SET I

LOVELOCK v. M.O.T. (Constitutional)

LOVELOCK v. M.O.T. (Constr.)

IN THE HIGH COURT OF NEW ZEALAND
TIMARU REGISTRY

GR 102/80

BETWEEN CHRISTOPHER DAVID LOVELOCK

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 15 July 1981
Judgment: 21 JUL 1981
Counsel: C.A. McVeigh for Appellant
J.L.D. Wallace for Respondent

JUDGMENT OF ROPER J.

This is an appeal against conviction only on charges of driving with excess breath alcohol and refusing to accompany a Traffic Officer to a Police Station when required so to do pursuant to s.58(3) of the Transport Act 1962.

There are three grounds of appeal but two can be disposed of very quickly. The first is that the Traffic officer did not sufficiently comply with the requirements of s.58(4) of the Act, which provides:-

> " (4) Notwithstanding any other provision of any Act or rule of law, the result of a positive evidential breath test shall not be admissible in evidence in proceedings for an offence against subsection (1)(a) of this section if -
>
> (a) The person who underwent the test is not advised by an enforcement officer, forthwith after the result of the test is ascertained, that the test was positive and that, if he does not request a blood test within 10 minutes, the test could of itself be sufficient evidence to lead to his conviction for an offence against this Act;"

After a positive evidential breath test the Traffic Officer read the following form to

"1. To: Christopher David Lovelock
Date 5.4.80
Address: 6 Houston Place Ashburton
Occupation: Clerk

2. The evidential breath test you have just undergone has given a positive result which is 550 micrograms of alcohol per litre of breath. This result, of itself, could be sufficient evidence to lead to your conviction for driving or attempting to drive while the proportion of alcohol in your breath exceeded 500 micrograms of alcohol per litre of breath (being an offence against Section 58(1)(a) of the Transport Act 1962).

3. Should you wish to undergo a blood test you must so advise me within 10 minutes. If you choose to undergo a blood test the result of the evidential breath test cannot be used in Court to support a charge of driving with excess breath alcohol. The result of the blood test may however be used in Court to support a charge based on an analysis of blood alcohol."

According to the Traffic Officer's evidence the Appellant acknowledged that he understood what had been read to him, and the Appellant himself said in evidence that the form had been read and he had indicated that he did not require a blood test. There is no suggestion that he was confused as to his rights.

I had occasion to consider the same submission recently in the unreported case of Hurley v. Ministry of Transport (Christchurch Registry M.387/80; Judgment 3 July 1981). I there said:-

" I must agree that the form in the present case is not as happily worded as it might be, but for all that I agree with Mr Williamson that the limited obligation imposed by s.58(4) was met; and on the whole of the evidence, including the Appellant's attitude to the form itself and the option given him, I see no serious risk that he was misled."

I stand by that and so reject the first submission.

Council [1980] 1 N.Z.L.R. 337 disposes of that argument. However, Mr McVeigh relied on Boyd's case for the proposition that the Traffic Officer must identify the substance by the precise words on the container and nothing less will do. I cannot accept that.

The Traffic Officer's evidence that he complied with the Notice, and his description in cross-examination of what he introduced leave no doubt that Step 2 was complied with, and Boyd's case is not authority to the contrary.

I come now to the third and what I see as the only submission of substance in this appeal. It concerns the circumstance that the Traffic Officer, being concerned at the Appellant's driving, followed him to a property at 80 Wills Street in Ashburton where the Appellant claimed he lived. The request for a breath screening test, which was refused, and the request to accompany the Traffic Officer to the Police Station took place on that property, which is in fact the home of the Appellant's mother.

The submission was that the Traffic Officer's licence to be on the property had been expressly or impliedly revoked before the breath screening test had been requested with the result that at least the excess breath alcohol charge must fail.

The powers of a Traffic Officer to enforce the blood alcohol legislation on private property are limited, and the limits have been established by our Court of Appeal in Transport Ministry v. Payn [1977] 1 N.Z.L.R. 50, and Allen v. Napier City Council [1978] 1 N.Z.L.R. 273. Those cases establish that the powers of a Traffic Officer under the blood and breath alcohol provisions cannot be exercised on private property unless the officer is present on the property by the licence of the occupier; that his power of arrest without warrant on private property is dependent on his lawful presence there; but that a request to accompany a traffic officer to the police station may be made, within limits, after withdrawal of the officer's licence

to be on the property. In such a case there is no power of arrest if the request is not complied with, but as Woodhouse J. said in Payn's case the authorities would be left with the choice of bringing the individual before the Court by summons for he "would certainly have put himself on the wrong side of the law".

In the present case the Traffic Officer followed the Appellant onto the property at Wills Street, asked him his name and received the reply "Lovelock and I live here". Although it was in fact his mother's home the Appellant was staying there temporarily and I accept that he had sufficient status to revoke the Traffic Officer's right to be there. The determination of whether or not the Traffic Officer's licence to be on the property was revoked had to be decided by the trial Judge on credibility. According to the Traffic Officer all the Appellant said when he was questioned about his consumption of alcohol was that the Traffic Officer "could do nothing about it as he was now home". Words to the same effect may have been said more than once, but the Traffic Officer was adamant that at no stage was he told to leave the property. The Appellant and his witness, who had been a passenger in the Appellant's car, gave evidence that the Traffic Officer was told on several occasions to "get off" or "leave" the property. The trial Judge accepted the Traffic Officer's evidence that at no time was he ordered off the property, whether in specific terms or otherwise. The trial Judge believed the Traffic Officer and there is nothing in the evidence which leads me to the conclusion that I should do otherwise. It follows that there was no express revocation of the Traffic Officer's licence to be present. Express notice is of course not necessary to terminate a bare licence. It may also be terminated by doing acts which are inconsistent with its continuance, and Mr McVeigh submitted that even on the Traffic Officer's evidence there was an implied revocation. I do not accept that submission. All the Appellant did was to refuse to co-operate with the Traffic Officer and assert that as he was "home" the Traffic Officer was powerless. The Traffic Officer was not powerless unless and until his licence to be there was withdrawn, and in my view it never was. Casey J. considered a rather similar situation in the

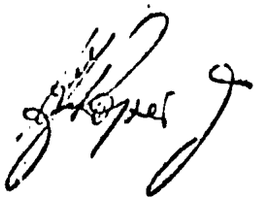
unreported decision O'Brien v. Ministry of Transport (M.35/78 Christchurch Registry; Judgment 15 June 1978). He said:-

" Mr Jones raised two points on appeal. The first one was that the implied licence to the Officers to be on the property had been withdrawn by the Appellant before arrest, so that on the authority of Transport Ministry v. Payne (1977) 2 NZLR 50 the arrest and subsequent steps taken under the legislation were unlawful. The learned Magistrate found there was no question of the Officers' right to be there on their first entry into the driveway, until they went back to the patrol car on the first occasion with the Appellant. I agree: the evidence shows that he was uncooperative, but nothing was said or done to suggest they should not be there. Mr Jones' case really depends on a passage of cross-examination he put to one of the Officers (Mr Reeves) which is set out in full at p.4 of the judgment. I don't propose to repeat it, but it clearly establishes that after Mr O'Brien walked back up the drive after refusing to give the first breath test, his whole attitude was one of hostility and lack of co-operation with the Officers who followed him. In the exercise of their duties under the Transport Act they had an implied licence to enter and remain on the property, which continued until revoked by the occupier. Mr Jones concedes that Mr O'Brien's words ordering them off after he was arrested came too late to affect the position. But he submits that his earlier conduct, as understood by the Officers, clearly amounted to a revocation of their licence. The learned Magistrate considered this point in a careful reserved decision, and found that Mr O'Brien had done no more than make it clear that they were unwelcome and that he didn't want to have anything to do with them, but this did not amount to a revocation of their licence to be there.

The onus is on the prosecution to establish that the steps under the Blood Alcohol legislation have been lawfully taken, and this involves proving on balance of probability that the Officers were entitled to be on the property. They can rely upon that implied licence, which continues until withdrawn. Making every allowance in his favour, the Appellant's conduct is at best equivocal. In my view it amounts to no more than the acknowledgement of a distasteful episode which he desired to see at an end as quickly as possible, with the departure of the Officers. There must be countless situations where just such a [illegible] operated [illegible] a [illegible].

unwelcome enquiries of investigators. The Officers appreciated this state of affairs, and knew he didn't want them on his property. But merely wishing them out of the way in these circumstances does not amount to revocation; something more positive was needed to end their permission to be there. And this was exactly what Mr O'Brien attempted when he realised the worst was happening with his arrest, but by then it was too late. Like the learned Magistrate, I am satisfied that the Officers' licence continued to that stage and the steps under the Act were lawfully effected."

In the result I see no basis for this appeal and it is accordingly dismissed. The period of disqualification is to commence on the 1st August 1981.



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