IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 11/90

BETWEEN HAILES

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 9 March 1990

Counsel: Mr Harte for Appellant
Miss Evans for Respondent

Judgment: 9 March 1990

ORAL JUDGMENT OF HILLYER

This is an appeal against a decision of District Court Judge Elliott sitting in the District Court at Auckland on 22 November 1989. The appellant was charged with driving with excess blood alcohol and was convicted. He was disqualified for six months and fined $300 and costs. The appeal is against conviction only.

On 3 August 1988 the appellant was stopped for other reasons by a traffic officer, was required to take a breath screening test by a traffic officer and thereafter an evidential breath test which showed a level of 450. That evidential breath test was carried out in the blood alcohol suite of the Auckland City Council Administration Building. At that level the officer was entitled to require the

appellant supply a specimen of venous blood. He obtained the blood specimen form, filled it in with appellant's name, occupation, address and date and then read to him from the form the advise given on the form as follows:

> "You are advised that you are required under the Transport Act to permit a Registered Medical Practitioner to take for the purposes of analysis a specimen of your venous blood in accordance with the normal medical procedures. Please answer "Yes" or "No". If you do not consent please state your reason ....
>
> You are advised that if you fail or refuse to permit a specimen of blood to be taken you can be charged with an offence for which you are liable on conviction to imprisonment for a term not exceeding three months or to a fine not exceeding $1500 or both and unless the Court for special reasons orders otherwise, a minimum disqualification from driving of six months".

The appellant then discussed the situation with the traffic officer. There was some talk about fear of needles, getting his own doctor, and what might happen if he had AIDS and the officer then went on to say that the driver asked if he was under arrest and the officer said "No". The appellant then asked if he could leave and the officer said "No" because he was <u>being</u> required to have a blood specimen taken but he was no way under arrest. The officer said that the appellant finally agreed and the officer read the requirement again. The appellant read the form and then circled "No". The officer asked him about this. The officer said the appellant said something to the effect it depended on what school one went to. Private schools circled to eliminate a "No" and Government schools crossed.

The officer said that the appellant then crossed out the circled "No" and wrote "Yes". He read the rest of the form and then signed it and it was thereafter a doctor arrived and appellant after confirming that he was prepared to give a specimen of blood had a blood specimen taken which proved a positive.

Mr Harte's first point is that the blood specimen was obtained by a form of duress. He referred to the case of Auckland City Council v Dixon [1985] 2 NZLR 489 in which the Court of Appeal held that "a traffic officer went too far in telling the defendant that if he did not give a specimen of blood he would be arrested and taken to the Auckland Central Police Station". That said the Court of Appeal, was a form of duress which invalidated the procedure. Mr Harte says that after the request had been made to give blood the appellant asked if he could leave and was told that he could not. That, however, in my view overlooks the fact that prior to that time the defendant had had read to him the section of the form that I have set out above.

Under the Act as it then was S 58(A)(5)(c) provided that:

"A person commits an offence who -

(c) Having accompanied an enforcement officer to any place pursuant to a requirement under this section, fails or refuses to remain at that place until he is required either to undergo an evidential breath test or a blood test pursuant to this Act, or to accompany an enforcement officer to another place pursuant to this section..."

He was, therefore, legitimately required to stay at the place where he was being questioned by the officer. Mr Harte's point is that the officer had required him to give the blood test and had then refused to allow him to go. The learned District Court Judge did not take that view of the matter. He said:

> "The officer did not say that he could not go until he had his blood test. He simply said that he was being detained because he was being required, ie an ongoing process of requirement at that time, to which clearly no definite answer had been given and, therefore, there was no suggestion to be drawn from that, that he would be detained indefinitely or that he necessarily had to give blood".

It would, of course, be wrong for a traffic officer having asked a driver whether he was prepared to give blood to assume that he was refusing simply because he did not say immediately that he was going to. It is the case, of course, that a refusal can be inferred from a course of conduct. The driver does not have to say "No I will not give a specimen of blood" and if he fails to do so that is an offence, but it cannot be assumed that he has failed to do so or refused simply because he is asking questions as to what his rights are and what will happen if he had for example some disease.

Mr Harte submitted that the obligation on the appellant to remain at the place collapsed once the requirement to give blood was put to him and subsequent detention after that point in time was illegal. Mr Hart

says the appellant was given no idea of how long he would be detained. I agree with the learned District Court Judge that what was happening was that the requirement was still being made of the appellant and that that requirement was not answered either in words or in conduct until the appellant had made the inquiries he wished to and had read again and filled in the form that was presented to him. I do not consider that there was any duress.

Mr Harte further submitted that the learned District Court Judge was under some misapprehension because he had referred to a case of Auckland City Council v Haresnape [1983] NZLR 412. That was a case in which at that time a person had a right to request a blood test within 10 minutes of a positive reading as a result of an evidential breath test. A traffic officer in those circumstances must not give the impression that he cannot change his mind, if at first he does not request a blood test provided that he says he wants to change his mind within the 10 minute period. That, however, was not what I read the learned District Court Judge to be saying. In Auckland City Council v Haresnape there was a question as to whether the advice given was inaccurate and what the learned District Court Judge was saying in this case, there was no ambiguity in the advice given in the same way as there was no ambiguity in the Haresnape case. It does not seem to me that the learned District Court Judge was

confusing the law as it was at the time of the Haresnape case with the law as he had to apply it at this time. Under Haresnape the motorist had an option to ask for a blood test. Under this case the appellant had an option to refuse to give a sample of blood and to be convicted, therefore, of the offence of refusing. That is what is set out in the section of the blood specimen form that I have referred to and that it seems to me that is all the learned District Court Judge was referring to when he talked about there being no inaccuracy in the advice given.

The appeal will, therefore, be dismissed.

Costs to respondent $150.

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P.G. Hillyer J

Solicitors
Mr M. Harte for appellant
Crown Solicitor for respondent