

259

NZCR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

AP.289/96

**LOW
PRIORITY**

BETWEEN

HARDYMENT

Appellant

AND

THE POLICE

Respondent

Hearing: 17 December 1996

Counsel: *Michael Harte* for Appellant
Katrina Williams for Respondent

Judgment: 17 December 1996

ORAL JUDGMENT OF TOMPKINS J

Solicitors:
Meredith Connell and Co, Auckland for Crown

The appellant was charged with driving a motor vehicle on a road with excess breath alcohol. Following a defended hearing on 17 July 1996 in the District Court at Auckland, he was convicted. He has appealed against that conviction.

The events to which the charge relates occurred on 21 December 1996 at 10.10 pm. The constable stopped the appellant on the northern motorway. He underwent a breath screening test followed by an evidential breath test, both of which were positive.

At the hearing in the District Court a number of issues were raised. On appeal Mr Harte advanced one of them. It was his submission that the prosecution had failed to prove that the breath screening test device was used before its expiry date as specified by the manufacturer on the box.

This issue was directly raised in cross examination of the constable. He was asked by Mr Harte for the appellant whether he knew the expiry date of the device he used. He replied that he did not. In re-examination at the request of the prosecutor, he produced to the Judge an Alcotest R80 box. As explained to me by counsel, this is a box approximately the size of a small cigar box that contains the parts necessary for ten breath screening tests to be carried out. The constable explained that the box is sealed by a white labelling across the top end. To open the box it is necessary to break the white tape. The result is that until this tape is broken the box is sealed so that no part of the contents can have been used. On the white tape is printed an expiry date, the precise wording of which was not given in evidence. The prosecutor then in re-examination asked the constable a question concerning checking the date to which Mr Harte objected as leading. The question was then asked by the Judge. The relevant part of the re-examination reads:

"THE COURT: What, if anything, did you do. Constable, on the night when you stopped this defendant, and carried out the roadside test, what, if anything, did you do when you opened the box to take out the device?

THE WITNESS: I checked if the expiry date had expired on the box prior to opening it. The

THE COURT: Did you say "I check" or "I checked"?

THE WITNESS: I checked.

THE COURT: Yes?

THE WITNESS: And then I just sort of got my nail through it to open, to rip the sticker across the green case.

THE COURT: Do you specifically recall doing that, or are you simply reconstructing that as being the probable course of events you would have follows?

THE WITNESS: Just reconstructing the probable course, because well basically it is a new box, and I just take it upon that it is okay, open the box, and -"

In his decision Doogue DCJ referred to this issue and to the provisions in the Transport (Breath Test) Notice (No.2) 1989. After referring to the definition of Dräger Alcotest, he held that there was no additional requirement that he could find to the effect that any expiry date noted on the device or its packaging has not been reached or past by the date when the device is used. Therefore, even if the prosecution had not proved the expiry date of the device, he concluded that that is irrelevant to whether or not the device was an approved one.

Two issues arise. The first is whether on the evidence the prosecution had proved that the expiry date had not arrived and the second is whether the issue having been raised, proof that the expiry date had not expired was a necessary ingredient for a conviction to be entered. As to the first, Mr Harte was inclined to accept that the constable's first answer that he checked if the expiry date had expired on the box prior to opening it, would have been sufficient. But he submitted that the last answer the witness gave in the passage I have cited derogates from that answer as it indicates that the witness was reconstructing the probable course he followed.

I am not prepared to read down the witness' first answer in the manner Mr Harte proposes. The witness answered the Judge's first question in an affirmative way. The second to last question commences:

"Do you specifically recall doing that, ..."

That immediately followed the witness' answer when he referred to getting his nail through the tape to open it to rip the sticker across the green case. On the face of it and taking account the affirmative answer given earlier, it appears that the word "that" relates to ripping the sticker not checking the date. It follows that the last answer about reconstructing the probable course also relates

to the officer putting his nail through the tape and tearing it open, not to checking the date. In the absence of any evidence to the contrary, I consider that had he chosen to decide the issue on a factual basis, the Judge could properly have decided that the evidence did establish that the constable checked the expiry date, and as Mr Harte accepted, it is a reasonable inference that if the expiry date was checked, it had not expired.

This makes it unnecessary for me to express a conclusion on the second issue. But it may be of assistance if I express a view, albeit obiter.

On this issue there are two possible approaches. One is to determine that because the definition of "Dräger Alcotest" in clause 2 of the notice makes no reference to the expiry date, the intention of the draftsman was that a Dräger Alcotest R80A was an approved device, whether or not the expiry date had passed. The alternative approach is that the manufacturer, by placing an expiry date on the box, must have intended to indicate that the device should only be used before the expiry date, and that therefore a Dräger Alcotest in respect of which the expiry date has expired can no longer be regarded as a Dräger Alcotest. I prefer the second approach. This is because the scheme of the notice is that total reliance is place on the manufacturer and the accurate labelling of the device. No other evidence is required except to prove the name the manufacturer has placed on the device. This approach depends entirely on the integrity of the manufacturer that every device bearing the manufacturer's name will be an accurate and sound device. If the manufacturer placed as Mr Harte put it "a use by date" on the device, it is clearly the manufacturer's intention that the device should only be assumed to be accurate if the expiry date has not passed. It follows from this that if the issue is raised at the prosecution, the constable should be in a position to establish that the expiry date of the Dräger Alcotest he or she uses is still current.

Since in this case I am satisfied that the evidence establishes that it was a current device that was used, the appeal is dismissed.

