In the Supreme Court of Bermuda

APPELLATE JURISDICTION
2003: NO. 40

BETWEEN:

DUANE DENNIS

Appellant

-and-

ANGELA COX
(Police Constable)

Respondent

JUDGMENT

Date of hearing: January 25, 2007
Date of Judgment: February 1, 2007

Mr. Paul Harshaw, Linda Milligan-Whyte & Associates,
for the Appellant
Ms. Nicole Smith, Office of the Director of Public Prosecutions,
for the Respondent

The Decision appealed against and the grounds of appeal

1. On June 28, 2006, the Appellant was convicted on his own plea before the Learned Senior Magistrate of one offence of dangerous driving contrary to section 36 of the Road Traffic Act 1947. He was fined $1000 and disqualified from all vehicles for 12 months.

2. The Appellant appeals against his sentence on very limited grounds. No complaint, on the hearing of the appeal, was made in respect of the fine or even the length of the disqualification. In substance, the Appellant complained that (a) the Learned Magistrate erred in law by failing to (i) invite the Appellant to make a plea in mitigation and (ii) consider whether disqualification from one class of vehicle would be sufficient punishment, and (b) that the appropriate penalty, having regard to the mitigation advanced on appeal, was to disqualify the Appellant from such class of vehicles alone which would allow him to drive his light van for work.

Supplementing the record

3. On the hearing of the appeal, the Appellant sought leave to supplement the record by admitting into evidence his Affidavit sworn on September 14, 2006 in support

of his application for an extension of time within which to appeal. Ms. Smith, for the Crown, sensibly did not oppose this application. Nor did she oppose the secondary application for leave to file an Affidavit proving service of the operative Notice of Appeal on the Magistrates' Court on November 15, 2006.

4. But Crown Counsel made her own application, on the hearing of the appeal, without prior notice to Mr. Harshaw, to supplement the record by placing before the Court the Summary of Facts read out by the Prosecution in the Court below. The Appellant's Counsel opposed her application.

5. In my view both applications should be granted, and no prejudice was caused to the Appellant by the lateness of the Crown's application. The Summary of Facts is highly relevant in terms of supporting the appropriateness of the level of fine and length of disqualification, but the principal thrust of the Appellant's complaints is that the learned Senior Magistrate erred in failing to invite him to mitigate on the extent of the disqualification he proposed to impose.

6. The power to supplement the record to more completely explain what transpired in the Magistrates Court, which arises under the amply drafted provisions of section 16(2) of the Criminal Appeal Act 1952, is an unfettered discretionary power. It ought not to be confused with the discretion, to be more cautiously exercised, to permit an appellant to adduce fresh evidence for the first time on appeal, in circumstances where there is no dispute as to what transpired in the Court below.

7. *Bryan-v-Lambert* [2003] Bda LR 33, to which both Counsel referred, was a case where the Appellant "*confirmed he was given an opportunity to forward an explanation*"[1]. In *Bowd-v-Lambert* [2006] Bda LR 37, Simmons J correctly stated that where an appellant has been represented by Counsel in a fully argued matter, "*this Court should be slow to exercise its discretion to admit further evidence on appeal.*"[2] In both cases, where it was accepted that an opportunity to mitigate had been afforded, fresh evidence was nevertheless admitted on appeal, with both Judges taking the view that the appellants might not have appreciated their right to mitigate.

8. Where all that is sought is to supplement a sparse record which is not based on a verbatim transcript, it is difficult to imagine circumstances in which this Court would refuse to admit the supplementary material, particularly where it is either not contradicted by other evidence and/or appears credible on its face.

Findings: Did the Magistrates' Court afford the Appellant with an opportunity to address the issue of what classes of vehicle any disqualification should extend to?

9. In my view this Court is bound to conclude that the Appellant was not invited to address the Court in mitigation either generally or with respect to the scope of the disqualification in particular. This is, first and foremost, because the Appellant's evidence to this effect is not contradicted by any other positive evidence. It seems possible that the Learned Senior Magistrate had actual or constructive notice of the point that was being taken on appeal when he made no comment when signing the appeal record on December 28, 2006. In any event, and more significantly, the Crown, who appeared below[3], were in a position to adduce evidence to challenge the Appellant's version of events, but did not do so.

10. In paragraph 4 of the Appellant's September 14, 2006 Affidavit sworn in support of his application for an extension of time within which to appeal and a stay of the disqualification pending appeal, he deposed as follows:

> "*I was not asked if I had anything to say on my behalf before sentencing and I did not know that I was allowed to say anything.*"

[1] Judgment, page 3, lines 28-29.
[2] Judgment, page 2, lines 15-16.
[3] The record does not disclose the identity of the Prosecutor.

11. The appeal record itself, Ms. Smith's able advocacy notwithstanding, is consistent with the Appellant's main factual point. The Magistrate's notes read as follows:

> "*The Accused pleads guilty to driving in a dangerous manner. Accused says, 'I am guilty of the offence but I was not doing 120k.'*
>
> **COURT**
>
> *Fined $1000.00* [^] *or 3 months in default.*"

12. The sparse notes are entirely understandable for a busy Traffic Court. Yet both Counsel sought to extract conflicting meaning from what at first blush looked like uncontroversial words. Ms. Smith suggested that the second sentence of the notes indicated that the Appellant had in fact advanced some mitigation, by contesting the speed. This contention seemed to have merit. But Mr. Harshaw made the equally persuasive retort, that a dispute over speed should have given rise to a Newton hearing to determine the factual basis on which sentencing would proceed. The Crown's Summary of Facts alleged speeds of up to 125kph, while the Appellant contended (at the scene) he travelled at no more than half that speed, and made a general denial of the speed relied upon before the Magistrates' Court.

13. At best, what the Appellant told the Magistrate, on its face, was an explanation of the basis on which his plea was made. While there was an element of mitigation in what he said, the complaint made in the present appeal is that the Appellant was not explicitly asked to advance mitigation relating the scope of the disqualification, and the record does not in any way contradict the Appellant's central complaint. Nor does the record in any way contradict what I consider to be the most important complaint of substance, that the Learned Senior Magistrate did not invite submissions on the class of vehicles issue, to give the Appellant an opportunity to (a) appreciate that the Court contemplated a suspension in respect of all vehicles, and (b) seek to dissuade the Court below from adopting that course. This ground of appeal implicitly accepts that the Magistrates' Court in no way prevented the Appellant from advancing the mitigating factors he now relies upon, had he appreciated before sentence that he was likely to be disqualified from all vehicles, or even at all, and been confident enough to put these matters forward at the appropriate time without being invited to do so.

14. The following argument made in paragraph 5 of the Appellant's September 14, 2006 Affidavit encapsulated the essence of the present appeal:

> "*If the Senior Magistrate was correct in disqualifying me from driving, he should have allowed me to explain my personal circumstances and then consider whether I should be disqualified from driving private cars only (which is what I was driving at the time in question) or from only certain classes of vehicles.*"

Findings: applicable legal principles

15. Mr. Harshaw placed four authorities before the Court, one of which was also relied upon by his opponent. In *Pimentel-v- Taylor*, [1998] Bda LR 40, where this Court reduced the entire sentence in a traffic sentence appeal, Meerabux J observed:

> *"I repeat what I said in Neil Thornley v. Philip Taylor, Appellate Jurisdiction 1996 No. 64:*
>
> *'I think that the discretion of a Magistrate is an essential element of fairness and that the passing of a sentence is not a mechanical task.'*

> *From the affidavit evidence of the Appellant, it appears that the learned Magistrate passed sentence without permitting the undefended Appellant to address the Court fully in mitigation of sentence. In my view it is unjudicial not to permit an offender to fully address the Court in mitigation of sentence.*"

16. These are principles which I would adopt. Mr. Harshaw sought to rely upon, and Ms. Smith to distinguish, my own decision in *Bryan-v-Lambert* [2003] Bda LR 33, and in particular the following passage:

> "*Timid persons appearing in Traffic Court and facing possible disqualification for speeding in excess of 60kph should ideally, incur the expense of a lawyer, if the potential loss of a license has serious employment implications. On the hand, Magistrates proposing to disqualify an unrepresented defendant should, despite the pressures on them, bend over backwards to encourage the delinquent driver (or other offender) to put forward any mitigating circumstances, adjourning the hearing (if necessary) to the more tranquil setting of a special fixture. Justice should not only be available for the bold, the brash or the eloquent"*[4].

17. Ms. Smith for the Respondent sought to distinguish the present case on the grounds that here, the Appellant was clearly not timid as he is recorded as having said something in his own defence. But the timidity of the appellant in *Bryan* was only a factor because he admitted that he had been invited by the Magistrate to put forward mitigation. The real complaint made in the present case is that the Appellant was not invited to address the disqualification issue at all, so that, no matter how bold, brash or eloquent he was, he did not appreciate the need to persuade the Court not to disqualify him from all classes of vehicle.

18. The Appellant's Counsel also relied on the following passage from Simmons J's Judgment in *Bowd-v-Lambert* [2006] Bda LR 37[5], which was another case where the merits of the sentence were not in doubt, and the appeal ultimately turned on a natural justice point:

> "*In this case we are dealing with a speeding matter, and it is a notorious fact that the Traffic Court is the least judicial of all proceedings that take place in the Magistrates' Court, in the sense that …large numbers of cases are dealt with, parties are for the most part unrepresented….And so it seems to me that it would be unfair to deprive the Appellant of an opportunity of having his case heard on its merits merely because he was not savvy enough to put forward his case below…*"

19. This case, although in large part based on the premise that *Bowd* was unfamiliar as a new resident with Court proceedings in Bermuda, together with *Bryan*, demonstrates the importance this Court attaches to the right to a fair hearing, even in traffic matters where the substantive decision reached is otherwise beyond reproach. In the present case this Court is not required to consider the exceptional circumstances in which a fresh case can be put forward for the first time on appeal in circumstances where it is admitted that the Appellant was not prevented by the Court from advancing the relevant mitigation. In this case the Court is required to analyze to what extent the Magistrates' Court is under a positive duty, even in a busy Traffic Court, to invite submissions on the scope of disqualification issue from defendants who are not legally represented.

20. I am willing to accept, based on the submissions of Counsel for the Crown, that the usual sentencing practice in dangerous driving cases was to disqualify for all classes of vehicles. But this submission was only made in answer to the Court's query as to what the sentencing practice was. There is in this case, and there only

[4] Judgment, page 3, lines 35-42.
[5] Paragraphs 8-9, a case in which *Bryan-v-Lambert* was cited with approval.

rarely could be in other cases involving litigants in person, no suggestion whatsoever that when the Appellant appeared before the Learned Senior Magistrate, he ought to have known that the likely penalty was disqualification from all classes of vehicles. After all, according to the record this was a first offence, and any form of disqualification at all was discretionary: Traffic Offences (Penalties) Act 1976, Schedule 1, Head 6.

21. Mr. Harshaw also placed before the Court the apparently inconsistent case, referred to in *Bowd*, of *Peniston-v- Raynor* [2005] Bda LR 54. This case appears to have been decided by Bell J on the substantive basis that "*this Court can only interfere with the sentence imposed by the magistrate if it can be shown that the magistrate erred in the exercise of his discretion.*"[6] Bell J gave a short decision in which he explained that any suggestion in previous cases that there was a regular practice or policy of disqualifying only for the class of vehicle involved in the offence, could not be relied upon as a ground of appeal. However, a ground of appeal seemingly substantially similar to the one raised on the present appeal was summarily rejected in *Peniston-v- Raynor* in the following terms:

> "*It was also submitted on behalf of the appellant that he was not given an opportunity to mitigate until after the sentence had been pronounced. In fact, the appellant chose to offer one matter in mitigation only after sentence had been imposed, and chose not to advance another ground at the time. I was not satisfied that this ground of appeal was made out…*"[7]

22. Ms. Smith implicitly adopted the reasoning of this case by contending that once it was shown that a lawful and appropriate sentence had been handed down, a disqualification could not be disturbed save on the grounds that the magistrate had improperly exercised his discretion. However, in my view the *Peniston* case does not appear to have fully considered the question of the duty of the Magistrates' Court to invite an offender to advance mitigation before sentence at all. No authorities were cited, and it is unclear what evidence was before the Court to support the complaint referred to in Bell J's Judgment. In my view, *Peniston-v-Raynor* cannot be regarded as having decided that it was not (or could never be) a breach of the rules of natural justice for a magistrate to fail to invite an unrepresented defendant about to be disqualified from driving all vehicles to advance mitigation on that specific issue.

23. In my view the Magistrates' Court has a positive duty to invite mitigation as to the scope of disqualification in every traffic case where disqualification is proposed to be imposed on a discretionary basis. This duty will most likely be engaged in circumstances where (a) the defendant is not legally represented, (b) disqualification is not obligatory, (c) a period of disqualification is obligatory, but a term in excess of the minimum period is in contemplation, and/or (d) the Court has a discretion as to which class of vehicle the disqualification should apply to. Where such an invitation is not extended, and an unrepresented defendant fails to advance the relevant mitigating arguments, a breach of the rules of natural justice will likely have occurred, and any disqualification imposed will, on this ground alone, be potentially liable to be set aside. Provided such an invitation to advance mitigation is extended, it will ordinarily be difficult for a disqualified person to advance mitigation for the first time on appeal, based on timidity, unfamiliarity with the Court's processes, or other such grounds.

24. Disqualification from driving is a penalty which not only interferes with an offender's fundamental property rights, albeit in a constitutionally permissible manner[8]; it also interferes, again to a constitutionally permissible extent, with the

[6] Judgment, page 1 lines 35-36.
[7] Judgment, page 1, lines 41-45.
[8] Bermuda Constitution, section 13 (2)(a)(ii), permits the confiscation of the right to use one's vehicles as a penalty for a breach of the law..

fundamental right to move freely through Bermuda[9]. Where an offender is likely to be disqualified from using a vehicle linked with his work, the penalty also impacts on the fundamental economic right to work[10]. And it appears to be well recognised that road traffic proceedings are, for human rights purposes at least, classified as criminal proceedings to which section 6 of the Bermuda Constitution and/or Article 6 of the European Convention on Human Rights and Fundamental Freedoms apply. Although the human rights dimension was not canvassed in argument, it is important to contextualize the legal underpinnings of every complaint that fair hearing rights have been infringed. The European Court of Human Rights in *Ozturk v Germany* (1984) 6 EHRR 409 held[11]:

> *". . . [T]he sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr Ozturk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all the general character of the rule and the purpose of the penalty being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature."*

Findings: Disposition of Appeal

25. So, for the above reasons, I find that the mere fact that the Appellant complains of being deprived of a fair hearing in the context of summary proceedings for a traffic offence does not in any way dilute the quality of justice to which he is entitled. Having found that the Appellant was not invited to advance arguments by way of mitigation with respect to the issue of disqualification which forms the subject of his appeal, his appeal as a matter of law succeeds. The Magistrates' Court is, for most Bermudians, their only window into the workings of the local administration of justice system. The high volume of cases that are conducted there, creating often considerable difficulties in terms of judicial case management, give rise to a proportionate need to ensure that justice is seen to be done in summary proceedings.

26. This will, from time to time, result in decisions being set aside by this Court in circumstances where, as here, the substantive decision made would not be open to any criticism if a "technical" procedural error had not occurred. Not only, as Meerabux J has observed, is sentencing not a mechanical process; magistrates are not machines. It is to be hoped that the electronic recording of proceedings will reduce the burden of note-taking, and result in an appeal record based on a full transcript of the hearing. This would allow the Magistrates' Court to both improve the quality of justice administered and deal with cases in a more timely manner. Where a judge is required to compile a record based on contemporaneous handwritten notes, efficiency and quality of adjudication are likely to become adversaries rather than companions.

27. The Court has a statutory discretion not to set aside a decision which could in law be set aside, on the grounds that no substantial miscarriage of justice has occurred: Criminal Appeal Act 1952, section 18(1), proviso. The Crown invites me to exercise this discretion. It is unclear whether this power permits the Court to uphold a penalty imposed by a legal process which is so flawed as to constitute a nullity. In *Friedman-v-Minister of Labour, Home Affairs and Public Safety* [2004] Bda LR 51, I stated:

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[9] Bermuda Constitution, section 11(1), (2)(a)(i).

[10] Article 6, International Covenant on Economic, Social and Cultural Rights 1966, ratified on behalf of Bermuda by the United Kingdom on May 20, 1976: http://www.ohchr.org/english/countries/ratification/3.htm ; http://193.194.138.190/html/menu3/b/a_cescr.htm .

[11] Paragraph 53, cited with approval by Simon Brown LJ in *R (on the application of West) v Parole Board* [2002] EWCA Civ 1641, paragraph 24.

> *"The question of whether a "technical" breach of the rules of natural justice can be ignored because the result would not have been different does not admit a clear answer: de Smith, Woolf & Jowell, 'Judicial Review of Administrative Action'. I am guided in this regard, however, by the following passage in the said text*:
>
> > '*The courts have rightly cautioned against the suggestion that no prejudice has been caused to the applicant because the flawed decision would inevitably have been the same. It is not for the courts to substitute their opinion for that of the authority constituted by law to decide the matter in question. Further, 'natural justice' is not always or entirely about the fact or substance of fairness. It has also something to do with the appearance of fairness. In the hallowed phrase, 'Justice must not only be done, it must also be seen to be done'.'"*[12]

28. In my judgment the breach of the rules of natural justice which Mr. Harshaw has established occurred is not so trivial that this Court is entitled to either (a) regard the disqualification imposed as legally valid nonetheless, or (b) to reach the conclusion that no substantial miscarriage of justice occurred. In my view justice would not be seen to be done if the appeal were to be dismissed, and the breach of the rules of natural justice ignored. Accordingly, even though the disqualification imposed was lawful and not liable to criticism on any tariff terms, the appeal is allowed, the disqualification from driving all vehicles is quashed, and an order disqualifying the Appellant from driving private cars is substituted instead.

Dated this 1st day of February, 2007

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KAWALEY J.

[12] Judgment, page 5, lines 13-24. By way of contrast, in a case reported today, the English Court of Appeal has held that a purely procedural breach of Article 8 of the European Convention entitled the applicant to a declaration, but not automatically damages : *P-v- South Gloucestershire Council*, The Times, February 1, 2007. It is unclear whether a similar approach would be adopted in relation to a breach of fair trial rights.