

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.101/84

11 CLR 703

BETWEEN _____ KARIPA
Appellant
AND AUCKLAND CITY COUNCIL
Respondent

Hearing: 18th May, 1984

Counsel: Illingworth for Appellant
Gresson for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This man was convicted of a blood/alcohol offence in the District Court at Auckland. The only question at issue is a question of identification.

All the breath testing and blood testing procedures were conceded by counsel for the Appellant, but what was put in issue was the question whether at the particular time Karipa was the driver of the vehicle involved. There were four witnesses, one for the prosecution being the traffic officer who positively and, from the look of the notes of evidence, quite emphatically identified the Appellant as the driver; he went so far as to say that when the vehicle stopped he stopped immediately behind, went to the side of the vehicle in question, and sitting in the driver's seat was the Appellant. As a result of speaking to him he stated that he noticed there was a smell of liquor and that his speech was mildly slurred. He asked the Appellant to alight from his vehicle, which he did, and he was stated to be mildly unsteady on his feet.

Under cross-examination, from the way the notes appear, I am satisfied that he was not shaken at all. As against that there was the Appellant himself, another person - Mr Peita - who was alleged to be the actual driver, and a witness, Mrs Pl , who was the driver of another vehicle which had got itself into trouble that night and which was across a traffic island near where the suspect vehicle, so far as the Appellant was concerned, was stopped. She had, however, been in the hotel where the other two had been earlier that particular night and to some degree she knew the Appellant.

The defence witnesses all maintained that the Appellant was not the driver. In this particular matter Mr Illingworth made reference to some blood/alcohol forms which contained in them an acknowledgement by the Appellant that he was the driver, and that those were used to some extent by the District Court Judge to bolster his conclusion. Except for one purpose I intend to neglect those documents and their admissibility.

As he was entitled to, the District Court Judge dismissed the evidence of the Appellant and Mr Illingworth does not attempt to use either his evidence or that of Mr Peita for the reasons advanced by the District Court Judge.

Mr Illingworth hangs his hat on certain observations made by the District Court Judge as to the trustworthiness of Mrs Pl ' evidence. But that is in the light of his primary finding when he alerts himself to the fact that

there was a conflict, and he stated that he accepted without any hesitation the evidence of the traffic officer and was left in no doubt whatever that the Appellant was the driver. That is the emphatic finding.

Mr Illingworth then, in the context of a District Court hearing, wants to place everything under a microscope; this to my mind is a somewhat inept way of dealing with a situation such as this, in a Court such as a District Court. In any event what does the District Court Judge say? So far as Mrs P is concerned he refers to the fact that she observed people alight from the offending vehicle in a certain order and he makes a comment that that was not the order which was given by the Appellant. It may be correct to say: well then, how can one take much notice of what the Appellant said because he was acknowledged to be very drunk that night. Then there were two other matters referred to. One, that she could not remember if the Appellant had blown into anything; secondly, her observation that he might have been drunk. Then he makes the observation, after having observed her, and this is what he is in the Court for, that her recollections of events that evening were in his view quite faulty. He then went on to describe the evidence of all three as poor and so faulty that it did not in any way shake his belief in the correctness of the evidence of the traffic officer. Mr Illingworth now says that Mrs P is an independent witness and the reasons selected by the District Court Judge do not stand up under examination. What he conveniently overlooks is that the overall impression made by a witness is often very important to

a judicial officer and that can only be expressed in a general way. Credibility was his field. His assessment of the trustworthiness of the witnesses was his field and he found that the witnesses were untrustworthy. He did not, in fact, say they were lying; the implication is certainly there that that was his view. Mr Illingworth says that if that is the District Court Judge's view he should have stated it. He did, however, acknowledge that there are occasions when for very good reasons the Court does not go to those lengths, but if the attitude of Mr Illingworth is one which is going to become part of a pattern then it may well be that the District Court Judges will have to re-think their position and condemn people as liars if that is what they really think.

But in this case when one has a look at the evidence overall surely his conclusion is justified. Here was a situation where there was a traffic officer there who was in conversation with the Appellant with Mrs P1 in the near vicinity. It is attempted to excuse her failure to see anything in relation to the breath testing performance because of her desire to get her vehicle shifted. Quite frankly that seems to me to be unreal in all the circumstances as is her description that the man might have been drunk when on all the evidence he was in an advanced state of intoxication.

In all the circumstances, this being a case of credibility, and the credibility issue having been decisively decided against the Appellant, in accordance with all the tested cases and the principles which have been

laid down for years, this Court, in my view, has no right to intervene.

Before I depart from this case I want to comment on Mr Illingworth's criticism of the calling by the District Court Judge for the blood alcohol forms. It is true these were not produced by the prosecution and it may have been for good reason, but the District Court Judge for better or for worse decided to call for them. But there was no objection from counsel for the Appellant and this man was represented by counsel. It is now said on Mr Illingworth's instructions that it came as a bolt out of the blue. In every case which is defended, whether it be civil or criminal, counsel who are worth their salt must be always ready to take objections in case something is sprung upon them, as was said in this case, out of the blue. Here there was no objection, no submissions recorded in any shape or form and an election by counsel not to cross-examine. I simply say that if there is any criticism against the District Court Judge then by the same token counsel's performance equally is open to strong criticism if now an objection is to be taken when none was raised in the District Court where it ought to have been raised if there was any real objection to be tendered on behalf of the Appellant at that time.

I record that counsel in this Court, Mr. Illingworth, was not the counsel in the District Court. I simply observe that if he had been then he may have viewed the whole situation somewhat differently, not only from the point of view of the admission of the documents, but also in relation

to the demeanour of the witnesses because he then would have had the added advantage of having seen their performance.

Accordingly the appeal will be dismissed.

As is usual counsel for the Respondent asks for costs. Mr Illingworth, in normal fashion of counsel for the Appellant, opposed costs. However, I think it is the fairly universal view of the Judges that in matters of this nature, like any other, costs ought to normally follow the event. This is not quite in the same category as the appeal I heard earlier this morning and that can be reflected in the quantum of costs. Accordingly the Respondent will be entitled to costs in the sum of \$125 and disbursements.

P. D. W. J.

SOLICITORS:

Wilson Wright & Co., Auckland for Appellant
Butler White & Hanna, Auckland for Respondent