[2017] SC (Bda) 74 App (25 September 2017)

In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 37

NASIR MUHAMMED
Appellant

-v-

KUHN EVANS
(Police Inspector) Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-impaired driving-refusing to supply breath sample-sufficiency of evidence- need for objective assessment of whether failure to supply sample was deliberate

Date of hearing: September 13, 2017
Date of Judgment: September 25, 2017

Mr Philip J Perinchief, PJP Consultants, for the Appellant
Ms Nicole Smith, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant appealed against his conviction on September 28, 2015 in the Magistrates' Court (Wor. Archibald Warner) following a trial on both counts on the Information upon which he was charged on October 3, 2014. It was alleged that he on September 28, 2014, in Sandys Parish:

[1] The present judgment was circulated without a hearing.

(1) drove whilst impaired contrary to section 35AA of the Road Traffic Act 1947; and

(2) without reasonable excuse, refused to comply with a demand made by a Police Officer that he provide a sample of breath for analysis.

2. The formal grounds of appeal may be distilled into the following principal complaints:

(1) on Count 1, the Learned Magistrate ought to have given the Appellant the benefit of the doubt as he raised credible answers to all of the matters relied upon as evidence of his impairment;

(2) on Count 2, the Learned Magistrate erred in relying upon the evidence of one Police Officer that the Appellant refused to supply a breath sample having initially agreed to supply a sample.

Ground 1: driving whilst impaired

The Prosecution case in the Magistrates' Court

3. When the evidence led by the Prosecution on Count 1 is reviewed, it soon becomes obvious that the case against the Appellant was an overwhelming one and that it would require proof of legal errors on a grand scale in the course of the trial to justify the conclusion that his conviction amounted to a miscarriage of justice:

- the Appellant admittedly spent the afternoon of his arrest on a boat cruise, having parked his car at the Ely's Harbour public dock and had "one swizzle";

- the Appellant, travelling with his young son, admittedly drove only a short distance on the main road towards Somerset before crashing through the roadside railings and down an embankment with his car coming to rest upside-down on the edge of the sea. Neither he nor his son appeared to be injured;

- both arresting officers testified that the Appellant's breath smelled of alcohol, that his eyes were glazed and that he was unsteady on his feet;

- the Custody Sergeant testified that the Appellant's breath smelt strongly of alcohol, his eyes were red and that his speech was slurred;

- when the Appellant was taken to the Hospital in connection with a foot injury he complained of, one arresting Officer testified that, whilst waiting for treatment, the Appellant said " *I am an asshole for drinking like that*".

The Defence case in the Magistrates' Court

4. The Defendant's case, as put through cross-examination and by way of his own testimony had the following main strands to it:

    - he drank one rum swizzle while on the boat cruise (explaining his breath);
    - he swerved off the road not due to impairment, but because he foolishly tried to pick up his cell-phone from the floor of the car and then had to swerve to avoid a collision;
    - he was unsteady on his feet because of a sprained ankle sustained in the accident and his eyes looked glazed because he was understandably dazed and disoriented;
    - at the Hospital while waiting for attention in Police custody, he said "*I was an asshole for <u>driving</u> like that*", not "*drinking like that*".

The Magistrates' Court's decision

5. The Learned Magistrate's reasons for his decision can be extracted from his interchanges with counsel in the course of closing speeches, prior to his conclusory finding that "*I am satisfied so as to feel sure that he was impaired while driving the car*". He clearly accepted the Prosecution evidence that the following factors supported the Appellant's guilt:

    - the fact that he drove through the roadside fence; and
    - (more importantly) the fact that he appeared to Police Officers to be drunk based on the smell of his breath, his glazed eyes, his unsteadiness on his feet and his admission to having had at least some alcohol.

Merits of appeal against conviction on ground 1

6. The relevant ground of appeal complained that "*the learned magistrate failed in law to apply his mind sufficiently, or at all, to the plausible explanation of the Appellant that he was unsteady on his feet because of disorientation after a traffic accident and an injury to his foot that caused him to be hospitalized. One police officer at the scene of the accident admitted that the Appellant appeared disorientated and preoccupied with locating his young son who was in the accident with him.*" It would indeed constitute an error of law if the Learned Magistrate failed to consider the key elements

of the defence. However the way this ground was pursued in oral argument before this Court seemed to amount to little more than rearguing submissions which were rejected by the Magistrates' Court.

7. There was clearly sufficient evidence adduced by the Prosecution to support the conviction and to justify the Learned Magistrate concluding that the Appellant's evidence raised no reasonable doubt about his guilt on Count 1. The suggestion in written submissions that the factual findings were perverse was palpably misconceived.

8. The mere fact that the Appellant adduced evidence which might have been believed or which might have raised a doubt about his guilt did not deprive the Magistrates' Court of the duty to evaluate such evidence and the power to reject that evidence, finding instead that the Court felt sure of the Appellant's guilt. Merely raising a defence does not entitle an accused person to an automatic acquittal. The Appellant's defence essentially was that the Police Officers who thought he appeared to be drunk after the accident (and, in one instance, testified to hearing him express regret about drinking) were mistaken. It was for the Learned Magistrate, seeing the witnesses giving their evidence, to decide (1) whom he believed, and (2) (if he believed the Prosecution witnesses were not mistaken) whether he was sure of the Appellant's guilt.

9. The Learned Magistrate clearly found that he was satisfied so that he was sure that the Prosecution witnesses who testified that the Appellant was visibly under the influence of alcohol were not mistaken. He cleared did not accept the Appellant's evidence or find that it raised a reasonable doubt about his guilt. The Learned Magistrate clearly inferred from those primary factual findings that the Appellant's ability to drive was impaired by drink. This Court is in no position to disturb those primary factual findings and no convincing basis for disturbing the inferential findings was advanced in argument. Whether or not the Appellant's explanations (for why the Police saw what they thought they saw and heard what they thought they heard) were plausible was inextricably intertwined with the Learned Magistrate's assessment of the credibility of the witnesses. After an interchange with Mr Perinchief in the course of closing submissions which demonstrated that that the Learned Magistrate had a firm grasp of what the Defence case was, the following short oral ruling was made on Count 1:

> "*And…having considered all those matters for him and against him, I am satisfied so that I feel sure that he was impaired when driving the car…*"

10. The appeal against the impaired driving conviction was essentially asking this Court to disturb the primary findings made in the Magistrates' Court, something which an appellate court is not competent to do (unless, for instance, the primary factual findings are supported by no evidence at all). In *Mon Tresor and Mon Desert Limited-v- Ministry of Housing and Lands* [2008] UKPC 31, Lord Scott stated:

> "*2… <u>An appellate tribunal ought to be slow to reject a finding of specific fact by a lower court or tribunal, especially one founded on the credibility or bearing of a witness</u>. It can, however, form an independent opinion on the inferences to be drawn from or evaluation to be made of specific or primary facts so found, though it will naturally attach importance to the judgment of the trial judge or tribunal…*" [Emphasis added]

11. The appeal against the impaired driving conviction must accordingly be dismissed.

Ground 2: Refusing to supply a breath sample

<u>The Prosecution case in the Magistrates' Court</u>

12. It was common ground that before or shortly after he was arrested on suspicion of impaired driving, the Appellant initially agreed to supply a sample of breath. The refusal evidence came from Police Sergeant Thompson and the critical part of his evidence-in-chief was recorded as follows:

> "*I introduced myself to Defendant as an authorized Alco Analysis Technician. At 12.10am I told the Defendant that I was informed that when he was arrested at the scene of the accident that a demand for samples of breath had been made and that he had agreed. Defendant replied "No". I then told defendant that by saying no it amounts to a refusal and that he would be charged for refusing. Defendant replied "I will go to Court".* [He denied the suggestion put in cross-examination that the Defendant's reply to this request was "no problem-will I still have to go to Court?"]. *As a result of the Defendant's response I further made a demand for sample of breath from the defendant for analysis. He replied "I will go to Court". I then told Defendant that amounts to refusal to a lawful demand for samples by a police officer that he would be kept in custody until he sobers up. At which time he would be charged…*"

<u>The Defence case in the Magistrates' Court</u>

13. The Defendant in his evidence essentially denied ever refusing to supply a breath sample. He testified that he said "*no problem*" when asked on arrival at the station by Sergeant Thompson to supply a sample while he was being initially processed. After he was placed in a cell he was told that he was being charged with refusing to supply a sample: "*I then questioned why saying I guess I will have to go to Court*". This version of events was more inconsistent with the Prosecution version of events than the case which was put to Sergeant Thompson in cross-examination. According to the

Sergeant, the Appellant was already in custody when the change of shift occurred. The Learned Magistrate would have been entitled to infer from this that the Appellant had no clear recollection of precisely what had occurred at the Police Station and place no reliance on his own evidence.

14. The bulk of Mr Perinchief's closing submissions focussed on Count 2 on the Information. In the course of those submissions the Learned Magistrate noted that normally (or sometimes) two police witnesses were called in relation to the 'alco analysis' test. He acknowledged that there was no corroboration of Sergeant Thompson's evidence and that even the custody record was not in evidence. He reviewed his notes of the Sergeant's evidence in the course of interactions with counsel.

15. The Appellant's counsel in his closing submissions initially advanced two alternative arguments. Firstly, and most optimistically, he suggested that Sergeant Thompson had not wanted to conduct the test because of the passage of time since the Appellant's arrest. The Officer never had any genuine intention of taking a breath sample at all. However, in response to probing from the Bench, he effectively abandoned this unsupported limb of the Defence. The implication of this submission was that the Officer had deliberately fabricated parts of his evidence, a position which was never put to him in cross-examination. Secondly, and more realistically, Mr Perinchief argued that an innocent misunderstanding had occurred, there was room for doubt as to precisely what had been said by the Appellant and the Appellant should be given the benefit of that doubt.

16. However, the clarity of the innocent misunderstanding theory was obscured somewhat by argument about the connected but potentially irrelevant question of what the Appellant's motives were and whether or not he had actually 'changed his mind'.

The Magistrates' Court decision

17. After summarizing Sergeant Thompson's evidence, the Learned Magistrate made the following ex tempore findings on Count 2:

> "*There is nothing considering the Defendant's evidence in the box, and the submissions that will cause me to doubt Sergeant Thompson's evidence, I accept his evidence that he deemed the Defendant's behaviour to amount to a refusal. In the circumstances I am satisfied so that I feel sure that the Defendant refused to comply with the demand made by Sergeant Thompson for a sample of breath for analysis…*"

Merits of the appeal

18. The first ground of appeal set out in the Notice of Appeal made the following complaint:

> "*1) the learned magistrate erred in law and in fact and wholly misdirected himself in relying on the uncorroborated testimony of the duty sergeant cum breathalyzer technician, that the Appellant had changed his mind in giving a breath sample after consenting to two other police officers prior that he would do so.*"

19. This original complaint was refined somewhat in the course of the hearing of the present appeal. As a matter of law, it was clearly open to the Learned Magistrate to convict based on the Duty Sergeant's uncorroborated evidence. Mr Perinchief's submissions reached a crescendo when he submitted that the Learned Magistrate was wrong to effectively accept the Police Officer's judgment as to the refusal rather than making his own objective determination that a refusal had occurred. The conviction did, after all, rest upon the crucial finding that "*I accept his evidence that <u>he deemed</u> the Defendant's behaviour to amount to a refusal*" [emphasis added]. Ms Smith for the Crown sensibly made no attempt to contend that the law absolved the Court in such circumstances from carrying out its own assessment of whether an implied refusal had occurred.

20. The finding which was made might perhaps in many cases be perfectly adequate. If the Appellant had maintained the submission that Sergeant Thompson's evidence had been fabricated, it would have sufficed to record a finding that, in effect, the Court accepted him as a witness of truth. But the main defence argument (ultimately the only defence argument) that the Officer was honestly mistaken called for an objective analysis of his evidence, conceded to be largely accurate, to see whether it was possible that the Officer's judgment that the Appellant was refusing to take the test was wrong. This was a very difficult question to analyse clearly at the end of a trial involving another separate charge. It was particularly difficult because the Court was required, in the unique circumstances of the present case, to consider the question of mistake in two forms:

    (a) a narrow mistake, explicitly advanced by the Appellant's counsel, as to whether or not the "first no" was accurately remembered by the Sergeant;

    (b) a broader mistake, not advanced by the Appellant, which assumes that the Sergeant's evidence of what was actually said was substantially accurate, involving a wider "miscommunication" between both parties.

21. At trial, Mr Perinchief made the following concluding submissions on Count 2:

> "*I can't get past the first 'no' and that's why I say this officer is mistaken at best that this* [the change of mind]*…just does not equate with common*

> *sense…I put it as a miscommunication between officer Thompson and this Defendant, I cannot put it higher than that…*"

22. As Ms Smith had commented at an earlier stage of the closing submissions, it is in fact quite common for someone to change their mind on providing a sample when the time for supplying it actually arrives. Bearing in mind the coherence and logical sequence of the Sergeant's evidence, in my judgment it was clearly open to the Learned Magistrate to find that he accurately recorded the "first 'no'". Nevertheless, bearing in mind the absence of a contemporaneous record of what occurred and the failure to produce the Custody Record, the possibility that a mistake was made still had to be independently evaluated by the Court. Such an assessment was an essential preliminary step in the judicial process of assessing the evidence in the present case before a conclusory finding could be made that the Sergeant's subjective view that the Appellant had refused to supply a sample was correct.

23. If the Appellant was both audibly and visibly under the influence as the Sergeant testified, he would have had every reason to change his mind and decline to take the test. However, he might also have been both internally confused and verbally somewhat incoherent. As Mr Perinchief asked rhetorically in the Magistrates' Court: "*What was the first 'no' about?*" As the Learned Magistrate responded, this was simply a denial that the Appellant had earlier agreed to supply a sample of breath. The Sergeant testified, it bears remembering, as follows:

> "*I introduced myself to Defendant as an authorized Alco Analysis Technician. <u>At 12.10am I told the Defendant that I was informed that when he was arrested at the scene of the accident that a demand for samples of breath had been made and that he had agreed. Defendant replied "No"</u>. I then told defendant that by saying no it amounts to a refusal and that he would be charged for refusing. Defendant replied "I will go to Court". As a result of the Defendant's response I further made a demand for sample of breath from the defendant for analysis. He replied "I will go to Court". I then told Defendant that amounts to refusal to a lawful demand for samples by a police officer that he would be kept in custody until he sobers up. At which time he would be charged…*" [Emphasis added]

24. The questions asked by the Sergeant, freshly on duty at midnight, were entirely proper questions to ask. However, the Appellant had been on a boat cruise for between roughly12. 00 noon and 8.00 pm. He had crashed his car shortly after 8.00pm and was extremely fortunate not have injured his young son and only to have sprained his own ankle. He had been arrested, taken to the Hospital and then placed in a Police cell. The Sergeant commenced the breath sample procedure shortly after midnight almost four hours after the accident had occurred. The first "no" was not even said to have

been a response to a question, but to the Sergeant's very formal introductory remarks summarising his understanding of what had happened at the scene of the accident. Assuming the Appellant did say "no" at this juncture (which he positively denied at trial), three obvious inferences could be drawn:

- the Appellant was denying having earlier agreed to supply a breath sample, as a prelude to refusing to supply one at this stage;
- the Appellant was denying having earlier agreed to supply a sample of breath, not as a prelude to refusing to supply a sample but because he did not remember having agreed to do so being understandably shaken up by a very dramatic event in the immediate aftermath of having flipped his car at the water's edge; and/or
- the Appellant was denying having been asked to supply a sample earlier, not as a prelude to refusing to supply a sample but because he did not remember having been asked to do so at the scene of the accident.

25. What the Sergeant next said was on its face capable of misinterpretation: "*I then told defendant that by saying no it amounts to a refusal and that he would be charged for refusing.*" This either meant:

- the Appellant was going to be charged because he had just admitted refusing the initial request at the accident scene; or
- the Appellant would be charged if he refused the request that the Sergeant was about to make but had not yet made.

26. By the Sergeant's account of the Appellant's response to this ambiguous statement clearly suggests that the Appellant understood the statement as embodying the first of those two possible meanings: "*I'm going to Court*". This response also adds credulity to the Appellant's own recollection that he asked at some point whether he would have to go to Court. To my mind it is plausible that this question may well have been asked and affirmatively answered before the Appellant first stated "*I'm going to Court*", but it is not open to me to make any finding on this point. Be that as it may, the Sergeant's own account of the initial interchanges between him and the Appellant, before he eventually asked the Appellant to supply a sample, meant that the response to that request for a sample was itself open to at least two possible inferences:

- the Appellant in repeating "*I'm going to Court*" was implicitly refusing the request without any reasonable excuse;

- the Appellant in repeating "*I'm going to Court*" was implicitly refusing the request because the Sergeant had already decided to charge him for refusing the scene of the accident request.

27. The second inference in favour of the Appellant was, potentially at least, a reasonable excuse. It would very arguably be a misuse of the power conferred by section 35C(7) of the Road Traffic Act 1947 to commence a breath sample taking procedure on the assumption that the arrested person has earlier agreed to supply a sample, charge them for refusing to supply a sample based on an admission of an earlier refusal, and then make further request for a breath sample, exposing the suspect to being charged for refusing one request and then (potentially) failing a breath test or refusing a second request for a breath sample. Had the Sergeant appreciated (or allowed for) the possibility of confusion on the Appellant's part, he could have resolved the situation very simply by explaining to the Appellant that he <u>would not</u> be charged in relation to any refusal at the scene, but that he <u>would be</u> charged if he refused the Sergeant's own request for a sample, which was about to make. Had this been clarified, there would have been little room for doubt about the Appellant's guilt if he with the benefit of such clarification replied "*I'm going to Court*" when asked to provide a sample. This is, of course, the judgment of hindsight, both in terms how the Police Station Alco Analysis procedure might have been conducted and how the Learned Magistrate might have analysed the case against the Appellant. The Appellant's case at trial did not fully embrace (as an alternative to his affirmative case that Sergeant mistakenly recounted the "first no") the possibility of mistake in a broader sense. However, in my judgment the Learned Magistrate erred in inferring that the Appellant's conduct in the Police Station amounted to a refusal when there alternative inferences which might have been drawn in favour of the Appellant, inferences which:

    - were not explicitly or implicitly considered; and

    - were not explicitly or implicitly rejected because according to the record, the conviction on Count 2 was not based on an objective assessment of the refusal issue.

28. I find that the appeal against the conviction on Count 2 should be allowed on these grounds. The correct approach to drawing inferences in criminal cases is well known. In a frequently-cited judicial statement in *Teper-v-R* [1952]AC 480 at 489, Lord Normand observed:

    > "*It is…necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are not other co-existing circumstances which would weaken or destroy the inference.*"

29. In these circumstances there is no need to fully consider the alternative legal complaint which Mr Perinchief creatively advanced. This was to contend that in

failing to utilize the powers conferred by section 35C (2) of the Road Traffic Act to require the Appellant to take samples of blood at the Hospital, it was an abuse of process to make the subsequent breath test request. That subsection confers a discretionary power to be exercised where "*a police officer on reasonable or probable grounds believes that by reason of any physical or mental condition …it would be impracticable to obtain a sample of that person's breath*" (section 35(2)(b)). No arguable breach of that section in relation to which the Appellant has legal standing to complain occurred in the present case. Section 35C (2) is designed to confer a law enforcement power, not defence rights. It is for the Police to decide what type of evidence it is appropriate to collect. As Ms Smith rightly submitted, there was no evidential basis for concluding that section 35(2)(b) was engaged in any event.

Conclusion

30. The appeal against the Appellant's conviction on Count 1 (impaired driving) is dismissed. The appeal against his conviction on Count 2 (refusing to supply a sample of breath, for which he received no additional penalty) is allowed and that conviction is quashed.

Dated this 25th day of September, 2017 ________________________

IAN RC KAWALEY CJ