IN THE HIGH COURT OF THE COOK ISLANDS **JP APPEAL 1/17**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

TAMAINE TEAURIMA

v

POLICE

Hearing Date: 21 September 2017

Counsel: Mr W Rasmussen for the Appellant
Mr T Manavaroa for the Police

Date: 21 September 2017

JUDGMENT OF THE HONOURABLE JUSTICE PATRICK KEANE

[9:30:57]

[1] On 16 May 2017 Tamaine Teaurima was convicted of driving on 1 January 2017 with an excess breath alcohol level, 520 micrograms of alcohol per litre of breath. Justice of the Peace Mrs Temata, who had found the appellant guilty after a defended hearing and after entering a conviction, fined her $250, disqualified her for the minimum period of 12 months, and imposed costs.

[2] On this appeal against conviction the appellant puts in issue principally whether the Justice could have been satisfied on the evidence that the police adhered to the procedure prescribed under the Transport Amendment Act 2007, and was entitled to conclude that the evidential breath test result was admissible. She puts in issue the accuracy of the two officers, who gave evidence as to the sequence of events and the timings critical.

[3] Essentially, she contends, the Justice ought to have found on the evidence that there was at least the reasonable possibility that a testing device used at the roadside for non-

evidential purposes was then used evidentially at the police station. Implicitly that is a challenge to whether the device was prescribed or accurate.

[4] A point identified in submission was that, after the test, the appellant was not accorded the choice of a blood test. But, as she accepts, her breath alcohol level, 520 micrograms per litre of breath, lay below the level that triggered that right, 550 micrograms. The confined issue on this appeal is whether the Justice erred in fact and perhaps law as to the device itself.

Evidence

[5] Acting Inspector Tuaati gave evidence that at 7.50 am on 1 January 2017 he stopped the appellant at Titikaveka after pursuing her from Tikioki as a result of the speed at which she was travelling, some 87 kilometres per hour. He supported that timing by a notebook entry.

[6] The appellant was, he said, fully cooperative. She admitted to consuming alcohol the night before, New Year's Eve. He accepted when cross-examined that he had breath tested her. He said that it was a non-evidential breath test merely to confirm whether she had alcohol on her breath. The device he used, however, was the same type of device as that used for evidential purposes. When asked what the number was he said that he could not recall. It could have been 2050 but he could not be exact.

[7] He then said that he had the appellant accompany him to the police station at Avarua. He thought they arrived there between 8.15 to 8.30 am. It was put to him, there was evidence from the second officer, Sergeant Poila, that it could have been 9.30 am. He disagreed.

[8] Sergeant Poila gave evidence that the acting inspector had contacted him by radio at 7.15 am; a time which he confirmed by notebook entry. When asked whether that might have been 9.15 am, as his brief of evidence recorded, he said that was a typing error.

[9] His evidence was that at the police station he administered an evidential breath test to the appellant. He produced the printout. It recorded that the test had occurred at 8.16 am, that

the device used was number 2050, and that the result was 520 micrograms of alcohol per litre of breath. He then passed responsibility to a probationary constable.

[10] When asked whether the device he used was the device used by the acting inspector he said that it was not. It was housed at the police station. He was unaware that the acting inspector had a device in his vehicle for breath screening purposes.

[11] At the end of the prosecution evidence Mr Rasmussen saw the Justice in chambers. In effect he submitted that there was no case for the appellant to answer. He contended that the device used at the police station must have been that used at the roadside. It was evidential for one purpose but non-evidential for the other. That put in issue whether it was a prescribed device on which reliance could be placed.

[12] The Justice was unpersuaded and the appellant elected to give evidence. She confirmed broadly, that she had been apprehended at the roadside after speeding and after having consumed alcohol the night before; that she had undergone breath tests at the roadside and at the police station; and that at the police station a printout resulted.

[13] She thought that she may have been apprehended at the roadside by the acting inspector between 7.45 and 8.00 am. She could not say whether the device he used was also used at the police station. As to that she was indefinite.

Law

[14] An appeal against conviction, as this is, lies under section 131(1) of the Criminal Procedure Act 1980-81 and is by way of rehearing. The powers section 131(1) accords on an appeal, to confirm or quash the conviction principally, turn on the "finding of facts" made on the appeal. That must be a finding by recourse to the record.

[15] In advancing this appeal Mr Rasmussen relies on cases, which he submits illustrate his essential point; that the prosecution must prove strict compliance with the statutory process

set out in sections 28B, 28C and 28D before the presumptions contained in section 28F as to the conclusive character of the breath test result come into play.[1]

[16] Each of those steps, Mr Rasmussen submits, must be proved to have been complied with beyond reasonable doubt. As to that, on the authorities I have here I express no view. But I do accept that, if there is any substantive question as to whether the steps have been strictly complied with, that could be fatal to the admissibility of the evidential breath test result.

Conclusions

[17] On my own review of the evidence I am satisfied that the Justice was entitled to conclude that the police had complied with the prescribed process and that the device used was a prescribed device as to the accuracy of which there was and could be no question.

[18] The officers, and indeed the appellant, gave generally consistent evidence as to the sequence from the roadside to the conduct of the test at the police station and its outcome. They did differ as to the timings involved in the sequence but not, to my mind, critically.

[19] The acting inspector said he apprehended the appellant at the roadside and had her undergo the screening test at 7.50 am. The appellant herself says that it was between 7.45 and 8.00 am. Ironically that is not readily consistent with Sergeant Poila's evidence that the acting inspector called him by radio at 7.15 am, a time he adhered to when it was put to him that his brief of evidence said 9.15 am. That was his notebook entry.

[20] However the timings are consistent as to when the acting inspector and the appellant arrived at the police station and when the evidential breath test was conducted. The acting inspector thought that they arrived there between 8.15 and 8.30 am. Sergeant Poila relied on the printout from the device. It showed the time of the test to be 8.16 am. The appellant gave no evidence to the contrary. There is no basis on which the printout time can be questioned. It has to be decisive.

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[1] *Ministry of Transport v Cashell* [1988] 3 CRNZ 232; *Braid v Monk* CRI-2010-412-000012, 17 November 2010; *Police v Daniel Webb* CR 881/16, 2 August 2017.

[21] The ultimately critical issue remains whether the device at the roadside was the same as that used at the police station. That too was correctly resolved on the evidence. The acting inspector said that the device he used at the roadside was the same type of device that Sergeant Poila used at the police station but they were different devices. Sergeant Poila said the device he used was housed at the police station and that he was unaware that the acting inspector had a device in his vehicle.

[22] The only point of nexus between the two devices is that Sergeant Poila confirmed that the device he used was number 2050, as appeared on the printout. The acting inspector said that the number of his device could have been 2050 but he could not recall or be exact. The Justice was entitled to conclude that this apparent point of nexus raised no question as to the accuracy of the evidence of the two officers that they used different devices.

[23] The result is, I find that the Justice was entitled to conclude that the statutory sequence had been adhered to; and that the evidential breath test result produced in evidence was from a prescribed device and was conclusive. She was obliged to find the charge proved and enter a conviction. There is no appeal against the sentence she imposed which seems to me to have been within quite usual bounds. I dismiss the appeal.

Patrick Keane, J