IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-Ā-KAHU ROHE

CRI 2018-463-3
[2018] NZHC 1582

BETWEEN	S Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 26 March 2018

Counsel: A Haskett for the Appellant
O M Salt for the Respondent

Judgment: 28 June 2018

JUDGMENT OF DUFFY J

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[1] On 15 December 2017, the appellant was convicted of driving with excess blood alcohol content[1] in the Thames District Court.[2] He was sentenced to a fine of $800.[3]

[2] The appellant now appeals against his conviction.

Factual background

[3] Judge Harding detailed the factual background of the appellant's conviction in his oral judgment. A summary of this background is as follows.

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1 Land Transport Act 1998, s 56(2); the maximum penalty for which is three months' imprisonment or a fine of $4,500.
2 [redacted].
3 [redacted].

[4] On 28 May 2017 the appellant was driving along [redacted]. He was going to collect his daughter from a party, which had apparently gone awry.

[5] The appellant arrived at a police breath and alcohol checkpoint. He was waved over by Constable Collingwood and asked if he had been drinking. The appellant replied that he had had a stubbie.

[6] A passive breath test determined the existence of alcohol on the appellant's breath. A breath screening test then produced a reading of more than 400 micrograms of alcohol per litre of breath.

[7] Constable Collingwood requested that the appellant accompany him to the "booze bus" which was at the checkpoint. The appellant agreed.

[8] At a certain point, the appellant advised Constable Collingwood that he needed to go to the bathroom. The constable said in evidence that from the time of this first request he knew the appellant wanted to defecate. However, Constable Collingwood did not accommodate this request and the pair proceeded to the "booze bus."

[9] Once inside the "booze bus" the appellant underwent an evidential breath test which produced a result of 587 micrograms per litre.[4] The appellant elected to have a blood test.[5] A nurse was summoned to administer this test.

[10] Throughout the time the appellant was in the "booze bus" awaiting the blood test procedure he repeatedly asked Constable Collingwood for access to a bathroom. No access was provided. Instead, Constable Collingwood assured the appellant that the process would not take long, and that he would be able to use the bathroom in due course. The constable's tone in deferring the appellant's requests appears to have been gentle yet unswerving.

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4 Section 56(1) of the Land Transport Act 1998 makes it an offence for a person to drive with an excess of 400 micrograms of alcohol per litre of breath.

5 Section 70A of the Land Transport Act 1998.

[11] Unfortunately for the appellant, he was unable to maintain control of his bowels and defecated in trousers. Judge Harding commented that this caused the appellant "significant embarrassment".[6]

[12] The nurse responsible for administering the blood test procedure then arrived and the appellant apologised to her for the unpleasant smell. He explained to her why he could not sit down as requested. After some hesitation, the nurse successfully administered the blood test, with the appellant standing.

[13] Afterwards, the appellant was permitted to leave the "booze bus." However, the constable offered no assistance to enable the appellant to clean himself. He was left to walk in a soiled state to a nearby service station where he managed to clean himself to some extent. He then walked home.

[14] The appellant's blood test produced a result of 117 (plus or minus six) milligrams of alcohol per 100 millilitres of blood.

[15] The constable said in evidence that the appellant was stopped at the Police check point at approximately 12:42 am. The blood specimen medical certificate records that this specimen was taken at approximately 02:27 am. Shortly after that the appellant was released. Accordingly, he was in Police custody for approximately one hour and 45 minutes.

[16] The respondent accepts that throughout the appellant's detention there were several requests by him to use the bathroom. The respondent also accepts the act of defecation took place sometime between the failure of the evidential breath test and election of a blood test and the arrival of the nurse to take the blood test.

District Court decision

[17] Judge Harding found that the appellant was deprived of his right to be treated with humanity under s 23(5) of the New Zealand Bill of Rights Act 1990 (NZBORA). The Judge took guidance from the following comments of Collins J in *Kelly v Police*:[7]

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6 At [7].
7 At [18]; *Kelly v Police* [2017] NZHC 1611.

> [28] … the right to be treated with humanity and respect in s 23(5) of the NZBORA is engaged where agents of the state treat persons who are detained in ways that are excessive and/or demeaning but which fall short of the high threshold required to establish a breach of s 9 of the NZBORA.

[18] Judge Harding held that the appellant was treated in a sufficiently demeaning manner as to breach s 23(5) but not s 9. The Judge noted that there was no need for the appellant to have been prevented from using a bathroom.[8] It was also observed that the intention of Constable Collingwood was not a factor in respect of the operation of s 23(5).[9]

[19] Having established a breach of s 23(5), the Judge turned to consider s 30 of the Evidence Act 2006 (EVA). The Judge began by considering whether the exclusion of the blood test result would be proportionate to the impropriety with which it was obtained under s 30(2)(b), having regard to the factors under s 30(3). He did this before considering whether the evidence was improperly obtained under s 30(5).[10]

[20] Judge Harding approached s 30(3) of the EVA methodically, noting:

(a) The breached right was important;

(b) The constable did not act in bad faith;

(c) The nature and quality of the blood test result was statutorily unimpeachable;

(d) Driving with excess breath or blood alcohol poses a danger to the community, but the appellant's offending in the overall range of offences was not at the higher end;

(e) The constable could have simply escorted the appellant to a bathroom and then continued with the process;

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8 At [14].
9 At [19].
10 At [20].

(f) There is no alternative remedy other than the exclusion of the blood test result;

(g) There was no physical danger to the Police or others; and

(h) There was no particular urgency in administering the blood test subject to statutory requirements.

[21] After balancing all of these factors, the Judge found that the overall interests in maintaining an effective and credible system of justice were best served by allowing the evidence to be admissible.

Appellant's submissions

[22] The appellant appeals his conviction on the grounds that the inclusion of his blood test result as evidence resulted in a miscarriage of justice.

[23] The appellant submits that being denied access to a bathroom during the testing process breached his rights under NZBORA. The appellant accepts Judge Harding's finding that his s 23(5) right was breached. However, he submits that the Judge erred in not finding that ss 9 and 21 were also breached.

[24] The appellant refers to the Supreme Court's articulation of s 9 in *Taunoa v Attorney-General*.[11] He argues that his treatment was "disproportionately severe" in that it would cause shock and revulsion among New Zealanders.

[25] The misuse of coercive State powers is said to be even more egregious due to the relatively minor nature of the appellant's detention. While the prisoners in *Taunoa* were convicted of violent offences, the appellant was merely being temporarily detained for a traffic offence.

[26] The appellant also submits that his right to a reasonable search and seizure under s 21 was breached. He argues that it is not reasonable to conduct a non-urgent

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11 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172].

search of a motorist at the cost of basic human decency to the extent that it causes significant embarrassment and pain.

[27] Taken cumulatively the breaches of ss 9, 21 and 23(5) of the NZBORA, the appellant submits, should have resulted in the evidence being excluded under s 30 of the EVA. He notes:

(a) The seriousness of the intrusion was extremely grave, causing "one of the most degrading results imaginable";

(b) Constable Collingwood was recklessly indifferent in that he should have reasonably known that there was a real risk of the appellant defecating in his trousers;

(c) The nature of the blood test result is not statutorily unimpeachable, although its validity is not being challenged;

(d) The seriousness of the offence in the overall scheme of offending is at the lower end of the spectrum; and

(e) There were alternative investigative techniques or remedies other than exclusion available and no risk of physical danger or urgency, as was pointed out by Judge Harding.

[28] The appellant also argues that the long-term integrity of the justice system supports the exclusion of the evidence, in that the broader public interest in the propriety of evidence outweighs the short-term interests of adjudication of the current case on its merits.

Respondent's submissions

[29] The respondent disputes that ss 9 and 21 of the NZBORA were breached. Judge Harding's finding that s 23(5) was breached seems to be accepted.

[30] The respondent submits that while the act of defecation caused the appellant significant embarrassment, this did not go so far as to reach the high threshold of s 9. Regard is had to the Supreme Court's interpretation of s 9 as covering conduct which is grossly disproportionate to the circumstance or which causes shock and abhorrence to properly informed citizens by New Zealand standards.[12]

[31] At the appeal hearing the respondent withdrew its written submission that New Zealanders might readily expect an adult man to be able to hold his bowels for an hour and a half, and that somebody who had made the decision to drive under the influence of alcohol should expect to be detained for such a period.

[32] The respondent submits that the only ground upon which the search of the appellant could be unreasonable in terms of s 21 of the NZBORA is in terms of privacy. In this regard the respondent argues that in *Police v McGrath* the lack of privacy, which was more glaring than in the current circumstances, did not trigger the threshold of s 21 alone.[13] Rather the breach of NZBORA in that case centred on the lack of safety during the blood sample testing undertaken in the "booze bus". Constable Collingwood, by comparison, is said to have followed standard procedure and conducted the search in good faith.

[33] In any case, the respondent submits that despite any breach of NZBORA, the evidence cannot be said to have been improperly obtained. Under s 30(5) of the EVA it was not obtained in consequence of any breach of NZBORA or unfairly.

[34] The respondent points out that s 30(5) of the EVA requires a causative link between the impropriety and the obtaining of the evidence.[14] It is pointed out that there were no unfair misrepresentations, misleading conduct or bad faith employed by Constable Collingwood in obtaining the evidence. The respondent submits that the failure to allow the appellant use of a bathroom did not have a material or operative effect on the obtaining of the blood test result.

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12 *Taunoa v Attorney-General* at [289].
13 *Police v McGrath* [2013] NZCA 3.
14 *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [47].

[35] In the alternative, the respondent submits that Judge Harding did not err in his assessment of the factors under s 30(3). It is submitted that:

(a) Despite all NZBORA rights being important, the specific intrusion in this case was not so serious;

(b) Constable Collingwood did not act in bad faith, and was even described as "accommodating" in terms of his conduct throughout the process; any recklessness is overstated;

(c) The blood test has not been challenged, was obtained appropriately and proves the appellant's guilt;

(d) Driving with excess breath or blood alcohol is inherently dangerous;

(e) Allowing a blood test result to be admitted serves the overall interests of justice;[15] and

(f) The centrality of the evidence and the relative strength of the causative link between the evidence and the impropriety may also be taken into account in this balancing exercise.[16]

Appeal against conviction

Approach on appeal

[36] The appellant can appeal as of right to this Court.[17]

[37] This Court can only allow an appeal from a Judge alone trial if it is satisfied that the District Court Judge "erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred", or that "a miscarriage of justice has occurred for any reason":

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15 *Police v Kelly* [2017] NZDC 651 at [44].
16 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [141].
17 Criminal Procedure Act 2011, s 229 and 230.

232 First appeal court to determine appeal

(1) A first appeal court must determine a first appeal under this subpart in accordance with this section.

(2) The first appeal court must allow a first appeal under this subpart if satisfied that,—

(a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or

(b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or

(c) in any case, a miscarriage of justice has occurred for any reason.

(3) The first appeal court must dismiss a first appeal under this subpart in any other case.

(4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

(5) In subsection (4), **trial** includes a proceeding in which the appellant pleaded guilty.

[38] Not every "error or irregularity" causes a miscarriage of justice.[18] The Court of Appeal recently confirmed that s 232 did not change the approach to appeals against conviction. The tests that applied prior to the enactment of the Criminal Procedure Act 2011 continue to apply.[19]

[39] A "real risk" that the outcome was affected exists when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong."[20] This standard means that "an appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe" but that there is a real possibility the verdict would be unsafe.[21]

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18 "A miscarriage is more than an inconsequential or immaterial mistake or irregularity": *Matenga v R* [2009] NZSC 18 at [30].

19 *Wiley v R* [2016] NZCA 28.

20 *R v Sungsuwan* [2006] 1 NZLR 730 (SC) at [110] per Tipping J.

21 At [110].

Analysis

[40] There are three questions that require addressing:

(a) Has there been a breach of ss 9 and 21 of NZBORA?

(b) Was the blood test improperly obtained?

(c) If the blood test was improperly obtained, should it have been excluded from the prosecution's evidence against the appellant?

NZBORA – s 9

[41] I do not consider that Judge Harding erred in his assessment of s 9 of NZBORA and its applicability to the appellant's predicament.

[42] Section 9 of the NZBORA states that everyone has the right not to be subjected to cruel, degrading, or disproportionately severe treatment or punishment.

[43] Judge Harding considered that the demeaning way in which the appellant was treated did not reach the level of breaching s 9. I agree. In doing so, I note the interpretations of s 9 advanced by counsel in their submissions.

[44] In *B v Waitemata District Health Board* the Court of Appeal held that *Taunoa* is the "governing authority" in New Zealand in cases such as these.[22] The Court helpfully summarised the approach of the majority of the Supreme Court in *Taunoa* as follows:[23]

> [63] … ss 9 and 23(5) of NZBORA established a hierarchy of proscribed conduct. Within that hierarchy, s 9 is "reserved for truly egregious cases" involving official conduct "which is to be utterly condemned as outrageous and unacceptable in any circumstances. On the other hand, s 23(5) concerns official conduct that is less reprehensible, but still unacceptable.
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> [64] … to breach s 9 official conduct will typically involve an intention to cause harm, conscious actions or a reckless indifference to causing harm, as well as significant physical or mental suffering.

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22 *B v Waitemata District Health Board* [2016] NZCA 184, [2016] 3 NZLR 569.
23 At [63]-[64].

(Citations omitted)

[45] In terms of disproportionately severe treatment, the Court went on to say that it must be:

> [64] … conduct that is so severe as to shock the national conscience, or so disproportionate as to cause shock and revulsion. Such treatment is a standard well beyond even manifestly excessive treatment.

[46] I do not consider that the appellant's treatment comes close to reaching the lofty threshold required to trigger a breach of s 9 because it cannot be described as "truly egregious". A public and involuntary defecation in one's trousers is of course significantly embarrassing. Nonetheless, I do not think that a police officer who brings about that outcome through denying a detained person access to a bathroom for approximately one hour and 45 minutes can be said to constitute treatment that is "well beyond manifestly excessive" in terms of its severity.

[47] Accordingly, I find Judge Harding's assessment that the conduct of Constable Collingwood went so far as to breach s 23(5) but not s 9 was correct.

Section 21 of the NZBORA

[48] Judge Harding did not address whether a breach of s 21 of the NZBORA was made out. I am not sure if this potential breach was argued in the District Court. However, the appellant raised it on appeal and the respondent has addressed it in its submissions.

[49] The respondent argued that there was no infringement of privacy so serious as to breach s 21 of the NZBORA. I disagree.

[50] Section 21 of the NZBORA centres on the reasonable expectation of privacy[24] and dignity[25] when subject to powers of search. In *R v Williams* the Court of Appeal held that an unlawful search or seizure will almost always be unreasonable in terms of s 21.[26] The Court of Appeal also observed that a situation involving a search that is

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24 *R v Williams* at [48].
25 *R v Pratt* [1994] 3 NZLR 21 (CA) at 24.
26 Above at [228]

both lawful and unreasonable is possible, but rare.[27] The example given was where a lawful search has been conducted in an unreasonable manner,[28] as occurred in *R v Pratt* where a strip search which was conducted in public view was found to be legal but unreasonable due to the time, place and disregard for Mr Pratt's "privacy and dignity".[29]

[51] In determining whether there has been a breach of s 21 in this case, the following comments of Allan J in *McGrath v Police* are helpful:[30]

> [41] The question of whether or not there has been a breach of s 21 will depend on all the circumstances of the case. Although the taking of a specimen of blood amounts to a search, it could not be said that any taking of blood on a booze bus must necessarily infringe s 21 on privacy grounds. For example, if the specimen of blood was sought when the only persons in the bus were the apprehending officer and the medical officer, and there was no suggestion that those in the bus were visible from outside, then there would be no room at all for a s 21 argument.

[52] Also relevant is the early recognition in *Scott v Ministry of Transport* that the compulsory testing regime, as applied ordinarily, was not intended to expose citizens "unnecessarily to embarrassment or even humiliation."[31] Whilst this was said in relation to the requirements of the former compulsory testing regime under the Transport Act 1962 it is equally applicable to the present testing regime. Such recognition carries even more force in the case of extraordinary circumstances like the present.

[53] Further, in *Scott v Ministry of Transport* the Court of Appeal found that in the ordinary run of cases as long as the statutory object of a speedy preliminary test was not in any way frustrated there was room for some element of reasonableness and tolerance if proper reason was given for some small measure of delay. Judge Harding found there was no need for the appellant to be deprived of access to bathroom facilities, particularly as the constable was aware the appellant needed to defecate.[32]

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27 Above at [24].
28 Above at [24].
29 See *R v Pratt* at 24.
30 *McGrath v Police* HC Auckland CRI-2011-404-110, 20 December 2011; whilst Allan J's decision was reversed on appeal, this aspect of the decision was endorsed by the Court of Appeal.
31 *Scott v Ministry of Transport* [1983] NZLR 234 (CA) at 237.
32 [redacted]

On appeal no-one disputed that had the appellant been given a short toilet break the test results would have been unaffected.

[54] Here the only people within the "booze bus" at the relevant time were other police officers, including a female police officer, coupled with the addition of the nurse when the blood sample was required. Further, there is no suggestion that the interior of the bus was visible to anyone outside. So, in terms of those factors, all of which featured in *McGrath*, there was no adverse effect on the appellant's privacy.

[55] However, the blood specimen was taken in circumstances where through no fault of his own by that time the appellant had soiled his trousers. His unchallenged evidence was that when the nurse asked him to sit he was obliged to refuse the request, explain why that was and then apologise for the smell when he saw her initially recoil from him. Fortunately for the appellant the nurse was sympathetic to his predicament. She took the test while he stood saying, "We'll be as quick as we can, you can stand."

[56] There is no doubt the taking of a blood sample amounts to a search.[33] Further, the taking of the blood sample was the final step in a compulsory search process that commenced when the appellant gave a positive reading of alcohol for a passive breath test, which he was required by law to undergo.[34] Throughout this search process the appellant made clear to the constable the need to access bathroom facilities. In this regard the appellant was entirely dependent on the constable. It would have been a criminal offence for the appellant to take matters into his own hands and attempt to leave the "booze bus" to find toilet facilities for himself at any time before the search process was complete.[35] Given the involuntary defecation had occurred by the time the blood sample was taken this humiliating act clearly occurred part-way through the compulsory search process.

[57] Most people would consider defecation to be something that should occur in the privacy of a bathroom. It is an intensely private act.[36] That the appellant found

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33 See *Police v McGrath* above.
34 See Part 6 of the Land Transport Act 1998, in particular ss 68-72.
35 See ss 59 and 60 of the Land Transport Act 1998.
36 The minority who deliberately perform this act in a public place or within public view risk committing the offence of offensive behaviour under s 4 of the Summary Offences Act 1981.

himself the victim of a public act of involuntary defecation is entirely due to this event occurring while he was subject to a compulsory search process, and without access to bathroom facilities. The constable could have alleviated the situation by permitting the appellant to access bathroom facilities that were in reasonably close proximity, but failed to do so. This left the appellant in the unenviable situation where the compulsory search stopped him from acting to save himself from committing a public act of defecation, but ultimately neither could he control the course of events. For him to needlessly suffer this event was in my view a significantly serious breach of his privacy and his dignity.

[58] I find the appellant's situation analogous to that in *R v Pratt*, where a lawful warrantless search conducted under s 18 the Misuse of Drugs Act 1975 was rendered unreasonable by Police taking Mr Pratt to a side street and strip searching him to the point where he was either naked or nearly naked. The Court of Appeal found that to strip search someone in a public street when it would have been possible to transport him to a more suitable place and when no law enforcement considerations necessitated an immediate strip search was "a serious infringement of [Mr Pratt's] privacy and dignity", which made the search unreasonable in terms of s 21 of the NZBORA.[37] This conclusion led the Court of Appeal to find the trial Judge should have excluded the evidence obtained from the search. Because the admission of this evidence may have adversely impacted on Mr Pratt's fair trial rights the appeal was allowed and a new trial was ordered.[38] I note that in *R v Pratt* the infringement of Mr Pratt's dignity was a factor that went to the unreasonableness of the search.

[59] Here the experience of performing an involuntary public act of defecation, albeit in a "booze bus" with a limited number of others present, seems to me to be as much a serious infringement of a citizen's privacy and dignity as does being stripped naked in a side street and searched by police. Each experience entails its own peculiar form of serious humiliation. Accordingly, I am satisfied that, whilst the search properly complied with the requirements of Part 6 of the Land Transport Act, the

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37 *R v Pratt* at 24.

38 In *R v Pratt* there was other admissible evidence that was sufficient to sustain a conviction under the Misuse of Drugs Act 1975; also the decision pre-dates the Evidence Act 2006 and so the exclusion of the evidence from the search does not follow a s 30 analysis.

manner in which the search was conducted was so unreasonable that it breached s 21 of the NZBORA.[39]

[60] Further I consider the breach of s 21 of the NZBORA was compounded by the failure of the Constable to offer assistance after the appellant had soiled himself. Once the constable was aware the appellant had soiled himself the constable should have taken steps to give the appellant the opportunity to clean himself. Before, and certainly after, the blood sample was obtained the appellant should have been offered the opportunity to clean himself at the nearby Police Station. Instead, no help was given to him and he was left to take himself in a soiled state to a nearby service station and ask the personnel there for assistance. The omission of the constable or other police officers in the near vicinity to offer the appellant an opportunity to clean himself adds to the gravity of the breach of s 21 as it is a further blow to the appellant's dignity.

Section 23(5) of the NZBORA

[61] After a well-reasoned consideration of the relevant case law, Judge Harding found s 23(5) to be breached.[40] I agree with the Judge's reasoning. The respondent has not attempted to dispute this finding. Accordingly, I am satisfied the circumstances of the detention breached s 23(5) of the NZBORA.

[62] However, I consider that Judge Harding stopped too short in his consideration of the breach of s 23(5) the NZBORA. This is because the Judge did not turn his mind to the Constable's omission to offer the appellant a means of cleaning himself. The soiling occurred while the appellant was detained under the Land Transport Act's powers. The omission to offer him an opportunity to clean himself reveals a separate lack of respect for the appellant's dignity. Accordingly, it constitutes a separate but equally egregious breach of s 23(5) of the NZBORA.

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39 There was no challenge in either the District Court or on appeal regarding compliance with the requirements of Part 6 of the Land Transport Act 1998. Absent a specific challenge of this kind there can be no complaint about compliance with the requirements of the statutory regime.

40 See above at [17] - [19].

Sections 18 and 22 of the NZBORA

[63] The appellant also relies on ss 18 and 22 of the NZBORA. However, his submissions did not address those rights. Since he has confined his submission to ss 9, 21 and 23(5) of the NZBORA I consider there is nothing to be gained by going beyond those provisions. I do not propose to consider ss 18 and 22 as well.

Was the evidence improperly obtained?

[64] Section 30 of the EVA imposes a two-stage process which requires the Court to consider: (a) was the evidence improperly obtained; and if so (b) should it be excluded.[41] Here Judge Harding erroneously omitted the first stage and went directly to the second stage. Accordingly, it is necessary for me first to consider whether the blood test sample was improperly obtained.

[65] The established breaches of ss 21 and 23(5) affect the overall seriousness of the infringement of the appellant's rights as guaranteed by NZBORA. More importantly, the finding that s 21 NZBORA rights were breached directly impacts upon whether the blood test was improperly obtained.

[66] Section 30(5)(a) of the EVA states that evidence is improperly obtained if it is obtained in consequence of a breach of any enactment by a person exercising a public function. Here the conviction almost entirely rests on the blood test. This evidence was obtained through the exercise of a compulsory search power by persons exercising a public function: namely, the constable who engaged the compulsory testing regime and the nurse who, in reliance on that regime, took the blood test. Without the compulsory search, the blood sample could not have been obtained. However, here the compulsory search was so unreasonable it breached s 21 of the NZBORA. Thus the evidence on which the conviction largely rests was obtained in consequence of a search that breached s 21 of the NZBORA. Accordingly, I find the requirements of s 30(5) of the EVA are satisfied, which means that the evidence has been improperly obtained. It follows that I reject the respondent's submission that there is no link between how the evidence was obtained and the breach of s 21 of the NZBORA.

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41 See *Boskell v R* [2014] NZCA 497 at [10]-[11].

[67] The next question is whether the blood sample was obtained in consequence of a breach of s 23(5) of the NZBORA. In *Kelly v Police* Collins J found that the breach of s 23(5) rights had allowed evidence to be obtained in consequence of that breach. This was because to avoid breaching Mr Kelly's s 23(5) rights the Police would have needed to take Mr Kelly to the hospital in which case they could not have obtained the evidential breath test from him at the police station, as they had done. Thus, in *Kelly v Police* the breach of the s 23(5) rights was linked directly to how Police obtained the evidential breath test from Mr Kelly.

[68] Here the completion of the compulsory testing regime was always going to be done in the "booze bus". So in that sense the present case is a different from *Kelly v Police*. However, the breach of s 23(5) is inextricably woven into how the compulsory testing regime was applied to the appellant. So long as he remained subject to that regime he had no liberty to take the necessary steps to avoid soiling himself. Without his detention in the "booze bus" the various tests the compulsory testing regime imposed upon him could not have been taken. The circumstances of that detention breached s 23(5). Accordingly, the evidence (the blood sample) was obtained as a consequence of a detention that breached s 23(5). This in my view is sufficient to satisfy the requirements of s 30(5) of the EVA.

[69] In reaching this conclusion, I have had regard to the decision of the Court of Appeal in *Pollard v R*.[42] In that case, a Police officer conducted an unlawful warrantless search of a property. The observations made during the course of that search were then used as the basis for a search warrant application. The impropriety of the first search was held to "taint" the later search carried out under the warrant. The Court commented:

> [24] It would be wrong for this Court to sanction the admissibility of evidence obtained as a result of a chain of events triggered by conduct which the police officer must have known contributed to a trespass.

[70] In the appellant's case, the impropriety arose from the constable's ongoing refusal to accommodate his requests to use a bathroom while he was detained. It is therefore different from *Pollard* in that the impropriety was not a discrete occurrence

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[42] *Pollard v R* [2010] NZCA 294.

triggering a chain of events which led to a later search being carried out. Rather, the Constable's conduct supplied the backdrop to the period of detention during which the relevant evidence was obtained. I therefore consider it is similar to *Pollard* insofar as it is impossible to disentangle the impropriety from the search.

[71] It is not so simple as to say that the blood test would have been obtained regardless of the Police impropriety and therefore there was no causative link between the two. I accept that in principle the blood test could have been obtained without a search that breached the appellant's NZBORA rights, but that would have been a markedly different search from the search that was actually undertaken. Causation is ultimately a question of judgment.[43] A "material or operative effect" is required.[44] In this case, the entire search was coloured by the impropriety. This was the search by which the blood test was obtained. Without this search, there would be no blood test. The fact it could have been obtained by means of a different and NZBORA compliant search is a separate issue that cannot break the linkage between the actual search and the evidence on which the conviction now rests. Taking this into account, and as I have stated above, I consider that the blood test was obtained in consequence of the breach of the appellant's NZBORA rights.

Should the improperly obtained evidence be excluded?

[72] Once there is a finding that evidence has been improperly obtained the next step is to determine whether or not exclusion of that evidence is proportionate to the impropriety. This involves a balancing process, which includes consideration of the matters set out in s 30(3)(a) to (h) of the EVA. I am also required pursuant to s 30(2)(b) of the EVA to determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

[73] Here the same factual circumstances underlie the breaches of both s 21 and 23(5) of the NZBORA. Also the same assault on human dignity features in both the

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43 *Nicol v R* [2017] NZCA 140 at [30].
44 *Boskell v R* at [10].

s 21 breach and the s 23(5) breach. Accordingly, I consider that the presence of two breaches does not exacerbate the impropriety by which the evidence was obtained.

[74] I turn first to the matters set out at s 30(3) of the EVA. First, I need to consider the importance of any right breached by the impropriety and the seriousness of the intrusion on it.[45] The right to be free from unreasonable search and for the citizen's privacy and dignity not to be interfered with (either by search or through loss of liberty) are important rights. I consider the gravity of the intrusion on those rights to be very serious. Here a natural bodily function which most persons expect to be entitled to perform in private was by reason of the breaches of ss 21 and 23(5) of the NZBORA compelled to be performed in a public setting and in circumstance where other persons present (in particular the nurse) could not help but be aware of what had occurred.

[75] Second, I need to have regard to the nature of the impropriety, in particular whether it was deliberate, reckless or done in bad faith.[46] Because Judge Harding did not consider the breach of s 21 of the NZBORA I do not have the benefit of his views on whether or not the breach was deliberate, reckless or done in bad faith. Nonetheless, because the factual circumstances are the same for both the breach of ss 21 and 23(5) of the NZBORA, Judge Harding's findings in relation to the s 23(5) breach give some helpful insight into how he viewed the relevant evidence.

[76] As regards the breach of s 23(5) of the NZBORA Judge Harding found there was no requirement for this right to be breached intentionally so he had little to say about this aspect of that breach.[47] Nonetheless, the Judge found he could not conclude the constable was acting in bad faith and the appellant had acknowledged the constable was accommodating.[48] The Judge also found there was no evidence on which he could properly conclude that the constable had deliberately detained the appellant knowing he was about to soil himself, nor was that something that was put to the constable in cross-examination.[49]

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45 See s 30(3)(a) of the Evidence Act 2006.
46 See s 30(3)(b).
47 [redacted].
48 [redacted].
49 [redacted].

[77] Whilst Judge Harding found the impropriety was neither deliberate nor done in bad faith he did not specifically address the question of whether it was done recklessly. The appellant was in Police custody for approximately one hour and 45 minutes. Throughout that period he made repeated requests to access a bathroom. The constable was first told the appellant needed bathroom facilities when the constable asked the appellant to accompany him to the "booze bus." The request was then repeated after the evidential breath test. The constable admitted under cross-examination that from the outset he was aware that the appellant was wanting to defecate. He admitted there was a Police Station with bathroom facilities about 1200 metres away, and a service station was in close proximity. Under cross-examination the constable accepted there was no impediment or nothing stopping him from taking the appellant to the Police Station or to a service station to use bathroom facilities. While waiting for the nurse to come the appellant again requested access to bathroom facilities and again the constable did nothing to assist. Given the length of time the appellant was detained by the constable, given his repeated requests which had begun almost from the outset to use bathroom facilities, and given the close proximity of bathroom facilities to the "booze bus", the failure to accommodate the appellant's request was in my view definitely careless.

[78] Those circumstances may also have supported a finding of recklessness. However, the transcript of the cross-examination of the constable shows he was never asked whether he had considered the possibility of the appellant soiling himself, but decided nonetheless to maintain the refusal to permit access to bathroom facilities. Without such cross-examination I consider it is not open to me to reach a finding on recklessness. For that reason alone, I am left in the position where I find the nature of the impropriety to be careless, but no more than that.

[79] Third, I now consider the nature and quality of the improperly obtained evidence.[50] Judge Harding found the nature and quality of the evidence obtained was statutorily unimpeachable within the statutory regime. That is correct. This evidence is also fundamental to the conviction.

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[50] See s 30(3)(c).

[80] Fourth, I now consider the seriousness of the offence with which the defendant was charged.[51] In the wider context of offending in general this offence is not particularly serious.[52] The offence was driving with excess blood alcohol first or second, which makes it a not particularly serious offence in the context of land transport offending. I accept that as Judge Harding rightly noted, anyone driving with excess breath or blood alcohol is a danger not only to himself, but also to the community. On the other hand, Judge Harding also rightly noted that in terms of the range of offences this offence was not at the higher end. I note that the appellant was a first offender for offences of this type. The level of alcohol found in his blood was not high. The blood test produced a result of 111 or rather 117 plus or minus 6. The legal limit for an offence is an excess of 80 milligrams of alcohol per 100 millilitres of blood[53] and it is an infringement offence if the blood specimen exceeds 50 milligrams of alcohol per 100 millilitres of blood, but does not exceed 80 milligrams of alcohol per 100 millilitres of blood.[54] Whilst the appellant was over the legal limit this was only moderately so. There was nothing about the appellant's driving in particular which attracted the attention of the Police. He was randomly stopped at a routine check point. There was no other driving offence committed by him. Accordingly, for an offence of this type when looked at overall I place it at the lower end of seriousness.

[81] Fifth, I now consider whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used.[55] The Judge found there were other investigatory techniques available. In this regard he noted the constable simply needed to take the appellant down to the nearby garage, let him use the bathroom facilities and then take him back to continue the process.[56] Judge Harding found that there was no need for the appellant to have been prevented from using the bathroom, particularly when the constable became aware it was defecation rather than urination.[57] I agree.

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51 See s 30(3)(d).
52 See *Muggeridge v New Zealand Police* HC Tauranga CRI-2008-463-57, 2 December 2008 CRI 2008-463-57 at [24].
53 See s 56(2) of the Land Transport Act 1998.
54 See s 56(2A).
55 Section 30(3)(e).
56 [redacted].
57 [redacted].

[82] Sixth, I now consider whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant.[58] Judge Harding found there was no other practical remedy that the Court could offer, and I agree with that view. Judge Harding found that what occurred was not necessary to avoid any risk of physical danger to the Police or others and there was no particular urgency in getting the blood test, subject to the statutory requirements of moving with appropriate speed. Again, Judge Harding stated:[59]

> [24] … One imagines that it would have been possible for the constable to take the appellant to the service station and back while the nurse was being summonsed if that possibility been considered.

[83] Seventh, I now consider whether the impropriety was necessary to avoid apprehended physical danger to the Police or others.[60] The answer here is no.

[84] The final question is whether there was any urgency in obtaining the improperly obtained evidence.[61] Again the answer is no.

[85] In *Kelly v Police* Collins J found the evidential breath test was improperly obtained but nonetheless refused to exclude this evidence. However, in that case Mr Kelly was charged with numerous driving offences. He had crashed the motor vehicle he was driving and then left the scene. He was tracked by a police dog and police officers and eventually arrested. He was charged with dangerous driving, and driving with excess breath alcohol on a third or subsequent occasion. The latter offence carried a maximum penalty of two years' imprisonment or a fine not exceeding $6,000.[62] It is a more serious offence than the offence for which the appellant was convicted. Mr Kelly had sustained an injury as a result of the accident. He sought medical assistance which the Police did not provide. Collins J found that this was a breach of s 23(5) of the NZBORA.

[86] When Collins J came to make his overall assessment for the balancing factors in s 30 of the EVA he concluded that the seriousness of Mr Kelly's offending and the

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58 Section 30(3)(f).
59 [redacted].
60 Section 30(3)(g).
61 Section 30(3)(h).
62 Sections 56(1) and 56(4) of the Land Transport Act 1998.

"inadvertent" nature of the police impropriety outweighed the factors in favour of exclusion of the evidence.[63]

[87] The present case is distinguishable from *Kelly v Police*. First, the offending is at a far lower level of seriousness, and it is the appellant's first driving with excess alcohol offence. There was nothing otherwise wrong with the appellant's driving. Secondly, I consider the impropriety was the result of the constable's carelessness rather than, as was the case in *R v Kelly*, mere inadvertence on the part of the police. Thirdly, this careless impropriety was entirely unnecessary; there was nothing to stop the Constable from allowing the appellant access to bathroom facilities. Fourthly, whilst I accept that exclusion of the evidence will mean the conviction cannot be sustained, when I weigh the relevant factors discussed above my assessment is that the exclusion of the improperly obtained evidence is proportionate to the gravity of the Police impropriety. The impropriety suffered by the appellant was serious and substantial. His rights under ss 21 and 23(5) of the NZBORA were seriously and substantially infringed. There was, at the least, a careless and unnecessary disregard for those rights by Constable Collingwood. As was recognised in *Hamed v R* an effective and credible system of justice has the potential to cut both ways.[64] Whilst the view I have reached will mean that the conviction cannot be sustained, I consider the need for effective vindication of the breach of the appellant's ss 21 and 23(5) rights warrants exclusion of the evidence. No other remedy is available. Upholding those rights in circumstances such as the present is very important, not just in terms of the appellant's rights to privacy and dignity but also in terms of the rights of other persons who may find themselves in a similar predicament.

[88] An effective and credible system of justice would not countenance the breaches which have occurred here, nor let them go unanswered and without remedy. In this regard I note that in *R v Pratt* the Court of Appeal was of the view that evidence obtained from a strip search in a public place should be excluded. I also find it of concern that the respondent was prepared to argue, up to the time of the appeal hearing, that an adult male in the appellant's circumstances should have been able to exercise

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63 *Kelly v Police* at [44].
64 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [251].

sufficient self-control to avoid soiling himself. This suggests to me that the respondent has failed to recognise the enormity of what has occurred here.

[89] Accordingly, I am satisfied the blood test sample evidence must be excluded, which means there is no evidence to support the conviction. Thus, the appeal is allowed and the conviction is set aside.

Result

[90] The appeal is allowed. The conviction for driving with an excess blood alcohol limit is set aside.

Suppression order

[91] On 14 May 2018 I granted an application that the name and identifying details of the appellant be suppressed. The application was not opposed by the Crown. At the time I was satisfied that the appellant met the requirements for a suppression order. The media were not, to my knowledge, aware the application was made.

[92] Section 200 of the Criminal Procedure Act 2011 authorises the Court to suppress the identity of a defendant. One of the grounds for so doing is when the Court is satisfied that publication would be likely to cause extreme hardship to the person acquitted of the offence.[65] I am satisfied that publication of the appellant's identity would be likely to cause him extreme hardship. He unnecessarily endured a significantly humiliating experience that offended against his ss 21 and 23(5) NZBORA rights. For his experience to become publicly known and therefore susceptible to public comment would in my view only exacerbate the humiliation and its adverse effect on his privacy and dignity. Whilst the breach of those rights has been remedied by his acquittal, publication of his identity would, at the least, partially undo the remedial effect of this judgment. If the events of 28 May 2017 and the adverse consequences for the appellant became public knowledge and susceptible to public comment the humiliation he has suffered and the affront to his NZBORA rights would be continued.

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[65] See s 200(2)(a) of the Criminal Procedure Act 2011.

[93] Further, I am satisfied that publication of the appellant's identity would be likely to prejudice the maintenance of the law in that I consider that other persons who may experience similar humiliation through breaches of their ss 21 and 23(5) NZBORA rights may then be reluctant to take steps to have those breaches corrected by the Courts, if they perceive that through taking such steps they risk being publicly identified.[66]

[94] Accordingly, I am presently satisfied that there is a proper basis for ordering permanent suppression of the appellant's identity. However, I consider the media should be given the opportunity to be heard on this subject before the present suppression order is made permanent.

[95] Accordingly, I direct that the suppression order made on 14 May 2018 is to continue in force until 20 August 2018. A redacted version of this judgment will be released for publication, and drawn to the attention of the media. If the media want to apply to challenge the existing suppression order they should do so by filing formal applications by 12 July 2018.

[96] If such applications are filed I will then make further timetable orders to progress the hearing of those applications. If no application seeking to challenge the suppression order is filed the suppression order made on 14 May 2018 will become permanent.

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[66] See s 200(2)(g) of the Criminal Procedure Act 2011.