

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**CRI-2016-009-009876
[2017] NZDC 7387**

NEW ZEALAND POLICE
Prosecutor

v

JOHN ANDREW FRASER
Defendant

Hearing: 5 April 2017
Appearances: Sergeant A Trinder for the Prosecutor
N Hansen for the Defendant
Judgment: 5 April 2017

ORAL JUDGMENT OF JUDGE S J O'DRISCOLL

[1] The defendant, John Andrew Fraser, has been charged with driving with an excess blood alcohol level of 448 micrograms of alcohol per litre of breath. The offending is alleged to have occurred on 18 September 2016. The defendant pleaded not guilty to the charge and today I have heard a Judge alone trial in respect of this matter.

[2] Two witnesses were called by the prosecution. They are both police constables, [Constable A and Constable B]. The defendant did not elect to give evidence at the end of the case.

[3] The matter really came down to one issue. It is not disputed that the defendant was driving a motor vehicle on 18 September. It is not disputed that he was stopped by the police. There was a requirement to accompany after a breath

screening test. There was a subsequent evidential breath test. There was no election to have a blood test.

[4] The issue that I am being asked to determine is in effect the admissibility of the evidential breath test. The reason why that is an issue is that the submission that has been placed before me is that there has been a breach of the defendant's rights to consult and instruct a lawyer. A right which is given to the defendant under the Bill of Rights Act 1990 and in particular, s 23(1)(b).

[5] It is not in dispute that the defendant was given his rights to consult and instruct a lawyer. I take it from Constable [A]'s evidence that after the requirement to accompany was given, his Bill of Rights was read to him as per the "aide-mémoire" in her notebook. At the Christchurch police station the defendant was again given his rights to consult and instruct a lawyer. While in the EBA suite, another constable attempted to contact eight lawyers. The names of the eight lawyers have been provided to me as an exhibit by Constable [B]. The police took the view that the attempts to contact the eight lawyers was sufficient in terms of the duty of the police to facilitate the defendant's right to access a lawyer. I am clearly of the view that those eight attempts were reasonable. Some might say that they were more than reasonable in an endeavour to facilitate the defendant's rights to contact a lawyer before the evidential breath test was undertaken. I do not see any issue or argument with that matter at that stage.

[6] After the evidential breath test, the defendant was given his advice in relation to the 10 minute period in which to elect to have a blood test. He again was asked if he wanted to speak to a lawyer. The breath and blood alcohol procedure sheet indicates that he did want to contact a lawyer. I have no doubt because of the eight previous attempts which were unsuccessful that the police did not attempt to contact a lawyer in order to facilitate his rights. The rights are:

- (a) The right to consult and instruct a lawyer is one which can occur at a number of stages. The advice was given prior to the evidential breath test being undertaken by the defendant. As I have said, I do not think that there is any issue with that.

- (b) After the positive evidential breath test there is a right to consider whether to have a blood test and that is clearly an important right. The defendant was given the right but there was no facilitation to speak to a lawyer at that stage and the defendant therefore could not have received legal advice about that matter. The right, as I have said, is important and with the defendant's level at 448 micrograms of alcohol per litre of breath, it was clearly an option that was open to the defendant to have a blood test.

[7] The view that I have taken is that the police should have attempted to have made contact with at least one other lawyer in order for the defendant to get advice about that blood test. I accept that it would have been unreasonable for any contact to be made or any attempt to contact any of the other eight lawyers, but I think that had the police attempted to contact at that stage, one other and further lawyer, then the facilitation would have been complied with. I accept that the right to consult and instruct a lawyer is not an absolute right but the law is clear that every reasonable opportunity to get advice must be given and enforcement authorities must do what is reasonable in the circumstances to facilitate the right. I do not think that it would have been unreasonable to have made one further attempt to have contacted one other lawyer.

[8] In those circumstances the Courts have said that if there is a breach of a defendant's rights then the prima facie rule of exclusion applies. In saying that, s 30 Evidence Act 2006 becomes relevant and when considering the matters set out in s 30 Evidence Act, my view is that the evidence in relation to the evidential breath test result should be excluded. In those circumstances I intend to dismiss the charge against the defendant.

[9] What I am also going to do is to direct a copy of my decision be typed and a copy provided to the Canterbury District Law Society. I think that it is incumbent on the Law Society to ensure that lawyers who have their names on the list of lawyers that defendants can contact are readily accessible. I do not know why eight lawyers who the police attempted to contact were not accessible. I do not know whether correct telephone numbers have been given to the police. I do not know whether

lawyers take their phones off the hook so that they cannot be contacted, but I would have thought it was not an unreasonable inference that when an attempt is made to contact eight lawyers that none of the lawyers are available. If lawyers do not want to participate in the scheme and be readily accessible then they should not have their names on the list of lawyers that are given to defendants. I would therefore ask that the Law Society look into this matter immediately so that the rights which defendant's have to facilitate the advice which is given to them is able to take place.

[10] For the reasons that I have mentioned, Mr Fraser, the charge against you is dismissed.

S J O'Driscoll
District Court Judge