

APPEAL COURT, HIGH COURT OF JUSTICIARY

[2015] HCJAC 77
HCA/2015-1985/XJ

Lady Clark of Calton
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

APPEAL

by

JAMIE ANDREW MACLEAN

Appellant;

against

PROCURATOR FISCAL, STORNOWAY

Respondent:

Appellant: McIntosh; John Pryde &Co SSC
Respondent: M Hughes AD; The Crown Agernt

21 August 2015

[1] On 24 April 2015, before the sheriff at Stornoway, the appellant pled guilty to a charge of driving without due care and attention contrary to section 3 of the Road Traffic Act 1988, as a result of which certain damage was caused. He also pled guilty to a contravention of section 170(3) and (4) of the Act, the gravamen of the charge being that having failed to stop and provide his details following the accident, he failed to report the accident to a police constable or at a police station as soon as reasonably practicable and in any case within 24 hours of the accident. The offences were said to have been committed on 8 or 9 February 2015.

[2] The sheriff's report narrates that, at about 9pm on 8 February 2015, the appellant's vehicle left the carriageway and collided with a fence around a house. The householder called the police

and a number plate for the appellant's vehicle was found. He was traced on 11 February, having failed to stop at the time of the accident or to report it subsequently.

[3] A schedule of previous convictions was produced disclosing two breaches of the peace, an assault and a contravention of section 143(1) and (2) of the 1988 Act.

[4] The appellant's agent told the sheriff that there was nothing sinister in the accident. The appellant had misjudged a bend in the road. We need not repeat the personal details which were placed before the sheriff but he was told that the appellant had three points on his licence and he was asked to exercise leniency and not to impose a sentence which would result in disqualification.

[5] The sheriff imposed fines on each charge. These were discounted, to reflect the fact that the appellant pled guilty at the first opportunity, and the fines are not the subject of appeal.

[6] In respect of each charge the sheriff considered that six penalty points should be imposed and he discounted those points to four in each case, making a total of eight. As a result, the appellant was not disqualified as the total points on his licence fell below 12.

[7] The range of penalty points attributable to a contravention of section 3 of the Road Traffic Act 1988 (careless driving) is three to nine whereas that for a charge of failure to report is five to ten. It was therefore incompetent, as Counsel accepted, for the sheriff to impose less than five points for that offence. The granting of a discount could not displace the statutory provisions.

[8] The note of appeal proceeds on the basis that penalty points should only have been imposed in respect of the charge of failing to report as that was the offence to which a higher number of penalty points could be attributed. Thus, ran the argument, the appellant's licence should only have been endorsed with five penalty points.

[9] The basis for the argument is section 28 of the Road Traffic Offenders Act 1988, the relevant parts of which are in the following terms:

> "(4) Where a person is convicted (whether on the same occasion or not) of two or more offences committed on the same occasion and involving obligatory endorsement, the total number of penalty points to be attributed to them is the number or highest number that would be attributed on a conviction of one of them (so that if the convictions are on different occasions the number of penalty points to be attributed to the offences on the later occasion or occasions shall be restricted accordingly).
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> (5) In a case where (apart from this subsection) subsection (4) above would apply to two or more offences, the court may if it thinks fit determine that that subsection shall not apply to the offences (or, where three or more offences are concerned, to any one or more of them).
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> (6) Where a court makes such a determination it shall state its reasons in open court and, if it is a magistrates' court, or in Scotland a court of summary jurisdiction, shall cause them to be entered in the register (in Scotland, record) of its proceedings."

[10] The sheriff found that the two offences were not committed on the same occasion. He was of the view that the driving offence was committed on 8 February and the failure to report occurred sometime during the succeeding 24 hour period. He purported to follow the approach set out in the case of *Cameron* v *Brown* 1986 SCCR 675 rather than that of the Court of Appeal in the case of *Johnson* v *Finbow* (1983) 5 Cr. App. R. (S.) 95 and referred to the opinion of the court given by Lord Johnston in *Cameron* v *Brown* at page 677, where he said the following:

"We have the greatest difficulty in seeing how the phrase 'on the same occasion' can contemplate incidents occurring at different points of time and place and *a fortiori* not even on the same day. In our opinion the statutory provision is designed to provide relief if an accused effectively faces a number of charges arising out of precisely the same incident. That is the essential ingredient. It is not helpful to try to give definitive examples, but in relation to the offence of driving while disqualified, a whole journey might qualify as one occasion. If in the course of that journey an accident occurs which renders the accused liable to be convicted in respect of another provision of the Road Traffic Acts along with that of driving while disqualified, that is arguably still the same occasion. However, for the offences being compared as separate in the sense of not being contemporaneous with each other, they cannot in our opinion be said to have been committed on the same occasion."

[11] The sheriff considered that those words might be binding on him and in any event preferred them to the approach of the court of appeal in *Johnson* v *Finbow*. The words quoted from Lord Johnston seemed to him to be more true to the wording of the statute than the approach in *Johnson* v *Finbow,* which interpreted the provisions as if the criterion was "arising out of the same occasion" rather than "committed on the same occasion".

[12] He went on to say that even if this were not so he considered that the offences were sufficiently different and separate in nature each to be marked with penalty points as subsection (5) anticipates.

[13] In *Johnson* v *Finbow* the appellant was charged with two offences contrary to section 25 of the Road Traffic Act 1972, namely failing to stop after an accident and give particulars to a person having reasonable grounds for so requiring and failing to report to the police. This section was the precursor of section 170 of the 1988 Act. The appellant had been involved in an accident whereby damage was caused to another vehicle. She stopped at the scene but drove off before anyone could request her name and address and failed to report the accident to the police. The magistrates allotted five and four points to the offences and endorsed her licence with nine points. It was held that although the offences were committed at different moments of time, they arose out of the same accident and were very similar in their nature. They were accordingly committed on the same occasion for the purposes of section 19 of the Transport Act 1981, which was the precursor to section 28 of the Road Traffic Offenders Act 1988.

[14] Giving the opinion of the court Robert Goff LJ said the following:

"Faced with the question: were these offences committed on the same occasion? it can be said that they were not committed at the same moment; they were not both committed, for example, at the moment of the accident: one was committed when the accident occurred or shortly thereafter, and one was committed sometime after that. Therefore, looking at the language alone, it can be argued that the two offences were not committed on the same occasion.

On the other hand, looking at the matter more broadly (and, for my part, I think more sensibly), and looking at the context in which the two offences were committed, it can be said that the lapse of time, although significant, is not sufficiently great to be able to say, as a matter of common sense, that those offences were committed on different occasions. It is

true that they were committed at different moments of time; indeed, they might even have been committed on different days. But looking at the matter sensibly, it seems to me that they were committed on the same occasion. They certainly arose out of the same accident… that may not be enough of itself, but it certainly provides a link. And when one sees how closely they are connected with the accident, and how very similar, in fact, the two offences are in their nature, then I think the proper conclusion is to say that when arising out of the same accident both these offences were committed, then they were committed on the same occasion, within the meaning of those words used in section 19(1)".

[15] In *Cameron* v *Brown* there were two offences on the same day. One was a parking offence and the other was a failure to provide a sample of breath. That involved a request having to be made by a police officer which effectively amounted to a *novus actus*. Lord Johnston's remarks fell to be considered in that context.

[16] Lord Johnston had felt himself bound by the opinion of the court in *McKeever* v *Walkingshaw* 1996 SCCR 189. That case clearly involved two separate incidents, consisting of speeding and crossing a double white line. The offences were committed at different places in the course of a single journey. Giving the Opinion of the Court, Lord Sutherland, in remarks which were strictly *obiter,* said this:

"The classic case of somebody who is driving under the influence of drink while disqualified causing an accident and then driving off without stopping would all arise as a single incident even though it might give rise to four separate charges."

[17] In *Robertson* v *McNaughtan* 1993 SCCR 526 the appellant pled guilty to two charges of driving while disqualified within about an hour of each other in the centre of Fraserburgh. The sheriff held that the offences were not committed on the same occasion. On appeal it was held that, had the appellant been engaged on a single uninterrupted course of driving while disqualified, the proper view to take would have been that he was committing a single offence, albeit in different streets, as he travelled from one place to another but there was no information to suggest that the charges related to anything other than two separate incidents.

[18] At page 530, the Lord Justice General (Hope) said the following:

"The typical example of a case where two or more offences are committed on the same occasion is where a single incident has occurred as a result of which the driver is charged with a number of separate offences involving obligatory endorsement under different provisions of the Act. This will be the position where the driver is charged with the offence of careless driving and at the same time with the offences under the Construction and Use Regulations in circumstances where endorsement is obligatory."

[19] Counsel submitted that the purpose behind the enactment of section 170 offences was closely linked with the original offence. There would be no need to stop and report if the original offence had not been committed. Section 170 was designed to aid investigation into such offences and it could not be said that they arose out of a separate incident. Furthermore, when the factual matrix was considered, it could be seen that the principles enunciated in *Cameron* v *Brown* were not all that different from those in *Johnson* v *Finbow*.

[20] We invited the Crown to comment. The advocate depute accepted that the requirement to report arose directly out of the driving into the fence and she did not support the sheriff's reasoning.

[21] We note that Lord Johnston in *Cameron* v *Brown* used the phrase "arising out of precisely the same incident". Having considered the authorities and the submissions of Counsel, we conclude that whether or not two or more offences are committed on the same occasion, or arise out of precisely the same incident, will be a question of fact and circumstance. Lord Johnson followed *McKeever* v *Walkingshaw* and the typical example given by Lord Sutherland in that case is very close to the facts in *Johnson* v *Finbow*. That case for present purpose effectively equiparated what are now the two offences under section 170 and Lord Sutherland opined that the first of these offences was committed on the same occasion as the driving offences *per se*. It is but a small step therefore for us to hold that the offences of which the appellant was convicted in this case arose on the same occasion. The obligation under section 170(3) to report to the police as soon as reasonably practicable and in any case within 24 hours of the accident arises immediately if there has been no provision of the requisite details in terms of section 170(2).

[22] Counsel submitted that if we were with him in this regard we should not attempt to invoke the caveat contained in subsection 5 of section 28 of the 1988 Act. We do not propose to do so.

[23] It is not for us to say precisely when such a course of action would be appropriate but we can envisage cases where the evidence disclosed that the offender failed to report because he wished to avoid the detection of other offences. In such a case it might be appropriate to aggregate the penalty points.

[24] In the circumstances we shall allow the appeal to the extent of quashing the penalty points attributable to charge 1 (the careless driving charge) and increasing the penalty points attributable to charge 3 (the charge of failing to report) to five.