NZLR

IN THE SUPREME COURT OF NEW ZEALAND
NORTHERN DISTRICT
AUCKLAND REGISTRY

M.10/72

BETWEEN JOHN EBREY

Appellant

A N D POLICE

Respondent

Hearing: 16th February, 1972.

Counsel: Craddock for Appellant.
Nicholson for Respondent.

Judgment: 23 February, 1972.

JUDGMENT OF HENRY, J.

Appellant has appealed against a conviction for the offence of driving his motor car while the proportion of alcohol in his blood exceeded 100 milligrams per 100 millilitres of blood. By Section 58 (1)(a) of the Transport Act, 1962, and its amendments, so to drive is an offence. A constable was called to the scene of a fatal accident a short time after it happened. This was about 11 o'clock at night. Weather conditions were normal. Appellant's car was stopped in the roadway in a position described as "not unusual". A pedestrian had been killed as the result of being run down by Appellant's car. When the constable arrived Appellant was not at the scene. There is no evidence of the whereabouts of the pedestrian. About 20 minutes after arrival the constable saw Appellant who was then in a neighbouring house. He had been taken there because he collapsed when told of the death of the pedestrian. The constable was informed that Appellant had been given "a small "amount of brandy". This had been given with the approval of an ambulance officer. The constable observed that Appellant smelt strongly of alcohol, that he was unsteady on his feet and stumbled into some fairly large furniture in the lounge room of the house. When questioned about the consumption of alcohol Appellant said he had been drinking at a club where he had arrived at 5.30 p.m.

and from whence he had left at about 10 p.m. Appellant admitted to the consumption of 6 to 7 glasses of beer. No explanation was sought from Appellant as to how the accident had happened, nor did he offer any such explanation. In cross-examination the constable admitted that in appearance Appellant could be described as "very shocked", "shaken" and "extremely upset". The constable was also told that shortly before the accident a motorist who passed Appellant's car had noticed nothing unusual about Appellant's driving. Breath tests were then administered. They were positive. Blood specimens were taken and subsequent analysis showed that Appellant's blood had a proportion of 139 milligrams of alcohol per 100 millilitres of blood.

At the trial evidence was given about the quantity of brandy consumed by Appellant after the accident. The evidence was conflicting. Evidence was also given by a pathologist on the effect of such consumption on the specimen of blood subsequently taken. Counsel agreed, and the Court is of a clear opinion, that the evidence of the pathologist was not admissible by reason of the decision of the House of Lords in Rowlands v. Hamilton (1971) 1 All E.R. 1089. The appeal was conducted without reference to this evidence. The sole relevant evidence on this topic is what information was given to the Constable about Appellant's consumption of brandy. Appellant elected not to give evidence. The defence rested on two submissions, namely:-

(1) That it was not proved that the constable had good cause to suspect that Appellant had committed an offence within the meaning of Section 58A (1) of the said Act, and,

(2) That, by reason of proved consumption of alcohol (brandy) after the accident and before the specimen was taken, the analysis was not of a specimen of blood within the meaning of Section 58 (1) which defined the offence whereof Appellant was charged.

Appellant's Counsel further asked the learned Magistrate, if the

above defences were rejected, to exercise his discretion under Section 195 of the said Act to dismiss the prosecution on the ground of prejudice caused by undue delay. The delay, which was seemingly not explained, was something of the order of five months. All three submissions were rejected in the Court below. All three submissions were again put forward on this appeal.

I turn to the first ground, namely, that there was insufficient proof that the constable had good cause to suspect that an offence had been committed within the meaning of Section 58A (1). The argument of Counsel for Appellant appeared to confine this topic to the offence with which Appellant was subsequently charged. This is not a correct approach. Sub-sections (a), (b) and (c) of Section 58A (1) describe a number of offences. Each of these offences relates to persons who are responsible for certain acts or omissions whilst either under the influence of drink or have an excessive amount of alcohol in their blood. These may be called "the designated "offences". If Appellant were affected by liquor in either manner stated in the designated offences, then it is clear that the other circumstances were such that he must have committed one of the designated offences. The sole question to which the constable had to address his mind, in the circumstances which he clearly ascertained and are not challenged, was whether or not he had good cause to suspect that Appellant had consumed alcohol to such a degree that he came within one of the designated offences so far as concerns the result of such consumption.

It was conceded, and properly so, that the point in issue must be proved on a balance of probabilities on an objective view of the evidence. Much of the argument addressed to this Court on behalf of Appellant demonstrates how essential it is to keep to the realities of the circumstances contemplated by the Legislature. The persons entrusted with the decision are constables and traffic officers, so a legalistic approach is to be deprecated. There is old authority, recognised in New Zealand,

that "good cause to suspect" means a reasonable ground of suspicion upon which a reasonable man (in this case a constable or a traffic officer) may act: R. v. Spencer (1863) 3 F. & F. 857, 858. It is trite law that it is for the Court to pass on this. It is imperative to remember that the good cause is "to suspect" - the prime meaning of which word is "imagine the "existence of something evil, wrong or undesirable". To imagine is to form in the mind an idea or picture. It will be noted that in R. v. Spencer (supra) the word "suspicion" was used. Either "suspect" or "suspicion" connotes something much less than proof and both import a state of mind to which, of course, the Legislature has added the requirement of good cause. A good description is that given in Black's Law Dictionary, 4th Edn., p. 1616 - "a belief or opinion based on facts or circumstances "which do not amount to proof". Counsel for Appellant seemed on occasions to argue that they should, if accepted, amount to proof. The Legislature clearly intended that a constable or traffic officer would act promptly when suspicion arose because otherwise a suspected person could easily escape detection if the word "suspect" is too narrowly construed and without regard to real intention to test drivers "suspected on reasonable grounds".

I must confess I am quite unable to accept the arguments put forward on behalf of Appellant on this ground. In my judgment it was not open to the learned Magistrate to hold other than against Appellant. If he accepted the arguments put forward he would be clearly wrong. The constable had information upon which he could conclude that Appellant had run down a pedestrian when driving conditions were normal. The driver admitted to a long period, shortly before the accident, over which he had had access to liquor. Appellant admitted to 6 to 7 glasses. The hours were approximately from 5.30 p.m. to 10 p.m. and it is significant that no meal was mentioned. Appellant smelt strongly of liquor and was unsteady on his feet and bumped into large items of furniture. This is a clear picture of a man seriously affected by alcohol. But it is

claimed that this picture should be put to one side and that no reasonable constable or traffic officer should act upon it for reasons which I will now detail:-

(1) The constable was told a small amount of brandy had been consumed since the accident. Comment on this is superfluous.

(2) The Court was told by a motorist who passed Appellant's car shortly before the accident that he noticed nothing unusual about his driving. The test, of course, usually comes when an emergency arises. How this can throw even the slightest doubt on reasonable suspicion arising from the admitted facts surrounding the consumption of alcohol it is difficult to imagine.

(3) Appellant's car was stopped in a manner "not unusual". This is negative. I might comment that one might more reasonably expect some deviation in an attempt to avoid a pedestrian. It may even be positive evidence of a failure to keep a proper lookout - a not unusual factor in these cases.

(4) The fact that Appellant was variously described to be in a shocked condition. It is not unusual for a drinking driver also to be shocked by what has happened. To suggest that suspicion, otherwise properly based, should become unreasonable because shock appears to exist, carries with it its own refutation. The blood test eliminates much of the difficulty in diagnosis between shock and the effects of alcohol.

A combination of the above cannot, in my view, possibly throw even a reasonable doubt on suspicion which ought, in any reasonable person, arise as a result of the other positive factors. This ground fails.

The second point taken is that by reason of the proved consumption of brandy after the accident, and before the specimen

was taken, the analysis was not of a specimen of blood within the meaning of Section 58 (1). Two statutory provisions are here relevant.

(1) Section 58 (1)(a) which reads:-

"(1) Every person commits an offence who -

(a) Drives or attempts to drive a motor vehicle on any road while the proportion of alcohol in his blood, as ascertained from an analysis for which he subsequently permits a specimen of blood to be taken under Section 58B of this Act, exceeds 100 milligrammes of alcohol per 100 millilitres of blood; "

(2) Section 58B (11) which reads:-

" For the purposes of proceedings for an offence against this Part of this Act arising out of the circumstances in respect of which a specimen of blood was provided by the defendant under this section, it shall be conclusively presumed that the proportion of alcohol in his blood at the time of the alleged offence was the same as the proportion of alcohol in the specimen of blood provided by the defendant. "

This argument is based on the speeches of their Lordships in the House of Lords in the case of Rowlands v. Hamilton (supra). In that case it was a matter of construing Section 1, sub-section (1) of the Road Safety Act, 1967. It reads:-

" If a person drives or attempts to drive a motor vehicle on a road or other public place, having consumed alcohol in such a quantity that the proportion thereof in his blood, as ascertained from a laboratory test for which he subsequently provides a specimen under section 3 of this Act, exceeds the prescribed limit at the time he provides the specimen, he shall be liable . . . "

The driver had consumed alcohol before and also after he had ceased driving. The specimen was later taken. It will be noticed that the words "having consumed alcohol" appear in the English provision. These words do not appear in our statute. The argument for Appellant was that the word "while" in Section 58 (a) had the same effect. This is a dangerous, unsafe and unsatisfactory form of reasoning. It is important to construe the exact words of the particular instrument according to permissible rules of construction. The English legislation has

other differences when compared with our provisions.

However, be that as it may, Lord Morris of Borth-y-Gest at p. 1090, made it clear how important the words "having consumed "alcohol" were. His Lordship said:-

> " The words 'having consumed alcohol' clearly point to a consumption of alcohol before a person ceased (or ceased to attempt) to drive. The sequence indicated by the subsection is that a person consumes alcohol, then drives, and subsequently provides a specimen; the specimen will later be subjected to a laboratory test; the analysis of the specimen will reveal the proportion of alcohol in the blood at the time the person provided the specimen. A person therefore who drives after having consumed alcohol will be guilty of an offence if 'as ascertained from' the laboratory analysis of a specimen which he subsequently provides it is found that the proportion of alcohol in his blood exceeds the prescribed limit at the time he provides the specimen. The specimen must naturally be provided 'subsequently' to the actual time of driving (or attempting to drive) but as it is by analysis of the specimen that guilt of an offence may be proved it seems to me to follow that the specimen must be one which has relevance to alcohol consumed before the driving ceased. A test of a specimen provided by a person who has consumed alcohol after he ceased to drive (or ceased to attempt to drive) is not, in my view, a test of a specimen as contemplated by the subsection. "

The starting point in our legislation is Section 58A which provides for the administration of breath tests. Section 58B then provides for the taking of blood specimens and for the subsequent testing of those specimens. Then comes an important provision which does not appear in the English legislation. This is sub-section (11) which has been set out in full above.

It was clearly proved that the precedent steps were taken so that, by reason of sub-section (11) it must be conclusively presumed that, at the relevant time when Appellant was driving his car, he had an excessive amount of alcohol in his blood. The offence under Section 58 (1)(a) is to drive (or attempt to drive) while the blood alcohol level is excessive as ascertained by Section 58B. So the sole inquiry is into the provisions of Section 58B (provided, of course, Section 58A had been observed). Section 58 (1)(a) says nothing of "having consumed alcohol", so any inquiry into the consumption of alcohol is otiose. When ascertained in accordance with Section 58B that ascertainment is

conclusively the state of the blood alcohol level at the time when the alleged offence is committed. This means that there is no room to construe the word "while" in any way so as to support Appellant's argument. Evidence of consumption of alcohol either before or after the time when the alleged offence took place is irrelevant because the only statutory requirement is/Sections 58A. and 58B. to be complied with, therefore the state of the Appellant's blood alcohol level at the time of (i.e. while) driving is that so found.

In view of sub-section (11) the word "while" in Section 58 (1)(a) is clear and unambiguous and does not permit any argument as to when alcohol was consumed. I am unmoved by claims that this construction may convict persons who, in all innocence, drink only after driving. It is a matter, no doubt, which was weighed against other evils when the legislation was enacted. This claim is not very realistic. First, some untoward incident must have occurred to draw the attention of the authorities before inquiries are commenced. Next, unless there was ground for suspecting consumption before driving it is difficult to see how the provisions of Section 58A (1) will not be an effective shield. Those who drink and drive and then drink after their driving has become suspect, need no sympathy and ought to be caught in the net. The "hip flask defence" goes. The present case is one of bona fide ingestion of additional alcohol after driving ceased. If any miscarriage of justice was likely to occur the facts of the case can be fully canvassed on sentence. There is then ample power in the Court to avoid injustice. This is in answer to what Appellant's Counsel put forward and is not a matter to be considered on construction because I find the words clear and unambiguous. Some argument was based on the claim that the relevant provisions were "unlimited as to time and circumstances". That is not so. Section 58A (1) is an answer to the hypotheses put forward on this basis. This ground of appeal fails.

No ground has been advanced to show why the learned Magistrate was wrong in refusing to accept the submission made

under Section 195. The case depended solely on the uncontradicted evidence of the constable as to his observations and information. Thereafter the matter rested on proof of breath and blood tests and the ultimate analysis of a specimen. Again no attack factually was made on this evidence. Appellant gave no evidence. I do not understand how the learned Magistrate could be wrong in refusing to exercise this discretion. Nothing Counsel said has enlightened me on that. This ground also fails.

The appeal will be dismissed with $40.00 costs.

Solicitors:

Holmden, Horricks & Co., Auckland, for Appellant.

Crown Solicitor, Auckland, for Respondent.