



before the Court as to the case shows that the enforcement officer determined that the test was positive at 2.58a.m. and he so advised the respondent at that time of the result but a time of three minutes elapsed before the respondent was advised of his right in terms of the section referred to to request that a blood sample be taken for analysis.

Section 58(4) (a) is in the following terms:

"Notwithstanding any other provision of any Act or rule of law, the result of a positive evidential breath test shall not be admissible in evidence in proceedings for an offence against subsection (1) (a) of this section if -

- (a) The person who underwent the test is not advised by an enforcement officer, forthwith after the result of the test is ascertained, that the test was positive and that, if he does not request a blood test within 10 minutes, the test could of itself be sufficient evidence to lead to his conviction for an offence against this Act:

'Provided that this paragraph shall not apply if the person who underwent the test fails or refuses to remain at the place where he underwent the test until he can be advised of the result of the test;'

On the hearing of this appeal Mr Kain, I should mention, sought to argue that the decision to dismiss the charge was sustainable upon a further ground additional to that which is the subject of the specific question posed in the case for the decision of the Court. His submission was that the evidence of the officer did not go so far as to cover the second requirement of the provision quoted above, that is to say that the suspect must be advised of the fact that the breath test itself can be sufficient evidence to lead to a conviction if no request is made for a blood test within the prescribed period. Mr Kain

submitted that pursuant to the view taken in the various cases that this Court should, on appeals by way of case stated, endeavour to deal with all issues that appear to be open notwithstanding that they are not made the subject of specific question, I should deal with this aspect of the matter also.

I say at once that in my view the particular point is not open to the respondent on the evidence as presented by the record which is, of course, before me in addition to the case stated. I note from that, that the officer specifically referred to having explained to the respondent the contents of the Ministry of Transport form to which he referred and the rights which he had in terms of the Legislation. I cannot, particularly in the absence of any cross-examination on the point, simply infer from that evidence that there was no specific reference to the particular point to which Mr Kain thus referred this morning.

As to the matter which is dealt with in the case stated, the question framed as follows:

"The question for this Honourable Court is whether my decision that the advice to the Defendant that he was entitled to provide a specimen of his blood for analysis 3 minutes after being advised of a positive evidential breath test was not so closely related in time as to constitute 'forthwith' in terms of Section 58(4)(a) of the Transport Act 1962."

In my view, the answer to this question must clearly be that the fact of there being a lapse of three minutes in the way referred to is not sufficient for it to be concluded that the requirement of the section as to the advice which must be given

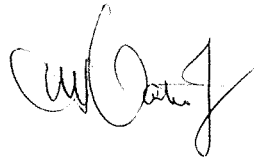
forthwith was not complied with. In my view the inclusion of the word "forthwith" in the subsection does not carry with it the result that the advice referred to must be given on the instant after the result of the test has been ascertained. The phraseology employed in the section in my view is to be interpreted as meaning that the advice required to be given to the person who has undergone the test is to be given to him as soon as practicable after the result of the test has been ascertained. In considering whether or not that has been done regard must be had to the circumstances. In the situation with which this particular section is concerned there could well be circumstances which would make it quite impracticable for the advice to be given the very instant after the result of the test had been ascertained. The suspect, for example, while the officer is taking the reading may well have dozed off to sleep and efforts may have to be made to awaken him in order that he can be given the advice. It would be absurd in my view to conclude that because there was a delay for a few minutes while that was being done the result is the advice must be said not to have been given forthwith.

The view to which I have referred is, I am aware, supported by a number of authorities which are not available to me in Whangarei for the purposes of this oral decision but there is in addition, of course, the recent decision of the Court of Appeal in Lawrence v. Ministry of Transport (1982) 1 NZLR 219 where the Court gave consideration to whether in the particular circumstances of that case the advice had been given forthwith and in the judgment of the Court it is said at p.221:

"The purpose of the statutory period of 10 minutes and the use of the word 'forthwith' is to enable a suspect to have adequate time without undue pressure within which to make up his mind about a blood test. Provided that period is allowed to run and is closely related in time to the result of the test, as happened here, then the purpose of s.58(4) has been discharged."

In that case there was shown to have been a delay of two minutes between the ascertaining of the result of the test and the advice to the suspect that that result was positive and the subsequent advice required by s.58(4)(a).

The question in the case stated is answered accordingly and the matter is remitted to the District Court for the matter to be further heard and determined in accordance with the evidence when this has been concluded, taking into account the answer thus given.

A handwritten signature in cursive script, appearing to read 'C. J. Gray', is written in black ink.

SOLICITORS:

Marsden Wood Inskip & Smith Whangarei, for Appellant.  
Webb Ross & Co. Whangarei, for Respondent.