In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2014: NO. 11

FIONA MILLER
(Police Sergeant)

Appellant

-v-

JECAL O'MARA

Respondent

EX TEMPORE JUDGMENT

(In Court)

Date of Hearing: March 19, 2014

Ms. Cindy Clarke, Deputy Director of Public Prosecutions (Litigation), for the Appellant
Mr Larry Mussenden, Mussenden Subair Ltd., for the Respondent

Introductory

1. The Appellant in this case is the informant, who appeals against the acquittal of the Respondent before the Magistrates Court (the Wor. Archibald Warner, Senior Magistrate) on the 11th of February 2014 in respect of offences under the Road Traffic Act, 1947. The two offences in relation to which the complaint is made are:

    (1) firstly, without reasonable excuse failing to comply with the demand made by police officer that the Respondent supply a sample of breath

for analysis contrary to section 35C7 of the Road Traffic Act 1947; and,

(2) secondly, it was alleged that the Respondent had care and control of a motor vehicle in a public place namely the parking lot of the Swizzle Inn when his ability to drive was impaired by alcohol or drug contrary to section 35 AA of the Road Traffic Act 1947.

2. The Appellant raised in her Notice of Appeal two grounds, which read as follows:

(1) *That the Learned Trial Magistrate erred in law in finding that there was no lawful demand for a sample of breath for analysis once he as a trial affect was not satisfied that he felt sure that the respondent was driving motor vehicle 26742 and therefore applied the wrong test for the offence under section 35C(7) of the Road Traffic Act 1947*; and

(2) That the Learned Trial Magistrate erred in law in finding that the Prosecution had to prove that the Respondent intended to put motor vehicle 26742 in motion to satisfy the elements of the offence under section 35AA of the Road Traffic Act 1947."

Preliminary objection: do grounds of appeal fall within or without section 4(a) of the Criminal Appeal Act 1952?

3. The appeal is made under Section 4 of the Criminal Appeal Act which provides a material part as follows;

"*A person who was the informant in respect of a charge of an offence heard before and determined by court of summary jurisdiction shall have the right of appeal to the Supreme Court in the manner provided by this act upon a ground which involves a question of alone:*

(a) where the information was dismissed then against any decision in law which led the court of summary jurisdiction to dismiss the information;…"

4. Mr. Mussenden for the Respondent raised a preliminary objection to the appeal. The objection was, in essence, that the Appellant's grounds did not amount to "questions of law alone" within the requirements of section 4 of the Criminal Appeal Act. It is therefore appropriate before considering the merits of the appeal, which I decided to hear before resolving the preliminary objection, to consider the merits of the preliminary objection itself.

5. The Respondent's counsel referred to a number of authorities the first of which was my own decision in *Lyndon Raynor (Police Constable)-v- Stuart Lacey* [2003] Bda LR 58. In this case, I considered a complaint about the dismissal in the Magistrates' Court of an offence on abuse of process grounds. I considered the scope of section 4 of the Criminal Appeal Act of 1952, and did so in light of the decision of the Judicial Committee of the Privy Council in *Smith-v-R* [2004] LRC 4. This case, relied upon in the *Lacey* case, was relied upon by Mr. Mussenden to support a proposition which I considered was too broad, namely that the only circumstances in which one can raise a point of law alone by way of appeal as an informant is where no evidence was considered at all.

6. The Respondent's counsel also referred the decision of Justice Bell in *Angela Cox (Police Constable)-v-Jahkeil Samuels* [2005] Bda LR 63. In this case Bell J concluded at page 2:

> "*In my view the decision of the learned Magistrate to dismiss the information on the basis of delay was a decision in law alone and accordingly I find the appellant as jurisdiction to appeal the learned Magistrates dismissal to this court under section 4A of the Criminal Appeal Act 1952*"

7. Again Mr. Mussenden sought to imply that a question of law could only be a "*question of law alone*" for the purpose of section 4(a) in circumstances where no evidence was considered at all. But, in my judgment, the *Samuels* case is merely another illustration of circumstances in which a misconceived preliminary objection was made. He also referred to the case of *Lyndon Raynor-v-Kyril Burrows [*2011] Bda LR 25, a decision of Chief Justice Ground. And, in this case, the Learned Judge considered the importance of the rule against double jeopardy and found (at paragraph 9) that in view of the terms of the Criminal Appeal Act, that appeal fell at the first hurdle because it did not involve a point of law alone:

> "*Whether or not the circumstances gave rise to an appearance of bias is in my judgment necessarily a question of mixed fact and law and so is not a point of law alone within the meaning of the section.*"

8. Mr. Mussenden also pointed out, in reliance upon the *Burrows* case, that section 4(a) of the Criminal Appeal Act has two elements to it. It is not just a statutory requirement that the ground of appeal <u>relate to</u> a point of law alone. But there is the additional requirement that it must be evident, to use the words of the statute, that it was a "*decision in law which led the court of summary jurisdiction to dismiss the information*". In paragraph 10 of the *Burrows* case, this causative link between the acquittal and the point of law in which complaint is made by an appellant was explained at follows:

> *"Were I wrong on that, the Act introduces a further safeguard: the wrong decision in law must have led to the acquittal i.e. there must be a direct causative link between the error and the acquittal. The Crown could never demonstrate that where they allege <u>apparent</u> bias only. An <u>appearance</u> of bias could never lead to an acquittal there can be no causative link. It might be different if they alleged actual bias and produced cogent evidence to demonstrate that there was real bias which in*

deed led to the acquittal, but, very wisely, they do not attempt to embark on such a course here."

9. In the present case it must be said that the question of whether or not any of the errors of law complained about (if substantiated) actually led to the acquittal is far less clear a question. It is in a sense a question that becomes blurred to some extent with the question of whether or not, assuming the errors of law complained of are in fact substantiated, the Court should exercise its discretion to make no further order rather than to allow the appeal. Because the evidence adduced below was not so clear that it seems justifiable to put the Respondent to the expense and prejudice of a retrial.

10. Because the question of this causative link in section 4 is solely and extricably caught up in the merits of the appeal, I will come back to this point at the end of this Judgment.

11. I should perhaps conclude very briefly with my finding on the first limb of the preliminary issue by saying this. In my view, when one looks at the grounds of appeal in a practical and substantive way rather than in a narrow and technical way, it is clear that they do raise questions "of law alone".

12. Ground 1 has two limbs to it. The substantive complaint is that the Learned Senior Magistrate applied the wrong test. That is clearly a question of law alone, and it is necessary and appropriate, in my view, to have regard to the background facts which are referred to in the first phrase of that paragraph (Ground 1).

13. The second ground, which complains that, in effect, the Learned Senior Magistrate misdirected himself in the way he constituted the elements of the offence, is clearly a question of law alone.

Merits of appeal: Ground 1

14. The first ground of appeal was a complaint that the Learned Senior Magistrate in effect applied the wrong test. So if we look at the first ground of appeal and the part of the Ruling of which complaint is made, it is set out on page 43 where the Learned Senior Magistrate said this:

> "*Regarding Count 2- if the Court is not satisfied so that it feels sure who was the driver of the vehicle then it is impossible for PC Lathan or any other officer to believe that the person- the Defendant was committing an offence under section 35 of the Road Traffic Act- therefore no lawful demand could have been made against the Defendant, Jecal O'Mara.*"

15. Ms. Clarke made the very clear and forceful submission that the Learned Senior Magistrate erred in law by eliding or confusing two distinct questions; one question being whether or not the police officers in question had reasonable grounds to believe that the Respondent had committed an offence which entitled them to request a breath sample. And the second question being a wholly distinct one: what view did the Court itself take of the evidence relied upon by the Prosecution in support of the charges before the Court?

16. It is perhaps understandable that these issues where somewhat confused, because the Learned Senior Magistrate found on the first count before him (which is not the subject of any appeal by the Prosecution) that he was not satisfied that the Respondent was in fact driving the car at the material time.

17. Now the first authority that Ms. Clarke relied upon in respect of the proper approach was, I believe, the *Pitcher* case. The *Pitcher* case was a decision of Chief Justice Ward (as he then was) in the case of *Duffy-v-Pitcher*, Appellate Jurisdiction 1994:12, Judgment of 9th August 1994[1]. And in that case Chief

[1] [1994] Bda LR 67.

Justice Ward analysed the question of reasonable grounds for belief and stated (at page 4 of his Judgment) as follows:

> "*The quality of the proof may have been insufficient to support a charge of stealing but sufficient to support a reasonable belief or as Tennyson rendered it:*
>
> *'believing where we cannot prove'."*

18. Ms. Clarke rightly relied on that passage as demonstrating that there is a distinction between those two questions, questions of whether there were reasonable grounds for believing that an offence had been committed and the question of whether or not a court would subsequently satisfied that an offence had been committed. A further passage which was cited to support the same proposition is set out at the bottom of page 5 of the judgment in the *Pitcher* case where L.A. Ward CJ said this:

> "*For in the words of Lord Wright at page 613H of McArdle v Egan supra:*
>
> > *'It it has to be remembered that police officers in determining whether or not to arrest are not finally to decide the guilt or innocence of the person arrested."*"

19. It may be helpful to remember that the relevant statue in this case is the Road Traffic Act 1947 and section 35C(1) provides as follows:

> "*(1)Subject to subsection 2 where a police officer on reasonable and probable grounds believes that a person is committing, or at any time in the preceding 12 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 as soon as practicable thereafter, require him to provide then or soon thereafter as it 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 purpose of enabling such samples to be taken."

20. And subsection 7 of that section says as follows:

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

21. Mr. Mussenden sought to defend the decision of the Learned Senior Magistrate on somewhat pragmatic grounds, but said nothing that I found persuasive in rebutting the conclusion that the Court below did in fact misdirect itself in law in the way it formulated the relevant test for considering whether or not a lawful demand was made for a breath sample.

22. What Mr. Mussenden did succeed in doing was raising serious doubts as to whether in fact the misdirection had any significant result in terms of impacting the decision. And he also succeeded in raising doubts as to whether or not the case on count 2 (or Ground 1 in this Court) was in fact such a clear one that any error of law should result in the matter being retried.

Merits of appeal: Ground 2

23. As far as ground 2 is concerned, this was a slightly more complicated complaint, although it was easier to decide that this was clearly a complaint about a question of law alone. The passage of the ruling of the Learned Senior Magistrate of which complaint is made is set out in page 44 of the Record, and reads as follows:

> "*This is I should add dealing with the care and control charge. The Prosecution must prove that the Defendant intended to put the vehicle in*

motion. Though there is admitted evidence of the Defendant that he was in the driver's seat of 26742 whilst in Swizzle Inn's parking lot-there is no evidence that he intended to put the vehicle in motion. Rather there is evidence from the defendant that he was securing the vehicle. There is evidence from Bailey whose evidence is that she left the Defendant to look after the car in the face of this contending evidence the inferential evidence of him being in the driver's seat to put the car in motion is displaced."

24. Ms. Clarke's central complaint was that the Learned Senior Magistrate has misstated the applicable law by implying that the law required the Prosecution to prove that the responded intended to put the vehicle in motion as an essential element of the offence.

25. It is clear from the Record that the relevant statutory provisions were in fact before the Learned Senior Magistrate and were, in fact, seemingly addressed by Ms. Clarke in the course of argument. The relevant section under which the Respondent was charged, seemingly added in the course of the trial and as a result of evidence given in his own defence, is section 35AA of the Road Traffic Act 1947, which reads as follows:

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

26. On a straightforward reading of that section without reference to authority it seemed obvious that Ms. Clarke was right that the elements of that offence do not include any requirement to prove that the Respondent intended to put the vehicle in motion. Mr. Mussenden, however, referred the Court to section 35H of the Road Traffic Act 1947, which he contended was not only engaged by the facts of the present case, but was in fact implicitly taken into account by the Magistrates'

Court in the relevant portion of its Judgment. This section reads, so far as is relevant, as follows:

> "*(1) The provisions of this section apply to any proceedings under section 35, 35AA, 35A or 35B.*
>
> *(2)In any such proceeding where it is proved that the accused occupied the seat ordinarily occupied by the driver of the 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.*"

27. On balance, I would find that the Learned Senior Magistrate did in fact have this section in mind, but this finding is not an end to the question. Because Ms. Clarke, in reply, made the following more refined submission. That is, that even if the Learned Senior Magistrate did have section 35H in mind it was necessary for him to go on to consider whether in fact the evidence of the Prosecution did in fact support the elements of the offence charged. Because, even if the presumption is displaced by the defendant the Court still has to consider whether or not the Prosecution's evidence, independently of the question of the occupation of the seat and the intending to put the car in motion, proves the elements of the offence.

28. The authority which was cited by the Appellant's counsel which shed light on this offence was the case of *The Queen-v-Toews* ,which was a Canadian Supreme Court case reported at [1985] 2 RCS 119. And that case was instructive because the relevant provisions of the Canadian statute are in fact the same as those in our own Road Traffic Act. In that case the facts were somewhat different in that the Respondent who was acquitted at trial was sounded asleep in a sleeping bag in a truck that was parked on private property. The Police found him in a state of alcoholic impairment or what they believed was alcoholic impairment and they did in fact take blood alcohol readings and found that he was over the limit. In

the course of upholding his acquittal the Supreme Court of Canada considered what sort of facts amounted to care and control and made it clear that it was not a general requirement of the offence of being in control of the vehicle that in fact the defendant must intend to put the car in motion.

29. Mr. Mussenden, however, pointed out that, in addition to supporting that point, the Supreme Court of Canada in *Toews* also considered examples of the sorts of acts that are required to amount to control of a vehicle. Most helpfully, McIntyre J said this (at page 126 of the Judgment):

> "*There are of course other authorities dealing with the question. 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 or its fittings or equipment of some course of conduct associated with the vehicle which would involve a risk if 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 maybe found will vary widely.*"

30. So even if the Learned Senior Magistrate had in fact applied the law in a way the Appellant contends for, it is far from clear that he would have reached a different result. Here, it appears to be common ground that the acts that the Respondent committed that were relied upon belatedly as acts of control were by his account getting into the car that his girlfriend had been driving, turning the ignition on to the power step so that he could close the windows, and then getting out of the car. So on any view the evidence before the Court, which from a Prosecution perspective seemingly amounted to little more than the Police seeing him getting out of the driver's side of the car, and having regard to the Respondent's evidence (and in fact the evidence of his witness, whom the Magistrate believed), was far from strong.

Conclusion

31. In conclusion, the position is that as far as Ground 1 is concerned, I accept that there was an error of law in that the Learned Senior Magistrate applied the wrong test.

32. As far as ground 2 is concerned I also accept that there was an error of law in that the Learned Senior Magistrate did not properly formulate the elements of the offence as they exist according to law.

33. The difficult question, it has to be said, is whether or not it can be said that these errors actually resulted in the acquittal. The question of the rationale behind the restrictive terms of section 4 was explained by Ground CJ in the *Burrows* case as being the rule against double jeopardy. And, as I stated earlier, he expressed the view that there must be a direct causative link between the error and the acquittal.

34. In all the circumstances of the present case, I am unable to find with any conviction that the errors of the law of which the Crown complain were in fact responsible for the acquittal. In the sense that, if the Learned Senior Magistrate had directed himself correctly, he would likely have reached a different result. And for these reasons, despite having found that there was considerable legal merit to the appeal, I would dismiss the appeal.

35. If I have applied the wrong test in considering the 'causative link' issue[2], I would in any event, if I had allowed the appeal on questions of law, have simply made no order. Because I would take into account the fact that:

    (a) these offences are at the bottom end of the criminal law scale in terms of seriousness;

[2] I.e., in construing section 4(a) of the Criminal Appeal Act 1952 with a view to deciding whether qualifying errors of law were made.

(b) the observations of Mr. Mussenden about the expense to which the Respondent has been put and the length of the proceedings below; and

(c) I also take into account the fact that we do not have a costs regime in relation to criminal appeals which mirrors the costs regime in civil cases. The Respondent has also had to bear the cost of defending the present appeal.

36. And so, in all the circumstances, it seems to me that it is a just result that the Appellant has succeeded in clarifying the law and that the Respondent is left with the benefit of the acquittal that he received in the Court below.

Dated 19th March 2014 _____

IAN R C KAWALEY

CHIEF JUSTICE