APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 76
HCA/2017/000428/XC]

Lady Dorrian
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

SHERIFF APPEAL COURT – POINT OF LAW

by

MICHAEL SAINI

Appellant

against

PROCURATOR FISCAL, DUNDEE

Respondent

Appellant: S Collins, Sol Adv; Collins & Co
Respondent: A Prentice, QC, Sol Adv, AD; Crown Agent

12 October 2017

Background

[1] The appellant pled guilty by letter (the earliest opportunity) to a charge of speeding. The justice would have imposed a fine of £300 and 6 penalty points, but to reflect the plea proposed to discount these by one third. That this was what the justice intended to do, and thought he had done, is quite clear from both his original and supplementary appeal reports. In accordance with that intention, the fine was reduced to £200. However, the

penalty points were discounted only to 5. This arose because the justice mistakenly thought that, since he required to impose a minimum of 3 penalty points, he could only apply the discount to any points imposed in excess of that number. Rather the position is that any discount could not take the number of points below the statutory minimum. As a result of that error, he applied the one-third discount to 3 points rather than 6.

[2] An appeal limited to the level of penalty points imposed was presented to the Sheriff Appeal Court. Having explained his error in calculation in his supplementary report, the justice then said:

> "Revisiting this matter has led me to believe that my discount was actually a one quarter discount rather than a one third discount. The error is therefore in the text of the report. Please note that I did not wish to discount by as little as one sixth. I was of the opinion that a reduction to four penalty points would have been a greater discount than was merited, taking account of the speed of the vehicle".

The Sheriff Appeal Court concluded that a discount of 15% was appropriate in a case of this kind, increased the fine to £255 and made no alteration to the level of penalty points. That decision is now appealed.

Decision of the Sheriff Appeal Court

[3] The Sheriff Appeal Court, whilst recognising that only in exceptional circumstances should an appeal court interfere with a discounting decision, considered that the justice had erred in failing to give cogent reasons for the discount. It stated that this was a case, such as *Coyle* v *HMA* 2008 JC 107 and *Horribine* v *PF Edinburgh* 2008 JC 306 where conviction was "practically inevitable". The Court noted that in *Gemmell* v *HMA* 2012 JC 223 it had been stated that the level of discount was one for the sentencer. Nevertheless the Sheriff Appeal Court considered it desirable that the Court should exercise discretion in accordance with some broad general principles and that it should take the opportunity to "express a general

view of the level of discount to be awarded in cases such as this where it may be considered that conviction is, to repeat the phrase used in *Coyle* and *Horribine* practically inevitable." On that basis the Court considered that a discount of one third was not merited and that a discount of 15% was appropriate "in a case where the speed is recorded by such a speed measuring device and a plea made at the first opportunity". The Court amended the fine to one of £255 and left the penalty points at five.

Analysis and decision

[4] In *Gemmell* the Court specifically considered the question of the strength of the case against an accused and stated that "the strength of the Crown case ought not to be treated as a factor influencing the amount of the discount" (per Lord Gill, Lord Justice Clerk, para 48). Lord Osborne and Lady Paton delivered dissenting opinions in that case, but their dissent was restricted to the treatment of that element of a sentence imposed specifically for public protection (see, for example, Lord Osborne para 134). Lord Eassie specifically agreed on the point (para 148) and the result was that *Horribine* was overruled on this issue. We do not understand *Coyle* to be a case decided on the basis that the strength of the Crown case was a relevant factor: rather the point being made was similar to that referred to by the Lord Justice Clerk in *Gemmell* (para 42) that delay in tendering a plea on a matter within the knowledge of the accused is not justified. Otherwise it was a case in which the protection of the public was considered to be a factor relevant to prevent or restrict discounting, and on that basis it was disapproved in *Gemmell*. Accordingly, in suggesting that the strength of the Crown case was a factor which might be prayed in aid in withholding or restricting discount the Sheriff Appeal Court fell into error.

[5] In *Gemmell* the Court also made it very clear that the selection of the appropriate, or any, discount, was a matter for the discretion of the sentencer, something which had repeatedly been stated by this court. The discretion is not wholly unfettered, since the sentencer must take account of the principles upon which sentence discounting is based (see paras 32 and 145). However, where the sentencer has given cogent reasons for his decision an appeal court should interfere only in exceptional circumstances. In this case the confusion which arose because of the justice's error led to the supplementary report referred to above in which a confusing and unconvincing explanation is given for the situation which eventuated. However, in his original report, before realising the error in calculation, the justice made it clear that (a) he was aware that the question of discount was a matter of discretion; (b) that the only relevant factor was the utilitarian value of the plea; and (c) having regard to the timing of the plea, at the first available opportunity, he considered that a discount of one third should be given. These are satisfactory reasons with which the Sheriff Appeal Court should not have interfered save for a correction of the arithmetical mistake.

[6] The focus of submissions to the Sheriff Appeal Court was on the confused nature of the justice's approach to discount in relation to penalty points. No question was raised in relation to either the starting point or discounted level of the fine, and the submissions were not directed to that issue. It seems that during oral submissions the Court suggested that the view could be taken that the discount of the fine might be "on high side", since only two police officers would have had to be cited to trial. In response it was submitted that without further information this could not be known, and that the justice had only been asked to explain his approach in relation to the points. No further submissions were made or sought. The Court did not indicate that it considered the strength of the Crown case as a relevant

factor. Had it done so, the opportunity would have arisen for a submission to correct that misconception. Equally, the Court did not indicate that it was considering making in effect a guideline decision. Had it done so, the opportunity would have arisen for further submissions not only from the appellant, but from the Crown which would have had a locus to address the issue of (a) whether this was an appropriate case for such a step; and (b) what the considerations for such a decision might be. It might also have questioned whether it would be appropriate for a court composed of only two of its members to issue such a decision.

[7] For all these reasons we consider that the Sheriff Appeal Court erred in law. We shall accordingly re-instate the fine of £200 and reduce the penalty points from 5 to 4.