



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION

2020: 08

LAURIN DAVIS

Appellant

-v-

FIONA MILLER  
(POLICE SERGEANT)

Respondent

## JUDGMENT

*Appeal against conviction in the Magistrates' Court  
Whether Dangerous Driving or Careless Driving  
Sections 36 and 37 of the Road Traffic Act 1947  
Approach to Sentencing under the Traffic Offences (Penalties) Act 1976*

Date of Hearing: 24 September 2020  
Filing of Notice of Appeal: 25 September 2020  
Date of Judgment: 29 September 2020

Appellant Mr. Mark Chudleigh, Kennedys Chudleigh Limited  
Respondent Ms. Maria Sofianos for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

## Introduction

1. This is an appeal against conviction in the Magistrates' Court upon the Appellant's guilty plea on Information 18TR04170 to a charge of dangerous driving contrary to section 36 of the Road Traffic Act 1947 ("RTA"). The Appellant, a 25 year old female, was sentenced by Magistrate Tyrone Chin to a fine in the sum of \$1000 and an 18 month disqualification from the use of all vehicles. Having been granted leave to file a Notice of Appeal out of time, she now seeks an order to quash the conviction.
2. At the hearing of the appeal before me Mr. Chudleigh readily accepted that while the evidence before the magistrate did not support a conviction for dangerous driving, it did give rise to a conviction for careless driving contrary to section 37 of the RTA. Accordingly, he invited this Court to substitute a conviction for careless driving.
3. In relation to the subject of sentence, Mr. Chudleigh pointed out that the Appellant has thus far served a 9 month period of disqualification. He submitted that the 9 month period together with the \$1000 fine was a sufficient penalty for a conviction for careless driving, if imposed by this Court.
4. Crown Counsel, Ms. Sofianos, did not oppose the appeal. This agreed position was formed on the basis that a conviction for careless driving would be substituted as proposed by Mr. Chudleigh and that a 9 month disqualification term, together with the \$1000 fine, be affirmed.

## The Facts

5. The unchallenged summary of facts underlying the Appellant's guilty plea was as follows:

*"At 5:58pm on Monday 30<sup>th</sup> April 20178 [sic] [2018] uniformed Police Officers were on mobile patrol duty traveling west on Middle Road, Smith's Parish near its junction with Kilderry Road. At that time they were caused to pull over to allow an ambulance also traveling west to pass. This ambulance had its lights and siren activated.*

*Police then observed a black and red motorcycle with registration CM194 following closely behind said ambulance as it caused other motor vehicles to give way to it.*

*Police caused the motorcycle to stop near to Chaingate Hill, Devonshire. The driver of CM194 who is the Defendant in this case gave her name as Laurin DAVIS (dob 11/01/1995). She was asked to present his [sic] [her] driver's license which she produced.*

*Davis was informed of the offence of Driving in a Manner Dangerous. DAVIS was also informed that she may be prosecuted for the mentioned offence. DAVIS was cautioned and she made no reply. The defendant DAVIS was issued with Moving Violation Tickets for the said offence to which she signed.”*

## **The Grounds of Appeal:**

6. At my direction, a Notice of Appeal was filed on Friday 25 September 2020. The grounds relied on parallel the arguments made before me at the 24 September 2020 hearing. The pleaded complaints and relief sought on the Notice of Appeal are as follows:

### **“1. Part of decision of the Supreme Court complained of:**

*The Appellant complains of the conviction of driving dangerously pursuant to section 36 of the 1947 Act and, in the alternative, of the length of period of disqualification in His Worship’s sentence.*

### **2. Grounds for appeal:**

*For the following reasons, the Learned Magistrate was wrong in law and/or failed properly to weigh the evidence before him and/or failed properly to exercise his discretion:*

*The Learned Magistrate failed to have regard (or sufficient regard) to the requirements in subsections 36A(1) and 36A(3) of the 1947 Act that require that it be proven (beyond all reasonable doubt) that “it would be obvious to a competent and careful driver that driving in that way would be dangerous” in the sense of there being a “danger either of injury to any person or of serious damage to property.”*

*The Learned Magistrate failed to take into account the absence of any evidence before the Court such as would satisfy the requirements of subsections 36A(1) and 36A(3) of the 1947 Act in relation to any “danger either of injury to any person or of serious damage to property.”*

*In particular, the Learned Magistrate failed to take into account the following facts, matters and/or inferences, including from the statement from Police Constable Swan (the only evidence before the Learned Magistrate):*

*There was no statement or other evidence by Police Constable Swan (or any other witness) to suggest that there was any danger either of injury to any person or of serious damage to property resulting from the Appellant's alleged actions.*

*There was no statement or other evidence by Police Constable Swan (or any other witness) to suggest that there was in fact any injury to any person or of damage (much less serious damage) to any property resulting from the Appellant's alleged actions. There was no statement or other evidence from any witness to suggest that there was any apprehension of danger or of any injury to any person or damage to property resulting from the Appellant's alleged actions.*

*There was no statement or other evidence from any witness as to any actions by or conduct of third parties consistent with there being any danger of any injury to any person or damage to property, such as a vehicle swerving to avoid contact with the Appellant.*

*Although Police Constable Swan stated that the Appellant was "following closely behind" an ambulance, there was no indication in Police Constable Swan's statement as to how close the Appellant was alleged to have been driving behind the ambulance from which the Learned Magistrate might conclude that the Appellant's proximity to the ambulance was dangerous (in the sense of a danger either of injury to any person or of serious damage to property) as opposed to, say, careless.*

*There was no statement or other evidence by Police Constable Swan (or any other witness) to suggest that the Appellant was driving in excess of the speed limit at the time in question.*

*In sentencing the Appellant (whether for the offence of dangerous driving or a substituted charge of careless driving), the Learned Magistrate failed to have regard (or sufficient regard) to the following:*

*The matters... above; and*

*The Appellant's position as an employee at Rosewood Tucker's Point where she works on a shift basis and is therefore particularly reliant on her own means of transportation; and*

*The Appellant's clean driving record bar one minor conviction for disobeying a stop sign in 2016.*

*Relief sought from the Supreme Court:*

*The Appellant seeks an Order that:*

*The Appellant's appeal against her conviction on 3 January 2020 for dangerous driving pursuant to section 36 of the 1947 Act shall be quashed.*

*In the alternative to 3.1 that, in accordance with section 18(2) of the Civil [sic] [Criminal] Appeal Act 1952, the aforesaid conviction for dangerous driving shall be substituted by a conviction for careless driving and driving without due care and attention pursuant to section 37 of the 1947 Act.*

*In the alternative to 3.1 (and assuming a substituted conviction pursuant to section 37 of the 1947 Act), that the Appellant shall:*

*be disqualified from driving all vehicles for a period of no greater than nine months with the period of disqualification already served being taken into account such that the period of disqualification shall be deemed to have expired no later than 3 September 2020.*

*Be fined \$1,000.00 which fine shall be deemed discharged by the Appellant's previous payment on 3 January 2020."*

## **The Law on Dangerous Driving and Careless Driving:**

7. Section 36 of the RTA provides:

***“Dangerous driving***

*36 Any person who drives a vehicle dangerously on a road or other public place commits an offence.*

*[Section 36 repealed and replaced by 2012 : 18 s. 5 effective 5 October 2012]”*

8. The meaning of dangerous driving is stated under section 36A as follows:

***“Meaning of dangerous driving***

*36A (1) A person is to be regarded as driving dangerously only if—*

*(a) the way he is driving is far below what would be expected of a competent and careful driver; and*

*(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.*

*(2) A person shall also be regarded as driving dangerously for the purposes of sections 34 and 36 if it is obvious to a competent and careful driver that driving a vehicle in its current state, including any thing attached to or carried on or in it and the way it is attached or carried, is dangerous.*

*(3) In subsections (1) and (2) “dangerous” refers to danger either of injury to any person or of serious damage to property.*

*(4) In determining for the purposes of subsections (1) and (2) what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to circumstances of which he could be expected to be aware but also circumstances shown to have been within the knowledge of the accused.*

*[Section 36A inserted by 2012 : 18 s. 6 effective 5 October 2012]”*

9. Section 37 of the RTA constructs the offences of careless driving and driving without reasonable consideration:

***“Careless driving and driving without reasonable consideration***

*37 Any person who drives a vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or public place, commits an offence.*

*[Section 37 repealed and replaced by 2012 : 18 s. 7 effective 5 October 2012]”*

10. The meaning of careless driving or driving without reasonable consideration is stated under section 37B:

***Meaning of careless driving or driving without reasonable consideration***

*37B (1) A person shall be regarded as driving without due care and attention if the way he drives falls below what would be expected of a competent and careful driver.*

*(2) In determining for the purposes of subsection (1) what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.*

*(3) A person shall be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.*

*[Section 37B inserted by 2012: 18 s. 8 effective 5 October 2012]*

11. For an offence of dangerous driving the Crown must prove not only that the accused's manner of driving was "*far below*" the standard expected of a competent and careful driver but also that it would be "*obvious*" to a competent and careful driver that driving in that way would put someone in danger of personal injury and / or serious property damage. In assessing the facts, the Court shall have regard to all circumstances. This means the Court will apply a subjective and objective test so to consider both the circumstances known to the accused and the circumstances which reasonably ought to have been known by the accused.
12. The offence of dangerous driving is more serious than careless driving. While the former applies to an offender who has fallen far below the expected standard, the offence of careless driving arises where the manner of driving merely falls below what would be expected of a competent and careful driver. More so, careless driving does not entail, as an element of the offence, any requirement of risk of personal injury or serious damage to property.
13. It follows that the range of sentence for dangerous driving is more severe than that for careless driving. The maximum sentence which may be passed in respect of a first offence for dangerous driving is a fine of \$1,500 and / or 12 months imprisonment. Further, an obligatory 18 month period of disqualification applies to an accused convicted for the first time of dangerous driving in addition to a range of 8-10 demerit points.
14. The maximum sentence for a first-time offender of careless driving is a \$1000 fine with no provision for imprisonment. The Court has a discretionary power to disqualify an offender for 12 months and a range of 10-12 points is provided.
15. The sentencing provisions for these offences are contained in the Traffic Offences (Penalties) Act 1976 ("the 1976 Act"). Section 2 outlines the structure of the sentence provisions under the 1976 Act:

*"2 (1) Schedule 1 shall have effect with respect to the prosecution and punishment of traffic offences.*

*(2) In relation to any traffic offence-*

*(a) head 3 of the Schedule indicates the general nature of the offence;*

*(b) head 4 of the Schedule shows whether the offence is punishable on summary conviction or on indictment or either in one way or the other;*

(c) head 5 of the Schedule shows the maximum punishment by way of fine or imprisonment which may be imposed on a person convicted of the offence in the way specified in relation thereto in head 4, any reference in head 5 to a period of months or years being construed as a reference to a term of imprisonment of that duration;

(d) head 6 of the Schedule shows the type and length of disqualification in relation to which offences the court is required or empowered to order the person convicted to be disqualified from holding or obtaining a driver's licence, any reference in head 6 to obligatory disqualification importing such a requirement and any reference therein to discretionary disqualification importing such a power;

(e) head 7 of the Schedule shows the demerit points to be recorded under section 4A in respect of a person convicted of the offence.

(3) Where in head 5 of Schedule 1 different penalties are specified for second, third or subsequent offences against the same section committed within two years of the date of conviction of a first offence, only offences committed-

(a) within the two years immediately preceding the coming into operation of this Act; or

(b) after the coming into operation of this Act,

shall be taken into account for the purpose of determining whether the offence in question is to be treated as a first, second, third or subsequent offence, as the case may be, and any offence committed at an interval of more than 2 years after the date of conviction of a previous offence shall for such purposes be treated as a first offence:

Provided that nothing in this subsection shall be construed to derogate from any rule of law under which evidence of previous convictions may be given to a court.

[Section 2 amended by 1993:30 effective 29 June 1993; subsection (2)(e) inserted by 2005:44 s.3 effective 1 November 2007].”

16. The statutory term “previous reckonable offence” is employed as a reference to a relevant previous conviction only for the purpose of determining a disqualification period. This is broadly similar to the rule at section 2(3) of the 1976 Act regarding previous convictions relevant to the determination of the appropriate level of fine or imprisonment. Section 3 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...be deemed to be a previous conviction...*

*Provided that in each group of Schedule 2 the offences therein specified shall be reckonable inter se, the offences specified in group 1 shall be reckonable with the offences specified in group 2 but not conversely.*

17. The descriptive terms ‘obligatory’ and ‘discretionary’ for the purposes of imposing a disqualification period are explained under section 4 of the 1976 Act:

***Disqualification; obligatory and discretionary***

4 (1) *Where a person is convicted of a traffic offence in relation 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;*

(b) *the word “discretionary”, the court may order him to be disqualified for such period as the court thinks fit, not exceeding the period specified in that head as the period of discretionary disqualification in relation to that offence;*

(c) *both the word “obligatory” and the word “discretionary”, the court shall, subject to paragraph (a), order him to be disqualified for the period of obligatory disqualification and may, subject to paragraph (b), order him to be disqualified for a further period, the aggregate of such periods not exceeding the period of discretionary disqualification.*

(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 until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.*

*(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 may, in addition to any other order under this section, order him to be disqualified until he has, since the date of the order, passed the test of competence to drive prescribed under the Motor Car Act 1951.*

*(3) A disqualification ordered by the court under this section may be in addition to, or in lieu of, any other punishment imposed by the court in respect of the offence.*

18. Sections 4A and 4B outline the parameters of the demerit point system and the correct approach to interpreting Head 7.

***Recording of demerit points***

*4A (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 the person -*

*(a) the number of demerit points shown in head 7 of Schedule 1; or;*

*(b) if head 7 of Schedule 1 shows a range of demerit points, a number of demerit points, specified by the court, within the range.*

*(2) For the purposes of subsection (1)(b), the lowest and highest numbers of a range shall be deemed to be within the range.*

*(3) If a person is charged with a traffic offence in a ticket issued under Part II of the Traffic Offences Procedure Act 1974 and pleads guilty and pays the amount of the penalty specified in the ticket, the following shall apply - ;*

*(a) the following number of demerit points shall be recorded in respect of the person-*

*(i) the number of demerit points shown in head 7 of Schedule 1; or*

*(ii) if head 7 of Schedule 1 shows a range of demerit points, the lowest number of the range;*

*(b) if head 7 of Schedule 1 sets out different numbers or ranges of demerit points which depend on whether the offence was a first or subsequent offence, the number or range of demerit points for the first offence shall be used for the purposes of paragraph (a).*

*(4) Subject to section 4E(3), demerit points expired two years after the date of the convictions in relation to which they were recorded.*

*(5)-(7) ...*

***No points to be recorded where person disqualified***

*4B Notwithstanding section 4A, where a person is convicted of a traffic offence and the court, under section 4, orders the person to be disqualified in respect of that offence, the court shall not direct any demerit points to be recorded in respect of that person as a result of that offence.”*

19. Sections 4A(1)-(2) and (4) apply to the offences of dangerous driving and careless driving. Section 4A(3) does not apply to the present case as it is reserved for offences subject to the Ticket Summons Procedure under Part II of the Traffic Offences Procedure Act 1974. Schedule 1 of the 1974 Act lists the offences to which the Ticket Procedure applies, to the exclusion of offences contrary to sections 36 and 37 of the RTA.
20. So where a person is charged with the offence of dangerous driving or careless driving, the Court *shall*, pursuant to sections 4A(1)-(2), direct the recording of the number of demerit points prescribed under Head 7. Where a range of demerit points are provided, the number of demerit points ordered by the Court must come within the range. However, section 4B prohibits the Court from imposing any demerit points in circumstances where a disqualification period was ordered as a result of the same offence.
21. Under Schedule 1 of the 1976 Act, the sentence provisions applicable to dangerous driving and careless driving are as follows:

*Head 1: Road Traffic Act 1947*

*Head 2: section 36*

*Head 3: Dangerous driving*

*Head 4: summary*

*Head 5: if first offence - \$1,500 or 12 months, or both*

*if second offence - \$2,500 or 18 months, or both*  
*if third or subsequent offence - \$5,000 or 2 years, or both*

*Head 6: if first offence - obligatory - 18 months*  
*if second offence - obligatory - 3 years*  
*if third or subsequent offence - obligatory - 5 years*

*Head 7: if first offence - 8 to 10 points*  
*if second offence - 10 to 12 points*  
*if third or subsequent offence - 12 points*

*Head 1: Road Traffic Act 1947*

*Head 2: section 37*

*Head 3: Careless driving*

*Head 4: summary*

*Head 5: if first offence - \$1,000*  
*if second offence - \$1,500*  
*if third or subsequent offence - \$2,000*

*Head 6: if first offence - discretionary - 12 months*  
*if second offence - discretionary - 12 months*  
*if third or subsequent offence - discretionary - 18 months*

*Head 7: if first offence - 10 to 12 points*  
*if second offence - 10 to 12 points*  
*if third or subsequent offence - 12 points*

## **Analysis and Decision**

22. The proviso under section 18(2) of the Criminal Appeal Act 1952 states as follows:

*“Provided that where an appellant has been convicted of an offence by a court of summary jurisdiction and that court could, in respect of the information before it, have convicted him of some other offence, and on the finding of the court of summary jurisdiction it appears to the Supreme Court that the court of summary jurisdiction must have been satisfied of facts which could have justified his conviction of that other offence, then in any such case the Supreme Court, instead of allowing or dismissing the appeal, may substitute for the conviction by the court of summary jurisdiction a conviction of that other offence,*

*and may impose such sentence in substitution for the sentence imposed by the court of summary jurisdiction as may be allowed in law for that other offence so, however, that unless the appellant has appealed against the sentence imposed on him by the court of summary jurisdiction, any sentence imposed by the Supreme Court under this subsection shall not be a sentence of greater severity than the original sentence.”*

23. In this case, it is clear that the magistrate was satisfied of the facts contained in the summary of evidence before him. Those facts, however do not sufficiently establish the offence of dangerous driving as there was no evidential basis for the Court to conclude that the Appellant’s manner of driving would have placed any person in danger of personal injury or any property in danger of serious damage.
24. To support to conviction for dangerous driving, the magistrate would have had to be satisfied that any such endangerment would have been obvious to a competent and careful driver. There was no evidence of the Appellant’s speed of travel in following the ambulance vehicle. In my judgment, any view that she was travelling at a high speed could only be tempted by speculation as the evidence was silent as to the approximate speed of travel of both the Appellant and the ambulance.
25. I find that the evidence is more supportive of a conviction for careless driving as the evidence illustrates a manner of driving which fell below the standard of a competent and careful driver. This is therefore an appropriate case for substitution of a conviction as contemplated under section 18(2).
26. It follows that a sentence for careless driving under section 37 must be imposed in place of the sentence passed for dangerous driving. The Appellant had no reckonable offences when the offence was committed on 30 April 2018 and she has thus far served a period of 9 months disqualification. As such, it would be outside of the spirit of section 4B for this Court to impose any demerit points. Mr. Chudleigh also relayed to the Court that the Appellant paid the \$1000.00 fine and does not seek to challenge this part of her sentence. Fair to say, the Appellant has therefore accepted and served a sentence of 9 months disqualification from all vehicles and a \$1000 fine. In my judgment that is sufficient. I therefore confirm her sentence in those terms.

## **Conclusion**

27. I have substituted a conviction of careless driving contrary to section 37 of the Road Traffic Act 1947 in place of the conviction entered by Magistrate Chin for dangerous driving contrary to section 36. I have also imposed a new sentence of 9 months disqualification from all vehicles and a \$1000 fine. The Appellant has served this sentence.
28. This substitution of conviction is in exercise of this Court's statutory powers under section 18(2) of the Criminal Appeal Act 1952 which provides that this may be done in lieu of dismissing or allowing an appeal.

Dated this 29<sup>th</sup> day of September 2020

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE