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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A803

MEDIUM PRIORITY

FARRELL
Appellant

v

THE POLICE
Respondent

Hearing: 7 & 14 March 2003

Appearances: M Ryan for Appellant
M Corlett for Respondent

Judgment: 11 April 2003

JUDGMENT OF LAURENSON J.

Solicitors:

M Ryan, Haigh Lyon, P.O. Box 119, Auckland 1
Crown Solicitor, Auckland

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[1] Mr Farrell has appealed against a conviction entered against him on 27 November 2002 after he was charged pursuant to s.60(1)(a) of the Land Transport Act 1998 with having refused to permit a blood specimen to be taken after having been required to do so under s.72 of the Act, by an enforcement officer.

[2] Section 72, so far as it is relevant to this case states:

> "**72. Who must give blood specimen at places other than hospital or surgery** - (1) A person must permit a registered medical practitioner or medical officer to take a blood specimen from the person when required to do so by an enforcement officer if—
>
> (a) ...
>
> (b) The person has undergone an evidential breath test under section 69(4) [ ], and—
>
> (i) It appears to the officer that the test is positive; and
>
> (ii) Within 10 minutes of being advised by an enforcement officer of the matters specified in section 77(3)(a) (which sets out the conditions of the admissibility of the test), the person advises the officer that the person wishes to undergo a blood test; or
>
> (c) ...
>
> (d) ...
>
> (2) A person who has been required by an enforcement officer under subsection (1) to permit the taking of a blood specimen must, without delay after being requested to do so by a registered medical practitioner or medical officer, permit that practitioner or medical officer to take a blood specimen from that person."

[3] The appellant had defended this charge on the ground that he had not, in fact, advised the enforcement officer that he wished to undergo a blood test and hence there was no basis upon which the officer could require him to permit the taking of a blood specimen.

[4] The prosecution had alleged the appellant had advised he wanted to undergo a blood test, but had then refused to do so.

[5] The learned District Court Judge found that "it came down to a credibility issue of whether or not he said he wanted to give blood and then changed his mind".

He then found that he accepted the officer's evidence and accordingly convicted the appellant.

[6] The appeal before me was based on the ground that the Judge was not entitled to make this finding of credibility because the prosecution had failed to adequately cross-examine the appellant on the critical issue as to whether or not he had, in fact, ever advised that he wished to undergo a blood test.

[7] Reliance was placed on *R v Main,* (HC Wn, M.208/86, 28 August 1996) where Heron J. had found that the prosecution was under an absolute duty to cross-examine in a situation where an accused had given evidence in which, for the first time, he provided an explanation as to why cannabis found in his possession was for his own use. The prosecutor had chosen not to challenge this evidence with the consequence that the conviction which had followed was quashed.

[8] Counsel for the respondent submitted that *Main* was not applicable to the present case and that the correct principles were those to be found in *R v Gutierrez* [1997] 1 NZLR 192 (CA) where a quite different situation had arisen. In that case there was an issue from the outset as to whether, in relation to a prosecution under the Land Transport Act, the appellant had, in fact, made a request to see a solicitor during the course of an alcohol breath test procedure. The Court of Appeal decided that in a case where an issue had been clearly identified, and where the accused had given evidence which was clearly in conflict with evidence previously given by the prosecution, then there may not be an obligation to cross-examine on the point. In other words if the issue was clearly highlighted and the appellant's position was quite clear, then there could be a situation where any cross-examination would be an exercise in futility .

[9] Counsel for the respondent submitted that this was precisely what happened in this case. Reference was made to the following matters of evidence:

a) The officer had stated unequivocally that the appellant had advised he did wish to undergo a blood test. He, the officer, had then commenced filling out the appropriate forms, but then, when required to permit the taking of the blood specimen, the appellant had refused to do so.

b) The appellant in evidence stated, equally unequivocally, that:

i) He was aware that he did not have to agree to a blood test;

ii) He was aware that a blood test could produce a higher result;

iii) He had an aversion to needles;

iv) Accordingly, if given an opportunity under any circumstances to have a blood test or not, he would definitely not have chosen to do so.

c) Under cross-examination he admitted

i) He was confused and agitated on the night;

ii) He couldn't remember signing any forms;

iii) He had "a strong memory of the night, there are bits and pieces that I do not remember. I am definitely adamant that I would not have given blood, as I said before I've been scared of needles and..."

d) The following passage of evidence then took place:

"The officer said in evidence that you wanted a blood sample taken? ..... Yes.

And now you are saying its wrong, or do you recall him saying that? ..... Yes I recall him saying that in evidence, yes.

And did you want a blood sample taken? ..... No definitely not."

[10] On the basis of this evidence counsel for the respondent submitted:

a) The key issue had been clearly identified;

b) The appellant had stated his position very clearly;

c) He had confirmed it under cross-examination;

d) There was nothing else the prosecutor could have asked to further the matter. It would have been pointless to do so.

[11] I agree with this submission. When asked what further questions could have been asked in the face of the evidence already given in cross-examination, counsel for the appellant was unable to suggest what these could have been.

[12] I find accordingly:

a) The prosecutor had addressed in cross-examination what was clearly the key issue;

b) The answers received left no room for any doubt as to the appellant's position;

c) It was pointless pursuing the matter;

d) Accordingly the Judge was entitled to make the finding of credibility he did.

[13] I have to add, even though it is not referred to in the sentencing notes, there is a further item of evidence which indicates to me that, in fact, the appellant did advise that he wished to undergo a blood test. I refer to the evidence by the officer relating to him having partly completed blood specimen forms which he produced at the hearing. As I see the position there was no reason why this would have been done if the appellant had not first said he wished to undergo the tests. Had there been no such request it was open to the officer to simply issue a summons pursuant to s.19B(1) of the Summary Proceedings Act 1957, based on the positive breath test result already obtained.

[14] For these reasons I find that this ground of appeal cannot succeed.

Further Ground of Appeal

[15] During the course of argument another matter arose, namely whether the appellant had, in fact, requested the blood test within the 10 minute period and, if not, whether there was a proper basis for the police officer in this case to require the appellant to provide a specimen of blood.

[16] An enforcement officer can only do so if authorised by s.72. Stated shortly, there can be no such requirement unless the suspect is properly advised and requests a blood test within 10 minutes of that advice.

[17] The evidence revealed:

a) The officer had required the appellant to permit a blood specimen to be taken

b) Because –

i) The appellant had undergone an evidential breath test under s.69(4); and

ii) It appeared to the officer that the test was positive.

c) It was disputed however, whether the appellant, within 10 minutes of being advised by the officer of the matter specified in s.77(3) (which sets out the condition of the admissibility of the test), advised the officer that he, the appellant, wished to undergo a blood test.

d) The appellant had then been required to permit a specimen to be taken

e) He refused to do so.

f) He was then arrested and subsequently charged pursuant to s.60(1)(a).

[18] Counsel for the appellant submitted:

a) The advice by the appellant was not made within the 10 minute period; and

b) Therefore a request outside that period could not be relied on as a basis for the officer proceeding on with the blood test procedure.

c) If this was the case, then the officer should have dealt with the matter by serving the appellant with a summons pursuant to s.19B of the Summary Proceedings Act 1957.

[19] Because the issue had not been anticipated, I agreed to adjourn the matter to enable both counsel to prepare further submissions.

[20] The hearing resumed on 14 March 2003 at which time the following issues were addressed

a) Was the appellant's advice that he wished to undergo a blood test in fact made within the ten minute period?

b) If not, was the request to do so nevertheless made in circumstances where it could be said there was reasonable compliance with this condition?

c) If the advice was given within the ten minute period (or if there was reasonable compliance in this regard), was the officer entitled to treat a subsequent refusal to undergo the blood test procedure as a basis for:

i) Requiring a test; and then

ii) Charging the appellant with having refused to comply with the requirement;

OR

iii) Was the officer required, once the request for a sample was withdrawn, to simply rely on the prior breath test result and simply issue a summons pursuant to s.19B(1) of the Summary Proceedings Act 1957 which states:

> "(1) If a person undergoes an evidential breath test under section 69 of the Land Transport Act 1998 and the test is positive, but the person who underwent the test does not advise an enforcement officer within 10 minutes of being advised of the matters specified in section 77(3)(a) of the Land Transport Act 1998 that the person wishes to undergo a blood test, an enforcement officer may sign and serve on the person a summons in a form prescribed for the purposes of this section."

The Factual issue

[21] According to the officer's evidence, and by reference to the New Zealand Police Excess Breath Test Checklist completed by him at the time, he had carried out an evidential breath test and advised the appellant of the positive result at 0212 hours.

[22] The form, as completed, then states:

> "**POSITIVE EVIDENTIAL BREATH TEST**
>
> | | | | |
> |---|---|---|---|
> | Officer read Advice of Positive Evidential Breath Test Form (Pol 510) to suspect | | | YES |
> | Time reading advice form completed: | 0212 | hrs | |
> | Time 10 minute period started: | 0214 | hrs | |
> | Finished: | 0225 | hrs | |
> | OR time suspect requested blood: | NA | hrs | |
>
> **BLOOD TEST**
>
> | | | | |
> |---|---|---|---|
> | Time Officer required blood sample: | 0228 | hrs | |
> | Time if failed or refused requirement: | 0227 | hrs | |
> | "Arrested" (advised of right to bail) | | | YES |
> | Summonsed (19A or 19B) | | | YES/NO" |

[23] Having read through the evidence in detail I am satisfied that in this case the following events occurred:

a) The advice of positive evidential breath test was read; and

b) Before the 10 minute period commenced the officer went further. He said:

> "Because of the level of intoxication of the defendant I had to make sure that he understood what step the procedure was now going to; to leave it at basically reading a form to him without confirming that he understood parts of the form would be detrimental to him. I had to clearly explain the form to him and make sure he understood before I started the 10 minute period."

c) 0214 – the ten minute period started after the above steps had taken place;

d) 0225 – the ten minute period ended;

e) The officer asked him upon completion of the 10 minute period:

> "Would you like a sample of venous blood taken for the purpose of analysis, a blood specimen, would you like one to be taken? That's what I asked him upon completion of the 10 minute period."

f) The appellant said he did;

g) The officer did not note the time when this advice was given because it was given after the expiration of the 10 minute period;

h) The officer then commenced filling out the Blood Specimen Forms and read them to the appellant;

i) 0228 – Having done so he required a blood sample;

j) 0229 – The appellant declined;

k) He was then arrested.

[24] At this point there are a number of matters to consider. The ten minute period is actually noted as 11 minutes, i.e. 0214 – 0225. The respondent submitted, and I accept, that this is a reflection of the position referred to in *Ellis v MOT* (1986) 2 CRNZ 97 where Jeffries J. referred to the onus on the prosecution of proving that a suspect driver had, in fact, been allowed the full 10 minutes in which to determine whether he wished to undergo the blood test. If therefore:

a) Evidence of the passage of a period of a specified number of minutes is given by reference to two times expressed in terms of the hour and minutes; and

b) The difference between those times is exactly the number of minutes concerned, there is a possibility that a lesser period than that specified has passed. Accordingly there was insufficient evidence to prove the passage of the full period of time. Jeffries J. referred to the decision in *Griffin v MOT* (HC, Napier, M.86/82, 23 August 1982) in which Quilliam J. said

> "In such a situation it is not at all clear why a prudent traffic officer would not, as a matter of practice, allow a little over 10 minutes in order to be on the safe side. If he chooses to conclude the matter as precisely as was done here he is accepting the burden of ensuring there is no mistake in his calculations and if there is a reasonable possibility that there may be then, of course, the inference cannot properly be drawn."

[25] At this point three matters should be noted in relation to the expiry of the ten minute period at 0225:

a) The onus was on the appellant to request or advise if he wanted a blood test prior to this point;

b) Because he did not do so the officer could have served him with a summons pursuant to s.19B(i) of the Summary Proceedings Act.

c) He didn't, instead he made a further enquiry whether the appellant wanted to undergo the test.

[26] In *Auckland City Council v Adam* [1981] 2 NZLR 352, the Court of Appeal considered whether a request to undergo the blood test procedure made 39 minutes after the expiry of the ten minute period could later sustain a conviction for driving with an excess blood alcohol content. Cooke J. said (p.353):

> "... the enforcement officer is within his powers in allowing the motorist no more than 10 minutes to ask for a blood test. If the motorist does not ask for one in that time, the result of the evidential breath test will be decisive. If in his discretion the officer decides as a matter of fairness or mercy to allow the motorist rather longer to make up his mind, a subsequent positive blood test obtained after the motorist has advised that he wishes a blood test will found a prosecution under s 58(1)(b) if the Court accepts that there has been reasonable compliance in all the circumstances. Otherwise the prosecution can only rely on para (a)."

In that case the delay of 39 minutes was held not to amount to reasonable compliance.

[27] If, as in this case, the officer gave the appellant a further opportunity to make the request immediately after the expiry of the ten minute period, then a request made by the appellant at that point would, in my view, clearly constitute reasonable compliance. I should mention also the length of the delay between the notification of the positive result of the breath test (0212) and the commencement of the ten minute period (0214). Given the reason provided by the officer, i.e. to ensure that because of the level of the appellant's intoxication he went to additional trouble to explain the position to him, I consider that this delay, directed as it was to the appellant's advantage, should also be regarded as reasonable compliance in those circumstances. Hence it was appropriate for the officer to proceed on to the blood test procedure.

Was the officer entitled or required to move on with the remainder of the blood test procedure after the appellant withdrew his request to do so.

[28] I was referred to the following previous decisions:

a) *Wilson v Police* [1982] 1 NZLR 216 (CA) makes it clear that a driver is entitled to a full 10 minutes during which time he may make a request for a blood test, notwithstanding he has earlier said he did not want one.

This has been confirmed in *Auckland City Council v Haresnape* [1983] NZLR 712. Somers J. said, however, that unlike a previous refusal "on the other hand a request for a blood test whenever made is final" (p.715).

b) In *Police v Irwin* (1990) 6 CRNZ 171 Tompkins J. was required to consider the case where an appellant had first indicated he wished to undergo a blood test and then changed his mind. He was then arrested and charged under the (then) relevant sections with:

i) Having been required by an enforcement officer he refused to permit a specimen of blood to be taken; and

ii) Driving a motor vehicle with an excess breath alcohol content.

Tompkins J. found (at p.174) that:

> "...once the person has advised the enforcement officer that he wishes to undergo a blood test within 10 minutes, then that decision is not revocable. Once that election is made the enforcement officer may require the person to permit a blood specimen to be taken, and I find nothing in the section to suggest that that requirement cannot properly be made until the 10 minute period has expired."

As a result the appeal was dismissed. In relation to the charge of driving with an excess breath alcohol content, it was held that because there had been a failure to comply with s.58B(1) (now s.72(2)), the evidential breath test was properly admissible in evidence.

c) A somewhat different situation arose in *McDowell v Police* (HC Ak, AP.287/95, 4 March 1996). Here the appellant had advised he wished to provide a blood specimen, but then changed his mind. The police apparently did not follow through the blood test procedure and subsequently charged the appellant on the basis of the positive breath test. On appeal it was argued that because an irrevocable request had been made the police were obliged to follow through the blood test procedure, and having failed to do so, the police could not thereafter rely on the refusal to supply a blood specimen. Elias J. defined the issue as follows (p.8):

> "The point I have to consider is whether, where the election to request a blood test is withdrawn within the ten minutes and is treated as being withdrawn so that no requirement by the enforcement officer is made, the (breath test) evidence is inadmissible. I am unable to agree with the submission advanced on behalf of the appellant, that an election is irrevocable and that the evidential breath test becomes inadmissible if there is no request for blood made as a result of a change of election."

As I see it, the basis for this conclusion rests principally on the finding that the then relevant section of the Transport Act 1962, s.58C was permissive (p.8):

> "The officer "may" require the blood sample, but is not obliged to follow that procedure even where a request for a blood test has been made by the driver".

Section 58C(1) of the Transport Act 1962 read as follows:

> "58C. BLOOD TESTS—
>
> (1) An enforcement officer may require a person to permit a registered medical practitioner or authorised person to take a blood specimen from the person if—
>
> (a) The person fails or refuses to undergo forthwith an evidential breath test, having been required to do so by an enforcement officer pursuant to section 58B of this Act; or
>
> (b) It appears to an enforcement officer that an evidential breath test undergone pursuant to section 58B of this Act is positive (other than a test carried out by means of a conclusive evidential breath-testing device that indicates that the proportion of alcohol in the person's breath exceeds 600 micrograms of alcohol per litre of breath), and, within 10 minutes of being advised by an enforcement officer of the matters specified in section 58(4)(a) of this Act, the person advises an enforcement officer that the person wishes to undergo a blood test; or
>
> (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 section 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; or
>
> (d) An enforcement officer has arrested pursuant to section 62 of this Act a person whom the officer has good cause to suspect has committed an offence against section 55(2) or section 58(1)(e) or section 59 of this Act (being an offence committed while under the influence of drink or a drug, or both), and either—

(i) A registered medical practitioner has examined the person and believes that the person may be under the influence of [drink or a drug, or both]; or

(ii) The person has refused to be examined by a registered medical practitioner for the purposes of this paragraph."

[29] Section 72, the corresponding section under the Land Transport Act 1998, is not drawn permissively see paragraph [2]. Also relevant is that s.70A was introduced from 29 December 2001. It states:

> "**70A. Right to elect blood test** – (1) If the result of a person's evidential breath test appears to be positive, the person has the right, within 10 minutes of being advised by an enforcement officer of the matters specified in section 77(3)(a) (which sets out the conditions of the admissibility of the test), to elect to have a blood test to assess the proportion of alcohol in his or her blood.
>
> (2) This section is for the avoidance of doubt."

Previously the prosecution could rely solely on an evidential breath test over 600 micrograms of alcohol per litre of breath without offering an opportunity for a blood test. The short point is that now, any person who produces a positive breath test must be given the opportunity to have a blood test.

[30] The result is that if a person having been given the opportunity to do so, does not take that opportunity, then the prosecution may simply serve a summons pursuant to s.19B of the Summary Proceedings Act and the prosecution proceeds on the basis of an admissible positive breath test result.

[31] Section 77 refers to presumptions relating to alcohol testing. The parts relevant to this case are:

> "**77 Presumptions relating to alcohol-testing** - (1) For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it is to be conclusively presumed that the proportion of alcohol in the defendant's breath at the time of the alleged offence was the same as the proportion of alcohol in the defendant's breath indicated by the test.
>
> (2) ...
>
> (3) Except as provided in subsection (4), the result of a positive evidential breath test is not admissible in evidence in proceedings for an offence against any of sections 56 to 62 if—

(a) The person who underwent the test is not advised by an enforcement officer, [without delay] after the result of the test is ascertained, that the test was positive and that, if the person does not request a blood test within 10 minutes,—

(i) In the case of a positive test that indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath, the test could of itself be [conclusive] evidence to lead to that person's conviction for an offence against this Act; or

(ii) In the case of a positive test that indicates that the proportion of alcohol in the person's breath exceeds 150 but does not exceed 400 micrograms of alcohol per litre of breath, the test could of itself, unless the person is 20 or older, be [conclusive] evidence to lead to that person's conviction for an offence against this Act; or

(b) The person who underwent the test—

(i) Advises an enforcement officer, within 10 minutes of being advised of the matters specified in paragraph (a), that the person wishes to undergo a blood test; and

(ii) Complies with section 72(2).

(4) Subsection (3)(a) does not apply if the person who underwent the test fails or refuses to remain at the place where the person underwent the test until the person can be advised of the result of the test."

[32] Therefore, in order to be able to rely on the breath test result, the prosecution must prove in the case of a person who does not request a blood test:

a) The person had undergone a positive evidential breath test;

b) The person was advised by an enforcement officer without delay after the result of the test was ascertained –

i) That the test was positive; and

ii) That if the person did not request a blood test within 10 minutes then

iii) The consequences referred to in subss (3)(a)(i) or (ii) would follow.

c) The person did not advise the enforcement officer he or she wished to undergo a blood test.

[33] In the case of a person who does elect to undergo a blood test, the proof required is:

a) The person had undergone the positive evidential breath test;

b) The person had been given the necessary advice without delay referred to above;

c) The person had elected to undergo the blood test;

d) Had then been required to provide a blood specimen; and

e) Had then refused to do so.

[34] The key point to note is that if a person requests the blood test then refuses to provide the sample, the prosecution can only rely on the breath test result if it can be proved the person didn't comply with s.72(2).

[35] In order to prove that failure the prosecution must prove that the same person had been required by an enforcement officer under s.72(1) to permit the taking of a specimen. That requirement can, in turn, only be made if the suspect has:

a) Received the necessary warnings;

b) Elected to undergo the blood test;

c) Then refused.

[36] Therefore, if, as in the present case, the prosecution had accepted the refusal without more, it could not have relied on the breath test result, i.e. there would be no proof of failure to comply with s.72(2). However, given that there was a failure to comply with s.72(2) the prosecution could have relied on the positive breath test result.

[37] So far as the procedure under s.19B(1) was concerned, this was not available in this case because there had been an election to undergo the blood test procedure within the 10 minute period.

[38] For the above reasons I find:

a) The appellant did advise that he wished to undergo a blood test within the 10 minute period;

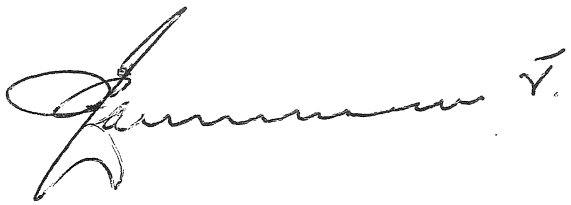
b) This was irrevocable;

c) The enforcement officer had no option but to proceed with the blood test procedure;

d) The subsequent withdrawal of the election was irrelevant; and

e) At the point when the election to undergo the test was made, the s.19B(1) procedure was no longer available.

Accordingly the further ground of appeal must also fail. The appeal is therefore dismissed.



Delivered at 1 ~~am~~/pm on 11th day of April 2003