

BETWEEN THOMAS COOK

APPELLANT

AND THE POLICE

RESPONDENT

Hearing: 15th November, 1983 and
 3rd February, 1984.

Counsel: Halse for Appellant
 Miss Sim for Respondent

Judgment: 3rd February, 1984.

REASONS FOR JUDGMENT OF MOLLER, J.

This is an appeal against a conviction in respect of an alleged offence of driving a motor-vehicle on the Auckland Harbour Bridge when the proportion of alcohol in the appellant's breath exceeded 500 microgrammes of alcohol per li of breath. It came before me first on 15th November of last year, but then, for reasons which will appear shortly, it had be adjourned at the conclusion of Mr. Halse's submissions on behalf of the appellant.

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The hearing was concluded on 3rd February of this year. I then heard Miss Sim's submissions for the respondent and a reply by Mr. Halse, after which I allowed the appeal, saying that I would supply reasons later for so doing.

The District Court Judge found the following basic facts:-

" Mr Cook was travelling across the Auckland Harbour Bridge in a northerly direction when his vehicle was then observed to be wandering across the roadway by two police officers who were in plain clothes coming off duty crossing the bridge in a private car. Eventually they spoke to Mr Cook at the toll gates on the far side of the bridge where one of the Constables formed the impression that Mr Cook had been drinking and might have committed an offence. Although it was not a busy time of night, early morning, the car was stopped alongside the toll gates at the centre of the roadway and the Bridge Authority Building was nearby, adjacent to the roadway at that point. "

The Judge then went on to say this:-

" One of the Constables asked the defendant to accompany him, not to accompany him but to go with him to the Bridge Authority Building. His purpose I find was two-fold. One, to get off the roadway and secondly to go to the Bridge Authority where he expected to get a Breath Screening Device, which he in fact did. "

From the constable's point of view it was necessary to take the appellant to the Authority's building because, not being on duty, he had none of the required equipment with him, and, as recorded by the Judge, he expected to find the device with which to carry out a breath screening test at that building.

Then, in his judgment, the Judge said:-

" The first point of the defence is that the Constable had no right to ask the defendant to accompany him to the Harbour Board Bridge Authority Building. A number of authorities have been given me in relation to this matter. It is clear that the Act does not provide a right to require someone to accompany to another place for the purpose of the breath screening test. "

In the end the Judge convicted the appellant, fined him \$350, and disqualified him from holding or obtaining a motor-driver's licence for six months.

In the course of his submissions to me Mr. Halse drew my attention to the case of Ambler v. Ministry of Transport (Dunedin Registry: No. M. 104/80: Somers, J. : 19th November 1980.), and to that portion of the District Court Judge's judgment in this case in which to justify, at least in part, his final decision, he appeared to rely on that case. This is what the District Court Judge said:-

" The matter has been averted (sic) to in the case decision by Mr Justice(Somers) in D.P. Ambler and the Ministry of Transport, a matter heard in the Dunedin High Court of (sic) which an officer

asked the man to go to the Transport Office for a breath screening test, the man having consented, he held in that case it was merely a request rather than a specific requirement. I am prepared to hold here that this matter was no more than a request falls short of being a requirement in the legal sense. "

In connexion with this Mr. Halse also drew my attention to a note about Ambler appearing in Graham's Law of Transportation (Volume 1) at page 8 - 29. This reads:-

" A traffic officer must be careful not to make a requirement when he has no legal right to do so. In Ambler v. Ministry of Transport ... the officer required a suspect to go with him from the roadside to a Ministry of Transport office close to the road. He did this because he had no screening devices in his possession. It was held that if the accompanying had been truly voluntary in the sense that the suspect knew that he was under no obligation to accompany the officer he could then have validly asked to supply a breath screening test on arriving at the Ministry office. The Court was not satisfied that the defendant fully appreciated that when he accompanied the officer and the charge was dismissed. "

Neither counsel then had available a copy of the judgment of Somers, J., and it seemed to me that there was reason to think that either the District Court Judge or the author of the text was wrong in his interpretation of the decision. And it was for this reason

that I adjourned the matter so that a copy of the judgment could be obtained. This was done, and the hearing of the appeal was, as I have already mentioned, continued before me on 3rd February.

Before I deal with the decision of Somers, J., in Ambler any further, I think that I should make clear what really happened procedurally in that prosecution. Ambler was convicted in the District Court on the same kind of charge as was preferred against the present appellant. He appealed a number of grounds and, as already shown, that appeal was heard by Somers, J. The third point of appeal raised in Ambler was the one which is directly in point here, and, although a reading of what the learned Judge said in this part of his judgment seemed clearly to show that the appeal should be allowed, he, nevertheless, said in the final sentence:
 " The appeal is dismissed."

However, attached to the copy of the judgment that I have is a memorandum by Somers J., which is dated two days after delivery of the judgment, and in which he acknowledges that I made a mistake, and added this: " The true conclusion intended and conveyed by the judgment save for the last line is that the appeal is allowed and the conviction quashed."

It may be that the Judge in the Court below in the present case did not know of the correction made by Somers, J., this leading him to an interpretation of the judgment which, in my view, was quite inaccurate. The true position is as set out in Graham. In this connexion I set out an important portion of the judgment in Ambler. It reads this way:

" But the true question is whether the officer

required the appellant to accompany him to the Ministry office for a breath screening test.

If he did he purported to exercise a power he did not possess. If the appellant was asked whether he was willing to go and his going was voluntary then I do not consider he can complain of the subsequent events.

The distinction is between a requirement, which there is no power to make, and a request which the suspect may decline without incurring any penal sanction. In cases where a requirement may be made, as for example a requirement to accompany for an evidential breath test following a positive breath screening test, it may not be necessary (although it will be wise) for the officer to use the word 'require' so long as he makes it clear that he is making a requirement or demand. But if as is contended in this case the officer merely asked the suspect to go to another place for a breath screening test then it must at least be clear that the suspect would understand that he was under no obligation to accompany the officer. " ;

and, in effect, Somers, J., decided that, on the evidence before him (the District Court Judge not having made a finding on the point), he could not be satisfied that Ambler had understood that he could have refused the officer's "request" (if such it was) without incurring any penal sanction.

I am not going into any detail as to the words used by the officer in Ambler but it seems to me that the "asking" (to use a

neutral term) in the case before me was nearer to being a "requirement" than a "request", and there is certainly no evidence that Cook was ever given to understand, or otherwise knew, that he need not accompany the officer to the Authority building.

There are only two portions of the present evidence to which I need refer. In the constable's evidence-in-chief this occurs:-

" I asked the defendant to come across with me to the Harbour Bridge Authority building and there I obtained an Alcotest R80a breath screening device which is a device approved by the minister (sic) by notice in the Gazette, from the Harbour Bridge Authority people. I assembled and used this device in accordance with the Transport Breath Test Notice 1978. ";

and, in his cross-examination, this is recorded:-

" When you called out to the defendant by the toll plaza and you subsequently examined him physically, what did you say to him about going to the administration building, what were your words? . Just come over to the administration building.

Did you say why? ... No. The main reason was because of the safety aspect.

THE COURT. -- There would be more than that? . Also to undergo the procedure, however the first concern was to get the defendant, his girlfriend and the car out of the way, there was only two lanes

open.

THE COURT. - And you had to get a breath screening test? ... Yes we were in a private vehicle.

MR HALSE. - Didn't say that to him though? .. Not initially, no.

So you just said to the defendant, come with me or words to that effect? I beckoned the defendant towards the building and just outside said for him to undergo a screening test. "

When the hearing of the appeal was continued, Miss Sim, had had an opportunity to read the decision in Ambler, began her submissions by accepting (a) that the District Court Judge did turn his mind to the question as to whether the appellant knew he did not have to go with the constable to the Authority's building; (b) that, on the evidence, there is a doubt whether the words used by the constable constituted no more than a "request" which the appellant knew that he could refuse without penal sanction; (c) that what was said could have amounted a "requirement"; and (d) that the legislation gives no power an enforcement officer to make such a "requirement".

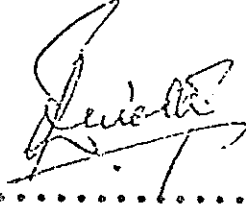
On the face of this it would seem that, applying Ambler, the appeal would have to be allowed. But Miss Sim submitted quite a lengthy argument to the effect that the circumstances here were of such a kind that the doctrine of "reasonable compliance" should be applied and the appeal dismissed. It is clear from his judgment that the Judge in the Court below would have used the doctrine in support of the prosecution if it had been necessary for him to do so. Miss Sim referred to certain authorities

which she called in aid of her submission, none of which was, however, directly in point. Her argument seemed to be that the constable certainly had a power to require the appellant to undergo a breath screening test; that he then did "something extra" in "requiring" him to go to another place to undergo such test; that, although he had no power to make such a "requirement", this "did not vitiate his power to require" the appellant to undergo the test; that the Court should consider "side by side", and weigh up together, the liberty of the subject and the purpose of the legislation; and that when that is done the unlawful "requirement" here did not result in any prejudice to the appellant, with the result that, "in the light of the war blood alcohol legislation", the doctrine of "reasonable compliance" should be applied.

I do not accept these submissions. In the first place, I think that it is significant that no mention of the matter at all appears in the judgment in Ambler. I find it hard to subscribe to the view that, if it were a doctrine that could properly be applied in such circumstances, Somers, J., would not of his own motion, have raised it; even if counsel had not made submissions to him. In the second place, I am of the opinion that "reasonable compliance" can be used by the Court when an enforcement officer has been given, by the legislation, a specific power, but, in the exercise of that power by him, there has arisen some deficiency which, in the circumstances of the particular legislative provision establishing the power and its method of exercise, can be excused on the basis that it is not of sufficient importance to destroy completely the exercise of the power, and on the basis that an application of section 58 E will not prejudice the suspect. The section cannot, in my view, be resorted to when an application of it would mean that

separate and specific power, not in any way created or contemplated by the legislation, must first be conferred upon officer by the Court to justify what he did as being "reasonable compliance".

The appeal is allowed, and the conviction and penalties are quashed.



A handwritten signature in cursive script, appearing to read 'J. Smith', is written above a horizontal dotted line.

Solicitors: Foy & Halse for Appellant
Auckland
Crown Solicitor, Auckland, for Respondent