In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2008: No. 25

B E T W E E N:

RICHARD COX

Appellant

-v-

EUNICE LAMBERT
(Police Constable)

Respondent

JUDGMENT

Date of Hearing: October 10, 2008
Date of Judgment: October 30, 2008

Mr. Alan Dunch, Mello Jones & Martin, for the Appellant
Mr. Carrington Mahoney, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. The Appellant appeals against the sentences imposed on him in the Magistrates' Court by the Senior Magistrate (Worshipful Archibald Warner) on September 11, 2008 when he pleaded guilty to 11 counts of unlicensed driving and 11 counts of uninsured driving. Three demerit points and a fine of $750 were imposed for each offence under section 52 of the Motor Car Act 1951, together with six months disqualification. Fines of $1000 were imposed for each offence under section 3 of

the Motor Car Insurance (Third Party) Act 1943. The cumulative total of fines amounted to $19,250.00, and a total of 33 demerit points were imposed.

2. Having appeared in person below, he advanced two grounds of appeal. Firstly, he complained that the various offences were in law continuous offences so that he could only properly have pleaded guilty to one offence under each Act. Secondly, and alternatively, he contended that the sentences imposed were manifestly excessive having regard to the disparity principle. Neither point was advanced before the Senior Magistrate in the Court below.

3. Both grounds of appeal challenge for the first time the prosecutorial and sentencing policy in relation to two longstanding traffic offences which as of July 1, 2008 became subject to new forms of detection under the Electronic Vehicle-Registration Act ("EVR") 2007. In the early days of this new enforcement regime, offending drivers including the Appellant have been charged for multiple offences and received substantial fines. The appeal therefore raises for the first time not just the question of how such multiple offences ought to be charged, but also the appropriate level of fines and the operation of the comparatively new demerit points system.

4. The sentence aspect of the appeal was argued very shortly by each counsel, with each side effectively contending that their respective positions were obviously correct[1]. While I was mindful of the fact that it was important for this Court to hand down its decision as soon as possible to assist the Magistrates' Court in its ongoing sentencing policy, the fact that the decision in this case would likely be used as a precedent made it equally vital that a considered decision be handed down. I therefore decided to seek a Supplementary Report from the Learned Senior Magistrate, and to invite counsel to advance supplementary submissions on two important sentencing points which were not apparent in the course of the

[1] It is entirely understandable that the Appellant's counsel should not have been willing at private expense to do more than was necessary to advance his own client's case.

very short appeal hearing. Accordingly, this Judgment is being delivered far later than the parties might otherwise have reasonably expected.

The hearing before the Magistrates' Court

5. The Appellant pleaded guilty to 11 counts of driving an unlicensed and uninsured vehicle, respectively, on eleven separate days between July 9, 2008 and July 29, 2008 inclusive. It appears from documents placed before the Court by Mr. Mahoney that the Appellant's license and insurance expired one day prior to his birthday on November 18, 2007. Implicit in the Crown's case is the fact that the Appellant affixed the electronic registration sticker to his vehicle in compliance with the EVR Act on or before July 9, 2008 making it easier (presumably) for his illicit driving to be detected. He was given 12 of the 22 tickets at the Transport Control Department (TCD) at around 10.00 am on August 5, 2008. The car was insured from 10.04 am that same date, but not licensed until August 20, 2008.

6. Mr. Dunch submitted without contradiction that the Appellant had a clean driving record.

7. The 11 unlicensed driving charges each attracted a fine of $750, 3 demerit points, and six months disqualification. The 11 uninsured driving charges each attracted a fine of $1000. It was common ground before me that the 11 six month disqualifications were ordered to run concurrently. There was contention as to whether the periods of disqualification were ordered on a points basis or not, the position not being clear on the face of the record. Nor was it apparent to me what level of penalty would ordinarily be imposed for a single unlicensed driving offence.

8. After reserving judgment, I requested a Supplementary Report from the Learned Senior Magistrate with respect to (a) the standard penalty for driving an unlicensed vehicle by a driver with a clean traffic record, and (b) the basis on

which the disqualification was imposed. It then became apparent that if the Appellant had been convicted of a single offence of unlicensed driving, he would likely have been fined $750 and not disqualified, because the six months disqualification imposed in each case was imposed on the basis of accumulated penalty points.

The relevant offences and maximum penalties

9. Section 52 of the Motor Car Act 1951 provides in material part as follows :

> *"(2) No person shall—*
>
> **(a) use or cause or allow any other person to use on the highways of Bermuda—**
>
> **(i) a motor car, other than a motor cycle***; or*
>
> *(ii) a motor cycle; or*
>
> *(b) keep or cause or allow any other person to keep, in a public place, a motor car other than a motor cycle; or*
>
> *(c) keep or cause or allow any other person to keep, in a public place, a motor cycle,*
>
> *unless a motor car licence has been issued by the Minister and is in force in respect of that motor car.*" [emphasis added]

10. The Traffic Offences (Penalties) Act 1976 (Schedule 1) provides the following penalties for the latter offence:

> "*Head 1: Motor Car Act 1951*
> *Head 2: section 52(2)(a)(i)*
> *Head 3: using or allowing use of an unlicensed motor car other than a motor cycle*
> *Head 4: summary*

Head 5: $1,000

Head 6: discretionary - 6 months

Head 7: 2-4 points."

11. Two comparatively modern provisions of the 1976 Act[2] govern the points system. Firstly, section 4A provides in salient part as follows:

"*(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 of that 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, a 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…"

12. Secondly, section 4B of the same Act provides as follows:

"***Disqualification if too many demerit points***

4B (1) Where a person is convicted of a traffic offence and the accumulated demerit points of the person, including any demerit points to be recorded as a result of that offence, equals or exceeds 12 points, the court shall order the person to be disqualified from driving all motor vehicles, including auxiliary bicycles.

[2] This provision was introduced with effect from November 1, 2007 by Act No. 44 of 2005.

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

(3) In this section "accumulated demerit points" means the total unexpired demerit points recorded in respect of a person.

(4) This section does not apply with respect to the following –

(a) a conviction for a parking offence within the meaning of Part III of the Traffic Offences Procedure Act 1974; or

(b) a conviction where a ticket was issued under Part II of the Traffic Offences Procedure Act 1974 and the person charged pled guilty and paid the amount of the penalty specified in the ticket.

(5) 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."

13. Finally, the Motor Car Insurance (Third Party Risks) Act 1943 provides in relevant part as follows:

"3. (1) Subject to this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor car on the highway or on an estate road unless there is in force in relation to the use of the motor car by that person or that other person, as the case may be, such a policy

of insurance in respect of third-party risks as complies with the requirements of this Act….

(2) Any person who contravenes subsection (1) commits an offence against this Act:

Punishment on summary conviction: imprisonment for 12 months or a fine of $5,040 or both such imprisonment and fine."

Findings: are the offences charged continuous offences?

14. The argument that the offences charged constituted a single continuous offence, superficially appealing and advanced with conviction, does not withstand careful scrutiny. No direct judicial authority dealing with these specific offences or similar offences appears to exist, but in my judgment the question is essentially a straightforward matter of statutory interpretation.

15. Mr. Dunch sought to equate the driving charges before the Court with the sort of offence which may be committed over an extended period of time, such as failing to comply with an enforcement notice: *Hodgetts –v- Chiltern D.C.* [1983] 2 A.C. 120. In such a case, it would indeed be duplicitous to charge a defendant separately for each day that the offence continued in the absence of clear legislative intent that a separate penalty should be imposed for each day that the statutory breach subsisted.

16. As Mr. Mahoney rightly pointed out, this analysis would properly apply to a charge of keeping an unlicensed car in a public place contrary to section 52(2)(b). The fact that this separate offence exists alongside the offence of unlicensed driving helps to illustrate that the statute has distinguished between the implicitly continuous offence of keeping an unlicensed motor vehicle and the implicitly

"single" offence of using a motor vehicle on a particular occasion. Section 3(1) of the Third-Party Risks Act 1943 must be given the same interpretation. The mischief addressed by this offence is obviously driving a car on a particular occasion while uninsured when a single accident could result in a substantial uninsured claim. Although *Flack-v-Church* [1916-17) All ER 499 was relied upon by the Respondent, I place no real reliance on this decision which I do not find persuasive having regard to its facts, even though it is cited in '*Wilkinson's Road Traffic Offences*' at paragraph 12.84. What is more significant is that Mr. Mahoney established that this case has been considered to be relevant by analogy in the specific context of driving an unlicensed vehicle by the authors of the leading English road traffic law text. This text states with equal relevance in the preceding paragraph: "*A person who is detected using an unlicensed vehicle on a public road at any time commits an offence…*"[3]

17. On the facts of the present appeal, therefore, separate offences were clearly committed on each day the Appellant admittedly drove his vehicle, and the separate charges (3-22) were not bad for duplicity.

Findings: was the cumulative total of fines imposed manifestly excessive having regard to the totality principle?

18. In terms of an instinctual response to the totality of the fines imposed, a total of $19,250.00 for traffic offences not involving damage to person or property, or driving under the influence of drink or drugs, undoubtedly causes the eyebrows to rise quizzically. In the present case there is no suggestion that the Appellant is unable to pay the fines, but the total amount which is payable represents almost the entire cost of a modest new car or less than modest second-hand car.

[3] Paragraph 12.83, Wallis, McCormack & Niekirk (eds.), '*Wilkinson's Road Traffic Offences*', 20th edition (Sweet & Maxwell: London, 2001).

19. The total amount of multiple fines must, one would assume, be proportionate to the gravity of the offences looked at as a whole; ability to pay will usually only be relevant when considering the time afforded for payment of the fine although in some cases the time it would take a defendant to pay a large fine might be a clear indication that the financial penalty is excessive. It is therefore necessary as a starting point to analyze the gravity of the offences looked at as whole and the sentencing approach adopted.

20. Mr. Mahoney rightly pointed out that the fines were levied in relation to eleven separate occasions of illicit driving several months after the relevant license and insurance expired. However, it does seem clear that the Appellant was in the process of getting his car licensed and insured because his new insurance took effect around the same time as he was attending TCD to be notified of the pending charges. On any view, it appears he put his affairs in order quite promptly after being informed of the charges and did not repeat the offences. These are mitigating factors which are perhaps of less significance than the fact that it appears the Appellant has a clean driving record and did not waste the Court's time, pleading guilty at the earliest opportunity.

21. I do not think, however, that the Court can properly treat any delay in reporting the offences as a mitigating factor, as Mr. Dunch somewhat irreverently contended. The statutory scheme of the EVR Act is designed to ensure that unauthorised driving will be more efficiently detected without the need for offenders to be caught in the act by human intervention. The offences are strict liability offences to which there are no substantive defences. It does not lie in the mouth of those who repeatedly drive without a license and insurance to complain that they would not have committed so many offences if they had been informed more promptly that their illicit driving had been detected. Transposing this "blame the authorities for not charging me sooner" argument to the context of a Court sentencing a serial burglar helps to illustrate why this argument must be rejected.

22. What is the appropriate level of fine for a first offence of driving an unlicensed and insured vehicle? The Magistrates' Court typically establishes and follows a tariff and it was not contended that the fines imposed were inconsistent with what is ordinarily imposed. No complaint was made that the individual fines were excessive having regard to what might properly have been imposed in respect of a single offence. The Appellant's complaint is about the cumulative effect of imposing the usual fine in respect of 22 similar offences which was dealt with on a single occasion[4]. According to the learned authors of '*Wilkinson's Road Traffic Offences*' at paragraph 18.15:

> "*The application of a rigid formula in the assessment of fines, even for a single offence, is not right; to apply it to each of 10 offences and add up was clearly wrong. The Divisional Court so held in R-v-Chelmsford Crown Court, ex p. Birchall [1990] Crim L.R. 352 in reducing fines totalling L.7,6000 for excess weight offences to a total of L.1,300. Courts had to consider all the circumstances and apply the principles of sentencing (in particular the 'totality principle') which were well known.*"

23. *Birchall* was a case involving repeated offences of a similar character which were detected by a mechanical device and in respect of which the defendant was dealt with at the same hearing. Although looked at narrowly it was decided in circumstances where the ability of the defendant to pay was a significant factor, it is more significant in a broader sense in deciding that the totality principle applies to multiple traffic fines as well. The most recent Court of Appeal for Bermuda case to deal with the totality principle in relation to custodial cases appears to be *White-v-R* [2005] Bda LR 50 where the Court accepted the submission that the sentence imposed for the most serious single offence should not be as severe as the maximum sentence unless the case was the worst imaginable case[5]. Accordingly where consecutive or concurrent penalties are imposed, it will

[4] Grounds 2 and 3 of the Notice of Appeal explicitly invoked the totality principle.
[5] Per Evans JA (Acting President) at page 2, applying the totality principle to a case of similar offences where concurrent sentences were imposed so that the traditional totality principle did not strictly apply.

generally wrong in principle to impose a total fine either (a) more severe than the maximum penalty available for a single offence, or (b) as severe as the maximum penalty which could be imposed for the most serious offence, unless the conduct looked at overall is in the worst imaginable case range.

24. The Respondent's counsel was afforded an opportunity to advance supplementary submissions if he wished to challenge the applicability of the above-cited passage in '*Wilkinson's Road Traffic Offences*', at paragraph 18.15 to the present case. Mr. Mahoney argued that *R-v-Chelmsford Crown Court ex parte Birchall* should not be followed because (a) that case involved several offences committed on the same day, (b) there is no evidence that the Appellant lacks the means to pay, and (c) injustice would be caused if drivers convicted on the same occasion of several offences were treated more favourably than those convicted on different occasions. None of these points is sufficiently cogent to persuade me that the *Birchall* case ought not to be followed.

25. As far as the suggestion that the *Birchall* case's reasoning is limited to situations where multiple offences are committed on a single day is concerned, it is unclear from the report whether or not the overweight offences where in fact committed on the same day. There is in any event nothing in the report of the case to suggest that the reasoning crucially depended on the fact that the various offences were committed on the same day, as opposed to the fact that the various offences were being dealt with by the Court on the same day. According to the report, the facts were as follows:

> "*The applicant was an independent haulage carrier who was engaged to carry quarried material from a quarry to some road works about three or four miles away. Each time he took a load from the quarry, he passed over a weighbridge and a certificate was issued. The lorry was found to be overweight on one particular occasion, and investigation of the*

weighbridge certificates showed that he had driven the lorry while over laden on a total of 10 occasions."[6]

26. The fact that the lorry was recorded by the detection device as having driven overweight on 10 separate occasions implicitly formed the basis of the 10 separate charges. One occasion would only have constituted a single offence. This decision in no way suggests that the totality principle would only be applied in relation to road traffic fines where multiple offences were committed on one day. This would certainly not be the case in relation to consecutive sentences of imprisonment, which is the analogy followed by the Court in *Birchall*. As the commentary to the case observes:

> "*The totality principle is well established in cases dealing with custodial sentences…The interest of this case is that an analogous principle applies to fines.*"[7]

27. In the present case there is no plea of financial hardship and I accept Mr. Mahoney's contention that the new detection devices have been installed to deal with prevalent offences so that a need for penalties with a deterrent element exists, particular in relation to 11 offences committed within a comparatively short time so long after the Appellant's license expired. But this robust submission cannot eliminate the need for a more reasoned approach to the imposition of multiple fines when a driver is convicted and sentenced at a single hearing. The wider principle in *Birchall* is in no sense tethered to a factual situation where the defendant is unable to immediately pay the fine in full.

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[6] [1990] Crim LR 352 at 353.

[7] *Idem*. I consider the final sentence of the commentary states the value of this decision too narrowly in suggesting that its greatest value will be to "*magistrates' courts dealing with offenders for a multiplicity of traffic offences committed* **on the same occasion**" [emphasis added]. The multiple charges in *Birchall* were only possible because of conduct occurring on multiple occasions which were dealt by the court at a single hearing.

28. It may be that in the case of fines, the totality principle may operate more flexibly than as regards custodial sentences because no loss of liberty is necessarily involved, but the same broad principles in my judgment apply. And these principles are routinely applied by the criminal courts whenever similar or related offences committed on different dates are, for whatever reason, dealt with at the same trial and/or sentencing hearing. I reject the submission that the application of the totality principle to this and similar cases of multiple offences tried together is in some way an anomaly and will result in absurdity. The examples provided in Mr. Mahoney's supplementary submissions are themselves anomalous because they seem to presuppose that a defendant has the power to elect when he will be charged or sentenced in connection with multiple traffic offences. This power rests with the Crown alone, and no defendant will ever have any motivation to deprive himself of the benefit of the totality principle by deliberately pleading guilty on different dates where it is possible to have multiple offences dealt with together. In the present case the Crown sensibly decided to charge the Appellant at the same time with a series of related offences committed within a three week period. Had each charge been dealt with separately (despite the Appellant's desire to admit each charge) with a view to getting around the totality principle in a manner inconsistent with usual prosecution policy and good administration, the Crown would be exposed to complaints of abuse of process. *White-v-R* [2005] Bda LR 50 is an illustration of how, even in relation to a trial, offences covering a large period of time are dealt with as part of a single proceeding. It is for the Crown to lay charges in a consistent manner to avoid the sort of inconsistencies identified in the Respondent's argument.

29. I find that it is wrong in principle to impose total fines of more than three times the maximum amount ($5500-for uninsured driving-and $1000 for driving an unlicensed vehicle) which could be imposed for the worst imaginable single offence. The correct approach is to determine the appropriate total amount, and adjust the individual fines accordingly. The adjustment could take the form of imposing no penalty at all for some offences, different penalties for different

offences or lowering the fines to the same level for each offence: *R-v-Chelmsford Crown Court, ex p. Birchall* [1990] Crim L.R. 352. I find that an appropriate total fine is $4875, 75% of the maximum fine which could have been imposed for any single uninsured driving combined with driving an unlicensed vehicle offence.

30. Accordingly, I allow the appeal against sentence and set aside the fines of $750 and $1000 respectively, and substitute the following fines in each case, namely $750 for the first driving an unlicensed motor car offence and no additional monetary penalty for the remaining ten offences (unlicensed driving: $750) + $4125 for the first uninsured driving offence and no additional monetary penalty for the remaining ten offences (uninsured driving: $4125) =$4875.

Findings: was the six months disqualification imposed under the points system or under the Court's discretion?

31. Before the appeal against the disqualification can be considered it is necessary to determine whether this aspect of the penalty was in legal terms a mandatory disqualification under the new demerit points system (in which case the minimum obligatory disqualification was imposed and no appeal can possibly succeed) or simply a concurrent discretionary disqualification. How this new system operates has not been previously considered by this Court.

32. Because it was unclear on the face of the record whether the Learned Senior Magistrate intended to impose a mandatory penalty points disqualification for each unlicensed driving offence or a discretionary one, I sought a Supplementary Report which confirmed that the penalty was imposed on the penalty points basis. Mr. Mahoney was given an opportunity to make supplementary submissions in support of the approach adopted in the Court below of accumulating penalty points imposed on the same date, which had the effect of treating penalties imposed on the same date as prior penalties. While the supplementary report confirmed his position at the oral hearing of this appeal, it contradicted my

provisional view as to what had occurred in the Court below. And neither Mr. Dunch nor the Court had put to the Respondent's counsel the argument that a demerit points disqualification was not legally open to the Magistrates' Court because all of the points were imposed on the same date. In his supplementary submissions on the question of whether penalty points recorded on the same date can be treated as accumulated points giving rise to a mandatory disqualification, Mr. Mahoney made the bare submission that:

> "*…section 4B(1) of the Traffic Offences (Penalties) Act 1976 makes it a mandatory disqualification if too many points equal to or in excess of 12 points are accumulated. The Respondent submits that a mandatory disqualification can result from accumulated demerit points as a result of several traffic offences occurring on the same occasion or from several traffic offences occurring on different occasions as in the instant case…The Respondent submits that the learned Senior Magistrate cannot be faulted in disqualifying the Appellant as he was so obliged by section 4B(1) of the Traffic Offences (Penalties) Act to do so*"

33. Because these provisions are unfamiliar, it may be helpful to reproduce the crucial provisions again bearing in mind that 3 demerits were imposed for each of the 11 unlicensed driving charges (the minimum being 2 and the maximum 4). It is correct, as Mr. Mahoney contended, that the relevant points had to be imposed (or, strictly, at least two points had to be recorded) and that the Court below had no power to impose no demerit points at all (in contrast to the position as regards fines):

> "*4B (1) Where a person is convicted of a traffic offence and the accumulated demerit points of the person, including any demerit points to be recorded as a result of that offence, equals or exceeds 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 months and shall continue thereafter until enough demerit points expire so that the accumulated demerit points of the person are less than 12 points."

34. If section 4B of the Traffic Offences (Penalties) Act 1976 is construed in one way, the Appellant's demerits points would have accumulated in the course of the single hearing as he pled guilty to each unlicensed driving charge, eventually reaching the grand total of 33 points. It is true that the disqualification imposed may be ordered to run concurrently (which was not specified in the present case but is implicit). However this period would have to be served in addition to the disqualification period measured by reference to the expiry of points so that the accumulated total falls below 12 points. None of the 33 points would expire for two years from the date of sentence, because section 4A(4) provides: "*Demerit points expire two years after the date of the conviction in relation to which they were recorded.*" The Appellant would on this basis be disqualified for at least two years. Does section 4B envisage what might be described as a horizontal totting-up of points recorded in respect of multiple offences in respect of which the defendant is convicted on the same date?

35. On the other hand if the accumulated demerit points are construed as meaning "*accumulated on a date prior to the date of the relevant conviction taking into account the points to be recorded in respect of each single offence before the Court*", the Appellant had no accumulated demerit points to be added *in each case* to *each of* the 11 charges of which he was convicted on September 11, 2008. He would not on this analysis be liable to a mandatory demerit points disqualification at all. He would have had 33 accumulated points on September 12, 2008, and those points would all expire on September 11, 2010. This would leave him (or any person in a similar position) with a sword of Damocles over his head; because any further traffic conviction prior to September 11, 2010 would result in a mandatory disqualification for at least the unexpired portion of that two year

period. Does section 4B, therefore envision only a "vertical" totting-up of points whereby the points accumulated prior to the relevant date of conviction are added to the points liable to be recorded in respect of each single offence?

36. How these statutory provisions are to be interpreted may not properly be shaped by the facts of the present case. Their impact on the present case may helpfully illustrate the way in which conflicting interpretations do or do not fall within the range of outcomes Parliament may be presumed to have intended. In my judgment the true legal position is indeed obvious, albeit after the sort of calm reflection that is not possible in Traffic Court when the Learned Magistrate is requested by the prosecution to deal with several matters involving unrepresented defendants in quick succession, and without any apparent submissions being made as to how the statutory regime ought properly to apply. The demerit point scheme contemplates accumulated points to have been accumulated on a date prior to the date of conviction for the case at hand. The language of the statutory provisions implies that accumulated points will expire at differing times, and it would be inconsistent with established sentencing practice in traffic cases and generally to effectively treat offences of which a defendant is convicted on the same date as prior convictions.

37. In my judgment plain words would be required to justify a departure from established sentencing practice according to which where a defendant is convicted of multiple offences on the same date, the first offences to which he pleads are not treated as prior offences for the purposes of determining the appropriate sentence for the subsequent of which he is convicted on the same date. In the criminal field, if a defendant pleads guilty to several offences committed on the same or different dates at a single hearing, the previous convictions to which reference will be made are those offences of which the defendant was found guilty on a date prior to the sentencing date. The same approach generally applies in the road traffic field. Section 3 of the Traffic Offences (Penalties) Act 1976 itself provides:

"3 (1) In this section "reckonable offence" means an offence against a provision of law specified in heads 1 and 2 of Schedule 2 of a description specified in head 3 of Schedule 2.

(2) Where—

(a) a person is charged with a reckonable offence; and

(b) *he has within the two years preceding the date of commission of such offence been convicted of a previous reckonable offence,*

such previous conviction shall, for the purpose only of determining the period of disqualification that may be imposed on his conviction of the offence charged, be deemed to be a previous conviction of the offence charged and the court may disqualify him accordingly…"

38. The concept of "*reckonable offence*" requires the sentencing court to have regard to a "*previous conviction*" for a reckonable committed within two years prior to the date of commission of the offence before the Court. By necessary implication such previous conviction must have been recorded prior to the conviction of the offence before the court, because the defendant will not be before the court unless the offence has been committed. So the demerit points system was introduced into a statutory framework in which, unsurprisingly, disqualification based on previous convictions would only be legally possible in relation to convictions recorded on a date prior to the relevant sentencing hearing. The demerit points system itself provides for a different number of points to be recorded having regard to prior convictions. 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-10-12 points…if second offence committed within 2 years of date of conviction of first offence-12 points...*"

39. So the number of points to be imposed for certain offences is determined with reference to previous convictions as understood both generally and in the context of reckonable offences under the 1976 Act. Why should there be a dramatic departure from this entirely logical approach in relation to the accumulation of demerit points? The concept of demerit points has clearly been borrowed in general terms from the English penalty points system. However significant features of the complicated English system have been omitted from the Bermuda legislative framework, making it impossible to simply follow English authorities without confirming that the precise statutory regime is the same. Under the English regime, it appears that where an obligatory disqualification is ordered, points may not be endorsed at all. This applies to not just the offence which has attracted obligatory disqualification but also "*other offences of which he* [the defendant has] *been convicted on the same occasion*": '*Wilkinson's Road Traffic Offences*', paragraph 20-44. Also, disqualification for accumulating 12 or more penalty points will remove existing points from the license, "wiping the slate clean" (paragraph 20.53). The English regime also expressly provides that where offences are committed on the same occasion, there is a statutory discretion to endorse points for more than one offence. In practice, points will seemingly only be endorsed only for the most serious offence (paragraphs 19-46-19-59). The Appellant's case would not fall into that category, however, because the offences were committed on different occasions.

40. However, under the English scheme it seems clear that points endorsed for different offences on the same date may be added up to result in a points disqualification as the Crown contends (without explicitly relying upon the English approach) should occur here: '*Wilkinson's Road Traffic Offences*', paragraphs 19-48-59. But this approach is mandated by an express statutory provision, section 29(1) of the Road Traffic Offenders Act 1988 (UK)[8] which provides as follows:

[8] As amended by section 28 of the Road Traffic Act 1991: '*Wilkinson's Road Traffic Offences*', Volume 2, paragraph 26.57.

"**29. Penalty points to be taken into account on conviction**

(1) **Where a person is convicted of an offence involving obligatory endorsement, the penalty points to be taken into account on that occasion are** *(subject to subsection (2) below)—*

(a) **any that are to be attributed to the offence or offences of which he is convicted,** *disregarding any offence in respect of which an order under section 34 of this Act* [obligatory disqualification] *is made, and*

(b) any that were on a previous occasion ordered to be endorsed on the counterpart of any licence held by him, unless the offender has since that occasion and before the conviction been disqualified under section 35 of this Act [penalty points disqualification] .

(2) If any of the offences was committed more than three years before another, the penalty points in respect of that offence shall not be added to those in respect of the other." [emphasis added]

41. Section 29(1)(a) of the UK Act expressly empowers the Court to take into account the penalty points "*that are to be attributed to the offence or offences of which he is convicted* " in addition to prior penalty points, displacing the normal sentencing rule that only prior convictions are relevant for sentencing purposes. Most importantly, this UK provision explicitly provides that where a defendant is convicted of more than one offence on the same occasion, the points attributable to each offence must be taken into account. 'Horizontal' totting-up is expressly required by the statute. Further, this provision exists within a legislative framework which has checks and balances designed to ensure the defendant is not penalised twice in terms of disqualification based on accumulated points for the

same offence(s). Not only are these safeguards absent from the Bermudian legislative scheme, there is no unambiguously explicit statutory power to take into account demerit points recorded on the date of conviction in sentencing for the offence(s) before the court.

42. It is clearly arguable that the following provisions of section 4B(1) of our 1976 Act and on which Mr. Mahoney's argument depends are intended to require the sentencing court to tot-up all demerit points imposed when a defendant is convicted on the same date of more than one relevant offence; but this is not what the statute explicitly states. On the contrary, carefully read, it appears that the 12 or more total must be calculated by reference to points accumulated on a previous occasion and the points to be recorded in respect of each offence (singular) before the court:

> "*Where a person is convicted of a traffic offence and the accumulated demerit points of the person,* **including any demerit points to be recorded as a result of <u>that</u> offence**, *equals or exceeds 12 points, the court shall order the person to be disqualified…*" [emphasis added]

43. In my judgment the natural and ordinary meaning of the provisions of the statute, read in their context, clearly support the view that horizontal totting-up of points recorded in respect of more than one offence of which the defendant is convicted on the same date is not legally required and/or permissible. However to the extent that there is any ambiguity, I would reach the same conclusion.

44. Having regard to the constitutional protection afforded to the double jeopardy rule (Bermuda Constitution, section 6(5)), irrespective of whether it strictly applies to a traffic offence and the potential impact of a disqualification from driving all vehicles on a driver's constitutional freedom of movement rights (Bermuda Constitution section 11), the canon of construction that penal statutes must be construed strictly against the Crown has particular resonance in the

present context. On a strict reading of section 4B(1), the duty to disqualify only arises when the "*accumulated demerit points… including any demerit points to be recorded as a result of* **that offence,** equals *or exceeds 12 points*" [emphasis added]. The only explicit totting up which is required to take place encompasses (a) whatever unexpired demerit points have previously been recorded, and (b) whatever points are due to be recorded by the "*offence*" before the Court. Unlike under the UK 1988 Act section 29(1)(a), there is no express duty to take into account the "*offence or offences of which he is convicted* ". So any ambiguity that might be said to exist must be resolved against the Crown.

45. The Bermuda provision may fairly be interpreted as only engaging the automatic disqualification machinery where, as regards any single offence before the Court, the "vertically" accumulated demerit points including those to be imposed (here 3 in each case) equals or exceeds 12 points. This interpretation is consistent with (1) the normal sentencing rule that only prior offences are taken into account, and (2) the natural and ordinary meaning of section 4B(1) in its context. The alternative construction would also lead to absurd results. Under the Bermudian legislative scheme, the minimum six months disqualification imposed by the Court below will in fact amount to two years, because section 4A(4) provides that demerit points do not expire until "*two years after the date of the conviction on which they were recorded.*" And section 4B(2) provides: "*A disqualification under subsection (1) shall be for at least six months and shall continue thereafter until enough demerit points expire so that the accumulated demerit points of the person are less than 12 points.*" The same result (an obligatory 2 year disqualification) would come into play in any multiple offence case, even where offences occurred on the same occasion, for example where a person is convicted of a first offence of speeding (4-7 points), driving without lights(4-7 points) and carrying an unsafe load (4-7 points). This would represent the same points and mandatory disqualification period as an offence of causing injury by reckless or dangerous driving (12 points).

46. The Bermudian scheme appears to require points to be recorded despite the fact that an obligatory disqualification is imposed and apparently has no provisions for one mandatory points disqualification to "wipe the slate clean", so as to prevent double disqualification for the same offence. In the context of such a draconian regime, there can be no justification for interpreting section 4B(1) in a way that presumes that Parliament intended to achieve an even more punitive result, absent the clearly expressed intention that this result was indeed intended.

47. Accordingly, when the Appellant was convicted of each unlicensed driving offence and three demerit points were recorded in each case, this did not result in 12 or more accumulated demerit point triggering a mandatory disqualification under section 4B of the 1976 Act. I therefore find that the demerit points disqualification of six months purportedly imposed on the Appellant for each Motor Car Act offence was wrong in law and must be quashed. However, the imposition of 3 penalty points for each of 11 unlicensed driving offences is not disturbed, so the accumulated demerit points of the Appellant for future purposes stands at 33.

48. It remains to consider whether any discretionary disqualification is appropriate and if so for what period.

Findings: is any discretionary disqualification required?

49. If the Appellant had been convicted of a single offence of contravening section 52(2)(a)(i) of the Motor Car Act 1951, a discretionary disqualification would not have been ordinarily imposed. However, a disqualification of six months could lawfully have been imposed. If the totality principle were to be applied to the penalty of disqualification, imposing the maximum disqualification possible for a single offence would be excessive because the present case is clearly not the worst imaginable case.

50. In my judgment it would be wrong in principle to impose a discretionary disqualification on the same occasion when 12 or more demerit points are recorded because for the next two years the Appellant will be at risk of receiving a mandatory disqualification for the offences in respect of which he was convicted on September 11, 2008.

51. On the facts of the present appeal, therefore, I am satisfied that no discretionary disqualification should be imposed in relation to offences in respect of which a massive 33 points have been lawfully imposed.

Conclusion

52. For the above reasons the appeal against conviction as regards counts 3-22 is dismissed. Each offence of driving an unlicensed motor car and driving without insurance was a separate offence, properly charged as such.

53. The appeal against sentence is allowed to the following extent. The fines of $750 and $1000 respectively are set aside and substituted with the following fines in each case, namely: —

    (a) $750 for the first driving an unlicensed motor car offence and no additional monetary penalty for the remaining ten offences (unlicensed driving: $750);

    (b) $4125 for the first uninsured driving offence and no additional monetary penalty for the remaining ten offences (uninsured driving: $4125); and

    (c) total fine $4875.

    The imposition of 3 penalty points for each offence of driving an unlicensed motor vehicle is not disturbed so that, for the purposes of any future conviction of a traffic offence in respect of which demerit points must be imposed, the Appellant's record at the outset will reflect 33 accumulated demerit points.

However, as a matter of law no mandatory demerit point disqualification was required, because the accumulated total in each case was only 3 demerit points. Accordingly, the six months mandatory disqualification purportedly ordered is set aside in each case so that no disqualification period must be served.

54. The full implications of the demerit points system have not been fully argued in the present case, and may need to be revisited in future cases. Absent legislative refinements, the present demerit points scheme could well prove difficult to enforce in a manner consistent with modern notions of justice.

55. I will hear counsel in relation to any matters arising from this Judgment.

Dated this 30th day of October, 2008.

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KAWALEY J