In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 40

LEON BURCHALL

Appellant

-v-

FIONA MILLER
(Police Sergeant) Respondent

JUDGMENT

(in Court)[1]

Appeal against conviction-impaired driving-failing to supply breath sample-assault on Police during breath test procedure-abuse of process- failure to disclose video evidence recording breath test procedure-whether trial was fair

Date of hearing: August 28, 2017
Date of Judgment: September 6, 2017

Mr Cameron Hill, Westwater Hill & Co, for the Appellant
The Respondent did not appear

Introductory

1. On January 27, 2014, the Appellant was charged in the Magistrates' Court with committing the following offences on January 24, 2014: (1) driving a motor

[1] The present judgment was circulated without a hearing.

vehicle while impaired, (2) failing to comply with a demand made by a Police Officer to supply a sample of breath for analysis, (3) assaulting a Police Officer in the execution of her duty, (4) using offensive words to a Reserve Police Officer.

2. The trial dates do not appear clearly on the face of the record. However, the trial seemingly commenced in January 2015 before the Worshipful Warner with the Prosecution closing its case on June 30, 2015. On January 15, 2015 the Crown conceded that video evidence of the events which occurred at the Police Station when the Defendant was asked to supply a sample of breath no longer existed. The Defence, *inter alia*, made an application for a stay on abuse of process grounds because of the failure of the Police to disclose video evidence from the Alco-Analysis ("AA") room. The submissions which began on June 30, 2015 were not concluded until January 8, 2016 when the Court rejected the stay application without giving full reasons. The Defence opened its case with the Defendant giving his evidence-in-chief. The case was further adjourned for his cross-examination on January 11, 2016. His mother gave evidence in his defence on the same date. The matter was adjourned until January 20, 2016 for closing submissions. Judgment was reserved and delivered March 9, 2016, over two years after the Appellant was charged in Magistrates' Court and over a year after the commencement of a supposedly "summary" trial.

3. The Appellant was convicted on counts 1-3 and acquitted on Count 4[2]. He appeals against his conviction on the central ground that he was deprived of a fair trial by reason of the Police (a) failing to disclose the video evidence in their possession after the Appellant pleaded guilty, and (b) destroying the evidence (apparently in accordance with standard retention policies) after the Appellant had pleaded not guilty to the relevant charges. This evidence, it was contended, might have supported the Appellant's case that:

    (1) he was not visibly drunk;

    (2) he did not fail to comply with a demand for a sample of breath; and

    (3) he did not assault the Police Officer who relied upon the alleged assault as evidence of his refusal to comply with her request for a sample.

The Respondent's failure to appear

4. I decided to proceed to hear the appeal in the absence of the Respondent because, despite having made inappropriate unilateral attempts to delist the appeal hearing fixed by the Registrar without the Appellant's consent, the Respondent was

[2] He was sentenced as follows: (1) Count 1: $1500 fine and 18 months' disqualification from driving all vehicles; (2) no separate penalty; (3) $1500 fine.

shortly before the hearing notified that the appeal was in fact being heard and informed the Court that counsel would not be attending.

5. With a view to eliminating a history of delays in the disposition of appeals, the Registrar some months ago instituted a practice of fixing directions hearings so that when an appeal is fixed for effective hearing it is able to be substantively heard. In the present case the record shows that counsel for the Appellant and the Respondent appeared before the Registrar on August 10, 2017 and that the following directions were ordered:

    (1) The appeal was listed for hearing on August 28, 2017;
    (2) The Appellant's submissions were to be filed by August 21, 2017 and the Respondent's by August 24, 2017.

6. Commencing on August 18, 2017, in emails not copied to the Appellant's counsel[3], the Respondent's counsel requested a re-listing of the hearing on the grounds that the date fixed was not convenient. It is only fair to point out that Crown Counsel suggested in this correspondence that the reason for his delisting request was that he had not received actual notice of the hearing before the Registrar, and only attended (unprepared to fix a convenient date) because he happened to be at Court on an unrelated matter. I have no reason to doubt that there were valid reasons for the delisting request. These '*ex parte*' communications were nonetheless inappropriate for the following reasons:

    - once any matter has been fixed for hearing, especially by a formal order of the Court at a directions hearing, the fixture can only be delisted by consent or by an application to adjourn made at the hearing. This has been the practice of the Court for, in my experience, over 35 years;

    - although Mr Hill fairly disclosed that he was aware in general terms that the Respondent was seeking to delist the appeal hearing after it had been fixed by the Registrar, he denied receiving copies of the post-directions hearing correspondence between the Respondent and the Court which was not on its face copied to him. These communications (with comparatively new, non-legally qualified members of the Court's administrative staff) were in breach of the following provisions of a Practice Direction issued by Richard Ground CJ on March 10, 2011('*Communications between Counsel and the Court etc.*'), which provides as follows:

[3] In commenting on a draft of the present Judgment, Mr Hill clarified that he did actually see a copy of the initial August 18, 2017 email from Crown Counsel to the Court. That email, in fairness to Crown Counsel, explains that the Respondent did not have a copy of Mr Hill's email address at that juncture, another point which I did not appreciate when deciding to proceed with the appeal. These points of detail do not alter the indisputable and dispositive point that the Respondent failed to appear for a hearing which was fixed by an administrative Order of the Court following unsuccessful attempts to reschedule the hearing with the Appellant's consent.

"*4. Save as regards applications which are properly made on an ex parte basis without notice to any other party, no communications with the Court should take place without notice to all parties affected. In particular all correspondence should be copied to the other parties.*"

7. On August 24, 2017 the Listing Officer, clearly assuming that the Respondent was seeking a delisting on a consensual basis, asked the Respondent to "*submit an agreed date*" for a re-scheduled hearing. No agreed date was submitted because the Appellant's counsel had never agreed to delist the fixed appeal hearing. The Registrar's Order of August 10, 2017 stood; it could not be unilaterally varied by the DPP's Office through *ex parte* communications with the Court.

8. Mr Hill attended Court at the scheduled date for the hearing of his client's appeal. The DPP's Office was called and notified that the hearing was about to commence and informed the Court that counsel would not be attending.

9. The DPP's Office is well aware of the correct procedure for delisting appeals which have been fixed for hearing. The day after the hearing of the present appeal, coincidentally, I signed a Consent Order delisting another criminal appeal and making consequential directions in relation to skeleton arguments. The Consent Order was filed shortly after the hearing was due to be heard. Prior to the scheduled hearing date, counsel wrote to the Court confirming that the parties had agreed to delist the matter. That is the correct approach. The Court will not allow its processes to be manipulated by one party to an appeal unilaterally seeking to pressure the Court into rescheduling a fixed hearing which the other party wishes to proceed.

10. I accordingly decided to proceed to hear the appeal in the absence of counsel for the Respondent.

The case against the Appellant in the Magistrates' Court

11. The case against the Appellant in respect of each offence which he was convicted may be summarised as follows.

Impaired Driving

12. Two witnesses gave evidence for the Prosecution about observing the Appellant driving his van in an erratic, fast, careless and/or dangerous manner, off-duty PC Evelyn and his female passenger. They were nearly struck by the van on Middle Road, Devonshire, at around 10.15pm on the night in question. They followed the van to the Appellant's residence, with PC Evelyn summoning Police assistance en route. The Appellant approached PC Evelyn's passenger to enquire if PC Evelyn was indeed a Police Officer, and she testified that she smelt alcohol on his breath. She observed him being arrested "*with great difficulty*". PC Evelyn testified that he initially made a report about the "*manner of the driving of the vehicle*" which he followed to Town Hill, Flatts. PC Evelyn approached the Appellant and spoke

to him about the manner of his driving. He "*smelt an aroma of intoxicants*" on the Appellant's breath.

13. Other Officers arrived and arrested the Appellant. Reserve Officer McGuiness arrested the Appellant on suspicion of impaired driving having "*noted that his eyes were glazed, speech was slurred and his breath smelt like intoxicating liquor*". The Appellant resisted being handcuffed. Reserve Officer Terceira supported Officer McGuiness' account of the arrest and also stated that he smelt intoxicants and that the Appellant's eyes were glazed, his speech was slurred and that he was unsteady on his feet. This evidence was also supported by Reserve Officer Sousa, who described the Appellant's eyes as being "*red*". En route to Hamilton police Station the Appellant was verbally offensive to Officer McGuiness.

Failing to give a sample of breath/assault

14. The relevant evidence may be summarised as follows:

- the Appellant was aggressive in language and appearance during processing at Hamilton Police Station. There was CCTV footage of what occurred in the AA Room which was viewed(McGuiness);

- the Appellant initially agreed to provide a sample of breath, was taken into the AA room (Terceira/Sousa/Gibbons);

- inside the AA room PC Gibbons, who was preparing the test, warned the Appellant (who was initially seated but stood up and moved to within a foot of PC Gibbons and shouted that he should not be there) not to invade her personal space. Sounds of a struggle were later heard (Terceira);

- inside the AA room the Appellant "*got very aggressive*" when the place of his arrest was relayed to PC Gibbons and came into her personal space. PC Gibbons raised her right hand to push the Appellant away and he struck the officer on her right wrist (Sousa);

- While PC Gibbons was preparing to administer the test, the Appellant was pacing around and said he should not be there in an aggressive tone. She warned him "*not to approach me in that manner*". He became angry when PC Gibbons asked Reserve Officer Sousa where the arrest took place: "*Defendant then rushed towards me. I immediately went into a safety stance extending my right hand. Defendant then hit my right hand with his right hand knocking my right hand to the side*" (Gibbons).

The Appellant's case

15. The Appellant denied drinking on the evening in question but admitted overtaking two cars and a van near Whitney School on Middle Road approaching Flatts. He testified that he was checking his peppers in his garden outside his house when PC Evelyn drove up, got out of his car and approached him. He asked PC Evelyn if he could help him and Evelyn replied: "*Shut up man you are drunk*". PC Evelyn's irate passenger said that the Appellant had almost killed Evelyn, who was a Police Officer. When other officers arrived, the Appellant agreed to undergo a breath test at the Police Station but queried whether it was necessary to handcuff him. When one of his hands was handcuffed, the handcuff was cutting into the skin of his wrist. He tried to release the pressure with his free hand-"*that is when all hell broke loose*". He started using abusive language and his other hand was only cuffed after he had been forced to the ground. At the Police Station, the Appellant testified that he confirmed his agreement to take the test, was seated in the AA room an arms' length away from PC Gibbons but stood up and said "*stop lying*" when Reserve Officer Sousa reported that he resisted arrest. McGuiness and Terceira then rushed into the room and took him away. He never said anything to PC Gibbons in the room or hit her.

16. The Appellant's mother gave evidence which generally supported the Appellant's own account of his arrest.

Grounds of Appeal

17. There was no merit to the complaint that there was insufficient evidence to support the convictions on Counts 1 and 2. It was clearly open to the Learned Magistrate to find that the Appellant's ability to drive was impaired by drink and that he had by his conduct refused to supply the specimen, having initially agreed to do so. It could not even be suggested that there was insufficient evidence to support a conviction on Count 3. However, looked at broadly, the evidence of the Crown was stronger on Count 1, and less strong (because of inconsistencies in the Police accounts of precisely what happened in the AA room) on Counts 2 and 3.

18. In his oral arguments, Mr Hill sensibly focussed the entire appeal on the one potentially meritorious complaint. Namely, that the Learned Magistrate ought to have stayed the proceedings because the failure by the Police to preserve the AA room video film deprived the Appellant of a fair trial on all counts because the film might have raised a doubt as to:

    (1) whether he was in fact visibly intoxicated, which was central to the issue of whether he had not simply been drinking, but had been drinking to such an extent as would impair his ability to drive (Count 1);

    (2) whether he by his conduct effectively refused to supply the sample of breath (Count 2); and

    (3) whether he did in fact assault PC Gibbons.

19. The Appellant's counsel also made the important point that if, as appeared to be the case, the Police retention policy was to destroy video evidence of AA room procedures after three months, the purpose of recording such procedures (to protect the Police from false allegations by accused persons) would be undermined. Without directly advancing this submission, counsel subtly encouraged the Court to approach the present appeal taking into account the wider interests of justice beyond the narrow fair trial rights of this particular Appellant; an Appellant who did not at first blush appear to be deserving of much sympathy from this Court.

Governing legal principles

20. Although several authorities were placed before the Court which were of general relevance to the argument, emphasis was rightly placed on two cases in oral argument. The first case Mr Hill relied upon was *R-v-Birmingham* [1992] Crim. L.R. 117. The key facts and findings were as follows:

- the accused was charged with violent disorder at a night-club and assaults on police officers after they arrived;
- a night club camera filmed part of the disorder before the Police arrived (i.e. the film related to some but not all of the offences);
- Police viewed the film but never disclosed it (regarding it as not relevant) and it had been lost by the date of trial (the film was never seemingly ever under their control);
- the indictment was stayed on the grounds that a fair trial would not be possible and that continuing the proceedings would be a misuse of process.

21. The second case, *R. (Ebrahim)-v-Feltham Magistrates' Court* [2001] 2 Cr. App.R. 23, cited *R-v-Birmingham* with apparent approval. Two important passages were referred to in the course of argument:

(1) although the Divisional Court was considering a Code of Practice under the United Kingdom Police and Criminal Evidence Act, which I was not told has its counterpart in Bermuda, Brooke LJ opined as follows (at 431-432):

"*12. <u>These provisions of the code preserve and amplify common law rules which were prescribed by the judges before the code came into force</u>. We mention this fact because the investigations in some of the cases to which we were referred took place before 1st April 1997. In one of them, Reid (unreported 10th March 1997 CACD), Owen J said, in effect, that*

(i) *There is a clear duty to preserve material which may be relevant;*

(ii) *There must be a judgment of some kind by the investigating officer, who must decide whether material may be relevant;*

(iii) *If he does not preserve material which may be relevant, he may in future be required to justify his decision;*

(iv) *If his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceedings.*" [Emphasis added]

(2) There were two categories of abuse of process case, (i) where a fair trial was impossible, and (2) where it would be unfair for the defendant to be tried. The *Birmingham* case was summarised as follows (at 435-436):

> "*Violent disorder broke out at a night club. The judge was satisfied that a video camera was trained on an area of the club where an incident occurred prior to the arrival of the police and where part of the incident of violent disorder took place. Police officers viewed the video but its existence was not revealed to the defence in spite of their specific requests for unused material, and by the time of the trial the videotape had disappeared. The judge ordered a stay.*
>
> *This was a Category 1 case. It was not a case of the prosecution deliberately manipulating or misusing the process of the court, but the police had actually viewed the video and decided not to retain it because it did not assist their case, without performing their duty of considering whether it assisted the defendant's case. The court considered that the trial would not be fair. (Birmingham [1992] Crim LR 117)*" [Emphasis added]

22. The significance of the holding that these disclosure obligations exist at common law is that the present charges were all summary in nature and accordingly the statutory disclosure obligations under the Disclosure and Criminal Reform Act 2015 (sections 4, 6) do not strictly apply. I say strictly, because it is my understanding that in practice the same approach to disclosure is usually adopted by the Crown in all cases.

Application of principles to facts of the present case

23. In the present case, it was admitted by a Crown witness that:

- (expressly) the AA room video recorded the incidents which formed the basis of Counts 2 and 3;

- (impliedly) no assessment was carried out by the Police of whether or not the video might assist the Appellant's defence and therefore ought to be disclosed; and

- (impliedly) no steps were taken to preserve the video evidence for the purposes of any actual or potential disclosure.

24. It was conceded by the Crown that by the date of the trial the video evidence did not exist and could no longer be disclosed. The present case is, in a general sense, on all fours with *R-v-Birmingham* [1992] Crim. L.R. 117. In one respect the facts are more favourable to the Appellant. The video evidence which the Crown failed to disclose was recorded by the Police and under their control. It was recorded (it seems self-evident) with a view to assisting the Police and the courts by providing clear and compelling evidence as to what happens in the AA room when a breath sample is obtained in controversial circumstances. There is accordingly no readily identifiable excuse for not preserving the film, bearing in mind that the Appellant appeared in Court and pleaded not guilty a mere two days after the recording was made. Mr Hill was careful to make it clear that there is no suggestion whatsoever that the video evidence was deliberately destroyed with the proceedings against the Appellant in mind. Counsel's understanding was that there is a three months' retention period. In my judgment it also important to take into consideration the fact that the arresting officers were all Reserve Police Officers who (the record suggests) found the Appellant to be a 'handful', even on his version of events.

25. The prejudice to a fair trial is quite obvious and significant as regards Counts 2 and 3; less so and far more marginally as regards Count 1. Had the present legal complaint been argued as fully before the Learned Magistrate as it was argued by Mr Hill before this Court, it is difficult to see how the Magistrates' Court could have properly concluded that the proceedings ought not to be stayed, in part if not in whole. A significant aspect of the prejudice in this case flows from the absence of any independent evidence in a case in which the Prosecution case was almost entirely based on Police evidence (the sole civilian being socially connected to one of the Police witnesses).

26. In my judgment the failure of the Crown to preserve and disclose the video evidence of what transpired in the AA room resulted in a substantial miscarriage of justice. Bearing in mind that the Respondent elected not to appear in opposition to the present appeal, I find that this procedural error constitutes grounds for allowing the appeal against the Appellant's conviction on all three charges. The failure to disclose and/or preserve the video evidence, it is also important to record, did not involve the breach of any statutory or established policy rules, rules which it is hoped the Commissioner may hereafter see fit to promulgate.

Conclusion

27. The appeal is allowed and the Appellant's conviction on Counts 1-3 of the Information is quashed (as are, for the avoidance of doubt, the fines totalling $3000 and the disqualification from driving all vehicles for 18 months which were imposed on the basis of that conviction). Mr Hill foreshadowed making an application for costs at the end of the appeal hearing despite my intimation that costs do not routinely follow the event in the criminal appeal context[4]. I will hear counsel as to costs, if necessary, on a date to be fixed by the Registrar on notice to the Respondent.

Dated this 6th day of September, 2017 _____
IAN RC KAWALEY CJ

[4] An award of costs against the Crown in a criminal appeal will only be made in an "*exceptional case*": *Raynor-Saldana-v- R* [2014] SC (Bda) 58 App (Kawaley CJ at paragraph 27); a successful appellant has a "*high threshold*" to cross before a costs award will be made against the Crown: *R-v-Worrell (Costs)* [2016] Bda LR 103 (Sir Scott Baker P, at paragraph 16). The Appellant has achieved an extremely fortuitous outcome and nothing emerged during the hearing of the appeal which suggested that he would be entitled to an award of costs.