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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1761/83

453

BETWEEN M ALLEN

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing : 23rd March 1984

Counsel : M. Harte for Appellant
Mrs Shaw for Respondent

Judgment : 6 April 1984

JUDGMENT OF BARKER J.

This is an appeal against the conviction of the appellant in the District Court at North Shore on 17th December 1983 on a charge of driving with excess breath alcohol.

Mr Harte raised one point on appeal. Section 58(4) of the Transport Act 1962 requires the traffic officer to advise the subject of the contents of paragraph (a) of that subsection "forthwith". In the present case, there was no direct evidence given by the traffic officer of time either of the performance of the evidential breath test or of the advice to the suspect in terms of the said paragraph (a).

The traffic officer stated in evidence-in-chief that the evidential breath test was conducted in strict accordance

with the Transport (Breath Tests) Notice 1978. The results of the test were recorded; the appellant was informed "of the result". The officer filled out a standard Ministry form; he read it out to the appellant from beginning to end. He then gave him the form to read for himself; the appellant read the document; he endorsed on it that he did not require a blood specimen to be taken.

The traffic officer produced this document in evidence; it was of course admissible to show the appellant's signature. After producing the document, the traffic officer stated again that he conducted the test in accordance with the Notice. He gave no direct evidence of the time when he conducted the test or of the time when he informed the appellant of his right to a blood test. The form recorded that the evidential breath test was taken at 19.46 hours, that the time the appellant was informed of his right of election was 19.51 hours and that his election not to seek a blood specimen was made at 20.02 hours.

The District Court Judge noted that the traffic officer did not spell out the timing of this step, but that he relied on the document. The learned Judge considered the document as evidence, not merely of the fact that the appellant had refused the option of having a blood specimen taken, but also of the timing of the actual breath test and of the advice to the suspect. The District Court Judge considered that there was a necessary inference that these activities took place at the times mentioned in the form. He noted that there was no challenge in cross-examination. He noted that the form was not the "best" evidence

but it was the only evidence and it was proper for him to act on it because it had not been challenged.

Mr Harte submitted that there was an important omission in the evidence of an essential step in the process, and that the form was inadmissible in the absence of direct evidence from the traffic officer that the appellant was duly informed of his right to demand a blood specimen.

Mrs Shaw in reply referred me to R v. Naidanovici, (1962) N.Z.L.R. 334. The Court of Appeal held that, in circumstances where a witness has no present recollection of the event which he recorded in writing at the time that it happened, the written record is admissible as evidence.

In Douglas v. Police (26th July 1983, Auckland Registry, M.629/83) Prichard, J., in a breath alcohol appeal, considered R v. Naidanovici; he held that it was obvious that a traffic officer who has carried out numerous evidential breath tests will not, when he comes to give evidence of a particular test have a current recollection of each step. On that basis, he was prepared to admit a record of a check-list prepared at the time by the traffic officer, which showed that the various steps had been performed, but only insofar as the record was co-extensive with the evidence of the witness.

The officer did not state in evidence that he had no present recollection of administering the test; it could be imposing an impossible burden on traffic officers if they were

required to remember the minutiae of the breath alcohol procedure every time without some resort to forms filled in at the time.

The officer clearly stated that he read the form to the appellant "from beginning to end". Included in the form is the following information:

> "You are advised that the Evidential Breath Test you have just undergone records a level of 0850 micrograms of alcohol per litre of breath. This means that the test is positive. You may request that a specimen of blood be taken from you for the purposes of analysis for alcohol content.
>
> YOU MUST MAKE THE REQUEST TO HAVE A BLOOD SPECIMEN TAKEN WITHIN THE NEXT TEN MINUTES. TIME INFORMED OF ELECTION 1951 HRS p.m.
>
> You are advised that if you do not request that a specimen of blood be taken from you, the result of the Evidential Breath Test you have just undergone could, of itself, be sufficient evidence to lead to your conviction for an offence against Section 58(1)A of the Transport Act 1962. Such a conviction renders you liable to 3 months imprisonment or a fine not exceeding $1500 or both, and unless the Court, for special reasons orders otherwise, a minimum disqualification from driving of six months.
>
> If you undergo a blood test the result of that test will become the only evidence admissible in Court, if the level of alcohol exceeds 80 milligrammes per 100 millilitres of blood this is an offence."

If the officer read out that information (and the District Court Judge found that he did), then he informed the appellant sufficiently of his rights.

In my view, however, the officer did not provide a proper basis under the Naidanovici principle for the admission of the document as evidence on the crucial matter of timing. In other words, he did not say that he had no recollection of this

occasion. He referred to but did not seek to produce a "check list". Had he produced this, then no doubt it would have had some reference to the time of the advice of the election to have a blood test. One cannot speculate on its contents. I think Mr Harte is right to submit that this is a fatal omission and that the statement that the breath test was conducted in accordance with the Minister's Notice does not repair the omission.

The District Court Judge was right to say that primary proof involved direct oral evidence. However, if an essential step in the process has not been proved, it is not encumbent on defence counsel to cross-examine on the subject - a move which would probably be counter-productive for him. Accordingly, the District Court Judge should not have acted on secondary evidence in the absence of a Naidanovici foundation for its adission.

The appeal must be allowed and the conviction quashed.

R. I. Barker J.

SOLICITORS:

Snedden, Grace, Hall & Craighead, Auckland, for Appellant.

Crown Solicitor, Auckland, for Respondent.