418

D C Judge

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M.176/84

875

BETWEEN RASMUSSEN

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 15 June 1984

Counsel: A.N.D.Garrett for Appellant
B.M. Stanaway for Respondent

Judgment: 28 JUN 1984

JUDGMENT OF HARDIE BOYS J.

This appeal against conviction on charges of refusing to accompany a traffic officer when required so to do, and of refusing to supply a blood specimen, is based solely and bravely on a challenge to the District Court Judge's findings as to credibility. But it can at best be no more than partially successful, for as will appear, even if the appellant be right he has no defence to the first of the charges.

Two traffic officers in a patrol car saw the appellant drive on the incorrect side of the road. As they began to follow him he turned almost immediately into the driveway of a private house, stopped and alighted. It was the home of the parents of his fiancee, who was a passenger in the car.

He was a boarder there. One of the traffic officers approached him and questioned him about his driving, confusing in his questions the name of the street concerned. That confusion, I interpolate, I see as largely irrelevant to the real issue of credibility. Then there followed discussion, argument and altercation, in which first the appellant's fiancee and then her father joined. The upshot was that the appellant was arrested, dragged to the patrol car and taken to the police station. There, he refused to participate in any of the blood alcohol procedures, all of which, it was conceded, were properly administered.

There was no argument about the law applicable to such a situation. A traffic officer, like any other person, has an implied licence to enter upon a residential property, (but not to go inside the house: Robson v Hallet [1967] 2 QB 939) but as soon as that licence is revoked he must leave or else he becomes a trespasser. Whilst lawfully there, the officer may exercise any of his powers under the blood-alcohol legislation. He may make a request to accompany. He may in appropriate circumstances treat a revocation of the licence as a refusal to accompany. But once the licence is revoked, he cannot exercise his power of arrest, even on account of such a refusal: see Transport Ministry v Payn [1977] 2 NZLR 50, Allen v Napier City Council [1978] 1 NZLR 273 (both in the Court of Appeal) and Woodward v Auckland City Council (an unreported judgment of Speight J delivered on 12 December 1980 in Auckland, M.2843/79). Revocation may be by word or deed,

but it must be something positive, not a mere refusal to cooperate or an assertion that the officer has no right to act (see Lovelock v Ministry of Transport (Timaru, GR.102/80, 21 July, 1981, per Roper J)).

In the present case, both traffic officers said in evidence that they had not been told to leave before the appellant was arrested. He had certainly claimed, on several occasions, that as he was on his own property there was nothing they could do. But he had gone no further than that. The appellant on the other hand said that as soon as he was approached in the driveway he asked the officer to leave, and that he repeated that request on several occasions prior to his arrest. This was confirmed by his fiancee. She did not herself make any request to leave. Her father said he did, but that was clearly after the arrest. He was however angry at the degree of force being used by the officers, enquired of a senior police officer as to their rights, and made a formal complaint to a senior traffic officer.

The District Court Judge did not give an immediate decision, but delivered a carefully reasoned written judgment eighteen days later. After detailing the evidence he expressed his conclusions thus:

> " So it is a matter of credibility, and having observed the witnesses closely, and weighed up their evidence very carefully, I find myself convinced by the evidence of the Traffic Officers that although the defendant may have believed

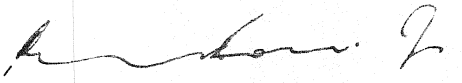
> that once he was home he was in a place of sanctuary, and refuge, and vigorously protested at the actions of Traffic Officer Craig, he did not require him to leave the property in specific terms. That is my finding. "

An appeal to this Court is by way of rehearing (s 119(1) of the Summary Proceedings Act 1957) and so it is open to an appellant to challenge a finding such as this, as the present appellant has done. But because this Court does not rehear the evidence, it is at a disadvantage compared with the lower Court. For where credibility is in issue, great assistance can often be derived from the impressions the witnesses themselves create as they give their evidence. And so an appellate Court is loathe to interfere where a decision is reached as a result of the influence of those impressions on the mind of the trial Judge: Powell v Streatham Manor Nursing Home [1935] AC 243, 255 per Lord Atkin. Imperfect though the process may be, our jurisprudential experience has been that it is usually more satisfactory than attempts to resolve conflicts of evidence merely from a perusal of a written record of the spoken word. The appellate Court's role was well summed up by Henry J in O'Callaghan v Galt [1961] NZLR 673 in these words:

> " So long as the advantage enjoyed by the Court of first instance of seeing and hearing the witnesses is sufficient to explain or justify the conclusion reached in that Court, it ought to be upheld. However, the Supreme Court, either because the reasons given by the Magistrate are not satisfactory, or because it unmistakably so appears from the evidence may be satisfied that the Magistrate has not taken proper advantage of having seen and heard the witnesses, and the matter will then be at large for the Supreme Court."

In his able argument, Mr Garrett submitted in effect that the traffic officers' evidence was intrinsically incredible. It is inconceivable, he said, that the appellant's sustained protests went no further than a challenge to the traffic officers' authority, and that he did not once tell them to leave the property on which he was insisting they had no right to be. I do not find that unbelievable, or even very surprising. The distinction between words of protest or challenge on the one hand and words of revocation on the other may be a lawyer's one, (but it is for all that a vastly important one,) and not one to which a layman would necessarily turn his mind : as the Lovelock case exemplifies. Then, Mr Garrett referred to the complaint made by the appellant's prospective father-in-law, which he said confirmed the untowardness of the earlier events. That is true, but it was clearly open to the Judge on the evidence to hold that what prompted the complaint was the manhandling of the appellant and not the refusal of the officers to leave when directed to do so. After all, this witness did not appear on the scene until after the arrest had been made. And it was also open to the Judge to conclude, as he did, that the apparent support given to the appellant's evidence by his fiancee, may to some extent at least have derived from the explanation as to the limits of the officers' powers on private property that was given to her at the time of the complaint.

I have considered carefully the evidence and Counsels' submissions and have concluded that grounds for reversing the District Court Judge's findings have not been made out. The appeal is therefore dismissed. As I have a suspicion that an excess of zeal may have been displayed on this occasion, I make no order as to costs.



Solicitors

A.N.D. Garrett, CHRISTCHURCH, for Appellant
Crown Solicitor, CHRISTCHURCH, for Respondent.