

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. AP236/91

BETWEEN IAN BRIAN KENTISH

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 8 November 1991

Counsel: K. Flood for Appellant
 C.A. Lange for Respondent

Judgment:

13 NOV 1991

JUDGMENT OF HOLLAND, J.

This appeal arises directly from the decision of the Court of Appeal in Ministry of Transport v Masters (CA135/91, Judgment 6 August 1991, unreported) overruling the decision of this Court under the breath and blood alcohol driving legislation in the Transport Act 1962.

There is no challenge to the fact that the appellant was properly required to accompany a traffic officer to Transport House, Christchurch for the purpose of undergoing an evidential breath test or blood test or both pursuant to the provisions of s.58B of the Transport Act 1962. A test on an approved machine was duly conducted. The procedure for using the machine is that two readings are required to be taken and an average of those readings is relied upon. If the two readings are

outside the allowable tolerance the machine records "incomplete test". This is what occurred with the test of this appellant.

The traffic officer, having received a return of incomplete result from the test, then required the appellant to give a blood sample which he agreed to do. The result of that blood sample was that the proportion of the appellant's blood was shown to be 161mg of alcohol per 100ml of blood, substantially over the prescribed limit. The appellant was prosecuted in the District Court at Christchurch on a charge that contrary to the provisions of s.58(1)(c) of the Transport Act 1962 he drove a motor vehicle on a road while the proportion of alcohol in his blood exceeded 80mg of alcohol per 100ml. He was convicted. The defence, inter alia, was that the traffic officer was not empowered to demand the blood sample.

The hearing took place on 12 August but was adjourned part-heard to 23 August. In that intervening period the decision of the Court of Appeal in Ministry of Transport v Masters (supra) came to the knowledge of the Judge and counsel for the appellant.

It was submitted at the resumed hearing on 23 August that in the light of the decision of the Court of Appeal there was no case to answer. The Judge indicated that a prima facie case had been made out and adjourned the hearing to 11 September. On 11 September the appellant elected not to call evidence and he was duly convicted.

Because of the traffic officer having given evidence before counsel was aware of the Court of Appeal decision, there is no cross-examination of the traffic officer as to the circumstances when the blood sample was requested. In Masters the Court of Appeal held that a person who has been required to provide a breath sample for testing by way of evidential breath test may lawfully be required to provide another such sample where the machine indicates "incomplete test" on the first test and that a decision of this Court that an enforcement officer did not, following a return of "incomplete test", have the right to require a person to undergo a further evidential test was wrong.

The issue before the Court of Appeal arose from the wording of the Notice prescribed by the Transport (Breath Tests) Notice (No. 2) 1989 SR1989/389. Clause 10 of that Notice prescribed steps 1, 2 and 3, of which step 3 relates to the results of the test and provided as follows:-

- " (i) The results of the various steps in the testing sequence will be shown on the result card or printout, and will include the evidential breath test result which shall be taken to indicate the number of micrograms of alcohol per litre of breath of the person test:
- (ii) If the evidential breath test result is "incomplete test" the test has been unable to be carried out."

However, as is pointed out in Master's case, step 2, which relates to the conduct of the evidential breath test, provides in paragraph (iii) as follows:-

"Step 2(i) and step 2(ii) shall be repeated, as required, until the testing sequence has been completed."

The right to require a blood test occurs pursuant to s.58C, the relevant portion of which, for the purpose of these proceedings, is subs.(i)(c) which authorises the taking of a blood specimen if:-

"(c) An evidential breath testing device is not readily available at the place to which the person has accompanied an enforcement officer pursuant to a requirement under s.58B of this Act (whether or not at the time the requirement was made it was likely that the person could undergo an evidential breath test at that place) or to which the person has been taken under arrest, as the case may be; or for any reason an evidential breath test cannot then be carried out at that place."

In Masters' case the issue was whether, following the return of "incomplete test" the traffic officer was entitled to require a further specimen of breath to be taken. In that case he had done so and a satisfactory reading was obtained indicating that the alcohol in the breath was over the prescribed limit. Masters was prosecuted and convicted. In this Court it was held that the provisions of paragraph 10(c) relating to step 3 meant that a return of "incomplete test" meant that the test had been unable to be carried out. Step 3 did not provide for the sequence of tests to be repeated. It was this Court's view that the officer was then entitled only to require a blood sample to be given pursuant to s.58C. The Court of Appeal disagreed,

holding that the return of "incomplete test" did not necessarily dispose of the matter and that a further test could be required.

The Court distinguished between the provisions of s.58C(1)(c) which refer to the situation where "an evidential breath test cannot then be carried out", and paragraph 10(c) of the Notice which was no more than a statement that a return of "incomplete test" meant that that test had been unable to be carried out. The Court of Appeal held that the Court must direct its attention to whether an evidential breath test cannot be carried out and that in the normal course of events an evidential breath test should be repeated at least once and possibly more times. As was indicated in the leading judgment:- "Persistence beyond a third sequence would be difficult to justify". Nevertheless it was equally clear that the mere return of "incomplete test" on the second test did not of itself amount to a finding that an evidential breath test could not be carried out at that place.

One must have considerable sympathy for the traffic officer in the present case. The District Court Judge, in giving his reasons for judgment, said that the officer, having obtained the incomplete test result, "in accordance with a directive from the Head Office of the Ministry of Transport ... then told the defendant that he required him to provide a blood specimen". That does not appear in the evidence. It was, however, not challenged before me that apparently the Ministry of Transport had advised traffic officers of the decision of this Court in

Masters and that therefore the traffic officer believed that the only course open to him was to require a blood sample to be given. In the light of the decision of the Court of Appeal that conclusion was wrong.

The District Court Judge recognised that in his judgment. The prosecuting sergeant, in submissions, is recorded as having been inclined to concede that in view of the decision in Masters the blood specimen had not been lawfully obtained. However, the Judge decided to consider the matter further. He said:-

"The evidence of the traffic officer confirmed that the directive from Ministry of Transport Head Office as to the procedure to be adopted in cases in this category followed the judgment of Tipping J. in the High Court in Masters. It seems likely that there may be a number of other cases yet to come before this Court in which the procedure advocated by Tipping J. in his judgment has been adopted."

The District Court Judge concluded correctly that the Court of Appeal was concerned with the right of a traffic officer to require a second evidential breath test and not specifically with the circumstances under which a blood specimen could be required. He said:-

"The only evidence before me is an uncontradicted testimony of the officer that the result card read 'incomplete test' and that he therefore followed the Ministry's directive which was, of course, based upon the reasoning of Tipping J. in the High Court namely, that the evidential breath test was unable to be carried out."

A second or even a third evidential breath test may have produced a completed result. Then again such tests may equally have produced further 'incomplete test' results. There is in my view nothing magical in the suggestion of the Court of Appeal that three 'incomplete test' results will entitle an officer to require a specimen of blood."

With respect to the Judge, I am unable to accept that that was a conclusion open to him in the light of the decision in Masters. There was no evidence before the Judge that an evidential test could not be carried out other than the return of "incomplete test" on one carrying out of the test. The Court of Appeal certainly did not say that there could not be circumstances where such a reading in the circumstances would amount to evidence that an evidential breath test could not be carried out but there are simply no circumstances or evidence in this case differing from the facts in Masters. I am accordingly of the view that when the traffic officer required the appellant to give a specimen of blood he was not entitled under the Transport Act 1962 so to do. Nevertheless the appellant consented and there is no cross-examination or defendant's evidence relating to the obtaining of the blood sample.

The District Court Judge then went on to consider the discretion of the Court in relation to evidence illegally obtained. Although he does not specifically say so, he appears to have indicated that he would have exercised his general discretion in favour of allowing the evidence of the blood sample to be admitted. He did, however, refer to the provisions of s.58I of the

Transport Act. There can be no doubt that the Judge is correct in saying that a Court has a discretion to refuse to admit evidence illegally obtained, but in this case there is a specific provision allowing for convictions to be entered on charges of this nature where there has not been strict compliance with the Rules. Section 58I provides as follows:-

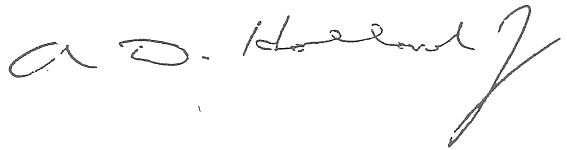
"It shall not be a defence to a charge under any of paragraphs (a) to (d) of section 58(1) of this Act or under subsection (1) or subsection (2) of section 58E of this Act that any provision or provisions forming part of any of sections 58A to 58H of this Act have not been strictly complied with or have not been complied with at all, provided there has been reasonable compliance with such of those sections as apply."

It has been recognised since the decision of the Court of Appeal in R v O'Callaghan (No. 2) (1985) 1 N.Z.L.R. 208 that s.58I cannot be relied on so as to permit a conviction where there is no existence of the substratum upon which there might be said to be reasonable compliance.

Here, however, I am satisfied that there was compliance, or at least substantial compliance. The scheme of the Act requires the administration of an evidential breath test and if that evidential breath test is positive or cannot be carried out a right to obtain a blood sample arises. Here the evidential breath test was administered and produced no result. The traffic officer believed reasonably, but wrongly, that the requirements of s.58C(c) had been met and requested the blood sample

which was voluntarily given. There was no injustice as far as the appellant is concerned and there was reasonable compliance with the Act. I therefore agree with the District Court Judge that the matters raised could not be a defence to the charge and that s.58I applies so that the conviction was properly entered.

The appeal is dismissed.

A handwritten signature in black ink, appearing to read "A. D. Howard". The signature is written in a cursive style with a long, sweeping tail.

Solicitors:

Layburn Hodgins, Christchurch, for Appellant
Crown Solicitor, Christchurch, for Respondent

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