Butterworths (2)

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.542/78

Special Consideration

BETWEEN BRUCE ROBERT FINCH

Appellant

A N D THE POLICE

Respondent

436

Hearing: 20 July 1979

Counsel: D.S.G. Deacon for the appellant
K.G. Stone for the respondent

Judgment: 15-8-79

RESERVED JUDGMENT OF WHITE J.

This is an application for leave to appeal to the Court of Appeal on the ground that there is a question of law which, by reason of its general or public importance, ought to be submitted to the Court of Appeal for decision. The question of law is stated in the motion for leave as follows:

> "Where there has been a failure or refusal to permit a sample of blood to be taken is it essential that it should be made known to the subject what the traffic officer is requiring him to submit to in terms of Section 58B(i) of the Transport Act 1962."

When the appeal was heard originally in this Court there were two grounds. The appeal was dismissed. It is the second ground which is the subject of the present application.

It was contended that where there has been a refusal to permit a sample of blood being taken it is essential that it should be made known to the alleged offender that he is required to permit a sample of "venous" blood to be taken. In the present case the adjective "venous" was not used in referring to a specimen of blood. This question had already been dealt with in the Court of Appeal in Ministry of Transport v. Murdoch(C.A.183/77, 9 March 1978). There was some difference of opinion amongst the Judges and Mr Deacon relied particularly on

the language of Richardson J. who, with Quilliam J. formed the majority on this topic. In his argument in support of the present application, Mr Deacon submitted that the question whether the principle to be applied in the case of a refusal to permit a sample of blood was different from the principle applied in Murdoch's case (supra) in a case where the person concerned had agreed to a sample being taken.

An essential point to note is that in Murdoch's case the majority considered that in a case where "the traffic officer did not unequivocally make it known to the respondent that he was required to supply venous blood" it was necessary to consider the reasonable compliance provisions of s.58(2). In considering that aspect of the case, Richardson J. said, (as I have pointed out in my judgment) "...what is of overriding importance is that the subject should understand that a specimen of blood is to be taken by a registered medical practitioner." He went on to say in relation to the case before the Court of Appeal:

> "If the requirement to which consent was given was expressed in too general terms, not being confined to venous blood and with no reference to normal medical procedures, and the sample was then taken as prescribed in the provision, I find it difficult to see prejudice to the subject. I think, too, that the failure to add to the statement that a specimen of blood was required, the qualification that it was limited to venous blood and that normal medical procedures would be followed, could, and should, in these circumstances be excused under s.58(2)."

Mr Deacon submitted that he was entitled to rely on the words I have underlined to found an argument that there was a difference between a case where an offender refused to permit the test and a case where the offender agreed to be tested.

In my opinion the underlined words simply related to the facts of the case he was considering. Further, on the question of "reasonable compliance" the members of the Court of Appeal were unanimous that there was reasonable compliance. Woodhouse J. said this:

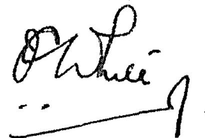
> "During the argument reference was made to the 'reasonable compliance' provision contained in s.58(2). It was submitted that the subsection could be called in aid if it were held that the qualification 'venous' would need to be used whenever the requirement for a blood specimen were made. If I had thought it necessary as a matter of construction to hold that there must be precise adherence to the formula contained within the relevant part of s.58B(1) I would certainly agree that the present situation would enable use to be made of the reasonable compliance provision of s.58(2). In Coltman v. Ministry of Transport this Court made it clear that the subsection may have application to 'any of the provisions of s.58 A or s.58 B;' and in this part of the case I think the practical insignificance of the word 'venous' for virtually all suspect drivers and the mandatory direction to every doctor to act within the statutory formula would go far to support a claim of reasonable compliance in any case such as the present."

In his judgment, Quilliam J. said he agreed with the judgment of Richardson J. He also said :

> "I should only add that for the reasons given by Woodhouse J. I am unable to regard the provisions of s.58C(2) of the Transport Act 1962 as affording an answer to the charge that the respondent faced."

I return to the words used by Richardson J. that the point of "over-riding importance is that the subject should understand that a specimen of blood is to be taken by a registered medical practitioner." That is, of course, before the alleged offender elects to permit a sample to be taken. In my view, when those words of Richardson J. are considered with the words of Woodhouse J. (with which Quilliam J. specifically agreed) it is clear that the Court of Appeal did not leave open a question whether a person who refused a blood test might be in a different and better position than a person who agreed to have his blood tested. I need hardly add that it would have been surprising to find such a distinction in the legislation.

For these reasons, leave to appeal is refused.



Solicitors:

Deacon & Tannahill, Wellington, for appellant
Crown Solicitor, Wellington, for respondent