

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2016] HCJAC 9
HCA/2015-001558-XJ

Lady Paton
Lord Menzies
Lord Matthews

OPINION OF THE COURT

delivered by LADY PATON

in

APPEAL BY STATED CASE

by

MARCUS HOWE

Appellant;

against

PROCURATOR FISCAL, AYR

Respondent:

Appellant: C M Mitchell, advocate; Public Defence Solicitors' Office
Respondent: Farquharson AD; Crown Agent

26 January 2016

Introduction

[1] On 10 February 2015, after a summary trial in Ayr Sheriff Court, the appellant was found guilty of the following offences:

> "(1) On 29th May 2012 on a road or other public place, namely the A70 road, near to Lugar, East Ayrshire you….did drive a mechanically propelled vehicle, namely an articulated lorry, namely motor vehicle registered number SF56 FNJ dangerously and did drive too close to another car, namely motor vehicle registered number NL11 KZN, then being driven by Michael Chalmers…overtaking said vehicle registered number NL11 KZN at speed and into the path of an oncoming vehicle registered number S25 PCM causing said motor vehicle

registered S25 PCM to swerve to avoid a collision and causing said vehicle registered number NL11 KZN to brake sharply to avoid a collision and did [thereafter] persistently follow Michael Chalmers as he drove motor vehicle NL11 KZN away in an attempt to evade you;

CONTRARY to the Road Traffic Act 1988 section 2 as amended.

(2) On 29th May 2012 at the A70 road, near to Lugar, East Ayrshire you…did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did exit the vehicle you were driving registered number SF56 FNJ, approach Michael Chalmers, named in Charge 1, wave your fist as him, behave in an aggressive manner and repeatedly kick the side of motor vehicle registered number NL11 KZN causing damage to it;

CONTRARY to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010".

[2] The appellant appealed against conviction by way of a Stated Case. The question which passed the sift was:

"… (ii) in relation to charge 2 on the complaint, the sheriff erred in law in repelling a submission of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995, and more particularly in so doing:
(a) the sheriff erred in rejecting a submission that a reply to a requirement made by a police officer in terms of section 172 of the Road Traffic Act 1988 was admissible as evidence only in relation to road traffic charges or otherwise as set out in section 172(1) of said Act, and in holding that, on the contrary, a reply made in answer to such a request might properly be relied upon by the Crown in proof of a separate charge of a different character outwith the scope of the Road Traffic Acts …"

The Crown evidence

[3] Sheriff Scott Pattison sets out the evidence led on behalf of the Crown at pages 7 to 12 of the Stated Case in the following terms:

"(2) **Philip MacMillan**

Mr MacMillan stated that he had been driving his wife's Volvo convertible at 10.30am on the A70 road near to Lugar in East Ayrshire on 29th May 2012. His wife was with him. He described the road as one lane in each direction with no barrier. The road was quite busy with a lot of heavy traffic using it at that time. On the right hand side of the road from where he was driving there was open ground with a football park, and residential properties and on the left hand side there is a river. The road was subject to a 30 mile per hour speed limit.

(3) His attention was drawn to a black vehicle which he thought was a Ford Focus and an articulated vehicle which was trying to pass it. Both the Focus and the articulated lorry were driving towards Mr MacMillan's vehicle. The articulated lorry came out onto Mr MacMillan's side of the road, that is the offside, to overtake the Ford Focus. He estimated

that it was 50 to 60 metres away when he first saw the lorry. He thought that it was dark red in colour but was not sure and that it had writing on the side, possibly with a name 'Anderson' although he was not sure about that either. He did not notice the registration number at the time but stated that there was no other lorry on the road at that time. Mr MacMillan had to move swiftly to the left hand side of the road to avoid a collision. The lorry did not complete the overtaking manoeuvre and went back in behind the black Ford Focus. The lorry pulled back in as it passed Mr MacMillan's car. Mr MacMillan stated that he would not have been able to drive in his lane when the lorry was overtaking and that was why he pulled the car off the road and stopped. It would have been a head on collision otherwise. Mr MacMillan stated that he was very fortunate that there was an entrance way to a private property on his left hand side at that time which had allowed him to pull in and stop. The lorry was travelling almost right up against the back of the black car. It was only a few feet away. Mr MacMillan stated that he continued to watch. The black car stopped at this point around 50 metres to Mr MacMillan's rear. The lorry stopped behind it abruptly and the driver of the lorry jumped out and ran round to the front of the black car and started to kick the driver's side of the black Ford Focus. He kicked it more than once. He looked angry. Mr MacMillan could not make out who was in the black car and couldn't even see if there was more than one person in it. He did not know if the black car had been damaged. The lorry driver was too far away to be identified but he was wearing a fluorescent vest. Mr MacMillan reported what he saw to the police and as soon as he saw the driver kick the black car he phoned Cumnock Police Office and provided his details. He said he did this in case the driver of the black car reported the incident. He gave his details of the lorry to the police although he did not see the registration number. He stated that it was the only lorry on the road as far as he could remember.

(4) **Michael Chalmers**

This witness said that he was driving a hired car, a Vauxhall Astra which he thought was navy blue on the A70, near Lugar on 29th May 2012. He had just hired the vehicle that morning for work and did not know the registration number. He stated that an articulated lorry, which was predominately orange in colour and with no writing on it, came to his attention in his rear view mirror. It was the only lorry travelling near him and he noticed it because it was very [close] to the rear of his vehicle. It was so close he could not make out the number plate. As he, Mr Chalmers, approached the town of Cumnock he had to slow down but the lorry just kept coming at his rear and looked as though it wasn't slowing down. Mr Chalmers spoke to travelling over speed bumps near the police station in Cumnock and passing through a roundabout and taking a left turn [at] which point the speed bumps stopped. He had the clear impression that the lorry wanted him to go faster but he could not because of the speed bumps and the presence of the school.

(5) Mr Chalmers was not familiar with the area and in particular was not familiar with Lugar. After he left Cumnock he started to increase speed and the lorry behind him in turn increased its speed. Mr Chalmers stated that the lorry started to overtake his vehicle in

Lugar. He could not remember any vehicles coming in the opposite direction but he saw the lorry begin to overtake him and to pass his vehicle. The lorry then braked abruptly. He heard the tyres squeal and could smell burning rubber. Mr Chalmers had to bring his car to a complete stop by slamming on the brakes to stop going into the rear of the lorry's trailer. Mr Chalmers stopped his vehicle around 20 feet behind the lorry. He was shaken. Mr Chalmers stated that he then started to pull his vehicle out to the right and as he was doing so the driver's side cab of the lorry flew open and a man got out. His arms were flailing in the air and he looked aggressive. He was waving his fists and he kicked Mr Chalmers's vehicle causing a dent in the driver's side rear door which he noticed later on that morning. Mr Chalmers was alarmed but managed to pull away. He just stayed on the road. Further down the road he pulled into a siding or a lay-by to compose himself. The lorry appeared and pulled in right behind him. The cab flew open again and the driver got out but Mr Chalmers managed to pull away and there was no contact between him or between the man and the vehicle at that time. Shortly afterwards Mr Chalmers was out of Lugar and going up a slight incline. He again pulled into the side of the road and noticed the lorry behind him again starting to brake. Mr Chalmers pulled away again. Further on up the road the lorry was still pursuing him and Mr Chalmers noticed a lay-by on the right hand side. He was concerned about what was happening and used the lay-by to swing his car around to begin travelling in the opposite direction. In his rear view mirror he saw the lorry also attempt a u-turn and 'jack-knife'. Mr Chalmers then went to Cumnock Police Office to report the matter. He identified the appellant as the driver of the lorry. When he reported the matter he learned that the police already knew about it and he gave a statement later that day at a scheduled time. He stated that he got a few letters from the registration number of the lorry. In the course of his evidence the Procurator Fiscal put part of his statement to him in terms of the case of Jamieson. In that statement he had stated that the lorry was orange and fitted with a trailer and that the registration number was SF or SJ56 to 59, FNJ. He said that he had given the police this information and that it was the truth.

(6) **Police Constable Sacha Solman**

Police Constable Solman stated that she worked at the divisional admin department in Motherwell and had been a police officer for 18 years. On 2nd October 2012 she was working with her colleague Police Constable Paul Collins and was instructed to attend a local address and carry out a requirement in terms of section 172 of the Road Traffic Act 1988 of the appellant Marcus Howe in terms of a request sent from enquiry officers in U Division, Ayrshire. She explained she attended at the appellant's address and carried out a section 172 requirement requiring the appellant to identify the driver of a Volvo lorry SF56 FNJ at 10.30am on 29th May 2012 on the A70 near to Lugar. The appellant identified himself as the driver of the vehicle on that day. Constable Solman then cautioned and charged the appellant with a contravention of section 2 of the Road Traffic Act 1988 to which he made no reply. She also charged him with a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and with vandalism in terms of section 52(1) and (3) of the Criminal Law (Consolidation) (Scotland) Act 1995. The appellant made no reply to all of the

charges. Constable Solman identified the appellant. In cross-examination part of Constable Solman's statement was put to her in terms of section 263 of the 1995 Act. Her statement said that she had been asked to carry out the section 172 requirement 'in an effort to identify the driver of a Volvo lorry VRN SF56 FNJ who had allegedly been involved in a road traffic *collision*…'. Constable Solman stated that she had not used the word collision when making the actual 172 requirement and that she had explained the circumstances of the alleged incident to him in brief terms".

Section 172 of the Road Traffic Act 1988

[4] Section 172 of the Road Traffic Act 1988 provides *inter alia* as follows:

"**Duty to give information as to identity of driver etc in certain circumstances**

1. This section applies –

a. to any offence under the preceding provisions of this Act except [certain specific provisions not relevant to this case],
b. to any offence under sections 25, 26, or 27 of the Road Traffic Offenders Act 1988,
c. to any offence against any other enactment relating to the use of vehicles on roads …
d. to manslaughter, or in Scotland culpable homicide, by the driver of a motor vehicle.

(2) Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies –

a. the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and
b. any other person shall if required as stated above give any information which it is in his power to give and may lead to identification of the driver.

(3) Subject to the following provisions, a person who fails to comply with a requirement under subsection (2) above shall be guilty of an offence …"

In terms of section 172(1), the requirement to give information about the identity of the driver applies *inter alia* to the offence of dangerous driving in terms of section 2 of the Road Traffic Act 1988.

The submission of no case to answer

[5] At the close of the Crown case Mr McFadyen, solicitor for the appellant, submitted that the appellant's response to the police officer's question in terms of section 172 of the 1988 Act was not admissible in relation to charge 2, as the statutory offence of breach of the peace in terms of section 38 of the Criminal Justice and Licensing (Scotland Act 2010 was not one of the offences specified in section 172(1). Thus there was no corroboration of the identity of the appellant as the perpetrator in

charge 2. It followed that there was insufficient evidence and no case to answer in respect of charge 2.

[6] The sheriff repelled the no case to answer submission. Having dealt with a complaint about the passage of time between the alleged offences on 29 May 2012 and the request for information in terms of section 172 made on 2 October 2012, the sheriff continued in paragraph (21) of the Stated Case:

> "(21) In paragraph 2(ii) of the application the defence repeat the second leg of the no case to answer submission namely that the section 172 answer is not capable of providing corroboration of identity in relation to charge two given that section 172 does not envisage that as a scenario. I took the view in this case that the circumstances of charge two were inextricably linked with the course of driving set out in charge one and that the overall circumstances should be seen as a concerning case of road rage. The events forming the basis of charge two occurred, if one takes Mr Chalmers's account as the principal source as one must, in the middle to later stages of the course of driving which properly founded charge one. Mr Chalmers, as I have set out above, spoke to being overtaken, to having to abruptly stop behind the appellant's vehicle, to having his car kicked by the appellant and then to being followed persistently by the appellant in the way he described. I also recall, in the course of the discussion surrounding the no case to answer submission, suggesting to parties that it would have been open to the Crown to have libelled the narrative of charge two within charge one, and my recollection is that both parties accepted that that would have been possible and competent. The view I took in this case was that the section 172 response was admissible in support of proof of the identity of the perpetrator in charge two in these particular circumstances when the charges were so linked and arose out of what was a single incident all of which related to the appellant's driving; and in circumstances in which it was obtained when the police were investigating a road traffic incident in which it was clear that the major focus was on the appellant's driving and a potential charge of dangerous driving. Section 172 is lawful and not incompatible with Article 6 [Stott v Brown supra].
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> I do not say that in general a reply made in answer to such a request might be relied upon generally by the Crown in proof of a separate charge of a different character outwith the scope of the Road Traffic Act as the application for Stated Case suggests. The question should be considered on a case by case basis. In this case I was satisfied that the request made of the appellant by the police was lawful and that the response was admissible in relation to proof of the two charges libelled".

[7] The questions posed by the sheriff at page 27 of the Stated Case are as follows:

> "2) Upon the evidence narrated was I entitled to repel the submission that there was no case to answer on charge 2?...
> 4) On the facts stated was I entitled to convict the appellant?"

Appeal submissions for the appellant

[8] Counsel for the appellant submitted that it was not a legitimate purpose to use the reply given to the section 172 inquiry in order to corroborate the identity of an accused in respect of a

non-road-traffic-related matter. While it was conceded that, as a general rule, evidence led in relation to one charge could be relied upon in relation to other charges, nevertheless it was submitted that, in terms of section 172, there was a narrow use to which the response generated by a section 172 inquiry could be put. The only basis upon which the evidence could be used against the accused person was in relation to a road traffic matter. Because of the rule against self-incrimination, narrow constraints had to be applied to the use to which section 172 could be put, in order to make the provision ECHR-compliant (*Wilkinson's Road Traffic Offences* paragraphs 7.24, 7.26, 7.27; *Brown* v *Stott* [2003] 1 AC 681). Section 172 was therefore an exception to the general rule that evidence led in respect of one charge could be used in relation to other charges. Researches had failed to disclose any decided case directly in point.

Appeal submissions for the Crown

[9] The advocate depute submitted that it could not be said that the sheriff had erred. There had been one single incident and one course of driving. As the sheriff noted in the section headed "Reasons for Decision" at paragraph (21) of the Stated Case, the driving and the statutory breach of the peace were inextricably linked. It had been open to the Crown to libel the events in charge 2 as part of charge 1, but it had been thought neater to separate them. The courts regularly used evidence led in respect of one charge to provide evidence in respect of another charge (cf *McColl v Skeen* 1980 SLT (Notes) 53). It was competent to use the information given in response to a section 172 request. The appeal must fail.

Discussion

[10] As Lord Hope of Craighead explained in *Brown* v *Stott* [2003] 1 AC 681:

> " … there are the qualifications which are written into section 172(2)(a) itself. The provision may be operated only when it is alleged that an offence has been committed of the kind to which the section applies: section 172(1). Then there is the fact that the requirement in section 172(2)(a) to give information as to the identity of the driver may be addressed only to the person keeping the vehicle. The expression "keeping the vehicle" is not defined, but I take this to be a reference to the person in whose name the vehicle is registered under the Vehicle Excise and Registration Act 1994: see section 172(7) and (9) and the definition of the expression "registered keeper" in section 172(10). A person who submits to registration as the keeper of a motor vehicle must be taken to have accepted responsibility for its use and the corresponding obligation to provide the information when required to do so. Furthermore the requirement for which provision is made is directed to one issue only, the identity of the driver of the vehicle. It is proper to recognise that the identity of the driver is likely to be an important and indeed crucial issue at any trial. But the provision does not permit open-ended questioning of the person keeping the vehicle in order to secure an admission of guilt as to the offence. It seems to me that, bearing in mind the difficulties that may arise in tracing the driver of a vehicle after the event, this limited incursion into the right of silence and the right of the driver who is alleged to have committed an offence not to incriminate himself is proportionate.
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> Then there is the use which may be made of the response to the requirement in the event that the person keeping the vehicle admits that he or she was the driver of it. This is not the subject of any express provision in section 172 or of any other provision in the 1988 Act. But

the approach which has been taken to provisions of this kind is that, unless the legislation provides otherwise, answers which a person is compelled to give in response to a statutory requirement can be used against that person in criminal proceedings. It was on that basis that Lord Justice Clerk Grant proceeded when he said in *Foster* v *Farrell* 1963 JC 46, 53-54 that a statement obtained from the keeper as to the identity of the driver was admissible in evidence against him. The answer to the question whether the use of the driver's self-incriminating statement at a trial for the offence with regard to which the requirement was made is proportionate to the legitimate aim is to be found partly in the characteristics of section 172(2)(a) which I have already identified, and partly in the other respects in which the legislation preserves the accused's right to a fair trial. Under Scots law the driver's admission must be corroborated, and there must be other evidence to show beyond reasonable doubt that the driver committed the offence with which he is charged. All the usual protections against unreliable evidence and evidence obtained by oppression or other improper means remain in place …"

[11] *Wilkinson's Road Traffic Offences* notes at paragraph 7.27:
"Powerful judgments from Lord Bingham and Lord Hope [in *Brown* v *Stott*] explored the background and concluded that s.172 provided for the putting of a single, simple, question the answer to which could not of itself incriminate the suspect since it was not, by itself, an offence to drive a car …"

[12] Against that background, it is our opinion that the appellant's response to the section 172 requirement was available as evidence in respect of both charges 1 and 2 for several reasons. The response was obtained lawfully in terms of section 172. It then became evidence available to the Crown (admittedly requiring corroboration) for any offence related to the relevant vehicle at the time and place to which the section 172 inquiry was directed (cf the approach adopted in *McColl* v *Skeen* 1980 SLT (Notes) 53). The observations of Lord Hope, quoted above, confirm the validity of that approach, and also the proportionality of using the section 172 response "in criminal proceedings" (and not just in the narrower context of "road traffic offences"). The appropriateness of such a use of the section 172 response is illustrated if certain hypothetical circumstances are envisaged: if a driver collided with a pedestrian causing death, the driver's section 172 response would be available as corroborative evidence in respect of a charge of causing death by dangerous driving in terms of section 1 of the Road Traffic Act 1988; but if the Crown, on further investigation, found that the driver had appeared deliberately to have driven at the pedestrian with murderous intent such that the case had to be re-indicted as "murder", it would be illogical and unprincipled if the section 172 response could not to be used as corroborative evidence identifying the driver in the alleged murder case. Finally, we note that, in the circumstances of this particular case, there was a sequence of events involving road traffic matters and also the appellant's alleged behaviour in breach of section 38 of the 2010 Act. That behaviour was very much part of the sequence of events involving the dangerous driving. As the sheriff notes, the behaviour was "inextricably linked" to the alleged road traffic offence, namely a contravention of section 2 of the 1988 Act.

[13] In the result, we are not persuaded that the sheriff erred in repelling the no case to answer submission for the reasons he gave. We answer questions 2 and 4 in the affirmative. The appeal is

refused.