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BETWEEN      LAWRENCE PATRICK ODELL  
Appellant

A N D      BRIAN JAMES McCONCHIE  
Respondent

Hearing:      16 March 1984  
Counsel      B.M. Stanaway for Appellant  
                 M.B. O'Regan for Respondent  
Judgment:      9 APR 1984

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JUDGMENT OF COOK J.

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The respondent came before the District Court upon three charges:-

- (a) On the 24th of March 1983 at Christchurch drove a motor vehicle on Ilam Road while the proportion of alcohol in his breath exceeded 500 micrograms of alcohol per litre of breath.
- (b) On 24th March 1983 at Christchurch did fail to accompany a Police Constable to the Central Police Station when required to do so under Section 58(A)(3) of the Transport Act 1982.
- (c) On 24th March 1983 at Christchurch resisted ANTHONY GAVIN YEADON a Constable acting in the execution of his duty.

All three were dismissed and the police now appeal by way of case stated. According to the case, the following facts were

proved at the hearing:-

- "1. The Defendant was the driver of motor vehicle on Ilam Road on the 24th of March 1983 at approximately 8.45 p.m.
2. While driving that vehicle the Defendant was observed by Constable Yeadon in a marked patrol car, to cross the centre white line in Ilam Road.
3. The Constable following the Defendant a short distance to the Defendant's address. At his address the Defendant drove his vehicle into his garage and alighted from it.
4. The Constable parked his patrol car across the Defendant's drive, walked up the Defendant's drive and spoke to the Defendant by the garage door.
5. The Constable noticed the Defendant was unsteady on his feet, that he nearly fell over, his breath smelt of alcohol and his speech was slurred.
6. The Defendant admitted to having consumed 2 jugs of beer.
7. At 8.50 p.m. the Constable told the Defendant that he required the Defendant to accompany him to the patrol car for a breath screening test.
8. The Defendant refused to accompany the Constable and said to him 'you are on private property and you can't touch me'.
9. At 8.55 p.m. the Constable required the Defendant to accompany him to the Christchurch Central Police Station for an evidential breath test, a blood test or both.
10. The Defendant refused and was arrested, handcuffed and placed in the patrol car after a struggle, with the assistance of an off-duty Policeman.
11. The Defendant was taken to Christchurch Central Police Station and underwent an evidential breath test to which he agreed.
12. The first evidential breath test was not continued with and the Constable elected to administer a second evidential breath test.

13. The second test was completed which showed a positive reading of 1460 micrograms of alcohol per litre of breath.
14. The detailed evidence as to the evidential breath tests administered and their procedure appears from the notes of evidence which are annexed hereto and are intended to form part of the Case Stated. (see McKenzie v Hawkins [1975 NZLR 165]).
15. The Defendant was then advised of his rights following the positive breath test in accordance with the Transport Act.
16. The Defendant elected to have a blood sample taken within the 10 minute period prescribed, however then changed his mind when the registered medical practitioner sought his consent."

It seems that the point taken in the District Court for the defence was that it was not lawful for the constable to administer a second evidential breath test; despite that, however, the District Court Judge dealt with certain matters not raised by the defence, in particular, the questions whether the respondent had revoked the constable's implied authority to be on the former's property and whether the constable had power to require the respondent to accompany him to some other place i.e. from the respondent's garage to the patrol car standing across the entrance to the drive. As to the first, he determined that the words used by the respondent to the constable and quoted above "you are on private property and you can't touch me" constituted a revocation of the constable's licence to be there and that the constable's subsequent arrest of the respondent and the procedures which followed were unlawful.

Findings on other aspects were favourable to the respondent; that there is no provision in the Transport Act which enables a constable to require a person suspected of recently consuming drink to accompany him to some other place for the purpose of a breath-screening test, in the present case from the respondent's garage to the patrol car at the gate and that it was not a situation where Section 58E could

be invoked; that, when the first evidential breath test was taken, the respondent had done all that was required of him under Step 4 of the Transport Breath Test Notice 1978 and, that being the case, the reasonable compliance provisions of Section 58E could not apply to the administration of a second evidential breath test in a situation where a respondent had done all that was required of him and where the failure to complete the test was due to a fault of the operator and not a malfunction of the machine. While that does appear to be his final determination on that particular point, I do note that, earlier in his judgment, the District Court Judge made the finding "... he underwent an evidential breath test, to which he agreed, and in the course of the first evidential breath test, I find that due to a Read Button not performing satisfactorily, more force than normal was required to be exerted ..." Finally he determined that, once the constable had obtained a positive evidential breath test and the respondent had elected to have a blood sample taken, only to refuse to permit a sample of blood to be taken when the doctor arrived, the appropriate charge to lay against the respondent was one of refusing to permit a specimen of blood to be taken pursuant to Section 58C so that the informant could not rely on the evidence obtained from the evidential breath test.

While these findings were made, the dismissal was based on the conclusion that everything that followed the revocation of the licence of the constable to be on the respondent's property became inadmissible by virtue of that revocation.

In this situation a number of questions, expressed to be questions of law, are asked, the first being:-

"Whether the words 'you are on private property and can't touch me' in the circumstances in which they were said were a revocation of the Constable's licence to be on the Defendant's property."

Others relate to the other determinations made.

As to the first, however, I do not see that, certainly in the circumstances of this case, it can be regarded as constituting a question of law. Whether or not the implied licence was revoked must be a question of fact taking into account the words used and all other relevant evidence. In the present case the constable certainly testified on several occasions during his evidence and in more or less the same words that the respondent had said that he could not touch him because he was on private property. Standing alone, this sounds rather to be a statement, though erroneous, of what the respondent imagined his rights to be but, as mentioned, this point was not being taken by the defence and there was no cross-examination of the constable on the point. On the other hand, when the respondent gave evidence, he said that he had asked the constable to leave the property before he had been told he was under arrest but had received no answer. Later, when under cross-examination, concerning the arrest and what he had said to the constable as to being on private property, there was the following exchange:-

- "Q. You said you can't you are on private property, do you remember saying those words exactly?
- A. No, I said you are on private property and asked him to leave.
- Q. Are you sure here today that you didn't say that after he said you are under arrest 'you can't, you are on private property'?
- A. No I said you are on private property and asked him to leave."

The respondent's wife also gave evidence. She said:-

"I was just folding washing and next minute I seen a torch on Brian's face. I could see it was a Police Officer. Then I walked out. I was standing on the step. I stood on the step

then I walked over. I heard Brian ask him why and then asked him to get off the property. When my husband asked the Officer to get off the property the Officer grabbed him by the arm and they started to walk and I asked what was going on. I got no reply. Brian just said that he was under arrest."

There was no cross-examination on this aspect. It may be that, when duly considered in their context, and with the other evidence, that those words did constitute a revocation. There is no reference to them by the District Court Judge, no finding as to what precisely was said or as to credibility, no doubt because the Judge considered that the evidence by the constable was adequate for the finding he intended to make. I am satisfied that, whether or not there was a revocation of the constable's authority to be on the respondent's property, must be a question of fact having regard to all the evidence and it is not possible to convert it into a question of law in the way in which the police, perfectly understandably in the circumstances, have endeavoured to do.

Accordingly, I am unable to answer the first question and the District Court Judge's finding must stand. In this situation nothing is to be gained by considering the other questions, as any answers given cannot affect the dismissal which follow the finding on the revocation issue. The appeal must be dismissed.

*R. Coak J.*

Solicitors:

Crown Solicitor's Office, Christchurch, for Appellant  
Cameron & Co., Christchurch, for Respondent.