IN THE CROWN COURT AT CARDIFF

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A20010009

The Law Courts
Cathays Park
Cardiff

**Before:**

**HIS HONOUR JUDGE G. HICKINBOTTOM**
**(Sitting with Justices)**


**R E G I N A**

**-v-**

**MAURICE JOHN KIRK**

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**REASONS**

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**ANDREW DAVID of Counsel appeared on behalf of the Respondent.**

**The Appellant appeared in person.**

**Introduction**

On 15 March 2002, we heard two appeals by the Defendant, Mr Maurice Kirk, both against sentence in relation to road traffic matters. That day we allowed both appeals, but, because Mr Kirk had accumulated a total of 13 extant penalty points, we disqualified him from driving for 6 months from that date under Section 35 of the Road Traffic Offenders Act 1988 ("the 1988 Act"). That section provides for a minimum disqualification of 6 months when twelve points or more have been accumulated (the "totting" procedure). We gave the decision and brief reasons that day, indicating that we would provide full reasons at a later date. We now provide those reasons.

Mr Kirk appealed against sentences imposed by Magistrates' Courts on two separate occasions, as follows:

1. On 11 April 2000, before the Cardiff Magistrates, Mr Kirk pleaded guilty to charges of having no insurance, failing to provide a specimen and three other charges. In relation to the no insurance matter, in addition to a fine of £450, the Magistrates endorsed Mr Kirk's licence with 6 penalty points. In relation to failing to provide, Mr Kirk's licence was simply endorsed. No appeal was made in respect of that sentence at that time. However, in circumstances with which we will deal shortly, the matter was returned to that bench on 18 September 2000, when, under Section 35, Mr Kirk was disqualified for 6 months. That same day, he lodged a Notice of Appeal, appealing against "the decision of the Magistrates today re insurance", i.e. their decision to disqualify. That was the appeal that fell to be determined by us.

2. On the 2nd January 2001, before the Vale of Glamorgan Magistrates, Mr Kirk was found guilty of failing to provide a specimen. In addition to a fine of £250, the Court endorsed

Mr Kirk's licence with 4 penalty points. Again under Section 35, the Magistrates purported to disqualify Mr Kirk for 6 months. Mr Kirk also appeals against that sentence, other than the monetary penalty.

**The First Appeal**

The history of this matter is long and complicated, but is usefully set out in the judgment of His Honour Judge Peter Jacobs of 4 October 2001. We should say that we are grateful for the work done by Judge Jacobs in unravelling the background to this matter, and so usefully setting it out in this judgment.

Briefly:

1. On 27 July 1999, Mr Kirk's licence was endorsed with 3 penalty points for a fixed penalty matter, unrelated to those to which we have referred. There is no outstanding appeal or proceedings in respect of those 3 penalty points.

2. On 22 March 2000, Bridgend Magistrates' Court convicted Mr Kirk for driving without insurance, and endorsed his licence with 7 penalty points.

3. As indicated above, on 11 April 2000, Mr Kirk was convicted by Cardiff Magistrates of driving without insurance, failing to provide a specimen and other matters, and his licence was endorsed with 6 penalty points in relation to the insurance offence. Presumably, no penalty points were endorsed in relation to the offence of failing to provide because of the effect of Section 28(4) of the 1988 Act (i.e. where two or more offences are committed on the same occasion, the basic rule is that the number of penalty points to be endorsed is the

number attributable to the offence carrying the highest number of points). However, the 6 points imposed meant, at that stage, Mr Kirk had 16 penalty points, and was liable to be disqualified under Section 35. However, the Cardiff Magistrates were unaware of the Bridgend conviction and penalty points, and therefore did not disqualify him.

4. On 8 September 2000, Mr Kirk successfully appealed the Bridgend conviction, with the result that the 7 points imposed by the Bridgend Magistrates ceased to be effective.

5. Ten days later, on 18 September 2000, the Cardiff Magistrates, by now realising that 7 points had been imposed by the Bridgend Magistrates on 22 March (but unfortunately being unaware that these points had been revoked as a result of the successful appeal), disqualified Mr Kirk under Section 35 on the basis that he had 16 points. In fact, at that date he had only 9 points.

Mr Kirk now appeals against that disqualification.

The reason why Mr Kirk's appeal has not substantively been dealt with earlier is because of other applications he has made in different fora. After the matter had been dealt with by the Magistrates and after he had been sentenced, Mr Kirk became aware of video evidence of his arrest which, he claimed, showed that the police had smashed their way into his car as he was in stationery traffic. He therefore made an application to the Magistrates to change his plea to not guilty, an application which was refused. He then sought permission from the Administrative Court (Brooke LJ and Morison J). Permission was refused on 13 March 2001, after a hearing. Giving the judgment of the Court, Morison J said:

"The circumstances in which a person may change his plea are limited and I am bound to say

that I can see no grounds for believing that the magistrates erred in the exercise of their powers to permit a change of plea. There is no basis for suggesting that the original plea was either equivocal or confused. It was a deliberate decision from an experienced litigant. I refuse this application as it has no merit in law."

With great respect, we agree. Once a defendant has been sentenced on an unequivocal plea, it is too late for any Court to entertain an application to change plea (R v McNally 38 Cr App R 90, and S v Manchester City Recorder [1971] AC 481). A Court may only enquire into whether a plea is equivocal if there is some *prima facie* evidence of equivocality. A plea is not equivocal if based upon incorrect evidence. With the Divisional Court, we can see no evidential basis for a suggestion of equivocality in Mr Kirk's pleas on 11 April 2000. We make this clear in the light of Mr Kirk's attempt to open up the issue of his pleas again, before us.

Whilst Mr Kirk pursued his application in the Administrative Court, the Crown Court (under Section 40(2) of the 1988 Act) imposed successive suspensions of his disqualification on the basis of the pending appeal to it, which had the effect of allowing the application for judicial review to run its course. That course has now been run, Mr Kirk having had permission to review refused in respect of all relevant matters. There is now no impediment to Mr Kirk's appeal against disqualification being dealt with, now.

As has been recognised for some time by the CPS and this Court, the disqualification by the Cardiff Magistrates on 18 September 2000 was unlawful and bad, as it was imposed on the basis that Mr Kirk had 16 penalty points whereas in fact he had only 9. On 9 points, Section 35 was not triggered. We have no alternative but to quash that disqualification, which we do.

The other elements of the sentence concerning no insurance, imposed at the original hearing on 11 April 2000, were a fine of £450 and 6 penalty points. Neither of these has been appealed. In any

event, in our judgment, both of these elements were entirely appropriate for that offence at that time and we would not seek to alter the Magistrates' decision in regard to either.

**The Second Appeal**

On 2 January 2001, the Vale of Glamorgan Magistrates found Mr Kirk guilty of failing to provide a specimen, and endorsed his licence with 4 points and disqualified him under Section 35 on the basis that he had by then a total of 13 extant penalty points. That same day, Mr Kirk gave Notice to Appeal, expressly against both conviction and sentence.

The appeal was set down before Mr Recorder Seys Llewellyn and Magistrates on 24 September 2001. Mr Kirk did not attend. He sent into the Court a doctor's note, dated 12 September, which indicated that Mr Kirk could not work for two weeks from that date. Because there was no reference on the medical certificate to an ability to attend Court, as opposed to conduct his profession, the Recorder proceeded with the matter and dismissed the appeal in Mr Kirk's absence. We have seen the transcript of the Recorder's ruling, and he carefully explained why, in the absence of Mr Kirk and any compelling evidence sufficient to explain that absence, the Court considered it appropriate to proceed to dismiss the appeal, rather than grant any adjournment. We consider it beyond question that, on the evidence before him, the Recorder acted properly. However, he considered it right to give Mr Kirk one final opportunity to appear, or explain his absence. He therefore set the matter down again for 27 September to give Mr Kirk an opportunity to reinstate his appeal, that date being after the period indicated in the medical certificate as the period Mr Kirk would be indisposed so far as his work was concerned. The Recorder said:

> "It is obvious in this case that, if Mr Kirk in fact has evidence which makes it clear that he is unable, for medical reasons, to attend Court, not merely to carry out the strenuous work of a

veterinary surgeon, then doubtless he will place that evidence before the Court."

Mr Kirk accepts that he was put on notice of that further hearing. He did not attend again, nor did he submit any further evidence as to his medical condition. On 27 September, the Recorder made no further order: but repeated his comments about evidence of Mr Kirk's indisposition, in similar terms to those made on 24 September and set out above.

The matter came before His Honour Judge Jacobs on 4 October 2001 when an application to reinstate the appeal was considered by him. Mr Kirk attended that hearing. Judge Jacobs had before him only the documents that Mr Recorder Seys Llewellyn had, including the doctor's note of. 12 September. On the basis of these documents and what he heard from Mr Kirk himself, he considered that there was no real basis for reinstating the appeal at all. However, to avoid an immediate effective disqualification whilst the Administrative Court matters were being dealt with, he reinstated the appeal so far as sentence was concerned merely to empower the Court to suspend the disqualification that would otherwise bite. With respect, we consider the course adopted by Judge Jacobs to have been proper and eminently sensible. For him to have done otherwise, would have meant that Mr Kirk would have had to have made an application to suspend to the High Court (under Section 40(5) of the 1988 Act).

Mr Kirk made two applications to the Administrative Court for permission for judicial review. We do not know the precise details of these applications, but Mr Kirk has sent a letter to this Court (dated 15 February 2002) indicating that at least one of these applications concerned the Crown Court's dismissal of his appeal in his absence. Although Mr Kirk indicated to us that a further doctor's note (dated 14 September 2001, and specifically referring to "Post-op: unable to attend court) was not submitted to any Court before it was submitted to us on 15 March, it is clear from his 15 February 2002 letter to the Court that he provided this certificate to the Administrative Court (Keene LJ and

Silber J), the previous day. This was the first time he had deployed this second medical certificate. Mr Kirk says, in his letter to the Court:

> "Lord Justice Keene and Mr Justice Silber....on 14 February 2002 dismissed judicial review applications 3826/01 and 4015/01 relating to the above appeal, dismissed in Cardiff Crown Court due to my absence.
>
> Despite my presenting my doctor's statement dated 14.9.01, on which it was written "unable to attend court" due to a post operation problem, they dismissed my application to have the appeal reheard in Cardiff Crown Court....
>
> It appears from Mr Justice Collins' comments, at a previous judicial review application of mine, that this appeal has not yet adjudicated on sentence.
>
> I therefore apply to your Court to have my appeal for conviction reheard and enclose the appropriate medical certificate."

The doctor's note of 14 September 2001 was duly enclosed.

Mr Kirk's application to reinstate the appeal was heard by Judge Jacobs on 4 October 2001. In our view, the Judge's decision on the evidence he had before him was the only proper decision to which he could have come. There were no grounds for reinstating the appeal. We consider that Mr Kirk's application to reinstate the appeal was conclusively dealt with by Judge Jacobs. Although no appeal was made in respect of his refusal to reinstate the appeal so far as conviction was concerned, Mr Kirk application for permission for judicial review to require this court to rehear the appeal was refused. The Administrative Court, of course, would have the power to quash the order of Mr Recorder Seys

Llewelyn, dismissing Mr Kirk's appeal in his absence, if, and only if, they considered the Recorder had acted incorrectly. On the limited papers we have, there is no evidence that that Court considered the Recorder acted in anything but an appropriate and lawful manner.

Insofar as Mr Kirk sought to reapply to us for reinstatement of his appeal, the manner in which Mr Kirk withheld from the Court the additional certificate upon which he now relies until February of this year does not lead us to look upon the application sympathetically. In any event, we consider that, bearing in mind the opportunities Mr Kirk had to produce evidence of an inability to attend Court for the appeal on medical grounds before the earlier hearings before Recorder Seys Llewelyn and Judge Jacobs, we should only reopen the appeal as to conviction if either had acted improperly, or if not to reopen the appeal would result in some injustice to Mr Kirk. We do not consider that either Mr Recorder Seys-Llewelyn or Judge Jacobs acted anything but properly in coming to their decisions to dismiss the appeal and not to reopen the appeal respectively. In failing to produce the medical certificate of 14 September 2000 until February 2002 (after the hearings before the Recorder and Judge), Mr Kirk has only himself to blame if he has been deprived of the opportunity to have his appeal heard. Before us, he relied on Article 6 of the European Convention of Human Rights, which, through the Human Rights Act 1998, guarantees the right to a fair trial. That includes a right to be heard. However, that Article of that Convention is intended to ensure, amongst other things, that all litigants (but particularly defendants in criminal proceedings) have a proper opportunity to put their case to a Court. It is not designed to enable litigants unlimited licence in how they conduct litigation, nor will the Courts allow it to be used to disrupt the very justice that it is designed to ensure. Prior to the 4 October 2001 hearing before Judge Jacobs, Mr Kirk had every opportunity to bring forward evidence as to why he failed to attend the appeal in September 2001. He took none. He is now too late to make yet a further application to reopen the appeal. We consider that the proper and appropriate approach is to treat this appeal as restricted to sentence on the basis of Judge Jacobs's ruling, and that is the course we propose to follow. Bearing in mind the above, this will result in no

injustice to Mr Kirk.

Mr Kirk's appeal against sentence is primarily, if not exclusively, against disqualification. The 13 penalty points that formed the basis of the disqualification included the 6 points imposed by Cardiff Magistrates in April 2000. However, on 18 September 2000, the Cardiff Magistrates had already disqualified Mr Kirk. Although that disqualification was inappropriate for the reasons we have given, so far as penalty points are concerned, it had the effect of "wiping the slate clean" whilst that disqualification subsisted. Therefore, the only penalty points that the Vale of Glamorgan Magistrates had to consider for the purposes of Section 35 were the 4 points imposed by them on 2 January 2001 and, consequently, they had no power under that section to impose any disqualification upon Mr Kirk. There are no outstanding proceedings, appeals, reviews etc in respect of this matter that could warrant deferral of any decision on the appeal. Again, we formally set aside that disqualification.

In respect of the other elements of the Magistrates' sentence (the £250 fine and the endorsement with 4 points), no appeal is made in respect of either of these and, in any event, we would not alter or vary the Magistrates' decision. We do, however, note that, generally, for penalty points to be awarded in respect of such a serious matter as failing to provide a specimen is, in our view, a lenient course. For such an offence, it is open to the Court to impose an immediate discretionary disqualification. However, we have no doubt that the Magistrates considered all matters in this case before imposing the sentence in respect of points that they did, and we would not seek to alter it.

**Conclusion**

Consequently, on these appeals, we will formally set aside the orders made under Section 35 of the 1988 Act disqualifying Mr Kirk from driving, made by the Cardiff Magistrates on 18 September 2000 and by the Vale of Glamorgan Magistrates on 2 January 2001.

However, the fact remains that, as at the date of the hearing of this appeal (15 March 2002), Mr Kirk has the following extant penalty points:

1. 3 points imposed on 27 July 1999, in respect of the fixed penalty matter.
2. 6 points imposed by the Cardiff Magistrates on 11 April 2000, for driving with no insurance.
3. 4 points imposed by the Vale of Glamorgan Magistrates on 2 January 2001, for failing to provide a specimen.

Consequently, once the disqualifications we have quashed are removed from the equation, since January of last year, Mr Kirk has been the subject of 13 penalty points: and has been liable to be disqualified under Section 35 of the 1988 Act, which provides for a minimum disqualification of six months when 12 points or more have been accumulated, except where there are particular mitigating circumstances. Mr Kirk has put forward no mitigating circumstances in this case, and we have seen no evidence of any. Various disqualifications have been suspended in the past under Sections 39 and 40 of the 1988 Act, which allow for a suspension of a disqualification during the course of any relevant appeal. All appeals now having been determined, there is no power, yet alone obligation, to suspend any disqualification.

Consequently, we do now impose a disqualification of six months on Mr Kirk from today's date (15 March 2002), imposed under Section 35. That disqualification should and would properly have been imposed on him on 2 January 2001, but for the events as described above. Of course, by imposing the disqualification now, Mr Kirk is not subjected to any injustice, because he has not been the subject of any effective disqualification to date. Formally, we impose this disqualification by way of variation of the sentence imposed by the Vale of Glamorgan Magistrates.