



In The Supreme Court of Bermuda

APPELLATE JURISDICTION 2020: 30

MICHAEL RICHARDSON

Appellant

-v-

FIONA MILLER

Respondent

REASONS FOR DECISION

(In Court)¹

Appeal against Conviction in the Magistrates' Court - Failure to comply with a Demand by a Police Officer for a sample of breath for analysis – S. 35C(7) of the Road Traffic Act 1947

Date of Hearing: 9 December 2021

Date of Decision: 9 December 2021

Date of Reasons: 21 January 2022

The Appellant in Person

Ms. Karen King-Deane, Office of the Director of Public Prosecutions, for the Respondent

JUDGMENT delivered by S. Subair Williams J

¹ These Reasons were handed down without a hearing as indicated at the end of the appeal hearing.

Introduction

1. The Appellant was charged and tried in the Magistrates' Court for the offences of driving whilst impaired contrary to section 35AA of the Road Traffic Act 1947 (RTA) on Count 1 and for failing to comply with the demand of a police officer for a sample of breath for analysis on Count 2, contrary to 35C(7) of the RTA. He was convicted by the learned Magistrate, Mr. Khamisi Tokunbo, on 13 November 2020 on Count 2 alone. Consequently, the Appellant was sentenced to a \$1500 fine in addition to a period of 18 months driving disqualification from all vehicles.
2. On 23 November 2020 the Appellant filed a Notice of Appeal in this Court on the following grounds of appeal:
 - 1 *That I did agree to take the breath test*
 - 2 *That I did not disagree to take the test*
 - 3 *That I blew into the device to the best of my ability following the officer's instruction*
 - 4 *That I have asthma as a result to giving short breaths*
3. At the hearing of the appeal, I dismissed the appeal and indicated that I would provide these written reasons.

Summary of the Evidence

4. The Crown called two witnesses at trial, namely PC 951 Steven Paynter and PC 540 David Ward. The Appellant gave evidence at trial as the sole witness in his defence.
5. In short summary, on 28 February 2020 at approximately 9:53pm, the police officers were conducting roadside sobriety tests on Crow Lane in Pembroke Parish when they stopped the Appellant who was riding on motor cycle BX 065. The Appellant was transporting a pillion passenger at that time.
6. Having caused the Appellant to stop his vehicle, each of the two officers gave evidence at trial that they noticed that the Appellant's eyes were glazed and that he smelled of alcohol. When PC Paynter asked the Appellant if had consumed any alcoholic beverages, the Appellant admitted that he had consumed a couple of beers.
7. The Appellant was thereafter required by the police to conduct a preliminary impairment test with the use of a handheld device (Drager Alcotest). After three attempts to secure a sample, the Appellant tested at 105 ml of alcohol in 100 millilitres of blood. This led to him being arrested and conveyed to Hamilton Police Station where

Sergeant Kinmola demanded further samples of his breath for analysis, to which he verbally agreed.

8. Upon being escorted to what was described as the ALCO room, the Appellant was given an explanation on the requisite procedure for testing. On PC Ward's evidence the Appellant was specifically warned not to blow into the device using a stop-and-start strategy. He was told that this would constitute a failure to provide a breath sample.
9. PC Ward performed a test-run on the machine and confirmed that it was working correctly. The officer said that he could see on the screen that the Appellant was employing the stop-and-start approach he was warned to avoid. Accordingly, PC Ward issued the Appellant another warning but the Appellant persisted and the machine registered the sample as insufficient. PC Ward therefore informed the Appellant that this would be treated as a refusal to comply with the demand for a breath sample. That was the Crown's evidence which was by and large unchallenged during cross-examination of the police witnesses.
10. The Appellant said nothing in his evidence he chief which materially conflicted with the evidence given by the police officers. When cross-examined, he again agreed that he consumed alcohol stating that he had 3 beers and 1 glass of rum. He said his passenger had also been drinking. The Appellant expressly agreed that his eyes were glazed and said that gave him all reason to head home. He added, in the words noted by the magistrate [17];

"They say I wasn't blowing properly. I don't know. I have done it before. Yes my decision was to drink and drive."

The Law

11. Section 35C(1)-(2) provides:

"Samples of breath where reasonable belief in commission of offence under section 35, 35AA or 35A

35C (1) Subject to subsection (2) where a police officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding twelve hours has committed an offence under section 35, 35AA or 35A, he may arrest him without a warrant, and by demand made to that person forthwith or as soon as practicable thereafter, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the police officer for the purpose of enabling such samples to be taken.

(2) Where a police officer on reasonable and probable ground believes that, by reason of any physical or mental condition, of a person referred to in subsection (1)—

- (a) that person may be incapable of providing a sample of his breath; or*
- (b) it would be impracticable to obtain a sample of that person's breath,*

the police officer, shall require the person to provide such samples of the person's blood, urine or other bodily substance, under the conditions referred to in subsection (6), as in the opinion of a qualified medical practitioner or qualified technician taking the samples are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in the person's blood and to accompany the police officer for the purpose of enabling such samples to be taken."

12. Under the Schedule 1 (Prosecution and Punishment of Offenders) of the Traffic Offences (Penalties) Act 1976 a person convicted under section 35C(7) of the RTA may be sentenced up to \$1,500 or 12 months imprisonment or both. An obligatory 18 month disqualification period also applies. Under Head 7 there is an additional mandatory provision which calls for the imposition of 8-10 demerit points for a first offender.
13. An "impaired driving traffic offence" is defined under the Interpretation section of the 1976 Act to include an offence of failure or refusal to comply with a demand by a police officer for a sample of breath, contrary to section 35C(7) of the RTA. Section 4(2A) makes it mandatory for any disqualification period ordered against a person convicted of an impaired driving traffic offence to be disqualified from all motor vehicles:

Disqualification; obligatory and discretionary

...
...

4 (2A) *Where a person is convicted of an impaired driving traffic offence and the court orders him to be disqualified, the court shall order him to be disqualified for driving all motor vehicles, including auxiliary bicycles and may, in addition to any other order under this section, order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.*

(3) A disqualification ordered by the court under this section may be in addition to, or in lieu of, any other punishment imposed by the court in respect of the offence.

14. However section 4B prohibits the Court from directing that any demerit points be recorded against an offender who has also been made the subject of an order for disqualification from driving under section 4.

No points to be recorded where person disqualified

4B ... where a person is convicted of a traffic offence and the court, under section 4, orders the person to be disqualified in respect of that offence, the court shall not direct any demerit points to be recorded in respect of that person as a result of that offence.”

Analysis and Decision

Appeal against Conviction

15. The Appellant invited this Court to accept his un-sworn assertions that his medical condition of asthma disabled him from providing sufficient samples of breath for analysis. However, he offered no reasonable explanation for having failed to raise the subject of his asthma at trial, during his cross-examination of the officers or during his own evidence on the stand. Instead he left the Crown’s evidence wholly unchallenged.
16. In my judgment, the magistrate was correct to accept the Crown’s evidence which mounted a very strong case against the Appellant. As I see it, the Crown independently discharged its burden of proving the offence under section 35C(7) beyond all reasonable doubt and the Appellant gave no reason for the learned magistrate to form any such reasonable doubt.
17. For these reasons, the appeal against conviction failed.

Appeal against Sentence

18. No error of law arises out of the Appellant’s post-trial sentence comprising a \$1500 fine and a disqualification period of 18 months in respect of all vehicles. Had he had the benefit of the mitigation offered by a guilty plea, he might have hoped for a lesser fine. However the disqualification period was mandatory under the law.
19. That being said, the order of demerit points together with the order of disqualification offends section 4B of the 1976 Act. It is thus curious that Head 7 contemplates the inclusion of demerit points since the disqualification periods are all mandatory. Notwithstanding, I am bound to allow the appeal against sentence only to the extent that the demerit points are unlawful under section 4B.
20. Under the Schedule 1 (Prosecution and Punishment of Offenders) of the Traffic Offences (Penalties) Act 1976 a person convicted under section 35C(7) of the RTA may be sentenced up to \$1,500 or 12 months imprisonment or both. An obligatory 18 month disqualification period also applies. Under Head 7 there is an additional mandatory provision which calls for the imposition of 8-10 demerit points for a first offender.

Conclusion

21. The appeal against conviction was accordingly dismissed and the conviction on Count 2 is upheld.
22. The appeal against sentence is allowed only to the extent that the demerit points entered were unlawful under section 4B of the 1976 Act. Otherwise, the sentence passed in respect of the fine and the disqualification period is affirmed.

Dated this 21st day of January 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE