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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

1546

BETWEEN JOHN ROBERT McGREVEY
Appellant

AND AUCKLAND CITY COUNCIL
Respondent

Hearing : 16 November 1984

Counsel : M. Harte for Appellant
Mr Gresson for Respondent

Judgment : 16 November 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal against conviction and sentence. On 29 June 1984, in the District Court at Auckland, the appellant was convicted on a charge of failing to permit a blood specimen to be taken when required by a traffic officer under S.58B(1) of the Transport Act 1962.

The appellant was sentenced to 4 months' Periodic Detention and disqualified from obtaining a licence for 12 months.

The facts of this case have some superficial resemblance to those in the case of Hall with which I have just dealt. However, in my view, the resemblance is very superficial. In the present case, the appellant did not give evidence, nor was there any suggestion, as there was in Hall's case, that he was suffering from any disability which made the blowing into the evidential breath testing device difficult or impossible.

The learned District Court Judge, in his oral judgment, stated the correct tests. He accepted the evidence of the traffic officer, whom he found to have been familiar with the

procedures, to have had a good memory, and to have given his evidence fairly accurately and reliably. He accepted the evidence of the traffic officer that the appellant blew through the tube of the evidential breath testing device with insufficient force which was barely audible. When asked to blow again and increase his force, the appellant did the same thing. When asked again to increase his blowing force, he made no attempt to do so. After the third attempt, the traffic officer treated the breath test attempt as having failed. The learned District Court Judge considered that the appellant "was not trying". He considered also that the appellant's demeanour showed a sustained effort to co-operate as little as possible.

In my view, the District Court Judge quite rightly distinguished Hall's case, a decision of Judge Gilbert, and said that it was a particular one on its facts, as I have indeed found it to be. The District Court Judge found that, in the circumstances, the appellant had failed to blow into the evidential breath testing device; when he later refused to give an answer to a request to permit a registered medical practitioner to take a blood sample, that failure to give an answer was rightly construed as a refusal.

Apparently, after that refusal, the appellant may have later asked again for a blood test; however, in my view and that of the District Court Judge, that was too late. The District Court Judge distinguished the case from one where there was genuine proof of apprehension of the medical procedures. There was not here any apprehension of medical procedures expressed, nor was there any physical difficulty about blowing. There was, in the District Court Judge's view, a failure to co-operate.

In my opinion, the District Court Judge was quite entitled, on the evidence, to come to that view. As discussed in the previous case of Hall, the case of Fleetwood v. Ministry of Transport, (1972) NZLR 798, shows a duty on the part of the suspect to co-operate reasonably throughout. It is not enough to give a mere scintilla of a blow into the device as was the effect of the District Court Judge's finding. There must be an effort to do so as was done in Hall's case.

In my view, there is absolutely no possibility of holding that the District Court Judge was wrong in this particular case; therefore, the conviction must be upheld and the appeal against conviction disallowed.

I have had more difficulty,however, with the question of penalty. This appellant had a previous conviction for refusing to give a blood specimen in early 1980. The offence was committed in December 1979. Accordingly, it was an offence within 5 years; under the present legislation, no limited licence can be issued to such a defendant at all.

Mr Harte submitted to the District Court Judge circumstances which, in my view, called for some consideration by the learned District Court Judge. The appellant is a self-employed baker, aged 39. He runs a small bakery, making biscuits and smallgoods which he supplies to coffee bars and the like around the Auckland area. He has recently been promoting this business which has started to build up.

If he is unable to obtain a limited licence, he will be financially at a grave disadvantage because he will have to employ someone to carry on this vital promotion and delivery work for his small business. He was in a position to pay a fine. Mr Harte submits that, with the very heavy consequences for this man of the inability to obtain a limited licence for a period of 12 months, a sentence of Periodic Detention is, in the particular circumstances of this offender, inappropriate. For a man working 7 days a week, he will have to work very hard for one day a week at the Periodic Detention Centre and also give up his baking that day.

I agree with Mr Harte that Periodic Detention for a second offence of this nature within 5 years is not an unusual sentence and one could not say it is manifestly excessive. Rather, in my view, it was appropriate for this particular appellant because of his personal circumstances and because of the way in which the other consequences of his conviction will constitute a very grave hardship for him.

Accordingly, in the unusual circumstances of this case, I quash the Periodic Detention and substitute a fine of $750. The period of 12 months' disqualification must stand. I wish it to be emphasised that I am not saying that Periodic Detention is not a usual and generally suitable penalty for a second offender of this nature. I just think that, in all the circumstances of this man, it would be an excessive penalty when combined with 12 months' disqualification which precludes him from driving in the course of his one-man business.

The appeal against sentence is therefore allowed to the extent indicated.

R. D. Barker J.

SOLICITORS:

Crown Solicitor, Auckland, for Respondent.