IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 65/87

BETWEEN EVANS

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing 31st August 1987

Counsel M. Harte for appellant
M. Woolford for respondent

Judgment 15th September 1987

JUDGMENT OF TOMPKINS J

The appellant has appealed from his conviction in the District Court at Auckland on 10th December 1986 of a charge that having been required by an enforcement officer to permit a specimen of blood to be taken, he refused to do so.

At the commencement of the hearing before Judge Brown Mr Harte, counsel for the appellant, made it clear that the defence conceded that everything had been correctly done in terms of the Transport Act 1962 and the Transport Breath Test Notice 1978 with the sole exception of the performance of the Evidential Breath Test procedure.

The events to which the charge relates occurred on 22nd February 1986. The appellant had been stopped at about

11.20 p.m. on the Great South Road at Greenlane. Following the initial procedures he was taken to the Ministry of Transport office at Ellerslie where Traffic Officer Hall attempted to conduct an Evidential Breath Test on an Alcosensor II. He depressed the 'set' button then depressed the 'read' button. He recorded a reading of 0000. He then proceeded to conduct the standarisation test. He introduced alcohol from an appropriately marked container. He obtained a reading of 0300. As the maximum permitable reading in accordance with the container ws 0350 that step was properly completed. Traffic Officer Hall then said

> "After approximately a minute and a half I proceeded on to conduct the second zero test. On that occasion the machine gave a reading of 0050. On that basis I deduced that the machine was defective and at 11.41 I requested the defendant to supply a sample of his venous blood."

The defendant declined to consent, hence this prosecution.

The reason why the traffic officer considered the machine was defective was because it did not produce the digital reading of 0000 as required by step three of paragraph 7 of the Transport (Breath Test) Notice 1978. In cross examination the traffic officer said that he considered that if the machine did not show the four zeros it was malfunctioning.

The appellant called evidence from Mr Rory Shanahan, a consultant scientist. He qualified himself as an expert in relation to the Alcosensor II device. He expressed the opinion that when the traffic officer obtained the reading of 0050 it

indicated that there could have been alcohol still in the instrument which had not been flushed from the instrument upon pushing the 'set' button. He considered that all that was required was for the 'set' button to be pushed again. In his view the probability was that the four zero reading would then have been obtained. He had observed occasions when these events had occurred, that is, when the device had not given the four zero reading first but had after the 'set' button had been depressed again, one or more times. It followed from Mr Shanahan's evidence that the result the traffic officer had obtained did not necessarily establish that the machine was defective.

Section 58B(1) sets out the five alternative circumstances, one of which must exist before an enforcement officer may require a person to permit a registered medical practitioner to take a blood specimen from him. Relevant to this appeal is paragraph (d). Its effect is that an enforcement officer may require a person to permit a blood specimen to be taken if "for any reason an evidential breath test cannot then be carried out at that place." It was the case for the prosecution that an evidential breath test could not be carried out because the Alcosensor device was malfunctioning. It was the case for the appellant that it had not been proved that the Alcosensor device was malfunctioning. If it were not, an evidential breath test could have been carried out. Therefore, the appellant contended,

the enforcement officer was not entitled to require the appellant to have a blood specimen taken.

This part of s 58B(1)(d) was considered by Thorp J in Lankreijer v Auckland City Council (M 1637/79 Auckland Registry 21 February 1980). The traffic officer, when endeavouring to comply with step three, depressed the 'read' button. He found the device very slow in producing any reading, it then "flickered" readings of 50 and 100 and "finally flickered to 300 for a split second before the light went completely out." The traffic officer concluded that the device was faulty as its batteries were flat. He took it to another traffic officer who fitted the device with new batteries. When that was done it was tested and operated normally. But the traffic officer, without any re test, required the appellant to give a blood sample. He refused. Thorp J allowed his appeal against conviction. It was submitted for the Auckland City Council that the traffic officer should not require a second evidential breath test to be undertaken. But Thorp J concluded that the legislation did not prevent the traffic officer doing whatever was required to be done to complete the evidential breath test he had commenced. At p7 of the unreported judgment he said

> "I would readily accept that the language of s 58A only gives jurisdiction to require a driver to undergo one evidential breath test. I am quite unable to find anything in the statute which suggests that until such a test has been completed a traffic officer is prevented, as a matter of law, from taking such action as is reasonable in the circumstances, to complete a test."

I, with respect, agree. So if in the present case all that was required in order to complete the test properly was to depress the 'set' button a second time, then I find nothing in the legislation that would have prevented the traffic officer from taking that step then proceeding to carry out a valid evidential breath test.

But the traffic officer did not do so, nor is there any other evidence to show that the machine was defective. If, as the traffic officer said, he believed it was as the result of the reading he had got, one would have expected that the device would have been examined, any defect in it found and evidence of that defect given. No such evidence was tendered by the prosecution.

The Judge considered that the traffic officer could not have been expected to know why he did not get a correct reading at step three. He considered, and this was not contested, that the traffic officer acted bona fide. It was his view that the reading obtained at the second zero test prevented the officer from proceeding further. He also noted that there was no evidence as to whether this was in fact a malfunctioning device. With respect to the Judge, the traffic officer's bona fide belief or whether he had reasonable grounds for his conclusion that the machine was malfunctioning, is not the issue. The issue rather is whether an evidential breath test could not be carried out, not whether the traffic officer <u>believed</u> that an evidential breath test could not be carried out. And if a second depressing

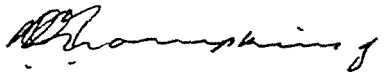
of the test button would have produced the requisite four zeros, then the officer could properly have proceeded further.

In the absence of any evidence of a defect or malfunction, and having regard to the evidence given by Mr Shanahan, I consider that the prosecution failed to discharge the onus resting on it to establish that an evidential breath test could not have been carried out. It follows that the traffic officer was not justified in requiring the appellant to have a specimen of blood taken from him.

Mr Woolford submitted that even if I reached that conclusion, the prosecution could be saved by applying s 58E, the reasonable compliance section. I think not. If the prosecution has failed to prove an essential prerequisite for requiring a person to permit a blood specimen to be taken, I do not consider that it could properly be said that there has been reasonable compliance with the section.

This conclusion makes it unnecessary for me to deal in detail with Mr Hart's alternative submission that the traffic officer did not say and therefore failed to prove that, when carrying out step three, he depressed the 'read' button "for approximately 10 seconds", but I should record my view that in the absence of any cross examination by Mr Hart on this issue, the Court could reasonably assume that the traffic officer had in that respect complied with the requirements of the test.

The appeal is allowed. The conviction is quashed. The appellant is entitled to costs which I fix at $500.



Solicitors

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