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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.No.347/84

684

BETWEEN McCAFFERTY

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 18 June, 1984.

Counsel: R.J. Johnson for Appellant
Miss Linda Shine for Respondent

Judgment: 18 June, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

The appellant, Douglas McCafferty, appeals to this Court in respect of the conviction imposed upon him in the District Court, North Shore, on 16 February, 1984 for an offence in terms of s.58(1)(b) of the Transport Act 1962, that is to say of driving with an excess blood alcohol level. The essential facts of the matter can be stated fairly briefly. The appellant was asked by the enforcement officer to undergo a breath screening test and as a result of this indicating that further steps were warranted the appellant was asked to accompany the officer to the Takapuna Police Station where he was required to undergo the evidential breath test. The result of this, according to the officer's evidence, was that the level revealed was 450 micrograms of alcohol per litre of breath. Accordingly, the officer decided to exercise the discretion open to him in terms of s.58B(1)(b) of the Act and to require the appellant to

permit a registered medical practitioner to take a specimen of blood. This the appellant agreed to and it was on the basis of the result of the blood test so carried out that the prosecution was brought.

The sole ground advanced for the appeal is that the blood specimen which was obtained, as I have mentioned, should not have been permitted to be the basis for a conviction because it should have been regarded as having been obtained under duress and the evidence of it rejected accordingly.

The situation as revealed by the evidence and the recorded judgment of the Judge in the District Court is this: The traffic officer in giving evidence referred to what he had said to the appellant with regard to the result of the evidential breath test and to his having informed the appellant of the requirement made of him that he submit to the taking of a blood specimen and in relation to this he described how the appellant was given the form which referred to the consequences of a refusal to permit a blood specimen to be taken in the circumstances mentioned. He admitted that it was possible that when the fact of the reading being at the level of 450 was mentioned the appellant may have got up to leave considering that the situation was that the test was not positive and that this was the end of the matter. It was, however, further put to the traffic officer that he had at this stage said to the appellant that if he did not give a blood specimen he could be put in gaol for the night. The

traffic officer admitted that he had told the appellant that the breath test was not really conclusive but he denied quite definitely that he said anything about the appellant going to gaol for the night.

The situation so far as the appellant himself was concerned is that he in his evidence said that when the traffic officer made the comment concerning the giving of the blood sample, he also said that he "had the right to throw me in gaol for the night" if the sample was not given and he said that he considered that in these circumstances he did not have much choice and that for this reason he signed the form and gave the blood specimen. He said in his evidence he did so because "he didn't fancy spending the night in gaol".

The position so far as the findings of fact of the Judge is concerned is this: he does indeed, as Mr Johnson submitted, seems to have accepted that the appellant may have thought that he was free to leave the police station following the initial breath test being less than the figure of 500. He also appears from his statements in the judgment to have accepted that the appellant may have genuinely concluded that he could be put in gaol for the night if he did not agree to the taking of the blood specimen. The conclusion expressed by the Judge was that the appellant may very well have misunderstood the wording of the form which made reference to the statutory consequences of a refusal to supply a specimen of blood in the circumstances here referred, these consequences, of course, including the possibility of the imposition of

a term of imprisonment.

The appellant relies upon a number of unreported decisions in which evidence as to the results of a blood alcohol test taken in pursuance of the statutory provisions here under consideration was rejected on the grounds that the suspect had been subjected to duress or unfair treatment. The decisions referred to are: Fifield v. Ministry of Transport, M.421/81 Auckland Registry, judgment 29 July, 1981; Arthur v. Ministry of Transport, M.608/83 Auckland Registry, judgment 7 July, 1983 and Dixon v. Auckland City Council, M.39/84 Auckland Registry, judgment 23 May, 1984. It is made clear by what is said in these decisions that they all proceed upon the underlying basis of what was said by Mahon, J. in an earlier decision, Stowers v. Auckland City Council delivered on 21 December, 1977. Thus, in the first case mentioned, Fifield's case, Moller, J. quotes the following passage from the judgment of Mahon, J. in the earlier case:

> "In New Zealand, however, as in the United Kingdom, the courts have taken the position that the statutory requirement of self-incrimination, no matter how justified on social grounds, must carry with it a corresponding requirement that the authorised mode of extracting the incriminating evidence is to be strictly performed."

In Fifield's case the factual situation upon which the judgment proceeded is that the traffic officer made an unsolicited statement to the appellant that in addition to being arrested he would be "taken to the Takapuna cells for the night".

In the later case of Arthur the Judge proceeded upon the basis that the evidence clearly showed that there was

a possibility of the appellant in that case having had mentioned to him that a night in the cells might follow if he did not furnish the specimen.

Likewise, in the third case, Dixon, it was accepted that there had been a statement made by the enforcement officer that if the appellant did not submit to the test he would be then and there arrested. In the course of his judgment, Prichard, J. said:

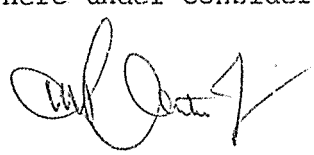
> "A blatant threat that if the suspect does not submit he will be arrested bears comparison with the action of a police officer who tells a person being interviewed in the course of investigating a criminal offence that if he makes a statement admitting the offence he will be released on bail: but that if not, he will be held in custody."

It is clear in my view that the facts of those cases go far beyond the present case. The Judge here in the course of his judgment makes it quite clear, as Mr Johnson agreed, that he, the Judge, accepted that the enforcement officer did not make any statement to the appellant about his being kept in gaol. In other words, he accepted the traffic officer's evidence on this question in preference to that of the appellant.

In my view, it would be going far beyond the ambit and the principles applied in the cases referred to to hold that on the facts of this present case there could be said to be any element of oppression or unfairness so far as what occurred while the appellant was at the police station and immediately prior to the blood specimen being taken. The

authorities mentioned and indeed, of course, the authorities generally in relation to these particular provisions, make it clear that it is proper and indeed necessary that the suspect should be afforded a clear understanding of the consequences of refusing to furnish a specimen for the purposes of a blood test. There cannot, therefore, be said to be any oppression or unfairness insofar as the appellant here being given the form making mention of such matters. It would not be surprising, of course, if in some cases and indeed in many of these cases, persons asked to undergo a blood test are in something of a confusion as to what their position is and they may very easily form ideas, as it seems to be accepted that this appellant did, that they might face some imprisonment of some kind forthwith if the specimen is not furnished. There is no indication on the facts as found by the Judge, however, that any coercion was exercised in this way against him in any respect by the traffic officer or that any such impressions that the appellant formed in his mind were attributable even to any particular actions of the traffic officer.

Accordingly, in my view, the authorities referred to have no application to the case here under consideration and the appeal is dismissed.



SOLICITORS:

Stevenson & Young, Browns Bay, for Appellant.
Meredith Connell Gray & Co. Auckland, for Respondent.