Neutral Citation Number: [2021] CA (Bda) 19 Crim

Case No: Crim/2021/007

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS APPELLATE CRIMINAL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2020: No. 032

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 03/12/2021

Before:

THE LORD PRESIDENT SIR CHRISTOPER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

THE QUEEN

Appellant

- and -

DWAYNE CREARY

Respondent

Mr. Alan Richards, Office of the Director of Public Prosecutions for the Appellant

Mr Marc Daniels, Marc Geoffrey Barristers & Attorneys, for the Respondent

Hearing date 17 November 2021

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APPROVED JUDGMENT

BELL JA:

Introduction

1. This appeal raises a short point. The Respondent to the appeal, Dwayne Creary, was involved in a road traffic accident on 1 July 2018, close to the entrance to the Elbow Beach hotel, when the car he was driving crossed the centre line and hit a motor cycle travelling towards him, ridden by Shawnita Furbert, whose son Alizay Furbert was the pillion passenger. Both were seriously injured in the accident, and Mr Creary was charged with two counts of causing grievous bodily harm by driving without due care and attention. The trial commenced on 13 March 2020, and Mr Creary was found guilty by the magistrate on 24 November 2020. The magistrate imposed a period of disqualification of two and a half years in respect of each count, increasing the mandatory disqualification of two years by six months, and ordered that the two periods of disqualification should run consecutively. He also fined Mr Creary $2,500 for each offence, giving a total sentence of five years' disqualification and a $5,000 fine.

2. Mr Creary appealed the sentence imposed by the magistrate to the Supreme Court, which appeal was heard by Subair Williams J on 9 July 2021, and she delivered her judgment on 4 August 2021. In her judgment, the learned judge set out the relevant provisions with regard to sentence for the offences with which Mr Creary had been charged, which are to be found in a combination of section 37A of the Road Traffic Act 1947, and Schedule 1 of the Traffic Offences (Penalties) Act 1976 ("the 1976 Act"). The learned judge noted that for a first offence of causing grievous bodily harm by careless driving, the obligatory disqualification period is set at two years. She referred to the charges against Mr Creary as having been duplicitous, and asked herself the question: how many offences were committed? She found the answer to that question to be that only one offence had been committed, albeit that the effect of that one offence was doubly horrendous to those injured. She held that the magistrate was statutorily bound to treat Mr Creary as a first offender, and accordingly the magistrate had been compelled to order his disqualification for two years for the single offence committed. The judge held in terms that under the 1976 Act, it was not open to the magistrate to increase the obligatory period of disqualification. In relation to the level of fine, the judge had previously noted that the maximum fine which could be imposed under the 1976 Act was one of $3,000, commenting that she had not been invited to interfere with the $3,000 fine, and saw no reason to do so. In fact, as the judge had noted earlier in her judgment, the total fine imposed by the magistrate was $5,000, being $2,500 for each offence.

3. The judge had noted early in her judgment that "While the Crown opposed the appeal from the outset, the prosecutor at the close of hearing conceded that the appeal ought to succeed." At first blush it is therefore surprising that an appeal is being pursued further. But Mr Richards in the course of his submissions submitted that in deciding matters as she did, the judge had dealt with the case in a manner which had not been canvassed before her. And the issue which falls for determination on the appeal is whether the judge was right in her finding that only one offence had been committed by Mr Creary, and whether it was in fact duplicitous for the Crown to pursue two counts in the same information, arising from the one instance of careless driving.

The grounds of appeal

4. The notice of appeal is expressed to be against the decision in law to quash one of the convictions recorded by the magistrate, the grounds being:

   (i) that the judge had erred in law when she had concluded that the Crown had duplicitously charged Mr Creary with two separate counts of causing grievous bodily harm by careless driving;
   (ii) that the judge erred in law when she determined that, on the facts of this case only one such offence had been committed;
   (iii) that the judge erred in reducing the period of disqualification imposed by the Magistrates' Court on this basis; and
   (iv) that the judge failed properly to deal with the other questions presented on the appeal against sentence because she erroneously concluded that she had not been asked to interfere with the fine imposed by the Magistrates' Court (which was a total of $5,000 and not $3,000).

The written submissions

5. The Crown filed two sets of submissions. The first was filed on 14 October 2021. In those submissions the Crown submitted that although, on the facts of the case, the careless driving aspect of the case need only be made out once, the court had to consider separately whether grievous bodily harm had been proved in relation to each of the complainants. The Crown accepted that Mr Creary should be treated as a first offender.

6. But the Crown maintained that the judge's finding that only one offence had occurred was incorrect, and that consequently reducing the period of disqualification on that basis was also incorrect. In correspondence with the Court, Mr Richards for the Crown submitted that the judge had fallen into error when she had arrived *sua sponte* at the conclusion that the Crown had "erroneously" and "duplicitously" charged Mr Creary with two separate counts, noting that Mr Daniels had never sought to argue that that was improper, and that it was apparent from his written submissions that his position on that point had not changed.

7. In relation to the fine, the Crown described the question whether the total fine of $5,000 was lawful and appropriate as being the main point of contention in the first appeal, and urged that the total fine of $5,000 was neither unduly harsh nor unlawful.

8. In his reply submissions, Mr Daniels indicated in terms that he took no issue with the fact that there were two counts on the information sheet, because the Crown had the burden of proving grievous bodily harm in respect of both complainants. He maintained that the sentence imposed was manifestly harsh, because the magistrate had imposed a higher period of disqualification than

was permissible in law, and had erred by imposing consecutive sentences when concurrent sentences would have been appropriate in all the circumstances.

9. The Crown then filed further submissions on 5 November 2021, in response to a query raised by the Court, as to whether there was in this case only one *actus reus*, as the judge had held. Simply put, the submission on this point was that the *actus reus* of this offence was not constituted by the act of driving carelessly alone, but also by causing grievous bodily harm (or death in the more serious case) to a person by driving in that manner. The Crown stressed that while in this case there was no issue that the injuries caused to both persons amounted to grievous bodily harm, that would not always be so, and that where injury has been caused to more than one person by a single act of careless driving, a trial court must be able to adjudicate whether each person's injuries constituted the necessary level of harm. And where a person's careless driving caused death to one person and injury to another, it would be appropriate to charge that person with one offence of causing death by careless driving and one offence of causing grievous bodily harm by careless driving.

10. The Crown's second submissions then helpfully went through the different levels of penalty, and submitted that the rule against duplicity was not offended by two charges which overlap to a degree, citing Blackstone's Criminal Practice (2019 edition at D11.53) as authority for the proposition that "*Old cases provide examples of a single count naming more than one person as the victim of the offence*" but that "*Modern practice, however, is in general to have a separate count per victim*".

The argument on appeal

11. Mr Richards pointed out at the outset of his oral submissions that the judge had been in error in part of her written judgment, insofar as she had said at paragraph 25 that "I see no reason, nor was I invited, to interfere with the $3,000 fine". In fact, as set out in paragraph 1 above, the magistrate had imposed fines of $2,500 for each offence, totalling $5,000, and Mr Richards took us to the transcript of the hearing before the judge, where Mr Daniels had said that he could not complain if the judge limited the fine to the cap of $3,000, whereupon the judge had referred in terms to reducing the total amount of the fine from $5,000 to $3,000.

12. Mr Richards acknowledged that when he had appeared before the magistrate for the sentencing, what he had asked the magistrate to do was not lawful. In the absence of special reasons (and there were none in this case), the disqualification must be for the fixed period of two years provided for in the 1976 Act, and there was no power for the magistrate to increase that period, as he had done, to one of two and a half years. Neither was there any power to order that there should be consecutive periods of disqualification, which would have involved the start of the second period being delayed, so that the periods of disqualification for each count necessarily had to run consecutively. This is because section 6 of the 1976 Act provides that a period of disqualification shall commence on the date of conviction. Consequently, he submitted, the sentences on each count were bound to run concurrently, so that the correct total period of disqualification was two

years. In relation to the fine, Mr Richards submitted that the magistrate had correctly imposed fines of $2,500 for each count (the maximum fine being $3,000, although the maximum penalty included a period of imprisonment of three years), for a total of $5,000. And the position taken by the Crown before the judge was that Mr Creary should be treated as a first offender in respect of both counts, so that the level of penalty which could be imposed was lower than would be the case for a second offender.

13. The argument then turned to the two count question, as to which Mr Richards reiterated the contentions set out in paragraph 9 above, maintaining that to charge one count for two instances of causing grievous bodily harm by careless driving would itself contravene the rule against duplicity. If an accident caused by careless driving had led to a much higher number of injured victims, the correct course would still be to charge separate counts for each victim. Mr Richards maintained that the judge's reasoning at paragraphs 21 to 23 of her judgment had been wrong, and that while the judge had been correct that a disqualification of only two years should be substituted for the five years imposed by the magistrate, this was not for the reasons given by the judge of there being only one *actus reus*.

14. In relation to the law, Mr Richards first referred the Court to *R v Mansfield* [1978] 1 All ER 134, where a kitchen porter had been charged with starting various different fires at hotels where he had worked. The case deals mostly with other points, but it is clear that in relation to the last fire started by the accused, in which seven persons had died, separate counts had been laid in respect of each victim.

15. The case of *Cox v Lambert* [2008] Bda LR 69 was concerned with a slightly different point, but is nevertheless instructive. In that case the defendant had been charged with and had pleaded guilty before the magistrate to eleven counts of unlicensed driving and eleven counts of uninsured driving. The sentences imposed were appealed on the basis that the various offences were in law continuous offences, so that the defendant could only properly have pleaded guilty to one offence. It is true that the offences had occurred on eleven different days, but in dismissing the appeal Kawaley CJ stated that separate offences were clearly committed on each day, and the separate charges were not bad for duplicity.

16. The case of *Jemmison v Priddle* [1971] 1 QB 489 concerned a defendant who had fired three shots at two running deer. The defendant had permission to shoot on B's land. One deer had been shot on P's land and one had been shot on B's land but had run on to P's land before it died. On appeal it was held that it was legitimate to allege in an information one activity, even though that activity involved more than one act, and since the matters occurred within a few seconds and in the same geographical location and were therefore components of a single activity, the information was not bad for duplicity.

17. None of the other cases to which we were referred is directly on point, and consequently little assistance is to be gained from them.

18. In reply, Mr Daniels was admirably brief. He agreed that the Crown was right to charge two counts in the information, and that the periods of disqualification could not be consecutive, so that there was one disqualification period of two years. As to the fine, he did not dispute that the magistrate had been entitled to impose two fines, and did not press in relation to the level of fine imposed.

Conclusion

19. It seems to me that Mr Richards was correct to say that the *actus reus* in a case of causing grievous bodily harm by careless driving is a combination of both the driving and the injury caused thereby, and this is best demonstrated by the example he gave, of one instance of careless driving causing death to one victim and serious injury to another. In such a case there would have to be two counts in the information. That position is consistent with what is stated to be the modern practice in Blackstone. I would therefore find that the judge erred in ruling that the information containing two counts was bad for duplicity, although the effect of Mr Richard's submissions in relation to the impossibility of consecutive periods of disqualification does mean that the total period of disqualification fixed by the judge, a period of two years, is unaltered. In relation to the level of fine imposed by the magistrate, there is no basis upon which this should have been limited to the one count, and no reason advanced for a fine at the maximum level of $3,000. To this extent I would allow the Crown's appeal and restore the level of fines to those set by the magistrate, namely two amounts of $2,500 each, totalling $5,000. And in relation to the period of disqualification, this should be two years disqualification on each count, to take effect concurrently from the date of conviction. This reaches the same overall result as the judge's holding, namely that Mr Creary is disqualified for two years from the date of conviction, and not five years as ordered by the magistrate. But the means by which she reached her conclusion cannot be supported, and the appropriate route to that period of disqualification is as submitted by Mr Richards.

20. The Court would wish to thank both counsel for their assistance.

GLOSTER, JA

21. I agree.

CLARKE, P

22. I also agree.