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JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CRIMINAL APPEAL. 15/2004

**BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A. (AG.)**

R.V. WILLARD COSTLEY

Leroy Equiano for the appellant

Herbert McKenzie and John Tyme for the Crown

31st May, 2nd June and 29th July, 2005

SMITH, J.A.

On the 15th April, 2002 the appellant was convicted of the offence of disobeying a road traffic sign contrary to section 97 of the Road Traffic Act. He was ordered to pay a fine of \$3,000.00, or in default of payment, to be imprisoned for 30 days.

He has appealed against his conviction on the following grounds:

- 1) The learned Resident Magistrate's verdict is not supported by the evidence.
- 2) The learned Resident Magistrate allowed inadmissible evidence after the close of the case at the point when submissions were being made by the prosecutor.

The facts are not in dispute. Sergeant Wilbert Afflick was the only witness for the prosecution. His evidence is to the following effect:

On December 11, 2002 he was on traffic duty along the Washington Boulevard, St. Andrew. He was standing on the left hand side of the Boulevard as one faces Six Miles. There are three lanes on that side of the road for vehicles travelling in the direction towards Six Miles. There are signs placed along the road and on the surface of the road. One of these signs indicates that the left lane is for buses only. He saw the appellant driving a white motor car, registered PA 3487 in the left lane designated for buses only. He signalled the appellant to stop. The appellant obeyed. He told the appellant he was driving his vehicle in disobedience of the traffic sign. The appellant was eventually handed a traffic ticket for disobeying a road sign.

The appellant who represented himself cross-examined Sergeant Afflick. During the cross-examination the appellant tendered in evidence the Road Traffic Regulations – Exhibit 1. He also tendered Jamaican Gazette dated Tuesday February 12, 2002 – Exhibit 2. Sergeant Afflick in answer to the appellant said that the Road Traffic Act did not define "bus". A bus, he said, is a vehicle which conveys eleven (11) or more persons. He said he did not see any construction or repair being done at the section of the road where he stopped the appellant. He agreed that section 105 did not give the Minister any authority to make any permanent change.

The appellant gave evidence on his own behalf. He operates a taxi. On the day in question he was driving his taxi on the Boulevard. He was travelling in the left lane in a westward direction when he was stopped by Sergeant Afflick.

Under cross examination he said that he went into the bus lane because he knew that there was no vehicle categorized as "bus" in Jamaica. He testified that he knew that the lane, though in his view, illegal, was designated for "buses only". His vehicle, he said, could be considered a bus by virtue of the dictionary definition of the word "bus". His vehicle is registered as a hackney carriage and it is not stated whether it is a car, bus or truck.

Submissions before Magistrate

Mr. Costley submitted that the charge against him for traffic violation was "illegal" because the Road Traffic Act or the Regulations made thereunder did not define any category of vehicle as 'bus'. "This so-called bus lane created by authority must not be considered legal ..." he contended. Further he submitted that section 105 did not give the Minister power to designate any part of a road as bus lane. Thus the Gazette (Exhibit 1) is to no effect.

Miss Fulton, the Clerk of Courts, submitted that since the Road Traffic Act did not define 'bus' one must look at the ordinary dictionary meaning. She referred to sections 59, 97 105, 106 of the Road Traffic Act and to a letter from the Chief Traffic Engineer and submitted:

- 1) That in all the circumstances, as a matter of law, the defendant was not driving a vehicle that is classified as a bus;

- 2) The defendant failed to obey the road markings designated by virtue of section 97 of the Road Traffic Act;
- 3) Those markings are designated as such by the powers of section 97 of the Road Traffic Act;
- 4) The defendant admits that he knew that the lane was designated for buses only.

The Magistrate's decision

The Magistrate found that the defendant was properly charged. He took judicial notice that repair work was in progress at the time of the alleged offence. He found that the prosecution had discharged the burden of proof. He rejected the appellant's arguments and found that the Minister had the power, once work was in progress, to make provisions for the use of the road as he saw fit.

On appeal

Ground 1 – Verdict not supported by evidence

Mr. Equiano submitted that the prosecution had failed to show that the traffic sign was lawfully placed on the road in question. The Minister, he argued, had purported to act under section 105 of the Act but this Act does not confer any such power on the Minister. In this regard he referred to the Gazette (Exhibit 2). Section 107(2), he contended, mandates that all regulations must be gazetted. Even if section 105 was relevant, he contended, the Crown had failed to show that any repair or reconstruction was required or was in progress on the

road. He referred to Sergeant Afflick's evidence that there was no reconstruction or repair work in progress at the material time and submitted that the signs were not lawfully placed or erected on the road. He conceded that the Minister was empowered to make such regulations as to the use of motor vehicles on roads, under section 59. However this cannot avail the prosecution since the regulation was purported to have been made pursuant to section 105.

Mr. McKenzie for the Crown submitted that the sole question for the trial judge was whether or not the road sign "Bus Lane" was lawfully placed and if so whether the appellant disobeyed the sign.

He referred to section 97 of the Act and submitted that this section places the burden on the appellant to prove that the sign was not lawfully placed on the road. The appellant he submitted has failed to do so. He read section 105 and submitted that it is for the appellant to show that reconstruction or repair was not required.

In any event, he contended, section 106 (d) empowers the Minister to designate a lane as a bus lane. The fact that the Minister promulgated the regulation and in so doing named a provision other than the provision which enables him to do so would not, he argued, make the regulation unlawful or of no legal effect.

In our view this ground really concerns two (2) issues, as Mr. McKenzie suggested:

- (i) Whether or not the road sign "Bus Lane" was lawfully placed on the road and if so
- (ii) Whether the appellant disobeyed the sign.

As far as the first issue is concerned sections 96 and 97 of the Act are important. Section 96 provides:

"96. (1) - The Road Authority may cause or permit traffic signs to be placed on or near any road.

(2) - Traffic signs shall be of the prescribed size, colour and type, except where the Road Authority authorizes erection of a sign of another character.

(3) ...

(4) - In this Part the expression "traffic sign" includes marks on the surface of roads, all signals, whether automatic electric signals or otherwise, warning sign posts, direction posts and signs or other devices for the guidance or direction of persons using roads.

(5) - Regulations may be made restricting or regulating the placing, erection and exhibition of traffic signs under this section."

It is important to note that the expression "traffic sign" includes marks on the surface of the road.

There is no requirement that notice of the erection of any sign by virtue of this section should be gazetted. Section 107(1), on which the appellant relies, does not impose such a requirement on the Road Authority.

Section 97 provides:

"97. - (1) The driver of every vehicle and the rider of every bicycle shall obey -

- (a) all red lights and stop signs; and

(b) all other traffic signs which may be lawfully placed, erected or exhibited on or near any road, or so as to be visible from a road, in accordance with the provisions of section 96.

(2) Any person who fails to comply with any such traffic signs shall be guilty of an offence.

(3) For the purposes of this section a traffic sign placed, erected or exhibited on or near any road shall be deemed to be of the prescribed size, colour and type or a sign of another character authorized by the Road Authority under section 96, and to have been lawfully so placed, erected or exhibited, unless the contrary is proved.

By virtue of subsection 3 of section 97 a traffic sign placed on any road shall be deemed to have been lawfully so placed, unless the contrary is proved. Thus the burden is on the person charged to show that the sign was not lawfully placed on the road.

The appellant attempted to discharge this burden by exhibiting a Gazette dated February 12, 2002 (Exhibit 2) which indicates that the road in question was designated a "Bus Lane" by the Minister in the purported exercise of powers conferred on him by section 105 of the Act. I agree with counsel for the appellant that section 105 does not confer on the Minister any such power. However, the power of the Minister to make regulations by virtue of section 105 is not relevant to the question as to whether or not the "bus lane" sign was lawfully placed on the road. To show that the sign was not lawfully placed the appellant would have to show that the placing of such sign on that particular road was in contravention of a regulation made by the Minister restricting or

regulating traffic signs – see subsection 5 of section 96 (supra). The appellant has failed to show that the “bus lane” sign was unlawfully placed on the Boulevard.

The second question is whether or not the appellant has disobeyed the sign. Unlike the first issue where the burden is on the appellant, the burden of proving disobedience of the sign is, in our view, on the Crown. The appellant admitted that he was driving his vehicle on the lane designated for buses only. His contention is that there is no definition of the word “bus”. As we understand his argument, he is saying that the Crown has not shown that the vehicle that he was driving at the material time was not a bus. What is the evidence? Sergeant Afflick said the appellant was driving a car. Under cross examination he defined a bus as a vehicle designed to carry at least eleven passengers.

It was then that the appellant produced the Gazette (Exhibit 2). The appellant did what the prosecution should have done. This Gazette defines bus as follows:

“For the purpose of the schedule, a bus shall be defined as a motor truck designed primarily for the carriage of passengers, licensed as a stage or Express Carriage, and constructed to accommodate not less than 19 seated passengers.”

The appellant in his evidence was careful not to say the type of vehicle he was driving. Under cross-examination he said that his vehicle could be considered a bus by virtue of dictionary definition. His vehicle, he said, was registered as a hackney carriage and it is not stated whether it is car, bus or truck.

The learned trial judge of the Traffic Court was called upon to make a finding of fact as to whether or not the appellant was driving a vehicle which was not a bus in a lane designated for buses only. This might seem far fetched, but the appellant having put the Crown to proof is entitled to have the issue determined. The learned judge of the Traffic Court was misled into focusing on the authority of the Minister to make the regulation under the Act designating the lane a 'bus lane' and as to whether or not work was in progress on the road in question at the material time. These issues were completely irrelevant. The judge did not properly adjudicate on the relevant issues before him. We are driven to the view that in fairness to the appellant, who represented himself, his conviction should not stand. The prosecution, seemingly, made no serious effort to prove that the appellant was driving a vehicle other than a bus at the time in question and therefore had disobeyed the traffic sign.

Ground 2 – The reception of hearsay evidence

After the close of the case for the defence and after the defence had addressed the court, the Clerk of Court in her address read and relied on a letter from the Ministry of Transport and Works. This letter was signed by the Chief Engineer for the Permanent Secretary. It is dated April 15, 2003 – the last day of the trial. The content of this letter indicates that road works were still in progress at the material time. Mr. Equiano complained that the procedure was irregular and that the content of the letter was inadmissible. Mr. McKenzie quite

properly conceded that the procedure, was irregular and that the 'evidence' was hearsay and inadmissible.

The learned judge seemed to have relied on this letter in coming to the conclusion that road work was in progress. Although not strictly necessary, we think we should point out that what we have described above constitutes a material irregularity in these adversarial proceedings such as would vitiate the trial.

Conclusion

The appeal is allowed. The conviction is quashed and the sentence set aside. A verdict of acquittal is entered.