SHERIFF APPEAL COURT

[2019] SAC (Crim) 3
SAC/2-19/000193/AP

Sheriff Principal MM Stephen, QC
Sheriff Principal Ian R Abercrombie, QC
Sheriff Murphy, QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL IAN R ABERCROMBIE, QC

in

Crown Summary Appeal Against Sentence

by

PROCURATOR FISCAL, DUMFRIES

Appellant

against

ELEANOR McTAGGART

Respondent

Appellant; L MacDonald; Crown Agent
Respondent: Macintosh; Paterson Bell Solicitors

23 April 2019

[1] In this Crown appeal, it is argued that the disposal by the sheriff in granting the respondent an absolute discharge was unduly lenient in that it was a disposal which fell outside the range of sentences which the sheriff applying his mind to all relevant factors could reasonably have considered appropriate. We were referred to the dictum in *HMA* v *Bell* 1995 SCCR 244.

[2] While weight is always to be given to the trial judge view, especially when he or she has had the advantage of seeing and hearing all the evidence, we are satisfied that in this case, an absolute discharge was well outwith that range.

[3] The respondent was found guilty of theft in the sum of £207.86, being the value of fencing delivered to and erected at her home address. The theft was committed while the respondent was employed by the complainers, a buildings material supply company, as a credit controller.

[4] The breach of trust involved cannot, in our view, be categorised as the sheriff has done as a "lack of a duty of care" to the complainers. The sheriff appears to have been unduly swayed in reaching this view by the fact that the respondent originally faced a complaint of embezzlement of goods and money to a total value of £1,621. The fact that she has been found guilty of a lesser charge and one reduced in value, should not have led him to close his mind to the seriousness of the offence.

[5] Furthermore, it is clear that the sheriff has placed undue weight on the respondent's personal circumstances. While the consequences of a conviction may well be serious for the respondent in terms of both her current employment and future employment prospects, the sheriff has placed too much weight on these factors, particularly bearing in mind the respondent's previous convictions for theft. In 2001 she was convicted of three charges of theft in respect to which a *cumulo* period of 80 hours community service was imposed. That sentence was a direct alternative to imprisonment. The respondent also has a conviction for driving without a licence and without insurance in 2002.

[6] The authorities under reference to Section 246(3) of the Criminal Procedure (Scotland) Act 1995 make it clear that there require to be exceptional circumstances before a court may order absolute discharge. The authorities referred to in submission today have

been recently reviewed by this court in the case of *AS* v *PF, Kilmarnock SAC/2016-663/AP* and there is no requirement for us to add anything further to the principles set out in that case by her Ladyship in the chair. Suffice it to say for the reasons we have given, there are no exceptional circumstances justifying the sheriff imposing the disposal he did.

[7] We will find that the sheriff has erred in deciding that it was inexpedient to inflict punishment without proceeding to conviction that being an error having regard to (a) the circumstances, including the nature of the offence being one of theft from employers and (b) the character of the offender including analogous previous convictions.

[8] We quash the decision of the sheriff to make an absolute discharge and convict the respondent of the charge of theft.

[9] We now turn to the matter of sentence. As suggested by Mr Macintosh, we consider that there is sense in imposing a level 1 community payback order. We considered the appropriate number of hours of unpaid work in this case should be 80. The respondent has six months in which to complete that order.