

CO/653/2015

Neutral Citation Number: [2015] EWHC 2333 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 17th June 2015

B e f o r e:

LORD JUSTICE BEATSON

MR JUSTICE KENNETH PARKER

Between:

BARBARA MARSHALL

Claimant

v

CROWN PROSECUTION SERVICE

Defendant

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165 Fleet Street London EC4A 2DY
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(Official Shorthand Writers to the Court)

Mr T Rainsbury (instructed by Peters & Peters LLP) appeared on behalf of the **Claimant**
Mr Lewis (instructed by the Crown Prosecution Service) appeared on behalf of the
Defendant

J U D G M E N T
(Approved)

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1. MR JUSTICE KENNETH PARKER: On 5th March 2013 at 11.08 pm on the Cromwell Road by Kenway Road SW5 westbound, a speed camera placed at that location captured an image of an Aston Martin Virage V12 registration LJ12FX5 travelling at 40 miles per hour, very substantially in excess of the permitted maximum speed of 30 miles per hour.
2. The registered keeper of the vehicle was Mrs Barbara Marshall, the appellant in this appeal by way of Case Stated, who according to her evidence did not habitually drive the vehicle. The other driver of the car was her husband, Mr Phillip Marshall.
3. On 13th March 2013 Mr Marshall was issued with a notice under section 172(2)(b) of the Road Traffic Act 1988 ("the Act") requiring him to give such information "as to the identity of the driver of the vehicle who is alleged to be guilty of an offence as he may be required to give by or on behalf of a chief officer of police".
4. On 29th March 2013 Mr Marshall completed and returned the notice stating in respect of the alleged offence at 11.08 pm on 5th March 2013: "I am aware of who the driver was. It was either myself or my wife." He then gave relevant particulars of his wife.
5. On 18th April 2013 Mrs Marshall as registered keeper of the vehicle was issued with a materially similar notice under section 172(a) which she completed and returned stating in respect of the alleged offence at 11.08 pm on 5th March 2013: "I do not know for sure who the driver was; either me or husband."
6. After some earlier court proceedings, which it is not for present purposes necessary to describe, Mrs Marshall was eventually, on 16th January 2014, recharged with an offence under section 172(3) of the Act, namely that on 20th May 2013 she failed to give information relating to the identification of the driver of the vehicle who was alleged to have been guilty of an offence.
7. On 23rd January 2014 Mrs Marshall filed a written plea of not guilty to the offence and the matter finally came to trial on 26th August 2014 in the Magistrates' Court sitting at Waltham Forest - Mr Nina Hall and Mr William Adams.

The Proceedings in the Magistrates' Court

8. In the Magistrates' Court Mrs Marshall appeared in person without legal representation. Mr Marshall gave evidence first on behalf of the defendant, Mrs Marshall. I am not convinced looking at the efficient conduct of the trial that there was good reason why he gave evidence first. Because Mrs Marshall was the individual

charged with the offence, and the court needed primarily and as a matter of priority to hear directly from her what she knew or believed about the identity of the driver of the vehicle at 11.08 pm on 5th March 2013 and what steps, if any, she had taken to ascertain the identity of the driver when she received the notice in April 2013.

9. Furthermore in a criminal trial, witnesses of fact are regularly excluded from court when other witnesses give evidence in order that they may not be influenced by what they would otherwise hear and that any testing of the evidence may be effectively conducted.
10. In any event Mr Marshall told the Magistrates' Court that on the night of 5th March 2013 he and Mrs Marshall with their temporary cleaner, Adele, had been together in their flat at 16 Sloane Street SW1. He said that Mrs Marshall at some point drove Adele to Nevern Place in Earl's Court just off the Cromwell Road and then returned to 16 Sloane Street. Following her return he said that he then drove himself and his wife to their home, Sheen Common Drive, Richmond, TW10 5BN.
11. It appears that both journeys involved travelling along the Cromwell Road westbound and passing the speed camera by Kenway Road. It appears that two journeys were taken because the Aston Martin Virage has only a cramped rear seat and there were some articles intended for Richmond taking up room on that seat.
12. Mr Marshall had not noticed any flash of a speed camera on his journey home and on reflection he had no reason to think that he had driven at excessive speed. He spoke to his wife and Adele. They had not noticed any flash of a speed camera on the journey and on reflection they did not think the vehicle had been driven at excessive speed.
13. Mrs Marshall then gave evidence. From what is stated in the Case Stated, it appears that the Magistrates' Court did not find her to be an impressive witness. The court formed the view that she was at first reluctant to give any evidence and that she showed herself to be, quoting from the Case Stated, "dismissive of the offence and the proceedings", an observation which I take to mean that she was not treating the alleged offence and the consequential criminal trial with the seriousness that the Bench believed to be required in the circumstances that had arisen.
14. In any event Mrs Marshall told the court that on the night in question she had given Adele a lift home from 16 Sloane Street. Mr Marshall then drove home to Richmond. She and her husband, she said, had driven the vehicle within 25 minutes of each other. It was dark and she was not aware of any speed camera flashing. She did not explain what steps, if any, she herself had undertaken to ascertain who had driven the vehicle.

The Decision

15. The Magistrates' Court convicted Mrs Marshall of the offence under section 172(3) on the ground that on all the evidence she had failed to show that she "did not know and

could not with reasonable diligence have ascertained who the driver was" - see paragraph 3 of the Case Stated.

16. The Magistrates' Court announced its verdict in the following terms:

"Please set out what is at page 5 on the Statement of Case in the documents beginning with 'Agreed facts which is in italics down to the end of 'Conclusions' all of which is italics."

17. In the Case Stated dated 30th January 2015 the Magistrates' Court amplified their reasons in the following terms:

"12c It had been for the appellant to have taken further relevant steps and actions herself to ascertain who had been the driver of the vehicle at the relevant date and time and not to have merely relied upon the steps and actions her husband had already taken alone following receipt of the notice addressed to her.

d. The appellant should herself have taken steps and actions to resolve who had driven the vehicle, from which it may have been possible for her to have identified whether it had been in fact her husband or herself who had driven the vehicle on the night in question."

e. The appellant had not satisfied us that it was more probable than not that she did not know and could not with reasonable diligence have ascertained who the driver of the vehicle had been."

18. The Magistrates' Court initially imposed a fine of £1,395, made a statutory surcharge of £120 and awarded costs of £85. The fine exceeded the maximum for the offence and later on the day of the trial the Magistrates' Court reduced the fine to the maximum amount of £1,000 and the surcharge to £100 under section 142 of the Magistrates' Courts Act 1980. Mrs Marshall's licence was also endorsed with six penalty points.

19. In the Case Stated the Magistrates' Court stated three questions for this court as follows:

1. Did we misdirect ourselves in determining whether or not the appellant had established her defence on the balance of probabilities to our satisfaction evidentially under section 172(4)?

2. Did we give adequate reasons for rejecting the appellant's defence pursuant to the case of Veightman v DPP [2007] EWHC 634 (Admin), [2007] RTR 565?

3. Was our finding and decision Wednesbury unreasonable in all the circumstances of this case?

Preliminary Application

20. Through the appellant's notice and a supporting witness statement of Mr Marshall dated 11th February 2015, Mrs Marshall applied for an order under section 28A(3) of the Senior Courts Act 1981, or under the inherent jurisdiction of the court that the Case Stated be amended or remitted to the justices with a direction that they amend the Case Stated.
21. It is submitted that the Case Stated contained two particularly significant or key defects. First, it included a statement of evidence contrary to Part 64.3(4)(d)(ii) of the Criminal Procedure Rules, the importance of which was stressed in Tuthill v DPP [2011] EWHC 3760 (Admin) by Sir John Thomas (the then President of the Queen's Bench Division) at paragraph 17 to 20 and especially in a postscript to the judgment with which Wyn Williams J had agreed.
22. Secondly, it is submitted that the Case Stated contains a number of matters that never arose at the hearing before no part of the findings or reasons for the decision. The Magistrates' Court, as I have already noted, made observations in the Case Stated about Mrs Marshall as a witness and amplified its reasons in the manner that I have indicated.
23. I can deal relatively briefly with the application to amend. Part 64.5(3) of the CPR states that unless one of the questions on which the opinion of the High Court is sought is whether there was evidence on which the Magistrates' Court could come to its decision the case shall not contain a statement of evidence.
24. The third question appears to me to be a shorthand way and would so readily be understood by a reasonably informed reader of asking whether the decision convicting Mrs Marshall was one that no reasonable Magistrates' Court, giving themselves proper directions and applying proper considerations to the relevant evidence could have reached.
25. The third question does therefore raise an issue as to the sufficiency of the evidence and a statement of the evidence in the Case Stated was not technically out of place.
26. In the circumstances of this case I accept that it might well have been sufficient to state the primary facts that the court found and upon which the court rejected the statutory defence under section 172(4) of the Act. But the arguably superfluous inclusion of the brief summary of the evidence does not require for a fair disposition of this appeal that the Case Stated either be amended by this court or remitted for amendment.
27. In regard to the further matters included in the Case Stated it is important to bear in mind the observations of Lord Bingham CJ (as he then was) in McKerry v Teasdale and Wear Valley Justices [2000] 164 JP 355, at page 362. The Lord Chief Justice then said:

"It is, however, as I think, the law that justices are not obliged to state reasons in the form of a judgment or to give reasons in any elaborate form. ... In my judgment the reasoning which is called for depends both on the matter to be decided and the court by which the matter is to be decided. It is not usual for magistrates to give detailed reasons; nor is it usual for juries, who make very important decisions affecting human rights, to give any reasons at all. If an aggrieved party wishes to obtain more detailed reasons from a magistrates' court, then a request can be made to state a case, as was done here, and the justices have given their reasons at somewhat greater length."

28. This court comprising Tuckey LJ and Silber J relied upon those observations as an accurate statement of law in R McGowan v Brent Justices [2001] EWHC (Admin) 814, HLR 974 at 979. In my view the Magistrates' Court was entitled to amplify its reasons as it did. First, it is an important function of any trial court to evaluate the quality of the oral evidence that is given. A task that may well include in appropriate instances an assessment of the manner in which the evidence is given and the demeanour and apparent attitude of the witness. Appeal courts have also stated on myriad occasions that the trial judge or judges have a unique advantage in discharging that important function and that where the performance of an oral witness is for consideration they must have powerful reasons for rejecting primary findings of fact made by those with that unique advantage.
29. In the present case the Magistrates' Court were not impressed by Mr Marshall as a witness. They saw and heard her. This court has not. They formed the view that she, perhaps unlike Mr Marshall, was a reluctant witness and that she had failed to appreciate the seriousness of the alleged offence and of the criminal proceedings. That appreciation was within the legitimate scope of their functions. This court has no proper grounds to interfere with their appreciation or to exclude its exposition from the amplified reasons given in the Case Stated.
30. Furthermore, I do not see any proper ground for excluding the amplified reasoning set out at paragraph 12d of the Case Stated as I have quoted earlier in this judgment. It is suggested, primarily by reason of passage of time, that the reasoning in question did not in fact form any part of the decision making of the Magistrates' Court and constitutes no more than an expose facto rationalisation of a decision reached at the time on a materially different basis. I reject that suggestion. The Magistrates' Court was well aware - see paragraph 3 of the Case Stated of the express terms of the relevant provision in the Act, namely that Mrs Marshall in this case had to show that even if she had exercised reasonable diligence she could not have ascertained the identity of the driver. Paragraph 12d of the Case Stated simply puts beyond any doubt that they had in fact directed their minds to the application of that provision.

Submission

31. Mr Tom Rainsbury, counsel for the appellant, who did not appear in the Magistrates' Court, puts forward as the principal ground of appeal that the Magistrates' Court simply asked themselves the wrong question and so erred in law. The Magistrates' Court did no more than enquire whether Mrs Marshall exercised, within the meaning of section 172(4) of the Act, reasonable diligence to ascertain the identity of the driver who was alleged to have committed the speeding offence.
32. Having concluded on the evidence that she herself had not exercised such reasonable diligence the court rejected her defence and convicted her of the offence. The Magistrates' Court did not enquire at all into relevant question, namely whether, even if Mr Marshall herself had exercised reasonable diligence, she would not have ascertained the identity of the driver.
33. The second and connected principal ground of appeal is that if the Magistrates' Court had asked the right question, there was on the evidence only one rational conclusion, namely that even with reasonable diligence the identity of the driver could not have been ascertained. Mr Rainsbury asserted that the Magistrates' Court have accepted that Mr Marshall had exercised reasonable diligence and that he nonetheless had been unable to ascertain the driver's identity. How could Mr Marshall have done any better in the circumstances - Mr Rainsbury asks rhetorically? Any further investigation by her of the events of 5th March 2013 would inevitably have ground into the sand as did the earlier investigation by Mr Marshall. The decision on a full understanding of the fact was, it is contended, incomprehensible and irrational.

Discussion

34. It is not uncommon for husband and wife, or for others in a family or other enduring relationship to share the use of a particular motor vehicle. In times of relative economic austerity and with the substantial and rising financial and social costs of motoring such sharing can be expected to increase. I would also surmise that the scenario presented by the circumstances of this present case is also not uncommon, namely that where more than one individual uses a motor vehicle, it may not be immediately or obviously clear who was in fact driving the vehicle at the time of an alleged moving traffic offence. However, if the driver cannot with reasonable certainty be identified he or she cannot be effectively prosecuted for the traffic offence. It also all too easy to see therefore that shared use of a vehicle potentially offers significant scope for committing what could well be in a particular case a serious moving traffic offence but with an impunity from appropriate criminal sanctions including of course a period of disqualification from driving.
35. In that context I would wish to emphasise that Langstaff J at paragraph 22 of Atkinson v DPP [2011] EWHC 3363 (Admin), [2012] RTR 14 an appeal in which I participated was giving no more than a hypothetical example on one particular factual scenario. He was not providing a blueprint for successful evasion of liability under section 172(3) of

the Act.

36. With that background, it is in my view understandable and indeed commendable that a Magistrates' Court trying an alleged offence under section 172(3) of the Act should examine with the utmost care and rigour whether the alleged offender himself or herself did in fact exercise reasonable diligence with a view to ascertaining the identity of the driver at the time of the alleged traffic offence. If the alleged offender himself or herself has not exercised such reasonable diligence it will, to put the matter at its lowest, be extremely difficult to persuade the court that even if reasonable diligence had been the deployed the exercise would have been futile and would have led nowhere in the search for the driver. This is fully supported by Langstaff J's analysis in Atkinson at paragraph 28. Indeed, the defendant herself before the Magistrates' Court appeared correctly to recognise that the focus of the trial was likely to be on the steps, if any taken by the defendant, to ascertain the driver's identity.
37. For the trial written submissions under Mr Marshall's name were provided to the Magistrates' Court. Paragraph 7 stated in terms:

"It is well established that where a vehicle is driven by more than one person and the owner/keeper after making inquiry is unable to identify who was driving at the material time, then the owner/keeper will not be liable under section 172 of the 1988 Act but will have a defence under section 172(4)."
38. The Magistrates' Court was therefore right to focus on what steps if any Mrs Marshall herself took to ascertain the driver's identity when she received the notice under section 172(2)(a). The Magistrates' Court found in effect she had done nothing and said as much in their decision. However, I reject the argument that Magistrates' Court treated that finding as the end of the matter. As I have already observed they had well in mind terms of section 172(4) - see the Case Stated at paragraph 3 and in the circumstances it was implicit that they could not exclude the probability that the exercise of reasonable diligence by Mr Marshall herself would have revealed the driver's identity. In any event what I believe to be implicit was made clearly explicit in the amplified reasoning set out in paragraph 12D of the Case Stated that I have already quoted. I therefore reject this first ground of appeal.
39. The second ground of appeal is founded on a false premises. The Magistrates' Court did not find that Mr Marshall exercised reasonable diligence in seeking to ascertain the driver's identity. The Magistrates' Court according to admissible evidence on this appeal simply accepted his account of the steps that he had taken to identify the driver and made no finding either as to the adequacy of those steps or as to what might have emerged if further other steps had been taken. Mr Marshall had not been charged with any offence and no question arose under section 172(4) as to whether he had exercised reasonable diligence.

40. In accepting that account therefore the Magistrates' Court was not inevitably committed to finding that Mrs Marshall must herself have acted with reasonable diligence in so far as she relied on her husband's endeavours or to agreeing that if she herself had acted with reasonable diligence, she unlike her husband would not have ascertained the driver's identity. Even if the justices had thought that Mr Marshall had made reasonable enquiries, I am unpersuaded that the Magistrates' Court had no rational basis for concluding that if Mrs Marshall herself had "taken steps and actions to resolve who had driven the vehicle" it would nonetheless not have been possible for her to have identified whether it had been in fact her husband or herself who had driven the vehicle on the night in question.
41. As a start on receiving the notice under section 172(2)(a) Mrs Marshall could, for example, have very carefully and conscientiously gone over the chronology and manner of the driving on the night of 5th March 2013. The following questions could have diligently explored: at what time did she leave 16 Sloane Street, arrive at Nevern Place and return to Sloane Street to leave for Richmond? The distance from Sloane Street westward along the Cromwell Road to Kenway Road can be ascertained and the duration of the relatively short journey at night reasonably estimated.
42. On the first working assumption that she herself had been driving at the time of the alleged offence she could have sought to work out the approximate time that she must have left 16 Sloane Street, reached Nevern Place close to Kenway Road and then returned to Sloane Street to leave for Richmond.
43. If, on the other hand, Mr Marshall had been driving at the time of the offence the relevant chronologically, whatever it might exactly have been, must have been significantly different. Mr Marshall must on that working assumption have left Sloane Street on the first occasion considerably earlier, allowing her initially to drive Adele to Nevern Place, drop Adele off at the residence, return to Sloane Street to collect Mr Marshall before setting off on the final journey to Richmond. The final journey to Richmond must then have been considerably earlier.
44. It is not of course for me to speculate on exact routes, traffic conditions, driving times and manner of driving of Mr and Mrs Marshall on the night of 5th March 2013. My point is simply that what adumbrated in broad terms is the nature of one obvious enquiry that Mr Marshall herself could have undertaken and could reasonably have been expected to undertake and explained to the court having received the notice and facing potential criminal proceedings.
45. Experience shows that it is quite surprising what individuals can recall when they apply their minds in a conscientious and determined manner to ascertain the timing of past events. That is just the kind of experience and understanding of human affairs that lay magistrates are expected to bring and do bring to the discharge of their judicial function.

46. It was not therefore on any view irrational for the Magistrates' Court to refuse to exclude the probability that a conscientious and determined enquiry by Mrs Marshall, for example along the lines that I have indicated, would have revealed whether it was Mrs Marshall or her husband who drove past the agreed camera by Kenway Road at 11.08 pm on 5th March 2008.
47. Finally, I am satisfied having regard to the case statement and the reasons given by the Magistrates' Court that adequate reasons were given in this case it was plain to all from that statement of reasons as to why the magistrates had convicted and indeed this judgment explains as well how they reached that verdict on the material that they heard.
48. For those reasons, in my judgment, each ground of appeal fails. I would answer the first question in the Case Stated as "no", the second question as "yes" and the third question as "no" and I would dismiss this appeal.
49. LORD JUSTICE BEATSON: I agree.

(Submissions re: costs)

50. LORD JUSTICE BEATSON: Thank you. I am not sure you have a right to respond. We will hear anything you want to say. We do not require anything.
51. Taking into account the points that Mr Rainsbury has raised we consider that the right course in this case is to, and I am going to give an equation rather than a bottom line, to assess the respondent's costs at 75% of £2511 and to summarily award the respondent the costs in that sum. The order will have to do the sum. We are grateful to both of you.