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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1728/84

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BETWEEN M FAIRLEY

APPELLANT

AND MINISTRY OF TRANSPORT

RESPONDENT

Hearing: 4 March 1985

Counsel: Illingworth for Appellant
Moore for Respondent

Judgment: 4 March 1985

(ORAL) JUDGMENT OF PRICHARD, J.

This is an appeal against a conviction entered in the District Court at Auckland on 25 October 1984. The Appellant was convicted of the offence of driving with excess breath alcohol. Following a positive roadside breath screening test, an evidential breath test was carried out at the Motorway Base Office of the Ministry of Transport at Ellerslie. The test gave a positive reading of 600 microgrammes of alcohol per litre of breath. The Appellant elected not to undergo a blood test and, accordingly, the charge was laid under s.58(1)(a).

The first point taken by Mr Illingworth for the Appellant is that after the second zero test was carried out on the Alcosensor II Device, it was found there was no mouthpiece for the Appellant to blow through. There ensued a delay of some 20 minutes while a mouthpiece was obtained from another office of the Ministry of Transport. When it arrived the enforcement officer proceeded at once with the breath alcohol test (Step 4). It appears that his last action, prior to the arrival of the mouthpiece, was to depress the READ button when he obtained a reading of four zeroes.

Mr Illingworth submits that this delay of 20 minutes has in fact two separate, although perhaps inter-related consequences.

The first is that the elapse of a period of 20 minutes between the Standardisation Test and the breath alcohol test might invalidate the Standardisation Test as an indication that the device was working properly at the time of the breath test. In this regard, although admittedly speculating, Mr Illingworth suggests that the circumstances at the time of the Standardisation Test might differ materially from those at the time of the evidential breath test (Step 4). For example the temperature at which the device operated might differ between the time of the Standardisation Test and the time of the actual breath alcohol test, or perhaps the

batteries which energise the device might lose their effectiveness. It would, as Mr Illingworth suggests, have been a simple matter to carry out the Standardisation Test again when the mouthpiece became available. This was probably the appropriate course for the enforcement officer to follow in the circumstances. Mr Illingworth submits that if there is any doubt in this regard, it ought to be resolved in favour of the Appellant.

In relation to the delay of 20 minutes, Mr Illingworth addressed his submissions to a second matter - the proposition that the delay between the request to undergo an evidential breath test and the actual test amounted to a failure to comply with s.58(a)(4). A suspect who has provided a positive roadside breath test and has accompanied an enforcement officer to any place may then be required to undergo forthwith, at that place, an evidential breath test. In this case, although the request was duly made, the enforcement officer was not in a position to administer the test forthwith. As I understand it, the argument is that the enforcement officer cannot effectively require a suspect to forthwith undergo an evidential breath test which he is not equipped to administer "forthwith". I do not think this is a valid objection - the word "forthwith" applies to the compliance of the suspect, not the actions of the enforcement officer. The officer could

have required the Appellant to accompany him to "another place" where it was likely that she could undergo a breath test (s.58A(3A)): he chose the course of having a mouthpiece sent from another office, which was probably more expeditious than transporting the suspect to the mouthpiece.

The next matter to which Mr Illingworth refers is that following the recording of a positive evidential breath test, there was a delay (and it is an unexplained delay) before the Appellant was informed that the test was positive and told of her right under s.58(4)(a) to request a blood test, and of the consequences of her not so requesting.

Finally, Mr Illingworth is critical of the terms in which the Appellant was informed of the matters set out in s.58(4)(a). In particular, Mr Illingworth refers to the fact that the Ministry of Transport Evidential Breath Test form was read to the Appellant. The submission is that this document is unnecessarily complicated, goes beyond the simple requirements of subsection 58(4)(a) and is likely to confuse rather than inform the suspect. However, the evidence is not clear as to the exact words in which the position was explained to the Appellant. The advice to the Appellant was certainly not confined simply to the reading of this form. On this particular ground, I am of the view that

there is no basis for the submission made by Mr Illingworth.

As to the period of delay which was occasioned by the non-availability of the mouthpiece for the Alcosensor device, I take the view that the Transport (Breath Tests) Notice 1978 prescribes a series of steps which are to be taken in sequence and without any significant delay between each of those steps. Whether a delay of 20 minutes between steps 2 and 4 is significant I have no idea. But I think it reasonably possible that there is substance in Mr Illingworth's submission that when there is a delay as long as 20 minutes between the Standardisation Test and the breath alcohol test the reliability of the breath alcohol test is not safely established. If this be so, then it raises a matter of doubt which ought to be resolved in favour of the Appellant. On that ground therefore I see a basis on which this appeal should be allowed.

As to the further point that there was a delay of 10 minutes between the obtaining of a positive evidential breath test and the informing of the Appellant of her right to undergo a blood test, it was held by the Court of Appeal in M.O.T. v. Beattie (C.A.312/82, judgment delivered on 21 February 1984) that an unexplained delay of 13 minutes at this juncture was such that it was not possible to invoke the reasonable compliance provisions

of s.58E of the Act. When I come to compare a delay of 10 minutes with a delay of 13 minutes, it is impossible for me to say that the two cases are significantly different. It appears to me that on that ground alone the appeal is entitled to succeed.

Accordingly, the appeal is allowed and the conviction is quashed.