

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP 313/91

BETWEEN

TREVOR JAMES FRIAR

Appellant

A N D

MINISTRY OF TRANSPORT

Respondent

Hearing: 6 March 1992

Counsel: Appellant in Person
Miss V. Shaw for Respondent

Judgment: 6 March 1992

ORAL JUDGMENT OF TEMM J.

This is a case in which the appellant was convicted on 21 August 1991, at the District Court Otahuhu, of driving a motor vehicle on a road, namely East Tamaki Road, while the proportion of alcohol in his breath exceeded 400 mcg of alcohol per litre of breath, in that it was 1301 mcg of alcohol per litre of breath.

Two traffic officers had given evidence that they came upon the appellant's vehicle parked at the side of the road, in what they described as an unusual angle, in a rural area some distance from any residential area. At the time they did so it was in the early hours of the morning and when they investigated they found the appellant was in the car sitting, as they said, as if he were in a trance. They shook him lightly to arouse him and when he

came round his speech was very slurred and virtually incoherent. They gave evidence of certain questions they put to him to which I shall return.

The defence in the case, put by the appellant, was that he had been parked at the side of the road for several hours and that part of that time he had been accompanied by a friend whom he called to give evidence, a Mr Raymond Thomas. Mr Thomas' evidence was quite vague but its general burden was that he had been given a ride in the appellant's motor car where they had a beer or two, which led to some sort of altercation as a result of which Mr Thomas walked off. He was not able to estimate how long he had been there, nor could he say what time of night it was. His evidence generally is very vague.

The central question in the case which had to be proved beyond reasonable doubt was that the appellant "did drive a motor vehicle on a road, namely East Tamaki Road", while the proportion of alcohol in his breath exceeded the permissible limit. As to this the traffic officers' evidence is not satisfactory. The first traffic officer said that when he got out of his patrol car and walked to the front of the defendant's vehicle he noticed, while doing so, the bonnet on the defendant's vehicle was "still very warm". He then went on to depose to his conversation with the appellant and the passage in his evidence reads as follows: (p.2)

"He gave his name as Trevor James Friar, a pump attendant. He produced a driver's licence for the class of vehicle he was driving. The defendant smelt strongly of liquor, his eyes were very bloodshot. I asked him to step out of the vehicle and when he did so he was very unsteady on his feet and almost fell. I had to catch him before he hit the ground. Once he got his footing he was able to stand unaided.

He said he had been driving from Maraitai, he had felt sick and pulled over and had been sick on

the side of the road. I looked into the grass area behind the car and could see there was something resembling vomit. This gave me good cause the defendant had recently consumed liquor before driving or whilst driving."

That traffic officer did not question the appellant as to when he had been driving. The second officer seems to have played a subordinate role in the matter. He was the passenger in the patrol car and left most of the talking, it appears, to the other officer. The relevant passage from this officer's evidence is as follows: (p.6)

"When we initially pulled up alongside the defendant's vehicle it appeared like he was semi-slumped over to the wheel and I looked at him and he was looking directly back at me but I got not reaction. It was like he was in a gaze(sic) or he was dreaming or something. As I previously said, I along with Traffic Officer Pizinski subsequently spoke to him. He had told me that he had left Maraitai and was on his way home. At that point I went to the front of the vehicle and I could feel that the engine of the vehicle was still quite hot, I could feel the draft coming from the grill area of the vehicle. I also went to the rear of the vehicle and felt the exhaust pipe on the vehicle and that also was quite hot.

I then asked the defendant did he know where he was. He further stated that he was on his way home and that home was in Bucklands Beach. I then told him that he was enroute or if he followed the route that he was on it would take him to Manukau City, the back road."

It appears that in that conversation anyway Mr Friar, the appellant, did not make any mention of having had a passenger in his car at some earlier stage in the evening.

The only other witness for the prosecution was another traffic officer who deposed to the fact that about three weeks after the incident the appellant came into the Ministry of transport office at Manukau and said that

he wished to make a statement which she then took in writing. That statement has been produced. In the statement the appellant makes no mention of his passenger having been in the car but the general burden of the statement is quite clear, that he complained that he had been in the car for some time before the traffic officers disturbed him. He said while he was in the car he had been drinking some beer from a quantity he had in the back.

There is no doubt that it is proved to the requisite standard that Mr Friar's blood alcohol level exceeded the permissible limit but the question is whether or not it has been proved beyond reasonable doubt that he was driving a vehicle on East Tamaki Road while in that state.

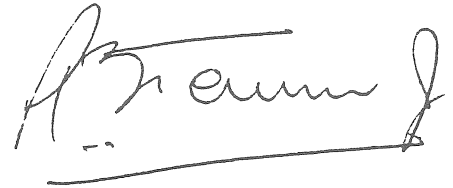
The traffic officers did not precisely question him as to when he had been driving and for how long. As a result the Learned Judge in the District Court was placed in the awkward position of having to reach a conclusion. At p.19 of the record the relevant part of her judgment is as follows:

(The Traffic Officers came upon the scene) "they spoke to a person whom they say was sitting in the driver's seat. They describe his alighting from the motor vehicle with the ignition keys in his hand. They both indicate that the vehicle was warm to the touch. Traffic Officer Pizinski placed his hand on the bonnet of the car and it felt warm. Traffic Officer Arthur placed his hand near the grill of the motor vehicle and also on the exhaust pipe and it was warm to the touch. I am satisfied that it would not have been warm to the touch had it in fact been parked there for the several hours described by the defendant."

The difficulty with that conclusion is that the fact the motor was still warm does not prove he had been driving after he had been drinking. There is a gap in the evidence which has not been closed. One might entertain the

gravest suspicions about the story put forward but nevertheless the evidence for the prosecution does not close the gap to prove that the appellant was driving on that particular road with an excessive amount of alcohol in his breath at the time. The appellant says in short that he had been driving and then drinking. Furthermore, the blood alcohol level as proved was not related in evidence back to the appellant's driving, whenever it was that that took place.

In the result the appeal must be allowed and the conviction quashed.

A handwritten signature in black ink, appearing to read "A. Braum". The signature is written in a cursive style and is underlined with a single horizontal line.

Solicitors: Crown Solicitor, Auckland for Respondent

