IN THE SUPREME COURT OF NEW ZEALAND
CANTERBURY DISTRICT
TIMARU REGISTRY

S.C. No. 15/72

BETWEEN ALLAN NELSON BOWDEN

Appellant

A N D MINISTRY OF TRANSPORT
(J.N. Stewart)

Respondent

Hearing: 10 July 1972

Judgment: 28 JUL 1972

Counsel: Green for the appellant,
T.M. Gresson for the respondent.

JUDGMENT OF QUILLIAM J.

This is an appeal against conviction under s. 58 (1)(a) of the Transport Act 1962 of driving with excess blood alcohol.

The facts were scarcely in dispute. At about 3.20 p.m. on the 25 December 1971 a traffic officer was operating a microwave unit in King Street, Timaru. He saw a car approaching on the same side of the street as his patrol car. He was not able to state the speed of the car beyond saying that it was, as recorded on the microwave unit, less than 50 miles per hour. He noticed that the front of the car was lopsided and that the car was travelling about six to twelve inches from the centreline of the road. The traffic officer's evidence at first seemed to suggest that he regarded this position on the road as a matter of suspicion but he later receded from this. What particularly attracted his attention was his observation that the face of the driver of the car (who was admittedly the appellant)

was very flushed. He then suspected that the driver may have been affected by liquor. He accordingly put the microwave unit into the patrol car and drove off in pursuit of the appellant. Shortly after, he saw the appellant's car driving slowly in Arthur Street. The appellant stopped and got out of his car. The traffic officer pulled up behind him and also got out. As the appellant walked from his car the traffic officer asked him to stop. The appellant said that he had to go to the convenience which was nearby. The traffic officer accompanied him to the convenience and after they left he was able to smell alcohol on the appellant's breath. He observed that "his speech was slur his face was flushed, His eyes were very glassy, his pupils were very dilated, his movements were clumsy, he was swaying at the feet when standing still. I observed him walking. His movements were clumsy as mentioned before. He did mention a past injury to his ankle. He admitted to consuming one flagon of beer at a friend's place". The traffic officer then considered that the appellant was affected by liquor and asked for a specimen of breath which was duly given. He considered that the test was positive and took the appellant to the police station. He there requested a second breath test which appeared to yield a positive result although the appellant did not inflate the bag in a single breath as instructed but took three breaths to do so. A blood sample was then taken and this showed 277 mg. of alcohol to 100 ml. of blood.

Before the Magistrate a number of defences were raised but on appeal these were confined to four. They were:

(1) That the Transport (Breath Tests) Notice 1971 is invalid and that there is no authority for the taking of breath tests at all.

(2) That the certificate of the medical practitioner purporting to have been given under s. 58B (5) of the Act was defective and therefore inadmissible.

(3) That there was insufficient evidence that Step 6 of the Transport (Breath Tests) Notice had been complied with.

(4) That the traffic officer did not have good cause to suspect that one of the prescribed offences had been committed.

With regard to the first ground, s. 58A (6) of the Act provides that every breath test shall be conducted in a manner prescribed by the Minister by notice in the gazette. Section 58A (7) is as follows: -

> "Any notice given by the Minister under this "section or the corresponding provisions of any "former enactment shall be deemed to be and always "to have been a regulation for the purposes of the "Regulations Act 1936, and prima facie evidence "of the notice may be given in all Courts and in all "legal proceedings in the manner specified in "section 5 of that Act. "

Section 5 of the Regulations Act 1936 is as follows: -

> "5. Evidence of regulations - Prima facie evidence "of any regulations may be given in all Courts and "in all legal proceedings by the production of "a copy of the regulations purporting to be "printed under this Act. "

What was produced in evidence in the present case was a copy of the Notice as supplied by the Government Printer.

At the end of the Notice after the explanatory note there appear the words "Issued under the authority of the Regulations Act 1936". It was argued for the appellant that the word "issued" has an entirely different meaning from "printed" and that it cannot be said that something which is issued is therefore something which purports to have been printed. I regard this argument as altogether lacking in merit, but as it was advanced strongly and in all sincerity and as it was contended that the result was to render invalid all the breath tests which have so far been taken in this country I devote a few words to it.

At the foot of the notice there appears the statement usually to be found on loose copies of statutes, regulations and orders in council, namely, "Wellington, New Zealand: printed under the authority of the New Zealand Government by A.R. Shearer, Government Printer - 1971". This would seem to be sufficient to be able to say, if it is necessary to say it at all, that the Notice was in fact been printed. Apart from this, however, common sense demands that the expression "Issued under the authority of the Regulations Act 1936" is intended to include the act of printing. I see no reason for the Court to regard itself as limited to any narrow meaning of the word "issued". It was argued that the definition of "issue" in the Shorter Oxford Dictionary as "to send out authoritatively or officially" does not admit also of the act of printing. I cannot agree. I think the only sensible conclusion is that the issuing of the Notice under the Regulations Act embraces the obvious

appeal, therefore, fails.

The second ground related to the medical practitioner's certificate given under s. 58B (5). That subsection deals with the matters to be covered by the certificate given by a medical practitioner after he has taken a sample of blood. So far as is relevant for present purposes the subsection is as follows: -

> "58B Blood tests - ... (5) In any proceedings
> "for an offence under this Part of this Act, -
> "(a) A certificate purporting to be signed by
> a registered medical practitioner and
> certifying that -
>
> (iv) Each such separate container
> was received by him in a sealed outer
> container having endorsed thereon or
> affixed thereto a label indicating
> that it had been supplied by the
> Department of Scientific and
> Industrial Research;
>
> "shall be sufficient evidence, until the
> "contrary is proved, of such of those matters
> "as are so certified and of the qualification
> "of the person by whom the specimen of blood was
> "taken: "

The certificate signed by the medical practitioner in the present case was a printed form on which there is filled in the name of the doctor and the name, occupation and address of the appellant. Paragraph 1 (b) of that certificate follows the words of the Act and is as follows: -

> "(3) Each separate container was received in a
> sealed outer container having endorsed
> thereon or affixed thereto a label indicating
> that it had been supplied by the
> Department of Scientific and Industrial
> Research; "

It was argued that the expression "endorsed thereon" involves something different from "affixed thereto" and that the doctor should have certified with particularity which of the two was the case. Presumably

As I indicated at the hearing, I am completely unimpressed by this argument and need say no more than that the certificate adequately covers the matters which the doctor is required to certify. If, of course, the container had been received by the doctor without a label either endorsed on it or affixed to it then it would have been his duty to decline to give his certificate. He has, however, certified that it complied in one or other of the two prescribed ways and this is ample for compliance with the Act.

The third ground was that there was insufficient evidence of compliance with Step 6 of the Transport (Breath Tests) Notice. This was on the basis that the evidence did not establish that all the crystals up to the yellow ring on the device had been stained green. It was argued that the evidence left open the conclusion that part only of the crystals up to the yellow ring had been stained green and that this would not amount to full compliance with the requirements of Step 6.

Step 6 is as follows: -

> "(f) Step 6: If the yellow crystals are stained a green colour and this green stain extends from the end of the crystals closest to the arrow marked on the tube to and beyond the yellow ring marked around the middle of the portion of the tube containing the crystals, the test shall be taken to indicate that the proportion of alcohol in the subject's blood exceeds 80 milligrammes of alcohol per 100 millilitres of blood. "

It was contended that the expression "the yellow crystals" must mean all the yellow crystals. The traffic officer's evidence as to the first breath test was as follows: -

" Prior to the defendant inflating the bag the crystals were yellow. The defendant placed it in his mouth on to the mouth piece head and blew into the bag and fully inflated it. The yellow crystals turned into a dark green colour and this went beyond the yellow line marked on the tube. ... The bag was fully inflated and I read the tube, and it turned the yellow crystals green and it went beyond the yellow line. "

This evidence would seem to comply precisely with the requirements of Step 6. When the traffic officer used the expression "the yellow crystals turned into a dark green colour" it is not reasonable to conclude that he may have been referring only to some of them. When he continued "and this went beyond the yellow line marked on the tube" it is again not reasonable to conclude that the word "this" referred only to part of the crystals previously mentioned. In my view there was ample evidence from which the Magistrate could decide that Step 6 had been complied with.

The final ground was that the traffic officer did not have good cause to suspect that one of the prescribed offences had been committed. It must first be observed that s. 58A of the Act provides that before a specimen of breath can be required the constable or traffic officer must have "good cause to suspect". Clearly, the decision of the constable or traffic officer that he has good cause to suspect will be based upon the information available to him up to the time he requires the specimen. In the present case the appellant has been misled by the evidence of the traffic officer that he had good cause to suspect an offence simply because he considered the appellant's

face was flushed as he drew past the patrol car. If the traffic officer's evidence had gone no further than that I could have understood that there may be grounds for querying the basis upon which a specimen of breath was required. Regardless, however, of how the traffic officer expressed himself in his evidence, it is perfectly clear from a reading of the evidence as a whole that the matter went very much further than that. The traffic officer's suspicions were plainly aroused but he did not request a specimen of breath until he had spoken to the appellant, accompanied him to the convenience, smelt alcohol on his breath and observed that his speech was slurred, his eyes glassy, his pupils dilated, his movements clumsy, and had been told that the appellant had consumed a flagon of beer. At that stage the traffic officer had accumulated enough information to mean that he would have been seriously failing in his duty if he had not suspected the appellant of having committed one of the prescribed offences. It is to be noted that the traffic officer did not stop the appellant while driving. Had he done so on the basis only of his observation of a flushed face, it may well have been that he could be said to have acted prematurely. That, however, was not the case. There was, in my view, ample cause for the traffic officer to suspect the commission by the appellant of one of the prescribed offences and this ground of appeal must also fail.

The appeal is accordingly dismissed with costs to the respondent which I fix at $40.00.

Solicitors: Stout, Green & Brown, TIMARU, for the appellant.

Crown Solicitor, TIMARU, for the respondent.

TIMARU REGISTRY

BETWEEN **ALLAN [illegible]**

Appellant

A N D **MINISTRY OF TRANSPORT**
(J.R. Stewart)

Respondent

JUDGMENT OF QUILLIAM J.

Delivered by me
on 28/7/72 at
Timaru

[signature]
Deputy Registrar