

IN THE COURT OF APPEAL FOR THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 11 OF 2003

(Summary Court Appeal 62/02)

BETWEEN THE ATTORNEY GENERAL

APPELLANT

-and-

JOHN MERVYN CUMBER

RESPONDENT

BEFORE: THE RT. HONOURABLE MR. JUSTICE E. ZACCA, PRESIDENT
THE HONOURABLE MR. JUSTICE I. D. ROWE, J.A.
THE HONOURABLE MR. JUSTICE M. TAYLOR, J.A.

MS. CHERYLL RICHARDS AND MRS. SMITH -ANDALCIO FOR THE
ATTORNEY-GENERAL AND MR. L. AIOLFI OF WALKERS FOR THE
RESPONDENT.

HEARD: JULY 21, 2003

DELIVERED: 5TH DECEMBER, 2003

REASONS FOR JUDGMENT

ZACCA P.



The respondent was charged with the offence of driving whilst intoxicated.

It is an admitted fact that he was driving a motor vehicle on July 1, 2000.

The police requested from him a specimen of his breath. The machine used to capture the specimen of breath for analysis was an Intoxilyzer 5000 E. N.

In order to establish their case the Crown sought to tender in evidence a certificate. Objection was taken to this on the ground that the Intoxilyzer

5000 E.N., which appeared on the certificate, was not an instrument prescribed by the Governor under the Traffic Prescription of Measuring Devices Order (1999 revision).

The Learned Magistrate heard expert evidence about the machine and arrived at two conclusions:

- (1) The Intoxilyzer 5000 E.N. was not the same device as the Intoxilyzer 5000 and was therefore not the gazetted device.
- (2) The evidence concerning the operation of the device and the modifications made to it in the enhanced version was essentially irrelevant to the question, given that the manufacturer had changed the name by which it designated the machine.

The magistrate held that the certificate was inadmissible and ruled that there was no case for the respondent to answer. He was acquitted of the charge.

On the application of the Attorney General pursuant to sections 170 and 172 of the Criminal Procedure Code 1995 Revision, the magistrate stated the following points of law for the opinion of the Grand Court:

- Q. 1 Whether the Court erred in finding that the Intoxilyzer 5000 E.N. was not the same device as the Intoxilyzer 5000 and that it was therefore not the gazetted device?
- Q. 2 Whether the Court erred in law in holding that the evidence that goes to show that the essential operation of the device remains unchanged by the modifications is not relevant where on the face of it, the device producing the certificate is not the gazetted device, that is, neither an Intoxilyzer nor an Intoxilyzer 5000?

Henderson, J. in the Grand Court answered the second question in the affirmative. He held that it was open to the Crown to lead evidence to show that a device actually used to measure alcohol in breath was of a type prescribed by the regulations albeit of a different name from those listed in the regulations. He said that this requires an analysis by the Court of the design, construction and workings of the machines in question and the type of the machine named in the regulations. He stated that a comparison must be carried out between the two machines and if it is found that the machine actually used was in substance the same as the type prescribed the Crown may rely on the statutory presumption.

There was no appeal from this finding by Henderson, J. In our view he was plainly correct. Whilst not specifically relying on the decision of the Supreme Court of South Australia in *South Australian Police v Hemsley*, S.C. GR.G 94/354, judgment No. 4907 as supporting his decision on the second question, in our view his decision on the second question is supported by judicial authority.

Henderson J. found that the magistrate addressed her mind to the issue of whether or not the changes made at the time the Intoxilyzer 5000 E.N. was found on the market were of sufficient substance to render it a different machine from the Intoxilyzer 5000. He found too, that “She concluded clearly that they were not the same machine”, and that the magistrate relied on unchallenged evidence from the Crown that the two machines were “electronically different”. On this basis Henderson J. answered the first question in the negative and affirmed the verdict of acquittal.

The Crown now appeals from the decision of Henderson J. The grounds of appeal were:

- (1) The learned judge from the Grand Court erred in law in agreeing with the learned magistrate’s finding that the intoxilyzer 5000 E.N.

was not the same device as the Intoxilyzer 5000 and that it was therefore not the gazetted device.

- (2) The learned judge of the Grand Court further erred in law in ruling that the learned magistrate had addressed her mind to the issue of whether or not the changes to the Intoxilyzer 5000 E.N. were of sufficient substance to render it a different machine from the Intoxilyzer 5000.
- (3) The learned judge having determined that the magistrate had applied the wrong test in considering whether the Intoxilyzer 5000 E.N. was the same device as the Intoxilyzer 5000, erred in accepting her erroneous conclusions on the evidence.

S. 72 (2) of the Traffic Law (1999 Revision) provides:

“A person who has been arrested under subsection (1) may, while at a police station, hospital or other convenient place, be required by a constable to provide –

- (a) a specimen of breath for a breath test by an alcohol-in-breath measuring device prescribed by the Governor; or
- (b) a specimen of blood, or one or more specimens of urine for a laboratory test.”

The specimen of breath that was provided shows a reading of .211%. The print out showing the reading described the instrument used as:

“Intoxilyzer Alcohol Analyzer Model
5000 E.N. S.N. 68-011091”.

The learned magistrate heard arguments on the preliminary issue of the admissibility of the certificate produced by the questioned machine. This was the certificate on which the prosecution sought to rely, pursuant to section 72 (4) of the Traffic Law (1999 Revision).

Section 92 of the Traffic Law (1999 Revision) provides:

“The Governor may make regulations prescribing - (a) Type of alcohol-in-breath measuring devices which may be used for breath tests under section 72”.

Section 72 (4) of the Traffic Law reads:

“A certificate under the hand of the constable operating an alcohol-in-breath measuring device as to the result of the breath test counter-signed by the constable in whose presence it is made shall be receivable in evidence by any court and shall be prima facie evidence of the proportion of alcohol in the blood.”

Pursuant to section 72 (2)(a) and section 92, the Traffic (Prescription of Measurement Devices) Order (1999 Revision) was issued. The Order prescribed the following devices :-

- (a) The Intoxilyzer manufactured by C.M.I. Incorporated, Minturn, Colorado in the United States of America;
and,
- (b) The Intoxilyzer 5000 manufactured by C.M.I. Incorporated, a subsidiary of M.P.D. Incorporated in Owensboro, Kentucky in the United States of America.

Two experts gave evidence, one on behalf of the Crown and one on behalf of the Defence. The witness for the Crown, Phillip Lively stated that within the model 5000, there were several series – the 64, 66, and the 68. There was then the 1768 series which is the model referred to as the 5000 E.N. The last model before the E.N. model was the model 5000 – 68 series. He conceded that there were modifications made to create the 1768 series – 5000 E.N.

These are quotes from his evidence:-

“The primary upgrades or modifications were focused on making it easier for people to work on the machine.”

“We made no changes to the analytical bench between the two models. The analytical bench is the heart of the instrument. Where the breath alcohol comes into contact with the infrared light, the absorption occurs and the reaction is measured.”

“The machine basically did exactly the same thing as it did before the modifications and made it nicer, in and out. The addition of the flow sensor made it easier for the subject to deliver a sample of breath than with the pressure switch. It didn't improve the accuracy.”

“It was decided to label it as an “enhanced” model hence the E.N., but that had nothing to do with the science of the instrument itself.”

“The instrument 68 and 1768 are basically the same so the maintenance would be the same. It would be easier to clean the sample chamber in the E.N. of the redesigned cud blocks.”

“We consider it to be the 5000 despite the addition of the letters E.N. The 5000 E.N. is electronically different. It does the same function, it just does it in a different way.”

The evidence of the other expert Ricky Bateh was as follows:

“The changes which I consider the most significant from 68 to 1768 was the elimination of the pressure switch and instead allowing the breath to be monitored by a flow sensor. It is significant in respect to breath testing

because in the past, instruments with pressure switches were known to malfunction where a person would have provided a proper breath sample but the instrument could not analyse it, resulting in the person being charged with refusing to provide proper breath sample.”

“I do not consider the other changes significant, as outlined by Mr. Lively. The 68 is not the same as the E.N. according to Mr. Lively’s evidence.”

“The most significant feature was the introduction of the pressure switch and the flow sensor.”

“The other changes outlined by Mr. Lively are not significant. I don’t believe they improved the machine from an operational or analytical perspective. I believe Mr. Lively’s evidence was that it was to make it easier for technical personnel to work on the instrument.”

In analyzing the evidence of the experts, the magistrate stated:-

“The evidence adduced by the Crown from its’ own witness was that “the 5000 E.N. is electronically different. It does the same function, it just does it in a different way.” I accept the evidence and the assertions made that “the two machines, the 5000(68) series and the 5000 E.N. are not the same machine. The differences are not significant in the analytical portion of the machine.” By that I understand the witness to mean that the breath was analyzed in the usual way: by the

application of infra red light to a sample of breath.

I accept and find that the Intoxilyzer 5000 E.N. and the Intoxilyzer 5000 are not the same machine. The changes can only be regarded as far reaching if the two devices are "electronically entirely different." I am of the view that it does not matter one whit of the 'analytical bench' or the way the machine operates remains unchanged or is in fact improved by all the manufacture's modifications. If the manufacture changes the machine's designation, then fresh approval is necessary."

"It is the opinion of this Court, that to be admissible, the certificate must identify the instrument as either an Intoxilyzer or an Intoxilyzer 5000, those being the only two instruments approved by the Governor. I do not find that the evidence that goes to show that the essential operation of the device remains unchanged by the modifications is relevant where the device used does not answer the description of the prescribed device. The device producing the certificate does not answer the description of the approved device and for that reason alone I would find it inadmissible without more. In my opinion the list of approved devices is exhaustive and this device is not on the list".

"The certificate does not identify the instrument as either one of the two devices approved by the governor. It identified a device which, prima facie, was not a prescribed device. One could argue that the Intoxilyzer 5000 is really just an

improved version of the intoxilyzer but both are prescribed by the governor as alcohol-in-breath measuring devices, exemplifying the need for the devices to be described with particularity.”

The magistrate appeared to have found that evidence relating to the comparison of the two machines was not relevant. She was of the view that once the certificate does not identify the instrument as either one of the two devices approved by the Governor, then the certificate would not be admissible. She relied heavily on the fact that the certificate did not contain the devices “Intoxilyzer or Intoxilyzer 5000.

In our view she therefore fell into error in coming to the conclusion that on that basis alone the certificate was inadmissible.

Henderson J. in our view correctly stated: -

“Based on the language of the section, and also on certain common sense considerations – to which I will refer in a moment – it is open to the Crown on any prosecution of this sort to attempt to prove that a certain device actually used to measure alcohol in breath was of a “type” prescribed by the regulation, albeit with a different name from any of those listed. That requires, of course, an analysis of the design, construction and working of the machine in question and of the type of machine named in the regulation. There must be a comparison.

If it is found that the machine actually used is, in substance, the same as the type prescribed, the Crown may rely on the prima facie presumption..... Nothing, ultimately, should turn on the name given to the device by its maker”.

Henderson J., however, went on to find that the magistrate did in fact address her mind to the issue of whether or not the changes made at the time the Intoxilyzer 5000 E.N. was placed on the market were of sufficient substance to render it a different machine from the Intoxilyzer 5000 and that she concluded clearly that they were not the same machine. He concluded that he was in agreement with the Magistrate and so answered the first question – “No”.

South Australia Police v Andrew Glen Hemsley, No. SC GRG 94/354, judgment number 4907 was a case in which the issue was whether a breath analysis instrument used was of the same kind as that approved by the Governor. Changes had been made to the instrument approved by the Governor but the name remained the same.

In his judgment DeBelle J. at page 14 stated: -

“Plainly what is important is whether there is any material change in the operation or operational principles of the machine. The fact that a change is also an improvement is not, of course, conclusive. The inquiry must

always be to determine whether the change or changes are to essential features of the instrument”.

The evidence of the expert in that case, a Mr. Farrer, was that none of the alternations affected the manner in which samples of breath are analysed. They did not affect the essential features of the machine and were all superficial changes.

The evidence was that the manufacturer had improved the existing model but that the operational principles were the same. The Court there held that it was open to the magistrate to find that the unit used was a device approved by the Governor.

In the present case, the two experts who testified before the magistrate said that the modifications to the electronics of the model 68 of the Intoxilyzer, which then became the device known as Intoxilyzer 5000 E.N. were not substantial. They said that the several rearrangements of the electrical circuits were introduced to make it easier for the technical personnel to work on the instrument.

The experts were agreed that the only substantial or significant change introduced in the 5000 E.N. was the elimination of a pressure switch and its

replacement by a flow sensor to make it easier for an individual to deliver a sample of breath.

In our view the learned magistrate did not carry out the comparison, which she was obliged in law to do. She rejected the opinion of the two expert witnesses as to the insignificance of the changes in the electronic circuitry on the 5000 E.N. and offered no reasons for rejecting the scientific opinion of the two experts. The magistrate was not required to determine whether the Intoxilyzer 5000 E.N. was the same machine as the Intoxilyzer 5000. The proper inquiry was to determine whether the Intoxilyzer 5000 E.N. was of the same type as the device prescribed. This she failed to do and perhaps fell into error because of her finding that the certificate did not identify the instrument as either one of the two devices approved by the Governor. In her opinion the list of approved devices was exhaustive and the device 5000 E.N. was not on the list.


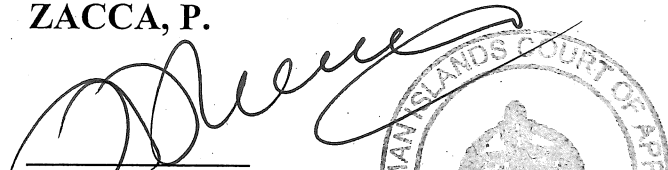
Henderson J. in our view fell into error when he accepted the conclusions of the magistrate and thus gave a negative answer to the first question.

In our view the answer to Question 1 is "yes".

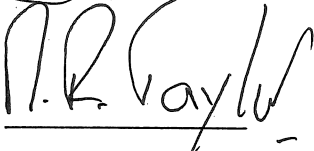
It was for these reasons that on 1st August, 2003 we set aside the verdict of acquittal entered by the magistrate and remitted the case to the magistrate with a direction to find that there was a case for the respondent to answer and to continue with the hearing of the case.



ZACCA, P.



ROWE, J.A.



TAYLOR, J.A.