IN THE HIGH COURT OF NEW ZEALAND 4/10 AP 158/91
CHRISTCHURCH REGISTRY

1885

BETWEEN GARY ARNOLD JOPE

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 16 August 1991

Counsel: E C Maciaszek for appellant
J C S Sandston for Crown

Judgment: 16 August 1991

ORAL JUDGMENT OF EICHELBAUM CJ

After a defended hearing the appellant was convicted on a charge that on 2 February 1991 he drove a motor vehicle on Lineside Road while the proportion of alcohol in his breath exceeded 400 micrograms of alcohol per litre of breath, in that it was 764 micrograms. The notice of appeal was against both conviction and sentence, but at the hearing the appeal against conviction was abandoned, it being accepted that the presumption in S 58(2) of the Transport Act 1962 puts the matter beyond doubt. That subsection provides as follows:

> "For the purposes of proceedings for an offence against this Act arising out of the circumstances in respect of which an evidential breath test was undergone by the defendant, it shall be conclusively presumed that the proportion of alcohol in the defendant's breath at the time of the alleged offence was the same as the proportion of alcohol in the defendant's breath indicated by the test."

So far as sentence is concerned however, a line of cases in the Court of Appeal has established that the expression "conclusively presumes" is to be read subject to a gloss. I refer particularly to Transport Ministry v Sowman [1978] 1 NZLR 218, and Bell v Ministry of Transport [1983] NZLR 229. It follows from these cases that notwithstanding the seemingly stringent wording of the presumption, it was open to a defendant to adduce evidence to show his actual breath alcohol level at the time of driving. As to the onus of proof in this respect, in Bell's case the headnote includes the following:

> "If the evidence leaves the sentencing Judge satisfied that there was a material difference between the level ascertained by a test carried out under the provisions of the Act and the true driving level, that may be taken into account in determining culpability for the purpose of arriving at a penalty."

At p 232 Cooke J, delivering the judgment of the Court, said:

> "...we think that Sowman must be accepted as allowing a defendant in attempted mitigation to adduce evidence of a driving blood alcohol level lower, for whatever reason, from the blood test level leading to the conviction....
>
> In our view Sowman's case should not be understood as requiring a District Court to reduce the penalties that would otherwise have been imposed - still less to find special reasons for not imposing a disqualification - merely because evidence establishes on the balance of probabilities that the driving level was lower than the test level or even below the limit. When the material passage in the judgment at p 223 lines 30 to 55 is read as a whole, this clearly emerges. There is an emphasis on discretion".

From this passage it will been that the Court clearly had in mind not only the question of special

reasons for not imposing a disqualification, where patently the burden of proof of establishing special circumstances must lie on the defendant, but also the wider question of penalties generally. In that instance, equally, it was the Court's view that the burden lay on the defendant. I accept that as is usually the case where by statute the burden of proof is reversed, the standard is that of balance of probabilities.

Coming then to the facts, the appellant after drinking earlier in the afternoon, called at Brooks Hotel where he purchased a quantity of beer, a dozen bottles and a dozen cans. When he was later accosted by a traffic officer and taken back to the police station, 11 of the bottles went with him, the twelfth having been found open at the scene, but the dozen cans was nowhere in evidence. There was evidence from a barman at the hotel that the defendant put the beer in his landrover and drove off. When accosted by the traffic officer in consequence of a complaint received, the defendant was some five minutes drive away from the hotel, looking into the engine of his car with the bonnet up. It is common ground that the vehicle had broken down and could not have been driven further. The time for which the defendant may have been at that spot with his vehicle immobilised cannot be established conclusively. On the evidence it is possible that the defendant could have been there for three quarters of an hour. His case in the District Court was that he had drunk the dozen cans, or at any rate 11 of them, at that particular spot and had thrown the cans over the fence or somewhere nearby. There was evidence from the defendant's wife that at some later stage she found seven matching cans at various places in the vicinity, spread over an area of about 500 metres.

The Judge completely disbelieved the defendant's evidence. The factor which the Judge regarded as most

salient was the defendant did not tell, and indeed did not claim to have told, the traffic officer at the scene that he had drunk 11 cans at that spot and that the empty cans could be found with little effort, presumably within throwing distance. The defendant claims that he told an officer about that at the police station, but did not maintain positively that the traffic officer was among the officers told, and clearly the Judge did not believe that the defendant had told traffic officer Broun of this fact. At one stage of the hearing the notes of evidence indicate that the Judge overlooked or had forgotten that counsel had put it to the traffic officer that this explanation had been given to him at the police station. However, counsel pointed out the correct position at the time, and there was nothing to indicate that at the stage where the Judge delivered his oral judgment, he was under any misapprehension on the point.

For present purposes the appellant has to show not merely that the Judge should have given him the benefit of the doubt on the question of post-driving drinking, he must establish that on the balance of probabilities the Judge should have found in favour of the defendant that the 11 cans were consumed at that stage. On the findings of fact made by the Judge, which turned almost entirely on credibility and were fully open to him, that is an impossible task.

It was accepted that so far as disqualification was concerned, the appeal was academic because on any view, on conviction the defendant became liable to an order under S 30A of the Transport Act with the consequence that under S 30C(3) no order for removal of the automatic disqualification could be made within two years. That in fact was the period of disqualification imposed. It was not argued that (on the assumption that substantially all the alcohol was consumed before the appellant stopped) the fine imposed of $1500 was manifestly excessive or

inappropriate to the appellant's means. Accordingly, the appeal is unsuccessful and is dismissed.

Thomas Eichelbaum CJ

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