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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 68/89

732

BETWEEN HARSTONE

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 28 June 1989

Counsel: Harte for Appellant
Kovacevich for Respondent

Judgment: 28 June 1989

(ORAL) JUDGMENT OF THORP J

This is an appeal against conviction for driving a motor vehicle with excess breath alcohol contrary to S.58(1)B of the Transport Act 1962 entered in the District Court at Papakura on 2 March 1989.

The sole point of appeal concerns the authority of the Traffic Officer who carried out breath test procedures to have remained in the premises occupied by the appellant as part of the single mens quarters in the quarry operated by his employers.

The Traffic Officers had discovered an abandoned car in a field by the roadside and from that had traced the appellant, rung him at his place of residence which is already described, and had been invited by him to come and see him there. When they arrived at the house or dwelling quarters they asked a third party visitor, who answered the door, if they could see the person who had been involved in the

accident. He permitted them to go through to a living room where, amongst others, were the appellant and a Mr Holgate who was then the Manager of the quarry concerned. One of the two officers who entered the house had discussions with Mr Hartstone, the second became involved in conversation with Mr Holgate.

The findings of the learned trial Judge were that the Officers were present at the house in the first instance on the invitation of Mr Hartstone, that Mr Hartstone did not invite them to leave, and that the statements by Mr Holgate - I am not sure whether His Honour's findings in that regard were that they were a request to leave the premises or were merely enquiries as to the right of the Officers to be there - were in either event made without any authority vested in Mr Holgate to require the Officers to leave.

The case for the appellant was that, granted the Officers were initially given an implied licence to enter the property, they had no right to remain because (i) that licence was terminated by Mr Holgate; and (ii) in any event they should have obtained an express licence.

The second proposition was based on the judgment of Bisson J in Howden v Ministry of Transport (1987) 2 NZLR 747. In my view the judgment does not justify the proposition for which Mr Harte seeks to use it. In that case Bisson J at p.754, after noting that in accordance with the decision of Transport Ministry v Payn (1977) 2 NZLR 50 an officer entering private property requires the express or implied permission of the occupier to do so, indicated that implied licences had to be justified in the particular circumstances existing in each case, and that the fact that the Officers in that case attended at 1.30 in the morning prevented their obtaining any implied licence. The judgment then continues:

> "The appellant was present on the driveway. There was no occasion therefore for the traffic officer to enter the property under any implied permission."

In my view that is a statement about the limits of implied licences and their availability. It is not a statement that if an implied licence is used to obtain entry it must be replaced by an express licence at the earliest practical moment. Certainly that proposition does not appear either in the other judgment in Howden's case or in any part of the leading decision in Payn.

The same topic recently came before the Court of Appeal again in Tipa v Ministry of Transport (CA348/88 judgment delivered 17 February 1989). The circumstances were somewhat similar to those of the present case so far as entry was concerned, and their Honours made it plain that they were not such as to produce a similar result to that in Howden. At p.2 the President, Cooke P, given the judgment of the Court, noted that entry had been made:

> "... for the purpose of enquiring about an accident in which a vehicle belonging to the householder had shortly beforehand apparently been involved. That entry to enquire about the accident, and no doubt to consider the possibility of a breath screening test if reasonable grounds emerged to suspect the consumption of alcohol, falls well within the kind of implied licence exercisable by law enforcement officers ..."

The argument based on Howden's case accordingly fails.

It was in any event, as I saw it, a very secondary argument. The primary argument was that the judgment appealed against failed to recognise the right of the Quarry Manager to require the Officers to leave, or in other words terminate the licence given by Mr Hartstone.

The nature of the authority vested in the Quarry Manager, Mr Holgate, is of course simply a matter of fact to be proven by the evidence, and the evidence was open to more than one interpretation.

The judgment satisfies me that this factual issue was a matter of interest to His Honour the trial Judge, and that having considered the evidence, which is not all one way, he found that Mr Holgate had not the authority he claimed. I am not prepared to find that he was not justified in that conclusion.

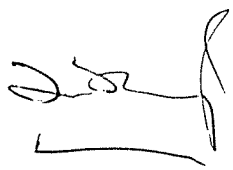
That would have terminated the issues for consideration but for late entry from Mr Harte, who argued on the basis of a passage in Mr Hartstone's evidence that in fact, whether or not Mr Holgate had authority vested in him to require people to leave the premises whenever he thought fit, he was on this occasion acting as agent for Mr Hartstone, so that a request made by him was an adequate termination of the licence. The passage in question appears at the top of p.15 of the case.

Mr Hartstone was asked by Mr Harte "How did you feel about what he (that was Mr Holgate) was doing?" There follows a series of dots indicating, so I am informed, that the record is not complete. But the record then continues: "It was going through my head I had crashed my parent's car which wasn't all that good. Joe was talking on my behalf. I was quite happy. Just a blank. I couldn't think of anything much".

That answer has to be taken with the rest of Mr Hartstone's evidence, which included statements more than once that he had not told the Traffic Officers concerned to leave the premises. And to my mind, although the passage in question could be given the construction which Mr Harte asks me to place

upon it, it would be an extraordinary use of the appellate function to draw such inference in the absence of having heard the witnesses and when it is far from an inevitable construction of the record taken as a whole.

For all those reasons it is my view that the appellant fails to establish that the admitted licence was in fact cancelled and accordingly the appeal must fail and the appeal will be dismissed with costs to the Crown $200.



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