

POLICE

v

KAHIKI RICK TAUA TEHAAMATAI

Date: 8 March 2017

Counsel: On the papers

**JUDGMENT OF HUGH WILLIAMS, CJ
[on reserved question of law]**

Introduction - Referral

[1] On 18 October 2016 the above named defendant defended a charge brought against him in the Justice's of the Peace Court under the Transport Amendment Act 2007, s 28C(1), that on 19 January 2016 he refused to undergo a blood test.

[2] It appears that the police evidence was all adduced before Carmen Temata JP on that day but that, at the conclusion of the police case, the defendant applied for the charge to be dismissed on the basis that, in the factual circumstances, Mr Tehaamatai was under no legal obligation to submit himself for a blood test. The JP reserved her decision until 21 February 2016 when she decided to refer the matter to a judge for decision acting under the Criminal Procedure Act 1980-81.

Jurisdiction

[3] The jurisdiction for a JP to refer a question of law for determination by a judge is created by s 106 which reads:

106. Reservation by Justice of question of law for determination by Judge – (1) a Justice sitting alone or Justices sitting together may reserve for determination by a Judge any question of law which arises on the trial of any person for any offence, or in any of the proceedings preliminary, subsequent, or incidental thereto, and may give any decision subject to the determination by the Judge of that question; and the Judge shall have power to consider and determine that question.

(2) Either the prosecutor or the defendant may during the trial apply to the Justice or Justices presiding at the trial to reserve any such question, and the said Justice or Justices, if he or they refuse so to do, shall nevertheless take a note of the application.

(3) If the result of the trial is acquittal, the defendant shall be discharged, subject to being again arrested if the Judge orders a new trial.

(4) If the result of the trial is conviction, the said Justice or Justices may in his or their discretion postpone sentence, or respite the execution of the sentence until the question reserved has been determined, and in either case shall in his or their discretion either remand the defendant in custody or grant him bail on such terms and subject to such conditions as the Justice or Justices think fit.

(5) If the Justice or Justices decide to reserve a question under this section, he or they shall state a case for the determination of a Judge.

(6) Where the Justice or Justices decide to reserve a question under this section on an application so to do made under subsection (2) of this section, the applicant shall, within 21 days after being notified of that decision, or within such further time as the said Justice or Justices may in his or their discretion allow, submit a draft of the case stated, through the Registrar, to the said Justice or Justices, and deliver or post a copy of the draft to the other party or to his solicitor.

[4] This being a referral by the JP under subs (1), ss (2) and (6) are accordingly inapplicable. Subsections (3) and (4) are similarly inapplicable as the JP has not yet decided whether to convict Mr Tehaamatai or acquit. And subsection (5) is, common in the circumstances about the reviewed, a matter of inference.

Summary of Facts

[5] Given a decision on the facts is still a live issue before the JP, it is appropriate only to review the facts of the Prosecution to an extent sufficient to put the reserved question of law in context.

[6] Early on the morning of 19 February 2016 the defendant was seen in his truck at the Avatiu intersection by police. It is alleged he was stopped on the wrong side of the road. When they approached him, he acknowledged to have been drinking alcohol and was then required to accompany the police to the police station for excess blood alcohol testing.

[7] However, when the party including the defendant arrived at the police station it transpired that all of the police breathalyser machines had been sent to New Zealand for recalibration. It was therefore impossible for Mr Tehaamatai to comply with the police requirement that he provide a specimen of breath for a breathalyser test and, in lieu of the breathalyser test, the police then required him to go to the Rarotonga Hospital for a blood specimen to be provided. Mr Tehaamatai demurred claiming to be afraid of needles and he was then arrested for failing to undergo a blood test.

[8] The evidence then went on to record a change of attitude by Mr Tehaamatai and the police refusal to take him to the hospital for a blood test because he was then under arrest, but those are factual matters for later determination and do not affect determination of the reserved question of law.

Legal issue

[9] Section 28C (1) (c) under which Mr Tehaamatai was charged reads:

A person shall permit a medical officer to take a blood specimen from the person when required to do so by a constable if ...

- (c) a breathalyser testing device is not readily available to the apprehending constable or at the nearest Police Station.

[10] The reserved question of law centres around whether the breathalyser testing device was “not readily available” in this instance when all such devices in Rarotonga had been sent out of the country for recalibration.

[11] Looking initially at the matter from a broad perspective, s 28C (1) (c) is a slightly unusual provision in that, on its face, it requires persons apprehended by police to submit themselves to the more invasive technique of a blood test when the capacity to assess the

person's alcohol intake by means of the less invasive breathalyser test cannot be undertaken simply because the breathalyser testing device is unavailable.

[12] However, on the plain words of the subsection, Parliament clearly had in mind when enacting the Transport Amendment Act 2007 that instances might arise when breathalyser testing devices were unavailable and, to guard against possibly intoxicated motorists continuing to drive on the roads, required them to undergo a blood test in such situations.

[13] Seen in that light, what occurred in this instance with all the breathalyser testing devices being out of the Cook Islands must, on the plain words of the section, have been in Parliament's contemplation with Parliament requiring persons apprehended in Mr Tehaamatai's circumstances being required to submit themselves to a blood test, even though the unavailability of all the breathalyser testing devices was as a result of police actions.

[14] On that approach, there is nothing in the broad interpretation of the subsection's words to say that Mr Tehaamatai was not obliged to undergo a blood test.

[15] Looking at the matter more narrowly, the dictionary definition of "readily" is "without much difficulty; easily"¹ and the dictionary definition of "available" is "present or ready for immediate use or service... accessible or obtainable"².

[16] Looking at the factual situation in terms of the dictionary definitions, there can be no doubt that the breathalyser testing devices were not available "without much difficulty" or "easily" and that they were not "present or ready for immediate use or service" and were not "accessible or obtainable" on the evening of 19 February 2016.

[17] It follows, again, that, in the factual circumstances that obtained that evening, all the police breathalyser testing devices were "not readily available" to them that evening and, that being the case, the defendant's obligation to provide a blood specimen under s 28C(i) arose.

¹ Penguin English Dictionary 2004, p1163

² op cit p90

Result

[18] The reserved question of law is accordingly answered as follows:

Where a breathalyser testing device is “not readily available” within the definition just discussed to the police, the obligation of a person to provide a blood test when they would otherwise have been required to provide a specimen of breath or breathalyser test arises; and it matters not how the lack of availability of the breathalyser testing device arose.

[19] For completeness, this determination of the question of law reserved for the High Court is not intended to influence the JP’s decision on the facts of the case or as to any sentence be imposed, if a conviction comes to be entered.

A handwritten signature in black ink, appearing to read 'Hugh Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ