



SHERIFF APPEAL COURT

**[2016] SAC (Crim) 9
SAC/2016/000046/AP**

Sheriff Principal M M Stephen QC
Sheriff S Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

JOHN DUNCAN

Appellant:

against

PROCURATOR FISCAL, LERWICK

Respondent:

**Appellant: Morrow; MTM Defence Lawyers
Respondent: Clelland AD; Crown Agent**

23 March 2016

[1] The appellant pleaded guilty at Lerwick Sheriff Court to a contravention of section 7(6) of the Road Traffic Act 1988 which occurred on 8 October 2015. A person who fails without reasonable excuse to provide a specimen of breath when required to do so to ascertain the proportion of alcohol in that person's breath or ability to drive will be guilty of this offence.

[2] The appellant who is now 68 came to the attention of the police on the public road between Brae and Roe on Shetland due to the manner of his driving on the day in question. He initially refused and then failed to provide a specimen of breath for the purpose I have mentioned. He has refused to provide a breath specimen in the past and therefore has a directly analogous conviction from February 2009. The appellant has a schedule of previous convictions ranging from a High Court conviction under sea fishing conservation order to offences of disorder.

[3] The single issue to be argued in this appeal is whether the order made by the sheriff in terms of section 33A of the Road Traffic Offenders Act 1988 for forfeiture of the appellant's vehicle reg no SF15 XDJ was excessive leading to a miscarriage of justice. The sheriff imposed no fine in respect of the offence but ordered that the appellant be disqualified from holding or obtaining a driving licence for a period of four years. No appeal is taken with regard to that disposal. No valuation has been produced in respect of the vehicle but it appears from the sheriff's report that there was a degree of acceptance that the vehicle is likely to have a significant value, but beyond that there has been no further specification of the value, make or model of the vehicle.

[4] Under reference to the following authorities it was argued today that the order for forfeiture was excessive having regard to the circumstances of this case. We were referred to *Carron v Russell* 1994 SCCR 681 ; *Craigie v Heywood* 1996 SCCR 654 ; *Purdie v MacDonald* 1997 SLT 483 ; *Quinn v PF, Glasgow* [2010] HCJAC and *Whitefield v PF, Portree* [2012] HCJAC 70. However no issue is taken with a sizeable financial penalty.

[5] In our view the offence of failing to provide breath specimens when required is a serious one. It undermines the provisions of the Road Traffic Act with regard to detection and prosecution of drink drivers as it deprives the court of a reliable measure of the level of

alcohol in a driver's breath for the purpose of assessing the level of intoxication; ability to drive and the risk which the offender poses to public safety on the roads. No doubt that is why the commission of that offence may trigger the court's powers under section 33A. A contravention of section 7 is specifically included in the range of offences which invokes the court's powers under section 33A. A significant aggravating factor with regard to the appellant's circumstances is, of course, the previous analogous conviction which is another deliberate challenge to enforcement of road traffic law. Enforcement of the road traffic law has as its principal purpose the protection of the public and penalising those who flout road traffic law. A second deliberate contravention of police requirements with regard to breath testing is rightly a matter of some significance and gravity for the sheriff. The sheriff also accepts the Crown's submission as to the prevalence of this type of offending on the island. The sheriff records that he had in mind the public interest and the deterrent effect that the court would exercise its powers in terms of section 33A irrespective of the value of the vehicle. Furthermore, in *Purdie v MacDonald* the Lord Justice General in delivering the Opinion of the court in a case in which the appellant had been unfit to drive through the effects of drink or drugs, specifically commented that the sheriff was entitled to exercise an element of discretion having regard to the prevalence of certain offences and their risk for the public in the locality in deciding whether to order forfeiture.

[6] We have had regard to the authorities mentioned. In our view the case of *Alice Whitefield v The Procurator Fiscal in Portree*, is of very doubtful assistance in the present appeal as it can be readily distinguished on its own facts. In that case the vehicle was the Appellant's main asset and a custodial sentence was imposed. In *Quinn v PF Glasgow* the appellant was a person of limited means who would require to maintain finance payments on the vehicle without having it available to her after forfeiture, so it too turned on very

different considerations of fact. By contrast, in *Craigie v Heywood* the driving of a first offender was considered to be of a fairly outrageous nature so that a fairly severe penalty was appropriate; and in that case the forfeiture of his vehicle was upheld. Obviously the sheriff is entitled to consider forfeiture for any contravention of section 7 of the 1988 Act and especially for a second offence. In *Carron v Russell* the appellant had pleaded guilty to a second drink driving offence, the reading was high, his car was not essential for his work, no fine was imposed but his car was forfeit. That appeal was refused. The appeal court considered that the case was exceptional due to its particular circumstances including the recent analogous offence and the fact that no fine was imposed. In this appeal the circumstances are not dissimilar albeit the sheriff here was not considering a custodial sentence.

[7] In our view when the court is considering forfeiture in terms of section 33A the sheriff requires to consider the particular facts and circumstances of the offence and the offender with a view to determining the overall penalty to be imposed. Factors such as public safety and protection together with deterrence will be relevant to that determination. In this case the appellant's refusal to comply with the requirement to give breath specimens has deprived the court of an assessment of the level of alcohol in his breath. This is the second occasion the appellant has deliberately refused to comply in a jurisdiction where it is said that such offending is prevalent. In our view, the sheriff was entitled to take into account not only these facts and circumstances, which include the appellant's means but also local factors relating to the prevalence of this type of offending. No other financial penalty was imposed by the sheriff in this case. In our opinion, the circumstances of this case disclose specific factors which support the sheriff's decision to order forfeiture. Accordingly

it cannot be said that the sheriff's decision to order forfeiture was excessive and the appeal is refused.