AUCKLAND REGISTRY

BETWEEN PETER JAMES GORDON HALL

Appellant

AND AUCKLAND CITY COUNCIL

Respondent

Hearing: 16 December 1985

Counsel: M. Harte for Appellant
J.R. Gresson or Respondent

Judgment: ~~December 1985~~ 23 JANUARY 1986.

JUDGMENT OF BARKER J

This is an appeal against the conviction of the appellant in the District Court at Auckland on 3 April 1985 on a charge under s.58C(1)(a) of the Transport Act 1962, of refusing to permit a blood specimen to be taken from him by a registered medical practitioner, having been so required by a traffic officer under s.58B(1)(c). The appellant was charged, in the alternative, with driving with excess breath alcohol; because of the learned District Court Judge's decision to convict on the charge of refusing to supply a blood specimen, this alternative information was dismissed.

The evidence disclosed that, on 24 November 1984, the appellant was apprehended by a traffic officer. He was given a breath screening test and an evidential breath test. When the evidential breath test disclosed a reading of 550, he was correctly informed by the traffic officer of his right to request a blood specimen within the next 10 minutes. Some 5 minutes after he had been correctly informed of this right, the appellant wrote on the form "Blood sample by own doctor". He made it clear to the

traffic officer that he declined to sign the consent form with no tag attached; he was advised that the Police surgeon was in an adjoining room and available to take a blood sample. Two traffic officers had a lengthy discussion with the appellant; they informed him that, by insisting on his own doctor, he was imposing an unacceptable condition onto his consent; therefore, such a conditional consent must be taken as a refusal. The appellant was permitted the use of a telephone; he made 3 unsuccessful attempts to ring someone.

At 10.15 p.m., some 13 minutes after the statutory period of 10 minutes had commenced, the traffic officer again explained to the appellant his view that his imposition of a condition on the taking of a blood specimen was deemed to be a refusal. The appellant persisted with his attitude. At 10.16 p.m., the traffic officer arrested the appellant.

In cross-examination, the traffic officer said that the appellant had several times stated to him that he wished a doctor of his own choice or his own doctor to take his blood.

It was submitted by Mr Harte that the request for a blood test to be taken by a suspect's own doctor was not a proper request in terms of s.58(4)(a) and s.58B(1)(c). Accordingly, he submitted that the enforcement officer did not have power to require the appellant to permit the registered medical practitioner to take a blood specimen from him; therefore there was no offence of refusing to give blood.

A request for a blood sample to be taken accompanied by a condition is not a request at all. The District Court Judge held that the condition attached to the request for blood did not invalidate the request that the appellant made to give a blood sample. The District Court

Judge noted that the form had been shown to the defendant which correctly stated his rights to request a blood sample; he had this form read to him; but that the addition of the condition did not invalidate the request for the blood sample. The District Court Judge considered that the conditional acceptance of the request was not consent at all; it therefore amounted to a refusal.

Mr Harte submitted that the District Court Judge should have convicted her appellant on the alternative charge of driving with excess breath alcohol. This submission was on the basis that there was no proper request by the appellant for a blood sample to be taken. It is only when such a valid request is made that the evidence relating to the evidential breath test is rendered inadmissible under s.58(4). I do not think that it is possible for the request for blood to be separated from an accompanying unacceptable condition. There is inconsistency in accepting the request for one purpose, and then, in the next instant, to say that the basis on which the request was made cannot be achieved.

In Fleetwood v. Ministry of Transport, (1972) NZLR 798, the appellant consented to the taking of the specimen of blood at the doctor's surgery. When requested by the doctor and traffic officer to permit a blood sample to be taken from his arm, he refused and offered certain alternatives such as his thumb, his toe or his leg. Haslam J held that the place and method of extracting the specimen of blood must be left to the good sense and judgment of the doctor. He also considered that, in the absence of some genuine independent justification or excuse, there is a duty implied on a suspect to co-operate reasonably throughout the prescribed procedures.

In my view, the appellant was advised properly in terms of the legislation that he must make a request to have a blood specimen taken within the next 10 minutes.

and that, if he did not so request, that failure to request could render admissible sufficient evidence to lead to a conviction on driving with excess breath alcohol.

The formula read out to him referred to a registered medical practitioner taking a specimen in accordance with normal medical procedures. Any doubt that the appellant may have had on this score should have been assuaged by the traffic officer's patient explanation to the appellant that his request for his own nominated medical practitioner was not possible and that he had no right to impose conditions.

I think Mr Harte is right, following the line of cases such as Fleetwood, that there was no proper request at all made the appellant. It therefore follows that there was no proper request for the giving of blood. Accordingly, it would have been possible for the evidence to have supported a conviction for driving with excess breath alcohol; there was no proper request by the suspect for a blood test and the evidence of the breath testing procedures would not be rendered inadmissible.

It follows, therefore, that the District Court Judge should have convicted the appellant on the alternative charge.

I then raised with counsel the question as to whether I should exercise the powers of substitution contained in s.132(1) of the Summary Proceedings Act 1957. That subsection reads:

> "If on any appeal against a conviction for any offence (whether or not the appeal is against the sentence also) it appears to the High Court that the evidence is insufficient to support a conviction for that offence, but is sufficient to support a conviction for some other offence of a similar character within the jurisdiction of the convicting Court, and that the defendant has not

been prejudiced in his defence, the High Court may, on such terms as to costs and otherwise as it thinks fit, -

(a) Amend the conviction by substituting the last-mentioned offence for the offence mentioned in the conviction, and, if it thinks fit, quash the sentence imposed and either impose any sentence that the convicting Court could have imposed (whether more or less severe), or deal with the defendant in any other way that the convicting Court could have dealt with him, on the conviction as amended; or

(b) Remit the conviction to the District Court with a direction that it be amended accordingly."

It initially seemed appropriate to remit the conviction to the District Court with a direction that, in place of the conviction for refusing to supply a blood sample, the District Court give consideration to substituting a conviction for excess breath alcohol. I use the words "give consideration to" advisedly, because counsel in the District Court raised a defence to the breath alcohol charge which was not considered by the District Court Judge because he had convicted the appellant on the charge of refusing to give a blood sample.

However, the section does not give me power to send back for a rehearing on a substituted charge. I can either substitute another charge or not. Another factor is that the alternative charge of driving with excess breath alcohol has been specifically dismissed.

It seems that, although the appellant appears to have evaded criminal responsibility, I can only allow the appeal and quash the conviction. The prosecution could have appealed by way of case stated from the dismissal of the excess breath alcohol charge.

I am informed by Mr Harte that the appellant is now in Australia. He was disqualified for 6 months. No order was made suspending the operation of the disqualification. He has therefore served the principal part of the penalty. That fact provides another reason therefore for not substituting another offence.

R. D. Gault J

The appeal is allowed and the conviction quashed.

SOLICITORS:
Wilson, Wright & Co., Auckland, for Appellant.
Simpson Grierson Butler White, Auckland, for Respondent.