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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M.805/84

NZLR 1096

BETWEEN

GIBSON

Appellant

AND

MINISTRY OF TRANSPORT

Respondent

Hearing: 21st August, 1984

Counsel: Dawson for Appellant  
Dacre for Respondent

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ORAL JUDGMENT OF SINCLAIR, J.

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This man appeared before the District Court at North Shore on a number of charges, but one of driving whilst disqualified was dismissed during the course of the hearing. He was, however, convicted on four charges: one of failing to stop when signalled to do so by a traffic officer; one of failing to drive in marked lanes when he was driving a motor cycle in an area where the lanes were marked; one of driving an un-lighted vehicle during the hours of darkness and one of excess breath/alcohol whilst driving a motor cycle.

The whole matter turns upon identification and it was a matter which was forcefully brought to the attention of the District Court during the course of the hearing. There is no necessity for me to refer to the legislation on the aspect, or the cases which have become almost legion, but this is one of the classic cases on identification.

During the hours of darkness two Ministry of Transport

officers whilst on patrol saw an unlit motor cycle being driven along a roadway. Thereupon a chase ensued with the motor cyclist not switching on his headlight and there was an almost around the houses chase for a considerable distance around Milford with the motor cyclist finally disappearing into a property down a right of way. In that property the offending motor cycle was found and later this Appellant was returned to that site, but where he was found is certainly not clear.

Both traffic officers gave evidence of having identified Gibson as being the driver of the motor cycle, but both of them acknowledged that they had no previous knowledge of this man's existence so therefore were not acquainted with him at all. When one has a look at Mr Ford's evidence this is what appears:

"Eventually got up beside it. I wound down my window. I was right beside the motor cyclist. I shone my torch on him, I shouted to him to stop, I indicated to him to stop with a hand signal. He just looked me in the eye and kept going. The rider of that motor cycle was the defendant seated in court today next to counsel. Had a very clear view of his face and body etc. throughout the pursuit.

Mr Ford was the passenger in the patrol vehicle and it is obvious from that portion of his evidence that he was talking of shining his torch out of the left hand passenger's window at the motor cyclist who was then alongside the vehicle. By contrast Mr Hooper, who was the driver of the vehicle, had this to say:

"The motor cyclist proceeded in the incorrect lane and I was alongside him and looking at the rider. I yelled at him to pull over and stop. I got a good look at his face. Traffic Officer Ford shone his torch past me and illuminated his face. The rider

"merely stared and then proceeded to turn right down a driveway and out of sight down a private driveway."

That evidence can mean one thing and one thing only, namely that Mr Hooper was looking out of the right hand driver's window and that the torch was being shone across him by Mr Ford, but there is not one word of evidence from Mr Ford that he did that. In those circumstances both cannot be right.

What does the Court do when faced with that dilemma? The only comment is from page 14 where it is said:

"Neither officer was challenged about those two pieces of evidence and it may be that both were right and that there were two such incidents."

It was not incumbent upon defence counsel to straighten out the dilemma. He is not there to fill in the gaps in the prosecution case. If there are gaps there he is entitled to take advantage of them. It was for the prosecution to remedy the dilemma and it failed to do so. In those circumstances how can one have any confidence in that type of evidence at all. But if that is not sufficient, what about some of the other gaps which appear?

Mr Ford gave the number of the motor cycle which was followed. It was said it was found on the lawn of this address in Beach Road. We know from the informations which were issued that Gibson lives at Hart Road, Takapuna, which is certainly not Beach Road. Who was the owner of the motor cycle? Was it connected with Beach Road or was it connected with Gibson's address of 17 Hart Road, Takapuna? After the rider of the motor cycle disappeared down the driveway of

this property it was not either of the two officers who apprehended him, but a Police Officer who returned to the front of the property with Gibson, but where he apprehended him does not appear from the evidence at all. It may or may not have been at the Beach Road address. What happened to the helmet which was described by one of the traffic officers, with Mr Ford stating he was not sure whether the man had a helmet on or not? When one has a look at the totality of the evidence it is obvious that there are so many gaps which could have been closed that the whole situation is totally unsatisfactory.

In these circumstances to my mind it is too dangerous, having regard to the consequences which follow from convictions of this nature, to allow the convictions to stand. Accordingly they are quashed.

I note that Mr Dawson has made a plea for consideration as to costs in his points of appeal, but I have distinct suspicions in this case and I think that they are strong enough in all the circumstances for me to say that this is one of those cases where I would not allow costs.

The appeal will be allowed and the convictions will be quashed.

*P. D. W. J.*  
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SOLICITORS:

Mr B. S. Dawson, Auckland for Appellant  
Crown Solicitor, Auckland for Respondent