IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2020-404-465
[2021] NZHC 330

BETWEEN	NEW ZEALAND POLICE Appellant
AND	MARK ANTHONY MCKINNEY Respondent

Hearing: 2 February 2021

Appearances: K Lummis and B Archibald for the NZ Police
A J Haskett and Z Reid for the Respondent

Judgment: 2 March 2021

JUDGMENT OF POWELL J

This judgment was delivered by me on 2 March 2021 at 4 pm
Registrar/Deputy Registrar
Date:

[1] The appellant, the New Zealand Police, seeks leave to appeal against a decision of Judge CJ Field in the District Court, dismissing a charge of driving with excess breath alcohol against Mr McKinney.[1]

[2] The sole issue raised in the District Court was the wording of Block J in the Police Procedure Sheet POL515 09/19 (the blood and breath alcohol procedure sheet).[2] In common with a number of other decisions in the District Court at that time,[3] Judge Field concluded that the wording in Block J failed to comply with s 77(3)(a) and (3A) of the Land Transport Act 1998.[4]

[3] This present application is brought under s 296 of the Criminal Procedure Act 2011, which permits a prosecutor or defendant, with leave of the appeal court, to appeal on a question of law against a ruling by the trial court, in this case a misdirection of law apparent in the decision.[5] Specifically, the Police seek leave on two questions of law:

(a) Was the Judge correct to find there had been non-compliance with ss 77(3)(a) and (3A) of the Land Transport Act 1998 by reason of the wording of Block J on the Police Procedure Sheet POL515 09/19?

(b) If the answer to the question to the above is yes, was the Judge correct to find as a result that there had not been reasonable compliance with ss 77(3)(a) and (3A), in terms of s 64(2) of the Act, such that evidence of the evidential breath test result was inadmissible?

[4] As it happens, those very questions have recently been addressed in the *Solicitor-General's Reference (No 1 of 2020)*("the *Solicitor-General's Reference*").[6] In that case, heard shortly after Judge Field issued his decision dismissing the charge against Mr McKinney, the Court of Appeal held that Block J communicates the "sense

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1 *Police v McKinney* [2020] NZDC 20169.
2 At [2].
3 At [6].
4 At [8].
5 *R v Malu* [2017] NZCA 546 at [10].
6 *Solicitor-General's Reference (No 1 of 2020)* [2020] NZCA 563.

and effect" of the warning required to be given to motorists by s 77(3A)(a).[7] In reaching this decision the Court concluded that verbatim recitation of the statutory section is not necessary,[8] and the use of the word "prosecution" instead of "conviction" was immaterial as the wording of Block J still conveys to a motorist that they may be found guilty of an offence as a consequence of their evidential breath test result.[9] As a result of these conclusions, the Court of Appeal answered "no" to the first question and given that answer, concluded that no answer was necessary to the second question.[10]

[5] Given the outcome of the *Solicitor-General's Reference*, the position of the Police is that not only have the requirements for leave been met in that an error in law in Judge Field's decision has been identified, but that the substantive appeal should also be allowed given the *Solicitor-General's Reference* is, as Ms Lummis on behalf of the Police submitted, clearly binding on this Court.

The position of Mr McKinney

[6] Despite the apparently clear nature of the *Solicitor-General's Reference*, Mr Haskett on behalf of Mr McKinney disputes that it is determinative, and indeed opposed the appeal proceeding. Mr Haskett initially suggested that the *Solicitor-General's Reference* could be distinguished from the present case but it was clear from his extensive submissions filed in opposition to the appeal that no basis was identified for distinguishing the decision. Instead Mr Haskett's primary submission was that the *Solicitor-General's Reference* was wrongly decided, identifying no less than 12 alleged errors of law, and also suggested that the Court of Appeal decision left open the approach to be followed by this Court.

[7] As a result, Mr Haskett initially sought to have this appeal remitted directly to the Court of Appeal. Although this application was declined by Downs J prior to the present hearing, Mr Haskett sought to revisit this decision, or to otherwise have this appeal adjourned pending the outcome of another appeal, currently before the Court

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7 At [40]-[41].
8 At [37].
9 At [41].
10 At [52].

of Appeal, which raises similar issues. In the alternative Mr Haskett suggested I could simply find that the Court of Appeal's decision was "per incuriam", that is it was wrongly decided, suggesting that broadly if I accepted the merits of the issues raised I was not required to follow it. In making this submission, Mr Haskett was not able to point to any authority to support his proposition I could simply decline to follow the *Solicitor-General's Reference* if I concluded it was wrongly decided.

Discussion

[8] The application for removal and the application for adjournment were both declined at the hearing, and the matters raised by Mr Haskett provide no basis whatsoever for not applying the *Solicitor-General's Reference*.

[9] The point of the *Solicitor-General's Reference* was to bring clarity to whether or not the wording of Block J provided a barrier to prosecutions like that faced by Mr McKinney. Given the clear conclusion so recently reached by the Court of Appeal, no useful purpose is served to either remit the present appeal back to the Court of Appeal for further discussion on the issue or to otherwise adjourn.

[10] Likewise, Mr Haskett's undeveloped submission that I can simply decline to follow the Court of Appeal if I consider that it is wrong is fundamentally misconceived, and flies fully in the face of the doctrine of precedent. Quite simply, this Court is bound by the Court of Appeal's judgment in *Solicitor-General's Reference (No 1 of 2020)*.

[11] The reference to the Latin maxim of per incuriam does not assist Mr McKinney. While there is little recent authority on what it means, the following components are suggested by Richard Scragg in *The Principles of Legal Method in New Zealand*:[11]

> A decision reached *per incuriam* is one reached "in ignorance of a relevant statute or precedent".[12] In other words, it is a decision involving an oversight as to the relevant principles of law.

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11 Richard Scragg *The Principles of Legal Method in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2016) at 76.

12 David M Walker *The Oxford Companion to Law* (Clarendon Press, Oxford, 1980) at 946.

> There are certain requirements which must be satisfied before a decision can be classified as *per incuriam:*
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> (1) As already stated, the court in the earlier case must have overlooked a relevant statute or case in coming to its decision.
>
> (2) In addition, the later court must be satisfied that the earlier decision would have been different if the earlier court had been made aware of the overlooked statute or precedent.
>
> (3) A decision can only be held to be *per incuriam* by the same court in the hierarchy or one above it. This third requirement is essential. Without it the whole doctrine of *stare decisis* could be undermined. If a lower court could hold the decision of a higher court *per incuriam*, the lower court would not be bound by it.[13]
>
> (citations included)

[12] With regard to the first and second requirements, it is by no means clear that any such relevant statute or case has been overlooked, still less that the decision in the *Solicitor-General's Reference* would have been different had the matters contended by Mr Haskett been put to the Court of Appeal. It is however the third point that is the fundamental obstacle in this case. It is not open to me to simply hold that the Court of Appeal was wrong and decline to follow the *Solicitor-General's Reference*. As Lord Diplock noted in *Baker v The Queen,* cited above:

> Strictly speaking the *per incuriam* rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own previous decisions (*Young v. Bristol Aeroplane Co.* [1944] K.B. 718), does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked: *Broome v. Cassell & Co.* [1972] A.C. 1027. To permit this use of the *per incuriam* rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of superior courts with which it disagreed must have been given *per incuriam*.

[13] There can be no basis for departing from this fundamental principle in this case. On the contrary, the *Solicitor-General's Reference* provides a clear and determinative answer to the questions of law posed by the Police and I am required to follow it. To the extent therefore Mr Haskett has submitted that the decision is wrongly decided is of no moment in the present appeal.

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13 *Baker v The Queen* [1975] AC 774 (PC) at 788 per Lord Diplock.

[14] I also cannot see that there is any merit in Mr Haskett's submission that the *Solicitor-General's Reference* somehow allows for a different path to be considered based on his reading of the decision of Court of Appeal in *Police v Tolich*.[14] That decision approved wording in an earlier police procedure sheet on the basis that there had been reasonable compliance for the purposes of s 64(2) of the Land Transport Act. The approach of the Court of Appeal in the *Solicitor-General's Reference*, in finding that the Block J wording communicates the "sense and effect" of the warning required to be given to motorists by s 77(3A)(a), obviates the need to consider whether there has been reasonable compliance, and in any event does not open up an alternative pathway for interpreting Block J.

[15] I therefore accept the submissions made on behalf of the Police that the *Solicitor-General's Reference* is determinative of the questions at issue in this appeal. As a result, the answer to the first question is no and the appeal must be allowed.

Decision

[16] Th application for leave to appeal is granted.

[17] The appeal is allowed:

(a) the decision of Judge Field dated 30 September 2020 is overturned pursuant to s 300(1)(e) of the Criminal Procedure Act 2011; and

(b) a new trial is directed pursuant to s 300(1)(b)(ii) of the Criminal Procedure Act 2011.

Powell J

[14] *Police v Tolich* (2003) 20 CRNZ 150 (CA).