In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2017: 74

MARK WILSON

Appellant

-v-

FIONA MILLER

Respondent

REASONS FOR DECISION
(In Court)[1]

Appeal against Conviction
Care and Control of a Vehicle while ability to Drive was Impaired
(*Section 35AA of the Road Traffic Act 1947*)
Uttering Threatening Words (Section 12 of the Summary Offences Act 1926)

Date of Hearing: 22 March 2018
Date of Judgment: 22 March 2018
Date of Reasons: 10 April 2018

The Appellant in Person
Ms. Jaleesa Simons, Office of the Director of Public Prosecutions, for the Respondent

JUDGMENT delivered by S. Subair Williams A/J

[1] These Reasons were handed down without a hearing as indicated at the end of the appeal hearing. The decision to dismiss this appeal was made *ex tempore*.

Introduction

1. The Appellant was tried and convicted by the learned Magistrate, Mr. Khamisi Tokunbo, on 14 November 2017 in respect of offences which were committed on 30 April 2017. On Count 1 the Appellant was convicted for having care and control of a vehicle while his ability to drive was impaired by alcohol or a drug, contrary to section 35AA of the Road Traffic Act 1947 (RTA). On Count 2 he was convicted under section 35C(7) RTA for refusing, without reasonable excuse, to comply with a demand by a police officer for samples of his breath for analysis. The final charge upon which the Appellant was convicted was for behaving in a threatening manner towards a police officer by attempting to head-butt the officer while uttering threatening words, contrary to section 12 of the Summary Offences Act 1926.

2. The Appellant filed a Notice of Appeal in this Court on 14 November 2017 against all three convictions. The grounds of appeal relied on were pleaded as follows:
   (i) Officers had no evidence. Said they arrested me on the wrong road
   (ii) Lied under oath
   (iii) Both officers said this was not a driving case
   (iv) Change the charge to suit them

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 754 Wesley Watson and PC 2315 Darren Marcano. The Appellant did not give evidence at trial and he called no witness in his defence.

Count #1 (Care and Control while ability to drive was impaired)

5. Both Crown witnesses gave evidence that they were on patrol in company with one another in the Ducks Paddle area where they observed the Appellant sitting on a motor bike appearing to be asleep.

6. PC Watson stated that he heard Mr. Wilson snoring and that there was a strong scent of intoxicants coming from his breath. PC Marcano corroborated PC's Watson evidence that he smelled an alcoholic intoxicant on the Appellant's breath.

7. Both officers stated under oath that they saw keys in the ignition of the motor bike upon arrival and that they made prolonged attempts to wake the Appellant before he finally awoke. PC Wilson's evidence was that the Appellant's eyes were bloodshot and PC Marcano said that his speech was slurred. They both said that the Appellant admitted to having consumed alcohol when asked. On the evidence of both officers, the Appellant was unsteady on his feet and challenged to stand up.

8. This was the thrust of the evidence on Count 1. While the officers were cross-examined by Mr. Wilson himself, none of this evidence was effectively challenged under cross-examination.

Count #2 (Refusal to provide breath samples for analysis)

9. According to the evidence of the police witnesses, the Appellant responded, "*I have not done fucks. You are a pussy*" upon being cautioned by Officer Watson. When PC Watson demanded samples of the Appellant's breath for analysis, Mr. Wilson did not comply. Instead, he replied, "*I do not know why you are arresting me. I am an officer. I have not done fucks, as you pussies will find out*."

10. The Appellant was conveyed to Hamilton Police Station where, on PC Watson's evidence, he was further demanded to provide breath samples by another officer to whom he refused.

11. All of this evidence was also unchallenged by the Defence.

Count #3 (Threatening Words)

12. Both police witnesses stated in their evidence on the stand that the Appellant threatened to fight them when he was being transported to Hamilton Police Station. They stated that upon arrival Mr. Wilson at one point attempted to head-butt PC Watson while shouting; "Fuckin pussies".

13. On the evidence of both PC Watson and PC Marcano the Appellant, having been restrained, further shouted, "*When I come out I will see and deal with you. Do you know who I am. I am an officer*."

14. Again, this evidence was unchallenged.

The Law

Having Care and Control of a Vehicle whilst Ability to Drive is Impaired

15. The Appellant was seemingly unaware of the law as it relates to the offence of a person having care and control of a vehicle whilst his ability to drive is impaired.

16. Section 35AA of the Road Traffic Act 1947 (RTA) provides 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*."

17. Section 35AA must be read with section 35H to which it relates:

"***Proceedings under sections 35, 35AA, 35A or 35B***

35H (1) The provisions of this section apply to any proceedings under section 35, 35AA, 35A or 35B,

(2) In any such proceedings, where it is proved that the accused occupied the seat ordinarily occupied by the driver of a 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.

(3) ..."

18. Section 35AA was previously considered by this Court in *Miller v O'Mara [2014] Bda LR 25*. The learned Hon. Chief Justice, Ian R.C. Kawaley, observed that the relevant provisions of the RTA are the same as those in Canada. Kawaley CJ considered the judgment of the Canadian Supreme Court in *The Queen v Toews [1985] 2 RCS 119* and summarized it at paragraph 28 as follows:

"*In that case the facts were somewhat different in that the Respondent who was acquitted at trial was sounded (sic) 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*."

19. In providing examples of the sorts of acts that are required to amount to control of a vehicle, McIntyre J continued in his judgment at page 126:

"*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 and its fittings or equipment of some course of conduct associated with the vehicle which would involve a risk if (sic) (of) 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*."

20. In *Miller v O'Mara* the learned Magistrate acquitted Mr. O'Mara, having found that the Crown had to prove that he intended to put the vehicle in motion as an essential element of the offence. On appeal, Kawaley CJ found that the learned Magistrate erred in applying this test and approved the test stated in *The Queen v Toews*.

The Court's Power to Amend

21. Section 489 of the Criminal Code provides:

> "*Amendment of indictment*
> *(1) An indictment may not be amended after it is presented, except by the prosecutor with the-*
> *(a) leave of the court; or*
> *(b) consent of the accused person*
> *(2) Nothing in this section shall effect the powers of the court under section 489A.*
> (3) *For the purposes of this section, an amendment of an indictment includes the substitution of an indictment*."

22. Section 489 equally applies to an Information of the Magistrates' Court, pursuant to section 491.

Analysis and Decision

Decision to Amend

23. The Magistrate was well within his statutory powers to allow the Crown to amend the Information in respect of Count #1.

24. I see no reason to criticize the Magistrate for having granted leave to amend prior to the start of the trial. Indeed the powers to amend may be properly exercised even at the mid-trial stage.

Assessment of the Evidence

25. I found that the evidence from the police officers on the Appellant's impairment to drive was compelling and substantially unchallenged. The question for this Court was whether the evidence properly established that the acts of the Appellant involved a risk of putting his vehicle in motion. The evidence was that the Appellant was alone sleeping on his motorbike on a public driveway with the keys in the ignition.

26. In my judgment, these were all acts of care or control, short of riding the bike. The Appellant's usage of the motorbike was sound evidence of a risk of putting it into motion which of course would have been dangerous.

27. For these reasons I found that the conviction on Count 1 was safe and the challenge to the evidence on this Count failed.

28. Count 2 was not seriously argued during the appeal. The evidence supporting the charge of refusal to provide breath samples upon the demand of a police officer was clear and I saw no reason to interfere with the learned Magistrate's finding.

29. Equally, I find that the evidence of threating behaviour on Count 3 was undisputed and compelling.

30. Overall, the Crown's evidence was strong on each of the three counts and it supported the convictions entered by the learned Magistrate.

Conclusion

31. The appeal was accordingly dismissed and the convictions on all three counts affirmed.

32. I extended the time within which the Accused had to pay the fines ordered by the learned Magistrate (totalling $3,500) from the original deadline of 31 December 2017 to Friday 29 June 2018.

Dated this 10th day of April, 2018 _____

SHADE SUBAIR WILLIAMS
ACTING PUISNE JUDGE