

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 CRIMINAL SIDE  
3

4 SCA No: 0019/2018

5 IN THE MATTER OF  
6

7 REGINA  
8

9 v.  
10

11 GARFIELD ST. GEORGE WONG  
12

13 AND IN THE MATTER OF  
14

15 GARFIELD ST. GEORGE WONG  
16

17 v.  
18

19 REGINA  
20

21 **Appearances:**

22 Mr. Dennis Brady of Brady Attorneys for the  
23 Respondent/Cross Appellant

24 Mr. Scott Wainwright of the ODPP for the  
25 Appellant/Cross Respondent  
26

27 **Before:**

28 Justice Marlene I. Carter (Actg.)  
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30 **Summary Court Appeal Hearing:**

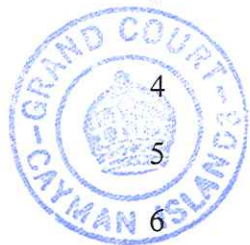
31 4<sup>th</sup> March 2020 & 1<sup>st</sup> April 2020  
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36 **HEADNOTE**

37 *Criminal Law – s.32 of the Court of Appeal Law – Appeal against conviction –*  
38 *Magistrate’s inferences from the evidence.*  
39

40 **JUDGMENT**  
41





1 8. There was significant damage to the vehicle. The front right wheel was almost  
2 detached from the axle. There is photographic evidence, with which the court was  
3 provided, of the significant damage caused to both vehicles.

4 9. Mr. Wong was arrested on suspicion of DUI and leaving the scene of an accident. A  
5 specimen of breath was requested from him at the roadside however, he was unable to  
6 provide such a sample. The reason for this inability is not clear.

7 10. He was taken to the Bodden Town police station where he provided a specimen of  
8 breath by means of the Intoxilyzer 5000EN machine. The reading was .184. The legal  
9 limit is .100.

10 11. At trial Mr. Wong claimed that he was not aware that he had been involved in a  
11 collision. He stated that his cell phone fell into the foot well of his vehicle. He bent  
12 down to retrieve it taking his eyes from the road, and, as he did so, he felt a “thud”, but  
13 assumed he must have hit a pothole.

14 12. His case was that he could not therefore be guilty of leaving the scene of an accident as  
15 he was not aware that he had been involved in an accident.

#### 16 **THE CROWN’S APPEAL**

17 13. The Crown appeals the Magistrate’s decision to acquit the cross-appellant on the  
18 charge of driving while under the influence of alcohol by way of case stated.

#### 19 **Appeal by way of case stated**

20 14. Section 85 of the *Traffic Law* (2011 Revision) addresses the Provision of Specimens  
21 for Analysis and s.85(7) states as follows:

1           “(7) *A certificate signed by the constable operating the alcohol-in-breath*  
2           *measuring device as to the result of the breath test and*  
3           *countersigned by the constable in whose presence it was made shall*  
4           *be received in evidence in a court and be evidence of the proportion*  
5           *of alcohol in the breath.”*

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7           15.     The Learned Magistrate’s reasons for her decision relating to this charge are found at  
8           paragraph 27 and 28 of her ruling as follows:

9           “27.     *The fact that PC Grant who performed this test was unable to confirm*  
10           *unequivocally that the arresting officer PC McLaughlin was present in the*  
11           *Intoxilyzer room throughout the breath test procedure, and because the*  
12           *prosecution failed to adduce direct evidence that the certificate exhibit 6A*  
13           *was countersigned by Officer McLaughlin in the presence of PC Grant*  
14           *there is a doubt that this certificate conformed to the requirements of s. 82*  
15           *(7)<sup>1</sup> of the Traffic Law. In this case it appears that there may not have been*  
16           *strict compliance with the provisions of s. 82 (7) of the Traffic Law so that*  
17           *the certificate produced by the machine should not have been admitted*  
18           *into evidence.*

19           28.     *The court rules that the certificate was not properly admissible into*  
20           *evidence. Had the admissibility of this certificate been raised as*  
21           *preliminary issue, this case could have been shortened considerably. In the*  
22           *absence of evidence as to the proportion to alcohol in the breath of the*  
23           *defendant, the defendant is found not guilty and acquitted of the charge of*  
24           *driving under the influence of alcohol.”*

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26           16.     The Crown submitted that the Magistrate erred in finding that because she was unsure  
27           of the presence of two persons in the room at the time of the breath test administered to  
28           the defendant, the certificate tendered by the Crown as evidence of the proportion of  
29           alcohol in the defendant’s breath was inadmissible and, it being the only evidence to  
30           support the charge, that the defendant was entitled to an acquittal.

31           17.     The Crown argued that the acquittal was a wrongful exercise of the Court’s discretion.  
32           The Crown’s submission was that once the “*certificate [was] signed by the constable*

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<sup>1</sup> It was accepted that the Magistrate misquoted the number of the relevant section in her judgment and that she was referring to s. 85(7) of the Traffic Law (2011 Revision)

1           operating the alcohol-in-breath measuring device as to the result of the breath test and  
2           countersigned by the constable in whose presence it was made” the Magistrate was  
3           compelled, by the wording of that section, to receive the certificate as “evidence of the  
4           proportion of alcohol in the breath.” – quoting that the certificate “shall be received in  
5           evidence in a court.” The Crown argued that the Magistrate should not therefore have  
6           found as she did that the certificate was inadmissible.

7           18.     This Crown submitted that on the facts of the instant case there was nothing in the  
8           evidence which rendered the certificate inadmissible.

9           19.     Counsel made reference to s.85(6) of the Law which states:

10                     “(6)    The constable operating an alcohol-in-breath measuring device shall do  
11                                so in the presence of another constable.”

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13           20.     Counsel for the Crown submitted that the provisions of s.85(6) does not set a  
14           condition precedent to the admissibility of the certificate pursuant to s.85(7) -  
15           emphasizing that s.85(6) does not state that non-compliance with its requirements  
16           automatically rendered a certificate inadmissible.

17           21.     The Crown drew the Court’s attention to a number of authorities to support this  
18           argument, such as *Mercer v Director of Public Prosecutions*<sup>2</sup>; *Howard v Hallett*<sup>3</sup>;  
19           *Regina v Fox*<sup>4</sup>; *Director of Public Prosecutions v. Kay*<sup>5</sup>; *Chief Constable of Avon*  
20           *and Somerset Constabulary v, Creech*<sup>6</sup> and *Morgan v. Lee*<sup>7</sup>.

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<sup>2</sup> [2003] EWHC 225 (Admin)

<sup>3</sup> [1984] R.T.R. 353

<sup>4</sup> [1985] R.T.R. 337

<sup>5</sup> [1999] R.T. R 10

<sup>6</sup> [1986] R.T.R. 87

<sup>7</sup> [1985] R.T.R. 409



1 22. These authorities highlight the Court’s approach in the United Kingdom to issues  
2 surrounding the admissibility of similar certificates. Although the statutory provisions  
3 considered are not equivalent to those in the Cayman Islands, the Crown argued that  
4 this court should adopt a similar approach in this case, emphasizing that an irregularity  
5 with the procedure does not automatically render the certificate inadmissible or the  
6 reading unreliable.

7 23. Counsel on behalf of Mr. Wong argued in response to the Crown’s submissions that  
8 this court should not interfere with the Magistrate’s findings and also referred the court  
9 to s.85(6) of the *Traffic Law*.(see paragraph 19 above).

10 24. Counsel on behalf of Mr. Wong submitted in response that the requirements of s.85(6)  
11 were mandatory. The Magistrate had to be certain of the “the process to get the  
12 certificate to court”. Counsel went further to submit that this was not a matter of the  
13 Magistrate’s discretion and once she was not certain that both officers were present at  
14 the time that the breath test was administered, as reflected in paragraph 28 of her  
15 judgment, she had no option but to resolve that doubt in Mr. Wong’s favour.

16 25. Counsel for the Respondent drew the Court’s attention to the inconsistencies in the  
17 Crown’s evidence on this point noted by the Learned Magistrate and also to the  
18 evidence concerning Officer McLaughlin’s movement from the time of the incident up  
19 to the time that the breath test was administered by Officer Grant, as pointing to  
20 matters upon which the Magistrate may have found reasonable doubt in relation to the  
21 Crown’s case, thereby lending support to her conclusion that the Crown had not proved  
22 its case to the requisite standard.



1 COURT'S CONCLUSIONS ON THE CROWN'S APPEAL

2 26. In order to be considered by a court, evidence must be relevant and admissible. The  
3 certificate tendered by the prosecution in this case to prove Mr. Wong's elevated  
4 alcohol-in-breath level was in fact both relevant and admissible.

5 27. Upon a court's consideration of the evidence, once it has been determined that it is  
6 both relevant and admissible, a court must go on to consider the weight that is to be  
7 given to that evidence. The weight is the reliance that can properly be placed on it by  
8 the Court. In this case it appears that the Learned Magistrate fell into error when she  
9 conflated the two aspects of admissibility and weight. The Respondent's<sup>8</sup> challenge on  
10 this appeal is to the procedure followed in the taking of the breath test, not to reading  
11 or the certificate itself.

12 28. Applying the provisions of s.85(7), the Magistrate was obliged to admit the certificate  
13 into evidence. The certificate was both relevant and admissible and *prima facie*  
14 complied with the requirements of the Section. The certificate was "*signed by the*  
15 *constable operating the alcohol-in-breath measuring device as to the result of the*  
16 *breath test and countersigned by the constable in whose presence it was made.*"

17 29. Clearly the Magistrate considered, as reflected in her Reasons at paragraph 28, that  
18 there was evidence before the Court which may have influenced the weight that she  
19 would attach to that evidence in all the circumstances, and, in this regard, s.40 of the  
20 *Evidence Law* (2019 Revision) states:

21 ***"Discretion of court to disallow evidence in criminal proceedings***  
22 *40. Nothing in this Law derogates from the power of a court in any criminal*  
23 *proceeding to disallow evidence otherwise admissible which, in the opinion of*  
24 *such court, would, if allowed, operate unfairly against an accused person."*

<sup>8</sup> In this first Appeal the Respondent is Mr. Wong



1 30. However, as I have stated above: Weight does not equate to admissibility. The  
2 Magistrate erred when she found that the certificate was not admissible into evidence  
3 pursuant to s. 85(7). The Magistrate did not consider admissible evidence in this case.

4 31. For these reasons the Crown's appeal is allowed. The matter is therefore remitted to  
5 the Summary Court for re-trial on the charge of Driving Under the Influence of  
6 alcohol.

7 **MR. WONG'S CROSS-APPEAL ON THE CHARGE OF LEAVING THE SCENE**

8 32. Mr. Wong appealed against his conviction for the offences of careless driving and  
9 leaving the scene of an accident. At the hearing before this court the appeal against the  
10 conviction for careless driving was withdrawn.

11 33. Mr. Wong, appealed by way of motion. Such an appeal is not a re-hearing. In  
12 *Bertolino v Regina*<sup>9</sup>, Harre, J. set out the approach a court should take on appeals  
13 turning on questions of fact and inference as follows:

14 *"Before reviewing the grounds of appeal against the record of the trial I will*  
15 *now indicate the principles which I shall follow in relation to that record. They*  
16 *were expressed in the House of Lords in the speech of Lord Thankerton in* *Watt (or*  
17 *Thomas) v. Thomas (10) (1947) 1 All E.R. at 587) as follows:*

18 I. *Where a question of fact has been tried by a judge without a jury*  
19 *and there is no question of misdirection of himself by the judge, an*  
20 *appellate court which is disposed to come to a different conclusion*  
21 *on the printed evidence should not do so unless it is satisfied that*  
22 *any advantage enjoyed by the trial judge by reason of having seen*  
23 *and heard the witnesses could not be sufficient to explain or justify*  
24 *the trial judge's conclusion.*

25 II. *The appellate court may take the view that, without having seen or*  
26 *heard the witnesses, it is not in a position to come to any*  
27 *satisfactory conclusion on the printed evidence.*



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<sup>9</sup> 1990-91 CILR 112 (Grand Court)



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III. *The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.*”

34. On this issue, there are essentially three aspects to the Appellant’s submission that the Learned Magistrate’s finding against the Appellant was unsafe as it was based upon speculation and not by evidence beyond a reasonable doubt.

35. The Appellant first argued: The Magistrate did not give sufficient weight to the submission made at trial that the Appellant’s vehicle had not sustained the extensive damage, apparent in the photographs submitted into evidence, at the time of the collision but rather that the damage was sustained when the defendant was returning to his home and that it was caused by a slight decline from the main road leading to his driveway. The submission was that the Magistrate had failed to consider that had the damage to the vehicle been sustained at the time of the accident there would have been evidence of marks and a distinctive gouge on the roadway left by the Appellant’s vehicle leading from the scene of the accident to his home. There being no evidence of such from the Crown’s witnesses, the Appellant submitted the Magistrate should not have come to the conclusion that she did.

i. Analysis:

(a) The Appellant, however, agreed that no expert evidence on this matter of the gouge was called by the Appellant before the Magistrate.

(b) A consideration of the record reveals that the Magistrate did fully consider the Appellant’s evidence as well as this submission made at trial. At paragraph 3 of her judgment the Learned Magistrate related the following

1 in relation to the defendant bending down to retrieve his phone from the  
2 floor:

3 "3. ....On reaching down, he heard a thud, felt a bump and  
4 believed he had hit a pot hole or run over a marker in the  
5 road.

6 4. He continued driving towards his home in Savannah and  
7 became aware of a vehicle behind him flashing lights. He  
8 was unwilling to stop because it was approximately 1 :00  
9 am in the morning.

10 5. The defendant's evidence was that the entrance toward the  
11 road on which he lives is between 12 - 15 feet and goes  
12 down to a dip. He said that as he entered the road where  
13 he lives, he heard a noise when his tyre gave way. Going  
14 down into the dip the axle gave way from the vehicle. As  
15 he turned into the driveway leading to his home, Anthony  
16 Ebanks, the driver of the vehicle which had been flashing  
17 him, pulled up behind him, exited his vehicle and asked  
18 the defendant, "Do you realize that you were involved in  
19 an accident?" To which the defendant responded, "No."



20  
21 (c) The Learned Magistrate makes clear in her judgment that she was satisfied  
22 that the extensive damage that was noted to the Appellant's vehicle and to  
23 that of the Complainant in the case was caused at the scene of the accident.  
24 The Magistrate rejected the Appellant's account.

25 36. The Appellant's second submission relates to the Magistrate's reliance on the evidence  
26 of Officer McLaughlin to support her conclusion that the Crown had proved its case to  
27 the required standard. The Appellant submitted that the Learned Magistrate had  
28 expressed doubt about some of McLaughlin's evidence at trial. It was therefore argued  
29 that the Magistrate's reliance on "his reported observations in relation to the condition  
30 at the time of the Appellant's vehicle, was an unsafe reliance to ground an opinion of  
31 the Court on a very crucial element of what by law is the standard to be proved and  
32 support a charge of leaving the scene."

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i. Analysis:



(a) The Learned Magistrate presiding at trial had ample opportunity to consider the evidence of the Crown witness, McLaughlin. Having done so, she was well able to determine the credibility and reliability of his evidence. It was open to her as the trier of fact to accept some of a witness's evidence and to reject other aspects of a witness's evidence. Therefore, although she expressed doubt about Officer McLaughlin's evidence on another aspect of this case, it was entirely open to her, as she did, to accept the Officer's evidence relating to this charge.

37. The Appellant's third submission is that on a charge of leaving the scene of an accident the court must be satisfied of the defendant's knowledge and he is correct in this submission.

i. Analysis:

(a) However, as the Appellant drew to this court's attention in paragraph 9 of his written submission to the following: "*In Selby v Chief Constable of Avon and Somerset 1988 RTR 216 the Justices found that the defendant was the driver of the vehicle involved and that there was a rebuttable presumption that he knew that he had been involved in the accident...*" On this point, it is the view of this Court that the Learned Magistrate, having the benefit of all the witnesses before her, including the defendant, has found, by her rejection of the defendant's evidence, that that presumption was not rebutted. Her finding that the defendant knew that he was involved in an accident was inferred from all the circumstances described by the Magistrate in her judgment.

1 (b) The Magistrate’s conclusions and findings are set out at paragraphs 29 -31  
2 of her judgment as follows:



3 “29. *The photographs tendered into evidence show*  
4 *considerable damage to both vehicles involved in this*  
5 *incident. It is clear that the force of impact must have been*  
6 *significant. The noise of this collision must have been such*  
7 *as to alert the defendant that he had been involved in a*  
8 *vehicle to vehicle collision and should have alerted him*  
9 *that he had been in an accident and not just run over a pot*  
10 *hole or a road marker. The final resting place of the other*  
11 *vehicle involved in this accident, the BMW also suggests*  
12 *the defendant should have been aware that he had been*  
13 *involved in an accident.*

14 30. *Officer McLaughlin testified that he saw sparks coming*  
15 *from the wheel of the defendant's vehicle. At the point of*  
16 *rest of the defendant's vehicle the rim was almost entirely*  
17 *separated from the front axle. After the collision the*  
18 *defendant was driving on a rim and should have been*  
19 *aware that he had been involved in a collision. All of these*  
20 *are factors which would have caused the reasonably*  
21 *prudent driver to stop, and not to have continued driving.*

22 31. *The court rejects the defence evidence that he was not*  
23 *aware that he had been involved in a collision. ...”*

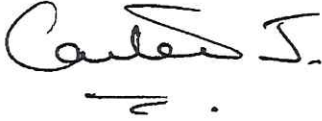
24  
25 38. This court finds no reason to fault her findings. The facts, as she found, were supported  
26 by the evidence that she accepted, and she was therefore entitled to draw the  
27 reasonable inference that she did that the Appellant must have been aware that he was  
28 involved in a collision. This was a reasonable inference from the evidence before her  
29 and justified the conclusion that she reached in this case.

30 39. The Learned Magistrate was best placed to assess the credibility of the witnesses and  
31 the Court is mindful that an Appellate Court should accord her findings a degree of  
32 deference, there being no doubt that she properly applied the correct legal principles on  
33 this issue.

1           40.       Accordingly, the appeal against conviction for the charge of leaving the scene of an  
2                    accident is dismissed.

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**Dated this the 15<sup>th</sup> April 2020**



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**Carter J**  
**Acting Judge of the Grand Court**

