BAGLIETTO v. ATTORNEY-GENERAL

SUPREME COURT (Schofield, C.J.): March 6th, 1998

Road Traffic—driving under influence of drink—examination by doctor—medical evidence always desirable to prove presence of alcohol, especially if accused has pre-existing medical condition—police evidence admissible as to accused's demeanour but not as to fitness to drive—police should have automatic access to doctor in interests of justice

The appellant was charged in the magistrates' court with driving whilst under the influence of alcohol and driving without due care and attention.

The appellant was observed driving his car at speed and was pursued by a police car. During the chase, the appellant's vehicle swerved from side to side and overtook another vehicle on a pedestrian crossing. The two officers in the car gave evidence that when the appellant emerged from the car he seemed to be unsteady on his feet, had to lean against his vehicle and at one point, fell against one of the officers. Custody officers at the police station observed that he was being held up by the arresting officers and that he had difficulty in sitting on the bench in the cells. All the officers testified that he smelt of alcohol. He asked for his doctor to be called but the doctor could not be contacted.

The appellant pleaded guilty to driving without due care and attention but not guilty to driving whilst under the influence of alcohol. He denied having drunk more than the legal limit and stated that he sometimes had difficulty getting out of his car due to a disability sustained some years before. He denied having refused to be examined by any other doctor. The trial was adjourned for the purpose of calling the appellant's doctor but the doctor did not appear and could not be contacted in the time allowed by the court. When cross-examined, none of the police witnesses recalled noticing that the appellant had any disability. The appellant was convicted and was fined and disqualified from driving for a year.

On appeal the appellant submitted that (a) the court had erred in hearing his case in the absence of medical evidence and should have issued a witness warrant to secure the doctor's attendance; and (b) since there was no scientific evidence available to show that he had been drinking, and since the police were not qualified to say whether he had been drinking or was incapable of driving, the court should not have relied on their evidence to convict him.

The Crown submitted in reply that (a) the onus had been on the appellant's counsel to seek a further adjournment to allow the doctor to attend if his evidence was crucial, and in the absence of such an application, the court had acted properly in proceeding with the case; and

(b) it was entitled to rely on the observations of the police officers as to the appellant's appearance on the night in question and the court was at liberty to draw whatever conclusions were appropriate from that evidence.

Held, allowing the appeal:

(1) The justices had not acted improperly in proceeding to hear the appellant's case without hearing evidence from his doctor, since there was no application before them for an adjournment or for a witness warrant to compel his attendance (page 244, lines 1–8).

(2) However, evidence of the appellant's medical condition might well have been relevant to the court's deliberations, since no medical evidence was available to support the allegation that he had been drunk and none of the officers had noticed his physical disability. Although it was open to the court to consider their evidence as to the appellant's demeanour at the time of his arrest, their evidence on the issue of fitness to drive was not admissible. It was most unsatisfactory that the police did not have automatic access to a doctor when required, a situation which should be remedied as soon as possible in the interests of justice. In the circumstances, the conviction was unsafe and would be quashed (page 244, lines 11–34; page 245, lines 22–37).

Case cited:

(1) *R.* v. *Davies*, [1962] 1 W.L.R. 1111; [1962] 3 All E.R. 97, applied.

C. Finch for the appellant;
K. Colombo for the Crown.

SCHOFIELD, C.J.: The appellant, Charles Baglietto, appeared before the justices of the peace on November 5th, 1997, charged with driving a motor vehicle whilst under the influence of drink or drugs and driving without due care and attention. He pleaded not guilty to the first count but was convicted after a trial and was fined £100 and disqualified from holding or obtaining a driving licence for one year. On the second count he pleaded guilty but no separate penalty was awarded on that count in view of the decision on the more serious count. He now appeals against his conviction on the charge of driving a motor vehicle whilst under the influence of drink or drugs.

Constable Bautista and W.P.C. Sawyer were on duty in a police car in Coaling Island on February 10th, 1997. It was after 10 p.m. Their attention was drawn to the motor vehicle driven by the appellant because of screeching tyres and they gave chase to the vehicle up Queensway and into Rosia Road. Their evidence was that the appellant was driving his vehicle at speed and the police vehicle reached speeds of 90 k.p.h. during the chase. Furthermore, the appellant overtook another vehicle on

Queensway at one of the zebra crossings. The vehicle was swerving from side to side and at times its reversing lights went on. The appellant admitted that this driving amounted to careless driving. His vehicle was never checked by the police.

5 The police vehicle, which had given chase with beacons flashing, caught up with the appellant's vehicle past Piccadilly Gardens at the entrance to Rosia Road. The evidence of the two police officers was that when the appellant alighted from his vehicle he was unsteady on his feet, and that when he tried to stand he was leaning on the vehicle and at one 10 point fell on to Const. Bautista. He smelt of alcohol.

The police officers took the appellant to the police station where, according to the custody officer, Det. Const. Mackintosh, the appellant was being held up. The police evidence is that the appellant said he wanted Dr. Borge to be called, but Dr. Borge could not be raised and the 15 appellant said he did not want any other doctor. Sergeant Yome was also at the police station and saw the appellant taken into the cell area. He testified that the appellant was unsteady on his feet and when he sat on a bench he could not hold his position for long. He smelt of alcohol.

The appellant testified that he is a taxi driver. Two years before the 20 incident in question he had an accident in which a speedboat went over him. He sustained injuries to his leg and head which needed treatment in the United Kingdom. He had a tracheotomy which affected his speech. Although it is not recorded that the appellant said he was left with a limp after the accident, it was put to at least one police officer and was referred 25 to in the appeal hearing as if mentioned before the justices.

The appellant said that after work on February 10th, 1997 he went to play pool at the Taxi Club. He had one or two half pints of beer and then left for home. When he heard the police car he did not know it was for him to stop, and thought that the police officers simply wanted to pass 30 him. At the police station he asked for Dr. Borge but he did not come. He did not say that another doctor should not be called. He was not unfit to drive that evening and he was happy for the doctor to test him. He was not tested and no enquiries were made of his medical condition. He does not recall falling on Const. Bautista but he normally has trouble getting 35 out of his car.

At the end of the appellant's evidence Mr. Finch made an application to adjourn the case to enable Dr. Borge to be called to give evidence about the appellant's general medical disabilities. The relevance of this evidence is that the police officers could have mistaken his disabilities for 40 an impairment to his driving abilities due to intake of alcohol. That application was granted and a witness summons was issued for the appearance of the doctor. At the adjourned hearing Dr. Borge did not attend and the justices gave Mr. Finch half an hour in which to contact the doctor. The doctor could not be contacted and Mr. Finch made his final 45 submissions.

The first of two main grounds of appeal argued was that the justices erred in proceeding in the absence of Dr. Borge and that they should have issued a witness warrant to ensure the doctor's attendance at court. That argument would carry more force if Mr. Finch had applied for a second adjournment and had applied for the witness summons to be re-issued or for a warrant to issue but he admits he did not do so. The justices were thus left with no application before them and proceeded with the case. I find they did not err in that regard.

The second main argument is that the evidence of the appellant's incapacity to drive because of being under the influence of drink is unsafe and unsatisfactory. There is no medical evidence as to his physical condition and we are left with the evidence of four police officers none of whom is medically qualified.

It is accepted by the appellant that he drove carelessly but, of course, it was for the prosecution to prove that his driving was impaired because he was under the influence of drink. The best way the prosecution could do that was to call medical evidence in that regard. However, I understand that the police do not have access to a doctor. This is a most unsatisfactory state of affairs and it is hoped it will be remedied as soon as possible. It cannot be in anyone's interests, the police, the suspects, or the courts, for the police not to have access to a doctor who can examine those suspected of being under the influence of drink or drugs. In the present case it is not without significance that the appellant asked for Dr. Borge to be called. He must have been confident of the result of any examination on the night he was arrested to do that.

Be that as it may, it is open to the prosecution to bring evidence other than medical evidence which could lead the court to the conclusion that the defendant was under the influence of drink. The police officers were entitled to give evidence of their observations of the appellant and they did so. It was quite proper for them to testify as to his physical condition and the smell of alcohol on his breath. However they were not entitled to give evidence as experts that the appellant was under the influence of drink so that he could not have proper control of a motor vehicle. The position was clearly stated by Lord Parker, C.J. in *R.* v. *Davies* (1) as follows ([1962] 3 All E.R. at 98):

> "Counsel for the appellant, however, has taken further points. The first point is that certain evidence was wrongly admitted. The very first witness, Bombardier Diment, found these vehicles in collision, and he gave evidence as to a conversation which he had had with the appellant and how the appellant appeared to be behaving. He then said this:
>
> > 'I formed the impression that the [appellant] was under the influence of drink and at that time he was in no condition to handle a motor vehicle.'

> That is what he was allowed to say. The defence had strongly taken the stand that the witness should only be allowed to speak as to facts he had seen, because it was for the court to say what was the appellant's condition. Apparently, the judge-advocate advised the court that the witness could state the impression he formed as to the appellant's condition at the time he saw him if he was a witness who knew what was entailed in the driving of a car. It is to be observed that the witness was allowed to speak as to two matters which are quite distinct; one is what his impression was on whether drink had been taken by the appellant, and the second was his opinion whether, as the result of that drink, he was fit or unfit to drive a car. The court has come clearly to the conclusion that a witness can quite properly give his general impression whether the accused had taken drink. He must describe, of course, the facts on which he relies, but it seems to this court that he is perfectly entitled to give his impression whether drink has been taken or not.
>
> On the other hand, as regards the second matter, it cannot be said, as it seems to this court, that a witness, merely because he is a driver himself, is in the expert witness category so that it is proper to ask him his opinion as to fitness or unfitness to drive. That is the very matter which the court itself has to determine."

Sergeant Yome is recorded as offending that direction in that he testified that in his opinion the appellant was under the influence to such an extent that he did not have proper control. Mr. Finch objected to that evidence but there is no record that the justices ruled it inadmissible. We are left with the conclusion that they paid regard to it, for if they had determined that the evidence was inadmissible there would, no doubt, have been an appropriate record of the ruling.

There is also the uncontroverted evidence that the appellant was a man with physical disabilities which were matters not alluded to by the police officers in their evidence, except for one officer, who said he did not notice that the appellant walked with a limp. In these circumstances the absence of medical evidence carries more significance.

On a review of the record and the submissions, I consider the conviction for driving whilst under the influence of drink or drugs is unsafe and I allow the appeal, quash the conviction and set aside the sentence imposed thereon.

Appeal allowed.