IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. No. 206/84
(CRN 300452370)

IN THE MATTER of an appeal from a determination of the District Court at Auckland

BETWEEN THE AUCKLAND CITY COUNCIL (STEPHEN JOHN BOOTH)

Informant/Appellant

AND JOHN ALBERT COLLINSON

Defendant/Respondent

Hearing: 10th August, 1984

Counsel: Gresson for Informant
Hart for Defendant

Judgment:

JUDGMENT OF SINCLAIR, J.

This prosecution in relation to excess breath/alcohol legislation comes before this Court by way of case stated. The substantive part of the case stated is as follows:

"IT WAS PROVED UPON THE HEARING THAT:

1. TRAFFIC OFFICER CONWAY apprehended the Defendant and after obtaining good cause to suspect required the Defendant to supply a specimen of breath for the purposes of a breath screening test. The device was correctly assembled and handed to the Defendant with a request that he fully inflate the device as far as possible in one deep breath taking 10-20 seconds.

2. THE Enforcement Officer stated that the Defendant took three short blows through the tube inflating the bag only to the extent of one quarter and then handed back the device to the Officer stating that he was not going to do any more. The Enforcement Officer then stated that he deemed the test to be a failure as the bag had not been fully inflated although subsequently he did notice that even with the quarter inflation the crystals in the tube

" were stained green up to and beyond the yellow line around the tube indicating a positive test.

3. THE Enforcement Officer was cross-examined extensively on the manner of carrying out the breath screening test and particularly whether or not he required the Defendant after the first attempt producing a quarter inflation to have a second attempt upon which the Defendant then fully inflated the bag. The Enforcement Officer denied that this took place. The Officer was also asked if he was able to see what was going on having regard to the fact that it was raining very heavily and the Officer was standing outside the Defendant's vehicle by the driver's door. The Officer stated that he was able to see what was going on and that he would have noticed had the defendant made a second attempt and had the bag been fully inflated.

4. THE Defendant then gave evidence and said that on the first attempt he blew in to the device and whilst still holding the device handed it back to the officer who said to him that it was not inflated enough and that he should try again. The Defendant then blew into the device a second time with two blows and handed it back to the Officer who stated that it still was not enough and that it was a failed test and that he was required to accompany the Officer. The Defendant stated that he believed that he had fully inflated the bag.

5. A witness who was a passenger sitting in the front and to the left of the Defendant then gave evidence and stated that he took a particular interest in the procedure because he had never seen it carried out before. The witness stated that the Defendant proceeded to blow up the bag when told by the Enforcement Officer that it was not sufficient and that it should be inflated more as a result of which the Defendant took 2 to 3 breaths and fully inflated the bag. The Officer then said that it was insufficient and required the Defendant to accompany.

I DETERMINED:-

6. THE issue was whether or not there were in fact two road-side breath screening tests or one. Although I was not impressed by the evidence of the Defendant when compared with that of the Enforcement Officer, I then had to consider the evidence of the passenger seated beside the Defendant. Because this passenger had had no previous encounters with breath screening devices he was curious about the procedure. I felt I could not really reject the passenger's evidence as being untrue and as I could not make up my mind as to exactly what had happened I could not determine the issue either way and therefore had to give the benefit of the doubt that I had to the Defendant and dismiss the information.

"THE QUESTION FOR THE OPINION OF THIS HONOURABLE COURT is whether or not my decision was erroneous in point of law and in particular:-

(a) Is there any restriction in the Transport (Breath Tests) Notice 1978, clause 4, that the Enforcement Officer when carrying out the breath screening test may not require the person being tested to blow through the device on more than one separate occasion until the device is fully inflated?

(b) If the answer to the previous question is in the affirmative, and an Enforcement Officer may only require the person being tested to blow on one occasion into the device, what constitutes in terms of the notice one complete breath screening test?

(c) If the action taken by the Defendant was to make two attempts at further inflating the bag, did this constitute a second breath screening test within the meaning of the notice?"

At first glance it would appear from the case stated that a conflict of evidence existed as between the evidence given by the enforcement officer and that given on behalf of the Defendant and that, in consequence of that conflict, as it could not be resolved the District Court Judge came to the conclusion that a doubt existed in his mind and he dismissed the information. However, it appears that that doubt may have been produced by a view which was adopted in the District Court of the evidence and which may or may not have been in accordance with established legal principles. Accordingly I proceed to examine the situation as it appears to this Court.

If one accepts what is in paragraph 2 of the case stated it will be seen that according to the enforcement officer during the course of a breath screening test the bag was inflated only to the extent of one quarter, but that even then the crystals in the tube were stained green up to and beyond

the yellow line. During cross-examination it appears that the enforcement officer denied that he required the Defendant to blow further into the bag and that is where the conflict arose as between the evidence tendered on behalf of the Informant and that tendered on behalf of the Defendant in that the defence contended that after the initial attempt at blowing up the bag it was handed back to the Defendant with the direction that he blow into the bag further. The enforcement officer maintained that there having been a failure to blow up the bag initially, he treated the test as a failure.

The starting off point is to consider the Transport (Breath Tests) Notice 1978 in so far as the breath screening test is concerned. Clause 4 of that notice, sub-paragraph (d) reads as follows:

> "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 - 20 seconds."

The identical provision was considered in Simpson v. Police (1971) N.Z.L.R. 393 and the Court of Appeal in that case held that the first part of the requirement, namely to blow through the mouthpiece until the bag was fully inflated, was mandatory, but that the second part relating to the requirement that the inflation of the bag should be done in one breath in 10 - 20 seconds was , because of the wording of it, merely directory. The decision in Simpson's case went on to state that the reference to the operation being done with one single breath in 10 - 20 seconds could be satisfied if there had been substantial compliance with that requirement and in the absence of evidence to show a reasonable possibility

that non-compliance might result in a miscarriage of justice.

That decision was adopted as the basis of the decision in Marris v. Ministry of Transport, M.27/80 Dunedin Registry, 10th July, 1980. In that particular case Somers, J. was confronted with a situation where the suspect had been required to undergo an evidential breath test or a blood test because of his failure to undergo the breath screening test completely. The failure referred to by the enforcement officer was that the bag had not been fully inflated between 10 and 20 seconds. In adopting the decision in Simpson's case Somers, J. stated that a breath screening test is nonetheless a relevant test even if it is not completed within the directed period provided there is substantial compliance. He went on to say that the same reasoning indicated that it would not be a less relevant test if with like safeguards more than one breath was taken. In fact that statement is obiter, but it highlights the situation that the requirement of the breath screening test is that the bag should be fully inflated. If more than one breath is required to carry out that operation that does not of itself render the test any less effective than if the whole operation were carried out with the use of but one breath.

A situation similar to the present confronted the Court in Argus v. Ministry of Transport, M.19/81, Christchurch Registry, 25th August, 1981. In that case the suspect when asked to blow into the breath screening device at first blew five short puffs. He was then directed to blow the bag up and to finish it off with one breath, whereupon the suspect then proffered about another five small puffs which inflated the bag about three quarters full. When he was asked to complet

inflating the bag he replied that he could not and the enforcement officer did not persist. At that particular time it was noted that the test appeared to be positive for the crystals were stained to the extent necessary for that result. Instead of treating this particular result as a failure to complete the test, the enforcement officer treated it as a positive test. In the course of his judgment Hardie Boys, J. referred to Simpson v. The Police (supra) and Marris v. Ministry of Transport and then had this to say:

> "I agree with the District Court Judge that the traffic officer was entitled to treat the test as having been completed and having produced a positive result. I think that was a perfectly reasonable conclusion for the officer to draw. I see no reason to suppose that fuller inflation of the bag would cause the staining of the crystals to diminish. I find it helpful to consider what the position would have been had the traffic officer decided that there had been a failure to undergo the screening test, and based his requirement to accompany on that ground. The case would then have been very similar to Marris v. Ministry of Transport (supra) where Somers, J. held that evidence indicating only that the bag was not fully inflated in one breath within the period of 10 to 20 seconds, did not establish that the Appellant had failed to give a breath test. I am not prepared to hold in effect that a suspect can avoid the further testing procedures by such a simple expedient as not fully inflating the bag."

For the purposes of this case stated the above extract from Hardie Boys, J's judgment seems to me to be very appropria for the circumstances as outlined in the instant case stated. Whether or not there had been a failure to inflate the bag which would entitle the enforcement officer to proceed to the next step is a question of fact. Whether or not there had been reasonable compliance with requirements relating to the breath screening test is also a question of fact and, of course, the District Court has available to it the provisions of S.58E of the statute. Whether, in any given case a suspect partially

inflates the bag during the course of a breath screening test and is required to further inflate the bag, that second inflation can be regarded as merely a continuation of the original test or a second test, will depend upon the circumstances pertaining at the particular time. The time which has elapsed between the first attempt at blowing up the bag and the requirement to further inflate it may be of such small moment as to be of no significance, whereas in another case the time differential may be so great as to lead inevitably to the conclusion that the second requirement to inflate the bag must be regarded as a second test. Again, where the bag is not fully inflated, and yet the crystals are stained to the necessary extent, it may be possible for the Court to conclude, as was done in the Argus case, that the test was positive. But on the other hand the Court may conclude, as was contended in this case by the enforcement officer, that there had been a failure to undergo the necessary test.

Accordingly I am of the view that the answer to question (a) is in the negative and therefore no answer is required to question (b). So far as question (c) is concerned, the answer to that question will depend upon the conclusion which the District Court Judge comes to on the evidence, namely whether, if in fact there was a second or subsequent attempt to inflate the bag, that that second or subsequent attempt was merely a continuation of the requirement to fully inflate the bag or whether, in the circumstances, it ought to be properly regarded as being in fact a requirement to undergo a second breath screening test.

During the course of argument counsel for the Informant

suggested that it would be necessary for a second device to be tendered to the suspect before it could be suggested that he was required to undergo a second test. I am of the view that that is not necessarily so, but that the facts of an individual case would almost inevitably determine the issue.

The case is accordingly remitted back to the District Court at Auckland for it to act in accordance with this judgment. There will be no order as to costs.

P. D. Hardie J.

SOLICITORS:

Butler White & Hanna, Auckland for Informant
B. J. Hart, Auckland for Defendant