Crown Counsel

**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**AP.239/91**

**BETWEEN:** **KEVIN EARNEST PAYNE**
of Dunedin, Race Commentator

Appellant

**A N D:** **MINISTRY OF TRANSPORT**

Respondent

**Appeal Hearing:** 25 October 1991

**Oral Judgment:** 21st November 1991

**Counsel:** A J Becroft for appellant
Miss Yelavich for Crown

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**JUDGMENT OF HENRY J**

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The appellant was convicted in the District Court at Otahuhu on 25 June 1991 on a charge brought under s.58E (1) (a) of the Transport Act 1962 of having refused to permit a specimen of blood to be taken. The appeal against conviction is brought on two primary grounds which will require separate consideration.

It was first submitted by Mr Becroft that there was no "refusal" within the meaning of s.58E (1) (a). Following his apprehension by an enforcement officer the appellant underwent an evidential breath test which gave an incomplete result.

Following that, at 12:51 a.m, the officer required a blood sample to be taken and section 1 of the form (the details of which are not relevant to this particular submission) was read to the appellant. In response to the request, the appellant asked if he could telephone first his family to ascertain the name of the family lawyer, and then that lawyer. The officer's evidence as to what then transpired is as follows :

> "I agreed to this and at 12:56 he rang his parents straightaway. The defendant made another phone call after that and asked to speak to Brenda, and at 12:57 he used the phone again and asked to speak to Brenda. At 12:59 he told me he was going to use the phone again to ring his radio station. At l:02 he finished on the phone, then he used the phone again. He said on the telephone: "Hello Albie, I've just been pulled up for DIC at Manukau City. I want a solicitor, do you know of one? What is the procedure? I want to, sorry, I want to know what to do". He then said "That isn't going to help me", and then he said "What do you reckon I should do?". He then said "Is that going to help me?". The defendant then started looking through the phone book and he stated "John Hart. He's a solicitor. What about him?". He carried on looking through the phone book, then he stated on the telephone again "What's he like?". He then looked through the phone book again, then at 1:15 he finished on the phone. At 1:15 I read to him again Part I of the Blood Specimen Form and he stated "I want a lawyer". This form was read four other times to the defendant, then he finally wrote on the Blood Specimen Form "If a lawyer of my own choice consents, I will agree to allow blood to be taken". I produce that form to the Court. At 1:25 a.m. a Traffic Offence Notice was issued to the defendant for failure to supply a blood specimen to a traffic officer. The defendant left the office at 1:29 a.m."

Under cross-examination the officer accepted that the appellant had obtained the telephone number of a lawyer from "Albie", and that after the conversation with "Albie" had been concluded no further calls were made. The appellant's evidence was that after speaking to "Albie" the officer again asked him if he would give the blood specimen, but he was

not allowed to make a further call and was told "enough is enough". The officer denied ever having refused the appellant permission to use the telephone. The findings of the Judge are :

> "I'm faced with the situation here where the defendant having spent nearly 20 minutes endeavouring to contact a solicitor is told, is read again the provisions in Part One in the Blood Specimen Form and in fact read then some four time times and he still replies with his conditional consent. His own evidence is that the Traffic Officer said 'enough is enough'. I'm satisfied that the traffic officer made it quite clear that he was not permitted any further time and that he was required to give his specimen, give a specimen of blood and to that requirement, made some four times after the final phone call, the defendant still gave a conditional consent."

Certain relevant propositions are not in dispute :

1. Whether or not there has been a refusal is a question of fact (***Fleetwood v Ministry of Transport*** [1972] NZLR 798).
2. A conditional consent is a refusal (***Pettigrew v Northumbria Police Authority*** [1976] Crim.L.R. 259).
3. Leaving to one side the New Zealand Bill of Rights Act 1990 which has no application to this case, there is no right to obtain legal advice before making a decision whether to consent or to refuse a blood specimen to be taken.

The finding that there had been a refusal in fact cannot be challenged. The appellant was fully aware he had been required to permit a specimen to be taken and after a considerable period of time from the making of the first request wrote his conditional consent on the form. On his own evidence that followed an observation from the officer that "enough is enough". The case of ***Hunt v Ministry of***

*Transport* (1989) 5 CRNZ 231 is distinguishable. There, Holland J held there was no refusal where the motorist had requested a further five minutes for his solicitor to telephone back, to which the officer did not respond, merely treating that as a refusal. It was held on the facts that no decision had been made by the motorist. Here the decision was made -"No, unless my lawyer consents". It follows that for this first submission to succeed there must be some basis for vitiating the refusal. The basis is said to be that the conduct of the officer was unfair or unreasonable in not allowing or not waiting for the appellant to phone the solicitor after speaking to "Albie". There is in my view an inherent difficulty in adopting that proposition. It is accepted, properly, that the appellant was not entitled to postpone his decision whether or not to refuse until he had consulted a solicitor: having been permitted to attempt to do so cannot give him any greater rights. If the requirement to provide a specimen is clearly made and understood by the motorist and the motorist makes a deliberate and responsible decision to refuse, then in the absence of any exculpatory statutory provision the offence is complete. In that general situation there can be no room for the Court to superimpose of its own volition some additional obligation or duty on the enforcement officer, the extent of which he cannot accurately assess. Furthermore, in the present case I can see no element of unfairness or unreasonableness which could be a cause of concern. The appellant had been given the opportunity to make several telephone calls, over some 19 minutes: he was repeatedly told he was being required to provide a blood specimen: he elected deliberately not to do so without the consent of a lawyer of his choice. The Judge's finding was accordingly open to her on the evidence - indeed, the finding would seem to be inevitable in the factual situation which existed.

The second broad ground of appeal raised a novel point, one which had not been taken in the Court below by counsel then appearing. Mr Becroft submitted that an enforcement officer is obliged to advise the motorist of the consequences of refusing to provide a blood specimen. In this case Part I of the standard blood specimen form was read out to the appellant. The relevant portion states :

> "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 four thousand five hundred dollars, or both, and unless the Court for special reasons orders otherwise, a minimum disqualification from driving of six months."

The complaint is that no reference was made to s.30A, which provides for certain mandatory consequences following conviction if the offender has previously been convicted of alcohol or drug-related offences. This appellant was in that category of persons. It was suggested that advice or knowledge of the possible consequences of refusal went to the issue of *mens rea.* I have some difficulty in seeing how that could be. The element of *mens rea* in this offence could only arise in respect of the requirement to provide a specimen having been made and the refusal to do so. Knowledge of the possible consequences (i.e. prosecution for an offence) is irrelevant to any element of the offence. Knowledge that certain conduct constitutes an offence is generally not a pre-requisite to commission of the offence. *A fortiori* knowledge of the range of penalties which may be imposed for an offence is irrelevant.

That apart, in my judgment there is no obligation on an enforcement officer to advise of the consequences of a refusal when requesting a blood specimen. The legislation does not so provide, and there is no need to imply such an obligation to give it sensible operative effect.

In this case certain advice as to consequences was given, and the alternative submission is that the adoption of such a course carried with it an obligation also to give advice as to the effect of s.30A. Mr Becroft was invited to formulate the particular advice, and suggested the following as an addendum to that part of the form earlier referred to :

> "If you have a previous conviction for an alcohol related offence under the Transport Act 1962 committed within the previous five years you may also be subject to indefinite, absolute, disqualification which will be for a minimum of two years."

There are problems with that formulation, as there must be with any alternative formulation. The section specifies related offences under no less than eight separate headings, including their former corresponding provisions. It also provides for the offender to be required to attend an assessment centre and has other provisions relative to penalty. The right to apply for a limited licence is also barred. It would in my view be impossible to convey in any comprehensive way, readily understandable to a person apprehended under this legislation, the possible effect of s.30A.

Furthermore, reference to the penalties for driving with excess blood-alcohol would also seem to be required for the sake of

completeness - and for the sake of comparison . All these matters I think emphasise that reference to the s.30A provisions is an exercise which an enforcement officer should not embark upon.

However, as a matter of principle, it seems to me that a refusal which has been improperly obtained or unfairly induced, for example if the motorist has been misled in some material way, could in some circumstances be an ineffective refusal for the purposes of s.58E (1) (a). Whether or not that is the position in any particular case is a question of fact. The absence of reference to the effect of s.30A is not of itself evidence of inducement - the section by definition has no application to many persons who may commit an offence under s.58E (1) (a). Whether the absence was of any significance in the present case requires a consideration of the evidence. The appellant's own evidence raised no such question - his position was stated quite clearly and is summed up in the last part of the cross-examination :

> "Do you remember that there is another further part on the form that says words to the effect of what will happen if you do refuse a blood sample? It says you can be charged with an offence. do you remember the officer reading that to you?
>
> A. Yes, but I don't remember that I actually refused as such, a blood specimen as such. I have always said, right throughout, that I would consent to give a blood sample as long as I have spoken to my lawyer, which is exactly what I was trying to do right throughout."

There was therefore no evidence that the absence of reference to the provisions of s.30A operated in any way unfairly on the appellant or served in any way to induce his refusal. Viewed objectively, the result

must be the same. The absence of reference to s.30A could not be described as creating a misleading or prejudicial situation. That absence therefore in my judgment cannot operate to defeat the present charge.

The appeal is therefore dismissed.

**Solicitors:**

Mangere Community Law Centre, Auckland, for appellant
Crown Solicitor, Auckland, for respondent