

LLOYD CUNNINGHAM V. REGINA

Mr. Polack for the appellant.  
Mrs. Escalante for the Crown.

JUDGMENT

SCHOEFIELD J.

Lloyd Cunningham was convicted in the Summary Court of an offence of driving whilst under the influence of alcohol, contrary to section 61 (b) of the Traffic Law. He now appeals against that conviction.

The alleged offence took place on Cayman Brac. On Saturday the 18th February, 1989, at about 1:50 a.m. Police Constable Tibbetts was on mobile patrol and he observed the appellant driving a motor car. The car was swerving from one side of the road to the other so P.C. Tibbetts pulled the appellant over and asked him to get out of the car. When asked to stand up straight, the appellant stumbled. His breath smelled of alcohol and he was arrested on suspicion of driving whilst intoxicated.

At Cayman Brac Police Station, Police Sergeant Elliott, in the presence of P.C. Tibbetts, conducted a breath test on the appellant. Both officers testified that the reading on the machine represented a reading of 120 milligrams of alcohol in 100 millilitres of blood which is above the prescribed limit. When charged and cautioned the appellant said, "I don't see how two stout can drunk a man."

The original charge sheet read that the appellant had 190 milligrams of alcohol in 100 of millilitres of blood. During P.C. Tibbett's cross-examination by Mr. Polack an application to amend the charge from 190 milligrams to 120 milligrams was made by the prosecutor. I shall return to the circumstances of that application for amendment later. The application was granted and the accused was asked to plead to the amended charge. The appellant pleaded "not guilty" to the amended charge. Immediately thereafter Mr Polack objected to the charge as amended and, as a result of his objections, further amendments were granted. These amendments related to the licence number of the vehicle the appellant was driving and the inclusion of a date which did not appear on the original charge sheet. After the charge was so amended the court should have asked the appellant to plead to the charge as further amended. From the record the court did not do so. The first ground of appeal relates to that failure of the learned Magistrate to invite the appellant to plead to the amended charge.

Section 70(1) of the Criminal Procedure Code reads:

"70. (1) Where, at any stage of a trial it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration or addition of a charge, as the court thinks necessary to meet the circumstances of the case:

Provided that where a charge is altered, added or substituted as aforesaid, the court shall thereupon call upon the accused person to plead to the altered or new charge:

Provided further that in such case the accused person shall be entitled, if he so wishes, to have the witnesses (or any of them) recalled to give evidence afresh or to be further cross-examination by the defence, and in such last mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

It is argued for the appellant that failure to comply with the provisions of that section is fatal to this conviction.

In *Re Witt v. R* 1987 CLR 49 it was held that whilst section

62 (1) of the Criminal Procedure Code, the provision which requires the court to call upon a accused to plead to a charge when it is first put to him, is not mandatory in the sense that it is necessarily required that there be a formal arraignment on each charge, there had nevertheless to be some evidence that a plea of not guilty was either vicariously offered or tacitly conveyed on behalf of an accused before he could be tried on the charge. In that case the appellant had been tried for several offences, one of which had not been brought to his attention at the beginning of the trial and he had not been asked to plead to it. It was held that the conviction could not be upheld.

In the present case there was but one charge before the magistrate. The appellant was made fully aware of the contents of the charge and indeed when the charge was amended, he was made fully aware of the amendments. He pleaded "not guilty" to the charge when it was first put to him and pleaded to the charge when it was first amended. It cannot be said that there was any prejudice to the appellant by the learned Magistrate neglecting to put to him the charge as amended on the second occasion. The present case is far removed from the circumstances of De Wilt v. R. (supra). That the trial was to continue on a "not guilty" plea was tacitly conveyed by the appellant and his counsel.

The second ground of appeal is that the learned Magistrate erred in admitting into evidence the certificate on which the breath test instrument endorsed its findings as to alcohol content whereas such certificate was defective, and should have been excluded. The certificate itself was defective it is argued, and it was never proved adequately that the machine from which it came was an approved machine. In this regard Mr. Polack, for the appellant, makes reference to Police Sergeant Elliott's evidence that he turned on test 109 313 which he said was a measuring device to measure blood-alcohol levels. He then testified as to the manufacturer and place of manufacture of the machine. Mr. Polack argues that no reference is made to that number in the Gazette notice approving the instrument for use in these Islands. He also referred to the fact that Sgt. Elliott could not spell correctly the brand name of the instrument. However, from the totality of the evidence of Sgt. Elliott and P.C. Tibbetts

there is sufficient evidence to satisfy the court beyond doubt that the machine used by Sgt. Elliott was an approved instrument. I do not think it is in dispute that the certificate produced as Exhibit 2 was the certificate on which the record of that instrument was made on that particular day. If therefore there is any defect in the certificate itself that is not a question of admissibility but a question of the value or quality of the evidence. If the reading or any other part of the contents of the certificate are inaccurate then, as with untruthful evidence tendered viva voce, it does not render the evidence inadmissible, it merely renders it implausible. The appeal cannot succeed on the ground that the certificate was improperly admitted in evidence.

Ground 3 is that the verdict of the magistrate was unreasonable and /or unsafe as there was no evidence or no reliable evidence before the court as to the alcohol level in the blood of the appellant.

On the certificate, exhibit 2, under the heading which shows the percentage alcohol in the blood, there is a reading B 12. The capital letter B means 'Breath' and the 12 represents the amount of alcohol in the appellant's blood. When Sgt. Elliott was referred to the certificate in evidence he testified that it indicates a reading of 12. Mr. Polack for the appellant objected to the certificate being produced because, *inter alia*, he said the reading was twelve and not .12 as would be the case if the blood/alcohol level was that testified to by the police officers. That objection was rightly overruled and as I have stated above the actual reading is not a matter of admissibility. Mr. Polack still maintains his submission, however, that the reading is unreliable in that a reading of twelve represents a blood alcohol level which would render the appellant dead.

It is clear from the subsequent evidence of Sgt. Elliott that he read the certificate as representing the reading of 120 milligrams in 100 millilitres of blood and not 1200 milligrams of alcohol. So too did P.C. Tibbetts. To the left-centre of the column in which the recording is made there are large dots, which to my mind must represent percentage points. There is no merit in Mr. Polack's

argument that the reading was inaccurate or in any way defective so as to render the certificate unreliable. There is clear evidence from the certificate as testified to by Sgt. Elliott and P.C. Tibbetts that the reading represents 120 milligrams of alcohol in 100 millilitres of blood and not ten times that amount.

The fourth ground of appeal is that the verdict of the learned Magistrate was unsafe in that he allowed an interruption of defence counsel's cross-examination of Police Constable Tibbetts at a crucial time and in respect of a crucial part of the body of evidence.

I must say that this ground of appeal has given me some cause for concern. P.C. Tibbetts had testified as to the contents of the certificate and when he was shown the charge sheet, which read that the appellant had 190 milligrams of alcohol to 100 millilitres of blood, he was in some difficulty and began to hesitate. Mr. Polack should have been permitted to continue with his cross-examination without any interruption in that regard, but the record shows that the prosecutor rose to make an application to have the charge amended to read 120 milligrams of alcohol. Mr. Polack quite clearly feels aggrieved by this interruption because the learned Magistrate without further ado granted the prosecutor his amendment. It seems from the record that the prosecutor came to the rescue of the witness and was allowed to do so.

The correct course should have been for the prosecutor to have waited until the end of Tibbett's evidence or even the end of the whole of the prosecution evidence to make his application, instead of giving the impression that he was coming to the rescue of his witness. However, I have considered the record of proceedings in its totality and, whilst I confess to some concern on this point, I am unable to conclude that at the end of the day the situation as outlined above caused any prejudice to the appellant in the conduct of his defence or in the trial. P.C. Tibbetts had stated the reading of the machine in his evidence-in-chief long before Mr. Polack was putting him in difficulty in his cross-examination. Indeed the difficulty of the witness related not to the certificate or the evidence but to the charge sheet which was clearly defective. In the circumstance

therefore I do not feel that any injustice has been suffered by the appellant in this regard.

Ground 5 was not pursued.

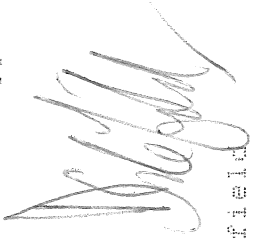
Ground 6 is that the verdict of the magistrate was unsafe as he failed to give any or adequate consideration to the arguments submitted on behalf of the appellant.

The judgment of the learned Magistrate did not comply with section 52 of the Criminal Procedure Code. It did not, for example, specify the offence of which and the section of the law under which the appellant was convicted. The judgment did not comply with the requirements of this court as to the contents of a judgment as set out in Ann Elizabeth Smith and Ian Martin Ebanks v. Regina, (S.C.A.'s 47/88 and 61/88).

A judgment should set out the point or points for determination, the decision thereon and the reasons for that decision. One of the points raised by Mr. Polack in his submissions was that the description of the Intoxilyser machine does not correspond with the type of machine which has been Gazetted as approved for the purpose of blood alcohol examination. Although in fact I do not consider that there is any merit in that submission the learned Magistrate should have dealt with it in his judgment and with the other points raised by the defence and did not do so. An insufficient judgment is fatal to the conviction unless the appeal court is satisfied that no substantial miscarriage of justice could have thereby occurred (see section 72 of the Criminal Procedure Code as amended).

Having considered the evidence in its totality and having carefully considered all of the submissions made by the appellant's counsel, I am satisfied that the evidence against the appellant was overwhelming. The defects in procedure and the neglect on the part of the magistrate to set out all the issues in his judgment, do not to my mind indicate that he failed to consider all the issues. I am satisfied that there has been no miscarriage of justice by the learned

Magistrate failing to deal with all the issues in his judgment. The case against the appellant really was overwhelming and there is no merit in this appeal, which is dismissed.



D. Schofield

Dated this 23rd day of July, 1990