

JERSEY / JUDGMENT

Sutherland -v- AG [2014]

JRC 149 (29 July 2014)

[2014] JRC 149

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JUDGMENT

THE commissioner: 1. On 23 rd April, 2014, the Court dismissed the appellant's appeal against his conviction before the Magistrate's Court on 16 th January, 2014, of driving his Range Rover motor car on the road in Grouville on 1 st September, 2013, having consumed so much alcohol that the proportion of it in his breath exceeded the prescribed limit, and this in contravention of Article 28(1)(a) of the Road Traffic (Jersey) Law 1956 ("the Road Traffic Law"). We now set out our

reasons.

2. The following basic facts were not in dispute at the appellant's trial. In the early evening of Sunday 1 st September, 2013, he drove his Range Rover to Checkers Express on La Rue a Don, Grouville, where he purchased some items. He then drove the short distance along La Rue de la Ville es Renauds towards the Pembroke Pub. A member of the public, who had seen him at Checkers Express and followed him along the road in his car, phoned the police as he was concerned that the appellant was acting as though drunk. 3. The Pembroke car park was full and so the appellant drove the short distance to the house of his friend, Mr John Donaldson, where he parked his car. It was in dispute whether he then went directly to the Pembroke Pub or first entered Mr Donaldson's house but it was not in dispute that he went to the Pembroke Pub where he ordered and consumed a double vodka and coke. 4. The police, responding to the call from the member of the public, and not finding the appellant's car in the Pembroke car park, went first to his home address before returning to the pub where they found him. He later provided two samples of breath which showed 109 micrograms of alcohol in 100 millilitres of breath, substantially over the limit of 35. 5. Article 33(2) and (3) of the Road Traffic Law provides:- "(2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by or taken from the accused shall, in all cases (including cases where the specimen was not provided or taken in connection with the alleged offence), be taken into account, and subject to paragraph (3), it shall be assumed that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen. (3) The assumption described in paragraph (2) shall not be made if the accused proves - (a) that the accused had consumed alcohol before providing the specimen or having it taken, and (i) in relation to an offence

under Article 26, after the time of the alleged offence, or (ii) otherwise, after the accused had ceased to drive, attempt to drive or to be in charge of a motor vehicle on a road or other public place; and (b) that had the accused not done so, the proportion of alcohol in his or her breath, blood or urine would not have exceeded the prescribed limit and, if it is alleged that the accused was unfit to drive through drink, would not have been such as to impair his or her ability to drive properly." 6. The onus was therefore upon the appellant to disprove the assumption in Article 33(2) by proving on the balance of probabilities that he consumed alcohol before providing the specimen and after he had ceased to drive and that, had he not done so, the proportion of alcohol in his breath would not have exceeded the prescribed limit. 7. In his interview with the police, the appellant said that having parked his car in Mr Donaldson's property, he went straight to the Pembroke Pub, where he had consumed at least six or eight double vodkas and coke. He gave the same explanation to his lawyer, Advocate Julian Gollop. Advocate Gollop commissioned a report from Mr Nicholas Hubbard, the official analyst to the States of Jersey, which concluded that even if he had consumed this amount of vodka, he would have had a breath alcohol concentration in excess of the legal limit at the time he was driving. 8. The appellant then changed his account, saying that having parked in Mr Donaldson's property, he went in and drank a large quantity of his own vodka which he kept there, as confirmed by Mr Donaldson. He said in evidence that he had consumed a quarter of a litre of 50% vodka, which is the equivalent of ten shots or measures of vodka, with a dash of coke. Mr Donaldson then gave him a lift to the Pembroke Pub where he ordered the double vodka and coke. 9. A subsequent report from Dr Graham Mould, a consultant in Pharmaceutical Forensic Toxicology, and a joint statement by Dr Mould and Mr Hubbard confirmed that if this scenario was accepted, then his breath or blood alcohol concentration would have been below the legal limit for driving a motor vehicle at the relevant time. They both agreed that the police breath test was higher than the result estimated by them based on this scenario, making it likely that the appellant had drunk more than he was stating. 10. The difficulty for the appellant lay in evidence as to timings that were formally admitted by him pursuant to Article 3 of the Criminal Justice (Evidence and Procedure)(Jersey) Law 1998 . Article 4 of that Law provides:- "4. Effect of admission (1) An admission of a fact under Article 3 by a party in any criminal proceedings shall be conclusive evidence in those proceedings of that fact, as against that party". (emphasis added) (2) An admission by a party under Article 3, for the purpose of proceedings relating to any matter, shall be treated as an admission by that party for the purpose of any subsequent criminal proceedings relating to that matter." 11. The admissions were based upon witness statements provided to the defence by the prosecution in relation to the following:- (i) CCTV footage from Checkers. (ii) The police record of the timing of the call from the member of the public. (iii) The timing of the till receipt for the double vodka consumed at the Pembroke Pub and the evidence of the barmaid who served the appellant (taken a mere hour after the event). (iv) The evidence of the police officer who attended at the Pembroke Pub. 12. As a consequence of the admissions, those witnesses were not called at the trial. 13. The admissions were as follows:- "(1) ... (2) ... (3) At approximately 18.38 hours Mr Sutherland drove J84712, a green Range Rover ("the Vehicle") to the Checkers

Express on La Rue a Don, Grouville ("Checkers Express"). Mr Sutherland entered Checkers Express and purchased some items. (4) At approximately 18.44 hours Mr Sutherland left the Checkers Express and drove the Vehicle onto La Rue a Don and then along La Rue de la Ville es Renauds towards the Pembroke Pub. (5) At approximately the same time a member of the public contacted the Police Control Room to report concerns about a male at Checkers Express acting as though he was drunk. The male had just left Checkers Express and was driving the vehicle. The member of the public followed the vehicle along La Rue de Ville es Renauds and saw him pull into the car park of the Pub. (6) ... (7) At approximately 18.49 hours, Mr Sutherland entered the bar of the Pub and purchased and drank a double Smirnoff Red and a can of Coca-Cola from a barmaid in the Pub, Iwona Wawrzen. He paid the total of £6.55 in cash and used his Randalls Loyalty Card. This transaction is recorded on Exhibit GR/01/11/13/01. (8) Mr Sutherland did not purchase or drink any other alcohol after the double Smirnoff Red and can of Coca-Cola. (9) Other than the double Smirnoff Red sold to Mr Sutherland at 18.49, the Pub did not sell any other double vodka between 18.30 hours and 19.30 hours. (10) At approximately 18.55 hours PC 384 John Gibson was directed to Checkers Express and then subsequently to the Pub to locate the vehicle. At approximately 19.05 hours PC Gibson arrived at the Pub but was unable to locate J84712. PC Gibson left the pub to try to locate the vehicle at Mr Sutherland's home address; having been unable to do so PC Gibson returned to the pub. (11) At approximately 19.20 Hours PC Gibson located Mr Sutherland in the bar of the pub. (12) Once outside PC Gibson explained that he had received information that Mr Sutherland had been driving a green Range Rover a short while before. Mr Sutherland said that he had not and that his friend "Donaldson" had the vehicle. Mr Sutherland did not elaborate further or confirm the location of the Range Rover. (13) At approximately 19.25 hours Mr Sutherland was lawfully arrested and cautioned and transported to Police Headquarters. (14) ... (15) ... (16) At approximately 21.17 hours Mr Sutherland provided two samples of breath the lowest provided at 21.18 hours showed 109 micrograms of alcohol in 100 millilitres of breath. (17) ..." 14. The hearing in the Magistrate's Court was before Assistant Magistrate Mr Peter Harris, and it is helpful to set out his review of the evidence and his decision:- "Review of the evidence The specimen provided by the defendant measured 109 mcg in 100 ml of breath. The crucial question is how much did the defendant consume after driving had ceased and before the specimen was provided? The admissions place the defendant at Checkers Garage, Grouville, driving his car, at 18.44 hours on 1st September, 2013, and at the Pembroke at 18:49 hours that same day. He admitted driving from the garage to the Pembroke and then on to Mr Donaldson's house. The evidence of the defendant as to the amount and type of alcohol consumed at the Pembroke was consistent with the information provided by Mr Reid. This was evidently after driving had ceased. The version of events given by the defendant to the Police was untrue and the defendant accepted this when challenged in Court. Today he put forward a wholly different version. I am asked to accept that he left the Checkers garage at 18:44 hours having drunk no alcohol during the day, drove to the Pembroke, entered the car park but, finding no spaces, left and drove to Mr Donaldson's house, parked, entered and poured himself a drink comprising a quarter litre of 50% vodka, adding just a splash of coke, drank it, left in Mr

Donaldson's car, having a lift back to the Pembroke where he walked through the bar before he ordered a drink at 18:49 hours. I find it infeasible for that to have happened in close to five minutes and do not accept he had anything to drink at Mr Donaldson's house. This is of course the position that the defendant maintained in his police interview. His evidence does not explain the shortfall in his expert's calculation and this further damages his credibility. Superficially Mr Donaldson's evidence is more credible, saying that the defendant was at his house for some 10-15 minutes and that they chatted whilst Mr Donaldson finished his coffee and got ready to go out to see his children, all this while the defendant drank his vodka. But that timing is of course fundamentally flawed as there was no such time available between the two agreed markers and it is wholly at odds with what the defendant said in the police interview and not consistent with what he said in evidence. Also, the estimated time of arrival was some 10 minutes after his known presence at the Pembroke, or at best very shortly after. The evidence of Mrs Sutherland adds little to the case as she had no knowledge of the evening's events until after the defendant had been arrested. The prosecution did not put forward that the defendant drank at the Pembroke that afternoon and it is not for them to prove what or when he drank. Decision The key elements of the offence were not challenged by the defendant and thus, on the basis of the clear admissions and the evidence that I heard, I am in no doubt whatsoever that the high standard required to prove the substantive offence has been satisfied. Further, I am not persuaded to any degree that even approaches satisfying the civil standard that Mr Sutherland drank the stated measure of vodka at Mr Donaldson's house after driving, but before providing the sample of breath at Police Headquarters. There was no suggestion that the double vodka and coke consumed at the Pembroke would be sufficient to rebut the assumption in Article 33(2) and accordingly he clearly fails in his submission that the assumption should not apply and I find him guilty of the offence. PCH (16.01.14)" Grounds of appeal 15. In his notice of appeal dated 14 th February, 2014, the appellant put forward the following general grounds of appeal:- "1) The decision of the Magistrates was contrary to the weight of the evidence; 2) Insufficient weight was given to the evidence of John Donaldson, which was discarded due to emphasis on the timings stated in the admissions; 3) I had not consumed alcohol prior to driving at the time in question; 4) A number of admissions were made that were inappropriate, the full meaning and significance of which I did not appreciate at the time. Undue weight was placed on these as opposed to the oral evidence; 5) The Magistrate drew the wrong conclusions and inferences from the evidence." 16. At the hearing, Advocate Nicholls candidly conceded that on the basis of the admissions, a conviction was inevitable. Indeed, he said he had no criticism of the decision of the Magistrate based on the admissions. The essence of the appellant's case was an attack upon the competence of his defence lawyer, Advocate Gollop, who Advocate Nicholls said should not have made the admissions, and should have probed the evidence as to the timings. 17. As Advocate Nicholls pointed out, the precise timings were as follows (quoting from Advocate Nicholls' skeleton argument):- "a) The CCTV from Checkers showing the appellant driving his car out of the forecourt, which was timed at 18:44:46; b) The telephone call from the member of the public, starting, according to the audio recording, at 18:48:43, with the caller stating he was watching the

appellant getting into his car at Checkers; and c) The till receipt from the Pembroke showing the purchase of a double vodka and coke, timed at 18:49:21." 18. Thus, the appellant is seen driving out of Checkers some 4 minutes before the member of the public says he was watching him getting into his car at Checkers. The timing of the call to the police shows that the appellant was reported to be driving into the Pembroke Car Park at 18:49:48 and ordering a double vodka some 38 seconds later, which cannot be correct. Advocate Nicholls submitted that the timings were plainly contradictory and none of this evidence could be relied on evidentially. If the admissions had not been made and these timings probed at trial, the Assistant Magistrate would have been left with the evidence of the appellant and John Donaldson, which would have been more than sufficient to displace the assumption. 19. As Advocate Byrne, for the Attorney General, pointed out, the second statement from the engineer showed that the timings on the Checkers CCTV were 5 minutes slow, so that the adjusted time would be 18:49, which accords with the timing of the phone call to the police made by the member of the public, but in any event, the admissions made were all "approximate" timings creating an agreed and reasonable timeframe for the sequence of events; not precise timings. 20. In *Vekaplast v T A Picot (CI) Limited and Vekaplast Windows (CI) Limited*

[1989] JLR 269, it was held that the Court had a discretion to grant leave to appeal if it was satisfied that there was prima facie evidence that an error had been made in the lower Court, in the sense that something had clearly gone wrong in that Court:- "Although this was wide enough to include the alleged error of counsel in making a concession he was not authorised to make, the court was not satisfied that evidence had been adduced to show that such an error had been made" 21. In *Lewis, Christmas, Foot and Cameron v AG*

[2013] (1) JLR 325, the Court of Appeal held:- "(14) The first and fourth appellants' allegations of incompetence against their trial advocates would be dismissed. When considering such allegations, the issue for the court was not a qualitative assessment of ineptitude but rather whether the appellant had shown that the alleged incompetence rendered the verdict unsafe. Decisions made by counsel in good faith and, where appropriate, after due discussion with the client, would not, without more, meet this test even if the Court of Appeal disagreed with them. None of the failings alleged by the first appellant against his trial advocate called into question the justice of the first appellant's convictions. In any trial, an advocate must have a wide margin of discretion to conduct the case as he saw fit. Strategy and tactics necessarily varied between advocates. It was not for an appellate court to second-guess their choice of strategy and tactics unless what an advocate did, or failed to do, could be said with confidence to have had a definite effect on the verdict." 22. In our view, there had been no failings on the part of Advocate Gollop. On the contrary, his two affidavits with accompanying exhibits comprising, inter alia, detailed attendance notes demonstrate a very thorough approach. In particular, it is clear that the admissions were discussed with the appellant in detail, admission by admission, and agreed by him. Furthermore, as Advocate Byrne said, there was ample evidence to support the making of

those admissions. 23. The admissions were conclusive as against the appellant and there can, therefore, be no criticisms of the Assistant Magistrate, who heard the oral testimony of the appellant and Mr Donaldson, reaching the decision he did; as indeed conceded by Advocate Nicholls. 24. Article 5 of the Criminal Justice Law provides:- "Withdrawal of admission With the leave of the court, an admission under Article 3 may be withdrawn - (a) in the proceedings for the purpose of which it was made; or (b) in any subsequent criminal proceedings relating to the same matter." 25. Despite this provision being raised for consideration at the appeal hearing, there was no application to withdraw the admissions and such an application would have been refused, as in our view, the admissions were properly made. Of particular significance, as Advocate Byrne said, was the evidence of the timing of the till receipt at the Pembroke Pub and the evidence of the barmaid taken only an hour after, which taken within the timeframe of the appellant's departure from Checkers made the appellant's evidence inherently implausible. We heard nothing which called into question the justice of the appellant's conviction and we therefore dismissed the appeal. Authorities Road Traffic (Jersey) Law 1956. Criminal Justice (Evidence and Procedure)(Jersey) Law 1998. Vekaplast v T A Picot (CI) Limited and Vekaplast Windows (CI) Limited

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