



The Court Of Appeal for Bermuda

CRIMINAL APPEAL No. 14 of 2008

Between:

EUNICE LAMBERT (Police Constable)

Appellant

-v-

RICHARD COX

Respondent

Before: Hon. Justice Zacca, President
Hon. Justice Stuart-Smith, JA
Hon. Justice Ward, JA

Date of Hearing: 17 March 2009
Date of Judgment: 20 March 2009

Appearances: Mr. C. Clarke, Crown Counsel for the Appellant
Mr. A. Dunch of Mello Jones & Martin for the Respondent

JUDGMENT

STUART-SMITH, JA:

Introduction

1. On the 11th September 2008 Mr. Cox (the Respondent) pleaded guilty in the Magistrates Court to eleven counts of unlicensed driving contrary to section 52 of the Motor Car Act 1951 and eleven counts of driving whilst uninsured contrary to section 3 of the Motor Car Insurance (Third Party) Act 1943. For the offences of unlicensed driving he was sentenced to a fine of \$750.00 for each offence. Three (3) demerit points were imposed for each offence, together with six (6) months disqualification. Fines of a \$1,000.00 were imposed for each offence of driving whilst uninsured. The cumulative total amounted to \$19,250.00 and a total of thirty-three (33) demerit points.
2. The Respondent appealed to the Supreme Court. The appeal was heard on the 10 October 2008. The judge Kawaley J reserved judgment. In a written judgment dated 30 October 2008 he allowed the appeal. The fines of \$750.00 on each count of unlicensed driving and the \$1,000.00 on each count of uninsured driving were set aside and a fine of \$750 for the first unlicensed driving offence, with no separate penalties for the other offences, and a fine of \$4,125.00 for the first offence of uninsured driving, with no separate penalties on the other offences were substituted. The total of the fine amounted to \$4,875.00. The disqualification was set aside; the thirty-three (33) penalty points remain.
3. The prosecutor, Eunice Lambert (the Appellant) applied for Leave to Appeal to the single judge which was refused on the 14th November 2008. This was a renewed application. We granted Leave to Appeal and treated the hearing of the application as the hearing of the appeal. There is no appeal in relation to the fine substituted by the judge. The appeal relates solely to the removal of the disqualification for six (6) months. It is submitted that the sentence was manifestly inadequate and/or the judge erred in principle and as a matter of law.

Facts of the offences

4. The offences had occurred on eleven separate days between the 9 July and 29 July 2008 inclusive. The Respondent's licence and insurance had expired one day prior to his birthday on the 18 November 2007. It was implicit in the Crown's case that the Appellant affixed the electronic registration sticker on his vehicle in compliance with the Electronic Vehicle Registration Act 2007 on or before the 8 July 2008 making it easier for his illicit driving to be detected. He was given twelve (12) of the twenty-two (22) tickets at the Transport Control Department at about 10:00 a.m. on the 5 August 2008. The car was insured from 10:04 a.m. on that date, but not licensed until the 24 August 2008.
5. It was unclear from the Magistrate's order, whether the disqualification had been imposed on a discretionary or obligatory basis by virtue of the accumulated demerit points. The judge therefore inquired of the Magistrate and was told that it was the result of the accumulated demerit points.

Statutory Provisions of the Traffic Offences (Penalties) Act 1976 (The Act)

6. The Act provides for an offender to be disqualified from driving for a period of time. In very serious cases the disqualification is obligatory for the period specified in the Act. For the lesser offences it is discretionary. (see section 4) Section 4A provides the machinery for enabling the Court to order disqualification where the offender has been guilty of a number of offences over a period of time. It provides:

1) Where a person is convicted of a traffic offence, the Court shall direct that the following number of demerit points be recorded in respect to the person—a) the number of demerit points shown in head 7 of Schedule 1; or b) if head 7 of Schedule 1 shows a range of demerit points, the number of demerit points specified by the Court within the range.

4) *Demerit points expire two years after the date of the conviction in relation to which they were recorded.*

5) *The director shall keep a record of all the demerit points.*

7. Section 4B provides:

1) *Where a person is convicted of a traffic offence and the accumulated demerit points of that person including any demerit points to be recorded as a result of that offence equals or exceeds twelve (12) points, the Court shall order the person to be disqualified from driving all motor vehicles, including auxiliary bicycles.*

2) *A disqualification under subsection 1 shall be for at least six (6) months and shall continue thereafter until enough demerit points expire so that accumulated demerit points of the person are less than twelve (12) points.*

3) *In this section “accumulated demerit points” means the total unexpired demerit points recorded in respect of a person.*

4) *A disqualification under this section may be in addition to or in lieu of, any other punishment imposed by the Court in respect of the offence and the Court may provide for the disqualification to run concurrent with or consecutive to any other disqualification.*

The Issue

8. The issue in the appeal is whether the thirty-three (33) demerit points imposed on the eleven (11) unlicensed driving offences are “accumulated demerit points” within the meaning of subsection 4B(1). The Magistrates held that they were, the judge in a full and careful judgment held that they were not. He held that “accumulated demerit points” other than those recorded as a result of the offence in question related to demerit points which had been imposed in respect of conviction which had taken place on a previous occasion.

Construction of the Act

9. It is common ground that the Bermuda Act is loosely based on the U.K. Legislation. But certain provisions of the English Legislation have been omitted. Ms. Clark on behalf of the Applicant admitted that she found the provisions of section 4B difficult to construe. Further she recognized that some of the apparent consequences of the Act appear to be bizarre, such that it is doubtful that the legislature can have contemplated them. Thus, if the construction of section 4B(1) for which Ms. Clark contends is correct, not only is the Court bound to disqualify the Respondent for six (6) months, even though he has accumulated no demerit points prior to the present conviction, but as a result of subsection (2) he must be disqualified for two (2) year since more than twenty-four (24) demerit points are recorded against him and will not be less than twelve (12) before they expire in two (2) years time. This is on any showing a remarkable result. Because there is no provision, as there is in England, that where a disqualification is imposed, for the demerit points to be rescinded and the slate to be wiped clean. The judge ascertained that in the case of a person with no previous convictions, such as the Respondent, for a single offence of unlicensed driving the Magistrates Court normally imposed a fine of \$750.00 and did not impose a discretionary disqualification.
10. On the judge's construction an almost equally extraordinary result obtains. The thirty-three (33) demerit points remain on the Respondent's license and will do so until the 10 September 2010, i.e. two years (2) from the date of conviction. This means that if within that period the Respondent is convicted of any offence in respect of which any demerit points must be awarded, he is liable to be disqualified until September 2010. Mr. Dunch on behalf of the Respondent accepted that this must be so, unless the Court was able to impose no separate penalty by way of demerit points, as it can in relation to a penalty by way of fine or imprisonment. Although this seemed an attractive

suggestion, which, if possible, could avoid manifest injustice and enable Magistrates to impose what they considered the appropriate number of points to reflect the gravity of the offender, we do not think that it is open to the court to do so. Section 4A (1) is mandatory. This is to be contrasted with the position where the Court imposes a fine or imprisonment. In such a case a person becomes liable for a penalty up to the maximum; that clearly postulates that no separate penalty need be imposed where justice requires it; and that is a well known practice.

11. In our judgment the judge's construction of section 4B (1) is correct. "Accumulated demerit points" must mean those that have accumulated as a result of convictions prior to that for the offence in question. Subsection (3) defines these as "those points recorded in respect of a person". At the time of conviction of the instant offence, there are no points recorded against that person in respect of that offence. In the English corresponding provision, this is made explicit (see Road Traffic Offenders Act 1988 (the English Act) section 29(1)). It is true that the words "including any demerit points to be recorded as a result of that offence", do not fit particularly easily with this construction. But we think the words "including" should be construed as meaning "together with". The words "to be recorded" show that such points are not yet accumulated within subsection (3). We accept Mr. Dunch's submission but if there is ambiguity in the construction of a penal statute, the most benign construction should be adopted.
12. As the judge pointed out it is normal sentencing practice in fixing the sentence of the offence before the Court to take into account previous convictions of the offender. And in some case the Court is explicitly required to do so. For example, head 7 of Schedule 1 provides in relation to an offence under section 34(2) of the Road Traffic Act 1947

If first offence 10 to 12 points... if second offence committed within two (2) years of the date of conviction of first offence—12points”.

Previous convictions are those which occur on a previous occasion. Sentences passed on the same day as that of the instant offence are not previous convictions. One would expect clear language to be used if this general principle of sentencing was to be departed from. On the contrary, as we have pointed out the language of section 4B (1) coupled with section 4B (3) is in our view consistent with this general approach.

Other problems caused by Sections 4A and 4B of the Act

13. That is sufficient to dispose of the appeal. But in the course of argument other anomalies came to light, and some are referred to in the judge’s judgement. The present case is concerned with offences which occurred on different dates which are dealt with on the same occasion. If more than one offence occurs on the same day, where demerit points must be ordered, the total could easily exceed twelve (12) because there is no provision for them to be treated concurrently, instead of cumulatively, or as in the case of the English Act for the total points to be no more than those attributable to the offence attracting the highest number of points (see section 28 (2) of the English Act). Accordingly while the totality of the offending does not merit mandatory disqualification, such may nevertheless be the result.
14. We think that counsel well may be right when they submit that the legislature did not contemplate what might be the consequences of the provisions of section 4B where several offences committed on different dates are dealt with on the same occasion as here or, where a number of offences each attracting demerit points are committed on the same day, fall to be dealt with. Moreover the fact that the imposition of a period of disqualification does not expunge the penalty points leaves the offender very vulnerable in the event that he

should offend again even for a comparatively minor offence. Accordingly we express the hope that the legislature may take the opportunity of reconsidering the provisions of section 4A and B with a view to avoiding what appear to be unintended consequences and manifest injustice.

The appeal is dismissed.

Signed

Stuart-Smith, JA

Signed

I Agree

Zacca, President

Signed

I Agree

Ward, JA