

Sekubumba v Sims [2009] NTSC 64

PARTIES: ANTOINE SEKUBUMBA

v

ERICA ANN SIMS

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: JA 37 of 2009 (20911594)

DELIVERED: 27 November 2009

HEARING DATES: 27 November 2009

JUDGMENT OF: RILEY J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant: S Lee
Respondent: G McMaster

Solicitors:

Appellant: Robert Welfare Barristers & Solicitors
Respondent: Office of the Director of Public
Prosecutions

Judgment category classification: B
Judgment ID Number: Ril0916
Number of pages: 6

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Sekubumba v Sims [2009] NTSC 64
No. JA 37 of 2009 (20911594)

BETWEEN:

ANTOINE SEKUBUMBA
Appellant:

AND:

ERICA ANN SIMS
Respondent:

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 27 November 2009)

- [1] On 2 April 2009 a police officer, Sergeant Kay Pemberton, was driving home following a lengthy shift at the Casuarina Police Station. Whilst her vehicle was stationary at traffic lights on Trower Road she saw a motor scooter “bouncing all over the road” and collide with the curb. The scooter then fell over. The driver of the motor scooter and his pillion passenger fell to the ground. Sergeant Pemberton observed the driver and described him as having blood shot eyes and being unsteady on his feet. She formed the opinion that he was intoxicated. Sergeant Pemberton thought she recognized the driver of the scooter and she asked his name. She believed the driver gave her a false name. After some effort the driver managed to put his

scooter on a stand and then walked away. Sergeant Pemberton told him that he was under arrest and was not free to go but he ignored her. The pillion passenger also walked away. In the course of events Sergeant Pemberton called police communications for assistance. In so doing she gave a description of the driver including a description of the clothing being worn by him at the scene. Sergeant Pemberton remained with the scooter until the police arrived and she then went home.

[2] Constables Vivien and Tomaskenski attended the scene. They received a description of the rider and his clothing from Sergeant Pemberton and then took the scooter back to Casuarina Police Station. The motor scooter was registered to the appellant and they went to his address. As they approached the address they saw a man fitting the description provided to them by Sergeant Pemberton and they drove towards him. As they approached they called out to the man and he ran off down an alleyway. They pursued him and located him hiding in some bushes. They called for him to come out from the bushes and when he did so they found that he had removed his shirt. When they inspected the area they found a motorbike helmet and a shirt. They called upon the appellant to submit to a random breath test and he refused. He was then arrested.

[3] The appellant was charged with three offences namely: failing to submit to a breath analysis¹; being a prisoner in lawful custody following arrest, escaped

¹ Contrary to s 29AAE of the *Traffic Act*.

from such custody²; and driving a motor scooter without due care³. On 4 August 2009, following a defended hearing, the appellant was found not guilty of the charges of a escape lawful custody and drive without due care. The learned Magistrate closely considered the evidence relating to identification and whether it had been established that the person seen by Sergeant Pemberton on the motor scooter was one and the same as the appellant. It is unnecessary to rehearse the evidence on this issue. It is sufficient to note that having reviewed the evidence and having warned herself regarding the dangers associated with evidence of identification, her Honour was not satisfied beyond reasonable doubt that the prosecution had discharged the onus.

[4] The learned Magistrate went on to consider the charge of failing to submit to a breath test and found the appellant guilty. The appellant now seeks to challenge that finding submitting that the finding was "unsafe and unsatisfactory".

[5] It is necessary to consider the relevant provisions of the *Traffic Act*. Section 29AAE of the Act provides that a person "who is required under section 29AAC or 29AAD to submit to a breath analysis must not fail to provide a sample of breath sufficient for the analysis to be carried out." It is agreed that section 29AAD has no application in the present circumstances.

Section 29AAC is the relevant provision and relevantly provides that a

² Contrary to s 112(1)(a) of the *Criminal Code*.

³ Contrary to reg 18 of the *Traffic Regulations*.

police officer may require a person to submit to a breath test or a breath analysis to determine if the person's blood contains alcohol in certain circumstances. In the present case the circumstance relied upon was that "the officer has reasonable cause to suspect that person ... was the driver of a motor vehicle that was involved in a crash on a road, road related area or public place"⁴.

- [6] The learned Magistrate concluded that the officers had reasonable cause within the meaning of that subsection to require the appellant to submit to a breath test or a breath analysis. In the course of her reasons her Honour said:

When the two officers apprehended the defendant and in particular Officer Vivien, they had been informed by Sergeant Pemberton that they needed to look for a person who was the driver of the motor scooter that had been involved in a crash on Trower Road. They were given a description of that person. They saw a person meeting that description. The person ran from them, the person hid. He was wearing clothes similar to what had been described to them.

In my view, they had reasonable cause to suspect that he was the person who had been driving a motor scooter and was, therefore, in terms of s 29AAC(1)(b)(2) was (sic) the driver of the motor vehicle that had been involved in a crash on a road. In those circumstances they had the power - Constable Vivien had the power to require the defendant to submit to a breath analysis.

- [7] It is the complaint of the appellant that neither constable indicated that he had reasonable cause to suspect the appellant was the rider of the scooter involved in the crash witnessed by Sergeant Pemberton. With respect to the appellant it is plain from reading the whole of the material that this was the

⁴ S 29AAC(1)(b)(ii) of the *Traffic Act*.

basis upon which the officers proceeded and, further, it was the basis upon which the learned Magistrate reached her conclusions. I see no error on the part of the learned magistrate.

[8] The appellant also submitted that the evidence of identification upon which the learned Magistrate did not find the appellant guilty of the second and third charges is inextricably linked to the first charge. The appellant argued that a finding of guilt in relation to the charge that the appellant drove the scooter without due care was necessary before the elements of the charge relating to failing to submit to a breath analysis could be made out. This argument is misconceived. The requirement to submit to a breath analysis established by s 29AAC(1)(b)(ii) of the *Traffic Act* is not based upon the prosecution establishing that the person was the driver of a motor vehicle involved in a crash but, rather, that the officer had reasonable cause to suspect that the person was the driver. That requirement was met in this case.

[9] The appellant submitted that the incident at the traffic lights did not fall within the definition of "crash" because there was "no evidence of property being damaged, specifically neither the curb or the road or the scooter itself was damaged". Again this is to misunderstand the requirement of the provision which is that the officer have reasonable cause to believe that a crash had occurred. What was known to the relevant officers was that the scooter had swerved all over the road, collided with the gutter and had been laid over. They were told the scooter had "crashed into the gutter". The

driver and the pillion passenger had departed the scene. On the basis of that information there was, at the time that the police officer required the appellant to submit to a breath test or breath analysis, a reasonable basis for the officers to suspect that a crash had occurred. It matters not that subsequent investigations may reveal that what took place would not amount to a "crash" within the meaning of the Act. The issue was what was reasonably suspected at the time the person was required to submit to a breath test or breath analysis. At the relevant time the officers reasonably suspected that a crash had occurred.

[10] In the course of argument this afternoon counsel for the appellant sought to press another ground of appeal being that the learned Magistrate erred in not finding that the defendant had other reasonable grounds for failing to submit to a breath analysis. This is a defence available under s 29AAE(8)(b) of the *Traffic Act*. The onus of satisfying the court that there were other reasonable grounds for failing to submit to a breath analysis rests upon the defendant. In this case the appellant did not raise the issue before the learned Magistrate and, in those circumstances, the issue was not addressed in the reasons for decision. Counsel for the appellant acknowledged that it is now too late to raise this fresh ground of appeal.

[11] The appeal must be dismissed.
