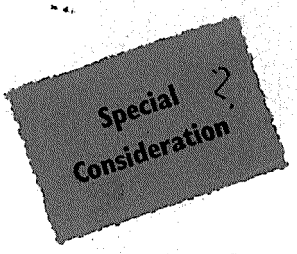
Butterworths (2)

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.542/78



BETWEEN BRUCE ROBERT FINCH

Appellant

A N D THE POLICE

Respondent

Hearing: 29 November 1978

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

Judgment: 2 February 1979

RESERVED JUDGMENT OF WHITE J.

The appellant was convicted in the Magistrate's Court at Wellington on 4 September 1978 for failing to permit a specimen of blood to be taken. He was fined $250 and disqualified for 12 months. He has appealed against both his conviction and sentence. The general grounds of his appeal were that the conviction was erroneous in fact and law, and that the sentence was manifestly excessive. A further memorandum of points of appeal against conviction has since been filed.

The facts are somewhat unusual. The appellant, who drove his car a short distance of less than a hundred yards from the Roadmaster Service Station in Wakefield Street, Wellington, into the yard of the Taranaki Street Police Station, then acknowledged to the police that he was intoxicated. It is not disputed that he declined to have breath tests and to permit a specimen of blood to be taken. What is disputed is that the Magistrate was entitled to infer from the evidence that the appropriate procedures were followed.

Mr Deacon submitted that the prosecution failed to prove that there was a breach of s.58A(2) under which a constable or traffic officer may require a person to

"accompany him to any place where a specimen of blood may be taken, or to remain where he is so that a specimen of blood may be taken". It was argued that without such evidence there was no evidence upon which the Magistrate could be satisfied or infer that the provisions of s.58A(4) had been satisfied. Mr Deacon submitted that the evidence was clear that the first breath test was requested at 8.55 p.m. and the second at 9.16 p.m. It was submitted that the evidence was also clear that after the first request some time was occupied before it was refused so that on the evidence it could not be established that not less than 20 minutes had elapsed.

I have considered the evidence and, in my view, the only reasonable inference is that time was calculated from the time of the refusal to give a breath test on the first occasion. I do not understand the evidence of the constable to support Mr Deacon's submissions. In my view, the constable's evidence is consistent with the sergeant's evidence and with the inferences drawn by the Magistrate that at 8.55 p.m. the constable was satisfied that the appellant had refused to have a breath test. In my view, it would be most unlikely that a point of time before the appellant's refusal would be taken as the time at which the 20 minutes began to run. There was no dispute that that time has been fixed in the interests of the person tested and clearly runs from the time of a positive test, or the time of a person's refusal, if contemporaneously he is required by a constable to remain at the place he is in. In my view, that point of time is a matter of fact and does not require a formal statement by the constable. In this case, as I understand the evidence, the appellant was required, as a matter of fact, to remain where he was, in the police station, from the time he refused to provide a

specimen of breath. Accordingly I do not consider that the conclusions of the Magistrate on this aspect of the matter were erroneous in fact or law.

Mr Deacon also submitted that where there has been a refusal to permit a sample of blood to be taken it is essential that it should be made known to the offender what the constable or traffic officer requires him to submit to. It was contended that, in applying Murdoch v. Ministry of Transport (see judgment of Chilwell J. in the Supreme Court, dated 17 August 1977, and the judgments of the Court of Appeal, C.A. 183/77, dated 9 March 1978), the request to the appellant in the present case had not been properly given with the required precision.

In Murdoch's case there was no dispute that the traffic officer was entitled to require a suspect to provide a blood sample under s.58B(1). What he said to the suspect was taken from a police form and read as follows:

> "You are advised that you are required under the Transport Act to permit a registered medical practitioner to take for the purposes of analysis a specimen of blood. Do you consent to the taking of a specimen of blood? Please answer 'Yes' or 'No'."

It was accepted by Mr Deacon that the words used in the present case were virtually the same. In Murdoch's case the suspect consented and it was not disputed that the sample was taken in accordance with the statute. An appeal from a conviction in the Magistrate's Court had been allowed in this Court on the ground that the traffic officer had omitted to refer to "venous" blood, which is specifically referred to in s.58B(1), and it was also held that s.58(2) could not be invoked successfully. After considering the matter in some detail in the Court of Appeal, Woodhouse J. said:

> "In my opinion it could not possibly be misleading in any practical way for reference to be made to a blood specimen without this rather special qualification, which in the present context has

> no more than a medical and technical significance. That opinion is reinforced when it is remembered that not only would a consent to supply a specimen of blood always embrace the more limited concept of venous blood but that only venous blood may then be taken by the medical practitioner."

Woodhouse J. also came to the conclusion that, if it had been necessary to consider "reasonable compliance", he agreed s.58(2) applied. As to that he said:

> "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."

Mr Deacon referred particularly to the judgment of Richardson J. in Murdoch's case (with which Quilliam J. agreed) and submitted that, in effect, Richardson and Quilliam JJ had not disagreed with Chilwell J's interpretation of s.58B(1) as to "venous" blood. Richardson J. pointed out that the relevant part of s.58B(1) deals "expressly and directly with two matters", the first, with what a constable or traffic officer "may require" and the second with what the subject "must permit". And he said, "They are part and parcel of the request to the subject to give a specimen of his blood". Continuing, Richardson J. said, and I quote the relevant words:

> "The section does not specify how the requirement in this respect is to be conveyed to the person from whom the sample is sought. It is not necessary that the exact words of the section be used. It is both necessary and sufficient that the essential features of the requirement be made clear to the person concerned by the traffic officer. That information may be conveyed to the person concerned in any way. An almost infinite variety of situations may arise. It is not helpful to speculate on all the various possibilities. It is sufficient to say that, in some cases where this point becomes an issue, it may be necessary to consider what was said and done by the traffic officer, the driver concerned, and perhaps others present, for example the medical practitioner, in the period up to

> and including the taking of the sample, that is, in cases where a sample is taken. What is essential is that it should be made known to the subject what the traffic officer, as the person in authority, is requiring him to submit to. The effect of what was said and done must be such as to lead to the conclusion that the subject must have known what was involved. His own conduct may, of course, have shed light on his understanding of what was required of him."

It is true that Richardson J. then went on to consider and apply s.58(2) but, referring to the passage from his judgment just quoted, his view, in which Quilliam J. concurred, is that it is not necessary to use the words of the statute. What is "necessary and sufficient" is that "the essential features of the requirement be made clear to the person concerned". In my view, the Magistrate was entitled to infer from what was said and done that the appellant understood "what was involved" and "what was required of him" by the police officer.

Bearing in mind the facts and the clear directions of the Court of Appeal in Murdoch's case (supra), I am quite unable to agree with Mr Deacon that the Magistrate failed to apply the principles there stated.

The appeal against conviction must be dismissed.

Regarding sentence, Mr Deacon referred again to the circumstances as showing that the appellant had realized his condition and took reasonable steps in the interests of other users of the highway as well as himself. It was submitted that he should receive some credit for acting with some sense of responsibility.

I do not agree that in the circumstances of the case it can be said that the Magistrate failed to take these matters into account in imposing sentence. In short, in my opinion it has not been shown that the sentence was manifestly excessive. Accordingly the appeal against sentence is dismissed.

Solicitors:

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