HIGH PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 9/12 C.A. 394/94

BETWEEN THE POLICE

1918

Appellant

A N D McKAY

Respondent

Coram: Cooke P.
Casey J.
Tompkins J.

Hearing: 24 November 1994

Counsel: J.C. Pike for Appellant
C.P. Brosnahan and A.J. Becroft for Respondent

Judgment: 2 December 1994

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal on a question of law, under s.144 of the Summary Proceedings Act 1957 and by leave granted by Neazor J., from his judgment delivered on 22 July 1994 on an appeal on questions of law by the prosecutor from the dismissal of a charge in the Wanganui District Court. The dismissal was by Judge Simpson and occurred on 16 February 1994.

The defendant's car had gone out of control into a ditch. He was charged under s.58B(1)(a) of the Transport Act 1962 with (in short) driving with excess breath alcohol. The reading was 1124 micrograms of alcohol per litre of breath, which is grossly above the limit of 400 micrograms. The defendant by his counsel does not now dispute the accuracy of the result. When asked whether, in

the event of the success of the present appeal, the opportunity was desired of being permitted at a rehearing in the District Court to endeavour to raise a reasonable doubt as to the accuracy, his counsel said that this was not desired (although Mr Brosnahan added that a Bill of Rights point remained). Indeed expert evidence for the prosecution in the District Court that the Seres device is regarded internationally as 'deadly accurate' was objected to by the defence; and it seems that the District Court Judge upheld the objection.

The point now taken may therefore accurately be described as a technical defence. If well-founded, it is of course none the worse for that.

The point is this. By s.57A(1) of the Transport Act, 'Evidential breath-testing device' means a device of a kind approved for the purpose of evidential breath tests by the Minister by notice in the *Gazette*. By the duly gazetted Transport (Breath Tests) Notice (No. 2) 1989, S.R. 1989/389, which came into force on 15 December 1989, the Minister approved as kinds of evidential breath-testing devices five named devices, the last being '(e) Seres'. The Notice, clause 2(1) and (2), included the following definitions:

> 'Seres' means a Seres Ethylometre model S 679; and includes any device having the trade name 'Seres' and associated with the number 679.
>
> (2) For the purposes of subclause (1) of this clauses, a device shall be deemed to have a particular trade name or be associated with a particular number or expression if that trade name or number or expression -
>
> (a) Appears on the device (whether by means of a label or otherwise) or is shown on the display panel on the device; or
>
> (b) Is printed out by the device on a card or on paper; or

(c) Appears on any printed matter that accompanies the device or is issued by or on behalf of the manufacturer of the device.

The words 'includes any device' etc. were used in defining other approved devices also. They were not used in earlier Notices under which some issues of identity consequently arose. So it is not helpful to go into those earlier cases. In the interests of simplicity we refrain from doing so.

Clause 10 of the Notice now under consideration prescribed the manner of carrying out tests by means of named devices, including a Seres. It is not disputed in this case that the prescribed procedure was followed.

Nor is it disputed that the test was conducted with a device labelled by its French manufacturers Seres Ethylometre 679 T. *Prima facie*, therefore, the test was in order. But it is common ground that since the issuing of the 1989 Notice the manufacturers had made major changes in the EPROMS (erasable programme read only memory), being microprocessors controlling the software supplied as part of the machines. These changes had been made because some problems had been encountered in operating the machines in New Zealand. The defence argument is that the EPROMS are 'the brains' of the device, and that as those supplied and used in this case had not been approved by the Minister, the device was not the same device as that approved and so could not be used for evidential breath tests. A witness from the Institute of Environmental Science and Research, called for the prosecution, produced data to show the correlation between breath test results after the changes in the EPROMS and blood test results taken from the same persons. He expressed the opinion that the device is reliable and accurate, that opinion being based in part from collected data showing breath/blood correlations for this device.

In support of the appeal Mr Pike told the Court from the bar that, while evidence of reliability and of the general way in which the machine operates is available from New Zealand personnel, no one in this country is able to explain the programming of the EPROMS. Evidently this is a matter on which in a competitive international market the manufacturers and their scientific advisers are reluctant to disclose information.

The defence argument was accepted by the learned Judge in the High Court, and possibly by the learned District Court Judge also. It has a ready appeal, but in our respectful opinion its appeal is superficial. One can easily say that the Minister's statutory power to approve a kind of device does not extend to approving any device which the manufacturers choose to label, in a way specified in clause 2(2) of the Notice, as Seres 679. Similarly - but again by what seems to us, with respect, less than inevitable reasoning - one can say that the Minister has no power to approve a device not yet in existence, or differing from one already in existence so greatly that they can no longer be regarded as the same device. Yet this would involve reading into the Minister's statutory powers of approval of *kinds* of devices some limitation not to be found in the words of the statute: and not, in our view, justified by any legitimate process of statutory interpretation.

Against the considerations urged for the defence, it can no less plausibly be said that the Minister and his officials may well not have any detailed understanding of the working of the componentry of machines produced by overseas manufacturers. Evidently that was in fact the case as regards both the software of Seres 679 initially used after the 1989 Notice and the replacement software. But the statute does not stipulate that any detailed understanding is required when a device is approved. In our view, the New Zealand Government and its advisers are entitled to place some trust in reputable manufacturers whose products are accepted

internationally. It is well known that improvements are made from time to time by manufacturers of machines which nevertheless continue to be marketed under the same name. The Act and the Notice are drawn in terms wide enough to allow for such changes.

There are two safeguards. First, the Minister may always revoke an approval if satisfied that a particular model of a device is defective or unreliable. Secondly, if there is in any case evidence raising a reasonable doubt as to the accuracy of the results produced by the model, when properly used as prescribed by the Breath Tests Notice or the instructions on or with the machine, then that device cannot be treated as within the Ministerial approval. Mr Pike unhesitatingly accepted the existence of both safeguards. Applying s.5(j) of the Acts Interpretation Act 1924 and ss.6 and 25(c) of the New Zealand Bill of Rights Act 1990, we regard the second safeguard as an implicit limitation of the Minister's approval.

To counter that approach counsel for the respondent relied on, *inter alia*, an observation of two Judges of the High Court in *Ministry of Transport* v. *Gilbert* [1990] 3 N.Z.L.R. 629. An appeal from the decision in that case was dismissed by this Court, sitting with five Judges, on 21 March 1991. The latter judgment is apparently unreported, but it is a brief judgment in which the Court accepted in substance both the conclusions and the reasoning of the High Court Judges.

That case was concerned with two questions. The first has no relevance to the present argument. The second was whether the manner in which tests were to be carried out by means of the device known as Intoxilyser 5000 had been sufficiently prescribed by notice in the *Gazette*. It was held that the prescription was sufficient, bearing in mind the evidence that the device would not produce an

evidential breath test result unless the necessary steps in the testing sequence have been correctly followed.

On the present appeal it has been drawn to our attention that the extensive High Court judgment in *Gilbert* stated towards the end, at 640, that the software must be part of the device approved by the Minister, and that a device in which other software had been substituted would be a different device requiring a new approval. That was said in rejecting a submission envisaging unlawful conversion or substitution of software, not changes made by the manufacturers. When *Gilbert* reached this Court it was necessary in the public interest to give an immediate decision. The decision then given was not directed to the issue raised by the present appeal. This issue relates to changes by the manufacturers, not by persons unauthorised by the manufacturers, and it was not considered by this Court in *Gilbert*. Consequently we are unable to accept that *Gilbert* requires us to give a decision contrary to the true interpretation of the Act and the Notice thereunder, as we hold it to be after having had the advantage of full argument on both sides directed specifically to the point.

The question posed on the grant of leave to appeal in this case was as follows:

> **Was the learned High Court Judge correct to hold that if a question is raised concerning whether an evidential breath testing device has ceased to be an approved device under the Transport (Breath Tests) Notice (No. 2) 1989 due to alteration to the device's software since approval, the prosecution must prove that the method by which the device now produces its result is not materially different to the method contemplated at the time the device was approved?**

That wording is inappropriate in its references to 'ceased to be an appropriate device' and 'the method contemplated'. The true question is whether

the Minister's approval extended to any model of the device produced by the manufacturers from time to time and labelled by them in accordance with the terms of the approval. In our view, that is the right interpretation and because of the safeguards mentioned above it involves no injustice. We add that, as was both held by this Court in *Gilbert* and enacted by Parliament in precautionary legislation passed while *Gilbert* was still before the Courts (Transport Amendment Act 1990, s.2), the manner of carrying out a test may be prescribed in the relevant Notice by reference to instructions displayed or printed on or by the device. Should the instructions change - for instance, because of software changes - this will not affect the validity of tests; but it may be thought desirable to publicise the change for the information of lawyers called upon to advise persons asked to undergo the tests.

Accordingly we allow the appeal and direct that the case be remitted to the District Court for consideration of any outstanding issues, in particular the Bill of Rights one. It should be recorded that Mr Brosnahan, in his forceful but candid submissions for the respondent, accepted that an argument based on *Holt* v. *Auckland City Council* [1980] 2 N.Z.L.R. 124, which found support in the District Court, was wrong. The case should now proceed in the District Court on the footing that the machine used was an approved device and the result reliable.

R J Cooke P.

Solicitors:
Crown Solicitor, Wanganui, for Appellant