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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.355/84

[redacted]

1526

BETWEEN AUCKLAND CITY COUNCIL

Appellant

AND SIMON JOHN HALL

Respondent

Hearing : 15 November 1984

Counsel : Mr Gresson for Appellant
M. Harte for Respondent

Judgment : 15 November 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an informant's appeal by way of case stated from a judgment of Judge R.J. Gilbert, given in the District Court at Auckland on 11 July 1983. In a reserved decision, the learned District Court Judge dismissed an information against the respondent of driving with excess blood alcohol.

The case stated records that a traffic officer apprehended the respondent after obtaining good cause to suspect consumption of alcohol. No issue arises until the procedures at the Auckland Civic Administration Building where the respondent was asked to undergo an evidential breath test. He was asked by the traffic officer, at step 4 of the test, to blow into the evidential breath testing device. The officer said he required the respondent to blow through the tube to his satisfaction until a whistle on the device sounded.

Although some air escaped around the sides of the device, the respondent did manage to blow through the mouthpiece; however, the officer did not consider his efforts sufficient to enable him to take a reading. The officer did not consider there was any malfunction of the device to preclude its correct use. He stated there was a mouthpiece on the device with a whistle built

into it; the whistle did not sound on any of the occasions when the respondent blew through the mouthpiece.

The District Court Judge heard evidence, not only from the traffic officer, but from the respondent and from Mr H.F. Murphy, a solicitor with long experience in the law relating to blood and breath alcohol. The District Court Judge found, after seeing and hearing the witnesses, that the respondent was endeavouring, as best he could, to blow into the device. Some air did pass through the device as well as escaping around the sides. He found the appellant was suffering from a physical disability on the night in question and also from a speech impediment which affected his ability to blow strongly through the device. The District Court Judge held that as some air did pass through the device, this was in accordance with the statutory notice and that the respondent had therefore complied with the notice. He held that the statutory notice did not require that the test be conducted to a stage where a whistle would sound before the officer obtained a readout.

Along with the District Court Judge, I consider that the sounding of a whistle was not in accordance with the statutory notice and that the respondent could not be required to comply with such a requirement.

The question for the opinion of the Court is as follows:

> "Is an Enforcement Officer entitled to require a suspect when carrying out step 4 of the evidential breath test to blow through the mouthpiece of the device to a sufficient degree until the officer is satisfied the whistle on the device sounds and to decline to depress the read button until that occurs?"

In my view, the learned District Court Judge was clearly right in his decision. I accept the submission of Mr Gresson for the appellant that a suspect is required to blow through the mouthpiece and that the obligation is not satisfied by merely breathing into the mouthpiece or by passing into the mouthpiece the merest amount of air; (see Ministry of Transport v. Sain (Judgment of Sinclair, J., 27 March 1981, M.1538/80,

Auckland Registry).

It is also clear from Fleetwood v. Ministry of Transport, (1972) NZLR 798, that, in the absence of some genuine independent justification or excuse, there is a duty implied on a suspect to co-operate reasonably throughout the prescribed procedures. Mr Gresson drew my attention also to the decision of the Court of Appeal in Morris v. Ministry of Transport, (1980) 2 NZLR 362 where the Court of Appeal stated at p.365:

> "As it is we are satisfied that it cannot be said, as a general proposition of law, that an evidential breath test will always be invalidated if the officer introduces into the manner of carrying out the test some step not required by the notice. The test could well be invalidated if the extra step is of a nature which could fairly be said to contravene or conflict with the requirements of the notice. Such a case may arise for consideration but it is not the present case, as the notice is completely silent on the question of temperature. Nevertheless, we think that the introduction of an extra step will be fatal to the test if that step is of a nature which would cause material error in the functioning of the device."

That case is different. In Morris, there was tendered to the Court of Appeal an affidavit from a scientist responsible for experimentation in specialised breath alcohol testing procedures and for the introduction of the present system; he stated that the warming of evidential breath testing devices did not make them malfunction. However, in the present case, there was no evidence of a scientific nature before the learned District Court Judge concerning the operation of a whistle on the breath testing device. Indeed, in over 6 years of hearing appeals of this nature, this is the first time that I have heard mention of a whistle as being part of the scenario for breath testing devices.

As Chilwell, J. mentioned in the unreported case referred to by the Court of Appeal in Morris, one is left to guess as to the purpose of the whistle and the way in which it operates; one should not have to guess about this aspect of a scientific test upon which the reputation and liberty of a citizen might rest.

I consider that the District Court Judge was right for the following reasons:

(a) On the evidence as he heard it, including the evidence from the respondent which the District Court Judge accepted, the respondent did carry out his duty to blow into the device; the fact that his breath was not sufficient to activate the whistle is, in my view, immaterial;

(b) The respondent clearly, on the facts of this case, complied with the statutory obligation, hinted at in Fleetwood's case, to co-operate reasonably. He was clearly a man who was under a disability; he was doing his conscientious best to comply with the officer's requests;

(c) Like the District Court Judge, I am apprehensive at the thought of introducing fresh requirements into the breath test procedure which do not appear in the very detailed steps outlined in the Ministerial notice. It may be that the requirement of activating a whistle is something which, like warming of the device in Morris's case, makes no difference at all. However, in the absence of any evidence to assuage one's fears, I am not assuming any such requirement.

In all the peculiar circumstances of this case, I consider that the District Court Judge's decision is entirely correct.

I therefore answer the case stated in the negative.

R.D. Barker J.

SOLICITORS:
Butler, White & Hanna, Auckland, for Respondent.