ROTORUA REGISTRY

BETWEEN JOHN VICTOR ENGLEBRETSEN

APPELLANT

AND MINISTRY OF TRANSPORT

RESPONDENT

Hearing : 26 June 1980

Counsel : Thomas for Appellant
Savage for Respondent

Judgment: 14th July 1980

JUDGMENT OF PRICHARD J.

On 28 August 1979, the appellant entered a plea of guilty to the charge that "he did drive a motor vehicle registered number HM.6787 on a road namely Tonga Road, Taupo, while the proportion of alcohol in his blood, as ascertained from an analysis for which he subsequently permitted a specimen of blood to be taken under s.58B of the Transport Act 1962, exceeded 80 milligrams of alcohol per 100 millilitres of blood, contrary to s.58(1) (b) of the Transport Act 1962". It will be seen that the charge, which I quote verbatim from the information, does not follow exactly the wording of s.58(1) (b).

A conviction was entered and the appellant was fined $150 and disqualified from holding or obtaining any motor driver's licence for 6 months from 5 September 1979.

The circumstances were that on 11 August 1979, the appellant, while driving his car, was stopped by a traffic officer and subjected to a breath screening test which was positive. He was then required to accompany, and did accompany, the traffic officer to the offices of the Ministry of Transport at Taupo where, with his consent, a blood sample was taken. No evidential breath test was taken - for the acknowledged reason that, as the traffic officer well knew, there was no evidential breath testing device at that place. The blood sample revealed a proportion of 123 milligrams of alcohol per 100 millilitres of blood.

The judgment of the Court of Appeal in Auckland City Council v. Fulton (1979) 1 N.Z.L.R. 683 was delivered on 29 August 1979, which was the day following the date on which the appellant entered his plea of guilty.

Had the judgment in A.C.C. v. Fulton been delivered a few days earlier, it goes without saying that the appellant would not have pleaded guilty and would not have been convicted of the offence of which he was charged.

It was contended by Mr Savage for the respondent that this is not a case where an appeal can be entertained after a plea of guilty. In substance, Mr Savage submits that the absence of the step prescribed by s.58A(3) (c) i.e. the request by the enforcement officer that the subject accompany him to a place where it is likely that he can undergo an evidential breath test goes only to proof: that the appellant's plea overcomes any evidential defect: that the offence having been admitted by the plea of guilty and being an offence known to the law, there is no basis for setting aside the conviction.

The entering of a plea of guilty, being a formal admission of guilt, is generally an absolute bar to an appeal against conviction. Exceptions (not necessarily the only exceptions) are where the plea was not in terms unequivocal; (R. v. Lloyd (1923) 17 Cr. App. R.184) where it was induced by an incorrect ruling by the Court; (R. v. Clarke (1972) 1 All.E.R. 219), where it was entered under an obvious mistake or misapprehension as to the nature of the charge; (R. v. Durham Quarter Sessions Ex.P. Virgo (1952) 1 All.E.R. 466), and where on the admitted facts the accused person could not have been convicted of the offence charged; (R. v. Forde (1923) 2 K.B. 400). The dictum of Avery, J. in R. v. Forde (supra) cited by T.A. Gresson, J. as the basis for his decision in Udy v. Police (1964) N.Z.L.R. 235, is as follows:

> "The first question that arises is whether this Court can entertain the appeal. A plea of guilty having been recorded, this Court - the Court of Criminal Appeal - can only entertain an appeal against conviction if it appears -
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> (1) That the appellant did not appreciate the nature of the charge, or did not intend to admit he was guilty of it; or
>
> (2) That upon the admitted facts he could not in law have been convicted of the offence charged."

Udy was charged with hunting "game" to wit ducks in a wild life sanctuary contrary to s.64 of the Wild Life Act 1953: Walker was charged with assisting him in that enterprise. Both Udy and Walker pleaded guilty. There was a third member of the party named Stansfield who pleaded not guilty. Stansfield was acquitted because the prosecution omitted to prove that the ducks which had been fired at were "game" within the meaning of the First Schedule to the Wild Life Act 1953. Udy and Walker then appealed to the Supreme Court. Gresson, J., in dismissing the appeal against conviction, observed that the dismissal of the informations against Stansfield meant in law no more than that there was not sufficient proof on Stansfield's trial that "game" were hunted. It did not constitute an affirmative finding that no game were hunted. The oversight on the part of the police to prove that the birds at which the shots were fired were "game" within the meaning of the Wild Life Act 1953 was cured in the cases of Udy and Walker by their pleas of guilty.

It is significant that Gresson, J. went on to say at p.239:-

> "If the evidence in Stansfield's case had established that the birds in question were not game - e.g. had it been proved affirmatively that they were seagulls or muscovy ducks - then this Court would, it seems to me, have been justified in disregarding the appellants' pleas and in quashing the conviction on the ground that the proved facts showed that contrary to their confessions, they had not hunted "game" and they were, as a matter of law, not guilty of the offences charged."

In the present case, at all stages of the proceedings, both in this Court and in the Court below, it has been common ground that the place to which the appellant was required to go in purported exercise of the traffic officer's powers under s.58A(3) (c) was a place at which there was then, to the traffic officer's knowledge, no approved evidential breath testing device. The case is therefore fairly and squarely within the ambit of the decision of the Court of Appeal in A.C.C. v. Fulton (supra) where it was held that a "requirement to accompany" made in those circumstances was invalid "and the subsequent procedure therefore fell to the ground"; (per Cooke, J. at p.688).

The question now is as to whether the absence of a valid "requirement to accompany" is merely a shortcut in following a prescribed path towards establishing the appellant's blood/alcohol ratio or, whether the absence of that step in the procedure necessarily negates a circumstance which is an essential element of the offence. If it is no more than a gap in a chain of evidence, then, as in Udy's case, it is overcome by the formal plea of guilty. But if the absence of that step in the procedure effectively negates the existence of a circumstance which is an essential ingredient of the offence charged, then the appellant could not in law be convicted of that offence.

The charge was laid under s.58(1) (b) of the Transport Act 1962 which reads as follows:-

> s.58(1) "Every person commits an offence who -
> (b) Drives or attempts to drive a motor vehicle on any road while the proportion of alcohol in his blood, as ascertained from an analysis of a blood specimen subsequently taken from him, exceeds 80 milligrams of alcohol per 100 millilitres of blood."

I observe that the Legislature has not simply created an offence of "driving while the proportion of alcohol to blood exceeds 80 milligrams of alcohol per 100 millilitres of blood". For the offence to be committed, the excess proportion has to be "ascertained from an analysis of a blood specimen subsequently taken from him". Only in those circumstances is there an offence. In A.C.C. v. Fulton (supra), Cooke, J. (at p.688 of the report) said:-

> "In each case, the requirement to accompany was invalid and the subsequent procedure therefore fell to the ground."

Richardson, J. (on the same page) said:-

> "The issue is whether or not the Legislation can operate in the absence of an approved evidential breath testing device."

Then at p.690:-

> "The "requirement to accompany" was invalid. That defect vitiates the subsequent procedures."

Somers, J. at p.692 said:-

> "The amendments contained in s.7 of the Transport Amendment (No 3) Act 1978 - the enactment of ss.57A to 57F in place of the former ss.58 to 58D - have as their substratum or postulate the availability and use of the evidential breath testing device."

In my view, those dicta lead to the conclusion that the offence created by s.58(1) (b) is only committed when there is a positive test, not of just any sample, but of a sample which has been obtained in compliance with the procedures prescribed by s.58A(3) (c). The provisions of ss.58A and 58B do not merely provide a system which invests enforcement authorities with powers enabling them to obtain irrebuttable evidence: the provisions actually create and define substantively an offence, the ingredients of which include the fact of compliance with the evidential breath testing procedure prescribed by s.58A. A test of a blood sample not so obtained is not relevant. It is "vitiated" by the defect in the earlier procedure, it is outside the "substratum or postulate underlying ss.57A to 58F."

In other words, the provision creating the offence, s.58(1) (b), has to be read as though it included the words; "in accordance with the provisions of ss.58A and 58B of this Act." Section 58(1) (b) would then read as follows (the interpolation being underlined):-

> s.58(1) "Every person commits an offence who -
>
> (b) Drives or attempts to drive a motor vehicle on any road while the proportion of alcohol in his blood, as ascertained from an analysis of a blood specimen subsequently taken from him, <u>in accordance with the provisions of Section 58A and Section 58B of this Act</u>."

It follows that the blood sample which was taken in the present case was not such a blood sample as would meet the requirements of the definition of the offence in its expanded form - an expansion which, in my view, is justified by the decision in Fulton's case.

The case is one in which the appellant could not have been convicted of the offence charged on the admitted facts. In Udy's case, had it been common ground that the duck which Udy hunted was in fact a muscovy duck, T.A. Gresson, J. indicated that he would have been justified in allowing Udy's appeal - because the duck would not have met the requirements of the statute under which the charge was laid. By the same token, it is common ground in this case that the blood sample which was tested was not the sort of blood sample contemplated by the legislation - it had (like the hypothetical muscovy duck) the wrong antecedents.

I was referred, by Mr Savage, to the decision in Ministry of Transport v. Paringatai (1980) 14 M.C.D. 409 in which a rehearing was refused where the relevant circumstances were identical with those of the present appeal - Paringatai having pleaded guilty on the morning of the day on which the Court of Appeal decision in Fulton's case was delivered. The learned Magistrate (as he then was) analysed the relevant decisions. But he based his decision on the view which he took, which was that "there was no question of the invalidity of the essential ingredients of an offence under s.58 but rather it was a question of the inability of the prosecution to prove those essential ingredients because the procedure adopted by the traffic officer was invalid".

With respect, for the reason I have given, I take the opposite view.

Accordingly, the appeal is allowed and the conviction quashed.