IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-085-002769
CRN17085003802
[2018] NZDC 11873

NEW ZEALAND POLICE
Prosecutor

v

HENRY MOTU POMANA
Defendant

Hearing: 31 May 2018

Post-hearing submissions (dates of receipt): 15, 28 June and 4 July 2018

Appearances: Sergeant M Stonyer for the Police
B Dawson for the Defendant

Judgment: 23 July 2018

RESERVED JUDGMENT OF JUDGE S M HARROP
AS TO VERDICT

Introduction

[1] Who would have thought that an apparently straightforward case of driving while the driver's licence was suspended would give rise to two interesting and rather complex issues?

[2] Most drivers who receive from a police officer a notice suspending their licence for 28 days and then are caught driving during that period plead guilty promptly when charged. But not Mr Pomana. He contends that while the police officer who issued him with such a notice for excess speed no doubt believed he was justified in doing so, in fact he was not entitled to do so because of the status of the road on which he was driving. He therefore says that the suspension was invalid and that even

though he did not appeal against the suspension, as he could have, he is not guilty of the charge of driving while his licence was suspended.

[3] On 1 October 2017 Mr Pomana drove his Mercedes motor vehicle at 149 km per hour southwards on State Highway 1 between Himatangi Beach Road and Platform Road in Manawatu. The speed was checked by Sergeant Johnson who stopped Mr Pomana and issued him with an infringement notice. He also gave him a Notice of Mandatory Suspension of Driver Lic ence ("the suspension notice") because he considered Mr Pomana had driven at a speed exceeding the posted speed limit by more than 40 km per hour. Sergeant Johnson explained to Mr Pomana that he was suspended from driving immediately, for a period of 28 days, and that if he drove during that period his vehicle would be impounded and he would likely face a charge of driving while his driver licence was suspended which carries a minimum period of six months' disqualification from driving.

[4] On 20 October 2017 Constable Dunstan stopped the same Mercedes motor vehicle on Jessie Street in Wellington. Mr Pomana was the driver. When spoken to by Constable McWilliams he said he thought his suspension had ended. He said he thought his "29 days were up".

[5] As a result Mr Pomana has been charged with driving while his driver licence was suspended under s 32(1)(c) of the Land Transport Act 1998. He pleaded not guilty and the matter became before me for a judge-alone trial on 31 May 2018. The prosecution evidence was accepted by Mr Pomana and he did not give evidence. He did not therefore attempt to establish a *Millar*[1] defence as his comment to Constable McWilliams suggested he might.

[6] Mr Pomana accepts that he was driving at 149 km per hour on 1 October 2017 (I understand he has paid the infringement notice fee), that he was given the suspension notice and that he drove during the 28-day period of suspension. However he denies that he has committed the offence with which he is charged because he says the status of the road on which he drove on 1 October was such that his licence could not lawfully

[1] *Millar v Ministry of Transport* [1986] 1 NZLR 660

be suspended for excess speed unless he was exceeding the applicable speed limit by more than 50 km per hour; he only exceeded it by 49 km per hour.

[7] In short, Mr Pomana says he is not guilty because while Sergeant Johnson may have believed on reasonable grounds that he was justified, indeed required to give him the suspension notice, he did not in fact have a lawful basis for doing so.

Issues

[8] There are two issues to be determined:

(i) Having regard to the status of the road on which Mr Pomana drove on 1 October 2017, was there a lawful basis for Sergeant Johnson to issue the suspension notice? ; and

(ii) If not, does this provide a defence to the charge in circumstances where Sergeant Johnson clearly believed on reasonable grounds that he was justified, indeed required, to give Mr Pomana the suspension notice, and there is no doubt that Mr Pomana did not exercise his right(s) to appeal against the notice and that he drove during the suspension period?

The status of the portion of State Highway 1 on which Mr Pomana drove on 1 October 2017

[9] Section 95(1) of the Land Transport Act 1998 provides:

> **95 Mandatory 28-day suspension of driver licence in certain circumstances**
>
> (1) An enforcement officer must give a person a notice under this section if the enforcement officer believes on reasonable grounds that the person has—
>
> (a) undergone an evidential breath test or blood test under this Act and been found,—
>
> (i) for an offence, where the person has previously been convicted of an offence against any of sections 56(1)

or (2), 57A, 58(1), 60(1), or 61(1) or (2) within the last 4 years,—

(A) to have a breath alcohol concentration exceeding 400 micrograms of alcohol per litre of breath; or

(B) to have a blood alcohol concentration exceeding 80 milligrams of alcohol per 100 millilitres of blood:

(ii) in any other case,—

(A) to have a breath alcohol concentration exceeding 650 micrograms of alcohol per litre of breath; or

(B) to have a blood alcohol concentration exceeding 130 milligrams of alcohol per 100 millilitres of blood; or

(b) failed or refused to undergo a blood test, after having been required or requested to do so under section 72 or section 73; or

(c) driven a motor vehicle on a road at a speed exceeding—

(i) the applicable permanent posted speed limit by more than 40 km an hour (which speed was detected by a means other than approved vehicle surveillance equipment); or

(ii) any other speed limit by more than 50 km an hour (which speed was detected by a means other than approved vehicle surveillance equipment).

[10] Sergeant Johnson was relying on s 95(1)(c)(i) in giving Mr Pomana the suspension notice so for that to have been justified in law Mr Pomana had to have driven his motor vehicle at a speed exceeding "the applicable permanent posted speed limit" by more than 40 km an hour. Mr Pomana argues that there was no such speed limit applicable to the portion of State Highway 1 on which Mr Pomana drove. His counsel Mr Dawson submits that the status of the relevant portion of road was that it merely had a "default rural speed limit" as opposed to having a "permanent posted speed limit". In the circumstances Mr Dawson submits that in order to be lawfully served with a suspension notice for driving at excess speed on that portion of State Highway 1 he needed to have exceeded the default rural speed limit (also 100 km an hour) by more than 50 km an hour. Sergeant Stonyer accepts, based on advice from the New Zealand Transport Agency, that the speed limit on that section of the State

Highway network is "part of the default rural speed limit of 100 km an hour" but submits that this is one of several possible "permanent posted speed limits" and that the case accordingly does fall within s 95(1)(c)(i), not s 95(1)(c)(ii).

[11] Mr Dawson's multi-faceted argument began with s 2 of the Land Transport Act 1998 which defines "permanent speed limit" as meaning:

> "a maximum speed limit set by a regulation or rule made under this Act and that is in force except when a holiday, variable, minimum, or temporary speed limit is in force"

Mr Dawson does not seek to draw a distinction between "permanent speed limit" and the words used in s 95(1)(c)(i), "permanent posted speed limit". I will come back to this point later.

[12] Mr Dawson submits that the above definition clearly contemplates the *setting* of a speed limit by regulation or rule and he said there has been no evidence provided that has been done in respect of the relevant portion of road because the New Zealand Transport Agency itself in a letter dated 23 March 2018 written by Mr Brett Gliddon (which was admitted by consent as part of the prosecution case) states that the speed limit is "part of the default rural speed limit of 100 km an hour….". Mr Dawson argues that a "default" speed limit is the converse of one which has been set. He notes that even the exceptions referred to in the definition of "permanent speed limit" do not include a "default" speed limit.

[13] Mr Dawson went on to refer to the Land Transport Rule: Setting of Speed Limits 2017 which came into force in August 2017. He notes that this replaced Rules which had been in place since 2003. The definition of "permanent speed limit" was inserted into the Land Transport Act 1998 in 2011 by which time the 2003 Rules had been in force for several years. Mr Dawson suggested that what Parliament appears to have done in 2011 is to have adopted the definition of "permanent speed limit" which appears in the 2003 (and the 2017) Rule in the definition section in Part 2. The definitions are identical.

[14] While normally of course the provisions of an Act would take precedence over the provisions of a Rule Mr Dawson points out that the s 2 definition of "permanent

speed limit" expressly refers to a speed limit having been set by regulation or rule so one is immediately required to consider what regulation or rules have set such speed limits.

[15] Mr Dawson referred to Section 3 of the Rules which contains categories of speed limit, specifies a range of speed limits, and defines urban and rural default speed limits. Rules 3.1 to 3.4 provide as follows:

> **3.1 Categories of speed limit**
>
> This Rule provides for the following categories of speed limit:
>
> (a) the default urban speed limit and the default rural speed limit:
>
> (b) a permanent speed limit:
>
> (c) a holiday speed limit:
>
> (d) a variable speed limit:
>
> (e) a temporary speed limit:
>
> (f) an emergency speed limit.
>
> **3.2 Range of speed limits**
>
> A speed limit that is set in accordance with this Rule must be one of the following:
>
> (a) 10 km/h:
>
> (b) 20 km/h:
>
> (c) 30 km/h:
>
> (d) 40 km/h:
>
> (e) 50 km/h:
>
> (f) 60 km/h:
>
> (g) 70 km/h (which may only be set following approval by the Agency under *4.5(4)*):
>
> (h) 80 km/h:
>
> (i) 90 km/h (which may only be set following approval by the Agency under *4.5(4)*):
>
> (j) 100 km/h:

(k) 110 km/h (which may only be set following approval by the Agency under *4.6(4)*).

3.3 Road lengths for speed limits

3.3(1) A road for which a speed limit is set under this Rule must—

(a) be of a reasonable and safe length; and

(b) if the speed limit is 50 km/h or more, be equal to or exceed the minimum length in the table in *Schedule 1*, unless the requirement is impracticable for that road.

3.3(2) In addition to applying to the road which is being reviewed, a speed limit may apply to short lengths of road adjoining that road, even though those short lengths of road would not comply with the table in *Schedule 1*.

3.3(3) The point at which a speed limit changes must be at, or close to, a point of obvious change in the roadside development or the road environment.

3.4 Default urban and rural speed limits

3.4(1) The urban speed limit is 50 km/h and applies to any road that is within an area designated as an urban traffic area, except for—

(a) any road that is a motorway; or

(b) a road described in *3.4(3)*.

3.4(2) The rural speed limit is 100 km/h and applies to any road that is a motorway and any road that is not within an area designated as an urban traffic area, except for a road described in *3.4(3)*.

3.4(3) The roads to which neither *3.4(1)* nor *3.4(2)* apply are—

(a) any road for which a permanent speed limit has otherwise been set; and

(b) any road for which a variable, temporary, emergency, or holiday speed limit is in force and is operating; and

(c) any road for which a speed limit has been set by or under another enactment.

[16] Mr Dawson pointed out that clause 3.1 expressly distinguishes between a default rural speed limit and a permanent speed limit. He submits this reinforces his submission that when one looks at s 95 "a default rural speed limit" must be seen as in a different category from " a permanent speed limit". He further submits that r 3.4(3) reinforces the distinction between a default speed limit, whether rural or urban, and a road for which a permanent speed limit has otherwise been set.

[17] Mr Dawson therefore submitted that in Mr Pomana's case s 95(1)(c)(i) did not apply and that Parliament's intention was that in a case such as this where a default rural speed limit applied then it was s 95(1)(c)(ii) which governed, so that Mr Pomana's suspension notice was not validly given as he did not exceed the default rural speed limit by more than 50 km an hour. Finally, Mr Dawson submitted that if the police contention was correct then s 95(1)(c)(ii) would be redundant.

[18] At the hearing, Sergeant Stonyer did not make submissions beyond those contained in a letter dated 30 May 2018 prepared by Mr Graham O'Connell of the New Zealand Transport Agency ("the Agency"). For convenience, I set out Mr O'Connell's points in full:

> 1. The Land Transport Rule – Setting of Speed Limits does not use the term "permanent posted speed limit". It does use the term "permanent speed limit" and this is defined in Part 2 to mean "a maximum speed limit set in accordance with this rule, that is in force except when a holiday, variable, temporary, or emergency speed limit is in force." This definition is wide enough to include the default rural speed limit. In our view "set in accordance with this rule" means set by and under the rule, which includes 3.4(2) which sets the rural default speed limit at 100 km/h (essentially, set by the Minister in making the rule). The term is clearly being used here to distinguish a permanent speed limit from a holiday, variable, temporary, or emergency speed limit, which, when they are in force, will displace the permanent speed limit.
>
> 2. The word "posted" is not used in the rule, but in other contexts it usually is a reference to having signs installed on a road, for example a posted weight limit on a bridge is the maximum mass for vehicles using that bridge that is "posted" on a sign installed on the bridge. It is unclear what the intention is regarding its use in section 95 of the Act, but it could be a reference to speed limit signs. At every entry point into a section of road where the speed limit changes to the rural default there will be a speed limit sign stating that the speed limit is 100 km/h. This is required by 9.1(1) of the rule.
>
> 3. While 3.1 of the rule lists the default in a spate category from a permanent speed limit, that provision should not be read in isolation. The categories are established for the purpose of interpreting various provisions of the rule where the distinction has meaning. For example, section 4 of the rule, which contains the machinery for reviewing current speed limits and setting new ones, does not talk about the default rural speed limit because the default is no "set" using that machinery. Also, for the purpose of requiring repeater signs to be installed at specified intervals (clause 9.2) the distinction is important because repeater signs are not mandatory where the speed limit is 100 km/h, including roads where the rural default applies. Section 3.1 should be read as being drafted specifically for the purpose of the Setting of Speed Limits Rule and should be used only for interpreting

and applying this rule. It is not really appropriate to try and rely on a provision in a rule to interpret a section of an Act.

4. The essential issue seems to largely rest on the interpretation of 3.4(3) of the rule. In our view there are three key points here:

   a. There is no reason to look at the rule to assist with interpreting the Act, if the Act itself is clear. The Act contains its own definition of 'permanent speed limit' which means:

      "a maximum speed limit set by a regulation or rule made under this Act and that is in force except when a holiday, variable, minimum, or temporary speed limit is in force". In this definition, the term 'permanent' is being used to distinguish a permanent speed limit from a "holiday, variable, minimum, or temporary", speed limit, which, when it is in force, would displace the permanent speed limit. This definition does not mention 'rural default speed limit', because it does not need to as the rural default is also a maximum limit set by the rule. The plain English everyday usage of the word "permanent" suggests something that will not change without an intentional and statutory process being undertaken to make a change. A default rural speed limit certainly s in line with this meaning. Clause 3.4(2) of the rule sets the rural speed limit that applies on the section of road in question here. It sets it at 100 km/h.

   b. The rule contains machinery for 'setting a permanent speed limit' and where this has been done, that speed limit will displace the default. But they are both 'set' by or under the rule. Nothing in the rule suggests that this process alters the status of either limit as a permanent speed limit.

   c. Section 3.4(3)(a) says that a default speed limit does not apply to a road for which a permanent speed limit has "otherwise" been set. The word 'otherwise' here, refers to the machinery provisions in the rule that are used when reviewing or setting a speed limit, or even to the use of other legislation entirely which might override that default speed limit. Therefore, 3.4(3) is distinguishing the default speed limit from other speed limits that have been set using other means. The distinction is in how those speed limits have been put in place, not in whether they are a permanent speed limit or some other category of speed limit.

Discussion

[19] The starting point in analysing this issue must be the provision under which Sergeant Johnson purported to give a valid suspension notice, s 95. Self-evidently given that Mr Pomana drove his vehicle at a speed above 40 km per hour but below 50 km per hour beyond the applicable 100 km per hour speed limit, it is s 95(1)(c)(i)

which had to be satisfied in order for the notice to be valid. In other words, given his speed of 149 km per hour "the applicable permanent posted speed limit" had to be lower than 108 km per hour. Sergeant Johnston's formal statement dated 22 March 2018 was admitted by consent as part of the prosecution case under s 9 of the Evidence Act. After referring to the portion of road on which he was travelling when he saw Mr Pomana's vehicle Sergeant Johnson says in paragraph 12 "This section of road has a posted speed limit of 100 km per hour". That is unchallenged evidence and in my view on its own is sufficient to allow me to conclude, without reference to any of the other provisions referred to by Mr Dawson, that Mr Pomana drove at a speed exceeding the applicable permanent posted speed limit by more than 40 km an hour.

[20] Mr Dawson, as I noted earlier, did not seek to draw any distinction between the phrase "permanent speed limit" and "permanent posted speed limit". The latter phrase is not defined. I consider the word "posted" cannot be ignored. Regardless of the underlying status of the road, and as any driver on State Highway 1 in that area would know, there is a posted (signposted) speed limit of 100 km per hour. Mr Pomana himself knew this and obviously accepted that he had exceeded the applicable permanent posted speed limit because he did not challenge the infringement notice for the offence of exceeding 100 km per hour.

[21] I conclude that there was therefore the basis for Sergeant Johnson to give Mr Pomana the suspension notice under s 95(1)(c)(i).

[22] In case I am wrong in this conclusion, and in deference to Mr Dawson's careful argument, I go on to consider it.

[23] Assuming as he does, but contrary to my above view, that there is no difference between "permanent posted speed limit" and "permanent speed limit" the definition of "permanent speed limit" in s 2 of the Act must be considered. I reiterate that it says:

> "a maximum speed limit set by a regulation or rule made under this Act and that is in force accept when a holiday, variable, minimum, or temporary speed limit is in force."

[24] While I acknowledge the logical force of Mr Dawson's argument about the plain meaning of "default" as being the antithesis of something which is set, and the

delineation in clause 3.4 of the 2017 Rule between default speed limits and a permanent speed limit, and other types of speed limit, the short point, as Mr O'Connell has said, is that the s 2 definition defines "permanent speed limit" as meaning a (i.e. any) maximum speed limit set by a regulation or rule made under the Act. Despite the apparent inappropriateness of "setting a default" urban and rural speed limit, that is exactly what r 3.4 does. It sets urban and rural speed limits and accordingly a default rural speed limit such as applies to this portion of State Highway 1 *is* for the purposes of the s 2 definition "a maximum speed limit set by a regulation or rule made under the Act".

[25] I therefore reject Mr Dawson's submissions and conclude that the default rural speed limit of 100 km per hour is a permanent speed limit for the purposes of the Act and therefore for the purposes of s 95(1)(c)(i).

[26] I acknowledge Mr Dawson's point that if this interpretation were correct then it would appear that s 95(1)(c)(ii) is redundant but I do not have sufficient information to draw that conclusion. There may well be other portions of the New Zealand roading network in respect of which no designation of a speed limit within the categories set out in r 3.1 has been made.

In any event, does the prosecutor need to prove the suspension notice to have been justified in law?

[27] The focus of the hearing before me was on the "road status" issue dealt with above. I did raise informally the question of whether the validity of the suspension notice in law ultimately mattered and after reflection following the hearing sought further submissions on this issue which have now been received. In case I am wrong in my earlier conclusions, I will consider this issue.

[28] It is convenient here to set out s 95 in full:

> **95 Mandatory 28-day suspension of driver licence in certain circumstances**
>
> (1) An enforcement officer must give a person a notice under this section if the enforcement officer believes on reasonable grounds that the person has—

(a) undergone an evidential breath test or blood test under this Act and been found,—

(i) for an offence, where the person has previously been convicted of an offence against any of sections 56(1) or (2), 57A, 58(1), 60(1), or 61(1) or (2) within the last 4 years,—

(A) to have a breath alcohol concentration exceeding 400 micrograms of alcohol per litre of breath; or

(B) to have a blood alcohol concentration exceeding 80 milligrams of alcohol per 100 millilitres of blood:

(ii) in any other case,—

(A) to have a breath alcohol concentration exceeding 650 micrograms of alcohol per litre of breath; or

(B) to have a blood alcohol concentration exceeding 130 milligrams of alcohol per 100 millilitres of blood; or

(b) failed or refused to undergo a blood test, after having been required or requested to do so under section 72 or section 73; or

(c) driven a motor vehicle on a road at a speed exceeding—

(i) the applicable permanent posted speed limit by more than 40 km an hour (which speed was detected by a means other than approved vehicle surveillance equipment); or

(ii) any other speed limit by more than 50 km an hour (which speed was detected by a means other than approved vehicle surveillance equipment).

(1A) If an enforcement officer believes on reasonable grounds that a person has undergone an evidential breath test and has been found to have a breath alcohol concentration exceeding 650 micrograms of alcohol per litre of breath,—

(a) the enforcement officer must give the person a notice under subsection (1)(a) even though the person has the right under section 70A to elect to have a blood test; and

(b) a further notice is not required and must not be given under subsection (1)(a) if the person undergoes a blood test and is found to have a blood alcohol concentration exceeding 130 milligrams of alcohol per 100 millilitres of blood.

(2) A notice under this section must—

(a) be in a form prescribed by regulations made under this Act or in a form to the same effect; and

(b) tell the person to whom it is given that the person is suspended from holding or obtaining a driver licence for 28 days; and

(c) require the person to immediately surrender any driver licence that the person has to the enforcement officer; and

(d) outline the person's rights of appeal under sections 101 and 109.

(3) A suspension under this section starts immediately after the notice is given to the person to whom it applies.

(4) A person whose driver licence is suspended under this section has the rights of appeal conferred by sections 101 and 109.

(5) Nothing in this section affects or limits any power of a court to impose a penalty.

(6) Subsection (1)(c) does not apply if the vehicle—

(a) was an ambulance fitted with a siren or bell, and at the time was being used on urgent ambulance service; or

(b) was conveying a constable in the execution of urgent duty, if compliance with the speed limit would be likely to prevent or hinder the execution of that duty; or

(c) was being used by a fire brigade for attendance at fires or other emergencies, and at the time was being used on urgent fire brigade service.

(7) The suspension of a driver licence under subsection (1) ceases to have effect if—

(a) the Police decide finally that proceedings will not be taken against the person for an offence arising out of circumstances referred to in subsection (1) or if such proceedings have been taken and the person is acquitted; and

(b) the suspension has not already been removed.

(8) The suspension of a person's driver licence in the circumstances referred to in subsection (1A) ceases to have effect when the result of the blood test (if any) is notified to the person if—

(a) the blood test shows that he or she had a blood alcohol concentration of, or less than, 130 milligrams of alcohol per 100 millilitres of blood; and

(b) the result of the blood test is notified to the person before the close of the 28-day suspension period.

(9) For the purposes of this section, *driver licence* includes a foreign driver licence.

[29] I consider, based on the plain wording of s 95, that the suspension notice is valid provided the officer believes on reasonable grounds that there is a basis for giving one to a driver and provided there has been no successful appeal under ss 101 and 109 and the suspension has not ceased to have effect under s 95(7).

[30] Sections 101 and 109 of the Act provide:

101 Appeal to Agency against mandatory suspension of driver licence

(1) A person whose driver licence has been suspended under section 95 may appeal to the Agency against the suspension on the grounds that—

(a) the person was not the driver of the vehicle at the time of the act or omission to which that section applies; or

(b) the enforcement officer did not have reasonable grounds of belief as required by section 95 or did not give a notice that complied with subsection (2) of that section.

(2) An appeal under this section must be set out in a statutory declaration.

(3) The Agency must, within 5 working days after an appeal under this section is lodged, either—

(a) remove the suspension immediately, if satisfied that a ground referred to in subsection (1) has been established; or

(b) dismiss the appeal.

(4) If a suspension is removed under subsection (3)(a), the suspension ceases to have effect when that decision is made and the Agency must return the licence to the holder's last known place of residence or business or postal address, or to the holder at an office of the Agency.

(5) The Agency may refuse to consider an appeal under this section if satisfied that the appeal is frivolous or vexatious, or that the appellant has provided insufficient information.

109 Appeal against refusal of Agency to remove suspension of driver licence

(1) A person who unsuccessfully appeals to the Agency under section 101 may, on any grounds set out in subsection (1) of that section, appeal to the District Court against the decision under that section.

> (2) The court must determine the appeal on 1 or more of the grounds set out in subsection (1) or subsection (5) of section 101 and may not consider any other grounds.
>
> (3) The court may—
>
> (a) direct that the suspension be removed, in which case that direction has effect as if it had been made under section 101 by the Agency; or
>
> (b) dismiss the appeal.

[31] In this case there can be no doubt that Sergeant Johnson believed on reasonable grounds that he was justified, indeed required, under s 95 to hand Mr Pomana the suspension notice. As I have noted above his evidence was admitted by consent. He was not required to attend for cross-examination so there was no challenge to his evidence in any way. Indeed Mr Pomana himself apparently believed (at least until he was apprehended on 20 October, if not beyond) that the suspension notice was given on reasonable grounds; his comment to Constable McWilliams shows he accepted that he was not able to drive during the suspension period but claimed to have made a miscalculation of the duration of the period.

[32] I infer from the evidence that Mr Pomana did not appeal under s 101 nor (obviously) was there then an appeal under s 109. He could have done so if he considered Sergeant Johnson did not have reasonable grounds for belief. Also, under s 95(7), this was not a case where the suspension ceased to have effect before it expired.

[33] Accordingly, what Mr Pomana did on 20 October 2017 was to drive during and an unappealed suspension period, which had not ceased to have effect.

[34] My impression of s 95 in isolation (without reference to authority) is that it provides a form of code with its own internal remedies protecting a driver's rights in the event of an officer capriciously or otherwise unjustifiably giving him or her a suspension notice. It seems to me that if a driver, notwithstanding having those rights (but without exercising them), chooses to drive during the proscribed period he or she is arguably committing the offence, regardless of whether at a later time it is

determined that despite the officer having had reasonable grounds for belief at the time, the notice was not validly issued as a matter of law.

[35] I have subsequently found that a similar view has been taken in several cases.

[36] In *Alexander v Police*[2] the defendant was caught driving at 144 km per hour in a 100 km per hour zone but the police officer who stopped him did not have the necessary suspension form with him so instructed Mr Alexander to drive to Oxford. After a wait of somewhere between 30 minutes and 2 to 3 hours he was given formal notice of suspension. He then drove within the 28 day period of suspension and was charged with driving while suspended. He appealed to the High Court against his conviction saying that the evidence of suspension was inadmissible because it was obtained in breach of ss 21 (unlawful search and seizure) and 22 (unlawful detention) of the New Zealand Bill of Rights Act 1990.

[37] At paragraph [18] Whata J made the following observations about the workings of the suspension procedures under s 95:

> "It is evident from the scheme of the Land Transport Act that liability to suspension arises by operation of law on satisfying the conditions specified in s 95(1). The giving of a suspension notice is a mandatory obligation, triggering the suspension period, and with the purpose of informing an offender that his or her licence is suspended immediately for a period of 28 days. An appeal lies against suspension, and if lodged, the Agency must remove the suspension within five working days or dismiss the appeal. A second right of appeal, on the same grounds, then lies to the District Court if the Agency does not remove the suspension. The grounds of appeal include failure to give notice in accordance with s 95(2). For my part it may be presumed that the notice must be given in a manner consistent with fundamental rights affirmed by the NZBOR. Breach of those rights is a relevant factor in deciding whether the notice was properly given and then whether the suspension should be set aside. *But in light of the careful and detailed way Parliament has framed the suspension procedures, with immediate effect on notice and two rights of appeal, it seems to me that the suspension remains valid until set aside on appeal. A corollary of this is that driving while suspended is logically a separately actionable offence, requiring only proof of formal notice, valid on its face, and the act of driving*." (emphasis added) (footnotes omitted)

[2] [2012] NZHC 1686.

[38] At paragraph [31] at the conclusion of His Honour's judgment, he said:

> "This judgment should not be seen to be condoning unlawful police conduct. The rule of law has limited tolerance for unlawful exercise of the State's coercive powers. Also, as s 101 specifies, non-compliance with the statutory requirement to give notice will provide a basis for removing suspension. But as I have said, the statutory scheme provides for immediate suspension if an officer has reasonable grounds for believing that a driver as exceeded the speed limit by 50km/hr. That scheme and the statutory purpose of securing public safety could be seriously undermined if suspended drivers could nevertheless assert a continuing right to drive in advance of successfully exercising rights of appeal. *Accordingly, the immediate effect of suspension is legislatively mandated and, in my view, is not amenable to retrospective invalidity for the purpose of defending a charge of driving while suspended.* (emphasis added) (footnotes omitted)

[39] Of course I am bound by Justice Whata's observations which are directly on point, but in any event I respectfully entirely agree with them.

[40] To similar effect in a different context is the judgment of Judge Hubble in *Meyer v Land Transport Safety Authority*[3].

[41] Mr Meyer had his driver licence suspended for 28 days under s 95(1)(a)(ii) because his blood alcohol concentration was found to exceed 160 milligrams of alcohol per 100 millilitres of blood[4]. He claimed that the breathalyser device was faulty and appealed under s 101 to the Director of Land Transport Safety on the basis that the enforcement officer did not have reasonable grounds for belief under s 95. The appeal was dismissed and Mr Meyer appealed unsuccessfully to this court. Judge Hubble observed[5]:

> "It is clear from this section that the operation of the suspension is in no way dependent upon the court being satisfied that a charge will ultimately be proved, or indeed that a prosecution will even be taken. Subsection (3) is clear that the suspension begins immediately notice is served, and will cease to have effect only if the police decide not to prosecute, or the charge is subsequently dismissed in court. It is fairly pointed out by [counsel for Mr Meyer] that the latter eventuality would almost certainly be irrelevant because in the vast majority of cases, a defended hearing would take place well outside the 28 days of the suspension."

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[3] [1999] DCR 715
[4] The current qualifying level is 130 milligrams.
[5] At 718

[42] Mr Meyer argued that he should be protected by the presumption of innocence and since there was a real likelihood that he would he acquitted when the charge was ultimately heard the procedures under s 95 for 28-day suspension were unjust and the blood test, being allegedly a nullity should not be relied on as "reasonable grounds" under s 95(1).

[43] Judge Hubble rejected the submission and said[6]:

> "There will in future be cases where there appears to be a clear defence, and indeed cases where the police decide not to prosecute at all, but in my judgment it is very clear from s 95(7) that this will not automatically prevent the continued effectiveness of the 28-day suspension, provided the court can be satisfied that the enforcement officer had "reasonable grounds" to believe that the requirements of s 95 were met…"

[44] For completeness, I note that in *Alexander v Police* Whata J cited in support of his conclusion at [18] the House of Lords judgment in *R v Wicks*[7]. That was not a driving case but one where a local planning authority had served an enforcement notice the defendant under town planning legislation alleging improper erection of a building and requiring removal of all parts of it higher than 2.5 metres. The notice allowed one month for compliance but the defendant failed to comply with it. His appeal against the notice failed. When charged with a breach of the provision under which the notice had been issued the defendant alleged that the Local Planning Authority had served the notice in bad faith and been motivated by immaterial considerations. The trial judge ruled that such matters should had been raised by way of application for judicial review and that the enforcement notice had to be treated as valid. Mr Wicks' appealed to the Court of Appeal was dismissed as was his further appeal to the House of Lords. It was held that for the purposes of the offence provision "enforcement notice" meant a notice issued by the Local Planning Authority that was formally valid and had not been set aside on appeal or quashed on judicial review. Accordingly in failing to comply with the notice within the compliance period Mr Wicks had been guilty of the office charged.

[45] As Whata J effectively indicated by his reference to this case in his judgment, the principle espoused in *R v Wicks,* albeit in very different factual circumstances, is

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[6] At 719
[7] [1998] AC 92.

the same as must be held to apply here: where there a statutory provision providing for the person receiving the notice to do, or not to do, something within a particular period and it arises in a statutory framework where there are express rights of appeal or review allowing the person to challenge the notice, any prosecution for breach of the notice during the period may not be defended based on its alleged invalidity.

[46] Mr Dawson's response to these points is that Mr Pomana did not have "an effective appeal right" in the circumstances. Because there is no doubt that Sergeant Johnson (subjectively) had reasonable grounds for belief that he was entitled to and indeed required to give Mr Pomana the suspension notice, Mr Dawson submits that Mr Pomana could not have succeeded on an appeal under s 101.

[47] With respect, I consider this unduly constrains the meaning of a challenge on appeal to the holding of "reasonable grounds of belief". It is not limited to subjective holding of reasonable grounds of belief but must surely extend to it being demonstrated there were in fact, despite that genuinely held belief, no valid grounds to suspend the driver's licence.

[48] I see no reason at all why Mr Pomana could not have advanced the argument about the status of the road that Mr Dawson advanced before me, by way of an appeal to the Agency under s 101. Had he done so the Agency would had been required to respond within five working days. If dissatisfied with the response Mr Pomana could have appealed to the District Court under s 109. The former right particularly was clearly an "effective" and expeditious right of appeal. I accept that had Mr Pomana been dissatisfied with the response of the Agency to his initial appeal then the reality would almost certainly have been that any further appeal to the District Court would not have been heard during the period of suspension. However, despite those practicalities, I would not be prepared to find that that second appeal right was illusory or ineffective. It certainly would however have required an unusual effort to obtain a hearing and decision.

[49] In short, in my view it was open to Mr Pomana to challenge, on appeal to the Agency and if necessary beyond that to the District Court, the objective reasonableness

of the Sergeant Johnson's grounds of belief , without needing to dispute the fact that he genuinely subjectively held that belief.

[50] For these reasons I conclude that, even if I am wrong in my conclusion about the underlying legality of the notice issued to Mr Pomana by Sergeant Johnson, that does not matter for present purposes. Any underlying invalidity does not provide a defence to the charge of driving while suspended which is established on proof (only) that Mr Pomana drove during the unchallenged period of suspension.

Conclusion

[51] For these reasons I find the charge proved beyond reasonable doubt and Mr Pomana will be convicted.

[52] I propose that sentencing take place at 3pm on Wednesday 22 August 2018. The Registrar is to consult Mr Dawson to confirm that is suitable to him and Mr Pomana.

S M Harrop
District Court Judge