



SHERIFF APPEAL COURT

**[2016] SAC (Crim) 15
SAC/2016/000136/AP**

Sheriff Principal C A L Scott QC
Sheriff J Morris QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C A L SCOTT QC

in

APPEAL AGAINST SENTENCE

by

DANIEL HAMAND

Appellant;

against

PROCURATOR FISCAL, GLASGOW

Respondent:

**Appellant: Findlater; Faculty Services Ltd
Respondent: Carmichael; Crown Agent**

4 May 2016

[1] On 19 November 2015 at an adjourned trial diet, the appellant pleaded guilty to firstly, a charge of driving while using a mobile phone and secondly, using a motor vehicle without insurance.

[2] Initially, a special reasons proof was assigned. However, thereafter the appellant's position altered and the court was persuaded to assign an exceptional hardship proof, all in

terms of section 35 of the Road Traffic Offenders Act 1988. The exceptional hardship proof ultimately took place on 10 February 2016, the presiding magistrate having heard evidence found that exceptional hardship had been established. That being so, the appellant's agent, when addressing the magistrate in mitigation, submitted that the court should confine its sentence to monetary penalties, coupled with the endorsement of the appellant's licence with appropriate penalty points, on the basis that the need for disqualification had been avoided owing to the court's finding of exceptional hardship.

[3] In the course of the plea in mitigation, the magistrate drew attention to the printout which had been obtained from DVLA. It disclosed an endorsement for an analogous offences, that is to say, using a motor vehicle without insurance which had arisen from conduct which had taken one week prior to the offence then under consideration by the magistrate.

[4] It is plain from page 4 within the magistrate's report that the offence committed on 17 February 2014 influenced his approach when it came to sentencing. In particular when it came to the second charge on the complaint using without insurance, the magistrate imposed a fine in the sum of £200 and disqualified the appellant from holding or obtaining a driving licence for six months and the present appeal is brought to challenge that disqualification.

[5] In the course of his submission to the court today, counsel for the appellant adhered in effect to his written submissions which were broadly to the effect that once the magistrate had proceeded to the stage of hearing evidence and submissions on the question about exceptional hardship, the court had thereby passed beyond consideration of a discretion of a discretionary disqualification. Accordingly, having proceeded to hear evidence and submissions and to determine that exceptional hardship had been established, counsel

maintained that it was not open to the magistrate thereafter to revert back as it were, to consideration and imposition of a discretionary disqualification period.

[6] For our part, we agree with the submissions advanced on behalf of the appellant. In our view the allowance of an exceptional hardship proof carries with it the clear implication that the court was restricting its consideration to the issue of whether a mandatory disqualification by way of the totting up procedure might be avoided. For example had the endorsement flowing from the events of 17 February 2014 been deemed sufficient to merit the imposition of a discretionary disqualification, then the court at that stage ought to have proceeded in that way rather than allowing an exceptional hardship proof to take place. Moreover, where such a proof does take place and where exceptional hardship is held established by the court, the court cannot then in effect cast that determination aside and instead reintroduce a disposal which it had already ruled out *viz* to say a discretionary disqualification.

[7] Therefore in the circumstances of this case, we consider the approach of the magistrate to have been an illegitimate one. He was not entitled to consider and to impose a discretionary period of disqualification. All that being so, we shall quash the six month disqualification period imposed on charge 2 and in lieu thereof we shall order that eight penalty points be endorsed on the appellant's licence and of course, for the avoidance of doubt, exceptional hardship having already been established, there will be no mandatory period of disqualification resulting as a consequence of the totting up procedure.

[8] For completeness, we are reminded that the penalty points in respect of charge 1 cannot stand in these particular circumstances so they will be removed but his licence will simply be endorsed in respect of charge 1.

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