NZLR

IN THE HIGH COURT OF NEW ZEALAND 25/2
NAPIER REGISTRY

AP 50/92

108

IN THE MATTER	of an Appeal for a determination of the District Court at Napier	
BETWEEN	POLICE	
	Informant	
AND		ORR
	Defendant	

Hearing: 21 February 1994

Counsel: R J Collins for Informant
A K G Morgan for Defendant

Decision: 21 February 1994

ORAL DECISION OF McGECHAN J

This is an appeal by the informant by way of Case Stated following from the dismissal of an information in the District Court at Napier on 17 September 1992, alleging driving with proportion of breath alcohol exceeding 400.

The matter has had a regrettable history which I am afraid is the product of administrative failings and not those of either party to the proceeding. Tapes on which the evidence and decision were recorded were erroneously cleared. When it came to constructing the Case Stated there were consequent difficulties. The District Court Judge involved then fell ill and indeed a Case Stated was not completed and filed until November 1993.

The facts are simple enough. The respondent driver was required to undergo a positive breath screening test. In the light of the result he was properly required to accompany and did go to a Police Station where a traffic officer attempted to obtain an evidential breath test using the Intoxilyser 5000 device. There were four or five attempts to obtain that evidential breath test. To quote the words of the Case Stated "on each occasion the defendant was unable to exert sufficient breath pressure to activate the device. This was because the defendant was suffering from an illness and did not have the lung capacity to provide sufficient breath pressure. On each occasion the device indicated that there was no result as opposed to any indication of incomplete test." The alleged wording "no result" appears to be an error for words "no sample" and I proceed on that basis. Following on from that, the traffic officer decided to change from the Intoxilyser 5000 conclusive device to the Alcosensor II device. He made that decision because the defendant had been genuinely trying to give a breath sample. There is no suggestion this is one of those cases where the defendant was pretending difficulty. He made that decision also due to belief that the Alcosensor II required less breath pressure. He carried out the Alcosensor II device test successfully and it gave a reading of 600, being above limit.

The questions raised are whether His Honour was erroneous in determining the Alcosensor result was inadmissible because the traffic officer could not lawfully and reasonably change devices after there were a number of "no samples" indicated by the Intoxilyser, and secondly, whether if there were breach, s58I should apply.

The thrust of submissions for the appellant was that the situation was covered not only by the decisions of the Court of Appeal in ***Ministry of Transport v Masters*** (1991) 1 NZLR 645 and ***Duell v Ministry of Transport*** (1992) 1 NZLR 13, but also and particularly by ***Clark v Police*** unreported, High Court Auckland, 10 December 1992, AP 254/92, Smellie J. I consider the present case is indeed on all fours with the last decision, namely ***Clark.*** It was a situation in which on its facts it was entirely reasonable for the traffic officer to turn to the Alcosensor device when it appeared the driver genuinely was unable to produce the breath necessary for the Intoxilyser. I do not accept (although in His Honour's

words it might have been a "counsel of perfection") that there was any obligation expressly to put an option of an alternative invasive blood test to the driver before proceeding to the alternative breath test device. That must particularly be so where it was evident the driver suffered from an illness, and there could be real questions as to the taking of a blood test, and as to delays involved. It was an appropriate decision to go to the other device, and was one open as a matter of law. If indeed the situation were otherwise, and s58I became potentially applicable, it is in my view very much a situation where that section applies.

Accordingly the questions posed in the Case Stated are answered affirmatively in both cases, namely that His Honour was in error in law in determining the breath test result using the Alcosensor was inadmissible, and in not applying s58I.

However, in the extraordinary circumstances of the way this particular appeal has progressed, which are in no sense the fault of the driver concerned, I am more than reluctant to see a penalty visited upon him. Indeed, and I must record very properly, counsel for the informant has acknowledged that might be an inappropriate course. It is of importance that the law applicable in situations of this sort, which occur occasionally be clarified, but in all the circumstances it is not necessary that this driver be subjected to further legal processes.

Accordingly, while I answer the questions as above, I direct that no further steps are to be taken in relation to the prosecution of the driver concerned.

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R A McGechan J

Solicitors:

Crown Solicitor's Office, Napier for Informant
McKay Mackie, Waipawa for Defendant

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