IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

18/6

AP 59/93

NOT RECOMMENDED

BETWEEN **GATLEY**

868

Appellant

AND **NEW ZEALAND POLICE**

Respondent

Hearing: 9 June 1993

Counsel: C J O'Neill for the Appellant
C Q M Almao for the Respondent

Judgment: \\ June 1993

RESERVED JUDGMENT OF HAMMOND J

INTRODUCTION

This is an appeal against conviction by Mr Gatley. He was convicted in the District Court at Hamilton on the 1st April 1993 of an offence under s.58E(1)(b) of the Transport Act 1962, namely that having been requested by a registered medical practitioner to permit a specimen of blood to be taken under s.58C of the Transport Act 1962, he refused to permit such specimen to be taken.

This appeal raises (yet again) a problem which has troubled courts in recent months, namely the relationship between breath tests and blood tests. In particular, if a breath test is returned on the appropriate device as defective, or incomplete, at what point, and under what circumstances, is the officer conducting the testing entitled to require a blood test? The appeal also raises questions as to the application of s.58I of the Transport Act 1962, and the blood testing procedures under s.58E of the same statute.

THE BROAD FACTS

On the 30th October 1992 at about 6.40pm a Police Constable was patrolling Galloway Street, Hamilton. He observed a motorcycle travelling at 87 kilometres per hour in a 50 kilometre per hour restricted area. He followed the motorcycle; stopped it; and identified Mr Gatley as the rider of that motorcycle.

The officer thought the appellant's face to be flushed; he claimed he smelt alcohol on his breath. The officer undertook a roadside breath screening test in accordance with the Transport (Breath Tests) Notice. This gave a positive result.

The officer then advised Mr Gatley that he was required to accompany the officer to the Hamilton Police Station for the purpose of a breath test, blood test, or both. The defendant was advised of his rights under the Bill of Rights Act, and also of his right to bail if he was arrested.

The requisite warnings were given to Gatley at the Police Station; he made various phone calls over a period of 15 minutes; and the officer concerned then conducted an evidential breath test using an approved device - an Intoxilyzer 5000. That test (which in the usual way was produced to me as an exhibit) shows the test commencing at 7.19pm. The calibration check reported as "correct" and the test

proper began at 7.20pm. At 7.23pm it returned the result "Evidential Breath Test Result: Incomplete Test".

The officer concerned then immediately required the defendant to permit a registered doctor to take a specimen of his blood. The officer contacted the Police doctor - Dr Richard Clarke - who attended at the Police Station. The officer re-read the defendant his rights under the Bill of Rights Act prior to the blood test. The Police doctor arrived and the evidence was that he asked the defendant if he would consent to a specimen of blood being taken. The defendant said: "Yes". For some reason, the doctor then asked the defendant a second time, after he had prepared the blood test kit, whether he consented. This time the defendant replied: "No". The doctor then left the Police Station. The blood specimen forms were produced to me in the usual way as Exhibit 3, and indicate that the driver's consent was confirmed to the first request. There is an entry on the form which reads "Refused second request at 1948 hours".

After the refusal of consent on this second occasion the doctor left the Police Station and the officer charged the appellant with refusing a medical practitioner's request for blood.

THE DECISION OF THE DISTRICT COURT JUDGE

The learned Judge records in his Oral Decision that two points were raised in his Court.

First, that the appellant had in fact consented to a taking of blood and signed the form to that effect. The learned Judge disposed of that by saying that whilst it was true there had been a consent, "of course the consent to be a real consent enures up to the time the blood is actually taken, and if refused during that period

the consent is revoked and it becomes a refusal, so that that point can be shortly disposed of." (p.3)

The second point - and the one the Judge acknowledged to be of more difficulty - was a submission that the Constable ought to have conducted a further evidential breath test before proceeding further to the more intrusive activity of taking blood.

On that matter the Judge, referring to ***Ministry of Transport v Masters*** (1991) 7 CRNZ 558 (CA), held that the "preferable course" is to ask for a further breath test, but that ***Masters*** does not *compel* that practice. And, even if he was wrong on that point, he suggested s.58I of the Transport Act 1962, the so-called reasonable compliance provision, applied in this case.

THE SUBMISSIONS ON APPEAL

Before me, Mr O'Neill advanced three points, viz.

1. The request for a blood test made by the Police Officer of the Appellant pursuant to section 58C(1)(a) of the Transport Act 1962 was unlawful in that he had no authority in the circumstances to require the blood sample:
   MOT v Masters (1991) 7 CRNZ 558 C.A.
   Kentish v MOT (AP 236/91, High Court Christchurch, 18.11.92, per Holland J)

2. The Learned District Court Judge is bound by the decisions of the High Court and the Court of Appeal. It is not open to him to avoid or disregard the decisions of those Courts by purporting to find "reasonable compliance" with the law by the Police Officer when that interpretation is not available to him either in fact or in law:
   Coltman v MOT [1979] 1 NZLR 330 C.A.
   Aualiitia v MOT [1983] NZLR 727 C.A.
   R v O'Callaghan (No. 2) [1985] 1 NZLR 208 C.A.
   MOT v Masters op. cit.
   Kentish v MOT op. cit.
   Section 58I Transport Act 1962

3. It is submitted that the Appellant did in fact consent to the blood testing procedures and there was no statutory basis for the Medical

Practitioner to seek a confirmation of consent already given and recorded:
Section 58E(1)(a) & (b) and section 58E(3) Transport Act 1962
Davison v MOT (1987) 2 CRNZ 426.
The evidence relating to the Doctor's alleged handwriting on Exhibit 3 was in any event inadmissible hearsay:
Section 3 Evidence Amendment Act (No. 2) 1980.

Mr Almao took essentially three points for the Crown:

1. He referred me to ***Duell v Ministry of Transport*** [1993] 1 NZLR 13, and suggested that ***Masters*** (in light of ***Duell***) could not now be read as *requiring* a second breath test.

2. He supported the learned Judge's observations that the reasonable compliance provision of the Transport Act could be applied in this case.

3. He said that, having consented, that consent was ineffective, since no blood was taken before the appellant refused to give blood.

GENERAL CONSIDERATIONS

Since it is claimed by Mr O'Neill that some of the various judgments in the Court of Appeal in ***Masters*** and ***Duell*** are at odds, it is necessary that I make some general observations about the difficulties in the law in this area.

Erecting workable breath or blood alcohol legislation, as it relates to the driving of motor vehicles, has posed an intractable problem worldwide. The reasons are relatively easy to discern. On the one hand, there is the traditional libertarian concern of the Courts and the defence Bar. I do not use the term "libertarian" in a pejorative sense. It is one of the fundamental concerns of the Bar and the Judiciary to see that the strict rights of citizens are strictly observed. This is particularly so in offences which carry imprisonment. And, of course, in the social circumstances in which we live today the ability to drive a motor vehicle is central to the employment of many persons, and the effect of a drink/drive conviction can have very serious consequences for the individual.

But, of course, there is also a communitarian concern. The socio-economic costs of drink/drive behaviour are now appalling. An overly technical regime - favouring individuals - can thwart those legitimate communitarian concerns.

Against that background, the legislature made some attempt to strike a balance in this traditional libertarian/communitarian calculus by the insertion of s.58I of the Transport Act 1962 into that statute.

As far as the Courts are concerned, it is, with respect, unlikely that a strictly black letter, doctrinal approach is ever going to successfully wrestle the problem of the interpretation of blood alcohol legislation to the ground. In ***Masters***, with respect, McKay J clearly thought that there *ought* to be a bright line rule. He said:

> As a matter of common sense [the provisions of s.58B(4)] must mean a test which is completed to the stage of reaching a result. If an attempt to conduct the test fails for any reason, then the requirement has not been fulfilled and the test must still be undergone. If the first attempt fails for any reason, whether machine failure or human error in the procedure adopted, one would expect a second attempt in order that the test could be completed. If one's car does not start the first time one turns the key, one usually turns it a second time before deciding that the car will not start at all. (p.562)

His Honour went on to observe, however, that one would not expect a sequence of key turnings, and that "persistence beyond a third sequence would be difficult to justify." Mr O'Neill relies heavily on that statement in saying that a second test was "required" in this case before the officer concerned could proceed to a blood test.

Gault J in ***Duell*** said:

> I find nothing in the judgments [in ***Masters***], even obiter, nor in the legislation, that *requires* a second sequence to be followed before an enforcement officer may conclude that the suspect has failed or refused to undergo the evidential breath test. (p.19) (My italics)

Cooke P, with respect, appears to me to have found the most balanced situation, having regard to the broad philosophical concerns I adverted to earlier in this judgment. He said:

> If the officer has reason to think that, although a first attempted evidential breath test has produced an "incomplete test" result, a further test may produce a reliable result, he *may* require at least one further testing sequence. (Italics in original)
> ...
>
> There may be reason to think that the person will be able to provide an adequate sample or samples if given a further opportunity. That is to say, in this type of case the test is incomplete and there is no reason why the officer should not require at least one further attempt to complete it.
> ...
>
> The key to all these matters is reasonableness and common sense in the particular circumstances: hard-and-fast rules applying to all circumstances cannot be laid down. (p.16 line 3)

Cooke P further emphasised that the officer has to "exercise his judgment at the time. If he does so reasonably and has treated the person fairly, the Court is highly likely in the event of subsequent challenge to endorse his appreciation of the facts or to apply the reasonable compliance provisions of s.58I." (p.15 line 54).

All of this is close to the position taken by the learned Judge in the District Court below, even though he had not the benefit of ***Duell*** in front of him at the time he heard this matter.

THE APPLICATION OF THESE PRINCIPLES TO THE INSTANT CASE

I do not consider it necessary to go beyond the principles I have just referred to to resolve the matter before me. I do not accept Mr O'Neill's submission (based essentially on ***Masters***) that on *every* occasion a Traffic Officer must make a second attempt at a breath test. I adopt, with the greatest respect, the case by case approach explicitly referred to by Cooke P in the Court of Appeal: what is required is an examination of the circumstances in a given case, and an officer who fails to

make a second attempt on an "incomplete result" return on a first test if, in practical litigation terms, can expect to be pressed as to why at least a second attempt was not made.

There was some discussion - of a relatively unfocused and desultory character - in the Court below as to why this test result had been returned in the instant case. However, it is a reasonable balance in my view, between the rights of the individual and legitimate social concerns, that before the appellant in this case was asked to attend at the Police Station and undertake the exercise there required, he should have been afforded another Intoxilyzer test. I do not think that to be taking the libertarian bias too far. Being asked to attend a Police Station for further testing is a traumatic event; the taking of blood samples (or the suggested taking of them) is also, in the eyes of many, a genuinely intrusive act. It imposes no undue burden upon the officer concerned, and is a valuable safeguard that the test be run again.

Hence, whilst I do not agree with Mr O'Neill's submissions that a second test is always required, I think it should have been attended to in this particular case.

The preservation of this discretion is an important matter because the circumstances in which the officer has to administer the test must surely always be relevant. I take a very simple example. The individual concerned may have been involved in a motor accident, and have been injured. The officer may find it necessary to make an effort to get a breath test result, but he might form the view, if it returns incomplete, that in the particular circumstances the testing ought to be by way of blood sample - as for instance when the defendant is receiving medical treatment. I agree completely with Cooke P, and even if I did not, I am certainly

bound by the reasoning of the Judges in the Court of Appeal as I read it, that to throw a noose of an absolute character around this procedure is quite inappropriate.

CONCLUSION

In the result, in my view this appeal must be allowed on the basis that I have indicated above. That makes it unnecessary for me to deal with the other matters raised on appeal.

The result reached fills me with no particular enthusiasm. The appellant has two previous convictions for refusing tests in 1981 and 1983. That he should again have been driving whilst in the state in which he rather obviously was is a matter of very real concern. He has been acquitted solely on the basis that there is a rather important principle at stake. However, I strongly urge upon the appellant the wisdom of addressing a problem from which he obviously suffers, on an ongoing basis. Whatever comfort the present decision may afford him should be tempered by the realisation that he must responsibly address the problem which brought him to Court in the first place.

The appeal is allowed.

R G Hammond J