

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

X
No. M.663/83

BETWEEN

McCLEARY

Appellant

A N D

MINISTRY OF TRANSPORT

Respondent

38

Hearing: 2 February 1984

Counsel: P.B. McMenamin for Appellant
N.W. Williamson for Respondent

Judgment: 3/2/84

JUDGMENT OF HOLLAND, J.

The appellant was convicted in the District Court at Christchurch on a charge of driving a motor vehicle while the proportion of alcohol in her breath exceeded the prescribed limit. The matters in issue in the District Court and in this Court on appeal relate to the adequacy of the evidence produced on behalf of the prosecution that the evidential breath test conducted on the appellant was conducted in the manner prescribed in the Transport (Breath Tests) Notice 1978 and a challenge to the evidence of the traffic officer that the screening test was positive in that the crystals in the tube forming part of the Alcotest R80A turned green.

The District Court Judge found on the issue of credibility that he accepted the evidence of the traffic officer as

to the result of the Alcosensor Test and he rejected the evidence to the contrary by the appellant. This issue was one solely of credibility and I am satisfied that no ground exists to interfere with the finding of the District Court Judge in this regard. There was a peripheral conflict of testimony between the evidence of the traffic officer and the evidence of the appellant and a witness called on her behalf as to the circumstances in which the vehicle was stopped. That conflict was not resolved by the District Court Judge but it was unnecessary for him to do so. The District Court Judge referred to the matter and found it unnecessary to resolve the issue but clearly he allowed it as a possibility. In doing so he has recognised the possibility of the traffic officer being mistaken or untruthful in that regard. But it does not follow from that that the traffic officer might have been mistaken or untruthful over the result of the test. It was common ground that the test was conducted, that the tube was shown to the appellant after the test had been conducted and that the appellant voluntarily agreed to go to the police station for the purpose of undergoing an evidential breath test or blood test or both. If the appellant were correct in stating that there was a dispute as to the result of the preliminary screening test it seems unlikely that she would have so willingly agreed to go to the police station for further tests particularly when it was common ground that she had been drinking. However, in essence the issue of credibility was one for the District Court Judge and although it is competent for this Court to reverse such a finding no grounds exist so to do.

The substantial issue on appeal is whether there was sufficient proof that the tests were conducted in accordance with the Transport (Breath Tests) Notice 1978.

In evidence-in-chief the traffic officer in referring to both tests said:-

"The device used for the breath screening test was an Alcotest R80A which was assembled in accordance with the Transport Breath Tests Notice 1978 and the breath test itself was conducted in accordance with the same Notice."

This was repeated further in chief in relation to the evidential breath test when he said:-

"The device used was an Alcosensor II device, a device approved under the Transport Breath Tests Notice 1978. It is number 208P. The breath test was conducted in accordance with the Transport Breath Tests Notice 1978 and at 3.24 a.m. Mrs McCleary blew through the mouth piece attached to the device and the subsequent maximum digital reading of 0550 milligrammes of alcohol per litre of breath was observed."

Counsel for the appellant in cross-examination delicately challenged the evidence of the traffic officer that the tests were conducted in accordance with the Notice. The relevant passages of cross-examination are as follows:-

- "Q. ... you administered the Alcosensor II test you say, in accordance with the Transport Breath Tests Notice 1978. Is that right.
- A. Yes.
- Q. Do you happen to know that Transport Breath Tests Notice off by heart.
- A. Not the complete notice - the relevant facts pertaining to breath screening tests and the evidential breath test using an Alcosensor II device, I believe I know what it contains. yes.
- Q. You know what it contains. Could you recite it?
- A. Not word perfect, no.
- Q. Did you have a copy of it with you when you administered the test.
- A. No.
- Q. So you weren't in a position to compare the testing you did to the notice yourself.
- A. Not at the time, no.
- Q. Presumably you did refer to that, the check sheet you have.
- A. Yes I did.

- Q. And you would agree the wording of that is different to that of the Transport Breath Tests Notice 1978.
- A. That is correct.
- Q. So in fact it is true to say you performed the test in accordance with that document issued by the Ministry of Transport rather than the Notice.
- A. No I wouldn't agree with that.
- Q. You wouldn't.
- A. Well in a sense they both say exactly the same thing to me what steps are required, what is required to be done.
- Q. You say you performed the test in accordance with that document there.
- A. The check sheet.
- Q. Yes.
- A. Yes.
- Q. You say you believe you performed it in accordance with the Transport Breath Tests Notice because in your opinion that document is the same as the Transport Breath Tests Notice.
- A. It says the same. It is not necessarily the same in words.
- Q. You believe it means the same.
- A. Yes, the relevant section of the evidential breath test."

In re-examination the traffic officer stated that he had administered hundreds of these tests and that he did not require a piece of paper in front of him to instruct him as to the use of the device.

Counsel for the appellant submitted to the District Court Judge that he was bound by an unreported decision of this Court in Stuart v Ministry of Transport (No. M.195/83, Judgment 11 May 1983) not to be satisfied that the tests were conducted in accordance with the Notice.

He submitted that the statement of the traffic officer that the checksheet used by him says the same although not necessarily the same in words as the Transport Breath Tests Notice was a matter of opinion in respect of which he was not competent to give opinion evidence and that in the absence of production of the

actual checksheet the District Court Judge should not have accepted that this test was conducted in accordance with the Notice.

The facts bear some similarity to those which arose in Stuart v Ministry of Transport. I have read that judgment but have not of course all the facts of the case before me. It was a judgment given on the day of the hearing of the appeal and it was a judgment which recorded that counsel for the Crown further agreed that he was in difficulty with counsel for the appellant's submission concerning the admissibility of the traffic officer's opinion evidence which involved an interpretation of two documents. Counsel for the Crown also apparently agreed that the check sheet and Notice should have been produced to the Court so that the Court could make its own comparison. Those concessions are not made in this case and rightly so. Stuart v Ministry of Transport is no doubt a proper decision in respect of its own facts. But it should be restricted to those facts because of the concessions made by counsel for the Crown. The issue in Stuart's case as in this case is essentially one of fact.

The question is, "has the Crown proved that the tests were conducted in accordance with the Notice?" It may well be that if after considering the evidence, the Court is lead to believe that the person conducting the tests has no knowledge of the Notice, but relies solely on his checklist coupled with an opinion that the checklest complies with the Notice, then the mere statement of opinion by a traffic officer would be insufficient to establish the charge. The question is essentially one of law and could be resolved by the Court on the production of the checklist which could be compared with the provisions of the Notice. This was not the

situation in the present case. There was a positive statement by the traffic officer on two occasions in chief repeated in re-examination and not damaged in cross-examination that the tests were conducted in accordance with the Notice. Certainly it is no part of the defence to prove the prosecution's case but in the light of that evidence it was necessary for the defence to raise serious doubts as to the testimony of the prosecution witness. That could be done by obtaining some admission from the witness in cross-examination but no such admission was obtained. In the absence of an admission it could be further challenged by requiring the traffic officer to prove step by step the various steps that were taken but he was not invited so to do. Similarly counsel for the defence could have required him to produce his checklist but for obvious reasons counsel for the appellant chose not to do so.

In the end in considering all the evidence there was only the unchallenged evidence of the traffic officer that the tests were conducted in accordance with the Notice. On that basis the District Court Judge was correct in convicting the appellant and the appeal must accordingly be dismissed.

A. S. Holland

Solicitors:

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Crown Solicitor, Christchurch, for Respondent