M.364/84

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN LEONARD HUGH McBRIDE

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 1 August 1984

Counsel: J. P. Clapham for Appellant
K. G. Stone for Respondent

Judgment: 1 August 1984

ORAL JUDGMENT OF EICHELBAUM J

The appellant was convicted on a charge that having been requested by a registered medical practitioner to permit a specimen of blood to be taken he refused.

The appellant had been stopped in Lower Hutt at night and had returned a positive result to a breath screening test. He was requested to accompany the traffic officer to Apex House where an evidential breath test failed to give a positive result. The reading was however in excess of 300 thus entitling the traffic officer to require a blood specimen. The traffic officer deposed that he read the entire portion of Part 1 of the blood specimen form to the defendant which of course advises the defendant that he is required to permit a doctor to take a specimen of venous blood for analysis in accordance with normal medical procedures and enquires whether the defendant consents. The traffic officer said that the defendant's initial reaction

was that he did not wish to have a blood sample taken, that he just wanted to plead guilty. The traffic officer said that he explained to the defendant that that was not possible and that he required a blood specimen from him. He said that he read the penalty out to him and outlined the consequences if he refused the specimen. He said that the defendant then agreed, but would not sign the form.

In the presence of the traffic officer the doctor who had been called then, so the traffic officer said, requested a blood sample using words to the effect of "do you consent to me taking a blood test". The traffic officer said that the defendant refused, stating that he just wanted to plead guilty and that he did not like needles. In the ensuing discussion the defendant was adamant that he did not wish a blood sample to be taken. In cross-examination the traffic officer elaborated on what took place at that point. He said that there was a further conversation, as he put it, more or less again describing to the defendant what would happen if a blood sample was not taken and he said that he kept giving Mr McBride every opportunity to change his mind and have the sample taken. The doctor himself had little or no recollection of events, but by refreshing his memory from notes was able to say that he filled in a portion of the blood specimen form, but the appellant did not give consent to having the sample taken. The doctor could not recall exactly how he had phrased the question. On this evidence there is no room for doubt regarding the appellant's refusal.

The nub of the appeal relates to whether the prosecution proved beyond reasonable doubt that in terms of the statute the appellant was requested by the doctor to give a blood specimen. Section 58B(1) demands that the driver must twice be asked for a sample before an

offence under s 58C can be constituted. In describing the legislative requirement I have used the neutral word ask, but in fact in the first instance the traffic officer must require the driver to permit a sample to be taken and then there must be a request by the doctor to which the driver is to accede by permitting the sample to be taken. It is non-compliance with the second request with which the appellant was charged, and which is now in issue. In relation to the preceding step, the requirement by the traffic officer himself, the meaning of the word require in such a context was discussed by Beattie J in Chesham v Wright 1970 NZLR 247, 250. The authorities and dictionary meanings there discussed made reference to an order or demanding from a person,something laid down as imperative. Other unreported cases under the blood alcohol legislation have referred to the fact that it is essential that it is made known to the subject that the traffic officer is imposing a requirement upon him. The driver must know what was involved. The essential features of the requirement must be made clear to the person concerned by the traffic officer,as Richardson J said in Ministry of Transport v Murdoch C.A. 138/77.

Returning to the present case it is I think significant that no attack has been made upon the requirement by the traffic officer himself. That is understandable for there is abundant evidence on which the District Court Judge could find that the officer had made a requirement for a blood test within the sense of the authorities; that the traffic officer explained the consequences fully to the driver and that the request was made in terms that brought it home to the appellant what it was that was being demanded of him, in other words that the essential features had been clear to the defendant. The Judge further accepted the traffic officer's evidence that he heard the doctor

request a blood sample from the appellant. I do not think that there is any significance in the fact that against this background the doctor may not have used any stronger word than consent. Even had there been any deficiency in that language, and I am far from saying that there was, it must have been plain to the appellant that the doctor was now requesting him to allow to be taken from him the blood specimen regarding which the traffic officer had explained the position to him at length. The Judge said he was satisfied that the only reason the defendant having initially indicated he would consent then refused was that he took it on himself so to elect. The Judge found that the defendant had been fairly and fully informed of the consequences. In my view the evidence fully justified those findings.

In the circumstances the Judge in my respectful view was correct in finding the charge proved and accordingly I dismiss the appeal.

Solicitors :

Clapham Gaskin & Allan (Lower Hutt) for Appellant
Crown Solicitor (Wellington) for Respondent