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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.424/84

1164

BETWEEN DANIEL JOSEPH McCARTHY

Appellant

A N D POLICE

Respondent

Hearing: 4 September 1984

Counsel: K.N. Hampton for Appellant
B.M. Stanaway for Respondent

Judgment: 7 September 1984

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JUDGMENT OF HARDIE BOYS J.

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Daniel Joseph McCarthy was convicted in the District Court at Christchurch on four charges. The first under s 55(2)(b) of the Transport Act 1962, was that while the proportion of alcohol in his breath as ascertained by an evidential breath test undergone by him pursuant to s 58A exceeded 500 micrograms of alcohol per litre of breath, he was in charge of a motor vehicle and by an act or omission in relation thereto caused the death of Scott Andrew Frazer. The other three charges were brought under s 65(1) of the Transport Act and they were that after the accident involving Mr Frazer the appellant failed to stop; failed to ascertain whether any person had been injured; and failed to render all practicable

assistance to the injured person. He was convicted on all four charges and was sentenced on each to imprisonment for a term of six months and disqualified from holding or obtaining a driver's licence for a term of two years. This appeal is brought against his conviction on all the charges but that of failing to ascertain whether any person had been injured in the accident; and it is brought against the sentence of imprisonment imposed on all four charges.

I deal first with the charge of causing death whilst driving with excess breath alcohol. The appellant had been drinking at a tavern in Rangiora and at about 9.45pm was driving east along Kippenberger Avenue when, a short distance before the end of the restricted speed zone, his car struck the deceased who was on a bicycle travelling in the same direction. The appellant did not remain at the scene of the accident but returned to it briefly at the time the ambulance was removing Mr Frazer's body. Then some two hours later he went to Rangiora Police Station with his father to acknowledge his responsibility. He was interviewed by a police constable and a traffic officer. The traffic officer noted that he smelt of alcohol; that his eyes were slightly glazed and his speech slurred. The traffic officer therefore required him to undergo a breath screening test; and when that proved positive, required him to undergo an evidential breath test or blood test or both. The appellant agreeing, an evidential breath test was administered immediately in the same room. That test produced a reading of 850 micrograms of alcohol per litre of breath. The appellant did not request a blood test.

The procedures laid down in the Transport Act and the Transport Breath Test Notice 1978 in respect of both tests were gone through with care and it was not suggested that there was other than full compliance in all but one respect. That one respect in which it is contended there was non-compliance is that the breath screening test and the evidential breath test were both conducted in the same place. That, Mr Hampton submitted, invalidated the evidential breath test. His argument was that the power conferred on a traffic officer to require a suspect to undergo an evidential breath test is exercisable only in the circumstances set out in s 58(A)(4), namely when, following the taking of a breath screening test, the suspect has been required pursuant to subs (3) of s 58A to accompany him to a place where it is likely that he can undergo either an evidential breath test or a blood test or both; or where he has been arrested under the provisions of subs (5).

Mr Stanaway had of course to acknowledge that s 58A does not provide for the situation which arose in this case and for the steps taken to deal with it. He made two submissions: first that the power to require a suspect to undergo an evidential breath test at the same place as that at which the breath screening test is administered is implicit, or ought to be implied, in s 58A, and secondly that the circumstances of this case were in any event covered by the substantial compliance provisions of s 55(5), which I consider, and Mr Hampton accepted, applies to a charge such as this, even though brought summarily and not indictably.

Section 58A is primarily a law enforcement measure, but it also contains a number of safeguards for the protection of the suspect. The attention given to the latter aspect can I think lead to the former being overlooked. As McMullin J pointed out in Daly v Ministry of Transport [1983] NZLR 736, 741, the necessity, in all but the cases mentioned in subs (3)(b) and (c), for a positive breath screening test before an evidential breath test may be administered, affords the first and prime safeguard. He added:

> " Concern for the suspect need not be so great at the stage when the breath screening test being positive the testing procedure moves on one further step by providing for the administration of either an evidential breath test or a blood test. It is implicit in the 1979 amendment that once a breath screening test has been administered there should be available a method of testing which has regard to the convenience of the testing authority rather than promotes the interest of the suspect."

The requirement to accompany is a means of ensuring that the evidential breath test is administered. It is an enforcement not a protective measure. Where the evidential breath test is required, the protective consideration means that both the requirement to accompany, as well as the evidential breath test itself, must be executed in a proper manner. But that is not to say that the requirement must be resorted to even in a case where it is not necessary, or that in such a case failure to resort to it invalidates the next step, namely the requirement that an evidential breath test be taken.

Whilst I accept that there are occasions on which the implication of powers may be proper, I hesitate to resort to such a device where exercise of the power is an essential step in a sequence leading to proof of commission of a serious offence. I consider that the present case is more properly to be dealt with under the reasonable compliance provision of s 55.

Mr Hampton, relying on the Court of Appeal decision in Auckland City Council v Fulton [1979] 1 NZLR 683, submitted that the requirement to accompany is such a major element in the breath testing procedure that its omission cannot be cured by resort to s 58E. In the particular circumstances of this case, I cannot accept that submission. In Aualiitia v Ministry of Transport [1983] NZLR 727 Cooke J had a little more to say about s 58E than he had ventured in Fulton. He said (p 730):

> " In determining whether there has been reasonable compliance, the extent of the non-compliance is obviously highly material. This is what the Courts have had in mind in saying that fundamental or major departures from the scheme of the Act are not protected by the section. Linked with this is the question whether there is a real possibility that the defendant has been prejudiced by the non-compliance."

For the reasons already given I do not think that the absence of any requirement to accompany is in this case a fundamental or major departure from the scheme of the Act. Nor is there any possibility of the appellant having been prejudiced by it. The prescribed procedure was followed in every other respect, with the result that his rights were as fully protected as the Act requires.

This ground of appeal cannot therefore be upheld.

Mr Hampton's second ground of appeal in relation to the first charge is that it had not been proved beyond reasonable doubt that the appellant's condition resulting from his consumption of alcohol was a material cause of the act or omission which led to Mr Frazer's death. Although on first impression s 55(2) would not appear to require such a causative connection, but appears rather to impose liability for the consequences of the act or omission simply by virtue of the fact that the driver is affected by alcohol, the Court of Appeal has ruled that that is not a correct interpretation of the section. In The Queen v Wolter [1959] NZLR 1178, 1183, it was said in relation to the proper direction to be given to a jury:

> " They should then be directed that they are to be satisfied that here was an act or omission on the part of the accused, and in relation to the vehicle, which caused the bodily injury or death; and that the act or omission was of a character which should not have happened if the accused had not been under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle."

This statement was amplified by the Court in R v Carey [1966] NZLR 963, 966, in this way:

> " ....the Court meant that the act or omission relied upon by the Crown as causing the death of the deceased was the result of the accused being under the influence of drink or a drug to such an extent as to be incapable of having proper control of his vehicle; that is to say, that that condition of the accused was a material cause of the act or omission which led to the death or bodily injury, as the case may be."

(These observations were directed particularly to what is now s 55(2)(a) but clearly apply equally to s 55(2)(b).) The difficulty of applying such a test is obvious, but is somewhat reduced in the light of what Woodhouse J said in Smyth v Police [1937] 1 NZLR 56, 59:

> " It is well accepted that the consumption of alcohol beyond certain well known limits takes the fine edge from perception and judgment and puts a cloud over one's capacity for physical reaction. It then can adversely affect the ability to control a vehicle in a proper and adequate fashion. It is not necessary to demonstrate that the act or omission must be of a character which occurs only if the offender has been rendered incapable of proper control by reason of his consumption of alcohol. The test is simply whether the presumed condition brought about by a consumption of alcohol beyond the prescribed limit has been a material cause of the act or omission which led to the injury; cf R v Carey (supra p 966). In the final analysis it is a factual issue to be decided within the circumstances of each case."

In this case, Mr Hampton placed great stress on the facts that it was dark at the time of the accident; that the road at the point of impact was narrow, whereas it had been wider further back in the direction from which the appellant had come; that the cyclist had been struck by the extreme left portion of the front of the appellant's car, and that it was not established that the bicycle had any form of illumination visible from the rear. The evidence showed that it was equipped with a dynamo attached to the front wheel and wired to two lights, one directed forwards and the other directed to the rear. There was also a rear reflector which after the accident was bent up underneath the saddle. It was not clear what clothing the deceased was wearing but it was established

that he had a bag; whether the bag was being carried in front or behind is not known, but it could well have been behind. There was evidence that the forward facing light was operating but the evidence suggested that the back light may not have been and further that the reflector may not have been visible either. A pedestrian who saw the cyclist a few minutes before the accident said he was proceeding slowly, well on his own side of the road. She was watching him quite carefully as he pedalled away from her down Kippenberger Avenue. She said "There were to me no sign of any lights on his cycle." "But from where I looked I looked all the time and I could see no sign of any lights on the cycle." She was even more definite in cross-examination:

> "A. I did not see any form of light.
>
> Q. Not even a reflector light being thrown back from a reflector?
>
> A. There was nothing to show that there was a reflector on the cycle."

It must therefore be assumed in favour of the appellant that as he approached the cycle no light was emitted or reflected from it towards him; and Mr Stanaway acknowledged that any light directed forwards would not in the circumstances have assisted in rendering the deceased visible to the appellant. However the matter does not end there. For not only must the appellant have been driving with his car lights on, but also there was some street lighting. The pedestrian said that there were three street lights in the distance of approximately

200 yards between where she was and the end of the speed restriction. Asked whether those lights created the effect of "pools of light and dark stretches in between", she replied "Not really. Any object on the road is visible. There are pools, but objects are visible from one light to the next". She herself was able to observe the cyclist as he pedalled some distance, probably about 100 yards, away from her. After what proved to be the impact she looked to where he should have been, where she said he should have been visible in the street lights, but could see nothing. The cycle's rear wheel and carrier were found about 15m to the west of a power pole on which there was a street light and the deceased's body was found about 11m to the east, the far side of that power pole. It was not possible to fix the point of impact, but it was clearly on the west side, the appellant's near side, of that light. The weather was fine and clear and there was no other traffic on the road to distract the attention of a driver in the position of the appellant. In these circumstances, I consider that notwithstanding that the District Court Judge relied on the fact that the cycle had a reflector, he was correct in his conclusion that the cyclist should have been seen by any prudent motorist. The appellant did not give evidence, but made a statement in which he said he had not seen the cyclist at all until "all of a sudden there was a bang in the front of my car - I saw a push bike and a body - then my windscreen shattered - it all just happened. I do not know where the bike had come from." The cyclist was there to be seen and in my view the appellant was clearly negligent in not seeing him. That however is not the point for the purposes of

the charge brought against him. For as mentioned it is necessary for there to be a causative link between his negligence and the alcohol he had consumed. However as Woodhouse J pointed out in the passage quoted from Smyth v Police, contrary to Mr Hampton's submissions, the fact that the accident could have occurred whether the driver was affected by alcohol or not is not determinative.

As to the question of causation, there was the evidence of a woman who had been introduced to the appellant in the tavern who had not herself been drinking and who had endeavoured to engage him in conversation. At that time he was carrying a glass of beer which she said "was wobbling quite violently and slopping"; "he did seem at the time to be unable to hold it steady"; "he was waving it around between hand and mouth slopping a bit"; and he was "definitely inebriated". Her attempts to engage him in conversation failed so dismally and his demeanour was such that she obviously became concerned about him and asked if he would like her to take him home. He did not reply to that offer, but instead asked for another beer. A good deal of that "went down him whilst he was drinking". He then "lurched his way out of the hotel with a wave of the arm". The appearance he presented when he arrived at the police station two hours later has already been mentioned, although it should be added that before going there he had, he said, drunk a further two beers with his father before telling his father what had happened. It is also pertinent to note what the appellant said in his statement as to the events immediately following the collision

with the cyclist. He said:

> " I pulled into the shingle straight away. I came to a stop. I wound the window down and looked around. I saw nothing. I looked up and saw a car coming around the corner near Golf Links Road on the bend. I drove off another 20 yards and stopped again. I didn't know what to do. It crossed my mind that I had been drinking, had an accident and that I didn't want to be caught again. I drove off again and went to Woodend. I wanted to get there quick. I never got out of my car near the accident."

One gains from this a clear impression that the appellant himself connected the accident with his drinking and whilst that would not in itself be enough to create the causative link, in my view it confirms the conclusion to which the Judge was brought and I, too, have been brought, that the circumstances of the accident coupled with the state of intoxication in which the appellant was, established that link sufficiently for the charge to be held to be proved.

The appeal against conviction on the charge of causing death whilst driving with excess breath alcohol is therefore dismissed.

Mr Hampton's argument in support of the appeal against conviction on the charge of failing to stop depends almost entirely on the appellant's own statement. The Judge was satisfied that he did not stop. The pedestrian said this:

> " I suddenly heard a bump down the road, quite a heavy thud and I thought 'My God that car's hit that cyclist'. That is the thought that run through my mind. I was quite shaken and then the car continued. It did not stop. I expected the car when I heard the bump to come to a sudden stop and the car continued. It did not

> stop at any point of time. As far as I am aware that car did not stop because I had waited to hear a screaming of brakes or something and when the car did not stop I thought 'Well it must have been something else that I heard' - that it was not the car hitting the cyclist."

By then she was almost outside her own home, and reassured by the fact that the car did not stop and by being unable to see anything on the road ahead, she went in. At that stage no other traffic was visible. Asked whether the car could have stopped further down the road she said it could have, but she was sure that it did not stop immediately after she heard the thud.

On the evidence of the pedestrian, the Judge was in my view quite entitled to reach the conclusion that the appellant did not stop at all. But even if it be accepted that her limited observation and his statement together raise a reasonable doubt as to whether he did in fact stop, it is abundantly clear that even what he said he did was not adequate compliance with his obligation. In King v Bowden [1938] NZLR 247, 254, the Court of Appeal said that obligation to stop has as its purpose to ensure as far as possible the protection and safety of the injured person. And in Houten v Police [1971] NZLR 903, Richmond J said that in order that this purpose may be fulfilled the driver is required to do more than merely stop and move on. He must stop and remain stopped for long enough to enable him in all the prevailing circumstances to discharge at least the second part of his duty, which is to ascertain whether anyone has been injured. The appellant clearly did not do that. He had seen a body and his windscreen had been

shattered. All he did the first time was stop long enough to wind the window down and look back. On the second stop he does not seem to have done anything before driving off. That was not in my view enough. Thus whatever weight is given to the statement, I conclude that the appellant was rightly convicted on this charge.

In relation to the charge of failing to render assistance, Mr Hampton argued that the duty to assist flows on from the duty to ascertain, so that it does not arise unless the driver has in fact ascertained that there has been injury. This submission involves reading the words "in which event" as referring to the ascertainment and not to the fact of injury. The argument seems equally applicable to the charge of failing to ascertain whether any person was injured, now that I have held that a conviction was properly entered on the charge of failing to stop. And indeed it may be said that a failure to stop necessarily results in a failure to ascertain and assist, whilst a failure to ascertain necessarily results in a failure to assist: so that to convict on the breach of more than one of these duties is to impose a double, or a triple, penalty for what is in reality but the one omission. And whilst that may appear to have been the view of the Court of Appeal in The King v Bowden, although the point was not expressly decided, it is not the view that has been taken in reported cases in this Court. In Waddington v Boyd [1959] NZLR 1332, Henry J held that the statute lays down two primary duties, linked by the words "and shall also" - the duty to stop and the duty to ascertain, - and that a person can properly be

charged with a breach of both. Further, he rejected the argument that the duty to render assistance arose only if the duty to ascertain had been obeyed. But he did hold that this third duty requires knowledge of an accident in which injury had occurred, thus distinguishing it from the other two. This view was adopted by Macarthur J in Dickson v Police [1968] NZLR 499, and I am not prepared to differ from it after it has prevailed for so long.

The appellant's own statement of what he saw at the moment of impact and then again when he first stopped establishes the requisite knowledge for this purpose and Mr Hampton did not argue to the contrary. Accordingly the appellant was rightly convicted on this charge too.

I turn now to the appeal against sentence. The appellant was convicted in 1979 on a charge of either reckless or dangerous driving, and it was probably to that that he referred in his statement when he mentioned being caught again. He has not previously been convicted of any offence such as the present. I do not regard the earlier offence as of any particular significance now and the District Court Judge did not do so either.

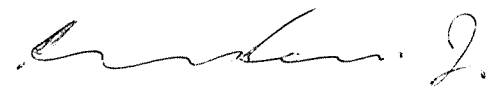
It is an unfortunate fact that many persons convicted of alcohol-related driving offences, and of panic-stricken responses to accidents in which they have been involved, are otherwise of good character, and they are appalled by what they have done and by the penal consequences that follow. That is

the case here. There are many positive things to be said about this appellant. They were referred to in the probation report, in the references produced and in the submission of counsel.

The Judge obviously gave anxious thought to all these matters, but decided that nonetheless a sentence of imprisonment was called for. I think he was entitled to take that view. Drunken driving is a grave social problem. Its cost to the community in terms of life and injury is enormous. The community I am sure expects the Court to play a strong role in combatting it by the imposition of deterrent sentences. And whilst the personal circumstances of the offender must always be a relevant consideration they must yield to the wider community interest.

Whether imprisonment is called for will naturally depend on the circumstances of the case. The most relevant factors are the degree of intoxication, the seriousness of any driving fault which may have occurred, and the consequences of any such fault. Here I acknowledge at once that this was not flagrantly bad driving. But nonetheless the appellant failed to see the cyclist who was there to be seen and who I am satisfied was visible to any driver keeping a proper lookout. The most serious aspects of the case however are what happened before and after the accident. The appellant was clearly badly affected by liquor, yet refused the offer of a ride home and chose to drive himself. And then he callously went off and left this boy at the side of the road where he could easily

have remained for some time before being found. One finds comfort in the likelihood that the boy was killed instantly, or at least would not have been saved had the appellant behaved responsibly, but he cannot call that in aid in mitigation of his irresponsibility. These are the factors that weighed most heavily with the Judge and, in my opinion, rightly so. I am not persuaded that the sentence was manifestly excessive or inappropriate and the appeal against sentence is also dismissed.



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