IN THE CAYMAN ISLANDS COURT OF APPEAL

Criminal Appeal No. 40 of 1999
Indictment No. 54/97

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MICHELLE EVANS

Appellant

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Rt. Honourable Mr. Justice P. T. Georges, J. A.
The Honourable Mr. Justice I D. Rowe, J. A.

Mr. Clyde Allen instructed by Brooks & Brooks for the Appellant.
Ms. Jane Rowley, Crown Counsel, for the Respondent.

May 1st and 5th 2000

REASONS FOR DECISION

ROWE, J. A.

Michelle Evans, the appellant herein, was driving a Ford Thunderbird motor car along North Church Street, George Town, Grand Cayman, sometime after 1:00 a.m. on Saturday August 17th 1996 when it crashed into a utility pole and was extensively damaged. The only passenger in that car, Jennifer DaCosta, received numerous head injuries including injuries to the right side of her neck, a fracture of the skull, and multiple contusions of the right frontal, temporal and parietal lobes

of the brain. She died of craniocerebral trauma. The appellant was charged with causing the death of Ms. Jennifer DaCosta by dangerous driving.

The case was tried before Douglas J. and a jury. The jury returned a verdict of guilty and a sentence of two years imprisonment and disqualification from holding a driver's licence for six years was imposed upon her. She appealed against her conviction and sentence. At the conclusion of the appeal, we allowed the appeal against conviction, quashed the conviction, set aside the sentence and in the interest of justice we ordered a new trial. The reasons which moved us to allow the appeal are set forth herein.

Jennifer DaCosta was a visitor to Grand Cayman. The appellant was her friend. They decided to have an evening of celebration prior to Jennifer's return to the United States. On the night of August 16th 1996 the appellant and Jennifer went to Queen's Court Plaza about 9:00 p.m. The appellant played pool with her sister while Jennifer watched. The appellant had a drink to toast Jennifer on her birthday which she had recently celebrated. It was not stated what drink was then consumed. The two women then went to Sharkey's Night Club at the Falls Shopping Plaza. There the appellant danced until after midnight. The appellant admitted that she drank a vodka and orange juice at about 11:00 p.m. and another vodka and orange juice at about 12:15 a.m. The appellant as the driver, and Jennifer as the passenger, left the night-club intending to drive to Burger King to buy hamburgers. It was on this journey that the vehicle crashed into the utility pole.

There were three limbs to the prosecution's case. It had rained in George Town that day and there were pools or puddles of water in the road. The road was generally wet. A motorist who was

driving in the opposite direction to the appellant noticed that her car was being driven on his side of the road but she regained her correct driving side before the two vehicles passed each other. Something caused this other driver to look back in his rear-view mirror and he observed the crash. From the damage which was done to the Ford Thunderbird, the police estimated that the car was travelling about 40 mph when it collided with the utility pole, in an area where the speed limit is 25 mph. A blood specimen was taken from the appellant and it was chemically analyzed to determine the presence or otherwise of alcohol in the blood. The prosecution relied upon the evidence of the analyst as to the blood alcohol results in the presentation of its case as to dangerous driving.

Although Mr. Allen filed and argued a number of grounds of appeal, we find it necessary to refer only to Ground 4. In summary form, this was a complaint that the learned trial judge misdirected the jury as to the manner in which the defence could challenge evidence of blood alcohol presented by the prosecution. Evidence had been led that a specimen of blood had been taken by a police officer from the appellant at the hospital during the night at a time when the appellant was either unconscious or semi-conscious and was not competent to give her consent. That blood sample was analyzed at the hospital. The actual process of analysis was performed by Ms. Colleen Duggan-Williams, a chemist employed by the hospital, but the Certificate of Analysis was signed by Ms. Cathy Gomez, the gazetted officer, pursuant to the provisions of the Road Traffic Law 16 of 1973. The analysis showed that the blood sample taken from the appellant contained 181.6 milligrams of alcohol in 100 millilitres of blood. This presented nearly twice the legal limit for alcohol in the blood under which a person may be in charge of a motor vehicle on the road in the Cayman Islands.

Various submissions were made by Mr. Allen as to admissibility of the blood alcohol evidence. He said that the sample was illegally obtained without the consent of the appellant or her relatives. He submitted that there was no credible evidence as to who received the specimen at the hospital and who performed the chemical analysis of the specimen, of the date when the specimen was delivered to the hospital, and of the integrity of the analytic process. The defence adduced evidence from Dr. John Obafunwa, who was the government pathologist and laboratory director at the George Town Hospital. His credentials included Bachelor of Surgery, Fellow of the Royal College of Pathologists of Nigeria, Fellow of the West African College of Pathologists, Diploma in Medical Jurisprudence – UK, and Member of the Royal College of Physicians and Surgeons. Dr. Obanfunwa's evidence was that he had been asked by the Chief Medical Officer of the George Town Hospital to review the hospital chart of the appellant because there were two blood alcohol analyses relating to her which appeared inconsistent with each other. On checking the chart, Dr. Obafunwa said he observed that there was a notation that a blood specimen had been taken from the appellant at the hospital about 12 hours post-accident and that the result was 13 milligrams of alcohol to 100 millilitres of blood.

Dr. Obafunwa gave as his opinion that the average range of excretion of blood alcohol was between 10 and 20 milligrams percent per hour. The upper limit was assumed for heavy drinkers while the lower end of the scale was reserved for social or very mild drinkers. He gave as his opinion that if a person who is a social drinker had a blood alcohol level of 181 at 3:00 a.m., that person would be expected to have a blood alcohol level of 100 at 11:00 a.m. Dr. Obafunwa said that in his opinion a person would have to consume between 13 and 14 drinks in a 3-4 hour period to have a blood alcohol level of 181.

The learned trial judge directed the jury that there were only two methods by which the defence could challenge the evidence of the prosecution as to the blood alcohol level, to wit, by producing the result of his own sample or by showing that the sample tested did not come from him or was a mistake. At pages 28 to 30 of the summing up the trial judge instructed the jury that:

"But, when a blood specimen or the report of a blood specimen is being challenged, there are two ways in which to challenge a blood specimen and this is the law: (1) that I didn't drink anything at all, I had no drink at all, And secondly, that it was not my specimen. But to make the allegations about the person testing it and the tests that were carried out, this is not a valid challenge, because they are just surmising that, well, maybe it wasn't right. This is not a challenge. The thing is there in black and white and the next person says, I did it and these are the results I gave you.

So to come and say that expert - well, she doesn't do the test, I do it and the test may have been handed in a day or so before and all little things around the test are true. The only evidence you have there is the evidence in the report. That is the law. There are cases on that and judges have made it very clear indeed, very clear.

So, the only two ways to challenge. The defendant who wishes to challenge the analyst of a properly taken and analyzed part specimen, had to challenge it either (1) bringing his specimen in and saying this one it is different from the one and the result on this one is different from the result on mine. This is one way of challenging it. It was open to the defendant to say this specimen didn't come from me at all. This is not my specimen and bring evidence to show that it is not her specimen. To call evidence to establish that she had nothing to drink or that a mistake was made, but it was not open for him to attempt by calling expert evidence to indulge in hypothetical calculations on the uncertain and unproven facts. This is what we had here, calculations and speculations on unproven facts. So that the evidence you have before you is the evidence of 181".

Then at page 59 of the summing up while the learned trial judge was reviewing the evidence for the defence, he came to the evidence of Dr. John Obafunwa and said this:

> "We had evidence of Dr. Obafunwa. That you will see and read. How that affects this case I cannot say. It comes in the same way that what you have. You have the evidence and that evidence has not been challenged. He is just another one of these so-called experts who – which does not amount to a challenge."

We have considered the case of R. v. Bowell, 1974 RTR 273. There a defendant was charged with driving with 192 milligrams of alcohol in 100 millilitres of blood. He gave two specimens of breath to the police on the night of his arrest both of which tested positive. Then he gave a specimen of blood. Later that same night he gave a third specimen of breath which tested negative. At trial the defendant did not give evidence, did not have his part specimen of blood analyzed, but he called a forensic chemist who gave an opinion that base upon the excretion rate of alcohol from the body, if the defendant tested negative in the given circumstances, he could not have had a blood alcohol level of 192 at the time of his arrest.

The prosecution did not object to the evidence of the forensic chemist and the Court, although doubting whether the analyst's report could be challenged in that way nevertheless allowed the appeal due to a misdirection by the Judge.

In the later case of R. v. Rutter, 1976 RTR 105, the Court of Appeal had for consideration sections 6(1) and 10 of the Road Traffic Act 1972 of England and Wales. Under the scheme of that Act evidence of the proportion of alcohol found in the specimen is not admissible on behalf of the

prosecution unless the specimen is part of a single specimen which was divided into two parts at the time that it was provided and the other part was supplied to the accused. In giving the judgment of the Court, Roskell L.J. said at p.111:

> "Once the specimen is shown to be a specimen which was properly taken and properly analyzed then the only question is what does that relevant analysis show, and if it is desired to challenge that analysis then it should be challenged by analysis of the other specimen. If it is desired to say "that cannot be the right specimen because I was doing something else than drinking that quantity of alcohol" then it is open to a defendant to call evidence showing that he had not had anything to drink if he can prove it, that a mistake was made if he can prove it, but what he cannot do in our view is to try, by calling expert evidence, to indulge in hypothetical calculations upon uncertain and unproven facts in order to seek to get behind the analysis in that way."

The legislative regime in the Cayman Islands is different from that upon which Roskill L.J. was commenting in the Rutter. Section 72(6) of the Road Traffic Law (1999) Revision provides:

> "The constable requiring any person to provide a specimen of blood or urine under paragraph (b) of subsection (2) for a laboratory test, shall, if requested, supply to him in a suitable container, part of the specimen or, in the case of a specimen of blood which it is not practicable to divide, another specimen which he may consent to have taken".

There is no legislative prohibition in the Cayman Islands against the introduction of the results of a blood analysis by the prosecution unless a part specimen had been provided to the defendant. In this case a part specimen had not been given to the appellant or anyone on her behalf. These facts clearly distinguish the instant case from the case of Rutter. In Rutter the Court said that the prosecution's blood analysis result could be challenged on the basis of mistake. Here the appellant

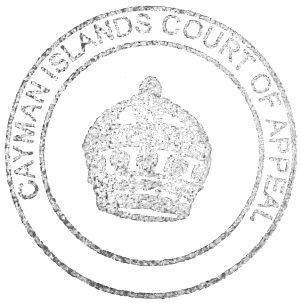
was attempting to mount a challenge on the basis of mistake by the only means open to her. She gave evidence that she had consumed only three alcoholic drinks, not 13 or 14; that her blood alcohol level was found to be 13 milligrams percent some eight hours after she was admitted to hospital; that there was the possibility of a mix up of blood specimens when they were in the hands of the police so that the blood specimen actually analysed did not come from her and her defence counsel attempted to allege that the chemist who conducted the analysis was incompetent to do so. There was absolutely no possibility by which this appellant could have presented evidence of the part specimen of blood in her possession, simply because she had not been provided with one by the police officers. The analogy with Rutter by which the learned trial judge had recourse to *dicta* in that case was inapposite.

CONCLUSION

The evidence of Dr. Obafunwa was admitted by consent. Before us learned Crown Counsel admitted that this evidence was relevant and ought to have been left to the jury for their consideration as to weight. In our view, although the learned trial judge based himself squarely upon the dicta of Roskill L.J. in Rutter, he fell into error by instructing the jury that Dr. Obafunwa's evidence had no weight. He fell further into error by failing to instruct the jury that it was perfectly open to the appellant to challenge the results of the blood analysis presented by the prosecution by calling evidence from which the jury could infer that there had been a mistake in the analysis of "181". We therefore allowed the appeal against conviction.

We took into consideration the evidence as a whole which had been presented by the prosecution against the appellant and in the interests of justice, we ordered that there be a new trial. As a consequence we do not consider it desirable to deal with the other grounds of appeal which were argued before us.

Zacca, P.



Georges, J. A.

Rowe, J. A.