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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.654/84

930

BETWEEN UTANGA

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 9 August 1984

Counsel: Z.K. Mohamed for Appellant
D.P.H. Jones for Respondent

Judgment: 10 AUG 1984

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JUDGMENT OF SINCLAIR J.

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This particular appellant was convicted on a number of offences in the Otahuhu District Court and appeals against each conviction. He was firstly charged with carelessly using a motor vehicle on Tamaki Station Road; secondly, he was charged with failing to furnish his name and address to a traffic officer when directed so to do - that offence being alleged to have occurred in Tamaki Station Road - thirdly, he is charged with failing to accompany a traffic officer when required to do under s.58A (3) of the Transport Act 1962 and fourthly, he was charged with an excess breath alcohol offence.

With meticulous particularity, counsel for the appellant has sought to examine every sliver of evidence which he can and which can be offered in support of the submissions that the District Court erred in arriving at the decision which it did to convict on all 4 charges.

In the early evening of 19 January 1984 but when darkness had fallen, a car driven by a Miss Callaghan was stationery in a driveway in Tamaki Station Road with the nose of the vehicle jutting out into the roadway and with the remainder of the vehicle situated within the confines of the driveway. The headlights of the vehicle were on and one indicator was operating, although the evidence is not clear which one it was. While stationery, a vehicle came from Miss Callaghan's right, that being driven by the appellant and it collided with the front of Miss Callaghan's vehicle, bouncing off it across the road on to the grass verge on the opposite side. That evidence came not only from Miss Callaghan, but also her passenger, a Mr Ritchie. There was some evidence as to the amount of visibility which was available to either driver, but that evidence was not entirely conclusive and counsel for the appellant not unnaturally had some criticism of it having regard to the fact that it was contended that the appellant's vision would have been for some 75 yards while Miss Callaghans would have been somewhat less. He found that somewhat difficult to accept and one can well understand his dilemma. However, the District Court Judge had the opportunity of gauging the reliability of Miss Callaghan and Mr Ritchie and he came to the conclusion that the prudent

driver of a motor vehicle would not come into collision with a vehicle which was protruding only a short distance into the roadway. In other words, he obviously came to the conclusion that either the appellant was travelling too fast having regard to the distance he could see ahead and as lit by his headlights, or was not keeping a proper lookout.

Indeed, I come to the conclusion that the District Court Judge properly found that the appellant did not keep a proper lookout as in the course of his judgment he did state that a prudent driver would have been able to have seen the presence of Miss Callaghan's vehicle and would have been able to drive round it without coming into collision with it. That was an inference which was open to him on the evidence and in the circumstances in my view, this Court has no right to interfere with that finding when it was competent in all the circumstances for the District Court Judge to come to that conclusion.

Therefore, so far as the careless use charge is concerned, the appeal is dismissed.

Turning next to the failure to accompany, this has its origins in the carrying out of a breath screening test at the scene of the accident. When the traffic officer arrived having regard to the smell of liquor on the appellant's breath and his admission of having been to a tavern, he came to the conclusion that he had just cause to suspect that an offence

against the provisions of the Transport Act 1962 may have occurred. He then required the appellant to undergo a breath screening test and it was contended that some of the steps had not been satisfactorily carried out or that at least the evidence as tendered indicated that. When giving evidence in chief, the traffic officer, Mr Campbell, stated that he assembled the Alcotest R80A in accordance with the Transport Act (Breath Tests) Notice 1978, which required the appellant to undergo the test. He stated that he explained fully to the appellant how he was required to carry out the test; where to hold the tube and in general what to do. Mr Campbell went on to say that the appellant was unable to inflate the measuring bag at all and that he put the device to his lips and blew, but the air kept coming out of the side of his mouth and that it did not inflate the bag. In consequence, he required the appellant to accompany him to the Ministry of Transport Motorways Office in Ellerslie for the purposes of an evidential breath test or blood test, or both.

In cross-examination, Mr Campbell stated that he removed the device from the box in which it was and that he next removed the sealed ends from the tubes. For the appellant, it was submitted that this did not comply with Step 1 as set out in clause 4 of the breath test notice which states that the ends of the tube shall be broken off. Quite frankly, that objection seems to me to be one of splitting hairs and even counsel for the appellant was

prepared to concede that in any event the provisions of s.58E of the Statute would probably be available in relation to that particular aspect of the matter. In any event, as the District Court Judge concluded that the first step had been properly conducted, I simply say that was an inference which was available to that Court. Further on, in cross-examination, the traffic officer was asked what he then did next and he stated that he inserted the tube into the measuring bag, making sure that the arrow on the side of the bag was facing down the tube towards the measuring bag. Once again it was said that this particular answer did not comply with Step 2 which requires that the green end of the tube shall be inserted into the collar of the empty measuring bag so that the arrow marked on the tube points towards the bag. Quite frankly, it seems to me that the only proper inference to draw is that it was the green end of the tube which was inserted into the collar, but if more is required in relation to Step 3, the officer said that he inserted the tube on to the mouthpiece, going on to say, "That is the white end of the tube into the mouthpiece." If the white end went into the mouthpiece, then the other end - there being only two ends - must have been the green end. There is nothing in that particular objection taken by counsel for the appellant.

So far as the third step is concerned, it was contended that there was no evidence to show that the white end had been firmly pushed into the mouthpiece and that if

there had been such a failure, that may have had some bearing on the failure to inflate the bag. Quite frankly, I do not think that that objection is open to the appellant, as there is nothing to suggest that the white end of the tube was inserted other than in a normal manner and the evidence shows quite conclusively that the failure to inflate the bag was due to the actions of the appellant in that he permitted the air from his breath to come out of the side of his mouth so that it did not inflate the bag.

The fourth step was fully explained to the appellant and I hold that there was sufficient evidence brought forward to establish that the breath screening test was properly carried out.

Under those circumstances, it is apparent now that the traffic officer then was in a situation where he could require the appellant to accompany him to the Motorwarys Office as earlier set forth and the evidence discloses that initially Mr Utanga agreed to accompany the traffic officer, but then some argument developed in relation to the removal or otherwise of the appellant's vehicle from the scene of the accident. After that aspect of the matter had been resolved, Mr Campbell gave evidence that he again asked Mr Utanga on a number of occasions to get into the patrol car and reminded him that he, Mr Utanga, had agreed to accompany the officer and he was advised of the consequences of his failure to accompany the officer. Mr Campbell stated that he then gave Mr Utanga

a final opportunity to go with him and that when he failed to do so, he arrested him.

On the evidence which was before the District Court, it is obvious that there was more than one reference made by the traffic officer to Mr Utanga's initial agreement to accompany the traffic officer and that he was appropriately warned of the consequences. He failed to go with the officer as required and as he had earlier agreed to. To my mind, there was a failure to accompany and in those circumstances it seems to me that the conviction was correctly entered in that charge. Accordingly the appeal in respect of that charge is also dismissed.

At the scene of the accident the appellant was asked to supply his name and address and he failed to do so. It was not until the appellant and the traffic officer arrived at the Otahuhu Police Station and following the intervention of a Sergeant of Police that the appellant gave the requisite information to the traffic officer. As was referred by the District Court Judge, the offence was alleged to have occurred in Tamaki Station Road and at that time having regard to the circumstances, the appellant was under an obligation to divulge the information requested. He failed to do so and was therefore guilty of the offence.

Counsel for the appellant attempted to gloss over this situation by stating that in any event in due course the information was given at the Police Station and that the

appellant and the traffic officer were in one another's company right from the time the traffic officer arrived on the scene and until the information was given. That approach is far too simplistic with regard to this type of offence as the traffic officer was not to know that the appellant would not make a successful bid to leave the scene of the accident and the officer was therefore entitled in all the circumstances, to demand to be given the information.

I can find nothing to support the contention of the appellant in relation to this particular charge and that appeal is also dismissed.

This then leaves the breath alcohol offence to be dealt with and this falls to be decided very much on the evidence which was given at the hearing. After the evidential breath test had been carried out, the evidence shows that at 2325 hours, Mr Utanga was informed that the test was positive and at 2326 hours, he was informed that he had 10 minutes within which to make his election whether to have a blood test or not. It is interesting to quote from the evidence and I set out a portion of it which appears during cross-examination at p.19:-

"Q. What time did you inform him that?

A. He was informed of that at 23.25 hours, that it was a positive test and at 23.26 was the time he was given to make his election, that was the start of ten minutes.

Q. You informed him at 23.25. Did you start reading the form immediately after he was informed of it?

A. No, I had to fill it in. He was informed at 23.25 that it was a positive result with the reading of 1100. I then completed MOT4165 which is a matter of three seconds and then he was read it and at 23.26 by my watch was the time he was informed of his election, that was the start of his ten minutes.

Q. When you say he was informed of his election you told him something in addition to the reading of the form?

A. No, he was simply read the form.

Q. Are you saying that you completed reading the form at 23.26 or did you begin reading it at 23.26?

A. If you care to have a check of the form you will see it is in two parts. Your client was advised there was a positive test of 1100 at 23.25 hours. I then completed the form. The form was read to him, time informed of election 23.26 and the remainder of the form was read to him.

Q. I see, what you are saying is that at 23.26 you completed reading that first part of the form, is that right?

A. That's where he was advised that he had his ten minutes, yes.

Q. So at that stage when you were at that particular stage, the first part of the form, you looked at the watch and you made a note of the time?

A. That's correct.

Q. And you continued reading the rest of the form?

A. It is just advice on what the consequences are and what the penalties are.

Q. And how long would you have taken to read the rest of the form?

A. I could probably do it in about 20 second maybe.

Q. How long would it take you to read the form?

A. Half a minute.

Q. Officer I am only asking you this because in other cases other officers have taken a minute or minute and a half"

A. As I said, your client was read the form. If he had any questions he could read it if he so wished.

Q. After you completed reading the second part of the form you gave the form to him to read?

A. That's correct."

The evidence establishes and it was not challenged, that the traffic officer had in his possession a form which was used by the Ministry of Transport in relation to evidential breath tests and for the sake of convenience, I reproduce in this judgment the form which was used on this occasion:-

"MOT 4165

EVIDENTIAL BREATH TEST FORM

MINISTRY OF TRANSPORT

Date: 19/1/84

(Apprehending Officer to Complete):

TO:
Full name of Driver: Joseph Utanga D.O.B. 15/12/56
Address: 6 McCulloch Rd., Mt. Wgtn. Occupation: Unemployed

Time taken: 2322 p.m. at Otahuhu Police Station
(Police Station, Hospital, Other place - specify)

You are advised that the Evidential Breath Test you have just undergone records a level of 1100 micrograms of alcohol per litre of breath. This means that the test is positive. You may request that a specimen of blood be taken from you for the purposes of analysis for alcohol content.

YOU MUST MAKE THE REQUEST TO HAVE A BLOOD SPECIMEN TAKEN WITHIN THE NEXT TEN MINUTES. TIME INFORMED OF ELECTION

2326 p.m.

You are advised that if you do not request that a specimen of blood be taken from you, the result of the Evidential Breath Test you have just undergone could, of itself, be sufficient evidence to lead to your conviction for an offence against Section 58 (1) A of the Transport Act 1962. Such a conviction renders you liable to 3 months imprisonment or a fine not exceeding $1500 or both, and unless the Court, for special reasons orders otherwise, a minimum disqualification from driving of six months.

If you undergo a blood test the result of that test will become the only evidence admissable in Court, if the level of alcohol exceeds 80 milligrams per 100 millilitres of blood this is an offence.

DO YOU REQUEST THAT A SPECIMEN OF VENOUS BLOOD BE TAKEN FROM YOU BY A REGISTERED MEDICAL PRACTITIONER IN ACCORDANCE WITH NORMAL MEDICAL PROCEDURES?

'YES' OR 'NO'

Signature of driver ..... Witness (Sgd.)

Time 2337 p.m.

Would Not sign

(Sgd.)

It is evident that the traffic officer read the first portion of the form to the appellant shortly after 2325 hours when he was advised that the evidential breath test was positive. The officer refers to completing the top portion of the form and that it appears relates to the filling in of the number of micrograms of alcohol per litre of breath and that was stated to have taken 3 seconds. Immediately after the officer told the appellant that he had 10 minutes within which to request a blood specimen, the time at which

that statement was made was recorded as 2326 p.m.. The officer then went on to read the remainder of the form which has included in it notification to the suspect as required by s.58 (4) (a) that if the blood test is not requested within 10 minutes, the test could of itself be sufficient evidence to lead to a conviction for an offence against the Act. The form which was read to the appellant contains more information than is required by s.58 (4) (a) of the Statute, but in preparing the form in the way it has, the Ministry to my mind invites traffic officers to do precisely what this traffic officer has done on this occasion. It would be better in my view, if the time which is required to be regarded as the time the suspect is informed of the election was put at the bottom of the form, so that the whole of what is to be read out is read out in one exercise with the time at the bottom being regarded as the time of completion of the reading of the whole form. If that had occurred in the instant case, the criticism which has been made of what occurred would in all probability not have been available to the appellant.

Mr Mohamed points out that no account has been taken by the traffic officer of the number of seconds which had elapsed after the traffic officer's watch had arrived at the time of 2326 hours and that it may well be that on the whole of the form having been read to the appellant, he may have been left with less than 10 minutes within which to make the election which was available to him.

From the evidence which I have set forth above, it will be seen that the traffic officer maintained that to read the second part of the form would take approximately 20 seconds and that it would take about half a minute to read the whole form. Quite frankly, I have considerable doubts as to whether that is a correct assessment of the time it would take to read the whole form, but I am not entitled to substitute my assessment for the evidence which was given in the case. This matter was specifically raised at the District Court hearing and at p.32 of the judgment, the Court considered whether or not the appellant had the necessary 10 minutes as provided in the Statute, to make his election. I quote one small portion of the judgment only:-

> "There is no shaking of the traffic officer in his evidence that he could read this form in half a minute and read the second part in 20 seconds. Even if it took longer than half a minute but less than a minute, the defendant still had ten minutes from the completion of the reading of the form"

Thus this particular aspect of the matter was firmly within the mind of the District Court Judge and he came to a conclusion upon it on the evidence. There was evidence which justified the conclusion which he came to and despite the microscopic attention given to this particular aspect of the case by counsel for the appellant, I am unable to say that the conclusion arrived at by the District Court

Judge was one which in all the circumstances he ought not to have arrived at.

In all the circumstances, the appeal against the excess breath alcohol conviction must also be dismissed.

The appeal having failed, to my mind the appellant must meet the respondent's costs which I fix at 200 dollars.

P. A. Ellis J.

Solicitors for Appellant: Messrs Mabin and Mohamed, Panmure

Solicitors for Respondent: Crown Solicitor, Auckland