[2021 Gib LR 521]

BUHAGIAR v. R.

CORREA v. R.

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 14th, 2021

2021/GCA/11

Road Traffic—driving with excess alcohol—sentence—disqualification—in absence of Gibraltar guidelines, appropriate for Magistrates' Court to adopt starting points and ranges set out in English Sentencing Guidelines based on level of alcohol—not undue fetter on discretion conferred by Road Traffic Act 2005, s.71(2)

The appellants were each charged with driving a motor vehicle with alcohol concentration above the prescribed limit.

The appellants in the two appeals each pleaded guilty to driving a motor vehicle with alcohol concentration above the prescribed limit under s.63 of the Traffic Act 2005. Their alcohol concentrations were over twice the legal limit.

The appellant Buhagiar contended that he had driven his vehicle for a relatively short distance, to find lawful parking, at a quiet time, his driving was not in fact impaired, no damage was caused, he had no relevant recent convictions and if he were disqualified from driving he might lose his job. He was sentenced in the Magistrates' Court to a fine of £600 and was disqualified from driving for 17 months. His appeal against the disqualification order was dismissed by the Supreme Court.

The appellant Correa had been employed as a bus driver and if disqualified she would lose her job. She lived with her parents. She had no previous convictions and was remorseful. She was fined £800 and disqualified from driving for 18 months. On her appeal, the Supreme Court reduced the fine to £500 and the period of disqualification to 17 months.

Section 71 of the Traffic Act 2005 provided:

"Discretionary disqualification.

71.(1) This section shall apply where a person is convicted of an offence contrary to sections 62, 63, 63A, 63B or 65(5).

(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."

In the Supreme Court, the judge applied the starting points and guidelines for disqualification which applied in England and Wales for such offending. In England and Wales, in cases of driving with excess alcohol, disqualification for a minimum period of 12 months was mandatory unless there were "special reasons" (s.34 of the Road Traffic Offenders Act 1988) to the contrary. In s.35 of that Act, which dealt with totting procedures by reference to the penalty points procedure applicable in England and Wales but which had no counterpart in Gibraltar, disqualification was to be for not less than the minimum period unless the court was satisfied that there were grounds for mitigating the normal consequences of conviction. Sentencing guidelines had been promulgated by the Sentencing Council of England and Wales. They set out levels of seriousness and ranges of disqualification by reference to the degree of intoxication.

The judge had regard to the judgment of the Chief Justice in *R*. v. *Cozanni* in which he said that a conviction in Gibraltar should almost invariably attract a period of disqualification in line with the English guidelines. The judge stated that 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. When dealing with discretion, the judge said that once the starting point was identified in accordance with the guidelines, the court had a discretion whether to disqualify for that period, for a longer or shorter period, or not at all. The judge referred to the provisions in the Road Traffic Offenders Act and took together special reasons (s.34 of the Act) and mitigating circumstances (s.35) and compendiously referred to them as "exceptional reasons." The judge then set out a non-exhaustive summary as to what might or might not amount to "exceptional reasons."

The appellants submitted *inter alia* that the position in England and Wales, where disqualification was obligatory for offences of driving over the prescribed limit in the absence of special reasons, was not comparable to that in Gibraltar, where the courts had discretion under s.71(2) of the Traffic Act 2005. They submitted that the judge's approach placed an undue and unwarranted fetter on the broad discretion conferred by s.71(2).

The prosecution submitted that the judge had not imposed any undue fetter by reference to s.71(2) and that the policy considerations applicable in England and Wales for disqualification, and for a minimum period, in cases of this kind should equally apply in Gibraltar, as the judge had held. The judge had properly exercised her power under s.484(4) of the Criminal Procedure and Evidence Act 2011 and had provided valuable guidance to the lower courts.

Held, dismissing the appeals:

(1) It was appropriate for the judge to have indicated a starting point and consequent ranges for cases of this sort. In the absence of any guidelines issued by the Chief Justice, judicial guidance as to the appropriate starting

point and ranges was appropriately given. Although flexibility was usually very desirable in the imposition of sentences and remedies in many contexts and s.71(2) of the Traffic Act 2005 conferred flexibility, at the same time, consistency of approach was also desirable and important. There would otherwise be a risk that sentencing in cases of this kind might become arbitrary and erratic (para. 29).

(2) The court would uphold the judge's decision that an appropriate starting point in cases of this kind was for a disqualification period of 12 months and also that it was appropriate to have regard to the guidelines issued by the Sentencing Council in England and Wales. The court agreed with the judge that the policy considerations relating to disqualification in this context applied as much in Gibraltar as in England and Wales. Driving over the prescribed limit was a serious matter, carrying the real risk of death or injury to other road users or pedestrians as well as to the driver. The seriousness of such offending, the need for deterrence and the protection of the public had to be appropriately marked both in the penalty and in the period of disqualification. Adopting a starting point of 12 months by reference to that applicable in England and Wales was not incorrect or unjustified. Moreover, although the Chief Justice had not issued any formal guidelines for this purpose in Gibraltar, the judge was entitled to have regard to the fact that the Chief Justice had essentially taken the approach in the case of *R.* v. *Cozanni* that the judge was now taking in the present cases. The judge's approach was not an unwarranted fetter on the broad discretion conferred by s.71(2) of the Traffic Act 2005. Appropriate discretion was retained by the courts in Gibraltar. Guidelines did not have to be followed rigidly and they could be departed from if justified in the particular circumstances of a case (paras. 30–33).

(3) The court added a qualification to the judge's approach. The judge took what would in England and Wales be "special reasons" for the purposes of s.34 of the Road Traffic Offenders Act 1988 and "mitigating circumstances" as modified by s.35(4) of the Act and compendiously styled them as "exceptional reasons." She then set out her proposed guidance to the Magistrates' Court by reference to those "exceptional reasons." The court did not agree with that aspect of the judge's judgment, which would run counter to the broad discretion conferred by s.71(2) of the Traffic Act 2005 and the magistrates' entitlement under s.71(2) to assess what were the "reasonable circumstances" to be taken into account in each case and the weight to be attached to such circumstances. The notion of "special reasons" and the limitations on "mitigating circumstances" as set out in the English legislation had no reflection in the provisions of s.71(2) of the Traffic Act 2005. Subject to relevance, there were no legal limits on a magistrate's assessment of "reasonable circumstances" in any particular case. It followed that exceptionality was not a legal test under s.71(2). In relation to hardship, there was no legal requirement in Gibraltar that hardship must be exceptional before it could properly be taken into account in cases of disqualification. Magistrates were free always to take hardship

into account and to the extent that the judge said that they could not do so unless the hardship was exceptional, that went too far. Whilst hardship was ultimately a matter for the assessment of the magistrate as part of the evaluation of the overall circumstances of a particular case, magistrates might well be disinclined when considering "all reasonable circumstances" to attach much weight to hardship unless it was more than might be described as a norm. In addition, perhaps needless to say, even where magistrates find that there would be hardship which could properly be described as "exceptional" it would by no means follow that they should decline to disqualify although it might be relevant to the period of disqualification (paras. 34–36).

(4) In respect of the appellant Buhagiar, the judge was right to dismiss his appeal against disqualification for 17 months. He had been over twice the legal limit. In all the circumstances there was no proper basis for interfering with the evaluations by the magistrate and the judge. Indeed, it might be noted that 17 months' disqualification was at the bottom of the relevant range indicated under the guidelines. In respect of the appellant Correa, she had been significantly over the prescribed limit and, according to police observations, not fully in control of a motorcycle driven on a public road at night. Although significant hardship would potentially be caused to her by reason of losing her job if disqualified, in the circumstances of this case the magistrate and the judge were entitled to take the view that the hardship was not of such an order as to require that no disqualification be imposed or to require the court to go below the indicated range. No viable challenge could be made to the period of 17 months' disqualification. The appeals would therefore be dismissed (paras. 39–43).

Cases cited:

(1) *R.* v. *Cozanni*, CC 22 of 2017, Supreme Ct., July 11th, 2017, considered.

(2) *R.* v. *Wickens* (1958), 42 Cr. App. R. 236, referred to.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.484(4): The relevant terms of this subsection are set out at para. 16.

Traffic Act 2005, s.71: The relevant terms of this section are set out at para. 7.

Road Traffic Act 1988 (c.52), s.5: The relevant terms of this section are set out at para. 9.

Road Traffic Offenders Act 1988 (c.53), s.34: The relevant terms of this section are set out at para. 10.

s.35: The relevant terms of this section are set out at para. 11.

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C. Ramagge (instructed by the Office of Criminal Prosecutions and Litigation) for the respondent against the appellant Buhagiar;

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P. Canessa (instructed by the Office of Criminal Prosecutions and Litigation) for the respondent against the appellant Correa.

1 **DAVIS, J.A.:**

Introduction

Each of these two appeals has the same set of facts and circumstances. Both, however, involve one common issue. That can be summarized in this way. In the context of disqualification from driving under s.71(2) of the Traffic Act 2005 on a conviction for driving with an alcohol concentration above the prescribed limit, is it appropriate to apply in Gibraltar the starting point and guidelines for disqualification which are applicable in England and Wales for such offending? The sentencing judge, Ramagge Prescott, J. decided in each case, on appeal from the Magistrates' Court, that it was appropriate.

2 The appellants say that she was wrong so to hold. They contend that such an approach cuts against the wide discretionary regime applicable to such matters in Gibraltar under the express provisions of s.71 of the Traffic Act 2005, and that the primary legislation in Gibraltar is sufficiently different from the primary legislation in England and Wales as to make it inappropriate to have regard to the starting point and sentencing guidelines applicable in England and Wales for an offence of driving over the prescribed limit.

Facts

3 The background facts can be summarized as follows. So far as the appellant Buhagiar is concerned, the position is this. At around 05.25 hours on Monday, February 24th, 2020, the appellant was driving his Audi car in the area of Queensway Road when, after allowing a 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. He then turned back in the direction of Montagu Gardens, before again making a sharp right turn into Devil's Tongue Road. Officers then followed the car onto the same road and found that it had stopped. The appellant opened the driver's side door. On his speaking with the officers, it was clear that his speech was slurred and, as it was put, alcoholic beverages emanated from his breath. Officers then requested him to undertake a roadside breath test. He complied, providing a sample of 72 micrograms per 100 millilitres of breath. He was then cautioned and arrested on suspicion of driving a motor vehicle whilst over the prescribed limit of alcohol, to which he made no reply. The appellant was then brought to New Mole House Police Station where he provided two further samples, with 71 and 72 micrograms per 100 millilitres of breath. The applicable limit

is 35 micrograms per 100 millilitres of breath; the appellant therefore was just over twice the prescribed limit. He then was charged with an offence under s.63 of the Traffic Act 2005; and in due course he pleaded guilty.

4 The following points in particular were advanced in the court below on his behalf. The car had been driven by him for a relatively short distance and over a relatively short period of time, in order to find some lawful parking. Moreover, he was driving at a time when the streets and pavements were empty. His driving was not in fact impaired and no damage to anyone or anything was caused. He had no relevant recent convictions, although there was one dating back to 2008. Further, his financial position was very straitened and moreover, if he was disqualified from driving, he potentially stood to lose his job as a ship technical superintendent, a job which, amongst other things, required him to make journeys by road to Spain. Further, the appellant throughout had cooperated with the police and had expressed remorse, which was wholly consistent with his early plea. In the result, he was sentenced on August 12th, 2020 in the Magistrates' Court to a fine of £600 and was disqualified from driving for a period of 17 months. On his appeal, Ramagge Prescott, J., by a reserved decision dated December 7th, 2020 (reported at 2020 Gib LR 445), dismissed his appeal against the disqualification order.

5 Turning to the case of the appellant Correa, the factual background, in summary, is this. In the early hours of November 28th, 2020, the appellant's motorcycle was observed by the police on Reclamation Road. The motorcycle was, on their observation, being driven very slowly and was swaying from side to side. It was being ridden by the appellant. When stopped, she showed clear signs of being under the influence of alcohol, her eyes were glazed and her breath smelt strongly of drink. When tested at the roadside there was a reading of 72 micrograms per 100 millilitres of breath. Two subsequent tests taken at the police station gave a lowest reading of 81. In due course, she pleaded guilty to an offence under s.63 of the Traffic Act 2005.

6 On her behalf, the following points in particular had been advanced. She had for the previous 6 years been employed as a bus driver, with an exemplary work record which included, in the difficult Covid times, being trusted to take doctors and nurses to various institutions; and she since then had been driving children to school as well as transporting ship's crews from time to time. Her ambition was to join the Gibraltar Bus Company. She was currently suspended by reason of the prosecution and if disqualified she would lose her current job and her long term ambitions would also be greatly affected. Further, she had taken out a car loan guaranteed by her father (with whom and her mother she lived) and the loss of her job would pose financial problems for her, in particular, but not only, with regard to the car loan. Disqualification also would impact on her

ability to drive her father, who has health issues. Further, the proceedings had caused her significant depression; and further still she had no previous convictions and, consistently with her early plea, was wholly remorseful. In the result, she was sentenced on April 19th, 2021 at the Magistrates' Court to a fine of £800 and was disqualified from driving for a period of 18 months. Upon her appeal, Ramagge Prescott, J. reduced her fine to one of £500 but she refused to set aside the making of the disqualification order, although she did reduce the period of disqualification by one month to a period of 17 months.

The law

7 In order to explain the judge's overall approach, it is necessary to refer to various statutory provisions. The operative statute is the Traffic Act 2005. In particular, s.71 of that Act provides as follows:

> "**Discretionary disqualification.**
>
> 71.(1) This section shall apply where a person is convicted of an offence contrary to sections 62, 63, 63A, 63B or 65(5).
>
> (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."

8 The overall scheme, therefore, of this section is that in the case of a first time conviction for a specified offence, whether to disqualify is in the discretion of the court and, if disqualification is ordered, the period of disqualification is also in the discretion of the court. In the case of a subsequent conviction within 6 years, however, disqualification is mandatory but the period of disqualification remains within the discretion of the court. I should add that, to my mind, the phrase "taking all reasonable circumstances into account," albeit derived from predecessor legislation, seems to me, as a matter of language, a slightly curious one: although, as I gather, it is also used in some other contexts in Gibraltarian legislation. But in my view its overall meaning is clear enough and can safely be taken in the present context to connote taking into account all relevant circumstances which are reasonably to be taken into account; and those circumstances will comprehend any relevant circumstances which may aggravate the offending and any relevant circumstances which may mitigate the offending.

9 In view of the approach taken by Ramagge Prescott, J. and the criticisms made of that approach, it is necessary for me to refer to the position for

disqualification with regard to driving when over the prescribed limit that pertains in England and Wales. Under s.5 of the Road Traffic Act 1988 this is provided:

"**5 Driving or being in charge of a motor vehicle with alcohol concentration above prescribed limit.**

(1) If a person—

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other 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.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

(3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle."

10 By s.34 of the Road Traffic Offenders Act 1988 this is provided:

"**34 Disqualification for certain offences.**

(1) Where a person is convicted of an offence involving obligatory disqualification, the court must order him to be disqualified for such period not less than twelve months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

(1A) Where a person is convicted of an offence under section 12A of the Theft Act 1968 (aggravated vehicle-taking), the fact that he did not drive the vehicle in question at any particular time or at all shall not be regarded as a special reason for the purposes of subsection (1) above.

(2) Where a person is convicted of an offence involving discretionary disqualification, and either—

(a) the penalty points to be taken into account on that occasion number fewer than twelve, or

(b) the offence is not one involving obligatory endorsement,

the court may order him to be disqualified for such period as the court thinks fit.

(3) Where a person convicted of an offence under any of the following provisions of the Road Traffic Act 1988, that is—

(aa) section 3A (causing death by careless driving when under the influence of drink or drugs),

(a) section 4(1) (driving or attempting to drive while unfit),

(b) section 5(1)(a) (driving or attempting to drive with excess alcohol), F4 . . .

(ba) section 5A(1)(a) and (2) (driving or attempting to drive with concentration of specified controlled drug above specified limit),

(c) section 7(6) (failing to provide a specimen) where that is an offence involving obligatory disqualification,

(d) section 7A(6) (failing to allow a specimen to be subjected to laboratory test) where that is an offence involving obligatory disqualification;

has within the ten years immediately preceding the commission of the offence been convicted of any such offence, subsection (1) above shall apply in relation to him as if the reference to twelve months were a reference to three years.

(4) Subject to subsection (3) above, subsection (1) above shall apply as if the reference to twelve months were a reference to two years—

(a) in relation to a person convicted of—

(i) manslaughter, or in Scotland culpable homicide, or

(ii) an offence under section 1 of the Road Traffic Act 1988 (causing death by dangerous driving), or

(iia) an offence under section 1A of that Act (causing serious injury by dangerous driving), or

(iib) an offence under section 3ZC of that Act (causing death by driving: disqualified drivers), or

(iic) an offence under section 3ZD of that Act (causing serious injury by driving: disqualified drivers), or

(iii) an offence under section 3A of that Act (causing death by careless driving while under the influence of drink or drugs), and

(b) in relation to a person on whom more than one disqualification for a fixed period of 56 days or more has been imposed within the three years immediately preceding the commission of the offence.

(4A) For the purposes of subsection (4)(b) above there shall be disregarded any disqualification imposed under section 26 of this Act or section 147 of the Powers of Criminal Courts (Sentencing) Act 2000 or section 164 of the Sentencing Code or section 223A or 436A of the Criminal Procedure (Scotland) Act 1975 (offences committed by using vehicles) and any disqualification imposed in respect of an offence of stealing a motor vehicle, an offence under section 12 or 25 of the Theft Act 1968, an offence under section 178 of the Road Traffic Act 1988, or an attempt to commit such an offence.

(4AA) For the purposes of subsection (4)(b), a disqualification is to be disregarded if the period of disqualification would have been less than 56 days but for an extension period added pursuant to—

(a) section 35A or 35C,

(b) section 248D of the Criminal Procedure (Scotland) Act 1995, or

(c) section 147A of the Powers of Criminal Courts (Sentencing) Act 2000 or section 166 of the Sentencing Code.

(4B) Where a person convicted of an offence under section 40A of the Road Traffic Act 1988 (using vehicle in dangerous condition etc.) has within the three years immediately preceding the commission of the offence been convicted of any such offence, subsection (1) above shall apply in relation to him as if the reference to twelve months were a reference to six months.

(5) The preceding provisions of this section shall apply in relation to a conviction of an offence committed by aiding, abetting, counselling or procuring, or inciting to the commission of, an offence involving obligatory disqualification as if the offence were an offence involving discretionary disqualification.

(5A) In relation to Scotland, references in this section to the court include the justice of the peace court.

(6) This section is subject to section 48 of this Act."

11 Section 35 of the Road Traffic Offenders Act 1988 then deals with totting procedures by reference to the penalty points procedure applicable in England and Wales but which has no counterpart in Gibraltar. In that regard, s.35(1) provides as follows:

"**35 Disqualification for repeated offences.**

(1) Where—

(a) a person is convicted of an offence to which this subsection applies, and

(b) the penalty points to be taken into account on that occasion number twelve or more,

the court must order him to be disqualified for not less than the minimum period unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified."

The applicable "minimum period" is then set by the provisions of s.35(3). Section 35(4) then imposes significant limitations on what may count as "mitigating circumstances," in particular, but not only, as to hardship. Section 35(4) reads as follows:

"(4) No account is to be taken under subsection (1) above of any of the following circumstances—

(a) any circumstances that are alleged to make the offence or any of the offences not a serious one,

(b) hardship, other than exceptional hardship, or

(c) any circumstances which, within the three years immediately preceding the conviction, have been taken into account under that subsection in ordering the offender to be disqualified for a shorter period or not ordering him to be disqualified."

12 Mr. Gomez, on behalf of the appellant Correa, also drew attention to s.34A of the Road Traffic Offenders Act 1988 which provides that a period of disqualification imposed under s.34 shall, if the court so orders, be reduced by a period of not less than 3 months or more than one quarter of the unreduced period if the offender satisfactorily completes the appropriate specified course. As he points out, there is no such corresponding provision in the Gibraltarian legislation.

13 Turning to the provisions of Schedule 2 of the Road Traffic Offenders Act 1988, it is there provided that, amongst other offences, obligatory disqualification attaches to the summary offence of driving or attempting to drive with an excess of alcohol, contrary to s.5(1)(a) of the Road Traffic Act 1988. (Disqualification is, however, discretionary for offences of being in charge contrary to s.5(1)(b).) I perhaps might add that in terms of the available maximum custodial penalty, the sentence available under the

legislation of England and Wales (6 months and 3 months respectively for the offences referred to in s.5(1) of the Road Traffic Act 1988) corresponds to the maximum custodial sentences available in Gibraltar for corresponding offending under s.63.

14 Put shortly, therefore, in England and Wales in cases of driving with excess alcohol both disqualification and a minimum period of 12 months are mandatory unless there are "special reasons" to the contrary. In totting cases, the steer is also towards a disqualification for the applicable minimum period unless the court, having regard to the circumstances, is satisfied that there are grounds for mitigating the normal consequences of conviction as provided in s.35 and with the restrictions applicable to mitigating circumstances as provided in s.35(4).

15 Sentencing guidelines have been promulgated by the Sentencing Council of England and Wales for, amongst other offences, offences under s.5(1)(a) of the Road Traffic Act 1988. The Guidelines, amongst other things, set out a series of mitigating factors and aggravating factors. They also set out levels of seriousness, and ranges for disqualification, by reference to the degree of intoxication. Thus in breath analysis cases, readings in excess of 120 will, for first time offenders, attract a disqualification range of 29 to 36 months; readings in excess of 90 will attract a range of 23 to 28 months; readings in excess of 60 will attract a range of 17 to 22 months; and readings in excess of 36 will attract a range of 12 to 16 months. This court gathers, from what we were told at the hearing, that Magistrates' Courts in Gibraltar in practice often have regard to these aspects of the Guidelines (that is to say, as to levels of intoxication) in assessing seriousness. The obvious point is that the greater the degree of intoxication the longer the period of any disqualification is likely to be.

16 Finally, in this context, I should refer to the provisions of s.484 of the Criminal Procedure and Evidence Act 2011. That empowers the Chief Justice in the circumstances there specified, and after consultation, to issue sentencing guidelines in Gibraltar. Section 484(4) then provides as follows:

> "(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)."

We were told at the hearing that thus far it apparently has not been the practice of the Chief Justice to issue such guidelines in criminal cases; and certainly none has been issued with regard to cases of driving over the prescribed limit.

The judgment of the judge

17 Turning to the judgment of Ramagge Prescott, J. in the case of Buhagiar she reserved her decision. It is evident that she had thereafter very carefully considered and researched the matter. Moreover, in deciding on the approach which was properly to be adopted she had regard, as indeed had the Magistrate in the court below, to the statements of Dudley, C.J. himself in the case of *R.* v. *Cozanni* (1). In the course of his decision in that case, the Chief Justice had said this (CC 22 of 2017, at 3):

> "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 disqualify 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."

18 That approach of the Chief Justice was, in effect, endorsed by Ramagge Prescott, J. The argument advanced before her had been, in essence, that the statutory provisions in England and Wales were materially different, in particular in that, by s.34(1) of the Road Traffic Offenders Act 1988, a minimum period of 12 months disqualification was indicated, which is entirely in contrast with the provisions of s.71(2) of the Traffic Act 2005, and moreover that period was mandatory in England and Wales absent "special reasons." In rejecting that argument, Ramagge Prescott, J. held that the courts in Gibraltar should follow the approach set in the legislation and in the Guidelines extant in England and Wales. She acknowledged the differences in the wording between s.34 of the Road Traffic Offenders Act 1988 and s.71(2) of the Traffic Act 2005. But in the course of her judgment she, amongst other things, said this (2020 Gib LR 445, at para. 16):

> "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.'"

19 She then went on to say this (*ibid.*, at para. 17):

> "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."

20 Ramagge Prescott, J. (*ibid.*, at para. 18) then understandably pointed to the very serious nature and potentially very serious consequences of driving while over the prescribed limit. She went on to say this (*ibid.*, at paras. 19–20):

> "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 . . .
>
> 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 When dealing with discretion, amongst other things, the judge said this (*ibid.*, at para. 22):

> "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."

22 The judge then went on to refer in more detail to the provisions applicable in England and Wales. In effect, she took together what in England were for the purposes of s.34 styled "special reasons" and for the purposes of s.35 styled "mitigating circumstances" and, having so taken them together, she then compendiously referred to them in her decision as "exceptional reasons." Thereafter, she set out a long, non-exhaustive, summary of what may or may not amount to what she called "exceptional reasons." In doing so, she also set out in prescriptive terms what exceptional reasons could not be; and to a considerable extent in doing so she reflected the restrictive provisions of s.34 and s.35(4) of the Road Traffic Offenders Act 1988. She also gave some examples of what "exceptional reasons" may be.

23 In her extempore judgment dated May 20th, 2021, in the subsequent case of the appellant Correa, the judge expressly adopted the approach which she had set out in the case of Buhagiar. In both cases (that is, of Buhagiar and Correa), after a careful review of the facts and mitigating circumstances advanced, the judge decided that there were no good reasons for departing from the guidelines applicable in England and Wales and, given the levels of intoxication in each case, and given the circumstances, she decided that a disqualification period of 17 months was in each case appropriate.

Submissions

24 On these appeals, Mr. Finch for the appellant Buhagiar and Mr. Gomez for the appellant Correa repeat and expand upon the submissions made below. In particular, they maintain that the position in England and Wales with regard to disqualification for offences of driving when over the prescribed limit is not comparable to that in Gibraltar. In England and Wales, they stressed, the position is that disqualification is obligatory in the absence of special reasons being established; and what may constitute "special reasons" is, in any event, closely circumscribed: see, for example, *R.* v. *Wickens* (2). That, they therefore say, simply does not correspond with the position under s.71(2) of the Traffic Act 2005, which gives the court entire discretion "taking all reasonable circumstances into account."

25 To the extent that the judge had also sought to import the provisions of s.35 of the Road Traffic Offenders Act 1988 in deciding what the relevant circumstances might be, their riposte is that the provisions of that section cannot be in point, first, because the provisions of that section relate to the totting procedures which have no counterpart in Gibraltar and, secondly, and in any event, because s.35(4) in terms places pronounced and very specific restrictions on what otherwise may be taken into account as "mitigating circumstances," which do not correspond with the open textured provisions of s.71(2) of the Traffic Act 2005. Overall, they accordingly submit, the judge's approach places an undue and unwarranted

fetter on the broad discretion conferred by s.71(2) of the Traffic Act 2005. In consequence, they go on to say, this was not a proper case for the application of the power conferred by s.484(4) of the Criminal Procedure and Evidence Act 2011—the circumstances are, they say, such as to make it inappropriate.

26 Mr. Gomez further sought to fortify his argument by reliance on s.34A of the Road Traffic Offenders Act 1988 which, as I have said, has no counterpart in Gibraltar. He also pointed out that in Gibraltar there had originally been adopted a notion of "special reasons" under the Traffic Ordinance 1984, thereby aligning the legislation with the provisions of the English legislation. But that, as he observed, had been displaced by the time of s.71(2) of the Traffic Act 2005. A "special reasons" approach, he therefore said, could not legitimately now be re-introduced into Gibraltar by the back door.

27 The submissions of Mr. Ramagge for the prosecution, in effect, came to this. The judge had made clear that ultimately each case was a matter for the Magistrates' Court exercising its discretion on the individual facts, and so, he submitted, the judge had not imposed any undue fetter by reference to s.71(2). He further submitted that the policy considerations applicable in England and Wales for disqualification, and for a minimum length of disqualification, in cases of this kind should equally apply in Gibraltar—as the judge indeed had held. He submitted that the judge had properly and appropriately exercised her power under s.484(4) and had provided valuable judicial guidance to the lower courts in so doing.

Discussion

28 As I see it, there are three matters to be addressed. First, was it appropriate for the judge to indicate a starting point, and consequent ranges, for cases of this kind at all? Secondly, if it was, was it appropriate for the judge to indicate a starting point of 12 months' period of disqualification by reference to the primary legislation of England and Wales and to related guidelines issued by the Sentencing Council? Thirdly, if it was, was her decision to impose a period of disqualification, and to do so for a period of 17 months, justified in the circumstances of each case?

29 As to the first point, I am in no doubt that, in principle, judicial guidance as to the appropriate starting point and ranges was, in the absence of any guidelines issued by the Chief Justice, appropriately given by the judge. I should in fact record that although the strict logic of the arguments of Mr. Finch and Mr. Gomez perhaps might have tended towards a contrary position, both of them in argument realistically and sensibly agreed that that was so. In my own opinion, that is correct. Flexibility is usually very desirable in the imposition of sentences and remedies in many contexts and unquestionably, the provisions in s.71(2) of the Traffic Act 2005 confer

that flexibility. But at the same time, consistency of approach is also desirable, and indeed important. As the judge herself had observed, sentencing in cases of this kind otherwise runs the risk of becoming "arbitrary and erratic" (2020 Gib LR 445, at para. 17). In fact, that may have in the past to an extent been the position in Gibraltar, at all events judging from the selection of disqualification decisions in cases of this kind in the Magistrates' Court placed before us. I stress that we were not given the full facts of such cases. Even so, they seem to suggest that, hitherto, there on occasion has been a disconcertingly broad diversity of outcomes as to the periods of disqualification imposed in cases of such offending.

30 That being so, I turn to the second and, in truth, central matter—was the judge justified in taking a starting point of 12 months' disqualification, with ranges to match, by reference to the position in England and Wales? In my opinion, she was.

31 As the judge said, and I agree, the policy considerations relating to disqualification in this context apply as much in Gibraltar as in England and Wales. Driving over the prescribed limit is a serious matter, carrying with it the real risk of death or injury to other road users or pedestrians as well as to the driver himself or herself. The seriousness of such offending, the need for deterrence and the protection of the public have to be appropriately marked both in the penalty and in the period of disqualification. In such circumstances, I do not accept that adopting a starting point of 12 months by reference to that applicable in England and Wales is incorrect and unjustified. Moreover, whilst it is true that the Chief Justice has not issued any formal guidelines for this purpose in Gibraltar under s.484(1), I think that the judge was entitled to have regard to the fact that in *Cozanni* (1) the Chief Justice himself had essentially taken the approach which she was now taking in these two cases.

32 Mr. Finch and Mr. Gomez, nevertheless, continued to maintain that this was an unwarranted fetter on the broad discretion conferred by s.71(2), a broad discretion which, they repeatedly emphasized, did not correspond to the language of the English primary legislation. In my view, however, reflecting what I previously said, appropriate discretion is retained by the courts in Gibraltar. Guidelines, after all, are just that: guidelines. They are not required to be followed rigidly and slavishly and they may be departed from if the particular circumstances of the particular case justify a departure. As to Mr. Finch's suggestion in argument that an appropriate starting point for a first offence should be in the region of 6 months, based on what he said was his general experience in the Magistrates' Court in Gibraltar (albeit that does not, with respect, seem altogether to find reflection in the brief reports of outcomes in the selection of cases in the Magistrates Court put before us) that does not in my opinion adequately or

appropriately reflect the need to mark the seriousness of such offending, the need for deterrence and the need to protect the public.

33 Consequently, I would uphold the judge's decision that an appropriate starting point in cases of this particular kind is for a disqualification period of 12 months and that it is also appropriate to have regard to the Guidelines issued in this regard by the Sentencing Council in England and Wales.

34 I would, however, add one (and I think potentially important) qualification to the judge's approach. As I have said, the judge took what would in England and Wales be "special reasons" for the purposes of s.34 and "mitigating circumstances" as modified by s.35(4) of the Road Traffic Offenders Act 1988 and compendiously styled them as "exceptional reasons." She then set out her proposed guidance to the Magistrates' Court by reference to those "exceptional reasons." With that aspect of the judge's judgment I do not, with respect, agree. I do not agree with it just because it would, in my opinion, unduly cut into and run counter to the broad discretion conferred by s.71(2) of the Traffic Act 2005 and would cut into and run counter to the Magistrate's entitlement under the provisions of that section to assess for themselves what are the "reasonable circumstances" to be taken into account in each case and to assess for themselves the weight to be attached to each such circumstance. The notion of "special reasons" and the limitations on "mitigating circumstances" as set out in the primary English legislation simply have no reflection in the provisions of s.71(2) of the Traffic Act 2005 at all. Consequently, as I see it, there are, subject to relevance, no legal limits on the Magistrate's assessment of what are considered to be "reasonable circumstances" in any particular case.

35 It therefore also follows, in my judgment, that exceptionality, as such, is not a legal test under s.71(2). It may perhaps, I can accept, be used as a shorthand phrase, descriptive of some likely outcomes. For example, Mr. Finch in argument frankly accepted that disqualification was, in his words, "almost inevitable" in cases of driving over the prescribed limit. I agree. Thus I also would agree with the Chief Justice's assessment in *Cozanni* (1) that not to disqualify at all in such cases would (as a matter of descriptive language, though not as a matter of strict law) be "most exceptional." I would however, with respect, be altogether more cautious in accepting the Chief Justice's further statement that it would also be "most exceptional" to impose a lesser period of disqualification in such cases than is indicated by the Guidelines issued by the Sentencing Council in England and Wales. To the contrary, there may well be cases where the circumstances, taken overall, are such that the magistrates may have good reason to go below the relevant range in the Guidelines—although I would certainly agree with the Chief Justice and indeed would endorse his observation that, if they do so, magistrates then should give reasons for so doing (although I would, for myself, express the view that such reasons may be concisely given).

36 Perhaps, in this context, I should also add something specific about hardship. For the reasons I have given, there is no legal requirement, as such, in Gibraltar that hardship must be "exceptional" before that can properly be taken into account. Magistrates are free always to take hardship into account and to the extent that the judge said that they could not do so unless the hardship was "exceptional" that goes too far. Nevertheless, as the judge also pointed out, hardship of some sort almost always arises in cases of disqualification. Whilst hardship is ultimately a matter for the assessment of magistrates as part of their evaluation of the overall circumstances of each particular case, it may well be that magistrates will be disinclined, when considering "all reasonable circumstances," to attach much weight to hardship unless it is something above what may be described as a norm. And, perhaps needless to say, even where Magistrates do find that there will be hardship which can indeed properly be described as "exceptional," it by no means follows that they thereby should decline to disqualify at all—although of course such a factor (that is to say, exceptional hardship, if found) may well then, depending on all the circumstances, be potentially highly material in deciding whether, and the extent to which, there should be a reduction in the period of disqualification otherwise to be imposed.

37 Against those observations, I turn to the third and remaining issue: which is whether disqualification for a period of 17 months was appropriate in the circumstances of each case. In this regard, in the appeal of Buhagiar, Mr. Finch, realistically, did not seek to argue that disqualification was inappropriate. The challenge was solely as to the length of the period of disqualification. Mr. Gomez for the appellant Correa, on the other hand, did seek to say that disqualification in her case was not justified, albeit in the alternative he argued that a 17-month disqualification period was in any event excessive.

38 I think that I can deal relatively briefly with these aspects of these two appeals, given their facts.

39 So far as the appellant Buhagiar is concerned, he was over twice the legal limit—clearly a very important point. The position that the appellant found himself in was, as the judge pointed out, entirely of his own making. He was intent on driving on a public road until he found a convenient lawful parking space. As for hardship, the judge found that the evidence adduced did not establish that he would necessarily lose his job if disqualified, even if he would not be able to drive himself to the various locations, and that any hardship caused would not be exceptional (I might add that we were in fact told at the hearing that the appellant has not lost his job and his employer has been able to make alternative arrangements whereby he can visit various locations as required for the performance of his duties). But in any event, in all the circumstances, and notwithstanding

the other mitigation otherwise available, there was and is, in my judgment, no proper basis for interfering with the Magistrate's and the judge's evaluation. Accordingly, the judge was right to dismiss the appeal. Indeed, it may be noted that the period of disqualification of 17 months is at the very bottom of the range indicated under the guidelines relating to a reading of 60 micrograms per 100 millilitres.

40 Turning to the appellant Correa, this was in its way, a bad case of its type. She was significantly over the prescribed limit, just over twice the limit and, according to the police observations, was not fully in control of a motorcycle being driven on a public road at night. Mr. Gomez, however, stressed the various elements of the personal mitigation available to the appellant. In particular, he stressed the clear evidence that she would be dismissed from her employment if disqualified—as indeed has happened. He submitted that, overall, the circumstances were such that no disqualification from driving should have been imposed. I cannot agree, any more than did the judge. The very fact that the appellant's job involved her driving as a bus driver was, as the Magistrates had pointed out, one she should have taken into account. Indeed, by virtue of her job, she should have been all the more alive to the dangers of driving when over the prescribed limit. Further, she would, if not disqualified, have been able to continue to drive others in her employer's vehicles. Inevitably, it is true, significant hardship would potentially be caused to her by reason of losing her job if disqualified. But in the circumstances in this particular case, the judge and the Magistrates were entitled to take the view that in this case the undoubted hardship caused to this appellant if disqualified was not of such an order as to require that no disqualification should be imposed at all or to require the court to go below the indicated range. For example, as the judge herself pointed out, the appellant was not the main breadwinner of a family which was dependent on her, she would not lose, if disqualified and deprived of her current employment, any accommodation (because she was living with her parents) and in any event there was always the prospect of her finding some different kind of occupation (as, indeed, we were told at the hearing, has in fact since happened). Given the level of her intoxication, which was over twice the lowest limit, it seems to me that disqualification was entirely justified. Further, I do not think that any viable challenge can be raised to the disqualification period of 17 months imposed by the judge, who had carefully considered all the mitigation advanced. As I have indicated, the judge in fact thought it appropriate to reduce the period of disqualification imposed by the Magistrates by just one month, but since that modest reduction was entirely in favour of the appellant I need not discuss whether that reduction was necessary or appropriate.

41 Accordingly, although I would not agree with the judge's approach as to the need for "exceptional reasons," it seems to me that the right result was reached in each of these two cases.

42 Finally, I should add that I agree with the judge that no discount to the otherwise appropriate period of disqualification should be accorded simply by reference to a plea of guilt. A primary purpose of disqualification is, after all, to protect the public. That also reflects the position in England and Wales. The contrary had not been sought to be argued before us.

Conclusion

43 By way of conclusion, therefore, I would dismiss both appeals.

44 **ELIAS, J.A.:** I agree.

45 **KAY, P.:** I also agree.

Appeals dismissed.