IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Set 4

AP. 149/91

BETWEEN PETER EDWARD BURROWS

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 25 July 1991

Counsel: G.C. Gotlieb for appellant
Mrs S.C. McAuslan for respondent

Judgment: 13 August 1991

JUDGMENT OF BARKER J

This appeal against the conviction of the appellant on a charge of driving with excess breath alcohol presents several important topics for consideration.

On 13 August 1990, the appellant drove his vehicle on the northern motorway in a manner which attracted the attention of a traffic officer. He received a roadside breath test and later an evidential breath test for which an Intoxilyzer 5000 machine was used. He was convicted in the North Shore District Court on 9 May 1991 after the learned District Court Judge had delivered a reserved decision.

At the hearing in the District Court, counsel for the appellant accepted that the procedures set out in the Transport Act 1962 ('the Act') and the Transport (Breath Tests) Notice (No 2) 1989 ('the notice') had been properly followed. The evidence showed that, on the two evidential breath tests carried out on the appellant using the Intoxilyzer 5000, the readings were 688 and 639 - a difference between the two tests of 9.2%. In cross-examination, the traffic officer said that he understood that there was an inbuilt 'safeguard' in the device of 15%; of course, he could not give evidence as to whether that was a reasonable percentage or why any 'safeguard' was provided at all or why one was necessary.

The prosecution conceded that a request had been made to it on 4 April 1991 by counsel for the appellant for certification records, log books and records of repair relating to the particular device used in the test performed on the appellant. None of the information was provided by the respondent nor was any reason offered for the non-provision of the information.

Counsel for the appellant, stated from the Bar, without opposition from counsel for the respondent, his purpose in seeking this information. He wished to obtain assurance from the officer of the Department of Scientific and Industrial Research ('DSIR') responsible for programming the Intoxilyzer devices, that the information printed at the foot of the printout, recording the result of the

evidential breath test indicated to that officer that the device was functioning properly. Counsel also stated that some offices of the respondent provide this information on request but that the North Shore office involved in this case did not do so. He also stated from the Bar that the requested information is not held by the respondent but by the DSIR, which in these days of 'user pays' wishes, to exact a fee from somebody for providing the information.

The learned District Court Judge declined to uphold the appellant's submissions that the Court should reject the oral evidence of the traffic officer of the result of the evidential breath test performed on the Intoxilyzer 5000 and also the card on which the evidential breath test result was recorded. He held that no reasonable doubt as to the accuracy of the machine had been raised.

Counsel for the appellant submitted that there was no provision in the Act or the Notice which deems the device to be accurate or provides for certification of devices; a provision can be found in S.197 of the Act relating to certificates which are admissible in evidence on the accuracy of weighing devices and speed-measuring devices.

The District Court Judge found, in the absence of any statutory requirement about certificates of accuracy, that the accuracy of the device was not put in issue merely by counsel requesting certification records, log books and

records of repair. The District Court Judge acknowledged correctly that, although there was no legal burden upon the appellant to prove anything, he had to point to some evidence from which a reasonable doubt could be inferred. There was no such evidence in this case.

Mr Gotlieb who argued the appeal with considerable skill had produced two recently published American textbooks devoted to the topic of the defence of drunken driving charges, i.e. 'Defending Drinking Drivers' (2nd ed.) by John A. Tarantino, and 'Drink Driving Defences' by Lawrence Taylor. Both books devote much discussion to the Intoxilyzer 5000 and to problems which have arisen in the United States with that device. In general terms, the authors point out that, because a micro-processor is used in the device, a small error may occur in a matter of seconds which may significantly affect the test. The micro-processor might allow the machine to continue functioning without any sign of problem. Even if a simulated test is subsequently run, there may be no evidence that the test run was flawed.

Counsel for the respondent, submitted that this information about the experience with the Intoxilyzer in American jurisdictions may be of academic interest but of little help; the Act is a Code; the Minister has approved the Intoxilyzer device; a Full Court has held that the use of this device was appropriate: See Gilbert & Addison v Ministry of Transport (Auckland AP.189/90, 20 December

1990). There it was held that the Minister's approval of the device must have included, not only the physical elements, but its software and the arrangement of the switches which are essential parts of its operation and functioning.

Counsel for the respondent acknowledged that, in an appropriate case, if a reasonable doubt was raised on the evidence to the effect that the machine had not been functioning properly on a particular occasion, it would then be incumbent on the prosecution to prove that the machine was functioning properly. However, counsel submitted that the decision of Hardie Boys J in Elliot v Ministry of Transport (M.21/81, Christchurch, 2 December 1981) determined the present appeal. This authority was relied on by the District Court Judge in the present case in the following passage from the unreported judgment -

> "First, although evidence raising a reasonable doubt that the device was in working order will entitle the defendant to an acquittal unless the prosecution is able to establish that it was in fact working properly, it is not permissible to seek to prove that a device that appears to be working properly is not to be relied upon because of some weakness or deficiency in this kind of device in general. That kind of proof is irrelevant. The Court is required by the legislature to accept the reading on a device in apparent satisfactory working order. The Court accepts the reading as constituting an offence rather than showing a perfectly accurate result."

That quotation referred to a submission before Hardie Boys J that the District Court Judge should have allowed the defence to call scientific evidence as to the accuracy,

not of the particular testing device used, but of the Alcosensor II in general. The thrust of the evidence proposed to be called was that experiments with other devices had demonstrated that they were inaccurate. The device under consideration by Hardie Boys J was not one which was deemed by the Minister in his notice to be conclusive.

The result of the present state of the legislation and notice is that certain devices, including the Intoxilyzer 5000, are deemed to be conclusive whenever the device shows an evidentiary breath test reading of more than 600. Only where the breath test reading is between 400 and 600 is the suspect entitled to demand that a blood test be taken. Other devices, such as the Alcosensor, are not deemed to be conclusive; when these are used, the suspect is still entitled to require a blood sample to be taken, even if the breath test reading is over 600.

Hardie Boys J in Elliot's case and the District Court Judge in this case nor I derived no help from the decision of the Court of Appeal in Holt v Auckland City Council [1980] 2 NZLR 124. There it was held that the Court is not entitled to take judicial notice of the operation and reliability of the computer used as part of the blood analysis procedure, there was no statutory provision relieving the prosecution from the obligation to observe the ordinary rules of evidence in establishing the results of the test and their accuracy.

I agree with Hardie Boys J when he distinguished Holt's case from the case before him; the distinction applies equally in the present case. By means the the Notice, the legislature has dispensed with the kind of proof which, in Holt's case, was required to show the proportion of alcohol in the suspect's blood. I agree with the District Court Judge that there was insufficient material raised by the appellant in this case to raise a reasonable doubt. Accordingly, the appeal must be dismissed.

Before parting with this appeal, there is a matter of concern to the Court; namely, the failure of the respondent to reply to the reasonable request of counsel for the appellant to provide details of the maintenance records of the device. The obduracy of the respondent is hard to understand in the light of the concluding comments of Hardie Boys J in the Elliot case viz -

> "I cannot leave this matter without commenting upon the Ministry's refusal to allow the defence to examine the particular device that was employed in this matter. An accused person is in my view entitled to be assured that the device was in fact operating properly. He ought to have access to it in order that he may look into that question if he wishes. In certain circumstances, a refusal to allow him to do so might justify the Court in disallowing evidence of the result of the testing procedure in exercise of its general duty to ensure fairness in the conduct of the investigation and prosecution of offences. In this case, where access to the device was sought for a purpose which was not relevant to an available defence, no injustice has been done by the attitude taken by the Department and the circumstances do not warrant any action being taken by the Court."

Since that case was decided, the Official Information Act

1982 has been passed. The rights of persons charged with offences have been defined by the Court of Appeal in Commissioner of Police v Ombudsman [1988] 1 NZLR 385. In criminal cases the prosecution can be required to provide the defence with much pre-trial information, much of it of a kind rarely disclosed previously. It seems fairly standard, at least in major criminal trials, for the Police to be called upon to produce "job sheets" and other records relating to their investigation of an alleged offence. This mild revolution in criminal discovery appears to have been accomplished with little damage to the viability of the criminal justice system.

Also of relevance is the fact that the Intoxilyzer, unlike the device in the Elliot case, is deemed to be a conclusive device. Once its reading over 600 is accepted, the suspect, has no right to demand a blood test. Consequently, defence counsel may feel under a duty to be more diligent in checking that a given device was properly working for any given evidential breath test.

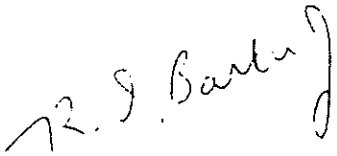
I have considered whether I should take the course suggested by Hardie Boys J and allow the appeal as a mark of the Court's condemnation of the intransigence of the respondent in refusing to comply with the reasonable request of the appellant to provide the records.

Regardless of whether the reason for this obduracy is financial, it should be understood that the proper avenue

by which defence counsel may obtain information of this nature is an approach the prosecutor. The respondent cannot shirk its prosecutorial responsibility by saying that the information is not in its control; or that the DSIR might charge it for the information. Notions of 'user pays' lie uncomfortably with the right of a suspect to obtain legitimate information relating to his or her prosecution on a criminal charge.

I have decided not to take the extreme step of dismissing the prosecution in the present case. However, the respondent can be put on warning that the Court may not be so well disposed if faced with another refusal to comply with such a request made on some date after the delivery of this judgment.

The appeal is accordingly dismissed.



Solicitors: Gary Gotlieb, Auckland, for appellant
Crown Solicitor, Auckland, for respondent

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