[1999–00 Gib LR 383]

PLOUJNIKOV v. ATTORNEY-GENERAL

SUPREME COURT (Pizzarello, Ag. C.J.): January 19th, 2000

Road Traffic—driving under influence of drink or drug—examination by doctor—B.M.A.-recommended intoxication tests part of practice and procedure in Gibraltar law—performance of some but not all tests may suffice as evidence of impairment if blood test refused—doctor's estimate of blood-alcohol level inadmissible

Criminal Procedure—appeals—appeals against conviction—conviction unsafe or unsatisfactory if court has doubt that justice done, e.g. because evidence of co-accused treated as evidence against appellant

The appellant was charged in the magistrates' court with driving under the influence of drink or drugs.

The appellant was seen by police to be in the driver's seat of a car obstructing the road at a junction. The car moved off, stalled several times and veered from side to side of the road, narrowly missing some railings before the appellant was stopped by the police. He was observed to be unsteady on his feet and smelling of alcohol. He told the police he had had two whiskies. At the police station, he agreed to be examined by a doctor but refused to give a blood sample. The doctor concluded that he was unfit to drive and, at the appellant's trial, gave evidence that the appellant had smelled of alcohol, had slurred speech and a raised pulse, had been unable to walk in a straight line or to perform the "finger-to-nose" co-ordination test with his eyes shut. He doctor opined that the appellant had been twice over the UK legal alcohol limit at the time of his arrest.

The owner of the car made a statement that he had lent the car reluctantly to the appellant, whom he believed to be under the influence of drink, having shared a bottle of wine with him. He was acquitted of aiding and abetting the appellant.

The appellant denied smelling of alcohol or failing the co-ordination test, and attributed his failing the walking test to tiredness and an injured knee. Tiredness had also caused his erratic driving, as he had made two international flights during the day, missed lunch and attended a party. Furthermore, he was unused to driving a car with manual transmission. His Russian accent accounted for the reports that his speech had been slurred.

The Stipendiary Magistrate remarked during the trial on the evidence of the car owner and the doctor's assessment of the appellant's likely

blood alcohol level. He found the appellant guilty of driving under the influence of alcohol, stating that the results of the doctor's co-ordination tests—which he had consulted, having reserved judgment—sufficed to prove the charge when taken with the other evidence, including the appellant's demeanour.

On appeal, the appellant submitted that (a) the prosecution case had not been made out, since (i) the police observations were explained by the appellant's tiredness, his unfamiliarity with a manual car, his defective knee and his Russian accent, (ii) the co-ordination tests carried out by the doctor were not comprehensive and were acknowledged by the medical profession to be susceptible to widely varying interpretation, (iii) the doctor had drawn his conclusions from isolated factors rather than from an overall assessment of the appellant, and his request to perform a blood test showed that he was unsure of his findings, and (iv) the acquittal of the car owner indicated that the court was not satisfied of his awareness that the appellant was drunk; and (b) the conviction was unsafe or unsatisfactory, since (i) without a blood test, the doctor's opinion that the appellant had been twice over the limit was worthless and should not have been taken into account, and (ii) the car owner's evidence should not have been treated as evidence against the appellant.

The Crown submitted in reply that (a) the police evidence of the appellant's intoxication was not explained by tiredness, and was affirmed by the doctor, who had stated at the trial that the appellant's speech was slurred, not accented; (b) the co-ordination tests were only guidelines, which could be modified to suit the particular case; (c) the Magistrate had been aware of the existence of approved intoxication tests and had accepted that those performed were adequate; (d) the Magistrate had properly taken into account the appellant's unreasonable refusal to give a blood sample; (e) the car owner had been acquitted because he had not been present in court; and (f) the court should not lightly set aside the findings of the Magistrate, who had had the opportunity of seeing the witnesses.

Held, quashing the conviction:

(1) The appellant's conviction was not perverse or against the weight of the evidence, and the Stipendiary Magistrate had clearly been aware of the matters on which the Crown had to satisfy him in order to prove the appellant's guilt, namely, that the defendant was under the influence of drink and that his ability to drive was impaired as a direct consequence. The B.M.A.-recommended intoxication tests conducted by the doctor formed part of the practice and procedure of the court in drink-driving cases under Gibraltar law, and were presumably the same tests the Magistrate had consulted when he adjourned. He had accepted that the doctor had been unable to carry out all the possible tests, but had found them to be adequate. His consideration of the appellant's demeanour, if referring to his demeanour in the doctor's presence, was justified. There had been sufficient evidence on which to reach his conclusion (paras. 24–26).

(2) However, the conviction would be quashed on the ground that it was unsafe or unsatisfactory, since the court had a lurking doubt that justice had been done. The Magistrate might have taken into account the evidence of the car owner that the two men had drunk a bottle of wine together and that the appellant had been drunk when he borrowed the car (which was not evidence against the appellant), and the appellant's denial may have affected the Magistrate's assessment of his credibility. Furthermore, he might have given weight to the doctor's assessment, unbased on scientific evidence, that the appellant was twice over the UK legal blood-alcohol limit (paras. 27–30).

Case cited:
(1) *R.* v. *Cooper*, [1969] 1 Q.B. 267; [1969] 1 All E.R. 32, applied.

Legislation construed:
Traffic Ordinance (1984 Edition), s.34(1):

> "Any person who when driving or attempting to drive a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle shall be liable—
>
> (a) on summary conviction to imprisonment for six months and to a fine . . ."

S.P. Triay for the appellant;
A.A. Trinidad, Senior Crown Counsel, for the Crown.

1 **PIZZARELLO, Ag. C.J.:** This is an appeal against conviction for the offence of driving under the influence of drink or drugs contrary to s.34(1) of the Traffic Ordinance.

2 The facts relating to the incident, as far as I can make out, are that the car the appellant drove was seen by three police officers who were driving in a police vehicle along Europort Road in a northerly direction. The car was first seen when it was stationary in Europort Road at the "Give Way" sign at the junction of Europort Road with Europort Avenue. It was causing an obstruction, and an individual later identified as Mr. Gretchkine was standing in the highway alongside the car, by the driver's seat. The police vehicle's driver signalled for it to move on by flashing its lights. Eventually, Mr. Gretchkine left the side of the car and entered Europort Towers. The car was started up. It moved forward and stalled. This occurred on three occasions, giving rise in the officers' minds to the suspicion that they were in the presence of a drink-drive offence.

3 Sergeant Chichon alighted from the police vehicle, but before he reached the car it moved off, and he returned to the police vehicle and followed the car. He followed the appellant's car for a distance of about

100m. and no more, and the car was observed by all three officers to be driven unsteadily in that it strayed from side to side as it moved along.

4 The evidence of the police officers on this differs. Sergeant Chichon says that the car went to the other side, crossed the centre of road into the oncoming lane, then turned right to return into its lane and nearly collided with the fence by the pelican crossing on its right-hand side. Constable Chipolina says that the car swerved from its side into the centre and back again, avoiding collision with the railings. And Const. Morello, the driver of the police vehicle, said that the car veered to the left slightly, its tyres went on to the centre line, it then veered right and nearly collided with the railings by the car park.

5 The car park and the pelican crossing are in the same area. The police vehicle's beacons were switched on and the appellant turned off Europort Avenue to the right and stopped at Chilton Court. The driver was the appellant and he alighted. He was observed to be unsteady on his feet, smelled of alcohol, was swaying and could not keep straight. The appellant told Sgt. Chichon he had had two whiskies and that he was not the owner of the car.

6 Mr. Gretchkine was identified as the owner of the car and he made a statement to the effect that he had lent the appellant the car, although he had been reluctant to do so, but the appellant was his boss. Mr. Gretchkine also made a statement in writing to the effect that he thought he should not have lent his car, since the appellant was under severe alcoholic influence, but he could not refuse as the appellant was his boss. He also told Const. Morello that he and the appellant had drunk a bottle of wine between them.

7 Mr. Gretchkine did not give evidence in court and the statements he made with regard to the appellant are therefore not evidence against the appellant. When Mr. Triay examined the appellant upon Mr. Gretchkine's statement, that introduced the statement, but the court may only consider the appellant's reply.

8 After arrest, the appellant was taken to New Mole House and, with his agreement, a doctor was called. The doctor's evidence is that the appellant smelled of alcohol, his speech was slurred, his blood-pressure was 230/85, which, as I understood from the transcript, the doctor said was normal, and his pulse was 100 beats per minute, which is higher than the normal range of 60–90. He asked the appellant about any medical history and the appellant referred him to a knee operation in September. He asked the appellant to perform certain tasks, namely, walking along a straight line for a couple of metres. In respect of this test, the appellant did not fall but he had no balance. Another test was a finger-to-nose test with his eyes shut and stretched arms, and the appellant failed to do this.

The appellant was asked for a blood sample but he refused and gave as a reason that he was not in the habit of allowing someone he did not know to put a needle into him. In evidence, the appellant said that to his recollection he did not fail the nose test, and failed the walking test because of his tiredness and his knee.

9 The doctor's conclusion was that the appellant was unfit to drive. He examined the appellant at 3 a.m. and his opinion was that the appellant would have been in a worse state at the time of his arrest, two hours earlier. The longer one waits, the more alcohol is eliminated from the body.

10 Both counsel agreed that the prosecution has to prove that: (a) the defendant was under the influence of drink; (b) his ability to drive was impaired; and (c) the impairment was the direct consequence of the drink.

11 Mr. Gretchkine was charged with aiding and abetting the appellant and, notwithstanding his statement, the learned Stipendiary Magistrate dismissed the charge. Mr. Triay sought to draw comfort from this and said that that meant that the Stipendiary Magistrate was not satisfied that Mr. Gretchkine had been aware, or could reasonably have been aware, that the appellant was under the influence of drink, and if that was so then equally the Stipendiary Magistrate must have had a doubt. Mr. Trinidad, on the other hand, submitted that Mr. Gretchkine was acquitted because he was not present. Mr. Triay replied that in law presence was not required, so that could not be right and, in his submission, it added weight to his argument.

12 I do not consider that the acquittal of Mr. Gretchkine is relevant in this appeal. Each case has to be taken on its own, and while there is a certain nexus between the two—for instance, Mr. Gretchkine could not have been convicted unless the appellant also was convicted—that is not sufficient to bring any considerations relating to Mr. Gretchkine to this case.

13 Mr. Triay argued that the evidence of the appellant's bad driving amounted only to (a) that he started and stalled three times, and (b) that the car swerved as it moved along. That has to be coupled, as I understood him, with the Stipendiary Magistrate's findings that the police evidence did not amount to a great deal. Those circumstances in the context of this case, submitted Mr. Triay, have an innocent interpretation because the evidence of the appellant was that he had left the United Kingdom at 4.15 a.m. (UK time) on the morning of November 11th, 1999, had flown to Malaga, travelled from Malaga to Gibraltar, attended various meetings—*i.e.* seeing his lawyer and preparing to meet with the Chief Minister on November 12th—had skipped lunch and then, after 5.30 p.m., he had attended the party held near the place where he had been first seen by the police officers.

14 That evidence was not rejected by the Stipendiary Magistrate. In those circumstances, said Mr. Triay, it was reasonable to expect that the appellant must have been very tired and the mode of driving testifies to and reflects that tiredness. In his submission, while that might not have been prudent, if the bad driving was the reflection of tiredness—which, in his submission, it was—then it was not the consequence of drink. If there is this explanation and it is a reasonable explanation, the court should not draw the inference that drink caused the poor quality of driving. After all, on these matters a court can only draw an inference from the surrounding circumstances, and whilst an adverse inference might be properly drawn when there is no explanation for erratic driving, here there is one.

15 Furthermore, he submitted, the appellant is used to driving a car with automatic gears in the United Kingdom and has not been to Gibraltar for over a year. Again, that is evidence which was not rejected by the Stipendiary Magistrate and that means, first, that he is used to driving on the left—and that reasonably explains why his driving drifted to the left and he then had to correct it, and may have over-corrected in his tiredness when he went to the right and got close to the fence—and, secondly, because he is used to an automatic drive, the management of a gearbox would explain why the car stalled. He had only just got into a strange car. Mr. Triay asked me to look at the defendant's driving with these matters in mind, and to conclude that the bad driving was not due to drink.

16 As for being under the influence of drink, Mr. Triay submitted that that depends entirely on the doctor's view. This is because the police evidence on this is very weak at its best. The observations of the police officers are the swerving, the near collision with the fencing, the breath smelling of alcohol and the difficulty with balance. On those matters, there are reasonable explanations which the police officers did not know about and the smell of alcohol on breath is not evidence that a person is under the influence of drink so as to be unfit to drive. He points out that none of the police officers speaks in terms of slurred speech or blood-shot eyes, and the station officer is completely silent on anything which might point to the appellant's being under the influence of drink.

17 The doctor's evidence, therefore, is crucial and, while undoubtedly honest, it must be taken with caution, having regard to the British Medical Association's report of a Special Committee on *The Relation of Alcohol to Road Accidents* (1960), especially at 23:

> "Experiments have been made to find out how much reliance can be placed on a purely clinical examination (that is, without biochemical estimation of the concentration of alcohol in the tissues) as a means of determining the degree of impairment of function which alcohol produces. When doctors have examined the same individual on the same occasion under standard conditions, it

> has been shown that there is considerable disagreement in their findings. This is true not only of the various parts of their examination but also of their final conclusions. It must be emphasized, however, that this is no reflection on the clinical proficiency of the doctors concerned, and that the clinical examination in these cases is always essential for the determination of the individual's physical and mental condition. The available tests in the physical examination for assessing impairment of driving ability are, however, relatively unreliable, and the majority are not sensitive enough to indicate when the concentration of alcohol in the blood has reached a level at which direct tests of driving ability would reveal impairment to be present.
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> The first comprehensive experiment of this type was carried out in Sweden, where a study was made of the reports of seven different doctors, each of whom examined 100 subjects with varying concentrations of alcohol in the blood. The results revealed a wide discrepancy. At a blood-alcohol concentration of 100–150 mg./100 ml. one of the doctors judged only 43% as 'under the influence' whereas another found no less than 91% to be 'under the influence.' The discrepancies were more pronounced when single tests (on which the diagnosis was based) were referred to blood-alcohol levels. In the range of 150–200 mg./100 ml., one doctor found impairment in the 'finger-finger' test in 91% of the cases, whereas another found no impairment in that test. Alcoholic odour was found in 100% by one doctor and in only 16% by another; a staggering gait in 72% by one doctor and in only 8% by another; a slow reaction of the pupils in 83% by one and in only 6% by another."

18 Two more things. First, the slurred speech, which was not mentioned by the police officers, could well be the accentuation given by the appellant in his speech, as he is Russian, and, secondly, it is noteworthy that the doctor sought to obtain a blood sample for testing and that shows that the doctor was not certain of his finding.

19 Furthermore, says Mr. Triay, the intoxication tests recommended by the British Medical Association at Chapter III of *The Recognition of Intoxication* (1954, revised in 1958) were, to a large extent, not followed by the doctor. The Stipendiary Magistrate recognized that the doctor did not carry out all the tests. It is evident from the intoxication test that in the diagnosis, the examiner should be careful to base his opinion on a review of the results of the whole of his examination and not to draw conclusions from isolated factors. That, he submits, is what the doctor did, and the Stipendiary Magistrate—erroneously and in a flawed way—followed him, saying it was sufficient. But the Stipendiary Magistrate did not say what was sufficient.

20 In reply, Mr. Trinidad pointed out, first, that the intoxication tests are mere guidelines and, secondly, that it is not known if the learned Stipendiary was looking at these tests when he was considering his decision. If the Stipendiary and this court are looking at the same intoxication tests, it is to be noted that the tests provide specifically that the doctor may adapt the details to suit any particular case. The failure by the doctor to follow the tests to the very letter does not nullify any findings he may make and the Stipendiary Magistrate said it was sufficient in his opinion and that is enough to validate his judgment.

21 As for the tests, the test itself, Mr. Trinidad suggested, seems to have taken about half an hour and the doctor's evidence of the factors he identified substantiates his opinion that the appellant was under the influence, notwithstanding anything that Mr. Triay submitted. And, disagreeing with Mr. Triay, Mr. Trinidad said the doctor's evidence is not alone because the police evidence is also probative and something the Stipendiary Magistrate could take into account. What the police officers say shows that on a proper inference, the driving was impaired through drink, and not tiredness as the appellants' counsel would maintain. A tired person, he suggested, would not zig-zag along an empty road at that time of the night; there would have been no reason for it and there is no reasonable explanation for the manoeuvre both of the zig-zagging and the stalling.

22 Furthermore, the Stipendiary Magistrate was entitled to take into account that the defendant had agreed to be medically examined, yet refused to have a blood test when requested, and counsel submitted that it was unreasonable having accepted the doctor as a doctor for the purpose of an examination, to resile and not agree to have a blood test done.

23 Finally, Mr. Trinidad reminded me that an appellate court ought not lightly to interfere with the decision of the lower court which has had the advantage of seeing the witnesses.

24 In my opinion, I can look at the intoxication tests which form part of the practice and procedure of the court when dealing with drink/drive offences under our present law, which is the old law in the United Kingdom, and I am prepared to assume that the learned Stipendiary Magistrate was looking at the same tests when he reserved his decision in order to look at what tests were required. He adjourned specifically for that purpose and he would have found them in Wilkinson, *Road Traffic Offences*, 2nd ed., Appendix II, at 249–254 (1956). When he came to deal with the appellant, he did say that the doctor did not carry out all tests but that he did carry out some tests, and that suggests to me that the Stipendiary was perfectly aware that these intoxication tests existed and, as I say, are the same tests that are now before this court.

25 It is wise to remind myself that the standard of proof in a criminal matter is beyond reasonable doubt. It seems to me that there was sufficient evidence for the learned Stipendiary Magistrate to come to the conclusion that he did. As for Ground 1 of the appeal, the conviction was not perverse or against the weight of the evidence and Grounds 2–4 are not made out. The short note of the Stipendiary Magistrate's reasoning shows that he was alive to what was required of him.

26 I have some difficulty with the last words "and general demeanour." Does this remark relate to the appellant's behaviour in the doctor's presence, or to the appellant's demeanour at the trial (which would help the Stipendiary Magistrate in coming to a conclusion on such matters as the credibility of the appellant)? As for the first possibility—demeanour in the presence of the doctor—while it appears to be correct to say, as Mr. Triay does, that the doctor limited his tests to two, the doctor did say that he could not perform other tests of co-ordination and that he was aware of the appellant's slurred speech, which the doctor said was not the result of a foreign accent but of not talking in the proper way. If that is what the Stipendiary Magistrate refers to as general demeanour, that suffices. As for the alternative—demeanour in court—the appellant contradicted the doctor's finding that the appellant did not touch his nose. He is recorded as saying: "I think I did not fail the nose test. The doctor said I failed." He contradicted the doctor's finding that he smelled of drink: "I disagree with the doctor that I did smell of alcohol." That conflicts also with the evidence of the police officers.

27 The last ground of appeal is that the conviction it is unsafe and unsatisfactory. I was referred to the case of *R.* v. *Cooper* (1), the headnote to which in *The All England Law Reports* states ([1969] 1 All E.R. at 32):

> ". . . [W]here there is an appeal against conviction on the ground that . . . it is unsafe or unsatisfactory, the [court] must in the end ask itself a subjective question, viz., whether it is content to let the matter stand or whether there is a lurking doubt in the court's mind which makes it wonder whether an injustice has been done . . ."

28 On this point, two matters cause me difficulties. The first is: What effect did the "evidence" of Mr. Gretchkine have on the learned Stipendiary Magistrate's decision? As my view is that the evidence of Mr. Gretchkine was not admissible against the defendant except to the extent that I have mentioned, the remark from the Bench that "Mr. Gretchkine said you drank wine," shows that Mr. Gretchkine's evidence *was* taken on board to some extent by the Stipendiary Magistrate, and the appellant's denial might have affected the Stipendiary's judgment as to his credibility.

29 The second matter was thrown up by the question of the blood test. The doctor sought to opine that the appellant was twice over the UK legal limit of 80 mg. (this without verifiable scientific evidence) and so assessed the appellant ("I think 160"). That, of course, is not Gibraltar law and might and should have been disregarded by the learned Stipendiary Magistrate, but he does not appear to have done so, as shown by the interchange between himself and the defence: "Doctor said he was double the UK limit." That seems to have been fixed in his mind, and the question I ask myself is: What bearing might that have had with his final decision? In my view, if it had played any part that would have been wrong. However, it is recorded that the learned Stipendiary Magistrate did say that "I do not think the doctor has to do a blood test," so he may have put that consideration out of his mind. But I am not sure.

30 Not without some doubt, I have come to the conclusion that this conviction is unsafe and I shall quash it.

Appeal allowed.
