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IN THE HIGH COURT OF NEW ZEALAND M. 1540/83

AUCKLAND REGISTRY

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BETWEEN BEATTIE

APPELLANT

A N D AUCKLAND CITY COUNCIL

RESPONDENT

Judgment: 17 February 1984

Hearing: 17 February 1984

Counsel: P.H. Thorp for Appellant
J. Gresson for Respondent

ORAL JUDGMENT OF CASEY J.

On 19th August Mr Beattie was convicted on a charge of driving with an excess blood/alcohol content, found on examination to be 101 milligrams per 100 millilitres of blood which, of course, is a relatively low finding. He pleaded not guilty and the case was heard in the District Court on 12th August and the learned Judge reserved his decision, delivering it on the 19th. The case was vigorously contested step by step by Mr Thorp on behalf of the Appellant, and he has with equal vigour prosecuted the only matter that was left open to him on appeal - namely, the adequacy of the breath screening test carried out by the officer. There was a substantial conflict of evidence over many of the matters traversed in the Court below, and the learned Judge found himself - in this area of the breath screening test particularly - favouring the evidence given by the Appellant, who maintained that he had been asked to blow into the device three times before the officer expressed himself as satisfied on examining the crystals.

Mr Thorp's criticism of the District Court Judge's finding that this part of the case had been proved, is based on the conflict of evidence; and the proposition that he made a presumption without adequate justification that the test had indeed been properly carried out, when there were other

explanations to raise at least a reasonable doubt in his mind. The officer said that the Appellant was sitting in the back of the car behind the passenger seat; that he handed the device to him and, as far as his recollection went, he inflated it with one breath and there were no problems about it. Mr Beattie's explanation was very different. He said the bag was handed to him. It was on the first occasion passed back over the seat to the officer who expressed himself as being dissatisfied. He had another try and then after another examination the officer still was not happy with it and (to quote his own evidence at p.B.17) he says:-

> "On the third occasion I could not get much air in because the thing was very much like a football. It was pretty tight, it was full. I recall the officer was not holding the bag while I was blowing it."

The learned Judge said in commenting on the evidence given by the traffic officer:-

> "I have no doubt that he followed the procedures faithfully on the night, but on disputed matters of fact his evidence was somewhat unconvincing."

As I have said previously, he accepted Mr Beattie's evidence of what happened at this particular stage of the proceedings and summarised his evidence at p.2 of his judgment, which reads:-

> "He said he blew it into the bag as instructed, he passed it over the seat to the traffic officer. The officer did not take it from him although he may have touched it. He said it was not satisfactory and asked the defendant to blow into it again. He did so and passed it over a second time to be told once again there was still not enough. Accordingly he blew into it for a third time and found he could get very little more air into it. That time when he passed it over the seat, the traffic officer took it from him, held it up to the interior light of the police car and declared it a positive test."

Mr Thorp suggests that the traffic officer had examined the crystal tube on the other occasions as well, but there is simply

no evidence from the defendant to this effect. The only reference is clearly to the last occasion when the officer examined the crystals and made the comment about them after holding the device up to the light. I am not prepared to infer or adopt the suggestion made from this evidence, that the officer was deliberately passing the bag back to the Appellant to get further samples of breath after a study of the crystals on each of the two earlier occasions, in order to achieve a result that was positive. If this had been his motive, of course, it would have been quite inconsistent with the Act, amounting to an attempt to administer a second and third breath test after a first negative result.

The learned Judge's finding on this evidence is in the following terms at the foot of page 4:-

> "I have no doubt that the traffic officer explained to the defendant what was required of him, that he asked the defendant to blow a second and third time because the bag was not fully inflated until the third attempt."

It is accepted by both Counsel that the bag does not necessarily have to be inflated in one breath and that the notice contemplates that a number of breaths may be required without vitiating the procedure. Mr Thorp submits that the Appellant was in fact being required to blow into a bag that was already fully inflated and that this may have resulted in an increase in the concentration of alcohol flowing past the crystals which would have yielded a positive result, whereas had the test been carried out normally, with the bag blown to inflation from a not fully inflated situation, the result may have been negative. (I trust I have correctly summarised his submissions on this.)

The learned Judge cited what he called the concession by the Appellant, that on both the second and third attempts he did manage to get more air into the bag and said that supported the inference that it was not fully inflated as

required by step 4 of the notice until the third attempt. Mr Thorp strongly criticised this process of reasoning and says that the learned Judge simply made a presumption on this evidence that the bag was not fully inflated at the time each breath was administered, and there were other explanations leaving it open to suggest that it had in fact attained its maximum content after one or more of the earlier breaths. The further breaths which were directed into it therefore increased the alcohol content in the air and affected the crystals to yield a positive result.

With respect, I do not share his view that the learned Judge made any such presumption. He has drawn an inference wich was fully open to him, and there is simply no evidence at all to support Mr Thorp's alternative explanations as to what might have happened. These were firstly, that even though the Appellant said he could get more air into the bag, he was only able to do so by a strong breath increasing the pressure of air in a fully inflated bag; his other explanation was that when the bag was being passed to and from the traffic officer for examination, that some air leaked out from the already full bag. This enabled more air to go into it on the succeeding breaths. In my view, this is pure speculation. There was no cross-examination of the traffic officer, or any evidence to indicate either that the suspect could blow further air into an already fully inflated bag as he suggested in his first alternative; or secondly, that air could leak out of a fully inflated bag in the way that he suggests. The learned Judge had ample evidence from which to draw this inference and the suggestions Mr Thorp raises are no more than speculations not giving rise to any reasonable doubt about the findings and for that reason the appeal must be dismissed, with costs of $75 to Respondent.

McCasey J.

Solicitors:

Martelli McKegg Wells & Cormack, Auckland, for Appellant
Butler White & Hanna, Auckland, for Respondent