IN THE SUPREME COURT OF BERMUDA

APPELLATE JURISDICTION 2018: NO. 19

BETWEEN:

GEORGE JAMES

Appellant

v.

FIONA MILLER (POLICE SERGEANT)

Respondent

DATE OF HEARING: 29TH AUGUST 2018

DATE OF JUDGMENT: 29TH AUGUST 2018

Appeal Against Conviction – Refusal to provide breath sample – Appellant's own determination that his consumption of rum subsequent to the accident was a reasonable excuse to refuse to give a breath sample – Reasonable Excuse under Section 35 C(7) of the Road Traffic Act 1947 – Magistrate to give detailed analysis

Mr. Michael Scott of Brown & Scott for the Appellant

Ms Jaleesa Simons, Office of the Director of Pubic Prosecutions for the Respondent

The following cases were referred to in the Judgment:

R v Lennard [1973] 2 All ER 831

Dean Grant v R and Derek Lambe v Fiona Miller [2012] Bda LR 17

Outerbridge v Grant [1997] Appellate Jurisdiction No. 14 and Plant v Simmons [1986] No. 1 (Appellate Jurisdiction)

EX TEMPORE JUDGMENT OF ELKINSON J (ASSISTANT JUSTICE)

Introduction

1. The Appellant was convicted on the 4th April 2018 in the Magistrates' Court (Wor. Khamisi Tokunbo) of committing an offence, contrary to Section 35 C(7) of the Road Traffic Act 1947:-

   "(7) Any person who, without reasonable excuse, fails or refuses to comply with a demand to him by a police officer under this section commits an offence."

2. The Appeal is put forward on three grounds but primarily on the ground that the Magistrate had erred in law in not accepting that the excuse put forward by the Appellant that his innocent consumption of over-proof white Jamaican rum contained in a colon cleansing procedure prior to a demand for a breath sample by the police was not a reasonable excuse. The Appellant, as a ground of appeal, relies on the Magistrate's statement in his Judgment that this may have been a reasonable excuse had the Appellant offered the breath sample and failed the test; that it is inconsistent or illogical to say that it could not be a reasonable excuse for the Defendant to refuse to provide the breath sample. A further ground of appeal is premised on the failure of the Prosecution to prove that the Appellant was driving his motor vehicle whilst impaired by alcohol or a drug (contrary to Section 35 AA of the Road Traffic Act 1947) and the acquittal on that charge was inconsistent with the Magistrate finding the Appellant guilty on the refusal to provide a breath sample.

The Evidence in the Magistrates' Court

3. Three police officers gave evidence of what occurred on the 4th March 2017. Around 4.30 a.m. two officers on uniform duty in a marked vehicle were directed by a member of the public to a silver motor car near the junction with Scotts Hill Road in Sandys which was blocking the roadway. It had damage to the front nearside bumper and front nearside wheel, the wheel being pushed back from its collision with a Bermuda stone wall along the roadside. They contacted the owner of the vehicle who informed them who the driver was and the driver subsequently

returned to the vehicle. This was the Appellant. He explained to the officers that the car had pulled to the left as he was driving and that was the cause of the collision. He was asked if he had been drinking and he said that he had four Heineken beers. The officers had the car towed to his home and there they informed him that they had reasonable and probable cause to believe he was in control of the vehicle while under the influence of alcohol. He was cautioned and made no reply and when the officers then demanded samples of breath for analysis, he replied *"No, I'm not doing that."*

4. At the police station, when the Sergeant demanded samples of breath from the Appellant he initially indicated he would do it but subsequently, after enquiring about his rights to refuse to take the test, he expressed concern. He told them that several days prior he had commenced a method of colon cleaning which required him to consume Jamaican white rum and garlic. He was informed that it was an offence not to take the test but he refused to do so. On cross-examination, the officers did not note any smell of garlic but noted a smell of alcohol. In his own evidence, Appellant accepted that he had had a few beers earlier in the evening and had been at a party. He took friends home in his car and then proceeded to Somerset where he resides. He lost control of the car as he came around the corner on Sound View Road heading to East Shore Road informing the court that *"I may have reached for something."* The car was unable to move and Appellant says it was he who called the police, waited 30 minutes and then went home and proceeded to take the colon cleansing mix comprising half a cup of over-proof Jamaican white rum, 12 cloves of garlic and a teaspoon of honey. He then, having taken this, got the call from the police to return to the car which he did. In his direct evidence to the court, he said *"I was conflicted about the test because knowing the content of the Jamaican rum, an over-proof rum, I would have failed that test."*

Merits of Appeal:

5. Mr. Scott on behalf of the Appellant sought in his written submissions to advance the Appellant's refusal to take the breath test on the basis of having a reasonable excuse because he had taken alcohol subsequent to the collision. This submission had been made to the Magistrate below. It is hard to discern the merit in such a submission where effectively the Appellant himself determined that he had a reasonable excuse for not taking the breath test. The reasonable excuse amounts to nothing more than the Appellant's opinion that he would fail the breath test because of the alcoholic content of his colon cleanse mixture. It is an extraordinary notion that a refusal to take a breath test on the basis that you will fail it could be a reasonable excuse. The Magistrate below quite properly noted that if the Appellant had taken the breath test and had failed it, it may have been open to the Appellant to argue that he had consumed alcohol subsequent to the collision of his vehicle with the wall. Ms. Simons for the Respondent in her clear, concise and compelling written submissions, supported by her oral argument made clear that on the Crown's view the Appeal had no merit and that the conviction ought to be supported. She referred the court to the definition of "reasonable excuse" in the case of **R v Lennard [1973] 2 All ER 831** where Lord Justice Lawton stated *"… in our Judgment no excuse can be adjudged a reasonable one unless the person from whom the specimen is required is physically or mentally unable to provide it or the provision of the specimen would entail substantial risk to his health."*

6. Mr. Scott in oral submissions sought to distinguish **Lennard** on the basis that the language of the section dealing with failure to provide a sample was different to that enacted in Bermuda; that the Bermuda legislature added the word "refusal" in our Section 35 C(7). The consequence of this, he submitted, was that a right was created to refuse to give a sample. For this reason, the Magistrate should not have followed **Lennard** and he should have held that there was a reasonable excuse. Ms. Simons responded that the Bermuda statute creates the offence, be it refusal or failure, and not a right to refuse and I find that this must be correct.

7. Mr. Scott raised further argument that the Magistrate did not properly, as he should have done, go into the reasonableness of the excuse tendered and his judgment shows that he didn't. He cited **Outerbridge v Grant [1997] Appellate Jurisdiction No. 14** which in turn cites **Plant v Simmons [1986] : 1 (Appellate Jurisdiction)** and that the Magistrate had a duty to make a detailed analysis of the evidence and make specific findings of fact. In those cases, the facts were more complex than those presented here. The simple point before the Magistrate was whether there was a "reasonable excuse" for the Appellant to refuse to give a sample and he found, having considered Mr. Scott's submissions on "special reason", that there was not. I find that the Magistrate set out his reasoning sufficiently, even if succinctly.

8. Mr. Scott had relied below on the notion of "special reason" which words have a particular legal meaning. They were considered by Chief Justice Ground in the conjoined Appeals of **Dean Grant v R and Derek Lambe v Fiona Miller [2012] Bda LR 17** wherein at paragraph 8 of the Judgment, in citing **Whittal v Kirby [1946] 2 All ER 552**, the then Chief Justice, Lord Goddard, in turn citing the case of **R v Crossan [1939] 1 NI 106** at pages 112, 113 said:

> *"A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."*

9. "Special reason" is not applicable in this instance and the Magistrate was right to reject those submissions and proceed to convict the Appellant on a very clear refusal to give a breath sample. The Appellant's knowledge that he would fail the test could never be said to be a reasonable excuse not to take it.

Conclusion

10. The Appeal against conviction fails.

Dated this 29th day of August 2018

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JEFFREY P. ELKINSON

ASSISTANT JUSTICE