N245

No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND
OTAGO AND SOUTHLAND DISTRICT
INVERCARGILL REGISTRY

M.1501

IN THE MATTER of the Transport Act, 1962

- AND -

IN THE MATTER of an appeal against conviction and sentence

BETWEEN IAN FREDERICK STEEL of Nightcaps, Driver

Appellant

A N D ROBERT DOUGLAS BAIRD of Otautau, Traffic Officer

Respondent

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Hearing: 22nd July, 1971.

Counsel: Mee for Appellent.
Slowley for Respondent.

Judgment: 16th August 1971

JUDGMENT OF McMULLIN, J.

Appellant was convicted in the Magistrate's Court at Invercargill of two offences under the Transport Act, 1962. The first offence was that of driving a motor vehicle on the Otautau/Nightcaps Highway while the proportion of alcohol in his blood exceeded 100 milligrams of alcohol per 100 millilitres of blood - S. 58 (1)(a). The second offence was that of refusing to accompany a traffic officer to a police station when required to do so - S. 58A (2). On each of these offences the appellant was convicted and fined $75. In addition his driving licence was cancelled for twelve months on the charge of driving with an excess blood alcohol level. He appealed against both his convictions and sentence on these offences but at the hearing of the appeal the appeal against sentence was abandoned.

The relevant facts as accepted by the Magistrate were that at approximately 9 p.m. on the 24th April, 1971, respondent,

a traffic officer, observed appellant driving his motor-car on the highway and saw him on three occasions over three-quarters of a mile weave onto the grass at the left hand edge of the road, and then over the centre line of the road. The traffic officer drew alongside appellant twice and sounded his siren. On the second occasion appellant slowed and then accelerated hard, making a left hand turn and broadsiding into his own drive. Appellant got out of his vehicle and ran into the doorway of the kitchen of his home. Respondent followed. Appellant spoke to respondent from an inner room. He refused to supply a breath test requested of him by respondent. Respondent therefore arrested him but appellant refused to go with him. A police constable was summonsed and he, on entering appellant's home, took appellant into his custody and to the police station. He again refused a breath test but consented to giving a blood sample, the analysis of which revealed a blood alcohol level of 114 milligrams per 100 millilitres of blood.

The conviction was challenged on three grounds which were:-

(1) That the traffic officer did not have "good cause to suspect" the commission of an offence in terms of Section 58A of the Transport Act, 1962.

(2) That the appellant's arrest was invalid in that the traffic officer did not have power to make an arrest on private premises but only on a road. Consequently it was said that the subsequent blood test was invalidly made and the results of it could not be given as legal evidence.

(3) The appellant had not been kept continually under observation as, it was contended, was required by Section 58A of the Act.

As to the first submission appellant contends that there was no evidence available to the respondent traffic officer

which would suggest that the appellant had committed an offence against the sections set out in S.58A (1) of the Transport Act, 1962. The relevant words in the section have been considered by Beattie, J. in Chesham v. Wright (1970) N.Z.L.R. 247, and by Roper, J. in Fletcher v. Police (1970) N.Z.L.R. 702. The judgments in both these cases confirm that the question is largely a factual one to be determined in each case, and on this point I need say no more than that the evidence accepted by the Magistrate that the appellant was seen on a public road to drive in an erratic manner veering from side to side in an extreme way was sufficient, in my view, to give the traffic officer good cause to suspect the commission of one of the prescribed offences. This ground of the appeal therefore fails.

The second submission was that the arrest of the appellant was invalid in that it was effected on private property whereas, it was said, that a traffic officer's powers of arrest are limited to a road. This matter was considered by Roper, J. in Kelly v. Lower Hutt City (1971) N.Z.L.R. 422. Although the learned Judge in that case said that he did not find the matter to be wholly free from doubt he adopted the observations of Sachs, L.J. in R. v. Jones (1970) 1 All E.R. 209. I am inclined to accept, as did Roper, J., that a traffic officer's powers of arrest in regard to this class of offence may be exercised on private property but I need not decide the matter in this case because even if the traffic officer in fact had no legal power of arrest the evidence which was subsequently obtained, namely the evidence of the excess blood alcohol level, is not thereby rendered invalid. I adopt what was said by Winn, L.J. in R. v. Palfrey (1970) 2 All E.R. 12, at 16, to the effect that even if an arrest is unlawful not all that follows in the way of breath and blood tests is thereby invalidated. This ground of appeal also fails.

The third submission was that the appellant could not be convicted of the excess blood alcohol charge because he had not been kept under continuous supervision by a police officer or traffic officer from the time he was suspected of committing an offence down to the time when the specimen of blood was taken. On this point the evidence of the respondent was that the appellant was out of his sight for a quarter of an hour between the time when he refused to come out for the breath test until the police constable arrived and entered appellant's house. Appellant claimed before the Magistrate that in this time he had consumed half a flagon of beer in his house. This ground of the appeal is based on some observations of Wild, C.J. in Stewart v. Police (1970) N.Z.L.R. 560, at 566, where at line 15 he said:-

> " It is to be noted that the legislature has been careful to stipulate that the suspected person is to remain (under pain of penalty and arrest without warrant) in the company of a constable or traffic officer from the time he is suspected of committing an offence down to the time when the specimen of blood is taken. "

It is to be observed that the statute makes it an offence for a person to attempt to leave the company of a constable or traffic officer and the penal provisions of the statute can be invoked against him if he makes the attempt. But I cannot see that it follows that, where a person by his own acts refuses to place himself in the company or under the observation of a police officer or traffic officer, he can plead his own activity or lack of it to his own advantage. I do not think that appellant can gain any comfort or advantage from his ability to frustrate the police. In any case on a factual basis I note that the learned Magistrate rejected the defence evidence as false in so far as it related to further drinking by the appellant within his own home. This ground of the appeal also fails.

The appeal is therefore dismissed with costs to the respondent of $40.00.

Solicitors:

Stout, Hewat, Binnie & Howorth, Invercargill, for Appellant.

Crown Solicitor, Invercargill, for Respondent.