



# In The Supreme Court of Bermuda

## APPELLATE JURISDICTION 2020: 32

DWAYNE CREARY

Appellant

-v-

FIONA MILLER  
(POLICE SERGEANT)

Respondent

## JUDGMENT (Reasons)

*Appeal against Sentence in the Magistrates' Court  
Causing grievous bodily harm by driving without due care and attention  
Sections 37A of the Road Traffic Act 1947 and the Traffic Offences (Penalties) Act 1976*

Date of Hearing: 09 July 2021

Date of Judgment: 04 August 2021

Appellant Ms. Marc Daniels (Marc Geoffrey Barristers & Attorneys Ltd)  
Respondent Mr. Javone Rogers for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

### Introduction

1. This is an appeal against a sentence passed by the learned Magistrate, Mr. Khamisi Tokunbo, in respect of convictions following a trial on two counts of causing grievous bodily harm by driving without due care and attention contrary to section 37A of the

Road Traffic Act 1947 (“RTA”). The Appellant argued that the total sentence of 5 years disqualification together with a fine of \$5,000.00 was manifestly excessive. While the Crown opposed the appeal from the outset, the prosecutor at the close of hearing conceded that the appeal ought to succeed.

2. At the close of the hearing before me on 9 July 2021 I allowed the appeal for the reasons which I now provide herein.

### **The Facts**

3. On 1 July 2018 the Complainant, Ms. Shawnita Furbert, was riding her motorcycle at a speed less than 30kph east along South Road in Paget Parish, approaching the entrance way to Elbow Beach Hotel. Her son, Mr. Alizay Furbert, who was then 19 years of age, was the pillion passenger and on the day in question.
4. The Appellant, Mr. Dwayne Creary, was driving a motor car at a high speed travelling in the opposite direction when he encroached on the eastbound lane and collided into the Complainant’s vehicle.
5. As a result of the collision, the Complainant suffered a fractures in her pelvic region, an amputation of her big toe and further fractures in her femur (thigh bone). She was also required to undergo surgery to her knee overseas at New England Baptiste Hospital. Mr. Furbert, her son, also sustained serious injury which most notably consisted of a cardiovascular arterial tear necessitating surgery overseas at Lahey Health Clinic. Undoubtedly, it was a horribly traumatic experience for both her and her son who both continue to suffer the long-term effects of their injuries.

### **The Magistrate’s Sentence Remarks:**

6. In passing sentence Magistrate Tokunbo said [pages 23-24 of the Record]:

*“This offence resulted in very serious injury to 2 persons and extensive damage to the vehicles. Both you and the complainants are lucky no one was killed. It could have happened. In which case you would be facing a more grave charge before the Court. You were entitled to defend the case as you did. But as I have found you guilty there is no credit for that. That evidence, I found, was strong, particularly given your response when first taxed. I am going to impose the mandatory disqualification of 2 years in each case and exercise my discretion to up it with 6 months; making it 2 ½ years on each count consecutive to one another. And a fine of \$2,500 x 2.*

*Time to pay 26/2/2021 or 6 months in default.”*

## **The Relevant Law:**

7. Section 37A of the RTA provides:

*“Causing death, or grievous bodily harm, by careless driving  
37 Any person who causes the death of, or grievous bodily harm to, another person by driving 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.”*

### **The Statutory Framework for Sentencing for an Offence under Section 37A**

8. The maximum sentence on summary conviction for a first-time offender for causing grievous bodily harm by careless driving is a \$3000 fine and/or 3 years imprisonment. The Court is also obliged to disqualify a first-time offender from operating all or a particular class of motor vehicles for a period of 2 years.
9. In *Lauren Davis v Fiona Miller* [2020] SC (Bda) 42 App (29 September 2020) I provided an overview on the approach to sentencing under the Traffic Offences (Penalties) Act 1976 (“the 1976 Act”) [paras 15-]:

“...

*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. ...

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.”*

10. Under Schedule 1 of the 1976 Act, the sentence provisions applicable to a conviction for causing grievous bodily harm by careless driving are as follows:

*Head 1: Road Traffic Act 1947*

*Head 2: section 37A*

*Head 3: causing death, or grievous bodily harm by careless driving*

*Head 4: causing death – on indictment  
causing grievous bodily harm – on indictment or summary*

*Head 5: ...*

...  
*causing grievous bodily harm [summary]-  
if first offence - \$3,000 or 3 years, or both  
if second offence - \$5,000 or 6 years, or both  
if third or subsequent offence - \$8,000 or 8 years, or both*

*Head 6: ...*

...  
*causing grievous bodily harm [summary]-  
if first offence – obligatory- 2 years  
if second offence committed within 2 years of date of conviction of first offence  
– obligatory- 4 years  
if third or subsequent offence – obligatory – 6 years*

*Head 7: ...*

...  
*causing grievous bodily harm [summary]-  
if first offence - 8 to 10 points  
if second offence committed within 2 years of date of conviction of first offence  
- 8 to 10 points  
if third or subsequent offence - 12 points*

## Reasons for Decision

21. In passing a sentence of 5 years disqualification, it is apparent that the learned magistrate intended for the Appellant to be separately penalized for the injury caused to each of the two Complainants. This approach was erroneously invited by the Crown in duplicitously charging the Appellant for two separate counts of causing grievous bodily harm by careless driving, contrary to section 37A.
22. Admittedly, in a case involving such grave injury to more than one person, it seems only fair that the sentence should reflect the harm done to each person. However, the effect of the disqualification provisions under the 1976 Act are not contingent on the number of persons injured in any single offending act. The relevant question is: how many offences were committed?
23. In this case, one offence was committed, albeit that the effects of that offence were doubly horrendous. The magistrate was statutorily duty bound to treat the Appellant as a first time offender, notwithstanding that the single accident caused serious injury to more than one person. Put another way, the number of persons made victim to the single accident was not capable of placing the Appellant in a category outside of that of a first-offender.
24. Further, section 37A carries an “*obligatory*” 2 year period of disqualification from the class of motor vehicle for which the offender is disqualified. This means that the learned magistrate was compelled to order the Appellant to be disqualified for 2 years for the single offence committed, (notwithstanding the double counts on the Information) barring any special reasons which might have justified a shorter period or no disqualification period at all. The absence of the word “*discretionary*” from Head 6 of Schedule 1 of the 1976 Act in respect of section 37A of the RTA signifies that it was not open to the magistrate to increase the obligatory period of disqualification.
25. For these reasons, I found that Magistrate Tokunbo was also obliged to disqualify the Appellant as a first-offender for a period of 2 years. Thus the learned magistrate erred in imposing a greater disqualification period. I see no reason, nor was I invited, to interfere with the \$3000 fine.



## **Conclusion**

26. The appeal is allowed only to the extent that the sentence of 5 years disqualification imposed by Magistrate Tokunbo shall be quashed and substituted for a period of 2 years disqualification from all motor vehicles including auxiliary bicycles.

Dated this 4<sup>th</sup> day of August 2021

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THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS  
PUISNE JUDGE