UNIVERSITY OF OTA.
31 MAR 1982
LAW LIB

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

M.115/81

BETWEEN RICHARD JAMES EDEN

Appellant

A N D THE MINISTRY OF TRANSPORT

Respondent

TRANSPORT
BLOOD ALCOHOL
REFUSING TO
ACCOMPANY
TRAFFIC OFFICER
ARREST VALID

High Court Palmerston North, M 115/81; 3 Feb
dismissed E's appeal against an excess blood
uphold his appeal against conviction for
a traffic officer which required to do so: the
properly intends to E the purpose for which he
Auckland CC v. Fulton (1979) 1 NZLR 683,CA);
as equivalent to the words of arrest
actually (since E had initially run away from
obtained as a result was admissible.

JUDGMENT

This is an appeal by Richard James Eden against his conviction in the district court on an excess blood alcohol charge and a charge of refusing to accompany a traffic officer to a police station when required to do so. The appellant had been charged on both the above charges as well as a third charge of careless use of a motor vehicle. He was also convicted on the careless use charge but did not appeal against that conviction. He was fined $250 on the excess blood alcohol charge, $50 on each of the other two charges and was disqualified from holding a driver's licence for a period of 18 months. He has not appealed against any of the sentences.

The circumstances of this matter were that at about 1.00 a.m. on Sunday, 23 November 1980 a car was seen to come off the Fitzherbert bridge in the direction of

Palmerston North. It careered into a tree, went up on its side and then came to rest with one side jammed against the tree trunk. The appellant was in the car when witnesses got to it. He was in the front, sprawled across the seat with his feet towards the driver's side and his body towards the passenger's side. He was unable to get out of the car because one door was jammed against the tree and the other apparently would not open. He eventually was assisted out through the windscreen. A traffic officer arrived and apparently told the appellant that he had been identified as the driver and asked him to accompany him to his patrol car, which was parked a short distance away. While talking to the appellant, the traffic officer had, according to his evidence, good cause to suspect that the appellant had consumed alcohol. When they reached the patrol car the traffic officer got into his car and commenced to call the police for some assistance. At that stage the appellant apparently started to walk away and, though there is some dispute as to just at what point he commenced to do so, he then began to run and eventually disappeared in amongst the trees that were in the area. However, before he disappeared the traffic officer chased him for a distance, he said, of something in the region of 250 to 300 metres, and while pursuing him he called out to him that he required him to provide a breath test and, though the exact words used are not certain, that he required him, the appellant, to accompany him, the traffic officer, because he believed him to have been drinking and further that he was under arrest for refusing to accompany him. A short time later a police officer located the appellant and he was placed in a

police car, at which point the traffic officer again spoke to him and asked him if he knew that he was under arrest and the reason for it; and he stated that he did. He was taken to the Palmerston North police station, where an evidential breath test was requested and refused. A blood sample was then requested from the appellant by the traffic officer and he agreed to a blood sample being taken. The certificate from the Government Analyst showed a blood alcohol proportion of 246 milligrams of alcohol per hundred millilitres of blood.

The appellant gave evidence and said that he had attended a function in the Wellington area and at about 12.30 a.m. he had left in his car, accompanied by three other people, two men and a woman. The woman had said he was not to drive and that she would drive. He said that the two men were dropped off at some address and he did not recollect anything thereafter until getting out of the car when people were milling around at the scene just off the Fitzherbert bridge. He could not recall who was driving but said he did not think that he was. His evidence then as to the events after he got out of the car was, however, rather better. He was vague as to the people who were milling about, he was uncertain as to who spoke to him, and he did not know whether it was a traffic officer or not who spoke to him when at the scene of the accident; but, and it is not without significance, his recollection appeared to be fairly clear in other respects. For example, one of the witnesses had said that she had seen a fish-hook in one of his trouser legs and she had attempted to remove it but she did not remember which leg it was. The appellant remembered that it

was his left leg. He did not remember running away as the traffic officer had said, but he did remember that he left the scene in order to ring up someone to recover his motor car.

Before the district court judge various submissions were put forward which he rejected. He said at the end of his judgment:

> "The defendant was knowingly in flight from justice. I do not believe that the law is so narrow as to require me to hold that any of his rights have been compromised or diminished by the possibly incomplete manner in which the statutory procedures have been carried out. I hold that there has been reasonable compliance with those procedures and that accordingly, pursuant to Section 38E of the Act, it is no defence to those charges that any of the provisions of Sections 58A, 58B or 58C have either not been strictly complied with, or not complied with at all."

Before this Court six specific grounds of appeal were raised. Counsel made full submissions in respect of each ground and so I set them all out below.

1. That the learned district court judge erred in fact and in law in determining that the appellant had heard the traffic officer's requests;
2. That the learned district court judge erred in fact and in law in finding that the defendant had been lawfully arrested;
3. That the learned district court judge erred in fact and in law in determining that the traffic officer had acquired a right under section 58A(3) Transport Act 1962;

4. That the learned district court judge erred in fact and in law in finding that there had been reasonable compliance by the traffic officer of the statutory procedures;

5. That the arrest was unlawful and therefore there were no grounds for obtaining a blood specimen;

6. That there was no evidence that the traffic officer was in uniform nor did he produce a warrant, and accordingly subsequent procedures adopted by him were invalid.

This last ground was not raised before the district court judge. In my view it can be dealt with readily; so I deal with it first. The appellant in cross-examination admitted that he spoke to the traffic officer not only when the police had apprehended him and he was sitting in the police car but also at the police station and said that once they were inside the police station he looked like a traffic officer and he recognised him as a traffic officer. It is clear that there was no challenge to his being a traffic officer in cross-examination and no question would appear to have been raised during the hearing as to his being a traffic officer at the roadside. In those circumstances, in my view, though the prosecution did not give any direct evidence that the traffic officer was a traffic officer and that he was in uniform,or otherwise establish that he was a traffic officer, nevertheless it puts this case within the category referred to by Woodhouse J in the Court of Appeal in Transport Ministry v Quirke [1977] 2 NZLR 497 at 505.

Accordingly I reject that ground and turn to consider the other grounds. It is, I think, more convenient to deal with those grounds as they relate to the two charges on which convictions were entered and which are the subject of the appeal rather than considering them individually, though I shall cover all of them in the course of this judgment. I propose first to consider the grounds in relation to the charge of failing to accompany a traffic officer when required to do so.

Section 58A(5)(b) makes it an offence to fail or refuse to accompany an enforcement officer when required to do so pursuant to the section. Mr Whitehead accepted that the traffic officer had good cause to suspect that the appellant came within the categories specified in sub-section (1) paragraphs (a) or (c) and so was entitled, pursuant to the section, to require him to undergo a breath screening test; but he made two submissions to the effect that there was not thereafter compliance with the section and therefore no offence was committed. First he submitted that there was no evidence that the appellant had heard the traffic officer's request to undergo a breath screening test and so he could not be guilty of refusing to accompany the traffic officer when required by him to do so. Failure or refusal to accompany a traffic officer only becomes an offence if the person requested has first failed or refused to undergo a breath screening test. In effect his submission was that if the appellant did not hear the request to undergo the breath screening test then he did not commit an offence in refusing to accompany the traffic officer when requested to do so; and I should add

Mr Whitehead's submission included a submission that in any event there was no evidence that the appellant heard or understood the second request to accompany the traffic officer. Mr Whitehead supported his submission by referring to various passages in the evidence which he suggested showed that the appellant was in a state of shock and was dazed, and accordingly the learned district judge could not properly draw the inferences that he did, which were that the appellant had heard the requests and ignored them. This issue is really a matter of fact and the learned district court judge found that the appellant had heard the traffic officer but deliberately continued in his flight. In my view there was sufficient evidence for him so to find.

Mr Whitehead's second submission on this charge was that, even if the appellant did hear the traffic officer's request to undergo a breath screening test and to accompany the traffic officer, nevertheless the statutory requirements relating to the form of those requests were not satisfied, and therefore no offence was committed. It is necessary to set out the relevant part of the section to follow the submission:

> "Section 58A(3) If
>
> (a) ...
>
> (b) a person, having been required by an enforcement officer pursuant to this section to forthwith undergo a breath screening test, fails or refuses to do so; or
>
> (c) ...
>
> the enforcement officer may require the person to accompany him to any place where it is likely that the person can undergo either an evidential breath test or a blood test,

or both."

Mr Whitehead's submission was that in the terms of that subsection the traffic officer had to use words when requiring the appellant to accompany him which included reference to, at least, the purpose for which he was required to accompany him. His submission was that this followed from the language of the subsection and that it was clear that this was the view of the Court of Appeal as expressed in the case of the Auckland City Council v Fulton [1979] 1 NZLR at 683. He referred in particular to the last part of the judgment of Cooke J.

In that case the evidence had established that there were at the time no devices by which a person could undergo an evidential breath test in New Zealand and the Court of Appeal was principally concerned with the question of whether or not in those circumstances a traffic officer could validly require a person to accompany him to any place where it was likely that the person could undergo an evidential breath test. The Court held that a traffic officer in those circumstances could not, since it was known that no devices were available, but in the course of the judgments, and there were three separate judgments delivered, the question of what a traffic officer had to say when requiring a person to accompany him was mentioned. Cooke J at p 687 said that the officer must at least require the person to accompany him to a place where it was likely that the person could undergo an evidential breath test and he went on to say that that was an essential condition precedent to any further procedure. At the same

time, he added, the officer might require the person to accompany him also (if necessary) to a place where it is likely that a blood test could be taken, which could be a different place from that where the evidential breath test might be taken. Alternatively, the officer might adopt the simpler course of "referring initially to an evidential breath test only", leaving any question of a blood test, and any requirement in that regard, until later. A little later in the judgment, at p 688, when dealing with the question of section 58E relating to reasonable compliance, he said that perhaps a failure by an officer to use altogether correct words when conveying a requirement to accompany might fall within the saving provision contained in section 58E. The question, however, did not need to be decided in that case and Cooke J went on to say "it would depend upon the particular facts".

In these circumstances I accept the submission that refusing or failing to comply with a traffic officer's requirement to a person that he accompany him constitutes an offence under s 58A(3) only if the requirement includes a reference to the fact that it is for the purpose of undergoing an evidential breath test. I do not for a moment think it is necessary that the enforcement officer has to use the precise wording of the section and say that he requires the person to accompany him to a place where it is likely that the person can undergo an evidential breath test. Somers J expressed the view in Auckland City Council v Fulton (supra) that the question of the likelihood of the person being able to undergo an evidential breath test at the place to which he is being taken is a

subjective matter for the enforcement officer, but I do not think it is necessary for the enforcement officer to say that he believes that it is likely that the person will be able to undergo an evidential breath test. In my view, in the light of the judgment in Auckland City Council v Fulton (supra), it would be sufficient for the enforcement officer to tell the person that he required him to accompany him, the traffic officer, for the purpose of undergoing an evidential breath test or to use words that made the requirement to accompany and the general purpose of the requirement clear to that person.

The learned district judge referred in his judgment to the fact that the request was not made in the accepted manner, but then he applied the reasonable compliance provision in s 58E. Unfortunately, it appears to me that that section has no application to this charge, which was laid under s 58A. Section 58E may be invoked in respect of charges under s 58 and s 58C, but this charge was not laid under either of those sections and accordingly cannot be invoked here. I have therefore considered carefully the evidence given and, while I am satisfied that the traffic officer lawfully required the appellant to undergo a breath screening test and that the appellant then refused to undergo it, I am not satisfied that the traffic officer then required the appellant to accompany him to a place where he could undergo an evidential breath test. The record shows that when asked directly what he had said he replied that he had required the appellant to accompany him for the purpose of an evidential breath test, blood test, or both, but that he had not actually used those

words, saying only, "I require you to accompany me because I believe you have been drinking". I do not think that it can be said of those words that he required the appellant to accompany him for the purpose of undergoing an evidential breath test. The appeal on this charge is accordingly allowed.

I turn now to consider the charge of driving with an excess blood alcohol level. As I understood Mr Whitehead's submissions, he did not dispute that if the evidence given was admissible then there was sufficient to justify the conviction. His argument was that the certificate from the Government Analyst was only admissible if every step in the procedure prescribed by the Act had been properly carried out, and here, he submitted, it had not. There were two matters, he contended, where the statutory requirements had not been observed and in result there had been no lawful arrest of the appellant; and accordingly there had been no right to require him to permit a blood specimen to be taken and hence no admissible evidence as to the proportion of alcohol in his blood. If these submissions are sound then unless the "reasonable compliance" provision should be invoked the certificate by the Government Analyst would not be admissible and the appeal should be allowed.

The two matters relied upon by Mr Whitehead were:

(1) that the request to accompany the traffic officer did not comply with the statutory requirements and accordingly there was no offence committed and so no justification for making an arrest;

(2) that the arrest itself was not effectively made and accordingly there was no justification for requiring the appellant to undergo an evidential breath test and, when he refused to do that, for requiring him to permit the taking of a blood specimen.

As to the first of these two matters, it might be thought that, since I have just allowed the appeal in respect of the charge that arose out of it, it should succeed. That, however, does not necessarily follow, because on this charge s 58E may apply, whereas it had no application to the other charge, as I have already mentioned. The learned district court judge in fact applied s 58E and in my view he was justified in so doing. In my view in the circumstances that existed what the traffic officer said was reasonable compliance with the statutory provisions. He had told the appellant he required him to undergo a breath screening test and the appellant had plainly refused to do so; he had told him that he required him to accompany him because he believed him to have been drinking and the appellant ignored that and tried to make good his escape; and he told him he was under arrest. In the circumstances of the appellant running away and the traffic officer in hot pursuit I do not think precision of language should be expected, and what the traffic officer said was reasonable compliance with the statutory provisions. As Cooke J said in the extract from Auckland City Council v Fulton (supra) to which I referred earlier, it all depends upon the particular facts. In my view the appellant suffered no injury to his rights, nor was he deprived of any safeguards that the statute gave him. He was, as Judge Watts said, in

flight from justice and he knew it.

As to the second matter, it is necessary to set out the relevant statutory provisions to follow the argument:

"s 58A

(4) Where any person -

(a) Has, pursuant to a requirement under this section, accompanied an enforcement officer to any place; or

(b) Has been arrested under any of paragraphs (a) to (c) of subsection (5) of this section and taken to or detained at any place

an enforcement officer may require him to undergo forthwith at that place an evidential breath test (whether or not he has already undergone a breath screening test).

s 58B

(1) If -

(a) A person, having been required by an enforcement officer pursuant to s 58A of this Act to undergo forthwith an evidential breath test, fails or refuses to do so; or

(b) ...

(c) ...

(d) ...

an enforcement officer may require the person to permit a registered medical practitioner to take a blood specimen from him, and that person shall permit a registered medical practitioner to take a blood specimen from him forthwith after being requested to so permit by the registered medical practitioner."

It will be thus seen that before a person can be validly required to permit a blood specimen to be taken under s 58B(1) he must first have either accompanied an enforcement officer pursuant to a requirement under s 58A

or been arrested under s 58A. Mr Whitehead submitted that no arrest of the appellant was effected in the circumstances. Mr Williams, on the other hand, accepted that the judge made no actual finding as to the arrest by the traffic officer and that if he was holding, as might be argued from his further remarks, that the appellant was in any event subsequently arrested by the police this was not supported by the evidence; but he submitted that the matter was not important, as the appellant clearly came within either s 58A(4)(a) or (b), which are set out above. I do not accept that submission, because, while it is clear that the appellant ended up at the police station, it does not follow that he was there in terms of either s 58A(4)(a) or (b). If he was not arrested and taken there, can it be said he was there because he had accompanied an enforcement officer there pursuant to a requirement under the section? Mr Williams suggested so long as he had accompanied the traffic officer to the police station, whether willingly or unwillingly, he came within subsection (4)(a). I do not think that is so. To come within it he must have accompanied the traffic officer "pursuant to a requirement under this section". He was, after all, charged with refusing to do just that.

Was the appellant arrested by the traffic officer?

The question of what constitutes an arrest was not explored at length, though Mr Whitehead submitted that for there to be an arrest the arresting officer must clearly indicate that the person being arrested is under arrest and the reason for it, and must also actually seize or touch the person. Macarthur J in Police v Thomson [1969] NZLR 513

reviewed the law on the matter. It would appear that there must be either

(a) a physical seizure or touching of the person with a view to his detention; and, though a mere touching will suffice, the intent to arrest must also be made clear to the person being arrested by words or otherwise; or

(b) the utterance of words of arrest coupled with submission or acquiescence on the part of the person being arrested.

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The evidence here makes clear that the traffic officer did not manage to seize or touch the appellant, who would appear to have been either fleeter of foot or else to have had too long a start, as he managed to disappear amongst the trees in the Esplanade while still being pursued. On the face of it, then, one might say that obviously the alleged arrest could not come into the second category, because the appellant plainly did not submit or acquiesce in his arrest at the time. However, I do not think that the acquiescence or submission must follow immediately upon the uttering of the words of arrest. A person may be told that he is under arrest and, immediately and instinctively, decamp before the arresting officer is able to lay hands upon him, but he may thereafter reflect upon the wisdom of his action and return and submit to the arrest. In this case the appellant, very shortly after disappearing amongst the trees, was found by the police and shortly after that, while he was sitting in the police car, was spoken to by the traffic officer. The traffic officer asked him if he knew that he was under arrest and

the reason for it and the appellant said that he did. The appellant's own evidence on the point seems somewhat confused, but in my view the traffic officer's evidence as to what was said is sufficient to establish that the appellant was arrested. In my view the arrest was made by the traffic officer informing the appellant of his arrest and the appellant's subsequent acceptance of that position. In the particular circumstances it does not seem to me necessary that there had to be any detailed reason given by the traffic officer for the arrest.

It follows that the appeal on this charge fails and accordingly is dismissed. The final result, then, is that the conviction for careless use, which was not appealed against, stands; likewise the fine of $50 on that charge. The conviction on the excess blood alcohol charge also stands and the penalty of a fine of $250 and disqualification for 18 months stands. The conviction for failing to accompany a traffic officer is quashed and the fine upon that conviction likewise.

Solicitors for the appellant: Jacobs, Florentine & Partners (Palmerston North)

Solicitors for the respondent: Cooper, Rapley & Co. (Palmerston North)