APPEAL COURT, HIGH COURT OF JUSTICIARY

[2010] HCJAC 96

Appeal No: XJ399/10

OPINION OF THE COURT

delivered by LORD OSBORNE

in

CROWN APPEAL

UNDER SECTION 174 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

PROCURATOR FISCAL, GLASGOW

Appellant;

against

WILLIAM GORDON JACKSON

Respondent:

_____

Lord Osborne

Lord Reed

Lady Smith

Appellant: A Stewart QC AD; Crown Agent

Respondent: Miss Mitchell, Advocate; Fitzpatrick & Co, Glasgow

1 October 2010

The Background Circumstances

[1] A summary complaint was served by the appellant on the respondent containing a single charge in the following terms:

"(1) On 30 April 2009 at 62 Aytoun Road, Glasgow you William Gordon Jackson being the person keeping a motor vehicle, namely motor car registered number SA58 KVO, and the driver of said motor vehicle being alleged to be guilty of an offence to which the aftermentioned section applies, namely a contravention of the Motorways Traffic (Speed Limit) Regulations 1974, Regulation 3 and the Road Traffic Act 1984, section 17(4) which occurred at about 13.53 hours on 16th December 2008 at M80 Glasgow/Stirling Motorway, Dunipace, District of Falkirk at a part near to Barnego Road Overbridge did fail to give such information as to the identity of the driver of said vehicle as you were required to give by Police Constable James Coleman a person authorised by and acting on behalf of the Chief Officer of Police, namely the Chief Constable of Strathclyde Police; Contrary to the Road Traffic Act 1988 section 172(2)(a) and (3)."

[2] The chronology of relevant events is as follows. The original moving road traffic offence was alleged to have taken place on 16 December 2008. The following day a notice of intended prosecution, coupled with a section 172 requirement was sent to the registered keeper, namely Audi Finance in Milton Keynes. On 12 January 2009, the reply form was received in which the respondent was identified as being the hirer of the motor vehicle involved in the alleged speeding offence. Accordingly, on 15 January 2009 a notice of intended prosecution, with again attached, a section 172 requirement form, was sent to the respondent at his home address in Glasgow. On 13 February 2009, a reminder letter was sent to the respondent, there having been no reply to the first letter. The reminder letter did not provoke any response. On 6 March 2009, the matter was still unresolved and was passed to Strathclyde Police for inquiry. On 30 April 2009, Police Constables James Coleman and Lynsey McGuigan proceeded to the respondent's home and required him to state the identity of the driver involved in the original offence. The respondent identified himself and confirmed that he was indeed the registered keeper of the motor vehicle in question. The section 172 requirement was then read to him. He replied stating that he understood what was required of him, but said:

"I have no recollection of the correspondence. I have no idea who was driving at the relevant time and date as my wife and I both drive the car."

Immediately thereafter he was cautioned and charged in respect of a contravention of section 172 of the 1988 Act. To that he replied in the following terms: "I don't know who was driving the car on 16 December 2008." Thereafter the case was reported to the procurator fiscal's office on 12 May 2009. Service of the present complaint was effected on 23 October 2009.

[3] The case first called in the Justice of the Peace Court at Glasgow on 29 October 2009. On the respondent's unopposed motion, the matter was continued without plea until 26 November 2009. Thereafter the case was further continued without plea until 24 December 2009. On that date the matter was again continued without plea on a joint motion for the purpose of further investigation to 21 January 2010. On that date, on behalf of the respondent, a plea to the competency of the charge was taken on the basis that the case was time-barred. A diet of debate of that plea was assigned for 18 February 2010, but unfortunately the procurator fiscal depute responsible for the case became unavailable on that date. Accordingly the diet was adjourned to 20 February 2010 when the Stipendiary Magistrate heard submissions on behalf of the respondent and the Crown. At the conclusion of the diet of debate, he sustained the objection taken on behalf of the respondent to the competency of the charge on the ground that the complaint was time-barred by 23 October 2009, the date on which service of it was effected. Accordingly he dismissed the complaint against the respondent. Against that decision, the appellant has now appealed to this court under section 174(1) of the Criminal Procedure (Scotland) Act 1995, "the 1995 Act", the decision of the Stipendiary Magistrate, being one to which section 144(4) of the 1995 Act applies. The grounds of appeal succinctly stated by the appellant are as follows:

"(1) That the learned Stipendiary Magistrate erred in law in holding that the charge on the complaint was time-barred.

(2) That the learned Stipendiary Magistrate erred in law in dismissing the complaint against the respondent."

The Submissions of the Appellant

[4] Before us, the Advocate depute submitted that the Stipendiary Magistrate had erred in law in holding that the complaint was time-barred. The charge had arisen out of a police visit to the respondents' house, which took place on 30 April 2009. It was contended that this charge and the complaint containing it were not time-barred, because service of the complaint had been effected on 23 October 2009, within the permitted period of 6 months provided for by section 136(1) of the 1995 Act. The charge itself had been brought under section 172(2)(a) and (3) of the Road Traffic Act 1988, "the 1988 Act". There was no dispute that the provisions of section 172 of the 1988 Act applied to the speeding offence to which reference was made in the substance of the charge. The broad effect of section 172 of the 1988 Act was that, where the driver of a vehicle was alleged to be guilty of an offence to which the section applied, the person keeping the vehicle was under an

obligation to give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police. It was pertinent to note that such a requirement under section 172(2) could be made by written notice served by post, as was provided for by section 172(7) of the 1988 Act.

[5] It was understood that the defence position, so far as the allegation brought under section 172 of the 1988 Act was concerned, was that the respondent did not know whether he or his wife had been driving the motor vehicle at the point in time at which the original offence was said to have occurred. Furthermore, there were no investigations that could reasonably be carried out, or enquiries made, that would have clarified that matter. In other words, the reasonable diligence defence provided for under section 172(4) was invoked. However, that matter was not currently in issue. The issue which was in controversy was the date on which the case might become time-barred.

[6] The position that had been taken up by the respondent was that the prosecution was time-barred since the complaint had not been served within the statutory 6 month period. That was based on the proposition that the date of the offence coincided with the expiry of the 28 day period provided for under section 172(7)(a) of the 1988 Act, in relation to the written requirement. According to this argument the date of the commission of the offence was 13 February 2009, 28 days after the requirement to identify the driver was first made of the respondent in writing. If that were correct, the time-bar would have operated on 13 August 2009, some 2 months and 10 days before the complaint was in fact served. It was part of the respondent's contention that the Crown, in calculating the 6 month period from the date on which the respondent was charged with the offence, sought to extend the time-bar, artificially prolonging the period during which it might purport to effect lawful service of a complaint. It was a facet of that argument that, the Crown could delay the commencement of the 6 month period, perhaps indefinitely, by making repeated requests for information pertaining to the identity of the driver. In response to that the Crown contended that, in the present case, the 6 month period did not commence until 30 April 2009, the date of the interview between the police constables and the respondent. If that was correct, plainly service of the complaint on 23 October 2009 was timeous.

[7] The Advocate depute said that there was a paucity of case law which dealt specifically with the issue involved in the case. While *Wilkinson's Road Traffic Offences* could not be regarded as authoritative, it might be considered to provide a measure of guidance. In paragraph 7.38 of the 24th edition, the learned authors said:

"It seems that the police can make more than one duly authorised demand, e.g. where a person says on Monday that he can ascertain by Friday who the driver was and fails to give the information when demanded again on Friday, he can be summoned for the Friday offence."

While the period between the demands referred to in this passage was short and while in the present case the period between the first and last requirements was approximately three and a half months, during that period the respondent had made no contact with the police and did not respond orally or in writing to their requirements. In the present case the police, in making more than one requirement, had provided the respondent with an ample opportunity to respond. The Crown's contention was that, while a contravention of section 172 might have occurred when the respondent failed to respond to the letter sent to him on 15 January 2009, within the statutory 28 days, that would not necessarily preclude there being another contravention at a later date. It was submitted that each case must turn on its own facts and circumstances. In the present case, the police, in sending out the initial requirement by post and in sending out a reminder also by post and visiting the respondent at his home address had provided him with an ample opportunity to comply with the requirement. The Crown was entitled to prosecute the respondent in relation to any occasion on which there was sufficient evidence that he had committed an offence in terms of section 172 of the 1988 Act. The Crown was not constrained in any way by the date on which the original requirement was made. In all these circumstances, the appeal should be allowed and the case remitted to the Stipendiary Magistrate to proceed as accords.

Submissions of the Respondent
[8] Counsel for the respondent observed that the Crown's position was that the offence was not a continuing one but that it could be committed on several different occasions. The time limit provided for by section 136 of the 1995 Act would, according to the Crown, run from the date of a requirement not acceded to. The respondent acknowledged that the offence was not a continuing offence; accordingly the provisions of section 136(1)(b) of the 1995 Act did not apply. In view of the terms of section 172(7)(b) it was clear that the offence, in the case of a written requirement, occurred when the 28 day period expired. The position in the present case was that the visit of police officers to the respondent's house on 30 April 2009 was unnecessary; there could have been a prosecution on the basis of the earlier written requirement. It was the submission of the respondent that there could be only one requirement made under section 172 and one offence if that requirement was not appropriately responded to.

[9] Counsel drew our attention to *Burns* v *Her Majesty's Advocate* 2009 S.C.C.R. 127, in particular, paragraph 15 in the opinion of Lord Rodger of Earlsferry, in which emphasis was placed on the importance of the starting point of any time limit, albeit that in that case, it was one derived from article 6(1) of the European Convention on Human Rights.

[10] Perhaps the most obvious objection to the Crown's position was that, if they were right, there could be repeated requirements made under section 172 resulting in the opportunity for a number of prosecutions, which could be brought within the 6 month period after a requirement, whenever that occurred. That meant that there was no end to the possibility of a prosecution other than that, after unconscionable delay, a prosecution might be seen as oppressive. In all these circumstances the appeal should be refused.

The Decision
[11] In the course of the argument before us, it was common ground between the Advocate depute and counsel for the respondent that the provisions of section 136(1)(b) had no application to the circumstances of this case. That enactment provides as follows:

"136(1) Proceedings under this Part of this Act in respect of any offence to which this section applies shall be commenced - ...

(b) In the case of a continuous contravention, within 6 months after the last date of such contravention, ...".

We are in agreement with that position. In that connection, we note that section 172(3) of the 1988 Act provides:

"(3) Subject to the following provisions, a person who fails to comply with the requirement under subsection (2) above shall be guilty of an offence."

The reference to "a requirement under subsection (2)" is, of course, a reference to the provision in that sub-section, which provides:

"(a) The person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, ...".

That language suggests to us that the making of a requirement is an event which occurs on a particular occasion, as opposed to being of a continuing nature. Furthermore, looking at the provisions of section 172(7) of the 1988 Act, which deals with a written requirement we are confirmed in that view. It provides:

"(7) A requirement under subsection (2) may be made by written notice served by post; and where it is so made - (a) it shall have effect as a requirement to give the information within the period of 28 days beginning with the day on which the notice is served, ...".

Thus, at the moment of the expiry of the period of 28 days following a written requirement, it appears to us that the offence is committed, if the requirement is not obtempered.

[12] Following that approach to the matter, the issue is the application of section 136(1)(a) of the 1995 Act. The question is on what date the contravention occurred. The position of the Crown in this appeal, as we understood it, was that, if more than one requirement under section 172 of the 1988 Act was made, then the 6 month period for prosecution commenced on the occasion of the last such requirement, in this case on 30 April 2009. We cannot accept that submission. If it were correct, it would mean that the statutory time limit provided for in section 136 of the 1995 Act could, in effect, be obviated by the making of repeated requirements, presumably subject to the proviso that, eventually, a prosecution might be considered to be oppressive on account of the passage of time. We cannot think that that reflects the intention of Parliament in enacting section 172 of the 1988 Act. In our view, the statutory intention emerging from our consideration of that legislation is that there can be but one requirement which would occur when the requirement was first validly made, if oral, or twenty eight days after service of a requirement in writing, from which date the statutory time limit would start to run. In saying that we do not intend to suggest that there should never be more than one actual requirement. We can understand that where, for example, a written requirement is made and apparently ignored, it may be appropriate for a personal requirement to be made by police officers. That might be done with a view to obtaining useful information which could lead to the prosecution of the original offence. However, where that occurs, it should be understood that the limited time available for a summary prosecution for breach of section 172(3) of the 1988 Act, provided for under section 136 of the 1995 Act, will nonetheless have started to run from the expiry of the 28 day period, in the case of a prior written requirement, or from the date of any prior oral requirement. We should say that nothing in the passage cited to us from *Wilkinson's Road Traffic Offences*, 24th edition, paragraph 7.38, persuades us to the contrary. Finally, we should make clear that we do not find any assistance to be got from the decision in *Brown* v *Frame* 2005 1 J.C. 320, relied upon by the appellant.

[13] In all these circumstances, the appeal is refused.