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NZLR

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.156/84

899

BETWEEN TUHUA

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 16 July 1984

Counsel: F.P. Hogan for Appellant
C.Q.M. Almao for Respondent

Judgment: 30 JUL 1984

JUDGMENT OF GALLEN J.

The appellant appeals against conviction on a charge of failing to permit a specimen of blood to be taken when he had been required to do so by an enforcement officer.

A traffic officer indicated that on 3 March 1984 he observed the vehicle of the appellant with an obscured rear registration plate and no white light to illuminate it. Before he was able to stop the vehicle, it pulled into a parking space and on the traffic officer's observation he became concerned as to whether or not the appellant may have been affected by alcohol. He required a specimen of breath for the purpose of a breath screening test in accordance with the Transport (Breath Tests) Notice 1978, using an approved device. The

evidence is that this was carried out and the result of the test was to indicate a level of alcohol in excess of 400 microgrammes of alcohol per litre of breath. The traffic officer, having informed the appellant of the result, then required him to accompany him to a place for either an evidential breath test or blood test, or both. For this purpose they went to the Ministry of Transport office in Hamilton. The traffic officer then prepared an approved evidential breath test device, the Alcosensor II and required the appellant to supply him with a specimen of his breath for the purposes of the evidential breath test. He stated that he made this request on two occasions - the appellant responding that he was not going to give an evidential breath test as he knew his rights and wanted a blood test. The traffic officer was cross-examined in detail, including a step-by-step cross-examination in respect of the breath screening test. He was then cross-examined, after other matters had been dealt with, in the following terms:-

"Q. How was Step 1 of the evidential breath testing device procedure carried out?

A. The first zero test, I depressed the "Set" button, then depressed the "Read" button for approximately ten seconds and observed the result digital read-out which was four zeros.

Q. How was Step 2 carried out?

A. I depressed the "Set" button and introduced into the device, alcohol vapour from a container marked "Breath Test Standard Alcohol Vapour supplied by the Department of Scientific and Industrial Research". Whilst the alcohol vapour was being introduced into the device, I depressed

the "Read" button and observed the maximum digital reading which was 0350. This reading was less than 0400 as marked on the container containing the alcohol vapour.

Q. How was Step 3 carried out?

A. I depressed the "Set" button, then depressed the "Read" button and observed the result digital read-out of four zeros.

Q. Is it your evidence, Traffic Officer, that you submitted this device to Mr Tuhua and requested of him that he blow through the device?

A. I didn't submit the device. I held the device in my hand and then put the requirement on him.

Q. In your evidence in chief in answer to a question put by the Prosecutor, you stated you prepared the evidential breath test and that you completed the first zero test and standardisation test and a second zero test. Is that all that you did in carrying out the evidential breath test procedure before requiring of the defendant that he blow through it?

A. I attached a mouth piece to the device.

Q. Going over the evidence that you have given as evidence in chief and cross-examination as to the carrying out of the evidential breath test, are there any matters upon reflection which you have left out or that you are not happy with?

A. I can't recall anything.

Q. You said that you made two requests of Mr Tuhua to blow through the evidential breath test device, what response did you get from him after the first request was made by you?

A. He said he wasn't going to undergo an evidential breath testing test."

Mr Hogan, for the appellant, in a carefully developed argument, pointed out that before an enforcement officer could validly request a person to permit a blood specimen to be taken, one of the pre-requisites contained in s.58B (1) must be

satisfied. In this case, the only one which would be applicable is s.58B (1) (a). Mr Hogan says that unless the appellant can properly be described as a person having been required by an enforcement officer pursuant to s.58 of the Act, to undergo forthwith an evidential breath test, who has failed or refused to do so, then there was no basis for requiring a blood test. He contends that the evidence does not establish that the enforcement officer had prepared the Alcosensor II device in accordance with the Transport (Breath Tests) Notice 1978 and that as a consequence there could be no failure or refusal to undergo an evidential breath test because what was requested of the suspect was not an evidential breath test as prescribed.

The basis for this submission was a contention that the officer had failed to comply with the provisions of the Transport (Breath Tests) Notice 1978, para.7 (a), Step 4, in that there was no evidence he had depressed the "Set" button before requiring the appellant to take the test. Effectively, he says that if a person is sufficiently knowledgeable to be aware of the steps and their sequence - and observes that these have not been taken - he is entitled to rely upon the failure of the traffic officer to justify a refusal. In this case, there is no positive evidence that the traffic officer did not depress the "Set" button. He simply failed to refer to this in his evidence although given the opportunity to do so, perhaps somewhat obliquely, in

cross-examination.

Mr Hogan relies upon cases such as Tirikatene v. Ministry of Transport (1980) 1 N.Z.L.R. 658, which held that the omission of any reference to depressing the "Set" button was significant and that the choice of the enforcement officer to refer to the steps in detail, rather than some global reference, required him to specify the steps as set out in the Notice.

Tirikatene's case was one where the appellant had been convicted under the provisions of s.58 (1) (a) and the decision is therefore one of those that relate to the chain of steps that must be complied with before an evidentiary breath test offence can be established, although I note that the decision in Tirikatene's case may need reconsideration as a result of the decision of the Court of Appeal in Soutar v. Ministry of Transport (1981) 1 N.Z.L.R. 545.

For the purposes of this appeal, I accept that the depressing of the "Set" button at the commencement of Step 4, is an essential ingredient of the procedure contemplated by the legislation.

In this case, the facts as found by the learned District Court Judge establish that the appellant was properly required by an enforcement officer pursuant to s.58 of the Transport Act 1962, to undergo forthwith an evidential breath test. The power to require an evidential breath test, is

dealt with in the provisions of s.58A in the following terms:-

> "(4) Where any person -
>
> (a) Has, pursuant to a requirement under this section, accompanied an enforcement officer to any place; or
>
> (b) Has been arrested under any of paragraphs (a) to (c) of subsection (5) of this section and taken to or detained at any place -
>
> an enforcement officer may require him to undergo forthwith at that place an evidential breath test (whether or not he has already undergone a breath screening test)."

There is no indication contained in the sub-section that the officer is required to prepare the device before imposing the requirement and the provisions of s.58B (d) lead to the inference that this is not necessary. If, therefore, the officer had said to the appellant before preparing the device in accordance with the notice that he required him to undergo the evidential breath test and the appellant had then refused, in my view an offence would have been committed under the provisions of s.58B (1) (a). If that is so, then I do not see that it makes any logical difference that the enforcement officer had taken some or all of the steps to prepare the device. This was substantially the view of the learned District Court Judge.

Some reliance was placed by the respondent on the decision of the Court of Appeal already referred to, that is

Soutar v. Ministry of Transport. In that case, it was held that the failure to depress the "Set" button at the start of the procedures was a significant omission, but that it could be cured by applying the provisions of s.58E of the Transport Act 1962 substantially on the basis that the evidence clearly established no aberrant evidential breath test result could have occurred. The evidence accepted was to the effect that the device had returned to a "zero" reading before the test had been administered. The purpose of depressing the "Set" button was to ensure that the device would not provide an aberrant evidential breath test result, but the fact that the device was clear and in working order was shown by the return to the "zero" reading and it was therefore held proper to apply the provisions of s.58E to cure the omission to depress the "Set" button which occurred in that case. S.58E applies to offences alleged under the provisions of s.58C.

In this case, the traffic officer gave evidence that after going through the steps provided in the notice, the device had returned to the "zero" reading. Mr Hogan sought to distinguish the Soutar case on the basis that it dealt with a situation where the "Set" button had to be depressed at the commencement of the steps, not just at Step 4 and that its significance related to arguments current at the time as to whether or not the device would remain in working order if it was stored with the "Set" button in the depressed condition.

Whether this is so or not, the general basis of the Soutar decision is clearly that the procedures are designed to safeguard a person who is required to submit to the device by ensuring that it is in working order. The Court was prepared to assume this from the parallel evidence that the machine was clearly reading correctly. The evidence in this case, establishes a similar result. The officer indicated that it had complied satisfactorily with the standardisation test and that it had returned to a "zero" reading following that test.

On the basis of Soutar's case therefore and in the absence of any evidentiary material which might suggest that the machine was not in working order, if there was any omission, I consider it can be cured by the application of the provisions of s.58E. I am fortified in this view by the consideration that if this prosecution had been one based on the provisions of s.58 (1) (a), the provisions of s.58E could properly be applied and an omission to refer to the depressing of the "Set" button at the commencement of Step 4, would not be fatal. If that is so, it would be quite illogical to conclude that a refusal at an earlier stage was justified and that no conviction could result.

In a genuine case of doubt as to the efficacy of the device, then obviously the decision of Soutar would not apply and in such a case a person might be able to refuse with impunity, but that is not the case here. There is no evidence to suggest that the device was not in a fit state to provde a

proper result. Indeed, the only evidence is to the contrary.

Mr Hogan referred to a number of other authorities but all of these need to be considered in the light of the decision in Soutar's case. It is therefore my view that the appellant was not entitled to refuse to undergo the evidential breath test and was required to permit a blood specimen to be taken.

The appeal will accordingly be dismissed. There will be no order for costs.

Solicitors for Appellant: Messrs Price, Voulk, Brabant and Hogan, Manukau City

Solicitor for Respondent: Crown Solicitor, Hamilton