IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M 313/84

BETWEEN DOWN

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 1 October 1984

Counsel: Mr Roose for appellant
Mr Morgan for respondent

Judgment: 1 October 1984

ORAL JUDGMENT OF HILLYER J

This is an appeal against a decision given in the Hamilton District Court on 4 July 1984 by District Court Judge Miller. The appellant was charged with driving a motor vehicle while the proportion of alcohol in his blood exceeded 80 mg per 100 mll of blood. He was convicted and fined by the learned District Court Judge.

Before me Mr Roose has appealed in effect on two points. They arise out of the provisions of S.58(4) of the Transport Act 1962 and S.58(b)(2) of that Act. In each case there is a provision that there is an obligation on a person to do something "forthwith".

Under S.58 (4)(a) the person who undergoes an evidential breath test which is ascertained to be positive, must be advised forthwith by an enforcement officer after that result is ascertained, that the test was positive and that if he does not request a blood test within 10 minutes, the test itself could be sufficient evidence to lead to his conviction for an offence against the Act.

S.58(b)(2) provides that after various procedures have been complied with and a blood specimen taken by a registered medical practitioner, that blood specimen shall forthwith be divided into two parts and those parts dealt with in accordance with the section.

The evidence in the case before me was given before the learned District Court Judge by a traffic officer. He said :

> "The evidential breath test was conducted in accordance with the Transport Breath Test Notice 1978 using an approved device, the Alcosensor II. The result of the evidential breath test indicated a positive test with the maximum digital reading being 0650 microgrammes of alcohol per litre of breath. I advised Mr Down that the result was positive. I immediately wrote the result down and I then read to Mr Down from a form "Advice of Positive Evidential Breath Test" and this is the form I completed."

That form contained the advice required to be given by the enforcement officer after the result of the test was ascertained. The question is whether that advice was given "forthwith".

Mr Roose submitted that there was no evidence that the reading to Mr Down was forthwith after the result was ascertained to be positive. The learned District Court Judge to whom that submission was made said :

> "Now, of course, the Traffic Officer was not cross-examined on these points, but, as Mr Roose rightly says, these are matters which must be established by the prosecution, and the defence does not have to disprove, so I must examine the evidence. The times that I have from the evidence, as will be seen from the summary of it which I gave earlier, are that the traffic officer was called to the scene of the accident at 2.45, that the "Advice of Positive Evidential Breath Test" was given at 3.26, that the election was made at 3.28, and the blood test taken at 3.40. It is also noted that, in the general context of the first requirement to which counsel has referred, the traffic officer used the word "immediately". It seems to me to be evidence that the Traffic Officer was well aware of the need for continuity and there is nothing to suggest in his evidence that there was not continuity, only 14 minutes after the advice the doctor took the blood specimen."

He found in relation to the submission under S.58(4) that the advice was given forthwith.

There is in my view evidence upon which the learned District Court Judge could have drawn such an inference. There is no indication that there was any delay between the result being ascertained and the advice to Mr Down that the result was positive. The officer says he immediately wrote the result down, read to Mr Down the matters that had to be advised. In my view the District Court Judge was justified in accepting that the traffic officer meant that he wrote the result down immediately the result was obtained. For the traffic officer to say that he then read to Mr Down is an indication that the reading followed immediately on the writing down of the result.

The expression "forthwith" of course has been dealt with in a number of different cases, in particular by the Court of Appeal in Scott v Ministry of Transport (1983) NZLR.234. It does not mean instantly, it means with as little delay as the circumstances will reasonably admit.

That inference in my view, is a legitimate one from the evidence given by the traffic officer, and I therefore accept that the advice was given forthwith.

When I come however, to the second submission made by Mr Roose, there is in my view an essential difference. The traffic officer said :

> "At 3.40 am I observed Dr Clark take a specimen of blood from Mr Down. I observed him divide the sample into two portions placing each portion in a bottle."

The traffic officer does not say, as he did in relation to the reading of the form: "I then observed him". Had the traffic officer said "I then observed him", I would have been inclined to accept that the learned District Court Judge was entitled to draw the inference from the traffic officer's evidence that

there was no delay between the taking of the specimen of blood and the division of the sample.

For some reason which I do not understand, the Legislature has made it a requirement that the blood specimen be divided forthwith. The fact that the reason for that is not apparent does not mean that the provision can be ignored. Equally, it means evidence must be given that the provision has been complied with. The position is not distinguishable in my view from the decision given by Eichelbaum J in the case of Greer v Ministry of Transport Palmerston North Registry, M15/84 Judgment 19 March 1984. In that case His Honour first determined, following a decision, Adolph v Ministry of Transport, Auckland No. M827/82 judgment of Holland J, 12 August 1982, that the certificate given by the doctor which states that the blood was divided forthwith, cannot be relied on to establish that fact. It is not one of the facts which can be established by certificate, pursuant to the Act. S.58(b)(5).

Before me Mr Morgan conceded that he did not rely on that sub-section. It was also conceded that this was not a case in which the reasonable compliance provisions could be invoked. The question is solely whether on the evidence given by the traffic officer the section has been complied with in the division being forthwith.

In the Greer case Eichelbaum J says :

> "On the facts the District Court Judge accepted that the evidence did not explicitly establish the lapse of time which occurred before the sample was divided. He accepted a submission that there might have been a delay of half an hour or more. At that stage he turned to s.58E. ... It is true that the evidence gives the impression of an unbroken sequence of events, but I think Mr Walker was right when he submitted that that is no more than an impression created by the sequence of questions and answers. The possibility of some substantial gap, for example while the doctor or the traffic officer attended to some emergency, is simply not excluded. The District Court Judge was not prepared to draw the inference and on the material I do not think that the position is sufficiently clear for me to take a different course on appeal."

In the case before me, the District Court Judge did find that there was sufficient material on which he could draw the inference. In my view, with respect, such an inference is not open. There is simply no evidence to establish that there was no lapse of time. Mr Morgan for the respondent submitted that there was no evidence of any intervening event, but the onus in my view is on the Crown to establish that the sample was divided without any delay and no such evidence was given. It might even have been, descending into the realms of speculation, that after the doctor had taken the blood sample some helpful police constable brought him a cup of tea, and he delayed in dividing the blood sample. These events occurred at 3.30 am and we simply do not know what happened.

In those circumstances I am of the view that the appeal must be allowed and it is allowed accordingly. As is frequently said in these blood alcohol matters, the necessity for strict compliance does not always result in an outcome which might appear to be a sensible one, but the provisions of the Act must be complied with.

In all the circumstances I do not allow any costs.

P.G. Hillyer J

Solicitors

Boot Roose for appellant
Crown Law Office for respondent