IN THE HIGH COURT OF NEW ZEALAND 29/12
AUCKLAND REGISTRY AP 239/95

BETWEEN

Appellant

A N D POLICE

Respondent

Hearing: 8 December 1995

Counsel: D.C.S. Reid for Appellant
G.C. de Graaff for Respondent

Judgment: 8 December 1995

ORAL JUDGMENT OF ANDERSON J

SOLICITORS

Chris Reid (Auckland) for Appellant
Crown Solicitor (Auckland) for Respondent

This is an appeal against a conviction entered in the District Court at Auckland on 16 August 1995 after a defended hearing of an information alleging that the appellant did on 22 September 1994 at Auckland commit an offence against s 58(1)(a) of the Transport Act 1962 in that he drove a motor vehicle on Beaumont Street while the proportion of alcohol in his breath exceeded 400 micrograms of alcohol per litre of breath in that it was 1142 micrograms of alcohol per litre of breath. This is not a case where the question of technical compliance with the operation of an evidential breath testing device is under consideration, the appeal being brought on the same essential grounds which founded the defence in the District Court that the whole evidential breath testing process was fatally flawed because the appellant had been unlawfully detained for the purpose of the test.

The factual circumstances are that in circumstances giving good cause to suspect an offence the appellant was given a breath screening test which he dismally failed. He was then required to accompany a police constable to Auckland Central Police Station pursuant to the authority of s 58B(1) which provides:-

> "An enforcement officer may require a person to accompany the officer to any place where it is likely that the person can undergo an evidential breath test or a blood test or both."

Upon arriving at Auckland Central Police Station the police constable determined that the evidential breath testing device was out of order and accordingly invoked s 58B(2) which is in these terms:-

> "If it is not practicable for a person to undergo an evidential breath test at a place to which the person has accompanied an enforcement officer pursuant to a requirement under section 1 of this section, an enforcement officer may require the person to accompany the officer to any other place where it is likely that the person can undergo an evidential breath test or blood test or both."

Plainly it was not practicable for the appellant to undergo an evidential breath test at Auckland Central Police Station and the constable was therefore entitled to require the appellant to accompany him to another place, which he did. He determined that it was likely that the appellant could undergo an evidential breath test at the Greenlane Police Station and in accordance with the requirement the appellant accompanied the constable to that place. Upon arrival the constable ascertained that there was not an evidential breath testing device available at all. He could then have required the appellant to undergo a blood test but he did not turn his mind to that possibility. Instead he required the appellant to accompany him to a third place, namely Mt Wellington Police Station, where an evidential breath testing device was available and where the appellant was required to undergo and again dismally failed that test.

The issue for the purposes of this appeal is whether the appellant could lawfully have been required to go to the third place, namely the Mt Wellington Police Station. The learned District Court Judge held that the scope of s 58B(2) was sufficient to render the requirement lawful. The learned District Court Judge was mindful of differences of fact and degree that can arise in these cases but, with respect, no such factors have legal relevance. The lawfulness or otherwise of the third requirement to accompany is a matter of statutory interpretation and I have no doubt that the appellant could not lawfully have been required to accompany the constable to the third place, namely Mt Wellington Police Station. It is of course the case, as the learned District Court Judge noted, that a third trip would be less intrusive on the person of a suspect than the taking of blood and that a constable might for laudable reasons prefer to try a third time for an evidential breath test to be administered than for a person's blood to be taken under the authority of the Transport Act. Nevertheless, with all respect to the learned District Court Judge, the altruism of the motive in making the third request cannot translate

the unlawful requirement into a lawful requirement. It simply ameliorates the opportunity for adverse criticism of the constable who acted at all times with courtesy towards the appellant.

The scope of the legislation is such that the singular form of the noun "place" must be taken to be deliberate. Were there any doubt the matter is put beyond inquiry by the parliamentary debate on the statute provided by learned counsel for the respondent for the Court's assistance. This copy of Hansard for 12 September 1979 shows at p.2880 in the speech of the Hon. J.K. McLay, then the Minister of Justice, and the Hon. R.L. Bailey at p.2882-3 that the parliamentary intention was specifically to restrict an enforcement officer's power to a second attempt and to prohibit a third or later attempt.

For these reasons the appeal must be allowed and it is. The conviction is quashed and the sentences consequentially also of course.

NC Anderson J