IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

709

M.283/84

BETWEEN KELLY

Appellant

AND AUCKLAND CITY COUNCIL

Respondent

Hearing: 18th May, 1984

Counsel: Gilbert for Appellant
Katz for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

This man was convicted of two offences against the Transport Act; the first was of driving with an excess blood/alcohol level and the second was of refusing to accompany a traffic officer to the Civic administration building.

The background of the matter is that some rather bad driving was observed by a traffic officer, including a failure to stop at a compulsory stop sign. After pursuit for some of the distance the vehicle was stopped and the Appellant was found to be the driver.

In the course of interrogation the traffic officer ascertained that the Appellant lived in Hillsborough and the stopping of the vehicle was in Orakei Road just near Benson Road, quite some distance from the Appellant's home.

During the course of the discussion the traffic officer deposed to the fact that he smelt alcohol on the

Appellant's breath and mentioned this to the Appellant who strongly denied that he had consumed any alcohol. The traffic officer repeated his allegation. In consequence he was required by the traffic officer to undergo a breath screening test and that is referred to at page 2 of the notes of evidence. But at page 7 under cross-examination, when asked to describe what he actually said, he replied:

> "I required him to undergo forthwith a breath screening test. If the result of the test is positive or if you fail or refuse to undergo the test I will require you to accompany me to the Civic Administration Building for the purpose of an evidential breath test or blood test or both. If I require you to accompany me or if you fail or refuse me I may arrest you."

At that stage the Appellant knew full well what was likely to happen to him if he refused. What does he do? He alights from the vehicle and then attempts to avoid the traffic officer moving down a short bank and attempting to go on to a property stating that he wished to go to the toilet. That was into a house which was so far as the officer was concerned private property belonging to a person who was not known to the Appellant and certainly the Appellant did not make it plain whether he knew the occupant of the property or not. It is urged on behalf of the Appellant that this was not a refusal, but that it fell within the ambit of such cases as Pettigrew v. Northumbria Police Authority (1976) Crim.L.R. 259. That I find almost impossible to accept having regard to the circumstances of the evidence in this case and the findings of the District Court Judge.

Once the Appellant attempts to go on to private property where the traffic officer would be restricted as to his

activities by reason of the fact that he would have no right to enter upon it, he realised the difficulties with which he was going to be faced. I point out that had the traffic officer gone on to the private property and had the Appellant also gone on to it there, and the traffic officer been ordered off, the Appellant could have remained if he had been so permitted by the Householder and there was nothing whatever the traffic officer could have done.

However, this Appellant continued to walk down the street and as he was walking down the street he was plainly told that he was required to undergo a breath screening test and that if he persisted in walking away and failed or refused to accompany the traffic officer he may be arrested. The traffic officer blocked his path as the Appellant tried to walk into a driveway and the Appellant then walked round the corner from Orakei Road into Benson Road. He was then informed by the traffic officer that the walking away was a refusal and he was then required to accompany the officer to the Civic administration building for the purpose of an evidential breath test or a blood test or both.

After that he was again advised that he would be arrested if he persisted in walking away and that if he walked on to private property the traffic officer would arrest him. Having walked on to a property at the corner of Benson Road he was then arrested. Subsequently he did enter a house where obviously he was not known and then persistently refused to get into the patrol car and, indeed, displayed his whole intentions by hanging on to a fence and had to be virtually prized off it.

This is a case where the Appellant deliberately showed

that he was not going to co-operate and that he was going to avoid or evade his responsibilities at all costs. The District Court Judge found that he had been uncooperative. That was a mild way of saying what to me appears to be perfectly plain, that he was obstructive. What is of note is at page B.12 when discussing the breath test the District Court Judge said:

"I am satisfied this was done in the normal way."

In making that comment he was referring to the request for a breath screening test. That carries with it the requirement to forthwith undergo it. There was a refusal which the District Court was entitled to find was a refusal in the circumstances within the meaning of the statute. Once that happened he was required to accompany and there once again was a refusal. As submitted by Mr Katz, all of the evidence points to deliberate obstruction as the man had only just left Paritai Drive some two kilometres away or so, and within that short time there appears this urgent necessity to go to the toilet. Nor is there any statement from the Appellant that to relieve himself, as suggested by the traffic officer, would involve him in any embarrassment.

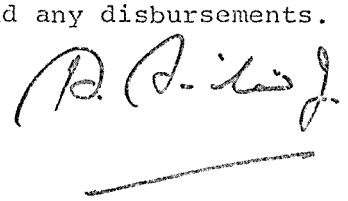
The whole matter smacks of a degree of unreality and is not a situation where this Court could countenance any successful appeal against the evidence in the District Court.

Accordingly the appeal will be dismissed.

Mr Katz asked for costs. Mr Gilbert opposed them and in support referred to the evidence relating to the traffic officer's suggestion that the Appellant relieve himself virtually in a

public place and stated that that would be really an unlawful suggestion and in those circumstances there are some mitigating factors in relation to costs. In view of the findings that I have already given, that really this whole episode smacks of unreality, I do not accept that what the Appellant put forward can be regarded as any justification for his behaviour, nor did the District Court, which reinforces my view of what was said in the evidence.

Quite frankly in my view this appeal had no real basis at all and costs ought to go in accordance with the ordinary event where an appeal is unsuccessful. Costs are allowed to the Respondent in the sum of $200 and any disbursements.



SOLICITORS:

Wallace McLean Bawden & Partners, Auckland for Appellant
Butler White & Hanna, Auckland for Respondent