IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NZLR 568

M. 340/84

BETWEEN KOSTYRKO
Appellant

AND MINISTRY OF TRANSPORT
Respondent

Hearing: 14th May, 1984

Counsel: Heaney for Appellant
Mrs Shaw for Respondent

Judgment: 18 May 1984

JUDGMENT OF SINCLAIR, J.

This Appellant was convicted and fined $250 on a blood/alcohol offence in the District Court at Auckland. He now appeals against that conviction raising three matters: I deal with them in the order in which they were raised.

The first ground of appeal related to the description given by the traffic officer of the label on the container which allegedly contained the breath test standard alcohol vapour. The notes of evidence disclose that the traffic officer, Mr Wildy, stated that the Appellant "underwent an evidential breath test using that device (an Alcosensor II device) and that was administered in accordance with the Transport (Breath Test) Notice 1978". Under cross-examination as to the steps he took in administering that particular breath test the traffic officer stated as follows in relation to the introduction of the standard alcohol vapour:

"I then depressed the left button and introduced into the device from a container labelled breath

> "test standard alcohol vapour supplied by
> the D.S.I.R. some of that vapour...."

It was submitted that when one has regard to the wording of the Transport (Breath Test) Notice 1978, in relation to the second step referred to as the "standardisation test", the enforcement officer is required firstly to depress the set button and then to introduce into the device alcohol from a container marked with the words "breath test standard alcohol vapour supplied by the Department of Scientific and Industrial Research". The contention was that by using the letters "D.S.I.R." the traffic officer had not correctly described the words which appeared on the container containing the standard alcohol vapour and that the description given by the traffic officer could not be regarded as being equivalent to the Department of Scientific and Industrial Research.

In the context of prosecutions of this nature that seemed a surprising submission to me, but counsel for the Appellant referred to a decision of Tompkins, J. in Auckland City Council v. Scott, M.1343/83, Auckland Registry, 2nd May 1984. After discussing the evidence in that case the learned Judge at page 6 of his judgment considered the situation with which the District Court Judge was faced when the description given by the traffic officer in that case of the label on a similar container was in the following words: "Breath test standard alcohol vapour supplied by the D.S.I.R.". The words which the Judge had to consider in that case were identical with those used in the present case.

Tompkins, J. observed that so far as Step 2 was concerned the container was required to be marked "with the words" specified and he went on to hold that a description of a container labelled "breath test standard alcohol vapour supplied by the D.S.I.R." did not comply with the requirements of Step 2 and that in consequence the label had not been correctly described by the traffic officer.

It is unfortunate that in that case the Court was not referred to a decision of the Court of Appeal in Williamson v. Police, C.A. 23/83, judgment 29th August 1983. That was an appeal from a decision of Prichard, J. and raised almost precisely the same question which was raised before Tompkins, J. and which is now raised before me. It is sufficient to quote from the actual judgment at page 3:

> "The second ground of appeal is as follows:
>
> 'The marking on the container from which the alcohol vapour was introduced into the evidential breath test machine was different to that provided for in the Transport Breath Test Notice 1978. The wording on the cannister must be exactly in accordance with that provided in the Transport Breath Test Notice 1978.'
>
> Against that requirement the submission is made that the wording on a container to be used for the purpose mentioned must follow precisely the words used in the foregoing part of the notice; and that the constable did not prove on this occasion that it did. What he did say in answer to a question in cross-examination was: 'I introduced the vapour which we have supplied to us into the machine - standardised alcohol vapour supplied by the D.S.I.R.' However that answer followed an earlier comprehensive statement by the constable in examination in chief that the evidential breath test was carried out in accordance with the Transport Breath Test Notice 1978 using an approved device. And concerning the matter Prichard, J. said:
>
>> 'It is true that the realm of breath/alcohol and blood/alcohol has become something of a wonderland. But common sense is not wholly excluded. The enforcement officer, who in this case was a police constable, said that the vapour he introduced was vapour supplied "to us" by the D.S.I.R. In my view, the Judge was able to infer, as I would infer,

> " 'that alcohol vapour supplied by the D.S.I.R. to the Police was for breath testing purposes.'

We draw the same inference."

When one considers the present case the only noticeable difference in the words used by the traffic officer in describing the lettering on the container was that in the Williamson case the traffic officer described the vapour which had been introduced into the device as being supplied "to us". To my mind the use of those words does not make any essential difference at all and what one is really concerned with is the description of the Department of Scientific and Industrial Research by the intials "D.S.I.R.".

In the present case I am satisfied that the inference can be drawn that the description given by the traffic officer was sufficient to satisfy the test that the vapour introduced was standard alcohol vapour of the type referred to in the Breath Test Notice.

I am reinforced in the view which I have come to by reason of the fact that as in Williamson's case the traffic officer had in examination in chief stated that the evidential breath test had been carried out in accordance with the Transport (Breath Test) Notice 1978. In any event in the area relating to evidence given as to an evidential breath test I am satisfied that the Court can take judicial notice that the initials D.S.I.R. stand for the "Department of Scientific and Industrial Research". In any criminal proceeding where forensic tests are carried out by that department and evidence of those tests is given in Court, it is almost universally common to hear of those tests being carried out by the "D.S.I.R." and those initials are used frequently in relation to the activities of that department. As was said by Prichard, J. in considering matters of this nature, commonsense is not wholly excluded and the statute and the regulations made thereunder must, or at least ought to be interpreted in such a way as to render them workable unless that does some violence to the words used.

On this particular aspect I appreciate that I may, on the face of it, have come to a different conclusion from that which Tompkins, J. came to, but on an examination of his judgment I do not think that that is so as his conclusion, on being asked to take judicial notice as to the meaning of the initials "D.S.I.R.", was dictated by his earlier stated view as to the evidence which must be given to describe the label on the container in question.

The second matter raised in this appeal was that the traffic officer gave evidence that when he administered the evential breath test the reading was "0450". In cross-examination I repeat what I have earlier said, namely that the traffic officer was asked to describe step by step what he did and saw whilst administering the test. In relation to the reading of 0450 he correctly described the assembly and testing of the machine and referred to the activities of the Appellant in blowing through the mouthpiece, depressing the read button and obtaining the reading above referred to. He was then asked:

> "Are you absolutely positive that is all you did and saw?"
>
> Answer: "I think that that is all I did and saw."

Later the traffic officer repeated that he could not think of anything he had missed out in his evidence. It was then submitted that the officer had failed to comply with the Breath Test Notice because he did not record the reading in writing, but that overlooks quite conveniently other portions of the evidence. I have already referred to the fact that in the evidence in chief the traffic officer stated that the test was carried out in accordance with the Transport Act (Breath Test) Notice. That, of course, contains the requirement that the enforcement officer should record the reading in writing and in this case at page 7 of the notes of evidence the officer went further and stated as follows:

> "The evidential breath test was assembled and administered in accordance with the Transport Breath Test Notice 1978. This is a copy of that notice. I produce that to the Court

He thereupon produced a copy of the notice as Exhibit 6. The obvious inference from that evidence was that the test was carried out precisely in accordance with the notice and that the requirement of recording the reading was carried out. There is nothing in my view in the cross-examination which displaces that inference.

That conclusion can also be tested by the fact that the offence was alleged to have occurred on 29th July, 1983 and yet the hearing was not until 2nd February, 1984, over six months from the date of the administration of the test. It would be improbable that the traffic officer could have remembered the exact reading for that period of time and it lends support to the inference that that reading was in fact recorded.

Finally it was alleged that the traffic officer had not correctly described the blood specimen collecting kit. Remembering again that he had described the test as being carried out in accordance with the Notice he was cross-examined as to whether the plastic bag containing the blood specimen collecting kit had any labels on it or included in it or affixed to it. The traffic officer replied that it had a label on it saying it was a blood specimen collecting kit supplied by the D.S.I.R. He was then asked:

> "Could it have said blood specimen collecting kit supplied by Smith Bio-Lab Limited?"
>
> Answer: "Yes, Smith Bio-Lab Manufacturers goods I believe."
>
> "That is what the label said?"
>
> Answer: "I believe it does say supplied by Smith Bio-Lab yes."

It was accepted by both counsel that the definition of "blood specimen collecting kit" does not have to have precise words on it and that it is sufficient if the label contains words indicating that it has been supplied by or on behalf of the Department of Scientific and Industrial Research. Having regard to the totality of the evidence given in this case there was sufficient evidence, in my view, for the District Court Judge to find as he did, namely that the blood specimen collecting kit fell within the type which the statute authorised to be used. In any event, S.58E of the statute would be available if necessary for the purposes of this prosecution, but in my view there is no necessity to resort to it.

The same observation can be made really in respect of the first ground of appeal and I observe that so far as the evidential breath test is concerned the Court of Appeal has held that S.58E can be used within the limits set forth in its decision of Soutar v. Ministry of Transport (1981)1 N.Z.L.R. 345.

In the circumstances the appeal is dismissed and I allow the Respondent costs of $250 which was the amount allowed by Tompkins, J. in the Scott case.

P. R. J.

SOLICITORS:

Heaney Jones & Mason, Auckland for Appellant
Crown Solicitor, Auckland for Respondent