

IN THE HIGH COURT OF NEW ZEALAND
ADMINISTRATIVE DIVISION
WELLINGTON REGISTRY

A.173/85

IN THE MATTER of Part I of the
Judicature Amendment
Act 1972

BETWEEN ERROL PHILIP CARR
of Auckland, Pilot
Applicant

A N D THE AIR CREW INDUSTRIAL
TRIBUNAL
First Respondent

A N D AIR NEW ZEALAND
LIMITED
Second Respondent

A N D THE NEW ZEALAND AIRLINE
PILOTS ASSOCIATION
INCORPORATED
Third Respondent

A N D GEOFFREY KENYON CATON
OGILVIE and PETER
LLEWELLYN HENSBY-
BENNETT
Fourth-Respondents

JUDGMENT OF DAVISON C.J.

Reserved judgement
delivered this 5th
day of September 1985.
Marie Potter
Deputy Registrar

Copy to Solicitor ✓
Press, Law Reports ✓
M. EK & Register ✓
Noted *PS* ✓
Registrar ✓
C.D.R. ✓

Set I

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M.527/83

BETWEEN DESMOND CARRINGTON

Appellant

A N D THE MINISTRY OF TRANSPORT

Respondent

Hearing: 3 February 1984

Counsel: D.C. Fitzgibbon for Appellant
B.M. Stanaway for Respondent

Judgment: 3 February 1984

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ORAL JUDGMENT OF HOLLAND, J.

The appellant was convicted in the District Court at Christchurch on a charge of driving a motor vehicle while the proportion of alcohol in his blood exceeded the prescribed limit. The issues involved in the hearing before the District Court and on this appeal require consideration of the provisions of the Evidence Amendment No. 2 Act 1980. I am indebted to counsel for the helpful submissions that they have made both orally and in writing which have assisted me in resolving what appeared to be a difficult problem.

The situation was created because of the unfortunate death of a traffic officer after the detection of the appellant in circumstances from which he presumably inferred that the appellant had been driving a vehicle with an excess proportion of alcohol in his blood and the hearing of the information laid. The prosecution

were able to rely on the evidence of a traffic officer who accompanied the deceased traffic officer to the scene of an accident, but that traffic officer did not interview the appellant, nor did he himself take any part in the administration of tests in relation to the proof of the excess alcohol in the blood.

The prosecution produced a number of documents. The first was what is described as an Activity Report of the deceased traffic officer for the night in question. As a result of translation of the various code terms used in that document it was apparent that the deceased officer had recorded that he was called to an accident in the Heathcote County situated at the corner of Colombo, Centaurus and Cashmere Roads, that a positive breath alcohol screening test was conducted and that he had administered a request to a person to accompany him to a place for further tests. The record then indicates that apparently he went to the Christchurch Public Hospital where a blood alcohol request was made to a medical officer. The appellant is not named in that document and nothing is in that document leading to his identity.

The second and more important document produced as Exhibit 3 is the breath test report prepared by the deceased traffic officer. It contains particulars describing the appellant, that a positive breath screening test was taken at 9.42, that he was asked to accompany the traffic officer, that a blood sample was requested and then there is a narrative described as the officer's notes and summary. It is important to set out that narrative in full and it is as follows:-

"At approximately 9.31 pm on Wednesday 19/5/82 the Defendant was the driver of a Vanguard Van travelling in a south direction along Colombo St and when turning right at the controlled intersection with

Dyers Pass Rd/Centaurus Rd/Cashmere Rd to head west on Cashmere Rd he collided with a Mirage car which was travelling in a north direction on Dyers Pass Rd on a true course, being on the defendants opposite direction.

Point of impact was not established by either driver due to injuries but by the position of the vehicles after the accident, as they had not been moved and shows that the Defendant had travelled approximately mtrs into the intersection and was extensively damaged to the front while the other vehicle had travelled approximately mtrs into the intersection and was extensively damaged to the front. No tyre burns visible. Visibility approaching intersection good. Road conditions good. Driver stated. Coming up Colombo St to turn right into Cashmere Rd I thought I had plenty of time to turn. The next thing I know the car hit me. While speaking to the driver Mr Desmond Carrington it was noticed that he was affected by drink his breath smelling of alcohol, his eyes being bloodshot and he admitted to having a couple of drinks earlier on. I informed Mr that I suspected him of driving with a excess breath or blood alcohol concentration or both and requested a breath screening test to which he agreed. This test proved positive (2142) hrs. Mr Carrington was then requested to accompany me to a place (Transport House) for the purpose of a evidential breath test blood test or both to which he agreed (2144 hr). Mr Carrington was then examined by the St Johns Ambulancemen, was advised that he should come to hospital to get his leg stitched up. He agreed.

At Chch Public Hospital I spoke to a Dr Jeffrey Brownless and at 2210 hr a blood sample was observed to be taken.

An analysts certificate dated - 185 - was recieved from the DSIR Analyst and showed a proportion of milligrams of alcohol per 100 millilitres of blood.*

It is clear that the last paragraph on the narrative was completed some considerable while after the taking of the original breath test. There was then produced a certificate under the provisions of the Transport Act relating to the taking of the blood test and the usual Analyst's Certificate from the DSIR to which no legal objection was taken or could be taken.

The prosecution essentially depends on the admissibility of the total contents of the breath test report under the provisions of the Evidence Amendment No. 2 Act 1980. In the case of a witness who is unavailable to give evidence the amendment to the law of evidence contained by section 3 of that Act is substantial. There is no challenge here to the unavailability of the witness because his death was comprehensibly proved at the hearing. Counsel for the respondent submits that the contents of the breath test report was admissible first within the terms of section 3(1)(a) of the Act and also within the terms of section 3(1)(b) as being a business record. The District Court held that the documents were business records. I do not find it necessary to reach a conclusion as to whether the documents are business records and admissible under that provision of the Act or not because I am satisfied that counsel for the respondent is correct in his submission that the contents of the breath test report are totally admissible under section 3(1)(a).

It is necessary for the prosecution to have established that the maker of the statement had personal knowledge of the matters dealt with in the statement. Clearly hearsay would not be admissible within the terms of subsection (a). The narrative previously set out does not state in so many words that the appellant or Mr Carrington admitted that he was the driver but on reading the narrative that is the only conclusion that one can reach. Had the narrative been that someone had told the traffic officer that Mr Carrington was the driver then clearly the knowledge would have been hearsay and inadmissible if given orally by the witness or in a document. What was however within the personal

knowledge of the traffic officer was what he was told by the appellant as against the truth of what he was told. The question of whether what he was told by the appellant persuaded the fact-finding tribunal to reach a conclusion is a matter for the Court. But I am satisfied that the traffic officer did have personal knowledge of what he was told and that the statement records what he was told by the appellant. This being no more than a record of what he was told by the defendant is admissible to prove what he was told.

Subsection (2) of section 3 provides:-

"Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that -

- (a) Records the oral statement of any person made when the criminal proceeding was, or should reasonably have been, known by him to be contemplated; and
- (b) Is otherwise inadmissible in the proceeding."

The oral statement of the appellant that he was the driver of the vehicle was clearly made at a stage when the traffic officer must have been contemplating criminal proceedings. The word "and", however, must be given its ordinary literal meaning and accordingly an oral statement in such circumstances is admissible even if criminal proceedings are contemplated provided that that statement would be otherwise admissible in the proceedings. An admission by a person charged with an offence is clearly admissible and on that basis, which is a somewhat different approach from that adopted by the District Court Judge, I am satisfied that the document was properly admitted. One must then turn to the question of the weight to be applied. The District Court Judge was not specifically referred to the provisions of section 17 of the Act. There is, however, only one conclusion which can be reached after considering section 17 of the Act and that is that in the absence

evidence from the defendant the Court must be satisfied beyond reasonable doubt that he was the driver and that it has been established by the admission of the defendant made to the Traffic Officer and recorded in the written documents produced. I have not overlooked counsel's submission that the Court has an overall discretion to reject evidence which is unduly prejudicial and where the prejudice outweighs the probative value. It could not possibly be said that any prejudice here outweighed the probative value which was considerable. The Court does, however, have a further discretion in relation to the admissibility of admissions or evidence of admissions of accused persons. But no grounds exist for the Court to exercise its discretion against the admissibility on that ground.

It accordingly follows that the conviction was properly entered and the appeal must be dismissed and is dismissed accordingly.

C. D. Holland J.