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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

SCA # 22 of 1993

REGINA V. KIMBERLEE G. VANDERBOL

JUDGMENT

Mr. Hampson for the Appellant
Mr. Clarke for the Crown

SCHOFIELD J.

Kimberlee G. Vanderbol ("the appellant") appeals against her conviction in the learned Magistrate's Court on a charge of failing to provide a specimen of breath, contrary to section 62 (8)(a) of the Traffic Law 1973 as read with section 62(2) of that Law.

The prosecution case is that Woman Police Constable Fran General was on mobile patrol in West Bay Road on Friday 13th March, 1993, at 12:35 a.m. when she saw a motor car in front of her swaying from the centre line to the hard shoulder. She stopped the vehicle and the appellant was in the driving seat. The appellant denied that she had been drinking but W.P.C. General observed that her eyes were glossy and her breath smelled of alcohol. The appellant was arrested on suspicion of driving whilst intoxicated and after caution replied: "You are ruining my life". She did not complain she was ill.

The appellant was taken to the Police Traffic Department and handed over to Police Constable Garcia. When told a breath test would be conducted the appellant agreed to provide a specimen because, she said, she was not drunk. In the presence of W.P.C. General, Police Constable Garcia explained how the Intoxilyser machine works. The appellant was sitting in a chair and when she was called to the machine she said she felt light-headed. She leaned forward and fell out of the chair onto the floor. When

she got up the appellant said she wanted to vomit so W.P.C. General escorted her to the bathroom. The appellant put two fingers down her throat but failed to vomit.



The appellant was escorted back to the room where the Intoxilyser machine was located. P.C. Garcia told the appellant he would give her another opportunity to blow into the machine. She agreed to do so and repeated that the police officers were ruining her life. Again a breath test was requested and again P.C. Garcia demonstrated the use of the machine. The appellant sat on a chair next to the machine and again leaned forward and fell on the floor. The police officers went to assist her up and P.C. Garcia said: "The woman is playing tricks". The appellant denied that she was. The appellant did not blow into the machine and the time limit on the machine expired.

W.P.C. General then charged her with the offence she is facing and when cautioned the appellant said: "I can faint any time I want to. You people are ruining my life."

The appellant testified that she had been with a girlfriend all evening. The girlfriend had tried to self-administer an abortion and the appellant had been rendering first aid. Afterwards the appellant tried to locate her friend's boyfriend at Coconut Place. At no time that evening did she consume alcohol. As she drove from Coconut Place towards Eastern Avenue a Thermos flask of coffee which was on the back seat fell over and the coffee spilled. As she leaned back to right the flask her car swerved. As a result W.P.C. General pulled her over. Her breath did not smell of alcohol but she had been crying earlier in the evening.

When the breath test was requested the appellant was sick to her stomach. She had not eaten and had a rough evening. She felt light-headed as though she was going to vomit. As she rose to take the test one of the tabs of her high-heeled shoes came



off and she slipped to her knees. When she got back in the chair she asked to go to the bathroom to see if she could vomit. She tried to make herself vomit but W.P.C. General grabbed her and dragged her back to the room where the Intoxilyser machine was located. She was asked if she wanted to go to hospital and she said it would probably be a good idea. She was feeling very upset and sick. She was invited to blow into the machine and she did so but the police officers said she did not do it right. They told her she had refused to take a breath test and she said she had not.

Counsel for the appellant argues that the judgment of the learned Magistrate is unsatisfactory in that there was no analysis of the evidence as the circumstances demanded and the findings therein were unreasonable. As learned Crown Counsel does not support the conviction because he also regards the judgment as deficient I shall set out the judgment in full. It reads:

"In this case the Crown first called Woman Police Constable Fran General the investigating officer. She gave evidence in a forthright and believable manner and strongly impressed the Court as to the integrity of her account of the events.

Thereafter Police Constable Garcia the Intoxilyser operator gave evidence and spoke as with one voice with Woman Police Constable Fran General on the material aspects of the events which took place at the Central Police Station and at the Traffic Department.

The defendant gave evidence from the witness-box and called no witness in support.

Her demeanour struck the Court as that of a reckless witness determined to falsify the material aspects of the events which had transpired, in order to avoid the mandatory sanctions which follow on conviction on this charge.

On a detailed review of all the evidence in this case the Court found no sufficient reason to discard the Crown's version of these events, and in the end became convinced beyond reasonable doubt that that version was the correct and true one.

In the event the Court finds that the defendant by her conduct deliberately frustrated the attempts of Police Constable

Garcia to obtain a specimen on her breath for testing lawfully requested of her in the circumstances of this case.

She is accordingly adjudged guilty as charged."

A judgment should contain the point or points for determination, the decision thereon and the reasons for that decision (see Smith and Ebanks v. R 1988-89 CILR 162, at page 167). As was succinctly stated by Sir Hugh Wooding in Sylvan v. Ragoothan (1966) 11 WIR 36, a case before the Court of Appeal of Trinidad and Tobago:

"We cannot too strongly insist that (a judgment) should show an awareness of the salient issues, an assessment of the material evidence and an application of the relevant law."

Of course the assessment of the evidence should demonstrate a proper and fair approach.

The learned Magistrate determined this case on the basis of credibility of the witnesses, and indeed the case fell to be so decided. This Court may decide an appeal with reference to matters of fact as well as matters of law (see section 170 of the Criminal Procedure Code) and thus it has a duty independently to assess the evidence to ensure that the learned Magistrate did not err in his assessment of the evidence and did not fall into erroneous findings of fact. Nevertheless, a Magistrate has the opportunity of seeing and hearing the witnesses and of making an assessment of them, which is an opportunity denied to this Court on hearing an appeal. Any findings of fact the Magistrate makes upon that assessment should not lightly be disturbed. It is only necessary to repeat the much-quoted passage from the speech of Lord Sumner in The SS Hontestroom [1927] A.C. 37, 47:

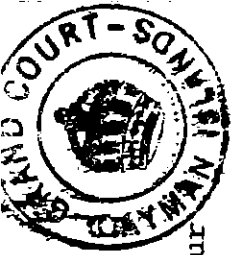
"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. ...not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to

use or has palpably misused his advantage, the higher Court ought not to take responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In The Julia [1860] 14 Moo. P.C. 210, 235 Lord Kingsdown says:

"They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty...We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong."

Counsel in this case have, however, pointed out that the learned Magistrate's judgment falls a long way short of the standard expected. It does not demonstrate, as it should, that he gave proper and fair consideration to the evidence as a whole. It is far from satisfactory for a judgment to say: "I believe the prosecution witnesses, I disbelieve the accused and therefore the accused is guilty." That is basically what this judgment says. There must be some demonstration in a judgment that the Magistrate fairly considered all aspects of the evidence, and in this case there is a body of evidence to consider. Proper reasons must be given for preferring some evidence to other evidence. In this case the learned Magistrate says that the appellant had the demeanour of a reckless witness without explaining how that demeanour was manifested in Court. One is left to ponder how the appellant demonstrated that recklessness from the witness box. The judgment does not leave this Court with the impression that the appellant's evidence was properly considered.

Furthermore, and perhaps more seriously, although the learned Magistrate gave lip-service to the correct burden and standard of proof to be applied in a criminal case, his judgment demonstrates



a different and incorrect approach. He speaks to the demeanour of the prosecution witnesses, that they appeared honest and forthright, and then to the demeanour of the appellant, that she appeared reckless and dishonest, and went on to say: ".....the Court found no sufficient reason to discard the Crown's version of these events....". It seems that the learned Magistrate considered the evidence for the prosecution, formed a view on that evidence and required the accused to displace that view. Of course the Magistrate is obliged to consider the evidence in its totality before forming a view on credibility. To hold up the prosecution version of events to be discarded or displaced if an accused passes muster is a shifting of the burden which is upon the prosecution to prove its own case and disprove any defence put forward by the accused.

The judgment does not demonstrate that the learned Magistrate gave proper and fair consideration to the evidence and adopted a correct approach on his assessment of it: the judgment does not demonstrate that there was a proper adjudication on the issues before the Court. I cannot therefore be satisfied that no substantial miscarriage of justice has occurred (see Smith and Ebanks v. R 1988-89 CILR (supra)). The appeal must succeed.

I have considered whether it is in the interests of justice in this case to order a retrial. There was evidence in the trial before the Magistrate upon which the appellant could have been convicted if such evidence had been properly assessed. However Crown Counsel does not urge a retrial and on balance I think he is right. The appellant has not sought to have her disqualification lifted pending appeal and has served more than five months of her twelve month period of disqualification. She has suffered the inconvenience and expense of one trial and an appeal to this Court. A further trial would be expensive for her and for the Crown. I think the interests of justice demand that matters lie as they fall.

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The appeal is allowed, the conviction is quashed and the sentence imposed upon the appellant is set aside.



Judge

Dated this 25th day of June, 1993

