

5pc.

ROYAL COURT
(Samedi Division)

106.

22nd June, 1992

Before: The Bailiff, assisted by
Jurats Orchard and Gruchy

John Manuel Pereira

- v -

HM Attorney General

Police Court Appeal

Appellant was convicted, on 22nd April, 1992 on:
1 charge of contravening Article 53 of the Motor Vehicles (Construction and Use) (Jersey) Order, 1956 (count 1);
1 charge of contravening Article 56 of the said Order (count 2);
1 charge of contravening Article 59 of the said Order (count 3);
1 charge of contravening Article 2 of the Road Transport Lighting (Jersey) Law, 1956 (count 4); and
1 charge of contravening Article 16C(7) of the Road Traffic (Jersey) Law, 1956 (count 5).

Appeal against conviction on count 5.

Advocate M. St. J. O'Connell for the Appellant.

Advocate S.C.K. Pallot on behalf of the Attorney General.

JUDGMENT

THE BAILIFF: This appeal arises out of a prosecution against the appellant for an infraction of Article 16C(7) of the Road Traffic

(Jersey) Law, 1956 inasmuch as he did not have a reasonable excuse for failing to provide a specimen of breath by blowing into a Lion Intoximeter.

The offence is said to have taken place on 7th February, 1992, therefore the facts were relatively fresh in the minds of all the witnesses when the case was heard some two months later.

The facts may be stated quite simply. The appellant was stopped by a police officer because the police officer, Constable Barnes, had noticed that one of his lights was not working. As a result of being stopped the officer, who smelt intoxicants on the appellant's breath, required him to take a roadside test and provide a sample of breath which he did. It was positive - he had no difficulty in doing it - and because of the result of that test, he was taken to Police Headquarters where he was handed over to Sergeant Coles who took him through the procedure for obtaining breath samples by means of the Lion Intoximeter.

It is not necessary for the Court here to go into the details of the test. No criticism has been offered by Mr. O'Connell, on behalf of the appellant, about the procedure. Certain matters of evidence have been disputed but the basic procedure is accepted by the appellant as having been properly carried out.

The appeal is brought because the appellant says that he is an asthmatic and by reason of his condition at the time was unable to provide a second breath specimen.

The procedure for using the Intoximeter is that two specimens have to be provided because in the event of the figures being different, it is the lower figure which is the relevant figure to be taken into account in deciding whether or not to prosecute.

After the first breath had been obtained without difficulty, the appellant was told that the breath indicated he was over the required limit, and there was some discussion as to what he had had to drink during the evening. Thereafter, according to the evidence of Sergeant Coles, he made four attempts to breathe again into the Intoximeter; according to the appellant himself there were only two attempts. But whether there were two or four, he failed on each occasion.

The appeal is brought because it is said that the reason he was unable to blow into the Intoximeter the second time and on subsequent occasions - whether it was another two or three - was not that he was having an asthmatic attack, to which a good deal of the evidence below was directed, but merely because of his condition, he did not have sufficient strength in his lungs to produce a breath.

There was evidence before the Magistrate as regards the amount of exertion that was needed before the machine can be operated. According to Sergeant Coles a simple breath only is needed to operate the machine. The appellant himself said it was a good deal more and he could not manage it. There was some doubt as to exactly what was happened when the second reading was being attempted. Sergeant Coles gave evidence that he felt the appellant was letting air escape from the sides and indeed the appellant himself in his evidence admits that the Sergeant said this to him. Sergeant Coles said that he put his hands round the mouthpiece and reached the conclusion that the appellant was not trying.

It is true, and the Court accepts it, that neither of the police witnesses had medical training and therefore neither was qualified to express a medical opinion. But neither of them were doing so. They were merely giving evidence as to what had taken place.

The Magistrate heard the evidence; he read a letter produced by the appellant which showed that the appellant had been treated on 8th January, 1991 (some 13 months before the occurrence), for a nocturnal dry cough and had been provided with a Ventolin Inhaler which according to the doctor - and we have no doubt this is correct - is a drug used in the treatment of asthma.

Unfortunately, the Inhaler was not with the appellant at the time of the incident. He gave an explanation to the Magistrate that he had changed his coat, but it does occur to this Court that if he needed his Inhaler whenever he was suffering for a period of time, it is strange that he was not carrying it with him.

However, the Magistrate had before him a very clear argument, which Mr. O'Connell has very fully set out before us today, as to the reasons which constitute a reasonable excuse, and of course an attack of asthma, or indeed a shortage of breath due to an asthmatic condition can amount, in law, to a reasonable excuse. Whether they are in fact - and it is a matter of fact - is entirely a matter for the Court. And this Court has to be satisfied, before it can allow this appeal, that there was insufficient evidence before the learned Relief Magistrate on which he could come to the conclusion that there was no reasonable excuse.

This Court is not satisfied that there was not such evidence before the Relief Magistrate and accordingly he was entitled if he wished to come to the decision which he did. Accordingly the appeal is dismissed.

Authorities

Wilkinson's Road Traffic Offences (14th Ed'n): Vol. 1: "Failure to provide a specimen; reasonable excuse".