In The Supreme Court of Bermuda

Appellate Jurisdiction
2011 No. 42

BETWEEN:

DEAN ALLEN GRANT

Appellant

-and-

THE QUEEN

Respondent

Appellate Jurisdiction
2012 No. 8

BETWEEN:

DEREK HERMAN LAMBE

Appellant

-and-

FIONA MILLER
(Police Sergeant)

Respondent

Date of Hearing: 17 February 2012; 9 March 2012

2011/42
Marc Daniels for the appellant; and
Nicole Smith for the respondent.

2012/8
The appellant in person; and
Geoffrey Faiella for the respondent.

REASONS FOR JUDGMENT

1. These two appeals concern the same point. They first came before me sequentially on 17 February, and when it appeared that there was going to be a difference of approach

between the two Crown Counsel I adjourned the matter for full consideration and argument. On the resumed date I heard them together.

2. The point is a short but important one. It concerns the meaning of "special reasons" in section 4 of the Traffic Offences (Penalties) Act 1976 ('TO(P)A'). Insofar as it is relevant, that section provides:

> **"Disqualification; obligatory and discretionary**
> 4. (1) Where a person is convicted of a traffic offence in relation to which there appears in head 6 of Schedule 1—
>
> (a) the word "obligatory", the court shall order him to be disqualified for such period as is specified in that head as the period of obligatory disqualification in relation to that offence unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified;"

3. The short issue is whether "special reasons" can include the personal circumstances of the offender, or whether they are limited to the circumstances of the offence. The former would let in such considerations as the impact of disqualification upon the employment of the offender, and in both the cases before the Court it was said that disqualification would either cause the offender to lose his job, or would make it difficult or impossible for him to travel to and from work. The Magistrates took the view that they could not consider personal circumstances such as this, but in 2011/42 the learned Senior Magistrate was recorded by Crown Counsel as having observed:

> "The issue of proportionality which was discussed in the case of David Cox[1] is not applicable to DUI cases. We are bound to accept the principle of the higher court or the Supreme Court when it has determined the law concerning DUI. I would welcome a current ruling on this area of the law. I encourage you to go to the Supreme Court and see what they say. I am bound and have no difficulty being bound. I understand the hardship."

4. In Appeal No. 2011/42 the brief facts were that the appellant was stopped at 1:25 am on Sunday 17th April 2011 during a stop and search under section 315(f) of the Criminal

[1] i.e. the decision of the Court of Appeal in David Jahwell Cox & Jahki Dillas v The Queen (14th November 2008)

Code. When pulled over the appellant seemed to have difficulty controlling his vehicle, mounting the curb and then parking it diagonally. The officers smelt a very strong smell of alcohol on his breath, and said that on getting out of his car his eyes were red and glazed and he was having difficulty standing straight. He was cautioned and asked if he had had any alcohol, to which he replied that he had had one Heineken beer. At this point the officers considered that his speech was slurred. He was arrested on suspicion of impaired driving and a sample of breath for analysis was demanded. He failed to provide a sample and was detained and subsequently charged with Driving Whilst Impaired contrary to section 35(1) of the Road Traffic Act 1947, and Failing to Comply with a Demand for a Sample of Breath for Analysis contrary to section 35C(7) of the same Act. On his first appearance in the Magistrates' Court he pled not guilty, but on the trial date he pled guilty to the charge of failing to comply with a demand for a sample of breath and the Crown offered no evidence on the DWI. He was fined $1,000 and disqualified from all vehicles for 12 months. That is the mandatory minimum period of disqualification under TO(P)A. The disqualification from all vehicles is also mandatory for impaired driving offences, although it is not for other traffic offences: see TO(P)A, ss. 4(2) and (2A)[2].

5. In mitigation counsel for the appellant in 2011/42 relied upon his personal circumstances. He said that he was employed as a carpenter, which was a trade already seriously impacted by the recession. His employers had indicated to him that in the event he lost his licence for all vehicles they would no longer be able to employ him as the company could not afford to pay for a carpenter who could not get around to the job sites, with his tools, under his own steam. It was also said that, in the event that he lost his job, the appellant would have difficulty finding alternative employment in these hard times,

[2] "(2) Where a person is convicted of a traffic offence, other than an impaired driving traffic offence and the court orders him to be disqualified, the court may order him to be disqualified for driving the class of motor vehicle in respect of the use of which the offence is committed or may order him to be disqualified for driving all motor vehicles, including auxiliary bicycles, . . .
(2A) Where a person is convicted of an impaired driving traffic offence and the court orders him to be disqualified, the court shall order him to be disqualified for driving all motor vehicles, including auxiliary bicycles . . . ."

and this would have a serious adverse impact upon his wife, who was expecting their third child, and two children.

6. In Appeal No. 2012/8 the appellant was observed at 3:20 a.m. on Saturday 27 August 2011 driving in an erratic manner on Palmetto Road. He was stopped, and the officers smelled intoxicants on his breath, and observed that his eyes were red and glazed, that he was unsteady on his feet and that his speech was slurred. He admitted having just left a bar. He was arrested and taken to Hamilton Police Station where a breath test was administered and he was found to have 229 milligrams of alcohol in 100 milliliters of blood (223 on the second test). He was charged, *inter alia*, with driving when the proportion of alcohol in his blood was in excess of the statutory limit (which is 80 milligrams of alcohol in 100 milliliters of blood) contrary to section 35A of the Road Traffic Act 1947. The pled Not Guilty on the first appearance, but on the day fixed for trial he pled Guilty, and was fined $800 and disqualified from all vehicles for 12 months.

7. In mitigation the appellant in Appeal No. 2012/8 said that he had drunk that night to dull the pain of a dental extraction earlier that day, and he produced a bill from his dentist to verify that. His employment was in Hamilton as a kitchen steward in a hotel, but he lived in St. George's. He worked from 6 p.m. to 2 a.m., and public transport had stopped running by the time he got off work. He could not use a pedal cycle for transport as he had C.O.P.D., and had had a triple heart by-pass. He said that the cost of getting a taxi home after work was prohibitive, and that therefore he was at risk of losing his employment, and would not then be able to maintain the mortgage on his home or pay for his medication.

THE LAW

8. The expression "special reasons" occurs in various provisions of the United Kingdom legislation dealing with disqualification. Apparently there were divergent opinions on its meaning, as it was not statutorily defined, but these were resolved by the decision in Whittall v Kirby [1946] 2 All ER 552, a decision of the King's Bench Divisional Court

presided over by the then Chief Justice, Lord Goddard. He endorsed the following statement of the law from R v Crossan [1939] 1 N.I. 106, at pp. 112, 113:

> "A "special reason" within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception."

9. Lord Goddard CJ also made it plain that personal mitigation, such as the impact of disqualification upon employment, did not suffice:

> "The limited discretion must be exercised judicially. . . . That a man is a professional driver cannot, as it seems to me, by any possibility be called a special reason. The fact that drivers are professional drivers would of itself indicate that they are more likely to be habitually on the roads than people who drive themselves, so there is all the more reason for protecting the public against them. By exercising discretion in favour of an offender because he is a professional driver or merely because he drives himself for business purposes, it is obvious that the court is taking into account the fact that in such cases disqualification is likely to work greater financial hardship than in the case of a person who uses his car for social or casual purposes. There is no indication in the act that Parliament meant to draw any distinction between drivers who earn their living by driving or who drive for purposes connected with their business and any other users of motor cars. That in many cases serious hardship will result to a lorry driver or private chauffeur from the imposition of a disqualification is, no doubt, true, but Parliament has chosen to impose this penalty and it is not for courts to disregard the plain provisions of an Act of Parliament merely because they think that the action that Parliament has required them to take in some cases causes some or it may be considerable hardship. Had Parliament intended that special consideration was to be shown to professional drivers or first offenders they would have so provided."

10. Further guidance was given by Devlin J (as he then was) in the case of R v Wickins [1958] Cr. App. R. 236. That case concerned a man who did not know that he was a diabetic. His disease caused him to be affected more than an ordinary man by a small amount of alcohol. The judge held at 239:

> "If one takes the essence of that definition [*i.e. the passage cited above from Whittall v Kirby*], there are four conditions laid down which have to be satisfied. The first is that it must be a mitigating or extenuating circumstance. . . . The next is that it must not amount in law to a defence to the charge. . .. The third is that it must be directly connected to the commission of the offence. In our judgment, the circumstances here are directly connected with the commission of the offence. If it had not been for the fact that the appellant was suffering from diabetes, the offence would not have been committed at all, because he had not taken sufficient drink to affect the mind of an ordinary man who was not suffering from that disease. The fourth is that the matter is one which the court ought properly to take into consideration when imposing punishment."

However, even in that case it must be born in mind that the charge was driving under the influence "to such an extent as to be incapable of having proper control of the said vehicle". It must be doubtful whether the same reasoning would avail an offender on a strict liability offence, such as driving with a blood alcohol level in excess of the prescribed limit.

11. For a more modern example of the application of these principles see Griffiths v DPP [2002] EWHC 792. In that case the driver, having consumed alcohol sufficient to put him over the prescribed limit, hoped to complete his journey home before the alcohol was absorbed into his blood. In rejecting that as capable of constituting a special reason, Turner J cited Whittall v Kirby and the passage from R v Wickins set out above.

12. The only remaining question is whether section 54 of the Criminal Code, which was added by amendment in 2001[3], alters this position, as Mr. Daniels contends. That section provides:

> **"Fundamental principle**
> 54. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

13. The application of that principle to mandatory sentences was considered by the Court of Appeal in David Jahwell Cox & Jahki Dillas v The Queen (14th November 2008), the case referred to by the Senior Magistrate in the remarks quoted above. The Court held:

[3] Section 54 was repealed and substituted by 2001:29 effective 29 October 2001.

"11. We hold without hesitation that counsel are correct in submitting that the requirement of a minimum sentence in section 351C (6) is subject to the fundamental principle that the sentence must be proportionate in the circumstances of the particular case, as specified in section 54. This is the correct interpretation, in our view, of these provisions of the Bermudian legislation. Our conclusion is supported, however, by judgments of the Canadian Courts to which we were referred, specifically R. v. Stauffer 2007 BCCA 7, a judgment of the Court of Appeal for British Columbia. The Court approved an earlier judgment which held that "minimum mandatory sentences should not vitiate the other substantive principles of sentencing" (per Arbour J. in R. v. Wust (2000) 143 C.C.C. (3d) 129), and added –

> "Proportionality is considered to be the fundamental governing principle of sentencing. We cannot, therefore, assume that Parliament intended to abridge this longstanding principle without clear and explicit language to that effect" (para.36).

"12. Secondly, similar statutory provisions in other countries were referred to, including England and Wales. It appears that in those jurisdictions the provisions for mandatory minimum sentences allow for exceptional cases where the minimum may not apply. If our view of the Bermudian legislation is correct, there is a similar implied safeguard, though it is not expressed."

14. In my judgment that does not affect the meaning of "special reasons" or alter the proper approach of the courts when applying the mandatory disqualification provisions of TO(P)A. Indeed, the ability of the court not to disqualify where "special reasons" apply is an example of a statutory safeguard of the type alluded to in paragraph 12 of the extract from the Cox judgment quoted above. This is because the principle of proportionality,

both as understood a common law[4] and as prescribed by the section, is directed to two matters, and two matters only: (i) the gravity of the offence, and (ii) the degree of responsibility of the offender. It does not admit consideration of circumstances personal to the offender unless they have a bearing on his responsibility for the offence. In the case of impaired driving offences the issue of responsibility is usually straightforward[5]. In the rare case, such as that exemplified by R v Wickins (*supra*), where a personal circumstance has a direct bearing on the question of responsibility, the courts can take it into account as a special reason. But the impact of the penalty on the offender has nothing to do with either the gravity of the offence or the degree of responsibility of the offender.

14. In summary, my understanding is that Whittall v Kirby has always been regarded as applicable in Bermuda, and there is nothing in section 54 of the Criminal Code which alters that. As neither appellant was able to put forward anything that amounted to a special reason so understood, I dismissed both appeals.

Dated this 13th day of March 2012

Richard Ground.
Chief Justice

[4] For an authoritative discussion of the common law position see Forrester Bowe and Trono Davis v. The Queen [2006] UKPC 10

[5] As Lord Goddard CJ observed in Whittall v Kirby:

> "So, too, it is certainly difficult to visualize what could amount to a special reason in the case of driving under the influence of drink or drugs, thought perhaps one might be found if the court was satisfied that a drug had been administered to a driver without his knowledge . . . "