

**IN THE HIGH COURT OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**  
**(CRIMINAL DIVISION)**

**JPAppeal: 11/08**

**POLICE**

**V**

**DONALD REID**  
**Defendant**

Mr M Tetava for Prosecutor  
Mr McFadzien for Defendant  
Date of hearing: 2 October 2008  
Date of Judgment: 7 October 2008

**JUDGMENT OF WESTON J**

1. The Police Appeal from a decision of a Justice of the Peace given on 19 August 2003 where the Court dismissed the charge laid against Mr Reid under Section 28A(1)(a), Transport Amendment Act 2007. The charge alleged that Mr Reid *"Did drive a motor vehicle on the main road at Panama and has the proportion of alcohol in his breath exceeding the prescribed limit."*
2. The charge rose out of a road block set up by the Police on 21 June 2008. Grice J has recently found that such road blocks are lawful: *Poko v Cook Islands Police* (Appeal 1/08, 13 May 2008).
3. At the road block the Police administered a device described as a Passive Voice Test (PVT). It is common ground that this device is not specifically authorized under the Act although I understand it is regularly used under specific authority in New Zealand.
4. When Mr Reid spoke into the PVT it showed he had failed the test. The Officer then noticed a smell of alcohol on Mr Reid's breath (transcript, pages 7 and 9). Mr Reid was required to accompany the

Officer to the Station where he was administered a breathalyzer test. This test device is properly authorized and there is no challenge per se to the conclusion of that test which showed a reading of 560 milligrams per litre of breath which is in excess of the prescribed limit of 400 milligrams. At the station Mr Reid was asked if he had drunk anything and he said he had drunk 3 small bottles of beer (transcript, page 3).

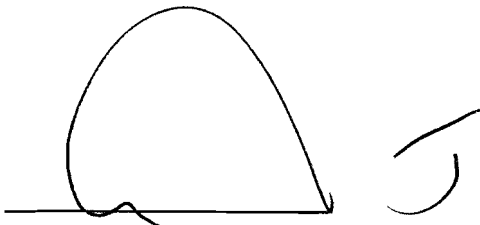
5. Section 28A(1)(a), for material purposes, reads; “*A person who ...(a) drives...a motor vehicle on the road ... and has the proportion of alcohol in his breath ... exceeding the prescribed limit commits an offence*”.
6. Section 28A appears as part of a carefully designed legislative scheme dealing with drink – driving offences. Section 28B is a crucial part of that scheme. Section 28B(1)(a), for material purposes, reads: “*When a Constable has reasonable cause to suspect that a person ...(a) is driving... on the road... the Constable may, subject to Section 28F, require that person to provide without delay a specimen of breath for a breathalyzer test*”.
7. Section 28F, mentioned in the extract above, sets out various evidential presumptions that will apply. I do not believe any of these are directly relevant here.
8. Section 28B does not speak of alcohol or drink – driving at all. The statutory threshold of “*reasonable cause*” does not relate to drink-driving but, rather, to driving. The respondent invited me to read the provision as if it referred to the drinking of alcohol (submissions, paragraph 12). But I decline to do so. I am not persuaded by the respondent’s argument set out in paragraph 14 of the submission that the Act will be abused if the Act is not read as advocated. This is a matter that will need to be addressed at a future time if that occurs. I conclude that the wording of Section 28B is deliberate and is designed

to set a low threshold before there can be a breathalyzer test administered.

9. Technically, then, the Police could take every driver who was stopped in the road block to the station for a breathalyzer test. At first sight that may seem surprising but that is the clear effect of the legislation and I see no basis to read it differently.
10. Such an outcome would be logistically and administratively unworkable. Therefore, the Police have designed a means of separating those drivers who warrant further consideration from those who do not. The method primarily used by the Police is that device called the PVT. But it is not the only mechanism used as question 13 on the Police checklist shows. The procedural step represented by question 13 on the checklist is not part of the statutory process. Rather, question 13 is a prompt for the Police Officer whereby the Officer is asked whether there is reasonable cause. The examples that are then provided all relate to alcohol, something not necessary for the purposes of Section 28B.
11. The PVT is part of a procedural chain that leads to the breathalyzer but it is not part of the evidential chain. Nothing needs to be proved at trial concerning the PVT. But that is only part of the picture.
12. The reality is that the PVT is compulsory. The Deputy Commissioner in submissions accepted as much. It is not offered to drivers as a voluntary option. Rather, all circumstances point to there being a requirement that the driver speak into the device. The facts in this case are that without the taking of such a step it was highly unlikely that Mr Reid would have been asked to take the breathalyzer test at all (transcript, page 2). In this case the use of the PVT led directly to the breathalyzer.

13. The degree of compulsion immediately directs our attention to article 64 (1) (a) of the Constitution which, for material purposes, states a fundamental human right in these terms – *“The right of the individual to liberty...and the right not to be deprived thereof in accordance with the law”*.
14. I find that Mr Reid was required to take the PVT which was a deprivation of his liberty. It was only lawful if specifically provided for by law. There was no express statutory authority and, in the absence of such, I find there was no such authority. I put the proposition to the Deputy Commissioner who had no serious opposition to it. I believe this reflects the reality of the situation.
15. The Police endeavour to argue that any deficiencies in relation to the PVT as identified above were not fatal. They argued that because they were entitled to stop Mr Reid and require him to take a breath test, the unlawful use of the PVT in between times did not matter. The argument is based on the proposition that evidence is admissible even if unlawfully or unfairly obtained. I reject the argument in this case.
16. At the hearing, counsel approached the argument as set out above. There was not a detailed analysis of the law, although Mr McFadzien did rely on the New Zealand decision of *R v Hall* [1976] 2 NZLR 678. My own reading after the hearing in the 1995 edition of Cross on Evidence identifies some discussion of this topic at paragraphs 1.67 and 11.26 and following. I found that discussion helpful and consistent with my own analysis, albeit that I reached it from first principles.
17. In my opinion the evidence of the breathalyzer test was both unlawfully and unfairly obtained. I reach that conclusion because, as a matter of fact, it occurred directly as a result of the compulsory but unlawful use of the PVT. That use of the PVT breached the Constitution. I see no way around the problem other than by a legislative change.

18. I accept entirely that the Police believed they were acting reasonably in using the PVT device. It was a practical means of dealing with a practical problem. But drink-driving legislation such as the Transport Amendment Act is highly prescriptive. If there are gaps in the procedure, the Act should be interpreted in a way consistent with important human rights as recognized in the Constitution rather than by trying to assist the Police to make the process work.
19. I see no particular difficulty in devising a formula of words to add into the statute which will overcome the affect to this judgment. It is often the case that drink-driving legislation needs to be amended during the honeymoon period following its enactment. The present case is just another example of that.
20. I do not propose making any order as to costs. This was in the nature of a test case and the issue needed to be determined.
21. Accordingly, I dismiss the appeal although I do so on grounds different to those relied upon by the JP.



Weston J