19/10/82

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
BEFORE THE HONOURABLE SIR JOHN SUMMERFIELD C.B.E.Q.C.

REGINA VS. WARREN GARTH POWELL

Mr. J. Martin for prosecution
Mr. J. Harding for defence.

RULING

Objection is taken to the evidence relating to the accused's blood/alcohol ratio. The blood samples for the test were taken about 2½ hours after the accident while he was in hospital and partly asleep due to anaesthetic. He was under treatment for the serious injuries he received in the accident. He was not under arrest. He was not asked for a blood sample. He was in no condition to give a rational consent or refusal of consent to any request. He may well have been completely unconscious at this time. The blood samples were obtained specifically to determine his blood/alcohol ratio as it had been noticed on his admission to hospital that his speech was slurred. It is clear that the provisions of section 62 of the Traffic Law had not been complied with.

This breach of the law is relied on and it is contended that the evidence of his condition (the blood samples) was obtained unfairly.

It is conceded that in the normal course of events such evidence would be admissible onthis charge (causing death by dangerous driving) because of the high level of alcohol in the blood - 174.8 milligrams of alcohol in 100 millilitres of blood - on the authority of R v McBride 1962 2 QB 167 cited with approval in R v Thorpe 1972 56 Cr App R. 293. That accords with my own view. It is submitted, however, that the court has a discretion to exclude the evidence and should do so because of the breach of section 62 and because, it is urged, it was obtained unfarily.

Section 62 of the Traffic Law deals with the procedure in relation to specific offences created by that section. It has no relevance at all to the charge the accused is facing. Most of the cases cited (R v Palfrey; R v Sadler 1970 2 All E.R.12; R v Payne 1963 1 All E.R.848 and R v Trump 1980 70 Cr App R. 300) deal with those specific offences under the corresponding English Law where there has been an irregularity in obtaining the samples. They have no direct bearing on this case.

On the principles set out in R v Sang 1979 2 All E.R. 122 I doubt very much if I have a discretion. The effect of this case is set out in the Eighth Cumulative Supplement to the 40th Edition of Archbold para 1407. A helpful abbreviation is contained in Trump's case (ante) as follows:

> "The duty or discretion of a judge to exclude evidence improperly obtained was recently considered by the House of Lords in Sang (1979) 69 Cr. App. R. 282; [1979] 3 W.L.R. 263. There it was held that (1) a judge in a criminal trial has a discretion to refuse to admit evidence if its prejudicial effect outweighs its probative value; (2) an involuntary confession or admission is inadmissible in evidence, and (3) there is room for further consideration of evidence tantamount to a self-incriminatory admission which was obtained from the defendant, after the offence had been committed, by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect, and also for consideration of the effect of a judge's duty to ensure a fair trial. Apart from this there is no general discretion to exclude evidence improperly obtained."

If I have no discretion that is the end of the matter.

However, I will proceed on the basis that I do have a discretion as both counsel suggest that I have.

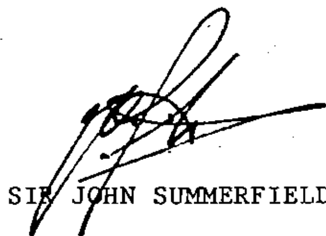
Bearing in mind that section 62 of the Traffic Law has no bearing on the matter (and, indeed, even if it did) I cannot see how there has been any unfairness in obtaining this evidence. It may be argued on a charge for a specific offence under section 62 that the evidence is inadmissible because of the procedural, defects. It does not necessarily follow that it would be inadmissible in spite of the

decision in Payne's case (ante). Trump's case appears to be more to the point. There was no intention to deceive; there was no trick; no mala fides. However, I am not considering a specific offence under section 62.

It seems to me that the persons concerned could not obtain the evidence they sought in any other manner having regard to prevailing circumstances. It was no different from, say, taking scrapings from his fingernails while he was unconscious; or removing his clothing for testing, or taking hair samples. There was nothing deliberately unfair in what took place. It was the only course open to the investigating authorities. It certainly was not in breach of the maximum _nemo debet procedere se ipsum._

The analysis of the blood samples could have given a result beneficial to the accused; namely, that he had no or a minimal alcohol content in his blood. It was intended to be a dispassionate test to see where the truth lay; to obtain relevant evidence whichever side it favoured. There is nothing unfair about that. And the accused is not being treated unfairly in allowing that evidence to be admitted.

Accordingly, I ruled that the evidence should be admitted.



SIR JOHN SUMMERFIELD.

19 October 1982