IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP178/91

BETWEEN PERCY ROBINSON
Appellant

AND MINISTRY OF TRANSPORT
Respondent

Hearing: 28 August 1991

Counsel: T.G. Vogel for the Appellant
M.A. O'Donoghue for the Respondent

Judgment: 24.9.91

JUDGMENT OF ELLIS J.

The appellant was charged in the District Court at Lower Hutt that contrary to the provisions of s58(1) of the Transport Act 1962 he drove with a proportion of 500 micrograms of alcohol per litre of breath as ascertained by a subsequent evidential breath test. He defended the charge but was convicted and now appeals against this conviction.

The appellant's vehicle was stopped by a traffic officer at a check point on Fergusson Drive at 3.18am on 8 December 1990. The appellant admitted to having had a few drinks and agreed to undertake a breath screening test.

The traffic officer said the breath screening test was positive, so he required the appellant to accompany him to the Upper Hutt Police Station, which he did, and an

evidential breath test was administered at 3.39am. The evidential breath test gave a result of 500 micrograms of alcohol per litre of breath.

The appellant was then informed of his right to elect to undergo a blood test and the traffic officer informed him that he would have 10 minutes in which to make his decision. The period started at 3.46am and stopped 12 minutes later at 3.58am. During the 12 minutes the appellant and the officer engaged in casual conversation on quite unrelated matters. It was submitted by Mr Vogel that the appellant had not been given at least 10 uninterrupted minutes within which to consider his position and whether to request a blood test.

In Lawrence v. MOT [1982] 1 NZLR 219 the Court of Appeal indicated that the purpose of the statutory period of ten minutes is to provide a suspect with adequate time to consider without undue pressure whether or not to request a blood test. The question subsequently arose as to what was meant by "undue pressure" in this context. Barker J in James v. ACC (unreported, 1 April 1987, High Court Auckland AP283/86) and Haslem v. ACC (unreported, 20 September 1985, High Court Auckland M934/85) and Tipping J in Wren v. Police (1989) 4CRNZ 421 took the view that it meant that the period was to elapse without substantial interruption. Tipping J said at 424:

> "I do not consider that these words are intended to denote a concept such as coercion or duress. I think what is being spoken of is undue pressure of time. It is after all in the context of a 10 minute statutory interval that the concept of pressure is being discussed. The question in my judgment becomes whether or not in substance the suspect has had at least 10 minutes of uninterrupted time for reflection."

What constitutes undue interruption is a question of fact and degree. Minor interruptions have been held of no consequence. Photographing a suspect was held to fall within this category of interruptions in James v. ACC. By contrast, continuous conversation between the suspect and the enforcement officer was held to constitute a substantial interruption in Wren v. Police. Tipping J stated at 424:

> "Mr Bates pointed out that in the present case the appellant had at least 15 minutes. He submitted that the casual conversation was not a sufficient interruption. It is something of a misnomer to speak of interruption in the present context because there was really nothing to interrupt. There was in fact no period allowed to the appellant to contemplate his position. As in many of the other cases no suggestion of bad faith can be or is levelled against the constable; but the unfortunate fact is that the appellant did not receive what the statute requires, namely 10 minutes uninterrupted time to reflect upon his position."

Mr O'Donoghue submitted that there was a conflict between Wren and the more recent decision of Williamson J in Baxter v. MOT 6 CRNZ 445. That case also involved conversation between suspect and enforcement officer during the 10 minute period but whereas the conversation in Wren was held to constitute a substantial interruption the conversation in Baxter was not. Williamson J recognised

that the suspect there used conversation as a means of considering his options and the circumstances in which he found himself. He said at page 452:

> "As has been emphasised in other authorities, it must always be a question of fact and degree. The evidence in this case is of amiable chatting between the suspect and traffic officer during the period of 10 minutes. The only specific items of conversation referred to concerned the appellant's self employment and that his apprehension may have some effect on his work. He said 'I do not need this'. It seems that during the 10 minute period, the appellant has been considering his options and the circumstances in which he found himself. It is clearly important that a suspect in such situations does have the 10 minutes available. That, however, does not mean that he must spend that time in reflection or silent retreat, or isolation, but rather that the time is available for him to make his decision. Some people make their decisions by talking; others by listening; others by thinking. The real choice as to the way in which the suspect spends those 10 minutes and makes his or her decision is the suspect's. A Court would not be satisfied of compliance with the statute if, by virtue of interruptions, the suspect is not given 10 minutes in which to make a decision or not free to consider his options. If, however, the suspect during that period is of the view that there can be casual conversation, such as described in this evidence, I do not believe that such conversation is an interruption. Indeed it may assist. It certainly does not constitute undue pressure and does not, on the facts of this case, appear to have taken away from the opportunity for the appellant to have considered whether or not to make a request for a blood sample."

In this case the relevant evidence of the appellant and the officer was not really at variance. The officer said in cross examination:

> "Just moving on a bit, after the result of the evidential breath test was made known to the defendant you gave him 12 minutes, didn't you, in which to consider giving blood or not...That is correct.

Do you know what he did and said during that 12 minutes...Initially the first comment he made was that he didn't want a blood test taken and then there was some general conversation in relation to a person that we both knew.

XXN - And how long do you think that conversation went on for...From my recollection of the events, we talked almost the entire time were at the station.
So it would be fair to say that during the 10 minute period there was conversation between the defendant and you, perhaps on and off about this independent matter... Yes there was.
Now I understand that the 10 minute period started at about 3.46am, I think that is what your notes will tell you...That is correct.
And it finished at 3.58am, is that correct...That is correct.
Now how did you informed the defendant that the time was up...I looked at my watch. The 10 minute period had elapsed and I advised the defendant of that fact and he stated that he didn't want a blood test. By the time this conversation had taken place the 12 minute period had then expired and I then issued a Traffic Offence Notice.
Now in the summary of facts in this matter, and I accept this is not evidence, it is noted down the bottom that the defendant was extremely polite, co-operative and pleasant to deal with, would you endorse that...He was, most definitely."

And in re-examination:

"Officer this 10 minute period that you advised the defendant he had in which to advise you he wished a blood sample to be taken you said that he said that he didn't want one taken, at what time in that 10 minute period did he give you this advice...It was almost immediately after the initial request. It was written down and the time commenced at 3.46.
Sorry, did you say he wrote it down...He signed the form that the matters had been advised to him and he said to me that he did not want a blood test taken.
And this subsequent conversation that went on about an unrelated matter was that at your instigation or his...At his, I think.
And did it occupy the entire time...Not the entire time, the majority of it though.
And at the end of this period I understand he again did not want the blood sample taken...That is correct."

The appellant's evidence was even more bland. He said:

"I remember the officer said something to the effect that I had 10 minutes, now that the result was positive, in which to decide whether to give blood or not. The officer said in his evidence that he gave me 12 minutes, approximately 12 minutes, and during the 12 minutes most of the 12 minutes was comprise of chit chat between us on some unrelated matter, I remember that. We were both talking general really. We were just sort of having a conversation and then he said the time was up, whether it was 10 minutes or 12 minutes I don't know. The officer has recorded in his notes that it was a 12 minute period and he has said that during that 12 minute period there was some conversation going on between myself and the officer, I accept that. I remember the officer informed me at 3.58 that the 10 minute period for me to decide to give blood or not had finished. He said the time was up, something to that effect, but it was optional for me to have the blood test or not. Put it this way, I didn't have to have it if I didn't want it."

And in cross-examination:

"Do you recall him telling you about your options to have a blood sample...Yes I had an option, I didn't have to have the blood sample.
But you could...I could if I wanted it.
But you had to tell the officer if you wanted one, do you recall him saying that, if you wanted the blood sample taken what did you have to do...It is up to me whether I wanted to have one or not and I said no.
What did you tell the officer...I just said no.
You said no you didn't want a blood sample taken, is that what you meant...Yes.
And at what time did you tell him that...It must have been around close to 4.
I don't mean the actual time, did you tell him immediately after he read you that notice, or did you wait a while...I can't recall.
The officer said it was immediately, would you agree with that...I can't recall.
Did you tell him at any other stage that you still didn't want one...No, just the once that I know of.
The officer says that when he told you that the period was up you again said you didn't want one...No.
You don't recall that...No, but he did say it to me though."

The Judge did not express a view on the matter but simply convicted the appellant. Plainly he thought the 10 minute period had been properly allowed. There is no doubt that the appellant refused a blood test and was not subjected to pressure by the officer. It is also plain that the casual conversation took up "almost the entire time". In my assessment the conversation appears to have been of the diverting kind to pass the time. I respectfully agree with the view of Williamson J about the varied thought processes of different people, but I think it should always be borne in mind that in many cases, and I think this is one, the suspect will be relaxed by drink and easily or willingly diverted from the seriousness of his situation. I do not have the benefit of any detailed assessment by the Judge of the witnesses, but consider the written record shows the casual diverting nature of the conversation clearly enough. The appeal is by way of rehearing and in my view the prosecution has failed to show that the appellant was afforded 10 minutes reasonably uninterrupted time to consider his position. The appeal is therefore allowed and the conviction is quashed.

Solicitors:

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