The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 14 of 2017

B E T W E E N:

THE QUEEN

Appellant

-v-

LEON BURCHALL

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Larissa Burgess, Office of the Director for Public Prosecutions, for the Appellant
Cameron Hill, WestHill Legal Ltd, for the Respondent

Date of Judgment: **5 March 2018**

EX TEMPORE JUDGMENT

Failure by police to retain video – effect on fairness of trial – stay for abuse of process

BAKER P

Introduction

1. This is an appeal by the Prosecutor against the decision of the Chief Justice who allowed an appeal by the Respondent, Mr Burchall, against his conviction by the Worshipful Archibald Warner in the Magistrates' Court of three offences. These

were: (1) driving a motor vehicle while impaired, (2) failing to comply with a demand made by a Police Officer to supply a sample of breath for analysis, and (3) assaulting a Police Officer in the execution of their duty.

2. An appeal lies to this Court on the ground of law alone. Mr Burchall's appeal before the Chief Justice proceeded in the absence of the Prosecutor in circumstances that are described by the Chief Justice, and which it is unnecessary for me to recount in detail in this judgment beyond saying that they are said to have amounted to a procedural error on the part of the Prosecutor. Ms Burgess sought to put a somewhat different slant on the circumstances, but it is unnecessary to go into that in the course of this judgment.

3. This case has a lamentable history, and one which it is hoped will not be repeated. The alleged offences occurred as long ago as the 24th January 2014. Three days later on the 27th January 2014, Mr Burchall appeared in the Magistrates' Court and pleaded not guilty to all three offences, and to a fourth offence, of which he was later found not guilty, namely using offensive words to a reserve police officer. The trial was initially fixed for the 22nd May 2014. There were numerous adjournments for different reasons, and the Magistrate finally delivered his judgment on the 9th March 2016. As the Chief Justice remarked, and this is supposed to be a summary procedure.

4. The appeal was not heard by the Chief Justice until the 28th August, 2017, a further seventeen month delay. This Court has not explored the delay in any detail, and there were no doubt several reasons for it. Whilst there may be good reasons for specific adjournments on some occasions, it is important that the Court does not lose sight of the overall picture, and it behoves those who manage the work in the Magistrates' Court, and the Supreme Court and indeed in this Court to appreciate that the delay that occurred in this case, and delays of this kind are totally unacceptable and should not reoccur.

5. The appeal to this Court should have been heard at the November Session. It is not entirely clear why it was not, except that it is appears that it was felt necessary to obtain certain transcripts. A transcript of the full hearing before the Chief Justice, which was one of those produced, seems to me to have been in the circumstances entirely unnecessary, as this was, as I have mentioned, an appeal on a point of law alone.

6. The short point before us is whether the trial of Mr Burchall should have been stayed for abuse of process, and whether the Chief Justice was right to hold that it should have been, and accordingly direct the acquittal of Mr Burchall on all three charges.

7. The basis of the Chief Justice's finding was the police's destruction of a video recording of what occurred at the police station and their consequent inability to disclose it to the defence.

Facts of the Case

8. In summary, the facts of this case are as follows. At about 10:15pm on the evening of the 24th January 2014, a Friday evening, Police Constable Evelyn, an off duty police officer, was driving north along Parsons Lane in Devonshire Parish. Mr Burchall was driving a Nissan van in the opposite direction. He was on the wrong side of the road, and nearly collided with PC Evelyn's vehicle. PC Evelyn turned around and followed the Nissan, which was driving erratically. He followed it in to Middle Road and noticed it was swerving from side to side of the road. It continued to drive erratically, attempting overtaking manoeuvres. PC Evelyn followed the vehicle to Town Hill Road, where it stopped and reversed into a driveway. It appears this is where Mr Burchall lived. As he got out of the vehicle Mr Burchall stumbled and had to hold on to the wall for support. PC Evelyn had a passenger, Ms. Lawrence, who gave similar evidence to the Magistrates of the Nissan's driving.

9. The learned Magistrate accepted their evidence of erratic driving, and PC Evelyn's evidence that Mr Burchall's eyes were glazed, he was unsteady on his feet, and his breath smelt of alcohol. He also accepted Ms. Lawrence's evidence that when Mr. Burchall approached her and spoke to her, when she remained in the passenger seat at his house, his breath smelled of alcohol.

10. PC Evelyn had called up other officers. PC McGuiness PC Terceira, and RPC Sousa soon arrived. These officers too gave evidence that Mr Burchall appeared to have been drinking. Mr Burchall became aggressive and was arrested and taken to Hamilton Police Station. There was evidence, albeit denied by him, and upon which no specific finding was made by the Magistrate, that he urinated on himself in the custody suite.

11. At the police station Mr. Burchall initially agreed to provide a sample of breath. But after being taken to the Alco-Analyser room ("the AA room") he became agitated and aggressive, and it is there he is said to have assaulted WPC Gibbons, and in consequence was deemed to have refused to have supplied a sample of breath, having earlier apparently indicated that he would provide one.

12. The police had a video recording of what occurred in the AA room, but in accordance with ordinary practice, routinely destroyed it after three months. It had been destroyed by the time Mr Burchall's lawyer asked for disclosure of it. It is not suggested it was destroyed in order to disadvantage Mr Burchall's defence. It was destroyed simply as part of the routine practice of the police at the time. However, it has to be noted that Mr Burchall pleaded not guilty to these offences three days after the events took place, and well before the routine destruction occurred.

13. Mr. Burchall submits through Mr. Hill that he could not have a fair trial, because the AA room video would have supported his defence, that he did not assault the officer and did not, in consequence, refuse to supply a specimen of breath.

The Crown's Duty of Disclosure

14. Non-disclosure of video recordings is the subject of many reported cases in England and Wales, but not yet apparently in Bermuda. The leading authority is *Regina v Feltham Magistrate's Court, ex Parte Ebrahim [2001] EWHC Admin 130*.

15. In the course of a careful judgment, Brooke LJ reviewed a series of cases. Since 1997, there has, in England and Wales, been both a Code of Practice and Guidelines in force in relation to matters of disclosure including videos. Before 1997, the common law rules applied. In Bermuda, there are now statutory disclosure obligations under sections 4 and 6 of the Disclosure and Criminal Reform Act 2015. As the Chief Justice pointed out, these did not then strictly apply to the Magistrates' Court, but the Crown usually adopts the same approach in the Magistrates' Court as it does in the Supreme Court.

16. Brooke LJ described the common law position in England (pre 1997) as set out by Owen J in the unreported case of *Reed*. He said this at paragraph 12:

> *"(1) There's a clear duty to preserve material which may be relevant; (2) there must be a judgment of some kind by the investigating officer who must decide whether material may be relevant; (3) if he does not preserve material which may be relevant, he may, in future, be required to justify his decision; (4) if his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceeding."*

17. Brooke LJ continued at paragraph 16 to say this:

> *"When a complaint is made on an abuse application that relevant material is no longer available, the first stage of the Court's inquiry would be to determine whether prosecutors had been under any duty pursuant to the 1997 Code and new Guidelines to obtain and or retain the material of whose disappearance or destruction*

> *complaint is now made. If they were under no such duty then it cannot be said that they are abusing the process of the Court, merely because the material is no longer available. If on the other hand they were in breach of duty, then the Court will have to go on to consider whether it should take the exceptional course of staying the proceedings for abuse on that ground."*

18. His reference there to the duty of the 1997 Code and the new Guidelines should be read in the present case to refer to the common law duty, because no statutory duty or guidelines apply to Bermuda in the Magistrates' Court in the present case.

19. Brooke LJ went on to distinguish between cases in which the court concludes that the Defendant cannot receive a fair trial, and cases where it concludes it would be unfair for the Defendant to be tried. This case is in the former category; an unfair trial would be an abuse of the Court's process and a breach of Article 6 of the European Convention on Human Rights. Accordingly, we have to apply the first category considerations to this case.

20. It cannot be emphasised too often that staying for abuse of process is a remedy that must be sparingly exercised. In the present case, there was a duty on the police to preserve the video evidence. Video recording took place in the AA room for the very purpose of providing independent evidence of what had occurred in the event of a dispute. It was there, amongst other reasons, in order to protect the police. The Respondent pleaded not guilty three days after the offences are alleged to have occurred. The Recording should not have been routinely recorded over after three months. It should have been downloaded and retained and disclosed when sought, if not previously submitted as unused material.

21. The question therefore for this Court today, is whether its absence prevented the Respondent from having a fair trial. I say that the question is for this Court today; the initial question was in fact for the Chief Justice and there is a further

question as to whether if he was wrong, we should interfere with the exercise of his discretion.

22. The Chief Justice held that the nondisclosure of the video did prevent the Respondent from having a fair trial, in respect of all three offences. At paragraph 18 of his Judgment, he said:

> *"18. In his oral arguments, Mr Hill sensibly focussed the entire appeal on the one potentially meritorious complaint. Namely, that the Learned Magistrate ought to have stayed the proceedings because the failure by the Police to preserve the AA room video film deprived the Appellant of a fair trial on all counts because the film might have raised a doubt as to:*
>
> *(1) whether he was in fact visibly intoxicated, which was central to the issue of whether he had not simply been drinking, but had been drinking to such an extent as would impair his ability to drive (Count 1);*
> *(2) whether he by his conduct effectively refused to supply the sample of breath (Count 2); and*
>
> *(3) whether he did in fact assault PC Gibbons."*

23. I would interject at this point that it was the Respondent's defence not so much that he had been drinking and was not impaired, but that he had nothing to drink at all.

24. The Chief Justice concluded his judgment with these important paragraphs at paragraphs 25 and 26. He said:

> *"25. The prejudice to a fair trial is quite obvious and significant as regards Counts 2 and 3; less so and far more marginally as regards Count 1. Had the present legal complaint been argued as fully before the Learned Magistrate as it was argued by Mr Hill before this Court, it is difficult to see how the Magistrates' Court could have properly concluded that the proceedings ought not to be stayed, in part if not in whole. A significant aspect of the*

> *prejudice in this case flows from the absence of any independent evidence in a case in which the Prosecution case was almost entirely based on Police evidence (the sole civilian being socially connected to one of the Police witnesses).*
>
> *26. In my judgment the failure of the Crown to preserve and disclose the video evidence of what transpired in the AA room resulted in a substantial miscarriage of justice. Bearing in mind that the Respondent elected not to appear in opposition to the present appeal, I find that this procedural error constitutes grounds for allowing the appeal against the Appellant's conviction on all three charges…"*

25. I have reason, with respect, to part company from the Chief Justice in respect to part of what he says in these two paragraphs. I accept that there is prejudice to a fair trial, and I accept that it is obvious and significant in regard to counts 2 and 3. The learned Chief Justice said that he felt it was much more marginal with regard to count 1. In my judgment, he fell into error in paragraph 26 in apparently taking into account the fact that the Respondent[1] had, as he put it, "elected not to appear in opposition to the present appeal." He went on "I find that this procedural error constitutes grounds for allowing the appeal against the Appellant's conviction on all three charges."

26. In my judgment, that is something that was quite irrelevant to the exercise of discretion in respect of a point of law; whether the Respondent was prejudiced in respect of having a fair trial. In my judgment, the position on count 1 is entirely different from that on counts 2 and 3. There were no less than five witnesses who spoke of the Respondent's condition when they saw him. His behaviour, too, might be regarded as something that could be taken into account as indicating that he had taken drink. There is also the fact that this erratic driving over a substantial distance as described by PC Evelyn and his passenger,

[1] The Crown appeared as the Respondent in the Court below who now appear as the Appellant in this case.

was consistent with somebody who, through drink, was unable to keep proper safe control of their vehicle.

27. I do not agree with the Chief Justice insofar as he seems to imply that it is relevant that the prosecution case was based entirely on police evidence with the sole civilian being socially connected to one of the police witnesses. The Learned Magistrate heard the evidence and the Chief Justice did not; and in the course of that, the Learned Magistrate plainly concluded that the evidence was credible and he accepted it and concluded on the basis of that evidence which was in my judgment strong evidence, that the Respondent's ability to drive was impaired.

28. Mr Hill's submission to us is that not only was the Chief Justice correct on counts 2 and 3, he was also correct with regard to count 1. He puts his submission effectively in two different ways. He says on the one hand, if the video had been presented to the Court or to the Defence, it would, or at least might have supported his client's case that the Respondent showed perfect signs of sobriety, which were inconsistent with what had been previously described by the police officers and the passenger in PC Evelyn's car, and was also inconsistent with the erratic driving having been caused through drink.

29. I observe that the events in the AA room took place some time after the driving, and sometime after the Respondent had been seen and described as having difficulties standing up when he got out of his vehicle. For my part, it seems to me that anything that might have been shown on the video would have been unlikely in the extreme to have had any bearing with regard to count 1.

30. The second limb of Mr Hill's submission was that had the Respondent been allowed to take the test, which he was not because he assaulted the police officer, it would have shown that he was below the limit, and therefore not guilty of impaired driving. Mr Hill complains that the absence of the video is relevant to count 1 in this way. But let us suppose for a moment that the video was shown.

At best from the Respondent's point of view, it would have shown that he did not assault the police officer, and the presence of the video might have shown that he in consequence did not refuse a breath test, would not on any basis have resulted in his having taken the test. So, the prosecution would have been left in a position akin to that where the breathalyser equipment was unavailable or defective, and they would still in my judgment have had ample evidence in respect to count 1 on which the Respondent would have been convicted.

31. Accordingly, I do not accept the submission of Mr Hill in regard to count 1 and is does not seem to me that the absence of the video with regard to count 1 had any significant effect on the fairness of the trial of that count.

32. There was very strong evidence of impaired driving as the Magistrate so found. I would accordingly dismiss the appeal with regard to counts 2 and 3 but allow the prosecution's appeal with regard to count 1. There has not been any appeal against the sentence with regard to count 1, and accordingly the fine of $1,500 with 30 days in default, and disqualification from driving all vehicles for 18 months should be reinstated. I also note that the Learned Magistrate said that the fine should be payable within one month, and subject to any further submissions, I would be minded to make the same order today.

33. There is no order as to costs.

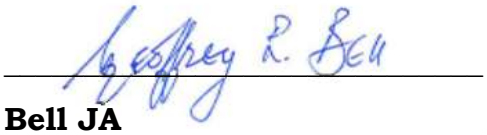
BELL JA

34. I agree with My Lord's judgment.

CLARKE JA

35. I also agree.

Baker P



Bell JA

Clarke JA