No Special Consideration

IN THE SUPREME COURT OF NEW ZEALAND M287/73
WELLINGTON REGISTRY

BETWEEN JOSEPH MIDDLETON EMMERSON

Appellant

AND IAN NOEL BRIAN

Respondent

Hearing: 26 September 1973

Counsel: D.S.G. Deacon for appellant
K.G. Stone for respondent

Judgment: 27 September 1973

JUDGMENT OF COOKE J.

These are appeals from two convictions under s.58(1) of the Transport Act 1962, one under paragraph (a) for driving with excess blood alcohol, the other under paragraph (b) for driving while under the influence of drink. Both charges arise out of the same accident and they were heard together. The Magistrate's oral judgment dealt with them in the order the reverse of that just stated, and after referring to the evidence and the course of the hearing I will follow the same order as did the Magistrate. The evidence is meagre, consisting solely of that of a traffic officer. Apparently he expected evidence to be given also by a doctor who had examined the defendant within a few hours of the accident, but for some reason the doctor was not present. After the traffic officer's evidence-in-chief and some limited cross-examination, the prosecution case was closed. Counsel for the defendant elected to call no evidence and said that the defence case was closed. He then made certain submissions. A major

point in his submissions was that there was no evidence that the first breath test was positive. The traffic officer had testified to having administered that test to the defendant in the patrol car after a call to the scene of the accident was sent out at about 12.30 a.m. He said:

> In the patrol car Mr Emmerson agreed to a breath test. This was taken at 12.50 a.m. with a Draeger Normalair Alcotest R.80 breath test device. The steps were in accordance with the Breath Test Notice 1971. The breath test tube was checked under the interior light of the patrol car and by torch. Mr Emmerson was shown the test. At 12.53 a.m. Mr Emmerson agreed to accompany me to Traffic House for the purposes of a second breath test and perhaps the taking of a specimen of blood. At 1.20 a.m. a second breath test was taken and agreed to. The device used was a Draeger Normalair Alcotest R.80 and taken in accordance with the Breath Test Notice 1971. The tube was examined under the fluorescent light in the medical room and was a positive test. A blood sample was requested of Mr Emmerson. I produce the blood specimen form.

At the hearing in this Court it was not disputed that the subsequent chain of events, and in particular an analyst's certificate regarding a blood specimen tendered in evidence pursuant to s.58B(9), depended for their validity and admissibility upon whether it appeared to the traffic officer as a result of the first breath test carried out by him that the device indicated more than 80 milligrammes of alcohol per 100 millilitres of blood. That point not having been disputed, I assume that it was essential to the prosecution's case on the charge of excessive blood alcohol to prove that s.58A (2)(a) was satisfied. That paragraph applies if:

> It appears to a constable or traffic officer as a result of a breath test carried out by him under subsection (1) of this section that the device by means of which the test was carried out indicates that the proportion of alcohol in any person's blood exceeds 80 milligrammes of alcohol per 100 millilitres of blood.

What happened following the submissions of counsel for the defendant is recorded thus:

> Court: I think your recollection of the prosecution evidence is correct. I accept that it is substantially correct. So far as I am concerned I am not prepared to allow this type of submission to be made before me. It is completely without merit and I am entitled if you press your submission to invite the prosecution to give further evidence on this matter. I do so.
>
> Mr Deacon: I have closed my case and elected to call no evidence. I do object to the calling of the evidence.
>
> Court: I understand your objection but I am going to permit the prosecution to call further evidence on the matter.
>
> Brian Hamilton Monteith (recalled)
>
> Court: I want you to tell me about the first breath test....
>
> The first breath test was taken at 12.50 a.m. with a Draeger Normalair Alcotest R.80 breath testing device and taken in accordance with the Breath Test Notice 1971. The test taken showed a positive test and that it was over the yellow line which was checked under the interior light of the patrol car and by torch light. Mr Emmerson was shown the positive tube.
>
> Court: to Mr Deacon:
> Do you wish to cross-examine.....No.

Turning now to the charge under s.58(1)(b), fully stated this was that the defendant:

> On the 14th of July 1973 at Wellington did while under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle drove a motor car on Queens Drive.

It is common ground that no presumption applies in establishing that charge so far as incapability is concerned. As was said in the judgment of McGregor and Henry JJ. in Lysaght v. Police 1965 N.Z.L.R. 405, 410:

> ....the matter at issue resolves itself into the familiar broad question whether, on the totality of the evidence, the Court is left in a state of reasonable doubt whether the appellant was under the influence of drink to such an extent as to be incapable of having proper control.

The Magistrate dealt with both charges in a brief oral judgment, which I shall read in full:

> I reject both of your submissions. The evidence in what you call the major charge (although I myself don't quite look upon them in that light, certainly not for the purpose of penalty at any rate,) is that when the traffic officer arrived on the scene, Mr Emmerson admitted driving the motor car which had been involved in an accident. The evidence is that he could hardly stand, he leaned against the vehicle for support, he couldn't speak clearly, his eyes were glazed and that the defendant told Mr Monteith that he had been drinking Bacardi for most of the evening and couldn't remember events. To my mind that is an adequate prima facie case. There has been no evidence adduced in rebuttal and I therefore convict the defendant on that charge. For the reasons I have already indicated, I have heard, rightly or wrongly, additional evidence on the other charge. The defendant is convicted on both charges. On the charge of blood alcohol the defendant is convicted and fined $100, Court costs $5, medical expenses $16. He is disqualified for 6 months commencing 30 August 1973. On the charge of driving under the influence of drink, the defendant is convicted and ordered to come up for sentence if called upon within one year. He is also disqualified for 6 months commencing 30 August 1973.

The Magistrate's account of the traffic officer's evidence is based on part of his evidence-in-chief. But it omits some of the evidence-in-chief, including the traffic officer's statement that the defendant's face was 'very white', and it omits any reference to the cross-examination, which is recorded as follows:

> When you arrived at the scene of the accident where was the defendant.....The defendant was with a group of people by his vehicle. And he was showing signs of injury was he not..... He had a cut to his tongue and lip at the time. He lost a few teeth.....The doctor didn't say anything about his death.(sic). Were you aware that he had cracked three ribs.....I was aware.

There was no evidence at all about the accident. Nor did the traffic officer express any opinion on the defendant's capability or otherwise of proper control of a vehicle, an opinion which, had he been qualified as an expert by evidence of his experience in such matters, would no doubt have been admissible. This very limited evidence invites the question whether it had been proved beyond reasonable doubt that the defendant at the time of the accident (whatever it was) was indeed under the influence of drink to such an extent as to be incapable of having proper control of his vehicle; or was his drinking, combined with the shock or trauma of the accident and his admitted injuries, such as to produce an abnormal state not necessarily corresponding with his state before the accident? Literally read, the reasons for the judgment under appeal are merely that a prima facie case had been made out, that no rebutting evidence had been called, and that therefore the defendant was convicted. Such a process of reasoning would clearly be unsupportable. The question here was not as to a prima facie case; the Court was not dealing with a preliminary defence submission of no case to answer. The question was whether the evidence as a whole established guilt beyond reasonable doubt. The existence of prima facie evidence and the absence of evidence from the defendant were relevant to that question, but not decisive. The judgment of the High Court of Australia in May v. O'Sullivan (1955) 92 C.L.R. 654, 658-9,

states the relevant principles lucidly. Here the learned Magistrate's expression of his reasons leaves one uncertain whether he applied the right test. As his was an oral judgment, I do not go as far as to accept the submission for the appellant to the effect that he demonstrably applied the wrong test. But this Court is left in so much doubt as to what test he applied that I think a fresh consideration of the evidence is called for. Considering the evidence afresh, I find myself, on the exiguous material before the Court, in real doubt about the defendant's condition at the time of the accident. Therefore I do not think a conviction on the charge of driving under the influence of drink, as explained in Lysaght's case, is safe. The appeal against this conviction will be allowed.

The conviction for excess blood alcohol raises the question of the power of a court of summary jurisdiction to call further evidence, or allow the prosecution to call it, after the case for the defence has closed. I reject the contention that in his initial evidence the traffic officer said enough to warrant an inference by the Court that the first breath test was positive. The defendant might have agreed to accompany the officer to Traffic House for various reasons, such as uncertainty as to his rights or duties or as to the results of the test. It is not without significance that the Magistrate himself seems to have felt the need for more evidence. With regard to the power to call such evidence or to allow it to be called, s.67 of the Summary Proceedings Act 1957 expressly provides for further evidence from the informant, after his case is closed, only by way of

rebuttal : see subs.(4). But that subsection is concerned with the duties of the Court. There are English cases holding that a court of summary jurisdiction has at least a limited discretion to admit such evidence even though not in rebuttal. The more recent of these cases have been decided against a background which, if the Act and the Rule be taken together, is much the same as the New Zealand statutory background. The current English provisions are the Magistrates' Courts Act 1952, s.13, and the Magistrates' Court Rules 1958, Rule 13. A number of the cases are collected in Stones Justices Manual, (1972) ed.) Vol. 1, p. 362. Some of them I shall refer to expressly later. In New Zealand there is an observation in the course of argument by Richmond J. in Martin v. Campbell (1892) 13 N.Z.L.R. 42, 44:

> From the reports I see in the papers, the Magistrates seem to consider that they have much less power in that respect than we should exercise in this Court. But I know no reason why a Magistrate in such a case should not take further evidence if he thought fit. It is a matter of practice, not of strict law, and a question for the discretion of the Court whether further evidence should be admitted.

That was said against the background of s.67 of the Justices of the Peace Act 1882, the terms of which are not materially different from those of s.67 of the present Summary Proceedings Act. I think I should follow the current of authority and hold that s.67 of the Summary Proceedings Act 1957 is not exhaustive and that a Magistrate's Court has a discretion in some circumstances to hear further evidence on behalf of the prosecution after the prosecution's case has been closed. The power must be regarded as necessary in the interests of justice and so vested by implication even in a court of summary jurisdiction. For a general description

of the power I would adopt a passage in the judgment of Lord Widgery C.J. in Phelan v. Black 1972 1 All E.R. 901, 904, where, with reference to a recorder sitting on appeal at quarter sessions, it was said:

> .....I have no doubt that there is an element of discretion in the recorder or chairman of quarter sessions when sitting alone, or with magistrates, when hearing an appeal and when not sitting with a jury, to allow evidence to be called after the normal point at which such evidence would be excluded, if the interests of justice require it, and if in the exercise of his discretion he thinks it is proper so to do.

Such a power must be sparingly used. In what circumstances is it right to do so? In considering that question it seems better to put on one side cases dealing with trial by jury. Different considerations may apply there; if anything the principles might be expected to be stricter. See Phelan v. Black at p. 903; Webb v. Leadbetter 1966 2 All E.R. 114, 115. Nevertheless some specific mention should be made of The Queen v. Nash 1958 N.Z.L.R. 314. There the Court of Appeal held that after the defence had elected to call no evidence the trial judge had been right to allow counsel for the Crown to rectify an omission discovered in the evidence on an overnight reading. In listing many articles found at the scene of the crime a detective had omitted in the Supreme Court to mention a brick bolster. He had mentioned it in the lower Court, as duly recorded in the depositions. This omission was rectified before the addresses were begun. Delivering the judgment of the Court, North J. said at pp. 315 to 316:

> There is no doubt that the Judge has the right and power to recall a witness even after the Crown has closed its case. This is a discretionary power with which a Court of Appeal cannot interfere unless it should appear that a real injustice has resulted: R. v. Sullivan (1923) 1 K.B. 47, 58; 16 Cr. App. R. 121, 123. We do not

> find it necessary to discuss the limits of this power, for we are satisfied that, however narrow those limits may be drawn, they must include the present case. It would be unthinkable that a mere slip or accident such as this was not capable of remedy, and we are satisfied that the learned Judge acted correctly and in accordance with legal precedent in adopting the course he did.

Neither that judgment nor the precedents cited in it dealt with a summary prosecution in which the defence case had been closed before the question of further prosecution evidence arose. And the Court of Appeal refrained from discussing the limits of even a trial Judge's power. Nash's case is therefore not here of direct help. But it does at least indicate that one should be slow to hold that a mere slip or accident is incapable of remedy.

Of cases concerned with summary jurisdiction, in Webb v. Leadbetter a Divisional Court in a judgment delivered by Lord Parker C.J. decided that after the defence case was closed and justices had retired to consider their decision, it was wrong to allow a witness who had arrived belatedly after a car breakdown to be called by the prosecution. In Saunders v. Johns 1965 Crim. L.R. 49, where the defendant's solicitor had said at the beginning of the hearing that the issue was one of identity, it was held that to recall a constable to give evidence bearing on identity after the defendant's case was closed was clearly wrong; Lord Parker C.J. said that this should have been done earlier, when a submission of no case was made by the defence. That decision was followed by Wild C.J. in Smith v. Ministry of Transport (Wellington, 28 March 1973). The learned Chief Justice said that this case on its facts was squarely

within Saunders v. Johns, so it may well be that he regarded Smith's case as one where identity was seriously in issue from the outset and not as a mere instance of opportunism by the defendant's counsel. In R. v. Godstone Justices (1971) 115 So. Jo. 246, again a judgment delivered by Lord Parker C.J., the case against the defendant rested on an analyst's certificate referring to Joan Grierson Dickson; the defendant's name was John Grierson Dickson. The defendant had been informed by the prosecuting authority that the justices would be asked to dismiss the case. Nevertheless there was a hearing and the defendant went into the box. There was an adjournment and in correspondence the clerk to the justices indicated that if the defendant did not call the analyst the court itself would do so. Lord Parker's judgment is briefly reported as follows:

> The calling of the analyst would result in evidence being given to show that the name Joan was a mistake for John and to that extent it would assist the prosecution. Although the justices might have had power to call the analyst at the end of the prosecution case, when it came to the end of the applicant's case there was no power to call any evidence, unless it was evidence in rebuttal. The order of prohibition would be issued to prevent the justices, if they were so minded, from calling the analyst or any other witness who would assist the prosecution case.

The facts of that case are special and the report so abbreviated that I do not think it would be safe to extract a general principle from it.

On the other side of the line, in Royal v. Prescott-Clarke 1966 2 All E.R. 366, at the conclusion of a case justices accepted a defence submission that the prosecution had not proved notice of the opening of a road as a special road. They dismissed the informations. A Divisional Court, constituted identically with the one that sat in Webb v. Leadbetter, held that the justices

had wrongly refused the prosecution an adjournment at that stage to enable the evidence to be obtained, as only a formal requirement was involved. This despite the fact that counsel for the defendant had intimated to the prosecution before the case came on for hearing that strict proof would be required. A similar case was Duffin v. Markham (1918) 88 L.J.K.B. 181; and a somewhat similar one Palastanga v. Solomon 1962 Crim. L.R. 334, though there the question arose on a preliminary point. Recently in Phelan v. Black a Divisional Court in a judgment delivered by Lord Widgery C.J. held that a recorder had not exercised his discretion wrongly in recalling a prosecution witness after all the evidence and the speech of counsel for defendant had concluded, to refresh his memory of the evidence of that witness, there being no shorthand note available. It was not suggested that there was any significant difference between what the witness said when recalled and what he said earlier. But the recorder did say that if the witness had not been recalled he could not and would not have found the case proved.

It seems to me that the authorities justify the conclusion that the discretion can properly be exercised if the evidence is required to repair a mere formal or trivial slip and if the course of the hearing has not been materially affected by that slip. Particularly in the light of Phelan v. Black, I do intend this to be an exhaustive proposition. I am fortified in the proposition by noting the views of Sir Francis Adams in paragraph 3005 of the second edition of his book on Criminal Law and in his monograph on Criminal Onus and Exculpations paragraphs 117-9.

In the present case the D.S.I.R. amlyst's certificate showed a blood content of 144 milligrammes per

100 millilitres. Once the chain of evidence leading to the admissibility of that certificate was completed by evidence that the first breath test appeared positive to the traffic officer, the defendant might have had no defence to the charge under s.58(1)(a). One cannot be sure of that, however, because the only evidence of driving by the defendant at the relevant time was the traffic officer's evidence of an admission; and in the circumstances counsel for the defendant did not cross-examine on that evidence. Moreover the charge under s.58(1)(b) was being heard at the same time. I accept Mr Deacon's statement that he limited his cross-examination in relation to that charge, having in mind the gap in the traffic officer's evidence on the other charge and the risk that an answer might fill the gap. While that point may be entitled to some weight, more importance attaches, I think, to the fact that as the case for the prosecution on both charges stood, counsel for the defendant elected to call no evidence. The Magistrate took the absence of evidence for the defendant into account in convicting on the charge under s.58(1)(b). It is true that I have held that conviction unjustified, but one cannot say that the defendant suffered no prejudice from the conviction, if only because he had to appeal to have it quashed. The material before the Court would have been much greater if cross-examination had been more extensive and if the defendant had given or called evidence; and I am satisfied that in shaping his course as he did, counsel for the defendant was influenced by the omission in the prosecution evidence. In these special circumstances I think that

there was an appreciable risk of unfairness to the defendant in the admission of further evidence on the Magistrate's initiative after both sides had closed their cases, and that the further evidence should not have been admitted.

Neither side has asked that I consider directing a rehearing at this stage, even if there is power to do so. The appeal against the second conviction will be allowed also, and both convictions are quashed.

Solicitors: D.S.G. Deacon, Wellington, for appellant.
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