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N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

M. No. 33/84

1699

BETWEEN CLIMIE

Appellant

A N D POLICE

Respondent

Hearing: 29 November 1984

Counsel: J.H. Williams for Appellant
B.D. Vanderkolk for Respondent

Judgment: 7 DEC 1984

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JUDGMENT OF QUILLIAM J

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This is an appeal against conviction on two charges under the Transport Act 1962, namely, refusing to accompany a constable (s 58A (5) (b)) and refusing to permit a specimen of blood to be taken (s 58C (1) (b)).

The circumstances were somewhat unusual. At about 7.25 p.m. on 23 April 1983 Constable Mallon, who was then off duty, was driving north towards Shannon. He saw that a car had left the road and come to rest partly in a ditch. He went to offer assistance and found that the car had "bellied", that is, the middle of the underside of the car was resting on the ground and the left-hand wheels were spinning clear of the ground with the result that the car could not be moved. The appellant was the sole occupant and he was apparently trying to drive the car out but achieving nothing. He refused the constable's offer of a lift. The constable noticed a strong smell of alcohol on the appellant and that he was having difficulty sitting up straight.

Constable Mallon left and rang the Police with the result that Sergeant Kiernan and Constable Grey arrived some time later. They found that a tow truck was there and the appellant was leaning against the car. He smelt strongly of alcohol and his eyes were bloodshot and glassy. A wire had been attached from the tow truck to the car. The appellant then got into the car, started the engine, and attempted to reverse the car which rocked backwards and forwards a few inches. Sergeant Kiernan attributed this to the actions of the appellant and not to the tow truck. This evidence was accepted by the District Judge.

The Sergeant then requested the appellant to undergo a breath screening test but he refused. He was then requested to accompany the Sergeant to the Police Station for the purpose of an evidential breath test or a blood test, or both. The appellant again refused and was arrested and taken to the Police Station. He there refused requests both for an evidential breath test and a blood test.

Evidence was given by a friend of the appellant's, a Mr Southee, who said that he had seen the appellant's car and stopped to assist him. Mr Southee's wife went back to Shannon to get a tow truck and this arrived about three-quarters of an hour later. During that period, and before the Police arrived, Mr Southee said that he and the appellant each consumed about three or four bottles of beer.

The defences raised and the grounds of the present appeal were, first, that it had not been proved that the appellant was the driver of the car and, second, that no enforcement officer (as that expression is defined in the Act) had had good cause to suspect. It should be mentioned that the prosecution accepted there was no evidence as to who had been driving the car when it left the road. The

District Judge was not prepared to hold that it had been the appellant, notwithstanding he was the only occupant when Constable Mallon arrived and that finding is not challenged. The prosecution case relied solely upon the actions of the appellant in getting into the car after Sergeant Kiernan arrived and attempting to reverse it out of the ditch.

I can accordingly deal briefly with the second submission first. Whatever the status of Constable Mallon at the time, it was acknowledged, on behalf of the appellant, that Sergeant Kiernan was an enforcement officer for the purposes of the Transport Act. The only question which arises under this submission is whether Sergeant Kiernan formed good cause to suspect before or after the appellant got into the car and started the engine. It was suggested that the evidence on this was somewhat equivocal but the District Judge has made a clear finding on it. What he said was:

> " ... Sergeant Kiernan gave clear evidence of his cause to suspect which preceded the attempts by the defendant to move the car.... "

This was a finding open to him on the evidence and I am accordingly unable to accept this submission.

The principal argument related to the first submission, namely, that the appellant was not shown to have been the driver of the car. I was referred in this regard to several cases but, in particular, to the decision of the Court of Appeal in R v Clayton [1973] 2 NZLR 211. That was a case in which the Court of Appeal considered what amounted to driving in the context of someone having simply steered a car. The Court accepted that driving "is a combination of acts which together produces the result of the controlled

movement of a vehicle" (p 215). It was argued in the present case that, as it had been impossible for the appellant's car to be made to move at all, he could not be said to have driven it. Whether this is correct or not I need not decide because the submission is directed to a point which does not arise in this case, although it must be acknowledged that the District Judge arrived at his decision upon the basis of a finding that the appellant had indeed been driving.

The first charge against the appellant was that he had refused to accompany the Sergeant when required to do so (s 58A (5) (b)). The question then was whether the Sergeant had been entitled to require the appellant to accompany him. Section 58A (1) (b) provides:

> " 58A. (1) Where an enforcement officer has good cause to suspect that -
>
> (b) Any person attempting to drive a motor vehicle on any road has recently, before attempting to drive the vehicle, or has, while attempting to drive the vehicle, consumed drink -
>
> he may require that driver or person to undergo forthwith a breath screening test. "

So long, therefore, as the Sergeant had good cause to suspect that the appellant was attempting to drive his car and had recently, before attempting to do so, consumed drink, then he was entitled to require a breath test. Upon refusal of that requirement he was entitled to require the appellant to accompany him. The real point of the case was whether the appellant was attempting to drive.

As to this two arguments were advanced. The first was that the appellant's car was not, at the relevant

time, a "motor vehicle" for the purposes of the statute. In s 2 of the Transport Act "motor vehicle" is defined as meaning "a vehicle drawn or propelled by mechanical power" (and then follow certain inclusions which do not apply here); and "vehicle" means "a contrivance equipped with wheels, tracks or revolving runners upon which it moves or is moved" (and the exclusions which follow do not apply). The argument was that at the relevant time the car was not "drawn or propelled by mechanical power" because it was not capable of being moved by that mechanical power. I am unable to accept this. The car, immediately before it left the road, was undoubtedly within the definition of a motor vehicle. Nothing had happened to take it out of that definition. All that had happened was that it had got into a position where it could not for the moment be propelled by its own power. I do not consider it could have ceased to be a motor vehicle unless there had been some change in its character so as to take it out of the definition (e.g. the removal of its wheels).

The other argument was that there could not have been an attempt to drive the car because it was incapable of being driven. Again I am unable to agree. The expression "attempting" is not defined in the Transport Act. There is, of course, a definition in s 72 of the Crimes Act 1961 which is capable of applying to the Transport Act and if that definition properly applies in the present case then there is here an attempt to drive. S 72 (1) provides:

> " Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not. "

The question which may arise is whether, on the facts of the present case, the appellant had an intent to commit an

offence. I should have thought it plain that he did but it is really unnecessary to pursue the point. Upon any sensible construction of the word "attempting" as used in s 58A (1) (b) that expression fits what the appellant did. His intention undoubtedly was to put the car in motion by the use of its engine. He tried to achieve that result and so he clearly attempted to drive the car.

That being so there was a proper basis for the Sergeant to require the appellant to take a breath test. Everything that followed accordingly had a valid basis.

I conclude that the decision reached by the District Judge was correct, although for reasons somewhat different from those given by him.

The appeal against conviction on each charge is therefore dismissed.

Solicitors: S.H. Philip & Co., LEVIN, for Appellant

Crown Solicitor, PALMERSTON NORTH, for Respondent