IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.39/84

BETWEEN DAVID MATTHEW DIXON

Appellant

AND AUCKLAND CITY COUNCIL

Respondent

UNIVERSITY OF OTAGO
9 JUL 1984
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Hearing: 9 March 1984

Counsel: M. Harte for Appellant
R.J. Katz for Respondent

Judgement: 23 May 1984

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JUDGEMENT OF PRICHARD, J.

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On 30 November 1983 the Appellant was convicted in the Auckland District Court of the offence of driving with excess blood alcohol contrary to s.58(1)(b) of the Transport Act, 1962.

The sole ground of the appeal against conviction is that the blood specimen on which the prosecution depended was obtained by undue pressure.

The circumstances were that at about 10.15 p.m. on 30 June 1983, a car driven by the Appellant was stopped by a traffic officer in Lorne Street. The Appellant is an accountant by

profession. He had two passengers in his car - a Mr & Mrs Barron. A roadside breath screening test gave a positive result. An evidential breath test carried out at the Auckland Civic Administration Building at 10.38 p.m. gave a reading of 400 microgrammes of alcohol per litre of breath. Thereupon in exercise of the power conferred upon him by s.58B(1)(b), the traffic officer required the Appellant to permit the taking of a blood specimen by a registered medical practitioner. Initially the request was made by reading out the first passage of the "Blood Specimen Form" issued by the Ministry of Transport. The passage referred to reads:-

> "You are advised that you are required under the Transport Act to permit a registered medical practitioner to take for the purposes of analysis a specimen of your venous blood in accordance with normal medical procedures.
>
> ............................
>
> You are advised that if you refuse to permit a specimen of blood to be taken you can be charged with an offence for which you are liable on conviction to imprisonment for a term not exceeding three months or to a fine not exceeding fifteen hundred dollars, or both, and unless the Court, for special reasons orders otherwise, a minimum disqualification from driving of six months."

The traffic officer's evidence is that the Appellant was co-operative except that he was reluctant to supply a specimen of blood to anyone other than his own doctor.

The Appellant's evidence was as follows:-

"The evidential meter had shown approximately 400 and I was told that was not positive and the traffic officer said for my own good I should give a blood test. I quietly rebelled on this thought for several reasons. One is I could see no reason for having to do so because of the other tests which did not appear to be positive. I do not like injections and to be honest the room where we were did not appear to be healthy. There was another person there and the officer was in his night duty uniform. He had come off the street and I was very nervous about any injection methods. The officer said that I should give a blood test. I then asked if I could have my own doctor to do that as I preferred it. We discussed this and he said that was not necessary. Their own doctor was qualified and actually he was not in the building at the time. He was on his way anyway. Well after some discussions I still said I did not want to give a blood test and didn't see why I should have to. I was permitted to use the phone to ring my own doctor but I could not get hold of him."

The traffic officer said in evidence:-

"I realised he was prepared to supply the specimen but only to his own doctor and I did not appear to be able to get the message across that he could not make a condition as to who he would supply a specimen of venous blood."

The following passage is from the traffic officer's cross-examination:-

"What consequences did you outline to him?... I have already read that in the part 1.

That is a very legal and formal setting out in the statute. I presume you explained the consequences to him in language more appropriate to a layman than to a traffic officer or a lawyer? ... That is not correct.

Did you just read the top of the Blood Specimen Form? ... I read the information as is on the form itself.

> "What did you tell him would happen to him in practical terms if he refused? Did you tell him that he would be arrested? ... I believe I did yes and that he would be taken to Central Police Station. Other than that there was no other comment made."

When the traffic officer failed to persuade the Appellant to permit the taking of a blood specimen by the police surgeon, he enlisted the assistance of Mrs Barron, who was outside in the waiting room. Mrs Barron, who was called as a witness, gave the following account:-

> "... the traffic officer came out ... and I asked him what was happening ... and he said: "Well Mr Dixon is not allowing us to take blood by the police doctor and is not really complying with our wishes, because if he doesn't we can keep him overnight for up to three days". I said, "Well could I help in any way?". I asked if I could see him to help to settle him down....
>
> I then went and spoke to him and I said to him, "You and he seem to be a little too upset. Does it really matter whether a police doctor takes the blood or your own?". He said, "I want my own doctor". I said, "They said to me they might keep you overnight for anything up to three days so it doesn't really matter who takes your blood", and Mr Dixon said, "I would rather have my own doctor". We chatted about it and I came out."

Mr Barron also gave evidence. He said that the traffic officer told him that if the Appellant did not give blood when asked to do so,"they could keep him in overnight". He says he saw the officer having a conversation with Mrs Barron but did not hear what was said apart from hearing the officer say to Mrs Barron that the Appellant was causing a few problems.

The Appellant said in evidence:-

> "Elizabeth Barron came through and spoke to me. She suggested that I give a blood sample otherwise I would be automatically arrested and held. This was a repeat of what the traffic officer had told me earlier on. He told me this after I had blown into the meter box when he said, "For your own good you should give a blood sample". That is when I protested and he said, "If you don't give a blood sample you are automatically charged and will be held over". By that he told me I would be taken to the police station and held over for charging. He did not tell me when I would be charged. No detail on that. I took it if I refused to give a blood sample I would be arrested and put inside in the city jail as such, I imagine overnight at least. Held over to me means overnight. I do not think any of us likes to be charged. I did not want to be charged or have anything to do with jail. With a legal background anything to do with that is distasetful. It has an effect on my profession and I certainly would not have anything to do with it if possible.
>
> At that stage I still felt I had the right not to give the blood owing to the non-definite previous tests. In the discussion the part about being "held over" subdued my resistance."

The traffic officer denies having said either to the Appellant or to Mrs Barron, that the Appellant would be "held over" or that he could be kept overnight for up to three days.

After Mrs Barron had spoken to him, the Appellant agreed to the taking of a blood specimen by the police surgeon and wrote on the "Blood Specimen Form":-

> "I wish to have my Doctor to take my blood specimen - good not find him - agree to officer's request."

The Appellant did not sign his name but the traffic officer signed as a witness, adding the notation "10.56 p.m.". A blood specimen was taken at 11.20 p.m. On analysis, it proved to contain 132 milligrammes of alcohol per 100 millilitres of blood.

There have been several appeals to this Court in cases where it has been alleged that oppressive means have been used to obtain consent to the taking of blood specimens.

Stowers v. Auckland City Council was a decision of Mahon, J. delivered on 21 December 1977. In that case, the Appellant had been quite violently assaulted by a traffic officer when he refused to give a blood specimen. The facts bore no resemblance to those of the instant case but the decision is referred to because Mahon, J. held that:-

> "..evidence of a positive test under the blood-alcohol legislation may be excluded in the exercise of the Court's discretion where it has been obtained under circumstances of such oppression or unfairness as would conventionally justify the exclusion of other types of incriminating evidence such as fingerprints and confessional statements".

In Norton v. Ministry of Transport (a judgment delivered on 1 May 1978), Mills, J. dismissed an appeal in a case closely resembling the present case. The traffic officer, having read the relevant portion of the Blood Specimen Form to the Appellant, told him that if he refused to supply a specimen, he "could be charged" and "would be

placed in police custody". There was no suggestion that the Appellant might have to spend the night in custody.

In Fifield v. Ministry of Transport (Auckland Registry, M.421/81, 28 July 1981, Moller, J.), the appeal was allowed. Moller, J. observed that the case might be "near the borderline" but took the view that there was, in effect, a threat going beyond what was said in the Norton case, being not an "explanation to an enquiring suspect" but "an unsolicited statement that, in addition to being arrested, the Appellant would be taken to the Takapuna cells for the night". The significant passage of evidence was as follows:-

> "You said the Defendant said he was nervous of needles, did not want to give blood, and then he decided to give blood? ... Yes.
>
> Between those two matters did you say to him, if you don't give blood you will be locked up for the night? ... I advised him what would occur if he did not give a blood specimen, that he would be arrested.
>
> Is what I have said the words in which you phrased that? ... Not exactly.
>
> How different were they? ... I informed him he would be arrested and taken to the Takapuna cells for the night.
>
> And held for the night? ... That is what is normally done, I do not bring them back so I presume they are held.
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> You do not have to do that do you, you can issue a summons can't you? ... Yes.
>
> You don't have to make that threat either do you? ... No it is not a threat, he is advised of what will occur if he refuses."

In Tozer v. Auckland City Council (Auckland Registry, M.1281/81, 9 December 1981) Speight, J. found that it had not been proved that the traffic officer said that the Appellant would be locked up for the night. He went on to say:-

> "However, as it may be a matter of interest I add my views as to what the situation would have been had there been evidence of the supposed remark.
>
> There can be many shades of discussion between a traffic officer and his suspect and improper threats would, of course, negative any consequential enquiries. In the case such as this, however, and against the statutory background, it is the obligation of the traffic officer to tell the suspect the consequences of refusing if he is asked, namely, that he is liable to be arrested, and the additional information that that could mean spending the night at Central Police Station would appear to be within the bounds of legitimate information supplied and could not amount to duress in the sense suggested."

Arthur v. Ministry of Transport (Auckland Registry, M.608/83, 7 July 1983) was a case in which I allowed the appeal. There was (as in the present case) some conflict of evidence. The following is a passage from the Appellant's evidence:-

> "What was said to you that really influenced you in the end to give blood? Do you remember? I either had to give blood or spend Saturday night and Sunday in jail and appear at Otahuhu Court first thing Monday morning. That is what I was told."

The traffic officer's evidence was equivocal as to whether he told the Appellant he "would" be arrested or whether he said "could" be arrested, but the following passage is significant:-

> "...I do recollect telling him of the penalty if he refused.
>
> You told him he would be liable for the minimum 6 months disqualification? Yes and I would have told him he would be arrested and taken up the next day.
>
> Which night was this? It was Saturday. So it would have been the Monday."

Enforcement officers entrusted with the powers invested in them by the blood-alcohol provisions of the Transport Act should not lose sight of the fact that the procedure authorised by the statute is a serious invasion of the personal rights of the subject and also a form of compulsory self-incrimination otherwise unacceptable as an incident of the administration of justice. For good reasons, the legislature has provided that in some circumstances compliance with a requirement to permit the taking of a blood specimen is compulsory. But the compulsion consists of no more than the fact that refusal to comply is itself declared to be an offence. The enforcement officer is, of course, fully entitled to bring the terms of the statute to the attention of the suspect - indeed it is his duty to make sure that the suspect

clearly understands that failure to comply constitutes an offence carrying exactly the same penalties as a conviction for driving with excess blood alcohol. But that is the full extent of the pressure to which the suspect is to be subject. On no account should the enforcement officer attempt, by promises or threats, to exert further pressure in order to obtain submission to his requirement. A blatant threat that if the suspect does not submit he will be arrested bears comparison with the action of a police officer who tells a person being interviewed in the course of investigating a criminal offence that if he makes a statement admitting the offence he will be released on bail: but that if not, he will be held in custody.

The right to arrest without warrant is conferred by s.58C. It is there for a purpose, but to use the power of arrest simply in terrorem for the sole purpose of overbearing the suspect's will is, in my view, an abuse of the power.

Mr Harte submitted that the practice of invoking the power of arrest without warrant in practically every s.58C case, despite the fact that it would be appropriate in most cases to use the summons procedure, is in itself an unjustifiable form of coercion. The arrest procedure, he submitted, is obviously being invoked by traffic officers

as a general practice, not for its legitimate purpose, but simply as a threat which is calculated to overcome the suspect's objection to permitting the taking of a blood specimen. The prospect of arrest is a powerful inducement to the great majority of citizens apprehended for suspected drink/driving offences; usually such persons will be unfamiliar with police procedures and will believe that being arrested and taken to a police station means being locked up for the night. Mr Harte's submission is not without substance. While the power of arrest conferred by s.58C is not to be circumsribed there is, in my view, no justification for the adoption of a general policy that every suspected offender whose breath registers in the 300 to 500 range on the Alcosensor II and who prefers conviction under s.58C to the taking of a blood specimen is automatically arrested. As the power to arrest without warrant is conferred by s.58C, I would not be prepared to find that an enforcement officer exerts undue pressure if he does no more than simply refer to the fact that failure to comply with his requirement will constitute an offence for which the offender can be arrested.

If, however, the reference to the right of arrest is coupled with a statement that if the suspect does not submit to the taking of a blood specimen, he will be arrested and taken to a police station, then in my view, it should not be condoned. A person who has been found to have a breath alcohol concentration which is not positive

but which exceeds 300 microgramms of alcohol per litre of breath and who has such an aversion to the taking of a specimen of his blood that he prefers conviction of the s.58C offence should be permitted without further coercion to make that election; there is no point in carrying the matter further nor is there any justification for what is plainly a threat of further unpleasant consequences if he does not submit.

In the present case the learned District Court Judge did not accept Mrs Barron's version of what she relayed to the Appellant in consequence of her discussion with the traffic officer. He concluded that Mrs Barron's recollection was faulty, probably because she had shared, with two others, in the consumption of three bottles of wine with their dinner. As the Judge pointed out, the Appellant himself said no more than that the officer told him he would be "held over" and that from this the Appellant said he deduced for himself that he could be held overnight. The Judge found as a fact that the traffic officer did not say to the Appellant that he could be or would be held overnight, but that the officer did say that the Appellant could be arrested and taken to the Auckland Police Station. The Judge expressed his conclusions as follows:-

"There is a statutory power in certain circumstances to arrest him and to suggest that it is a grave instrusion on the liberty of this defendant to point out that he could be arrested

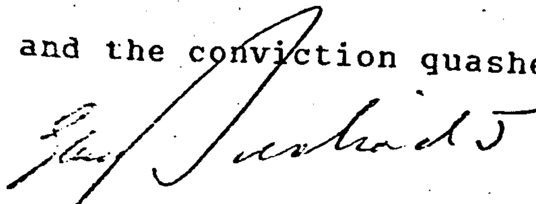
> when the statutory power is there is to me an abuse of the English language. I hold on the facts of this case that there was no element of duress whatsoever in compelling or suggesting that this defendant give a specimen of his blood. He faced the simple situation if he refused to give a specimen of his blood he would have been charged with an offence which carried exactly the same penalties as an offence which he now faces. I hold that his reluctance to give it was because he had the mistaken idea that he was entitled to have his own doctor and when he eventually did consent to the giving of the specimen both to traffic officer De Morgan and later to Dr Goodey himself he did so willingly and not under any form of duress."

There is no basis which would warrant my reviewing the Judge's finding on an issue of credibility; but the fact is that according to his evidence, the traffic officer did not just say that the Appellant could be arrested. His evidence, in cross-examination, is explicit - I have already referred to it. He said; "You will be arrested and taken to the Central Police Station".

As Speight, J. said in Tozer v. Auckland City Council (supra), there can be many shades of discussion between traffic officer and suspect: each case has to be viewed in the light of its own circumstances. In the present case the Appellant preferred being convicted under s.58C to the alternative of permitting the taking of a blood specimen by someone other than his own doctor. It is evident that his eventual capitulation was not because he changed his mind about that, but because of the fear of being arrested and taken to a police station. That fear

was induced by the officer's statement to the effect that if the Appellant did not submit he would be arrested. The statement was unsolicited. There were no circumstances which required that the power of arrest be exercised. I find it difficult to avoid the inference that the officer's statement was essentially a threat - and an effective one. In such circumstances the result of the test ought not to be admitted in evidence.

The appeal is allowed and the conviction quashed.



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