In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 337

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

SAFIYAH TALBOT

Applicant

-and-

THE QUEEN

Respondent

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Paul Wilson, DV Law Bermuda, for the Applicant**
Mrs Sharkira Dill-Francois, Deputy Solicitor General of the Attorney General's Chambers, for the Respondent

Date/s of Hearing: **17 January 2019**

Date of Judgment: **7 February 2019**

JUDGMENT

Right to obtain legal advice before complying with the demand for breath sample; section 35C (1) of the Road Traffic Act 1947; concept of "reasonable excuse"; compliance with section 5 of the Constitution

Introduction

1. In these proceedings, Safiyah Talbot ("the Applicant") seeks judicial review of the decision to charge with the offence of failing to comply with a sample of breath contrary to section 35C(1) of the Road Traffic Act 1947 ("RTA"). The Applicant refused to comply with the demand for a sample pending discussing the matter with her attorney. Sometime later, after discussion with her attorney, the Applicant requested that she be allowed to take the test but that request was refused.

Statutory provisions

2. Section 35C(1) of the RTA provides as follows:

> *"Arrest*
>
> ***Samples of breath where reasonable belief in commission of offence under section 35, 35AA or 35A 35C***
>
> ***(1)*** *Subject to subsection (2) where a police officer on reasonable and probable grounds believes that a person is committing, or at any time within the preceding twelve hours, has committed an offence under section 35, 35AA or 35A, he may arrest him without a warrant, and by demand made to that person forthwith or as soon as practicable thereafter, require him to provide then or as soon thereafter as is practicable such samples of his breath as in the opinion of a qualified technician are necessary to enable a proper analysis to be made in order to determine the proportion, if any, of alcohol in his blood, and to accompany the police officer for the purpose of enabling such samples to be taken.*
>
> …

(7) *Any person who, without reasonable excuse, fails or refuses to comply with a demand made to him by a police officer under this section commits an offence."*

Background facts

3. On Saturday, 14 April 2018 at around 7 a.m., PC Watson and PC Outerbridge attended a single vehicle collision, which occurred on Wellington Street, St George's. They observed a silver grey Suzuki Swift motorcar which had overturned and had come to rest on its nearside. The Applicant was the driver of the vehicle and according to the officers they noticed a strong smell of intoxicants on her breath and believed that impairment was a factor; they therefore made a demand for a sample of breath. According to PC Outerbridge, the Applicant initially agreed but shortly afterward stated *"I am not taking that test*".

4. In her first affidavit dated 26 September 2018, the Applicant confirmed that when asked to provide a sample, her first response was yes because she was quite confident that the reading would be negative. However, on further consideration she decided that she wanted to consult a lawyer and that "*Accordingly, having not yet spoken to him, I recanted my initial acquiescence to the request for a breath sample, as I wanted to wait for his advice".*

5. Even accepting the Applicant's affidavit evidence, it is clear that the Applicant refused to provide a sample when she was requested to do so by a police officer. It is also to be noted that whilst the Applicant states that she wanted to obtain legal advice, her affidavit does not state that she in fact communicated that fact to the police officers or that that was the reason why she had changed her mind.

6. The Applicant was conveyed to the Hamilton Police Station around 8:30 a.m. when PC Watson asked her if she was still refusing to complete the breath test procedure and she replied *"Yes".* According to PC Watson, he advised the applicant that refusal to provide a sample was treated the same in law as if she had failed the test and the Applicant stated that she was aware this to be the position.

Later that morning around 9:15 she spoke to her attorney. The Applicant's attorney then spoke with PC Watson on the telephone and requested that PC Watson administer the test to the Applicant. PC Watson said he would consider administering the test after he had made some enquiries as to internal policy in these circumstances. In the end, after further consultation, PC Watson refused to administer the test at this time.

Outline of legal arguments

7. The Applicant invites the Court to consider the following issues:

    (a) whether exercising her constitutional right to consult an attorney upon arrival at Hamilton Police Station can be interpreted as a *refusal to comply with the demand;*

    (b) whether police have the authority to refuse to administer the taking of a sample where the indication of a willingness to comply comes within a reasonably timely manner;

    (c) whether the rationale of previously decided cases is contrary to the constitutional right to obtain legal advice;

    (d) whether the Applicant's constitutional right to consult an attorney upon arrival at Hamilton Police Station is outweighed by the police need to recover evidence;

    (e) whether a sample of breath amounts to evidence for which defendants should be safeguarded against; and

    (f) whether the constitution should be read as the Supreme Law.

8. All these issues identified by the Applicant resolve themselves into two main questions: (1) does the refusal to comply with the demand for a breath sample because a person wishes to consult a lawyer amount to a "*reasonable excuse"* within the meaning of section 35C (7) of the RTA, and (2) if it is not a "*reasonable excuse"* does the situation created thereby constitute a breach of section 5 of the Bermuda Constitution?

(1) Issue of "reasonable excuse"

9. It is perhaps not surprising that the arguments raised in this application have been raised in the Bermuda courts before. Indeed there are two Court of Appeal decisions, which are of course binding on this court, dealing with this issue and factual situation.

10. In *Sybil Young v McClean* Criminal Appeal No 14 of 1993 (Court of Appeal), Mrs Young was accused of failing to comply with the demand for a sample of breath. At the Hamilton Police Station she was asked whether she wished to take the test. Her evidence was that she said that, "*I must speak to my lawyer first".* It was argued on behalf of Mrs Young, that as she was entitled to obtain legal advice before providing a breath sample, her request to do so constituted a "*reasonable excuse"* within the meaning of the relevant section. The argument advanced on behalf of Mrs Young is materially the same argument which is advanced here on behalf of the Applicant. This argument was rejected by the Court of Appeal. Roberts P. said at page 55:

> "*Even if he had accepted her evidence that she refused because she wanted to consult her lawyers, this would not, in our opinion, have constituted a reasonable excuse for refusing to comply with a lawful demand made under section 35A R.T.A.*
>
> *The powers which a police officer may exercise under that section depend upon the officer having a reasonable and proper suspicion of an offence against section 35A or 35B R.T.A., subject only to a reasonable excuse for failure to comply.*
>
> *There may well be circumstances which would amount to a reasonable excuse. A wish to see a lawyer is not one of them."*

11. Similar facts and the same legal issues arose in *Pitt v The Queen* [2014] Bda LR 49 (Court of Appeal), where the accused agreed to provide a breath sample at the scene of the accident. She was taken to Hamilton Police Station where she admitted to having consumed two glasses of red wine. She was asked to provide a specimen of breath and at first agreed. But after she had been given the opportunity of speaking to a lawyer on the telephone and having been unable to make contact, refused on the ground that she had not spoken to one. The judge directed the jury in terms that a police officer can demand a breath test from the accused without delay or as soon as practical and that the implication of this was that the police officer need not wait until the accused had in fact had obtained legal advice. Furthermore, a concession to allow the defendant to try and contact a lawyer could be ended if it was creating a too great a delay and mistaken belief of entitlement to contact a lawyer could not amount to a reasonable excuse. This direction was challenged in the Court of Appeal as being wrong in law, but the Court of Appeal disagreed. Baker JA, speaking for the Court, said at [22];

> *"In our judgment this direction is plainly correct. Were the position otherwise, the breath test procedure, could be rendered completely nugatory. The fact that the appellant was allowed to try and contact Ms Pearman was a concession that need not have been made by Sgt. Samaroo. Furthermore, one asks rhetorically, what advice could have been given if the appellant had succeeded in contacting a lawyer. If she refused to provide a sample without reasonable excuse, she committed an offence and no reasonable excuse had been suggested other than not being allowed to speak to a lawyer".*

12. In the circumstances it is clear from the two Court of Appeal cases that failure to provide a breath sample because the accused wishes to obtain legal advice is not a "*reasonable excuse",* and the failure to provide a breath sample in those circumstances will amount to an offence. The statements made by the Court of Appeal in *Young* and *Pitt* are statements of legal principle and cannot be explained away on the basis that the facts in those cases were different and can be distinguished. As set out earlier, the legal position set out in these two cases of the Court of Appeal is of course binding on this Court.

(2) Issue of Constitutional compliance

13. Mr Wilson also argued that the Court of Appeal decisions in *Young* and *Pitt* are not binding on this Court because they are in breach of the Bermuda Constitution. He argues that cases suggest that a detainee has the right to legal advice, but in the case of a person arrested under the suspicion of driving whilst impaired, such a right is illusory if refusal pending receipt of legal advice amounts to an offence.

14. Again, the constitutional issue has been argued before the Court of Appeal and that Court has rejected this argument. This very argument was considered in *Pitt* where Baker JA stated at paragraph [24]:

> *"Ms Christopher made a valiant effort to persuade us that there is a right to legal advice under the Bermuda Constitution and/or the Criminal Code and referred us to the Canadian case of R v Prosper [1994] 3 SCR 236, but we remained unpersuaded that there is anything in the laws applicable to Bermuda that trumps a police officer's right to demand a breath test in the circumstance of this case"*

15. Similar arguments based upon fundamental rights have been raised in the English courts and the English courts have also rejected them. In *Director of Public Prosecutions v Billington and other appeals* [1988] 1 All ER 435, the English court was asked to consider the question whether police were required to delay taking a specimen of breath until after a suspect has consulted his solicitor. The accused relied upon section 58 of the English *Police and Criminal Evidence Act 1984* which provides that a person arrested and held in custody in a police station shall be entitled, if he so requests, to consult a solicitor privately at any time and if a person makes such a request he must be permitted to consult a solicitor as soon as is practicable. Lloyd LJ rejected this argument in the following terms at page 6:

> *"The police have no discretion to refuse a defendant who is in custody in a police station access to a solicitor. If, therefore, the duty solicitor is present in the police station then the defendant has a reasonable excuse,*

so it is argued, if he fails or refuses to provide a specimen before he has had an opportunity of consulting the duty solicitor. Even if there is no duty solicitor present at the police station the police must wait until a solicitor can be found. The defendant has a reasonable excuse if they do not.

That, very broadly, is the argument advanced on behalf of these four defendants. It has been put very persuasively. But I for my part cannot accept it. All that the 1984 Act requires is that the defendant be permitted to consult a solicitor as soon as practicable. There is nothing in that Act which requires the police, whether expressly or by implication, to delay the taking of a specimen under s 8 of the 1972 Act in the meantime.

…

I am glad to have reached that conclusion for two reasons, both of which were put before us by counsel for the Crown. First, it is, for obvious reasons, important that the procedure under s 8 in the police station should be gone through as quickly as possible. That consideration was referred to by Orr LJ in R v Seaman [1971] RTR 456 at 460. In that case the appellant expressed a desire to make contact with his consulate or High Commission before providing a specimen. It was held this did not provide him with a reasonable excuse within s 8 of the 1972 Act. What Orr LJ said was:

'The highest that the case has been put for the appellant is that it is capable of being a reasonable excuse that the appellant wished to be given a few moments to endeavour to telephone the High Commission. But if that is right, it must equally in our judgment be true that any other person who wishes to speak to his solicitor on the telephone would similarly be capable of having a reasonable excuse. This could be used in all cases as a delaying tactic. It could have very wide repercussions and would give rise to very considerable practical difficulties as to the time to be allowed in particular circumstances.'

I would adopt, respectfully, every word of what Orr LJ said in that case."

16. Similar arguments have been made by reference to Article 6 of the European Convention on Human Rights. Article 6 provides that everyone charged with a criminal offence has the minimum rights*…" to defend himself in person or through legal assistance of his own choosing…"* In *Campbell v Director of Public Prosecutions* [2002] EWHC 1314, the defendant was stopped by police while driving his van. He provided a positive specimen of breath at the roadside and was arrested. Once at the police station he requested a duty solicitor. The defendant was twice required to provide two specimens of breath for analysis and refused both times. The defendant was charged with failing, without reasonable excuse, to provide a specimen of breath and was convicted. He appealed relying upon Article 6 of the ECHR and the court dismissed the appeal explaining at paragraph [31] as follows:

> *"Article 6(3) did not impose a blanket requirement that each time a person was detained, legal advice had to be obtained for him before he could be asked to do or say anything. Rather, there had to be a proper balance between the interests of the individual on the one hand and the interests of the community at large on the other. Taking account of the procedural protections involved in the taking of a specimen, it was entirely proportionate, to give effect to the public interest in the suppression of drink-driving, to permit a police officer to require a member of the public to provide a specimen, albeit the latter might have requested legal advice and not received it"*

17. Again, it is to be noted that these are statements of principle and are not linked or dependent upon the gravity of the alleged offence committed by the accused.

18. In light of these authorities I am bound to conclude that in the circumstances there has been no breach of section 5 of the Bermuda Constitution.

19. It follows therefore that this application for judicial review must be dismissed. Accordingly, I order that this application made by Ms Talbot seeking judicial review of the decision to charge her with the offence of failing to comply with a

request for a sample of breath is hereby dismissed. I also set aside and discharge the stay of the criminal proceedings resulting from the charges which were the subject matter of this application for judicial review. I invite counsel for the Respondent to prepare an order for the approval of the Court.

20. I am grateful to both counsel for their submissions. I acknowledge in particular the assistance I received from the concise and compelling written submissions submitted by Ms Shakira Dill-Francois, Deputy Solicitor General, which I have largely adopted in this judgment.

Dated this 7 February 2019.

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NARINDER K. HARGUN

CHIEF JUSTICE