IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1444/83

557

BETWEEN J THOMPSON

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Hearing: 9 March 1984

Counsel: M. Harte for Appellant
R. Haines for Respondent

Judgment: 23 May 1984

JUDGMENT OF PRICHARD, J.

The Appellant was convicted in the District Court at Henderson of the offence of driving with excess breath alcohol.

The only grounds of appeal are:-

(a) That it was not shown that the Appellant failed or refused to undergo a breath screening test and, accordingly, there was no foundation for the enforcement officer's requirement that the Appellant undergo an evidential breath test.

(b) That when the evidential breath test gave a positive result, the Appellant was not advised of the matters referred to in s.58(4)(a).

The evidence of the alleged failure to undergo the breath screening test is recorded as follows:-

> "I required from Mr Thompson a sample of breath for testing ... it was duly undergone, breath test ... 1978. Mr Thompson did not fully inflate the bag. I then requested him to accompany me to a place or places, namely the Henderson Ministry of Transport Office for the ... he agreed."

(The above is exactly how the transcript appears).

There was no cross-examination in relation to the breath screening test.

It is Mr Harte's contention that the bald statement, "Mr Thompson did not fully inflate the bag" unaccompanied by any reference to the circumstances under which he so failed is not proof of failure to undergo the test. Indeed the traffic officer did not say, in so many words, that the Appellant failed to undergo the test, although it may be inferred from the fact that the officer "then" required the Appellant to accompany him to the Henderson Ministry of Transport Office that he concluded that the Appellant had so failed. One of the difficulties in this case is that the notes of evidence are obviously incomplete. However, I think I must approach the matter on the basis that there was no evidence that the Appellant was given any instructions as to what he was required to

do or as to what endeavours he made to inflate the bag. For all the evidence shows the Appellant might have been handed the mouthpiece of the Draeger Alco-test device with no request that he blow through it "until the bag is fully inflated" and he might have been interrupted by the traffic officer before he had been given a reasonable time to inflate it.

The Transport (Breath Tests) Notice 1978 provides as follows:-

> "Step 4: The person being tested shall blow through the mouthpiece and the tube until the bag is fully inflated. As far as possible, this should be done with one single breath in 10 to 20 seconds."

In Marris v. Ministry of Transport (Dunedin Registry, M.27/80, 10 July 1980) Somers J., following Simpson v. Police (1971) N.Z.L.R. 393, held that the first sentence of Step 4 is mandatory but that the second sentence is only directory. In other words, there may be compliance with the procedure even though the test is not completed in one breath - or within the directed period. Somers, J. concluded that evidence that the bag was not fully inflated in one breath within the period specified was insufficient to prove failure. It might, for example, have been inflated by more than one breath, or in a time rather shorter than 10 seconds or longer than 20 seconds and yet be substantial compliance - not "failure to undergo":-

> "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." (pp.4-5).

Marris v. Ministry of Transport (supra) was followed by Greig, J. in McMillan v. Ministry of Transport (Hamilton Registry, 24 November 1980) and by Thorp, J. in Paterson v. Ministry of Transport (Rotorua Registry, M.187/82, 26 October 1982).

In the present case the evidence as to the circumstances of the Appellant's alleged failure to fully inflate the bag is conspicuously absent. I must allow the appeal on the first point taken by Mr Harte.

As to the second point taken by Mr Harte, the evidence shows that the Appellant was shown and, in fact, signed the "Evidential Breath Test Form" issued by the Ministry of Transport (MOT 4165). The form sets out clearly and

explicitly the matters of which he is required to be advised. However, the officer did not say that the Appellant read the form. The only other evidence from the traffic officer is that he told the Appellant that the evidential breath test he had just undergone was positive and that he might undergo a blood test "of his own free will".

Section 58(4) says that the result of an evidential breath test shall not be admissible in evidence in proceedings for an offence against s.58(1)(a) if:-

> "(a) The person who underwent the test is not advised by an enforcement officer, forthwith after the result of the test is ascertained, that the test was positive and that, if he does not request a blood test within 10 minutes, the test could of itself be sufficient evidence to lead to his conviction for an offence against this Act:
>
> Provided that this paragraph shall not apply if the person who underwent the test fails or refuses to remain at the place where he underwent the test until he can be advised of the result of the test; or .."

I doubt whether the officer's oral intimation to the Appellant, even in conjunction with the fact that the Appellant signed the form and circled the word "No" in response to a typed enquiry whether he requested the taking of a blood specimen is sufficient for the Court to infer that he was properly advised of all the matters referred to in s.58(4)(a). On very similar facts, it was recently found by Sinclair, J. that the evidence was

insufficient; (Stevenson v. Ministry of Transport, Timaru Registry, GR.19/84, 30 March 1984). However, I do not decide the point as I am satisfied that the Appellant is entitled to succeed on the first ground of appeal.

The appeal is allowed and the conviction quashed.

Solicitors:

Messrs Kennedy Tudehope McDell & Railey, Auckland, Solicitors for Appellant;

Crown Law Office, Auckland, for Respondent.