In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2009: No. 21

BETWEEN:

AARON EUGENE FOGGO

Appellant

-And-

ANGELA COX (POLICE CONSTABLE)

Respondent

Dates of Hearing: 6 August 2009

Date of Judgment: 2 September 2009

Mr. Kenville Savoury, SAVOURY AND ASSOCIATES for the Appellant
Ms. Cindy Clarke, DEPARTMENT OF PUBLIC PROSECUTIONS for the Respondent

JUDGMENT

1. The Appellant was charged with:-

   i. Driving a motor vehicle on Kindley Field Road, whilst his ability to drive the vehicle was impaired by alcohol or drug contrary to section 35 (1) of the Road Traffic Act 1947; and

   ii. Failing or refusing to comply with a demand made by a police officer that he gives a sample of breath for analysis under section 35 of the Road Traffic Act 1947

2. The Appellant plead not guilty to both charges and trial ensued by the Worship Magistrate Tyrone Chin. At the end of the Crown's case the Appellant made a no case submission. The Crown offered no evidence on Count 2 in response to the Appellant's no case submission.

3. At the end of the trial the Learned Magistrate Mr. Chin convicted the Appellant on count 1. He now appeals against that conviction.

4. The Appellant accepts that he was driving the motor vehicle at the relevant time. He accepts that D.C Hibbert observed him driving and requested that he pulled to the side of the road. D.C Hibbert testified that the Defendant's eyes were glazed and his breath smelt of intoxicant. He asked the Appellant if he had been drinking and he replied "I had a few". Additionally, in his testimony the Appellant conceded that on occasions he may have crossed the centre line.

5. The Learned Magistrate having seen and heard the witnesses accepted the evidence of Detective Constable Hibbert and found beyond reasonable doubt that the Appellant was driving the vehicle while his ability to operate it was impaired by alcohol or drugs.

6. The Appellant now appeals this conviction on the basis that there was insufficient evidence of impairment either by alcohol or drugs. He maintained that "without additional supporting evidence, the evidence of a police officer's observation giving him/her 'reasonable and probable grounds' to suspect the Appellant was driving whilst impaired is not sufficient to secure a safe conviction."

7. Mr. Savoury submitted the officer's observations are merely grounds for suspicion and it is not sufficient to secure a safe conviction of driving whilst impaired. Consequently the conviction is unsafe and should not be allowed he referred to the case of Carlos Santos v Angela Cox (Police Constable) Appellate Jurisdiction 2002

No.9 in which Ward CJ said that the Learned Acting Senior Magistrate fell into the error of converting a suspension into a fact without the evidential basis to support it. In the Santos case the Appellant was charged with driving a motor vehicle while his ability to drive that vehicle was impaired by alcohol or drugs. The Appellant admitted that he was at the steering wheel of the vehicle and in charge of the vehicle when he was struck from behind by another motor vehicle; he had 2 beers before the accident and that he did not have anything to eat that day. On that evidence the Learned Acting Senior Magistrate concluded that "Experience shows that drinking alcohol on an empty stomach is likely to impair ones manoeuvrability."

8. The Acting Magistrate went on to say that "the evidence shows that he had beers some time before the accident without having anything to eat for that day. That satisfies me that this must have left him impaired at the time of his driving." The Appellant objected to that conclusion based on those facts.

9. This case is distinguishable from the case at bar as Ward CJ said the Acting Magistrate converted suspicion into a fact without the evidential basis to support it. Evidence was required of the effect that beers on an empty stomach had on this particular Appellant. It is not a matter which comes within the sphere of everyday knowledge and experience of which judicial notice can be taken that two beers, taken in those circumstances would of necessity lead to inability to drive a vehicle because of impairment by alcohol.

10. In this case the Learned Magistrate had the evidence of the police officer's observation – glazed eyes, breath smelt of intoxicant, crossing over the centre line – and the Appellants evidence that he had 'a few'. Although the Crown offered no evidence on the charge of refusing to comply with the demand made by a police for him to give a sample of breath for analysis, there was evidence before the court that he refused the officer's request to take "one long blow" into the Alco Analyser

machine. Instead he blew intermittently into the machine which gave a reading of mouth alcohol.

11. After weighing up all the facts I have come to the conclusion that there was sufficient evidence before the Court which had the degree of certainty necessary to lead to a reasonable inference that the Appellant was driving whilst impaired. I cannot accept Mr. Savoury's submission that additional supporting evidence was needed to secure a safe conviction. Impairment can be proved in different ways and I can find no fault with the Magistrate's conclusion based on the evidence that it was beyond reasonable doubt that the Appellant was driving whilst impaired.

The appeal is therefore dismissed.

Dated the ____day of September 2009

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Norma M. Wade-Miller

Puisne Judge