THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Mag. App. No. P065 of 2016

BETWEEN

COLLIN PARTAP

Appellant

AND

STEPHEN WILLIAMS

(THE ACTING COMMISSIONER OF POLICE)

Respondent

PANEL:

A. Yorke-Soo Hon J.A.

M. Mohammed J.A.

APPEARANCES:

Mr. R. Rajcoomar and Ms. N. Bansee for the appellant

Mr. G. Busby, Assistant D.P.P. for the respondent

DATE OF DELIVERY: 29th June, 2017.

JUDGMENT

Delivered by: Justice A. Yorke-Soo Hon, J.A.

INTRODUCTION

1. The appellant was charged with and convicted of the offence of failing to provide a specimen of breath without reasonable excuse, contrary to ***section 70B. (5) of the Motor Vehicles and Road Traffic Act Chap. 48:50*** *(as amended) (*hereinafter *"the MVRT Act"*). He was fined five thousand dollars (TT $5000.00) and in default, ordered to serve a term of nine (9) months imprisonment with hard labour. He has now appealed against his conviction.

THE CASE FOR THE RESPONDENT

2. On Sunday 26th August, 2012, around 4:40 a.m., PC Omadath, WPC Baptiste, PC Victory, Ag. Cpl. Cephas and Sgt. Brandon-John were on duty at the intersection of Keate and Frederick Streets in Port-of-Spain. The officers observed the appellant exiting the Zen Night Club and drinking from what appeared to be a Johnnie Walker bottle. He then entered and drove off in a black Toyota Fortuner, registration number PCM 1016, which was parked along Keate Street in Port-of-Spain. The vehicle had blue and red flashing lights emanating from the front grill.

3. WPC Baptiste stopped the vehicle at the corner of Keate and Frederick Streets. PC Omadath approached the appellant and identified himself as a police officer and enquired whether he had permission to drive the said vehicle with the swivel lights. The appellant replied, "*I am the Minister of National Security."* PC Omadath observed that a strong scent of alcohol emanated from the appellant's breath and that his speech was slightly slurred. He then asked the appellant whether he would submit himself to a field sobriety test. The appellant replied, "*I am not submitting myself to any test*." PC Omadath reported the incident to Sgt. Brandon-John who then indicated to the appellant that he was informed

that he had refused to submit to a field sobriety test and that it was an offence to refuse to take the test. Sgt. Brandon-John cautioned the appellant and he replied, *"I am not submitting to that test. I am calling my attorney."*

4. Sgt. Brandon-John informed the appellant that he would be arrested and instructed him to park the vehicle which he was driving at the side of Frederick Street and he complied. The appellant informed Sgt. Brandon-John that he would not leave until the Commissioner of Police arrived. The appellant then rolled up his windows and was seen using his cellular phone. Sgt. Brandon-John subsequently approached the appellant, asked him to exit the vehicle and told him that he was under arrest for refusing to submit to a field sobriety test. He was then cautioned and he remained silent. The appellant was placed in a vehicle driven by PC Omadath, in the company of WPC Baptiste and Ag. Cpl. Cephas, and taken to the Belmont Police Station.

5. At the Station, Sgt. Brandon-John interviewed the appellant and again asked him to submit to a field sobriety test. The appellant indicated that he would await the arrival of either the Commissioner of Police or his Attorney-at-Law. WPC Daniel then approached the appellant and identified herself to him as a certified Breath Analysis Technician. She requested that the appellant offer a sample of breath so that a breath analysis test could be conducted via a breath analysis instrument. The appellant was having a conversation on his cellular phone at the time and ignored this request. He insisted that he would not take the test and that he wanted his attorney to be present. WPC Daniel again requested a breath sample from the appellant, to which he replied, *"The Commissioner right around the corner by Maraval, I will wait until he comes."*

6. The respondent, Ag. Commissioner of Police, Stephen Williams, arrived at the Belmont Police Station at around 6:00 a.m. and had a conversation with Sgt. Brandon-John. The respondent enquired from the appellant about the events which transpired that morning and the appellant explained that the police officers wanted him to take a breath test but he refused because he thought that they were being unfair to him since they had stopped him for having a flashing light on the vehicle which he was driving. The appellant told the

respondent that he had been at the Zen Night Club where he only had two drinks of champagne.

7. The respondent informed the appellant that it was an offence to refuse to submit to a breath test once he was driving a vehicle and that the police officer had reasonable cause to suspect that he had consumed alcohol beyond the prescribed limit. The appellant asked about the choices that were available to him and he was informed that he had the choice of either taking the breath test or refusing to take it, but that if he refused, he would be charged for failing to take it. The appellant then indicated that he would *"take the charge"* [sic].

8. The respondent then instructed Sgt. Brandon-John to charge the appellant for failing to take the breath test. Upon being informed of the charge by Sgt. Brandon-John, the appellant acquiesced to taking the breath test. WPC Daniel conducted the test and a reading of 28 micrograms per 100 millilitres of breath was recorded.

9. Sgt. Brandon-John conducted a search of the vehicle driven by the appellant in the presence of PC Victory and Cpl. Gervais of the Trinidad and Tobago Defence Force. He recovered one bottle labelled, *"Johnny Walker"* with a quantity of brownish liquid. The bottle was seized and subsequently submitted to the Food and Drug Laboratory for analysis. The Certificate of Analysis concluded that the liquid was alcohol, consistent with that of whiskey.

10. On the 10th December, 2012 the appellant was formally charged with the offence in question.

THE CASE FOR THE APPELLANT

11. At the trial, the appellant elected not to give evidence, and not to call any witnesses.

THE MAGISTRATE'S REASONS

12. At the close of the case for the prosecution, the appellant's attorney made a submission of no case to answer which was overruled. The appellant relied on his submissions. The magistrate considered the evidence led by the prosecution in order to determine the appellant's guilt.

13. She examined the ingredients of the offence and determined that they were all made out on the evidence, namely: (i) the appellant was in charge of the motor vehicle PCM 1016, (ii) PC Omadath had reasonable cause to suspect that the appellant had in excess of 35 micrograms of alcohol per 100 millilitres of breath, (iii) a valid request for a specimen of breath for the purpose of a breath test was made and (iv) the appellant refused to supply same without reasonable excuse. Accordingly the magistrate was sure beyond reasonable doubt that the appellant was guilty of the offence.

THE FRESH EVIDENCE

14. On the 27th January, 2017, leave was granted for the respondent to adduce evidence in respect of an issue which arose on appeal. This issue concerned the legality of the request for a field sobriety test. The evidence was in the form of an affidavit by WPC Susan Daniel No. 18231, who had given evidence at the trial.

15. WPC Daniel indicated that in 2012 she became a certified Breath Analysis Technician after participating in a Breath Alcohol Technicians Training Programme at the Police Academy in St. James. In that Programme, WPC Daniel was trained to use and operate 2 breath analysing instruments which are both approved by the Minister of National Security under the MVRT Act. The first instrument is the *"Alco-Sensor FST®"* which is a hand held breath alcohol testing device designed to read breath alcohol concentration. The "FST" is an acronym for field sobriety test, which is a test used in the field to determine whether a person is sober or whether their breath exceeds the prescribed limit. The second instrument is the *"RBT IV®"* which is used at police stations and which is less portable than the Alco-Sensor FST. WPC Daniel further indicated that she was taught to use the phrase *"field*

sobriety test" interchangeably with the phrase *"breath test"*. Upon completion of this Programme, the Ministry of National Security authorized WPC Daniel to conduct breath analysis and to operate breath analysing instruments in accordance with the MVRT Act.

16. At the trial, there was no cross-examination on a comparison or a contrast of the breath test with the field sobriety test. There was some cross-examination as to the differences between the terminology and the similarities. For example, during cross-examination of the respondent, Counsel for the appellant asked [1]:

> *Q: Nowhere you will see in that sobriety test, where that come from? You google that and get from America? Is that in the Act, a sobriety test?*
> *A: I have not spoken about any sobriety test*
> *Q: No, no, I just am asking you.*
> *A: No the sobriety test is not stated in the Act.*
> *Q: There is no such thing known to our law as a sobriety test, no such thing, isn't that so?*
> *A: There is no provision in the Act for sobriety test.*
> *Q: Yes. And you appreciate there is a difference between taking a breath test and a breath analysis, ent there is a difference?*
> *A: Yes sir there are provisions, clear distinctions.*

17. However, the manner in which the submissions have been canvassed at the hearing of this appeal placed the issue of whether a breath test and a field sobriety test are the same, squarely before us. In contrast, at the Magistrate's Court, what was elicited was that there was no provision in the law for a field sobriety test and the issue was not taken any further. At this hearing, however, the argument was extended in the first ground that the appellant was not guilty because the law does not compel a citizen to comply with a request for a field sobriety test. It was argued that such a request was illegal and any arrest following would therefore be unlawful. WPC Daniel was cross-examined at the trial and there was no attempt to raise the issue in the form in which it now presents itself.

[1] Cross-examination of respondent by Mr. I. Khan S.C. on Monday 13th May, 2013 p. 39.

18. We therefore found that the fresh evidence was admissible since it satisfied the test for its admissibility in that, (i) it pertained to an issue which was not raised before, (ii) the evidence was relevant to that issue and (iii) the evidence was capable of belief.

THE GROUNDS OF APPEAL

19. The appellant filed seven (7) grounds of appeal, namely:

(i) The appellant is not guilty;
(ii) The magistrate erred in law in that her decision that the Belmont Police Station was at or near the place where the requirement is made was erroneous;
(iii) The decision of the magistrate is unreasonable and or cannot be supported having regard to the evidence;
(iv) The magistrate erred in law in that she failed to consider that the police had complied with a request that the appellant be allowed to communicate with an Attorney-at-Law and or await the Commissioner of Police before providing a specimen of breath;
(v) The magistrate erred in law and or committed an illegality which impacted on the merits of the case;
(vi) The magistrate erred in law in that her reasons were defective.
(vii) The magistrate failed to take into consideration the good character of the appellant.

GROUND 1- THE APPELLANT IS NOT GUILTY.

THE APPELLANT'S SUBMISSIONS

20. In respect of this ground, counsel for the appellant, Mr. Rajcoomar, submitted as follows:

(i) Firstly, that a breath test is different from a field sobriety test. The MVRT Act authorizes the police to conduct a breath test and the respondent wrongly requested the appellant to perform a field sobriety test. Legislation in other jurisdictions such as Canada, the United States, United Kingdom and Australia, differentiate between a field sobriety test and a breath test.

(ii) Secondly, in Trinidad and Tobago, where there is no statutory authority for the demand for a field sobriety test, any such demand could not amount to a request for a breath test under the MVRT Act and any arrest made upon an unlawful request for a field sobriety test was itself also unlawful.

(iii) Thirdly, even if such an arrest was lawful, the magistrate failed to consider the fact that the appellant eventually provided a specimen of breath for a breath test at the Belmont Police Station after he was allowed to consult with the respondent pursuant to section 70B(8) of the MVRT Act.

THE RESPONDENT'S SUBMISSIONS

21. In response, Mr. Busby submitted that:

(i) A breath test is a type of field sobriety test. When one considers the ordinary meaning of the words, *"field sobriety test"*, it is clear that the phrase refers to a test to be conducted in the field to determine whether someone is sober and this is exactly what a breath test does. Moreover, from the affidavit evidence of WPC Daniel, it was clear that the term *"field sobriety test"* may be used as an alternative for the term *"breath test"*. No set formula of words had to be used before the requirement for a specimen of breath is properly made, once the language used was capable of amounting to a requirement. The unchallenged evidence at the trial was that the appellant knew that a breath test was required of him and he refused to provide a sample for the test.

(ii) Even if the Court found that the arrest was unlawful because the MVRT Act does not authorise the police to request that a citizen submits to a field sobriety test, the appellant's conviction for failing to provide a specimen of breath for a breath test was still lawful. This is because there was evidence of the appellant's subsequent refusal to provide a specimen of breath for a breath test at the Belmont Police Station. Such a refusal at the Belmont Police Station was still admissible to support his conviction.

(iii) In relation to the appellant's contention that the Magistrate failed to take into account the fact that he eventually submitted a specimen of breath after he was allowed to consult with the respondent, Mr. Busby submitted that this contention was devoid of merit as it was contrary to evidence in the case. Prior to the appellant doing so, the unassailable evidence was that he clearly refused to provide a sample of breath for a breath test.

LAW & ANAYLYSIS

22. Section 70B. (1) of the MVRT Act provides that:

> *Where a constable has reasonable cause to suspect—*
> *(a) that a person driving or attempting to drive or in charge of a motor vehicle on a road or other public place has alcohol in his breath or blood exceeding the prescribed limit or is in breach of section 70;*
> *…*
> *he may, subject to subsection (4) require him to provide a specimen of breath for a breath test at or near the place where the requirement is made.*

23. Section 70G. (2) states that:

> *References in section 70B to providing a specimen of breath shall be construed as references to providing a specimen thereof in sufficient quantity to enable a breath test to be carried out.*

24. A *"breath test"* is defined in section 70G.(1) of the MVRT Act as follows:

> *A test for the purpose of obtaining an indication of the proportion of alcohol in the person's breath carried out by means of a device approved for such a test by the Minister, under section 70B(9)".*

25. Where a person is required by a constable under subsections (1), (3), (4) or (8) to provide a specimen of breath for a breath test fails to do so and the constable has reasonable cause to suspect that the person has alcohol in his breath or blood above the prescribed limit, section 70B. (7) provides that the constable may arrest the person without a warrant.

26. Section 70B(8) of the MVRT Act states that:

> *(8) A person arrested under subsection (7), section 70(3) or 70A(5) shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test at the police station.*

27. Section 70B. (5) of the MVRT Act goes on to create an offence:

> *Where a person, without reasonable excuse, fails to provide a specimen of breath under subsection (1), (3), (4) or (8) he is guilty of an offence and shall be liable on conviction to a fine of eight thousand dollars or to imprisonment for three years.* [2]

28. *"Fail"* in relation to providing a specimen, includes refuse (section 70G. (1) of the MVRT Act).

29. The prosecution must therefore prove that:

(i) The appellant was driving, attempting to drive or was in charge of the motor vehicle;
(ii) The constable had reasonable cause to suspect that that he had alcohol exceeding the prescribed limit in his breath, that is, 35 micrograms per 100 millilitres of breath or was under the influence of drink or drug to such an extent as to be incapable of having proper control of the vehicle;

[2] The maximum penalty under this section has been increased by section 17(e) of Act No. 2 of 2015 to a fine of twelve thousand dollars.

(iii) The constable made a request to the appellant to provide a specimen of breath for a breath test at or near the place where the request was made;

(iv) The appellant failed to provide a specimen of breath for the test; and

(v) The appellant did not provide a reasonable excuse for such failure.

30. In other jurisdictions, such as Canada, the United States, the United Kingdom, and Australia, legislation specifically outlines the procedures that may be followed and tests that may be conducted to examine the proportion of alcohol in one's breath. For instance, in Canada's ***Criminal Code, RSC 1985***, paragraph 254(2) provides that:

> *If a peace officer has reasonable grounds to suspect that a person has alcohol…in their body and that the person has, within the preceding three hours, operated a motor vehicle…the peace officer may…require the person to comply…with* ***either or both of paragraphs (a) and (b), in the case of alcohol****:*
>
> *(a) to perform forthwith physical coordination tests prescribed by regulation…and*
>
> *(b) to provide forthwith a sample of breath that…will enable a proper analysis to be made by means of an approved screening device and, if necessary, to accompany the peace officer for that purpose.*

31. Canada's ***Evaluation of Impaired Operation (Drugs and Alcohol) Regulations (SOR/2008-196)*** goes on to outline the physical coordination tests to be conducted under section 254(2)(a) of their ***Code (supra)***, which are the following standard field sobriety tests:

(a) The horizontal gaze nystagmus test;

(b) The walk-and-turn test; and

(c) The one-leg standard test.

32. In the Canadian case of ***R v. Tran [2015] ONSC 4688 at paragraph 19,*** while the issue was whether a police officer had to be qualified as an expert witness in order to give evidence about a field sobriety test, Goldstein J. stated at paragraph 6 that:

> *A standard field sobriety test consists of three parts but it is basically a test of physical coordination…Making a demand for a field sobriety test is equivalent to making a demand that a driver blow into an approved screening device. A poor showing is basically the same thing as a "fail" when a driver blows into an approved screening device.* (emphasis added)

33. The Judge went on to state at paragraph 19 that:

> *The specifics of the field sobriety test are set out in the regulations. Failure also gives a police officer reasonable grounds to demand that the person provide samples to a qualified breath technician using an approved instrument (and to make an arrest). In that sense, a field sobriety test is no different from the use of an approved screening device.* (emphasis added)

34. Thus, in Canada, specific legislative provisions provide for the use of two investigative tools in determining the alcohol level of a suspect. An officer may request either a physical coordination test, or a breath test, or both. A breath test has been described as a field sobriety test.

35. Counsel for the appellant referred to the United States' Code of Federal Regulations as providing for three field sobriety tests in contrast to our jurisdiction where no such provision exists. A perusal of the said code under part **§** 634 section 36 (cited as 32 CFR 634.36) refers to the detection, apprehension, and testing of intoxicated drivers as follows:

> ***(a)*** *Law enforcement personnel usually detect drivers under the influence of alcohol or other drugs by observing unusual or abnormal driving behavior. Drivers showing such behavior will be stopped immediately. The cause of the unusual driving behavior will be determined, and proper enforcement action will be taken.*
>
> **(b)** *When a law enforcement officer reasonably concludes that the individual driving or in control of the vehicle is impaired, field sobriety tests should be conducted on the individual…Law enforcement personnel should use a standard field sobriety test (such as one-leg stand or walk and turn) horizontal gaze nystagmus tests as sanctioned by the National Highway Traffic and Safety Administration, and screening breath-testing devices to conduct field sobriety tests.* (emphasis added)

36. Therefore, in the United States, the law provides that screening breath-testing devices should be used to conduct field sobriety tests and it appears that under their Regulations, a screening breath test is a type of field sobriety test.

37. In the United Kingdom, section 6 of the ***Road Traffic Act 1988*** provides that where a constable reasonably suspects that a person is driving or attempting to drive a motor vehicle and has alcohol in his body, and where an accident occurs owing to the presence of a motor vehicle on a road, a constable may require such a person to co-operate and one or more preliminary tests may be administered to such a person. A person who, without reasonable excuse, fails to cooperate, will be guilty of an offence.

38. Sections 6A, 6B and 6C provide for three (3) preliminary tests: the preliminary breath test, the preliminary impairment test and the preliminary drug test. Section 6A provides that:

> *(1) A preliminary breath test is a procedure whereby the person to whom the test is administered provides a specimen of breath to be used for the purpose of obtaining, by means of a device…an indication whether the proportion of alcohol in the person's breath or blood is likely to exceed the prescribed limit.*

39. Section 6B provides that:

> *(1) A preliminary impairment test is a procedure whereby the constable administering the test—*
>
> *a. observes the person to whom the test is administered in his performance of tasks specified by the constable, and*
>
> *b. makes such other observations of the person's physical state as the constable thinks expedient.*

40. In the United Kingdom, the law allows for a choice of one or more of two distinct preliminary tests in the case of alcohol to be conducted by the constable in order to determine the sobriety of a suspect under investigation. These are a preliminary breath test and a preliminary impairment test.

41. In New South Wales (Australia) section 12 of the ***Road Transport (Safety and Traffic Management) Act 1999 No. 20*** states that a person must not drive a vehicle whilst under the influence of alcohol. By section 13 (1), a police officer is empowered to conduct a breath test in accordance with the directions of a police officer. Under section 13 (3), before requiring a person to undergo a breath test and for the purpose of determining whether to conduct such a test, a police officer may conduct a preliminary assessment to determine if alcohol is present in the person's breath by requiring the person to talk into a device that indicates the presence of alcohol. A person who fails the breath test is then arrested without a warrant and may be required to submit to a breath analysis test. Under section 25, the police officer may require the person to submit to an assessment of his or her sobriety only if the person had undergone the breath test in accordance with section 13 (1) and the result does not permit the person to be required to submit to a breath analysis test.

42. Gleaning from the legislative provisions in Canada, the United States, United Kingdom and Australia we note the following:

(i) In Canada, although the regulations set out standard field sobriety tests amounting to tests of physical coordination, the court has equated a field sobriety test with that of a breath test;

(ii) In the United States, a breath test is a type of field sobriety test;

(iii) In the United Kingdom, the preliminary impairment test is similar to the field sobriety test since the officer makes observations about the person's physical state. He may also conduct a breath test in order to determine the sobriety of a suspect; and

(iv) In New South Wales, the test for determining whether a person is in excess of the prescribed limit of alcohol for the purpose of driving a motor vehicle is a breath test. A sobriety assessment is only conducted in respect of a suspect whose breath test does not subject him to a breath analysis. Thus, each of these jurisdictions is governed by specific legislative provisions catering for the use of various tools in determining whether a person's alcohol content in their blood or breath exceeds the prescribed legal limit.

43. In Trinidad and Tobago, however, the ***MVRT Act*** caters for one test only, that is, a breath test in accordance with section 70B. (1). The Act does not provide for any other tool, unlike other jurisdictions. The definition of a *"breath test"* under the MVRT Act is a test to determine the proportion of alcohol in one's breath. In the context of section 70B of the MVRT Act, the request to submit to a *"field sobriety test"* could only have one meaning, namely a request for a breath test, and not for any other form of field sobriety test which is not provided for in the Act.

44. Moreover, the expert evidence of WPC Daniel, a certified Breath Analysis Technician, was that a field sobriety test is a test used in the field to determine whether a person is sober and the term *"field sobriety test"* is used in the alternative to *"breath test"* when engaging a citizen in the field where there is reasonable cause to suspect that the person has alcohol in his breath exceeding the prescribed limit. We note that she is trained to use and operate two breath analysis instruments approved by the Minister of National Security under the MVRT Act, one of which is the Alco-Sensor FST®, a handheld breath alcohol testing device to read breath alcohol concentration. FST is an acronym for Field Sobriety Test. Hence, in "police language" the field sobriety test is used interchangeably to mean a breath test as explained in the evidence of WPC Daniel. In the context of this particular case, it is clear that whatever the term used, the appellant understood that what was required of him was that he submit to a breath test.

45. From the evidence, it appears that the appellant, who is an attorney-at-law, knew that the police officers were requesting a specimen of breath from him for a breath test. The evidence of the respondent was that[3]:

> *I enquired from Mr. Collin Partap about the events of that morning. He explained to me that he was stopped by the police officers whilst driving on Keate Street, Port of Spain because of a flashing light on his vehicle. He further explained that the officers wanted him to take a breath test but he refused because he thought that they were being unfair to him since they had stopped him for a flashing light on the vehicle.*

[3] Statement of Acting Commissioner of Police Stephen Williams dated the 1st March, 2013.

46. In addition, the instructions which were put to the respondent by the appellant's counsel during cross-examination in the court below suggested that the appellant understood the police to be requesting a specimen sample of breath for a breath test:

> *Q: And that they wanted him to go to Belmont Police Station to take a breath test, he told them he ent going. Try and remember. You were not taking notes at the time he talking to you?*
> *A: I do not remember him making that utterance.*
> *Q: Well I'm putting my instructions to you that he said that they were targeting him and he was speaking in such a way that if he doesn't get a lawyer down there or you down, or somebody to intervene that there would have been a confrontation to such an extent that he was concerned with his own person, isn't that so?*
> *…*
> *Q: And they want him to go Belmont Police Station to take a breath test?*
> *A: It is not a fact that he told me that.*
> *Q: And they want him to take a breath test? He didn't tell you that they wanted him to take a breath test?*
> *A: He told me about the breath test, he didn't tell me anything about Belmont Police Station.*[4]

47. In ***R v. O'Boyle [1973] R.T.R. 445***, the constable said to the appellant: "*I intend to give you a breath test*." The appellant contended that a condition precedent for his arrest had not taken place in that the constable had not *"required"* him to take the breath test, as was stipulated by the legislation.

48. Roskill LJ dismissed the appeal and stated:

> *In the view of this court the precise word 'require' does not have to be used before the provisions of the statute can be said to be properly complied with. There is no set formula. So long as the language used can fairly be said to be capable of amounting to a requirement then it is a question for the jury in each case whether the statutory need for the requirement of a specimen of breath for a breath test has been satisfied.*

49. Once the language used has satisfied the request for a specimen of breath for a breath test, then it matters not that the request may not have included the exact words or phrase as provided within the Act. It mattered not that PC Omadath requested a "FST" when he

[4] Page 41, line 33 of transcribed notes.*

should have requested a breath test because the appellant appeared to have fully understood exactly what was requested of him.

50. Having regard to the above, we find that there is no merit in the appellant's first submission. A request for a person to submit to a field sobriety test is the same as a request for a breath test, they being one and the same under the Act. Therefore, when Sgt. Brandon-John requested the appellant to submit to a field sobriety test, he could only be requesting that the appellant submit to a breath test and the appellant clearly understood what was requested.

51. With respect to the appellant's further submission, that the appellant's arrest was unlawful on the premise that the request for a field sobriety test was unlawful, we agree with Mr. Busby that there was other evidence of a refusal by the appellant to submit a specimen of breath for a breath test. Evidence obtained following an unlawful arrest may still be admissible as was seen in ***R v. Fox [1985] R.T.R. 337***. In ***Fox***, the defendant was involved in a road accident and police officers unlawfully entered his home and requested that he provide a specimen of breath for a breath test but he refused. He was convicted of failing to provide the required specimen contrary to section 7(4) of the Road Traffic Act, 1972. On appeal to the Divisional Court, the appellant's conviction was quashed as the Court held that the officers were trespassing when they required the sample from the defendant. The House of Lords disagreed and held that proof of the offence was not dependent on the accused being validly arrested.

52. The evidence of the respondent[5] was that the appellant:

> *…explained to me that he was stopped by the police officers whilst driving on Keate Street, Port-of-Spain because of a flashing light on his vehicle. He further explained that the officers wanted him to take a breath test but he refused because he thought that they were being unfair to him since they had stopped him for a flashing light on the vehicle. He told me that he had been at Zen Night Club where he only had two drinks of champagne. I told Mr. Partap that it was an offence to refuse to submit to a breath test once he was driving the vehicle…*

[5] Page 347 of the Record of Appeal

53. In applying the reasoning in ***Fox (supra),*** we are of the view that even if the request for a field sobriety test was unlawful, (which we do not find that it was), and the appellant was unlawfully arrested, there was further evidence of requests for breath tests at the Belmont Police Station and further refusals by the appellant. Each refusal amounted to the commission of an offence under section 70B for which the officers were empowered to arrest the appellant and take him to the police station. Proof of the offence was not dependent on whether or not he was validly arrested.

54. Finally, in our view, the argument that the magistrate did not consider that the appellant eventually provided a specimen of breath at the Belmont Police Station, is without merit. This is because the appellant would have already refused to submit himself to testing at Keate Street and again failed to do so at the Belmont Police Station when Sgt. Brandon-John made the request of him. This was after the respondent spoke with the appellant at the Police Station, for over an hour, informing him of the options open to him and warning him of the consequences of his refusal. The appellant again refused and indicated that he would *"take the charge"* [sic]. It was only when the respondent instructed Sgt. Brandon-John to charge him and upon being informed of the charge, did the appellant agree to take the breath test. By that time, the appellant had refused three times, with each refusal amounting to the commission of an offence.

55. The magistrate, in arriving at her decision to convict the appellant, would have necessarily taken into account the fact that he eventually submitted to a breath test at the Belmont Police Station because this was an integral part of the factual matrix. However, in our view, this did not negate the commission of the offence under subsection (1), both as a matter of law and of fact.

56. In arriving at her decision, the magistrate took into account (i) the provisions of the MVRT Act, which requires police officers to request a specimen for a breath test, (ii) the evidence of PC Omadath requesting the appellant to submit himself to a field sobriety test and (iii) the appellant's understanding that the police wanted him to take a breath test and the appellant's refusal to do so without reasonable excuse. It was therefore reasonably open

to the magistrate based on the evidence to find that the appellant failed to provide a specimen of breath without reasonable excuse.

This ground of appeal therefore fails.

GROUND 2- THE MAGISTRATE'S DECISION THAT THE BELMONT POLICE STATION WAS AT OR NEAR THE PLACE WHERE THE REQUIREMENT IS MADE WAS ERRONEOUS.

THE APPELLANT'S SUBMISSIONS

57. Counsel for the appellant submitted that:

(i) Section 70B (1) of the MVRT Act mandated that a demand for a specimen of breath must be at or near the place where the requirement was made. The requirement of a test *"at or near"* the place where the requirement was made does not include a police station in the circumstances of this case. The fact that a police station was not included as a place under section 70B. (1), meant that Parliament did not confer on an arresting officer the power to take a person to a police station, nor can this power be interpreted based on the expression *"at or near."* While an arrested person may be taken to a police station, section 70B. (1) does not permit the taking of a person to a station to conduct a field sobriety test or to obtain a breath specimen.

(ii) Counsel for the appellant also submitted that the magistrate's reasoning, that the Belmont Police Station was at or near the place where the request was made, was erroneous in light of the private duties being performed by the police that night, the absence of equipment to conduct a test, the absence of an approved technician and/or the absence of equipment even to accept or collect a specimen of breath. The police had no ability to take a specimen of breath even if the appellant had complied.

(iii) It was further submitted that the MVRT Act provides for specific instances where a police officer may direct that a person be taken to a police station. Section 70B. (8) of the Act gives a person the opportunity to provide a specimen of breath at a police station following an arrest for failure to provide a specimen under 70B (5). Mr. Rajcoomar also submitted that as the Act is silent on the effect of providing a breath test at the police station, being a penal legislation, it must be construed in favour of an accused person. Therefore, a person who complies with section 70B. (8) should not be charged with non-compliance as this would render the section otiose.

THE RESPONDENT'S SUBMISSIONS

58. Counsel for the respondent submitted that:

(i) The appellant was not taken to the Belmont Police Station because it was at or near the place where the request was first made, but rather because the appellant was arrested for refusing to give a breath specimen on two occasions. Therefore, he was taken to the Belmont Police Station in accordance with the clear provisions of the MVRT Act as a result of his refusal to take the breath test.

(ii) The respondent argued that the appellant's submission, that the magistrate erred in law in deciding that the Belmont Police Station was "*at or near"* the place where the requirement was made, was not well founded as such a decision was for the magistrate to make as a matter of degree and fact.

(iii) Moreover, the requirement to provide a specimen of breath and the appellant's failure to do so at Keate Street were not invalidated by the fact that neither the breath analysis equipment nor the technician were available at Keate Street.

(iv) The Act provides that an officer may make a request for a breath specimen at a police station. Section 70B. (8) provides that an arrested person must be taken to a police station where they will be given an opportunity to provide a specimen of breath for a

breath test. A person who complies with the request at the police station can still be charged for his earlier non-compliance as it could not be the intention of Parliament to provide an escape for those who break the law.

LAW & ANALYSIS

59. Section 70B. (7) of the MVRT Act provides that:

> *Where a person required by a constable under subsection (1), (3), (4) or (8) to provide a specimen for a breath test fails to do so and the constable has reasonable cause to suspect that the person has alcohol in his breath or blood above the prescribed limit, the constable may, without prejudice to sections 70(3) and 70A(5), arrest the person without a warrant but no such arrest may be made if the person is at a hospital as a patient.*

60. Section 70B. (8) of the MVRT Act provides that:

> *A person under arrest under subsection (7), section 70(3) or 70A(5) shall, while at a police station, be given an opportunity to provide a specimen of breath for a breath test at the police station.*

61. In ***Donegani v. Ward [1969] 1 W.L.R. 1502,*** the defendant was driving his motor vehicle and was stopped by a police officer who demanded a specimen of breath from him. The officer did not have the necessary equipment with him and contacted the police headquarters for the equipment. Rather than wait for the equipment, the officer asked the defendant to walk in the direction from which the equipment would be brought which ended up being a distance of 160 yards.

62. Parker C.J. at page 1505 stated that:

> *Quite recently this court…held that the question whether or not a particular place where the requirement to take a breath test is made is "there or nearby" is a matter of degree and of fact for the justices. In my judgment that is quite clear, and the only matter which has concerned me is: by what criteria is one to judge "nearby". It is, of course, used in a*

> *geographical sense, but it may be that it is to be judged also in the light of the time interval that has elapsed between, in this case, the driver being stopped, and the breath test being made…I can only think that the words "or nearby" were inserted in order to cover the case where it was necessary to take the test, not on a main traffic road, but in a layby or in some such circumstances as that. At any rate, the justices have gone into the matter with care; they have come to the conclusion that 160 yards is not nearby, and I do not see how this court can interfere…It is sufficient here to say that his is a finding of fact with which this court cannot interfere.*

63. In ***DPP v. Swan [2004] EWHC 2432 (Admin),*** it was held that it was not necessary for the roadside device to be physically produced in order for a requirement to provide a specimen of breath to be made. If a driver's conduct showed that he was not willing to provide a specimen, or that he imposed unacceptable terms only upon which he would provide a specimen, then a *"failure"* to provide a specimen might well be made out. In ***Swan*** the defendant's admitted behaviour and delaying tactics clearly amounted to a failure to provide a specimen.

64. The provision under the MVRT Act, that a police officer may require a person to provide a specimen of breath for a breath test at or near the place where the requirement is made, means that the request must be at or near the place where the officer first encountered the suspect. This is necessary in order to promote efficiency in the testing of persons suspected of exceeding the prescribed limit.

65. In the factual matrix of this case, the appellant was not taken to the police station to submit a specimen of breath for a breath test. Rather, the appellant was taken to the police station after he was arrested for failing to submit to a field sobriety test. It follows that questions as to whether the appellant provided a specimen of breath for a breath test to be conducted at or near the place where the requirement was made, do not arise. In any event, if that issue did arise, it was for the magistrate to determine as a matter of degree and fact whether the Belmont Police Station was at or near Keate Street, where the requirement was made, the phrase *"at or near"* being used in the geographical sense.

66. Mr. Rajcoomar submitted that since the Act is silent on the effect of providing a specimen of breath at the police station and since the legislation is a penal one, it must be construed in favour of the appellant. The procedure to be followed under the Act is that the police may request a person to provide a breath specimen and if the person fails to do so, then an offence is committed and he may be arrested and charged. As contemplated by section 70B. (8), the arrested person, while at the police station, must be given a further opportunity to provide a specimen of breath for a breath test. However, at this stage, the offence under section 70B. (5) was already committed. Even if the arrested person finally complies and provides a breath specimen, he may still be charged for failing to do so previously.

67. Pursuant to section 70B. (8) of the MVRT Act, the appellant was given two opportunities to provide specimens of breath for breath tests while at the Belmont Police Station. Section 70B (5) of the Act states that failure under (1), or (8) creates an offence. Therefore, a refusal under both subsections (1) and (8) constitute offences. The subsequent compliance in taking the test does not validate or nullify the appellant's previous refusals. If a person who refuses to provide a specimen of breath under subsection (1) is then arrested and only complies when he is given an opportunity to do so at the police station in accordance with subsection (8), and his subsequent compliance sends him home free, this will serve to create a lacuna for persons to avoid liability by increasing the possibility of passing the test at the police station. This is because at the time of compliance, the blood alcohol content in the system would have decreased with the passage of time. This would serve to make a mockery of law. Even if a person complies with the second opportunity under subsection (8), Parliament could not have intended that he should escape liability for failing to comply in the first instance with a request under subsection (1). The public interest requires that persons do not drive vehicles whilst exceeding the prescribed blood alcohol limit. In order to ensure that this interest is protected, police officers must be able to timely and efficiently carry out the relevant testing as soon as is practicable. In this regard, we are of the view that Mr. Rajcoomar's submission on this issue is misconceived.

68. It is also irrelevant whether the police had the equipment available for conducting the test. It is not necessary for the roadside equipment to be at hand in order for the requirement to

be made. Once the driver either explicitly or by his conduct showed that he was unwilling to comply, then an offence has been committed under section 70 B (5). In the case at bar, the appellant stated categorically that he was not willing to take the test. He therefore failed to provide a specimen of breath without reasonable cause and was correctly charged for the commission of the offence.

69. This ground of appeal also fails.

GROUND 3- THE DECISION OF THE MAGISTRATE IS UNREASONABLE AND OR CANNOT BE SUPPORTED HAVING REGARD TO THE EVIDENCE.

THE APPELLANT'S SUBMISSIONS

70. The appellant submitted that:

(i) There was no evidence of a request by any police officer or constable for a specimen of breath from the appellant at the corner of Keate and Frederick Streets. The only evidence was for a request to submit to a field sobriety test.

(ii) Moreover, the magistrate did not take into account the fact that the evidence of reasonable suspicion, which was material to reasonable cause, did not form part of the witness statement or station diary extracts.

(iii) The test was eventually conducted in compliance with section 70B (8) at the Belmont Police Station. The police therefore waived the right to charge for failure to take the test at any time prior. If the appellant had failed the test, the respondent would then be required to charge him with committing an offence under section 70A. (1) and (2) of the Act.

(iv) Mr. Rajcoomar also raised the issue of the magistrate's failure to consider the appellant's right to consult with an attorney before providing a specimen of breath. This issue is addressed under the fourth ground of appeal.

THE RESPONDENT'S SUBMISSIONS

71. Mr. Busby repeated his submissions under the first ground of appeal, that while there was evidence of a request for a specimen of breath for a field sobriety test, the ordinary meaning of that phrase amounted to a breath test.

72. Mr. Busby submitted that the evidence of reasonable suspicion did not form part of the witness statement of PC Omadath. The only evidence with respect to reasonable suspicion that did not form part of the witness statement was that the appellant was slightly slurring, which was elicited during cross-examination.

LAW & ANALYSIS

73. In ***Rodriquez v. Sgt. Nimblett (2004) (Mag. App. No. 308 of 2003)*** Archie J.A. *(as he then was)* stated at paragraph 13:

> *Where a finding of fact is based on an assessment of truthfulness of a witness, it is axiomatic that an Appellate Court ought not to overturn it unless the magistrate has so clearly misconstrued the evidence, or palpably failed to consider the weight and the significance of the relevant circumstances as established or disproved on the evidence.*

74. In respect of our findings in relation to ground one, we repeat that a request for a field sobriety test is the same as a request for a breath test and that a request to submit to a field sobriety test is lawful.

75. With respect to the second submission, we disagree that evidence of reasonable suspicion did not form part of the evidence. In relation to the element of reasonable suspicion, there was the evidence of PC Omadath, that the appellant was seen walking out of a nightclub with what appeared to be a Johnny Walker bottle in his hand, that his speech was slurred and that there was a strong scent of alcohol emanating from him.

76. In PC Omadath's statement[6], he indicated that he observed the appellant:

> *...walking out of the Zen Night Blub with what appeared to be a Johnnie Walker black bottle and drinking directly from same and sharing it with other persons...I then observed the said gentleman entering into the driver seat of vehicle PCM 1016...Shortly after the said vehicle drove off from where it was parked...I observed WPC Baptiste give a front stop signal to the driver...I identified myself to the driver...I enquired from the driver if [he] had permission to drive this vehicle which had these blue and red swivel lights. He replied, "I am the Minister of National Security." At that time, I received a strong smell of what appeared to be alcohol coming from the breath of the driver.*

77. Moreover, during the trial, PC Omadath was cross-examined on this issue by counsel for the appellant[7]:

Q: *But you never suspected that he consumed alcohol to the extent that he exceeded the prescribed limit, eh?*
A: *Yes, sir.*
Q: *Since you answering, "Yes sir", how you suspect that?*
A: *Sir, by the distance I was standing from him and...*
Q: *You smell alcohol?*
A: *I smelt alcohol while he—*
Q: *--able to see him taking it from a bottle, em?*
A: *That was before, sir.*
Q: *Yes. How many drinks ah Johnnie Walker you have to take to exceed the speed limit, you know?*
A: *No sir*
Q: *Let me ask you another question. When Partap came down that stairs you saw him?*
A: *No sir.*

[6] Page 319 of the Record of Appeal
[7] Page 99 of the Record of Appeal

Q: *When he was walking on the road you saw him?*
A: *Yes sir.*

Q: *Let if you are honest witness. Was he staggering on the road?*
A: *No sir*
Q: *Eh?*
A: *No sir*
Q: *When you went up to him and asked him his name, he gave you his name?*
A: *If he gave me his…?*
Q: *His name? When you were talking to him was he slurring?*
A: *Slightly sir*

78. It was therefore during cross-examination that PC Omadath said for the first time that the appellant's speech was slightly slurred. Such evidence was elicited by way of a direct question posed by the appellant's counsel and not volunteered by the witness. Counsel was therefore bound by his answer.

79. As we have already noted in ground one, the fact that the appellant finally provided a specimen of breath while at the Belmont Police Station did not bar him from being charged for his previous failed requests.

80. In our view, there was evidence of reasonable suspicion and in the circumstances we find no reason to interfere with the magistrate's findings of fact. We are therefore unable to find favour with this submission.

81. The magistrate did not misconstrue the evidence or palpably fail to consider the weight and significance of the relevant circumstances.

82. Thus, this ground also fails.

GROUND 4- THE MAGISTRATE ERRED IN LAW IN THAT SHE FAILED TO CONSIDER THAT THE POLICE HAD COMPLIED WITH A REQUEST THAT THE APPELLANT BE ALLOWED TO COMMUNICATE WITH AN ATTORNEY AND OR AWAIT THE COMMISSIONER OF POLICE BEFORE PROVIDING A SPECIMEN OF BREATH.

THE APPELLANT'S SUBMISSIONS

83. Under ground three, Mr. Rajcoomar submitted that the magistrate failed to consider the appellant's right to consult with an attorney-at-law. The police officers appeared to be aware that an accused person had such a right and consented to await the arrival of the respondent at the Belmont Police Station. Having had the benefit of the advice of the respondent, the appellant complied and provided a specimen of breath.

THE RESPONDENT'S SUBMISSIONS

84. In response, Mr. Busby submitted that the police never consented to await the respondent's arrival before requesting a breath test. There was a clear refusal by the appellant prior to the arrival of the respondent, both at Keate Street and at the Belmont Police Station. Further, even after the respondent informed him of the options available to him, the appellant chose at first not to submit to the test.

LAW & ANALYSIS

85. The entitlement of a person in custody to legal advice does not provide a reasonable excuse for failing to provide a specimen until that person has had such legal advice. Neither an honest belief that there is such a right, nor does a willingness to provide a specimen on condition of first being able to consult with an attorney make a reasonable excuse for failing to provide the required specimen. Where a suspect indicates that he wishes to exercise his right to legal advice and it is possible for him to do so without delaying the taking of specimen to any significant extent, he should be allowed to do so, for example, where the

legal adviser is immediately available in person or via the telephone. Breach of the right to prompt legal advice will generally have no bearing on the obligation to provide a specimen of breath ***(Archbold 2015, para. 32-145)***.

86. In ***DPP v. Cornell, DPP v. Skinner [1990] RTR 254***, it was held that a failure to provide a specimen because the defendant was awaiting the arrival of or advice from a solicitor did not amount to a reasonable excuse for failing to submit to the test. In ***Plackett v. DPP [2008] EWHC 1335 (Admin)***, a case where the discussion included the right to legal advice following a request for a breath specimen, Davey J. adopted the observations of Kennedy L.J. in the case of ***Kennedy v. CPS [2002] EWHC (Admin) 167 JP 267*** and stated at paragraph 11 as follows:

> *The public interest requires that the obtaining of the breath specimens cannot be delayed to any significant extent in order to enable a suspect to take legal advice. Additionally, where legal advice has been requested, it is conceded that it is not necessary for an officer administering the breath test to wait for an uncertain time for a lawyer to be spoken to on a telephone, or to travel to a police station.*

87. In ***Kennedy (supra)***, the court also considered the right to legal advice in the context of an investigation into a suspected offence under section 5 of the 1988 RTA. Kennedy L.J. offered some helpful guidance in the approach to be taken when legal advice is requested. At paragraph 31 of his judgment, Kennedy LJ said:

> *…the public interest requires that the obtaining of breath specimens part of the investigation cannot be delayed to any significant extent in order to enable a suspect to take legal advice. That, to my mind, means this - that if there happens to be a solicitor in the charge office whom the suspect says that he wants to consult for a couple of minutes before deciding whether or not to provide specimens of breath he must be allowed to do so. Similarly, if the suspect asks at that stage to speak on the telephone for a couple of minutes to his own solicitor or the duty solicitor, and the solicitor in question is immediately available. But where, as here, the suspect does no more than indicate a general desire to have legal advice, I see no reason why the custody officer should not simply continue to take details, and alert the solicitors' call centre at the first convenient opportunity.*

88. Police officers, in the execution of their duties, cannot wait indefinitely for a person suspected of exceeding the prescribed limit of alcohol consumption, to await advice or consultation with his attorney. In such circumstances, time is a crucial factor and the length of time that has elapsed between the initial request for the specimen and the actual testing may well affect the specimen and the purpose of the legislation to safeguard road users may be defeated.

89. We recommend the approach suggested by Kennedy LJ. It is not necessary for an officer administering a breath test to wait for an uncertain length of time for an attorney to be spoken to on the telephone or to travel to a police station. Indeed, with improved technology in the communication field, there are numerous options open to a suspect such as instant messaging so that a suspect can have access to legal advice at his fingertips.

90. In the instant appeal, the appellant insisted on more than one occasion that he wished to speak with either his lawyer or the respondent when he was asked to submit to testing. There was no evidence that the police officers had consented to await the arrival of the respondent. On the contrary, the officers made repeated requests of the appellant to submit for testing but he refused to do so. They bent over backwards to accommodate him.

91. Even after more than one refusal, the appellant was still given the opportunity to speak with the respondent who advised him of his available options. The appellant's response was that he would *"take the charge"*[sic]. It was only when the charge was being read to him that he agreed to provide the specimen. This last refusal again constituted the commission of another offence. Due to the repeated requests made by the police officers, we are of the view that there was no consent by any of them to await the arrival of the appellant's attorney or the respondent.

92. This ground of appeal therefore fails.

GROUND 5- THE MAGISTRATE ERRED IN LAW AND/OR COMMITTED AN ILLEGALITY WHICH IMPACTED ON THE MERITS OF THE CASE.

THE APPELLANT'S SUBMISSIONS

93. During the proceedings, the magistrate said, *"Mr. Khan, I know that your client is an Attorney-at-Law and that he would have been advised but for the record he has been advised of the inferences that the court can draw if he elects not to give evidence and not to call witnesses. I just need it for the record."*

94. The effect of this statement was that the magistrate improperly and without legal justification drew an adverse inference from the failure of the appellant not to give evidence or call witnesses which is not permissible in law.

THE RESPONDENT'S SUBMISSIONS

95. Mr. Busby submitted that no prejudice accrued to the appellant as a result of the magistrate making the statement in question. The magistrate was entitled to draw the inference that the appellant had no reasonable excuse for failing to provide the specimen of breath as he chose not to lead no evidence on this issue when the evidential and legal burden fell on him.

LAW & ANALYSIS

96. An accused person cannot be compelled to give evidence and may exercise his right to remain silent during his trial. The legal and evidential burden of proving a case against an accused rests on the prosecution throughout the trial. Comments made by judicial officers about an accused not giving an explanation for a particular action or not raising a particular defence may amount to a misdirection when inappropriately juxtaposed with the accused's right to silence ***(Pamponette v. The State (2013) (Cr. App. No. 12 of 2012 at para. 33).***

Further *"improper comments on the failure to call a particular witness may give rise to a conviction being quashed. Once again, it will depend on the comment, and the nature and reason for failing to call a particular witness."* See ***Taylor on Appeals (2000), para. 8-056(c)***

97. The ***MVRT Act*** provides that it is an offence to fail to provide a specimen of breath for a breath test without reasonable excuse. Whether the facts are capable of amounting to a reasonable excuse is a matter of law and whether they do so is a question of fact and degree ***(Archbold 2015, para. 32-143***). When the appellant exercised his right to remain silent, the magistrate was left with the prosecution's case to assess and determine whether she was sure that all the elements of the offence were made out and whether there was any reasonable excuse being provided on the prosecution's case. No reasonable excuse was raised on the prosecution's case and none was forthcoming from the appellant, who was quite properly advised as to the potential consequences of his silence on this particular issue. The appellant, by not providing a reasonable excuse by way of evidence, left the magistrate with no choice but to conclude that he had none.

98. Therefore in our opinion the magistrate did not draw adverse inferences form the appellant's failure to give evidence but rather informed him of the possible consequences attached to such a failure.

99. This ground therefore fails.

GROUND 6- THE MAGISTRATE ERRED IN LAW IN THAT HER REASONS WERE DEFECTIVE

THE APPELLANT'S SUBMISSIONS

100. Matters raised under this ground were already addressed in grounds one and three. The Court finds no merit in this ground of appeal.

THE APPELLANT'S GOOD CHARACTER

101. Upon the invitation of the Court, Mr. Rajcoomar addressed the issue of the good character of the appellant.

THE APPELLANT'S SUBMISSIONS

102. Mr. Rajcoomar submitted that the appellant was a person of absolute good character. Insp. Brandon-John testified that he searched the records at the Criminal Records Office and nothing was found against the appellant. Therefore, the magistrate ought to have considered his good character when arriving at her decision. An examination of the magistrate's reasons revealed that there was no reference to the appellant's good character, which is an indication that it was not considered by her in arriving at her verdict of guilty.

103. Consideration of the appellant's good character would have been relevant under both limbs of propensity and credibility in addressing the issues raised such as: (i) whether there was reasonable cause to require a field sobriety test, (ii) whether he sought advice of an Attorney, and (iii) what was the effect of him saying that he was targeted. The magistrate's failure to consider the appellant's good character rendered his conviction unsafe and resulted in a substantial miscarriage of justice.

THE RESPONDENT'S SUBMISSIONS

104. Mr. Busby submitted that there was no need to consider good character in relation to the appellant's credibility since he did not give evidence during the trial and there was no pre-

trial statement that was given by him, that was relevant to the commission of the offence, that was capable of being assessed.

105. Good character is always relevant to propensity. While the magistrate did not expressly refer to the good character of the appellant in her reasons, that issue was one of the last points raised by defence counsel just before her decision. As such, the issue of the appellant's good character would have been uppermost in her mind before giving her decision.

106. In addition, on the basis of the facts found by the magistrate, any failure to direct herself on the appellant's good character would have made no difference on the safety of the conviction.

LAW & ANALYSIS

107. It has been well settled that:

(i) A defendant who is of good character (that is, has no convictions of any relevance or significance) is entitled to a good character direction tailored to fit the circumstances of the case;

(ii) A good character direction should be given as a matter of course, not discretion;

(iii) The standard direction should contain two (2) limbs: the credibility direction that a person of good character is more likely to be truthful than one of bad character and the propensity direction that he is less likely to commit a crime especially if the nature of the crime with which he is charged; and

(iv) The defendant's good character must be distinctly raised (See ***Teeluck & John v. The State (2005) 56 WIR 319***).

108. Nothing in the record indicates that the magistrate considered the appellant's good character when deciding on his guilt. The appellant was a man of absolute good character meaning that he has no previous convictions, no pending matters and no other

reprehensible conduct alleged, admitted or proven. In this regard, the magistrate fell into error. As a man of absolute good character, the appellant would have been entitled not only as a matter of discretion but as a matter of an obligation in law for his good character to be taken into account by the magistrate, both in terms of credibility and propensity when considering his guilt.

109. However, the deprivation of this benefit does not necessarily bring the matter to a close in the appellant's favour and the court must go on to decide the next question which follows, namely, the effect of the magistrate's error on the safety of the appellant's conviction. There is a large pool of authorities to the effect that such an omission is usually fatal. Including, ***Vye (1993) 97 Cr. App. R. 134*** and ***R v. Moustakim [2008] EWCA Crim 3096***. On the other hand, there is also a long list of authorities pointing in the other direction such as ***Brown v. The State 82 WIR 418***, ***Balson v. The State 65 WIR 128***, ***Singh v. The State 68 WIR 421*** and ***Bhola v. The State 68 WIR 449.***

110. In ***R v. Brown (supra)***, Kerr LJ pointed out at paragraph 33 that:

> *It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of the conviction…Where there was a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side was directly in issue, the need for a good character direction was more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broad plane and with a close eye on the significance of the other evidence in the case. There would be cases where it was simply not possible.*

111. The judge went on to say at paragraph 35:

> *There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference. Jagdeo Singh and Teeluck are obvious examples. But there will also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to*

> *those issues and evidence. It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial*

112. In ***R v. Hunter & Ors. [2015] EWCA Crim 631 at para. 89***, the principle was restated:

> *If the judge goes wrong, the sole test for the appellate court is one of the safety of the conviction. There can be no fixed rule or principle that a failure to give a good character direction or misdirection is necessarily or usually fatal. It must depend on the facts of individual cases.*

113. The issue of a magistrate's failure to consider a good character direction was addressed in ***Rodriquez v. Nimblett (supra)*****.** At paragraph 18, Archie J.A. *(as he then was)* stated that while it is generally accepted that a defendant's previous good character is relevant to an assessment of both his credibility and propensity, it is not a defence, but a factor to be taken into consideration. The challenge is in deciding what weight should be afforded to the evidence of good character and where it was not considered, to determine whether a conviction which is otherwise reasonably sustainable on the evidence should be allowed to stand.

114. Archie J.A. went on to state at paragraph 23 that:

> *As a general rule, where there is evidence of good character, magistrates ought to remind themselves of that in reaching their decisions, and to accord it such weight as they deem appropriate. That consideration should be specifically reflected in their written reasons as part of their duty…"*

115. In the instant appeal, the appellant neither gave evidence nor did he make a pre-trial statement. Therefore, no issue as to his credibility arose and the first limb of the good character direction was not required (See ***Vye (supra)***). Propensity, however, is in issue whether or not the appellant has given evidence. Nonetheless, this omission would not automatically lead to the conviction being quashed. The issue of whether the omission is fatal or not would all depend on a close examination of the nature of the issues raised on the evidence as well as an assessment of a good character direction to the issues which

arise on the evidence. In this case, the evidence against the appellant was overwhelming. It is well summarised in the magistrate's reasons as follows[8]: in the Record of Appeal at page 199 lines 6-20:

> *The evidence presented to this Court is that the defendant failed to provide a specimen of breath at Keate and Frederick Streets, Port-of-Spain. As a matter of fact, the defendant indicated this refusal to Constable Omadath, Inspector Brandon-John and in relating the incident to the complainant he indicated that he had refused to take the test and that he had taken two drinks of champagne. This evidence has not been contradicted by the defence. The Court finds therefore that there was a failure on the part of the defendant to provide a specimen of breath as required. Was there a reasonable excuse for this failure? A defendant may be guilty of this offence only if he or she fails to provide a breath specimen without reasonable excuse*
>
> *…*
>
> *The evidence presented to this Court and which has not been contradicted, is that the defendant told Police Constable Omadath when he requested that he submit himself for a breath test, "I am not submitting myself to any test", to Inspector Brandon-John, "I not doing no test, I going and call meh lawyer" again to Inspector Brandon-John at the Belmont Police Station, "I will wait until the Commissioner or my lawyer comes" to WPC Daniel at the Belmont Police Station, "I am not doing any test, the Commissioner right around the corner by Maraval, I will wait until he comes" and in answer to the Commissioner, "I will take the charge for refusing the test." Nothing has been presented to the Court to satisfy it that the defendant had any reasonable excuse for failing to provide a specimen of breath. This Court therefore finds that the defendant's failure was without any reasonable excuse.*

116. In our opinion, the sheer force of the evidence was so overwhelming that we therefore have no difficulty in concluding that the magistrate's failure to consider the propensity limb of the good character direction in deciding upon the appellant's guilt, could not reasonably have affected such a finding. On such overwhelming and indeed compelling evidence, a reasonable magistrate properly directing herself to the evidence of good character would inexorably have convicted the appellant.

117. This ground is therefore without merit.

[8] Record of Appeal at page 199, lines 6-19, 40-50, page 200, lines 1-5.

THE DISPOSITION

118. The appeal is dismissed and the orders of the magistrate are affirmed in respect of both conviction and sentence.

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A. Yorke-Soo Hon J.A.

……

M. Mohammed J.A.