SHERIFF APPEAL COURT

[2025] SAC (Crim) 5
SAC/2025/000022/AP

Sheriff Principal A Y Anwar KC
Appeal Sheriff G K Murray
Appeal Sheriff P Mann

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in

Appeal by Stated Case against Conviction

by

IVAN NICOL

Appellant

against

PROCURATOR FISCAL, INVERNESS

Respondent

Appellant: Culross, advocate; Faculty Services Limited (for Anderson MacArthur Solicitors, Portree)
Respondent: Glancy KC AD; Crown Agent

16 July 2025

Introduction

[1] On 29 November 2024, the appellant was convicted after trial of the following charge:

> "on 31st January 2023 on a road or other public place, namely at the Lower Cullernie level crossing situated on the Aberdeen to Inverness railway line, at the A96 Aberdeen to Inverness road, near to the junction with Barn Church

> Road, and Redhill Farm, Culloden, you IVAN LACHLAN JAMES NICOL did drive a mechanically propelled vehicle, namely motor car registered number SY70 LFA dangerously in that you did fail to comply with road markings, signs and signals and drive through a level crossing there with warning lights flashing, red light activated and warning sirens sounding and you did drive onto the railway track there into the path of an oncoming train, and you did cause your vehicle to collide with said train and cause extensive damage to your vehicle and said train;
> CONTRARY to the Road Traffic Act 1988, Section 2 as amended".

[2] The sheriff disqualified the appellant from holding or obtaining a driving licence for one year and imposed a fine of £1,000 together with a victim surcharge of £40.

[3] The appellant appeals his conviction. The issue in this appeal is whether the collision described in the charge took place on a road or public place for the purposes of the 1988 Act.

The circumstances of the offence

[4] The appellant is employed by a company which has a place of business at Redhill Farm, near Lower Cullernie. At the A96 Aberdeen to Inverness Road, near to the junction with Barn Church Road and Redhill Farm, Culloden, where it intersects the Aberdeen to Inverness railway line, there is a level crossing known as the Lower Cullernie level crossing. The road leading to and from the level crossing connects to the A96 trunk road. From the A96, the road passes across the level crossing and leads to several residential properties, to Redhill Farm, which itself contains a number of commercial properties, and beyond.

[5] There is no automatic barrier at the level crossing. Users require to open and close gates manually on either side of the crossing. The sheriff summarised the various signs and road safety features present as at 31 January 2023: there was a sign advising users of the correct use of the crossing; a red triangle warning sign advised of the presence of the level crossing; lights displayed as green when it was safe to proceed and red when it was not safe to do so; a sign stated that users must only proceed if the light is green and that if no light is

displayed they must stop and telephone the signaller using a telephone provided at the crossing; there was a sound warning system which was activated when the red light was displayed; and there was a sign on the gate which stated "authorised users only".

[6] When the appellant drove onto the railway track the warning light was displaying red at the level crossing. The appellant did not stop before entering onto the level crossing. An approaching train collided with the rear of the appellant's vehicle. Both the train and the appellant's vehicle sustained damage.

The trial

[7] The collision had been recorded by the cameras on board the train. On behalf of the Crown, evidence was led from the train driver who spoke to the incident and to the video recording. PC Ward, who attended at the scene, spoke to the nature of the locus. A railway signal technician spoke to information obtained from the computer system at the level crossing and confirmed that the warning light system had been operational at the time of the collision.

[8] At the conclusion of the Crown case, the solicitor for the appellant made a submission of no case to answer in terms of section 160 of the Criminal Procedure (Scotland) Act 1995 which was in three parts. This appeal is concerned with the first part; the solicitor for the appellant submitted that there was insufficient evidence led to prove that the locus was a road or other public place. The Crown submitted that a police officer, PC Ward, had given evidence that members of the public were free to use the road. The sheriff repelled the submission. She found that PC Ward's evidence about the nature of the road had been sufficient to establish that the locus was a road or other public place. No evidence was led on behalf of the appellant.

The sheriff's decision

[9] The sheriff made the following findings in fact which are relevant to this appeal:

> "[4] The appellant is an authorised user of the level-crossing at Lower Cullernie as a result of his employment at Redhill Farm.
> [5] At Lower Cullernie there is a level crossing where the public road crosses the railway track.
> …
> [11] The road leading to and crossing the Lower Cullernie level crossing comes from the A96 trunk road. The road from the A96 passes over the level-crossing and leads to several residential properties and Redhill Farm site which houses a number of commercial properties, and beyond. At the level crossing there is a sign on the gate which states that the road is accessible to 'authorised users only'. This road is not a private road. It is accessible to members of the public who wish to travel to the dwellings and to the business premises and beyond."

Finding in fact [4] reflected the terms of a joint minute of agreement.

[10] In convicting the appellant, the sheriff explained at paragraph 6 of the stated case that "there was evidence from PC Ward about the nature of the road which crossed the railway track and where it led to. The evidence was that the public had access to the road."

[11] In his application for a stated case, the appellant claimed (at paragraph 2(a)) that the Crown witnesses had referred to the level crossing as "a work user crossing, with lockfast gates and signage including 'a private level crossing. Authorised users only'." In her stated case, the sheriff noted that none of the Crown witnesses had referred to the crossing as a "work user crossing", as having "lockfast gates" or signage which stated "private level crossing". The appellant did not propose any adjustments to the draft stated case to reflect the evidence claimed to have been spoken to by Crown witnesses.

[12] The following questions have been stated by the sheriff for the opinion of this court:

> "(1) On the evidence led, was I entitled to reject the Defence submission of no case to answer, in its various parts and find that there was a sufficiency of evidence led by the Crown?

(2) On the facts admitted or proved, was I entitled to convict the appellant of the charge?"

Legislation

[13] Section 192(1) of the 1988 Act defines "road" as follows:

> " … in relation to Scotland, means any road within the meaning of the Roads (Scotland) Act 1984 and any other way to which the public has access, and includes bridges over which a road passes".

[14] Section 151 of the Roads (Scotland) Act 1984 defines "road" as follows:

> " … any way (other than a waterway) over which there is a public right of passage (by whatever means) [and whether subject to a toll or not] and includes the road's verge, and any bridge (whether permanent or temporary) over which, or tunnel through which, the road passes; and any reference to a road includes a part thereof".

Submissions

[15] For the appellant, it was submitted that the Crown required, and failed, to lead evidence to prove that the level crossing was accessible to the public generally. Use by a special class of the public to travel along the road to visit the commercial or domestic properties required to be ignored (*Harrison* v *Hill* 1932 JC 13 at 16). If the nature of the crossing was not immediately plain, the Crown required to lead evidence to establish its nature; it should not be assumed that the public had access to the road or crossing just because there was no evidence to suggest that the road was private (*Yates* v *Murray* 2004 JC 16 [20] – [21]).

[16] While the appellant conceded that a notice restricting access was not determinative of the issue (*Renwick* v *Scott* 1996 SLT 1164), the presence of the "Authorised Users Only" sign suggested use of the crossing was restricted to a special class of person (*Young* v *Carmichael* 1991 SCCR 332; and *Hallett* v *DPP* [2011] EWHC 488 [11]) and was not open generally to members of the public; the sheriff had failed to give the notice sufficient

weight. The appellant was an authorised user as an employee of a business accessed by use of the level crossing. There was a lack of detail in the sheriff's stated case to support finding in fact [11] which amounted to little more than a bald assertion that the public had access to the road. PC Ward had spoken of the public obtaining access "beyond" the residential and commercial properties situated at and near Redhill Farm; however, no further details had been provided. A finding that a road is not a private road is not the same as a finding that it is one to which the public have a right of access.

[17] The Crown submitted that sufficient evidence was led to entitle the sheriff to convict. Finding in fact [11] made it clear both that the road was not private and that use of it was not restricted. The sheriff had been entitled to make that finding based on PC Ward's evidence which had been summarised at paragraph 6. His evidence was supported by the evidence led from a Network Rail employee about the layout of the road and crossing. In the absence of a question in the stated case directed at finding in fact [11], it was not open to this court to look behind the finding in fact at the evidence (*Buchan* v *Aziz* [2022] HCJAC 46; 2023 JC 51 [9]).

Decision

[18] Section 2 of the Road Traffic Act 1988 is contravened when a person drives a vehicle dangerously on a road or public place. The definition of "road", as defined by the 1988 Act, is set out above at paras [13] and [14]. There are two alternative definitions of a "road" for the purposes of the 1988 Act. Put shortly, these are: (i) a way over which there is a public right of passage; and (ii) any way over which the public has access. The second definition was the focus of the submissions before us.

[19] However, the first definition is relevant for the purposes of this appeal. The sheriff found that at Lower Cullernie there is a level crossing "where the public road crosses the railway track". Finding in fact [5] states in terms that the locus is a public road. Finding in fact [11] states that the road is not a private road. The clear import of these findings is that the road is a "way over which there is a public right of passage". In those circumstances, there is no requirement for a detailed analysis of how the road was used or for what purpose. Findings in fact [5] and [11] are not challenged. In the absence of a properly directed question in the stated case related to these findings, the court is not able to look behind that finding and examine the evidence in support of it (*Buchan* v *Aziz* 2023 JC 51 [9]). As this court noted in *Dickson* v *PF, Kilmarnock* [2023] SAC (Crim) 3, the requirement for properly directed questions in a stated case is not a procedural technicality: specific and focussed questions both identify the issues for the appellate court and inform the content of the stated case, affording the sheriff the opportunity to set out and explain their findings in fact where those are challenged. There being no question directed at findings in fact [5] and [11], this appeal would fall to be refused.

[20] We note that the stated case contains little or no analysis of either the definition of a "road" for the purposes of the 1988 Act nor any references to the authorities dealing with the definition. The sheriff does not articulate, by reference to the evidence led before her, the basis upon which she concluded that the road was a "public road". The submissions before us focussed on the question of whether the road was a "way over which the public has access". That appears to have been understood by the sheriff as the grounds upon which she was invited to consider the appellant's submission of no case to answer and the basis upon which a stated case was sought. It is difficult to reconcile the sheriff's reasoning in relation to her decision to repel the appellant's submission of no case to answer, with

findings in fact [5] and [11]; if the road was a public road as defined by section 151 of the Roads (Scotland) Act 1984 (ie "a way over which there is a public right of passage") there was no need to consider whether it was also "a way over which the public has access". It is clear, however, that the true question in this appeal, notwithstanding the terms of findings in fact [5] and [11], is whether the locus was a way over which the public had access. For those reasons, we shall consider the merits of the appeal.

[21] It is important to observe that the second statutory definition of a "road" in section 192(1) of the 1988 Act refers simply to access by the public. It does not quantify or qualify the circumstances in which that access requires to be exercised. As the Lord Justice General (Clyde) explained in *Harrison* v *Hill* 1932 JC 13, having regard to the underlying purpose of the road traffic legislation, namely the safety and protection of the public, "it is natural to suppose that the statutory traffic legislation should apply to any road on which the public may be expected to be found" (at page 16).

[22] Accordingly, the task for the court is to identify the evidence of usage and to consider the likely presence of members of the public on the road; the relevant question is whether the way is "one on which members of the public may be expected to be found and over which they may be passing, or to which they are in use to have access" (*Cheyne* v *MacNeill* 1973 SLT 27 at 30). Each case will turn on its own facts and circumstances. There was agreement that use by a special class of persons who merely visit householders on a road for business or social purposes required to be ignored (*Harrison* and *Yates*); the onus of proving that the locus is a road or public place falls on the Crown (*Yates);* and while a sign or barrier may lend weight to the use of the road being restricted to a special class of persons, the presence or absence of such signs or barriers is not determinative (*Renwick* and *Hallett).*

[23] The present circumstances are very similar to those considered by the High Court of Justiciary in *Renwick*, to which this court drew parties' attention prior to the appeal. Like the appellant, Mr Renwick had failed to stop at a red light while driving over a railway line at a level crossing. The road that crossed the railway line lay within the grounds occupied and owned by Forth Ports plc and linked the Grangemouth docks area to the town of Grangemouth. Mr Renwick relied upon the existence of byelaws which regulated entry to the port premises and upon a notice which read "no entry to Port premises except for authorised business purposes", to advance a submission that the road was a private road and public access was restricted.

[24] The Lord Justice General (Hope) noted that the question of whether the pubic had access to the road did not depend upon the terms of any byelaw or upon the terms of any notice. Referring to the dicta in *Rodger* v *Normand* 1995 SLT 411, his Lordship repeated that the answer to the question depends not upon the entitlement of the public to be present; it depends upon what happens from day to day, or, put differently, is the place one where the public might be expected to be passing over which they are in use to have access? In his summary of the evidence in *Renwick*, the justice noted that there was nothing to prevent people physically from driving onto the land owned by Forth Ports plc and referred to the evidence of two witnesses who confirmed only that the road carried "much traffic between the town of Grangemouth and the dock terminals".

[25] What then was the evidence of usage of the road in the present case? The sheriff noted that PC Ward gave evidence about "the nature of the road which crossed the railway track and where it led to. The evidence was that the public had access to the road." The sheriff has provided little further detail of the police officer's evidence. In her summary of

the Crown's submissions relating to the no case to answer submission, the sheriff notes that the Crown submitted

> "there was evidence that this was a road which led to a number of dwelling houses and commercial properties … there was evidence from PC Ward that the public were free to use the road …"

She noted that notwithstanding the submissions made on behalf of the appellant, no witnesses had referred to the crossing as a "work user crossing" or to there being "lockfast gates" or to there being a notice which described the crossing as "a private level crossing". She found in fact that the road: (i) passed over the level crossing and led to several residential properties and a farm site housing a number of commercial properties "and beyond"; and (ii) was accessible to members of the public who wish to travel to the dwellings and to the business premises "and beyond". PC Ward's evidence appeared to have been unchallenged; the summary of that evidence was not disputed nor any adjustments to the stated case sought.

[26] We accept that the evidence of usage by members of the public was sketchy and brief. Ordinarily, where the nature of the locus and its usage is not immediately obvious, more might be expected by way of evidence from the Crown. However, it is not the case that the Crown led no evidence of public use; the police officer confirmed that members of the public accessed the road and that they did so to travel beyond the private dwellings and commercial premises. The presence of the sign limited access to "authorised users"; however, it did not prevent the public from taking access. On balance, we are satisfied that there was a sufficiency of evidence before the sheriff and that the facts found established entitled her to conclude that the road was a way over which the public had access.

[27] In a striking similarity to the present appeal, the High Court in *Renwick* too noted that the justice had not explained much about the facts relating to the usage of the level

crossing; however, a finding in fact stated clearly that the road was a way to which the public had access. No attempt had been made by way of adjustment to the stated case to challenge that finding or to include any facts which might lead to a contrary conclusion. The High Court too considered that the justice had reached the correct decision.

[28] Accordingly, we shall answer both questions in the affirmative and refuse the appeal.