NZLR

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IN THE HIGH COURT OF NEW ZEALAND **AP 334/96**
AUCKLAND REGISTRY

LOW PRIORITY

BETWEEN: **D**

Appellant

AND: **NZ POLICE**

Respondent

Hearing: 18 March 1997

Counsel: MR F R Mitchell for Appellant
C O'Connor for Respondent

Judgment: 24th MARCH 1997

RESERVED JUDGMENT OF PATERSON J

Solicitors:

for Appellant
Meredith Connell, Auckland for Respondent

On 25 August 1996 there was a motor accident in Glenview Road, Glen Eden. Mr D was charged, convicted and sentenced under the provisions of s58 (1)(a) of the Transport Act 1962 of driving a motor vehicle on a road while the proportion of alcohol in his breath exceeded 400 mcgrms of alcohol per litre of breath in that it was 775 mcgrms of alcohol per litre of breath. Mr D now appeals both against conviction and sentence.

Conviction

The point on appeal was that there was no evidence from which the District Court Judge could infer that Mr D was the driver of the vehicle.

The evidence given by a police constable who arrived at the scene after the accident, included -

> *"I spoke with the driver of this vehicle whom I identify as the defendant sitting next to counsel, gentleman in the white shirt. I suspected alcohol was involved. I requested him, I required him to undergo forthwith a breath screening test to which he agreed."*

The submission was made to the District Court Judge that there was no evidence that Mr D was the driver and his response to this submission was -

> *"... the only evidence about this issue was that that I have quoted before, when the officer said I spoke to the driver who is the defendant seated next to counsel in court. That was not challenged. It is evidence that she spoke to the driver who is the defendant.*
>
> *Mr Mitchell submits that this is insufficient because there is no way of knowing from the evidence what (sic) was the basis of her conclusion that he was driver was. (sic) Mr Mitchell is conducting the case, he chose not to ask any questions about it. Her evidence was that she spoke to the driver, that is where the facts remain in the case and I see no merit in that submission."*

Mr Mitchell, in effect, made two submissions -

(a) There was no evidence on which the Judge could draw the inference that Mr D was driving; and

(b) The way the Judge dealt with the matter was not correct. Even if an inference could have been drawn, the Judge should have still asked himself whether he was satisified beyond reasonable doubt that Mr D was the driver. In other words, the Judge has to more than draw an inference. That inference must take him to the position where he is satisfied beyond reasonable doubt.

Mr Mitchell says it was wrong in principle to determine that because there had not been cross-examination of the police constable, it was possible to draw an inference from her statement.

There were two pieces of evidence upon which a trier of fact was in my view, entitled to draw inferences. First, there was the statement by the police constable that Mr D was the driver. Secondly, there was the statement that he agreed to undergo forthwith a breath screening test, something which a person would not normally submit to unless he was driving the vehicle. It would have obviously been better for the police constable to have given evidence as to why she said Mr D was the driver when she does not appear to have arrived on the scene until after the accident. However, she made the statement, it went unchallenged, and this, combined with Mr D agreement to undergo the breath screening test, in my view, is a sufficient basis to draw an inference that Mr D was the driver. A Judge in a jury matter is entitled in his discretion to advise the jury that the accused has refrained from giving evidence. This discretion enables a Judge in an appropriate case to comment to the jury when the accused's failure to give evidence may be relevant to his guilt or otherwise. In this case, Mr D did not give evidence to explain why he underwent the blood test or to challenge the categoric statement of the police constable that he was the driver. Nor were these facts challenged in cross-examination. No person is required to give evidence or to provide an explanation until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction. When such proof has been given, as in my view it was given here, if the accused offers no explanation or contradiction, then an adverse inference may be legitimately drawn from an accused's silence. [1] The fact that Mr D agreed to undergo a blood test did in my view, require an explanation.

I do not see this as creating an onus on Mr D to prove his innocence but see it as a case where there was sufficient evidence before the Court for it to draw the inference that Mr D was the driver and Mr D by not giving evidence and by not cross-examining, did not challenge the basis for such an inference. As the

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[1] ***R v Burdett*** (1820} 4 B & ALD 95 and ***Hall v C I R*** [1965] NZLR 184

determinor of fact, the Judge, just as a jury can in a jury case, can draw the inferences which the Judge obviously drew in this case.

The Judge in this case was an experienced Judge and although he did not use the words that he was satisfied beyond reasonable doubt that Mr D was the driver, I have no doubt that this is what he meant when he made the statements he did. In summary the Judge was entitled to draw the inference he did and by drawing it and applying it, he satisfied himself beyond reasonable doubt that Mr D was the driver. The appeal against conviction fails.

Sentence

After conviction Mr D did give evidence to the effect that he only drank one pint of beer in the hour before being breath tested but drank several pints of coke in the space of about four or five hours before being tested. He alleged that someone must have put something in his coke which he later found out someone did. Mr D said that someone subsequently told him that he had put beer and vodka in the coke and he gave the name of the person who allegedly spiked his drink. He was cross-examined on the fact that the officer smelt alcohol on his breath and his face was flushed. He said he felt fine and did not realise that he had been affected by alcohol and he set out to establish that there were special reasons why he should not be disqualified from driving. The Judge found that there were no special reasons. While I accept that there is no statement from the Judge that he did not accept the spiking explanation, I am also of the view that the rejection of special reasons in this case was the decision that the Judge could have come to on the evidence before him as he had heard Mr D give his evidence on the sentencing matter. I am not persuaded that the sentence was wrong in principle and the appeal against sentence is dismissed.

Result

Both the appeal against conviction and the appeal against sentence are dismissed. The disqualification ordered by the Judge shall take effect as from 27 March 1997.

B J Paterson J