IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1264/84

BETWEEN LEO PATRICK GALLAGHER

Appellant

AND THE POLICE

Respondent

Hearing: 3 December 1984

Counsel: Hesketh for Appellant
Jones for Respondent

Judgment: 3 December 1984

(ORAL) JUDGMENT OF PRICHARD, J.

This appeal relates to the conviction of the Appellant on two charges which were heard together by consent in the District Court on 21 August this year. There was a charge of dangerous driving laid under s.57C of the Transport Act, 1962 and a charge of driving with excess blood alcohol.

Dealing first with the charge of dangerous driving, the evidence related to an incident which occurred at about 4.30 a.m. on Sunday 19 February 1984, the evidence being that the Appellant drove down Queen Street at about 100 kph (one police witness estimated the speed at about 130 kph), turned right into Customs Street against a red light skidding the car sideways in the process and then drove along Customs Street at speeds estimated by two

police officers at between 70 and 100 kph. There was no evidence of other traffic being about, apart from three cars in Queen Street and two parked vehicles in Customs Street. Nor was there any evidence that there were any pedestrians in the vicinity. It is submitted by Mr Hesketh that one would not reasonably expect people to be in the vicinity of the Customs Street/Queen Street intersection at 4.25 a.m. on a Sunday.

The criteria by which a charge of dangerous driving should be determined are, I think, now well known. The leading case on the topic is probably Transport Department v. Giles (1965) N.Z.L.R. 726. In that case, Tompkins, J. held that it is not necessary in such a case to establish that a person has been actually endangered by the defendant's mode of driving. The section uses the word "might". And the question is what might reasonably be expected to occur. "The responsibility is not only to a definite person but to a hypothetical member of the public who might come into the area rendered dangerous by the manner of driving".

In that case, Tompkins, J. was applying and approving what had been said by McGregor, J. in Wagg v. Shaw (1962) N.Z.L.R. 498. McGregor, J. summed the matter up when, at the conclusion of his judgment, he said:-

> "It is the reasonably possible, or if one prefers the use of the alternative phrase, the reasonably foreseeable contingency, that the section is designed to prevent whether or not such contingency results in an actual happening."

I have no doubt that these matters were in the mind of the District Court Judge when he determined, in this case, that the evidence did support a charge of dangerous driving, and, for my part, I am in respectful agreement with that view. There may be few people about in Queen Street/Customs Street at 4.25 a.m. on a Sunday morning but there is always a distinct and reasonable possibility that pedestrians or motor vehicles will be moving into that area at that time. To go through a red light and to turn right at that speed and at that time, in my view, was ample to support a conviction on the charge of dangerous driving. So, as regards the appeal against conviction on that charge, I would dismiss the appeal.

I turn then to the appeal against conviction on the charge of driving with excess blood alcohol. The case was somewhat unusual in that the police constable who carried out the evidential breath test started by using a breath testing device which he concluded was not working properly. He therefore started all over again with a second device.

With the first breath testing device, the officer went through all the tests except the last one - which is the actual evidential breath test. When he came to administer the

breath test, he obtained a reading of 8888. He was nonplussed by that result, consulted someone else, and was told that the reading signified a flat battery. As Mr Hesketh rightly points out, there is no admissible evidence that a reading of 8888 denotes a flat battery. I think, however, that the police officer was justified in abandoning the first device and starting again with a different one.

It seems, on reading the evidence, that the police officer's operation of the device on the first occasion did not encompass all the procedures which prescribed in the Transport (Breath Tests) Notice 1978. Indeed there is some foundation for Mr Hesketh's submission that the officer was not very familiar with the operation of the Alcosensor II device. On the first zero test (Step 1) there is no evidence that the enforcement officer depressed the SET button before depressing the READ button. On Step 2, the standardisation test, again there was no evidence that the SET button was depressed before the alcohol vapour was introduced. Whatever might be the consequence of those omissions the officer's evidence was that on the first zero test the device gave a reading of 0000 and that on the standardisation test a reading was obtained which was lower than that marked on the container of alcohol vapour. Then, when he came to carry out the second zero test (Step 3), the officer said that he depressed the SET button, waited for five minutes, and then pressed the READ button and obtained the expected

reading of 0000. Why he waited for 5 minutes is unexplained - it is not one of the prescribed requirements. After that he carried out the evidential breath teset (Step 4). He says he "pushed" the SET button, connected the plastic tube and had the Appellant blow through it. The device gave the aberrant reading of 8888. It was then that he concluded that he should abandon that device and start all over again with another.

The officer then proceeded to test a second Alcosensor II device. His account of how he did this suggests, again, that he did not comply strictly with the directions given in the Notice. He said that he "pushed" the SET button at the commencement of each of the preliminary tests - i.e. Steps 1, 2 and 3. He did not however, say that on those occasions the READ button was depressed "for approximately 10 seconds". And he repeated the uncalled for procedure of waiting for a considerable time between depressing the SET button and pressing the READ button when carrying out the second zero test - this time for a period of seven minutes. However, all three tests gave results compatible with the device being in order so the evidential breath test was duly administered and, this time, gave a reading of 550 micrograms of alcohol per litre of breath.

Although the evidence does not establish that the three preliminary tests (Steps 1.2 and 3) were carried out in strict compliance with the Notice, the question must be whether s.58E should be invoked. I think the first

consideration must be whether the circumstances leave the Court with a reasonable doubt as to whether the device used for the breath test was effectively tested.

Mr Jones referred to the judgment of the Court of Appeal in Soutar v. M.O.T. (1981) 1 N.Z.L.R. 545. He submitted that the reasoning which led the Court to invoke s.58E in that case applies equally in this case. But that was a different case. The Court was concerned with one particular aspect of the first zero test - a situation where an enforcement officer was confronted, at the outset, with an Alcosensor II device which had its SET button already in what, for lack of a better phrase, I would describe as a depressed state. The enforcement officer carried out the symbolic but otherwise futile ritual of pressing a SET button which was already depressed. The Court held that "pressing" is not synonomous with "depressing" and that the Notice had not been strictly complied with. Nevertheless, the Court was able to discern from a consideration of the instructions contained in the Notice that it makes no material difference whether the depressing of the SET button is performed by the enforcement officer or by someone who has previously handled the device - that so long as the button is in a depressed state at the commencement of the first zero test it is, for all practical purposes, immaterial who depressed it. Consequently it was appropriate to invoke s.58E.

I am not persuaded that the same reasoning should be applied in the instant case.

What concerns me in this casse is that throughout his evidence the police officer displayed a degree of unfamiliarity with the testing procedures. His methods proved ineffective with the first device he tested and this must lead to an inference that his second attempt may well have been equally unreliable. This does not mean that in other circumstances I would regard the carrying out of the tests as they were described by the officer in relation to the second device as necessarily so defective as to exclude the application of s.58E. It is the overall effect of the evidence which, in my view, creates a reasonable doubt as to whether the tests were carried out competently and effectively.

Accordingly, as regards the blood/alcohol charge, this appeal is allowed and the conviction set aside.

As regards sentence, Counsel does not pursue an appeal against the sentence imposed on the dangerous driving charge.