IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.178/84

BETWEEN E ANDREW

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing : 7th September 1984

Counsel : P.R. Connell for Appellant
P.J. Morgan for Respondent

Judgment : 7th September 1984

(ORAL) JUDGMENT OF BARKER J

This is an appeal against the conviction of the appellant in the District Court at Hamilton on 21st March 1984. He was charged with an offence under Section 59 of the Transport Act 1962 in that, being in charge of a motor vehicle while under the influence of drink or drug or both to such an extent as to be incapable of having proper control of the vehicle, but not so as to be liable for conviction for an offence under Subsections (2)(a), (b) or (c) of Sections 55 or 58, he did fail to deliver up the ignition keys in his possession when required to do so by a traffic officer.

The evidence in brief is that the appellant was a passenger in a car that was stopped by a traffic officer in Ngaruawahia on 29th December 1983. The driver of the car was given an evidential breath test and ended up being apprehended; he later escaped from custody; what happened to him is of no great moment here.

The appellant remained in the car. The traffic officer

said in evidence that he "approached him. His speech was very slurred, his mannerism was grossly affected and there was a very strong odour of drink about him". The traffic officer, who was stationed at Huntly but who gave no evidence of his experience as a traffic officer or of his experience in dealing with drunken drivers, stated further that he endeavoured to take the keys from the ignition when the appellant reached across and snatched them, holding them in his right clenched fist. There was some irresponsible behaviour on the part of the appellant in which he denied that he had possession of the keys, but he clearly refused to hand them to the traffic officer. Later, the traffic officer said that the appellant was held in the police cells subsequently; he was told why he had been arrested but, in the view of the traffic officer, he was unable to understand this because of his intoxication, but that four hours later, he was sobering up and he was able to understand it.

The learned District Court Judge rightly stated that there were three necessary ingredients which the prosecution had to prove:

1. The defendant was under the influence of drink or drug to such an extent that he was incapable of having proper control;

2. The keys were in fact in his possession and therefore able to be handed over upon demand;

3. The appellant was in charge of the motor vehicle.

Mr Connell for the appellant accepts that the keys were in the appellant's possession and able to be handed over but he disputes whether there was any acceptable evidence (a) that the appellant was under the influence and (b) that the appellant was in charge of the vehicle.

The District Court Judge accepted the evidence of the traffic officer that the appellant was intoxicated, drunk, grossly or seriously affected by liquor. He did not make any statement as to the extent that the consumption of alcohol would affect the appellant. He acknowledged that there was

no effort made by the prosecutor to qualify the traffic officer as a person able to give opinion evidence as to the state of intoxication of somebody in the appellant's position. Rather, the learned District Court Judge considered that the traffic officers, in their normal course of duties, are involved in standard breath tests that require a more sophisticated knowledge of people's driving than hitherto possible. He accepted the fact that the traffic officer was appointed by the Minister (he really meant Secretary) of Transport to carry out the functions of a traffic officer automatically gave him the ability and discernment to be able exercise requirements as to breath screening and evidential breath tests. He considered that when the traffic officer said that the appellant was grossly intoxicated, then he could be satisfied to the appropriate standard that the defendant was under the influence to such an extent as to be incapable of having proper control.

Unfortunately, this view is quite contrary to a decision of the Court of Appeal in Blackie v. Police, (1966) N.Z.L.R. 910; in that case, the majority of the Court of Appeal held that when a person is charged with driving a motor vehicle whilst under the influence of drink to such an extent as to be incapable of having proper control, the traffic officer or policeman can show that he is sufficiently qualified by training or experience to be allowed to express his opinion in evidence as to the person's capacity to drive. The majority of North and McCarthy, JJ. went on to emphasise that the fact that the witness is either a traffic officer or a policeman does not automatically qualify him to give opinion evidence on this topic.

In that case, the Court emphasised that whilst any observer can give evidence as to whether a person was drunk, a non-expert opinion of whether the level of drunkenness had ascended beyond a certain level was "a nice question calling for skill, care and precision".

The learned District Court Judge in the present case clearly formed his view as to the incapacity of the appellant

from the inadmissible opinion evidence of the traffic officer. Accordingly, there was in my view no acceptable evidence for one of the essential ingredients of this charge. Therefore, the appeal must be allowed.

It would have been a simple matter for the prosecutor in the District Court to have qualified the traffic officer as a person able to give opinion evidence as was emphasised in the Blackie case.

Because the other point has been raised, I think I should also express a view on it. It is clear from the judgment of Richmond, J. in Stoops v. Police, (1961) N.Z.L.R. 320, 323, that the prosecution, for an offence of this nature, does not need to establish that the defendant intended to drive or that there was a reasonable possibility that he would drive the car. Moreover, he held that it is not a defence for a defendant, if in de facto control of the car, to establish that has no intention whatsoever of driving the car himself. To that extent, if there is anything to the contrary contained in the decision of the Magistrates' Court in Police v. Thompson (1955), 9 M.C.D. 139, that must be taken as being over-ruled.

The obvious targets for the section are those drivers who have the good sense, after having consumed too much liquor, not to drive but to "sleep it off". It is normally a driver or potential driver who would be prosecuted. However, the cases show that it does not necessarily have to be the driver so long as the de facto control is assumed by the person who takes the keys and whether or not that person is entitled to the possession of the keys so far as the driver is concerned.

In the present case, the appellant in evidence stated that his intention in removing the keys was to prevent the owner suddenly returning to the car and driving off. Up until the stage when the appellant took the keys, just before the traffic officer went to take them, I do not think it can be said he was in de facto control of the car; however, his action in "beating the traffic officer to the draw" as it were does constitute an assumption of de facto control. The

District Court Judge assumed that there may have been a good motive for the accused in assuming domination over the keys, but he also noted that the contrary view could be that the appellant was acting out of "bloody mindedness". He said that "it seems that the appellant was aware of the stage which the traffic officer's dealings with the driver had reached and that, like any reasonable citizen, he should have accepted that the officer had some responsibilities but he elected to take the keys away from the officer". That is a finding of fact which I think was perfectly justified in the circumstances; therefore, the appeal would have failed on that ground.

However the appeal must be allowed and the conviction quashed on the first ground raised by counsel.

R J Bollard J.

SOLICITORS:

O'Neill, Allen & Co., Hamilton, for Appellant.
Crown Solicitor, Hamilton, for Respondent.