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NZLR X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. No. 634/83

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BETWEEN N WHITE

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 28 March 1984

Counsel: D.S.G. Deacon for Appellant
K.G. Stone for Respondent

Judgment: 17/4/84

JUDGMENT OF QUILLIAM J

This is an appeal against conviction on a charge of driving a motor vehicle while the proportion of blood alcohol exceeded the prescribed maximum.

The charge arose out of an incident which followed the driving of a car by the appellant in a manner which had attracted the attention of a traffic officer. The traffic officer checked the appellant's speed on the motorway approaching Johnsonville and attempted to stop him. The appellant left the motorway and went through Johnsonville to Simla Crescent in Khandallah. He was aware that he was being followed by a traffic officer but he had no intention of stopping because he had, on two previous occasions, been stopped for driving with excess blood alcohol and did not want to go through the procedures again. He decided, in conjunctio with his girlfriend who was with him, that they would get to her home and then both rush inside in order to get away from the traffic officer. The girlfriend was to get a bottle of beer so that he could drink some before the traffic officer could get to him. This, of course, was a futile plan but it was what they decided to do.

On reaching the girlfriend's home the appellant drove up on to the grass berm and perhaps on to the lawn in front of the house and intended to get out and run away as

quickly as he could. There were two traffic officers in the pursuing car. The driver, Traffic Officer Richardson, realised what the appellant was likely to do so when he stopped the patrol car he jumped out quickly and ran over to prevent the appellant getting away. There was a conflict as to precisely what happened but, as accepted by the Chief District Court Judge, the appellant started to run from his car and was tackled or struck from behind so that both he and the traffic officer fell to the ground. The appellant was seized and propelled back to the patrol car and made to sit inside it. Once he had been firmly detained he ceased his attempts to get away and was co-operative. He was then spoken to and admitted having had liquor. He was required to undergo a breath screening test, which he did. It was positive, and he was then taken to Pearse House where an evidential breath test was performed and that also was positive.

The appeal turns on the question of whether the traffic officer had any right to apprehend the appellant as he did, and this in turn is related to whether he could have had good cause to suspect a drinking offence. The Chief Judge has based his decision as to the traffic officer having good cause to suspect on a finding that "in the resulting scrummage on the ground when the traffic officer and the defendant were on the ground the traffic officer smelt alcohol on the defendant's breath". There was, however, no evidence upon which that finding could have been based and this was conceded by Mr Stone, on behalf of the respondent. The traffic officer's evidence was that he had smelled alcohol on the appellant's breath at a time when the appellant was sitting in the patrol car and this was after the scrummage on the ground had concluded.

Later, however, the Chief Judge has gone on to consider what the position would be if the detention of the appellant was illegal because of the traffic officer not having had good cause to suspect. He reached the conclusion that the powers of arrest of a traffic officer were severely limited but he held that if, in the course of detaining the appellant illegally, he acquired evidence which gave him

good cause to suspect and so gave him the power of arrest, then there was a discretion in the Court to admit such evidence. Accordingly, on the basis that there was a continuation of flight by the appellant and that the traffic officer had a duty to perform, he decided that there could be no unfairness in admitting the evidence, and he did so.

On behalf of the appellant, Mr Deacon made two main submissions. First he argued that the exercise of his discretion by the Chief Judge had been wrongly based and so could not stand. In the alternative he contended that there had been, in any event, no right to exercise a discretion at all because the appellant's consent to go through the blood alcohol procedures had been procured by unfair and illegal conduct. Mr Stone's answer was that although he conceded there had been an unlawful arrest, nevertheless there came a time when the traffic officer clearly had good cause to suspect a drinking offence and was entitled to go ahead with the procedures in the blood alcohol legislation because there was basically no difference between evidence acquired illegally of a blood alcohol offence and evidence acquired illegally of any other offence.

As to Mr Deacon's first argument it is, of course, true that the decision of the Chief Judge to exercise his discretion was based upon a wrong finding of fact. He thought that the smell of alcohol had been detected before the detention of the appellant had been finally effected. That was an error, but there seems little doubt that if the Chief Judge had appreciated that the smell of alcohol had been detected at the later stage when, in fact, it occurred, it would have made no difference to his decision as to the exercise of his discretion. This is because he exercised that discretion upon the assumption that there had been an illegal arrest and so the position was no different from what indeed was the case. It can, therefore, be concluded that he would in any event have admitted the evidence as to the breath screening test.

The real question in this case concerns whether this was a case in which the discretion should have been exercised at all. There was, I think, power as a matter of discretion to exclude or admit the evidence as to a blood alcohol offence. It was one of those cases such as were discussed by Mahon J in Stowers v Auckland City Council (unreported, Auckland, 21 December 1977, No. M.1280/77). That was a case in which the appellant was stopped by a traffic officer and a breath screening test administered. Following a positive result the appellant was taken to the Auckland City Council Administration Building and placed in a small room until the 20 minute period before which a second breath test could be administered had elapsed. While there he was assaulted by another traffic officer following which he consented to give a second breath test and also to give a blood sample. Objection was taken to the admission of the evidence as to the blood sample because of the circumstances in which it had been obtained. The Magistrate considered that she had no power to exclude the evidence but concluded that if she had then she should not exercise her discretion to exclude it. On appeal Mahon J considered the authorities as to the admission of evidence illegally obtained and, in particular, in the context of the blood alcohol legislation which imposes a form of compulsion on the suspect to supply self-incriminatory evidence. He made substantial reference to the decision of the Full Court of Western Australia in Cross v Bunning (unreported, 14 April 1977) and it is necessary that I also should refer to that case.

In Cross v Bunning a police officer had required a breath test without first having formed reasonable grounds to believe the commission of an offence. The defendant had only complied with the request because of his belief that he had no option. The evidence as to the breath test was excluded in the Magistrate's Court and the defendant acquitted. The Full Court, by a majority, allowed the appeal holding that evidence of a positive test under the blood alcohol legislation may be excluded in the exercise of the Court's discretion where it has been obtained under circumstances of such oppression or unfairness as would conven-

tionally justify the exclusion of other types of incriminating evidence such as fingerprints and confessions. Mahon J, in Stowers' case, was content to accept and apply that finding because it was a sufficient basis upon which he could decide the case. He made it clear, however, that he rather preferred the dissenting view of Burt CJ that because the consent to undergo the blood alcohol procedures was directly induced by a mistaken assertion on the part of the police officer as to the legal responsibility of the defendant, the evidence procured by such consent should be the subject of a discretionary exclusion. I am bound to say that I too prefer the approach of Burt CJ. Indeed, I took much that course in the decision which I gave in Connolly v Ministry of Transport (unreported, Auckland, 17 June 1983, No. M.270/83).

That was a case in which the appellant was involved in an accident after which he drove on to his home and went inside. A traffic sergeant went to his home to interview him. The appellant admitted his identity but denied any knowledge of the accident. He acknowledged that the car parked outside was his and that he had only recently arrived home after having been drinking at a tavern. The traffic sergeant considered he had good cause to suspect and he required the appellant to go out to the patrol car for a breath screening test. He wrongly gave the impression that if the appellant did not agree to this he could be arrested. As to that, I said at p 7 of the judgment:

> " If the appellant was given the impression that he must, on pain of arrest if he refused, leave his home and go to the patrol car then he went under a misapprehension as to what the law required of him. "

Whichever approach is adopted there can be no doubt that the evidence, although illegally obtained, is capable of being admitted and that the matter becomes one of whether the circumstances are such that the discretion to exclude it should be exercised. The Chief Judge directed himself in just that way. What he said was:

> " The overriding law on this is that the Court's discretion to exclude that evidence should be exercised to not admit that evidence if it was unfairly obtained. "

This seems to me to have been an apt summary of the view expressed by Mahon J in Stowers' case in applying the majority view in Cross v Bunning.

The question then is whether the exercise by the Chief Judge of his discretion ought now to be interfered with by this Court. The principle as to this is now well settled. This Court will not interfere unless it is clearly satisfied that the trial Judge acted on a wrong principle or that no weight or no sufficient weight has been given to relevant considerations which are important to the just determination of matters in issue and that injustice may be done if it does not interfere: (Auckland Hospital Board v Marelich [1944] NZLR 596). Apart from the erroneous finding of fact, to which I have already referred and which was not material in the exercise of the discretion, it has not been suggested that the Chief Judge applied any wrong principle or that he gave insufficient weight to any relevant consideration. Indeed he has expressly turned his attention to the question of oppressiveness and unfairness and has made his finding upon it.

It is true that the blood alcohol procedures were set in motion after there had been an unlawful arrest and that the appellant would presumably not have been asked to undergo them but for that arrest. The evidence as to good cause to suspect was, however, obtained and the matter then became one of discretion. The conclusion I have reached does not, therefore, conflict with the view I expressed in Connolly's case. That was a case in which there had been no finding by the District Judge on the relevant issue and so I was required to make the finding myself. In the present case the discretion was exercised and I can see no basis upon which it would be proper for me to interfere with it.

The appeal must accordingly be dismissed. In view, however, of the erroneous finding of fact which led to

the appeal being brought there will be no order as to costs.

Solicitors: Deacon & Tannahill, WELLINGTON, for Appellant
Crown Solicitor, WELLINGTON, for Respondent