[2003–04 Gib LR 442]

SANTOS v. R.

SUPREME COURT (Schofield, C.J.): July 12th, 2004

Road Traffic—driving while disqualified—sentence—mandatory imprisonment not required by Traffic Ordinance, s.24(5)—requirement of special circumstances only relevant if court believes fine adequate—special circumstances may be of offence and/or offender

The appellant was charged in the magistrates' court with the offences of driving while disqualified, contrary to s.24(5) of the Traffic Ordinance, and resisting a police officer, contrary to s.89 of the Criminal Offences Ordinance.

On October 6th, 2003, the appellant was disqualified from driving for 12 months. In December 2003, he was seen by police officers driving a motor vehicle and was arrested. He attempted to escape and became violent, and the police officers therefore handcuffed him and physically placed him in their van. The appellant pleaded guilty to both charges and was sentenced to four months' imprisonment for driving while disqualified, with no separate penalty for resisting the officers. The Stipendiary Magistrate understood s.24(5) of the Traffic Ordinance as obliging him to sentence the appellant to imprisonment unless there were special circumstances, of which there were none in the present case.

On appeal, the appellant submitted in mitigation, *inter alia*, that (a) he would lose his job if imprisoned; (b) he had been undertaking community service, as part of an order for a previous conviction, to which he had been responding well, keeping every appointment punctually and working well; (c) he had made progress in improving his family life and his son, who now lived with him rather than his mother, had settled down and found the prospect of his father going to prison and having to return to his mother most distressing; (d) he had severe health problems, including a heart condition which required him to walk $1\frac{1}{2}$ miles a day—this would be extremely difficult if he were to be imprisoned; and (e) all this indicated that he had made some positive steps in changing his life and imprisoning him would not help.

Held, allowing the appeal:

The Stipendiary Magistrate had erred in his approach—s.24(5) of the Traffic Ordinance did not oblige him to sentence the appellant to imprisonment. For the legislature to enact a mandatory sentence of imprisonment or fetter the court's discretion as to sentencing options,

there had to be express and unambiguous statutory wording. The express wording of s.24(5) merely provided a maximum sentence of imprisonment in familiar terms, and the only fetter on the court's discretion arose if the court considered that a fine was adequate punishment. It was only then that the court was required to find special circumstances, which could be special to the offender, or to the offence, or both. In the present circumstances, imprisonment was not suitable and for the sentence imposed by the Stipendiary would be substituted a community service order for 100 hours (paras. 10–12).

Legislation construed:
Traffic Ordinance (1984 Edition), s.24(5): The relevant terms of this subsection are set out at para. 8.

S. Bossino for the appellant;
C. Pitto for the Crown.

1 **SCHOFIELD, C.J.:** Jose Luis Santos appeared before the learned Stipendiary Magistrate on June 4th, 2004, and pleaded guilty to charges of (1) driving whilst disqualified, contrary to s.24(5) of the Traffic Ordinance; and (2) resisting a police officer, contrary to s.89 of the Criminal Offences Ordinance. A third charge of failing to provide a specimen of breath was withdrawn. The appellant was sentenced to four weeks' imprisonment on the first charge and no separate penalty was imposed on the second. He now appeals against his sentence.

2 The facts of the case, as accepted by the appellant, are these. On October 6th, 2003, the appellant was disqualified from driving for 12 months for an offence of driving under the influence of drink or drugs. Just after midnight on December 18th, 2003, he was seen by police officers driving a motor vehicle along Corral Road. The appellant stopped the vehicle outside a takeaway restaurant, not many metres from the police officers. The officers knew he was disqualified from driving and so they approached him. On being challenged, the appellant denied he had been driving. He was arrested and as he was being taken to the police van he attempted to get away and became violent, which resulted in him being handcuffed. He had to be physically placed inside the police van and the handcuffs were kept on him for a while when he was in the cells at the police station.

3 The appellant had 13 convictions for motoring offences from 1998 to the date he committed the offences with which we are dealing here. Until the conviction of October 6th, 2003, however, he had not been disqualified from driving and until then the convictions were mainly of a minor nature. He also has nine convictions for non-motoring offences, again mainly of a minor nature, although he was imprisoned for three months in 1997 for possessing controlled drugs.

4 In mitigation, it was said on the appellant's behalf that his resistance to the police officers was not the worst offence of its kind because he was merely objecting to the handcuffs being placed on him. He works with the Community Projects and it is company policy that if he is imprisoned he will lose his job. He had appeared before the magistrates' court on February 3rd, 2004, and had received a community service order of 70 hours for offences of throwing missiles and obstructing the police. I am uncertain of the date on which these offences were committed, but it would seem that they were committed before the offences we are here considering. The report of the probation officer said that the appellant had responded exceptionally well to the community service order, had kept every appointment punctually and had worked well.

5 The appellant has a bad family history. He had two children within what was described by the probation officer as a turbulent and abusive marriage, and his wife left him about 10 years ago to return to England. The appellant lost all contact with his children for 7 years and during this period he started to use drugs heavily. In 2000, he voluntarily entered Bruce's Farm Rehabilitation Unit and successfully completed the programme. With the help of his counsellors, he regained contact with his children and visited them in England. His ex-wife subsequently told him that she could not cope with his 13 year-old son and sent him to the appellant in October 2003. With the help of the Social Services Agency, the appellant was overcoming initial problems he encountered with his son and the son now appears to have settled well into Gibraltar and is not experiencing the difficulties he was having in England. If a sentence of imprisonment were passed then the son would be looked after by the appellant's current partner, but if that arrangement falls through then the son would have to be returned to England, the prospect of which the son finds most distressing.

6 Added to all this, in December 2002, the appellant had suffered a heart attack and it was revealed on his admission to hospital that his former abusive lifestyle had left its permanent mark on him. A scan revealed brain damage and he has problems with his short-term memory. His blood circulation is poor and needs to walk $1\frac{1}{2}$ miles daily because of his heart condition.

7 In the view of the probation officer, the appellant, who is now 41 years of age, has made substantial positive life-changes over the past couple of years, especially in relation to his substance abuse and in his parenting. However, he needs to develop a more responsible attitude to life to avoid being at risk of re-offending.

8 The learned Magistrate's view on sentencing the appellant was that he was obliged to sentence him to imprisonment unless he found there were special circumstances which precluded him from so doing. This is

because of the provisions of s.24(5) of the Traffic Ordinance, which is unlike any other statutory provision in our Laws. It reads:

> "If any person who under the provisions of this Part is disqualified from holding or obtaining a driving licence applies for or obtains a driving licence while he is so disqualified, or if any such person while he is so disqualified drives a motor vehicle, or, if the disqualification is limited to the driving of a motor vehicle of a particular category or description, a motor vehicle of that category or description, on a road, he is guilty of an offence and is liable on summary conviction to imprisonment for six months or if the court thinks that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence, to a fine at level 2 on the standard scale, or to both such imprisonment and such fine, and a driving licence obtained by any person disqualified as aforesaid shall be of no effect."

9 The learned Magistrate read into this provision that the intention of the legislature is that for the offences referred to in this sub-section only imprisonment is appropriate unless the court finds there are special circumstances in the case. He found there were none in the present case and sentenced the appellant to an immediate term of four weeks' imprisonment.

10 With respect, the learned Magistrate erred in his approach to sentence. For the legislature to enact a mandatory sentence of immediate imprisonment, or to fetter the court's discretion in regard to sentencing options, requires express and unambiguous wording. The express wording of s.24(5) is to provide a maximum sentence of imprisonment in terms which are familiar. The fetter to the court's discretion only arises if the court considers that a fine is an adequate punishment. In that case, the court is required to find that the case has special circumstances. There is nothing in the express wording of s.24(5) to preclude the court imposing a penalty or disposition other than imprisonment or fettering the court's discretion in that regard. There is nothing to prevent the court's ordering a discharge or probation, making a community service order, or, indeed, passing a suspended prison sentence. Indeed, there is nothing in the statutory provisions giving the court power to impose such sentences or dispositions, precluding s.24(5) from their ambit. As I say, the only fetter on the court's discretion is to require there to be special circumstances if a fine is considered an adequate punishment. And in my judgment, such circumstances, which have to relate to "the case," may be special circumstances of the offence or of the offender or of both the offence and offender, for in my view "the case" involves all the material before the court which is relevant to sentence.

11 What sentence was, then, the proper sentence for this appellant? With his previous convictions, and when one considers that the breach of

order for disqualification was within three months of its imposition, the appellant was almost inviting the court to consider imprisoning him. Be that as it may, there are strong mitigating factors in this case. The appellant, after a poor start in life, is showing some signs of maturing and of turning his life around. He has responded well to a community service order imposed after the commission of this offence. There would be health risks attached to his being imprisoned, in that he has to exercise daily to an extent which may be difficult within the confines and with the limited facilities of the Moorish Castle. His imprisonment could have a serious impact on his son who shows signs of settling in Gibraltar after an unsettled period in England. In the opinion of the probation officer, if a sentence of imprisonment is not considered by the court as the appropriate penalty then she recommends a community service order or a combination order and the appellant has indicated his willingness to undertake any such order. In all these circumstances, I consider a community penalty to be an appropriate alternative to imprisonment. In view of the fact that the appellant has a good relationship with Social Services and is not averse to seeking help, I do not think it necessary to make a combination order.

12 For the sentence imposed by the learned Magistrate, I would substitute a further community service order for 100 hours.

Appeal allowed.