

[2005–06 Gib LR 253]

**DEBONO v. R.**

SUPREME COURT (Schofield, C.J.): November 16th, 2006

*Road Traffic—driving with excess alcohol—sentence—disqualification—usual disqualification period of 12 months acceptable exercise of discretion for serious offence against Traffic Ordinance, s.63 but subject to mitigation which may result in reduced period or none at all—mitigation amounting to “reasonable circumstances” under s.71(2) may involve offender’s age, financial hardship to family because professional driver, absence of previous convictions and remorse*

The appellant was charged in the Magistrates’ Court with driving with an alcohol concentration above the prescribed level, contrary to the Traffic Ordinance 2005, s.63(1)(a).

The appellant was seen to fall off his motor scooter when driving at night. The police who went to his assistance administered a breath test which showed him to have an alcohol concentration of more than twice the legal limit. The appellant admitted the offence and pleaded guilty to the charge. The Stipendiary Magistrate sentenced him to a fine of £150 and disqualified him for 12 months.

On appeal against the disqualification order, the appellant submitted that there were “reasonable circumstances” within the meaning of s.71(2) of the Ordinance, justifying either no disqualification or a shorter period and maintained that (a) the magistrate’s statement that the consequences resulting to the appellant from disqualification would not be sufficiently “exceptional” to depart from his usual practice of imposing a 12-month disqualification showed that he was improperly fettering his discretion by applying an incorrect test; (b) his reference to the UK practice of disqualification showed that he was not adequately directing his mind to the details of the different Gibraltar legislation; and (c) the length of disqualification imposed was manifestly excessive and wrong in principle, since the appellant was a man of nearly 50 with dependent children, who was genuinely remorseful, with an excellent work record (and would be down-graded if he were unable to drive) and no previous convictions.

**Held**, reducing the period of disqualification:

(1) The magistrate had not given sufficient weight to the mitigating factors of the case and the period of disqualification would be reduced from 12 to 6 months. Disqualification was certainly called for, given the appellant’s level of alcohol, but the hardship that would be caused to the

appellant and his family by a lengthy period of disqualification would be significant. He had an excellent work record but was already able to demonstrate a reduction of £800 a month in salary following downgrading as he was temporarily unable to drive, which would seriously impair his ability to maintain his family and meet his mortgage commitments; at the age of nearly 50 he had no previous convictions; and he was genuinely remorseful (paras. 10–11).

(2) The court could not fault the magistrate’s general approach to the case. His practice of usually disqualifying for a serious offence under s.63 and imposing a disqualification period of 12 months, with a reduction to 8 or 9 months for an early plea of guilty, and on occasions exercising his discretion not to disqualify at all, was perfectly proper. His reference to the absence of “exceptional” circumstances to justify his departing from his normal practice in the appellant’s case had to be read in the light of this background. And his reference to the position in the United Kingdom was merely a warning to the appellant that other jurisdictions treated such an offence seriously, and did not involve his imposing an inappropriate tariff (paras. 5–7).

**Legislation construed:**

Traffic Ordinance 2005, s.63:

“(1) If a person—

(a) drives or attempts to drive a motor vehicle on a public place . . .

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence and shall be punishable on summary conviction—

(i) in the case of an offence contrary to paragraph (a) above, to a fine at level 5 on the standard scale, or to 6 months imprisonment or to both . . .”

s.71(2): The relevant terms of this sub-section are set out at para. 3.

(3): “In the case of a subsequent conviction in any period of 6 years, the court shall disqualify the person from holding or obtaining a driving licence for such period as the court may see fit.”

*M. Turnock* for the appellant;

*Ms. K. Khubchand, Crown Counsel*, for the Crown.

1 **SCHOFIELD, C.J.:** Francis Debono, the appellant, pleaded guilty to a charge of driving a motor vehicle with alcohol concentration above the prescribed limit, contrary to s.63(1)(a) of the Traffic Ordinance 2005. On July 5th, 2006, he was sentenced to pay a fine of £150 and was disqualified for holding or obtaining a driving licence for 12 months. He now appeals against the order for disqualification.

2 The facts, accepted by the appellant at the earliest opportunity, are these. At about 12.30 a.m. on the night of Saturday, May 27th, 2006, he

was riding his motor scooter in Winston Churchill Avenue when he tried to execute a U-turn into Smith Dorrien Avenue. In doing so, he fell off the scooter. Police officers were nearby and on seeing this went to his assistance. He was seen to be unsteady on his feet, when he got to them, his speech was slurred and he smelled of alcohol. A breath test carried out at New Mole House Police Station revealed an alcohol concentration of 75mg. in 100ml. of breath. This is more than twice the legal limit of 35 mg.

3 Before the passing of the 2005 Traffic Ordinance, an offence of driving whilst under the influence of drink carried an automatic period of at least 12 months' disqualification unless the court found special reasons to order otherwise. By s.71(2) of the 2005 Ordinance, on first conviction for an offence under s.63, "a court may, taking all reasonable circumstances into account, disqualify [a defendant] . . . for such period as [it] may see fit." By s.71(3), a subsequent conviction for such an offence within six years of the first offence carries automatic disqualification. It is clear that the legislature has adopted a more lenient approach to a first drink-driving offence. This may be because under the new legislation an offender does not have to manifest drunkenness but merely requires an excess amount of alcohol in his system. Persons who would not fall to be charged under the old law may well be caught under the new.

4 Be that as it may, the court now has a complete discretion whether or not to disqualify on a first offence and is not fettered by the "special reasons" requirement in the pre-2005 Ordinance. Mr. Turnock takes issue with the learned magistrate's reference to "exceptional" circumstances in his reasons and argues that he thereby fettered his discretion and adopted a test for exercising his discretion which is not contained in the Ordinance, which refers to "reasonable circumstances."

5 My own reading of the learned magistrate's reasons are that, after considering all factors in mitigation, he said that the difficulties which Mr. Turnock outlined the appellant would experience if he were to be disqualified were not so exceptional as to warrant his exercising his discretion in the appellant's favour.

6 I understand that the magistrate's approach to disqualification for an offence under s.63 is that for such a serious offence disqualification is usually imposed but that there have been occasions when he has exercised his discretion not to disqualify. In cases where there is an early plea of guilty, what is usually a 12-month period is reduced to 8 or 9 months. This court cannot fault such an approach.

7 Mr. Turnock also takes issue with the learned magistrate's reference to the UK legislation. After Mr. Turnock sought to persuade the court to accept a lenient approach, the magistrate pointed out that in the United Kingdom the period of disqualification would be 20 months for the offence committed by the appellant. My view of this remark is that it was simply

meant to point out to the appellant that, in a jurisdiction from which we derive assistance in the form of precedent, this offence would be regarded as extremely serious. It was an unexceptionable approach. The magistrate did not fall into the error of following a tariff laid down by the English courts which is inappropriate under the Gibraltar legislative framework.

8 The third ground of appeal is that in all the circumstances a term of 12 months' disqualification is manifestly excessive and therefore wrong in principle. The appellant is a 47-year-old man with no previous convictions of any kind. He is a family man with four dependent children at the time of conviction. Mr. Turnock quite properly points out that since his conviction one of his children has ceased to be dependent, but nothing rests on that. He is genuinely remorseful and demonstrates as much by his early plea. He is a driver for the Ministry of Defence and a disqualification means a down-grading and significant loss of earnings. He has an excellent work record as described by a letter from his employers. The offence was committed whilst he was driving a motor scooter, which is not the type of vehicle he drives in his employment.

9 The learned magistrate did not find these circumstances "exceptional" so as to move him from his usual practice of imposing a 12-month period of disqualification. I am sure that at the front of his mind was the fact that the appellant had over twice the legal limit of alcohol in his system and that he was clearly incapable of conducting a simple manoeuvre on his motor cycle.

10 In my judgment, the learned magistrate did not pay sufficient regard to the mitigating features in the case. Not only do we have a man approaching 50 with an excellent work record and no previous driving convictions who expresses instant remorse, but the hardship to himself and his family produced by a period of disqualification is significant. The full significance may not have been apparent to the lower court but I have had produced to me the latest salary slip of the appellant, compared with his salary slip when employed as a driver. This shows a reduction in salary from £1,800 per month to £1,000. For a man with a mortgage and substantial dependants this could be crippling.

11 Whilst a period of disqualification was warranted, given the amount of alcohol consumed by the appellant, I consider a 12-month period of disqualification was manifestly excessive. I reduce it to 6 months.

*Order accordingly.*