14/8/2008

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL NO. 1/07
(SCA 43/05)
(C# 0598/05(1-2))

BETWEEN

ARLIN WILLYARD

Appellant

AND

HER MAJESTY THE QUEEN

Respondent

BEFORE: THE RT. HON. MR. JUSTICE ZACCA, PRESIDENT
THE HON. MR. JUSTICE FORTE, JUSTICE OF APPEAL
THE HON. MR. JUSTICE MOTTLEY, JUSTICE OF APPEAL

CAYMAN ISLANDS COURT OF APPEAL

Appearances: Ms. Ailsa Williamson (Stuarts) for the Appellant.
Mr. John Masters for the Crown.

Heard: 10th April, 2008. Judgment delivered: 14th August, 2008.

FORTE, J.A.

On the 10th of April 2008, having heard the submissions of counsel, we took time out to consider our decision. The following is our decision.

The appeal concerns the dismissal of the appellant on two charges by Magistrate Ramsay-Hale when she ruled that there was no case to answer against the appellant. The charges are:

(1) Failure to provide a specimen of breath; and

(2) Failure to provide a specimen of blood.

The Crown appealed the ruling of Magistrate Ramsay-Hale. The appeal was heard by Levers, J. sitting in the Grand Court. Levers, J. ruled that the Magistrate was wrong in dismissing both charges and ordered that the case

should be remitted to the Summary Court for the Court to hear the case of the defence.

The appellant, Willyard now appeals against that order.

Facts:

To understand the issues advanced by Counsel for the appellant a brief summary of the facts is necessary.

On Saturday 5th February 2005 at about 1:10 a.m. Constable Robert Soper was in "uniform mobile patrol" when he received instructions to attend Industrial Way, on Dorcy Drive, "the scene of a motor vehicle accident". When he arrived at the location, in pursuance of his instruction, he found Constable Rice there. He was speaking to the appellant. Constable Rice, on his arrival had found the appellant seated in the driver's seat of a Ford F250, vehicle registered number 97781. This vehicle appeared to have collided with a Daihatsu motor car which was parked on the side of the roadway. The collision had apparently caused damage to, "the front off side of the Ford vehicle, and to the near off side of the Daihatsu motor car."

Constable Soper also spoke to the appellant. He testified that the appellant's breath smelled of alcohol and that the appellant slurred his words as he spoke. Constable Soper arrested the appellant for, "being in charge of a motor vehicle whilst suspected to be under the influence of alcohol."

The appellant was then taken to the George Town Police Station where Sergeant Pinnock in the company of Constable Soper and Special Constable Reid

who had also been at the scene, "commenced the Intoxilyser procedure." Sergeant Pinnock testified that they requested from the appellant, a sample of his (the appellant's) breath so that the Intoxilyser 5000 machine could measure the, "amount of alcohol". The appellant was cautioned by Sergeant Pinnock that, "if he failed and refused to provide the specimen without a lawful reason, he would be prosecuted." The appellant was asked if there was any reason why he could not blow into the machine. Sergeant Pinnock stated that he thought the appellant said "something about asthma".

The appellant was instructed how to blow into the machine, but would not follow the instructions. He was informed that he had to blow into the machine continuously for 10-12 seconds until the machine's "continuous tone" came to an end, indicating that the sample was sufficient. The appellant nevertheless continued to blow for "couple of seconds and stop" and then for another few seconds. The machine indicated that the sample was insufficient but nevertheless gave a reading of .171%.

The appellant was again requested to blow into the machine and he agreed. He was again told that he had to blow continuously into the machine for 10 seconds. In spite of the instructions, the appellant again blew intermittently ceasing each time after a few seconds. The machine again recorded that the sample was insufficient but nevertheless recorded a reading of .181%.

Because of the appellant's refusal to follow the instructions to enable the machine to function accurately, the police officers made the decision to take him

to the hospital where they would make a request of him for a sample of blood. At the hospital the request was made, and refused by the appellant.

The Law:

The appellant was charged with refusing without reasonable cause to provide a specimen of breath for test having been required to do so by Sergeant Pinnock, contrary to Section 74(1)(a) of the Traffic Law (2003 Revision) and, "without reasonable cause failed to provide specimen of blood for test having been required to do so by Sergeant Pinnock", contrary to Section 74(1)(b) of the Traffic Law (2003 Revision)

Section 74(1) states:

> "(1) A person who has been arrested under Section 71,72 or 73, shall, while at a police station, be required
>
> (a) to provide a specimen of breath for analysis by means of an alcohol-in-breath measuring device of a type approved from time to time by the Commissioner in writing and published by notice in the Gazette (emphasis mine)
>
> (b) a specimen of blood or one or more specimens of urine for a laboratory test.

(2) If a constable has reasonable cause to suspect that a person's ability to drive properly was, or might have been, impaired through drugs he may, with the consent of the officer in charge of the police station, require that person to provide a specimen of blood or urine under paragraph (b) of subsection (1) notwithstanding that he has, in respect of the same arrest been required to and has provided a specimen of breath under paragraph (b) of subsection (1).

(3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless –

(a) The constable making the requirement has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required;

(b) at the time the requirement is made, a device or a reliable alcohol-in-breath device either is not available at the police station or it is then for any other reason not practicable to use such a device there; or

(c) the constable making the requirement has been advised by a medical practitioner that the condition of the person required to provide the specimen might be due to some drug

But may then be made notwithstanding that the person required to provide the specimen has already provided or been required to provide two specimens of breath."

The issues raised in this appeal are:

(i) Whether given the circumstances of what transpired at the police station when the appellant was required to give the samples of breath could it be said to be a refusal by him to do so; and

(ii) were the provisions of section 74(1)(b) satisfied so that a sample of blood could be requested by the police at the police station.

Refusal to give sample of breath:

There is no dispute that the appellant was requested on two occasions to give the samples. He was given proper instructions by the police officer as to how the sample should be given, so that the machine could properly measure the level of alcohol. The prosecution's case was that, in spite of the instructions given to him, he deliberately continued to blow intermittently for short periods

stopping each time before the required time had expired. The appellant, however, contends that once the appellant gave a sample of breath, there was no need to do so in accordance with the required instructions of the manufacturers of the machine. Some reliance was placed on the fact that in previous laws there was a requirement to act in accordance with the instructions of the manufacturers. [See the case of ***Cheryl Donahue*** Grand Court ruling delivered on 20th May 1998]. The current law is silent in that regard requiring only that the alcohol-in-breath measuring device is of a type approved by the Commissioner in writing and published in the Gazette. No challenge has been made in respect of the approval of the particular device used in this case.

In our view, "a specimen of breath for analysis" must necessarily mean a specimen of the type necessary to allow the measurement to be done. In any event, in the instant case, the evidence for the prosecution is that the appellant deliberately acted contrary to the instructions of the officer apparently well knowing, that by doing so, he would defeat the purpose of the exercise. We are of the view that, in those circumstances, he could be held to have refused to give a sample sufficient to enable an analysis of the level of alcohol. Certainly, if it could not be said of the first request, the appellant on the second occasion would be aware of the consequences of not blowing into the machine for the required 10 seconds and, by not doing so, defeat the whole purpose of the Law. This would certainly amount to an absurdity.

The law requires that a sample of breath should be given and be tested by an alcohol-in-breath device approved by the Commissioner etc. In our view this implies that the sample of breath must be such that the true alcohol level can be ascertained by such a device. It follows that the method by which the device could achieve that function must be followed. This was in keeping with the instruction given by the officer, which the prosecution contends was deliberately not followed by the appellant.

In our view, this could be found to be tantamount to a refusal, requiring him to give reasonable cause for not giving the required sample.

Before leaving this issue we should note that counsel referred us to the case of ***Rweikiza v DPP*** (2008) EWTTC 386 in which the facts were similar to the instant appeal. The case, was decided, however, on the basis of a particular section in the English Road Traffic Act. Section 11(3) of that Act states:

> "A specimen is not provided unless it is sufficient to enable the test or the analysis to be carried out, and unless it is provided in such a way as to enable the objective of the test or analysis to be satisfactorily achieved."

There is no such provision in the Cayman Law. It was put in the English Legislation, no doubt, for the avoidance of doubt.

Nevertheless, we are of the view that the opinion we have already expressed is correct. If we were not, then it would be easy for anyone to defeat

the purpose of the law, by refusing to follow instructions to blow in the device in such a way as to provide an accurate reading.

In our view once the device has been approved by the Commissioner, then the sample must be given in accordance with the method of analysis by that particular device.

Refusal - Blood Sample:

The relevant section of the law, states that a request for a blood sample can only be made at a police station in certain circumstances. The Law, *inter alia*, allows the request to be made at a police station where –

> (i) The Constable has reasonable cause to believe that for medical reasons a specimen of breath cannot be provided or should not be required.

Apart from the mention of asthma of which Sergeant Pinnock spoke, no point was made of this, and so it did not develop as an issue, either at trial or in the appeal process.

> (ii) at the time the requirement is made, a device or a reliable alcohol-in-breath device either is not available at the police station or it is then for any other reason not practicable to use such a device there. (emphasis mine)

The case of ***Chief Constable of Avon and Somerset v Kellilier*** (1987) RTR 305 was relied on by the respondent in which the officer who was trained in

the use of the device was not available at the time and that was held to be sufficient reason why it was not practicable to use the machine.

In the instant case not only was the device present at the station, but the officer qualified to use it was also present. But could reasons for it not being practicable to use the device be limited to those two circumstances i.e. absence of a device or absence of a person qualified to use it? We would say no. The wording of the law in our view recognizes that there may be other reasons which may not make it practicable to use the device.

The circumstances in the instant case are a good example of "other reasons". The deliberate and obvious intentional act of the appellant to defeat the purpose of the test, if it be so found, can be the reason why it was not practicable to use the device. The result of the test, though showing quantities in excess of the accepted norm, would be highly suspect at a court of trial, after it was established, as would be done, that the machine recorded "insufficient sample". This would nullify any result it stated. Although there was a case stated by the Magistrate, asking whether the results of both alcohol-in-breath tests would be admissible in evidence, the appeal before us was not developed in that regard. The results, given the factual evidence, i.e. the refusal of the appellant to give the required sample and the consequent acknowledgement [of the machine] that the sample was insufficient would in our view render the results inadmissible, as the test would have been unreliable and lacking in credibility.

We would consequently agree with Levers, J. that the requirement in section 74(3)(b) would have been satisfied.

In any event the evidence of Constable Soper in respect of the request of blood was as follows:

> "It was explained to him how to provide a specimen. After the first effort, the machine timed out. We gave him a second chance to provide a specimen but basically the same thing happened. We then attended George Town Hospital at 03:01. I warned him again after I asked him for a specimen of blood and told him he'd be liable for prosecution if he failed and he said 'No I am not going to give one'." (emphasis mine)

The underlined words, if accepted, show clearly that the request for the blood sample was made at the hospital and consequently the provisions of section 74(3) would not be applicable in those circumstances.

Accordingly, and for the above reasons, the appeal is dismissed and the order of Levers, J. affirmed.

Zacca, P.

Forte, J.A.

Mottley, J.A.