IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

N.Z.L.R.
SPECIAL
CONSIDERATION

789

M. 108/81

BETWEEN : M BAKER

Appellant

A N D : MINISTRY OF TRANSPORT

Respondent

Hearing : 9th October 1981

Counsel : L.A. Andersen for Appellant
J. McDonald for Respondent

Judgment : 2 NOV 1981

JUDGMENT OF BISSON, J.

The appellant was charged with four offences arising from incidents on the 1980 at Whakatane. He was charged with driving whilst under the influence of alcohol to the extent of being incapable of having proper control of a vehicle, with exceeding the 50km/hr speed limit, with refusing to accompany a traffic officer when required to do so under s.58A(3) of the Transport Act, 1962 and with driving while the proportion of alcohol in his blood exceeded the statutory limit of 80mgs of alcohol per 100 mls of blood. After a defended hearing in the District Court at Whakatane, the learned District Court Judge held that the prosecution case failed in respect of the first charge and it was dismissed at the close of the hearing on the 27th January, 1981.

In a reserved decision the learned District Court Judge held that the charge of exceeding the speed limit was clearly proved and the appellant was convicted on that charge. There was considerable dispute about the charges of refusal to accompany the traffic officer and driving with excess alcohol

in the blood and I set out the facts as stated in the reserved decision and which are not in dispute :

> "I accept the traffic officer's evidence that the Defendant showed signs of being affected by alcohol. His breath smelled strongly of liquor, he was unsteady on his feet, when asked about recent consumption of alcohol he admitted drinking a couple of beers. The Traffic Officer considered that he had good cause to suspect an offence of driving with excess alcohol in the breath or blood and at 7.33 p.m. he asked the Defendant to undergo a breath screening test. The Defendant declined. At 7.34 p.m. the officer requested the Defendant to accompany him to a place where he could undergo an evidential breath test or blood test or both. The Officer did not name the place he had in mind for two reasons, first he thought the Act did not require him to name the place and secondly he found the Defendant un-co-operative and wanted to keep his options open so that he could take him to the Police Station instead of the Ministry of Transport office if that seemed best.
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> The Defendant told the Officer to go to hell and made it clear he would not accompany him and intended to go into his house. The Traffic Officer could do as he pleased. The Traffic Officer then told the Defendant that he was under arrest for a refusal to accompany but apparently he did not take hold of the Defendant or touch him in any way. The Defendant then went into his house. The Traffic Officer returned to the patrol car and called the Police Station for assistance. He then waited for the Police to arrive.
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> It is clear that the Defendant had wanted nothing to do with the Traffic Officer at any stage of these proceedings but he did not ask the Officer explicitly to leave his property.
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> Senior Sergeant Guy of the Whakatane Police soon arrived in his private car. It seems that the Defendant had telephoned him. Not long afterwards Sergeant Killen and a Constable arrived in a Police car. Sergeant Killen talked the matter over with Traffic Officer Cooper and came to the conclusion that the Defendant had been arrested by the Traffic Officer and that it was his duty to as a Police Officer to support the Traffic Officer by enforcing the arrest. If necessary he would arrest the Defendant

> himself for obstruction although he would make no arrest himself under the Transport Act.
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> Clearly there was considerable discussion in the house between the Police Officers and the Defendant. At one stage the Traffic Officer was inside as well but he left. The Police Sergeant was asked to leave but apparently continued with his discussions and did not leave until he had persuaded the Defendant to go to the Police Station with him. He had threatened to arrest the Defendant for obstructing the Police in the execution of their duty to enforce the Traffic Officer's arrest.
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> The Traffic Officer went to the Police Station in his patrol car and collected the evidential breath testing device from the Ministry of Transport Office on the way. It appears from the evidence that the Defendant went to the Police Station in the Police car with Sergeant Killen.
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> At the Whakatane Police Station the Traffic Officer asked the Defendant at 8.33 p.m. to undergo an evidential breath test and this was refused. The Defendant then consented to a sample of hi blood being taken and this was carried out at 8.52 p.m. by Dr. Lee using equipment taken from a bag which Traffic Officer Cooper agreed in evidence was labelled in the same way as the plastic bag produced as Exhibit A "Manufactured by Smith-Biolab Limited and supplied on behalf of the Department of Scientific and Industrial Research." The blood sample was sent by Registered mail to the D.S.I.R. at Petone and the analysis showed a proportion of 204 milligrammes of alcohol per one hundred millilitres of blood.
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> Questions asked of the Traffic Officer showed that he probably repeated his requests for the breath screening test and the evidential breath test when the Defendant refused on the first request each time."

Mr. Andersen who appeared for the appellant also appeared for him in the District Court and argued several points of law before the learned District Court Judge. The point taken by Mr. Andersen with regard to the charge of refusing to accompany a traffic officer when required to do so under s.58A(3) was that the traffic officer did not name the place to which he intended to take the appellant. The reasons for

this have already been stated. The learned District Court Judge held that s.58A(3) calls for the naming of the place to which the driver is to be taken. As this was not done and as the reasonable compliance provisions of s.58E do not apply to a charge under s.58A(5) that charge was dismissed. However, the learned District Court Judge elected to apply s.58E and accept the request to accompany as reasonable compliance for the purpose of the charge under s.58(1)(b) of driving with excess alcohol in the blood. I would certainly agree that there had been reasonable compliance under s.58A(3) and refrain from expressing any view on whether the learned District Court Judge was right in holding that the place must be named as that question was not argued before me and is not relevant to this appeal. After dealing with the other submissions raised before him by Mr. Andersen, the learned District Court Judge convicted the appellant on the blood-alcohol charge and it is from that conviction that he has appealed.

Mr. Andersen had submitted in the District Court that the Traffic Officer had not made an arrest of the appellant and he referred to the following passage in Adams Criminal Law and Practice In New Zealand (2nd Edn) para. 2490 which states :

> "There must be either (a) a physical seizure or touching of the person with a view to his detention (a mere touching will suffice, but presumably the intent must be made clear to the arrestee by words or otherwise): or (b) the utterance of words of arrest; coupled with submission or acquiescence on the part of the arrestee. The words, however, must be sufficiently clear to bring it home to the arrestee that he is in custody and not free to go."

The Sergeant had been asked by the appellant to leave the property about two minutes after he arrived so his continued presence was unlawful and he had no power of arrest without warrant on private property (See Allen v. Napier City Council(post.)). The Sergeant said in evidence :

> "I was purely there to assist the Traffic Officer in effecting his arrest."

The Sergeant said that 20 minutes after being asked to leave he threatened the appellant with obstructing him in the execution of his duty and with a forcible arrest. It was only then that the appellant consented to accompany him to the Police Station. Dealing with this evidence and Mr. Andersen's submission the learned District Court Judge said :

> "This is not a case where the Defendant is charged with escaping from lawful custody or with resisting or assaulting a Police Officer in the execution of his duty. It is a case where he was requested to accompany the Traffic Officer for the purpose of an evidential breath test or blood test or both. It was a case where for the purpose of the charge of driving with excess blood alcohol I am prepared to waive strict compliance. The Defendant had a duty to go with the Traffic Officer. He finally went as a result of persuasion by Sergeant Killen and whether one regards his going as a final acquiescence in the Traffic Officer's arrest or simply as a yielding to the Traffic Officer's request that he go into town for the procedures to be carried out to my mind does not matter. The purpose of the legislation was to get him to the next step in the procedures and this is what happened even though misunderstandings of the validity of the arrest may have occurred and the Police Sergeant was apparently asked to leave the house before he finally persuaded the Defendant to come with him. I do not see that arguments about the validity of the arrest go to the heart of this case at all. I stress it would be otherwise on a charge of escaping from custody or even of one of assaulting or resisting the Police Sergeant in the execution of his duty.
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> Counsel referred me to the cases Allen v. Napier City (1978) 1 NZLR 273 and Ministry of Transport and Payn (1977) 2 NZLR 50. These relate to proceedings on private property. I simply say that the officer had reached the stage of making his request to accompany without being ordered from the premises and that the Defendant finally came away from his home and went into town for the balance of the procedures without any further arrest being carried out."

With great respect to the learned District Court Judge I feel he has oversimplified the situation and failed to resolve essential issues. He has not specifically found

whether or not there was an arrest by the Traffic Officer. On the evidence and applying the passage cited from Adams there was not. The Traffic Officer did not make a physical seizure or touch the appellant with a view to his detention. Although words of arrest were uttered the appellant did not either then or later submit to or acquiesce in an arrest by the Traffic Officer. What he did was to accompany the Sergeant of Police under threat of arrest for an offence of a different kind. There was accordingly no arrest of the appellant by the Traffic Officer under s.58A(5). The next question is whether the appellant accompanied the Traffic Officer when required so to do pursuant to s.58A(3). Clearly the prosecution considered the appellant had refused to accompany the Traffic Officer because he was charged with that offence. His defence was not that he had eventually, after persuasion by Sergeant Killen, accompanied the Traffic Officer, but that there had not been a lawful requirement and this defence was upheld by the learned District Court Judge and the charge dismissed. In these circumstances and on the facts as already stated, the appellant did not accompany the Traffic Officer whether or not the requirement was lawful under s.58A(3).

Having made those findings on the evidence, the next question is whether the Traffic Officer was entitled to resume the procedures under s.58A of the Act when he again confronted the Appellant at the Police Station. The situation at the Police Station was this. The appellant had previously refused to undergo a breath screening test and to accompany the Traffic Officer "to a place for an evidential breath test or blood test or both." According to the Traffic Officer the appellant had told him he could go to hell because he was not coming with him. I have already explained how the appellant came to be at the Police Station some time later. At the Police Station the Traffic Officer asked the appellant to give him an evidential breath test and was refused. However, the appellant when requested agreed to the taking of a blood sample. The first question is whether the Traffic Officer was entitled to require an evidential breath test. Section 58A(4) provides :

"(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)."

I have already held that the appellant had not pursuant to a requirement under s.58A accompanied the Traffic Officer to the Police Station and he had not been arrested under s.58A(5) and taken to or detained at the Police Station. Accordingly the Traffic Officer was not entitled to require under s.58A(4) an evidential breath test. I should make it clear that although a Police Sergeant is an "enforcement officer" by virtue of s.57A(1) for the purposes of s.58A(4) and although the appellant had accompanied him to the Police Station the appellant had not done so pursuant to a requirement under s.58A(4) but because of a threat of arrest by the Sergeant for obstructing him in the execution of his duty.

The next question is whether the Appellant could be required to permit a blood specimen to be taken from him. This depends on whether any of the provisions of s.58B(1) apply. Only s.58B(1)(a) is relevant and it reads :

"(a) A person, having been required by an enforcement officer pursuant to section 58A of this Act to undergo forthwith an evidential breath test, fails or refuses to do so;"

However, as the Traffic Officer was not entitled to require an evidential breath test under s.58A the appellant's refusal cannot give rise to a valid requirement for the appellant to permit a medical practitioner to take a blood specimen from him and accordingly the appellant was wrongly convicted on the charge laid under s.58(1)(b) of the Act. The appeal is allowed and the conviction and sentence quashed. It is not necessary for me to consider the final point raised by Mr. Andersen as to the inadequate labelling of the blood

specimen collecting kit.

Although the appellant has been successful the circumstances do not call for an order for costs in his favour.

G.E. Brinsden J.