In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2009: No. 3

B E T W E E N:

MICHAEL JAMES MELLO

Appellant

-v-

EUNICE LAMBERT
(Police Constable)

Respondent

REASONS FOR DECISION

Dates of Hearing: February 23, May 15, 2009
Date of Reasons: June 12, 2009

Ms. Fozeia Rana-Fahy, Appleby, for the Appellant
Ms. Auralee Cassidy, Office of the DPP, for the Respondent

Introductory

1. On January 13, 2009, the Appellant, a self-employed wedding organiser, was convicted of speeding at 72 kph on December 6, 2008, contrary to section 7(2)(4) of the Road Traffic Act before the Magistrates' Court (Wor. Khamisi Tokunbo). He was fined $400, disqualified from driving all vehicles for six months, and awarded six penalty points.

2. It was unclear on the record whether the disqualification was imposed on a discretionary basis or on the basis of accumulated demerit points. Accordingly, the initial appeal hearing on February 23, 2009 was adjourned by Greaves J. for

clarification to be sought from the Magistrate as to the legal basis upon the Appellant had been disqualified and for written submissions to be filed in relation to the appeal. On March 5, 2009, the Learned Magistrate responded to this Court's request for clarification of the basis of the disqualification. Unfortunately the request for clarification was itself unclear, so the question as to whether the disqualification was a discretionary, or a mandatory accumulated points disqualification, remained shrouded in mystery.

3. On March 6, 2009, the Appellant swore an Affidavit deposing that at the conclusion of the hearing in the Magistrates' Court, reference was made to the demerit points imposed for an offence (driving without a valid license) also committed on December 6, 2008 and in respect of which he pleaded guilty and paid the fine prior to his Court appearance for the offence before the Court. This Affidavit was not challenged and the Respondent conceded at the re-scheduled appeal hearing before me that the six months' disqualification was imposed on the basis that the 6 penalty points imposed for the speeding offence before the Court combined with the points imposed for the offence committed on the same date (in respect of which the Appellant had been able to plead guilty and pay the requisite fine) amounted to 12 "penalty" points triggering a mandatory six months disqualification under section 4B(1) of the Traffic Offences (Penalties) Act 1976 ("the Act"). It was further conceded the points recorded in respect of the fixed fine offence could not lawfully be taken into account as "accumulated demerit points" by virtue of section 4B(4)(b) of the Act, and that the disqualification ought to be set aside.

4. After rejecting the Appellant's subsidiary complaint that 6 demerit points were excessive for the offence in question, which Ms. Cassidy did not concede, I allowed the appeal to the extent of setting aside the six months disqualification ordered in the Magistrates' Court. Both counsel requested a clarifying judgment to provide guidance on the demerit points system, and so accordingly I now give reasons for my decision of May 15, 2009. I also set out my provisional views on the Appellant's application for costs in this matter, which I adjourned to the date of delivery of the present judgment because I was unfamiliar with the jurisdiction to grant costs in relation to criminal appeals and the principles applicable thereto.

Section 4B of the Traffic Offences (Penalties) Act 2009

5. Section 4B of the 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) 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." [emphasis added]

6. The offence of driving a motor car without a valid license (or indeed driving an unlicensed vehicle) is an offence for which a fixed penalty ticket may be issued under the Traffic Offences Procedure Act 1974. The Appellant was issued with such a ticket when he was stopped for speeding on December 6, 2008 and paid the specified penalty without attending a Court hearing on December 7, 2008. It appears that in pleading guilty in this manner seven penalty points were recorded against him[1]. He was purportedly disqualified under section 4B(1) on the basis that the demerit points imposed for this fixed penalty offence qualified as demerit points for the purposes of this section. But section 4B(4)(b) explicitly provides that section 4B does not apply to such an offence. This provision, as Ms. Rana-Fahy pointed out, is clearly designed to encourage the payment of fixed penalty fines; because the offence may only be ignored if the defendant "*has paid the amount of the penalty specified in the ticket.*"

7. It therefore follows that the Learned Magistrate erred in taking into account demerit points in relation to an offence which ought not to have taken account according to the clear terms of section 4B(4)(b). The Appellant was not liable to be disqualified at all under the mandatory provisions of section 4B(1) of the Act

[1] The details about this related offence are taken from the '*Submissions for the Crown*' as the appeal record was silent as to this important matter.

and no case for a discretionary disqualification was ever considered in the Magistrates' Court or advanced by the Crown before this Court. This analysis adds a further layer of complexity to the reasoning of this Court and the Court of Appeal in relation to the workings of the recently introduced demerit points system in *Cox-v- Lambert (Police Officer)* [2008] SC (Bda) 56 App (30 October 2008); *E Lambert –v- R Cox* [2009] CA (Bda) 7 Crim (20 March 2009).

8. Even if section 4B(4) did not exist, because the speeding offence before the Magistrates' Court and the "previous conviction" taken into account for sentencing purposes were both committed on the same occasion, the *Cox* case (as decided by this Court on October 30, 2008) would have required the Magistrates' Court sentencing the Appellant on January 13, 2009 to ignore any demerit points recorded in relation to the fixed penalty conviction.

Suggested approach to section 4B (1) cases in the future

9. The present case, along with the *Cox* case and other similar cases, illustrates the need for appropriate judicial and prosecutorial training to be undertaken in relation to complicated new legislative schemes relevant to cases before the courts before such schemes are brought into force. Such a course is being taken in relation to the more wide-ranging Police and Criminal Evidence legislation, but is no less apposite in the far narrower context of demerit points for traffic offences. The need to make appropriate preparations exists in the present context because the traffic laws impact a large number of citizens, and the formulaic nature of the sentencing scheme envisages a high volume of cases being processed without extensive oral argument. This is precisely what occurs in Traffic Court where the Learned Magistrate is expected to process a large number of cases where guilty pleas are entered without undue time or formality.

10. As a purely procedural matter, it is essential that, where a mandatory disqualification under section 4B(1) is ordered, this fact is recorded in the Magistrate's notes. When an appeal record is prepared, the record should always include details of the dates of the previous traffic offences and demerit points which have been taken into account in reaching the conclusion that the accumulated points amount to 12 or more demerit points.

11. Section 21 of the Summary Jurisdiction Act 1930 requires the "*judgment*" of the Magistrates' Court and the reasons therefore in a summary prosecution to be recorded in writing; where a guilty plea is entered, the sentencing decision is the "*judgment*" for section 21 purposes. Section 13(2)(a)(ii) of the Criminal Act 1952 requires the record to include "*the record of all other proceedings (including preliminary process) connected with the criminal proceedings in question*". This proposition, that when an appeal record is prepared in relation to an appeal against sentence the Appellant's traffic record (if any) which was considered by the Magistrates' Court should form part of the appeal record, is neither novel nor

controversial. It may be that the departure from what is surely the established practice in this regard was merely an aberration in the present case.

12. As a substantive matter, however, the sentencing judge who considers that the case before him or her may require a mandatory disqualification under section 4B(1) of the Act must not proceed to impose such a disqualification order without being satisfied of the following four crucial facts. The sentencing judge must be satisfied that the 12 demerit points threshold is reached without taking into account any points recorded against the defendant in respect of any offence(s): (1) committed on the same occasion as the offence before the Court; (2) dealt with on the same occasion as the offence before the Court; (3) constituting parking offences; and/or (4) where the defendant was issued with a fixed penalty ticket and has pleaded guilty and paid the fine before the relevant hearing.

13. These substantive requirements must be in order to comply with the terms and effect of section 4B of the Act as explained in this case and in *Cox-v- Lambert (Police Officer)* [2008] SC (Bda) 56 App (30 October 2008); *E Lambert –v- R Cox* [2009] CA (Bda) 7 Crim (20 March 2009).

14. The Director of Public Prosecutions in conjunction with the Senior Magistrate may wish to consider what administrative mechanism can best facilitate compliance with these substantive law requirements in practice. However, when the case is called before the Magistrate presiding over Traffic Court, the Informant should have made it clear on the face of the papers handed to the Court that either (a) section 4B does not apply, or (b) that section 4B does apply. If (b) is the case, the relevant traffic record (no doubt a computer printout) should be attached to the information or summons with the relevant conviction dates and demerit points highlighted so that the Magistrate can readily ascertain whether or not he or she can lawfully make a section 4B(1) disqualification order.

Provisional views on costs

15. I have been unable to identify any decisions of this Court dealing with this Court's jurisdiction to award costs under section 21 of the Criminal Appeal Act 1952. Section 21 provides as follows:

> ***"Cost of appeal***
> *21 (1)* **Upon the determination of an appeal under this Act, the Supreme Court, if it appears in the circumstances equitable to the Court to do so, may make an order requiring the appellant or the respondent to pay all or any part of the costs of appeal**.
>
> *(2) For the purposes of this section—*
> *(a) "costs of appeal" includes any costs—*

(i) in respect of the preparation of copies of any documents required to be transmitted to the Registrar or to any other person in connection with the appeal;

(ii) in respect of the stating of a case in connection with the appeal;

(iii) in respect of the preparation of any affidavits made in connection with the appeal;

(iv) in respect of the appearance and examination of any witness upon the hearing of the appeal; and

(v) in respect of the enquiry and report of a special commissioner appointed under section 16(2)(f) ; and

(b) any order made by the Supreme Court as to the payment of the costs of appeal may direct all or any part of the costs of appeal, being costs otherwise falling to be met out of public funds, to be paid into the Consolidated Fund." [emphasis added]

16. The jurisdiction to award some or all of the costs of an appeal under section 21(1) appears to be a broad one. Subsection (2) does not appear to limit the costs recoverable to disbursements; rather, the subsection makes it clear that such items are potentially recoverable. The jurisdiction does not appear to be limited to reviewing costs decisions made in the Magistrates' Court. This is because (a) section 6 gives the informant or a convicted person the right to appeal against a costs order; and (b) section 20 makes separate provision for disposing of such appeals. Nevertheless, having regard to the fact that the award of costs in criminal cases is not provided for in this Court in respect of proceedings on indictment (arguably an anomaly), the summary jurisdiction to award costs must at least be noted. The Summary Jurisdiction Act 1930 provides in material part as follows:

"Costs against informant

28 (1) When a charge is dismissed, and appears to the court to have been unfounded, frivolous or made from any improper motive, the court may order the costs, or any part of the costs, to be paid by the informant, either forthwith or within such time as the court may allow; and if such costs are not paid the court may commit the informant to prison for a term not exceeding ten days, unless such costs are sooner paid.

(2) The costs which the court may order to be paid under sub-section (1) shall be such sums as may be fixed by the court in respect of—

(i) the expenses incurred by the defendant, including fees payable to his attorney (if any), which sum shall be payable to the defendant; and

(ii) the witness money payable under section 11, which sum shall be payable into the Consolidated Fund.

Prosecution costs

29 The court may award and order, in and by the conviction or order, the defendant to pay such sum towards the costs of the prosecution as to the court seems reasonable."

17. The different approaches to awarding costs against the Crown and an informant is of doubtful constitutional validity in light of the equality of arms principle embodied in section 6 of the Bermuda Constitution. Nevertheless, section 28 of the 1930 Act may well reflect a general principle of wider public policy that costs should not be awarded against the Crown in criminal cases save where the accused has been unfairly subjected to criminal prosecution. Bearing in mind the criminal standard of proof which creates an institutional probability that guilty persons may frequently be acquitted, it would be absurd if criminal costs were simply to follow the event as in civil cases.

18. My provisional view therefore is that appeal costs may only be awarded in favour of a successful appellant in circumstances where the respondent has to a material extent caused them to unfairly incur the costs of an appeal. It is insufficient to merely rely on the successful resolution of the appeal in the appellant's favour. This interpretation of section 21 would explain why, in the vast majority of appeals under the 1952 Act, no costs orders are sought or made and the scope of section 21 has not (in recent times at least) formed the subject of a considered judgment.

19. Nevertheless, the application in the present case appears to be, in large part at least, well founded. The Appellant ought never to have been disqualified, and the Prosecution has a duty to assist the Court to ensure that only lawful sentences are imposed. This has now been conceded by the Crown, but only after the Appellant (who initially filed an appeal in person): (a) instructed a lawyer; (b) appeared through counsel at the initial hearing when the Crown were seemingly unable to confirm the basis of the impugned sentencing decision; (c) filed an affidavit to supplement the incomplete appeal record, and (d) filed a comprehensive skeleton argument.

20. After all of this, the Respondent conceded that the disqualification was wrongly imposed so that the renewed appeal hearing took place with the only issue in controversy being the subsidiary question of whether too many penalty points were imposed, which issue was resolved in favour of the Crown. My provisional view is that, unless the Crown did not appear (through the Informant or otherwise) at the initial hearing, the concession that the disqualification was unlawful ought to have been made at or before the initial appeal hearing.

21. It is true that the Notice of Appeal suggested that the disqualification was made on a discretionary basis and the record was silent as to precisely on what grounds the disqualification was ordered. But if the Respondent was represented at the

sentencing hearing, it is difficult to see (in light of the unchallenged evidence of the Appellant) (a) how such person could not be aware that the disqualification was purportedly made under section 4B(1), and (b) how their knowledge as to the basis of the disqualification could not be imputed to the Respondent. Absent extremely unusual facts and bearing in mind that ignorance of the law is no excuse (indeed, prosecuting authorities have a positive duty to be aware of the legal limits of sentencing powers), in principle the concession made the day before the second appeal hearing on May 15, 2009 ought to have been made before the initial hearing on February 23, 2009. From a costs perspective, the fact that the judicial arm of the Crown may have materially contributed to the imposition of the unlawful sentence and the lack of clarity surrounding the basis of the disqualification would seem to be neither here nor there.

22. My provisional views on the appropriate costs order are as follows. The Appellant ought accordingly to be awarded his appeal costs on an indemnity basis from the date of the filing of the appeal until and including May 14, 2009 (the day before the effective appeal hearing) when the Respondent made the appropriate concession. No order should be made with respect to the costs of appearing before the Court on May 15, 2009.

Summary

23. These are the Reasons for my decision on May 15, 2009 to set aside the six months disqualification imposed against the Appellant in the Magistrates' Court in excess of the Court's lawful jurisdiction under section 4B of the Act.

24. I will hear counsel, if necessary, as to costs.

Dated this 12th day of June, 2009 _____

KAWALEY J