4/7/84

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1552/83

NZLR 710

BETWEEN NISBETT

Appellant

AND OTAHUHU BOROUGH COUNCIL

Respondent

Hearing: 6th December, 1983

Counsel: Mohamed for Appellant
Rolfe for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This Appellant was convicted in the District Court at Otahuhu on 7th September last on an excess breath/alcohol charge and also on a charge of failing to accompany an enforcement officer.

A number of grounds have been put forward and well argued on behalf of the Appellant, and in respect of one I can well understand the feelings of the Appellant and his counsel because there is in regard to this particular ground a criticism of the fact that when asked to accompany the traffic officer for the purposes of an evidential breath test the Appellant was not informed why he was being so required to go.

But in my view, when one has a look at the Statute, the enforcement officer is not bound to tell the suspect why he is required to accompany him and that may be for a number of reasons. Firstly, if the suspect is informed he may decide that his freedom is in jeopardy and depart the

scene in any event; it may result in violence or it may be just purely an oversight on the part of the Legislature. I do not know what the reason is so therefore I must approach the legislation in the terms in which it now appears.

S.58A by s-s.(3), if a breath test has been performed and is positive, empowers the enforcement officer to require the suspect to accompany him to any place where it is likely that the person can undergo either an evidential breath test or blood test or both. In this case the evidence disclosed that the Appellant was required to go with the officer to the Otahuhu Police Station for the purpose of undergoing either an evidential breath test or blood test or both and the Appellant was warned that if he failed to go he may be arrested. In fact at that point in time the Defendant did attempt to walk off and he was followed by the traffic officer who once again informed him that if he failed to accompany him as requested he was likely to be arrested; when the Appellant continued to attempt to depart the scene he was then arrested. That was precisely the power which the enforcement officer has by reason of s-s.(5).

Thus in this particular case, although the Appellant was not told that the result of the roadside test was positive, there was no requirement in law on the enforcement officer to so inform the Appellant. When the test proves positive a situation arises where the enforcement officer is then empowered to require the suspect to accompany and if he does not accompany then if the enforcement officer chooses so to do he may arrest him.

In respect of that ground of appeal which is common to both appeals that must fail.

The second ground of appeal comes out of a piece of evidence during cross-examination of the traffic officer as to the carrying out of the evidential breath test. After steps 1 and 2 had been carried out the traffic officer gave evidence that he depressed the set button, then waited approximately three minutes. He then depressed the read button and noted the resulting digital reading which was 0000. He then states that he commenced the evidential breath test. When questioned as to why he waited for three minutes between steps 2 and 3 the officer replied so that any vapour that had gone into the machine had cleared.

Mr Mohamed's submission in respect of this particular aspect of the test is twofold: first he says, and quite correctly, that there is no evidence that after having waited for the three minutes the read button was depressed for approximately 10 seconds as is referred to in step 3 in the Notice. That reads:

> "The enforcement officer shall depress the set button and shall then depress the read button for approximately ten seconds and note the resulting digital reading which must be 0000 before the evidential test step 4 may proceed."

Thus the purpose of depressing the read button is to ensure that four 0000 numbers appear and only when that occurs may the test proceed.

I accept entirely the submission made by Mr Mohamed that here the officer when questioned did not state the period for which it was depressed, but part of the evidence

which came in in this hearing was the evidential breath test form which came in as Exhibit 1 and I am entitled to look at all the evidence which was before the Court and the answer to this particular step has been ticked. After step 14 or item 14 where the temperature is recorded at 28°, item 15 reads as follows:

> "Press read out button reading 0000 for not less than ten seconds"

and it is ticked.

A further point was made in relation to waiting for three minutes to allow the vapour to clear and Mr Mohamed says that if the machine was functioning properly there would have been no necessity to wait that length of time. There is no requirement as to how long an officer must wait between steps 2 and 3 and unless there is something in the Notice which would prohibit a person waiting for as long as is stated in this particular Notice, and in the evidence, I would not be inclined to take much cognisance of it.

This present case can be distinguished from Coodwin's case, a decision of Greig, J. M.281/80 of Hamilton Registry given on 17th February, 1981 in that there one of the steps criticised was a depression of the read button for two minutes, which His Honour held was non compliance with the Breath Test Notice. We are not in the same position in this case. We do not know precisely how many seconds from oral evidence, but tying the oral evidence in with the form I am of the view that there has been compliance and if there has not been then that the reasonable compliance provisions of the statute ought to be applied in this particular case.

With regard to the other two matters raised, the first was that the evidential breath test form in fact had marked on it as Item 6 a reference to the container containing standard alcohol vapour supplied by the D.S.I.R. Mr Mohamed says that there could be some question arising as a result of that appearing on the form as to whether or not the correct vapour was introduced and that by referring to the form the officer may be supplying something that may be a vacuum in his memory. I think it is more likely to be the opposite; that when taking that particular step the officer has got the container in his hands and sees that it complies with the requirement that is on the form and I do not think that in the circumstances one can take more out of it than that. That ground also falls.

Finally there was a complaint that the District Court Judge erred in holding that the evidence as to identity of the evidential breath testing device was sufficient. In evidence-in-chief the officer gave positive evidence that "the device used was an Alcosensor II, a device approved by the Minister by notice in the Gazette, and the device was tested and used in accordance with the Transport (Breath Tests) Notice 1978." Under cross-examination at page 5 reference was made to the device and then the officer was asked if he knew that the particular one had been approved by the Minister and he replied "to the best of my knowledge, yes." Then appears the following:

> "That device itself, the one that you used? Yes it was of a type approved by the Minister.
>
> Will you tell His Honour whether that particular device had been approved? A device of that type is approved by the Minister."

In other words the officer was answering the questions which he was asked. Had he been asked how can you say that that particular device had been approved by the Minister it would then have put the officer on enquiry in relation to his knowledge as to whether or not this was an Alcosensor II or not and he would have had to have given evidence as to how it then came within the approved type. But on the evidence as presented it seems to me that there was no ground for complaint there. So that on the question of conviction I must hold that all the grounds of appeal fall and the conviction must be upheld.

The period of disqualification is one which causes some concern. The Appellant has recently embarked on a new business which I am informed, and which I accept, will cause him considerable hardship if he is not able to drive as he is unable to obtain a limited licence because this is the second such conviction within five years. In fact it is his third in all for a similar type of offence. But when enacting the statute the Legislature has been somewhat deliberate in providing that a person cannot, in a situation such as the Appellant now finds himself, obtain a limited licence for work purposes. The answer to that simply must be that the view is that a person who consumes alcohol and then drives a car does so with all the risks attendant upon it.

Having regard to the record of the Appellant and the discretion which was reposed in the District Court I have to decide whether the discretion was wrongfully exercised or on a wrong legal principle. I regret to say that I cannot find that that is so and in consequence I am not prepared

to vary the disqualification at all. The appeal therefore must be dismissed.

The appeals having been dismissed, the Respondent is entitled to costs, but the two appeals ran together so that on the first appeal, M.1552/83, costs of $80 and any disbursements will be allowed to the Respondent.

P. D. Wilson J.

SOLICITORS:

Mabin & Mohamed, Panmure for Appellant
Alderton, Kingston & Co., Auckland for Respondent