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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. M279/84

BETWEEN MINISTRY OF TRANSPORT at Christchurch

Appellant

A N D KOLFF of Christchurch Petrol Pump Attendant

Respondent

Hearing: 22 August 1984

Counsel: R.M. Stanaway for Appellant
D.H.P. Dawson for Respondent

Judgment: 31 AUG 1984

JUDGMENT OF O'REGAN J

A charge preferred against the respondent of driving a motor vehicle with excess blood alcohol in breach of s.58(1)(B) of the Transport Act 1962 was dismissed in the District Court at Christchurch on 29 February 1984.

The case differed from most if not all of its kind, which come before this Court on appeal, inasmuch as all the various steps and procedures prescribed were carried out properly and regularly and neither in the Court below or in this Court has any complaint or criticism been offered in respect of them.

The matters giving rise to this controversy arose during the course of the cross-examination of the Traffic Officer who came upon this respondent and after administering the various tests, arrested him. It had to do with the

breath-testing device and is best made known by recording the relevant parts of the evidence:

"Q. Back at Transport House you said you used an Alcosensor II Test, the number of that being 40T?

A. Yes, I said I used Alcosensor II No. 40T.

Q. Are you aware that the Alcosensor II at Transport House had been modified by a local modification that was suggested by one of the local transport officers?

A. Certainly are not.

Q. You're not aware of any modification that has been made to the original design of the Alcosensor II?

A. I am aware that the new ones are twin celled Alcosensors and that they are only modified by the D.S.I.R., Petone, not locally.

Q. But they were modified since the design was authorised in terms of the Transport Act?

A. Yes, some have been but which ones have I am not sure.

Q. And they have been modified since the design was authorised in the regulations - is that correct?

A. I don't know.

Q. You are not sure or you don't know?

A. No.

Q. And you do not know whether this Number 40T is one of the two celled modified variety or whether it is one of the original ones authorised under the regulations?

A. That is correct."

Then in re-examination:

"Q. Officer, have you any personal knowledge of any of the devices that you have used having been altered in any way?

A. No, I haven't. The only reason I know some of them have been altered is I was at the D.S.I.R. and I was watching one of the persons there doing it to one of the machines - testing it.

Q. And the ones that you now know having seen at the D.S.I.R. being altered, are they still the approved devices under the Transport Breath Test Notice 1978?

A. Yes, they are."

On the basis of this evidence, the respondent submitted that it was not proved beyond reasonable doubt that the breath test given him was conducted with an approved device.

The learned Judge dealt with the submissions as follows:

> "... The evidential breath test can only be carried out with an approved device. If it is carried out with some other device or there is a reasonable doubt as to whether or not an approved device was used, then the result of that evidential breath test could not be relied on.
>
> "Counsel for the defendant made submissions that the cross-examination of Traffic Officer Armstrong leaves room for a reasonable doubt as to whether this device was an Alcosensor II as approved or was in fact an Alcosensor II that had been modified in some way. In cross-examination there was an acknowledgment by the traffic officer that some of the Evidential Breath Testing Devices had been modified. In re-examination he said he was present at the D.S.I.R. on one occasion and saw one of the devices being altered. He said in answer to a question in cross-examination that he could not say if the device Number 40T used by him on this occasion was one that had been modified or not. I suspect that these devices would only go to the D.S.I.R. to be repaired, serviced or calibrated to ensure that they were in proper working order. However, the traffic officer used the word 'modify' which, in its ordinary sense means 'to make changes in' but also the word 'alter'. He said he actually saw the device being altered.
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> "In my view, if an approved device is modified or altered, there is no longer a device of the type approved by the Minister. In this case, the traffic officer's evidence certainly leaves room for the reasonable possibility that at least some of the Alcosensor II's have been modified or altered. ...
>
> "In my view, this does raise a serious doubt."

And, in the result, he dismissed the charge. The appellant has appealed, by way of case stated, against that

determination, the Court being asked whether such determination was erroneous in point of law and in particular whether:

1. There was any evidence to support the finding that there was a reasonable doubt whether the device used was one approved by the Minister; and
2. If the answer to Question 1 is "yes", whether the finding was a determination to which a person acting judicially and properly instructed as to the law could come, on the evidence adduced.

In his evidence in chief, the traffic officer deposed that an approved Evidential Breath-Tester, which was an Alcosensor II, was used; that its number was 40T and that the Evidential Breath-Test was conducted in accordance with the Transport Breath Test Notice 1978. And that evidence was not challenged. Accordingly, the crucial question is whether the matters elicited in cross-examination were sufficient to raise a reasonable doubt as to whether the device used in this case was identical with the device approved by the Minister of Transport in the Transport Breath Test Notice 1978. In this regard, it is well that I remind myself of the observations of Woodhouse J in Transport Ministry v. Morgan (1977) 1 N.Z.L.R. 238, at p.241 where he said:

> "It is worth emphasising, I think, the obvious enough point that the approval given by the Minister of Transport in terms of s.58A(6) of the Transport Act 1962 related not to the name or label by which the breath-test device was known but to the device itself ..."

The traffic officer's initial evidence as to the device was brief but in the circumstances, sufficient. He not only identified it by name but also as the approved kind. I think the learned Judge, too, was entitled to infer that the latter fact of his identification had its genesis in his experience and training. The nature of the cross-examination, however, was such that the identification by name was, in the circumstances, of but little probative value. The issues which arose out of cross-examination were whether the machine of that name which was used had been modified or altered so that it no longer had the same physical characteristics of the kind of device approved by the Minister or whether there was a reasonable doubt as to that matter.

Mr Stanaway submitted that what he termed the robust approach of the Court of Appeal in Morris v. Ministry of Transport (1980) 2 N.Z.L.R. 362 and Soutar v. Ministry of Transport (1981) 1 N.Z.L.R. 545 should be applied. Both those cases had to do with the conduct of the person carrying out the Evidential Breath Test on the one hand where something additional to what was prescribed was done and the other where one of the steps was not performed strictly in accordance with the prescription. Here the issue relates to the physical characteristics of the device. In Soutar's case, supra at p.549 Richardson J before declaring himself in favour of applying the reasonable compliance provision, spoke of the lack of evidential base giving foundation to a reasonable possibility that the failure to carry out the particular step would produce a reliable evidential breath

test reading. Mr Stanaway submitted that the cross-examination in the present case likewise did not provide such a base.

Mr Dawson referred to Auckland City Council v. Gray (1982) 1 N.Z.L.R. 200 and submitted that a passage in the judgment of the Court at p.208 was conclusive of the matter. The passage reads:

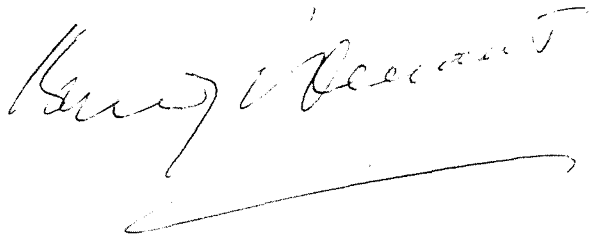
> "The District Court Judge was not satisfied on the evidence that it had been proved that the device used by the officer was an Alcosensor II device within the meaning of the Notice. We may well have reached a different conclusion but the issue is one of fact. The appellant has no right of appeal in such an issue."

And the reason why it was there held that the appellant in that case had no right of appeal was because the appeal, as here, was by way of case stated on a question of law.

Mr Stanaway, in reply to Mr Dawson's submission, stated, erroneously, that Gray's case was by way of general appeal. He did, however, refer me to Edwards v. Bairstow (1956) A.C. 14 and, in particular, to the speech of Lord Radcliffe at p.32 et seq which, in his submission, not only gave warrant for the formulation of the second question in the case stated in the manner it is framed but also was authority for the proposition that an appellate Court may assume that there has been some misconception of the law when facts found at first instance are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination reached - see p.36.

That is high authority and it seems to be at variance with the dictum which Mr Dawson cited from Auckland City Council v. Gray which is set out above. The point was the subject of but passing reference. In the absence of full argument - which, in any event, could not conclude the matter - I think my proper course is to follow the Auckland City Council case. And I do. And I hold that the findings of the learned Judge relate to a matter of fact and are not appealable in these proceedings. In those circumstances, precise answers to the questions posed are not required.

The appeal is dismissed.



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