[redacted]

IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.485/74

27 NO.

BETWEEN JOHN DAVID EDMONDS

Appellant

A N D THE POLICE

Respondent

Hearing: 3 February 1975
Judgment: 5 FEB 1975
Counsel: R.J. Murfitt for Appellant
G.E. Langham for Respondent

JUDGMENT OF ROPER J.

This is an appeal against conviction and sentence on a charge pursuant to s.58D(7) of the Transport Act 1962. That subsection provides in short that every person commits an offence who, being a person from whom a specimen of blood is required to be taken pursuant to subsection (2) of s.58D, refuses to permit such specimen to be taken. Subsection (2) provides, so far as is relevant to this case:-

> " (2) Notwithstanding anything in any other Act or in any rule of law, where-
>
> (a) Any person is received in any hospital for examination or treatment as a result of an accident involving any motor vehicle; and
>
> (b) The registered medical practitioner in immediate charge of the examination or treatment of that person believes that-
>
> (i) That person was the driver of the motor vehicle at the time of the accident; or
>
> (ii) ...
>
> it shall be the duty of the Hospital Board having the control of that hospital and of the Medical Superintendent of that hospital to ensure that if practicable a specimen of his venous blood is taken in accordance with normal medical procedures, whether or not that person has consented thereto and whether or not he is capable of giving his

> consent:
> Provided that the provisions of this subsection shall not apply unless and until that person has been examined by a registered medical practitioner and that medical practitioner is satisfied that the taking of such a specimen of blood would not be prejudicial to the proper care or treatment of that person."

On conviction the Appellant was fined $150 and disqualified from driving for twelve months.

The circumstances are that at about 11.30 p.m. on the 1st June 1974 the Appellant's car struck a power pole in Yaldhurst Road. No other vehicle or person was involved. By the time the police arrived at the scene the Appellant had already been taken to hospital by ambulance. When interviewed by the police on the 6th June he claimed that he had moved into the left lane for passing traffic at an intersection, been dazzled by lights, and crashed into the pole. A written statement was obtained from him but this contains no reference to anything that happened at the hospital.

On admission to hospital he was seen by a Dr Kelly, who, from some unspecified source of information, concluded that the Appellant was, in terms of subsection (2), "A person received in hospital for examination or treatment as a result of an accident involving a motor vehicle, and that he was the driver of the motor vehicle at the time of the accident." What the doctor actually said was:

> "he arrived in the A and E Department, Accident and Emergency Department, by ambulance after a road accident. I understood him to be the driver of the motor vehicle involved."

Mr Murfitt made certain submissions concerning the failure of the prosecution to prove the basis for the doctor's "belief" but I find it unnecessary to consider those submissions. I also find it unnecessary to consider the submission that Dr Kelly had not proved himself to be a "registered medical practitioner" in terms of the subsection.

According to the doctor he examined the Appellant and concluded that although he had been knocked out he did not have any serious injuries, and that the taking of a blood specimen would not be prejudicial to his proper care and treatment. The doctor said in evidence that he explained to the Appellant "that he was required by law to give ... a specimen". The Appellant refused.

The whole crux of this case is whether the Appellant was in any fit state to give rational consideration to the question of consent, and the consequences which could follow if he refused consent. It is not altogether clear from the doctor's evidence that he did explain the consequences of refusal of consent but that is by the way, for I am satisfied that the prosecution failed to prove that the Appellant was in a fit condition to give the matter of consent, and the possible results of refusal, rational consideration.

The time of refusal of consent was 1 p.m. The Appellant was seen by a constable in hospital a short time before that. That constable described the Appellant as "mumbling, very incoherent and smelling strongly of liquor." The Appellant gave evidence that he could recall virtually nothing of what took place in the hospital. He could not remember speaking to Dr Kelly, nor indeed ever having seen him until the attendance in Court. He claimed that he was off work for three weeks because of his injuries. There was no real challenge to this evidence in cross-examination and the constable who saw the Appellant at his home on the 6th June did refer to certain facial injuries.

The difficulty in this case is that in the lower Court the real defence as argued before me was hardly presented to the learned Magistrate. Counsel made submissions of law on entirely different aspects of the case, which were carefully considered and in my opinion properly rejected by the learned Magistrate. Counsel did not rely on those submissions before me. In the result what I see

as the substantive defence was virtually lost sight of, and Appellant's counsel must bear the responsibility for that. In his decision the learned Magistrate made two references to the crucial matter of the Appellant's state of health and understanding at the relevant time. He said:-

> "He (referring to Dr Kelly) completed the form of Blood Specimen Medical Certificate. He had examined the defendant, who he stated was not suffering from shock, but had only superficial injuries. He was discharged that night."

And further:-

> "The evidence does not suggest to me that the defendant was in a state of concussion.
>
> In the result I conclude that he was aware of what he was talking about at the time, he was rational and he was able to answer the doctor, that he was able to speak rationally, and that he knew what he was doing when he made this refusal."

In my view the evidence does not justify those conclusions. It seems abundantly clear that the doctor attended Court to give evidence ill prepared for his task. He claimed in evidence in chief that the Appellant had been treated and discharged, which would indicate injuries of very minor significance. The Appellant however claimed that he had been admitted to hospital, and that he had discharged himself at about 3 p.m. the following day, and that discharge at that time was against the advice of the hospital staff. The doctor conceded that that may well have been so, but did not have the records with him, which would have shown the position. He could not recall whether the Appellant had exhibited the symptoms of mumbling and incoherence deposed to by the constable, and could not recall the result of his examination of the Appellant for concussion, although that too would appear on a hospital record. He said in cross-examination:-

> "Q. You say you considered concussion.
> A. Any person who has been in an accident yes.
> Q. What was your opinion as to that.
> A. Well I can only go on my yellow card index which I had and it doesn't say I considered him to be concussed. If

> in fact he was admitted for observation following a head injury I might be wrong because I haven't looked up his in-patient notes."

The doctor was never asked his opinion as to the Appellant's ability to give rational consideration to the decision to give or refuse consent to the taking of a blood specimen.

I am satisfied therefore that the prosecution failed to prove a wilful refusal to give a specimen of blood - a conclusion the learned Magistrate may well have reached if the issue had not been clouded by other submissions of little merit.

The appeal against conviction is allowed. I make no order as to costs.

Solicitors:
D.H. Stringer & Murfitt, Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent