

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**Criminal Appeal No. 0001/10
(Summary Court Appeal No. 49/08)
C#4167/2006**

Between:

ATTORNEY GENERAL

Appellant

- and -

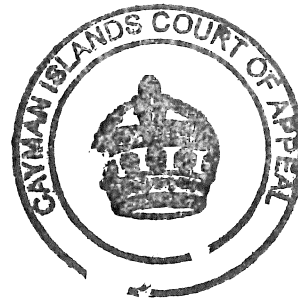
LUIS EDUARDO QUESADA CASTRO

Respondent

**Before: The Rt. Hon. Sir John Chadwick, President
 The Hon. Mr. Justice I. Forte, J.A.
 The Hon. Dr. A. Conteh**

**Appearances: John Masters, Crown Counsel, for the Appellant
 Nick Dixey of Mourant for the Respondent**

**Date heard: 8th March, 2010
Judgment delivered: 18th March, 2010**



JUDGMENT

Sir John Chadwick, President

1. On 22 December 2008 Luis Eduardo Castro Quesada was convicted in the Summary Court of three offences under the Traffic Law (2003 Revision): (i) careless driving contrary to section 69; (ii) driving under the influence of alcohol contrary to section 71(1)(a)(ii); and (iii) leaving the scene of an accident contrary to section 65(7). He was fined a total of CI\$1,120.00 with 30 days imprisonment in default of payment.

2. Mr. Castro appealed to the Grand Court. That appeal came before Justice Henderson on 1 February 2010 and was allowed. All three convictions were set aside and

verdicts of acquittal entered. The appeal now before this Court is the Crown's appeal under section 29(1) of the Court of Appeal Law (2006 Revision) from that order.

3. An appeal lies under that section on a point of law alone. The issue before this Court is whether the judge erred in law when he held that admissions made by Mr Castro to a police officer before caution ought not to have been admitted in evidence.

4. Section 40 of the Evidence Law (2006 Revision) is in these terms:

“Nothing in this Law derogates from the power of a court in any criminal proceeding to disallow evidence otherwise admissible which, in the opinion of such court, would, if allowed, operate unfairly against an accused person.”

5. It is common ground that in exercising its power to disallow evidence which would otherwise be admissible a criminal court in the Cayman Islands is required to have regard to the guidance given by the Judges' Rules formerly applicable in England and Wales. Rule II is in these terms:

“As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.”

6. In *R v Osbourne* [1973] QB 678 the Court of Appeal of England and Wales addressed the question what was meant by “evidence” in that context. Lord Justice Lawton, giving the judgment of the Court, said this (at pages 687-8):

“It is important for the court to remind itself that the Judge's Rules are intended for the guidance of police officers. They have to comply with the rules. If a police officer looks at the rules and asks himself the question: “What do they mean?” he would answer in the light of his own police experience. In police experience, evidence means information which can be put before a court; and it means that not only to police officers but to the general public, . . .

...

The rules contemplate three stages in the investigations leading up to someone being brought before a court for a criminal offence. The first is the gathering of information, and that can be gathered from anybody, including persons in custody provided they have not been charged. At the gathering of information stage no

caution of any kind need to be administered. The final stage, the one contemplated by Rule III of the Judge's Rules, is when the police officer has got enough (and I stress the word 'enough') evidence to prefer a charge. That is clear from the introduction to the Judge's Rules which sets out the principle. But a police officer when carrying out an investigation meets a stage in between the mere gathering of information and the getting of enough evidence to prefer the charge. He reaches a stage where he has the beginnings of evidence. It is at that stage that he must caution. In the judgment of this court, he is not bound to caution until he has got some information which he can put before the court as the beginnings of a case."

7. The offences of which Mr. Castro was convicted were committed on 19 June 2006. I can take the facts leading to his arrest from the Royal Cayman Island's Police Service Summary.

"On Monday 19 June 2006 about 12:25am PC 209 Jackson was on duty on mobile patrol when she received a report of one vehicle accident that occurred along the Quinn Centennial Roundabout. She also received further information that the possible driver for the vehicle was seen walking along Godfrey Nixon Way headed towards Eastern Avenue.

On arrival to the location, observation was made of a silver Nissan Sentry registration 112301 which had collided with a palm tree and a road sign off the road up onto the grass area. On making checks of the vehicle there was no sign of the driver inside and it was observed that the vehicle had damages to both front tyres.

On making enquiries the driver's girlfriend was located and she directed PC Jackson to the location of the driver. Mr. Eduardo Castro Quesada was then located at a friend's residence along Eastern Avenue. On PC Jackson speaking with him it was established that he was the driver of the Nissan Century registration 112301 which was involved in the accident along the Quinn Centennial Roundabout."

8. As a result of the conversation between PC Jackson and Mr. Castro he was arrested for leaving the scene of an accident and failing to report an accident. Subsequently, a breath test was conducted which showed an alcohol level of .201%. He was then formally charged for the offence of driving under the influence and leaving the scene of an accident.

9. The matter came for trial on 28 May 2007 before the Chief Magistrate. PC Tamara Jackson gave evidence that, having found no-one at the scene of the accident, she made enquiries and got in touch with Mr Castro's girlfriend. Having called her, she was given an address at Eastern Avenue; and was told that Mr. Castro would be there. She went on:

“I found him in a room, lying down, and spoke to him in relation to the accident. I asked him if he was the driver of the vehicle and he said “yes”. I asked him why he left the scene. He said he had been drinking earlier and there was little damage caused. I arrested him for leaving the scene of an accident.”

10. It can be seen, therefore, that there were two relevant questions put to Mr Castro by the police officer: (i) “were you the driver of the vehicle?”; and (ii) “why did you leave the scene of the accident?”. Each of those questions was put before Mr Castro was cautioned.

11. Under cross-examination PC Jackson said that she had had a suspicion of a drunk driver leaving the scene. When she had spoken to the girlfriend, her suspicion that she had a drunk driver strengthened. It was further strengthened when she found Mr Castro lying down at the Eastern Avenue address. She said this:

“I suspected that he had left the scene of an accident and was under the influence.”

12. After that evidence had been given, the Chief Magistrate heard submissions on the *voire dire* on the question whether Mr. Castro's admission that he had been the driver of the vehicle was admissible in evidence. It was said, on his behalf: first, that no questions should have been asked of him while he was thought to be intoxicated; and, second, that in any event he should not have been asked whether he was the driver without having been cautioned.

13. The Chief Magistrate ruled against those submissions. In her ruling of 28 May 2007, she reminded herself of the United Kingdom decisions of *Dilks v. Tilley* [1979] Crim LR 396, [1979] RTR 459 and *Hennell v. Cuthbert* [1962] Crim LR 104.

14. In *Dilks v Tilley* [1979] RTR 459, an English case, the defendant was charged with driving a motor vehicle without due care and attention. The circumstances were that his vehicle had been involved in what, colloquially, is described as a “shunt”. His vehicle, a van, had collided with the rear of another vehicle, a car and pushed it into a third vehicle, an unmarked police car. A police officer (not the driver of the unmarked car) was called to the scene. He asked the defendant: “What happened?”. In reply the defendant gave his account of how the accident had occurred, in terms which made it clear that he was, indeed the driver of the van. The case came before justices, who dismissed it. They took the view that the defendant’s admission that he had been the driver of the van had been obtained in breach of the Judges’ Rules; and that that statement was not admissible in evidence. They held that there was no other evidence that could be relied upon.

15. The Crown appealed to the Divisional Court. The appeal was allowed. Mr Justice Michael Davies (with whom the other member of the Court, Mr Justice Neill, agreed) referred to the justices’ finding that, before asking the defendant “What happened?”, the opening question should have been to establish which vehicle the defendant had been driving, if any; and, having established that he was the driver of the van, the police officer should then have cautioned him. He said this:

“No doubt – and I suppose we all, in this court, are aware of this – it is a very usual first question, after an accident, for a police officer to put to the apparent driver of any vehicle: ‘Are you the driver of this or that vehicle?’ In fact Constable Jarrett did not do so. We do not think that the justices were right in ruling that necessarily that question must always be put as the first question, although as I have said no doubt it frequently is. Constable Jarrett really went to the heart of the matter by asking the defendant ‘What happened?’”

Mr Justice Davies referred to the test indicated by Lord Justice Lawton in *R v Osbourne* and went on:

“We have considered whether the fact that there had been an accident involving three vehicles, the third one of which had apparently, to the constable’s knowledge, been driven by the defendant, was sufficient to come within those words of Lawton LJ. For my part, I am satisfied that Constable Jarrett did not

have, at that stage, information which he could put before a court as the beginnings of a case.”

16. *Hennell v Cuthbert* [1962] Crim LR 104 was also a case in which the defendant was charged with careless driving. The driver of the van was interviewed in hospital; and the justices held that his evidence, given before a caution had been administered, was inadmissible. The appeal by the Crown was allowed. It was held by the Divisional Court that (i) the Judges’ Rules were only rules of practice and that statements made in contravention of them could still be admitted in evidence; (ii) that whether there had been a contravention of the Judges’ Rules depended on whether the police officer was merely making inquiries or whether he had already made up his mind to charge the defendant; and (iii) that the questions put by the police officer before caution showed that he was not in a position to charge the defendant until he knew whether the defendant was the driver of the car. The case pre-dated both *R v Osbourne* and *Dilks v Tilley*. The report is little more than a summary; and so the case is, perhaps, of less assistance than the two later cases.

17. In the present case, the Chief Magistrate held, in her ruling of 28 May 2007, held that the information which PC Jackson had received from Mr Castro’s girl friend was not a reasonable ground for concluding that he was driving it at the relevant time. It may have raised a suspicion in her mind, but such suspicion would not, as a matter of law, give rise to the need to caution Mr Castro. She said this:

“I am satisfied on the evidence that when she spoke to the Defendant, she was still at the stage of gathering information. She asked a question which was perfectly permissible and which may well have eliminated from consideration if it transpired that he hadn’t been driving the vehicle at the relevant time.”

18. She then addressed the submission that– even if otherwise it would have been admissible – Mr Castro’s admission that he was the driver should have been excluded because he was intoxicated at the time. She rejected that submission in these words:

“I do not agree. The mischief that the drink driving provisions are intended to address is self-evident. To hold that officers should wait until intoxicated persons are sober before asking them questions in the course of investigating traffic offences which may involve drink driving – whether before or after caution – would defeat the purpose of the law.

On the evidence before the Court the Defendant, despite his inebriated state, had no difficulty understanding what was asked of him and was able to answer coherently. I find that the circumstances in which the officer asked the question were not oppressive and there was no unfairness to the Defendant.”

19. The Chief Magistrate then considered whether Mr Castro should have been cautioned before the second question - why he had left the scene of the accident without reporting it – was put to him. She said this:

“The officer also asked the Defendant why he left the scene and the issue remains as to whether this was a ‘further question’ which required the officer to administer the caution. The resolution of the issue lies in posing the question suggested by the Court in *Dilks*: did the officer, having ascertained that the Defendant was the driver of the car involved in the collision, have sufficient evidence to put before the Court as the beginnings of a case that he left the scene of the accident without reasonable cause I say the answer is no and she was entitled to ask this further question without caution.”

But she went on:

“Even if I am wrong and he ought to have been cautioned before being asked this further question, I do not think that his answers – that he was drunk and that no damage was caused – were obtained unfairly or in a manner that should cause a tribunal of fact to doubt the reliability of the admissions made. I would have exercised my discretion, in any event, to admit the answer into evidence.”

20. Mr Castro appealed from that ruling to the Grand Court. His appeal was heard by Justice Levers; and was allowed. The Crown appealed to this Court. On 1 August 2008, this Court determined that a ruling in the course of a summary hearing as to the

admissibility of evidence was not a “judgment sentence or order” from which an appeal lay to the Grand Court. Accordingly the decision of the Grand Court was vacated and the matter was remitted to the Magistrate to continue with the hearing of the case.

21. The hearing before the Chief Magistrate resumed on 17 November 2008. PC Jackson again gave evidence. She volunteered in cross-examination that she had been suspicious that Mr. Castro had been driving while intoxicated and that he had left the scene. She said that she was suspicious on two grounds “my own observations and conversations with others”. She said that when she had spoken to the girlfriend:

“I asked her who was driving the vehicle and she told me that it was Mr. Castro, that he was her fiancé and that he was at a friend’s house at Eastern Avenue.”

She said that when she went to the Eastern Avenue address she found Mr. Castro who “appeared to be intoxicated and was of Spanish origin”. She said that:

“It is fair to say at that stage I was suspicious that I had found the driver based on what I was told and what I had seen”.

In re-examination she explained that:

When I asked [the fiancé] who the driver was, I was asking her who was the driver in general. Who had the vehicle.”

She was asked what had changed between the time she arrived at the Eastern Avenue address and the time she arrested Mr. Castro her answer was:

“I felt I had enough suspicion that he was the driver and he was clearly intoxicated”.

22. At the end of the Crown’s case on 17 November 2008 counsel for Mr. Castro submitted that the new evidence was significant enough to warrant the Court’s revisiting the question of admissibility; on which it had already ruled on 28 May 2007. He indicated that if the Court were not with him on that point this client would make no answer to the case.

23. Following the adjourned hearing in November 2008, the Chief Magistrate delivered a written judgment dated 22 December 2008; in which she reviewed her earlier decision. She had been referred by counsel to *Walmsley v. Young* [1974] Crim APR 548 and to *R. v. Osbourne (supra)*. She drew the conclusion from those cases – correctly in our view - that the inclusion of the word “evidence” in Rule II of the Judges’ Rules had the effect the rule did not apply until the officer had “admissible evidence” which would afford reasonable grounds to suspect. She distinguished the case of *R v Shaaban bin Hussein*, on which counsel had also relied, on the ground that, in that case, the Court was concerned with the power of arrest without warrant anyone whom a police officer “reasonably suspected of being concerned in the commission of any offence”. She pointed out that the relevant statute, in that case, made no reference to “evidence” which would afford reasonable grounds for suspecting. She held that neither the new evidence, nor the further authorities to which she had been referred, persuaded her that she should revisit her earlier decision as to admissibility.

24. The Chief Magistrate found that the evidence of where and how the car had ended up led to the irresistible inference that the driver had failed so to operate the vehicle as to maintain control of it and keep it on the roadway. She observed that there was no issue that, when Mr Castro was breathalysed, he had .210% alcohol in his blood. Having made those findings she said that the only issue was whether she was satisfied so that she felt sure that he was the driver of the car at the material time. She observed that the only evidence to show that he was the driver as his own admission: on which the Crown relied.

25. The Chief Magistrate stated her findings on that issue in these terms:

“The Court must be satisfied that the answers were given voluntarily and that the answers made can be relied on in the circumstances where the evidence disclosed that the Defendant was intoxicated and was a native Spanish speaker. I accept the officer’s evidence that the Defendant was coherent and appeared to understand the questions asked. On the officer’s evidence the Defendant not only admitted he was the driver but explained why he had left the scene. The answers he made certainly suggest that he understood the question.

I don't accept the submission that in DUI cases police officers should decline to put any questions to a suspect because he is intoxicated. In any event when the officer questioned the Defendant he was potentially a witness who could identify the driver of the car. The fact that he was the usual driver of that car did not necessarily mean that he was driving the car when the accident occurred. Certainly the Crown could not have relied on his fiancé's assertion to prove he was driving at the material time."

26. On the basis of those findings, the Chief Magistrate expressed herself satisfied "so that she could feel sure" that the answers given by Mr Castro to PC Jackson were voluntary and were not obtained unfairly: that Mr Castro was driving the car when it left the roadway; that, at that time, he was intoxicated; and that he left the scene without reasonable excuse. So she convicted.

27. Mr Castro appealed to the Grand Court. That appeal came before Justice Henderson on 1 February 2010. He allowed the appeal for reasons given orally on that day.

28. The first submission which had been made to the judge on behalf of the Crown was that the Mr Castro was under a statutory obligation to reveal to PC Jackson that he was the driver of the car. Given the existence of that statutory obligation, it was said that to give him the standard caution as to his right to silence would have been inappropriate and misleading. That submission was founded on the terms of section 65 of the Traffic Law (2003 Revision): subsections (2), (3) and (4) of which require a driver involved in an accident to provide his name, address and other information and to report the accident. The subsections apply (*inter alia*) where, owing to the presence of a vehicle on a road, an accident occurs by which damage is caused to "any property constructed on, fixed to, growing in or otherwise forming part of the land of which the road in question is situated or land adjacent to such land". The judge observed, correctly, that, in the present case, there was no evidence of damage to anything other than the Defendant's own vehicle: in particular there was no evidence of damage to the palm tree or to the road sign. Consequently the submission based on section 65 of the Traffic Law failed. We need say no more about it on this appeal.

29. The judge turned, then, to the question whether there had been a breach of the Judges' Rules. He cited from his own judgment in *R v. Jarrett Daniels* (SCA No.14 of 2008, May 15 2009); in the course which he had reviewed the authorities on the need for a caution under the Judges' Rules. He pointed out that the rules were not rules of law but rules of practice for the guidance of police officers. He went on:

“The test of admissibility is voluntariness: a breach of the Judges' Rules does not, in itself, render a statement to the police involuntary. Such a breach does provide the Court with a discretion to refuse to admit the statement.”

30. The judge reminded himself that the test under Rule II was an objective one: the subjective belief of a police officer that he does not have evidence affording reasonable grounds for suspicion is a relevant consideration but far from determinative. He observed that the matter must be assessed from the viewpoint of the reasonable and objective observer. As he put it:

“The question must be answered by taking into account what the officer knew or did not know at that point in his investigation without regard to what was learned later on. The issue is not whether the police officer suspected that he was questioning a person who had committed an offence but whether he had evidence which might give him a reasonable ground for suspecting that.” [emphasis in text]

He reminded himself of the observations of the Divisional Court in *Dilks v. Tilley* when applying the guidance given in *R v. Osbourne*.

31. The judge then went on to observe that, in the present case, Constable Jackson had already focussed her suspicion upon Mr Castro. As he said:

“Because of the information she had received from his girl friend, the police officer was no longer simply investigating a traffic accident. She was engaged in an inquiry of a narrower scope: whether Mr Castro had committed a criminal offence when he left the scene of a particular motor vehicle accident. That is why she went to the room on Eastern Avenue to speak with him.”

And he concluded:

“At that point she already had the beginnings of a case; she had the evidence of the girlfriend, which would have been admissible against Mr. Castro in a court of law. This crucial element serves to distinguish the case at bar from *Dilks v. Tilley* where the officer’s investigative focus was not yet centred on anyone in particular when he asked his opening question.

32. It was for that reason – and only for that reason - that the Judge allowed the appeal and set aside the conviction. He found that, in putting the first question to Mr Castro - “were you the driver of the vehicle?” – the police officer had acted in contravention of Rule II of the Judges’ Rules. In those circumstances it is understandable that he did not find it necessary to consider whether the second question - “why did you leave the scene of the accident?” – would also have been in contravention of Rule II.

33. Less easy to understand is why the judge did not find it necessary to consider whether the Chief Magistrate would have been entitled to exercise her discretion to admit the evidence of Mr Castro; notwithstanding that (as he had found) there had been a breach of the Judges’ Rules. Nor did he consider whether questions should have been put to Mr. Castro at all: given that he was said to have been intoxicated at the time.

34. In our view the judge gave himself the correct direction in law: that is to say, whether, at the time she put the first of the two questions to Mr Castro, the police officer had evidence which she could put before a court that gave her reasonable grounds for suspecting that he had committed an offence. In the present context, that test required that PC Jackson had evidence that gave her reasonable grounds for suspecting that Mr Castro had been the driver at the time of the accident before she asked him that first question.

35. But, as it seems to us, the judge was wrong to hold that, before that first question was asked and answered, there was evidence, admissible in law, that gave reasonable grounds for suspecting that Mr Castro was the driver at the time of the accident. He held that the evidence of the girlfriend would have been admissible against Mr. Castro in a court of law. But he overlooked the fact that the evidence of the girlfriend did not go that far. The girlfriend’s statement that Mr. Castro was the driver was not evidence that he was driving at the time of the accident. That was made clear by PC Jackson’s evidence in re-examination on 17 November 2008. The Chief Magistrate had found, in terms, that, at the time when PC Jackson first saw Mr. Castro, she did not have evidence which would

afford reasonable grounds to suspect that he, and not someone else, was driving the car at the material time. There was no basis on which the Judge could go behind that finding: and he gave no reason for doing so.

36. We are satisfied, therefore, that the Judge was wrong in law to hold that this was a case where a caution was required under Rule II of the Judges' Rules before the officer asked the first question: "were you the driver of the vehicle". That was the answer which led to his conviction for careless driving; and that, together with the positive breath test, was the answer which led to his conviction for driving under the influence.

37. The question, then, was whether the officer had evidence which would afford reasonable grounds for suspecting that Mr. Castro, as the driver, had left the scene of the accident but without reasonable cause for leaving. If she did have evidence which would afford reasonable grounds for suspecting that he had left the scene without reasonable cause, a caution was required before she asked Mr. Castro why he had left the scene of the accident. The Judge did not address that issue. He did not do so, no doubt, because he had already taken the view that a caution was required before the first question was put. But, given that (as we have held) he was wrong in that view, he needed to do so. It follows from our conclusion in relation to the first question that we must hold that the judge erred in law in failing to go on to consider whether a caution was required before the second question was put. It was the answer to the second question that led to Mr Castro's conviction for leaving the scene of the accident without reasonable cause.

38. There remains the issue whether questions should have been asked of Mr. Castro at all. The judge did not find it necessary to address that issue. Absent a finding that the Chief Magistrate was not entitled to exercise her discretion to admit the evidence of Mr Castro on the ground that (whether or not there had been a breach of the Judges' Rules) that evidence was obtained unfairly – in that, by reason of his state of intoxication or his limited grasp of the English language, he was unable to understand the questions put to him – there was no basis upon which the judge could allow the appeal from the Chief Magistrate and set aside the convictions.

39. For those reasons we are satisfied that the Judge erred in law and that his Order of 1 February 2010 should be set aside. We remit the matter to the Grand Court for consideration of the outstanding issues on the appeal from the Chief Magistrate to which reference has been made in paragraphs 37 and 38 of this judgment. Pending further determination of the appeal before the Grand Court, the convictions must be restored.

Chadwick P

Forte JA

Conteh JA

