NZLR

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

1873

19/9

No. AP87/90

NOT RECOMMENDED

BETWEEN J HANNING

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 12 September 1990

Counsel: G.J. Cameron for Appellant
R.P. Bates for Respondent

Judgment: 18 September 1990.

JUDGMENT OF HOLLAND, J.

The appellant appeals against his conviction in the District Court at Dunedin on a charge that having been required by an enforcement officer to permit a specimen of blood to be taken he failed to do so. The appellant is a full-time student, some 25 years of age. On 13 January 1990 he was observed driving a motor vehicle in central Dunedin. It made an erratic overtaking manoeuvre and was then stopped by a traffic officer employed by the Ministry of Transport. That officer had, during the course of the discussion with the appellant, good cause to suspect that he had recently consumed alcoholic liquor and indeed the appellant admitted consuming three 12 oz glasses of beer at two hotels earlier in the evening.

The officer required the appellant to undergo a breath screening test. The result of the breath screening test was positive. The traffic officer said that prior to the conduct of the breath screening test the appellant had been extremely uncooperative and abusive and had made derogatory terms likening traffic officers to Nazi soldiers. The officer indicated to the appellant that he required him to accompany him to the Ministry of Transport office or any other place for the purpose of an evidential breath test or blood test or both. The officer then went on in giving his evidence-in-chief to say that the appellant was transported back to the Ministry of Transport office at Andersons Bay Road, Dunedin. During the trip he continued to be obnoxious and abusive.

At the Ministry of Transport office the appellant was told that he was required to undergo an evidential breath test. When assembling the device, the officer discovered that part of the device had somehow got into a rubbish bin. He took this piece out of the rubbish bin and, although it was explained that the piece was not a part which would come into contact with his mouth, the appellant refused to undergo an evidential breath test with the device. The officer then got another evidential breath test device. The evidence of the traffic officer is that the appellant failed to comply with the instructions in relation to this device and that no adequate result was able to be obtained. He deemed that the test had failed and

thereupon requested that a blood specimen be given by the defendant.

The officer read out in its entirety the form requiring the blood specimen to be given. He made an error by missing out one word and was corrected by the appellant. The officer then says:-

> "However, he would not consent to the taking of blood, would neither answer yes or no, but made many stipulations as to whether or not he would give a blood specimen."

It is apparent from the evidence that there then ensued a series of questions and demands by the appellant and the traffic officer and another traffic officer, some of which were answered and some were not. When asked what the questions raised by the appellant were, it was stated that the questions were whether the needle was clean, who was the packager, where was it packaged, was the traffic officer a medical practitioner experienced in the use of needles, and reference was made to what he described as the Civil Rights Act, as well as a good deal of abuse directed to traffic officers.

It was made clear to the appellant that the blood sample would be taken by a registered medical practitioner, but it is equally apparent that a number of the other questions and requests of the appellant were regarded by the traffic officer as merely a continuation of abuse and were ignored. The officer said:-

> "We had got to a stalemate situation really. I called for a supervisor to come in. He tried to talk to the defendant. He was merely shouted down."

When asked as to the demeanour of the appellant after the supervisor had been brought in, the officer replied:-

> "He was still totally obnoxious and abusive. Because the way he had acted through the procedure, being totally abusive and obnoxious, we believed it was in the best interests that he was arrested. There was a high chance that he may have driven again."

The supervisor, Sergeant Bridgeman, was called. His evidence is totally corroborative of the traffic officer. He did say that the traffic officer on a number of occasions, and at least once in his present, asked the appellant whether he would consent to the taking of a specimen of blood. He said however:-

> "He did this in so many words. I cannot remember the exact words but along the lines of 'Do you consent to the taking of a specimen of blood?'".

The sergeant was then asked for the reply of the appellant and it was:-

> "He would not allow the blood sample to be taken. Continued to argue and be aggressive."

The appellant was called to give evidence. He claimed that he was most alarmed from the point of view of

hygiene at the attempt to reconstruct the evidential breath test device by extracting part of the device from a rubbish tin. He claimed that from then on his questions were concerned about hygiene and that he was particularly concerned about this matter in relation to the extraction of blood. He claimed that he did not get adequate replies in relation to some of his questions. He said that he had not at any time refused to enable a blood sample to be taken.

The District Court Judge in entering a conviction dealt with the matter in one paragraph:-

> "It has been submitted there was no specific refusal and of course at no stage did the defendant say he refused. The defendant also submits there is no constructive refusal but the evidence is quite clear from the traffic officer that the defendant was obstructive and abusive. He was not listening, he was shouting down the traffic officers and he was quite unco-operative even in the context as submitted by Mr Cameron regarding a constructive refusal. I find that this man had made up his mind to be unco-operative and that is what he was doing.
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> Those are the very brief reasons I give at this late hour for finding this charge to be proved."

Section 58E(1)(a) of the Transport Act 1962 provides:-

> "Every person commits an offence, and may be arrested without warrant by an enforcement officer, who -
> (a) having been required by an enforcement officer under s.58C of this Act to permit a blood specimen to be taken, fails or refuses to do so ...".

Some significance must be attached to the fact that the offence is failing or refusing to permit the specimen to be taken. There obviously must be some circumstances where there could be a failure which does not amount to a refusal. On the other hand, mens rea is an integral part of the offence: Transport Department v Taylor (1971) N.Z.L.R. 622. In addition, it is necessary for a specific request to be made. The evidence of Sergeant Bridgeman probably is sufficient to establish that a specific request was made but the suspect is entitled to know the procedure, and obviously if a suspect had reasonable grounds to believe that the giving of a blood specimen might expose him to risk of infection it may be difficult for a prosecution to establish the necessary mens rea.

That does not arise here. The Judge was entitled, in my view, from considering the evidence to reach the conclusion he did that the appellant was being obstructive and abusive and uncooperative.

There may well be circumstances that give rise to the conclusions reached by the Judge that there could be a "constructive refusal" which in fact would be a "failure" and amount to an offence. Obviously an enforcement officer does not have to go on forever permitting questions to be put to him that are not in the circumstances reasonably justified. That may well have been the case here. It is nevertheless necessary for the prosecution to prove that there was a failure to permit the specimen to be taken which

was deliberate and which involved mens rea on the part of the appellant. There had been an ensuing discussion, questioning or even argument. There was some legitimate foundation for the commencement of the questions raised by the appellant, even if they were raised in an abusive and thoroughly unjustified manner. In my view, the circumstances of this case were such that a colloquy having commenced there was a clear obligation on the officer to have brought it to the attention of the appellant that the colloquy had been brought to an end. This could easily have been achieved by the officer saying to the appellant that there was not going to be any further discussion or questioning. He could easily have told the appellant that it was an offence to fail to provide the blood specimen and that unless he immediately consented to the specimen being taken he would be charged with such an offence. If that had been shown to have happened, there would have been no room for doubt as to the mens rea of the appellant.

The circumstances reflect no credit whatsoever on the appellant, but were such that in my view it cannot be said that beyond reasonable doubt the appellant had appreciated that the time for questioning and prevaricating had ceased, and that by continuing to question the officers, he was committing the offence of failing to permit a specimen to be taken.

I have sympathy with the Judge who had to decide this matter, obviously in a busy day, and he did so somewhat peremptorily. The circumstances leave me in a

state of doubt as to whether there was a deliberate failure on behalf of the appellant to permit the blood specimen to be taken, and it follows accordingly the appeal must be allowed and the conviction quashed.

Solicitors:

Garth James Cameron, Dunedin, for Appellant
Crown Solicitor, Dunedin, for Respondent