In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2016: 33

TERRY DARRELL FLOOD

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

(in Court)[1]

Date of hearing: August 4, 2016
Date of Judgment: August 8, 2016

Mr. Peter Sanderson, Wakefield Quin Limited, for the Appellant
Ms Kenlyn Swan, Office of the Director of Public Prosecutions, for the Respondent

Background

1. The Appellant, who appeared in person below, on May 6, 2016 pleaded guilty in the Magistrates' Court (Wor. Khamisi Tokunbo) to causing grievous bodily harm to Rozetta Augustus by driving his taxi without due care and attention on Church Street on November 23, 2015, contrary to section 37A of the Road Traffic Act 1947 ("RTA").

[1] The present judgment was circulated to the parties without a formal hearing.

2. The Prosecution case was that the complainant was riding a motor cycle which was stationary waiting for a green traffic light at the junction of Church and Parliament Streets when she was struck by the Appellant's vehicle from the rear at around 7.15 pm. Although it was dark, the collision occurred in a well-lit area when it was raining and the roads were wet. The complainant suffered a broken wrist, dental trauma and facial abrasions.

3. The mitigating circumstances advanced by the Appellant before the Learned Magistrate were his long driving history with a clean record and poor visibility due to weather conditions. I assume in the Appellant's favour that he additionally mentioned, as his counsel contended, that one of the two streetlights at the junction was not working.

4. The Learned Magistrate correctly, it is common ground, determined that a first offence under section 37A of the RTA carries an obligatory 2 years disqualification. Section 4 (1) (a) of the Traffic Offences (Penalties) Act 1976 ("TOPA") came into play:

> "*(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…*"

5. The appeal accordingly turned primarily on the question of whether the Learned Magistrate was wrong to conclude that (a) special reasons as that term of art is legally understood had not been established by the Appellant, and this was because (b) poor visibility imposed an added duty to take care on the Appellant rather than constituting a special mitigating factor. These questions were, in light of the authorities placed before the Court by counsel in the course of the hearing, not difficult to resolve. However Mr Sanderson advanced further arguments, potentially supported by somewhat indirect authority, which merited further consideration. These were the contentions, firmly disputed by Ms Swan, that the following mitigating factors also constituted "special reasons" in the requisite TOPA sense:

   (1) the carelessness which occurred involved only momentary inattention; and

   (2) the injury suffered by the complainant fell at the lower end of the grievous bodily harm scale.

The legal parameters of special reasons

6. Ms Swan referred the Court by way of authority for the legal definition of the term "special reasons" to the following helpful and very pertinent statements by Ground CJ in *Grant-v-R, Lambe-v-Miller* [2012] Bda LR 17 at page 3:

> "*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 NI 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.'"*

7. *These* pronouncements are insightful not simply because they articulate the well-recognised principle that special reasons must be mitigating circumstances which do not amount to a defence and relate to the circumstances of the offence as opposed to the character and circumstances of the offender. They also provide a sharp and highly relevant warning to judges sympathetic to appellants and/or defendants who drive for a living, not to allow their emotions to divert them from faithfully applying the will of Parliament.

8. I should add that Mr Sanderson invited the Court to take the general requirement of proportionality with respect to sentencing into account (section 54 of the Criminal Code). However Ground CJ in the same case, in my judgment correctly, rejected a submission that section 54 of the Criminal Code as interpreted by the Court of Appeal for Bermuda in relation to minimum mandatory terms of imprisonment (*David Jahwell Cox & Jahki Dillas-v-The Queen* [2008] Bda LR 65) had any relevance in the mandatory disqualification context. This was because the very purpose of the special reasons exception in section 4(1) (a) of TOPA was to allow for exceptions to the general mandatory rule. He stated:

> "*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.*"

Whether the poor visibility due to rain and/or inadequate lighting complained of (together with the additional factor of the complainant allegedly wearing dark clothing) potentially amount to special reasons for not disqualifying?

9. Mr Sanderson was unsurprisingly unable to identify any authority supporting the proposition that such common occurrences as rain or a cyclist wearing dark clothing could, in the context of a collision in the centre of Hamilton at a junction regulated by traffic lights could constitute special reasons for not disqualifying for the offence of careless driving resulting in grievous bodily harm. Referring the Court to authority for the proposition that a pedestrian who in breach of the English Highway Code is liable for contributory negligence if he wears dark clothing at night (*Widdowson-v-Newgate Meat Corporation*, Court of Appeal (Civil Division), November 19, 1997 (unreported)) was a straw-clutching and irrelevant point. The Learned Magistrate was clearly right to find that poor driving conditions in visibility terms imposed a higher standard of care on the Appellant rather than provided grounds of mitigation. Ms Swan aptly referred the Court to the following provisions of the Traffic Code which decisively demonstrated that this Court was bound to refuse the main ground of appeal:

"*(17) At night always drive well within the limits of your lights. When your headlights are dipped or extinguished be specially careful. If you are dazzled, slow down even to a standstill, especially if your windscreen is wet. Remember that cyclists and pedestrians, especially when wearing dark clothing, are often very hard to see in the dark.*

(18)Take special care when it is raining, when light is bad, or when roads have a loose surface, or are wet, slippery or otherwise dangerous."

10. She also supported the Learned Magistrate's findings as to the relevance of driving conditions by reference to the first two paragraphs of the judgment of MacKenna J in in *Nicholson-v-Brown* [1974] R.T.R. 177 at 181:

> "*The road was slippery and in a dangerous condition. The defendant, who pleaded guilty to careless driving, thereby admitted that because of those conditions he should have driven more carefully than he did. I do not see how the conditions which he did not sufficiently regard can be a special reason for not disqualifying him.*"

11. The facts of the present case were far removed from those in *Petty-v-Fiona Miller (Police Sergeant)* [2012] Bda LR 87 where Mr Sanderson succeeded in establishing special reasons. The facts I accepted supported such a finding were as follows:

> "*14…I do accept on the other hand that the combination of the facts that (a) this was an event which took place very near the Appellant's home; (b) that he was driving a vehicle which could not conceivably be used as a mode of transport; and (c) that the nature of the vehicle was such that the speed at which it could go was comparatively low, did amount to special reasons…*"

Could momentary inattention and/or borderline grievous bodily harm constitute special reasons for not disqualifying?

12. This ground of appeal was the one which Mr Sanderson ultimately placed primary reliance on anticipating the extent to which his opponent had successfully undermined the original poor visibility complaints. It is difficult to imagine how such an ambitious argument could have been advanced in a more persuasive manner. Ms Swan cited direct authority for the proposition that the mere fact that an offence was a minor one could <u>not</u> amount to special reasons. Crown Counsel relied upon the following passages from two judgments in the English High Court decision of *Nicholson-v-Brown* [1974] R.T.R. 177, which appeared to me to be particularly relevant because that case also dealt with careless driving:

(a) *Lord Widgery* (at 181): *"With all deference to what Lord Parker said in Delaroy-Hall-v-Tadman, I find it difficult to distinguish the present case from Smith-v-Henderson, 1950 JC 48. I am of the opinion that the ratio of Smith v Henderson is in fact that, if the offence is only a relatively minor one, that in itself amounts to a special reason, and if that is the correct ratio of Smith v Henderson, I respectfully disagree with it. It may be that our ideas have changed since 1950, when Smith v Henderson was decided, but for my part I would not accept the proposition that, if a man is found guilty of driving without due care and attention, he can be excused endorsement of his license on the basis of special reasons merely because it was not a bad case, or merely because the degree of blameworthiness was slight. I think that the line must be drawn firmly at guilt or innocence in those cases. If the defendant is guilty, then the consequences of endorsement of the license must follow , unless there is some special reason properly to be treated as such, not such a matter as that the offence was not a serious one*";

(b) MacKenna J (at 181): "*It may be that, having regard to the circumstances of the case, there was only a small degree of blameworthiness, but the fact that a case is not a bad one cannot be considered a sufficient reason for not disqualifying.*"

13. Mr Sanderson submitted that this decision, which if followed by this Court effectively destroyed his fall-back argument, was not binding and need not be followed. He argued that *Smith-v-Henderson* should be followed, even if it was a Scottish case. Further, he distinguished *Nicholson-v- Brown* as dealing with the less severe penalty of endorsing a license as opposed to imposing a disqualification. These were beguiling arguments in the context of an appeal argued without reference to any direct authority on what constituted special reasons in the careless driving and obligatory disqualification context. In summary, the Appellant's counsel contended that special reasons existed because the facts of the case fell at the very bottom of the gravity scale as regards:

(a) carelessness; and

(b) grievous bodily harm.

14. On careful reflection, however, these submissions cannot be sustained. Even assuming in the Appellant's favour that the offence in question was a minor one, which would be an eyebrow-raising conclusion to reach, I would agree in principle

with the conclusion reached by the English High Court in *Nicholson-v-Brown* [1974] R.T.R. 177 where Mackenna J agreed with Widgery LCJ that "*the fact that a case is not a bad one cannot be considered a sufficient reason for not disqualifying.*" This would amount to reading the word "*special*" out the statutory phrase "*special reasons*" altogether.

15. This ultimately inevitable conclusion is further, but not pivotally, supported by an earlier decision of the English Court of Appeal dealing with special reasons for disqualification in the drink-driving offence context, which was not referred to in the course of argument. In *R-v-Garry Anderson* [1972] EWCA Crim J0118-3 the English court of Appeal found that special reasons existed because the appellant had initially been told he would not be prosecuted and was convicted by a jury which recommended leniency resulting in the trial judge imposing an absolute discharge. However the Court made it clear that the mere fact that an offence was minor or not serious was insufficient to support a finding that special reasons existed for not disqualifying. Delivering the judgment of the Court, Roskill LJ (at pages 6-7) opined as follows:

> "*This Court draws attention to the fact that in Delaroy-Hall v. Tadman Lord Parker/in rejecting the arguments which had been advanced, said "If in any case the amount of the excess is truly minimal, this would, we hope, provide a good reason for not prosecuting the offender, but once the matter comes before the court, there is no room in this class of case for the principle of 'de minimis'. This Court respectfully adopts and agrees with that view…*"

16. Accordingly this alternative ground of appeal also fails. The Learned Magistrate correctly found, and regretfully so, that he had no discretion but to impose the minimum obligatory disqualification mandated by law. It is not without sympathy for the economic impact of this decision on the Appellant that I affirm the Magistrates' Court's decision.

17. Does the unblemished record of the Appellant count for nothing? In context of the present appeal it does not. However, in my judgment the Appellant would have a strong case for restoration of his license after half of the disqualification period has been served under section 9(1) of TOPA. I this context, the Magistrates' Court "*may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the order, the nature of the offence and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application.*"

Conclusion

18. The appeal is accordingly dismissed.

Dated this 8th day of August 2016_____
IAN RC KAWALEY