IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. No. 1343/83

NZLR

[redacted]

441

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 SCOTT

Respondent

Hearing: 2nd May, 1984.

Counsel: R. J. Katz for Appellant.
D. J. Heaney for Respondent.

Judgment: 4 May 1984

JUDGMENT OF TOMPKINS, J.

The Appellant appeals by way of case stated for the opinion of this court on questions of law pursuant to s.107 of the Summary Proceedings Act, 1957. The information that has been determined by the District Court alleged that the Respondent, on the 30th October, 1982, drove a motor vehicle while the proportion of alcohol in his blood exceeded 80 milligrammes of alcohol per 100 millilitres of blood. The Respondent had pleaded not guilty.

The information came before the District Court at Auckland on the 18th May, 1983. After hearing evidence called on behalf of the Appellant, the Respondent electing not to call or give evidence, the learned District Court Judge dismissed the information upon the grounds that he was not satisfied on all the evidence that the Appellant had established

that, when carrying out the evidential breath test, the enforcement officer had introduced into the device alcohol vapour from a container marked in the manner required by step 2 of paragraph 7 of the Transport (Breath Tests) Notice, 1978.

The case stated set out the question for the opinion of this court thus:

> " The question for the opinion of this Honourable Court are 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 ought to have found that the label on the canister was correctly described by the Traffic Officer?
>
> (b) Should I have taken judicial notice of the fact that the Acronym "DSIR" is synonymous with "Department of Scientific and Industrial Research"? "

In his evidence-in-chief the enforcement officer described the manner in which he took the evidential breath test:-

> " At 2232 hours the evidential breath test was carried out. The device I used was the Alcosensor II, a device approved by the Minister by notice in the gazette. I tested and used the device in accordance with the Transport Breath Test Notice 1978. I obtained a reading of 0350 and wrote that on to the evidential breath test form. "

Early in his cross-examination of the enforcement officer Mr. Heaney, appearing for the Respondent, made it clear that he was testing every element in the breath and blood test procedures. He questioned the traffic officer closely on the cylinder from which the traffic officer had obtained the alcohol vapour. The cross-examination was as follows:-

" When you carried out the evidential breath test did you use the cylinder of vapour?... Yes.
Can you describe the cylinder to us?....It is a, the cylinder itself has two valves on it. One valve is for the pressure and the other is for the measuring of contents in the cylinder and it also has a main tap on the top.
What colour is it?....It is a dark, almost dark brown, almost the same as this.
Did it have a label on it?....Yes it did.
Can you remember what was said on the label?.... Breath Test, standard alcohol vapour supplied by the DSIR.
Did it say DSIR or Department of Scientific and Industrial Research?....It said DSIR.
Did it have on it the words, Smith Bio Lab Limited?....No. "

In re-examination the prosecutor produced a photograph that he asked the witness to look at. Mr. Heaney objected to this procedure on the basis that the photograph had not been proved as taken by the witness and that therefore it was inadmissible. The photograph (which was produced in the course of this re-examination) appeared to be a photograph of a container. The re-examination then proceeded:-

" THE PROSECUTOR.- In relation to the cylinder that you used on that night with this defendant, is there any difference between the cylinder you used and the cylinder shown in that photo?....Yes, the only difference is this one has got cylinder 27. I used cylinder 22.
The label as shown in that photo, does that wording on that label differ in any way from the wording you used on that evening?....No.
On that basis would you read the wording on that label?....Breath Test, Standard Alcohol Vapour supplied by the Department of Scientific and Industrial Research.
Was that written on the label of the cylinder?....

MR. HEANEY.- That is a leading question. It is just . . . that the man could be given a photo and asked to read it out. It has got to be leading. I can see what the prosecutor is trying to so.

THE COURT.- I require your answer. You said the label clearly had on it DSIR, you were asked as to what it had on it subsequent. You are now really being asked to alter your view. What do you say about that?....I have made a mistake in the first one.

MR. HEANEY.- It is just absurd that he should be led on. The credibility I suppose it is a matter for Your Honour.

THE COURT.- The credibility?

MR. HEANEY.- It is not cross-examination.

THE COURT.- I am capable of knowing the fact that the officer was given a very careful chance of saying what was on the label and he said DSIR. He is now correcting himself from a photo but I cannot place much reliance on the correction you are now getting, but for what it is worth I will permit it but it is what you run into all the time. The value of it must be very limited, once you make these mistakes, it is.

THE PROSECUTOR.- Do you produce this photo to the Court?....Yes.

THE COURT.- We do not know, as far as this is concerned, what is on number 27 or what it is that he used. This is number 27, you used number 22?....I used 22, yes.

THE PROSECUTOR.- Have you ever seen a label on one of these cylinders simply as the letters DSIR?....

MR. HEANEY.- He is been cross-examined, with respect. "

In his decision the learned District Court Judge rejected other defences raised on behalf of the Respondent. He then dealt with the issue of the notice on the container. He described the cross-examination and re-examination to which I have already referred. He then went on to say:-

" This was greatly in issue and I am left with a situation where having given these original words, and as I have said to the prosecution that the method of showing the officer the photo, virtually putting it in his face to alter his evidence, seems to me to fly in the face of all proper re-examination techniques. I know that it places prosecution in difficulties when we are dealing with this sort of case which is full of problems for prosecution and for traffic officers. I have got to deal with it on the basis of deciding cases as a matter of fact. I find that I am left with the situation of the officer clearly spelling out what was on the label of the bottle. He first said that he confirmed it when asked to confirm it, but later when shown another photo, that he wanted to say he must have made a mistake. In my view that photo now takes all the weight, only it was deemed to be put forward, so any admissible evidence was not proper. We are all dealing with the situation and I can place no value on the alteration of the officers evidence. He was confronted with the photo in these circumstances and I would point out I cannot accept it as proper re-examination technique in the facts of this case. Perhaps to spell it out a little clearer, had the prosecution in re-examination, being faced with this difficulty,

> simply said, would you please clarify the step you took regarding the standardisation test and got a different answer from some voluntary way when the officer suddenly realised something different, then I could have had a different view, but the way this has come about I cannot say it is satisfactory and once again for technical reasons I find I am dismissing this charge. That charge will be dismissed. "

Question (a) is directed towards whether the learned District Court Judge "ought to have found" that the label had been correctly described. I take the question thus framed to be asking whether the learned District Court Judge was bound, on the evidence, so to find.

It was submitted by Mr. Katz, for the Appellant, that the learned District Court Judge was so bound. He contended that in his decision the learned District Court Judge had in effect held that because of the method used by the prosecutor in re-examination to put the photograph to the witness, he was bound to reject that evidence as inadmissible. Mr. Katz submitted that even if the method used by the prosecutor in re-examination was not in all respects satisfactory, that did not affect the admissibility of the evidence of the traffic officer that he had made a mistake and that the label on the container did read "Department of Scientific and Industrial Research".

I do not read the learned District Court Judge's judgment in the manner proposed by Mr. Katz. Certainly the learned District Court Judge in his decision does not refer expressly to a matter of credibility. But he did in the comment made in the course of the re-examination where he said that he "cannot place much reliance on the correction you are now getting". Then in his decision he said that he was left with the situation of the officer having clearly stated what was on the label, then said that he had made a mistake. He therefore placed no value on the alteration of the officer's

evidence. He was therefore in effect holding that, as a matter of credibility or weight, he was not prepared to accept the correction the traffic officer gave in the course of re-examination.

This was undoubtedly a course he was entitled to adopt. Indeed, having regard to the clear and unequivocal way in which Mr. Heaney had put the question to the traffic officer in cross-examination, and the unequivocal reply the traffic officer gave, it is not surprising that the learned District Court Judge found the correction given by the traffic officer in re-examination, under prompting from a photograph and in answer to leading questions, to be unconvincing.

This conclusion meant that the learned District Court Judge was left with the description of the label given by the traffic officer in cross-examination, namely, a label that read:-

> " Breath Test Standard alcohol vapour supplied by the DSIR "

Sub-para.(ii) of step 2 of para. 7 of the Transport (Breath Tests) Notice, 1978, reads:-

> " Introduce into the device alcohol vapour from a container marked with the words 'Breath Test Standard Alcohol Vapour supplied by the Department of Scientific and Industrial Research'; and "

It was submitted by Mr. Katz that the description given by the traffic officer correctly described the marking on the container and that the learned District Court Judge should have so found. In support he referred to the unreported judgment of the Court of Appeal in Thickpenny v. Ministry of Transport (C.A.163/83, 24 November, 1983) where the court was concerned with the labelling of a package on a blood specimen

collecting kit. The definition in s.57A(1) required the kit to have "a label indicating that it is a blood specimen collecting kit and that it has been supplied by or on behalf of the Department of Scientific and Industrial Research".

The kit had a label on the outside and a printed card amongst its contents. In this court the Judge considered that the label and the card did not comply with the definition but he considered that s.58E operated in the circumstances and rejected the submission that the appeal against conviction should be allowed. In the Court of Appeal it was held that the label and the card was sufficient compliance with the definition. However, there is a significant difference in the requirements in that case and this, because in that case the definition required a label "indicating" what is set out in the definition. In the present case step 2 requires the container to be marked "with the words" specified. That therefore is a more specific requirement. It follows that in my view a container labelled "Breath Test Standard Alcohol Vapour supplied by the DSIR" does not comply with the requirements of step 2 of the Notice. Thus the label had not been correctly described by the traffic officer. For these reasons I consider that question (a) should be answered "No".

On question (b), Mr. Katz submitted that the learned District Court Judge should have taken judicial notice of the fact that the initials "DSIR" is the abbreviated form of describing the Department of Scientific and Industrial Research and he referred expressly to s.13A of the Scientific and Industrial Research Act, 1974, which prohibits any person to use the name of the Department ("including the word 'DSIR'").

In my view there is little doubt that where appropriate for the purpose of deciding the issue in a case,

a court could properly take judicial notice of the fact that the Department of Scientific and Industrial Research is commonly referred to as the DSIR. This is reinforced by the fact that it is an offence for any person otherwise to use those initials. But, for the reasons I have already set out in answering question (a), I do not consider that, taking judicial notice of the fact that DSIR refers to the Department of Scientific and Industrial Research, decides the issue that was before the learned District Court Judge. That issue was whether the container had been marked with the words specified in the Notice, and for the reasons I have already given I do not consider that using the initials complies with the requirements of the Notice. There is therefore no reason for the learned District Court Judge to have taken judicial notice of the fact set out in the question. That question then is also answered "No".

For these reasons I confirm the determination in respect of which the case has been stated.

It was not contended in the District Court that that court should apply the provisions of s.58E. Although in the hearing in this court Mr. Katz submitted that s.58E could properly be applied in the circumstance of this case, whether or not it should have been applied does not arise for resolution on the questions as submitted in the case stated. Therefore I make it quite clear that in answering the questions in the way that I have, I make no finding on whether on the evidence as given by the traffic officer there was reasonable compliance with the provisions of the Notice.

The Respondent is entitled to costs on the hearing of this appeal which I fix at $250.

Solicitors:
Butler, White & Hanna, Auckland, for Appellant.
Heaney, Jones & Mason, Auckland, for Respondent.