

POLICE

v

TUTAVAKE JADEY ROSE AIMEHONUI NGARANGI THOMPSON

Date of Hearing: 28 February 2018

Counsel: Sgt Tuaine Manavaroa for Police
Mr W Rasmussen for Defendant

Decision: 4 April 2018

**DECISION
OF HIS WORSHIP MR JOHN WHITTA, JUSTICE OF THE PEACE**

[0]

The Charge

[1] Ms Tutavake Thompson faces a single charge driving a vehicle on a public road with a level of alcohol in her breath that exceeds the legal limit.

[2] This charge is brought pursuant to ss 28A and 28B of the Transport Amendment Act 2007.

Background

[3] In the late evening of 1st December 2017, the Defendant was stopped while allegedly driving erratically on the main road.

[4] She admitted to the officer who questioned her at the roadside that she had been drinking and was asked to accompany the officer and his sergeant to the police station to undergo a breathalyser test.

- [5] The Defendant agreed and she and her companion Ms Deborah Solomona were taken in the police vehicle to the police station in Avarua.
- [6] On arrival at the headquarters, responsibility for the processing of the Defendant was handed over to Constable Junior Tapoki.
- [7] It was at this point that the Defendant made a claim that Constable Tapoki grabbed her by the back of the neck and forced her up the steps of the police station. For the record, I will state that I have given this accusation no further consideration.
- [8] No formal complaint was laid, nor was any formal evidence gathered.
- [9] Therefore to allow any allegation against Constable Tapoki to influence this matter would be misguided.
- [10] The Defendant was then breathalysed and the police checklist outlining the process was provided to the Court as Police Exhibit 1.
- [11] According to the checklist related to this matter, the Defendant returned a result of 930 micrograms of alcohol per litre of breath. This reading exceeded the threshold for the Defendant to have the opportunity to request a blood test to further test her alcohol level.
- [12] The process requires that the Defendant be given an undisturbed 10 minute period to consider this opportunity.
- [13] Again according to the checklist, the Defendant was given this 10 minute period but chose not to request a blood test.
- [14] The Defendant was then interviewed, charged and arrested. She was placed in a cell at the police station but was later bailed when several later arrests meant space was at a premium.

The Elements

[15] In his opening comments, the Prosecution counsel outlined the elements that needed to be proven by the Prosecution for the Defendant to be found guilty.

[16] The three general elements were:

- a) That the person charged with the offence was the person present in Court.
- b) That there was a specified time or period of time when this offence took place
- c) That there was a place where the offence occurred

There was one specific element, the fourth, which was:

- d) That the level of alcohol in the Defendant's breath exceeded the legal limit.

[17] The Defence made pertinent comments as to the elements.

[18] Mr Rasmussen said that the Defence's position was not to defend any of the elements specifically or generally, but that they would be questioning the process by which the police reached their conclusion, and decision, to charge the Defendant with driving with excess breath alcohol.

[19] Mr Rasmussen submitted for the Court's consideration Article 64 of the Constitution which states that "...there exist...fundamental human rights and freedoms" for all people in the Cook Islands.

[20] Section 64 (1)(b) elaborates by saying that there exists "...[the] right of the individual to equality before the law and to the protection of the law."

[21] Mr Rasmussen pointed out that even if the Defendant was indeed over the limit, and was caught driving under the influence of alcohol, she was still protected by the law while the matter against her was being investigated and evidence gathered.

[22] The manner in which this evidence is gathered should be subject to scrutiny and, if that scrutiny finds fault with the process, then that evidence is weakened.

Analysis

- [23] The key area for this Court to look at is the period following the taking of the excess breath alcohol reading. All readings over 549 micrograms per litre of breath are automatically given the opportunity to consider having an evidential blood test.
- [24] Anyone given this opportunity is to respond to this offer within 10 minutes of being informed of this right.
- [25] By blowing 930 micrograms, the Defendant was well over this threshold.
- [26] According to the checklist filled out by Constable Tapoki, the Defendant was informed of her breathalyser result at 11:53pm. Her period of consideration was noted as ending at 00:04am.
- [27] It has been accepted by this Court previously that this 10 minute period of consideration needs to be undisturbed.
- [28] Constable Tapoki, in his evidence, stated that this was indeed the case for the Defendant. He then stated that at the end of that period she chose not to request a blood test.
- [29] For her part the Defendant claims that she was never given an undisturbed 10 minutes. She claimed that the entire time when she should have been considering the blood test, she was actually being interviewed.
- [30] The Defendant's companion, who for some reason was also taken to the station and interviewed, also stated that she recalls being in a room with the Defendant and two police officers for the entire time she was at the station.
- [31] Some of her recollections I have disregarded. She was being questioned at the same time as the Defendant therefore she would not have been aware of what was actually being said to, or asked of the Defendant.
- [32] Very relevant however is her statement that she was in the same room as the Defendant with two police officers right up until the time the Defendant was placed in a cell. In

her mind there was no time when the Defendant was left alone for the 10 minute consideration.

[33] This Court is therefore faced with essentially opposing witness recollections. Any decision will therefore be based on the relative merits of each testimony.

[34] Constable Tapoki was the only person taking any sort of record of proceedings and his testimony was credible and his checklist was never faulted in cross examination.

[35] The Defendant's testimony I found to be patchy at times.

[36] She was at odds with her friend Ms Solomona as to whether it was male or female police officer who approached her vehicle when she was first stopped. Constable Faariki Moekapiti who was the first witness to give evidence, testified that he was the one who approached the vehicle at the roadside.

[37] She could not definitively recall if she was breathalysed at the roadside or not. It stretches credibility that you would not recall a process such as being breathalysed.

[38] However where she and Ms Solomona were consistent was on the question of whether the Defendant was left alone.

[39] They were both emphatic that she was not. Ms Solomona's evidence in this regard was particularly important.

[40] This cannot be weighed on a simple "two-against-one" basis. The correct weight must be given to the totality of the evidence on both sides.

[41] Neither the Prosecution nor the Defence were able to discredit the opposing side's witnesses. The Defendant and Ms Solomona remained strong in their assertion that the Defendant never received her 10 minute consideration.

[42] Neither was Constable Tapoki's checklist adequately refuted to the point where it can be disregarded completely. His evidence in Court was strong and confident.

[43] Therefore I have to return to the burden of proof and that requires the Prosecution to prove the charge beyond any reasonable doubt. In fact, as a result of this burden the Prosecution is forced to go beyond any contrary evidence the Defence may present to prove its case.

[44] Given what has been before me I do not believe that has been the case.

Conclusion

[45] The heavy burden of proof that is placed on the Prosecution is a heavy burden to carry. It is necessary burden as it gives us a reassurance that if a person is found guilty then we have the comfort of knowing that the evidence placed against that person is strong and has been well tested.

[46] To find the Defendant guilty I would have to find fault with Ms Solomona's testimony. I would have to have grounds to believe that she was either lying or completely mistaken in what she remembers of that night. I have not been able to do that.

[47] Similarly I cannot fault Constable Tapoki however in the end my decision has had to come down in favour of the Defendant.

[48] I find this charge is not proven and is dismissed.

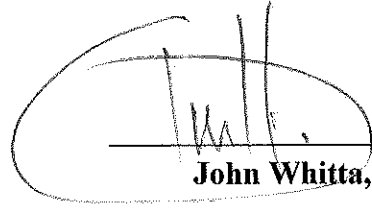
[49] I cannot complete this decision without commenting again on Constable Tapoki. He was an excellent witness doing a difficult job. The Defence was never able to call his actions into question.

[50] Ms Thompson you have been found not guilty but my advice is to take this as a lesson.

[51] On the balance of probabilities, and by your own Counsel's admission, I believe you were over the limit that night. You are going free because the system is here to ensure you get a completely fair trial and that is what it has done.

[52] During your testimony, you stated that you did not believe you were over the limit because you did not hit anyone. To say that it is alright to drink and drive as long as you don't hit people is disappointing and you should reconsider what you said.

[53] That completes the delivery of this decision and this Court is now adjourned.



John Whitta, JP