

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA428/2016
[2016] NZCA 592**

BETWEEN DAVID KEITH SILBY
 Applicant

AND NEW ZEALAND POLICE
 Respondent

Hearing: 18 October 2016

Court: Cooper, Brewer and Peters JJ

Counsel: Applicant in person
 A J Ewing for Respondent

Judgment: 9 December 2016 at 11.30 am

JUDGMENT OF THE COURT

- A The application for an extension of time to bring an application for leave to appeal is granted.**
- B The application for leave to bring a second appeal against conviction and sentence is declined.**
-

REASONS OF THE COURT

(Given by Peters J)

[1] The applicant, Mr Silby, seeks leave to bring a second appeal against conviction and sentence.

[2] On 4 November 2015, Judge Becroft convicted Mr Silby of driving at less than 20 metres behind another vehicle whilst his (Mr Silby's) speed was between

50 and 60 kilometres per hour, and of using a mobile phone whilst driving.¹ Both matters are prohibited by the Land Transport (Road User) Rule 2004.² The Judge fined Mr Silby \$150 on the distance offence, \$80 on the mobile phone offence and ordered him to pay Court costs of \$130.

[3] Mr Silby appealed to the High Court and sought leave to adduce further evidence in support of his appeal. Venning J declined to admit most of the further evidence and dismissed Mr Silby's appeal.³

[4] Mr Silby's application to this Court for leave to bring a second appeal was made out of time, and he seeks an extension. The Crown does not oppose an extension and we grant it.

[5] The Court may only grant leave to bring a second appeal if satisfied that the appeal involves a matter of general public importance or that a miscarriage of justice may occur unless the appeal is heard.⁴ Mr Silby seeks leave on the ground that a miscarriage of justice may occur unless the appeal is heard. For the reasons given below, we do not accept this submission and decline leave.

Background

[6] Shortly after 8.00 am on 31 March 2015, Detective Bailey was in an unmarked police car travelling west on State Highway 14. The Detective saw a Mazda vehicle coming in the opposite direction, less than a car's distance behind a logging truck and travelling at approximately 50 kilometres per hour. The Detective observed the driver was steering with his left hand and, with his right hand, holding a mobile phone to his right ear. The Detective turned his car around, pulled the Mazda over using his lights and sirens, and issued Mr Silby with an infringement notice in respect of both offences.

[7] Mr Silby pleaded not guilty but failed to appear at the allocated fixture on 4 November 2015, apparently having made a mistake as to the date. It is clear from

¹ *New Zealand Police v Silby* [2016] NZDC 25869.

² Land Transport (Road User) Rule 2004, rr 5.9(4)(b) and 7.3A(1).

³ *Silby v New Zealand Police* [2016] NZHC 162.

⁴ Criminal Procedure Act 2011, s 237; and *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.

the Judge's decision that he waited for a period to see if Mr Silby would appear. When Mr Silby did not do so, the Judge proceeded in Mr Silby's absence, heard the Detective's evidence, and then issued an oral judgment finding the offences proved.⁵ The Judge then convicted Mr Silby and imposed the fines and Court costs to which we have referred.

High Court

[8] On appeal to the High Court, Mr Silby sought leave to adduce further evidence, being an affidavit he had sworn. Venning J declined leave, at least in respect of those parts of the affidavit that were contested.

[9] The uncontested evidence in the affidavit was that Detective Bailey had been driving an unmarked police car, was not in uniform at the time, and had not produced his warrant to Mr Silby. It was also common ground that Mr Silby did not ask the Detective for his warrant.

[10] In the balance of the affidavit, Mr Silby denied the Detective's evidence that, by his conduct, Mr Silby had admitted infringing in the respects alleged. The Detective's evidence was that Mr Silby had nodded his head when the Detective told Mr Silby what he had observed. Mr Silby also disputed that he was driving at between 50 to 60 kilometres per hour. Mr Silby's affidavit contained evidence intended to establish that the logging truck he was following must have been travelling at less than 50 kilometres per hour, that Mr Silby likewise must have been travelling at less than 50 kilometres per hour and that, accordingly, Mr Silby was not required to maintain a distance of 20 metres or more.

[11] Venning J refused to grant Mr Silby leave to adduce this evidence because it was not sufficiently fresh. It could have been adduced at trial. Nor was the evidence sufficiently credible, compelling or even relevant.

[12] Mr Silby also submitted to Venning J that Detective Bailey did not have power to stop Mr Silby in the circumstances prevailing at time. Venning J rejected

⁵ Criminal Procedure Act, s 119.

this submission. He determined that the Detective had power pursuant to s 114(2) of the Land Transport Act 1998 (the Act), to which we refer below.

Discussion

[13] Venning J's refusal to allow Mr Silby to adduce his affidavit evidence is not a matter that satisfies the criteria for leave to bring a second appeal against conviction.

[14] Mr Silby also wishes to challenge Venning J's determination that the Detective had power to require Mr Silby to stop.

[15] Mr Silby's submissions to us on this proposed ground did not recognise the distinction between s 114 of the Act, which confers a power to stop, and s 113, which confers a power to enforce.

[16] We agree with Venning J that the Detective had power to require Mr Silby to stop pursuant to s 114(2) of the Act. The Detective had a separate power to enforce pursuant to s 113.

[17] The relevant parts of these provisions, and we include s 114(1) for comparison with s 114(2), are:

113 Enforcement officers may enforce transport legislation

- (1) An enforcement officer in uniform or in possession of a warrant or other evidence of his or her authority as an enforcement officer may enforce the provisions of—
 - (a) the Local Government Act 1974, the Local Government Act 2002, the Road User Charges Act 2012, the Government Rooding Powers Act 1989, the Railways Act 2005, the Land Transport Management Act 2003, and this Act:
 - (b) regulations and rules and bylaws in force under any Acts mentioned in paragraph (a).

...

114 Power to require driver to stop and give name and address, etc

- (1) An enforcement officer who is in uniform, or wearing a distinctive cap, hat, or helmet, with a badge of authority affixed to it, may

signal or request the driver of a vehicle to stop the vehicle as soon as is practicable.

- (2) An enforcement officer in a vehicle following another vehicle may, by displaying flashing blue, or blue and red, lights or sounding a siren, require the driver of the other vehicle to stop.

[18] Mr Silby submitted that the two provisions must be read together so that only an officer in uniform and so on, as described in s 113(1), may require a person to stop pursuant to s 114.

[19] This is not correct. The provisions are concerned with different matters. Detective Bailey was entitled to require Mr Silby to stop because he was following Mr Silby's vehicle and displaying the lights/sounding a siren referred to in s 114(2).

[20] There can be no challenge now to the Detective's entitlement to enforce under s 113(1). The failure at the scene to challenge the Detective's authority; the fact that the Detective was driving a car with lights and a siren; the fact that he was in possession of infringement notices; and the fact that he was known to Mr Silby as a police officer makes it reasonable to infer, as Venning J did, that the requirements of s 113(1) were met.⁶

[21] For these reasons, Mr Silby's application for leave to bring a second appeal against conviction does not satisfy the mandatory criteria.

[22] As to the proposed appeal against sentence, the sentence was clearly not excessive. The fines imposed were those prescribed and the Court costs unremarkable.

Result

[23] Mr Silby's proposed appeal does not satisfy the criteria for a second appeal. We decline leave accordingly.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ *Knott v New Zealand Police* HC Wellington CRI-2009-485-25, 1 July 2009; and *Stevenson v New Zealand Police* HC Wellington CRI-2011-485-44, 29 July 2011.