SHERIFF APPEAL COURT

[2020] SAC 008
SAC/2020/290/AP

Sheriff Principal Pyle
Appeal Sheriff Tait

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

Appeal against Sentence

by

GRAHAM CHARLES HENDRY

Appellant

against

PROCURATOR FISCAL, ELGIN

Respondent

Appellant: A Ogg (sol adv); Paterson Bell (for James McKay, Elgin)
Respondent: A Edmonds QC AD; Crown Agent

17 November 2020

Introduction

[1] The appellant pled guilty to a contravention of Section 5(1)(a) of the Road Traffic Act 1988. The reading was 63 micrograms. He had a previous conviction for the same offence from 2015. His plea was tendered at the first calling on an undertaking to appear. In allowing the appeal, we intimated that we would set out our reasons in writing.

Discount

[2] The sheriff sentenced him to a community payback order with a starting point of 200 hours of unpaid work. She also disqualified him from holding or obtaining a licence with a starting point of 54 months. No appeal was taken against these headline figures. She discounted both the hours and the period of disqualification by 25%. She set out her reasoning as follows:

> "I considered that a discretionary amount of 25% was appropriate to reflect the utilitarian value on the basis of the nature of the offending, the fact that there were no civilian witnesses and only two police witnesses. Given that there was no defence, any trial would have been unlikely to have lasted in excess of 30 minutes… I accept that the appellant offered a plea at the first opportunity. I gave a discretionary discount for what I considered to be the utilitarian value, rather than the 'mechanical' or 'automatic' discount of 1/3 appellants occasionally believe they are entitled to."

[3] While we recognise that appeals against the level of discount should be allowed only in exceptional circumstances, we consider that the sheriff fell into error in stating that there was no defence. In doing so, she was in effect regarding the strength of the Crown case as a relevant factor in the consideration of the sentencing discount. In *Gemmell* v *HMA* 2012 JC 223 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, p235). The point was reinforced in *Saini* v *PF Dundee* 2017 SLT 1308.

[4] We do not regard it as appropriate, at least in this case, to draw a distinction between civilian and police witnesses. As Lord Eassie expressed it in *Gemmell* (at p261):

> "While it may no doubt be that giving evidence is not an 'ordeal' for, at least most, police officers, the fact that by virtue of the early plea the police officers in question are freed not only from the need to attend at the trial, but also from the need to programme their activities to take account of that possibility, and are thereby available to perform other duties, seems to me to be a matter of important public benefit, increasing the protection of the public from crime and thus a material factor

in the equation of discounting sentences against utilitarian benefit."

Nor do we regard as relevant the length of a trial. Doubtless many, if not most, summary trials are limited in scope and are therefore likely to be concluded in less than a day, but that factor ignores the obvious point that the time and inconvenience caused by an unnecessary trial concerns much more than the diet itself, not least the preparation for it by the Crown, the court, the sheriff clerk and the court staff as well as the attendance of witnesses on the day including the time spent waiting to be called. In any event, to suggest that the length of the trial would be unlikely to exceed 30 minutes is, at best, speculative.

[5] Accordingly, the question of the level of discount is at large for this court. In our opinion, the appellant is entitled to a discount of one third, recognising that he pled at the earliest opportunity. That discount applies to both the number of hours of unpaid work and the period of disqualification.

Drink Driver Rehabilitation Course

[6] The sheriff allowed the appellant the opportunity to participate in the drink driver rehabilitation programme, but restricted to 10% the reduction of the period of disqualification in the event that he successfully completed the course.

[7] Section 34A(7) of the Road Traffic Offenders Act 1988 provides that the reduction be not less than 3 months and not more than one quarter of the unreduced period, ie the whole period of disqualification. The sheriff acknowledged that the reduction of 10% was "modest". She also did not think it appropriate that the reduction, which she referred to as a "discount", should result in the unreduced period falling below the statutory minimum of three years. She referred back to her overall reasoning for giving the appellant the opportunity to participate in the course:

> "[19] In respect of the drink driver rehabilitation scheme, I noted the level of the reading, the circumstances of the offence, and the fact that the appellant was not a first offender. I accepted that the appellant had not previously had the benefit of participating in the scheme. However, I did not accept that the appellant could not have had regard to the fact that his fitness to drive might be impaired. In particular, the crown's unchallenged position was that the appellant had continued to drink into the early hours of the morning. The caller alerted the police to this fact. The public are more than aware (through a variety of campaigns) of the dangers of drinking and driving. In particular, with a previous conviction for driving whilst with excess alcohol, one would have expected the appellant to be more vigilant. In the event, and by his own admission, the appellant is an alcoholic and, to my mind, was reckless in his disregard of the fact that he might be in any way impaired. To my mind, I was of the view that he could be educated to that extent in terms of the drink driver rehabilitation programme.
>
> [20] I distinguished this from the scenario of a first offender, with no underlying difficulty with alcohol, who was drinking late into the evening and then drove to work the following morning in the belief that he'd 'slept it off'."

[8] In *Boyd* v *PF Inverness*, unreported, 7 October 2020, this court (Sheriff Principal Turnbull, Appeal Sheriff Ross) considered the underlying purpose of the course:

> "The purpose of such certification is to encourage an errant driver to undergo training and education in order to reduce the risk of further offending, and with it the risk to the road-using public. There is considerable public benefit in such an initiative…
>
> The scheme of the legislation allows up to one-quarter discount from a disqualification. The incentive to take such a scheme, which itself involves significant financial and time commitment, will inevitably lessen with the restriction of any reduction. As there is a clear public purpose to the driving course, we would expect any reduction to be imposed at a level sufficient to present a reasonable incentive. As a one-quarter discount is available, we would expect any lesser discount, in ordinary circumstances, to require some justification."

Applying that purpose to the instant case, in our opinion the circumstances of the appellant as set out by the sheriff reinforce, rather than diminish, the need in the interests of public safety for the appellant to attend the course and thereby be incentivised to do so. Much of the content of the course is to emphasise to offenders the risks they take by driving under the influence of alcohol, not just to themselves but also, more importantly, to members of the public. At first sight, it might appear counter intuitive that an offender with a cavalier

attitude to drink driving should be offered the maximum incentive to attend the course, but that is to misunderstand its underlying purpose, namely the safety of the public.

[9] For completeness we should add that a further reason given by the sheriff was that "any further discount would take it below the statutory minimum [of disqualification for three years], which I did not consider appropriate". The sheriff does not give reasons for that conclusion. In our opinion, it is one which without further reasons she was not entitled to make. If any reduction should not result in the reduced period falling below the statutory minimum it would mean that the scheme would be unavailable to any driver who was given the minimum as the starting point. That would undermine the whole purpose of the scheme and would be contrary to the intention of Parliament.

[10] For these reasons we certified the appellant as suitable for a reduction of one-quarter, namely 9 months.