IN THE HIGH COURT OF NEW ZEALAND 24/10
WELLINGTON REGISTRY

2164E
6/11

AP 211/91

2029

BETWEEN MICHAEL JOHN SMITH

Appellant

AND POLICE

Respondent

Date of Hearing: 2 October 1991
Date of Decision:

Counsel: 7/10/91

W M Johnston for Appellant
M T Lennard for Respondent

RESERVED DECISION OF McGECHAN J

The Appeal

This is an appeal against conviction in the District Court at Wellington on 24 July 1991 upon a single charge under the Transport Act 1962 s58(C)(1)(a) of failing to permit a specimen of blood to be taken. At the conclusion of argument it appeared questions of some possible significance might arise as to:

(i) the extent to which officers administering breath screening tests must detail precise steps taken and observations made when in cross-examination invited merely to "amplify" general evidence;

(ii) description of the evidential breath testing device merely as "Intoxilyzer 5000" in the light of MOT v Newton (1990) 6 CRNZ 232, and

(iii) a possible mandatory requirement for production of Intoxilyzer 5000 result cards into evidence in the light of the Transport Amendment Act 1990.

I reserved decision accordingly. Upon further consideration, the last of these questions does not truly arise.

Facts

The basic facts are routine enough, although some questions arise from the course which the hearing and evidence took.

The only evidence in the case was from a female Police Constable. She stated that at 1.15 am on the morning of Thursday 18 May 1990 while on patrol she observed the appellant riding a motorcycle along Taranaki Street, Wellington. He was weaving, within the correct lane. When stopped, he smelt of alcohol and admitted some consumption. At 1.19 am she requested him to undergo a breath screening test. Her evidence-in-chief on that aspect was:

> "I assembled the breath screening device, which was an Alcolyser, in accordance with the Transport (Breath Tests) Notice (No 2) 1989 and administered the test at 1.20 am. The result was positive in that the crystals turned green up to and beyond the red line. I showed the defendant the device and he made no comment".

Subsequently, she amplified evidence by stating she instructed the appellant to blow into the device, fully inflating it by one breath, for 10 to 20 seconds, and showed him the result by torchlight. Under cross-

examination she confirmed she administered the breath screening test

> "in accordance with ... Transport (Breath Test) Notice (No 2) 1989 coming into existence 15 December 1989".

(I refer to the Transport Amendment Act 1990 s3 as to the relevance of the latter). She confirmed that the test was positive, explaining her meaning as "the crystals turned green up to and beyond the red line on the tube". Defence counsel then asked her whether she wanted "to amplify", stating he was giving her "a chance to be more specific". The officer did not amplify. Pressed along the lines that she could remember no more than the content of her brief, she repeated the same description a number of times. Asked to remember the content of the relevant Notice she recalled no more detail than that coinciding with the description given. She was not given a copy of the Notice to read, and nor were its detailed components read out to her, with accompanying questions directed at such specific details.

The officer's evidence continued that she required the appellant to accompany her to Pearse House for an evidential breath test, blood test, or both. He agreed. Her initial evidence simply was to the effect that at Pearse House he refused to undergo an evidential breath test, stating he had fulfilled all requirements by giving his name and address. It was said that at 1.48 am when asked in standard fashion (by reading from the relevant form) to permit a blood sample to be taken he prevaricated, claiming to have fulfilled his obligation by giving name and address. That response was taken as a refusal. The officer did not herself refer to "Intoxilyzer 5000" in her evidence-in-chief. Evidently, the device and details related to it were not included in her brief. Cross-examination commenced with a number of peripheral references to "the Intoxilyzer 5000", and in due course a question directed to her

> "You were going to use an Intoxilyzer 5000".

She was asked as to preparation made for its use, and what she did with it. Under further cross-examination, posited to some extent upon absence of reference to the matter in her brief, she stated in piecemeal fashion that she had carried out the procedure

> "in accordance with the Transport (Breath Test) Notice (No 2) 1989",

to the extent that she started the procedure, but the appellant refused to blow into the device, so she

> "got the test thing out of it saying incomplete test".

When cross-examined more closely as to the point in time in the process at which the appellant refused to blow, the officer evidently became nonplussed. The District Court Judge intervened to clarify the question as being whether the appellant had refused, or had agreed but the machine had thrown up an "incomplete" result. The officer, signalling understanding, clarified by saying:

> "He refused to undergo the evidential breath test, but I gave him every opportunity. I put the slip into the machine, did the whole test and gave him every opportunity to blow in the machine yet he refused. All the way through he refused everything.
>
> (DCJ) So what you are saying is that you took the device out, you pushed the right buttons, and put the card in and when it came to blow he would not blow. Is that what you are saying? Yes".

In further cross-examination the officer confirmed she had conducted the evidential breath test in accordance with the instructions in the Notice and on the machine. In particular she referred to the instructions on the machine as requiring her to put the card in, push the buttons, change the mouthpiece, and then as directed by

the machine itself. Defence counsel inquired where the card was. She answered there was a copy on file. The notes of evidence record that the card was shown to defence counsel. The card was not put to the witness by defence counsel, or in re-examination. It was then put to the officer that the test had not been carried out in accordance with the Notice. She disagreed, stating the appellant had refused the test.

District Court Decision

The learned District Court Judge summarised steps taken in terms of the officer's evidence. She rejected a submission that doubt remained as to the conduct of the breath screening test in terms of the Notice due to the officer (despite opportunity to amplify) not having given details specified in step 6 of the Notice. In the District Court's opinion such detail was not customary, and sufficient proof existed. The Court rejected a further submission that doubt existed as to the fact of refusal to give both evidential breath test and a specimen of blood.

Appellant's Submissions

In this Court, appellant submits (in summary):

(i) Breath screening test: the description given by the officer of a "positive" test was put in issue, and was insufficiently detailed to establish compliance with the Notice.

(ii) Evidential Breath Test:

(a) an evidential breath test was begun, and the result card showed an incomplete test. There was no complete test prior to the request for blood. The evidence as to refusal to blow

into the device was unsatisfactory. The Bench should not have intervened on that aspect.

(b) the description "Intoxilyzer 5000" was insufficient identification as an approved device. The officer did not say she was using an approved device. The printout card itself was not produced. There was insufficient evidence an approved device was used in the attempted evidential breath test.

Breath Screening Test : Description

The Transport (Breath Tests) Notice (No 2) 1989 provides:

"5. Manner of carrying out breath screening tests by means of Alcolyser - Breath screening tests carried out by means of an Alcolyser device shall be carried out in the following manner:

(a) Step 1: The sealed tips of both ends of the tube shall be broken off:
(b) Step 2: The red end of the tube shall be inserted into the collar of an empty measuring bag, so that the arrow marked on the tube points towards the bag:
(c) Step 3: The end of the tube nearest the arrow shall be pushed firmly into a mouthpiece:
(d) Step 4: The person being tested shall blow through the mouthpiece and the tube until the bag is fully inflated. As far as possible, this should be done with one single breath in 10 to 20 seconds:
(e) Step 5: The enforcement officer shall within 5 minutes examine the tube by daylight, or by the light of a torch or of any motor vehicle headlight or internal light, or by any other artificial light except mercury or sodium-vapour street lighting:
(f) Step 6 (results of tests):
(i) If any of the yellow crystals in the tube are stained a green colour and this green stain extends from the end of the crystals closest to the arrow marked on the tube to or beyond the red line marked on the middle of the portion of the tube containing the crystals, the test shall be taken to indicate that the proportion of alcohol in

> the person's breath exceeds 400 micrograms of alcohol per litre of breath:
> (ii) If any of the yellow crystals in the tube are stained a green colour, the test shall be taken to indicate that there is some alcohol in the person's breath".

The officer stated, generally, that she followed the prescribed procedure. She referred more specifically to certain aspects, eg blowing into the bag, examination by torchlight and the crystals turning green to beyond the red line. She did not state specifically, and in detail, each and every step otherwise taken. I agree with the learned District Court Judge such a shorthand approach is common enough, and an unprovoked litany of the totality of steps taken is uncommon. Such a general approach is recognised as usually sufficient unless specifics are properly put in issue by cross-examination. As the Court of Appeal said in a cognate situation in ACC v Scale (1985) 1 CRNZ 544, 546-547:

> "Thus, and as is well settled in High Court decisions, unless subsequently put in issue by the defence a general statement by the enforcement officer in evidence-in-chief that the tests were conducted in accordance with the Breath Tests Notice will ordinarily be sufficient evidence on which the Court may find that all the tests were carried out fully and correctly. In such a case cross-examination may put any one or more of the statutory steps in issue. What will be sufficient to raise an issue as to compliance with a particular requirement will then depend on a fair and practical assessment of the relevant passages in cross-examination, having regard to the materiality of that requirement under the statutory scheme. So if in the course of answering a general question as to how he carried out a particular step the enforcement officer omits an item of detail, which is not pursued by further questioning, it may nevertheless be open for the Court to draw an inference that any such unchallenged omission from the description was accepted by the defence as being inadvertent and unimportant, and to conclude that there had been proper compliance with that step. That is a risk defence counsel must face if they fail to follow up a general question with a further question drawing attention to an omission".

There can of course be situations where there is other evidence, sufficient on balance even without cross-examination of the officer on steps taken, to raise sufficient doubt: MOT v Newton (1990) 1 CRNZ 232, 237. The principle is not to be taken too far. It is not the obligation of the defence to fill holes. If a prosecution witness has said nothing whatsoever as to having taken a step, and no inference is open he may have done so, the defence need not fill the void. We operate for better or worse under an adversary system. However, when the prosecution has given some credible evidence on a matter, eg a generalisation which prima facie establishes or could establish certain action, the defence (unless it can shake the generalisation as a whole) must confront the problem. It must raise the specific which it says was indeed omitted and put that specific to the witness responsible. To be useful, that process must be direct and comprehensible to a witness. A Court will not often be in doubt that an apparently credible generalisation did not indeed cover a component specific unless that specific itself is pin-pointed or otherwise clearly in the forefront of the witness' mind when questioned.

That process was not taken sufficiently far in this case. A general attack on the generalised statement of compliance, founded upon departure from briefs, coaching, and rote learning, did not succeed before the District Court, and I would not question a conclusion so founded on credibility. I am not altogether surprised. Attacks on the credibility of a witness by pointing to versions from previous briefs or depositions, however attractive to counsel, often illustrate little more than the propensity of honest people to put the same thing on different occasions in different ways. No sufficient specific attack was mounted as to the officer's generalisation. It was not sufficient for the defence merely to invite her to "amplify" or "be more specific".

Under witness box conditions few witnesses are sufficiently perceptive and analytical to be able to instantly identify and expand upon all possible points at which the cross-examiner may be hinting. It was necessary for counsel to put exactly, and by item, the steps which he had in mind to challenge. I can understand the halfway-house approach he has in fact adopted. It was safe. It was not likely to stimulate adverse recall and answers. Indeed, it may well have been chosen because no confidence was felt the right fish would be caught. However, safety is not sufficient. Specifics as to step 5, and indeed otherwise, were not adequately put in issue to challenge the previously generalised evidence as to compliance with the Notice. The learned District Court Judge was entitled to accept the latter evidence, and I would not disturb her decision to do so.

Evidential Breath Test : Incomplete Test

This was not an MOT v Masters (6 August 1991, CA 135/91) situation involving a malfunctioning machine. There was evidence that while the officer set up the evidential breath test device, and inserted a card and made it operative, the appellant refused to blow into it. The device of course had to be cleared for the next customer. It produced an "incomplete test" result. That ultimate mechanical event, no doubt programmed, does not when viewed in the light of the other evidence as to refusal establish that a test was even attempted, let alone administered.

I do not accept the attack mounted on the officer's evidence that the appellant refused to blow into the evidential breath test device. Clearly she did not initially contemplate giving a detailed description in evidence of that aspect. No detail was contained in her brief. When the topic was developed with her,

understandably it came out in a halting fashion. However, it was in total sufficient, and its credibility was for the District Court. I do not see the learned District Court Judge's intervention as unjust in the particular circumstances. The question was a genuine attempt at assisting an apparently nonplussed witness by giving a guide as to the topic on which an answer was desired, and at a later point a summary of answers received as understood. Such interventions, particularly of a leading nature, can give rise to difficulties, but the question is one of degree. This intervention did not amount to anything infringing principles discussed in E H Cochrane Limited v MOT (1987) 3 CRNZ 38 (and see R v Morris 2 September 1991, CA 152/91).

Evidential Breath Test : Intoxilyzer 5000 Identification

I am uncertain quite how far this point was taken, if at all, before the District Court. However, it best is dealt with.

Counsel relied on MOT v Newton (1990) 6 CRNZ 323 as authority that a bare reference in evidence to "Intoxilyzer 5000" was insufficient proof of use of an approved device, although expressing some saddened experience to the effect the case was not being widely followed in the District Court in precisely those terms. Newton's case turned upon the earlier Transport (Breath Tests) Notice 1989, SR 1989/68. Under paragraph 2 of that Notice, "Intoxilyzer 5000" meant "an Intoxilyzer ® 5000", and it was not, in evidence, sufficient in itself as a substitution for the fuller description of that approved device. Evidence of colloquial usage to that shorthand effect would be needed. Moreover, when the then previous Transport (Breath Tests) Notice 1987 (1987/222) was considered, there was possible confusion with a differently described "Intoxilyzer 5000" defined there as meaning "an Intoxilyzer-Alcohol Analyser Model

5000". The result card - admissible - indeed was so noted. The High Court noted (239) that its decision was one on its own facts. With respect, the decision on those facts was hardly surprising. However, the Transport (Breath Tests) Notice (No 2) 1989 SR 1989/389 paragraph 2, presently relevant, now gives an expanded definition of "Intoxilyzer 5000". It is expanded to include "any device having the trade name 'Intoxilyzer' and associated with the number 5000". A reference to "Intoxilyzer 5000" may now be read more expansively. The possibility of confusion with the 1987 Notice and instrument does not exist on the facts of this case. I do not consider Newton's case is controlling. It is true the officer did not say the device was an "approved device" in the circumstances in which she gave evidence. That is not significant. She had been led to use of the shorthand phrase "Intoxilyzer 5000" by earlier cross-examination questions using that description. She would have assumed it was a sufficient description to cater for the authorised device, a matter to be taken as read. Her references to "Intoxilyzer" and "5000" reconcile easily with the expanded definition in the current Notice, as does her evidence as to location at Pearse House, and as to steps taken towards setting up and resulting in the ultimate "incomplete test". It sounded in evidence like the approved device. The learned District Court Judge was entitled to be satisfied beyond reasonable doubt it was such. She was so satisfied. I do not consider production of the result card was the best and only admissible evidence that the device was an approved Intoxilyzer 5000. The result card was admissible evidence on the authority of MOT v Newton (1990) 6 CRNZ 232. However, it was no better in that respect than the evidence of an officer familiar with the appearance, use and name of the machine. It was no more compelling evidence on the identification point than a label on the exterior of the machine itself, and perhaps even less so. Where the result card would have been the best evidence,

and doubtless produced, was if the device had shown a fully completed test. It would have been the best evidence of the readings concerned. In these circumstances I do not need to consider whether the Transport Amendment Act 1990 implicitly directs result cards must be produced. Indeed, it may be debatable whether the Transport Amendment Act 1990 applies at all in this case, given the offence date and the terms of s4.

Decision

The appeal is dismissed.

R A McGechan J

Solicitors

W M Johnston for Appellant
Crown Solicitor's Office, Wellington for Respondent