In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 26

JAHKEEL AUDLEY QUALLO

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal from Magistrates' Court-speeding-sufficiency of evidence- extent of Prosecution duty of disclosure in relation to the trial of summary offences -waiver of right to complain of non-disclosure disclosure as a ground for impeaching speeding conviction-Disclosure and Criminal Reform Act 2015 sections 3(1) and 4(1)

Date of hearing: May 18, 2017
Date of Judgment: May 26, 2017[2]

The Appellant appeared in person
Ms. Karen King, Office of the Director of Public Prosecutions, for the Respondent

[1] The present judgment was circulated to the parties without a hearing.
[2] The present appeal was argued together with the case of *Nakia Lynch-Wade-v-R*, Appellate Jurisdiction 2017: 17.

Introductory

1. On September 27, 2016, the Appellant pleaded not guilty to a charge of speeding at 59 kph on August 25, 2016. Following a trial in the Magistrates' Court (Wor. Khamisi Tokunbo) on November 22, 2016, he was found guilty and received a fine of $500 and 7 demerit points. He appealed against his conviction on the following grounds which were set out in his Notice of Appeal:

    (1) The Learned Magistrate erred in relying on the evidence of the Police Officer who measured the Appellant's speed despite the fact that he was not trained to use the device in question;

    (2) The Magistrates' Court (Wor. Archibald Warner) erred in refusing on October 28, 2016 to compel the Prosecution to produce the operating manual for the device used to measure the Appellant's speed;

    (3) The Learned Magistrate erred in finding that an admission of exceeding the speed limit was sufficient to support the conviction;

    (4) The Learned Magistrate failed to comply with section 83 of the Criminal Jurisdiction and Procedure Act 2015.

Ground 1

2. The Appellant cross-examined PC Roger Fox on his qualifications for using the speed measuring device in question and suggested (based on an article) that the device could be inaccurate in certain circumstances. The Officer admitted that he used a Pro Laser 4 device having been trained in 2006 on a Pro Laser 3 device. However, he also testified that the two devices operate in the same way and that the key consideration is whether he has a clear and unobstructed view of the target vehicle. He insisted his view of the Appellant's vehicle was unobstructed. Earlier, in his evidence-in-chief, PC Fox testified that he tested the device before using it and that he visually estimated the Appellant to have been travelling at 60 kph and that the speed detection device measured the speed as 59 kph.

3. I find that the Learned Magistrate was entitled to accept the evidence of PC Fox that he was sufficiently trained to use the Pro Laser 4 device (because it was similar to the Pro Laser 3), that the device accurately measured the Appellant's speed because it had been self-tested and because the Officer had an unobstructed view of the Appellant's vehicle. This evidence was not contradicted by any other evidence. This ground of appeal fails.

Ground 2

4. It was conceded in the course of the hearing that the disclosure application by the Appellant on October 28, 2016 which was refused by another Magistrate was not renewed at trial. The Appellant had essentially three options when the Wor. Warner refused his application for disclosure:

    (a) apply for judicial review of the refusal itself before trial (there being no right of appeal against interlocutory rulings in criminal cases);

    (b) renew the application at trial so that any adverse ruling could be challenged as part of the decision-making process which resulted in the conviction; or

    (c) abandon the disclosure issue, expressly or impliedly.

5. The essential purpose of an appeal against the decision of a single judge who is the trier of fact and law is to demonstrate some form of error of law or misdirection as to the facts during the trial process. In my judgment the Appellant in this case implicitly abandoned his right to complain of the pre-trial disclosure ruling because he did not raise the point again at trial. There was no agreement with the Prosecution that the pre-trial ruling could be raised on appeal even though the point was not pursued at trial. Although in exceptional cases pre-trial occurrences can be complained of within an appeal as demonstrating that a miscarriage of justice occurred, the facts of the present case do not fall into this category.

6. The Prosecution, I was told by Ms King, did in fact supply the only portions of the operating manual which the Prosecution was supplied with by the Police to the Appellant before trial. He considered there was additional relevant material. Sections 3(1) and 4(1) of the Disclosure and Criminal Reform Act 2015 imposes a duty on the Crown to disclose either its case or unused material "*in matters that are triable either way or triable on indictment only*", so no statutory disclosure obligation existed in any event in a speeding case. However, I accept from Crown Counsel that no further voluntary disclosure could have been given by the Prosecution.

7. The Appellant's case on the manual was essentially speculative. If the complete manual had been found, it might have revealed that the operating instructions for the device being operated were different to those for which the Police witness had been trained-despite the fact his positive evidence was that the two devices were not materially different. It is difficult to see how this argument, had it been advanced by way of submission at trial, could have carried much weight with the Learned Magistrate.

8. In these circumstances I am bound to find that this ground of appeal fails.

Ground 3

9. The complaint that the Learned Magistrate relied on the Appellant's admission of speeding at no more than 45 kph as a basis for convicting him of speeding at 59 kph is wholly unsupportable on a straightforward reading of the Judgment. This ground of appeal fails.

Ground 4

10. This ground of appeal may well have been formulated before the appeal record was obtained and the Appellant had an opportunity to peruse the Judgment which clearly:

    (a) identifies the points for determination;

    (b) records the Learned Magistrate's findings on the key issues and the reasons for them, namely:

        (i) he was satisfied that the Prosecution witnesses were truthful and had no motive to falsely implicate the Appellant;

        (ii) he was satisfied PC Fox was qualified to operate the device and that the device was accurate;

        (iii) the article put to PC Fox in cross-examination did not raise any doubts about the reliability of PC Fox's evidence;

        (iv) the evidence of the Appellant that he looked at his speedometer and that this read 45 kph did not raise any doubts about the accuracy of the device's reading as supported by the Prosecution's evidence;

        (v) the case of *White-v-The Commissioner of Police* [1993] Bda LR 31 (Sir James Astwood CJ) was correctly distinguished on the grounds that in that case the Court found that the sped detection device operator did not have an unobstructed view of the appellant's vehicle.

11. This ground of appeal was also without merit.

Conclusion

12. For the above reasons, the appeal is dismissed.

Dated this 26th day of May, 2017 _____

IAN RC KAWALEY CJ