IN THE COURT OF APPEAL OF NEW ZEALAND CA 286/92

93 BCL 2513
92/2429

JAMES RAYMOND LANGTON

v

THE POLICE

Coram	Eichelbaum CJ Hardie Boys J Holland J
Hearing	2 November 1992
Counsel	G N Bradford for Appellant K Raftery for Crown
Judgment	3 November 1992

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

This is an application for special leave to appeal under s 144(3) of the Summary Proceedings Act 1957 against a conviction for refusing to accompany an enforcement officer for the purpose of undergoing an evidential breath test or a blood test or both: s 58B(1)(c) and (5)(a) of the Transport Act 1962. The applicant was convicted in the District Court on 11 July 1991 and his appeal to the High Court was dismissed by Williams J on 4 June 1992. On 14 July 1992 his application for leave to appeal to this Court was dismissed by the same Judge. The present application was filed on

25 August 1992 and so is out of time but this Court has power to extend time under s 144(3).

The facts as found by the District Court Judge were:

> The defendant was driving down Ayr Street into Shore Road. The plain police car, containing Constable Rackliff and another officer, was behind his vehicle. The defendant stopped suddenly. The police car parked behind the defendant's car. Constable Rackliff approached the driver, identified himself and whilst speaking to the defendant, gained good cause to suspect that he had recently consumed alcohol. He ascertained that the defendant was a licensed driver and required the defendant to undergo a roadside screening test. The defendant refused three times. The constable then required him to accompany him to the Ministry of Transport, Harbour Bridge or any other such place for the purposes of a breath test, blood test or both. The defendant refused and started to walk away and he was then arrested. There was no warning by the constable that he was likely to be arrested if he did not accompany, and following on from that, of course there was no suggestion that if he was arrested he would be bailed. According to the constable, the defendant walked some three to four metres away into the dark park. He was arrested and taken to the Ministry of Transport office at the Harbour Bridge where he underwent a conclusive evidential breath test with a subsequent reading of 775 micrograms of alcohol per litre of breath.

A charge of driving with excess breath alcohol ultimately failed as a result of non-compliance with s 23(1) of the New Zealand Bill of Rights Act 1990. In defence of the charge of refusing to accompany, it was asserted that the officer, before arresting the appellant, should have warned him that he was liable to arrest if he persisted in his refusal to accompany. That defence was rejected in both the District Court and the High Court and its validity is now said to be a question of law which in terms of s 144(3) by reason of its general or public importance ought to be submitted to this Court for decision.

In arguing the appeal Mr Bradford relied strongly on this Court's judgment in *Auckland City Council* v *Dixon* [1985] 2 NZLR 489. His submission was such that it is important to understand what was decided in that case. It was an appeal against

conviction for driving with excess blood alcohol. The driver had supplied a blood specimen after having been told that if he did not do so he would be arrested. He was not told that if he were arrested, he would have a right to apply for bail. As the Court said at 492:

> Unless the right to apply for bail is mentioned a citizen unversed in the law could well expect to be locked up, at least overnight.

The judgment continued:

> ... unless the person is made aware that bail may be available there is a plain risk that consent to a blood specimen will be extracted by what is tantamount to misrepresentation. That the Courts could not countenance.

The blood specimen having been obtained by a "wrong inducement", should therefore be excluded from evidence. This was therefore an application of the well-known principle that the Court may in its discretion exclude evidence unfairly or improperly obtained.

The Court went further, however, and based its decision on a wider ground. Arrest for refusal of a blood specimen had become an inflexible practice of enforcement officers employed by the respondent local authority. This practice prompted the Court to warn that

> the power of arrest without warrant should never be exercised or threatened to be exercised automatically or without substantial reason.

Notwithstanding that there was no statutory justification for using the power of arrest, or the threat of it, to compel persons to submit to blood tests which they would otherwise refuse, the local practice amounted to compulsion, albeit indirect, which the Court was not prepared to countenance: it was an abuse of power. That too afforded

grounds for disallowing evidence obtained as a result of it. The judgment concluded with what may fairly be described as advice to enforcement officers:

> When the conduct of a person is such that a traffic officer is contemplating arrest, it may well be wise and only fair, depending on the circumstances, to warn the person first.

It was upon this second, wider, ground of decision, and this concluding advice, that Mr Bradford particularly relied.

The all-important difference between this case and the *Dixon* case is that here there is no question of evidence being improperly obtained and hence no question of its exclusion in exercise of the Court's discretion. The offence of refusing to accompany was committed before the arrest. Had the arrest been an abuse of police power, no relevant evidential consequences ensued from it.

The arrest was not however an abuse of police power. This is clear from this Court's decision in *Police* v *Bishop* [1991] 2 NZLR 388. In that case, the request was made following a positive breath-screening test. When the driver then refused to accompany him, the constable arrested her to ensure that she did. At the police station, she underwent evidential breath and blood tests, both of which were positive. The District Court Judge, purporting to follow *Dixon*, considered that the desire to procure the further testing did not justify the arrest, and that the tests thereafter carried out were invalid. In the High Court and in this Court it was held that the power to arrest was lawfully exercised. Somers J delivering the judgment of the Court explained the position in this way:

> The object of this part of the Transport Act is to ascertain whether a driver has had more to drink than is consistent with safety. If the breath-screening test at the roadside is positive the driver is required to undergo an evidential breath test (which may be conclusive) or if he refuses to take that test he is to supply a blood specimen. He cannot

> be forced to give a blood sample but his refusal to do so is attended with the same results as if he gave a sample and it was found to be positive. If the driver who has failed the breath-screening test cannot be brought up to that barrier the object of the legislation is largely defeated. In our judgment the power of arrest is given in order to achieve that end.

The arrest in the present case must be seen to have been effected for that same purpose, and so to have been an entirely proper exercise of the power.

The advice with which the *Dixon* judgment concluded is not to be taken as a pronouncement of law. There is no general requirement that an offender be warned that if he persists he will be arrested. And there is nothing in the Transport Act to suggest that such a requirement should be implied into the powers of arrest that Act confers. We therefore agree with the conclusions to this effect reached by Henry J in *Loli* v *Auckland City Council* (1989) 5 CRNZ 440 and Barker J in *Police* v *Chadwick* [1991] 3 NZLR 764.

Of course in many cases the officer will, if only to avoid misunderstanding, or in an endeavour to obtain informed co-operation, warn the suspect of the consequences of a continuing refusal. Indeed there may be circumstances in which a failure to do so may raise a doubt as to whether there has been a refusal at all. But this is not such a case. Four times the appellant refused the constable's various requests, and finally he walked away. On any view, his arrest was amply justified. It certainly cannot be said to have been arbitrary, in breach of the spirit of s 22 of the New Zealand Bill of Rights Act 1990, as Mr Bradford also suggested.

It is not necessary to consider whether if a warning is given mention needs also be made of the availability of bail. There is a great difference between inducing consent to a blood test by the threat of arrest as in *Dixon*, and persuading a driver to accompany by warning him of the consequences of refusal. In *Pillay* v *Ministry of*

Transport (1988) 3 CRNZ 593 Barker J considered that *Dixon* required that bail be mentioned. Other High Court Judges have taken a different view: Thomas J in *Austin* v *Ministry of Transport* (AP 53/90, Auckland Registry, 26 March 1990) and Eichelbaum CJ in *Ellicock* v *Courtney* (AP 277/91, Wellington Registry, 8 May 1992). In this Court, the point should remain open for further consideration if the need arises.

Williams J refused leave to appeal to this Court for the very good reason that the question of law counsel had then formulated was not only different from that which had been argued before him on the appeal from the District Court but also raised purely factual issues. In this Court the question was recast in a more appropriate form. In this form, it raised an issue that was not considered in *Bishop*. It was appropriate for it to come before the Court for clarification. Accordingly leave to appeal is granted, but the appeal is dismissed.

Solicitors

Tetley-Jones Thom Sexton, Auckland, for appellant
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