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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.66/84

BETWEEN FREDERICK JOHN O'NEILL

APPELLANT

AND MINISTRY OF TRANSPORT

RESPONDENT

Hearing: 6th March, 1984

Counsel: Wackrow for Appellant
Mrs. Shaw for Respondent

Judgment: 6.4.84

JUDGMENT OF GALLEN, J.

The appellant was convicted on the 8th December, 1983, of offences arising from a motor accident that occurred on the 28th April, 1983, on the north-west motorway at Pt. Chevalier. The first charge was that he drove a motor vehicle while having an excess of blood alcohol.

The learned District Court Judge made certain findings of fact as follows:

(1) that the appellant consumed 165 mls of cough mixture which amount of cough mixture contained 13.68 grams of ethanol;

(2) that the appellant consumed two glasses of white wine which wine contained 22.3 grams of ethanol;

(3) that the appellant told the traffic officer he had consumed two glasses of wine;

(4) that the consumption of cough mixture and the wine produced a reading of 103 milligrams of alcohol per 100 millilitres of blood.

The learned District Court Judge further found that on the bottle from which the cough mixture came there was a clear marking that alcohol was a part of the mixture. The learned Judge refers to the fact that the appellant had stated he did not know the cough mixture contained alcohol. He does not appear to have made a specific finding in this respect but did go on to say,

> "The defendant may not have known there was alcohol in the cough mixture. He, however, clearly knew...that there was alcohol in the wine."

I think I am entitled to take it from this that the learned Judge did not make a finding against the appellant in this respect. This is an aspect which will have some importance later in this decision.

There was no dispute as to the procedures followed by the traffic officer and the appellant based his defence in the District Court on the decision of McMullin, J. in Flyger v. Auckland City Council (1979) 1 N.Z.L.R. 161, submitting that the prosecution had failed to prove in the circumstances disclosed by the evidence that the appellant had "the necessary mens rea required by the offence". The District Court Judge specifically referred to a passage on p.176 of that decision commencing at line 20 where McMullin, J. summarised as he saw it the principles involved in the following terms:-

> "But it is my opinion that an offence under s.58 (1) (a) of the Transport Act 1962 of driving with excess blood alcohol is committed when:
>
> (1) A driver intentionally drives having voluntarily taken liquor, whether or not he appreciates that the quantity of liquor in his blood exceeds the statutory maximum. He is guilty in such a case because he voluntarily brought about the

factual state which is forbidden by the statute and it is no answer in such a case to say that he did not intend to break the law.

(2) A driver intentionally drives with excess blood alcohol partly as a result of voluntarily taking liquor himself and partly because of liquor surreptitiously introduced into non-alcoholic beverages by the actions of others if before he drives or in the course of driving he becomes aware that he has or might have a blood alcohol level in excess of the permissible limit. He is guilty in such a case because the existence in his blood of excess blood alcohol raises a presumption that he intended to bring about the state of affairs that the statute forbids and the evidence as to the manner of its consumption should not entitle him to an acquittal where he has elected to drive while in that state. "

The learned District Court Judge stated that the case was not one where the appellant had consumed a non-alcoholic liquid in which unknown to him alcohol had been surreptitiously introduced. Rather, it was a case of the appellant consuming two liquids, one of which he knew contained alcohol and the other of which he said he did not know contained alcohol. In the circumstances, he considered that the prosecution had proved the appellant had the necessary mens rea because "he intentionally drove having voluntarily taken liquor albeit without appreciating the quantity of liquor in his blood exceeded the statutory limit, but guilty nonetheless because he voluntarily brought about the factual state which is forbidden by the statute." The learned Judge therefore considered that the appellant came into the first of the categories referred to by McMullin, J. in Flyger's case and as a result convicted him.

The notes of evidence indicate that expert evidence was given to the effect that the wine of itself could have produced 64.48 milligrams of alcohol per 100 millilitres

of blood. That was uncontradicted.

This case raises again those difficult questions of mens rea and burden of proof which were considered in Flyger's case and which have been subsequently considered in a number of other decisions.

In Flyger's case McMullin, J. concluded, after a lengthy analysis and a consideration of decisions in various Commonwealth jurisdictions, that the offence created by s.58 (1) (b) of the Transport Act 1962 was not one of absolute liability but one where mens rea was required. He clearly did not confine the requirement to the act of driving but related it also to the further requirements of the section holding that it was necessary for the prosecution to prove that the driver concerned knew or ought to have known he was driving with an excess blood alcohol level. In the words of McMullin, J.:-

> "It was for the respondent to prove beyond reasonable doubt that the appellant could not mistakenly but reasonably have held the view that his conduct did not offend the statute."

He went on to say :-

> "While the test of honest belief is a subjective one in that it is the appellant's state of mind that is relevant, the Court is entitled to judge that state of mind by reference to objective factors."

In other words, the prosecution was required to prove the act of driving and also that the appellant drove knowing that he had taken liquor. The learned Judge accepted, no doubt as a matter of public policy, that once a person had taken liquor he could not be heard to argue that he did not realise that he

had produced a blood level contrary to that contemplated by the statute.

The learned Judge held in Flyger's case that it was necessary for the prosecution to prove the required state of mind beyond reasonable doubt and that, in judging that state of mind, the Court was entitled to have reference to objective factors. The learned Judge therefore followed the pattern apparent from the decision of the Court of Appeal in R. v. Strawbridge (1970) N.Z.L.R. 909, which itself reflected what was believed to be the emphasis of the House of Lords in Woolmington v. Director of Public Prosecutions (1935) A.C.462. The learned Judge was not referred to the case of R. v. City. of Sault Ste. Marie (1978) 85 D.L.R. 3 D 161. That was a case dealing with environmental law and water pollution where the Supreme Court of Canada, sitting with nine Judges, considered whether an offence involving the discharge of materials which might impair the quality of water was an offence of absolute liability and further on whom the onus lay and the nature of the burden of proof in offences of that kind where mens rea was considered to be an essential ingredient. The Court, following certain comments in Sweet v. Parsley (1970) A.C. 132, concluded that there was an intermediate category of offences between those of strict liability and those where mens rea was an ingredient which had to be proved by the Crown on the usual basis. It categorised such offences as being those which related to public welfare. In such cases the Court held that

the doing of the prohibited act prima facie imported the offence but it was open to the accused to avoid liability by proving that he took all reasonable care.

In the case of Rooke v. Auckland City Council (1980) 1 N.Z.L.R.680, Holland, J. was faced with a situation where an appellant had consumed a small quantity of beer and there was uncontradicted evidence that the quantity consumed could not have caused his blood alcohol level to reach the prescribed limit. In fact when tested the limit was exceeded and it appeared that this had occurred because the appellant had spent the greater part of the day painting inside a boat in a confined space using a paint which contained an unusually high quantity of ethynol. It was accepted that the fumes of the paint in the confined space had been sufficient to cause the blood alcohol level of the appellant to exceed the prescribed limit. In the District Court he had been convicted on the basis of the view which the learned District Court Judge had taken of the application of Flyger's case. Holland, J. indicated that he might himself have come to a different view on whether or not the offence under s.58 (1) (b) was absolute than had been the case in Flyger. He considered subsequent cases in the Court of Appeal and also the Sault Ste. Marie case (supra). The learned Judge accepted that mens rea was an ingredient and, although he would have preferred that the onus of proof of a defence based on an allegation that the alcohol was in the appellant's blood without his knowledge or there was a mistake of fact lay on the appellant, he followed

Strawbridge and accepted that a reasonable possibility of such an honest belief or mistake of fact was sufficient to entitle an accused person to an acquittal.

In the recent decision of the Court of Appeal in Civil Aviation Department v. MacKenzie (1983) N.Z.L.R.78 the Court was concerned with a charge brought under the provisions of the Civil Aviation Act 1964. The appellant had been charged with an offence relating to the operation of an aircraft in such a manner as to be the cause of unnecessary danger to any person or property. The Court, having considered the decisions which had occurred since Sweet v. Parsley (supra) and in particular the Canadian case of Sault Ste.Marie (supra), accepted that it was appropriate to follow the Canadian case and, as I understand the position, accepted the "half way house" concept referred to in Sweet v. Parsley which had itself long been a concept accepted in New Zealand law dating in fact from the decision of the Court of Appeal in R. v. Ewart (1905) 25 N.Z.L.R. 709. The Court of Appeal also followed the Sault Ste.Marie case in concluding that in the category of offences categorised as public welfare offences, the burden of proof passed to the accused to establish such defence as was open to him or her on the balance of probabilities. This was, of course, a change from the decisions which followed from the decision in Strawbridge. The position now would then seem to be that there are three categories of offences recognised:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.

2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault. R. v. City of Sault Ste. Marie (supra).

It is therefore necessary to consider what effect the decision of the Court of Appeal in MacKenzie's case has on the decision in Flyger's case. The first and most obvious effect is that it is necessary to consider in which category the offence under s.58 (1) (b) of the Transport Act is to be placed.

McMullin, J. in Flyger's case reached the clear conclusion that it should not be categorised as an offence of absolute liability. The analysis in MacKenzie's case supports this conclusion, particularly the decision of McMullin, J. who dissented on other grounds. MacKenzie's case places considerable reliance on the Canadian case of City of Sault Ste.Marie (supra) and this case in turn placed some reliance on an

earlier Canadian case of R. v. King (1962) 35 D.L.R. 386 which was itself a case dealing with an offence of driving while impaired by alcohol or drugs. It was accepted in that case that the offence was not one of absolute liability. With respect, I accept the conclusion of McMullin J. in Flyger's case.

Following MacKenzie's case, however, it is now necessary to consider whether an offence under s.58 (1) (b) is an offence against public welfare or a crime in the true sense. The distinction is important because of the onus and standard of proof applicable. The criteria for the precise definition of public welfare offences are, with respect, not entirely clear from either the Sault Ste. Marie case or the decision of the Court of Appeal in MacKenzie : see the dissenting judgment of McMullin, J. Such offences are said to reflect the need in the complexities of a modern society to maintain through effective enforcement high standards of public health and safety They are said to be offences which are not criminal in any real sense, and might well be regarded as a branch of administrative law to which precepts and principlesof criminal law have got limited application even though they are prohibited in the publi interest and enforced as penal laws through the utilization of the machinery of the criminal law. They are said to involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. This particular formulation is not too far from the distinction which Blackstone drew between torts and crimes but it is not a simple concept to apply in practice. It appears that certain conduct which would not normally be categorized as criminal is to be dealt with by the use of machinery applicable to crimes.

In the MacKenzie case flying in a particular manner was categorized as being an offence against public welfare. By analogy driving in a particular manner would seem to have many similar features. To place an offence under s.58 (1) (b) in the second category would also go some distance towards meeting the concerns expressed by Holland, J. in Rooke's case (supra) where he clearly had in mind the concern for the public welfare which is the basis of the legislation. This would not be inconsistent with Flyger's case and would help to reconcile those cases particularly English cases which categorised the equivalent English offence as absolute. As against this, the severity of the penalty tends to suggest that the normal criminal category is appropriate. With some hesitation and reservations, I reach the conclusion that the offence contemplated by s.58 (1) (b) of the Transport Act is to be regarded as one of the intermediate offences, so that the onus of proof of a lack of guilty mind passes to the appellant who is required to establish the defence he puts forward on the balance of probabilities.

I should have thought that it was clear, on the uncontradicted evidence, that the appellant had succeeded in doing this if it were not for the reference made by the learned District Court Judge to the statement on the cough mixture bottle that it contained alcohol. The concept of negligence will be one of importance in offences falling within the public welfare category because the defence contemplated to such offences in the case of the City of Sault Ste. Marie was that the accused person had taken all reasonable care. There

are comments in MacKenzie's case to the same effect. Reference by the learned District Court Judge in this case to the statement on the cough mixture bottle that it contained alcohol could be construed as a finding that the appellant did not take all reasonable care. In context, however, this was not in fact the basis of the decision of the learned District Court Judge. He had been referred to Flyger's case and he obviously placed an emphasis on the conclusion in that case that an accused person could not escape liability by stating that he was not aware that the quantity of alcohol he had consumed had produced a result where the blood alcohol level exceeded the permitted maximum. The first category defined in Flyger's case effectively conclude that where a person has knowingly consumed alcohol he will not be allowed to raise a defence that he did not know that it had produced the result which in fact occurred. In the absence of proof of some additional and contraverting factor proof of the excess level will lead to a conviction. At first sight it appea on reading the categories in Flyger's case that the logical basis for the prohibition contained in the first category prevents any defence based on the second category from succeeding except in the very special case referred to in that category, that is the surreptitious lacing of the accused's drinks. It is this interpretation which led to the decision appealed against in Rooke's case and which clearly led to the decision in this case. The learned District Court Judge expressly states that the appellant, having voluntarily consumed liquor, could not be permitted to defend on the basis that it had not produced the prohibited level. I think this result has occurred because of a misunderstanding arising from the wording used in Flyger's

case. The learned Judge there indicated that he had considerable difficulty in formulating categories which would apply. The answer, I think, is to be found in the proved presence of some additional factor which caused the prohibited result. Expanding the categories and expressions in Flyger's case, I arrive at the following conclusions:-

1. Where a person has voluntarily consumed alcohol it will be no defence to put forward a lack of knowledge that the quantity consumed did or could have produced the prohibited level.
2. Proof of an element of involuntariness will provide a defence. Such an element is present where a person consumes material which, without his knowledge, contains a sufficient quantity of alcohol to produce a prohibited level.
3. Such a defenc e cannot succeed where a person concerned nevertheless knew, or should have known, that he was affected by alcohol.
4. Any such defenc e will need to establish there was no lack of care.

Such a formulation is consistent with the decisions in both Flyger's and Rooke's case

The learned District Court Judge in this case was not referred to the subsequent decisions. Indeed, the decision of the Court of Appeal in MacKenzie's case would probably not have been available at the time of the hearing. Because of this and because of the way in which he applied the decision in Flyger's case, the learned District Court Judge

did not consider the situation in the way I have indicated.

On uncontradicted evidence the appellant established an element of involuntariness. The remaining question is whether his defence was negated by negligence. The learned District Court Judge has not found that the appellant was negligent, but he has drawn attention to the presence of the warning on thebottle. If the onus of proof were on the prosecution, then in the absence of a positive finding of negligence the appellant would be entitled to succeed. However, following the decision in MacKenzie's case I conclude that the onus of proof was in fact on the appellant.

The reference by the learned District Court Judge to the presence of the warning would in context suggest that the appellant had not discharged the onus which I have found lay upon him. However, the decision in MacKenzie's case was not available to the learned District Court Judge nor were submissions made to him except in accordance with Flyger's case which itself followed the earlier decision of the Court of Appeal in Strawbridge. I cannot tell what the learned District Court Judge would have concluded if the matter had been approached in accordance with MacKenzie's case. The learned District Court Judge found, in any event, that there were special circumstances and reflected this in the penalty which he imposed.

In view of this, as happened in Mackenzie's case itself, I consider that the appellant should be given the

benefit of any doubt as to the effect of the District Court Judge's findings. The appeal will therefore be allowed with costs of $100.

Before concluding, I wish to say that I am indebted to counsel for the careful and comprehensive argument put forward.

R.J. Gallen J.

Solicitors: Murdoch, Price & Hall, Auckland, for Appellant
Crown Solicitor, Auckland, for Respondent