File 1887/83

OFFICE

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1887/83
M 1888/83

BETWEEN ALASTAIR JOHN BURNS

Appellant

A N D NEW ZEALAND POLICE

Respondent

Hearing: 20 March 1984

Counsel: Miss D J Hunter for Appellant
Miss Shine for Respondent

Judgment: 20 March 1984

ORAL JUDGMENT OF THORP J

These two appeals are against decisions entered in the District Court at Thames on 12 July 1983 in respect of an accident which had occurred on the evening of 2 April 1983.

The result of the hearings in the District Court was that in respect of a charge of driving with excess blood alcohol the appellant was convicted, ordered to pay a fine of $375, Court costs and medical and analyst's fees, and was disqualified for a period of six months. On a second charge of careless use of a motor vehicle the appellant was, according to the Court record, convicted and discharged, ordered to pay $33 witnesses' expenses, and disqualified from holding a driver's licence for six months, that period expressly commencing from the same date as the period imposed on the conviction for excess blood alcohol.

The circumstances were that on the evening in question the appellant was driving a vehicle along Kapanga Road,

Coromandel. He failed successfully to negotiate a slight left hand bend and skidded across on to the wrong side of the road where he came into collision with another car. He informed the constable that he had been drinking that evening. He said he had had about three bottles of beer. Then followed breath screening tests and subsequently a blood test, both of which proved to be positive.

The ground of appeal against conviction is that the prosecution relied upon a certificate from the medical practitioner who had taken the blood specimen in terms of s 58B(5) of the Transport Act 1962. The doctor was not himself called. The certificate produced showed that it had been made out by the doctor in such a manner that the section which required him to state the name, occupation and address of the person from whom thespecimen was taken, contained the doctor's own name, occupation and address. As produced the certificate had these matters crossed out and the appellant's name, occupation and address written over the top of them.

The alteration was made by a police officer at Coromandel who said that he believed that the doctor had made a mistake in filling out the form and that he had corrected it. He said the correction was made after the doctor had left and that he had also found errors on the blood specimen bottles and had amended those in the way he thought appropriate.

At the hearing at the District Court, counsel for the appellant contended that this was a defect which made the certificate a nullity, in the sense that one of the most essential parts of the certificate had never been completed by the doctor whose certificate it purported to be.

The learned trial Judge commended the constable for being observant enough to realise the doctor had made a nonsense of the schedule and said that he was doing what on common sense would seem an appropriate thing to do. He added that the blood alcohol legislation is not particularly amenable to common sense, a view with which I wholly agree.

It is common ground that the principle of the decision in Ministry of Transport v Verey [1976] 1 NZLR 169, applies, and that in so far as the certificate is incomplete or contains an error, then the gap or fault can be corrected by direct evidence. Despite the best endeavours of Miss Shine to persuade me that it was reasonable to believe that a blood sample taken by the doctor in question could safely be assumed to be a sample of the appellant's blood, in the absence of any evidence of the number of samples taken by the doctor at the police station on the day in question, I feel unable to do that.

The burden of proof beyond reasonable doubt to my mind cannot be met in that situation by merely noting that the appellant was one of those who gave blood to the doctor on that day. Equally, the decisions such as Coltman v Ministry of Transport [1979] 1 NZLR 330, to the effect that s 58B certificates should not be technically construed, while wholly appropriate to certificates such as that considered in Coltman's case, where the error was as to one figure in the address in a particular street, to my mind can hardly permit the complete mis-statement not only of the address but also of the name of the person whose blood had been taken.

Whatever s 58E means I am not prepared to hold that its curative powers extend to that degree of inadequacy in proof of an essential matter.

Accordingly, although of course the appeal has no merit whatsoever, it must be allowed and the conviction quashed.

The second appeal was not in a form recognised by s 115 of the Summary Proceedings Act in that all the options available to an appellant as set out in clause 1 of the specified form had been deleted by him before the form was signed. However, it appeared to me that the powers given to the Court by s 120 to correct defects in notices of appeal probably extended sufficiently far to allow me to invite Miss Hunter for the appellant to elect which of the available forms of appeal she proposed to follow. After some consideration she

chose to proceed on the basis that the notice was an appeal against both conviction and sentence.

In my view that was the appropriate step to take because the manner of determination of the careless use charge by the learned trial Judge created an unusual difficulty.

Prior to the introduction of the Summary Proceedings Act 1957 the Magistrate's Court did have power to convict and discharge. That power was not repeated in the Summary Proceedings Act. Nor does it appear in the Inferior Courts Procedure Act 1909, which so far as I know, is the only other statute which one would expect might provide powers of this type.

Section 42 of the Criminal Justice Act 1954 gives power both to the District Court and this Court to discharge offenders without conviction if the circumstances justify that action and there is no provision of a minimum penalty in the statute creating the offence. At the time that Act was passed, subs (6), which provides that nothing in s 42 shall affect the power of any Court to convict and discharge any person, would have had effect not only in this Court, which still retains that power, but also in the Magistrate's Court by reason of the power then contained in s 92 of the Justices of the Peace Act 1927.

It is my belief that His Honour may have been misled by the existence of s 42(6) into the belief that he, as a member of the District Court Bench, still had the power to convict and discharge. Neither counsel were able to point to any such power, and in my view it can no longer exist.

The effect is that the determination which His Honour chose to effect is, in my respectful view, one that was not open to him. I have little doubt what he intended to do, namely to enter a conviction but leave the question of pecuniary penalty limited to that imposed on the blood alcohol

conviction, and to require a period of disqualification and the payment of witnesses' expenses.

On the amendment of the Notice of Appeal to one against conviction and sentence being allowed without objection by the Crown, Miss Hunter conceded, and in my view properly, that the circumstances were such that the Court was entitled to enter a conviction. She then proceeded with submissions on the appeal against sentence. On this she urged that the accident had not been a particularly serious one in that there had not been any physical injury, and that the weather circumstances at the time were poor.

She also informed me at some length of the particular inconvenience that would be caused to the appellant by the imposition of a period of disqualification. I agree with Miss Shine that that argument is irrelevant and that the cases to that effect are too numerous to be reversed.

In my view a more satisfactory determination of this matter would have been achieved had there been an application under s 201 Summary Proceedings Act 1957, in which case, in accordance with the decisions under that provision, I should simply have quashed the conviction and sentence, reimposed the conviction on the concession from counsel, and then remitted the matter to the District Court for an appropriate sentence to be imposed.

By reason of the manner in which the appeal has proceeded that course is not available, and in my view the better course is to reconsider sentence on the basis of the material before me. This suggests that the imposition of six months' disqualification on the basis of the dual offences found to have been committed warrants my abbreviating the period of disqualification now that the first has been the subject of an acquittal. I am not at all sure whether there should not be a further alteration in the penalty. Had the matter simply stood as a careless use charge, I think it is likely that His Honour would have imposed a fine.

However, there is no doubt that the appellant has been put to a good deal of inconvenience and expense, and not all of his own making. In the circumstances on the general appeal in respect of the careless use prosecution, the determination of the District Cout is set aside, the appellant is convicted in terms of the concession made by his counsel and on the evidence which supported that concession, an order is made for his disqualification from holding or obtaining a motor driver's licence for a period of three months commencing from today's date, and the order that he pay witnesses' expenses, $53 is confirmed.

There is no order as to costs.