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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 176/02

BETWEEN FRANKHAM

Appellant

AND NEW ZEALAND POLICE

Respondent

Hearing: 7 February 2003

Counsel: K.H. Maxwell for Appellant
T. Epati for Respondent

Judgment: 7 February 2003

JUDGMENT OF FISHER J

Solicitors:

B.J. Hart, Barrister, Auckland for Appellant
Meredith Connell & Co., Auckland for Respondent

[1] This is an appeal against a conviction entered in the District Court at North Shore on 27 September 2002. Having been convicted of refusing to permit a blood specimen to be taken pursuant to s 60(1)(a) of the Land Transport Act 1998, the appellant was fined the sum of $1,100 with Court costs $130 and disqualified from driving for a period of six months.

[2] On the night in question the police were alerted to the seemingly erratic driving of the appellant. On apprehending the appellant, Constable Brown administered a breath screening test at the roadside. It is common ground that no useful result was obtained from any of those tests. The Constable required the appellant to accompany him to the Takapuna Police Station. At the Police Station the appellant was provided with a form outlining his rights under the Bill of Rights Act. As a result he discussed the matter with his lawyer by telephone. The Constable then required the appellant to undergo an evidential breath test. It is common ground that, for whatever reason, no useful result was obtained notwithstanding eleven attempts.

[3] The Constable then provided the appellant with another form outlining his rights under the Bill of Rights Act. For a second time the appellant had a consultation with his lawyer by telephone. He was then provided with a document outlining procedures in respect of the taking of a blood sample and a request was made for him to provide such a sample. It is common ground that the appellant did not provide a sample. He was then arrested and a charge was laid for refusing to provide a blood specimen.

[4] In the District Court a host of technical arguments were advanced to the Judge centring on the minutiae of the breath screening test administered at the roadside, the evidential breath test administered at the Police Station and the procedures followed in respect of the lawyer access rights under the Bill of Rights Act. The learned Judge might have been forgiven for thinking that if there had been a defence of substance, it would have been the focus rather than the host of technicalities paraded before her. However, she proceeded carefully through the various defences and excluded them one by one.

[5] The appellant then appealed. Mercifully, by the time the matter came on for hearing some of the less meritorious technicalities had been weeded out as grounds for appeal. I now address the remainder.

[6] The first was the submission that the result of the breath screening device ought not to have been relied upon because at one point in his evidence the officer said that he pressed the "middle button" instead of the "second button from the display panel" which is the precise language used in cl 6A(b)(i) of the Transport (Breath Tests) Notice (No 2) 1989.

[7] By way of introduction to this and the other appeal grounds that follow, I think it important to note that the sole question in these cases is whether the procedures necessary for producing a valid breath or blood result were observed in fact. It does not follow that the witness must use the precise words found in the relevant Breath Tests Notice. Whatever the language used, the Court must be satisfied beyond reasonable doubt that the appropriate steps were taken and readings obtained. Breath and blood/alcohol cases are not a game the sole object of which is to see whether enforcement officers have memorised particular words by rote. Words are no more than a means to an end. The end is to see whether a reliable breath or blood alcohol reading was obtained. That is a question of fact and substance.

[8] Approached in that light, the context in which this officer used the expression "middle button", coupled as it was with judicial notice that there were only three buttons on this device, provided a clear evidentiary basis for concluding that the required step was taken.

[9] The second objection made in respect of the breath screening device was similar. The Constable said in evidence that he reached the stage that the device said that it was ready to run the test. He did not repeat from the witness box the precise words "screening ready" which are the words used in cl 6A(b)(I) and which must in fact have appeared on the device. Again the point is without merit. Plainly as a matter of fact the Constable received from the device the communication that the procedures had reached a stage when it was ready for the next step. There is no

suggestion that the device was capable of producing another message that could have been confused with "screening ready". There must be some evidence of that sort making it a live issue before it is to be taken seriously.

[10] The next point was similar. The Breath Tests Notice refers in cl 6A(b)(iv) to a reading "blow again" in respect of an inadequate breath sample. At one point in his evidence the Constable said that "the device registered a no sample". Later, and throughout his evidence, he referred to "a blow again result". There was no suggestion in the Constable's evidence that the actual words "no sample" were observed by him. He was using reported speech. There was no evidence to make it a live issue that in some way there could have been a mistake over the way in which this device would have produced a "blow again" reading.

[11] The next point was that at various stages the Constable changed the device's mouthpiece. There was no evidence suggesting that that could have any bearing upon the validity of the reading. That possibility was never made a live issue. That makes it unnecessary to resort to the reasonable compliance provision, s 64(2), which would, in any event, have been an answer.

[12] The next appeal ground related to the evidential breath test. It is even less meritorious. The argument here is that in some way the fact that the Constable changed the mouthpiece for each of eleven successive tests was inconsistent with the procedural requirements of cl 10 of the relevant Breath Tests Notice. A reading of subcl (b)(iii) indicates the opposite.

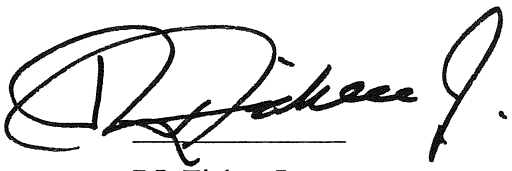
[13] The final ground of appeal concerned lawyer access rights. The argument is that the appellant was wrongly denied a lawyer when, after the first two consultations with his lawyer, and after learning that a blood specimen would be required, the appellant requested a third consultation.

[14] The first obstacle to that argument is a credibility one. The Constable was asked about the possibility of a third request for a lawyer. His reply at that point was "Not that I recall". Replies of that sort are notoriously ambiguous. In some cases, as in fact in this case on the previous page, the witness acknowledges that the event

may or may not have occurred and that he is not in a position to contradict that possibility. In other cases the expression is intended to convey a denial. In this case the reply was clearly in the denial category. Shortly after, defence counsel put it to him that there was a third request for a lawyer. He was then asked "do you accept that or not?". His reply was "No I don't". Although this conflicted with the evidence of the appellant, the Judge preferred the Constable's evidence on that point. In short the credibility question was decided in the prosecution's favour. As such it is beyond useful challenge in this court.

[15] Nor am I persuaded that a suspect at a police station who is faced with testing procedures for breath and blood/alcohol purposes is entitled to punctuate the procedure with a whole series of independent legal consultations at various steps of his choosing. Whether rights under the Bill of Rights Act have been breached must always be a matter of fact to be determined in each particular case on a common sense basis. In the present case there had already been two consultations, the second at a time when it must have been likely that a blood specimen request would be made. The appellant and his lawyer had ample opportunity to discuss such matters. I would not want it to be thought that I accepted that, even if the request had been made for a third consultation, the officer would have been bound to accede to it.

[16] The appeal is dismissed. I make no personal criticism of Ms Maxwell, who is no doubt carrying out the instructions of her client, but it is unclear to me why the Crown does not seek costs on appeals of this nature.



RL Fisher J