CLARK v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, A.J.): June 6th, 1997

Road Traffic—driving under influence of drink or drugs—examination by doctor—where insufficient evidence that road crash caused by motorist's intoxicated state, necessary to ensure immediate medical examination

The appellant was charged in the Magistrate's Court with driving whilst under the influence of drink contrary to s.34(1) of the Traffic Ordinance.

The appellant collided with a building whilst he was riding his motor cycle. He admitted to the police that he had been drinking. There were no eye-witnesses to the accident and the evidence of the precise nature of the collision was unclear. The police offered the appellant the opportunity to be examined by a doctor but he refused. When he was eventually examined a few days later, he was found to be still suffering from shock from the accident and the doctor examining him provided evidence that the symptoms of shock exhibited shortly after the accident would be similar to the symptoms of intoxication. The appellant was subsequently convicted of driving whilst under the influence of drink under s.34(1) of the Traffic Ordinance and sentenced to a fine of £150 and disqualification from driving, although the Stipendiary Magistrate conceded that he could have been in a state of shock as well as intoxicated.

On appeal, the appellant submitted that his conviction was unsafe because (a) there was insufficient evidence to prove beyond reasonable doubt that he had been sufficiently under the influence of drink; and (b) the medical evidence that his condition shortly after the accident had been caused by shock and not by alcohol had been disregarded by the Stipendiary Magistrate.

The Crown submitted in reply that there had been ample evidence from which the Stipendiary Magistrate could have inferred that the appellant had been sufficiently intoxicated and on the appellant's own admission, he had been drinking prior to the accident.

Held, allowing the appeal:

In view of the medical evidence that the appellant had been suffering from shock, the Crown had not satisfied the burden of showing that the accident had been caused by the appellant's intoxicated state. Where there were no eye-witnesses, the police should ensure that a person suspected of driving under the influence of drink be examined by a doctor at the earliest opportunity and it was insufficient that in the present case they had merely offered him the opportunity to call a doctor. For this reason the conviction was unsafe and would be quashed (page 135, line 25 – page 136, line 6).

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.288: The relevant terms of this section are set out at page 134, line 44 – page 135, line 7.

S.P. Triay for the appellant;
C. Pitto for the Crown.

PIZZARELLO, A.J.: In this case I am assuming that the appellant was riding a motor cycle along Line Wall Road in a southerly direction. It is a fact that the motor cycle he was riding collided into a door set in the wall of Capurro's Garage on the western side of the road, *i.e.* the southbound lane, and was seen at a 45% angle to the north when the police came to the scene. He was attended to by two policemen. The policemen saw him astride his motor cycle and unsteady and they helped him to put it on its stand. The policeman noted that he smelt of drink, that the door was damaged and there was a scratch mark on the road running from Irish Place to the vicinity of the door. In reply to the police officers, the defendant admitted he had drunk a certain amount and on his being taken to Central Police Station, the sergeant on duty noted that his eyes were glazed and he smelt of alcohol. The defendant was told that he could call a doctor but he did not. At the trial, a statement of Dr. Shelley, who examined the appellant a few days later, was allowed in as evidence, and she stated that having examined the appellant, she found that he was still suffering from injuries to the head, that the collision would have left him seriously impaired and that the behaviour of the appellant while under such trauma would not be different to that which would be observed of a person under the influence of drink.

The appellant having been charged with driving whilst under the influence of drink or drugs contrary to s.34(1) of the Traffic Ordinance, the Stipendiary Magistrate found the offence proved and sentenced him to a fine of £150 and disqualification. The appellant appeals against conviction and sentence on the grounds that (a) the conviction was against the weight of evidence adduced at the hearing; (b) certain evidence, namely, the report of Dr. Joanna Shelley, M.A., M.B., B.Sc., dated October 15th, 1996 was improperly rejected, or insufficient or no weight was given to the report; (c) there was no evidence or no sufficient evidence to found the conviction; and (d) he was therefore not guilty of the offence and the conviction was in all the circumstances of the case unsafe and unsatisfactory.

The appeal is a hearing *de novo* on a perusal of papers. The appeal is governed by s.286 of the Criminal Procedure Ordinance. The powers of the court are set out in s.287, and s.288 provides:

> "The Supreme Court upon the hearing of an appeal against conviction shall allow the appeal if it thinks—

(*a*) that the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
(*b*) that the judgment of the magistrates' court should be set aside on the ground of a wrong decision of any question of law; or
(*c*) that on any ground there was a material irregularity in the course of the trial,

and in any other case shall dismiss the appeal . . . ."

It is trite that it is for the prosecution to prove its case and the most damning evidence against the appellant is his own admission that he had taken drink, and moreover that he gave different versions of his story at different times. The second most damaging evidence against him was the scratch mark from Irish Place to the scene of the collision and that would show his trajectory across the road. If it came from his motor cycle, then it might offer good evidence of the manner in which he was driving and thereafter by deduction that his driving was impaired by alchohol, this having been done before he was concussed.

I shall deal with the second point first. While the evidence is that the scratch mark was recent, there was no evidence that the mark was caused by the stand which was on the left-hand side of the motor cycle. The most that the police officers could say is that it was possible and consistent with the side stand having been left on the motor cycle. The mark was not noted to finish where the motor cycle was stood on the ground, nor was the mark examined as against the stand, or so it appears to me from the record.

As to the first point, it seems to me on a perusal of Dr. Shelley's statement that the appellant might have been sufficiently under the influence of shock to disentitle the police from questioning him. And he was sufficiently under that influence, it seems to me, to regard his answers with caution. Of course, from the police officers' point of view, they will not have appreciated that he was also suffering from shock: indeed, their view was that if he was concussed he would have lost consciousness. The learned Stipendiary Magistrate was right when he observed: "Counsel argued that behaviour was due to concussion. It may be partly true, but combined with the effects of excessive alcohol." But that, in the circumstances of this case, does not go to discharge what is the respondent's burden of proof where a person is suffering from shock. This is the sort of case where, in the absence of any eye-witness account of the manner of the appellant's driving before the accident, a doctor should have been called to examine the appellant. It is not enough for the police officers to tell the appellant he could call a doctor to examine him. What struck me when I read the appeal papers was whether in fact the appellant had suffered injuries to his head at the time of the accident and was he therefore under shock? There was a conflict of evidence in respect of the helmet he was or was not using that night. That was resolved, it seems to me, by the Stipendiary Magistrate in favour of the appellant by

his implied acceptance that concussion was involved and therefore that it was true that the appellant's head had come into contact with the door.

In my view, the verdict should be set aside on the ground that under all the circumstances of the case it is unsafe. It is time that arrangements were made to ensure that a doctor examines, at the earliest opportunity, a person suspected of committing this sort of offence.

Appeal allowed.