In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 13

SHERMAN TAYLOR

Appellant

-v-

FIONA MILLER
(Police Sergeant)

Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction in Magistrates' Court-driving whilst impaired- refusal to give sample of breath-proof of impairment-relevance of medical condition to proof of deliberate refusal to supply sample of breath-whether convictions unsafe because of incompetence of trial counsel

Date of hearing: March 29, 2017
Date of Judgment: April 4, 2017

Mr. Arion Mapp, Christopher's, for the Appellants
Ms. Kenlyn Swan, Office of the Director of Public Prosecutions, for the Respondents

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

Introductory

1. The Appellant was convicted on August 27, 2015 in the Magistrates' Court (Wor. Archibald Warner) of committing the following two offences in Pembroke Parish on January 31, 2015:

    (1) driving a motor vehicle whilst his ability to drive that vehicle was impaired by alcohol contrary to section 35AA of the Road Traffic Act 1947;

    (2) without reasonable excuse failed or refused to comply with a demand by a police officer that he supply a sample of breath for analysis contrary to section 35C(7) of the Road Traffic Act 1947.

2. He appeals on a variety of grounds which can conveniently be divided into two categories. Firstly, it is complained that the convictions are unsafe because of the incompetence of Defence counsel at trial. Secondly it is complained that the convictions are unsafe because of misdirections by the Learned Magistrate.

The proceedings in the Magistrates' Court

3. The Prosecution case on Count 1 was based on the evidence of Police Constable Ward. He testified that himself and driver PC Paynter were on duty in a Police jeep on Pitts Bay Road when they saw the Appellant's vehicle accelerating westward on Pitts Bay Road from the Bermudiana Road traffic lights, driving at speed along the wet and winding roadway. The officers, whose vehicle was behind the Appellant's at the traffic light, activated the emergency lights and horn but the Appellant did not immediately stop.

4. He eventually stopped his vehicle at the junction of Pitts Bay Road and Fairylands Road, however before the Officers could get out their vehicle, the Appellant drove off, turning into Fairylands Road. The Officers resumed the chase, with lights and siren activated, and the Appellant stopped a second time and the Police vehicle stopped behind it again. The Appellant drove off a third time and stopped. He started off yet again but eventually responded to the shouting of PC Ward. The Officer approached the Appellant who was still at the wheel of his car and noticed that his eyes were glazed and that his breath smelt of alcohol. The Appellant admitted drinking beers and was unsteady on his feet when he was asked to walk in a straight line. He was arrested and taken to Hamilton Police Station.

5. At the Station, PC Peters observed by PC Ward requested the Appellant to undergo the Alco Analysis test, which the Appellant had agreed to take. PC Peters is recorded as stating:

> "*After several attempts, Defendant provided a sample of breath with the resulting reading from the machine indicating that the reading was 87 milligrams of alcohol in 100 milligrams of blood.*
>
> *Shortly after I attempted to take a second sample, the machine indicated that the Defendant was not blowing into it. I again explained to the Defendant what was required. I told Defendant that he needed to blow harder into the machine and pointed out to him the gauge on the machine that indicates the amount of breath going into the machine.*
>
> *Defendant continued to make blowing noises with his mouth however, the machine continued to indicate that Defendant was not blowing into it. I warned Defendant that it was an offence to fail to provide the adequate samples he ignored my instructions and failed to blow adequately into the machine.*
>
> *As a result the machine stopped and indicated that the sample provided was invalid…*"

6. PC Ward was cross-examined about his evidence as to the Appellant's speed and testified that he was trained to estimate speed. He also explained that he asked the Appellant at the scene certain questions designed to assess his suspected impairment. PC Ward also testified that he "*saw the Defendant and observed that Defendant was not blowing into the mouthpiece as air could be heard exiting the Defendant's mouth and not going into the machine*." This evidence was not (based on the Record) challenged in cross-examination, although PC Ward did state PC Peters was the authorized Police Analysis Technician. PC Peters was cross-examined about the test process he followed, but he never suggested that he could observe that the Appellant was deliberately not blowing into the device.

7. Police Sergeant Kellman was called as the Custody Officer who booked in the Appellant at Hamilton Police to confirm that the Appellant made no complaint of any medical impediments to providing a breath sample. However, under cross-examination he confirmed that the Appellant did report having a heart ailment and taking medication for glaucoma and pain. He rejected suggestions that the Appellant did <u>not</u> admit to having consumed two beers.

8. The Appellant himself gave evidence and stated that he stopped his car at the safest possible place to allow the Police to overtake him. He attributed what the Police saw as 'glazed eyes' to the effects of his eye drops. He explained his apparent

unsteadiness on his feet as being attributable to a knee injury (to which the pain medication related). He testified that he had told the Custody Officer that he sometimes suffered from shortness of breath. Under cross-examination the Appellant denied admitting to drinking beers and also denied driving off after initially stopping. He insisted that he made genuine attempts to supply a specimen of breath. The Appellant's counsel Mr Caines placed before the Court a letter from Dr. Kathryn Suter which stated that the Appellant "*has had symptoms of…shortness of breath during periods of extreme stress*". The doctor was not called as a witness, apparently because the Learned Magistrate expressed what could only have been the provisional view that her evidence did not appear to be of assistance to the Appellant[2].

9. The Learned Magistrate was satisfied of the Appellant's guilt on Count 1 (driving whilst impaired) by the following pieces of evidence upon which the Prosecution relied:

    (1) the manner of driving, including the fact that he had to be stopped three times;

    (2) the Appellant's glazed eyes;

    (3) the smell of alcohol on the Appellant's breath;

    (4) the admission of having been drinking;

    (5) the unsteadiness on his feet.

10. At first blush these findings were unassailable and there was overwhelming evidence of the Appellant's guilt.

11. The Learned Magistrate was satisfied of the Appellant's guilt on Count 2 based on the following findings which he reached "*having considered all the evidence* [with] *regard to the method of blowing conducted during the test*":

    (1) Sergeant Kellman's determination that the Appellant was fit to supply a sample;

    (2) "*the Defendant without reasonable excuse refused to comply with the demand made by Constable Ward that he give a sample of breath for analysis*".

12. At first blush these findings appeared to be deficient because:

[2] Mr Caines' sworn evidence to this effect was not challenged.

(a) no express finding was made in relation to the evidence of the blowing on which topic one Prosecution witness suggested he observed a deliberate failure to breath into the device and the other did not;

(b) the wrong officer was described as having requested the test; and

(c) no reasons were given for rejecting the possibility that the Appellant's medical condition was a reasonable excuse in circumstances where the Court was aware that the Appellant had potentially supportive medical evidence but did not invite him to adduce to it.

Merits of appeal: the incompetence of Defence counsel at trial

13. Mr Mapp elected not challenge through cross-examination the Affidavit sworn by Mr Caines in response to the Appellant's complaints about his conduct of the trial.

14. Mr Vaughan Caines admitted that he failed to put to the arresting officers that the Appellant did not tell them that he had consumed alcohol earlier that day but refuted all other criticisms. I am unable to find that any other errors have been established. Mr Caines also admitted that he failed to call the Appellant's doctor to confirm his medical condition. However, he explained that this was because:

(a) the Learned Magistrate indicated that the doctor's evidence would "*only advance that Mr Taylor suffered from certain medical difficulties, and the likelihood of when they would manifest*"; and

(b) "*after canvassing the issue with Mr Taylor, it was decided that Dr Suter was not going to be called as the pertinent and relevant parts of her opinion were detailed in the letter*."

15. The legal test is whether the Appellant can establish defects in his representation at trial which are so serious as to render his trial unfair: *Hypolite-v-R* [2007] Bda LR 85 at paragraph 30 (Court of Appeal for Bermuda). The relevant test was stated more fully in subsequent decision cited in my own judgment in *Caesar Graham-v-The Queen* [2014] SC (Bda) 76 App (26 September 2014) upon which Mr Mapp also relied:

"*14. The statutory jurisdiction of the Court mirrors the rules governing the circumstances in which an appellant can challenge a conviction based on errors allegedly committed by his own counsel. Ms. Mulligan slightly overstated the degree of incompetence on the part of trial counsel required to impugn the safety of a conviction on appeal, as Mr. Rogers correctly pointed*

out. The modern approach is to focus on the impact of the failures complained of on the fairness of the trial. As Ward JA stated, giving the judgment of the Court of Appeal for Bermuda in Fox-v-R [2008] Bda LR 69 (at paragraph 58):

> *'We also considered* R v Day *[2003] EWCA Crim 1060 at paragraph 15 where it was held that 'while incompetent representation is always to be deplored; is an understandable source of justified complaint by litigants and their families; and may expose the lawyers concerned to professional sanctions; it cannot in itself form a ground of appeal or a reason why a conviction should be found to be unsafe. We accept that, following the decision of this court in* Thakrar *[2001] EWCA Crim. 1096, the test is indeed the single test of safety, and that the court no longer has to concern itself with intermediate questions such as whether the advocacy has been flagrantly incompetent. But in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe.'*
>
> *15. These principles are important to keep at the forefront of one's mind because it is invariably possible to find some fault with the way any trial is conducted and the criminal appeal process is not designed to protect an ideal of perfect justice but, rather, to uphold substantial justice, not overlooking the twin requirements of justice being both done and seen to be done.*"

16. The complaint about Defence counsel's conduct at trial which has been established here (in relation to Count 1 alone) falls far short of the level of seriousness necessary to render the conviction unsafe. The case against the Appellant was overwhelming. The Appellant's disputed admission that he had been drinking, which was not challenged in cross-examination, was on its face the least significant of the five factors the Learned Magistrate relied upon. The manner of driving, smell of alcohol on his breath, glazed eyes and unsteadiness on his feet were more than enough to support a conviction and made any admission of drinking academic.

Merits of appeal: a miscarriage of justice occurred

Count 1

17. I find that no misdirections let alone misdirections resulting in a miscarriage of justice occurred in relation to Count 1. Ms. Swan effectively neutralised all complaints made about the findings reached, in particular the complaint that there was insufficient evidence of driving in a manner which evidenced impairment.

Count 2

18. At the end of the appeal hearing I permitted Mr Mapp to withdraw his initial abandonment of the ground of appeal complaining that insufficient findings and reasons for the decision were recorded. The main issue raised by the Appellant in his defence was that he had a medical condition which in stressful circumstances possibly impaired his ability to blow into the device. Mr Caines' sworn account of how the Learned Magistrate dealt with the letter was not challenged by the Prosecution. In my judgment he was obliged to either accept that the Appellant had a medical condition which potentially provided him with a lawful excuse for not providing the sample on the strength of the doctor's letter or to invite Defence counsel to call the doctor. He seemingly did neither.

19. In fairness, the Learned Magistrate may have been distracted by the undue emphasis seemingly placed at trial on the issue of whether or not the Appellant had verbally reported difficulties with breathing at the time, an issue which was largely beside the point. The main question was whether he had genuinely had difficulty or not irrespective of whether he verbalized his problems at the time. The Appellant's conduct as described by at least one of the two officers who observed the test was quite obviously consistent with someone having difficulty in providing the specimen he agreed to provide.

20. The Learned Magistrate accordingly failed to make the important finding that the Appellant did have a medical condition which might have impaired his ability to provide a sample. In these circumstances his failure to explain why he was satisfied, despite this potential corroboration of a significant part of the Appellant's evidence on Count 2, that the Appellant's failure to supply a sample was deliberate renders the conviction on Count 2 unsafe. It is impossible for this Court to be confident that the Magistrates' Court properly assessed the evidence having regard to the burden of proof and the fact that the Appellant merely had to raise a reasonable doubt as to whether he had deliberately refused to supply the specimen of breath. As Mr Mapp most significantly pointed out, the officer who was qualified to administer the breath test apparently said nothing to suggest that it was obvious as a matter of observation that the Appellant was deliberately 'fluffing' the test.

21. The appeal against conviction on Count 2 succeeds.

Conclusion

22. The appeal against conviction on Count 1 (driving whilst impaired) is dismissed. The conviction on Count 2 (failing or refusing to comply with a request to supply a sample of breath) is set aside and the appeal succeeds to this extent.

Dated this 4th day of April, 2017 _____
IAN RC KAWALEY CJ