

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

JP APPEAL NO. 3/2008

BETWEEN **KENNETH TIRO** of Rarotonga
Surveyor
Appellant

AND **COOK ISLANDS POLICE**
Respondent

Mr McFadzien for Appellant
Deputy Commissioner Tetava for Police
Date: 26 May 2008

DECISION OF GRICE J

This is an appeal against conviction under s. 28A(1)(a) and 2 of the Transport Act. The breath/blood alcohol testing regime was introduced by a 2007 amendment to the Transport Act. I understand from counsel this is one of the first test cases on the procedures under that amendment.

The conviction was entered after a defended hearing before a Justice of the Peace on 17 March 2008. Mr McFadzien, at the hearing took the point that the defendant had not been allowed a full 10 minutes to request a blood test after he was advised of his right to the blood test, following a breath test reading in excess of the allowed limit.

Under s. 28C(1)(b)(ii) of the Transport Act the defendant has 10 minutes after being advised by the constable taking the breath test of the result of the test to request a blood test. The evidence was that 10 minutes was not allowed – it appears the time allowed was more like 7 minutes.

There is no Cook Islands equivalent of the New Zealand s. 58(E) “reasonable compliance” provision which was introduced to provide relief from non prejudicial

technical breaches of procedure under the New Zealand Transport Act breath/blood alcohol testing provisions.

Deputy Commissioner Tetava indicated that the Police did not oppose the appeal and conceded non compliance. Mr McFadzien referred in his submission to the New Zealand cases on the this point, Flewellen v MOT (Hardie) BoysJ, High Court Christchurch, M6/85) and Auckland City v Haresnape (1983) NZLR 712 (CA). In those cases the requirement to allow the driver 10 minutes to consider whether he wanted a blood test was strictly enforced.

In the case of the testing requirements Parliament has seen fit to safeguard what are seen as significant rights of the individuals by providing for a strict procedure to be followed without providing a statutory "reasonable compliance" provision. In those circumstances the minimum term stipulated by statute should be met. It was not met in this case.

Accordingly I allow the appeal and set the conviction aside.

Mr McFadzien indicated that as this was in the nature of a test case he was not seeking costs. I direct the refund of any fines and Court costs (if paid) and the repayment of medical expenses (if paid) to the Defendant.

Grice J