[2020 Gib LR 445]

BUHAGIAR v. R.

SUPREME COURT (Ramagge Prescott, J.): December 7th, 2020

Road Traffic—driving with excess alcohol—sentence—17 months' disqualification for driving with 72 µg. alcohol/100 ml. breath not set aside on appeal—car moved to avoid parking ticket not exceptional reason to justify shorter disqualification—as to hardship, no evidence that disqualification would cause offender to lose employment or to suffer anxiety or depression

The appellant was charged with driving with alcohol concentration over the limit contrary to s.63 of the Traffic Act 2005.

At about 5.25 a.m., the appellant had been observed by police officers to have been driving erratically. When the appellant exited his vehicle, it was clear that his speech was slurred and alcohol could be smelled on his breath. The appellant undertook a roadside breath test, providing a sample of 72 µg per 100 ml. Two further samples provided at the police station gave samples of 71 µg and 72 µg per 100 ml.

The appellant pleaded guilty. He was sentenced by the Magistrates' Court to a fine of £600 and disqualified from driving for 17 months.

On appeal against disqualification, the appellant submitted that (a) the Magistrates' Court failed to take account relevant mitigating circumstances including his financial position; the risk of job loss; that he was a first-time offender; that the vehicle was only moved a very short distance to avoid a parking offence; the streets were entirely empty and his driving was not impaired; and there was no damage to property or risk to the public; (b) the Magistrate's Court misunderstood a decision of the Chief Justice concerning the discretion to disqualify and misapplied the English Sentencing Guidelines; (c) disqualification in Gibraltar for a first time offender was discretionary, not mandatory as it was in England and

Wales, which allowed the court to take account of mitigating circumstances in assessing the appropriate period of disqualification, which circumstances did not need to be exceptional; (d) given the differences between Gibraltar and England and Wales, Gibraltar should not follow the sentencing guidelines in England and Wales; (e) the particular facts of this case made a 17-month disqualification period excessive; and (f) the period of disqualification should be reduced for a guilty plea.

Held, dismissing the appeal:

(1) Driving with any amount of alcohol in the breath over 35 µg was a contravention of the law but there were no Gibraltar guidelines or statutory provisions which grouped the levels of alcohol in the breath (or blood or urine) on a scale of seriousness and which identified corresponding sentences and periods of disqualification. In the absence of Gibraltar guidelines and in accordance with s.484 of the Criminal Procedure and Evidence Act, the Magistrates' Court had been placing partial reliance on the Excess Alcohol (drive/attempt to drive) Guidelines issued by the Sentencing Council of England and Wales. Those Guidelines grouped the offences by the amount of alcohol in the breath, blood or urine on a sliding scale of 1 to 4. The Magistrates' Court appeared to defer to the Guidelines in assessing the seriousness of an offence with regard to the level of alcohol in the offender's body. It appeared the Magistrates' Court disregarded the Guidelines in relation to the period of disqualification applied to each scale. The Guidelines directed that the higher the concentration of alcohol in the body the higher the sentence and period of disqualification. While there was a difference in the nature of the disqualification in Gibraltar and in England and Wales (there being a mandatary minimum disqualification in England and Wales for driving under the influence, whereas in Gibraltar the disqualification was discretionary), it did not follow that the starting point should be different. Whether disqualification was mandatory or discretionary, there was no reason why the same starting point could not be applied to the same category of offence. The existence of a discretion did not prevent the Magistrates' Court from identifying an appropriate starting point commensurate with the level of alcohol in the body; not only did this lend consistency of approach but an appropriate starting point would reflect the serious nature of this offence. A starting point did not erode the court's discretion any more than starting points across the ambit of sentencing guidelines generally. Once the starting point was identified by reference to category or level, the court thereafter should consider mitigating and aggravating circumstances to determine whether there should be an adjustment of the starting point. The important function of the starting point was to categorize the seriousness of the offence with reference to the sentence it attracted, and to ensure consistency of approach (paras. 8–17).

(2) Public safety where driving under the influence was concerned was fundamental but for it to be effective the period of disqualification must afford a meaningful degree of protection. Disqualifying as a matter of

course for between 3–6 months, largely because it was a first offence, would fail to provide that protection and failed to recognize the seriousness of the offence. The courts should take a robust stance with regard to sentencing. There was no reason why the circumstances in Gibraltar should prevent the courts from following the Guidelines and adopting the corresponding starting points and ranges for disqualification and sentences in general. By setting the entry point at 12 months' disqualification for the minimum amount of alcohol in the body, England and Wales had marked this as a serious offence which should in the first instance attract a correspondingly substantial period of disqualification in order to afford the public appropriate protection. Gibraltar had to do likewise. The starting points in Gibraltar for periods of disqualifications should accord with the Guidelines as follows: Level 1: 12 months with a guide range of up to 16 months; Level 2: 17 months with a guide range of up to 22 months; Level 3: 23 months with a guide range of up to 28 months; Level 4: 29 months with a guide range of up to 36 months (paras. 18–21).

(3) The Guidelines should be followed in the usual way, applying the corresponding starting point and factoring in aggravating and mitigating circumstances as listed in the Guidelines. The court should exercise its discretion in line with the approach in England and Wales, namely that in cases which in England and Wales attracted obligatory disqualification the court could only reduce the minimum period of disqualification if special reasons existed and in cases of obligatory disqualification on penalty points the court could reduce the minimum period of 6 months if there were mitigating circumstances, except that as the legislature in Gibraltar had conferred a broad judicial discretion on the courts, the grounds on which a downward adjustment from the starting point could be effected should be an amalgam of both special reasons and mitigating circumstances, which for ease of reference the court termed "exceptional reasons." Mitigating circumstances were to be interpreted restrictively, broadly in line with s.35 of the Road Traffic Offenders Act 1988. The following was a non-exhaustive summary by way of example of what might and might not amount to exceptional reasons. Exceptional reasons would not be: (i) that alcohol levels were only marginally high; (ii) that the defendant's driving ability was not impaired; (iii) that the defendant's ability, if it was impaired, was impaired not by alcohol but by illness; (iv) that the defendant had been affected by an illness or drug of which he had no knowledge; (v) that the offence was trivial; and (vi) that a disqualification would cause hardship. Exceptional reasons might be found where: (i) the defendant did not know the nature of what he was drinking either because he did not know it was alcohol or because he knew it was alcohol but had been deceived or misled as to the nature of the drink; (ii) the defendant responded to a sudden medical emergency; and (iii) shortness of distance driven (para. 22; paras. 26–32).

(4) The burden of proof of establishing exceptional reasons lay on the defendant. The standard of proof was the balance of probabilities. Exceptional reasons must be supported by evidence and not mere assertions by counsel. The evidence upon which the court acted must be admissible evidence not hearsay. The finding of exceptional reasons should not automatically result in a decision not to disqualify; having found exceptional reasons, the court should then consider whether a downward adjustment was appropriate and to what extent. In the event that the court found exceptional reasons, they should be stated in open court (para. 33).

(4) The disqualification period was not subject to the usual reduction for a guilty plea. Although disqualification had a punitive aspect to it, in that it imposed a restriction on the liberty of the offender to drive a motor vehicle, the true purpose of disqualification was not to punish the offender (which was achieved through the imposition of fines, community service orders or custody) but rather to protect the public from irresponsible drivers, at least during the period of disqualification. To that extent, a disqualification was an ancillary order. Disqualification orders were highly fact sensitive and the court was required to give very careful consideration to individual circumstances surrounding each case and adjust the disqualification period accordingly. In those circumstances, to reduce a disqualification period further would potentially reduce the period to such a low level that it had little deterrent or protective value. An order ancillary to the punitive part of the sentence should not attract the statutory reduction for a guilty plea (paras. 35–39).

(5) On the facts of the present case, the Magistrates' Court had been correct in identifying the starting point of 17 months as the period of disqualification and disqualifying the appellant from driving for a period of 17 months. The shortness of the distance driven and the reasons for driving were not exceptional reasons. The fact that the car had been moved to avoid a parking ticket could not ever justify driving while under the influence of alcohol. It was not an emergency. The difficulty the appellant found himself in was entirely of his own making. It was not imperative that the car was moved; essentially the appellant's decision to drive was an ill-conceived choice. The court had not been informed of exactly how far the appellant drove. The manner of his driving was of concern to the police. This was not a case of moving a car from one parking space in a car park to another space within the same car park. A reasonable, responsible and sober friend would have advised the appellant not to drive. There was no evidence before the court that the appellant would lose his job if he were disqualified from driving. The fact that he had to attend to the company's ships daily in various locations did not mean he had to drive himself to those locations. His job description on which he relied made no reference to requiring a valid driving licence or for the post-holder to drive to relevant locations. The appellant had therefore failed to establish on the balance of probabilities that he would

lose his employment if he were disqualified from driving. He could not therefore argue that any hardship would follow from the disqualification. Nor was there evidence before the court that the appellant had suffered or was suffering from depression and/or anxiety, or that disqualification was likely to cause the appellant anxiety or depression at all or at a level that would qualify as exceptional reasons (para. 40; paras. 47–53; paras. 58–61).

Cases cited:

(1) *Brennan* v. *McKay*, 1997 SLT 603, considered.
(2) *Brown* v. *Dyerson*, [1968] 3 W.L.R. 615; [1968] 3 All E.R. 39, referred to.
(3) *Chatters* v. *Burke*, [1986] 1 W.L.R. 1321; [1986] 3 All E.R. 168, considered.
(4) *D.P.P.* v. *Bristow*, [1998] R.T.R. 100, applied.
(5) *D.P.P.* v. *Humphries*, [2000] 2 Cr. App. R. (S.) 1; [2000] R.T.R. 52, considered.
(6) *D.P.P.* v. *Oram*, [2005] EWHC 964 (Admin), considered.
(7) *Flewitt* v. *Horvath*, [1972] R.T.R. 121, referred to.
(8) *James* v. *Hall*, [1972] 2 All E.R. 59; [1972] R.T.R. 228; [1968] Crim. L.R. 507, considered.
(9) *Jones* v. *English*, [1951] 2 All E.R. 853, referred to.
(10) *Owen* v. *Jones*, [1988] R.T.R 102, referred to.
(11) *Pugsley* v. *Hunter*, [1973] 1 W.L.R. 578; [1973] 2 All E.R. 10; [1973] R.T.R. 284, referred to.
(12) *R.* v. *Cozanni*, CC 22 of 2017, Supreme Ct., July 11th, 2017, considered.
(13) *R.* v. *Crossan*, [1939] N.I. 106, referred to.
(14) *R.* v. *McIntyre*, [1976] R.T.R. 330; [1976] Crim. L.R. 639, considered.
(15) *R.* v. *Mullarkey*, [1970] Crim L.R. 406, considered.
(16) *R.* v. *Wickins* (1958), 42 Cr. App. R. 236, applied.
(17) *Whittal* v. *Kirby*, [1947] K.B. 194; [1946] 2 All E.R. 552, referred to.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.484: The relevant terms of this section are set out at para. 14.

Traffic Act 2005, s.71: The relevant terms of this section are set out at para. 12.

C. Finch for the appellant;
C. Ramagge for the Crown.

1 **RAMAGGE PRESCOTT, J.:** This is an appeal from a decision of the Additional Stipendiary Magistrate.

Background

2 The defendant pleaded guilty to a charge of driving with alcohol concentration over the limit contrary to s.63 of the Traffic Act 2005, and was sentenced to pay a fine of £600 and disqualified from driving for a period of 17 months.

3 The facts upon which the Magistrates' Court sentenced are set out in the summary of evidence to which the appellant pleaded, and for ease of reference I set them out now:

> "At about 05.25 hrs on Monday 24th February 2020, Anthony Wayne Mauro Buhagiar, the Defendant in this case, was driving his car G1003, a Black in colour Audi in the area of Queensway Road when, after allowing the Police vehicle to pass he took a sharp turn onto Devil's Tongue Road. Officers then turned around back onto the Waterport roundabout only to see the same vehicle still being driven by the Defendant waiting by the roundabout again, this time on the left hand lane. The Defendant turned back in the direction of Montagu Gardens again before again making a sharp right turn into Devil's Tongue Road. Officers then followed onto the same road and found the Defendant's vehicle stopped as the Defendant opened the driver's side door. On speaking with officers it was clear that the Defendant's speech was slurred and alcoholic beverages emanated from his breath.
>
> Officers then requested the Defendant to undertake a roadside breath test to which he complied providing a sample of 72 µg per 100ml Breath. The Defendant was then cautioned and arrested on suspicion of driving a motor vehicle whilst over the prescribed limit for alcohol to which he made no reply. The Defendant was then brought to New Mole House Police Station where he provided two further samples of 71 µg and 72 µg per 100mcg breath."

Not in dispute that the defendant presented with a reading of 71 µg. per 100 mcg. breath which is approximately twice over the prescribed limit.

Grounds of appeal

4 The appellant sets out the grounds of appeal as follows:

> "(i) The court failed to take account of any mitigating circumstances, including my desperate financial position, the risk of my job loss, the fact that I was to be treated as a first time offender, the fact that the vehicle was only moved to avoid a parking offence/obstruction, and then only a very short distance, it was at 05.15 hours in the morning when the streets and pavements were entirely empty and my driving

was not impaired, there was no damage to other cars or property or risk to the public.

(ii) The court misunderstood a decision of the Learned Chief Justice concerning the discretion to disqualify and misapplied English Law Sentencing Guidelines incorrectly, making the decision wrong in law. Reasons were not given. Disqualification in Gibraltar for a first time offender is discretionary, not mandatory and no allowance or benefit was given for cooperation with the police and a guilty plea."

5 As I understood the submissions before me, they can be summarized thus. The discretionary nature of Gibraltar legislation as distinct from the mandatory nature of the legislation in England and Wales ("E&W"'), allows the court to take account of mitigating circumstances in assessing the appropriate period of disqualification and, notwithstanding *R.* v. *Cozanni* (12), those circumstances need not be exceptional to operate as mitigation. Given the distinguishing features between E&W and Gibraltar law, Gibraltar should not follow the E&W sentencing guidelines as they are structured to fit a distinct offence.

6 Further, on the particular facts of this case counsel submits that the circumstances are such as to make a 17-month disqualification from driving excessive.

The law

7 Much of the appellant's argument rests on the difference in law between the E&W and the Gibraltar offences of driving under the influence and it is helpful to compare the two briefly.

England & Wales

8 In E&W, the principles of disqualification are contained in the Road Traffic Offenders Act 1988 ("RTOA"). Broadly speaking there are two categories of disqualification, obligatory and discretionary, and whilst not all relate to drink driving it is useful to set them out by way of summary.

Obligatory disqualification orders

9 There are three circumstances in which it is mandatory for the court to disqualify:

(i) the court must disqualify for a minimum period of 12 months where a person is convicted of an offence involving an obligatory disqualification, unless the court finds special reasons for not doing so. Not in dispute that driving or attempting to drive when unfit through drink or drugs is an obligatorily disqualifiable offence. The minimum period of disqualification of 12 months rises to two years where the offence is manslaughter,

causing death by dangerous driving, causing death or serious injury by driving whilst disqualified, or causing death by careless driving while under the influence of drink or drugs; or where more than one disqualification for a fixed period of 56 days or more has been imposed within three years immediately preceding the offence;

(ii) the court must disqualify for a minimum period of six months when the offender is convicted of offences totalling twelve or more penalty points unless the court finds mitigating circumstances for not doing so;

(iii) the court must disqualify, upon convicting an offender of manslaughter, causing death by dangerous driving, causing serious injury by dangerous driving, dangerous driving, causing death by careless driving when under the influence of drink or drugs, or causing death or serious injury by driving whilst disqualified.

Discretionary disqualification orders

10 Where an offender has been convicted of an offence involving discretionary disqualification the court may disqualify a person for such period as the court thinks fit. The circumstances which amount to discretionary disqualifying offences may be very briefly summarized as follows:

(i) the court may disqualify for any endorsable offence provided the offender is not also liable for a penalty points disqualification;

(ii) the Crown Court may disqualify where a motor vehicle has been used in the commission of a crime in respect of any indictable offence punishable with a custodial sentence of two years or more;

(iii) the court may disqualify a person convicted of any offence involving an assault if the offence was committed driving a motor vehicle;

(iv) the court may disqualify instead of or in addition to any other sentence where the court considers it appropriate to so;

(v) upon conviction of any endorsable offence, the court may disqualify an offender until he passes a test of competency;

(vi) the Magistrates' Court may disqualify an offender who has been convicted of an endorsable offence when committing him for sentence to the crown court; and

(vii) the court may disqualify an offender convicted of stealing or attempting to steal a motor vehicle.

Gibraltar

11 In Gibraltar, the Traffic Act 2005 ("TA") s.63 provides that it is an offence to drive a motor vehicle in a public place after consuming so much

alcohol that the proportion of it in the breath exceeds the prescribed limit. Pursuant to s.73(c) of the TA, the prescribed limit means 35 mcg. of alcohol in 100 ml. of breath.

12 Section 71 of the TA provides *inter alia* that in respect of a s.63 offence:

> "(2) Where the conviction is for the first time, a court may, taking all reasonable circumstances into account, disqualify the person from holding or obtaining a driving licence for such period as the court may see fit.
>
> (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."

13 Whilst any amount of alcohol in the breath over 35 mcg. is a contravention of the law, there are no Gibraltar guidelines or statutory provisions in this jurisdiction which group the levels of alcohol in the breath (blood or urine) on a scale of seriousness and which identify corresponding sentences and periods of disqualification.

14 Pursuant to s.484 of the Criminal Procedure and Evidence Act ("CPEA"):

> "484.(1) The Chief Justice, after consulting the Minister and such other persons or bodies as the Chief Justice thinks fit, may issue guidelines relating to the sentencing of offenders ('sentencing guidelines'), which may be general in nature or limited to a particular category of offence or offenders.
>
> . . .
>
> (3) Every court must in sentencing an offender, have regard to any sentencing guidelines which are relevant to the offender's case.
>
> (4) If and to the extent that sentencing guidelines have not been published under subsection (1), and subject to any common law provision, a court may, except where the circumstances of Gibraltar are such that it would not be appropriate to do so, have regard to the sentencing Guidelines Council Guidelines for England and Wales published in December 2004 (as amended or replaced from time to time)."

15 As I understand it in the absence of local guidelines the Magistrates' Court has been placing partial reliance on the Excess Alcohol (drive/attempt to drive) Guidelines issued by the Sentencing Council of England and Wales ("the Guidelines"). The Guidelines group the offences by the amount of alcohol in the breath, blood or urine on a sliding scale of one to four. It appears that the Magistrates' Court defers to the Guidelines in

assessing the seriousness of the offence, *i.e.* level 1–4 with regard to the level of alcohol in the offender's body. Where it appears that historically the Magistrates' Court has disregarded the Guidelines, is in relation to the period of disqualification applied to each scale. It is helpful to set out the Guidelines:

Level of alcohol			Starting point	Range	Disqualification	Disqual. 2nd offence in 10 years—see note above
Breath (µg)	Blood (mg)	Urine (mg)				
120–150 and above	276–345 and above	367–459 and above	12 weeks' custody	High level community order—26 weeks' custody	29–36 months (extend if imposing immediate custody)	36–60 months
90–119	207–275	275–266	Medium level community order	Low level community order—high level community order	23–28 months	36–52 months
60–89	138–206	184–274	Band C fine	Band C fine—low level community order	17–22 months	36–46 months
36–59	81–137	108–183	Band C fine	Band B fine—band C fine	12–16 months	36–40 months

Starting point

16 Evident that the Guidelines direct that the higher the concentration of alcohol in the body the higher the sentence and period of disqualification should be. I do not think counsel challenges that principle. The argument advanced by Mr. Finch is that the Guidelines should not apply because in respect of driving under the influence, the position in E&W is a mandatory minimum disqualification period of 12 months whereas in Gibraltar the disqualification is discretionary. It is evident that there is a difference in the nature of the disqualification but in my view it does not follow that because the nature of the disqualification is different, the starting point needs to be different. Whether disqualification is mandatory or discretionary, I can see no reason why the same starting point cannot be applied to

the same category of offence. In any event, the nature of the disqualification in E&W, whilst cloaked in a mandatory definition, is in fact transformed into a discretionary exercise upon the defendant establishing the presence of identifiable reasons, termed by the legislation of E&W as "special."

17 The issue from a Gibraltar perspective must be: how should the Magistrates' Court approach the exercise of its discretion in assessing what the appropriate period of disqualification should be? The existence of a discretion does not prevent the court from identifying an appropriate starting point commensurate with the level of alcohol in the body, not only does this lend consistency of approach, but an appropriate starting point would reflect the serious nature of this offence. A starting point does not erode the court's discretion any more than starting points across the ambit of sentencing guidelines generally do. Once the starting point is identified by reference to category or level, the court thereafter should embark upon an exercise of considering mitigating and aggravating circumstances to determine whether there should be an upward or downward adjustment of the starting point. The important function of the starting point is to categorize the seriousness of the offence with reference to the sentence it attracts, and to ensure consistency of approach. Without an identifiable starting point to serve as guidance, the sentencing of offences runs the risk of becoming arbitrary and erratic.

18 Mr. Finch rightly concedes that public safety where driving under the influence is concerned is of vital importance, and urges the court to give clarity to the sentencing exercise by reaffirming the approach hereto adopted by the Magistrates' Court. Mr. Finch submits that in most cases the practice of the Magistrates' Court is to disqualify a first-time offender for between 3 to 9 months, sometimes, but more rarely, for 12 months, depending upon the circumstances. It is not clear to me whether that is in respect of drivers who are only just over the limit or whether it applies across the board for drivers like the appellant who was two times over the prescribed limit. In any event, I agree entirely that public safety is fundamental but, for it to be effective, the period of disqualification must afford a meaningful degree of protection. Disqualifying a driver as a matter of course for between 3–6 months, largely because it is a first offence, in my view fails to provide that protection and fails to recognize the seriousness of the offence. I have not the slightest doubt in my mind of the seriousness that should attach to offences of driving under the influence of alcohol. Teachers in school educate the young on the dangers of driving whilst under the influence, every year the Royal Gibraltar Police lead public campaigns complete with graphic television advertisements and equally harrowing publicly placed posters, in order to alert to the very real dangers of driving whilst under the influence of alcohol.

19 Unless the courts take a robust stance with regard to sentencing, not only will those efforts likely go unheeded but, more importantly, the incidence of drunken drivers on our roads will not decrease. Except perhaps in the cases of dire emergency, these offences do not happen by accident of circumstance: they are entirely avoidable by anyone who has a basic degree of common sense and social conscience, but what is not avoidable is the devastation to life and limb and the damage to property that these offences have the potential to occasion.

20 I can see no reason why the circumstances in Gibraltar would prevent us from following the Guidelines and adopting the corresponding starting points and ranges for disqualifications and sentences in general. Leaving aside for a moment the mandatory nature of the disqualification in E&W, it is clear that by setting the entry point at 12 months' disqualification for the minimum amount of alcohol in the body, E&W are marking this as a serious offence which should in the first instance attract a correspondingly substantial period of disqualification in order to afford the public appropriate protection. Gibraltar must do likewise.

21 In my judgment, the starting points in Gibraltar for periods of disqualifications should accord with the Guidelines as follows:

Level 1: 12 months with a guide range of up to 16 months;
Level 2: 17 months with a guide range of up to 22 months;
Level 3: 23 months with a guide range of up to 28 months;
Level 4: 29 months with a guide range of up to 36 months.

Exercise of discretion

22 The Guidelines should be followed in the usual way, applying the corresponding starting point for the punitive and ancillary parts of the sentence and then factoring in aggravating and mitigating circumstances as listed in the Guidelines. Focusing on the issue of disqualification alone, once the starting point is identified in accordance with the Guidelines, the court then has a discretion whether to disqualify for that period, for a longer or shorter period, or indeed not at all. Coherence in the sentencing exercise requires guidance from this court as to the manner in which the Magistrates' Court should exercise its discretion pursuant to s.71 TA.

23 The Learned Chief Justice in *Cozanni* (12) provided some guidance. Cozanni was charged with two counts: one of importing 5.2g of cocaine and which need not concern us in the context of this case, and a second count of driving a motor vehicle whilst over the prescribed limit. The driving offence occurred at 22:50 hours and the defendant was seen to cross the land frontier riding a moped in an erratic manner. The defendant registered a lowest reading of 81 µg/100 ml of breath. In his sentencing notes the Learned Chief Justice said (CC 22 of 2017, at 3):

> "As regards the driving under the influence the level I impose a financial penalty in line with what would have been imposed in the Magistrates' Court namely £800. The level of intoxication is such that the English Magistrates' Court Guidelines suggest a period of disqualification of not less than 24 months. In Gibraltar unlike in the United Kingdom disqualification is discretionary rather than mandatory. However, in my judgment a conviction for this offence should almost invariably attract a period of disqualification in line with the English guidelines. It ought to be only in the most exceptional of cases that the court should either not disqualifying or impose a lesser period of disqualification than is indicated by the Guidelines and then full reasons should be given for departing from the norm."

24 Two matters arise from this, the first is that although possibly *obiter*, the Learned Chief Justice expressed the clear view that the Guidelines should apply to periods of disqualification in Gibraltar, only to be departed from in the most exceptional of cases (although he did not qualify what circumstances would constitute exceptional cases) and the second is that the present case under appeal excepted, the Magistrates' Court does not appear to have paid regard to *Cozanni*.

25 Mr. Finch submits that treating *Cozanni* as a statute is wrong in principle as it results in ignoring the element of judicial discretion in individual cases. I venture to suppose that by his comments the Learned Chief Justice was not suggesting that the court treat *Cozanni* as statute, nor was he advocating the abolition of discretion, rather he was giving guidance, albeit brief, as to the applicability of the Guidelines and as to the exercise of the court's discretion. As I have discussed, I am of the view that the application of the Guidelines does not diminish the court's discretion, but three years post-*Cozanni*, it is evident that more detailed guidance is required from the Supreme Court as to the manner in which the discretion should be exercised in so far as disqualification is concerned.

26 I remind myself that in E&W, in cases which attract obligatory disqualification, the court can only reduce the minimum period of 12 months if special reasons exist, and in cases of obligatory disqualification on penalty points, the court can only reduce the minimum period of 6 months if mitigating circumstances exist. Of course we do not have a system of penalty points in this jurisdiction, but to my mind there is no reason why the discretion should not be exercised in line with the manner in which E&W approaches the issue, save that because the legislature in Gibraltar has conferred a broad judicial discretion upon the courts, the grounds upon which a downward adjustment from the starting point can be effected should be an amalgam of both special reasons and mitigating circumstances, which for ease of reference I will term exceptional reasons.

27 It is important to note that the reference I make to mitigating circumstances in the preceding paragraph is not a reference intended to encompass all and every point of mitigation that a given defendant might advance (those general circumstances might be relevant to the punitive part of the sentence) but, rather, it should be read as having a far more restrictive meaning broadly in line with s.35 of the RTOA. It is instructive that s.35(4) RTOA provides that none of the following should amount to mitigating circumstances:

(i) Any circumstances that are alleged to make the offence not a serious one.

(ii) Hardship other than exceptional hardship.

(iii) Any circumstances taken into account by a court when a defendant escaped disqualification or was disqualified for less than the minimum period on a previous occasion within 3 years preceding the current conviction.

28 I am of the view that driving under the influence is not the type of offence [in which] the court should exercise its discretion widely, without structure, uniformity or regard for the conservative manner in which the courts in E&W approach the issue of disqualification, and I hold that view, cognisant of the different statutory approaches between the two jurisdictions.

29 There is a wealth of case law with regard to what amounts to special reasons and mitigating circumstances (as defined in para. 27 *ante*) and from which those representing defendants on these type of charges will be able to draw, and from which I have drawn to set out some general observations with a view to providing some guidance as to what will likely amount to exceptional reasons referred to at para. 26 *ante*.

30 Following *R.* v. *Crossan* (13) and *Whittal* v. *Kirby* (17), the court in *R.* v. *Wickins* (16) laid down a minimum of four criteria which needed to be present in order for the reason to amount to a special reason (in relation to Gibraltar an exceptional reason). The reason should (42 Cr. App. R. at 239–240) (*Wilkinson's Road Traffic Offences*, 29th ed., at paras. 21–04 and 21–18 (2021)):

"(1) be a mitigating or extenuating circumstance;

(2) not amount in law to a defence to the charge;

(3) be directly connected with the commission of the offence; and

(4) be one which the court ought properly to take into consideration when imposing sentence.

. . .

The circumstances which have been held to be capable of amounting to special reasons can be divided into three groups:

(1) those explaining how the defendant became unfit to drive or had excess alcohol in the body;

(2) those explaining why the defendant drove in such a condition; and

(3) miscellaneous circumstances relating to the offence."

Examples

31 I set out a brief non-exhaustive summary by way of example of what may and may not amount to exceptional reasons:

Exceptional reasons will not be:

(i) That alcohol levels are only marginally high;

(ii) That the defendant's driving ability was not impaired;

(iii) That the defendant's ability if it was impaired, was impaired not by alcohol but by illness;

(iv) That the defendant has been affected by an illness or drug of which he had no knowledge;

(v) That the offence is trivial;

(vi) That a disqualification would cause hardship. Almost every disqualification will cause some hardship. For hardship to amount to an exceptional reason it must itself be exceptional. Whether loss of employment amounts to exceptional hardship to the offender is a matter of fact and degree but every loss of job as a result of disqualification is likely to cause hardship and that of itself should not amount to an exceptional reason.

32 Exceptional reasons may be found where:

(i) The defendant did not know the nature of what he was drinking either because he did not know that he was drinking alcohol, or because he knew he was drinking alcohol but has been deceived or misled as to the nature of the drink.

(ii) The defendant responds to a sudden medical emergency, although consideration should be given to the fact that any such genuine emergency may give rise to a complete defence. In any event, case law has shown that in E&W it is almost certain that before the court will classify an emergency as a special reason, there must be evidence that there was no alternative but for the defendant to drive, that he must have explored every

reasonable alternative before driving, and that the emergency must be genuine and not manufactured.

(iii) Shortness of distance driven may amount to an exceptional reason particularly where the defendant has driven the car at the request of a third party.

Practice and procedure

33 (i) The onus of proof of establishing exceptional reasons lies on the defendant (*Jones* v. *English* (9), *Owen* v. *Jones* (10));

(ii) The standard of proof is the balance of probabilities (*Pugsley* v. *Hunter* (11));

(iii) Exceptional reasons must be supported by evidence and not mere assertions by counsel (*Jones* v. *English*, *Brown* v. *Dyerson* (2));

(iv) The evidence upon which the court acts must be admissible evidence not hearsay (*Flewitt* v. *Horvath* (7));

(v) The finding of exceptional reasons should not automatically result in a decision not to disqualify, having found exceptional reasons the court should then consider whether a downward adjustment is appropriate and to what extent;

(vi) In the event that the court finds exceptional reasons, they should be stated in open court.

34 Finally, before I leave the law and turn to the particular facts of this appeal, I must deal with a final matter. Counsel for the appellant advanced the submission that a driving disqualification formed part of a sentence and, as such, was subject to the usual reduction for a guilty plea.

35 The Sentencing Council's "Reduction in Sentence for a Guilty Plea Definitive Guideline" ("the Reduction Guideline") sets out the framework, in accordance with s.144 of the Criminal Justice Act 2003, for the reduction in sentence following an early guilty plea.

36 The Reduction Guideline specifically makes reference to the fact that ("Key Principles," at p.4)—

> "[t]he guideline applies only to the punitive elements of the sentence and has no impact on ancillary orders including orders of disqualification form driving."

37 There is no dispute that a driving offence ranks as a criminal conviction, and I immediately recognize that a disqualification has a punitive aspect to it, in that it imposes a restriction on the liberty of the offender to drive a motor vehicle. That said, in my view the true purpose of a disqualification is not to punish the offender (that is achieved through

the imposition of fines, community service orders or custody) but rather to protect the public from irresponsible drivers, at least during the period of disqualification. To that extent, a disqualification must be an ancillary order and I am fortified in my view by the Reduction Guideline affording it such recognition.

38 Mr. Finch submits that although the Reduction Guideline prohibits a court in E&W from reducing the disqualification part of the sentence, the same prohibition should not apply to Gibraltar. He submits that in E&W a reduction of the disqualification period is not possible because disqualification is mandatory and therefore a reduction for an early guilty plea would artificially reduce the statutory minimum, and the aim of the legislature would be defeated. He further submits that, given that in Gibraltar disqualification is not mandatory, there is no need to apply a prohibition against the reduction of a disqualification period.

39 That argument might have some merit were the court in E&W unable to disqualify for less than 12 months (or 6 months) in any circumstances but, as discussed, that is not the case and, appropriate reasons being present, the court in E&W has a discretion to disqualify for a lesser period or indeed not at all. Despite this, the Reduction Guideline prohibits a reduction of the disqualification period for an early guilty plea. In my view, disqualification orders are highly fact sensitive and, whether in E&W or in Gibraltar, the court is required to give very careful consideration to individual circumstances surrounding each case and adjust the disqualification period accordingly. In those circumstances, to reduce a period of disqualification further would on the one hand potentially reduce the period to such a low level as to make it of little deterrent/protective value and, on the other hand, could foreseeably result in double counting. An order ancillary to the punitive part of the sentence in my view should not attract the statutory reduction, not because disqualification is mandatory or discretionary, but because it is ancillary, and that is reflected in the thinking process behind the Reduction Guideline.

The facts

40 For the reasons given I find that the Additional Stipendiary Magistrate was correct upon the facts of this case in identifying the starting point of 17 months as the period of disqualification. No adjustment was made to that and the appellant was disqualified for 17 months. I now turn to consider whether that disqualification period should be subject to any degree of reduction.

41 The mitigation put before the Magistrates' Court was that:

(i) the driving distance was small because the defendant tried to move the car from its stationary position where no parking was allowed

overnight, to another parking which would infringe no parking restrictions;

(ii) the defendant expressed remorse;

(iii) the defendant had a relevant previous conviction from 2008 but given that it exceeded 10 years it should not be taken into account;

(iv) the defendant was of good character;

(v) the defendant cooperated with police;

(vi) the defendant entered an early guilty plea;

(vii) the defendant had started a business which failed and as a result he had incurred a debt of £15,000 and this was causing him depression and anxiety;

(viii) the defendant is employed as a ship technical superintendent and he requires a driving licence to attend to ships in Spain. Counsel made reference to the case of *Cozanni* (12) and submitted that the present case was an exceptional case because the defendant stood to lose his job "if his licence is removed for a significant period or if it's removed at all . . ."

42 Whilst some or all of that mitigation might be relevant to the punitive part of the sentence, in this case the fine, which is not the subject of an appeal, only points (i), (vii) and (viii) could potentially be capable of qualifying as exceptional reasons. Points (vii) and (viii) I shall take together as essentially they are examples of the same complaint, *i.e.* hardship. I preface the exercise I am about to embark upon by pointing out that it is most unfortunate that neither the Magistrates' Court nor this court has been referred to any authorities in support of the propositions advanced. In order to give the matter the thorough consideration it requires, I have had no option but to embark upon the exercise myself, because without guidance from authorities it is not possible to make a proper decision simply on entreaties from counsel.

Short driving distance

43 In addition to the mitigation put before the Magistrate's Court, Mr. Finch reinforces the position that "the driving distance was exceedingly small, and it was only due to having to remove the vehicle to avoid committing an offence if left in its location."

44 In *James* v. *Hall* (8), it was held that shortness of distance driven by a defendant could amount to a special reason, but it has since been established that distance of itself is not the only determining factor to be taken into account. The Divisional Court in *Chatters* v. *Burke* (3) held that there are seven matters to be taken into account when the court is

considering the issue of shortness of distance driven as a reason for lowering the disqualification period or not disqualifying at all:

(i) The distance the vehicle was driven;

(ii) The manner in which it was driven;

(iii) The state of the vehicle;

(iv) Whether the driver intended to go further;

(v) The road and traffic conditions prevailing at the time;

(vi) Whether there was a possibility of danger by coming into contact with other road users or pedestrians;

(vii) The reason for which the car was being driven.

45 *Chatters* v. *Burke* must be considered in light of the more recent decision of the Divisional Court in *D.P.P.* v. *Humphries* (5), in which it was held that whilst *Chatters* v. *Burke* provided useful guidance it did not compel any particular conclusion in any particular case.

46 Further guidance can be drawn from *D.P.P.* v. *Bristow* (4), where it was held that the key question a court should ask itself was ([1998] R.T.R. at 109):

> "what would a sober reasonable and responsible friend of the defendant, present at the time, but himself a non-driver and thus unable to help, have advised in the circumstances: drive or not drive?"

47 Submitted for the appellant that the reason the car was being driven was because it was parked in an area which would have attracted a parking fine had it been left *in situ*. The offence occurred at 5.25 a.m. Neither this court nor the lower court was provided with evidence of where the car was originally parked, or at what time such parking would have become illegal. It is therefore not possible to assess whether the appellant's perceived need to move the car was pressing. In any event, looked at objectively, attempts to avoid a parking ticket cannot ever justify driving whilst under the influence of alcohol. It is certainly not an emergency and as the court pointed out in *D.P.P.* v. *Oram* (6), the difficulty the appellant found himself in was entirely of his own making. In addition it is hard to justify an action which avoids the commission of a minor traffic infringement by the commission of a serious offence. It was not imperative that this car be moved; essentially, the appellant's decision to drive was an ill-conceived choice, but a choice nevertheless.

48 There was and is no evidence before the court of the actual or estimated distance that the vehicle was observed being driven, however it appears from the summary of facts that the distance the appellant was seen

to drive does not appear as "minimum" as was pleaded on his behalf. I remind myself that he was observed:

> "driving on Queensway Road, when after allowing the Police vehicle to pass he took a sharp turn onto Devil's Tongue Road. Officers then turned around back onto the Waterport Roundabout only to see the same vehicle still driven by the Defendant waiting by the roundabout again, this time on the left hand lane. The Defendant turned back in the direction of Montagu Gardens again before again making a sharp right turn into Devil's Tongue Road. Officers then followed onto the same road and found the Defendant's vehicle stopped as the Defendant opened the driver's side door."

49 I do not know if the distance the appellant was observed driving was particularly short but, even if it was, his intention was clearly to drive on until he found parking and if the distance driven was "short," that was at least partly due to the fact that he was stopped before he could go further. In *D.P.P.* v. *Oram* (6), the defendant, who was over the prescribed limit, had driven his van one-fifth of a mile from the pub to his house along a residential cul de sac because he did not want to leave the van parked outside the pub for fear over the safety of leaving his tools in the van overnight. The court held that the fact that the driver had driven only a short distance could not alone justify a finding of special reasons, otherwise in every case involving a short driving distance the driver would avoid disqualification. All the circumstances would need to be looked at to see if there was some unforeseen emergency. In any event applying the reasonable and sensible friend test in *D.P.P.* v. *Bristow* (4), no such friend would have advised the defendant to drive. The court held there were no special reasons.

50 I have not been given the information as to where the defendant's car was originally parked and how far along he had driven from the original parking to the point where he was observed and stopped by police. However, not unreasonable to suppose that immediately before he was first observed, he had driven from the original spot where the car was parked to the area where he was observed. *R.* v. *McIntyre* (14) is authority for the proposition that account has to be had not only of the driving which has been observed to have taken place but also the act of driving which preceded it.

51 With regard to the manner of driving, evident from the summary of facts that the appellant was driving along Queensway, turned onto Devil's Tongue Road, turned back onto Queensway and back onto Devil's Tongue Road. The manner of the appellant's driving was of concern to the police officers because as is evident from the transcript, it was the appellant's execution of two sharp turns which alerted the police and caused them to approach.

52 This was not a case of moving the car from one parking space within a car park to another space within the same car park, which might have reduced the possibility of the danger of coming into contact with other vehicles or road users. It is true that the offence occurred early in the morning, when one would suppose there to be less cars and pedestrians on the road than later in the day. I have no evidence of the road and traffic conditions prevailing at the time but for the reasons stated I will give the defendant the benefit of the doubt and assume there was not a great deal of traffic on the road at the time. That said, in *R.* v. *Mullarkey* (15), the court found there were no special reasons where the defendant drove 400 yards after midnight in winter where there was little traffic about.

53 The appellant was twice over the prescribed limit, there was no emergency, simply a desire to avoid a possible parking ticket. Applying the test in *D.P.P.* v. *Bristow* (4), a reasonable, responsible and sober friend would have advised the appellant not to drive. In the circumstances I find that the shortness of distance driven and the reasons why the appellant drove do not amount to exceptional reasons.

Hardship

54 Mrs. Hawkins in the Magistrates' Court stated that in the last year the appellant had opened a restaurant which had failed and he had incurred a debt of £15,000, and as a result—

> "he became depressed and even suffered from anxiety and required medical assistance . . . this man will lose his job if his licence is removed for a significant period of time or if its removed at all. He will remain indebted to the suppliers for his previous business and it will have a detrimental effect on him to the extent that it could lead to him suffering anxiety and depression again. He's already experiencing this just from coming to court."

Mr. Finch submits that—

> "the Appellant's livelihood is at stake and this was and still is an important consideration; he may keep his job with a lesser disqualification but 17 months puts this prospect beyond the pale."

55 There was and is no evidence before the court of the appellant's indebtedness to his suppliers, of whether there was an original debt and, if there was, whether that debt has been reduced in any respect since it was incurred.

56 In support of the submission that the appellant was to lose his job if disqualified, Mrs. Hawkins provided the lower court with a letter ostensibly written by a Mark Casiaro, crew manager, on company letter headed paper, but not signed by the author. The letter reads as follows:

> "Anthony's role as a Ship Technical Superintendent has a unique role where he needs to be attending all our fleet's ships daily. Peninsula Petroleum Ltd has a total of 9 ships within the bay of Gibraltar, Algeciras, Malaga and Barcelona. His prime motive is to visit all these ships on a monthly basis as part of his inspection routine to keep up the maintenance of our ships up to standards. Peninsula Petroleum having the head technical office located in Palmones, Calle Oceano Atlantico and is to carry out most of his works in Palmones."

57 When the Additional Stipendiary took issue with the fact that the letter made no reference to the appellant losing his job in the event of disqualification, Mrs. Hawkins referred to the job description attached to the letter for support of her submission that "he has to travel so if he can't get in his vehicle to travel he will lose his job."

58 With respect to counsel, there was and is no evidence before the court that Peninsula Petroleum would terminate the defendant's contract upon disqualification from driving. The fact that he needs to attend the company's ships daily in Gibraltar, Algeciras, Malaga and Barcelona does not translate into him having to drive himself to those locations. In addition, the job description relied on makes no reference to the requirement of the post holder having a valid driving licence, or to the post holder having to drive himself to the relevant vessels. Similarly there is no evidence that the appellant may keep his job in the event of a short period of disqualification but not if he is disqualified for 17 months. In the circumstances, all that is before the court are mere assertions by counsel, and the appellant has failed to establish on a balance of probabilities, or at all, that he will lose his employment if he is disqualified from driving. Given he has failed to establish that, he cannot argue that any hardship will flow from the disqualification.

59 Similarly, there is no evidence before the court that the appellant has suffered or is suffering from depression and/or anxiety, nor is there evidence that the loss of a licence is likely to cause the appellant anxiety and depression at all, or at a level which would qualify as exceptional reasons.

60 In the circumstances, it is not necessary for me to consider whether the appellant would suffer exceptional hardship as a result of the confiscation of his licence. That said, I venture to say for the avoidance of doubt that even if there had been evidence before me that the appellant was to lose his employment upon disqualification, there was, and is, no evidence that the loss of that job would cause more hardship than is normally suffered as a result of loss of employment. Invariably loss of employment will cause hardship but for that to operate as an exceptional reason there must be evidence that the hardship is exceptional, and that is a matter of

fact and degree to be determined in each case. In *Brennan* v. *McKay* (1), the court upheld a penalty points disqualification of 6 months in respect of a taxi driver who was likely to lose his job upon disqualification, who would have difficulty in finding another job, and whose family would suffer hardship as a result of his unemployment.

61 For the reasons given, I find that the Additional Stipendiary Magistrate was right to disqualify the appellant from driving for a period of 17 months, and the appeal is dismissed.

Appeal dismissed.
