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(3) NZLR FM7 X

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M 343/84

1454

BETWEEN MURRAY ALLAN BRYAN

Appellant

A N D POLICE

Respondent

Hearing: 5 November 1984

Judgment: 5 November 1984

Counsel: G.W.O'Brien for appellant
P.J.Morgan for respondent

ORAL JUDGMENT OF BISSON J.

This is an appeal from conviction and sentence in respect of a charge under s.55 (2), (b), of the Transport Act 1962 as amended in 1978. This section reads as follows:

s.55 (2) (b)

> "Every person commits an offence who, while the proportion of alcohol in his breath, as ascertained by an evidential breath test undergone by him pursuant to section 58A of this Act, exceeds 500 micrograms of alcohol per litre of breath, is in charge of a motor vehicle and by an act or omission in relation thereto causes bodily injury to or the death of any person."

In this case the appellant's level of alcohol per litre of breath was 1400 micrograms. The decision of the learned District Court Judge says:

> "One must bear in mind that 1400 micrograms is a high level"

And further on he says:

> "1400 is not very far from three times the maximum level permitted. That is a factor which I must bear in mind in moving on to the real gravamen of the charge."

The circumstances of this case, which relate to the death of a pedestrian as a result of a collision with the appellant's vehicle, can conveniently be taken from the decision of the learned District Court Judge in which he says:

> "As the defendant was driving in a westerly direction along Alexandra Street, the main business street of Te Awamutu, at about twenty past seven in the evening, an elderly man armed with two walking sticks was walking from the defendant's right, moving from stick to stick with his head down. He had reached about the centre of the roadway when he went from the view of an eye witness. He went from view by reason of the defendant's truck coming between him and the deceased and then the deceased was seen to be thrown in the air from the truck. So that the deceased may have moved further or may have stopped at the white line. When last seen, in any event, he had his head down and was still moving. Obviously by his means of transport, his movements would not be fast.
>
> Alexandra Street is an extremely wide street with angle parking on both sides of the road. I would imagine there is almost sufficient space on each side of the road for three carriageways. Certainly well and truly enough for two trucks to pass. The defendant was driving right down the white line in the sense that he was on his correct side of the road but very close to the line, I believe, on the basis of Mr Robertson's evidence. I can accept that it is not reasonable to drive right down behind the backs of angle-parked cars but the defendant was far too far across to his right.
>
> He had admittedly been playing bowls all day and in the course of the day had been drinking from time to time, coinciding with the end of each game, lunch hour and celebrations after the end of the tournament. I think he had rather more to drink than he indicated. However, it is to be taken into account in his favour that the police officer did not give in evidence any symptoms of the defendant being grossly affected by liquor and it seems that he also, after the test, asked him to carry out certain other tests of his ability to pick things up, things of that nature. There was nothing untoward discerned there.
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> I think I should say that from time to time there are accidents causing death when motorists do not see or observe other people and those motorists have not consumed anything to drink at all. A failure to observe is not necessarily due to the consumption of alcohol.

"Looking at the particular accident, the factors which I consider to be important are: the place on the road on which the defendant was driving; his failure to observe, as he drove along, this elderly man crossing the road with his two walking sticks lit up to some degree by the lights of shops, street lights and also by the lights of Mr Robertson's headlights; the failure to see the pedestrian was not the act of an observant motorist, I think it was contributed to by the quantity of liquor which had been consumed, which is reflected by the very high level indeed of breath/alcohol. It is also affected by the windscreen wipers not being operating. I think those wipers were not operating, if they could function as the defendant claimed, because he, affected to some degree by liquor, was not prepared to stop and make them work, but was prepared to soldier on with defective vision. I think that decision to do that was brought about by his over-consumption of liquor.

The situation in which he drove on the road, at or alongside the centre line, also was, in my view, contributed in part by liquor.

Weighing all those factors together, I come to the conclusion that there was in fact a causal connection between the amount of liquor which the defendant had consumed and his activities and his act or omission in relation to being in charge of a vehicle which caused the death of the deceased. His failure to see the deceased was due to his consumption of liquor. He will therefore be convicted."

The District Court Judge correctly stated the law in respect of a charge under this section. He said:

"The cases decided by the Court of Appeal are to the effect that there must be found to be a causal connection between the level of alcohol and the act or omission which causes the death."

That statement of law has been reaffirmed in the case of O'Callaghan Court of Appeal 154/84 judgment of 30 October, 1984.

Mr O'Brien for the appellant submitted that the cause of this accident could not be related to the alcohol level in that the deceased was wearing dark clothing and that his particular movements - those of a jay walker when there was a pedestrian crossing nearby - put him in a position of jeopardy to any driver, and there was no evidence on which the court could conclude that the appellant

had failed to observe the deceased because of his state of alcohol consumption. Mr O'Brien also drew attention to there having been no evidence of bad driving prior to the collision and that the appellant could carry out some simple tests after the breath test had been taken.

In an appeal such as this the onus is on the appellant to satisfy this court that, in the circumstances, the learned District Court Judge was either not warranted in entering a conviction or, at least, that he should have been left in a state of reasonable doubt. See Toomey v Police 1963 NZLR 699, and Page v Police 1964 NZLR 974.

I turn to the evidence in chief of the appellant who said:

> "As I was travelling up Alexandra Street the deceased just wasn't in my sight at all. The first time I was aware was I saw a shadow. You can't actually see the mudguards of the truck when you are sitting there. You've got a blind spot of about four and a half inches beside the window. All I saw was a shadow and then the bang. As I say, if he had been bent over and walking the way he was I wouldn't be able to see him anyway because youcan't even see the mudguards on the truck. I was keeping a look out for anyone on the sides of the road. There was nobody there. I just didn't see him."

I emphasise those last words: "I just didn't see him." Although the circumstances as outlined by Mr O'Brien may have made the sighting of this pedestrian more difficult than in broad daylight, or on a clear dry night, in my view there is no adequate excuse for this driver failing to see the slow moving pedestrian in all the circumstances appertaining on this particular night. I am compelled to the view that, without any reasonable doubt, his failure to see this pedestrian was caused by his consumption of alcohol.

I refer to the judgment of Woodhouse J., as he then was, in Smyth v Police (1973) 1 NZLR 56 at p.59:

> "It is well accepted that the consumption of alcohol beyond certain well known limits takes the fine edge from perception and judgment and puts a cloud over one's capacity for physical reaction. It then can adversely affect the ability to control a vehicle in a proper and adequate fashion. It is not necessary to demonstrate that the act or omission must be of a character which occurs only if the offender has been rendered incapable of proper control by reason of his consumption of alcohol. The test is simply whether the presumed condition brought about by a consumption of alcohol beyond the prescribed limit has been a material cause of the act or omission which led to the injury. In the final analysis it is a factual issue to be decided within the circumstances of each case. The evidence, in my view, justifies the conviction here and the appeal must be dismissed."

As I have already said, the question on this appeal is whether the learned District Court Judge was either not warranted in entering conviction, or at least that he should have been left in a state of reasonable doubt. For the reasons already given, I am satisfied that the conviction he entered was well justified and the appeal must be dismissed.

G E Barrison J.

Solicitors

Messrs Bennetts Morrison and O'Brien of Te Awamutu for appellant

Crown Solicitor for respondent