File

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.277/91

BETWEEN BRIAN NICHOLAS SOKOLICH

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 2 November 1991

Counsel: K.P. McDonald for appellant
Miss K. Evans for respondent

Judgment: 22 November 1991

(ORAL) JUDGMENT OF BARKER J

This is an appeal against the conviction of the appellant and the District Court at Otahuhu on 16 April 1991 on a charge of driving with excess blood alcohol.

The facts, as found by the learned District Court Judge are not in dispute. The essential feature is that the appellant had been drinking at a function in Wellington on the night before his apprehension by a traffic officer on 6 July 1990 at about 10.a.m. At the function at an hotel in Wellington, he had stopped drinking alcohol at about midnight. He went to bed at the hotel and caught a plane from Wellington to Auckland; he picked up his car at the airport; at about 10.a.m. on 7 July 1990 he was

stopped by a traffic officer who had checked him travelling at 80 kilometres an hour in a 50 kilometres an hour area.

The officer stated that, whilst speaking to the appellant, his breath smelt strongly of liquor, his eyes were glazed, he admitted to consuming an unknown quantity of beer and he said he had had his last drink at midnight. The officer said that he had good cause to suspect that recently prior to drinking the appellant may have consumed alcohol. Accordingly, the officer commenced breath screening test procedures which eventually resulted in the appellant being given a blood test which showed a blood alcohol reading of 111.

There were several matters of defence advanced before the District Court Judge; on appeal there is only one point taken. I add, on the facts, that the officer said in cross-examination that he had no reason to doubt the appellant when he said that his last drink had been at midnight.

The sole point on the appeal is whether the officer had formed a reasonable cause to suspect, in the words of S.58A, that the appellant had "recently before driving the vehicle ... consumed" alcoholic drink.

The District Court Judge rejected a submission that the officer did not have proper cause to suspect, which on

authority has to be decided on objective grounds; See *Police v Anderson* [1972] 233, 248. It is the judgment of the traffic officer that is important. The Court cannot substitute its own view or the traffic officer's; See *Police v Anderson* at 248 and *Price v Police* (M.355/83, Wellington Registry, 11 November 1983), where Hardie Boys J said -

> "For this Court to decide that grounds existed on which the officer could have acted had he chosen to do so would be to usurp the role of the officer. That is not the Court's function."

This point is relevant because clearly the traffic officer in this case had a further reason for administering the breath test procedure, namely the very recent commission of the offence of speeding by the appellant. However, the traffic officer preferred to rely on the recent consumption of alcohol ground as his reason for requiring the breath test procedure. The decision of Hardie Boys J makes it clear that this Court cannot substitute another available reason for conducting a breath screening test should the reason chosen by the traffic officer be proved to be found wanting.

The submission made is that the consumption of alcohol, 10 hours before the driving, cannot be said to be a reason to set in motion the breath screening test. The learned District Court Judge rejected that view in these words -

> "Recently is a word that derives its impact from context. 'Recent' in some contexts may mean only within a few minutes or even seconds previously. In other contexts, consideration of historical matters for example, an intervening period of some years might still enable an event to be described as a recent event.
>
> In determining what the word 'recently' means in the drink'drive context it is important to keep in mind the purpose of the legislation, the mischief at which it is aimed. It is legislation designed, not one might say always designed with any great coherence or polish, but designed nonetheless, to enable drivers who might reasonably be considered to be effected by alcohol to be put through statutory testing procedures. It involves balancing between the rights of the citizen and the need to preserve safety on the roads.
>
> In my view, where a driver exhibits physical signs of the effects of alcohol: where it can be smelled on his breath, where his physical appearance such as of his eyes, or his co-ordination, is indicative of the effects of alcohol then within the meaning of the statute an officer is entitled to conclude recent consumption. 'Recent' being in the sense of within a timeframe such that the effects of the consumption of alcohol are still with the driver to some degree."

Counsel for the appellant relied on a judgment of Judge Murray in the District Court ***Ministry of Transport v Sinclair*** (1985) 3 DCR 188. That was a fairly similar situation to the present; the defendant there had consumed alcohol at a party, gone to bed, slept for 8 hours and the next morning was stopped at a random check-point. The traffic officer noticed a strong smell of alcohol and the defendant's eyes were blood-shot.

The District Court Judge dismissed the prosecution on the grounds that, objectively speaking, the traffic officer could not hold that the defendant had "recently" before driving consumed alcohol. Judge Murray came to the view

that the officer had not taken into account all relevant material which was before him or available to him upon appropriate enquiry.

However, in an unreported decision ***Wilson v Police*** (M.138/83, Dunedin Registry, 10 November 1983) Cook J noted the dictionary definitions of "recent" in the Shorter Oxford English Dictionary as "Lately done or made; that has lately happened or taken place" "of a point or period of time: not long past". He considered that these definitions were not much assistance because -

> "Whether or not an event may be said to have happened recently, must depend very much on the context, upon the time scale which the user of the word must be understood to have in mind. When one is speaking of the consumption of alcohol and the affect it may have upon the consumer to drive, it must be a matter of hours, the time during which the alcohol ingested may continue to affect that person's capacity. When an officer observes that the breath of a person who has just stopped driving smells strongly of alcohol, I cannot but think that he has good cause to suspect that the person has recently consumed drink before driving the vehicle or while driving it; especially as that is all that he has to suspect, not that any particular quantity has been consumed, or with particular consequences."

It seems that Cook J was saying in a succinct way what the District Court Judge was saying here. The word "recently" must depend on the circumstances and the context. Part of the context must be the well-known fact that alcohol takes a considerable time for its effects to clear the human system. There have been many cases (of which this case and ***Sinclair's*** case are but examples) where a person who has had a heavy intake of

alcohol the night before mistakenly believes that after a sleep the effects of the alcohol will have been eliminated and that it is quite safe to drive. That is clearly not the case. I think it is a matter on which judicial notice can be taken that a person who has been drinking heavily the night before may still in the morning exhibit a glazed look and have a breath which smells of stale liquor.

I cannot follow the decision of Judge Murray in the case of ***Ministry of Transport v Sinclair*** which must be therefore overruled. I prefer to adopt the same line of reasoning as Cook J in ***Wilson v Police***. Mr McDonald properly pointed out that there was no evidence in that case as to the time interval between drinking and the apprehension of the suspect. The District Court Judge put it in this case -

> "The officer is not charged by law with conducting some sort of roadside judicial exercise of determining a situation with finality. What the law requires is that he has good cause to suspect, in other words that he has a suspicion on proper and reasonable grounds."

It is impossible in the circumstances of the present case to hold that the officer did not have a suspicion or proper reasonable grounds that the appellant had been recently drinking, giving "recently" the meaning appropriate in the context.

Accordingly, the appeal must be dismissed.

However, I do note one further matter raised by Mr McDonald. This appellant was convicted on 16 April 1991. The notice of appeal was filed in the Otahuhu District Court on 9 May 1991. It was not received in this Court until 25 October 1991 with all the associated documentation; a date for the hearing of the appeal was then given promptly. Mr McDonald produced a letter which he had written to the Otahuhu District Court on 9 July 1991 asking what progress was being made with processing the appeal file; counsel stated he had no reply. Counsel later telephoned an official at the Otahuhu District Court and was advised that the notes had been with the Judge since 12 August 1991 and had been returned for amendments.

The appellant was apparently concerned, as was his solicitor that the appeal had not reached this Court; he had chosen not to apply for a suspension of cancellation pending appeal.

One would hope that appeals can come to this Court with more despatch than appears to be the case on this occasion. I acknowledge that there may well be some good reason for the delay. However, from the appellant's point of view it has been most unfortunate that there has been this delay.

R. D. Barker, J.

Solicitors: Crown Solicitor, Auckland, for respondent
K. McDonald, Takapuna, for appellant

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