IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. No. 1542/83

N2LR

488

[redacted]

IN THE MATTER of an appeal from a determination of the District Court at Auckland

BETWEEN THE AUCKLAND CITY COUNCIL (Stephen John Booth)

Appellant

A N D PAUL FRANCIS SCALE

Respondent

Hearing: 4th May, 1984.

Counsel: R. J. Katz for Appellant.
D. A. Hagar for Respondent.

Judgment: 10.5.84

JUDGMENT OF TOMPKINS, J.

This is an appeal by way of case stated for the opinion of this court on a question of law only. That question relates to whether the prosecution proved compliance with the evidential breath test procedure and in particular that part of the standardisation test procedure relating to the introduction into the device of alcohol vapour.

The relevant portion of the case stated reads:-

" It was proved upon the hearing that:-

1. Traffic Officer Coxon apprehended the Defendant and after obtaining good cause to suspect carried out a breath screening test following which the Officer required the Defendant to accompany him to the Civic Administration Building of the Auckland City Council for an evidential breath test or a blood test or both. No issue arises out of these preliminary procedures.

2. At the City Council an evidential breath test was carried out. In evidence in chief Officer

Coxon said that he carried out the test in accordance with the Transport (Breath Tests) Notice 1978. In cross-examination he was asked to describe how he carried out the standardisation test of the evidential test and the Officer gave evidence as follows:

'After the second zero test, sorry, I beg your pardon. After the first zero test I depressed the set button on the device and introduced to the device breath test standard alcohol vapour supplied by the DSIR, purely for the purpose of testing the device for not less than 3 seconds. During that time I depressed the read button on the device. I obtained a reading which was recorded on the evidential breath test notice. The reading I obtained on the device at that time was 0350 micrograms of alcohol. This comes within the range permitted to use the evidential breath test device. The cylinder in particular which was used was cylinder number 22 and the level indicated on that cylinder was 0400 micrograms of alcohol. I showed Mr. Scale the reading on the device. We watched the figures rise together up to the maximum and then the set button was redepressed.'

3. No further cross-examination was carried out as to the conduct of the standardisation test. The Defendant then gave evidence himself but gave no evidence relating to the standardisation test.

I DETERMINED:-

4. When Officer Coxon described the standardisation test he failed to describe it fully. In particular, he gave no evidence as to what in fact was marked on the cylinder that he referred to other than the reference to 400 micrograms of alcohol nor did he say that the alcohol vapour that he introduced into the device came from a container marked with the words "breath test standard alcohol vapour supplied by the Department of Scientific and Industrial Research".

5. I held that as the Officer was asked about this step it was a matter of some importance for him to establish what was marked on the container principally because the Officer does not himself know precisely what the substance is that he is introducing into the device and must rely on the container. It was therefore a requirement that the container must be marked in a certain way and for there to be evidence of this. If there was such evidence the Court could then make the assumption that what came out of the container was what was marked on the container. As the Officer here was giving his evidence generally about what was on the container and did not use the actual words I felt that I could not apply the provisions of Section 58E and I dismissed the information.

The question for the opinion of this Honourable Court is whether or not my decision was erroneous in point of law and in particular:-

(a) Was there proper or sufficient evidence before me on which I could have found that the standardisation test of the evidential breath test was correctly carried out and that the label on the container referred to by the Traffic Officer was correctly described by him?

(b) If the evidence of the Traffic Officer did not strictly comply with the requirements of the statutory notice should I have applied the provisions of Section 58E Transport Act, 1962? "

On question (a) it was submitted by Mr. Katz on behalf of the Appellant that the officer was not cross-examined on the contents of the label on the container and in the absence of cross-examination he was not required to spell out verbatim the contents of the notice. He referred to the Traffic Officer having already said that he introduced into the device standard alcohol vapour supplied by the D.S.I.R. and that his only failure was to state explicitly by quoting the actual label. He submitted that there could be no doubt that the container carried the appropriate label and that the label was marked as required by the Notice.

In support of these submissions he referred to the judgment of the Court of Appeal in Williamson v. Police (CA.23/83, 29.8.83) and the judgment of Holland, J. in Beath v. Auckland City Council (M.693/81, Auckland Registry, 20 July, 1981).

For the Respondent, Mr. Hagar submitted that the prosecution evidence had failed to prove that the alcohol vapour referred to by the Traffic Officer in his evidence came from a container marked in the manner required by the Transport (Breath Tests) Notice, 1978. With regard to the numerous authorities that had been decided on the application of the standardisation test, he submitted that they fell into two broad categories. The first category is where the prosecution evidence failed to

establish that the alcohol vapour came from a marked container. The second category was where the evidence established that the alcohol vapour came from a marked container but the evidence of what was marked on the container did not precisely repeat the words "breath test standard alcohol vapour supplied by the Department of Scientific and Industrial Research". He submitted that the present case fell within the first category.

The requirement that the prosecution prove that the substance introduced into the breath testing device came from a container marked with the appropriate words was placed beyond doubt by the decision of the Court of Appeal in Boyd v. Auckland City Council (1980) 1 N.Z.L.R. 337. Then I was referred by Mr. Hagar to three decisions that he submitted fell into his first category. They were Creamer v. Ministry of Transport (M.1114/82, Auckland Registry, 23 November, 1982), Callaghan v. Ministry of Transport (M.1353/82, Auckland Registry, 26 July, 1983) and O'Connor v. The Police (M.523/83, Auckland Registry, 29 July, 1983). In each of these cases the enforcement officer in evidence-in-chief referred to carrying out the test in accordance with the Notice. In an answer to a question asking him to describe in detail the procedure that he followed, he in each case indicated that alcohol vapour was introduced into the device but made no reference to the marking on the container. In each case it was held that the absence of reference to the words marked on the container resulted in the court holding that the prosecutior had failed to prove compliance with step 2 of paragraph 7 of the Notice.

In Callaghan Prichard, J. said:-

> " The prosecution has to prove nothing more than that the vapour was taken from a container bearing the prescribed words. One would expect that some four years of experience of working under this provision would have persuaded enforcement authorities and prosecutors of the simple necessity of establishing this essential ingredient of the

> case by direct evidence. The necessity was made abundantly clear in the judgment of the Court of Appeal in Boyd v. Auckland City Council (1980) 1 N.Z.L.R. 337, but for some unknown reason traffic officers giving evidence of evidential breath tests quite commonly fail to say what, if anything, was marked on the container. "

I respectfully agree. The experience available to enforcement officers is now some five years.

If the facts fall into Mr. Hagar's second category of case, namely, where the enforcement officer has stated that the alcohol vapour came from a container marked with certain words, but the words do not fit precisely the words set out in the Notice, then it may well be that different considerations would apply. For example, in Smith v. Cotton (M.297/81, Hamilton Registry, 14 October, 1981) Greig, J. considered that where a traffic officer answered yes to the question:-

> " Did it have on it breath test alcohol vapour supplied on behalf of the Department of Scientific and Industrial Research? "

when the words specified in the Notice referred to alcohol vapour "supplied by the Department of Scientific and Industrial Research", there was not a failure to prove the requirements of the Notice. In such a case the court may be able to infer that the container was in fact marked with the appropriate words. This inference may more easily be made where counsel for the defendant has elected not to cross-examine further on the enforcement officer's evidence relating to the words on the label.

The Traffic Officer's evidence on the procedure that he followed is set out in paragraph 2 of the case. As paragraph 3 of the case records there was no re-examination of the Traffic Officer on whether the cylinder was marked and, if so, with what.

In his evidence the Traffic Officer said that the alcohol level indicated on the cylinder he used was 0400 micrograms of alcohol. Other than that the evidence did not establish whether or not the alcohol came from a container marked in the manner required by the Notice. The facts, therefore, place this case within Mr. Hagar's first category.

In those circumstances the learned District Court Judge was clearly entitled to take the view that the prosecution had failed to prove an essential ingredient of the charge. That the container is marked in the required way is, as I have already indicated, a significant fact that the prosecution must prove. When the enforcement officer has been asked to describe in detail the steps that he took when administering the evidential breath test, it requires no feat of memory to say that the alcohol vapour came from a container marked in a certain way. That the enforcement officer states in evidence the words that are required to be marked on the cylinder is not in itself, without more, evidence on which a court must necessarily infer that the container was marked with those words.

For these reasons question (a) is answered "No".

Question (b) asks whether, if the evidence of the Traffic Officer does not prove compliance with the requirements of the Notice, the learned District Court Judge should have applied the provisions of s.58E of the Transport Act, 1962. It has been held in a number of cases that in those circumstances there has not been reasonable compliance. These include the judgments of Thorp, J. in Ready v. Ministry of Transport (M.147/60, Auckland Registry, 26 February, 1981), of Barker, J. in Field v. Ministry of Transport (M.436/81, Auckland Registry, 28 May, 1981) and of Quilliam, J. in O'Connor v. The Police (supra). In Creamer v. Ministry of Transport Wallace, J. records that it was not suggested that in circumstances very similar to the present s.58E could avail

the respondent. I find no reason in the present case why the learned District Court Judge should have departed from this approach. Once the court has come to the conclusion that the prosecution evidence has failed to prove that the standardisation test has been carried out in the manner prescribed, then I do not consider that the court could find there has been reasonable compliance. I adopt the approach of Quilliam, J. in O'Connor v. The Police (supra) when he said at p.8 of the unreported judgment:-

> " It is appropriate to apply the provisions of s.58E where it may be seen the defect is one which does not leave open the reasonable possibility that there was some flaw which might have affected the efficacy of the test. It is by no means easy to apply s.58E to cases involving non-compliance with the evidential breath test procedures. This is because of the complex nature of the device itself and the fact that the result of such a test may, in itself, provide the basis for a conviction. What the possible variations in the standard alcohol vapours may be I am unable to say, but obviously there may be variations. No doubt it is for that reason that the Legislature has prescribed a formula of words to enable the courts to determine whether the correct vapour has been used. Once that formula is departed from the matter becomes one of speculation. "

Nor do I consider that this conclusion is affected by the fact that in the present case the Traffic Officer required the Respondent to permit a blood specimen to be taken upon the grounds set out in s.58B(1)(a) of the Act, namely, that the Respondent, having been required by the Traffic Officer to undergo an evidential breath test, failed or refused to do so. The evidence shows that in the present case the Traffic Officer was not satisfied with the Respondent's attempts to carry out the evidential breath test and that it was for that reason that he required the blood test to be taken. That requirement can still only be made where the Respondent had been required to undergo an evidential breath test and that, of course, means a test in respect of which all the steps set out in the Notice have been complied with. If they have not, then there has not been a

valid requirement.

Question (b) is therefore answered "No".

Both questions having been answered against the Appellant, the Respondent is entitled to costs on the hearing of the appeal which I fix at $250.

Solicitors:

Butler, White & Hanna, Auckland, for Appellant.

D. A. Hagar, Auckland, for Respondent.