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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.48/86

LOW PRIORITY

566

BETWEEN HATFIELD

Appellant

A N D AUCKLAND CITY COUNCIL

Respondent

Hearing: 24 April 1986

Counsel: Becroft for Appellant
Katz for Respondent

Judgment: 13 May 1986

JUDGMENT OF SINCLAIR, J.

This Appellant was convicted of an excess blood alcohol offence and appealed on two grounds to this Court. One of the grounds of appeal was in relation to the medical certificate which was tendered by the prosecution but after counsel for the Appellant had inspected the medical certificate once again, he abandoned that particular ground of appeal. The remaining ground of appeal advanced was that the circumstances of this case were such that the decision of the Court of Appeal in Auckland City Council v. Dixon, (C.A.234/84, 10 July 1985) ought to be applied and a verdict of not guilty entered in respect of the charge.

The facts are within a very small compass. Nothing remarkable came out of the examination-in-chief of the traffic officer, Mr Roycroft, but during corss-examination, suggestions were

made by counsel for the defence that in effect a threat of arrest was made to the Appellant which induced him into agreeing to give the blood sample which formed the basis of the prosecution against him. The traffic officer agreed that he did not have a perfect recollection of the events which had happened because the offence had occurred on 10 January 1985 and the prosecution was not until December of that year. He claimed to have a reasonable recollection of what had occurred and I set out a portion of the cross-examiantion:-

> "After you requested the blood specimen from the defendant the defendant asked you very briefly what would happen if he refused to give blood didn't he? I do not recall that exactly, he may have done yes.
>
> And you said at that stage there was a possibility of him being arrested for that failing to give blood, it was an arrestable offence along with the other penalties that you have outlined? No I would not have told him that at that stage.
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> What would you have said in answer to his question? At that stage it was my practice to arrest for refusing to give blood, however, my own personal practice is to read the whole of the blood specimen form to the defendant and ask him if he consented to the taking of a specimen of blood. If he said "no" or if he showed that he did not understand what I was asking of him, I would then explain to him that I was requiring him to supply a specimen of blood for analysis to a doctor, it was an offence to refuse to supply a specimen of blood and that the penalties for such an offence were the same penalties proposed by law had the evidential breath test recorded a reading of 550 or above, or should a blood test be taken and the reading be above the 80 milligrams per 100 litres of blood set down by law, the penalties were all the same. I would then have asked him again to consent to the taking of a specimen of blood. If I had received a refusal I would have proceeded to read aloud again the whole of part 1 of the blood specimen form and after reading out the penalties, the three months imprisonment, the $1500 fine or both, and the minimum disqualification for six months, I would then advise the defendant that it was an arrestable offence to refuse blood.

> The defendant will say after he indicated his reluctance or uncertainty as to whether he should give blood that that is in fact exactly what you said, that you said it was an arrestable offence, so apart from everything else that you explained to him it was an offence for which arrest was a possibility, do you accept that as something that might have happened? My recollection of that event was that the defendant did show some reluctance initially to give a blood test, but when I explained to him that it was an offence to refuse and that the penalties for refusing a blood test were the same penalties for excess breath or blood alcohol, he then agreed. My recollection is I did not mention the word arrest.
>
> Can you categorically rule out the possibility that you might have used arrest because that is exactly what the defendant will say that the word arrestable was used? I might have, however, certainly I do not recall it.
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> Do you accept that that was your practice at the time to use the word arrestable if the situation eventuated as you have outlined to the Court? If the situation eventuated to a point whereafter having explained to the defendant on three occasions the results of refusing to supply specimens of blood, he had already refused on two occasions, then I would caution him that to refuse blood was an arrestable offence.
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> The defendant was quite adamant that you said that in this particular case. Do you accept that as something that may have happened? It may have happened but I do not recall that, no."

From the Dixon decision, it became apparent that there had been a practice among certain of the Auckland traffic officers to arrest a suspect if he refused to have a blood test when required so to do by a traffic officer. This particular officer indicated quite clearly in my view that he did not go along with that practice and the third paragraph of his cross-examination sets forth the practice he would have followed had there been any demurring on the Appellant's part to undergoing the blood test. It is evident also from the answer given to the fairly long question in the fourth paragraph quoted

that the officer was maintaining a stand that the Appellant had agreed to the blood test at a point in time when there was no necessity for the officer to mention the word 'arrest' to the Appellant at all. Mr Roycroft did concede that a point could have been reached where he would have advised the Appellant that the refusal to undergo the blood test was an arrestable offence but the preponderance of his evidence is to the effect that that stage was never reached. As will be seen from the passage just quoted, counsel for the Appellant went on to allege that the word 'arrestable' was used by the traffic officer and the officer conceded that he could not categorically rule out the possibility that that might have occurred. It was the answer to this question which formed the basis of counsel's attack upon the prosecution evidence in that it was submitted that the mere possibility of 'arrest' having been mentioned was sufficient to contaminate the prosecution evidence to the point where everything that had happened after the possibility of the word 'arrest' or 'arrestable' having been used should be treated in effect as a nullity. The last question quoted once again referred to the same matter but the officer placed it merely as something which might have happened but the whole tenor of his answer leads one to the conclusion that he was really indicating that anything was possible but that he did not go along with the suggestion of counsel.

When the Appellant himself gave evidence, he maintained that so far as this particular part of the conversation was concerned,

he could remember it quite clearly and while his own counsel had stated that the Appellant would claim that the traffic officer had used the words 'arrestable offence', when that was plainly put to the Appellant, he denied that those words were used and claimed that the officer stated 'there is a possibility of you being arrested'. That appears at p.B1 of the notes of evidence. Counsel for the Appellant attempted to make light of the difference in phraseology by stating that the two words 'arrestable' and 'arrest' were somewhat interchangeable having regard to the circumstances. It is rather remarkable that while the Appellant could remember that portion of the conversation clearly he could not with any precision remember what had occurred at the roadside.

When the District Court Judge came to give his decision, he referred to this particular aspect of the matter at two points in his judgment. The first appears at p.B12 and reads as follows:-

> "It is contended on behalf of the defendant that in answer to a query by the defendant as to what would happen if he refused to give the blood sample, he was told by the enforcement officer that there was a possibility of his being arrested. The enforcement officer for his part denies saying those words and refutes suggestions of the possibility of his having done so and being unable now to recall whether he did or did not. In response to extensive questioning the enforcement officer says that if a situation had arisen with a defendant such as this persisting in refusing, he would have limited his answer to explaining an arrestable offence. He says also that according to him the only time he would have mentioned arrest in such a case would have been at the time of the roadside breath screening test."

It is to be noted that in that passage of the judgment, the Judge refers to the Appellant's contention, the traffic officer's denial, his stating that he was unable to recall whether or not he did use the word 'arrest' or a like word at the time, and goes on to refer to the traffic officer's evidence as to the point where he would have explained to the Appellant that he may have been getting involved in an arrestable offence. At the bottom of p.B.12, the District Court Judge has this to say:-

> "I find that I am not satisfied that the evidence of the Defendant alleging a specific or implied threat on the part of the enforcement officer is acceptable in preference to the evidence of the enforcement officer denying any such or even attempting any possibility thereof."

While counsel for the Appellant attempted to rely somewhat strongly on the closing words of that passage from the judgment, it must be read in light of the earlier passage I have quoted and which is set out above. In my view, this last passage from the judgment was a finding of credibility and that there, the District Court Judge was finding that he preferred the traffic officer's version that the word 'arrestable' or 'arrest' was not used, in preference to the evidence of the Appellant. That in my view is really sufficient to dispose of this appeal. In other words, the Court found as a fact that there was no threat of an arrest ever mentioned by the officer to the Appellant and thus the decision in the Dixon case had no application whatever.

It must be remembered that the District Court Judge had the advantage of seeing and hearing the witnesses and one of his functions was to resolve any conflict in the evidence. On the important point advanced on the Appellant's behalf in this appeal the Judge has done just that. He has resolved the conflict against the Appellant and there was evidence available to justify his findings and in that event this Court cannot and ought not interfere.

Finally, the best that can be said from the Appellant's point of view is that the traffic officer in his evidence, because of the passage of time, made a concession that he had possibly used the challenged word but on the totality of the evidence, that concession could not be construed as more than a mere possibility and insufficient on which to found a positive finding that the word was in fact used. That is a far cry from the situation in Dixon's case.

The appeal is accordingly dismissed with costs of $200 to the Respondent plus disbursements.

P. Q. J.

Solicitors:

Fortune Manning, Auckland, for Appellant;

Butler White & Hanna, Auckland, for Respondent.