IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CRI-2020-409-000027
[2020] NZHC 1143

BETWEEN	NEW ZEALAND POLICE Appellant
AND	CHEYMAN LEE MITCHELL Respondent

Hearing: 19 May 2020

Appearances: F Sinclair for Appellant
P McDonnell and P Tucker for Respondent

Judgment: 27 May 2020

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 27 May 2020 at 3.00 pm

Registrar/Deputy Registrar

Date:

Introduction

[1] This appeal concerns the special plea provisions in s 46 Criminal Procedure Act 2011 (CPA). In particular, is a special plea available where a defendant is charged under both ss 32 and 56 Land Transport Act 1998 (LTA) and is convicted of one of the charges?

[2] Cheyman Mitchell, the respondent, was charged under the LTA for driving with excess breath alcohol pursuant to s 56(1) and driving contrary to a zero-alcohol licence pursuant to s 32(1)(b). On 28 November 2019, the respondent attempted to plead guilty to both charges, but at the invitation of Judge Neave he instead pleaded guilty to the s 56 charge and entered a plea of previous conviction to the s 32 charge. The issue of whether that plea was available was heard by Judge O'Driscoll, who found the special plea of previous conviction pursuant to s 46 CPA applies to the s 32 LTA charge.[1] His Honour therefore dismissed the s 32 LTA charge.

Application for leave to appeal

[3] The Deputy Solicitor-General applies under s 296 CPA for leave to appeal the District Court judgment. The ground of the proposed appeal is that the District Court Judge erred in law by determining that a special plea was available under s 46 CPA, the respondent having been charged with offences under ss 32 and 56 LTA which arose from the same episode of driving. In the event that leave is granted and the appeal allowed, an order is also sought reinstating the charge under s 32 LTA.

[4] There exist conflicting decisions of the District Court in relation to the subject-matter of the appeal. In this case, Judge O'Driscoll preferred a line of authority which may be represented by the judgment of Judge Neave in *Police v Tindall*.[2] Judge O'Driscoll declined to follow decisions in which the special plea was found to be unavailable.[3]

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1 *Police v Mitchell* [2020] NZDC 1999.

2 *Police v Tindall* [2018] NZDC 22252. See also *Police v Broom* [2015] DCR 157 (DC); *Police v Pailegutu* [2019] NZDC 2135; *Police v Ruki* [2019] NZDC 24589; and *Police v Duncan* [2020] NZDC 559.

3 *Police v Smith* [2018] NZDC 2057; *Police v Kumar* [2019] NZDC 17758.

[5] In introducing his judgment, Judge O'Driscoll noted the absence of any decision of a senior court dealing specifically with whether the special plea is available to a defendant charged under ss 32 and 56 LTA. His Honour recorded the hope that there would be an appeal from his decision so that some guidance may be offered to the District Court which has to consider the issue on a regular basis.[4]

[6] Responsibly, Mr McDonnell for the respondent did not oppose the granting of leave to appeal.

[7] This appeal concerns a question of law which is the subject of conflicting District Court authority. It falls within s 296(3) CPA because it arose in proceedings that relate to the determination of the charge faced by the respondent. I respectfully adopt the conclusion in this regard of Katz J in *Rangitonga v Parker*.[5]

[8] Leave is appropriate because the legal questions raised by this appeal are potentially determinative of the outcome of the second charge the respondent faced.

[9] Leave is granted to the Deputy Solicitor-General to appeal.

Facts

[10] On 18 December 2017, the respondent was convicted of driving with breath alcohol of more than 400 mcg per litre of breath. He was disqualified from driving for seven months and ordered to apply for a zero-alcohol licence, which was subsequently granted.

[11] On 19 September 2019, the respondent was found driving a vehicle on Brougham Street, Christchurch. An evidential breath test returned a result of 649 mcg per litre of breath. He was charged under both ss 32 and 56 LTA.

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4 *Police v Mitchell,* above n 1, at [2]–[5].
5 *Rangitonga v Parker* [2015] NZHC 1772, [2016] 2 NZLR 73, at [26]–[27].

The LTA offences

[12] The LTA identifies the responsibilities of participants in New Zealand's land transport system.[6] Primary general responsibilities of participants include the requirement that drivers be licensed.[7] There are also primary responsibilities concerning the use of alcohol and drugs, including a proscription of exceeding specified alcohol limits.[8]

[13] Part 5 creates offences relating to driving (other than alcohol-related offences) and provides penalties for the offences. Section 32, under which the respondent was charged, falls within pt 5. It provides:

> **32 Contravention of section 5(1)(c)**
>
> (1) A person commits an offence if the person drives a motor vehicle on a road—
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> (a) while disqualified from holding or obtaining a driver licence; or
>
> (b) contrary to an alcohol interlock licence, a zero alcohol licence, or a limited licence; or
>
> (c) while his or her driver licence is suspended or revoked.
>
> (2) Nothing in subsection (1) applies to any person—
>
> (a) who has been ordered by a court to attend an approved driving improvement course under section 92(1) or a programme approved by the Agency under section 99A or to undergo any test or examination approved by the Agency; and
>
> (b) who, in the course of his or her attendance at that course or programme or while undergoing such a test or examination,—
>
> (i) in the case of a motorcyclist, drives under the supervision of a person who holds a driving instructor or testing officer endorsement under Part 5 of the Land Transport (Driver Licensing) Rule 1999 that is relevant to a class of licence for a motorcycle:
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> (ii) in any other case, drives while accompanied by a person who holds a driving instructor or testing officer endorsement under Part 5 of the Land Transport (Driver Licensing) Rule 1999.

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6 See in particular pts 2–3.
7 Section 5.
8 Sections 11–12.

(3) If a person is convicted of a first or second offence against subsection (1),—

(a) the maximum penalty is imprisonment for a term not exceeding 3 months or a fine not exceeding $4,500; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for 6 months or more.

(3A) If an offence against subsection (1) is a concurrent offence in relation to a qualifying offence for an alcohol interlock sentence, then the mandatory disqualification in subsection (3)(b) does not apply and section 65AH(3)(b) applies.

(4) If a person is convicted of a third or subsequent offence against subsection (1) (whether or not of the same kind of offence as the previous offences),—

(a) the maximum penalty is imprisonment for a term not exceeding 2 years or a fine not exceeding $6,000; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for 1 year or more.

(4A) If an offence against subsection (1) is a concurrent offence in relation to a qualifying offence for an alcohol interlock sentence, then the mandatory disqualification in subsection (4)(b) does not apply and section 65AH(3)(b) applies.

(5) For the purposes of this section, a conviction for an offence against a provision of the Transport (Vehicle and Driver Registration and Licensing) Act 1986 or the Transport Act 1962 corresponding to an offence specified in subsection (1) is to be treated as a conviction for an offence specified in that subsection.

(6) The imposition of a mandatory disqualification under this section is subject to section 81 (which allows a court not to order disqualification for special reasons relating to the offence).

[14] The second offence with which the respondent was charged, under s 56, falls within pt 6 of the Act. It provides:

56 Contravention of specified breath or blood-alcohol limit

(1) A person commits an offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's breath, as ascertained by an evidential breath test subsequently undergone by the person under section 69, exceeds 400 micrograms of alcohol per litre of breath.

(1A) A person commits an infringement offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's breath, as ascertained by an evidential breath test subsequently undergone by the person under section 69, exceeds

250 micrograms of alcohol per litre of breath but does not exceed 400 micrograms of alcohol per litre of breath.

(2) A person commits an offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's blood, as ascertained from an analysis of a blood specimen subsequently taken from the person under section 72 or section 73, exceeds 80 milligrams of alcohol per 100 millilitres of blood.

(2A) A person commits an infringement offence if the person drives or attempts to drive a motor vehicle on a road while the proportion of alcohol in the person's blood, as ascertained from an analysis of a blood specimen subsequently taken from the person under section 72(1)(b) to (e) or 73, exceeds 50 milligrams of alcohol per 100 millilitres of blood but does not exceed 80 milligrams of alcohol per 100 millilitres of blood.

(2B) A person commits an infringement offence if—

(a) the person fails or refuses to undergo an evidential breath test after having been required to do so under section 69; and

(b) analysis of a blood specimen subsequently taken from the person under section 72(1)(a) indicates that the person drove or attempted to drive a motor vehicle on a road while the proportion of alcohol in the person's blood exceeded 50 milligrams of alcohol per 100 millilitres of blood but did not exceed 80 milligrams of alcohol per 100 millilitres of blood.

(3) If a person is convicted of a first or second offence against subsection (1) or subsection (2),—

(a) the maximum penalty is imprisonment for a term not exceeding 3 months or a fine not exceeding $4,500; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for 6 months or more.

(3A) The mandatory disqualification in subsection (3)(b) does not apply if—

(a) an order is made under section 65; or

(b) an alcohol interlock sentence is ordered under section 65AC(1).

(4) If a person is convicted of a third or subsequent offence against subsection (1) or subsection (2), or any of sections 57A(1), 58(1), 60(1), or 61(1) or (2) (whether or not that offence is of the same kind as the person's first or second offence against any of those provisions),—

(a) the maximum penalty is imprisonment for a term not exceeding 2 years or a fine not exceeding $6,000; and

(b) the court must order the person to be disqualified from holding or obtaining a driver licence for more than 1 year.

(4A) The mandatory disqualification in subsection (4)(b) does not apply if—

(a) an order is made under section 65; or

(b) an alcohol interlock sentence is ordered under section 65AC(1).

(5) For the purposes of this section, a conviction for an offence against a provision of the Transport Act 1962 corresponding to an offence specified in subsection (4) is to be treated as a conviction for an offence specified in that subsection.

(6) The imposition of a mandatory disqualification under this section is subject to section 81 (which allows a court not to order disqualification for special reasons relating to the offence).

[15] For the appellant, Mr Sinclair also invokes the provisions in the LTA (introduced by a 2017 amendment)[9] which established the concept of "concurrent offence" as an offence which occurred as part of the same series of events as the facts that gave rise to a person's conviction (for a qualifying offence).[10] Later provisions of the Act which create offences and establish sentencing parameters include specific sentencing outcomes where a concurrent offence is involved. Section 32(3A) and s 32(4A) above at [13] are such provisions.

Plea of previous conviction under the CPA

The statutory provision

[16] The CPA provides through s 46 for a special plea of previous conviction (with a parallel in s 47 in relation to previous acquittal). The provision reads:

46 Previous conviction

(1) If a plea of previous conviction is entered in relation to a charge, the court must dismiss the charge under section 147 if the court is satisfied that the defendant has been convicted of—

(a) the same offence as the offence currently charged, arising from the same facts; or

(b) any other offence arising from those facts.

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9 Land Transport Amendment Act 2017.

10 Land Transport Act 1998 (LTA), s 2.

(2) Subsection (1) does not apply if—

(a) the defendant was convicted of an offence and is currently charged with a more serious offence arising from the same facts; and

(b) the court is satisfied that the evidence of the more serious offence was not readily available at the time the charging document for the previous offence was filed.

Previous law

[17] Sections 46 and 47 of the CPA replaced ss 358 and 359 of the Crimes Act 1961 as the statutory provisions for protection against double jeopardy.

[18] The issues raised by the former law and the relationship between the Crimes Act and the CPA provisions are informatively explored by Professor Mahoney in his article in the 2013 New Zealand Law Review.[11]

[19] The most detailed judicial discussions on the relationship of the new statutory regime to the old came in the judgment of Katz J (in the High Court) in *Rangitonga v Parker* and in the judgment of the Court of Appeal, given by Randerson J, on appeal.[12]

[20] Under the Crimes Act, the Court of Appeal had held that the question was not whether the facts or the evidence relevant to both offences were the same, but whether the offences were "the same or substantially the same".[13] Consequently, the plea of previous conviction did not apply where "two distinct offences were committed by one act".[14]

[21] The Court of Appeal in *Rangitonga* identified cases which illustrated the generally narrow view taken under the Crimes Act as to the availability of the special pleas, stating:[15]

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11 Richard Mahoney "From 'The Same Offence' to 'The Same Facts' – The Criminal Procedure Act Suddenly Strengthens the Pleas of Previous Conviction and Previous Acquittal" [2013] NZL Rev 171.

12 *Rangitonga v Parker,* above n 5; and *Rangitonga v Parker* [2016] NZCA 166, [2018] 2 NZLR 796.

13 *R v Brightwell* [1995] 2 NZLR 435 (CA) at 437.

14 *R v Brightwell,* above n 13, at 436–438.

15 *Rangitonga v Parker*, above n 12.

[29] Despite the adoption of the "same or substantially the same" formula, it must be accepted that the New Zealand courts have generally taken a narrow view of the availability of the special pleas. The focus has been very much on comparing all the legal elements of the previous and new charges. For example, in *Smith v Hickson* a plea of previous conviction was found not to be available.[16] The new charges of exposing liquor for sale and opening premises for the sale of liquor both arose from the same facts as the original charge of selling liquor during closed hours. And, in *Brightwell*, the new charge of assault with a shotgun arose from the same facts as the original charge of presenting a shotgun at the same victim.[17] Again, the plea of previous conviction was not available. In both cases, that was because the new charges were for different offences even though they arose in essence from the same actions by the defendant.

[30] In *Ministry of Transport v Hyndman* a plea of previous acquittal failed where the new charge of driving while under the influence of alcohol arose on the same facts as the original charge of driving with excess breath alcohol.[18] And, in *Connolly*, the new charge under s 129A of the Crimes Act of inducing sexual connection by a threat arose from the same facts as the original charge under the Prostitution Reform Act 2003 (inducing commercial sexual services by a threat). Again, the plea of previous acquittal failed.

[22] In the High Court judgment in *Rangitonga*, Katz J identified internal inconsistencies in the legislative history pursuant to which the CPA provisions in ss 46 and 47 came to be enacted.[19] Katz J found however that:[20]

(a) The new "arising from the same facts" test was intended to differ from the existing test under s 358 of the Crimes Act. The aim was to provide greater certainty than the previous statutory test, which required that the two offences be the same or substantially similar.

(b) It was intended that the new test bar the prosecution of not only the same offences but also different offences arising out of the same facts ("the prosecution cannot then have a further run at the case using a different charge"). The test was therefore clearly intended to be broader than the Crimes Act test.

(c) It was not envisaged, however, that a "series of events" would fall within the scope of the phrase "arising from the same facts".

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16 *Smith v Hickson* [1930] NZLR 43 (SC).
17 *R v Brightwell,* above n 13.
18 *Ministry of Transport v Hyndman* [1990] 3 NZLR 480 (HC).
19 *Rangitonga v Parker*, above n 5, at [51]–[61].
20 At [60].

[23] In considering the CPA reference to offences "arising from the same facts", Katz J focused on the concept of the "core facts" which the court must determine. Her Honour observed that determining the "core facts" of the original offence, possibly with reference to a jury question trail, provides a helpful starting point in ascertaining whether an offence is based on the "same facts".[21] She continued:[22]

> Once all of the core facts of the offending have been identified it would then be necessary to consider whether the subsequent charge "arises" from those facts. Difficult issues will no doubt arise as to what degree of common facts is necessary in order to found a special plea. It seems unlikely that it would be necessary to establish that all of the core facts are the same, as this would essentially mean that only an identical offence would be barred.

[24] Katz J then proceeded to consider whether there was the "same core punishable act" or "central common punishable act" underpinning both charges faced by Mr Rangitonga.[23] Her Honour expressed the view that where a common punishable act is central to both offences, they will usually arise out of the same facts.[24] Having then considered the rape and injuring charges which Mr Rangitonga faced, Katz J concluded:

> [86] It follows, in my view, that the injuring charge does not "arise from the same facts" as the rape charge. While there is some degree of factual overlap, it is relatively small. The actus reus of the alleged rape is the act of sexual intercourse. The actus reus of the injuring charge is the punching and strangling. The core punishable acts are significantly different. The two charges do not arise out of the same facts, rather they relate to two incidents that form part of the same broad series of events.

[25] Accordingly, Katz J concluded that the District Court Judge had been correct to conclude that the plea of previous acquittal was not available. The appeal was dismissed.

[26] The Court of Appeal granted leave to appeal from the High Court judgment but also dismissed the appeal.[25] In delivering the judgment of the Court, Randerson J

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21 At [79].
22 At [80].
23 At [83]–[84].
24 At [82].
25 *Rangitonga v Parker,* above n 12.

identified a general agreement with the approach adopted by Katz J in relation to the interpretation of s 47, which must be equally applicable to s 46. His Honour stated:

> [40] We are in general agreement with the approach adopted by Katz J to the interpretation of s 47.
>
> [41] We agree that the reference to offences "arising from the same facts" in s 47 is intended to apply to cases where there is a common punishable act central to both the previous and new charge. We would add that the same approach should apply to a common punishable omission. The new section focuses on the substance of the facts giving rise to the previous and new charges rather than a fine-grained comparison of each element of the charges.
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> [42] We explain this concept by reference to the present case. The central punishable act for the rape charge was sexual connection without the consent of the complainant. By contrast, the central punishable act for the injuring charge was punching and attempting to strangle the complainant. In these circumstances, the plea of previous acquittal is not available because the current charge does not arise from the same facts as the previous charge.

[27] Randerson J then summarised the reasons why the Court of Appeal had adopted that approach:[26]

> (a) There is nothing in the relevant Parliamentary materials to suggest that a radical departure from the existing law was intended. Rather, the policy goals were fairness, efficiency and clarity of language.
>
> (b) The approach we favour would provide greater clarity and certainty than the alternative approach advanced by the appellant (which we discuss at [44]—[46] below). It would enable decisions on the availability of the plea to be made without undue difficulty. In most cases it ought to be straightforward to identify the central punishable acts or omissions by reference to the essential elements of the offences.
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> (c) By focusing on the substance of the facts giving rise to the previous and new charges, an unduly technical approach to the availability of the special plea would be avoided. This would give better effect to the double jeopardy principle recognised by s 47 and by s 26(2) of the New Zealand Bill of Rights Act.
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> (d) An expansive approach to s 47 would not sit well with the recent statutory amendments establishing very limited circumstances in which previously acquitted persons may be re-tried.
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> (e) There is no room for judicial discretion when the special plea is made out. The court has no alternative other than to dismiss the charge. As Katz J said:

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26 At [43] (footnotes omitted).

> [69] … the abuse of process doctrine provides a flexible and effective safety net for dealing with cases that do not fall within the scope of the special pleas, but where the spirit (if not the letter) of the rule against double jeopardy is breached. Given the existence of that jurisdiction there is no need to give the special pleas an expansive interpretation in order to ensure that justice is done in an individual case.

[28] The Court of Appeal in *Rangitonga* expressed its overall conclusion in relation to the application of s 47 thus:

> [49] The application of s 47 in practice will necessarily be fact dependent. The general approach we have adopted of identifying and comparing the central punishable act or omission in the previous and new charges may need to be developed and refined as cases arise. It is to be expected that this approach will have a greater focus on substance than has been the case hitherto.

Subsequent application of Rangitonga

[29] Judge O'Driscoll in this case followed the conclusion reached by Judge Neave in *Tindall*.[27] I will first refer to Judge Neave's reasoning in *Tindall*.

[30] It was submitted for the Police that the core punishable act of Mr Tindall's s 56 charge was driving on a road with a blood alcohol level greater than 80 mg of alcohol per 100 ml of blood, while the core punishable act of the s 32 charge was driving on a road while the holder of a zero-alcohol licence in breach of the conditions of that licence.[28]

[31] Judge Neave rejected that Mr Tindall's core punishable act for both offences was driving on a road with alcohol in his system. Describing the acts of the defendant which gave rise to each offence as having "absolutely no difference" and being "virtually identical", Judge Neave continued:[29]

> The only difference essentially relates to matters of status. Or perhaps to put it another way, the only difference relates to the amount of alcohol found to be in the defendant's blood.

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27 *Police v Tindall,* above n 2.
28 At [31].
29 *Police v Tindall,* above n 2, at [25] and [27].

[32] Judge Neave rejected as erroneous the prosecutor's focus on the purposes of the LTA, stating that such focus is not required, the focus instead being "on the facts of the case", to determine whether those are sufficiently similar to engage ss 46 or 47.[30]

[33] In his Honour's decision in this case, Judge O'Driscoll referred to Judge Neave's reasoning in *Tindall*. His Honour referred also to other District Court decisions for the same effect as *Tindall*.

[34] Judge O'Driscoll referred also to the two contrary District Court decisions, being that of Judge Sainsbury in *Police v Smith* and of Judge Cunningham in *Police v Kumar*.[31]

[35] In *Police v Smith*, Judge Sainsbury identified in the Court of Appeal's judgment in *Rangitonga* guidance on the application of ss 46 and 47, adding his own emphasis to the conclusion that the provisions are intended to apply to cases where there is a common *punishable* act central to both the previous and new charges.

[36] In contrast to other District Court judgments, Judge Sainsbury referred to the mischief of the offences, observing that the zero-alcohol licence breach is in the same offence provision as the charges of driving while disqualified and driving while a licence is suspended or revoked (under s 32(1) LTA).[32]

[37] Judge Sainsbury recorded that both charges share the essential factual content that Ms Smith must have been driving a vehicle on a road.[33] But his Honour noted that such an activity is not inherently a punishable act – rather it is what is associated with it that is punishable.[34] His Honour then identified the two punishable acts under ss 56(1) and 32 LTA as being:[35]

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30 At [33].
31 *Police v Smith,* above n 3; and *Police v Kumar,* above n 3.
32 At [19].
33 At [21].
34 At [21].
35 At [22]–[23].

(a) s 56(1) – driving a car on a road when the driver's level of alcohol is established by statutory prescribed procedures to be over 400 mcg of alcohol per litre of breath; and

(b) s 32 – when a person, subject to a zero-alcohol licence, drives a car on a road when they have alcohol in their system.

[38] Judge Sainsbury contrasted the "design" or "concern" of the two offences, one being to prevent those impaired by alcohol being on the road to the danger of others and themselves and the other being to punish those who breach lawful restrictions on the ability to drive, being only "obliquely concerned with preventing driving impaired by alcohol".[36]

[39] Judge Sainsbury accordingly concluded that the facts giving rise to each offence were significantly different, so that s 46 CPA did not apply.[37]

[40] In *Police v Kumar*, Judge Cunningham adopted Judge Sainsbury's reasoning, including the analysis of the punishable acts. Her Honour noted as an important factor which should not be ignored that driving contrary to the conditions of a licence or driving while disqualified involve breaches of court orders.[38]

[41] Judge Cunningham referred to the observation of Judge Neave in *Tindall* which suggested that a special plea might be available where a defendant was charged both with breach of a protection order and an act of violence against the complainant arising from the same incident.[39] Her Honour implicitly rejected that possibility, identifying the breach of the protection order as involving a different punishable act (as with the breach of the zero-alcohol licence).

Further Court of Appeal authority

[42] Reference may be made to two Court of Appeal decisions in which *Rangitonga* was followed.

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36 At [24]–[25].
37 At [26]–[27].
38 *Police v Kumar,* above n 3, at [21].
39 At [22], citing *Police v Tindall,* above n 2, at [30].

[43] In *Filitonga v R* the defendant (who had HIV and knew it) had been found guilty and convicted of causing grievous bodily harm to the complainant with reckless disregard for her safety and of criminal nuisance, by having unprotected sex with the complainant knowing that this would endanger the complainant's life, safety or health.[40] Applying the "common punishable act" test under *Rangitonga*, the Court of Appeal found that there was a common punishable act, namely having unprotected sex, while knowingly HIV-positive, being reckless as to the consequences. On that basis the conviction on one of the offences would preclude the proper entry of a conviction on the other. The appeal was allowed and the convictions set aside.

[44] In *O'Reilly v Chief Executive of the Department of Corrections,* Mr O'Reilly, (the subject of an Extended Supervision Order ESO)), was charged with failing to comply with his statutory reporting obligations under the relevant Act and of failing to comply with the conditions of his ESO under the Parole Act 2002.[41] Having pleaded guilty to the charges of failing to comply with statutory reporting obligations, Mr O'Reilly had unsuccessfully applied to the District Court to enter pleas of previous convictions to the Parole Act charges.[42] Mr O'Reilly was convicted. He unsuccessfully appealed to the High Court.[43]

[45] On Mr O'Reilly's application for leave to appeal to the Court of Appeal, that Court referred to *Rangitonga* and the concept of "common punishable act" and "common punishable omission".[44]

[46] Counsel for Mr O'Reilly submitted that there existed common punishable acts, being Mr O'Reilly's change of employment status and his being absent from his address.

[47] The Court of Appeal rejected that submission, as had Woolford J in the High Court. The Court held that each set of charges faced by Mr O'Reilly required proof of different omissions, namely omissions to gain prior approval and omissions to

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40 *Filitonga v R* [2017] NZCA 492.
41 *O'Reilly v Chief Executive of Department of Corrections* [2018] NZCA 313, [2018] NZAR 1327.
42 *Department of Corrections v O'Reilly* [2017] NZDC 29066.
43 *O'Reilly v Department of Corrections* [2018] NZHC 469.
44 *O'Reilly v Chief Executive of Department of Corrections,* above n 41.

report, after the events, change of employment and absences from an address. The Court of Appeal observed:[45]

> The omissions were the punishable acts and they were different.

[48] The Court of Appeal proceeded to explain the significance of the differences:[46]

> They are matters of fact forming elements of the offences. The ESO controls Mr O'Reilly's ability to choose a work environment and constrains him in his choice of residence and absences therefrom. That is a measure to protect the public. The Child Protection Act reporting provisions are for the purpose of informing the police about where Mr O'Reilly has chosen to work, where he has chosen to live, and absences he has chosen to take from his residence. It is a monitoring measure.

[49] In other words the Court of Appeal had regard to the differing purposes of the offences (one being to protect the public and the other to enable police monitoring).

[50] The Court adopted the analogy suggested by counsel for the Department of Corrections:[47]

> If a person driving a car is stopped by the police and it is found the car has neither a warrant of fitness, nor is it registered, then without question the driver can be prosecuted for those omissions. The central fact of driving is common, but the omission in each case is entirely different. If one omission had not occurred, then only the other offence could be charged.

[51] The Court of Appeal declined leave to appeal.

The District Court judgment under appeal

[52] In the judgment under appeal, Judge O'Driscoll both set out the relevant statutory provisions and reviewed the case law in the Court of Appeal and District Court.

[53] His Honour summarised the submissions made by the police prosecutor and those made by Mr McDonnell for the respondent. From those submissions and the case law, his Honour identified what he needed to determine in this way:[48]

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45 At [15].
46 At [16].
47 At [18].
48 *Police v Mitchell,* above n 1, at [82].

> It is therefore necessary to determine if the level of alcohol, the method for ascertaining this and the holding of a zero-alcohol licence are only elements of the offence or also facts giving rise to them.

[54] He then discussed those three matters:

(a) Alcohol level:

His Honour noted that, while s 32 LTA refers to a level of any alcohol and s 56 specifies a statutory limit of alcohol, "the level of alcohol giving rise to the offence is the actual breath or blood alcohol level of the defendant", a matter "factually the same for each offence regardless of what is required to meet the offence".[49]

(b) Testing method:

Whereas the prosecutor had distinguished s 32 from s 56 upon the basis that it is only a charge under s 56 that involves prescribed evidential breath test procedures, that is simply the method used to ascertain an alcohol level and is not a fact giving rise to the offence. The Judge commented that in any case the same method will be used for both offences.[50]

(c) Zero-alcohol licence:

The police prosecutor had submitted that *Tindall* was wrongly sided because it ignored core facts relating to the steps involved in relation to the zero-alcohol licence, namely a court order followed by the defendant's successful application for a zero-alcohol licence followed by the defendant's ignoring the court order. Judge O'Driscoll, in applying the *Rangitonga* test of a "common punishable act or omission", adopted Judge Neave's conclusion in relation to the ss 32 and 56 charges, that there was a common punishable act namely the defendant's driving on a road having alcohol in his system and having drunk alcohol before driving.

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49 At [84]–[85].
50 At [86].

His Honour concluded that the respondent's breach of his zero-alcohol licence was not in the Court of Appeal's terms a "punishable act" because the act that achieves that is the drinking and driving.

[55] Judge O'Driscoll therefore concluded that he preferred Judge Neave's position from an interpretation perspective.[51] His Honour nevertheless recorded that he could see "strong policy reasons for the approach of Judge Sainsbury [in *Police v Smith*]".[52] The matters Judge O'Driscoll specifically identified were:

(a) In relation to charges laid simultaneously, it is not clear that Parliament intended the rules against double jeopardy to apply because their focus had been on preventing punishment again for the same crime and establishing finality, whereas when punishment has yet to occur for the first offence, a cumulative sentence or totality principles can be applied.

(b) Acceptance of the special plea prevents the Court from denouncing the breach of a court order through a separate conviction, a matter which has particular significance if double jeopardy is argued when a defendant is charged both with "male assaults female" and breach of a protection order.

[56] His Honour agreed with the approach taken in identified District Court decisions that there was a common punishable act where the two charges involved an assault which gave rise to the breach of a protection order.

[57] In conclusion, Judge O'Driscoll again referred to there being "clear policy reasons" for finding that the fact that a defendant has obtained a zero-alcohol licence is a fact that gives rise to the s 32 offence, so that the two offences arise from different facts.[53] But his Honour concluded that such a finding would be inconsistent with the statutory wording of "arising from the same facts" and the Court of Appeal's focus on the "core punishable act".[54]

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51 At [93].
52 At [93].
53 At [109].
54 At [110].

Appellant's submissions

[58] For the appellant, Mr Sinclair provided early in his submissions a summary which helpfully identified the gist of his submissions:

> 6. The Land Transport Act 1998 contemplates that "concurrent" offences may arise from the same facts. The intended operation of the Act is interfered with if s 46 is used to prevent simultaneous convictions.
>
> 7. In this case, the conduct underlying the two offences involved overlapping facts but not the same facts. A degree of overlap does not prevent the identification of different parcels of conduct, justifying the laying of multiple charges. Under *Rangitonga*, reference to the elements of the offences continues to play a role in that assessment. Section 46 does not prevent the laying of multiple charges and simultaneous convictions. The rationale for the double jeopardy rule is not offended by proceeding in this way. Unlike *Filitonga*, this was not a situation in which the charges needed to be laid in the alternative – indeed, the Land Transport Act anticipates there may be "concurrent" offences.
>
> (footnotes omitted)

[59] The balance of Mr Sinclair's submissions were then addressed to two main arguments:

(a) that, in a situation like this, the LTA requires multiple convictions for the same act of driving; and

(b) that this case involves overlapping rather than identical facts.

[60] Mr Sinclair, in relation to the need for multiple convictions for the same act of driving, referred to the regime of increasing penalties for subsequent offences. There is a lower set of penalties when a person is convicted of a first or second offence and a higher set of penalties for a third or subsequent offence.[55] In both sections, the third or subsequent offence carries a penalty of imprisonment for a maximum of two years, a maximum fine of $6,000, and a minimum disqualification of one year.

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[55] LTA, ss 32(4) and 56(4).

[61] As Mr Sinclair submitted, a defendant's reoffending trajectory (if it occurs) cannot be predicted as to whether it may involve licensing breaches or excess alcohol offences.

[62] Mr Sinclair illustrated the issue by reference to a defendant who successfully enters a special plea to an excess alcohol charge, having pleaded guilty to breach of a zero-alcohol licence. Should that person subsequently accrue two excess alcohol convictions, they will be subject to sentencing on the second such conviction on the basis it constitutes their second offence, rather than their third offence. Mr Sinclair submitted that the intended operation of the LTA is disrupted if that is allowed to occur.

[63] Mr Sinclair submitted that the 2017 amendments to the LTA which established the concept of "concurrent offence" (above at [15]) simply recognised that one offence may arise from the "same series of events as the facts that give rise to another", clarifying what is to happen when there is a particular combination of convictions. The amendments serve to explain how the two sentences are to mesh together. As Mr Sinclair submitted, s 32(3A) and (4A) are examples. If a person commits one of the licensing offences under s 32(1), the usual period of mandatory disqualification does not apply, if that offence is concurrent with a qualifying offence. There will instead be the mandatory interlock sentence for the qualifying offence, and s 65AH LTA then explains how other aspects of the two sentences should be assessed. Mr Sinclair noted that within that narrow range of situations, a conviction for breach of a zero alcohol licence may arise concurrently with a qualifying offence, as it will in the event of a combination of a zero alcohol licence breach under s 32(i)(b) and driving while incapable of having proper control in s 58(1) LTA.

[64] Turning to the need for common punishable acts, Mr Sinclair (by reference to diagrams) focussed on the Court of Appeal's example of driving offences which do not contain common acts (above at [50]).[56] In the *O'Reilly* example, the act of driving is common but the other core circumstances (that the car does not have a warrant of fitness and is not registered) are not common to both offences.

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[56] *O'Reilly v Chief Executive of the Department of Corrections,* above n 43, at [18].

[65] In Mr Sinclair's submission, the analysis of the "core punishable act" should not change in relation to the charges faced here by Mr Mitchell where the single common fact is that Mr Mitchell drove with alcohol (which is not an offence per se). The offences are committed when there is a breach of a zero-alcohol licence or a reading of excess alcohol. Mr Sinclair adopted the terminology of "parcels of conduct". He noted that no particular level of alcohol is required in one parcel of conduct whereas a person's licence status forms no part of the other parcel of conduct.

[66] Mr Sinclair contrasted the present case with that in *Police v Broom*.[57] The defendant there was charged with offences against both ss 32 and 57AA LTA. Section 57AA creates a number of offences where the holder of a zero alcohol licence drives on a road with varying levels of alcohol per litre of breath and per 100 ml of blood. As Judge Wolff found, there appear to be no circumstances where someone who commits the second offence (under s 57AA) would not also commit the first (under s 32).[58]

Respondent's submissions

[67] For the respondent, Mr McDonnell submitted that Judge O'Driscoll had not erred in law in finding that he must accept the special plea.

[68] Mr McDonnell took the Court through a comprehensive review of the judgments in *Rangitonga*, the other Court of Appeal authorities, and the conflicting District Court decisions.

[69] Mr McDonnell referred also to s 26(2) New Zealand Bill of Rights Act 1990 which provides that no one who has been finally acquitted or convicted of, or pardoned for an offence, shall be tried or punished for it again.

[70] In turning to the application of s 46 CPA, he submitted that both Judge O'Driscoll in this case and Judge Neave in *Tindall* had correctly applied s 46 by reference to the Court of Appeal's *Rangitonga* test of "core punishable act". He submitted that the core punishable act was correctly identified as the respondent's

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57 *Police v Broom*, above n 2.
58 At [9].

driving on a road with alcohol in his system. Mr McDonnell invited this Court to view the appellant's reliance upon authorities such as *O'Reilly* as "too widely focused on distinguishable factual elements". He submitted that the appellant's approach fails to directly focus on the core punishable act. He submitted that Mr Sinclair's approach invites what the Court of Appeal rejected in *Rangitonga*, namely a "fine-grained comparison of each element of the charges".[59]

[71] Mr McDonnell in particular invited this Court to reject any analogy with the driving example provided by the Court of Appeal in *O'Reilly.* Mr McDonnell accepted that the common act of driving is present but argued that warrant infringement relates to warrant of fitness mandatory requirements whereas the licence infringement relates to vehicle licence regulations. Mr McDonnell submitted that the appellant incorrectly drew support from the recognition of "concurrent offence" under the LTA. Mr McDonnell characterised the concurrent offence regime under the LTA as addressing a very specific and limited issue in relation to sentencing where the "concurrent offence" will be a non-alcohol related offence.

[72] Mr McDonnell identified s 57AA LTA as an amendment intended to get around the mischief underlying the s 32(1)(b) charge by not having an offender prosecuted twice for the same offence.

[73] Mr McDonnell rejected any suggestion in the appellant's submissions that the s 56 offence is not solely focused on public safety issues. He submitted that there is a common safety element in both ss 32 and 56 being the prohibition on alcohol in the driver's system.

[74] In conclusion, Mr McDonnell submitted that Judge O'Driscoll had correctly applied the test articulated in *Rangitonga.*

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[59] *Rangitonga v Parker,* above n 12, at [41].

Discussion

[75] The test that s 46(1)(b) CPA expressly requires the Court to apply to the two offences with which Mr Mitchell was charged is whether the breach of Mr Mitchell's zero alcohol licence arose from the same facts as his excess breath alcohol offence.

[76] The authorities in relation to s 46 CPA which this Court and the District Court must follow, where applicable, are those I have discussed namely *Rangitonga*, *Filitonga* and *O'Reilly*.[60]

[77] As explained by the Court of Appeal, s 46 applies where the central or core punishable act or acts are common to both charges. The Court of Appeal anticipated that this approach would make it straightforward to identify the central punishable acts or omissions by reference to the essential elements of the two offences. The court is to avoid a fine-grained comparison of each element of the charges – that is to say, the Court must identify in relation to each charge the core events which make the conduct punishable rather than examine the elements of the charges in too fine a detail. Two sets of circumstances identified in the Court of Appeal judgments particularly assist in the present case.

[78] In *Rangitonga*, the special plea could not be accepted because the core punishable acts – sexual intercourse in relation to the alleged rape and punching and strangling in relation to the alleged injuring – were significantly different. In the case of the rape, the core of the offence is that the defendant had sexual intercourse with the complainant, without consent. In the case of the injuring charge, the core criminality lies in the (unconsented) assault. The lack of consent is common to both charges, but the core punishable acts are significantly different.

[79] In *Filitonga*, on the other hand, there was an identifiable common punishable act in relation to both the charges, in that the defendant had unprotected sex, while knowingly HIV positive, being reckless as to the consequences. Significantly, the Court of Appeal's analysis establishes that the analysis is not solely on the "act" itself,

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[60] *Rangitonga v Parker,* above n 12; *Filitonga v R,* above n 40; and *O'Reilly v Chief Executive of the Department of Corrections,* above n 41.

as the Court's overarching test might suggest, but takes into account the other core features of the offending, namely the defendant's knowledge of his condition and his recklessness as to the consequences.

[80] The third situation identified by the Court of Appeal of assistance in the present case lies in the driving offences analogy drawn by the Court in *O'Reilly*, where a person drives their car when it does not have a warrant of fitness and is not registered. As the Court of Appeal identified, the central fact of driving may be common but that does not constitute the situation as one in which there is a "common punishable act". As explained by the Court of Appeal, the omission in each case is entirely different, one relating to a warrant of fitness and one relating to registration.

[81] The analogy identified by the Court of Appeal in *O'Reilly* serves to emphasise that the concept of "a common punishable act central to both charges", adopted in *Rangitonga*, is a convenient summation, rather than one which requires a single focus on "acts" alone. What the provisions themselves require is an examination as to whether the "facts" are the same.

[82] Applying that statutory test, in accordance with the Court of Appeal's explanation and formulations of it, I am satisfied that the two offences with which Mr Mitchell was charged do not arise from the same facts as required for a special plea.

[83] The analysis which has led to the acceptance of a special plea in a number of cases, including *Tindall* and the present case, has understandably identified as common features of the defendants' offending that there has been driving, it has been on a road, and the defendant is affected by an amount of alcohol. But such an analysis is to ignore the very elements which make the conduct punishable. In other words, there has been a successful identification of common core facts but not an identification of common core punishable acts.

[84] A key element which established Mr Mitchell's excess breath alcohol offence was that his alcohol level was excessive.

[85] Similarly, a key element which made his driving punishable on the second charge was that the driving was in breach of his zero-alcohol licence. But for Mr Mitchell possessing only a zero alcohol licence, the act of driving on the road with some level of breath alcohol would not have been punishable.

[86] There is a suggestion in at least some of the District Court judgments that to draw the distinction between the two offences which I have identified is to undertake the "fine-grained comparison of each element of the charges" which the Court of Appeal in *Rangitonga* rejected. But it is not. The excessive level of breath alcohol and the breach of the licence entitlements are respectively at the core of the two charges. The Court of Appeal's driving analogy in *O'Reilly* serves to emphasise that the status of a vehicle – whether it has a warrant of fitness or is registered – is an aspect of the core punishable facts. So, too, on my analysis, is the licensing status of the driver when the offence charged is driving in breach of a licence condition.

[87] As did the Court of Appeal in *O'Reilly*, I have found an analogy with other offences of assistance in considering these issues. The Sale and Supply of Alcohol Act 2012 creates a number of prohibitions and offences. It is an offence to sell or supply alcohol on licensed premises on certain days, including for instance Good Friday.[61] Section 239 of the Act makes it an offence for a licensee on any licensed premises to sell or supply alcohol to a person who is under the purchase age. The second offence is clearly a measure to protect minors. The ban on Good Friday sales clearly serves a different purpose. If a publican were to sell alcohol to a minor on Good Friday there is, as identified by the Court of Appeal in the *O'Reilly* analogy, a common central fact, in this analogy of selling alcohol. But in this analogy, the protections are entirely different. One protection is in relation to what may be termed "sacred" days; the other protection is in relation to an age group of persons. As in the *O'Reilly* analogy, there is no doubt that the publican selling alcohol to a minor on Good Friday may be prosecuted for both offences.

[88] Just as there is a different focus of the two offences under the Sale and Supply of Alcohol Act, there is an appreciably different focus in the driving offences, the first

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[61] Sections 47(1) and 259.

being concerned with the prohibition of driving with excess breath or blood alcohol and the second being breaching the requirement to have a licence or to drive within the requirements of a licence.

[89] The Court of Appeal articulated in *Rangitonga* the importance, in relation to the availability of special pleas, of having a straightforward test by which to identify central punishable acts and omissions.[62] That does not suggest that the Court of Appeal was anticipating that in such cases the relevant court would be having to analyse in detail the structure and purposes of the governing statute or statutes. To the extent that counsel have invited a broader consideration of the legislation, I consider that the "concurrent offence" regime provided for in the LTA and the structure of increasing penalties for repeat offences tends to reinforce the conclusion that it is important in relation to offences under the LTA that courts do not lightly conclude that two distinct offences share common core punishable facts. But that is not a material factor in my above finding.

[90] The availability of a charge under s 57AA LTA where a defendant is alleged both to have breached their zero-alcohol licence and to have offended against the breath alcohol regime does not cut across a prosecutor's discretion to charge under one set of provisions or the other. The prosecutor may elect to lay two separate charges as in this case.

Result

[91] The appeal is allowed. I find as a matter of law that Judge O'Driscoll erred in finding that the plea of "previous conviction" applied to the s 32 LTA charge. The District Court is to reinstate the charge under s 32 LTA.

Osborne J

Solicitors:
Crown Law, Wellington
Joynt Andrews, Christchurch

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62 *Rangitonga v Parker*, above n 12, at [43(b)].