IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.604/83

NZLR

No Special Consideration

364

BETWEEN JAMES EDWARDS

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 28th June, 1983.

Counsel: F. P. Hogan for Appellant.
Miss Sim for Respondent.

Judgment: 4th July 1983

JUDGMENT OF WALLACE, J.

This is an appeal against conviction on a charge of driving with excess blood alcohol in terms of Section 58(1)(b) of the Transport Act, 1962.

In brief outline the relevant facts are that the Appellant was stopped by an enforcement officer in Panama Road, Auckland, on the 6th August, 1982. The officer, having good cause to suspect an offence, subsequently initiated the breath and blood test procedures available to him under the relevant sections of the Transport Act. In the course of his evidence the officer said that he carried out a breath screening test and obtained a result which entitled him to proceed on to the next stage. The officer then stated:-

> " The defendant was informed of the result of the test and asked to accompany to a place for the purpose of undergoing an evidential and/or a blood, the taking of a blood sample at, namely, the Motorways Office situated in Tacoma Street, Ellerslie. "

The traffic officer further stated:-

" At approximately 22.56 p.m. an evidential breath test was agreed to and administered again in accordance with the Transport (Breath Tests) Notice 1978. which I had a copy with me at the time of the administration."

Based on the above passages in the evidence, Mr. Hogan raised two grounds of appeal, his submissions being, in essence, the same as were made to the learned District Court Judge and rejected by him in a carefully considered reserved decision.

The two contentions raised by Mr. Hogan were:

(1) In relation to the first passage in the officer's evidence, that the requirement to accompany did not make the purpose clear, i.e. that it was not clear the Appellant was required to go to a place where it was likely he could undergo either an evidential breath test or a blood test, or both.

(2) In relation to the second passage in the officer's evidence, that the words "administered" or "administration" cover only part of the steps set out in the Transport (Breath Tests) Notice, 1978, clause 7 of which requires that evidential breath tests shall be "carried out" in a particular manner. Mr. Hogan submitted that "carried out" connotes something different from "administered" and that simply to say the test was administered in accordance with the Notice was not sufficient.

(1) In elaboration of his first contention Mr. Hogan submitted that merely to refer to "an evidential" without the addition of the words "breath test" was meaningless and constituted a total failure to require the appellant to accompany the officer. In support of that submission Mr. Hogan pointed out that the term "evidential breath test" is defined in the Act, as is the term "blood test". Mr. Hogan further

submitted that in the circumstances it was not open to the Respondent to rely on the reasonable compliance provisions contained in Section 58E of the Act. In that regard, he referred in particular to three decisions, the first being Auckland City Council v. Fulton (1979) 1 N.Z.L.R. 683. Mr. Hogan placed particular reliance on this decision as establishing that Section 58E can have no application "where there has been no compliance and no attempt at compliance with . . . . a fundamental feature of the statutory scheme . . . .": per Richardson, J. at p. 690. Mr. Hogan also relied on the decision in Gray v. Davies (M.202/78, Hamilton Registry, 17.10.78) in which case a request was made to accompany "for the purpose of a breath test", when in fact the officer's only power was to require the person to accompany him so that a specimen of blood might be taken. Ongley, J. took the view that it would be unreasonable, having regard to the consequences of non-compliance, to require a person to accompany an enforcement officer or constable to any place without informing him of the purpose of the journey, and added that it goes without saying that if a person is to be informed of the purpose he must be informed correctly. In those circumstances he declined to apply the then Section 58(2) of the Act, which was the predecessor to the present Section 58E.

The final decision upon which Mr. Hogan relied was Eden v. Ministry of Transport (M.115/81, Palmerston North Registry, 25.2.82) in which Savage, J. applied the reasonable compliance provisions of Section 58E in circumstances where the traffic officer called to a defendant who was running away "I require you to accompany me because I believe you have been drinking". Those words plainly did not comply with the wording in the Act. Savage, J., however, held that it was sufficient if the traffic officer used words "that made the requirement to accompany and the general purpose of the requirement clear", and

found that in the circumstances there had been reasonable compliance. Mr. Hogan contended that the decision in Eden supported his submissions on the ground that the general purpose of the requirement was not, in the present case, made clear to the Appellant.

In answer to Mr. Hogan's submissions, Miss Sim, for the Respondent, conceded that the words used by the officer did not constitute a complete requirement to accompany, but submitted that in all the circumstances it was appropriate to apply the reasonable compliance provisions of Section 58E of the Act. In support of that submission Miss Sim referred to most of the authorities which deal with Section 58E of the Act.

When considering the correct approach to the difficult question of the interpretation of Section 58E of the Act, helpful guidance is obtained from the decisions of the Court of Appeal in Coltman v. Ministry of Transport (1979) 1 N.Z.L.R. 330, and Soutar v. Ministry of Transport (1981) 1 N.Z.L.R. 545 (although I appreciate that the facts in both cases were quite different from the present facts). Once it has been established that a provision has not been strictly complied with, or not complied with at all, the Court should consider whether there has been a degree of compliance that is reasonable in all the circumstances: Soutar at 549. In considering the matter it is important to ask two questions. Is the non-compliance such as to cause a reasonable doubt about the correctness of the result? Is there a risk that the non or partial compliance may give rise to a risk of injustice and unfairness? (Soutar at 550).

In the present case the traffic officer, on the evidence as it is recorded, undoubtedly failed to make a complete requirement to accompany in terms of Section 58A. I do not, however, consider that the requirement was meaningless or that

no purpose was indicated. Indeed, it seems clear from the evidence that the Appellant appreciated that he was being required to accompany the officer for the purpose of further tests, and co-operated in that course. The true position seems to me to be that the requirement was imperfectly expressed and that this is a case where a provision of Section 58A has not been strictly complied with, rather than a case where a provision has not been complied with at all.

Be that as it may, Section 58E is, in its terms, able to be applied in either circumstance, provided there has been reasonable compliance with Section 58A.

Applying the criteria established in the Fulton, Coltman and Soutar decisions, I am of the view that there was a degree of compliance which was reasonable in all the circumstances. On the facts I do not consider that there was a total failure to comply with a fundamental requirement of the Act. Moreover, some indication of purpose was given and I do not consider that the case can be equated with one where no purpose was indicated, or the purpose wrongly stated. I would on that ground distinguish the decision in Gray v. Davies. In so doing I appreciate that Ongley, J. declined to apply Section 58(2), which was the predecessor to Section 58E. In the present case, however, I do not think what was said was in fact seriously misleading, and it also needs to be remembered that the old Section 58(2) did not contain the words "or have not been complied with at all", i.e. it was not open to Ongley, J. to apply Section 58(2) if there had been a complete failure to comply with a provision. It appears to me that the present case can properly be regarded as coming within the principle enunciated by Savage, J. in Eden. Although the facts of that case were very different, it is clear that the officer made no reference whatsoever to the evidential breath test, but merely required the defendant to accompany him "because I believe you have been drinking". In my view, the

present case falls within the type of factual situation envisaged by Cooke, J. in Fulton when he stated "perhaps a failure by an officer to use altogether correct words when conveying a requirement to accompany might fall within the saving section (58E) in some cases . . . . In any event it would depend on the particular facts".

In all the circumstances I consider that there was reasonable compliance with Section 58A. All the evidence indicates that the Appellant was given a proper breath screening test, followed by a proper evidential breath test (subject to Mr. Hogan's second point which I will shortly consider), and then a proper blood test. There was no challenge to any aspect of the tests or cross-examination, and there is no indication of any unfairness or injustice to the Appellant. I therefore conclude that there has been a degree of compliance with Section 58A, reasonable in all the circumstances.

Mr. Hogan submitted that there was unfairness to the Appellant in that Section 58E does not apply to Section 58A(5), with the result that, had the Appellant refused to co-operate and been charged with an offence under Section 58A(5), he would have been unable to be convicted because the traffic officer had failed to make a proper requirement under Section 58A(3), and Section 58E could not be applied to remedy the situation. He submitted, therefore, that if Section 58E is applied on the present charge, the Appellant is placed in a worse position by co-operating than if he had refused to do so. That may be so (although the defendant might, as in the Eden case, have consented to undergo an evidential breath test or a blood test after being arrested), but I do not see that that creates an unfairness to the Appellant. Clearly a person should not be liable to arrest without warrant under Section 58A(5) unless the requirement has been made perfectly clear, but that

should not preclude a conviction under Section 58(1)(b) where there have been proper tests carried out and there is no indication of any likely injustice. This in fact was the result which Savage, J. reached in the Eden case.

I therefore consider that the first ground advanced by Mr. Hogan cannot succeed. Before parting with this ground I should mention that Mr. Hogan also relied, though only as a subsidiary matter, on the fact that the officer, when making the requirement, had referred to a blood sample rather than a blood test. In the first place I am of the view that the use of the term "blood sample" is in fact a substantial compliance with the requirement. I consider an ordinary person would readily appreciate that he was being required to give a sample which would in some way be tested. However, if I am wrong in that view, it would seem clearly to be a situation where the provisions of Section 58E should apply.

(2) Mr. Hogan's second submission was that the use by the officer of the word "administered" in relation to the manner of carrying out the evidential breath test was not apt to encompass the various steps envisaged by the words "carried out" in clause 7 of the Transport (Breath Tests) Notice, 1978. Mr. Hogan submitted that the word "administered" really only covered the procedure required by step 4 of clause 7, and was not apt to cover the zero and standardisation tests required by the earlier steps. In support of that submission Mr. Hogan referred to the various dictionary definitions of "administered" and "carried out", and also referred to the decision in Brown v. Ministry of Transport (Christchurch Registry, 15.3.82, Casey, J.).

In that case an appeal against conviction succeeded because the officer confined his evidence to a statement that he assembled the Alcotest R.80 device and instructed the defendant to blow through it. Casey, J. held that this evidence without more

did not permit the conclusion that the test was carried out in accordance with the Notice.

In the present case, however, the evidence establishes that the officer said that the test was administered in accordance with the Transport (Breath Tests) Notice which he had with him at the time of administration. The officer repeated this later in his evidence when he said that, having a copy of the Notice with him at the Motorways Office, "I went through the procedure with him and had him read it as I went through it". I am satisfied that unless that evidence was challenged (which it was not) and greater elaboration required, it was sufficient to establish a prima facie case which the Court was entitled to accept.

As far as the use of the word "administered" is concerned, I would accept that it can have a narrower meaning than "carried out" and can be said to be more appropriate to describe the actions required by Step 4 of clause 7 than the actions required by Steps 1 to 3. However, when the officer's evidence is viewed in context, and in the light of the reference to the Transport (Breath Tests) Notice 1978, I do not think there can be any reasonable doubt that in using the word "administered" the officer was referring to all the steps required by the Notice. Giving full weight to the need for precision in prosecutions of this nature, it would in my view be an over-refinement to place a limited meaning on the word "administered" in the circumstances in which it was used in the present instance.

I therefore consider that the Appellant's second ground of appeal also fails. The appeal must accordingly be dismissed. The Respondent is entitled to costs, which I fix at the figure of $50.00.

J. Walker J.

Solicitors:
Price, Voulk, Brabant & Hogan, Papatoetoe, for Appellant.
Crown Solicitor, Auckland, for Respondent.