N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NO. M.1144/80

10/11

448

BETWEEN MOA EDWARDS

Appellant

A N D AUCKLAND CITY COUNCIL

Respondent

Hearing: October 24, 1980

Counsel: Mr Williamson for Appellant
Mr Katz for Respondent

Judgment: 30 OCT 1980

JUDGMENT OF HOLLAND, J.

The Appellant was convicted in the District Court at Auckland on 28 May, 1980 of driving a motor vehicle while the proportion of alcohol in his blood exceeded 80 milligrammes of alcohol per 100 millilitres of blood. He was fined $350 and disqualified from holding or obtaining a driver's licence for nine months.

He appeals not only against his conviction but also against that part of the sentence relating to his disqualification from driving on the grounds that the period of disqualification was in the circumstances, excessive.

I deal firstly with the appeal against conviction which was advanced on five grounds.

The conviction was founded on a certificate from a Government Analyst employed by the Department of Scientific & Industrial Research admitted under the provisions of s.58B(9)(a) of the Transport Act, 1962. That certificate provided:

"This is to certify that -

A blood specimen in a sealed bottle, taken from

EDWARDS, Moa
Rubber Worker
16 Cullinan Ave.
Mangere

was delivered on 9 April 1980 to the Dominion Analyst by Registered Post No. 22 from Traffic Officer S J Booth for analysis; and

Upon analysis of the blood specimen by J F Lewin, analyst, a proportion of 145 milligrams of alcohol per 100 millilitres of blood was found in the specimen; and

No such deterioration or congealing was found as would prevent a proper analysis."

Such a certificate is provided to be sufficient evidence until the contrary is proved of the matters so certified.

The evidence presented for the prosecution was that a traffic officer employed by the Auckland City Council, attended while a registered medical practitioner took a sample of the venous blood from the Appellant. After labelling the two glass containers, into which this sample was divided, with the name of the Appellant, they were placed by the traffic officer in the security refrigerator of the Auckland City Council which was then locked. Two days later another traffic officer uplifted the sample noting its labelling and then stated:

"At 10 am on 8 April 1980 I consigned this sample with others by registered post at the Wellesley Street West Post Office to the Chemistry Division, Department of Scientific & Industrial Research, Private Bag, Petone. I produce Part 3 of the specimen form to the Court. In exchange for that delivery I received from the Post Office Registered Article Receipt No. 22 adhering to the notebook here which I produce to the Court."

Subsection (6) of s.58B provides:

> "An enforcement officer shall, within 7 days after the date on which they were taken pursuant to this section, deliver or cause to be delivered personally or post or cause to be posted by registered post, both parts of a blood specimen taken pursuant to this section or both those specimens, as the case may be, to the Dominion Analyst (or to a person employed in the Department of Scientific and Industrial Research, on his behalf) for the analysis of one of those parts or one of those specimens, as the case may be, and the custody of the other."

Counsel submits that in order to comply with this subsection the sample must be posted to a named person employed on behalf of the Dominion Analyst by the Department of Scientific & Industrial Research.

I reject that submission which is clearly not the requirement of the statute. Undoubtedly the sample should be addressed to the Dominion Analyst or if it is addressed to the Department of Scientific & Industrial Research, then it should be addressed for the attention of the Dominion Analyst or a person employed on his behalf. The addressee of this sample was the Chemistry Division of the Department of Scientific & Industrial Research and there is no evidence from which I can infer that all persons in the Chemistry Division of the Department are employed on behalf of the Dominion Analyst. However, the certificate certified that the sample was "delivered on 9 April 1980 to the Dominion Analyst by registered post". That is sufficient evidence until the contrary is proved.

The learned District Court Judge was not impressed with this submission if indeed it was made to him. Although the package might have been more accurately addressed it is not shown that it was not sent to someone employed by the Department of Scientific & Industrial Research on behalf of the Dominion Analyst. The onus is placed on the Appellant to disprove that this sample was delivered to the Dominion Analyst

by registered post as contained in the certificate, and there is no evidence to support a finding that the Chemistry Division, to whom the sample was sent, was not a person employed by the Department of Scientific & Industrial Research on behalf of the Dominion Analyst.

In this respect, attention should be drawn to the proviso of subs.(9) which provides that a certificate shall not be admissible in evidence if the Defendant applies not less than 14 days before the hearing for the analyst to be called as a witness. No such application was made. Even if this should be wrong, I am quite satisfied that it is precisely the type of matter intended to be covered by s.58E of the Transport Act, 1962 which provides:

> "It shall not be a defence to a charge under paragraph (a) or paragraph (b) of section 58(1) of this Act or under subsection (1) or subsection (2) of section 58C of this Act that any provision or provisions forming part of section 58A or, as the case may require, section 58B or section 58D of this Act have not been strictly complied with or have not been complied with at all, provided there has been reasonable compliance with such of those sections as apply."

The Appellant then submits that the evidence discloses that the sample was not consigned by "registered post". Although the oral evidence is that it was consigned by registered post, the Appellant relies on the receipt which was produced which shows that it was a receipt for "insured mail". There is nothing in the evidence to indicate whether insured mail is registered mail plus insurance, or whether it is a separate and distinct form of mail from registered mail.

This point was taken before the

District Court Judge but did not succeed. The production of the receipt for insured mail did not persuade him that the package was not sent by registered post and it does not persuade me.

For the reasons set out in relation to the first point of appeal as to the presumption of the facts certified in the certificate of the Analyst the ground fails, but it if should be necessary the ground also fails because of the provisions of s.58E.

The third ground of appeal is that the evidence showed that many persons employed by the Auckland City Council would have access to the safe into which the sample was placed and that a gap of two days between the taking of the blood specimen and the posting was so long as to raise a reasonable doubt as to the security of the samples. That is entirely an issue of fact.

There was no submission made to the District Court Judge that the sample posted to the Department of Scientific & Industrial Research was not the sample of the venous blood taken from the Appellant. There is nothing in the evidence or the cross-examination to indicate that this sample was not that of the Appellant. The learned District Court Judge has found that it was the sample taken from the Appellant and, in my view, he must have inevitably so found.

The third point of appeal has no merit whatsoever and must fail.

The fourth ground of appeal relates to Step 2 of the Transport (Breath Tests) Notice, 1978 which prescribes the manner of carrying out the breath screening test. Step 1 is prescribed as follows:

> "The sealed tips of both ends of the tube shall be broken off."

There then follows the requirement of Step 2:

> "The green end of the tube shall be inserted into the collar of the empty measuring bag, so that the arrow marked on the tube points towards the bag."

The traffic officer concerned deposed in chief as follows:

> "He agreed to the test. The test was carried out at 4.20 pm. The test was positive. The device I used was an Alcotest R80A, a device approved by the Minister by notice in the Gazette. It was assembled and used in accordance with the provisions of the Transport Breath Tests Notice 1978. The test was positive. By this I mean the yellow crystals at the mouthpiece end of the tube turned green up to and beyond the yellow centre line."

In the course of cross-examination Counsel for the Appellant asked the officer again to describe the procedure he used for taking the breath screening test. The witness then said:

> "I obtained from the package a tube, broke off the two sealed ends of the tube, placed the green end into the measuring bag, the white into the mouthpiece, asked the defendant to fully inflate the measuring bag as much as what he could practicably do within 10-20 seconds."

When giving his account in cross-examination of the manner of carrying out the breath screening test, the traffic officer did not depose in relation to Step 2, that the arrow marked on the tube pointed towards the bag. The officer was not asked any further questions in cross-examination in relation to the matter, but it was submitted to the District Court Judge that his failure to refer to the arrow meant that he failed to comply with the provisions of the notice.

It must firstly be remembered that the traffic officer in chief stated that he had administered the test in accordance with the provisions of the notice. When asked to give details in cross-examination, he clearly omitted to refer to the arrow.

The question before the District Court Judge was whether those circumstances left a reasonable doubt as to whether the notice had been complied with. The District Judge was apparently in no such doubt and, in the absence of further questioning by way of cross-examination to clarify the point, I am satisfied that such a conclusion was correct. There is no doubt that an accused person is not bound to cross-examine prosecution witnesses to enable them to establish their case and to remedy omissions from their proof.

In this case, however, there was a positive statement that the terms of the notice were complied with and I do not consider that the cross-examination went far enough to establish a doubt that such was the case. I am therefore of the view that the learned District Judge correctly concluded on the evidence that the notice had been complied with and the fourth ground of appeal also fails.

The fifth ground of appeal relates to several alleged defects in the manner of carrying out the evidential breath test, which in this case, was not the final foundation for the conviction, but was a necessary pre-requisite to the obtaining of the blood sample which demonstrated that the blood alcohol level of the Appellant was well above the limit.

In order to understand the submissions of the Appellant it is necessary to set out the requirements of the notice which are specified in paragraph 7 and are as follows:

"Evidential breath tests carried out by means of an Alcosensor II device shall be carried out in the following manner:

(a) Step 1 - First Zero Test: The enforcement officer shall depress the SET button, and shall then depress the READ button for approximately 10 seconds and note the resulting digital reading, which must be 0000 before the standardisation test (Step 2) may proceed:

(b) Step 2 - Standardisation Test: The enforcement officer shall -

(i) Depress the SET button; and

(ii) Introduce into the device alcohol vapour from a container marked with the words 'Breath Test Standard Alcohol Vapour supplied by the Department of Scientific & Industrial Research'; and

(iii) Depress the READ button while the vapour is being introduced and observe the maximum digital reading. If this reading is equal to or less than the level indicated on the Breath Test Standard Alcohol Vapour container, the second zero test (Step 3) may proceed:

(c) Step 3 - Second Zero Test: The enforcement officer shall depress the SET button, and shall then depress the READ button for approximately 10 seconds and note the resulting digital reading, which must be 0000 before the evidential breath test (Step 4) may proceed.

(d) Step 4 - Evidential Breath Test:

(i) The enforcement officer shall depress the SET button and attach the mouthpiece; and

(ii) The person being tested shall blow through the mouthpiece; and

(iii) The enforcement officer shall depress the READ button while the person is blowing through the mouthpiece and observe the maximum digital reading; and

(iv) The enforcement officer shall record this reading in writing.

This reading indicates the number of micrograms of alcohol per litre of breath of the person being tested."

The evidence in chief of the traffic officer relating to the manner of carrying out the evidential breath test was as follows:

> "At the Administration Building I obtained the Alcosensor II from the senior officer in charge of the radio room and showed this device to the defendant as I had already explained on the way in and at the roadside what the purpose of this device was. I assembled and used the Alcosensor II in accordance with the provisions of the Transport Breath Tests Notice 1978, a device which is approved by the Minister by notice in the Gazette."

Counsel for the Appellant, as in the case of the breath screening test, asked the officer in cross-examination to describe in detail the way in which the evidential breath test was administered. His reply to the question is recorded as follows:

> "I obtained the Alcosensor II, serial number 32, pressed the set button and noted the temperature which was showing on the back of the Alcosensor II, pressed the readout button and received four zeros through the screen on the front, pressed the set button, introduced the Alcosensor II into the steel cylinder containing the standard breath test alcohol vapour, for not less than three seconds let the vapour enter the device, pressed the readout button. The maximum reading I obtained was 0300. The maximum range permitted was 0400. 0300 did not exceed the maximum range. I pressed the set button and waited three minutes. I checked the temperature on the back. That was still 32°. I pressed the readout button reading four zeros for not less than ten seconds as applied for step four. I pressed the set button, connected the plastic tube to the device and whilst the defendant was blowing, pressed the readout button. The maximum reading I obtained was 0600. I recorded this reading on this form and the defendant read the form."

He was cross-examined extensively about a suggestion that he warmed the device but was not cross-examined further about administration of the evidential breath test. In re-examination the officer was asked for how long did he obtain the reading of four zeros. His reply was "for not less than ten seconds". He was further asked who supplied the standard alcohol

vapour that he said he introduced into the device. He replied "the Department of Scientific & Industrial Research".

The first criticism relates to Step 1 which, of course, requires the READ button to be depressed for approximately ten seconds. Although this was not dealt with in the detailed account given in cross-examination, the answer in re-examination satisfied the District Judge that Step 1 was properly complied with, and I am satisfied that such a conclusion was correct.

The next criticism refers to Step 2 which requires the introduction into the device of alcohol vapour from a container marked with the words "Breath Test Standard Alcohol Vapour supplied by the Department of Scientific & Industrial Research".

It is accepted that there is a recording error in the transcript of the evidence in the passage in cross-examination where the witness appears to say that he introduced the device into the alcohol vapour, but no point is taken in regard to this obvious error. What he says is he introduced "standard breath test alcohol vapour" from a steel cylinder. In re-examination he said it was supplied from the Department of Scientific & Industrial Research.

It is clear from the decision of the Court of Appeal in Boyd v. Auckland City Council No. C.A.61/80, judgment June 17, 1980; that it is not necessary for the witness to prove what he introduced was in fact breath test standard alcohol vapour which, of course, would require chemical analysis and proof from the person supplying the material. He must prove that he introduced into the device the contents or some of the contents of a

container marked with the words set out above. This witness did not say so. He said that he introduced standard breath test alcohol vapour from a steel cylinder. He did not, however, refer to any marking on the cylinder.

The question before the Court is not so much one as to whether the traffic officer has related verbatim in evidence the words contained in the Notice as whether in fact at the time the evidential breath test was administered the terms of the Notice were carried out. In this case the officer said in chief that he used the device in accordance with the provisions of the Notice. He was not cross-examined further on the introduction of the standard breath test alcohol vapour after he gave his description. In re-examination he said that standard breath test alcohol vapour came from the Department of Scientific & Industrial Research.

The learned District Judge held that there was reasonable compliance. I am not sure that if there is any reasonable doubt that the vapour came from a container marked as required by the Regulations that the provisions of s.58E could be relied on because it seems to me that it must be a necessary step in the administration of the evidential breath test that the alcohol vapour be of a certain kind. Failure to prove that, could not, in my view, amount to reasonable compliance. Although in the case of a prosecution a Court will not be quick to make inferences when evidence could be given of a necessary fact by a prosecution witness and is not given, I nevertheless do not consider that on the state of the evidence and in the absence of further cross-examination by Counsel

for the Appellant there could have been any reasonable doubt properly in the Court's mind that the alcohol vapour introduced into the device was from a container marked in accordance with the requirements of sub-paragraph (b) of paragraph 7 of the Notice.

In this respect, although the result is the same, I take a slightly different view from that which Barker, J. took in Fagan v. Auckland City Council, where he upheld a conviction on a similar point relying on s.58E. In my view, the issue is whether the prosecution has proved that the alcohol vapour introduced into the device came from a container properly marked. If it has proved that, then the prosecution will stand. If, however, there is a reasonable doubt as to such proof then I cannot, with respect, see how s.58E can be relied upon as it must mean that there is a doubt as to what was introduced into the device. It may have been anything. Such a doubt, in my view, cannot be regarded as establishing "reasonable compliance".

Further criticism arises in respect of the third part of Step 2. No evidence has been given that the reading of 0300 was equal to or less than the level indicated on the breath test alcohol vapour container. The witness, however, did say in the course of his evidence, that the maximum permitted range was 0400. He was not cross-examined on this point and it seems clear to me that his evidence can only mean that that was the level indicated on the container.

The District Judge does not refer to this matter in his judgment, but if it were referred to him I am sure that he would have rejected the

submission of the Appellant as I now do.

A further criticism is levelled at the evidence in relation to Step 3. The witness clearly referred to observing Step 3 in his evidence but is recorded as saying that was "as applied to Step 4". There was no cross-examination on the matter and again, I am satisfied that there is no foundation in fact for the Appellant's submission. It was not put to the District Court Judge, but would no doubt have been rejected by him and is by me.

I have, however, omitted a further criticism of the third phase of Step 2. It is necessary for the READ button to be depressed while the vapour is being introduced. Although the record of the description given by the traffic officer in cross-examination is somewhat cryptic, I am satisfied that again, in the absence of cross-examination, there is no ground for inferring even a possibility that the officer meant that the introduction of the vapour was done when the READ button was not depressed. His narrative at the introduction of the alcohol vapour after the depressing of the READ button and that must be the position, but there are no grounds, in my view, for holding that this means that the vapour was introduced while the READ button was not depressed.

All of the criticisms of the Appellant in relation to the fifth ground of appeal accordingly fail.

Counsel for the Appellant has referred me to a number of unreported judgments, all of which I have considered. With the exception of the difference of interpretation of s.58E referred to above, there is nothing in this judgment which

appears to be in conflict with any of them. In matters of this kind the exact words used by traffic officers in describing the steps taken must be considered in the context of the testimony given by the officer in the particular case concerned.

This Appellant has made up for lack of merit in his appeal with a great deal of ingenuity and his case has been well argued by his Counsel. In the result, however, none of the points raised succeed and the appeal against conviction must accordingly be dismissed.

With regard to the appeal against sentence, the minimum disqualification period, except for special circumstances, is one of six months. The degree of excess of blood alcohol above the permitted limit in this case was quite substantial and there cannot be any grounds for suggesting that the period of disqualification is excessive.

The appeal against sentence is dismissed.

The Respondent is entitled to costs and I make an order that the Appellant pay to the Respondent the sum of $75 by way of costs in respect of the appeal.

A. D. Holland J.