and Taylor* [1997] 1 NZLR 399 at 409, the Court of Appeal reiterated that the Bill of Rights is not a technical document and has to be applied in our society in a realistic way.

In the present case the appellant clearly indicated a desire to obtain legal advice whilst at the same time indicating that he felt unable to exercise that right because of financial constraints. He did not pursue the matter because of a belief, founded on the constable's advice given in good faith but erroneously, to the effect that it would cost him fees chargeable on a quarter hour basis to consult a lawyer. In fact by reason of the Police Detention Scheme he could have availed himself of free legal advice by means of a telephone call to a list lawyer and in the light of such advice may well have elected not to submit

voluntarily to the blood taking procedure with its potential for significant additional cost.

In my judgment the appellant was not accorded his right to consult and instruct a lawyer, and he was in fact deflected from availing himself freely of that right by dint of erroneous advice as to cost in circumstances where the free scheme should have been brought to his notice. The result of his being deprived of the guaranteed right is that the evidence of the evidential breath test and the evidence of the analysis of the blood sample should have been excluded, with the result that an acquittal was inevitable. I therefore allow the appeal and quash the conviction.

By way of postscript I mention that it would take little to amend the otherwise helpful written advice of rights to include a reference to the availability of the free legal service by telephone of the Police Detention Scheme.

NC Anderson J