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(23) N.Z.L.R. +

IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

M. No. 44/84

1490

BETWEEN McDONALD

Appellant

A N D POLICE

Respondent

Hearing: 14 November 1984 (at Wellington)

Counsel: D.S.G. Deacon for Appellant
C.H. Toogood for Respondent

Judgment: 28 November 1984

JUDGMENT OF QUILLIAM J

This is an appeal against conviction on a charge of refusing to permit a specimen of blood to be taken.

The facts do not appear to have been in serious dispute and for present purposes are in a fairly narrow compass. At about 11.40 p.m. on 29 June 1984 Police Sergeant Knox was in a Police car when he saw a car which had only one red rear light burning and that light was flickering on and off. He followed the car until it stopped in a car park. The evidence does not indicate how far away the Police car stopped, but it is implicit in all that occurred that it must have been close to the appellant's car. The Sergeant got out in order to speak to the driver, who was the appellant. The appellant almost fell out of his car and then fell back across the front seat. The Sergeant asked him to turn his lights on again, which the appellant did. The Sergeant then found that the tail light was working after all. He observed signs that the appellant had been drinking and asked him if that was so. The appellant acknowledged that he had "had a bit".

There is no dispute over the fact that the Sergeant had good cause to suspect an offence under the Transport Act.

He then asked the appellant to accompany him to the Police car and to remain there as he required the appellant to undergo a breath screening test. The Sergeant, in his evidence, expressed that in different ways, but the effect of it seems to be clear enough. The way he recorded it in his notebook shortly after was, "I require you to undergo a breath screening test and to remain at the car until you have done so." The appellant went with the Sergeant to the front of the Police car. The breath testing device was then taken from the Police car by one of its other occupants and handed to the Sergeant who had remained in the front of the car with the appellant. The Sergeant then started to assemble the device. As he was doing so the appellant started to walk away and so the Sergeant said, "I require you to remain here until you have undergone the test." The appellant continued to walk away so the Sergeant followed him and said, "I take your actions as a refusal." The appellant still did not acknowledge the Sergeant and so he was requested to accompany the Sergeant to the Masterton Police Station for the purpose of an evidential breath test, a blood test, or both. The appellant still took no notice so he was arrested. There is no dispute concerning the procedures then followed so I need make no reference to them beyond saying that the appellant refused, when requested to do so, to permit a specimen of blood to be taken.

Upon the basis of these facts three charges were preferred against the appellant. The first was that, having undergone a breath screening test, he failed to remain at the place where he underwent the test until the result of the test was ascertained. The second was that he failed to accompany an enforcement officer to the Police Station when required to do so. And the third was that, having been required to permit a specimen of blood to be taken, he failed to do so. The first two informations were dismissed and there seems no doubt that they were inappropriate and ought not to have been laid. It was part of the appellant's case that the ineptitude of the Sergeant and the lack of knowledge of the Transport Act shown by him made it unsafe for the conviction to stand, but that was not pursued and I am satisfied it was irrelevant.

Two questions now arise in respect of the third information upon which a conviction was entered. The first concerns whether the Sergeant had any authority to require the appellant to remain, and, if he did not, whether that was a defect in the chain of procedure of such a nature as to mean that nothing which followed was valid. The second is whether the fact that the Sergeant had a breath testing device which was not one of those approved for the purpose renders the conviction bad. I deal with these separately.

The Requirement to Remain

The submission was that the Sergeant, in requiring the appellant to remain, purported to exercise a power not given to him by the statute with the result that everything which followed was unlawful and could not form the basis of a conviction. On behalf of the appellant reliance was placed on a decision of mine in Connolly v Ministry of Transport (unreported, Auckland, 17 June 1983, No. M.270/83). In that case the Traffic Sergeant went to the appellant's home to interview him after an accident had occurred. The appellant admitted his identity but denied any knowledge of the accident. The Traffic Sergeant considered he had good cause to suspect and required the appellant to undergo a breath screening test. He asked the appellant to go out to the patrol car and there was a discussion as to what would happen if he refused. The appellant then went voluntarily. It was necessary in that case for me to make a finding as to the circumstances in which the appellant went to the patrol car and I concluded that he had done so because he may well have believed that if he did not he would be liable to arrest. This was because of the remarks made to him by the Traffic Sergeant. I expressed the view that if the appellant was given the impression that he must, on pain of arrest if he refused, leave his home and go to the patrol car then he went under a misapprehension as to what the law required of him. Having regard to the finding I had made I considered it unsafe to allow the conviction to stand.

It was argued in the present case that a situation very similar to that in Connolly's case existed and that the Sergeant had purported to make a demand on the appellant which he had no power to make. I do not consider that any proper analogy can be drawn between the two cases.

In the first place, unlike Connolly the appellant was not influenced in what he did by the remark of the Sergeant. Indeed, he did just the opposite and evidently felt free to ignore what had been said to him. It was that very fact which led to his being arrested. Secondly, although not expressed in a manner contemplated by the statute, all the Sergeant was doing was requiring that the appellant "undergo forthwith a breath screening test" (s 58A (1)). It is implicit in such a requirement that the driver remain where he is for long enough to complete the test. There is no other manner in which he can comply with the requirement. He is to do so "on the spot and without delay"; (Smith v Police [1970] NZLR 494 at p 498). If the Sergeant had said to the appellant, "I require you to undergo a breath screening test and your obligation is to complete that test on the spot and without delay" then there could be no objection raised to that form of words. What the Sergeant said was to just that effect. If, of course, he had threatened arrest in the event of the appellant not remaining to take the test then he would have stepped outside his jurisdiction because he is first obliged to require the driver to accompany him to a place where he can undergo an evidential breath test or a blood test, or both (s 58A (3)). But the Sergeant made no such threat. When the appellant started to walk away the Sergeant said, "I require you to remain here until you have undergone the test." This was no more than a repetition of the requirement to take the test. I can see no basis upon which it should be said that the words used by the Sergeant were in excess of his jurisdiction so as to invalidate what followed.

A further argument was advanced that the requirement by the Sergeant was in the form of a double request and so objectionable. It was said that this argument was supported by the decision of Eichelbaum J in Meaclem v Police

(unreported, Palmerston North, 18 May 1984, No. M.116/83), but that was a different kind of case and readily distinguishable. In any event the view I have expressed as to the effect of the words used provides an answer to the submission.

The Device

The second ground of appeal related to the fact that in his evidence the Sergeant said, "The device I used was a Draegar Normalair R80A, that is the approved device under the Transport Act." The Transport (Breath Tests) Notice 1978 specifies three devices which are approved as breath screening devices. They are -

> Draegar Normalair Alcotest R80;
> Draegar Safety Alcotest R80;
> Alcotest R80A.

The device referred to by the Sergeant is none of these. It may well be that what he said was simply a slip but it must be assumed that he may have meant exactly what he said. On that basis it was submitted that the requirement that the appellant undergo the test was not validly made because it was a requirement to undergo a test with a device for which no authority had been given. It was submitted further that this defect was not cured by the fact that the appellant never took the test at all.

In support of the submission I was referred to a decision of Speight J in Montgomery v Ministry of Transport (unreported, Auckland, 26 June 1978, No. M.504/78). That is a brief oral judgment and does not refer to the charge but it seems implicit in the observations of Speight J that an actual breath test was undergone. On this basis it is easy to understand why he reached the conclusion he did, that there was no evidence that a proper device had been used. The present case, however, is different. No device at all was proffered to the appellant because he walked away before one was assembled.

Further reliance was placed on the decision of the Court of Appeal in Ministry of Transport v Heron [1980]

1 NZLR 582. That was a case in which a person was required to undergo a breath test and handed a device which turned out to be defective so that the driver was unable to inflate it. The question in the case concerned whether this amounted to a failure or refusal to comply with the request. As to whether there had been a valid request Richmond P, delivering the principal judgment, said at pp 583-584:

> " Mr Orchard has submitted that there can be no effective request for the purposes of s 58A (1) unless and until the request is accompanied by a tendering to the suspect of an approved device in working order. I cannot accept that submission. In my view a request is effective as a request even if made without any tendering to the suspect of a breath-testing device. I reserve the question as to what the position might be in a situation where the request did involve the tendering of a device which was either not of an approved kind or not in working order. "

It was argued that the point reserved by Richmond P was the point which arises now. I do not think it is because here no device of any kind was tendered to the appellant. That stage was never reached. As Richmond P has observed, a request is effective as a request even without the tendering of a device. That is precisely the situation in this case. The request was made and it was not complied with. I conclude that the question of whether the Sergeant was in the process of assembling an approved or unapproved device does not arise.

I agree with the conclusion reached by the District Judge. I think I should add that, even if both he and I are wrong in this, then I should have thought this was clearly a case in which the provisions of s 58E would apply as there was reasonable compliance with s 58A. This is particularly so in view of the fact that it seems plain the appellant had no intention of complying with a request for a breath test regardless of what device may have been tendered.

The appeal against conviction is accordingly dismissed.

<u>Solicitors</u>: Deacon & Tannahill, WELLINGTON, for Appellant
Crown Solicitor, WELLINGTON, for Respondent