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BETWEEN

PASSEY

Appellant

A N D

MINISTRY OF TRANSPORT

Respondent

Hearing: 24 May 1985

Counsel: P.H.B. Hall for Appellant
D.J.L. Saunders for Respondent

Judgment: 30 MAY 1985

JUDGMENT OF ROPER J.

This is an appeal against conviction on a charge of driving with excess blood alcohol and is concerned with the advice given to the Appellant by the Traffic Officer following a positive evidential breath test.

Section 58(4) of the Transport Act 1962 provides:-

"Notwithstanding any other provision of any Act or rule of law, the result of a positive evidential breath test shall not be admissible in evidence in proceedings for an offence against subsection (1)(a) of this section if -

- (a) The person who underwent the test is not advised by an enforcement officer, forthwith after the result of the test is ascertained, that the test was positive and that, if he does not request a blood test within 10 minutes, the test could of itself be sufficient evidence to lead to his conviction for an offence against this Act;

Provided that this paragraph shall not apply if the person who underwent the test fails or refuses to remain at the place where he underwent the test until he can be advised of the result of the test; or

- (b) The person who underwent the test -
- (i) Advises an enforcement officer, within 10 minutes of being advised of the matters specified in paragraph (a) of this subsection, that he wishes to undergo a blood test; and
 - (ii) Complies with section 58(1) of this Act."

What is required of a Traffic Officer in complying with that subsection was dealt with in this way by Richardson J in Boyd v Auckland City Council [1980] 1 NZLR 337 (C.A.) at p 346:-

"The form in which the advice referred to in the subsection is to be conveyed to the suspect is not specified. It is not necessary that the exact words of the subsection be used. What is required is that the enforcement officer should convey that information to the suspect in clear and unmistakable terms so that the suspect knows where he stands. It is both necessary and sufficient that the sense of the information required to be given to the suspect is in fact given to him. So it is a matter of determining on all the evidence in a particular case, whether that requirement has been complied with."

In the present case the Traffic Officer read to the Appellant from an "Advice of Positive Breath Test" form which contains these words:-

"2. The evidential breath test you have just undergone has given a positive result and pursuant to section 58(4) Transport Act 1962 you are advised as follows:

If you do not request a blood test within ten (10) minutes, the result of the test you have just undergone could, of itself, be sufficient evidence to lead to your conviction for an

offence against the Transport Act (Section 58(1)(a) OR 55(2)(b).)

3. If you wish to undergo a blood test you must so advise me within ten (10) minutes and then comply with section 58B by allowing a medical practitioner to take a blood specimen from you.
4. If you in fact undergo a blood test the result of an evidential breath test cannot be used in Court to support a charge of driving or attempting to drive with excess breath/alcohol concentration.

BUT the result of the blood test may be used in Court to support a charge based on an analysis of your blood/alcohol concentration."

He then asked the Appellant if he understood what had been read. The Appellant was asked to sign the form, which he did, after appearing to read it himself. His signature appears beside the statement "I have read the above advice". Four minutes later the Appellant indicated that he wished to supply a blood sample which was duly taken.

The whole point of this appeal is that the Traffic Officer told the Appellant that the 10 minutes within which he was to make his decision was from 10.47 pm (or 2247 hours, the Traffic Officer could not remember which term he used) being the time of the positive breath test, when in fact the time was 11.47 (or 2347 hours). The Traffic Officer had noted the time as 10.47 pm on the advice form but later realised his mistake and amended it to 11.47 pm. That was after the Appellant had agreed to a blood specimen and it appears that the amendment was not drawn to the Appellant's attention. The Act does not provide that a suspect must be told the time of the positive breath test but Mr Hall's point was that if additional information is given to the suspect it must be accurate. The authorities certainly support the view that in this situation the information conveyed to a suspect must be clear, unmistakable and accurate. Mr Hall submitted that once an inaccuracy was shown that was the end of the matter and there can be no enquiry as to whether the false information actually caused confusion in the mind of the suspect or was likely to do

so. I cannot accept that proposition. It would follow that if a Traffic Officer told a suspect that he was to advise within 10 minutes whether he wished to undergo a blood test and that if he did so wish he was to comply with Section 58 by allowing a doctor to take the specimen, he would be imparting inaccurate information because the relevant section is Section 58B. An acquittal in those circumstances would be nonsense.

The question is whether the inaccurate information caused confusion in fact, or was likely to do so.

The Appellant did not give evidence and there was no suggestion in the evidence before the Court that the Appellant was in any way confused; nor can I see that confusion was remotely likely.

The appeal is dismissed.

A handwritten signature in black ink, appearing to be 'J. H. J.', is written in a cursive style on the right side of the page.

Solicitors:

Wood, Hall & Co., Christchurch, for Appellant
Crown Solicitor's Office, Christchurch, for Respondent.