



In The Supreme Court of Bermuda

APPALLATE JURISDICTION

2021: No. 36

IN THE MATTER OF THE CRIMINAL APPEAL ACT 1952

BETWEEN:

SABUR BURROWS

Appellant

-and-

THE QUEEN

Respondent

DECISION

Appeal against conviction - Care and control of a vehicle while ability to drive was impaired (Section 35AA of the Road Traffic Act 1947)

Date of Hearing: - 21st June 2022

Date of Judgment: - 23rd June 2022

Counsel for the Appellant: - Mr. Paul Wilson, Westwater Hill & Co.

Counsel for the Respondent: - Mr. Alan Richards, The Attorney-General's Chambers

ELKINSON A.J.:-

THE UNDERLYING FACTS

1. Mr. Burrows was found at 3.30 a.m. on 26th June 2020 asleep in his car in an area of Harmony Close, South Road in Paget. The headlights were on and the right indicator was blinking. Mr. Burrows had his window open and he was asleep with his right elbow on the door frame, his window down. Two officers on patrol noticed the vehicle and approached Mr. Burrows and tried to wake him. It took several minutes to wake him and the uncontested evidence is that when he was asked his name he responded, "*Busy Burrows*" and when asked where he was, he responded "*Warwick Post Office.*" When asked his date of birth, he replied "*January/August.*" He was also asked if he had been drinking and he responded "*Yes, six to seven hours ago.*" The officer observed that Mr. Burrows' eyes were red, there was a smell of alcohol from his breathe and he was unsteady on his feet. They took the keys from the ignition. Mr. Burrows was arrested and cautioned at the parking lot of Harmony Close and when the officer demanded a sample of breath, Mr. Burrows declined. Mr. Burrows gave evidence at the trial in the Magistrates' Court that he had pulled over because he was facing extreme exhaustion having had an emergency call that evening in the course of his work as a Systems Engineer. He did not dispute that he had drunk alcohol earlier but he contested that he was impaired. He accepted that his words were a bit mumbled and that it was likely that he said he was at Warwick Post Office because he saw the row of post boxes at the Harmony Close condominiums. He said that he was extremely fatigued and that he was not coherent but he did not accept that he was impaired. He said that he had vomited at the police station because of some food he had eaten but not because he was drunk.

THE CHARGE

2. Mr. Burrows was charged under Section 35AA of the Road Traffic Act 1947 which states that:-

“Any person who drives, or attempts to drive, or has care or control of a vehicle on a road or other public place, whether it is in motion or not, and his ability to drive is impaired by alcohol, commits an offence.”

THE JUDGMENT APPEALED

3. The Magistrate recorded in his Judgment on 23rd September 2021 that having heard the evidence he was satisfied that the police officer was credible. He noted that the Defendant did not challenge any of the evidence of the officer notwithstanding that he had repeatedly told him that cross-examination was his opportunity to do that.
4. The Magistrate sets out the facts as outlined above and found that Mr. Burrows had care and control of the vehicle and that he was impaired by alcohol. He concluded his short ruling with *“In the circumstances, I am satisfied so that I feel sure that the case against the Defendant has been made out. I do not accept his assertion that he was simply tired. I therefore find the Defendant guilty as charged.”*
5. Mr. Burrows was fined \$1,500 and disqualified from all vehicles for eighteen months.

APPELLANT’S SUBMISSIONS

6. The principle argument being made on behalf of the Appellant was that the Magistrate had made an assumption that Mr. Burrows’ ability to drive was impaired because of alcohol. It was submitted that there was no direct evidence of Mr. Burrows’ ability to drive being impaired or any evidence of him being over the prescribed limit. The complaint was that the Magistrate imposed a guilty verdict based on circumstantial evidence and assumptions. Mr. Wilson made the submission that the Magistrate erred in not giving the benefit of the doubt in relation to Mr. Burrows’ ability to drive in circumstances where there was a reasonable explanation that it was due to exhaustion and not to alcohol. He says that it is evident that there were assumptions because the Magistrate’s Judgment gives no reasons why he concluded that the case against the Defendant had been made out. Mr. Wilson valiantly sought to make the point that the Crown had sought the Magistrate to convict on

assumptions about (a) the amount of alcohol consumed and that it was sufficient to impair the Appellant (b) that there was insufficient time for Appellant to regain sobriety or for his ability to drive to be no longer impaired (c) the effect that alcohol has on each individual (d) the physical exertion, or lack thereof, which may increase or inhibit the rate alcohol exits the body.

7. The Appellant's case was focused on these assumptions and the several unknowns which the court should have considered but didn't, in particular that it was unknown how long he had parked before the officers approached him and how well he had driven prior to being arrested and how much alcohol the Appellant had consumed. Complaint was made that the Magistrate had made no finding in relation to any of these unknowns and that this was because there had been no evidence presented to him about them.

DISPOSITION

8. The Appeal fails because whilst complaint was made by Mr. Wilson about the brevity of the Magistrate's Judgment, there was sufficient evidence before the Magistrate to allow him to make the appropriate determination, beyond a reasonable doubt, that the case against the Defendant had been made out. The words used by the Magistrate were "*I feel sure that the case against the Defendant has been made out. I do not accept his assertion that he was simply tired.*" The Magistrate rejected the Appellant's reasons for his unsteadiness on his feet, his mumbling and his confusion of where he was as resulting from exhaustion. The Magistrate had seen the Defendant in the course of evidence. He had accepted the Crown's evidence which Appellant didn't challenge in any event. The evidence was that he smelled of alcohol and was unsteady on his feet. There was the evidence of the officer's attempts to wake the Appellant up and how difficult that had been. In the case of **Mark Wilson, Appellant v Fiona Miller, Respondent [2018] SC (Bda) 34 App** this court heard a similar appeal in respect of a conviction under Section 35AA. The learned judge, Mrs. Justice Subair Williams, then sitting as Assistant Justice, noted that Section 35AA must be read with Section 35H which provides:

"Proceedings under Section 35, 35AA, 35A or 35B

35H

1. *The provisions of this section applies to any proceedings under section 35, 35AA, 35A or 35B*
2. *In any such proceedings, where it is proved that that accused occupied the seat ordinarily occupied by the driver of a vehicle, he shall be deemed to have had the care or control of the vehicle unless he establishes by a preponderance of evidence that he did not enter or mount the vehicle for the purpose of setting it in motion;*
3. *..."*

9. The case of **Miller v O'Mara [2014] (Bda) LR 25** was cited by the judge which in turn referenced a Canadian Supreme Court authority, **R v Toews [1985] 2 SCR 119 at page 126** where it was stated:-

"The cases cited, however, illustrate the point and lead to the conclusion that acts of care or control, short of driving, are acts which involve some use of the car and its fittings or equipment of some course of a conduct associated with the vehicle which would involve a risk of putting the vehicle in motion so that it could become dangerous. Each case would depend on its own facts and the circumstances in which acts of care or control may be found will vary widely."

On the evidence, the Appellant had care and control of the vehicle.

10. The defence was that his ability to drive may have been impaired by his tiredness, not alcohol. This court cannot accept for the purpose of this appeal that the Magistrate was wrong in rejecting the excuse of tiredness and in forming a view that Mr. Burrows was impaired by alcohol and further that this in turn would have impaired his ability to drive. The issue of impairment is certainly one of degree in that the driver of the vehicle could be slightly impaired or he could be greatly impaired by the consumption of alcohol. However, where facts present themselves, as they did in this case, with a driver who is in a very deep

sleep, noting that it took some minutes to wake Mr. Burrows up, headlights are on and indicator is on, it triggers the inquiry as it did with the police officers who attended at the scene whether the driver is in anyway impaired and who has the care or control of a vehicle. He was in the driving seat, the keys were in the ignition, and he was fast asleep. When he eventually woke up, he mumbled, was unaware of his location, his eyes were red and he smelled of alcohol. He refused a breath test, he had admitted consumption of alcohol, albeit he said it was some hours earlier. All this led to the Magistrate, having heard this evidence, to recite that he was satisfied that Mr. Burrows had care and control of the vehicle and was satisfied that he was impaired by alcohol. The degree of impairment is irrelevant. The requirements of Section 35AA of the Road Traffic Act 1947 were satisfied and the Magistrate found the Defendant guilty as charged. There was no need to see the Appellant drive.

11. The court sees no reason to disturb the Magistrate's finding and the sentence he imposed. The Appeal is dismissed.

DATED the 23rd day of June 2022.

JEFFREY ELKINSON, ASSISTANT JUSTICE