[2018 Gib LR 1]

SAVIGNON v. R.

SUPREME COURT (Butler, J.): November 15th, 2017

Road Traffic—driving with excess alcohol—sentence—£300 fine and 17 months' disqualification for driving with 62 µg. alcohol/100 ml. breath not set aside on appeal—as no Gibraltar guidelines, UK sentencing guidelines may be considered

The appellant pleaded guilty to driving a motor vehicle with an alcohol concentration above the prescribed limit.

The appellant drove her car at night very slowly and erratically. When stopped by the police it was apparent that her speech was slurred, her eyes were glazed and she had difficulty standing up. She was intending to drive a passenger, her cousin, to hospital, although the police officers did not consider that the cousin needed medical attention. A breathalyser test showed the appellant to have 62 µg. of alcohol in 100 ml. of breath, almost twice the legal limit. She pleaded guilty to driving with alcohol above the prescribed limit.

The Stipendiary Magistrate sentenced the appellant to 17 months' disqualification in addition to a fine of £300 and an endorsement on her licence.

On appeal, the sentence was challenged on a number of grounds. The appellant submitted inter alia that the Magistrate had sentenced her on the basis that his discretion as to disqualification was fettered by a recent decision of the Chief Justice in which the Chief Justice commented that it would only be in the most exceptional circumstances, with reasons given for departing from the norm, that there would not be a disqualification along the lines of the UK Sentencing Council Guidelines for driving with excess alcohol.

Held, dismissing the appeal:

(1) The appellant accepted that the disqualification of 17 months and the fine of £300 were at the very bottom of the scale in the UK guidelines for the level of alcohol in the present case. The court took into account the appellant's guilty plea, her remorse and other personal matters including her position as the sole carer for her elderly mother and as the operator of a small business in Gibraltar which required her to travel to Spain to collect supplies. On the other side was the level of alcohol, the fact that the appellant had a passenger, the fact that she was intending to drive materially further than the distance she in fact drove and the erratic nature

of her driving. All of these factors had been taken into account by the Magistrate in reaching his conclusion that the sentence should be at the bottom end of the normal bracket in the UK guidelines. Although the court had sympathy for the appellant and she had significant mitigation, the sentence was not one which the Magistrate was not entitled properly to impose. Indeed, it seemed to be a perfectly proper sentence (paras. 17–20).

(2) Every case depended on its own facts but in the absence of statutory guidelines applicable directly in Gibraltar it was legitimate for the court to assist those representing parties in such cases by establishing a common approach and guidance. It was not a matter of fettering the jurisdiction of the court to decide a case in accordance with its facts. The Chief Justice had been entitled in the earlier case to make clear the court's view as to the gravity of drink driving offences and to have regard to the UK sentencing guidelines for driving with excess alcohol. Such offences were inherently dangerous. The Chief Justice had not decided that it was in any strict sense necessary for anyone to show exceptional circumstances but rather that, in the absence of exceptional circumstances, it was difficult to envisage that the courts in Gibraltar would take the view that disqualification was not appropriate. It would be appropriate for this court to take a tougher approach than in England. Driving in Gibraltar required particular care and concentration. Alcohol reduced effective concentration and put people at risk of injury or even death (paras. 9–15).

Cases cited:
(1) *Bernal* v. *Riley*, 2016 Gib LR 314, referred to.
(2) *R.* v. *Cozanni*, Supreme Ct., CC No. 22 of 2017, July 11th, 2017, unreported, considered.
(3) *R.* v. *Jablonskaite*, [2014] EWCA Crim 931, unreported, considered.

N. Gomez for the appellant;
R.R. Rhoda, *Q.C.* for the respondent.

1 **BUTLER, J.:** This is an appeal against the sentence of 17 months' disqualification imposed by the Stipendiary Magistrate in addition to a fine of £300 and an endorsement of the appellant's licence on September 26th of this year following the appellant's plea of guilty to an offence of driving with alcohol above the prescribed limit. I am grateful for the full skeleton and bundle of authorities produced by Mr. Gomez for the appellant who has clearly carried out extensive legal research on the issue.

2 The facts are that the appellant and her cousin were celebrating in Ocean Village either at El Faro Restaurant (as suggested in the Magistrates' Court on her behalf) or at the Casino (as suggested today before me) with a number of colleagues.

3 During the course of the evening the appellant's cousin began to feel ill. A letter handed to the Stipendiary Magistrate from the appellant's cousin is not consistent with the appellant's account in all respects but I shall not hold that against the appellant. It was decided that the appellant would take her cousin home to the Laguna Estate, not very far from Ocean Village. I observe that El Faro, as suggested in the Magistrates' Court, is marginally nearer but again nothing significant turns on that. On the way her cousin began to feel more ill. It may well be that this was as a result of the celebrations that they were both having during the course of the evening and the amount which her cousin had drunk, but I need not make any more detailed finding about that. She began to vomit. The appellant decided to obtain her car from where it was parked in the Devil's Tower Road multi-storey car park. She picked her cousin up. It is suggested that she panicked because her cousin had had previously heart and other problems and had undergone some surgery on a couple of occasions and she was worried for her and intended to take her to hospital. It had been suggested in the Magistrates' Court that this was effectively an emergency but the learned Stipendiary Magistrate, in my view correctly, decided that this was not a case of real emergency. Particularly it is apparent that the appellant had decided to leave her cousin by a bus stop to fetch her motor car and was intending to drive her to St. Bernard's Hospital and had not at that stage called a taxi or called for an ambulance. Whatever the position, it was a clear decision made by the appellant to drive her cousin to St. Bernard's Hospital for attention.

4 There is no doubt that though her driving was very slow it was erratic as described by the police officers. The appellant claims that that was because her cousin had again been vomiting in the motor car. Prior to driving to St. Bernard's Hospital the appellant had driven the short distance from the car park to the Cepsa petrol station and had obtained some bags in case her cousin should vomit further, so the matter was not so urgent that she wanted to rush her to the hospital. The original intention, it seems, was that the appellant was going to walk her cousin to her home in Laguna Estate where she was to stay the night but for the reasons that I have mentioned the appellant decided that she ought to take her cousin to hospital. The intention was to drive further than to Gaucho's, which is where she finally stopped having been followed by police officers. The police officers had been flashing her motor car for some time but that did not cause her to stop, she says because her cousin was vomiting in the car and not because she was not concentrating on her driving. But her driving was very erratic and at one stage is said to have involved her driving on the wrong side of the road. She eventually stopped after she heard the siren. I do not accept that that was the first place at which she could safely stop at that time of the night when traffic would not have been very high and when the police car was signalling for her to stop, but again that does not take the matter much further.

5 When she stopped it became apparent that the appellant's speech was slurred, her eyes glazed and she had difficulty standing up. She was breathalysed, taken to New Mole House Police Station and the result of the breathalyser test is that she had 62 milligrams of alcohol in 100 millilitres of breath, almost twice the legal limit.

6 The sentence of the learned Stipendiary Magistrate is challenged on a number of grounds. I should mention that her cousin was taken by the police home, not to hospital, to the South District and according to the police was not in a condition then in which they thought she needed to be taken to hospital. Again that does not mean to say that the appellant herself did not believe, with the drink that she had had, that it was necessary to take her cousin to hospital. It has been said over and over again that it is no excuse that someone is thinking differently because they have been drinking.

7 The first point made by Mr. Gomez on behalf of the appellant is that the learned Magistrate had sentenced on the basis effectively that his discretion as to whether to disqualify or not was fettered by the decision of the learned Chief Justice in the recent case of *R.* v. *Cozanni* (2) in which the learned Chief Justice commented that it would be only in the most exceptional circumstances, and then with reasons given for departing from the norm, that there would not be a disqualification along the lines of the UK Sentencing Guidelines for driving with excess alcohol.

8 I have also been referred by Mr. Gomez to the case of *Bernal* v. *Riley* (1), the decision of Jack, J. in relation to Personal Injury General Damages Guidelines in which he decided (or may have decided or at least indicated his view) that the Northern Ireland Guidelines for general damages and personal injuries cases were a closer comparator to those in Gibraltar.

9 I am told that many other jurisdictions have provided for a statutory minimum of 12 months' disqualification for the equivalent to the offence with which the appellant was charged but Mr. Gomez has not been able to refer me to any sentencing guidelines from other jurisdictions and indeed, in my judgment, it was unnecessary for him to do so. In my opinion Mr. Gomez's argument involves a leap in logic. Effectively he says that as a result of the difference in legislation (because in the United Kingdom a disqualification of 12 months is the minimum disqualification for this type of offence unless there are certain specified exceptional circumstances, whereas in Gibraltar the statute provides for no compulsory disqualification and no minimum disqualification) the UK guidelines should not be used. The answer to Mr. Gomez's submission, in my view, is that it may in certain circumstances in particular cases make a difference. Each case depends on its own facts but in the absence of statutory guidelines applicable directly in Gibraltar it is legitimate for this court to assist those representing parties in such cases by establishing some common approach

and guidance without which there would be a free-for-all in sentencing terms.

10 This is not a matter, in my view, of fettering the jurisdiction of the court to decide cases in accordance with the facts of each individual case.

11 To the extent that the comments of the Chief Justice in a case in which he was also sentencing for far more serious offences may appear to indicate otherwise, taken in context I am satisfied that the Chief Justice did not intend to convey any more than I have just indicated. It is no more than the court making clear its view as to the general gravity of that particular type of offence. In its approach the court is entitled, as I have said, to have regard to the approach in other jurisdictions and indeed, by statute, to the Sentencing Guidelines of the United Kingdom. Sentencing in Gibraltar does not operate in a vacuum. It is not blind to developing awareness of the need for the court to make it clear that a particular type of conduct must be regarded as more or indeed less serious than hitherto. That courts and legislators in the world have become increasingly tough in their approach to drink driving is common knowledge. If it were not, it should be. If the culture is one of acceptance of it as a lesser crime, this court is entitled and indeed has a duty in my view to correct that impression. The offence is inherently dangerous and the court is entitled in a particular case to decide that the sentence of the court should be higher than that which would apply according to the UK guidelines or to decide that in a case with exceptional features a lenient sentence is appropriate. The Chief Justice was not deciding, in my view, that it was in any strict sense necessary for anyone to show exceptional circumstances. What he was saying was that in the absence of exceptional circumstances it was difficult to envisage that the courts in Gibraltar would take the view that a disqualification was not appropriate.

12 I do not intend to give examples of situations in which it may be appropriate for the UK guidelines not to be followed. I simply say that it would be open to this court to take a tougher approach than that in England. Driving in Gibraltar requires particular care. No regular users of roads in Gibraltar could think otherwise. Traffic congestion is sometimes extreme (not in this case) as it is, for instance, in London. Many roads are narrow. Pedestrians, motorcyclists, cars, commercial vehicles, even motorized scooters are present in large numbers. Driving in Gibraltar requires particular concentration and care. Alcohol reduces effective concentration. It puts people at risk of injury or even loss of life. Section 484(4) of the Criminal Procedure and Evidence Act 2011 provides that a court may, except where the circumstances in Gibraltar are such that it would not be appropriate to do so, have regard to the Sentencing Guidelines Council Guidelines for England and Wales. I note the words "may" and "have regard to" as opposed to "must" or "shall follow." No one suggests that this court is bound to follow the guidelines. Indeed even in the United

Kingdom they are guidelines (although more recently guidelines to which the courts are enjoined to have regard).

13 In these circumstances, in my opinion, the learned Chief Justice was not only entitled but correct to emphasize the gravity with which this court will generally approach offences of this nature. He was entitled, as I have said, to have regard to the UK guidelines. That in the United Kingdom, though not in Gibraltar, a discount may be obtained for attending a course is something which this court could take into account if it were relevant. In my view it is of very limited relevance. What this court must do is to sentence according to the gravity or otherwise of the particular offence on the facts of the case. It seems to me that although a 25% discount in the sentence or the disqualification may be obtained in England for opting to undertake a course it is in return for a different obligation, namely attending the course. So a 25% discount or anything like it would not be appropriate.

14 The important thing is that all facts be taken into consideration. The court is equally entitled to take the view that, even without the opportunity to obtain a discount, the guidelines in England are a useful starting point. For the Chief Justice to say that in Gibraltar there is no justification generally for a more lenient sentencing approach than applied currently in the United Kingdom is within the proper exercise of his duty to indicate the view of this court as to appropriate approaches in sentencing.

15 It does not amount, in my view, to judicial legislation in any way. Nor does it amount to fettering or emasculating this court's discretion and I do not take his comments as indicating otherwise.

16 I have read and taken into account the other authorities relied upon by Mr. Gomez for the appellant and they do not alter my conclusions. In particular I have read the case of *R.* v. *Jablonskaite* (3), which involved the exercise of the court's power to suspend a sentence of imprisonment and the submission of Mr. Gomez that I should regard the conclusion in that case and in others to which he referred in argument today as persuasive authority that the comments of the Chief Justice were inappropriate and amount to a fettering of the court's discretion. These cases do not alter my view about the intention of the Chief Justice and the way in which his comments should be interpreted.

17 It is accepted by Mr. Gomez that the disqualification of 17 months and the fine of £300 come at the very bottom of the UK guidelines scale for this level of alcohol. In operating the UK guidelines, even as guidelines, a number of steps have to be taken. I have taken into account the defendant's plea of guilty, stated remorse and the other personal matters to which I have been referred. I do not propose to recite the details, but her position as a sole carer for her elderly mother (which I regard as important), her position as the operator of a small business in Gibraltar

which requires her to travel to Spain in order to collect supplies, and her remorse are matters of mitigation to be taken into account. On the other side of the equation is the level of alcohol, the fact that she had a passenger, and the fact that she was intending to drive materially further than the distance she in fact drove before she was stopped and her erratic driving. It seems to me that all those were taken into account by the learned Stipendiary Magistrate in reaching his conclusion that the sentence should be right at the bottom end of the normal bracket in the UK Guidelines.

18 So far as the extract from Hansard is concerned to which Mr. Gomez has referred, it is quite clear that the intention of Parliament was that drink driving should be taken very seriously but other than that it does not seem to me to add to the terms of the legislation which applies in Gibraltar.

19 I have sympathy for the appellant. She has a good record. This is her first offence. If it were not her first offence there would certainly be a compulsory disqualification in this jurisdiction in any event. I accept that she was concerned for her cousin but her decision to drive when she must have known that she was likely to be significantly above the limit was a decision which she must have consciously taken. It was an unnecessary decision. It was a bad decision. She has significant mitigation and it may be that the sentence of the learned Stipendiary Magistrate was at the upper end of the range of sentence which could have been imposed in relation to the disqualification. No doubt he took that into account also in setting the level of fine because it is all part of the sentencing process. I certainly cannot decide that the sentence of the learned Stipendiary Magistrate was one which he was not entitled properly to impose, within the range of reasonable sentences which he could impose. Indeed it seems to me to have been a perfectly proper sentence. I have heard and taken into account everything well said by Mr. Gomez in mitigation and I have reassessed the position entirely.

20 For the reasons that I have mentioned I dismiss this appeal.

Appeal dismissed.