



Court of Criminal Appeal

Madame Justice Dr. Consuelo Scerri Herrera, LL.D., Dip Matr., (Can)

Appeal Nr. 100/2017

The Police

Vs

Alvaro Garcia Bello

Today, the 31st July 2018.

The Court,

Having seen the charges brought against the appellant Alvaro Garcia Bello holder of Maltese Identity Card Nr. 114446A charged before the Court of Magistrates (Malta), as a Court of Criminal Judicature with having:

On the 12th of June, 2016 at around 06:12hrs at ix-Xatt ta' San Gorg, St. Julians:

- (1) Drove or attempted to drive or be in charge of a motor vehicle or other vehicle on a road or other public place after consuming so much alcohol that the proportion of it in the breath, blood or urine exceeds the prescribed limit.
- (2) Drove or attempted to drive or be in charge of a motor vehicle or other vehicle on a road or other public place while unfit to drive through drink or drugs.

The prosecution contended that the said person be disqualified from holding the driving license for a period of time that the Court deems appropriate.

Having seen the judgement delivered by the Court of Magistrates (Malta) on the 21st February, 2017, the Court after having seen the law, particularly section 15A(1) and section 15B(1) of Chapter 65, contended that all the accusation have been proven and the Court finds the accused guilty of all offences lodged against him and fined him a multa of 1,200 Euros payable over a period of 12 months from the 1st May, 2017 but this one time, did not suspend his driving license.

Having seen the application of defendant Alvaro Garcia Bello filed on the 28th February, 2017, whereby he asked this Honorable Court to cancel, revoke, quash and annul the above mentioned judgement *in toto* and consequently acquit him from each and every charge brought forward against him and also from any punishment awarded in his regard.

The Court noted that at the grounds of appeal of defendant consist of the following:

Whereas in the proceedings before the first Honorable Court the prosecution presented the relative documents of the case, including their copy of the breathalyzer result allegedly performed upon the appellant and, moreover, the two police officers concerned in performing the breathalyzer test testified under oath regarding the facts of the case;

Whereas the same police officers made no reference whatsoever with regards to the result of the breathalyzer test, more specifically, there was no reference to the 'receipt' presented by the prosecution;

Whereas subsequently the same prosecution rested its case and declared it had no further evidence to produce;

Whereas in the acts of the proceedings this Honourable Court will immediately notice that there are two (2) different copies or versions of the result allegedly obtained by the applicant upon performing the breathalyser test on the 12th June, 2016;

Whereas the relative charges refer to a specific registration number of one motor-vehicle, however the breathalyser result, commonly referred to as '*receipt*' above-stated, bears a different registration-number than that found in the charges issued against the appellant;

Whereas it is the humble opinion of the appellant that in view of the above, the first Honourable Court was clearly faced with flawed and contradictory evidence which should have clearly led the Magistrates courts to declare such evidence as insufficient proof of every fact necessary to constitute the crimes with which the appellant was charged.

The appellant further stated that this was being done without prejudice to any further grievances, submissions and/or evidence which the appellant is reserving the right to produce during the hearing of this humble appeal.

Having seen the records of the case.

Having seen the updated conviction sheet of the defendant.

Having heard the Attorney General and the defence lawyer put forward their pleadings.

Now therefore duly considers the following.

The appellant was charged before the Magistrates Courts with having on the 12th June 2016 driven the vehicle registration bearing number BLU 727 of make Renault in Ix-Xatt ta' San Gorg at about 06.20 a.m. when he was under the influence of alcohol and having more alcohol in his breath, blood or urine than that which is allowed by law and subsequently was also not in a state to drive this vehicle since he had no control over it due to his alcohol intake.

The parties did not summon any witnesses for this case though rested *in toto* on the documents exhibited in this case particularly the Police report exhibited in this case as well as the two receipts regarding the breathalyzer tests carried out allegedly on the accused.

In the police report it results that on the 21st June 2016 at about 15.30 the police were investigating an accident in Triq il-Kbira, St. Venera further down from the Juvenile Court. The road in question was partially closed and only one lane was being used. However at the time of the accident both lanes were being used one lane handled cars coming from Attard going into Hamrun whereas the other lane handled traffic coming out of Hamrun going towards Attard. Next to the football club there was a vehicle wherein the driver of this car was hooting heavily and PC 756 happened to be passing by at the time and told him not to over take and the traffic carried on moving. Later on PC 834 passed from this same road wherein he realised that the driver was not wearing a seat belt and the driver of the car addressed the policeman with the words " Qazzistu l-Alla" since he had been waiting for fifteen minutes to drive on . PC 834 told the driver to pull up at the side however the accused allegedly drove off. In the report it is stated that the police officer took down the number of the vehicle which was being driven by this same driver in particular, it is reported as being registration number KUS 865 make Peugeot 406. In the mean time in the car being driven by the police official there was PS 279 who was trying to make contact with the wardens to inform them about the collision. PC 834 reported to PS 279 what had happened and in the meantime PS 279

starting making contact to see whom this vehicle belongs . PS 279 made contact with its owner a certain Angele Sciortino and asked her to inform the driver who was driving her car to report to the police station in Birkirkara. .

When back at the Birkirkara police station he met Ryan Briffa who stated that he used to live in various places and thus was not able to give his home address to the police.

Later on in the same day at about 5.15 Angele Sciortino together with Ryan Briffa appeared at the Birkirkara Police Station who explained that the car had been transferred to Ryan Briffa. Whilst in the police station allegedly Briffa was not cooperating with the police and was threatening them that he was going to report all this to the Commissioner of Police who would then remove them from their uniform.

Before the Magistrates Court it transpires from the acts of the proceedings in particular the verbal dated 21st February 2017 that Pc 0033 and PC 1028 gave evidence though their evidence is not recorded in these proceedings. The prosecution also presented before the Magistrates Courts two receipts of the alleged breath alcohol test record taken from the appellant.

In one of these receipts it results that the Police namely PC 1028 took a breath test of the appellant who allegedly was driving a vehicle bearing registration number BLU 727 dated 12th June 2006, which test was taken at 06.12. Whereas in this same envelope there appears another receipt of a breathalyzer test taken allegedly also from the accused on the 7th June 2016 at 06.12 by the same PC 1028 this time however the driver is said to be driving a vehicle bearing registration number JOS 359.

Considers further.

It is the duty of the prosecution to bring forward the best evidence it has to be able to convince the court that the charges brought forward against the accused do exist and should result. In fact reference can be made to the Italian author Manzini to his book named *Diritto Penale*¹ Vol III Kap IV pagna 234, Edizione 1890:-

“Il cosi` detto onero della prova, cioe` il carico di fornire, spetta a chi accusa – onus probandi incumbit ui osservit”.

It is a basic principle practiced in our Court in criminal proceedings that, in order for the Court to find the accused person guilty, the charges have to be proven beyond reasonable doubt, namely beyond every doubt that is dictated by reason . The court makes references to the case decided by this Court though resided by a different Judge in the names '**Il-Pulizija v Philip Zammit et**²' whereby the Court held that not every minimal doubt is a ground for the Court to acquit the accused, but the doubt must be one that is dictated by reason.

During its oral pleadings the defence stated that the prosecution not only failed to bring forward the best evidence it had but that its documentary evidence was confusing to ay the least since the two alleged breathaylser tests that were supposedly carried out on the accused made reference to two vehicles which the accused was meant to be driving on the day in question and needless to say both these two vehicles had registration numbers different to the one indicated on the charge sheet.

With regards to the best evidence rule, the Court feels that it must make reference to the English author Blackstone and has the following to comment.

¹ Vol III Chapter IV page 234, Edition 1890

² Decided on the 7th September 1994.

“The best evidence rule, which was used in the 18th and early 19th centuries as an exclusionary principle, i.e. to prevent the admission of certain evidence where better evidence was available, is now all but defunct. Lord Denning MR has stated: The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available on one’s hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility.’ (Garton vs Hunter 1969).”

The *“best evidence rule”* is found in article 638 (1) of chapter 9 of the laws of Malta which provides the following. *“In general, care must be taken to produce the fullest and most satisfactory proof available, and not to omit the production of any important witness”*

This article begins with the words ‘In general’ and there this means that it is not necessary in every case that the prosecution brings forward the best evidence. However, undoubtedly it would be desirable that this takes place. Should the prosecution keep back any evidence for one reason or another, it would only be prejudicing its own case. Nevertheless, this does not mean that the Court should disregard all other evidence brought forward by the same prosecution. Therefore, if the prosecution that the evidence it brought forward was sufficient to be able to get a conviction in this eventuality it can rest its case and there is no need for the prosecution to burden the court with further evidence.

In this case, however, the only evidence which the prosecution brought forward was the police road report which was not confirmed on oath before this court and the production of two receipts regarding the results of the breath alcohol record whereby it results that the receipts refer to a different car than that being driven by the accused.

Thus, the Courts of Magistrates as a Court of Criminal Judicature could not have found the appellant guilty of these charges.

Consequently, the Court is upholding the appeal, revokes the judgement given by the Courts of Magistrates in the above names on the 21st February 2017 and acquits him of all charges.

(ft) Consuelo Scerri Herrera

Judge

TRUE COPY

Franklin Calleja

Deputy Registrar