In The Supreme Court of Bermuda

APPELLATE JURISDICTION
CRIMINAL APPEAL 2014: NO. 9

JENNIFER STOVELL

Appellant

-v-

THE QUEEN

Respondent

EX TEMPORE JUDGMENT
(In Court)

Date of Hearing: April 9, 2014

The Appellant appeared in person

Ms. Karen King, Crown Counsel, for the Respondent

Introductory

1. In this case the Appellant appeared before the Learned Senior Magistrate, the Worshipful Archibald Warner on the 9th of July 2013 and pleaded guilty to an offence of no third party insurance, contrary to section 3 of the Motor Car Insurance (Third Party Risks) Act 1943. She was fined $500 with two demerit points.

2. She filed an appeal on July 19, 2013 and her Notice of Appeal set out one ground of appeal:

> "*I was insured at the time I was pulled over. Pull over date 7 June 13. Insurance expiry date 28 June 2013.*"

3. In support of her appeal, the Appellant has put before the Court what appears to be a true copy of a Colonial Insurance motor policy certificate covering a Honda motor cycle CBR 125, and covering that vehicle for the period 28 June 2012 to 28 June 2013[1].

Merits of appeal

4. In response to the appeal, the Crown's written submissions raised, quite appropriately, the objection that it was not open to appeal because she had pleaded guilty in the Magistrates' Court.

5. Accordingly, at the beginning of the appeal hearing I asked the Appellant, who appeared in person, as it seems she did below, to explain how it was that she came to plead guilty and thereafter raised what appears to be the most straightforward and complete of defences to the offence charged.

6. Her explanation was that her plea was a result of a combination of misinformation and intimidation. She accepts that when she was stopped by the Police her motor cycle was unlicensed. And when she was charged with both driving an unlicensed and uninsured vehicle, she assumed that she must be guilty because she was given a ticket. She appeared in Magistrates' Court without investigating the position and, without the benefit of legal advice, pleaded guilty. Shortly thereafter, she

[1] It was not disputed that the insured vehicle identified in the certificate had the same registration number as the vehicle to which the charge related.

decided to investigate and discovered that she was in fact insured at the material time[2].

7. Ms. King for the Respondent very properly conceded that she was not in a position to challenge the authenticity of the certificate of insurance. And, more importantly still, that there was nothing in the Prosecution file which indicated that the charge of driving without insurance was actually based on more than supposition that, because the vehicle was unlicensed, it must also have been uninsured.

8. In these circumstances, it is obvious that justice requires that this conviction should be set aside.

Test for admitting fresh evidence on appeal

9. Ms. King, in her written submissions, also queried the extent to which it was open to the Appellant to put before this Court fresh evidence. And reference was made to the English Court of Appeal (Criminal Division) case of *R-v-Beresford* (1972) 56 Cr. App. R. 143. The citation of English authority on the test for admitting fresh evidence was unsurprising, because in the Bermudian courts we frequently assume that the English test applies.

10. However, in preparing for this appeal, I did have regard to the provisions of the Criminal Appeal Act 1952. And those provisions signal quite clearly, that the test applicable to admitting fresh evidence on appeal under Bermuda law is a more generous and flexible one than under the English appellate legislation. Section 16(1) prescribes that the appeals from the Magistrates' Court in criminal matters

[2] Crown Counsel declined an invitation from the Court for the Appellant to give sworn evidence and be cross-examined on her explanation. Had she been legally represented, an affidavit would have been required.

shall be "*upon the record of the proceedings*"[3] or, "*where a case is stated by a court of summary jurisdiction… upon the case so stated*"[4].

11. But subsection (2) then goes on to confer certain additional powers on the Court to supplement that procedure. Section 16(2) says as follows:

> "(2) *If in connection with the hearing of any appeal, upon the application of the appellant, or (subject as hereinafter in this subsection provided) of the respondent or any person made an additional party to the appeal, it is made to appear to the Supreme Court that in the interest of justice it is reasonable to do so, the Court shall supplement the procedure mentioned in subsection (1) by any or all of the following means, that is to say,—*
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> …
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> (e) *by ordering or allowing the production and the examination at the hearing of the appeal of any document, exhibit, article or thing, whether or not it was in evidence in the proceedings before the court of summary jurisdiction…*"

12. That discretion, which is guided by the dominant requirement that the Court only admit supplementary material where it is in the "*interest of justice reasonable to do so*", is clearly different to that under section 23(2) of the United Kingdom Criminal Appeal Act 1968, which imposes under section 23(2)(b) the requirement that the Court be "*satisfied that it was not adduced in those proceedings but that there is a reasonable explanation for the failure to adduce it*"[5].

13. Obviously, this Court does not wish to encourage persons appearing in the Magistrates' Court to put forward one case below, and then, on appeal, produce material which they could quite easily have produced in the Court below. But in this exceptional case where the Appellant was not represented below, and where it

[3] Section 16(1)(a).
[4] Section 16(1)(b).
[5] This is wording is taken from the headnote of *R-v-Beresford* (1972) 56 Cr. App. R. 143.

seems clear that there was no factual foundation for the charge at all, in my judgment it is in "*the interest of justice*" within section 16(2)(e) of the Criminal Appeal Act 1952 for the Court to admit into evidence the certificate of insurance, and to have regard to it.

Disposition of appeal

14. And the effect that admitting that evidence has, in light of the concession rightly made by Ms. King, is that the plea of guilty must be set aside and the conviction and sentence quashed.

15. The appeal is accordingly allowed on that basis[6].

Dated 9th April 2014 _____

IAN R C KAWALEY CJ

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[6] In preparing for the present appeal, at which it seemed likely the Appellant might be unrepresented, I was greatly assisted by the following guiding principles with regard to the jurisdiction to vacate a guilty plea. In *Saik-v-R* [2004]EWCA Crim 2936 at paragraph 43, Scott Baker LJ approved the following observations of Mantell LJ in *Sheik*[2004] EWCA (Crim) 492 (at paragraph 16):

> "*It is well accepted that quite apart from cases where the plea of guilty is equivocal or ambiguous, the court retains a residual discretion to allow the withdrawal of a guilty plea where not to do so might work an injustice. Examples might be where a defendant has been misinformed about the nature of the charge or the availability of a defence or where he has been put under pressure to plead guilty in circumstances where he is not truly admitting guilt. It is not possible to attempt a comprehensive catalogue of the circumstances in which the discretion might be exercised. Commonly, however, it is reserved for cases where there is doubt that the plea represents a genuine acknowledgment of guilt. As was said by Lord Morris of Borth-y-Gest in the leading case of S(an infant) v The Recorder of Manchester (1971) AC 481 at 501:*
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> > *'Guilt might be proved by evidence. But also it may be confessed. The court will, however, have great concern if any doubt exists as to whether a confession was intended or as to whether it ought really ever to have been made.*"'

These principles appear to have informed the more compressed explanation of the discretion to vacate a guilty plea which is not equivocal, which was articulated by Mantell JA in the local case of *Daniels-v-R* [2006] Bda LR 78 at paragraph 14.