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In the Grand Court of the Cayman Islands
Holden at George Town on 4th February 1980
Before The Honourable Sir John Summerfield C.B.E., Q.C.

Criminal Appeal No. 26 of 1979

FREDERICK WESTON EBANKS

V

REGINA

REASONS FOR JUDGMENT

At the hearing of this appeal I allowed the appeal, set aside the conviction and sentence and indicated that I would give reasons later. Those reasons now follow.

The appellant was convicted of an offence against section 62 (2) of the Traffic Law. That provision reads as follows:

"(2) A person who has been arrested under subsection (1) may, while at a police station, hospital or other convenient place, be required by a constable to provide a specimen for a laboratory test (which may be a specimen of blood or of urine) or to submit a prescribed test by Omnicron Intoxilyser or similar prescribed measuring device and if such person, without reasonable excuse, fails to provide such specimen he shall be guilty of an offence, and shall be punishable as if he had been found guilty of an offence against section 61."

The words "or to submit to a prescribed test by Omnicron Intoxilyser or similar prescribed measuring device" were introduced by an amendment in 1978.

The appellant was arrested under section 61 (1) and told that he was so arrested for the purpose of getting a blood or urine specimen. He was taken to a police station. There he agreed to give a urine specimen. He was given a container to urinate in and went to the rest room. A few minutes later he came back and said he "did not feel to urinate" but agreed to give a blood specimen instead. He was taken to the hospital and waited there for someone to take the blood specimen. After about 15 minutes he said he was not giving any blood. He gave no reason;

he merely said he was "not giving no blood again". He was then told that if he did not provide a urine or blood specimen the consequences would be the same as if he were tested and found to be above the alcohol level. He replied "I don't care".

Section 62 (3) provides:

"(3) When requesting any person to provide a specimen for the purpose of subsection (2) the constable shall warn such person of the possible consequences of failure to supply the specimen."

Construing these provisions of subsections (2) and (3) without the words introduced in the 1978 amendment it is my view that the warning must accompany the request for a specimen. This is very clear from the wording of subsection (3). This was not done on this occasion. Provisions of this nature have to be applied strictly before the failure to comply constitutes an offence.

It would have been open to the officer concerned to repeat the request, accompanied by the warning, at the hospital. This was not done. Only the warning was given at that stage. Furthermore, the reply "I don't care" does not constitute an unequivocal refusal. It was clearly directed to the giving of a blood specimen only. Had there been a specific request, with the two alternatives, at that stage, when the warning was given, then his subsequent failure to provide a specimen of either kind would have constituted an offence.

In my view these defects in the application of those provisions of the law are fatal.

When, however, one considers the facts in relation to section 62 (2) as amended, which one must do, the position becomes hopelessly complicated and obscure.

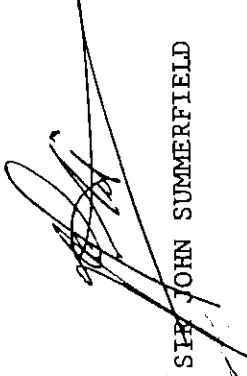
In my view the amendment introduced an ambiguity into the law which makes it virtually unworkable. It would appear that the three alternatives must be put to the suspect and it is for the suspect to choose to submit to one of them. I do not think it is for the investigating officer to make the choice - any more than he could choose before the amendment which sample was to be given by the suspect. And if the suspect

chooses to submit to a test by "a similar measuring device" (which, it might be argued, is a fourth alternative) the complications facing the investigating officer multiply.

The obscurity introduced by the amendment is compounded by the fact that the subsection does not go on to make the failure to submit to a prescribed test an offence. The former provision relating to failure to provide one or other sample remains unaltered.

It is clear from the foregoing that the conviction could not be allowed to stand on the facts relied on.

It is equally clear that section 62 (3) is in urgent need of repair by radical amendment.



SIR JOHN SUMMERFIELD

11th February 1980.