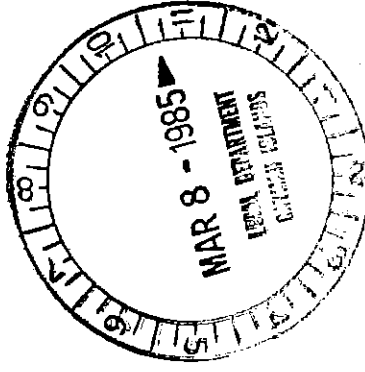


7/3/85



IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD C.B.E., Q.C. J.P.,
CHIEF JUSTICE.

ON THE 5TH MARCH 1985

BETWEEN :	DAWSON CALWARD RE BANKS	APPELLANT
AND :	REGINA	RESPONDENT

Mr. Ritch for appellant
Mr. Ground for respondent

J U D G M E N T

The appellant was arrested by a police officer on a public road on suspicion of driving while intoxicated. He was taken to the George Town Traffic Department and taken to the intoxilyser room. The intoxilyser machine had been purged and made ready for use. The appellant was reminded of the reason for his arrest and cautioned. He was then informed by a Police sergeant that the latter required a specimen of the appellant's breath for testing and given the statutory warning. The appellant agreed to undergo the test. It was explained to him that he had to blow through the breath tube for a period of 8 to 10 seconds, keeping the green light on the machine illuminated. It was stressed that he had to blow continuously for 8 to 10 seconds. He took the mouth piece of the breath tube handed to him, put it in his mouth and blew into it for about 3 to 4 seconds and then stopped. That resulted in the test not having been carried out. The sergeant again explained and demonstrated how the test should be carried out, stressing that the appellant should blow continuously for 8 to 10 seconds. The appellant again took the mouth piece and blew through it for 3 to 4 seconds and then stopped. For a second time the test had not been carried out. The sergeant once again explained and demonstrated how to do the breath test. The appellant then refused to carry on with the test saying something to the

effect: "When I blow that long and drop down here, who will take care of me. I can't blow that long." When handed the breath tube a third time he refused to take it. He was then formally charged with either refusing or failing to give a breath specimen. There is a conflict in the evidence as to what he was formally charged with.

Apparently it is customary, where a suspect fails to carry out the test properly, to instruct him again and give him another opportunity as he may not have understood the instructions correctly.

The charge as laid before the Summary Court was that the appellant without reasonable excuse failed to provide a specimen of breath for a breath test having been lawfully required to provide one. In the course of the trial the charge was amended on the application of the prosecutor and over the objections of the defence. The word "refused" was substituted for the word "failed". At the end of the prosecution case there was a no case submission which was overruled by the learned trial Magistrate. The defence rested on the no case submission and called no evidence.

The appellant was convicted and the appeal is from that conviction
The grounds of appeal are:

"1. The Summary Court erred in that

- (a) The conviction is contrary to law in that there was no case to answer in law, the appellant having been convicted of refusing to provide a third specimen of breath in relation to the one occasion in respect of which he had been arrested.
- (b) In law, a Constable is only empowered to require one specimen of breath for a breath test and therefore a requirement to provide a second or third specimen is not a lawful requirement and in law a person who refuses to provide such a specimen commits no offence.
- (c) There was, in law, no prima facie case of refusal, the appellant having already consented to blow into the breathanalyser twice and did in fact blow into the said machine on two occasions.

2. The Summary Court ought to

found that

- (a) Have/since the refusal to provide a specimen of breath was in relation to a third requirement, and not the first requirement in respect of which the appellant did

"blow into the machine, there was no prima facie case of refusal as any requirement to give more than one specimen is not a lawful requirement.

- (b) Have found that where a person is required to give a specimen of breath and that person fails in relation to such requirement after blowing into the machine, that there is no discretion vested in the police whereby they can require another or further specimens in respect of the same arrest and occasion."

Section 62(8)(a) of the Traffic Law reads:

"A person who, without reasonable excuse, -

- (a) fails or refuses to provide a specimen of breath for a breath test after having been required to do so under paragraph (a) of subsection (2);...

(b).....

shall be guilty of an offence and liable on conviction to the same punishment as if he had been found guilty of an offence under section 61."

Section 62(10) defines "breath test" in paragraph (a) as meaning

"a test for the purpose of obtaining a measurement of the proportion of alcohol in a person's blood carried out by the means of an alcohol-in-breath measuring device in accordance with the instructions of the manufacturer of such device, on a specimen of breath provided by that person." Paragraph (b) provides that "references to providing a specimen of breath for a breath test..... are references to providing a specimen thereof in sufficient quantity to enable the test to be carried out."

After the first abortive operation it would have been open to the police officer to charge the appellant with failing to give the breath specimen. In giving the appellant a second opportunity to give a specimen of breath (as defined), which he had agreed to give but had not yet given, he was merely being fair and reasonable towards the appellant. It was within the police officer's discretion to charge the appellant then or not. It might have been oppressive to have done so if the failure had been due to a misunderstanding of the instructions. It should be emphasised that section 62(2) empowers the police officer to require the suspect to provide a specimen of breath (as defined) for a breath test (as defined). Despite his agreement to do so the appellant had not yet provided that specimen of breath. He had

yet to do so and the police officer was doing no more than affording a further opportunity of doing so with tolerance and guidance. That was perfectly proper and, indeed, commendable.

The same can be said of the second abortive operation. The offer of a third opportunity after further guidance was a further act of forbearance. The appellant had still not provided that which he was required to provide and had agreed to provide.

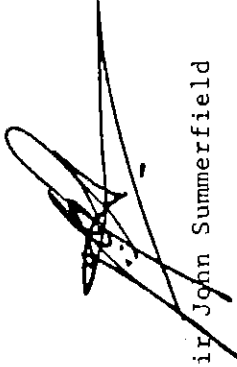
The refusal to provide the specimen can be based on the appellant's conduct as a whole and on his actual refusal after the second abortive operation. It is immaterial that, initially, he agreed to give the specimen if, in the result, he changed his mind before doing so and made his refusal known by actions or words. The two abortive operations did not amount to the giving of a specimen of breath as required of him. Before giving that specimen he made his refusal to do so known. There is no suggestion of any reasonable excuse such as a physical handicap inhibiting him.

Although the legislation in England is very different from ours the principles are the same and are summed up in Wilkinson's Road Traffic Offences 11th Ed, paragraph 193 in the supplement, as follows:

"193 Discretion to administer a second breath test. Not only can a second breath test be administered if the first is honestly but mistakenly administered (see Wright v Brobyn) but the constable has a discretion to administer a second breath test even if he could have arrested the defendant for failing the first breath test (Rex v Broomhead [1975] RTR 558). This case followed in Revel v Jordan; Hills v Nicholson (1983) The Law Society's Gazette p 157. In both cases the constable to be fair to the defendant gave him a further opportunity to take a breath test; in the former case the defendant partly inflated the bag on the first occasion and was arrested on the second occasion when he fully inflated the bag which then gave a positive reading; in the latter case the defendant who said he was asthmatic failed to inflate the bag on both occasions and was arrested for failing to supply a specimen of breath on the second occasion. Both defendants were convicted of an offence under s 6(1) and the Divisional Court hearing both cases together upheld the convictions. The power created in s 8(5) is a discretionary power and if a constable wished to give a motorist a second chance he could not be said to be acting in an oppressive manner; a motorist may be anxious or confused, misunderstand the procedure or make

"a poor showing on the first occasion (ibid).".

Accordingly, the appeal is dismissed.



Sir John Summerfield

7th March 1985.