IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2009-404-000093

ARTHUR TUAKE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing: 15 June 2009

Appearances: J Maddox for the Appellant
S Pidgeon for the Respondent

Judgment: 17 June 2009 at 3:30pm

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 17 June 2009 at 3:30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:

J Maddox, P O Box 11 342, Ellerslie, Auckland
Crown Solicitor, P O Box 2213, Auckland

[1] Mr Tuake seeks to appeal two convictions entered by Judge J G Adams in the District Court at Manukau on 16 September 2008 and the sentences subsequently imposed.

Background

[2] Mr Tuake and two others were riding motor cycles in a westerly direction on East Tamaki Road on 27 June 2008. As a result of events which occurred in the vicinity of the intersections of East Tamaki Road and Great South Road, and Great South Road and Shirley Road, Mr Tuake was charged under s 52(1)(c) of the Transport Act 1998 with failing to comply with a lawful requirement given to him by a traffic officer. Further, he was charged with driving a motor vehicle in a manner which having regard to all the circumstances of the case, might have been dangerous to the public contrary to s 35(1)(b) of the Transport Act.

[3] Mr Tuake pleaded not guilty and the matter proceeded to a hearing. Mr Tuake was represented by a Ms Treloar. Judge Adams heard evidence from a Constable Templey and from Mr Tuake. He found that the two charges had been proved. He convicted Mr Tuake on the failing to comply charge and fined him $200, and Court costs of $130. On the dangerous driving charge, the Judge convicted him, and disqualified him from holding or obtaining a driver's licence for a period of six months.

[4] One of the other motorcyclists – a Mr Paruru – faced the same charges. His case was also heard by Judge Adams on 16 September 2008. The informations against him were dismissed.

[5] I do not know whether charges were laid against the third motorcyclist.

[6] Mr Tuake initially appealed by way of a notice of appeal dated 14 October 2008. The grounds of appeal were as follows:

a) The sentence was excessive.

b) The Judge incorrectly applied the law to the facts.

c) The Judge accepted contentious factual evidence.

d) Miscarriage of justice – based on the failings of counsel to properly conduct/defend Mr Tuake.

e) Others involved accused in the incident were dealt with differently and were discharged.

[7] The appeal was set down for hearing on 3 February 2009.

[8] On 29 January 2009, Mr Heather, who was then acting for Mr Tuake, requested an adjournment. The adjournment was requested because Mr Heather had not been able to obtain a copy of a decision given by Judge Adams on the same day in relation to Mr Paruru

[9] A telephone conference call was convened before Harrison J. His Honour was not prepared to adjourn the hearing of the appeal. He issued a minute, and *inter alia* recorded that he had had an informal discussion on the merits of the appeal with Mr Heather, and that as a result Mr Heather was to confer with Mr Tuake and advise the Criminal Registry as soon as possible whether or not the appeal was to proceed.

[10] For some reason which is not clear from the Court file, the hearing on 3 February 2009 did not proceed. Rather on 12 February 2009, Mr Tuake signed and filed a notice of abandonment of the appeal. That notice of abandonment recorded that he did not intend to further prosecute the appeal, and that he was abandoning all further proceedings concerning it.

[11] On 24 March 2009, a fresh notice of appeal against conviction and sentence was filed by Mr Tuake. That notice is dated 20 March 2009. The grounds of appeal were substantially the same as those advanced in the first notice of appeal. They were as follows:

a) That Judge Adams incorrectly applied the law to the facts of the case.

b) That Mr Tuake's counsel failed to cross-examine Constable Templey in respect of inconsistencies in his *viva voce* evidence, and that this led to a miscarriage of justice.

c) That the charges against Mr Tuake's co-offender were dismissed on the same day, and on essentially the same facts.

[12] Clearly this second notice of appeal was well and truly out of time. Section 116 of the Summary Proceedings Act 1957 requires that any notice of appeal be filed within 28 days after the defendant has been sentenced or otherwise dealt with.

[13] There was no application for an extension of time. Rather Mr Tuake stated in his second notice of appeal:

> That when my earlier appeal was abandoned I thought that the matter was just being taken out of the Court list until the written decision of the co-offenders case was made available to my lawyer.
>
> I would not have abandoned my appeal if I thought that to do so would be determinative of my case.

These assertions were made in the notice of appeal itself. Mr Tuake has filed two affidavits in support of his appeal. In neither affidavit does he elaborate on these matters.

[14] The Crown did not initially take issue with the late filing of the notice of appeal. Rather I raised the issue direct with counsel when the appeal was called before me on 15 June 2009. I pointed out to counsel that I had a discretion to extend time and referred them to s 123 of the Summary Proceedings Act 1957. Mr Maddox was appearing for Mr Tuake. He had not been involved with the abandonment of the first appeal and could not offer any fuller explanation as to what had occurred. He did make an oral application for an extension of time. Ms Pidgeon, appearing for the Crown, objected to any extension of time. I discussed with counsel the fact that one of the factors relevant to the exercise of the discretion to extend time under s 123 is whether the proposed appeal has sufficient *prima facie* merit such that it is appropriate to grant an extension of time. Both counsel had prepared written submissions in support of their respective positions on the substantive appeal. It was

agreed that both would proceed to speak to those submissions. I also invited both to make any additional submissions they wished to advance in relation to whether or not time should be extended. Neither took any great advantage of that opportunity.

Extension of time under s 123

[15] Relevantly s 123 of the Summary Proceedings Act 1957 provides as follows:

> (1) Any Judge of the [High Court] may, on the application of the appellant or intending appellant, extend any time prescribed or allowed under this Part of this Act for the filing of any notice or the stating of any case or the doing of any other thing in respect of any appeal or proposed appeal to the [High Court].

[16] The section gives the Court a broad discretion to extend the time prescribed by the Act for the filing of any notices. It is a general provision, and there are no specified criteria to assist in determining when the discretion should be exercised. While it is perhaps a trite observation it seems to me that the discretion is given essentially for the purpose of avoiding miscarriages of justice.

[17] In earlier cases, the Courts have indicated that the following factors may be relevant:

a) Whether the failure to file the necessary papers within time has arisen in circumstances which ought reasonably to be excused.

b) Whether the proposed respondent has suffered any prejudice by the delay, being prejudice of a kind other than that which is inherent in the extension of time itself.

c) Whether the proposed appeal has sufficient *prima facie* merit to warrant the extension of time sought.

d) Such other matters as may bear on the exercise of the discretion in any particular case.

See e.g. *Police v Hill* [1990] 6 CRNZ 280 at p 281, and *Cleggs Limited & Anor v Department of Internal Affairs* HC AK M1032/84, per Thorpe J, 5 September 1984.

[18] I will consider these factors to the extent that they assist in the present context.

Circumstances relevant to the failure to file and serve the notice of appeal within time

[19] In this case, there is no material properly before the Court to explain why the second appeal has been filed some five months out of time and after the first appeal was abandoned.

[20] The first appeal was filed within the permitted timeframe. It was then withdrawn. Mr Tuake was represented by counsel at that time. The notice of abandonment was signed by Mr Tuake personally. It is clear in its terms. While Mr Tuake asserts that the earlier appeal was abandoned because he thought the matter was being taken out of the Court list until the written decision given by Judge Adams in relation to his co-offender was made available, that seems to me to be an inherently unlikely explanation. The assertion is inconsistent with Harrison J's minute. I do not know whether the content of the minute was communicated to Mr Tuake. That is because there is no sworn evidence from Mr Tuake. Rather there is the simple assertion made in the notice of appeal. I also observe that there is no affidavit signed by Mr Heather, who was then acting for Mr Tuake. I contrast this with the substantive appeal. One of the grounds raised in the proposed appeal is an alleged failure to properly cross-examine by Ms Treloar as counsel then representing Mr Tuake. An affidavit has been filed by Ms Treloar to explain what occurred and why.

[21] Moreover even if Mr Tuake's assertion in the notice of appeal is accepted, there is nothing to explain the six week delay between 12 February 2009 and 24 March 2009 when the second notice of appeal was filed. There is no evidence

confirming when Judge Adams' decision in the Paruru case became available or what efforts were made to obtain it.

[22] In the circumstances, I have considerable difficulty in concluding that Mr Tuake's failure to file the second appeal within time ought reasonably to be excused. I say this for the simple reason that no reasonable excuse has been advanced.

Prejudice to Police

[23] There is nothing to suggest any prejudice to the Police other than that inherent in extension of time itself. Ms Pidgeon did not suggest otherwise.

Merit of proposed appeal

[24] The appeal is advanced primarily on the basis that Mr Tuake's convictions are unsafe, and that it is in the interests of justice that they be quashed.

[25] It is asserted that Ms Treloar appearing for Mr Tuake at the time requested an adjournment, so that she could properly prepare for the matter. That adjournment was declined by Judge Adams, and it is said that as a consequence, Ms Treloar was not in a position where she could mount a meaningful challenge to the Police's evidence. It is then said that as a result, Judge Adams found in favour of the prosecution. It is said that counsel for Mr Paruru did challenge the Police's evidence, and that as a result, Judge Adams accepted that the officer's evidence was inaccurate in various respects, and dismissed the information against Mr Paruru. It is asserted that had a similar challenge been made to the Constable's evidence by counsel appearing for Mr Tuake, that the outcome would have been different, and the convictions would not have been entered.

[26] Affidavits have been filed by Mr Tuake in this regard, and also by Ms Treloar. Ms Treloar has confirmed that she interviewed Mr Tuake on 11 September 2008, but that she was unable "to access detailed disclosure" of the Police evidence

prior to the hearing on 16 September 2008. Mr Tuake says that he did not have much time to speak with Ms Treloar, but he did instruct her that the Police officer's evidence was incorrect in various specified ways. He states that Ms Treloar did not challenge Constable Templey's evidence, and that Ms Treloar could not and did not represent him properly.

[27] I have read the notes of evidence given before Judge Adams. Constable Templey gave evidence that on the day in question he was driving in a marked Police vehicle in a southerly direction on Great South Road, and that he stopped at traffic lights at the intersection of Great South Road and East Tamaki Road. He heard and then saw three motorcyclists enter the intersection of Great South Road and East Tamaki Road. Those motorcyclists were proceeding in a westerly direction along East Tamaki Road. He said that the motorcyclists stopped beyond the limit line and within the intersection itself. Constable Templey said that he then proceeded into the intersection, and that he activated the red and blue flashing lights on his Police vehicle. He pulled up beside the motorcyclists, and instructed the rider of "one of the bikes" to pull over onto the side of the road on Great South Road when the light turned green. He then stated that the motorcyclist proceeded to yell threats at him, telling him that he had already been pulled over earlier that day, and that he was not going to stop. He said that the rider made a gesture to him.

[28] Constable Templey did not identify which rider he told to pull over. It is however reasonably clear from his evidence that the rider of the motorcycle who yelled threats at him and who indicated that he was not going to stop, was the rider who he instructed to pull over onto the side of Great South Road.

[29] Mr Tuake gave evidence, and he accepted that when he and his colleagues stopped at the intersection, Constable Templey drove in front of them, and told them to pull over. Although Constable Templey was not cross-examined in relation to these matters, it was Mr Tuake's evidence:

a) That Constable Templey told him and his companions to pull over.

b) That he got angry and remonstrated with Constable Templey, and made a gesture towards him.

[30] Constable Templey said that he had activated the red and blue flashing lights on his Police vehicle when he pulled up beside the motorcycles and instructed the rider of one of the motorcycles to pull over onto the side of Great South Road.

[31] Thereafter, the three motorcyclists proceeded to turn right into Great South Road. Constable Templey said that they turned right on a red light. Mr Tuake denied that, and said that they waited until the lights were green. Constable Templey said that the three motorcyclists drove straight from East Tamaki Road onto the footpath, and then proceeded along the footpath in a northerly direction for a distance of about 50 or so metres, before turning left into Shirley Road. He then said that they proceeded for approximately 100 metres down Shirley Road before stopping. He gave evidence that the motorcycles reached speeds of approximately 70 odd kilometres an hour. He followed the motorcycles. It was his evidence that he had the Police vehicle's red and blue flashing lights on during this pursuit.

[32] Mr Tuake in giving his evidence-in-chief confirmed that the lights were on and that Constable Templey also had the vehicle's siren on. He confirmed that the Police vehicle was just behind the motorcyclists. Mr Tuake denied proceeding direct from East Tamaki Road onto the footpath on Great South Road. He said that he went onto the footpath only at the corner of Great South Road and Shirley Road, and that he then stopped.

[33] Mr Maddox on behalf of Mr Tuake submits that errors made by Ms Treloar as counsel have resulted in a miscarriage of justice. Essentially he argues that no effective challenge was made to the Constable's evidence. He points to discrepancies in relation to how far into the intersection the motorcyclists stopped, and in the Constable's evidence as to the speed they were going.

[34] I accept that Ms Treloar did not cross-examine Constable Templey on various aspects of his evidence, but I am not persuaded that there has been any miscarriage of justice as a consequence.

[35] Counsel error is not itself a ground of appeal. When the Court is asked to consider such issues, its enquiry is not into the competence or otherwise of counsel, but rather whether the verdict is unsafe through any deficiency in the trial, however caused – see *R v Sungsuwan* [2006] 1 NZLR 730.

[36] Here, it seems to me that Mr Tuake has essentially admitted in his own evidence that he received a direction from Constable Templey to pull over, and that he failed to comply promptly with that direction. The direction was given by Constable Templey to Mr Tuake when Mr Tuake was stopped at the intersection of East Tamaki Road and Great South Road. Mr Tuake did not stop on Great South Road. Rather he travelled in a northerly direction and then turned left into Shirley Road. He then travelled a further short distance along Shirley Road before stopping. Mr Tuake does not dispute this. He accepted that he was told to stop. He was aware of the directions from Constable Templey. He knew that the Police officer had activated the red and blue flashing lights on the Police vehicle, and that the siren was sounding. He was aware that the Police vehicle was following him and his colleagues as they proceeded north and as they turned into Shirley Road. He did not stop promptly as directed.

[37] While Ms Treloar did not cross-examine Constable Templey in relation to these matters, I cannot see that there is any miscarriage of justice in this regard. Judge Adams was entitled to reach the conclusion that the offence had been committed, and I cannot see that he erred in doing so.

[38] Judge Adams also concluded that Mr Tuake drove his motorcycle in a manner which having regard to all circumstances was or could have been dangerous to the public.

[39] It was Constable Templey's evidence that Mr Tuake drove his motorcycle onto the footpath from the intersection of Great South Road and East Tamaki Road, and that he then drove along the footpath to the corner of Great South Road and Shirley Road before turning into Shirley Road. It is not altogether clear whether or not Mr Tuake continued to drive on the footpath down Shirley Road, or whether he drove on the road for a short distance. I am not sure that that matters unduly.

[40] Ms Treloar did cross-examine Constable Templey in relation to his evidence about when Mr Tuake pulled onto the footpath. She put it to Constable Templey that he was on the other side of the road trying to keep an eye on traffic. The Constable accepted that that was the case. Ms Treloar then put it to the Constable that he would not really have been able to see how far Mr Tuake drove on the footpath. The Constable stated that he could, and that he saw Mr Tuake go onto the footpath, and that he saw him when he stopped down Shirley Road. Ms Treloar put it to the Constable that Mr Tuake actually stopped as soon as he got onto the footpath. The Constable stated that that was incorrect, that Mr Tuake got onto the footpath on Great South Road, that he travelled along the footpath making a left hand turn into Shirley Road, and that he travelled a short distance down Shirley Road before stopping.

[41] Mr Tuake's evidence was at odds with that of Constable Templey, but the Judge was entitled to prefer Constable Templey's evidence in relation to that of Mr Tuake, and I cannot see that he erred in doing so or that there has been any miscarriage of justice.

[42] Constable Templey remembered that there was a pedestrian on the footpath. There could of course have been others who might have wished to use the footpath. Driving so as to cause danger to a member of the public under s 35 has to be judged objectively. It has to be shown that the accused failed to meet the standard of care expected of a reasonable and experienced driver, given the manner of the driving, and the relevant circumstances of the case.

[43] In my view, and that of Judge Adams, it cannot be said that the possibility of a pedestrian being on the footpath or wishing to go onto the footpath was so remote, as to be beyond the contemplation of a reasonable person. Personal injury could have occurred, and the prospect of danger was more than a remote possibility. There was a reasonable likelihood of danger to persons who could reasonably have been expected to be on the footpath.

[44] While Mr Maddox queried the reliability of Constable Templey's evidence as to the speed at which Mr Tuake was travelling, I am not persuaded that much turns

on that. The offence of dangerous driving is not proved solely by proof of speed. What is required is proof that the speed was, in all the prevailing circumstances, of a degree that might have been dangerous to the public. It seems to me that this is the case here.

[45] While there were various matters on which Ms Treloar could have cross-examined Constable Templey, I am not satisfied that her failure to do so has resulted in any miscarriage of justice. She did cross-examine Constable Templey in regard to the essential aspects of his driving as constituted the dangerous driving charge. Judge Adams weighed the evidence, and preferred the evidence of Constable Templey to that of Mr Tuake. He did not err in doing so.

[46] Nor does the fact that the Judge reached a different conclusion in relation to Mr Paruru persuade me that there has been a miscarriage of justice. I was given a copy of Judge Adams' oral judgment in relation to Mr Paruru. The Judge found that Constable Templey's instruction to pull over was given to one of the riders, and that it was not Mr Paruru. He also preferred Mr Paruru's evidence that he did not drive on the footpath to that of Constable Templey. He observed that Constable Templey's evidence was not free from errors, and that while the differences were small, they did raise a question about the accuracy of Constable Templey's recall of the detail.

[47] I have not been provided with the notes of evidence taken by the Judge in relation to the Paruru trial. I do not know whether or not Constable Templey gave the same evidence in Mr Paruru's trial as he gave in relation to Mr Tuake. Even if I assume that there were factual discrepancies in the Constable's evidence in relation to Mr Tuake, they do not to my mind go to the heart of the Constable's evidence, which was first that Mr Tuake was told to pull over and that he failed to stop when required to do so, and secondly that Mr Tuake drove on the footpath in a manner which having regard to all the circumstances, was or might have been dangerous to the public.

[48] In the circumstances, I cannot see that the proposed appeal has sufficient *prima facie* merit to warrant the extension of time sought.

Other matters

[49] The only other matter of relevance is the fact that Mr Tuake had an appeal which was filed in time, and which he abandoned. This is not a case where an appeal has been filed late because of, e.g. oversight, counsel error, or for some other readily explicable reason. Rather it is a situation where Mr Tuake has elected not to proceed with an appeal filed within time, and then changed his mind and sought to file a fresh appeal some months out of time. To mind, the Court should not entertain an extension of time in such circumstances, unless the interests of justice plainly so require. In my view, they do not so require in the present case.

Summary

[50] The oral application made on Mr Tuake's behalf for an extension of time within which to file a notice of appeal is declined.

[51] The Crown is entitled to costs. If it wishes to seek the same, then it should file a memorandum within five working days of the date of this judgment. Any reply to be filed on behalf of Mr Tuake should be filed within a further five working days, and the Crown may then file a reply within a further two working days. I will then deal with the application on the papers.

Wylie J