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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. 26/86

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BETWEEN: ELLIS

Appellant

A N D: MINISTRY OF TRANSPORT

Respondent

Hearing: 19 March 1986

Counsel: Mrs M. Lee for Appellant
Mrs A. Gaskell for Respondent

Judgment: 19 March 1986

ORAL JUDGMENT OF JEFFRIES J.

Appellant on the night of 20 April 1985 at approximately 11.20 p.m. was driving his Hillman Avenger car north bound on State Highway 2 just north of Maungaraki. At this point he came under observation of Traffic Officer M.F. Brotherson and I now recount the evidence of Traffic Officer Brotherson in regard to the driving of appellant:

> "I observed this vehicle on five or six occasions to wander from the left hand lane in which it was travelling, of the two northbound lanes, with the left wheels and approximately half of the vehicle

encroaching into the safety or break-down lane that was marked to the left of the lane at which the vehicle was travelling Sir. At the time that the vehicle was itself in its own lane it was also quite markedly weaving, Sir, and a speed check was obtained over a short distance of 200 metres at just on 100 kilometres an hour, the speed limit at that time being 80 kilometres an hour Sir, on the open road. I stopped the vehicle Sir and some 400 metres prior to the Melling traffic lights. I approached the vehicle and spoke to the driver of the vehicle, (identifies the person sitting next to Counsel in the blue, in the blue shirt and tie). I asked the driver to come back to the patrol vehicle and upon speaking to him Sir his breath smelt quite strongly of intoxicating liquor Sir, his eyes were glazed and bloodshot Sir, and he admitted to consuming some spirits a while ago on a plane and that since his arrival on the plane Sir he had had two more drinks."

It is pertinent to remark as a result of these suspicions on behalf of the Traffic Officer he was asked to take a breath test and he did so and he failed that breath test and ultimately an evidential breath test was taken and he was found by that evidential breath test to have a reading of 650 micrograms of alcohol per litre of breath. I will return to the evidential breath reading and the charge that resulted out of that in a moment.

Out of that driving appellant was charged, firstly, with driving a vehicle on a road while the proportion of his breath was 0650 micrograms of alcohol per litre of breath, and a further charge of driving a motor vehicle on a highway marked out in lanes and not at the time changing lanes, failed to drive entirely within one of the marked lanes. Apparently no

charge of speeding was laid against him. He chose to defend both charges and appeared through counsel at the District Court at Lower Hutt on 13 November 1985.

I come now to the first offence of driving with excess alcohol in the breath. The evidence continued from that recounted earlier in the judgment is that when tested on the evidential breath testing machine at the M.O.T. office he recorded the reading previously given. He was then read the rights he has under the legislation of a period of 10 minutes in which to decide whether or not to accept a reading from the evidential breath testing machine or request a blood alcohol sample. The evidence of the officer was that at 11.47 he had concluded reading to him his rights and the period was then to begin and that at 11.57 he then informed him that the 10 minutes had expired and that he would be charged. In his evidence the officer said:

> "I gave the defendant a period of ten minutes to make up his mind whether he wanted to take the test."

I may also add that the appellant in the lower court chose not to give evidence. The sole point taken in this court is that 10 minutes was not allowed because there is no subdivision of the minutes and that it is insufficient to say 11.47 and give the time ending at 11.57 because that basically does not discharge the onus of proof that the full and complete 10 minutes from the start at one second to the end at 10 with the lapse of that second. For myself I do not think there is any doubt that the onus of proof has not been discharged in this case by the informant in the lower court, and I agree with the observations passed by Quilliam J. in the case of Griffin v M.O.T. (Unreported, M.86/82, Judgment 23 August 1982) when he said:

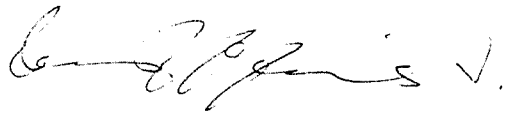
> "In such a situation it is not at all clear why a prudent traffic officer would not, as a matter of practice, allow a little over ten minutes in order to be on the safe side. If he chooses to conclude the matter as precisely as was done here he is accepting the burden of ensuring there is no mistake in his calculations and if there is a reasonable possibility that there may be then, of course, the inference cannot properly be drawn."

It is uncertain whether that judgment was cited to Gallen J. who dealt with an appeal brought by the M.O.T. basically on the same kind of fact pattern. Gallen J. on 18 March 1985 delivered his judgment in which he held substantially in the same manner as Quilliam J. did, and as I intend to do. Gallen J. said this in the course of his judgment in Radford v Kalff (Unreported, M.162/84, Judgment 18 March 1985):

> "In view of the fact that the Officer has referred only to the time in minutes, there has to be at least a possibility that a full period of 10 minutes did not elapse. For example, if the initial information was given at 2202 hours and perhaps 50 seconds and the subsequent information at 2212 hours exactly, a full 10 minutes would not have elapsed."

In my view those two judgments, with great respect, have correctly decided the matter and in these circumstances the onus of proof has not been discharged. The appeal against conviction on the breath alcohol charge is upheld and the conviction is quashed.

There is a further appeal against sentence of three months' disqualification arising out of the driving offence. I have already recounted in the course of this judgment the driving of appellant on this occasion, Section 34 of the Transport Act says that a licence may not be cancelled in a charge such as this unless the driving relates to road safety. The kindest thing I can say about this appeal is to say no more. The appeal against sentence is dismissed.



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