In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2017: 17

NAKIA LYNCH-WADE

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Appeal from Magistrates' Court-speeding-challenge to accuracy of speed detection device following non-disclosure of full operating manual- sufficiency of evidence-extent of Prosecution duty of disclosure in relation to the trial of summary offences-Disclosure and Criminal Reform Act 2015 sections 3(1) and 4(1)

Date of hearing: May 18, 2017[2]
Date of Judgment: May 26, 2017

The Appellant appeared in person with Mr J Audley Quallo as her McKenzie Friend
Mrs Takiyah Simpson, Office of the Director of Public Prosecutions, for the Respondent

[1] The present judgment was circulated to the parties without a hearing.
[2] This appeal was argued at the same time as *Quallo-v-R,* Appellate Jurisdiction 2017: 26, the judgment in which case was also delivered on today's date.

Introductory

1. On July 12, 2016, the Appellant pleaded not guilty to a charge of speeding at 62 kph on June 2, 2016. Following a trial in the Magistrates' Court (Wor. Khamisi Tokunbo) on January 9, 2017, she was found guilty and received a fine of $500 and 7 demerit points. She appealed against her conviction on the following grounds which were set out in her Notice of Appeal:

    (1) The Learned Magistrate erred in relying on the evidence of the Police Officer who measured the Appellant's speed despite the fact that he was not trained to use the device in question;

    (2) The device used to measure the speed was not an "approved instrument" as required by the Road Traffic Act 1947;

    (3) The Learned Magistrate erred in allowing the trial to proceed without compelling the Prosecution to produce the operating manual for the device used to measure the Appellant's speed;

    (4) The Appellant ought to have received the benefit of any doubt in the absence of any evidence of speed from an approved device;

    (5) The Learned Magistrate erred by suggesting that the burden of proving speed lay on the Appellant.

Ground 1

2. The Appellant cross-examined PC Colin Paynter on his training for using the speed measuring device in question. The Officer admitted that he used a Pro Laser 3 device having been trained in 1997 on a different Pro Laser device. He insisted that his view of the Appellant's vehicle had been unobstructed. Earlier, in his evidence-in-chief, PC Paynter testified that he tested the device before using it and that he visually estimated the Appellant to have been travelling at 60 kph before the speed detection device measured the Appellant's speed as 62 kph

3. I find that the Learned Magistrate was entitled to accept the evidence of PC Paynter that he was sufficiently trained to use the Pro Laser 3 device (because it was similar to the Pro Laser device he had been trained to use), that the device accurately measured the Appellant's speed because it had been self-tested and because the Officer had an unobstructed view of the Appellant's vehicle.

4. This evidence was not contradicted by any other credible evidence in the sense that the Appellant did not adduce expert evidence capable of casting doubt on the ability of the Police Officer to operate a device which on the face of it was quite

simple to operate. At best she advanced a speculative argument that the Officer was not competent by reason of his training on an earlier generation of the device in question which was unsupported by any or any credible evidence. This ground of appeal fails.

Ground 2

5. Mrs Simpson submitted that this ground of appeal was based on a statutory definition of "approved device" (a 2001 amendment to the Road Traffic Act 1947) which had never been brought into force. In the event, this ground of appeal was not pursued.

Ground 3

6. The complaint that the Learned Magistrate erred in failing to adjourn the trial or stay the proceedings so as to compel the Prosecution to disclose the full operating manual for the speed detection device which was used was misconceived for two main reasons:

    (1) although the Crown did give pre-trial disclosure as if the Disclosure and Criminal Reform Act applied to the speeding case, sections 3(1) and 4(1) of the Disclosure and Criminal Reform Act 2015 impose a duty on the Crown to disclose either its case or unused material "*in matters that are triable either way or triable on indictment only*". There was no statutory duty to disclose the operating manual;

    (2) the Crown was, admittedly, under a common law duty to disclose any relevant material in its possession capable of undermining its case. However, Crown Counsel apparently supplied the Appellant with the only portion of the manual which the Police supplied to the Director of Public Prosecution's Office[3]. Not only was there no basis (apart from speculation) for the Magistrates' Court to find that the undisclosed portions of the manual contained material which potentially undermined the Prosecution case. There was no basis for the Court to find that adjourning the proceedings would have served any useful purpose and resulted in the manual being produced.

7. Where a defendant wishes to advance a technical defence as a means of challenging evidence which is routinely accepted by a court without challenge, it must be incumbent on that party to advance a positive case based on their own researches and/or expert evidence. The Appellant might perhaps have had a valid grievance if, having failed to obtain the manual from the Crown, she had asked for an adjournment in order to find the manual by other means. The Appellant would clearly have had a valid complaint if, having obtained the manual, the

[3] As what was disclosed was unhelpful in any event, the complaint that the manual extracts supplied were for a Pro Laser 4 (and not the earlier model actually used in the Appellant's case) was otiose.

Magistrates' Court had refused to permit her to cross-examine the Police witnesses on it: *DeCouto-v-Allan Cleave (Police Sergeant)* [1989] Bda LR 51 (upon which Mr Quallo relied).

8. A far more pertinent case for present purposes is a decision of the Court of Appeal for Bermuda which Mrs Simpson placed before the Court, *Bean-v-Peter Giles* [1991] Bda LR 11. In this case, where defence counsel had access to the manual and established that certain recommended tests had not been carried out, the Court of Appeal held that (a) proof of accuracy of the device was not legally required, and (b) whether the offence had been proved was ultimately a question of fact for the trial court to determine. Crown Counsel aptly relied, *inter alia*, upon the following passages in the Judgment of Harvey da Costa JA (at pages 3-4):

> "*It is perhaps useful to examine the general approach to the use of speed check equipment. The comments of Ormrod J in Kent v Stamps (1982) RTR 273 at p. 278 in relation to the Truvelo electronic trip wire equipment are apposite:*
>
> > *'The basic principle must be that the reading on the machine is evidence. It is very cogent evidence indeed, and in the vast majority of cases one would suppose that it was conclusive evidence. But we have not reached the stage when the reading on such a piece of apparatus as this has to be accepted as absolutely accurate and true, no matter what. There are all kinds of things in a case like this which might have gone wrong…The reading on the machine is, as I have said before, strong and should in most cases be conclusive evidence of the fact that the vehicle was travelling at a speed in excess of the limit. The justices would, and should be, extremely reluctant to reject that finding, although there may be circumstances in which they are entitled to doubt it. They will be very few and far between, and the justices must be careful not to allow somebody to run away with their judgment in these matters.'*
>
> *With regard to evidence of speeding by speed measuring devices Halsbury states (Vol. 40, 4th edn., p. 398)-*
>
> > *'Evidence of readings given by mechanical and electrical devices is admissible and it is not essential in law that their accuracy be proved.'...*
>
> *In our view, a reasonable interpretation of the provisions of the manual is that the moving test is optional; but be that as it may, it is not essential that the accuracy of the electrical device should be proved. The question is one of weight and the Magistrate as the trier of fact was satisfied that the radar gun was operating satisfactorily and he did not have any reasonable doubt.*"

9. In the present case the crucial finding on the accuracy of the reading of the laser device was as follows:

> "*I am satisfied that the laser device was self-tested both before and after use and that the results showed no operating errors…I do reject her assumption that the machine must have some error rate or that it was improperly used in the absence of its manual being produced.*"

10. With advances in technology over the last 25 years since the quoted pronouncements in *Bean-v-Peter Giles* [1991] Bda LR 11 were made, it is likely to be more difficult today to cast doubt on the accuracy of speed measuring devices, even where strict compliance with an operating manual is shown not to have taken place. This provides further general support for the conclusion that the complaint that the Learned Magistrate erred in refusing to stay the proceedings for disclosure reasons must be rejected.

Ground 4

11. This ground of appeal, also based on the assumption that the device used was not legal approved, was not pursued.

Ground 5

12. This ground of appeal was also without merit and was not seriously pursued. On a straightforward reading of the Judgment, it is clear that no misdirection as to the burden of proof occurred. The Judgment concluded with the following unambiguous words:

> "*In all the circumstances I am satisfied so that I feel sure that the Defendant was checked by laser travelling at 62kph on 2nd June 2016 as charged on South Shore Road Warwick and is therefore guilty as charged.*"

Conclusion

13. For the above reasons, the appeal is dismissed.

Dated this 26th day of May, 2017 _____

IAN RC KAWALEY CJ