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NZLR

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

AP.22/89

2069

BETWEEN: IAN WAYNE ERIKSEN

Appellant

AND: THE MINISTRY OF TRANSPORT

Respondent

Hearing: 1 December 1989

Counsel: P.J. Mooney for Appellant
Susan Hughes for Respondent

Judgment: 1 December 1989

ORAL JUDMENT OF TOMPKINS J

The appellant was charged with failing to give way at an intersection and with driving with excess blood alcohol. These charges were heard in the District Court at Hawera on 3 May 1989. On the first charge he was acquitted. On the second he was convicted. He now appeals against that conviction.

The charges arose out of events that occured on 6 October 1988 at an intersection in Stratford. After being approached by the traffic officer the appellant underwent a breath screening test that was positive. He was then required to accompany the traffic officer to the Stratford Police Station where he underwent an evidential breath test that was also positive.

There was a conflict of evidence on the events that followed; the traffic officer stating that the appellant immediately agreed to have a blood test, the appellant contending that at not stage did he agree. That factal issue was resolved by the District Court Judge in favour of the prosecution. The traffic officer arranged for a doctor to be called. While they waited for the doctor to arrive the appellant indicated an intention to depart. Again the evidence is not clear and there is some element of difference that the District Court Judge in his judgment did not resolve, but I will assume for the purposes of this appeal that the appellant indicated to the traffic officer an intention to depart, and the traffic officer told the appellant that if he left he could be arrested. The appellant says, and the traffic officer does not contradict this, that the appellant gave a similar indication to a Police officer who also indicated that if the appellant sought to leave he would be arrested. In the event, the appellant did not seek to leave. He remained at the Police Station until the doctor arrived and then submitted to the taking of a blood test.

Mr Mooney for the appellant acknowledges that in accordance with the decision in *Auckland City Council v Haresnape* [1983] NZLR 712 (CA) and, in particular, the statement by Somers J at 715 that once the appellant had elected to undergo a blood test he could not change his mind. But it is Mr Mooney's submission in this court, as it was in the court below, that the threat of arrest by the enforcement officer was unjustified and that in accordance with the decision of the Court of Appeal in *Auckland City Council v Dixon* [1985] 2 NZLR 489 (CA), it rendered the evidence of the blood test subseqently taken inadmissible. In *Dixon's* case Cooke J, delivering the judgment of the court, examined in some detail the relevant legislation and, in particular, s 58B(1) being the subsection that authorises an enforcement officer to require the person to permit a blood specimen to be taken and s 58C(1) that provides that every person may be arrested without warning by an enforcement officer who, having been required by an enforcement officer under s58B(1) to permit a blood specimen to be taken, fails or refuses to do so. At p 492 Cooke J observed that while actions taken by officers in difficult situations should certainly not be judged harshly by the courts it is also true that their power of arrest without warning should never be exercised or threatened to be exercised automatically

or without substantial reason. The relevance of that observation was the practice that had developed in Auckland City for persons who refused to give blood to be arrested.

In *Dixon's* case the requirement for the taking of the blood test arose as the result of the circumstances being within s 58B(1)(b) where the evidential breath test indicated a proportion of alcohol between 300 and 500 micrograms of alcohol litre of breath. At p 493 Cooke J said:

> "Clearly the current New Zealand legislation contains nothing to suggest that, contrary to ordinary principles, the power of arrest without warrant, or the threat of it, may be exercised to compel persons to submit to blood tests which they would otherwise refuse. They will commit offences by refusing lawful requirements and may be prosecuted in the ordinary way. But naturally the Act stops short of authorising physical compulsion to undergo these tests. Similarly, in our view, it stops short of authorising indirect compulsion to do so."

Finally at p494 he said:

> "When the conduct of a person is such that a traffic officer is contemplating arrest, it may well be wise and only fair, depending on the circumstances, to warn the person first. But it follows from what we have already said that a warning should never be given simply for the purpose of inducing consent to a blood test. And we repeat that, to avoid any misunderstanding, a warning should usually be accompanied by a reference to the possibility of bail."

In the present case any discussion about the possibility of arrest was not for the purpose of inducing the appellant to consent to the taking of blood. That consent had already been given before any suggestion of arrest arose. But it is also so that it appears that when the question of a possible arrest arose there was no reference to bail. It also appears from answers given by the traffic officer that a factor that weighed in his mind when considering the possibility of the arrest of the defendant if he attempted to leave the premises was what he

described as, "expediting the matter and placing it before the court at an earlier date". I assume by that he meant that his objective was for the proceedings not to be delayed by any possible proceedings under s 58C for refusing to undergo a blood test.

I have reached the conclusion that *Dixon's* case does not apply in the circumstances that I have outlined. The essence of the decision in *Dixon's* case is that the threat of arrest should not be used as a form of indirect compulsion designed to compel a person to submit to a blood test which he would otherwise refuse. As I have indicated, that was not the situation in the present case.

On the District Court Judge's finding the appellant had consented to the taking of blood. Certainly it would appear from his subsequently expressing an interest in departing before the arrival of the traffic officer that he may have wished to change his mind. However, that option was not open to him. So, he having consented to the taking of blood and then having indicated the possibility of his departure, it was quite appropriate for the traffic officer and the Police constable to point out that if he sought to do that there was a possibility of his being arrested. It appears to me to be clear that the traffic officer would have had the power to arrest the appellant had he commenced to leave the Police station; that power arising under s 58C. So, I find nothing inappropriate in the traffic officer warning the accused that that consequence may follow if he were to endeavour to depart and in those particular circumstances, and at that stage, I do not consider that the validity of what the traffic officer said is affected by the absence of any reference to bail. Had the appellant persisted with his intention to depart so that an arrest became imminent, or indeed occurred, it may well be that a reference to bail at that stage should have been made, but as I read the evidence the situation did not develop to that stage.

For these reasons, therefore, I do not consider that the traffic officer exercised what Mr Mooney calls an "abuse of power" to justify allowing the appeal and setting aside the conviction.

The appeal is dismissed.

Solicitor for Respondent: Crown Solicitor, New Plymouth

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