IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A.P. No.5/91

BETWEEN SIMON MICHAEL MASTERS

Appellant

A N D MINISTRY OF TRANSPORT

Respondent

Hearing: 8 February 1991

Written Submissions: 1 March 1991

Counsel: G.J. Cameron for Appellant
Mrs M.J. Grills for Respondent

Judgment: Delivered 11th March 1991

JUDGMENT OF TIPPING, J.

Simon Michael Masters appeals against his conviction on a charge of driving with excess breath alcohol level. The crucial issue in the appeal is whether a "second" evidential breath test may be administered when the "first" test has resulted in an "Incomplete Test" reading by the Intoxilyzer 5000 device. It is common ground that all steps up to the point at which the enforcement officer requested Mr Masters to take an evidential breath test were justified and correctly taken.

In the circumstances described in s.58B(4) of the Transport Act 1962 an enforcement officer may require a suspect to undergo forthwith an evidential breath test. It is not an offence to fail or refuse to

take an evidential breath test but such failure or refusal entitles the enforcement officer, pursuant to s.58C(1)(a), to require of the suspect that he permit a doctor or other authorised person to take a blood specimen.

In this case Mr Masters, having been lawfully required to undergo an evidential breath test, was required to blow into an Intoxilyzer 5000 device. There was some suggestion during the hearing that the Appellant did not properly blow into the device but in the light of a concession made by the Sergeant Prosecutor in the Court below to the effect that a sufficient sample of breath had been provided for the purposes of analysis, it was not open for the Court to come to the conclusion that the Appellant had failed or refused to undergo the evidential breath test.

The steps set out in paragraph 10 of the Breath Tests Notice 1989 (No.2) were taken. Step 2(iii), as set out in Paragraph 10, requires Steps 2(i) and 2(ii) to be repeated as required until the testing sequence has been completed. It is apparent from the evidence that the testing procedures for one test involve two specimens of breath sufficient for analysis being supplied. In this case the result card demonstrated that the first specimen of breath provided by the Appellant at 2247 hours produced a reading of 0809mg. The second specimen, this being the one in respect of which it was suggested that the Appellant had not performed the test properly, which was taken at 2248 hours, produced a reading of 689mg. However the machine in the result box of the printout indicated "Evidential Breath Test Result - Incomplete Test". This

being the situation the enforcement officer required of the Appellant that he should either give a blood sample or undergo another evidential breath test from the beginning. The Appellant adopted the latter alternative and on this occasion the first analysis at 2253 hours was 801mg and the second at 2254 hours was 779mg. On this occasion the machine did give a result which was 779mg.

It was for that level of excess that the Appellant was prosecuted and convicted. He now says that as the machine gave the result "Incomplete Test" at the end of the first testing sequence the enforcement officer had no lawful authority to require him to undergo a second testing sequence, albeit that in the circumstances a blood sample may have been requested. At the conclusion of oral argument I requested written submissions from the Crown as I wanted to be sure that all relevant material was before me. These have now been received and considered along with Mr Cameron's submissions in reply and I deal with the points raised more fully below.

It is convenient to reproduce the whole of Clause 10 of the Breath Tests Notice:-

> "10. Manner of carrying out evidential breath tests by means of DataMaster, Drager 7119, Intoxilyzer 5000 or Seres - Evidential breath tests carried out by means of a DataMaster, a Drager 7110, an Intoxilyzer 5000, or a Seres shall be carried out in the following manner:
> (a) Step 1 (start of testing sequence): The enforcement officer shall depress the button for starting the test:
> (b) Step 2 (evidential breath test): The enforcement officer shall carry out the testing sequence in accordance with the instructions appearing on the display panel on the device: and -
> (i) The enforcement officer shall attach a new mouthpiece to the breath inlet tube

and instruct the person being tested to blow through the mouthpiece; and

(ii) The person being tested shall blow through the mouthpiece to provide a subject breath specimen sufficient for analysis, when instructed by the enforcement officer; and

(iii) Step 2(i) and Step 2(ii) shall be repeated, as required, until the testing sequence has been completed:

(c) Step 3 (results of test):

(i) The results of the various steps in the testing sequence will be shown on the result card or printout, and will include the Evidential Breath Test Result which shall be taken to indicate the number of micrograms of alcohol per litre of breath of the person tested:

(ii) If the Evidential Breath Test Result is "Incomplete Test", the test has been unable to be carried out."

When first considering this appeal I was of the tentative view that Step 2(iii) might be construed as authorising what occurred. However it seems to me that this is not so and that what Step 2(iii) is aimed at is the fact that the test involves the giving of samples of breath which are capable of analysis within the same testing sequence. What step 2(iii) does not authorise in my view is the commencement of a completely fresh testing sequence once the first has been completed, albeit that an "Incomplete Test" result has ensued. Similarly Step 3(i) demonstrates that the testing sequence has come to an end before the result card or printout is produced by the machine.

Step 3(ii) is crucial for present purposes. It says that where the machine produces the result "Incomplete Test" the test has been unable to be carried out. At one level this might be thought to be a blinding glimpse of the obvious. Presumably step 3(ii)

has been included in the Notice for some purpose and the purpose would seem to me to be that in the circumstances arising, i.e. where the machine produces the result "Incomplete Test", a situation has arisen where for whatever reason the view must be taken that the test cannot be carried out. I have emphasised the word "the" because that is the word used rather than the word "that" test or "a" test.

If it had been intended by the draftsman of the Notice that in those circumstances the enforcement officer could go back to the beginning and start the testing sequence all over again then it would have been very simple to have added appropriate words to that effect at the end of step 3(ii). There is nothing which expressly authorises the enforcement officer to start the testing sequence again. Although in one sense the first test is no test at all the "result" (that is the word used) is a legislative direction of inability to carry out the test. It must then be asked whether that inability of itself authorises a second attempt by a de novo commencement of the testing sequence.

Although in the construction of all legislation the singular may include the plural and vice versa, it seems to me that in the present context s.58B(4), which authorises an enforcement officer to require a suspect to undergo an evidential breath test, does not authorise the enforcement officer to require a suspect to undergo successive testing sequences until such time as the machine does give a completed test result.

given that the suspect provided, as here, sufficient breath for analysis during the first testing sequence.

If a suspect fails or refuses to undergo the evidential breath test then s.58C makes it clear that the enforcement officer may then require a blood specimen. A failure or refusal to supply a blood specimen when lawfully required to do so is of course an offence: s.58E. Thus if the evidential breath test is not completed as a result of failure or refusal by the suspect then the enforcement officer has his remedy by his entitlement to request a blood test which in itself may be indicative of an offence.

If the device produces the result "Incomplete Test" within the meaning of Clause 10, Step 3(ii), then it seems to me that the correct view is not that the enforcement officer may start the testing sequence afresh but that the provisions of s.58C(1)(c) apply. This provides that an enforcement officer may require a blood specimen if for any reason an evidential breath test cannot then be carried out at the place to which the suspect has been required to go. Clearly if the testing device produces the result "Incomplete Test" then in terms of Step 3(ii) the test has been unable to be carried out. This must by definition be within the contemplation of s.58C(1)(c) which authorises a request for a blood test if "for any reason an evidential breath test cannot then be carried out".

The enforcement officer is accordingly in the face of an "Incomplete Test" not without remedy.

His remedy is not to require the suspect to go through the testing sequence a second time, but rather to take the view that the evidential breath test cannot be carried out with the consequence that he may then require a blood specimen.

I am mindful of the authorities which suggest that in a case of alleged failure the enforcement officer should not be too quick to take the view that the suspect has failed the test but should give him every reasonable opportunity to complete it. While not dissenting from that proposition in general terms, it seems to me that once the device has produced the result "Incomplete Test" after the suspect has done everything required of him the situation has been reached in which, for whatever reason, the test must be taken as unable to be carried out. As the evidence in the present case shows, there may be a number of reasons why the machine produces the result "Incomplete Test" one of which is that the two readings are more than fifteen percent apart. Whatever the reason, be it that or anything else, the consequence laid down in Step 3(ii) of the Notice follows.

If this conclusion is contrary to the intention of the draftsman of the Notice then the remedy is simple. Words can be added to the Notice authorising the testing sequence to be started again if the machine produces the result "Incomplete Test". However there is force in Mr Cameron's submission in the present case that care would then have to be taken as to how many times the

suspect could be required to go through the testing sequence. Mr Cameron made the point that to come to the conclusion that a "second" test could be administered would mean that if that too produced an incomplete result then presumably a "third" sequence could lawfully be required and so on, theoretically ad infinitum.

That argument supports my conclusion that once an "Incomplete Test" has resulted from the testing sequence there is no lawful authority to require the sequence to be undertaken again. If it is a case of a failure or refusal then the enforcement officer may proceed to a blood test under s.58C(1)(a). In any event pursuant to s.58C(1)(c) the position is that where for whatever reason an evidential breath test cannot then be carried out a blood specimen may be requested. In either case the result of the blood test may show an offence. A failure or refusal to undergo a blood test is also an offence.

The learned Judge in the Court below in reaching the conclusion that the enforcement officer was authorised to require the testing sequence to be gone through a second time essentially relied on a judgment of Judge Jaine in Ministry of Transport v. Slaven a decision given in the District Court at Wellington on 31 August 1989. The Judge in the present case expressed his agreement with the reasoning in that judgment and I must now indicate why I differ from the conclusions there expressed.

Judge Jaine stated the issue as being whether the "first" test had been completed. He relied in particular on the decisions of Savage, J. in Flower v. Christie (Wellington M.567/83) and Thorp, J. in Lankreijer v. Auckland City Council (Auckland February 1980). In the first case Savage, J. emphasised that if a breath test under the then existing legislation had been completed there was no power to compel a suspect to undergo a second test. The corollary was that if the test had not been completed then there was still power to require the suspect to undergo an evidential breath test, which power remained until the test had been undergone in the sense of being completed by the suspect. I discuss below what amounts to completion by the suspect in this context.

In the second case Thorp, J. accepted that the language of s.58A gave jurisdiction to require only one evidential breath test. He was however of the view that there was nothing in the statute to suggest that until such a test had been completed an enforcement officer was prevented as a matter of law from taking such action as was reasonable to complete the test.

Those observations were not made against the express terms of Clause 10 of the Transport (Breath Tests) Notice 1989 (No.2). Judge Jaine went on to state that Step 3(ii) in Clause 10 appeared to him to provide the complete answer. He was of the view that it was untenable to suggest that where an "Incomplete Test" result had been printed out by the machine the test had been completed. On the face of it such would appear to be

a contradiction in terms but, as I discuss below, from a suspect's point of view he may well have completed all steps required of him.

With respect, however, it is my view that the question is not so much whether a "first" test with an "Incomplete Test" result is a complete test. As I have said self evidently by description it is not. The real question is what is the effect of the direction in Step 3(ii) that with an "Incomplete Test" the test is deemed to have been unable to be carried out. Judge Jaine went on to consider s.58(1)(c), drawing attention to the fact that a blood specimen may be requested where for any reason an evidential breath test cannot then be carried out.

The use of the word "then", although not emphasised by His Honour, is significant. It militates against a suspect being required to wait while the cause of the inability to perform the test, whatever it may be, is rectified. The sort of trivial delay involved in replacing batteries (as per the Lankreijer case) can even in terms of the current Breath Tests Notice be accepted as de minimis.

Judge Jaine then proceeded to say:-

> "I am satisfied that s.58(1)(c) was designed to cover a situation where the appropriate device was not readily available or for any reason any available device was not capable of performing an evidential breath test properly. In the present case the fact that the test was not completed with the device, for whatever reason, when the enforcement officer first attempted the test did not mean [my emphasis] that the test could not be carried out."

I am afraid I cannot accept that reasoning or conclusion. The "Incomplete Test" did mean that the test could not be carried out. That is exactly what Step 3(ii) says. Accordingly I disagree with His Honour's conclusion that in such circumstances the enforcement officer could not have proceeded to require a blood specimen. Thus the consequence which concerned His Honour that the enforcement officer in such circumstances as these can proceed no further does not follow.

I turn now briefly to indicate why I cannot accept the submissions made on behalf of the Crown. To the extent that Mrs Grills adopted the reasoning of Judge Jaine I have already explained why I cannot accept it myself. Mrs Grills placed considerable emphasis on the proposition that the evidential breath test must be a completed test before the ability of the enforcement officer to require such a test can be said to have come to an end. Much will depend on why it is said that the test has not been completed.

In the present case the test was entirely completed from the point of view of the suspect. Mr Masters had done all that was required of him. It is not a case of a machine failure such as occurred in Boyle v. Police M.1903/80 (judgment 23/3/81) per Sinclair, J. The test in the present case was completed right up to the point at which the machine gave the "result" as Mrs Grills acknowledged. It should again be noted that step 3(ii) states that the test has been unable to be carried out.

I disagree with Mrs Grills' submission that a result of "Incomplete Test" with nothing more does not entitle a traffic officer to request blood. In my view it would be quite unreal not to equate the words "has been unable to be carried out" with the words "for any reason ... cannot then be carried out". Nor can I accept, for the reasons given, that the test was not completed. Not only was it completed from the suspect's point of view, it was also completed from the machine's point of view because the machine gave a result, albeit not one demonstrating a breath alcohol level.

Furthermore step 3(ii) states what the consequence of that result is and, as mentioned earlier, if it had been intended that the consequence was that the testing sequence could be embarked on again the notice could and should have said so. I am not attracted to Mrs Grills' answer to the problem raised by Mr Cameron that if a "second" test was permitted in these circumstances why not a third and a fourth and so on. The suggestion that it would then be for the enforcement officer to decide at what point the test could not be completed seems to me to be quite unacceptable in the circumstances.

Finally I must deal with Mrs Grills reference to the decision of Vautier, J. in Ramsay v. Ministry of Transport M.225/83 Dunedin Registry. In that case Vautier, J. re-emphasised the need for a citizen to be given a proper opportunity of providing an evidential breath test. His Honour warned against traffic officers

being allowed too readily to take the view that there had been a failure or refusal. He indicated that suspects must be given a proper opportunity of providing a sample of breath sufficient for the carrying out of an evidential breath test.

The fundamental distinction between that line of authority and the present case is that here Mr Masters did provide two perfectly adequate breath specimens each of which appears to have been analysed by the machine but in respect of which the machine was unable to give a complete result. I am unable to accept Mrs Grills' concluding submission that in the circumstances of this case the officer's request of the Appellant to re-do the evidential breath test was a reasonable step in the process of obtaining a complete evidential breath test.

The test was complete in the sense that Mr Masters had done everything required of him. The machine for whatever reason came up with the result "Incomplete Test". While semantically one can hardly in the face of that result call the test complete the circumstances do not in my view allow the traffic officer to embark upon the testing sequence again for the reasons which I have endeavoured to set out.

In summary my views are these:-

(1) If an Intoxilyzer 5000 device gives an "Incomplete Test" result there is no lawful authority for the enforcement officer to require the suspect to

embark upon the testing sequence again from the beginning.

(2) Nevertheless an "Incomplete Test" result authorises a request under s.58(1)(c) for a blood specimen on the basis that an evidential breath test cannot then be carried out at the relevant place.

(3) A blood specimen may also of course be requested in a case of failure or refusal to perform the evidential breath test which failure or refusal must not be too readily assumed in the light of the fact that the enforcement officer must give the suspect every reasonable opportunity to complete what is required of him.

In the result, there being no lawful foundation for the "second" test, the prosecution was not properly founded. The officer could have required a blood test. He does not appear expressly to have done so and in any event the Appellant was not prosecuted on that basis. The appeal is allowed and the conviction is quashed. There will in the circumstances be no order for costs.

In conclusion I express some concern at the fact that the conviction in the present case was entered on 30 July 1990. The notice of general appeal is dated 16 August 1990 and was filed in the District Court on 17 August 1990. For reasons which are quite unexplained the papers were not received in the High Court office until 5 February 1991. The Appellant was disqualified for twelve months and it does not appear that any order was made deferring the disqualification pending

the appeal. As soon as the Registrar brought the matter to my attention I directed that the appeal be heard on 8 February 1991, three days after its receipt in the High Court.

The state of affairs disclosed is unsatisfactory, albeit that it does not appear that the matter was pursued by the Appellant or counsel. I direct that the Registrar make an enquiry as to why it took so long for the papers to be received in the office of the High Court and to take such action as may be appropriate to avoid a repetition.