IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M.492/83

BETWEEN: DE LUCA
of New Plymouth, Supervisor

Appellant

A N D: THE POLICE

Respondent

Offence: Excess Breath-Alcohol
Dealt With: 30 September 1983 At: Te Awamutu By: Millar DCJ
Sentence: Periodic Detention 3 months
Disqualified 2 years

Appeal Hearing: 1 February 1984

Judgment: 9 February 1984

Counsel: M G Kelly for appellant
C Q M Almao for respondent

JUDGMENT OF BISSON J.

The appellant was charged that on the 13th May 1983 at Te Awamutu he did commit an offence against s.58(1)(a) of the Transport Act 1962 in that he drove a motor truck on Kihikihi Road while the proportion of alcohol in his breath exceeded 500 microgrammes of alcohol per litre of breath. After a defended hearing he was convicted and sentenced to three months non-residential Periodic Detention and disqualified from holding or obtaining a driver's licence for a period of two years. He has appealed against his conviction.

The sole evidence for the prosecution was given by Police Constable Colin Arthur Hall. At the close of his evidence the learned District Court Judge held that

prima facie case had been made out. The appellant elected not to call evidence. The learned District Court Judge rejected a submission by Mr Kelly that the prosecution should not succeed because the constable had failed to prove that he was in uniform. The learned District Court Judge had regard to the evidence that the constable was in the Uniform Branch of the Police Force and was driving a Police Patrol car. In those circumstances he drew the inference that the constable was in uniform, and made a finding of fact to that effect. It was held in a majority decision of the Court of Appeal in Ministry of Transport v Quirke (1977) 2 NZLR 497 that s.68B (1) of the Transport Act 1962, which authorizes constables in uniform to enforce the provisions of the Act, applies to s.58B relating to blood tests. Section 68B (1) similarly applies to breath-tests under s.58A. In Quirke's case Woodhouse J. (as he then was) said in the course of his judgment at p. 503 :

> "In my opinion, where there has been no challenge in the field to the authority of a constable or traffic officer to take action under the Transport Act and in addition, at the hearing in court to some consequential charge, his authority to have acted in that way is not questioned at all until after the prosecution has closed its case, then the commonsense inference outlined in Cooper v. Rowlands ((1971) RTR 291) could usually be acted upon by the court. In the ordinary case at least that inference should be enough to dispose of the issue, if it were raised."

I respectfully agree with that opinion. Mr Kelly has raised this point again on the appeal. In my view the learned District Court Judge was perfectly entitled to draw the inference which he did, and I see no occasion to disturb his findings.

Mr Kelly's next submission was that when referring to carrying out the evidential breath-test the constable said in his evidence :

> "The defendant then took the breath test on the same apparatus under the same conditions."

which words, Mr Kelly said, related back to the taking of the breath-screening test. Mr Kelly pointed to the difference so far as Step 4 was concerned in respect of these tests. This point was not raised before the learned District Court Judge, so I do not have the benefit of his finding on the evidence, but as I understand the constable's evidence his use of the words "on the same apparatus under the same conditions" do not relate to the breath-screening test apparatus and conditions but to the evidential breath test apparatus and conditions as stated in the Transport (Breath Tests) Notice 1978, to which he said he had referred and complied with. This ground of appeal is likewise rejected.

Mr Kelly's third ground of appeal involved a submission which he had made to the learned District Court Judge. This ground relates to the requirement under Step 2, the Standardization Test in paragraph 7 of the Transport (Breath Tests) Notice 1978, which requires the enforcement officer to :

> "(ii) 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"; "

Mr Kelly submitted that the evidence had not proved beyond a reasonable doubt that such a container had been used for the introduction of alcohol vapour to the evidential breath-testing device, and that therefore the prosecution case

should have failed. The importance that the correct container is used is expressed by Richardson J. in his judgment in the Court of Appeal in Boyd v Auckland City Council (1980) 1 NZLR 337 at 346 :

> "The protection for the citizen is that the container must proclaim on its face that it comes from an official source and that the substance it contains is alcohol vapour appropriate for the purpose, which has been supplied from an official source."

In each case the Court must be satisfied that a container bearing the marking stated in Step 2 of the Standardization Test was used by the enforcement officer, and if he does not expressly state that he did so, his evidence must be sufficient for the Court to draw a reasonable and proper inference that he did so. In the course of his evidence-in-chief, the constable said :

> "In the patrol car I first took out a copy of the Breath Tests Notice 1978 and referred to them. I then assembled an 'Alcotest R.80A' breath-testing apparatus and asked the defendant to give me a sample of his breath. The apparatus was assembled in accordance with the Transport (Breath Tests) Notice 1978..."

Further on, he said :

> "At the Police Station I again referred to the Transport (Breath Tests) Notice 1978 and commenced to undertake the breath-screening procedure. I used the 'Alcosensor II' Breath-Testing device. I first undertook the zero test, then the standardization test, then the second zero test in accordance with the Trnasport (Breath Tests) Notice 1978."

At a later stage of his evidence, he said :

> "I referred to the Breath Tests Notice continually throughout, both when we first got back into the patrol car and then again at the Police Station throughout the whole of the test procedure."

He produced a copy of that Notice to the Court.

After cross-examination regarding the breath screening test Mr Kelly passed on to the evidential breath test, and the following questions and answers ensued :

"Q. When you got to the Police Station could you please explain what you did under the Standardization Test?

A. I used the 'Alcosensor II' breath-testing device.

TO THE COURT:
Q. Do you actually recall what you did on this occasion, or do you not recall?

A. It is the routine procedure, Sir. Nothing specific. I followed it, step by step. There was nothing unusual about it, put it that way.

COUNSEL:
Q. Can you remember introducing the vapour into the device?

A. I can, yes.

Q. Could you explain the procedure you used for that?

A. I inserted the vapour into the machine in the normal way, through the tube on the top of it. I cannot recall the reading that the machine gave other than it was less than that which was marked on the can of vapour.

Q. You can't remember either of the readings on the vapour can, or the reading you got from the device?

A. No.

Q. What sort of can did you use?

A. Could you re-phrase that? There is only one can that comes with the equipment.

Q. What was the can?

A. A pressurized vapour can.

Q. Can you remember anything distinctive about the can?

A. No.

Q. Nothing at all?

A. No.

/Cont'd.....

"Q. You are quite sure about that?

A. Yes.

NO Re-examination by Police.

TO THE COURT:
Q. You were asked what kind of can you used, and you said something like this - that it was the sort of can you always use. Is that right?

A. That is correct, yes. The can that comes with the equipment.

Q. Can you describe the can that comes with the equipment?

A. As I understand it, it is a can that is prepared by the D S I R, specifically designed for testing of the 'Alcosensor' machine."

In answer to the submission in the District Court, the learned District Court Judge said :

"I am aware of the various cases on this matter, which counsel was good enough to cite to me. It seems to me that what those cases say is not that the witnesses must specifically refer to that particular item but that the prosecution must show that that particular item was used. In the present case the constable said he referred constantly to the Notice. It was clear from the evidence that would include the making of the Standardization Test. He said that the cannister was the same as any other cannister provided for that purpose by the D S I R.

At no time did he say that the cannister had on it "Breath Test Standard Alcohol Vapour supplied by the Department of Scientific and Industrial Research", and at no time was he asked whether it had that on it. I believe that I am entitled to infer from the evidence of Constable Hall - he, incidentally, is a very experienced Police officer and, as he said, he had been carrying out this type of test for the past 10 years - that had the container been anything other than the usual sort of container as specified in the Notice, he would have observed it and would have said so in reply to counsel's question as to whether there was anything distinctive about it.

The reading I take, and I think it is the obviou reading, from Constable Hall's evidence, is that it was because there was nothing to him distinctive

> "about it that Constable Hall was satisfied this was the proper form of container as specified in the Breath Test Notice. So I reject that submission."

Mr Kelly drew attention to the fact that the learned District Court Judge had wrongly quoted the evidence when he said that the constable had said that the cannister was "the same as any other cannister provided for that purpose by the DSIR", whereas the only reference to the Department of Scientific and Industrial Research by the constable had been his final answer:

> "As I undersand it, it is a can that is prepared by the DSIR, specifically designed for testing of the 'Alcosensor' machine."

I see nothing material to the distinction referred to by Mr Kelly so far as the oral decision of the learned District Court Judge is concerned.

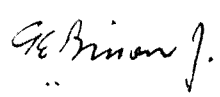
Mr Kelly relied strongly on the constable having said that he could not remember anything distinctive about the cannister which, according to Mr Kelly , meant that the cannister did not have the distinctive marking required under the Notice. I agree with Mr Almao's submission that the constable did not have what, to him, was the standard marking of such a cannister in mind when asked if there was anything distinctive about the cannister. The constable said in evidence he had done some 200-300 breath-screening tests. To a constable of that experience he would not consider what, to him, had become the usual marking of the cannister as in any way 'distinctive'. Similarly, when asked by the Court if he did actually recall what he did on this occasion, he referred to the routine

procedure, saying there was nothing specific, nothing unusual and, in my view, when asked if he could remember anything distinctive about the can he said "No" - again meaning there was nothing unusual about it for him to specify.

In this case the constable was meticulous in his approach by constantly referring to the Notice, and he referred to the reading that was marked on the container of vapour. From his inspection of the container so as to read the level indicated on it for the purposes of Step 2 (iii), and in the absence of any cross-examination directed specifically to the marking on the container, then it is a reasonable and proper inference that the container did carry the prescribed marking as to its contents, thereby causing the witness to answer the question whether there was anything distinctive about the can in the negative.

Mr Kelly produced copies of a number of unreported decisions in the High Court, but I see no occasion to make mention of them as, on the totality of the evidence, I see no occasion to interfere with the finding of fact by the learned District Court Judge that a container marked as specified in the Breath Tests Notice was used by the constable, and accordingly the appeal is dismissed.

Costs according to scale under the Costs in Criminal Cases Act are awarded to the respondent.



Solicitors:

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