BETWEEN : PAUL JOHN LANKREIJER

Appellant

A N D : AUCKLAND CITY COUNCIL

Respondent

Hearing: 23 November 1979

Counsel: Miss King for Appellant.
Katz for Respondent.

Judgment: 21 February 1980

JUDGMENT OF THORP, J.

This is an appeal by one Paul John Lankreijer against a conviction entered against him in the Magistrate's Court Auckland on 19 September 1979 of driving with excess blood alcohol contrary to S.58(1)(b) of the Transport Act 1962. On that date the appellant, having been involved in an accident while driving his car, was asked to and gave a breath test which proved to be positive.

He was then requested to attend the respondent's Administration Building, the phrasing of that request in the words of the Traffic Officer concerned being:

> "To accompany me to the Civic Administration Building for the purpose of an evidential breath test, a blood sample or both."

The appellant consented to do so, and no question arose about the propriety of the actions taken by the traffic officer to that stage.

The critical events are those relating to the endeavours by the traffic officer to complete an evidential breath test, and the subsequent requirement that the appellant give a sample of blood.

There was some conflict between the evidence of the two traffic officers who were present during this process at the Administration Building, and the appellant. The learned Magis-

considered this issue of credibility and, for reasons which he stated, preferred the evidence of the traffic officers, a ruling which must of course be accepted by me.

On the basis of that ruling, the facts relating to the dealing between the officers of the respondent Council and the appellant at the Administration Building may be summarised as follows:

1.. Traffic Officer Scott, the officer who had brought the appellant to the building, obtained an "Alcosensor II", the breath testing device approved by the Breath Test Notice 1978.

2. He completed the first three steps of the testing procedure prescribed by paragraph 7 of that notice, that is to sa he checked by depressing the SET button that the machine recorded four zeros, he then completed the standardisation or calibration test by introducing standard alcohol vapour and checking that the resultant reading was less than the level indicated on the standard alcohol vapour container, and then completed the second zero test, returning the device to neutral. The only matter of significance which occurred during that part of the proceedings was that the reading obtained on step 2 was lower than he would normally have expected. This did not preven his being entitled to proceed, but helps to explain the fourth an (for this appeal) critical portion of the breath test. The manne of carrying out the fourth step, the evidential breath test prop is set out in sub-paragraph (d) of paragraph 7 as follows:

> " (i) The enforcement officer shall depress the SET button and attach the mouthpiece; and
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> (ii) The person being tested shall blow through th mouthpiece; and
>
> (iii) The enforcement officer shall depress the READ button while the person is blowing through the mouth-piece and observe the maximum digital reading; and
>
> (iv) The enforcement officer shall record this reading in writing.
>
> This reading indicates the number of micrograms of alcohol per litre of breath of the person being tested."

What did occur on the evening in question was that when the officer depressed the READ button he found the device very slow

in producing any reading, it then "flickered" readings of 50 and 100, and "finally flickered to 300 for a split second before the light went completely out."

Traffic Officer Scott then informed the appellant that the device was faulty and that its batteries were flat. He took it to Traffic Officer Spurdle, the senior traffic officer present at the time, and had the device fitted with new batteries. When that was done it was tested and operated normally.

Traffic Officer Scott then returned to the appellant and informed him that he required him to give a blood sample. He read to the appellant Part I of the standard blood specimen form, which advises motorists that they are required to permit a registered medical practitioner to take a specimen of blood, that if they refuse to do so they can be charged with an offence for which they are liable on conviction to imprisonment, and asks whether the driver concerned consents to the taking of a specimen of blood.

This form having been read to the appellant, he was asked whether he consented to give a specimen of blood. He said he did, and wrote, "Yes" in the appropriate portion of the form.

The appellant's evidence of this matter was that he understood he "had to have a blood test." I can see nothing in the evidence of either traffic officer, or the findings of fact by the learned Magistrate, which suggests that this was not the appellant's understanding of his position. It would be a logical conclusion for him to reach if he accepted that the traffic officer was informing him correctly of his position when reading the first part of the blood specimen form to him.

Then followed the taking of a specimen of blood, which on analysis gave a reading of 105 micrograms, which was of course sufficient to support the conviction for excess blood alcohol if the analysis of the blood was lawfully admissible evidence.

It was accepted by Traffic Officer Scott, and part of the findings of the learned Magistrate, that as a matter of fact there was nothing to prevent Traffic Officer Scott either from obtaining an evidential breath test from the appellant after the batteries

had been changed, or obtaining another device for the same purpose.

The reason why neither step was taken was stated by Traffic Officer Scott in evidence-in-chief in the following words:

> "I did not use the device because it would mean I would be giving him a second evidential breath test. I am not entitled to give him a second evidential breath test."

It was not in issue that this was an opinion bona fide held by the traffic officer.

The evidence-in-chief of Traffic Officer Scott then continued:

> "I noted details of the battery failure on the evidential breath test form. I wish to produce this in evidence."

The form produced contains in a panel at the top right provision for recording details of the machine used and of the results of the different steps prescribed by the breath test notice. The details shown on the form are as follows:

"Serial number	DSIR 29
Temperature	28
Readout	0000
B/T Standard Alcohol Vapour	0450/ 0200 Read out
Temperature	26
Readout	0000
RESULT	Incorrect readout. "

The form was not signed either by the driver or the traffic officer. Half way down the form there was written by Traffic Officer Scott, apparently at the request of the appellant, the words:

> "Battery flat read out flickered then went out."

Since the hearing of argument on this appeal I have received from Mr Katz as counsel for the respondent a supplementary

Borough, seeking that another written [illegible] relating to the testing was made by the traffic officer, and seeking leave to put this before me and to address further argument upon it. That course was not agreed to by Mrs King, who was counsel for the appellant, and without her agreement it is quite clear that I cannot receive further evidence at this time. Indeed, that position was foreseen by Mr Katz in his supplementary memorandum in which he referred me to the decision in Judah v. Auckland City Council (1975) 1 N.Z.L.R..695 as authority for the proposition that although the further document had not been produced to the court, it had not been necessary to do so as the officer's statement that he had conducted the test in accordance with the notice was sufficient evidence. That may well be a correct view of the law if there is no other evidence. The fact is that in this case the evidence indicates that the traffic officer recorded in writing the reading of the device at stage 4 of the test in the words"Incorrect read out," which in the context of the other evidence leads me clearly to the view that no evidential breath test as defined in the Breath Test Notice 1978 was completed.

In reaching that conclusion I do not believe I am differing from the findings of the learned Magistrate, who said:

(i) At p.B.12 of the record: "Part way through the test the machine expired:"

(ii) At p.B.13: "I hold that the machine was faulty and the officer was justified in terminating the test with that machine at that point because quite clearly it would not work properly:" and

(iii) At p.B.14, in considering the application of S.58B(1)(d) "...if when he gets there he cannot carry out the test, and by that I mean cannot complete the test ...:"

The emphasis in the last passage is mine.

Because I have reached the clear conclusion that no evidential breath test was completed, it seems to me that the question involved here is not really whether the appellant could be asked to undertake a second test, but whether once the

procedure prescribed by the Breath Test Notice 1978 to
commenced, the fact that it is interrupted for some reason outside the control of the officer carrying out the test prevents him from beginning again and carrying out and completing a test.

For myself I should have thought any such construction an unnatural and an unreasonable one, which should not readily be accepted. However, as the law reports only too plainly show, this subject is one in which the application of commonsense is at best episodic. The decision as to the legality of the request for a specimen of blood and of the conviction against which appeal is now made must be determined not on the basis of commonsense but of statutory construction.

It was common ground that the manner in which the blood sample was obtained and the subsequent analysis were wholly unobjectionable provided there was an initial right in the traffic officer to require the giving of the blood sample..

It was also common ground that the request for the blood sample could only be justified if the officer could bring himself within one of the five paragraphs of s.58B(1), or, if he could not do so, his failure so to do was excused by S.58E, the "reasonable compliance" section.

So far as authority under s.58B(1) was concerned, it was also common ground that the only paragraph which could apply was paragraph (d). As to this the learned Magistrate found that an evidential breath testing device was readily available so that the first portion of paragraph (d) could not apply, but thought that the traffic officer's action was justified by the final clause of this paragraph which reads:

"Or for any reason an evidential breath test cannot then be carried out at that place"

As to this he said, at p.B.14:

> "... if a valid request to accompany to a place where a device is likely to be available is made and the traffic officer genuinely believes a device is available, but if when he gets there he cannot carry out the test and by that I mean cannot complete the test properly with a workable machine then it appears to me that the latter part of paragraph (d) has

application."

Later at the foot of p.B.15 he stated:

> "Admittedly the legislation is silent about what happens in those circumstances. I take the view it is covered basically by the latter words of paragraph (d) and in the absence of any authority requiring or enabling an enforcement officer to require a defendant to undergo a second test I hold he has no authority to do so. So that aborted first test I hold was a reason why an evidential breath test could not then be carried out at that place and that the availability of a replacement machine or a repaired machine or device does not take it outside the ambit of those words."

With due respect to the learned Magistrate, if there was no physical reason preventing the completion of an evidential breath test, a matter which he had already found to be the case in excluding the operation of the first portion of paragraph (d), then his conclusions as to the applicability of the last clause of paragraph (d) that it must rest upon the assumption that there is a legal barrier to such action. That in turn seems to me to rest upon the view that the recommencing of an interrupted test amounts to making a second test. I would readily accept that the language of s.58A only gives jurisdiction to require a driver to undergo one evidential breath test. I am quite unable to find anything in the statute which suggests that until such a test has been completed, a traffic officer is prevented as a matter of law from taking such action as is reasonable in the circumstances to complete a test.

I accordingly conclude that the respondent cannot call in aid paragraph (d) to justify its requiring the appellant to give a sample of blood.

I should state that I have given consideration to the arguments put forward by Mr Katz to the contrary.

He pointed out that s.58B(2) contained specific provision permitting a doctor to take a second blood specimen if the first proved inadequate for division into two parts, whereas there is no similar provision in relation to evidential testing.

At the conclusion of the argument I reserved leave to Mr Katz to file a supplementary memorandum referring to any particular authority he was able to locate as to the question of the power to require a driver to provide a second sample of breath, which is what would be involved in the proposition I have propounded in circumstances where the evidential breath test has proceeded to the stage where the driver has blown into the Alcosensor, but have not been referred to any additional authorities on that point.

I am accordingly left to consider whether or not the failure to comply with the provisions of s.58B(1) are excuseable in terms of s.58E, but before passing to that topic should note that the date of this offence makes the Transport Amendment No.3 Act of 1979 inapplicable.

As I endeavoured to indicate in my decision in Fulton and de Witte v. Auckland City Council (Auckland M.546,548/79 20 July 1979) I find definition of the precise boundaries of the healing power of s.58E extremely difficult... However, the decisions of the Court of Appeal on its consideration of the same case (C.A. 140/79) upon appeal indicate a firm view that the complete failure to carry out such an essential feature of the statutory scheme as the evidential breath test cannot be cured by s.58E.

It may be argued whether or not the steps taken by Traffic Officer Scott in this case were a complete failure to carry out an evidential breath test. Be that as it may, I do not think that s.58E can apply in this case in that it requires reasonable compliance with such of the sections as apply.

In order to exclude the operation of paragraph (d) of Section 58B(1), and particularly the latter portion of that paragraph, the Court needs proof that there was no reason why an evidential breath test could not be carried out. It would be a logical contradiction to find that paragraph (d) had not been complied with, and then to assert there had been "reasonable compliance" with its provisions.

The appeal is of course entirely without merits. For what it is worth I accept the validity of the comment by the learned Magistrate that if the Traffic Officer Scott had taken the other view and proceeded to ask the appellant to commence the evidential breath testing procedure a second time, there is a strong likelihood that the appellant would have been contending that such action was in excess of the traffic officer's jurisdiction. Nevertheless the Court has to determine these matters in accordance with the construction of the statute as it sees that matter, applying the normal rules of construction.

Accordingly, for the reasons set out above the appeal is allowed but without costs, and the conviction of the appellant is quashed.

Solicitors for Appellant: Simpson, Coates & Clapshaw, AUCKLAND

Solicitors for Respondent: Butler White & Hanna, AUCKLAND.