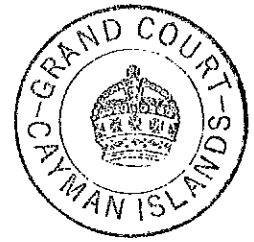


1 **IN OPEN COURT**
2
3 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
4
5 **CAUSE NO: SCA: 62 OF 2000.**
6



7
8
9 **RAYBE HYDES**

10
11 **V.**

12
13 **THE ATTORNEY GENERAL**
14

15
16 **Appearances:**

17 Miss Jane A. Rowley for the Crown
18 Mr. John Furniss for Raybe Hydes.
19
20
21
22



23 **RULING**
24

25 The appellant was convicted on his own plea of guilty to the charge of driving whilst
26 intoxicated contrary to section 71(1)(b) of the Traffic Law.

27 His plea was proffered after the commencement of his trial and after the evidence of the
28 investigating officer had been given.

29 The appellant had been found by the police in the driver's seat of his car which had
30 collided with a wall. The wall was demolished, there was extensive damage to the
31 vehicle and the appellant was in obvious pain. He complained of pain to his feet and ribs,
32 he had trouble breathing and his breath smelled of alcohol. He was taken by ambulance
33 to the hospital where later that night his blood sample was found to contain 139.4
34 milligram of alcohol in 100 millilitres of blood - 39.4 milligrams over the legal limit.

1 Upon his change of plea, the appellant proffered to the learned magistrate the explanation
2 that he had been drinking only non-alcoholic beers but medication he had been taking
3 must have triggered a release of alcohol into his bloodstream.

4 The investigating officer had stated in cross-examination that the appellant had proffered
5 no such explanation to him on the night of the accident. It was urged on his behalf that
6 the Learned Magistrate should exercise her discretion not to enter a conviction against
7 him and discharge him unconditionally.

8 The learned Magistrate had before her a report from a Dr. Addleson who had started
9 treating the appellant only after the date of the incident. His report was to the effect that
10 the appellant had been taking a drug for his medical condition as a non-insulin dependent
11 diabetic; and that this drug could interfere with the absorption of drugs including alcohol.

12 The report did not state whether the appellant had been taking that drug or one with
13 similar side effects at the time of the accident.

14 In any event, it is to be noted that the drug is not described as triggering or releasing
15 alcohol into the bloodstream as claimed by the appellant.

16 The learned Magistrate therefore, quite properly in my view, did not accept this
17 contention as a basis upon which she could have exercised the discretion which it is said
18 she had under the law.

19

20 She stated:

21 "It was my view that the blood alcohol (test) reading having been accepted, the
22 mitigating circumstances as put forward were not such as to allow for exercise of
23 the discretion in the defendant's favour.

1 I find it difficult to accept the claim about the consumption of non-alcoholic
2 beers.

3 In addition, the report submitted (by Dr. Addelson) does not cover the period of
4 the time of the accident and in fact referred to a period which was one year after
5 the accident. Consequently, I was not assisted with the contention that medication
6 exacerbated the blood alcohol level or reading”.

7
8 On those findings of facts there ought to be an end to this appeal as, for the reasons I have
9 pointed out to Mr. Furniss, even if the provisions of Law are found to vest the discretion
10 contended for in a case such as this, the learned Magistrate having arrived at those factual
11 premises, would have had no basis for finding the sort of extenuating circumstances
12 which the Law would require.

13 Mr. Furniss contends nonetheless that the learned Magistrate misdirected herself on the
14 Law and might have found differently had she taken the proper view of the Law.

15 While I regard that treatment of the learned Magistrate’s findings as misunderstanding
16 her reasoning, there is some difficulty over the meaning of the provisions of the Law and
17 Miss Rowley has expressed the view that the Learned Magistrate may have taken too
18 narrow a view of the effect of the discretion vested by one particular provision; ie:
19 Section 41 of the Penal Code.

20 I am obliged therefore to consider the provisions of Law.

21 They appear in Section 41 of the Penal Code and Sections 66 and 74 of the Criminal
22 Procedure Code (C.P.C.) as read with Section 71 of the Traffic Law.

23

1 These provisions of the Law follow:

2

3 **Section 41 of the Penal Code:**

4 41. (1) Where in any trial before a court of summary jurisdiction the court thinks
5 that the charge is proved but is of opinion that, having regard to the
6 character, antecedents, age, health or mental condition of the accused, or
7 to the trivial nature of the offence or to the extenuating circumstances in
8 which the offence was committed, it is inexpedient to inflict any
9 punishment, the court may, without proceeding to conviction make an
10 order dismissing the charge

11

12 (2) An order made under subsection (1) shall, for the purpose of revesting or
13 restoring stolen property and of enabling a court to make any order in that
14 behalf, have the like effect as a conviction.

15

16 (3) Where any charge is dismissed under subsection (1) the court may order
17 the accused person to pay the whole or any part of the costs of and
18 incidental to the prosecution.

19

20 **Sections 66 and 74 of the Criminal Procedure Code:**

21 66 If the accused person admits the charge, his admission shall be recorded and the
22 court shall convict him and pass upon or make an order against him unless, after
23 hearing anything which may be said by or on behalf of the accused, whether in
24

1 mitigation or otherwise, there shall appear to the court to be sufficient cause to the
2 contrary.

3
4 74. The court, having heard both the prosecutor and the accused person and their
5 witnesses, shall either convict the accused and pass sentence upon or make an
6 order against him according to law or shall acquit him, at its discretion, or may
7 with or without recording a conviction, if it is the opinion that it is not expedient
8 to inflict any punishment notwithstanding that it finds the charge against the
9 accused is proved, make an order discharging the accused absolutely or
10 conditionally:

11 Provided that no such order of discharge shall be made in respect of any
12 prosecution instituted under section 71 of the Traffic Law, 1991.

13

14 **Section 71 of the Traffic Law**

15 71. (1) A person who drives or attempts to drive or who is supervising or
16 attempting to supervise the learner driver of a vehicle or is in charge of a vehicle
17 on a road when -

18 (a) he is under the influence of drugs or alcohol to such an extent that his
19 efficiency as a driver is impaired; or

20 (b) he has consumed alcohol in such a quantity that the proportion thereof
21 in his breath, blood or urine exceeds the prescribed limit,

22 is guilty of an offence and liable on summary conviction on a first offence
23 to a fine of one thousand dollars or to imprisonment for six months, and
24 for a second or subsequent offence to a fine of two thousand dollars or to

1 imprisonment for twelve months. In any event whoever is convicted of an
2 offence under this subsection is disqualified from holding or obtaining a
3 drivers licence for twelve months or such longer period as the Court, in its
4 discretion, may order and the particulars of the offence shall be endorsed
5 on his driver's record.

6
7 (2) Whoever drives or attempts to drive or is in charge of a vehicle on a road

8 When -

9 (a) he is under the influence of drugs or alcohol to such an extent that his
10 efficiency as a driver is impaired ; or

11 (b) he has consumed alcohol in such a quantity that the proportion thereof
12 in his breath, blood or urine exceeds the prescribed limit,

13 and thereby causes the death of another person, is guilty of an offence and
14 liable on conviction on indictment to imprisonment for ten years and shall
15 be disqualified from holding or obtaining a drivers licence for twelve
16 months or such longer period as the Court may order and the particulars of
17 the offence shall be endorsed on his drivers record.

18
19 It will be immediately apparent that there are essential differences between Section 41 of
20 the Penal Code and Section 66 of the C.P.C on the one hand and section 74 of the C.P.C
21 on the other.

22 The first is that the former allow the Summary court to dismiss the charges without
23 proceeding to enter a conviction even where it considers the charge to be proved; (per s.

1 41) or a guilty plea has been entered (per S. 66); where the circumstances described
2 respectively in the sections exist.

3 Section 74 of the C.P.C. on the other hand gives a wider array of options by describing
4 the general plenitude of the Court's powers for dealing with the charge against an
5 accused, including that of not entering a conviction although it finds the charge proved.

6 The second distinction - the crucial one here - is that by virtue of the proviso to Section
7 74 - the power and discretion in it to order the discharge of an accused person although
8 the charge is proved; - the very power and discretion to which Section 41 of the Penal
9 Code is confined - is precluded under Section 71 of the Traffic Law. This latter is the
10 section under which the charge in this case is brought.

11 Thus, there is an apparent conundrum as between Sections 41 of the Penal Code (Section
12 66 of the C.P.C in cases of guilty pleas) and Section 74 of the C.P.C..

13 This is a conundrum which the Learned Magistrate recognised in her judgment where she
14 expressly refused to exercise a discretion under Section 41 of the Penal Code as invited
15 by Mr. Furniss (even if she had one) because of the inconsistency that would create with
16 S.74 of the C.P.C in this case.

17 I consider that the Learned Magistrate was correct in her reservations expressed about the
18 existence of that discretion where an offence under Section 71 of the Traffic Law is
19 concerned. Section 71 speaks of a mandatory term of disqualification for the offences of
20 driving whilst disqualified. As Miss Rowley has submitted, that is an essential aspect of
21 the policy of deterrence which underpins the legislation.

22 The construct to Section 41 of the Penal Code for which Mr. Furniss contends would
23 amount to an abrogation of that policy.

1 Section 74 of the C.P.C. which must be taken as being in pari materia with Sections 41
2 of the Penal Code; expressly recognises and defers to the policy underlying the Traffic
3 Law.

4 Statutes which are in pari materia "are to be taken as forming one system, and as
5 interpreting and enforcing each other": Palmer's Case (1785) 1 Burr 445 at 447. And, as
6 was said in Ex.p. Copeland (1852) 22 LJ Bank 17 at p.21 per Bruce Knight LJ (citing
7 Lord Mansfield in Palmer's case supra): "Where there are different statutes in pari
8 materia, though made at different times --- they shall be taken and construed together as
9 one system and as explanatory of each other".

10 As a matter of the exercise of her discretion, if she had one, I do not see that the Learned
11 Magistrate could be faulted for not exercising it in favour of the appellant in this case
12 where the result would be that she would in doing so construe the legal provisions as if
13 there is an inconsistency between Section 41 of the Penal Code and Section 74 of the
14 C.P.C.

15 My view is that by reference to the provisions in themselves taken in pari materia, section
16 41 should not be construed as giving a discretion in relation to an offence of driving
17 whilst disqualified in light of the proviso to section 74 of the C.P.C. Section 71 of the
18 Traffic Law provides a mandatory provision which would be rendered nugatory by the
19 exercise of the discretion contended for.

20 The case of Regina v Briggs Grand Court Appeal # SCA 20 of 1998 was brought to my
21 attention - a case in which it seems Section 41 of the Penal Code was relied upon by the
22 Summary Court for the exercise of a discretion not to enter a conviction for the proven
23 offence of refusing to provide a breath sample. This was an offence under section 72 (8)

1 of the Traffic Law for which a similar mandatory minimum period of disqualification is
2 prescribed.

3 The decision of the Summary Court was upheld on appeal by Murphy J. in this court, but
4 no reasons are expressed and it appears, in particular, that the provisions of section 74 of
5 the C.P.C. were not brought to the attention of the Court in Briggs' case. Although the
6 proviso to Section 74 of the C.P.C. does not mention section 72(8) Traffic Law offences
7 of refusing, the proviso it may well have been regarded, had it been cited, as an important
8 and influential factor in the exercise of the discretion which the Learned Magistrate in
9 that case exercised. I say this notwithstanding that the factual circumstances in Briggs'
10 case, unlike these here, were clearly presenting of factors which a Court in its discretion
11 could well regard as extenuating.

12 In any event I should make it clear that I do not regard Briggs' case as precedent for the
13 proposition contended for by Mr. Furniss in this case.

14 I do note, in conclusion however, that the legislative provisions as they stand present a
15 conundrum which may best be resolved by legislative amendment.

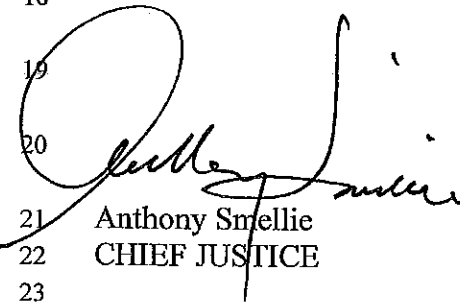
16 For all the foregoing reasons the appeal is dismissed.

17

18

19

20



21 Anthony Smellie
22 CHIEF JUSTICE



23

24

25 DATED THIS THE 17th APRIL 2000.

26