IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

SCA #: 24/2020 (Case #02703/2019) (Driving whilst impaired + failing to keep lights illuminated)

SHAYMA HAMDI-ROMANICA

v.

REGINA

Appearances:	**Mr. James Stenning for the Appellant**
	Ms. Kerri-Ann Gillies of the ODPP for the Respondent/Crown
Before:	**Justice Roger Chapple (Actg.)**
Heard:	**10th March 2021**

HEADNOTE

Criminal Law – Appeal against Convictions from the Summary Court to the Grand Court *– Driving Whilst Impaired – Failing to keep lights illuminated – Section 26 of* the *Summary Court Jurisdiction Act, 2019 – Section 175 of the Criminal Procedure Code.*

JUDGMENT

ON APPEAL AGAINST CONVICTIONS

1. As a result of a traffic stop in the early hours of 3rd August 2019, this Appellant was charged with three offences, as follows:

   i. Driving under the influence of alcohol contrary to s.82(1)(a)(ii) of the ***Traffic Act*** 2011

   ii. Driving whilst impaired, contrary to s.82(1)(a)(i) of the ***Traffic Act*** 2011

   iii. Failing to keep lights illuminated at night contrary to s.93(1)(q) of the ***Traffic Act*** 2011

2. After reviewing the case, the Crown, at a hearing on 4th March 2020, offered no evidence on the first charge, but indicated that it intended to proceed upon the remaining charges.

3. Following a Summary Court trial on 27th October 2020, this Appellant was found guilty of both charges. On 25th November 2020, she was sentenced to fines totalling five hundred and fifty dollars ($550) and disqualified from driving for 12 months. She now appeals to this Court against her convictions upon a number of grounds, set out in a "Memorandum of Appeal" dated 16th February 2021, and amended on 24th February, supplemented by a file of email correspondence. This Court also has the advantage of comprehensive and helpful written submissions from Ms Kerri-Ann Gillies, now appearing for the Respondent. (Ms. Gillies did not appear at the lower court).

4. The brief circumstances in which the Appellant came to be arrested and charged appear from the agreed facts submitted to the learned Magistrate at the start of the hearing. I now set out those agreed facts in full:

i. On August 3, 2019 at about 12:40 am Ms Hamdi-Romanica was driving a Mini Cooper registration number 177 348 along Esterley Tibbetts Highway.

ii. She was travelling behind a marked police vehicle driven by PC Nkrumah Morgan and was heading towards the Butterfield roundabout.

iii. PC Morgan stopped Ms Hamdi-Romanica's vehicle by Plaza Venezia. She was the sole occupant in the Mini Cooper.

iv. PC Morgan arrested Ms Hamdi-Romanica on suspicion of driving a motor vehicle while under the influence of alcohol. She was taken to the Detention Centre.

v. At the Detention Centre PC Kenville Holder requested a specimen of breath from Ms Hamdi-Romanica. She provided a specimen of breath at 3:46 a.m. and the result was .104%. All the procedural steps were followed and recorded by PC Holder when he conducted the test using the Intoxilyzer 9000.

vi. Ms Hamdi-Romanica admitted to PC Holder that she consumed alcohol prior to driving her motor vehicle.

5. Three witnesses gave evidence at the Summary Court trial: PC Morgan, PC Holder and the Appellant.

6. PC Morgan was alone when he stopped the Appellant. In her ruling, the Learned Magistrate relates his evidence – that he first saw the Appellant's car when she was behind him and the headlights were not illuminated. Her vehicle moved ahead of

him. PC Morgan noted that the vehicle was swerving. Once he had stopped Ms Hamdi-Romanica, he noted that she was:

> *"... talkative and freely admitted that she had a couple of drinks....her eyes were glossy (sic) and when she exited the Mini Cooper, she was unsteady on her feet."*

7. The Appellant's evidence was summarised by the Magistrate as follows:

> *"The defendant's case is that she went out that night with friends at Craft. She was there until closing time. She said she had 2 vodka drinks and ate some wings. She left after closing and stopped for fries at Burger Shack. She denied her headlights were off. Any swerving, she said may be as a result of using her phone to do a Face Book (sic) posting. She said she was not slurring but it was the discomfort of recent braces which made her have a lisp. She denied she was unsteady on her feet [saying it was] because of how low the car was and the heels she had on ..... She was adamant that she was not impaired because she is Irish and has a high alcohol tolerance and she is a responsible mother. If she felt she was impaired she would not have driven."*

8. On the face of it then, the case turned upon the view taken by the Magistrate of the credibility of PC Morgan on the one hand and the Appellant on the other and the inferences properly to be drawn from the evidence the Magistrate was sure about.

9. The Magistrate made clear that she accepted the evidence of PC Morgan – stating in her Ruling:

> "*He is a very experienced officer with no reason to pull over the defendant if he had not observed the headlights were off and she was swerving.*"

10. Turning more particularly to the charge of driving whilst impaired, the Magistrate noted:

> "*The charge very much rests on the observations of the officer and if the court accepts the observation as supporting the charge to the requisite standard.*"

11. In arriving at her finding that the Appellant was impaired, the Magistrate drew attention to various features of the evidence which she accepted, including:

a. "*The admission of drinking that night – whether it was 2 as the defendant stated or more*";

b. The smell of alcohol;

c. "*Her slurred speech – I reject this was because of her braces*";

d. "*Her glossy (sic) eyes.*"

e. Her unsteadiness on her feet, about which the Magistrate stated: "*... I reject was as a result of the heels she had on.*"

f. The fact of driving without headlights and swerving.

12. I mentioned above that three (3) witnesses gave evidence before the Magistrate. The third witness, Police Constable Holder, is only referred to once, in passing, in the Magistrate's ruling when the Magistrate stated:

> *"He [PC Morgan] was present when PC347 Kenval Holder carried out the Intoxylzer (sic) test which read .104%."*

13. His evidence is not otherwise referred to or noted, yet according to Mr Stenning, who represented the Appellant both at the Summary Court and at this appeal, PC Holder, when cross-examined, gave evidence which supported the Appellant's case and detracted from the evidence given by his colleague PC Morgan.

14. This court does not have the advantage of any separate record or note of the evidence given at the court below from the Magistrate.

15. It is then fortunate that Mr Gavin Dixon, who conducted the prosecution in the lower court, did take and keep with the ODPP's file a note of the evidence. Having consulted that note, Miss Gillies was able to confirm Mr Stenning's recollection that PC Holder did not agree that the Appellant's speech was slurred, nor that she had

"*glossy (sic) eyes*", nor that she was unsteady on her feet. Had he observed any of these features, he would have noted them in the Intoxilyzer pro forma he completed[1]. Under the heading "Observations made (slurred speech, smell of intoxicating liquor etc.)" PC Holder has noted only "smell of intoxicant."

16. It may be that the apparent inconsistency between PC Holder and PC Morgan can be reconciled. According to the agreed facts, three (3) hours elapsed between the Appellant being stopped by PC Morgan at 12.40am and her giving a specimen of breath at 3:46a.m. – allowing her time to sober up. However, as was pointed out in the course of this appeal, it may be that the facts agreed by both parties as to the time of driving/being stopped are wrong, since PC Morgan's notebook entry[2] records the time of arrest as 2:45am.

17. Be that as it may, this was clearly evidence which supported the defence case. Given the absence of any notes of evidence the Magistrate took during the course of the hearing, or any reference to this evidence in her ruling, it is impossible for this court to know what the Magistrate made of this apparently unchallenged evidence or how she resolved the apparent inconsistency. It is not for this Court to, as it might be, fill in the gaps.

18. The Magistrate was of course under a duty, pursuant to s.26 of the ***Summary Court Jurisdiction Act, 2019*** to ensure:

> *"... that a proper record is maintained of the proceedings and that the oral evidence given before the court, or so much thereof as (s)he considers material, is taken down in writing either by himself or by a clerk of the court under his supervision."*

[1] Summary Court Exhibit #4
[2] Summary Court Exhibit #3

19. Section 175 of the ***Criminal Procedure Code 2019*** provides that the appellant, having complied with various requirements:

> *"... shall be entitled to receive with all convenient speed a copy of the evidence taken by the court."*

20. In this case, whilst the learned Magistrate's ruling was provided, "*a copy of the evidence taken by the court*" was not.

21. In answer to Mr Stenning's enquiry, the Court wrote, in an email dated 12th January:

> "*The Magistrate has indicated that there are no transcript/notes of evidence as the ruling incorporates the court's notes.*"

22. The assertion that there are no notes of evidence does not bear close analysis as, in order to permit incorporation, there must surely have been notes in the first place.

23. Be that as it may, it must be taken from that reply that the ruling incorporates all notes of the evidence that the learned Magistrate took in accordance with her duty pursuant to s.26 – "*of the oral evidence given...or so much thereof as (s)he considers material.*"

24. It would serve no useful purpose at all were the ruling simply to contain selections from her notes of the evidence. It must then follow that the Magistrate did not consider that PC Holder's evidence, apparently supporting the Appellant's case, was material.

25. At paragraph 11 of her ruling, the Magistrate notes her findings of fact, including this at paragraph 11(d):

"Apart from the observations of the officer, the agreed facts and the evidence led accepts (sic) that there was a reading of .104%. If there was an argument on the accuracy of the machine – which there was not – at the very least it supports drinking which is very much pointed to being legally impaired."

26. What does not appear in the ruling is the explanation given to the Magistrate as to why the prosecution had decided, after review, not to proceed with the charge of driving under the influence of alcohol. I was told by Mr Stenning, and of course accept what he says, that at the start of the hearing, an email dated 4th March was handed to the Magistrate in which Mr Walcolm, Crown Counsel said this:

"I indicated that the charge of DUI was to be withdrawn or no evidence offered based on the reading of .104% as this is within the margin of error of plus/-.05%."

27. Reference to this margin of error was made in the original agreed facts[3] but deleted, since the margin of error was then erroneously said to be plus/-.005%, rather than .05%. I should add for the sake of completeness that the legal limit is .1%.

28. It follows then that the prosecution could not, and did not, seek to establish, that the Appellant was driving having consumed alcohol in such quantity that the portion of it in her breath exceeded the prescribed limit, albeit, when applying the margin of error most favourably, only by .01%. The fact – and it must be taken to be fact – that she was within the prescribed limit, is an obvious point in her favour and plainly relevant to a proper assessment of whether she had consumed alcohol **in such quantity** (my emphasis) that her ability to drive was impaired.

29. As the editors of ***Wilkinson's Road Traffic Offences, 29th edition*** at paragraph 4-92 note:

[3] Paragraph 6

"... evidence of analysis, whether above or below the limit, always has to be taken into account now..... so the lower the result the more it favours the defence."

30. Again, since it is not mentioned by the learned Magistrate in her ruling, this court is unable to know whether this was considered, and if it was considered, how it was approached or what reasoning was applied.

31. It would be no more than speculation to wonder whether the Magistrate had made assumptions given the passage of time between driving and providing a breath sample. The observation that the reading *"at the very least.... supports drinking which very much pointed to being legally impaired"* is not altogether understood. There was no dispute that the Appellant had taken drink. The question was whether she was under the influence of alcohol to such an extent that her efficiency as a driver was impaired. The fact that she had been drinking does not, by itself point to impairment.

32. The fact that she was not over the legal limit to drive, and the fact that according to one experienced police officer she exhibited none of the familiar signs of intoxication that his colleague noted, were clear points in the appellant's favour. It may be that they were not in the end decisive, but they merited proper consideration and discussion. That neither point was noted at all in the ruling – in this case the only record of proceedings available – places any appellate court in difficulty.

33. As was said by Collett, CJ in ***Smith & Ebanks v R***[4] - referring to a Magistrate's duty, under s.26 of the ***Summary Court Jurisdiction Law*** as it then was (the wording has not changed), to take a note of the evidence:

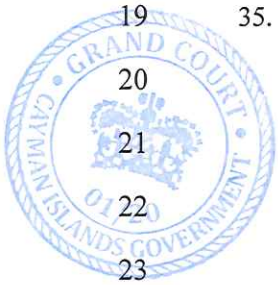
[4] [1988-89] CILR 162

> *"One reason for this is that an appeal is not by way of re-hearing, unless the Grand Court so directs, but has to be decided from the record. It follows that if the Grand Court is to be able to determine what led the Magistrate to his verdict, not only must the record be complete but some form of reasoned judgement is desirable. Without a proper record of proceedings and without a record of the reasons which led the Magistrate to his decision it is extremely difficult for the court charged with hearing an appeal to determine whether the decision of the Magistrate has arrived at properly."*

34. In ***Smith & Ebanks***, there was no record of the proceedings beyond the bald verdict and sentence. I make clear that here, there is very much more assistance provided by the Magistrate in her ruling. That said, given the absence of any reference to two clear and obvious points supporting the defence case, this court finds itself in the same position as Collett CJ, that is to say,

> *"It is extremely difficult for the court charged with hearing an appeal to determine whether the decision of the magistrate was arrived at properly."*

35. In the 30 years or so since ***Smith & Ebanks***, practice and requirements have moved on substantially. It is a principle of natural and open justice that a party to proceedings is entitled to know why evidence apparently supporting their case had been rejected.



36. This appeal against convictions is accordingly allowed, the convictions are thus quashed, and, the case is remitted to the Summary Court for re-trial.

37. Whilst this Court of course expresses no view upon the eventual outcome of this case, it cannot conclude on the information available to this Court, as Ms Gillies urged, that the convictions are safe.

FURTHER FEATURE

38. Before leaving this case, there is one further feature to which Mr Stenning draws to the Court's attention, with which I should deal. It is clear from email correspondence

that prior to this Summary Court trial, the Appellant was particularly concerned to ensure that there was a full and reliable record of the proceedings. This Court is bound to observe that the way in which the Summary Court dealt with those requests was, to say the least of it, unfortunate.

39. On 14th July 2020, Mr Stenning submitted a completed pro-forma supplied by the court entitled "Cayman Courts request for video/audio." Mr Shardon Nelson, IT Analyst replied, on 16th July:

> *"This recording will be sent after it has been recorded and the Judge or Magistrate approves it."*

40. Subsequently, Mr Nelson wrote on 20th July:

> *"The SC#2703/19 cannot be recorded as I was told that the traffic matters are not recorded. It was stated that this can be found in the practice directions."*

41. On further enquiry from Mr Stenning, Mr Nelson added that this *"information came from the Chief Magistrate."*

42. Thereafter Mr Stenning wrote:

> *"Please can you enquire if the Chief Magistrate will permit a privately funded stenographer (with their equipment) to attend the above captioned matter is trial."*

43. The response from the Personal Assistant to the Magistrates, on 21st July was as follows:

> *"Your request for a privately funded stenographer for a traffic trial in the summary court before the Hon. Magistrate Hernandez has been denied."*

44. Mr Stenning, not unreasonably, asked, *"Respectfully, may I have reasons (the legal basis) for the denial?"* The peremptory response, on 21st July, was, and I quote in full, *"The approval is up to the sitting Magistrate. Regards."*

45. For my part, I am sorry that a litigant before the Court was treated in this way. If apparently reasonable requests are to be refused, then reasons should be given. It is difficult to see why a request for a zoom recording – entirely common-place these days – should be refused. If there was good reason, the courtesy of an explanation should be provided. The email exchange in this case does nothing to foster or promote open justice or enhance the reputation of the Court.

46. The irony of the Court's refusal to allow a recording of this trial will not be lost on those reading this judgment, given the reasons for the Court's decision to remit the case for re-trial.

Dated this the 24th March 2021

Justice Roger Chapple
Acting Judge of the Grand Court