IN THE HIGH COURT OF NEW ZEALAND AP.12 /86 & AP.13/86
ROTORUA REGISTRY

(3)

NOT RECOMMENDED /021

BETWEEN HODGE

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 11 July 1986

Counsel: Appellant in Person
P.J. Savage for Respondent

Judgment: 11 July 1986

(ORAL) JUDGMENT OF BARKER J

The appellant appears in person and appeals against two convictions in the District Court. In both cases, there was a defended hearing. The first conviction was on 21 August 1985 when the appellant was charged with refusing to permit a blood specimen to be taken, contrary to s.58C(1)(b) of the Transport Act 1962. At the same time, he was charged with driving through a red traffic light. In respect of that charge, he was convicted and discharged; there is no appeal against that finding.

On 2 October 1985, the appellant appeared before the same District Court Judge on a charge of assaulting a traffic officer in the execution of his duty. On the same day, he was sentenced to 5 months' Periodic Detention for the two offences. In effect, the District Court Judge said that the Periodic Detention sentence was to be 4 months, but took into account the month's holiday over Christmas; the appellant was disqualified from driving for 12 months on the wilful refusal charge. The appellant had previous convictions under the blood alcohol legislation. There is no appeal against sentence.

These appeals have been called several times in this Court. The first occasion wa on 21 March 1986 when the appellant was represented by counsel. No points on appeal were filed; the appeal was adjourned until 17 April 1986. On that occasion, his counsel, Mr Birks, sought and was granted leave to withdraw. The appeals had been adjourned on a number of occasions since that date. Today, Mr Hodge has apeared in person and has argued his case with sincerity and ability.

Basically, what the appellant appeals against is the finding of the District Court Judge in both cases which accepted the evidence of the traffic officers in preference to the evidence of Mr Hodge.

The incidents arose on 24 July 1985 when the appellant was driving his car in Rotorua; he was stopped by a traffic officer who formed the view that the appellant had been drinking; this view was supported by two other traffic officers. It was necessary for the District Court Judge to make a finding that 'just cause to suspect' was available as the basis for the commencement of the breath testing/blood alcohol procedures.

The District Court Judge accepted the evidence of a traffic officer that the appellant had admitted drinking beer previously in Te Ngae Road. The appellant says that he had been working hard on that occasion; he looked tired and, if his eyes appeared bloodshot and his speech slurred, it was because he tends to react badly to stressful situations. It should be stated that, as a result of war injuries received, the appellant does suffer from a medical condition which could give some credence to this suggeestion. He is on a war disability pension - the result of epilepsy contracted during the Korean War. Clearly, for a person with that disability, stressful situations are to be avoided.

The District Court Judge stated, in respect of the blood alcohol charge, that he preferred the evidence of the traffic officers on the question that the appellant appeared to have been drinking. He also accepted the evidence of the traffic officer that he had assembled the breath screening device and that the appellant refused to undergo that test. Subsequently, the appellant was asked to give an evidential breath test which he refused; he refused to 'accompany' the traffic officer.

The District Court Judge considered that there was agreement that the basic requirements of the failure to accompany offence had been proved, once there had been 'cause to suspect'; he preferred the evidence of the officers. He did not say that he found that the appellant was not telling the truth; however, he said that - whether as a result of his medical condition or some other reason - there were gaps in his memory and his recollection. Accordingly, he considered that the offence of refusing to accompany had been proved beyond reasonable. He therefore convicted the appellant.

On the other charge which seems to be of greater concern to the appellant, the traffic officer alleged that, in the patrol car after he had apprehended the appellant on suspicion of having consumed liquor, whilst taking him to the Transport Department office, the appellant assaulted him. It is said by the traffic officer that the appellant struck him on the lower face or chin. The appellant stated that he was in the patrol car which then attempted to start quickly; in a jerky movement, the appellant's arms were thrown out in either direction; he inadvertently touched the traffic officer's face. He claims he was putting his arms out involuntarily. The District Court Judge regarded this explanation as unlikely and preferred the evidence of the traffic officer. There was no issue of self-defence; there was no factual foundation for such a defence.

The appellant states that he apologised to the traffic officer for accidentally touching him and that he did not over-react when he received what he regarded as provocation at the Ministry of Transport office.

The difficulty faced by Mr Hodge, which I think he understands and which he has had explained to him by his solicitor, is that the powers of this Court on an appeal of this nature are fairly limited. The law is that, if the Court below is faced with a conflict of evidence, the Judge has to make a finding as to which of two conflicting versions of evidence he prefers. If there was evidence upon which the Judge could have come to the conclusion he did, then the appellate Court is not able to come to a contrary view because of the advantage achieved by the Judge in the Court below in seeing and hearing the witnesses.

If the Judge below preferred the evidence of one witness against that of another, then, in the words of the Court of Appeal in R v Awatere, the Judge must do his 'conscientious best' to give his reasons and to show why he preferred that evidence. The District Court Judge has given reasons and in my experience, his reasons are far fuller than those frequently advanced in credibility cases in the District Court. It seems that there was clearly evidence on which he could have reached his findings. In all the circumstances, I have no jurisdiction to interfere with his findings of fact. In the absence of any additional evidence - and it is difficult to see what evidence there could be - I am not able to interfere with the convictions.

Mr Hodge, in his written notice of points of appeal which he has enlarged upon today, made a claim that the traffic officers conspired to produce perjured evidence: there is no evidence to support such a serious contention before me; I must disregard such a suggestion. The District Court

Judge did mention that if he were to have accepted Mr Hodge's version, particularly in relation to the serious matters in dispute, then such a conspiracy would be a necessary consequence of such a finding. Mr Hodge has been through the District Court Judge's judgment carefully; but I cannot, as a matter of law, interfere with the findings.

The only matter which concerned me was the fact that the second case was heard by the same District Court Judge in a situation where both charges arose out of the same series of events. I do not kow why these two charges were not heard together as would have been appropriate; but they were not. It seemed that it would have been desirable, in view of the adverse finding on credibility against the appellant, if another District Court Judge had heard the second charge. However, I bear in mind the practicalities of the situation in a provincial centre where it is not frequent that two District Court Judges are sitting at the seame time; however, more particularly, I take note of the fact that the appellant was represented by counsel at the time who could have taken objection to the course that was followed.

In the circumstances, therefore, the appeal must be dismissed. There was no appeal against sentence. However, I think that, in fairness to Mr Hodge, the period of Periodic Detention must be reduced to 4 months because the District Court Judge had said that the 5 months included the Christmas vacation. Accordingly, I give leave to appeal against sentence merely to vary the sentence from 5 months to 4 months' Perodic Detention.

The appellant is to report tonight, 11 July 1986, to the Periodic Detention Centre at Rotorua at 6 p.m. He is now living in Auckland; the Warden of the Periodic Detention Centre here in Rotorua will be able to arrange for him to serve his sentence at a centre in Auckland nearest to

where he lives. He is to report in accordance with the notice to be given to him by the Registrar before he leaves the Court today. The maximum period of Periodic Detention on any one occasion is 9 hours.

I should like Mr Hodge to know that I am sympathetic to his submissions. I can understand that he feels deeply about this matter; he has presented his submissions with great sincerity and restraint. However, the law is such that my hands are tied in a situation like this where the District Court Judge has clearly resolved the question of credibility one way; and there are no grounds in law for upsetting that finding.

Both appeals are dismissed.

R. D. Barkle J

SOLICITORS:
Crown Solicitor, Rotorua, for Respondent.