IN THE HIGH COURT OF NEW ZEALAND 30/7
AUCKLAND REGISTRY AP 99/93

1134

BETWEEN FISHER

APPELLANT

A N D POLICE

RESPONDENT

Hearing: 10 June 1993

Counsel: B.J. Hart for Appellant
V.J. Shaw for Respondent

Judgment: 10 June 1993

ORAL JUDGMENT OF ANDERSON J

This is an appeal against conviction entered in the District Court at Auckland on 25 March 1993 in respect of an information for driving with excess breath alcohol on 9 June 1992. The only evidence in support of the information was given by a Police Constable Rangi. She said that the appellant was apprehended about 1 a.m. on 9 June 1992 in Pitt Street, Auckland in consequence of his erratic driving; that she administered a breath screening test which the appellant failed; the appellant was taken to the Harbour Bridge Alcohol Testing Suite; that the appellant was given an evidential breath test by means of an Intoxilyzer device; that this device gave a reading of over 1100 micrograms of alcohol.

Two specific matters were raised by way of defence in the District Court. First that the evidential breath test had not been conducted by Constable Rangi but

by a male police officer who did not give evidence. Second that the appellant had not been accorded his rights in respect of legal advice pursuant to the New Zealand Bill of Rights Act 1990. The second matter is not pursued on this appeal. It is contended on behalf of the appellant that in the circumstances of the case the learned District Court Judge ought to have been left in reasonable doubt on the issue whether Constable Rangi conducted the evidential breath test. If there were a reasonable doubt on that issue then there is insufficient evidence before the Court of the offence alleged.

Constable Rangi insisted that she had carried out the test whereas the appellant insisted that Constable Rangi had not carried out the test. Independent support for the appellant's contention was seen in the fact that Constable Rangi denied giving the appellant a Notice of Advice of Positive Evidential Breath Test such as is required in cases where an evidential breath reading is in excess of 400 micrograms but does not exceed 600 micrograms. Given the reading in this case no such advice was legally required. Nor was the appellant entitled to the option of giving blood for testing purposes. Notwithstanding the absence of legal necessity for such advice he was apparently given it. Constable Rangi, until confronted with the document form MOT 4165 which bears handwriting by her, insisted that no such advice had been given. It is argued on this appeal that the unreliability of the constable's evidence in connection with the MOT 4165 form so diminished the reliability of her evidence on the issue whether she in fact conducted the evidential breath test that the learned District Court Judge ought to have been left in a state of reasonable doubt.

Counsel for the respondent points out that the reliability of Constable Rangi on this issue was specifically addressed by the learned District Court Judge who found deliberately and firmly that the constable was a reliable witness in connection with the issue as to whether she or someone else had conducted the test. In

answer Mr Hart submitted that the evidential relevance of the particular document was overlooked by the learned District Court Judge. He submitted that the Judge evaluated the relevance of the document in terms of procedural propriety rather than witness reliability.

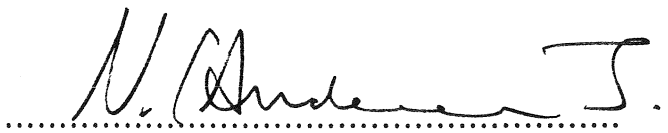
Having read the learned District Court Judge's decision more than once I think, with respect, that Mr Hart misinterprets what the learned District Court Judge says on this issue, particularly at p.B16 of the Court record. It is not for this Court on appeal to attempt to undertake an independent assessment of the reliability of witnesses who were observed at length giving their evidence by the District Court Judge. This does not mean that findings of credibility or reliability at first instance based on the assessment of demeanour are entirely immune from appellate review. However, in this case the whole of the evidence has to be considered and whereas the case for the appellant may derive support from the MOT form I have mentioned, there are other documents which reinforce the evidence of Constable Rangi. The evidential breath testing device readout notes that the relevant enforcement officer is Constable Rangi; so also does MOT form 4165. These forms were apparently and understandably completed about the time the appellant was processed. There is no reason whatever why Constable Rangi's name should be entered on these documents as the enforcement officer at the time the tests were being carried out if she were not in fact the relevant enforcement officer.

The learned District Court Judge also took into account the impairment of the appellant by reason of alcohol, quite independently of the level indicated by the evidential breath test. The appellant had been drinking quite significantly. His own evidence shows this. In addition he could not remember the extent to which he was advised about his rights pursuant to the Bill of Rights Act. He asserted that he had signed the standard form used by the former Ministry of Transport without understanding the purport of such form. His signature appears on this form not

only substantially immediately below but actually intercepting the printed advice "*I have been advised of my rights to consult and instruct a lawyer without delay*". The only possibilities in relation to the appellant's own evidence concerning his degree of understanding of his rights pursuant to the New Zealand Bill of Rights Act 1990 are either that through wishful thinking he no longer recalls exactly what happened or through gross intoxication he was too pie-eyed to see what he was actually signing at the time. Either possibility has to be taken into account along with all of the other relevant evidence in determining whether this Court would be justified in holding that the learned District Court Judge ought to have been left in reasonable doubt about the reliability of Constable Rangi's evidence.

Having had the benefit of very helpful submissions from Mr Hart I am nevertheless quite unpersuaded that the appeal has merit and it is dismissed.

The respondent asks for costs. Often there are justifications for the award of costs. The respondent, however, rendered itself vulnerable to litigious attack in this case through unorthodox documentary procedures and I am not minded to endorse the incidents of inexperience by giving costs in such cases.



N.C. Anderson, J.

Solicitors for Appellant: B.J. Hart, Auckland

Solicitors for Respondent: Crown Solicitor, Auckland

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