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N.Z. L. Reports

M.116/83

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

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BETWEEN MEACLEM

Appellant

AND POLICE

Respondent

Hearing: 18 May 1984

Counsel: K.C. Bailey for Appellant
B.D. Vanderkolk for Respondent

Judgment: 18 May 1984

ORAL JUDGMENT OF EICHELBAUM J

These are two appeals, both arising out of the actions of the appellant as the driver of a car in Queen Street and Oxford Street, Levin on the evening of 23 February 1983.

In relation to the dangerous driving charge it is quite correct as Mr Bailey has submitted that the prosecution evidence was not all consistent. A civilian witness stated that the appellant drove through a set of traffic lights while they were against him, but the police sergeant who witnessed the same incident disagreed and the learned District Court Judge quite rightly discounted this aspect in his decision. Another example was that there was some evidence from the same civilian witness suggesting that the appellant drove his car among

a group of girl cyclists causing them to take evasive action, but others who saw this happen obviously did not see any imminent danger in it. Again the learned District Court Judge did not rely on this aspect in convicting the appellant. Even disregarding the evidence of the civilian witness entirely as Mr Bailey submitted should be done, there remained a solid substratum of evidence relating to the appellant's driving which obviously made a very adverse impression on the Judge who saw and heard the witnesses. On any view of the evidence at least two U turns were made and it is clear that they were accompanied by considerable squealing of tyres. This driving, which the Judge recorded as exhibitionism on the part of the appellant, took place in the main street of Levin, in the heart of the shopping area and in a street which was also the No 1 main highway. There was evidence from which the Judge could conclude it was accompanied by excessive speed and that at least one vehicle was compelled to take evasive action.

In fairness to counsel, he did not feel able to press the submission that the evidence failed to show beyond reasonable doubt that the defendant drove in a manner that was or might have been dangerous to the public very far. I feel obliged to say that against the background of the evidence that I have rehearsed, the submission is entirely without merit, and the appeal against the charge of dangerous driving is dismissed accordingly.

The second appeal relates to a charge that the appellant refused to permit a specimen of blood to be taken. In order to enable the enforcement officer, a police constable, to require a specimen of blood (as to the fact of which requirement there was no argument) there first had to be made out one or other of the prerequisites

arising under s 58B(1) of the Transport Act 1962. It is common ground that the only one of those requirements or prerequisites that could be applicable was that arising under subcl (a), namely that the defendant, having been required to undergo an evidential breath test, failed or refused to do so. The narrow point on which the appeal turns is whether the prosecution established to the requisite standard that the enforcement officer required the defendant to undergo an evidential breath test. As to that, the learned District Court Judge records that on being asked for the exact words used, the constable hesitated twice and obviously was unable to remember them. In the end he said "I requested him to undergo an evidential breath test, a blood test or both". Some indication of the atmosphere that prevailed at the time may be gleaned from the defendant's reply, which was "I will knock your head off if you try". This dialogue was repeated. However, the legal issue on which Mr Bailey takes his stand is that pursuant to the legislation it was encumbent on the enforcement officer to make it clear to the defendant that he was required to undergo an evidential test and that there was a degree of compulsion on him to do what was asked.

I put to one side the point that the constable apparently used the term request rather than require. If that was the only issue I think that the learned District Court Judge would have been entitled to infer from the general circumstances that the enforcement officer was doing more than asking a polite question. The real difficulty, from the point of view of the prosecution, is that the constable on his own evidence put to the defendant a multiple choice question. As Mr Vanderkolk was obliged to concede the legislation does not in terms require any such question to be put to a defendant. The

legislation envisages that the matter will proceed by steps, the first being the requirement of an evidential test. If that is refused, or having been taken is positive, the next stage, requirement of a blood test, may be reached. It is clear that at the moment the question was asked the issue of a blood test had not arisen, nor were there any circumstances that then entitled the enforcement officer to raise the matter. His requirement should have related to the evidential test alone. In asking the question in the form that he did, in my view he failed to make it clear to the defendant what was being requested of him. Clearly it was not a question that permitted of a simple yes or no answer, and the defendant may have thought that whatever affirmative answer he gave might have been a committal to a blood test, which at that stage was not in issue. A request for a blood test could not validly arise until such time as within the terms of subcl (a) of s 58B(1) the defendant had failed or refused to comply with a valid requirement to undergo an evidential breath test. Clearly the necessity for proof of that requirement was in the learned District Court Judge's mind, since he commenced to discuss the topic a short way down p 3 of his judgment, where he rightly comments that at this point the evidence became a little vague. He then proceeded to discuss - in terms that in my respectful view were perfectly correct - the legal ingredients relating to the issue whether the enforcement officer had made a requirement, citing in that respect the judgment of this Court in Chesham v Wright 1970 NZLR 247, 250. The learned District Court Judge did not in terms return to the question he posed at the outset in relation specifically to the evidential test. In answering the question whether the constable had "required" anything of the defendant the Judge answered it at p 4 solely in terms of the requirement to undergo

a blood test which of course was a subsequent ingredient which the prosecution had to prove.

It may well be that the issue on which the appeal now turns was not put as clearly in the District Court as it has been by Mr Bailey here. However, for the reasons indicated it is my view that the prosecution failed to prove that the enforcement officer had required the defendant to undertake forthwith an evidential breath test within the terms of s 58B(1)(a) and accordingly the appeal succeeds. The conviction on the blood test count is therefore quashed.

In relation to the appeal against sentence, Mr Bailey confined his submissions to the 12 months disqualification, while drawing attention to the substantial fines imposed in respect of both convictions regarding which immediate payment was ordered and made. In the case of each of the charges on which the appellant was convicted there was a mandatory six months disqualification and obviously the learned District Court Judge had the totality of the offending in mind in fixing the period of 12 months disqualification in relation to each charge. Now that one of those convictions has been quashed I think that in principle it is proper that the period of disqualification in relation to the remaining conviction should be reconsidered. As Mr Bailey has pointed out, notwithstanding that the District Court Judge was quite justified in regarding the incident as a display of exhibitionism by the defendant, the fact is that no accident occurred. The Judge was entitled to regard the offence as serious against the background of the time and place in which it occurred, to which I have already referred, but the seriousness of the matter was I think amply marked by

the fine that was imposed. In the circumstances, and in view of the outcome of one of the appeals against conviction, I think it is proper to allow the appeal and reduce the period of disqualification to six months.

Solicitors :

P.H. Barbour Esq (Levin)

McKegg Walshaw & Co (Palmerston North) for Respondent