

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT
OF JUDICATURE ON APPEAL FROM THE WEST BERBICE
MAGISTERIAL DISTRICT HELD AT FORT WELLINGTON
MAGISTRATES' COURT
(CRIMINAL JURISDICTION)
APPEAL NO. 7 OF 2017

BETWEEN:

CHRISTOPHER RAJKUMAR

Appellant

-and-

KEVIN GRANT CPL 19581

Respondent

IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT
OF JUDICATURE ON APPEAL FROM THE WEST BERBICE
MAGISTERIAL DISTRICT HELD AT FORT WELLINGTON
MAGISTRATES' COURT
(CRIMINAL JURISDICTION)
APPEAL NO. 8 OF 2017

BETWEEN:

GAJANAND SINGH

Appellant

-and-

SUDANNAY KESNEY L/CPL
21759

Respondent

The Honourable Justices Navindra A. Singh and Jo-Ann Barlow, Puisne Judges.

Mr. Horatio Edmondson representing the Appellants

Ms. Natasha Backer representing the Respondent/ Director of Public Prosecution.

Heard February 26th and March 20th 2018.

DECISION

BACKGROUND

On February 8th 2017 Christopher Rajkumar was found guilty of "*Driving motor vehicle while breath alcohol level exceeded the prescribed limit*" contrary to section 39A(i) of the Motor Vehicle and Road Traffic Act, CAP 51:02 of the Laws of Guyana. It is from this conviction that this appeal lies.

On February 22nd 2017 Gajanand Singh was found guilty of “*Driving motor vehicle while breath alcohol level exceeded the prescribed limit*” contrary to section 39A(i) of the Motor Vehicle and Road Traffic Act, CAP 51:02 of the Laws of Guyana. It is from this conviction that this appeal lies.

These appeals have been heard together because they raise common issues with respect to what evidence is required to prove the elements of the offence for which the Appellants have been convicted.

The concentration of alcohol in the blood is what governs the effects on the nervous system, influencing the individual’s behaviour, judgment and ability to function. To determine the blood alcohol concentration, a direct measurement is therefore preferred, but in practice there are several serious drawbacks to this. Blood collection is by nature intrusive and requires specially qualified personnel to conduct the collection since there is always some danger of injury or infection.

Indirect measurement of blood alcohol concentration by determination of the alcohol concentration in the breath does not have these disadvantages. The collection and test can be performed simultaneously by police officers, with immediate results obtained and is therefore widely used.

There are however serious problems involved in converting breath alcohol measurements to blood alcohol concentrations.

The basic principle on which breath testing is based is Henry’s Law, which states that if a gas and liquid are in a closed container, the concentration of the gas in the air above the liquid is proportional to the concentration of the gas which is dissolved in the liquid.

If a sample of blood is kept in a stoppered bottle, alcohol will evaporate from the blood until the concentration of alcohol in the air above the blood reaches equilibrium. The higher the blood alcohol concentration, the higher the concentration of the alcohol in the air, which is called Henry’s Constant.

Section 39C of the Motor Vehicle and Road Traffic Act; CAP 51:02 contains several subsections which guides a Court on the elements that must be proven by

the State/ Police before a conviction can be obtained and it goes without saying that these elements must be established beyond a reasonable doubt.

Section 39C (3)

(a) provides “a person shall provide two separate specimens of breath for analysis”; and,

(c) provides “there must be an interval of not less than two minutes and not more than ten minutes between the provision of specimens”.

Section 39C (7) provides

“As soon as practicable after a person has submitted to a breath analysis, the member of the Police Force operating the breath analysing instrument shall deliver to that person a statement in writing signed by that member specifying –

(a) the concentration of alcohol determined by the analysis to be present in that person’s breath and expressed in microgrammes of alcohol in 100 millilitres of breath; and

(b) the time of day and the day on which the breath analysis was completed.”

Section 39C (9)(c) provides “the apparatus used by him to make the breath analysis was a breath analysing instrument approved by the Minister.”

It is noted that this subsection refers to a certificate in proceedings for an offence under section 39B and the offence that is the subject of this appeal falls under section 39A, nevertheless, this subsection demonstrates that the breath analysing instrument for offences of this nature has to be an apparatus approved by the Minister.

Section 39C (10) provides “In proceedings for an offence under this section a certificate purporting to be signed by the Minister that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments shall be prima facie evidence of the particulars certified in and by the certificate.”

ISSUE I

Was compliance with section 39C (7) of CAP 51:02 proven?

Based on the record of the evidence from both trials, the subject of these appeals, the provisions of section 39C (7) was not complied with by the police operating the breath analysing machine, not that there is no evidence of compliance, the evidence conclusively demonstrates non-compliance with the section.

In fact based on the Magistrate's decision, the Magistrate accepts that such a statement was not **given** to either Appellant.

In Rajkumar's case the Magistrate determined that the Legislators simply intended that the person submitting to the test "must be made aware of the alcohol concentration" contrary to what the section clearly states thereby demonstrating complete disregard for the rules of statutory interpretation.

The Magistrate states further in Rajkumar's case that "*This court applied the presumption of irregularity which does not make the proceedings void*". This Court is unfortunately unfamiliar with this principle and was unable to find merit in such a presumption.

ISSUE II

Did the State have the burden of proving that the breath analysing instrument used was one approved by the Minister?

Section 39C (9)(c) provides that a Member of the Police can sign a certificate certifying that "the apparatus used by him to make the breath analysis was a breath analysing instrument approved by the Minister" in proceedings for an offence under section 39B.

This subsection demonstrates that the breath analysing instrument for offences of this nature has to be an apparatus approved by the Minister.

It is therefore an element that must be proven and/ or established in the course of the prosecution; that the breath analysing instrument used was approved by the Minister

Based on the record of the evidence from both trials, the subject of these appeals, there is no evidence that the breath analysing instrument used was an apparatus approved by the Minister.

ISSUE III

Was it proven that the policeman/ policewoman operating the breath analysis machine was authorised to operate that machine by the Minister?

Section 39C (10) of CAP 51:02 provides “In proceedings for an offence under this section a certificate purporting to be signed by the Minister that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments shall be prima facie evidence of the particulars certified in and by the certificate.”

The section, in no uncertain terms, requires that a certificate, the certificate is what would be *prima facie* proof “*that the member of the Police Force named therein is authorised by the Minister to operate breath analysing instruments*”.

The Magistrate, without venturing a reason or explanation, found that the witnesses’ testimony that they were approved by the Minister to operate the instrument sufficient to establish that element.

The Court finds that it was not proven that the policeman/ policewoman operating the breath analysis machine was authorised to operate that machine by the Minister as is required under Section 39C (10) of CAP 51:02.

ISSUE IV

Was compliance with section 39C (3)(c) of CAP 51:02 proven at Gajanand Singh’s trial?

Based on the record of the evidence from the trial there is no evidence of compliance with this section.

ISSUE V

The Appellants further raised the issue that it was brought out in the evidence that the breath analysis machine used was last calibrated in excess of 29 months prior to it being used to obtain the readings from the Appellants.

The Appellants argue that the Court ought not to have found or could not have reasonably have found that the machine was accurate at the time of taking the samples since it had not been calibrated for such an extended period of time.

The Appellants argue that the State has to establish beyond a reasonable doubt that the machine, upon which they rely for their sole evidence to obtain a conviction, was operating the way the manufacturer's intended.

The State relies upon Section 39C (11) of CAP 51:02, which provides "*In any proceedings for an offence under this section, evidence of the condition of a breath analysing instrument or the manner in which it was operated shall not be required unless evidence that the instrument was not in proper condition or was not properly operated has been adduced*" to say that the evidence that the Appellants claim should have been led was not required.

Based on the record of evidence in Rajkumar's trial, Corporal Grant, the policeman operating the machine testified that the machine has to be tested to see if it is accurate and he further testified that he did not know if the machine was calibrated.

This must be evidence that, either the machine was not in proper condition or that it was not properly operated.

Based on the record of evidence in Singh's trial, Lance Corporal Kesney, the policewoman operating the machine testified that the first reading was 122 micrograms and the second reading was 91 micrograms, a difference of 31 micrograms. In addition, the slip that was produced at the trial was not clear, described as illegible by the Appellant's Counsel.

Surely, this must be evidence that the machine was not in proper condition or that it was not properly operated.

In these circumstances brought out in the evidence the Court finds that the State cannot use Section 39C (11) of CAP 51:02 as a shield to avoid leading evidence to establish the reliability and/ or proper functioning of the breath analysing machine used.

Further, in the case of People v Hargobind 2012 NY Slip Op 50450(U) [34 Misc 3d 1237(A)], Criminal Court of the City Of New York, Kings County, which I accept as persuasive authority, Gerstein, J. stated;

“Thus to establish the reliability of the results of the particular Intoximeter administered to Defendant, the People will have to show at least the following: that the device had been tested, producing a reference standard, within a reasonable period prior to Defendant's test; that the device had been properly calibrated; that the device was properly functioning on the day the test was administered; that the test was administered properly, including that the device was purged prior to the test, by a properly qualified administrator; and that Defendant was observed for at least 15 minutes prior to the test to ensure that Defendant had not "ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked, or have anything in his/her mouth.”

The reason for the requirement of observing the Defendant for at least 15 minutes prior to testing being that it has been scientifically accepted that, (1) if the subject has recently consumed alcohol it may take 15 to 30 minutes for the last traces in the mouth and respiratory system to be eliminated and (2), if alcohol is still in the stomach, one burp may bring up enough alcohol vapour to contaminate the respiratory system for 5 to 10 minutes.

It must be noted that the CMI Intoxilyzer 400 has a countdown clock that enables it to “countdown the 15 minute observation period”.

Also in the case of People v Bosis 2010 NY Slip Op 08380 [15 NY3d 494] Court of Appeals, which I also accept as persuasive authority, Graffeo, J. stated;

“Breath-alcohol detection machines have long been considered scientifically reliable, but it remains necessary for the proponent of breath-alcohol test evidence to establish an adequate evidentiary foundation for the admission into evidence of the results of the test (see e.g. People v Mertz, 68 NY2d 136, 148 [1986]). The issue here is whether, as a predicate to the admissibility of this evidence, there needed to be proof that the instrument used to test defendant had been calibrated during the past six months. Defendant claims that People v Todd (38 NY2d 755 [1975])

established a six-month calibration requirement that was not met here. Although Todd is susceptible to such an interpretation, we do not read it in such a rigid manner.

The trial evidence in Todd indicated that the breathalyzer machine "was constantly left on at the [state police] barracks and never turned off," and had been calibrated more than six months before it was utilized to test the defendant (79 Misc 2d 630, 633 [County Ct, Delaware County 1974]). The intermediate appellate court believed that those "two factors taken together raise[d] a reasonable doubt . . . as to the reliability of that particular machine" (id.). We agreed in a memorandum decision, explaining that "[t]he People failed to establish that the breathalyzer apparatus had been timely calibrated" and that "[i]t was incumbent upon the District Attorney to show that the machine was in proper working order" (38 NY2d at 756)."

Based on the foregoing both appeals are upheld and the convictions are vacated.

Gajanand Singh was also found guilty of disorderly behaviour but since no submissions were advanced with respect to this conviction, the Court finds that the Appellant Gajanand Singh has opted to not pursue his appeal with respect to that conviction and so the appeal with respect to that conviction is dismissed.

Sgd. Justice Navindra A. Singh

Justice N. A. Singh