Neutral Citation Number: [2020] EWHC 2864 (Admin)

CO/4848/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 27th October 2020

Before :

LORD JUSTICE HADDON-CAVE
MR JUSTICE JOHNSON

- -

Between :

HANI ALI

Appellant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

- -
- -

Jeremy Benson QC (instructed by Geoffrey Miller Solicitors) for the Appellant
Lucy Organ (instructed by Crown Prosecution Service) for the Respondent

Hearing dates: 13 October 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Lord Justice Haddon-Cave and Mr Justice Johnson:

INTRODUCTION

1. This is the judgment of the court.

2. This appeal raises questions as to the presumption of reliability of an alcohol breath test machine, and the burden and standard of proof to be applied when evidence of unreliability is sought to be adduced.

3. The Appellant, Hani Ali, appeals by way of Case Stated against the decision of Deputy District Judge Minhas, sitting at Westminster Magistrates' Court on 22nd October 2019, finding him guilty on summary conviction of an offence of driving with excess alcohol.

4. We are grateful for the able submissions of Mr Jeremy Benson QC for the Appellant and Ms Lucy Organ for the Respondent.

FACTUAL BACKGROUND

5. At around 11pm on Friday, 5th April 2019, PC Warrillo spoke to the Appellant, who was sitting in the driver's seat of his Range Rover on Richmond Way in Shepherds' Bush. PC Warrillo suspected that the Appellant had driven whilst using a mobile phone. On questioning the Appellant, PC Warrillo became aware of the smell of alcohol on the Appellant's breath. The officer observed that the Appellant's eyes were glazed, his pupils were large and fixed and his speech was slurred.

6. PC Warrillo asked the Appellant if he had consumed alcohol. The Appellant replied that he had drunk one glass of wine at 8pm. At around 11.21pm, PC Warillo conducted two roadside breath tests. Both tests recorded a fail. PC Warillo arrested the Appellant who was then taken to Hounslow police station

7. At the police station, the Appellant was brought before Police Sergeant Burriss at 12.34am. PS Burriss started the drink and drug driving procedure at 12.44am. PS Burriss used an Evidential Breath Machine ("EBM"). The lower of two readings recorded by the EBM at 12.55am was 46 micrograms of alcohol in 100 millilitres of breath. This was above the prescribed legal limit of 35 mg of alcohol in 100 ml of breath. As he explained in evidence, PS Burriss had no concerns as to the functionality of the EBM, no error messages were recorded and it was within the calibration dates indicated by the sticker on the front of the machine.

8. The Appellant was charged under section 5(1) of the Road Traffic Act 1988 ("RTA 1988") with driving a motor vehicle after consuming so much alcohol that the proportion of alcohol in his breath exceeded the prescribed limit. He pleaded not guilty to the offence. A trial took place over two days.

9. The Appellant gave evidence that he had consumed a medium glass of wine between 8 and 8.30pm. He denied that his speech was slurred or his eyes glazed. He adduced expert evidence to the effect that: (1) if he had drunk one glass of wine the recording would be zero, and (2) the EBM should have been serviced every 6-7 months, but the evidence had been that it was last serviced in June 2018, 10 months earlier. He also

gave evidence that he had suffered from reflux which had caused mouth alcohol to be present at the time he was breathalysed.

THE FINDINGS OF THE DEPUTY DISTRICT JUDGE

10. The Deputy District Judge accepted PC Warrillo's evidence that the Appellant smelt of alcohol and that his eyes were glazed. She considered that PC Warrillo was near the Appellant for a reasonable period of time, having conducted two roadside breath tests, and that she therefore had "ample opportunity to consider the smell of alcohol and demeanour" of the Appellant.

11. The Judge reminded herself that there was a presumption that the reading was accurate, but that this presumption was capable of rebuttal and cited *Cracknell v. Willis* [1988] AC 450 (see below). The Judge considered that the burden of proof was on the Appellant to rebut the presumption on the balance of probabilities. She rejected a submission that once evidence had been adduced to rebut the presumption the burden was on the prosecution to establish, to the criminal standard of proof, that the EBM reading was reliable. We return to this question below.

12. The Judge accepted the evidence of PS Burriss that the machine was within the relevant calibration period and found that the expert evidence as to calibration was speculative because it was based on a document that was 20 years old and related to unspecified devices. The Judge rejected the Appellant's case that, at the time he provided the evidential breath specimen, he had had suffered from reflux which had caused mouth alcohol to be present.

13. The Judge found on the evidence that the EBM was working correctly and that the Appellant had therefore committed the offence. She stated her conclusions as follows:

> "88. … I do not accept Mr Ali has been forthcoming with the Court or Doctors Mundy and Trafford about the amount of alcohol he drank. I find the evidence of Mr Ali to be self-serving. He was not willing to admit that he was driving until the CCTV evidence was adduced. He has every incentive to downplay the amount he drank that evening. In line with *Cracknell v Willis*, there is no compelling evidence before me to support what Mr Ali says he had to drink and in the absence of such evidence, I am entitled to be sceptical of his account. I also rely on the two roadside breath test procedures which Mr Ali failed, the fact that he smelt of alcohol and that his eyes were glazed. I accept that the roadside procedures are not evidential in themselves but in my view, they corroborate that he was over the legal limit and that the machine was operating correctly.
>
> 89. There is a presumption that the machine is working correctly; the presumption is rebuttable. Essentially, other than Mr Ali's claim that he did not drink enough to produce the reading that he did, there is no other cogent evidence before me to rebut the presumption. Therefore, on balance, I am not

> satisfied that the presumption has been rebutted. I am certain that the machine was working correctly.
>
> 90. Accordingly, I proceed on the assumption that the reading produced by the machine is reliable, that Mr Ali had a breach alcohol level of not less than 46 mcg in 100ml of breath. I find the case against Mr Ali proved beyond reasonable doubt."

THE CASE STATED

14. The Deputy District Judge has, on the Appellant's application, helpfully stated the following four questions for the Court:

    (1) Was I entitled to accept the evidence of PS Burriss that the machine was operating correctly and to reject the evidence of Dr Mundy that the machine may not be reliable?

    (2) Did I err in law to find that there was a legal burden on the defendant to rebut the presumption of reliability of the breath test machine on the balance of probabilities?

    (3) Even if I did err, was I entitled to find, so that I was certain, that the EBM was operating correctly?

    (4) Was I entitled to convict the defendant?

SUBMISSIONS

15. It is common ground that there is a legal presumption that an EBM is working properly, that there is an evidential burden on a defendant to challenge this presumption by way of relevant evidence, but that once that burden is discharged (by adducing relevant evidence) the prosecution must prove to the criminal standard that the machine was reliable. The parties therefore agree that the Deputy District Judge erred in finding that the burden was on the Appellant to establish, on the balance of probabilities, that the EBM reading was unreliable.

16. Mr Benson, on behalf of the Appellant, contended as follows. Dr Mundy's evidence was that the machine needed to be serviced and calibrated at particular dates to maintain reliability. It had not been serviced and calibrated within the timeframe indicated by Dr Mundy. The Respondent had not challenged Dr Mundy's evidence. His expert evidence raised a "realistic possibility" that the machine might not be functioning properly. There was no proper basis for rejecting this unchallenged evidence. The Deputy District Judge was not therefore entitled to find that the EBM was operating correctly.

17. Ms Organ, on behalf of the Respondent, argued that the error of the Deputy District Judge in respect of the burden and standard of proof was immaterial, because the Judge in any event found, to the criminal standard, that the EBM was operating correctly. This was a finding that the Judge was entitled to make for the reasons she

gave. She was, in particular, entitled to reject the evidence that had been given by the Appellant and Dr Mundy, and to regard the latter as "theoretical".

THE LEGISLATION

18. Section 5(1) of the RTA 1988 provides:

> "**5 Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit**
>
> (1) If a person—
>
> (a) drives or attempts to drive a motor vehicle on a road or other public place, or
>
> (b) is in charge of a motor vehicle on a road or other public place,
>
> after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence."

19. By section 11(2) of the RTA 1988 Act, the prescribed limit means (in respect of breath) 35 mcg of alcohol in 100 ml of breath.

20. Section 10 of the RTA 1988 provides:

> "**Detention of persons affected by alcohol or a drug**
>
> **(**1) The following provisions apply with respect to proceedings for an offence under section 5 or section 6 of this Act. (2) Evidence of the proportion of alcohol or any drug in a specimen of breath, blood or urine provided by the accused shall, in all cases, be taken into account, and 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; but if the proceedings are for an offence under section 6 of this Act, or for an offence under section 5 of this Act in a case where the accused is alleged to have been unfit through drink, the assumption shall not be made if the accused proves - (a) that he consumed alcohol after he had ceased to drive, attempted to drive or be in charge of a motor vehicle on a road or other public place and before he provided the specimen; and (b) that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit and, if the proceedings are for an offence under section 5 of this Act, would not have been such as to impair his ability to drive properly."

21. By section 16 of the Road Traffic Offenders Act 1988, evidence as to the proportion of alcohol in the Appellant's breath could be given by production of a document purporting to be a statement automatically produced by the EBM, together with a certificate signed by a constable that the statement related to a specimen provided by the Appellant at the stated date and time.

ANALYSIS

22. In criminal cases, the burden of proof is on the prosecution to establish, beyond reasonable doubt, that a defendant is guilty of the offence charged.

23. In the context of driving with excessive alcohol, there are two presumptions or assumptions which are relevant. The first is the common law presumption of regularity that breath specimen machines are reliable. The second is the statutory assumption under section 10(2) of the RTA 1988 that the proportion of alcohol in the relevant specimen was not less than the proportion of alcohol at the time of the offence. Lord Griffiths observed as follows in *Cracknell v Willis* [1988] AC 450 (at 467-468):

> "In the case of a breath specimen, there is of course a presumption that the machine is reliable. But if that presumption is challenged by relevant evidence, the magistrates will have to be satisfied that the machine has provided a reading upon which they can rely. …
>
> … I would hold that evidence which, if believed, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible. I am myself hopeful that the good sense of the magistrates and the realisation by the motoring public that approved breath testing machines are proving reliable will combine to ensure that few defendants will seek to challenge a breath analysis by spurious evidence of their consumption of alcohol. The magistrates will remember that the presumption of law is that the machine is reliable and they will no doubt look with a critical eye on evidence such as was produced by *Hughes v. McConnell* [1985] R.T.R. 244 before being persuaded that it is not safe to rely upon the reading that it produces."

24. Lord Goff emphasised the latter point in his judgment (at page 472):

> "I place greater faith in the good sense of magistrates who, with their attention drawn to the safeguards for defendants into the Act…, will no doubt give proper scrutiny to such defences, and will be fully aware of the strength of the evidence provided by a printout, taken from an approved device, of a specimen of breath provided in accordance with the statutory procedure".

25. The common law presumption of regularity requires a court to proceed on the basis that an EBM is in good working order and that its reading is reliable, unless sufficient relevant evidence to the contrary is adduced. However, where such evidence is adduced, the legal position is clear: as Lord Griffiths said, "the magistrates will have to be satisfied that the machine has provided a reading upon which they can rely" (see above).

26. It is, therefore, common ground between the parties that:

(1) There is a presumption that a EBM reading is reliable;

(2) The presumption is rebuttable;

(3) If evidence that the reading is not reliable is adduced, the burden is on the prosecution to establish, to the criminal standard of proof, that the reading is reliable.

27. We agree that these three propositions are an accurate statement of the law. It follows that the answer to the Deputy District Judge's second question is that she did err in finding that there was a legal burden on the Appellant to rebut the presumption of reliability of the EBM on the balance of probabilities. A defendant may adduce "relevant" evidence that the EBM reading was not reliable. Once a defendant does that, it is necessary for the prosecution then to prove, to the criminal standard, that the reading was reliable, notwithstanding the evidence adduced by the defendant.

28. In the present case, however, the Judge did go on to find, to the criminal standard of proof, that the reading was reliable. Unless the Appellant can show that this finding was flawed, the Judge's error that there was a legal burden on the Appellant to rebut the presumption of reliability is of no effect.

29. A great deal of authority was cited to us on the question of whether the Deputy District Judge was entitled to find, to the criminal standard of proof, that the reading from the EBM was reliable. Much of that authority addressed the question of what might amount to sufficient evidence to rebut the presumption of reliability (which is not, directly, the focus of any of the stated questions before us).

30. Ultimately, however, the Judge's conclusion that the EBM reading was reliable was a factual assessment based on the evidence that was before her. The evidence that the reading was unreliable consisted of:

(1) The evidence from Dr Mundy that the EMB had not been calibrated within the required time period;

(2) The evidence of the Appellant as to the quantity of drink he had imbibed.

31. As to Dr Mundy's evidence, the Judge observed that Dr Mundy had not examined the EBM in question or its calibration records. Dr Mundy's evidence was based on a Quality Framework document that the Judge found was 20 years old and did not refer to a specific device. As against that, there was direct evidence from PS Burriss that the machine was within its calibration dates.

32. The evidence given by Dr Mundy is quite different in nature from that given, for *e.g.*, by the expert witness in *Gregory v DPP* [2002] EWHC 385 (Admin) relied upon by Mr Benson. In that case, the police analysis of the appellant's blood sample suggested that it was marginally above the blood alcohol limit. A defence expert analysed the specimen of blood and gave evidence that the police's method of analysing the blood sample would inflate the alcohol results by about 8 per cent. Forbes J found (at [14]-[15]) that this was unchallenged evidence which "was not merely hypothetical calculation, based on uncertain and unproven facts" but "was admissible opinion evidence… based on uncontroversial facts… which seriously called into question, in the circumstances of this particular case, the reliability and accuracy of the blood alcohol analysis which was the very foundation of the prosecution's case against this appellant". He added:

> "… If the Crown Court was to reject this critical evidence…, there had to be a rational basis for doing so but, as it seems to me, in the state of the evidence which then existed, there was

> no such basis or any other proper reason for rejecting his evidence."

33. As the Court in *Gregory v DPP* itself emphasised, the decision was highly fact sensitive and turned on the particular evidence (see *e.g. per* Keene LJ at [18]). In our view, this decision is of little assistance to the Appellant.

34. In the present case, the evidence and findings of the judge were very different. As regards the expert evidence, in contrast, Dr Mundy did not analyse the Appellant's blood sample or the specific EBM that was in fact used. For the reasons she gave, the Judge was entitled to reject the evidence of Dr Mundy.

35. As to the Appellant's evidence, the Judge found that the Appellant was an unreliable witness; he had not been forthcoming; his evidence was self-serving; and his evidence was inconsistent with the evidence of the police officers (which the Judge accepted).

36. As against the evidence of the Appellant, it was common ground that the Appellant had failed two roadside breath tests (a fact which is, in itself, capable of corroborating the EBM reading – see *DPP v Brown and DPP v Teixeira* [2002] RTR 23). Further, the Judge accepted the evidence of PS Burriss that (a) he was an experienced operator of the EBM, (b) he had no concerns as to the functionality of the device, (c) he saw no error messages and (d) he was satisfied that the particular device he used was within its calibration dates because he recalled seeing the sticker on the machine. Furthermore, PS Burriss noted that the machine was self-calibrating, so it checks calibration and informs the operator if a fault has developed. In addition, the Judge accepted the evidence of PC Warrillo that the Appellant had smelt of alcohol, and that his eyes were glazed. All of this evidence was consistent with the reading given by the EBM.

37. Mr Benson made two particular submissions. First, that the Judge was not entitled to reject the evidence of an expert where it was unchallenged by the prosecution. Second, that in any event, in order to rebut the presumption of reliability it was sufficient for a defendant to assert solemnly in evidence that they had not drunk enough alcohol to produce the reading in question. We disagree with both submissions which are heterodox and run counter to both principle and the authorities. It sufficient to cite three authorities by way of illustration.

38. First, as Moses LJ said in *Pender v. Director of Public Prosecutions* [2013] EWHC 2598 (Admin):

> "20. It is important always in these cases to remember that the fact finders, both the district judge and the Crown Court, are entitled to disagree with an expert as they are entitled to disagree with any other factual proposition provided that there is a basis for doing so and provided that, if only shortly, they explain the basis of disagreement. After all, explaining the basis upon which an unchallenged expert's views are disagreed with is purely a discipline of a fact-finding approach to decision making itself."

39. Second, as Mitting J said in *Schneider v. Director of Public Prosecutions* [2006] EWHC 1516 (Admin):

> "12. …Evidence is required at least to raise the realistic possibility that the device on the occasion with which the court is concerned may have malfunctioned and produced a false reading. Assertions based merely on an alleged failure to comply with manufacturer's recommendations do not amount to such evidence."

40. Third, as Lord Griffiths was careful to say in *Cracknell v. Willis* (*supra*, at p.468):

> "I would hold that evidence which, *if believed*, provides material from which the inference can reasonably be drawn that the machine was unreliable is admissible." (emphasis added)

41. Mr Benson sought to pray in aid references in the Application for a Case Stated to aspects of Mr Mundy's evidence which did not feature in the Case Stated itself. Ms Organ objected on the basis that Mr Benson did not have leave to amend the Case Stated. We uphold her objection (but observe that we do not think that the reference materially assists Mr Benson in any event).

42. Finally, Mr Benson sought to argue that the Judge has misdirected herself when she said in paragraph 89 of her judgment (quoted above) that "on balance" she was not satisfied that the presumption has been rebutted and she further argued this misdirection fundamentally undermined her subsequent finding that she was "certain" that the EBM was working correct. We agree that the use of the words "on balance" was infelicitous. However, it is important to read the judgment as a whole and to construe this passage in the context of the Judge's earlier numerous, clear and detailed findings of fact. In our view, it is quite clear that the Judge was entirely satisfied (indeed, "certain") on the evidence that the EBM reading was reliable and that the case against the Appellant was proved "beyond reasonable doubt", *i.e.* to the criminal standard. Indeed, she said so in terms in her concluding paragraphs 89 and 90.

43. In our view, the Deputy District Judge was entitled to make the findings of fact that she did and, accordingly, to convict the Appellant.

CONCLUSION

44. For the reasons set out above, we answer each of the stated questions (see paragraph 3 above) in the affirmative:

(1) Was I entitled to accept the evidence of PS Burriss that the machine was operating correctly and to reject the evidence of Dr Mundy that the machine may not be reliable?

Answer: yes.

(2) Did I err in law to find that there was a legal burden on the defendant to rebut the presumption of reliability of the breath test machine on the balance of probabilities?

Answer: yes.

(3) Even if I did err, was I entitled to find, so that I was certain, that the EBM was operating correctly?

Answer: yes.

(4) Was I entitled to convict the defendant?

Answer: yes.

45. The appeal is therefore dismissed.