IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 1254/80

BETWEEN: HENRY EDMOND LORD
Appellant

A N D : MINISTRY OF TRANSPORT
Respondent

Hearing: 23 October 1980

Counsel: P.F. Hogan for Appellant
R.P.G. Haines for Respondent

Judgement: 23 October 1980

ORAL JUDGMENT OF VAUTIER, J.

The appellant in this case was convicted in the District Court at Otahuhu on 17 July 1980, in respect of a charge of driving a motor vehicle while the proportion of alcohol in his breath exceeded 500 micrograms of alcohol per litre of breath. He appeals to this Court in respect of that conviction.

The sole ground put forward in support of the appeal is that the traffic officer in his evidence in cross-examination when questions were put to him as to how he carried out the breath screening test and how he carried out the evidential breath test, simply answered that he carried out these tests in accordance with the Transport (Breath Tests) Notice 1978 and gave no details of the actual steps taken. The course which the matter took as appearing from the record was as follows: In his evidence-in-chief the traffic officer, Mr Price, simply referred to carrying out both the screening test and the evidential breath test "in accordance with the Transport (Breath Test) Notice 1978" When cross-examined he was asked, following questions which elicited the information that he was a traffic officer of

very short experience, the question -

> "How did you carry out the breath screening test you have referred to?"

The answer given was simply -

> "In accordance with the Transport Breath Test 1978".

After several further questions directed to the matter of the testing he was asked -

> "How precisely was the evidential breath test administered, officer?"

Answer:

> "It was administered in accordance with the Transport Breath Test Notice".

The point was taken before the learned District Court Judge that the traffic officer, having been asked to give the details of the steps he took, was obliged to tell the Court precisely what he did and was not entitled simply to refer again to having acted in accordance with the terms of the notice. The learned District Court Judge however took the view that counsel for the appellant had accepted the answers and was not, for this reason, entitled to rely upon this point. In the course of his judgment in which he found the offence proved, he said:

> "...the traffic officer says he conducted a breath screening test in accordance with the Transport Breath Test Notice 1978 and did not elaborate on that. Counsel asked him to elaborate on that and he replied by saying that he had conducted it in accordance with the manner laid down by law and the matter was left at that, there was no challenge to the fact that he complied with that procedure."

Counsel for the appellant relies upon statements which have been made in the course of the under-mentioned judgments: Smith v Lower Hutt City Council, M.556/75 Wellington Registry, Quilliam, J. judgment 13 February, 1976; Tirikatene v. Ministry of Transport M.679/79 Wellington Registry, Quilliam, J. judgment 16 April, 1980; Slipper.v Ministry of Transport, M.580/80 Auckland Registry, Barker, J. judgment 22 July, 1980 and Gee v. Ministry of Transport, M.163/80 Auckland Registry, Prichard, J. judgment 4 August, 1980.

Mr Haines on behalf of the respondent has submitted that all these cases are quite distinguishable from the present case and I agree that they certainly are as to their precise facts. There are to be found in these decisions however, in my view, various statements which are certainly of relevance to the present appeal. It can now, I think, be said to have been well recognised, as these decisions show, that in prosecutions of this nature it is sufficient for the traffic officer concerned to confine himself in his evidence-in-chief to the statement that the tests have been carried out in accordance with the prescribed notice. In the case of Smith v. Lower Hutt City Council (supra) Quilliam, J. referred to the statement of Mahon, J. in Judah v. Auckland City Council (1975) 1 N.Z.L.R. 695 at 698:

> "In my opinion it may not have been necessary for the traffic officer to describe in detail the administration of the breath test. It may have been sufficient if he stated in examination in chief that he followed the exact procedure prescribed by the Transport (Breath Tests) Notice 1971".

Quilliam, J. went on to point out, however, that this statement was obviously very carefully expressed and he then made observation -

> "I think, for myself, that one must be very careful to proceed on such evidence because, in essence, to do so would be to accept that it is permissible for a Traffic Officer to say, in effect, to the Court 'You may take my word for it that I got the procedure right, step by step.' I should have thought a Court will hesitate long before acting upon such a basis."

Mr Haines, with regard to what is said in this case, draws attention to the fact that at the outset of the judgment there

is a reference to the learned Judge being concerned about delay and for this reason less inclined to overlook procedural defects on that account: also to it having emerged in the course of the evidence that the traffic officer there was in fact relying upon a notice which had been superseded. For that reason it is suggested that not too much weight should be attached to the statement to which I have referred above. In my view however, it is indeed necessary to proceed with care in acting upon the evidence as to the carrying out of breath tests with the devices for which the legislation makes provision.

In the second case referred to, Tirikatene v. Ministry of Transport (supra) Quilliam, J. referred on p.6 of his decision to the evidential breath test machine as "a novel and, to the uninitiated, a complex device" and to the fact that subject only to the right to call for a blood test the evidential breath test may provide evidence for an offence. He also drew attention to the fact that there was a clear indication in s.58(4) of the Act of the special importance which the legislature has given to the evidential breath test and the recognition that it is only by the most careful adherence to the testing procedures that a reliable basis for conviction can be obtained.

These are matters which, in my view, must certainly be kept in mind in relation to the present appeal. The legislature in the provisions laid down has, of course, established a mechanical manner of obtaining evidence of an offence and there is available afterwards no independent means of confirming that the result which is said to have been achieved was in fact achieved by all the correct procedures. These devices clearly from the precise and detailed steps laid down by the manufacturers for their use and incorporated in the prescribed requirements call for care and considerable attention to detail on the part of those using them if incorrect results are to be avoided.

The decisions to which reference has been made certainly indicate quite clearly that various Judges have accepted that once a challenge is made to the enforcement officer as to the testing procedures followed he must be prepared to state fully and in detail just what was done. In the case of Tirikatene v Ministry of Transport already referred to, Quilliam, J. on p.4 said this:

> "It is obvious from a comparison of this procedure and the evidence given by the traffic officer that he has not recounted what he did in full compliance with the notice. In particular he has omitted any reference to depressing the SET button. I think there is little doubt that if he had contended himself with following the same course as he did in respect of the first three steps and simply said that he had carried out the procedure laid down under Step 4, or had in some other way referred expressly to the terms of the notice, then, in the absence of any challenge to his evidence, that would have been sufficient compliance."

Barker, J. in the case Slipper v. Ministry of Transport (supra) accepted that reference to the notice was sufficient "in the absence of any challenge" to his evidence.

In the last case, Gee v. Ministry of Transport (supra) Prichard, J. said this:

> "When the traffic officer gave his evidence in chief he adopted the convenient formula of saying that the evidential breath test was "administered in accordance with the Transport (Breath Tests) Notice 1978". Inevitably, he was asked in cross-examination to detail the steps taken."

It is noteworthy, I think, that in the case reference was made to the fact that the learned District Court Judge himself accepted that something more than a reference to the notice was needed and Prichard, J. quoted the passage from the decision in Smith v. Lower Hutt City Council (supra) to which I have already referred and expressed himself as being in agreement with that dictum. He continued however to say this:

> "... had the appellant in the Court below allowed the evidence in chief to go unquestioned I would be disposed to the view that the evidence would be sufficient proof of compliance with the Notice." (emphasis mine)

The decision of the learned District Court Judge in this case is supported by Mr Haines upon the basis that there was in fact here no real challenge to the evidence of the traffic officer that he had conducted the tests in accordance with the notice and, accordingly, he submitted, the learned District Court Judge was entitled to accept and act upon his evidence as establishing that all the necessary steps had indeed been taken. The questions which I have quoted from the cross-examination were not, he submitted to be regarded as amounting to a challenge to the traffic officer's evidence because they were not put in such a manner that they would be understood by the witness as amounting to such a challenge or as amounting, as I understood Mr Haines' argument, to a request that the actual steps carried out should be detailed. Mr Haines submitted that on four occasions the traffic officer had given evidence about the manner in which the various steps were conducted, that is on two occasions in respect of the screening test and on two occasions in respect of the evidential test, and that on each occasion he had simply referred to the fact that he had carried out the tests in accordance with the notice. In other words, he submitted that there was nothing to alert the mind of the traffic officer to the fact that when he was being questioned by the counsel for the defendant he should have answered the questions differently and gone into detail. Initially, it was Mr Haines' submission that in order to constitute an actual challenge to the traffic officer's evidence there should have been questions put to him by the defendant's counsel asking him about each individual step one by one. Later however, he contented himself with submitting that the position would have been met by a similar form of questioning to that which was evidently adopted in the case of Slipper v. Ministry of Transport. I refer to the passage in the judgment where it is said -

> "In cross-examination, the Traffic Officer was asked to outline what he did with the evidential breath test device from the time "you had it in your hand and as you conducted the tests?" The Traffic Officer then gave a lengthy answer that went through the detailed steps set out in the Transport (Breath Tests) Notice 1978; in relation to Step 4, he omitted to state that he depressed the set button as required by Step 4."

It was, in Mr Haines submission, necessary that the cross-examiner should ensure that the witness understood the question that was being put to him and precisely what was required of him. He said that the questions which were asked in cross-examination in the present case could only have been asked with two objectives, first, so that counsel should be able to be told what in fact was done with the respective devices or, secondly, to induce the traffic officer to test his memory and see if he could recite parrot fashion the check list of steps required to be taken in the hope that he might make some error in his recital. I must say that I do not agree that this is an exhaustive statement.

What was necessary, in my view, was that the traffic officer, having been asked the questions which were put to him, should proceed to demonstrate that he in fact was aware of what the requirements of the breath test notice were and had some proper understanding of the requirements. This indeed, it would have been reasonable to suppose, would be particularly necessary, in my view, in a case where, as here, it had been elicited that the traffic officer was an officer of very limited experience indeed as regards the use of these devices. It may well be that it would have been wiser for counsel for the defendant in this case to press the witness more strongly to give a proper answer to the question which was put to him "how precisely was the evidential breath test administered?" I cannot agree however that the submission that the witness could have been left with the impression in his mind that he was not being asked for any details and was at liberty simply to give a proper answer to that question

by referring again to the test having been administered in accordance with the Transport (Breath Tests) Notice.

The mere fact that there was the continued repetition of the reference to having acted in terms of the notice was, furthermore, I would agree, some indication that the traffic officer was not anxious to get into the realm of detail as to what was required and what was actually done.

Altogether I have come to the conclusion that this is a case in which there was not indeed any sufficient evidence before the learned District Court Judge of the correct procedures having been taken and of there being proper compliance with all the necessary steps. These were matters which of course it was essential should be established and once any question was asked in which the traffic officer was asked to give details I think that that was quite sufficient to make it clear that he was being specifically requested to demonstrate that the procedures were in fact correctly carried out. This in my view, was not done. Accordingly the appeal is allowed and the conviction quashed.

SOLICITORS:

Price, Voulk, Brabant & Hughes, Papatoetoe, for Appellant.
Meredith Connell & Co. Auckland, for Respondent.