19/4

N.Z.L.R.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M. No. 566/83

BETWEEN KOFLER

339

Appellant

A N D POLICE

Respondent

Hearing: 28 March 1984

Counsel: D.S.G. Deacon for Appellant
K.G. Stone for Respondent

Judgment: 12/4/84

JUDGMENT OF QUILLIAM J

This is an appeal against conviction on a charge of driving a motor vehicle while the proportion of alcohol in the blood exceeded the prescribed maximum. The defence raised and the present ground of appeal relates to a single short point and so the facts can be briefly stated.

The appellant was seen to drive his car south along Taranaki Street and into Wallace Street in Wellington in a manner which caused a following police constable to stop him and request a breath screening test. The appellant agreed to the test. The constable's evidence as to the carrying out of that test was as follows:

> " I requested the defendant to fill the bag with his breath. He took the bag from me and gave a short breath of approximately one second's duration. I asked the defendant to fill the bag and he again repeated a one second breath. I asked him on the third occasion to fill the bag and again he gave a one second breath. I then informed him that he had failed the test as it would take all night to fill the bag. "

At the end of his evidence-in-chief he added, "When I first gave the breath screening test it was conducted in accordance with the Breath Tests Notice 1978." There was no cross-examination on any of this evidence. The appellant was taken to Ministry of Transport Headquarters where he took an evidential breath test which was positive. He then elected to have a blood sample taken and this showed a proportion of 144 milligrams of alcohol per 100 millilitres of blood.

The single point which arises concerns whether the evidence of the constable established beyond a reasonable doubt that the appellant had failed the breath screening test.

Section 58A (3) (b) provides:

> " (3) If -
>
> (b) A person, having been required by an enforcement officer pursuant to this section to forthwith undergo a breath screening test, fails or refuses to do so -
>
> the enforcement officer may require the person to accompany him to any place where it is likely that the

> person can undergo either an evidential breath test or a blood test, or both. "

The question is when it may be said that a person has failed to undergo the test.

The manner in which the breath test is to be carried out is prescribed in the Transport (Breath Tests) Notice 1978. Paragraph 4, Step 4 of that Notice provides:

> " The person being tested shall blow through the mouthpiece of the tube until the bag is fully inflated. As far as possible this shoud be done with one single breath in 10 to 20 seconds. "

In Simpson v Police [1971] NZLR 393 the Court of Appeal held that the first sentence of Step 4 is mandatory and the second sentence is directory.

Two main arguments were offered in support of the appeal. First it was said that the evidence establishes that the appellant was in the process of complying with the constable's request and that it was the constable who terminated the attempt to inflate the bag rather than the appellant. The second argument was that in any event there was no evidence which entitled the District Judge to find, as he did, that the appellant "was making no real progress in fully inflating the bag."

The first argument involved a criticism of the instructions given by the constable to the appellant. It is clear, of course, that the constable did not attempt to give his instructions by using the words in Step 4. It is obviously desirable that this course should be followed, but

for some reason enforcement officers all too often use a different and at times equivocal form of instruction. However, it is necessary to look at what was actually said and to see whether the sense of Step 4 was adequately conveyed to the driver.

The mandatory part of Step 4 is that the person being tested "shall blow through the mouthpiece of the tube until the bag is fully inflated". Although the constable in this case expressed himself in an altogether different way there can be no doubt that he conveyed to the appellant the sense of that requirement. Mr Deacon, on behalf of the appellant, conceded as much. What the constable told the appellant to do was to "fill the bag with his breath". It was clear enough what the appellant had to do. At no stage did he attempt to do that with a single continuous breath. This, however, was not a necessary requirement. So long as the appellant had filled the bag then he could not have been said to have failed the test.

The problem then arises over the sequence of brief breaths which the appellant gave. Mr Deacon's contention was that the constable terminated the test before the appellant could inflate the bag and that this occurred while he was still in the process of attempting to do as he had been told. I cannot accept that argument. Although expressed in his own words the constable's instruction was clear. It was to fill the bag with his breath. The appellant's response was to blow briefly into the bag for about one second and then stop. Plainly this was not a compliance with the instruction. He was therefore told a second time to fill the bag. Again he blew briefly into it for about a second. Equally plainly this also was not a compliance. He was told a third time to fill the bag and repeated his performance. This again was not a compliance. It would, of course, have put the matter beyond doubt if the

constable had used the words of Step 4 as to a continuous breath, but it must nevertheless be concluded that the appellant failed to carry out the instruction given to him and so failed the test. He knew he must fill the bag with his breath. Three times he stopped far short of doing so. Only by blowing continuously or by a series of breaths could he have filled the bag. Notwithstanding the repetition of the instruction he made no attempt to do so. I have no doubt that this was a failure of the test and that the District Judge was entitled to reach that conclusion.

The other argument was that there was no evidence as to how far the appellant got in inflating the bag and so there was no support for the finding that he had failed the test. In this regard some relevance was placed on the decision of Somers J in Marris v Ministry of Transport (unreported, Dunedin, 10 June 1980, No. M.27/80). That was a case in which the evidence given was that the driver was requested to fully inflate the bag in one single breath in 10 to 20 seconds but that he failed to do so. Somers J referred to the decision in Simpson's case and to the finding in that case that the second sentence in Step 4 was directory only and that substantial compliance was sufficient in the absence of evidence to show a reasonable possibility that non-compliance might result in a miscarriage of justice. Somers J observed, at pp 4 - 5 of his judgment:

> " If then a greater period, or more than the one breath, may yield a sufficient test can it be postulated that a bag not filled within the directed period or by one breath evidences a failure 'to forthwith undergo a breath screening test'? A failure to undergo a breath screening test is a failure to blow through the mouth piece and the tube until the bag is fully inflated. The perimeters of success as of

> failure are substantial compliance with the direction. Whether in any particular case a failure to fill in one breath within the period evidences failure will depend upon all the circumstances. There will be cases for example where the evidence shows that the suspect was not and would not have been capable of substantial compliance in what can hardly be described as an arduous task. In the present case however there is no evidence of any attendant circumstances. Thus it is not known whether any and if so what partial success, attended the appellant's efforts. He may have been within a second of success, he may have advanced no distance on the road. The evidence only indicates the bag was not fully inflated in one breath within the period. "

Mr Deacon's argument was that in the present case there was no evidence of any attendant circumstances and so the possibility of substantial compliance with Step 4 had not been eliminated. Again I find myself unable to agree. The evidence as to the sequence of events is clear. In total the appellant blew into the bag for three seconds. It follows from the repetition of the instruction to fill the bag that this had not been accomplished on either of the first or second occasions. It follows also, from the evidence, that the constable informed the appellant that he had failed the test "as it would take all night to fill the bag", that he had not done so on the third occasion. Indeed, the only sensible inference that can be drawn from the evidence is that at the rate the appellant was going he had made little impression at all on the inflation of the bag. Precisely how far he had got is not known, but it could not be said that he had substantially complied with the instruction to fill the bag. This was a conclusion reached by the District Judge and I respectfully agree with him.

The appeal is accordingly dismissed. As the proceedings arise out of a failure by the constable to follow the normal course of using the words of the Notice there will be no order as to costs.

Solicitors: Deacon and Tannahill, WELLINGTON, for Appellant

Crown Solicitor, WELLINGTON, for Respondent