IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA: 1/2022
JPA NO. 2/19
CR NO. 42/18

BETWEEN **TONY BULLIVANT**
Appellant

AND **THE CROWN**
Respondent

Coram:	White P, Fisher JA, Asher JA
Hearing:	16 May 2022 (CIT) / 17 May 2022 (NZT)
Counsel:	Mr B Mason for Appellant Ms J Crawford and Ms J Epati for Respondent
Judgment:	19 May 2022

JUDGMENT OF THE COURT OF APPEAL

A. The appeal against conviction is dismissed.

B. The fine of $400, the order to pay Court costs of $50 and the disqualification from holding or obtaining a driver's licence for 12 months, which were stayed, are confirmed, save that the period of disqualification is to commence three months after the date of this judgment.

Introduction

[1] Following a defended hearing before Mrs Carmen Temata JP in the Criminal Division of the High Court on 9 May 2019, the Appellant, Mr Bullivant, was convicted of driving with excess breath alcohol under section 28A(1) and (2) of the Transport Act 1966 in a decision given on 9 July 2019.[1]

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1 *Police v Bullivant* CKHC JPA No.2/19, CR No.42/18, 9 July 2019.

[2] Sentence was subsequently imposed on 22 August 2019 when Mr Bullivant was fined $400, ordered to pay Court costs of $50 and disqualified from holding or obtaining a driver's licence for 12 months.[2] The sentence was suspended pending an appeal to a Judge of the High Court.

[3] The appeal was heard by Potter J on 1 December 2021 and dismissed in a judgment delivered on 4 March 2022.[3]

[4] By notice dated 9 March 2022 Mr Bullivant applied to the Court of Appeal for leave to appeal against the decision of Potter J and for a further stay of the sentence. As the Crown did not oppose the application, this Court in its interim judgment of 23 March 2022 granted leave to appeal and made a further order staying the sentence pending determination of the appeal.

[5] With the cooperation of Counsel and the Court staff the appeal was heard by way of Zoom with the Judges in New Zealand.

The factual background

[6] The factual background is not in dispute.

[7] On 20 January 2018 Mr Bullivant, while driving a green jeep, was stopped at a Police checkpoint where officers had devices for measuring alcohol in drivers' breath. A test was administered to Mr Bullivant and the reading, seen by two Police officers, was 1000.

[8] At the request of the Police, Mr Bullivant then accompanied one of the Police officers back to the Police station where a second test was administered using another device of the same kind which was attached to a printer. The printer produced a printout recording a reading of 990.

[9] The Police prosecution of Mr Bullivant was based on the evidence in the printout obtained from the second test.

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2 Above n 1, 22 August 2019.

3 *Bullivant v Bullivant* CKHC JPA No.2/19, CR No 42/18, 4 March 2022.

[10] Both Mrs Temata JP and Potter J accepted that the evidence from the second test was admissible and proved the offence.

[11] The devices used for both tests were Drager Alcotest 6810 GBs. The printer at the Police station was a mobile printer which could have been taken to the roadside, but was kept at the Police station for use by all officers.

The dispute

[12] Mr Bullivant does not dispute that the evidence from the second test proved the offence, but has argued at the initial hearing and on both appeals that the Police had no statutory power to administer two tests in his case and were only entitled to have prosecuted him on the basis of the evidence from the first test. He points out that the Police could have done so relying on the oral evidence of the officers who saw the reading on the device used for that test, but the second test was unlawful and the test result relied on by the prosecution was therefore inadmissible.

[13] Mr Bullivant claims he was unlawfully deprived of his liberty when he was taken to the Police station for the unauthorized second test.

[14] The Crown argues that the Police had statutory power to administer both tests and to decide which one to rely on when prosecuting Mr Bullivant.

The relevant statutory provision

[15] The relevant statutory provision is section 28B of the Transport Act 1966 which was inserted in 2007 and amended in 2016. Subsection (1) reads:

> **28B Who must undergo breath screening or breathalyser test** – (1) Where a constable has reasonable cause to suspect that a person -
>
> (a) Is driving or attempting to drive or is in charge of a motor vehicle on a road; or
>
> (b) Has recently been driving or attempting to drive or has been in charge of a motor vehicle on a road; or
>
> (c) Was the driver or person in charge of a motor vehicle which was involved in a motor vehicle crash, -
>
> the constable may, subject to section 28F, require that person to undergo without delay a breath screening test or a breathalyser test; and, if the person

> refuses to undergo a breath screening test as required, the constable may require the person to undergo without delay a breathalyser test.

[16] For Mr Bullivant, Mr Mason submitted that the word "or" in the heading to the section and in the phrase "a breath screening test or a breathalyser test" should be interpreted literally to mean one or other test and not both. In other words, "or" should be read in its normal disjunctive sense. The use of "or" is deliberate and not inadvertent and means that the Police may only administer one of the two tests.

[17] Mr Mason supported this submission with reference to:

(a) The following words in section 28B(1) – "and, if the person refuses to undergo a breath screening test as required, the constable may require the person to undergo without delay a breathalyser test." In other words, the inclusion of these words confirmed that, if the person had not refused to undergo the first test, the second was not authorised.

(b) Section 28F(4)(a) and (b) which provide that evidence of the proportion of alcohol in a person's breath may be adduced by the printout from the second test or oral evidence relating to the first test.

(c) The Police General Instructions which refer to a step by step process starting with a breathalyser test.

[18] There are several difficulties with these submissions. First, the literal interpretation of section 28B(1) leads to a result which is inconsistent with the obvious purpose of the legislation which, as Mr Mason quite properly accepted, is to "deal with the mischief of drink driving in the interests of public safety" as Potter J put it in her judgment.[4] When this purpose is borne in mind, we do not consider the legislation was intended to enact a narrow disjunctive either/or testing regime which would prevent prosecution of a person who failed the second test on the basis of that failure merely because he or she had also failed the first test. We prefer the Crown submission that the references to "or" in the provision should be read conjunctively as "and/or".

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4 Above n 3, at [37].

[19] Second, the language of section 28B(1) itself does not support a literal interpretation. There are clearly two different tests involved, namely "a breath screening test" and "a breathalyser test". The use of the adjective "screening" clearly suggests a first step – a preliminary step or triage. Then the reference to the second test – "a breathalyser" – suggests that is the one that matters. It would be very surprising if the provision were intended to be read so as to exclude reliance on the second test.

[20] It is easy to envisage circumstances where the first test is failed, but there are concerns about the evidence relating to that test which would warrant the second test to prove the failure. For instance, the initial screening test will frequently be carried out at the roadside in whatever weather and other conditions pertain, while the analysis breathalyser test on which any prosecution would be based would take place in the shelter and calm of a police station, a place much more suited to the use of a printer. While section 28B(3) permits both tests to be carried out at the same place, namely "the spot where the person is apprehended or at a police station", we expect, as Parliament will have recognised, it will be common for the tests to be conducted sequentially in this way for these practical reasons.

[21] The fact that a second test may be required when a person refuses the first step is consistent with our approach. If a refusal warrants a second test, so does a failed first test with evidential concerns about admissibility or reliability.

[22] The evidential options in section 28F(4)(a) and (b) are also consistent with our approach. Those paragraphs make it clear that the Police are able to rely on the printout from the second test or oral evidence relating to the first test. We agree with the Crown that the Police have a choice as to which test to rely on to prove their case.

[23] Third, like Potter J,[5] we do not consider the Police General Instructions are of relevance to the issue of statutory interpretation. Not only have they not been updated to take into account the latest legislative amendments but in any event they would also not override the statutory language or determine its meaning.

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5 Above n 3, at [33]-[35].

[24] Fourth, we consider the conjunctive "and/or" interpretation of section 28B(1) makes the legislation work in a practical and common sense way in the Cook Islands as Parliament intended.[6] It keeps the provision simple and straightforward for the Police to use in the interests of public safety. We reach this conclusion from our reading of the legislation itself.[7]

[25] Finally, it is important to note that our approach is consistent with Articles 64(2) and 65(2) of the Constitution of the Cook Islands. The former makes it clear that "every person has duties to others" and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed by any enactment "in the interests of public safety". This confirms that the public safety purpose of the drink driving provisions may limit the rights and freedoms of persons suspected by the Police of breaching them.[8]

[26] Article 65(2) also confirms that every enactment is "deemed remedial" and should accordingly receive "such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the enactment …."

[27] Accordingly, for these reasons, we have decided the appeal should be dismissed.

Sentence

[28] With the dismissal of the appeal, the sentence imposed by Mrs Temata, which has been stayed pending the outcome of the appeal, is confirmed.

[29] Mr Mason submitted, however, that the date for the commencement of the 12 month period of disqualification should not commence for a further three months in order to enable Mr Bullivant, who is a chef and caterer, to organize his affairs. Mr Mason pointed out that it has been over four years since the offence was committed and the delays in the hearings since then have occurred through no fault

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6 *Jones v Wrotham Park Settled Estates Ltd* [1979] 1 All ER 286, at 289; *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 537 (CA); *Johnstone v Police* CKCA [2015] CA 3/15, 20 November 2015, at [19]-[23]; and "A Personal Perspective on Legislation: *Northern Milk* Revisited – Soured or Still Fresh?" (2016) 47 VUWLR 699.

7 cf Susan Glazebrook *"Do they say what they mean and mean what they say? Some issues in statutory interpretation in the 21st century"* (2015) 14 Otago LR 61.

8 *Johnstone v Police*, above n 6, at [25]-[26].

of Mr Bullivant. Mr Mason also noted that there is a six month stand down period before an application may be made for a restricted licence.

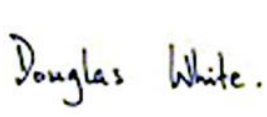
[30] Ms Crawford for the Crown opposed any deferral of the commencement of the disqualification period on the grounds that such a step would be unusual and Mr Bullivant has always been aware that in the event the appeal was unsuccessful disqualification would follow.

[31] Taking into account the length of the time since the offence was committed and the fact that the delays related mainly to Covid and were beyond the control of the parties,[9] as well as the nature of Mr Bullivant's current employment, we accept that, in the very unusual circumstances of this case, the commencement of the 12 month period of disqualification should be three months from the date of this judgment.

Result

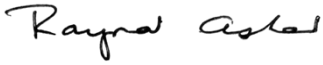
[32] The appeal is dismissed.

[33] The fine of $400, the order to pay Court costs of $50 and the disqualification from holding or obtaining a driver's licence, which were stayed, are confirmed, save that the period of disqualification is to commence three months after the date of this judgment.



Douglas White, P

Robert Fisher, JA



Raynor Asher, JA

9 *Bullivant v Police*, above n 3, at [1].