3/4 L R. X

IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY M.47/83

No Special Consideration

292.

BETWEEN DARRYL RUSSELL PERFECT

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing : 9th March 1984

Counsel : S.J. Hembrow for Appellant
P.A. Wetherall for Respondent

Judgment : 9th March 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an appeal against the conviction of the appellant in the District Court at Greymouth on 6th October 1983.

The appellant was charged with driving a motor vehicle whilst the proportion of alcohol in his blood exceeded 80 milligrammes. The offence is alleged to have taken place on 22nd May 1983 at the Rapahoe Motor Camp.

The only evidence before the District Court Judge came from a Traffic Officer; he swore as to having carried out the various procedures for breath and alcohol testing; in the result, a proper blood specimen taken from the appellant showed a blood alcohol reading of 213 - a very high reading.

The evidence established that at 2.40 a.m. on 22nd May 1983, the Traffic Officer on patrol in the Rapahoe area, when driving down a side street, observed the headlights of a car pointing slightly upwards in the grounds of the Rapahoe Motor Camp. He saw four persons standing around a car and one person seated in it. The car engine was running; it appeared to be stuck in soft soil. Three youths got out and pushed the car out of the soft soil; the car took off quickly; the front right guard collided with a fence post. Those who pushed the car out then entered it, one in the front and two in the rear. Before he could approach the car, it drove off. It performed one lap around the motor camp grounds appearing to be looking for the exit. It passed two exits before travelling back to where it was originally observed. It appeared to take a run at a small bank to get up on to the side of the road; the bank was approximately one meter high and too steep for the car; the front of the car collided with the bank and came to a stop.

The Traffic Officer then interviewed the appellant with the consequence that he was arrested; the blood alcohol procedures ensued.

Cross-examination established that the camp grounds are open to the public but privately owned. At the time there was a caretaker and one camper living there. There were two exits to the motor camp. No evidence was given as to the internal geography of the motor camp or as to whether a motor camp at this rather small settlement contained internal roading; no other information was given.

The District Court Judge rejected a submission of no prima facie case; he considered himself bound by the decision of Wild, C.J. in Elvey v. Police, (1969) N.Z.L.R. 21. He found as a fact that the motor camp was a "road" within the extended definition. Whilst the statement that the public had access to the motor camp lacked detail, there had been no cross-examination.

There is no duty on defence counsel to establish gaps in a prosecution case by way of cross-examination; if information is not led by the prosecution, there is no duty on the defence to provide it.

Counsel had addressed the District Court Judge along the lines of the criticisms made of Elvey's case in Graham's Law of Transportation, pp.3-13 et seq.

Elvey's case was the first in time concerning the amended definition of "road" in the Transport Act 1962. This definition, as the learned Chief Justice pointed out, was more comprehensive than the definition in the 1949 Act. It reads:

> "'Road' includes a street; and also includes any place to which the public have access, whether as of right or not; and also includes all bridges, culverts, ferries and fords forming part of any road, street, or place as aforesaid; but does not include a motorway within the meaning of the Public Works Amendment Act 1947."

The learned Chief Justice held in Elvey's case that a parking area adjacent to an aero club building was a "road". He distinguished the English case of Griffin v. Squires, (1958)

3 All E.R. based on a different statutory definition. He held that the change in definition was deliberate and that it demonstrated an intention by the Legislature that the term "road", for the purposes of the Act, should not only mean a road in the ordinary sense of the word, but should also include a street in the ordinary sense of that word or "any place to which the public have access".

Whilst I am in sympathy with some of the views expressed by the learned author of Graham, that the Chief Justice was perhaps expressing the definition a little too widely, I have come to the view that the learned District Court Judge was not in error in his finding of fact in this case.

I consider that the more recent authorities than Elvey demonstrate that the definition is not as "open-ended" as might be first thought from a consideration of Elvey. For example, in Police v. Smith, (1976) 2 N.Z.L.R. 412, Wilson, J. held that a driveway on private property, leading from a road to a building where a function was being held, was not a road. Admission to the function was by ticket; the appellant there had not purchased a ticket but had been told that he would be able to purchase one on arrival and did so. The incident occurred when he was leaving. It was held that the private driveway did not come within the extended definition of "road" as "any place to which the public have access whether as of right or not".

In another decision noted in Graham, Auckland City Council v. Peacock, (1978) R.L. 141, Chilwell, J. held that a municipal

carpark building was a "road" within the extended definition.

More recently in Cavanagh v. Ministry of Transport (M.40/83, Invercargill Registry) referred to at p.3-16 of Graham, Holland, J. held that a passenger platform of a public railway station was not a "road" within the extended definition; that the appellant could not be convicted of a driving offence for driving on the railway platform, although there were other offences with which he could have been charged.

There is a decision concerning a motor camp in McKimmie v. Thomson, (1962) N.Z.L.R. 963 under the 1949 Act definition; there, Henry, J., on an appeal by way of case stated, held that a Magistrate was not wrong when he found that the respondent was not driving on a "road" under the definition of the 1949 Act. He had been charged with dangerous driving in a motor camp in Alexandra at a speed in excess of 30 miles per hour. There were a number of people at the camp; there were notices warning drivers not to exceed 5 miles per hour. After being warned to slow down, he accelerated, negotiated a sharp left hand corner and drove out of the camp at a fast speed. He was not a resident of the camp which was private property, owned and controlled by a company. This company let camping sites to members of the public; it was used generally for the convenience of the travelling public. On these facts, the Magistrate found that the public in general was not invited to use the camp roads and that the defendant at the time of the alleged offence was not driving his motor vehicle on a "road" within the meaning of that word as used in the then Transport Act.

I venture the view that McKimmie's case may well have been differently decided under the new definition. It seems clear that, although the present evidence lacked the clarity and detail that one should have liked to see, at least when the appellant was driving over the exits to the motor camp, he was driving on a "road" within the extended definition.

I think the District Court Judge was entitled to take judicial notice of the fact that the public usually enter motor camps by car. The whole point of a motor camp, even an unsophisticated one with few facilities (and I have no knowledge of whether the Rapahoe Motor Camp is within this category), is that persons can come by car; they take a licence over small pieces of land where they may park their cars and set up tents and/or caravans.

It is necessary for a motor camp to have a reasonable form of access from a public road and also some reasonable form of internal roading. I think the learned District Court Judge was entitled to infer that, at least at the points of access from the motor camp onto the public road, there was some form of formation - albeit a crude trackway - which could come within the definition.

I do not go so far as to say that those areas of the motor camp where persons can park their caravans or set up their tents would necessarily come within the definition; it seems to me on the facts of this case, without necessarily creating a precedent for others, that the extended definition of "road" would apply to at least the "exits".

This view fits in with the other cases on those areas where the public more or less as of right use a "road" on the extended definition. For example, the carpark in the decision of Chilwell, J. is used normally by vehicles; yet the railway station platform in the decision of Holland, J. is not used customarily by vehicles.

In my view, the District Court Judge was entitled to infer that at least the exits to the motor camp would be used by vehicles in the absence of any suggestion to the contrary.

I cannot hold that the District Court Judge erred in fact. It has been said in many cases that whether a certain thoroughfare is a road or not is a question of fact.

The appeal is therefore dismissed.

R. J. Barker J.

SOLICITORS:

Hannan & Seddon, Greymouth, for Appellant.
Crown Solicitor, Christchurch, for Respondent.