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Butterworths

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 153/97

BETWEEN ANTHONY STANLEY MAY

Appellant

AND POLICE

Respondent

BR s22

Hearing: 22 August 1997

Counsel: M. Harte for Appellant
W.E. Andrews for Respondent

Judgment: 22 August 1997

ORAL JUDGMENT OF ANDERSON J

1012 — Breath alcohol — Policy of arresting all drivers who fail breath alcohol test — Whether the existence of an arrest policy justified the exclusion of evidence obtained — Whether the existence of an arrest policy gives rise to public law remediesm — NZ Bill of Rights Act 1990, s 22. M appealed his conviction on a charge of driving with excess breath alcohol. The question on appeal was whether the Court should quash the conviction because M was arrested pursuant to a policy of arrest, adopted as a standard procedure in respect of persons failing evidential breath tests in the Rotorua policing area. Anderson J noted that in situations where there is a causative link between the obtaining of evidence and the threat or operation of an arrest policy, the Court may exclude the evidence. Anderson J held that no such causative link was present in this case, thus the appeal failed. Anderson J, as obiter, noted that the existence of such policies were a matter of concern given that the power to arrest is discretionary. The police could be vulnerable to public law actions for breach of s 22 of the NZ Bill of Rights Act 1990. *May v Police* (High Court, Auckland AP 153/97, 22 August 1997, oral judgment of Anderson J). [5 pp]

Appeal — Integrity of breath test devices —

SOLICITORS

Michael Harte (Auckland) for Appellant
Meredith Connell (Auckland) for Respondent

On 27 September 1996 the appellant was convicted on an information determined summarily in the District Court of driving with an excess breath alcohol level, being 615 micrograms of alcohol per litre of breath, in contravention of s 58(1)(A) of the Transport Act 1962.

His vehicle was stopped by a police officer who in the circumstances had good cause to suspect that a relevant offence had been committed and he required the appellant to undergo a breath screening test by using the device, the Draegar Alcotest R80/A breath screening test device. The appellant failed that test and was then required to accompany the officer to the Rotorua Police Station for the purposes of an evidential breath test, blood test or both. At the Police Station he was informed of all relevant rights and underwent an evidential breath test with an Intoxilyzer 5000 device which returned the 615 micrograms per litre of breath result previously indicated. Because the level was in excess of 600 micrograms per litre the appellant did not have the option of a blood test and the results obtained by the Intoxilyzer 5000 were for relevant purposes conclusive. The appellant was immediately arrested and underwent the usual incidents of arrest, including fingerprinting, before being released on police bail.

On this appeal no question arises about irregularity concerning the administration of the breath screening test or the evidential breath test. The point on the appeal is whether the Court should quash the conviction because the appellant was arrested pursuant to a policy of arrest adopted as a standard procedure in respect of persons failing evidential breath tests in the Rotorua policing area.

The evidential basis for counsel's complaint as to this process is found at pp 5 and 6 of the transcript:-

> Why did you arrest him?...Standard procedure in Rotorua, Sir.
> You arrest all drink drivers?...Yes Sir.
> All positive breath tests you arrest?...Inclusive where it doesn't go to blood, yes Sir.
> Don't the solicitors tell the people to go to blood to avoid the arrest?...He's got no choice in this case, Sir.
> I mean, unless you outright miss the evidential out before? Do you get people doing that?...I don't understand, I'm sorry.
> Well, don't you get asked "is this person going to get arrested if he's a positive evidential" and, if the answer to that is "yes", do you get solicitors refusing the evidential and going straight to blood?...Not in my experience, Sir, no.
> I'll see what I can to do to encourage them?...I'm sorry, what was that?
> I said I'll see what I can do to encourage them. The - so you just arrested him as standard procedure?...Yes Sir.
> You arrest every excess breath alcohol person?...Conclusive device, yes Sir.

That such a policy was in operation at the relevant time was acknowledged by the prosecutor, although of course the duration of such policy, the geographical area, any qualifications that might apply, and the existence of any local reasons which might make it appropriate have not, nor in the context of such a case could be, extensively examined.

The case has superficial similarities but important differences from that series of cases of which ***Auckland City Council v Dixon*** [1985] 2 NZLR 489 is the exemplar. This stream of cases is carefully reviewed in a decision of the Chief Justice in ***Ellicock v Courtney*** (1992) 8 CRNZ 390. The principle indicated by these cases is that if there is a reasonable possibility of a causative link between words or conduct complained of in connection with the threat or operation of an arrest policy, and the particular evidence relied upon is essential to conviction, the Court in its discretion to ensure fairness, and to some extent consistent with the Court's proper disciplinary oversight of the administration of justice, may exclude the essential evidence thereby justifying an acquittal.

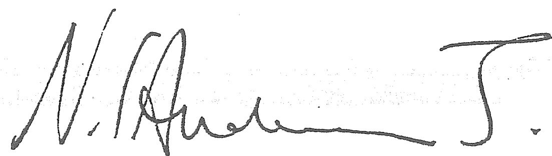
The present case is not such a case. It is essentially similar to ***Police v Costley***, 28 March 1994, AP 42/93, Whangarei Registry, determined by Tompkins J. In that case it was found that the arrest of the citizen in the particular circumstances was an abuse of power but that the information was not amenable to dismissal for that reason because of the absence of a causative link between the abuse and the evidence relied upon. I find this to be such a case also. There is no suggestion that the prevailing policy of arrest was indicated to the appellant or was otherwise in any way influential in respect of evidence relied upon. The appeal must therefore be dismissed.

This is not to say that such a policy is a matter of mere passing concern. Any arrest is patently an encroachment on the liberty of the person and may be in breach of s 22 of the New Zealand Bill of Rights Act 1990 which assures that everyone has the right not to be arbitrarily arrested or detained. Where a power to arrest or detain is discretionary, as it is in a case such as the present, the exercise of that power is dependent upon the proper exercise of the discretion. This is self-evident. There are public law decisions covering decades which exemplify the elementary point that there is no exercise of discretion where there is an absolute policy. The imposition of invariable policy is the antithesis of the exercise of discretion. Where a statutory power of decision may be invalid on the grounds that a necessary prerequisite to exercise a discretion has been displaced by an absolute policy of enforcement, judicial review will apply pursuant to the Judicature Amendment Act 1972. In addition, there is now authority of this Court that damages may lie for breaches of rights assured by the New Zealand Bill of Rights Act. The rationale of that approach, which has philosophical replication in the Droit Administratif of France and other European countries, is that where a right has been violated there must be compensation, and if compensation may only be assured by money then that will be the judicial response to the breach.

It is not appropriate for this Court to determine whether the policy indicated in the evidence in the particular case is invalid or amenable to suit for damages on the basis of the New Zealand Bill of Rights Act. Policy issues may well apply and such may import facts and circumstances which will require more extensive review than a summary information such as the present could permit. Yet I think it important to put on notice authorities, who may have an unjustifiable and arbitrary policy of arrest, who direct officers not to exercise discretions which at law they have in order to implement another agenda, that they may be amenable to extensive litigation pursuant to the public law remedies and the New Zealand Bill of Rights Act jurisprudence which I have identified.

I am obliged to Mr Harte and his client for raising these issues which are of no little public significance. Regrettably the appeal must be dismissed.

I direct that a copy of this decision be forwarded to the Crown Solicitor at Rotorua and to the senior commissioned officer of police in that city.



NC Anderson J