APPEAL COURT, HIGH COURT OF JUSTICIARY

[2006] HCJAC 22

Appeal No: XJ 1720/05

OPINION OF THE COURT

delivered by C.G.B. NICHOLSON, CBE, QC

in

APPEAL

by

STATED CASE

in causa

DR. DAVID GRIFFITHS

Procurator Fiscal, Perth

Appellant;

against

WILLIAM BRIERLEY

Respondent:

_____

Lord Johnston

Lord Nimmo Smith

C.G.B. Nicholson, CBE, QC,

Appellant: J. Hamilton, A.D.; Crown Agent

Respondent: S. Collins, solicitor advocate; Rollo, Davidson, Macfarlane, Cupar

23 February 2006

Background

[1] This is a Crown appeal against a decision by a sheriff at Perth not to impose what is commonly known as a "totting up" disqualification in terms of section 35 of the Road Traffic Offenders Act 1988. The respondent was originally charged with a contravention of section 2 of the Road Traffic Act 1988 but, at a notional trial diet on 12 May 2005, he pled guilty to an amended charge which libelled a contravention of section 3 of the Act. At that stage it seems to have been thought that the respondent was then subject to a probation order, and in that situation the sheriff adjourned the case for the preparation and production of a social enquiry report. For various reasons which are not now of consequence there were several further adjournments, and it was not until 6 October 2005 that the sheriff was finally able to proceed to sentence. On that date he imposed a fine of £150 and ordered endorsation of the respondent's driving licence with four penalty points. As at 6 October 2005 there were already nine live penalty points on the respondent's licence. Normally, of course, the addition of four further points would have obliged the sheriff to impose a period of six months'

disqualification for driving. However, for reasons to which we shall return shortly, the sheriff did not impose any disqualification; and it is that decision by the sheriff which is the subject of the present appeal by the Crown.

The statutory provisions

[2] Section 35 of the Road Traffic Offenders Act 1988 repeats "totting up" provisions which were originally introduced by section 19 of the Transport Act 1981. So far as relevant for present purposes, section 35 provides:

"(1) Where -

(a) a person is convicted of an offence to which this section applies, and

(b) the penalty points to be taken into account on that occasion number twelve or more, the court must order him to be disqualified for not less than the minimum period unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

...

(4) No account is to be taken under subsection (1) above of any of the following circumstances -

(a) any circumstances that are alleged to make the offence or any

of the offences not a serious one,

(b) hardship, other than exceptional hardship, or

(c) any circumstances which, within the three years immediately

preceding the conviction, have been taken into account under that subsection in ordering the offender to be disqualified for a shorter period or not ordering him to be disqualified."

In the present case it was accepted that the offence to which the respondent had pled guilty is one to which section 35 applies; and it was also accepted that, if the normal consequences of conviction were not to be mitigated in terms of subsection (1), the sheriff would have been obliged to impose a disqualification for a period of six months.

The sheriff's decision

[3] In considering the implications of section 35 of the 1988 Act the sheriff, as he has told us in the Stated Case, did not begin by deciding the number of penalty points which should be imposed. He recognised that even the minimum number of points which might be imposed (namely three) would be sufficient to bring the section into play, and in that situation he turned his attention at once to the question whether mitigating circumstances, as provided for in subsection (1), had been established.

[4] It appears that some attempt was made to persuade him that disqualification of the respondent would result in exceptional hardship both for the respondent himself and for his employers for whom he worked as a driver. However, the sheriff reached the conclusion that exceptional hardship had not been established; and his decision on that matter has not been challenged in the present proceedings.

[5] The sheriff then went on to consider a somewhat novel submission as to what would amount to a ground for mitigation in terms of section 35(1)(b) of the 1988 Act. Putting it shortly for the moment, that submission

was based on a consideration of the respondent's criminal history and, in the context of the public interest, his prospects for rehabilitation.

[6] An examination of the respondent's criminal history reveals that in 2002 he was dealt with in respect of two indictments containing offences of a sexual character. The first indictment contained five charges, one of which was a charge of shameless indecency committed between 1 July 1985 and 30 June 1986, and the other four of which were charges of indecent assault committed on various dates between 1998 and December 2000. The second indictment contained two charges of indecent assault committed in 2000, with one of the charges involving an assault on a 15 year old girl while she was having an epileptic fit. It appears that the respondent was made the subject of probation orders in respect of both of the foregoing indictments, with the probation orders coming to an end in January 2005, that is to say subsequent to the date of commission of the current offence, but some months prior to conviction and sentence.

[7] Against the foregoing background of offending, the social enquiry report prepared for the purposes of the present case contains the following assessment:

"Mr Brierley has completed a Probation Order and is currently assessed as posing a medium risk of re-offending and harm to women in the community. His job has provided him with a structure and focus, raising his self-esteem and assisting in the reduction of re-offending. He would lose his employment if he was unable to drive and it is assessed that this would raise the likelihood of re-offending and harm."

[8] In light of that assessment it was submitted to the sheriff at the stage of sentencing that he ought properly to take the view that the continued rehabilitation of the respondent, in the form of his employment as a driver, would be in the public interest and would amount to a ground for mitigating the normal consequence of his having acquired twelve or more penalty points on his driving licence. The sheriff accepted that submission, and in the Stated Case (at page 5) he states:

"In light of the information placed before me, I had no difficulty in concluding that in the event of the Respondent being disqualified, he would constitute a greater risk of reoffending not only for the period of disqualification but also thereafter in light of the difficulty he was likely to experience in obtaining alternative employment. By reference to *R v. Preston* and *R v. Thomas* [cited and considered below] I considered that I could properly take account of the rehabilitative process. In those circumstances, I considered that the greater public interest supported the respondent retaining his driving licence as part of the rehabilitative process thus reducing the risk he posed."

It is against that decision that the Crown has now appealed.

Submissions for the appellant

[9] The advocate depute began by reminding us of the three grounds of appeal which had originally been stated on behalf of the appellant. They were (put shortly) that:

"(i) The sheriff had erred in law by proceeding to consider mitigating

circumstances prior to determining the number of penalty points to be imposed for the present offence;

(ii) The sheriff had erred in law in deciding that he could refrain from

disqualifying the respondent despite holding that there would be no exceptional hardship to the respondent in so doing; and

(iii) The sheriff had erred in law in taking into account an irrelevant and

extraneous circumstance, namely the effect disqualification might have on the likelihood of the respondent committing further offences, and in particular offences of a sexual nature."

[10] In relation to the first of those grounds the advocate depute, very properly in our view, recognised that in the present case it is somewhat technical to criticise the sheriff for not following what is normally recognised as good practice since, as the sheriff himself has pointed out, the imposition of even the minimum number of points for the offence in question would bring the total number of points on the respondent's licence to twelve. In those circumstances the first ground of appeal was not pursued further.

[11] The second ground of appeal was not pursued either since the advocate depute recognised that, in the context of section 35, mitigating circumstances other than hardship may be found to exist regardless of whether or not exceptional hardship is held to have been established. Consequently, the sole argument for the appellant was directed to the issue which is highlighted in the third ground of appeal.

[12] In relation to that ground of appeal the advocate depute submitted that the circumstances founded on by the sheriff were of no weight, or at least were of insufficient weight to amount to mitigating circumstances such as to entitle him to refrain from imposing what was otherwise a mandatory period of disqualification. He submitted that the approach of the sheriff, as set out in the passage which we have quoted in paragraph [8] above, was difficult to follow, and did not provide an acceptable basis on which to hold that mitigating circumstances had been established. He also noted that, at the time of sentencing, the probation orders which had been imposed in respect of the two indictments which we have mentioned earlier had come to an end. In that situation, it was submitted, it could not be said that there was any continuing focus for rehabilitation in respect of court orders; and, that being so, there was no basis for treating the respondent differently from any other offender who had twelve or more penalty points on his driving licence. In the whole circumstances, it was submitted, we should answer question 3 in the Stated Case in the affirmative, and remit the case to the sheriff so that he might impose the appropriate period of disqualification.

Submissions for the respondent

[13] For the respondent Mr Collins submitted that the primary question is whether, in terms of section 35 of the 1988 Act, the rehabilitation process in respect of the respondent is something which can lawfully be taken into account as potentially constituting a mitigating factor. That, it was submitted, is different from considering whether the sheriff was entitled to take such matters into account in the present case. If rehabilitation, and its encouragement, are matters which can lawfully be taken into account, it then becomes a question for the sheriff, in the exercise of his discretion, to determine whether, on the facts of this particular case, a sufficient ground for mitigation has been made out. By reference to the two English cases referred to by the sheriff in the passage in the Stated Case which we have quoted above Mr Collins submitted that rehabilitative considerations can properly be taken into account when a court is considering whether or not there are circumstances which mitigate the normal consequences of a conviction. That being so, it was submitted, the sheriff's decision should not be overturned in the absence of any suggestion that he exercised his discretion in an improper way.

Discussion and decision

[14] It is clear that the English cases to which we have just referred, and which are founded on by the sheriff, require some consideration. They are *R v. Preston* [1986] RTR 136 and *R v. Thomas* [1983] RTR 437.

[15] In the case of *Preston* the appellant had been convicted of stealing a motor vehicle. He was sentenced to a suspended term of imprisonment, and eight penalty points were ordered to be endorsed on his driving licence. His licence already contained eight live penalty points, though none of them had been imposed in respect of driving offences. In terms of section 19(1) of the Transport Act 1981 (which introduced "totting up" disqualification, and which is in the same terms as section 35 of the 1988 Act) the appellant was disqualified for a period of six months. On appeal that order for disqualification was quashed. Giving the reasons for that decision (at page 141 C-G) Boreham J said:

" ... there is no blemish whatsoever upon his driving record. Indeed there has been no transgression of any of the provisions of the Road Traffic Act. ... We accept those as matters of mitigation. The question remains whether they suffice to avoid the normal consequences of a conviction of this kind. With some hesitation, we have come to the conclusion that they do."

Boreham J then went on to consider the matter of rehabilitation. He noted that much of the appellant's working life had involved the driving of motor vehicles, and he went on to observe that his offending took place in part because of his lack of funds. In that situation he continued:

"We obviously shall provide an advantage to him and, perhaps more importantly, an advantage to the public if we increase his chances of employment or of retaining his employment by not disqualifying him. By doing so we think that we increase his chances of rehabilitation."

[16] The circumstances in the case of *Thomas* were different. The appellant in that case pled guilty to two offences of driving while disqualified, and he had a record of identical offending in respect of which he had been disqualified on more than one occasion. He was sentenced to six months imprisonment and, in terms of section 19(4) of the Transport Act 1981, was disqualified for a period of two years. That subsection in the 1981 Act is in the same terms as section 35(2) of the 1988 Act, and it provides that, where more than one previous disqualification has to be taken into account, the minimum period of "totting up" disqualification is two years. It seems that the Judge who passed sentence expressed regret that he could not impose a shorter period of disqualification. The reason for that is explained by Lord Lane CJ (at page 439D) where he says:

"[The Judge] was influenced in this regard by what in recent years has become accepted sentencing policy in this type of case, that is, that with persons like the present appellant, who seem to be incapable of leaving motor vehicles alone, to impose a period of disqualification which will extend for a substantial period after their release from prison may well, and in many cases certainly will, invite the offender to commit further offences in relation to motor vehicles. In other words, a long period of disqualification may well be counter-productive and so contrary to the public interest."

Having considered the statutory provisions regarding grounds which may mitigate the normal consequences of a conviction, his Lordship expresses the Court of Appeal's conclusion that "the principle of sentencing policy does constitute such grounds"; and in that situation the period of disqualification imposed on the appellant was reduced to one year.

[17] It is, we think, worth noting that the Court in *Thomas* went on (at page 441B-F) to consider the "apparent anomaly" that a persistent offender like the appellant in that case might escape the minimum obligatory disqualification on account of sentencing policy while a person of reasonably good record and character who happened to acquire the appropriate number of penalty points might find himself unable to avoid the imposition of the minimum obligatory disqualification. Lord Lane CJ suggests that the answer is that the distinction between such offenders is likely to be reflected in the punishment imposed apart from disqualification. Thus, in *Thomas* the appellant was imprisoned whereas an offender with a less serious record might well be fined, albeit sentenced to a longer period of disqualification.

[18] Certain features are to be noted in the two cases which we have just described. In the case of *Preston* it seems clear from the passages in the judgment of Boreham J which we have quoted above that the ground which was founded on as mitigating the consequences of the appellant's conviction arose from the fact that none of the penalty points on his licence were for contraventions of the Road Traffic Acts. Given that "totting up" legislation was introduced in order to penalise, and to act as a deterrent to, those who regularly commit road traffic offences, that decision by the Court of Appeal may well have been justified. It is also to be noted, however, that, having taken the foregoing decision, Boreham J then appears to have dealt with the matter of rehabilitation almost as an afterthought. He does not say that rehabilitation would have been a ground for mitigating the normal consequences of the conviction, and we read what he says as merely highlighting a potentially helpful consequence which will flow from the fact that the consequences of the conviction have been mitigated on another ground. We do not regard what he says on that matter as offering any support for

the proposition that, had the matter of rehabilitation stood alone, it would have been regarded as a proper, or sufficient, ground for mitigating the otherwise mandatory consequences of the conviction.

[19] There is no doubt that in the case of *Thomas* rehabilitation *was* taken into account as a mitigating factor. However, it is important to note that this was done in the context of a well established principle of sentencing policy in England and Wales. There is nothing in the judgment in that case to suggest any support for the proposition that prospects of rehabilitation are factors which can properly be taken into account in any general sense, and in the absence of any recognised sentencing policy. Moreover, it seems to be of some significance that the history of previous offending which was taken into account in *Thomas* was one involving analogous road traffic offences of a serious kind. That, of course, is quite different from the present case where the previous offending is of a completely different character.

[20] Before leaving the case of *Thomas* we should also add that we are less than convinced by the answer which the Lord Chief Justice gave in relation to the anomaly whereby the taking into account of prospects for rehabilitation may mean that a serious and persistent offender will be dealt with less severely in the matter of disqualification than an offender who has simply amassed the requisite number of points on his licence as a result of having committed a number of relatively minor road traffic offences. The present case before this Court clearly demonstrates, in our opinion, the shortcomings of the Lord Chief Justice's answer since we regard it as unlikely that any offender, committing the same section 3 offence, would be dealt with differently from the present respondent in respect of the basic punishment for the offence: but, if the sheriff's decision is to stand, there would then be the anomaly that someone who had led a completely blameless life apart from committing a few minor road traffic offences would be sentenced to a period of disqualification whereas a convicted sex offender would not. We venture to doubt whether such an outcome would command public support.

[21] Having regard to all of the foregoing matters, we are of opinion that neither the case of *Preston* nor the case of *Thomas*, both of which were founded on by the sheriff in the present appeal, can be regarded as providing support for the course which he took. We recognise, of course, that the terms of section 35(1)(b) of the 1988 Act are expressed in a way which could admit mitigating circumstances other than exceptional hardship. Not surprisingly, perhaps, considerations of hardship have been the subject of almost all of the reported cases since "totting up" provisions were first introduced to our law: but that does not mean that circumstances of another kind may not, in appropriate cases, be held to be relevant and compelling in a particular case.

[22] That said, we do not consider that it would be appropriate, or indeed possible, for us to express any general view as to what may, or may not, be properly taken into account as amounting to a ground for mitigating the normal consequences of a conviction giving rise to a "totting up" disqualification. The sole question for us is whether, in the circumstances of the present appeal, the sheriff was entitled to hold that he was able to refrain from imposing the otherwise obligatory period of disqualification by having regard to the respondent's previous convictions for sexual offences and the perceived desirability of maintaining a situation where, by virtue of continued employment, the risk of re-offending might be reduced.

[23] We have, without much difficulty, come to the conclusion that the sheriff was not so entitled. His decision was not guided by any considerations of general sentencing policy relative to offenders of a particular kind; and, indeed, his approach would seem, on the face of it, to be equally applicable had the present respondent been, for example, a regular housebreaker, a regular offender in respect of crimes of violence, or a regular offender in respect of misuse of drugs legislation. Obviously, there is much to be said in favour of trying to enhance the possible rehabilitation of any offender with a history of serious offending. We do not consider, however, that it is appropriate, or indeed competent, to seek to achieve that by refraining from imposing a disqualification which is, as we have previously observed, intended to be a penalty, and to act as a deterrent for the safety of the public, in respect of repeat offending of a relatively minor character under the Road Traffic Acts. It is also, we think, of some relevance that in the present case the probation orders which had been imposed in respect of the two indictments which we mentioned earlier had come to an

end some nine months prior to the date when the sheriff was considering his sentence in the present case. Had they still been in force, it is possible that the sheriff might have considered it appropriate, perhaps by deferring sentence, to await their completion before deciding on sentence. But, given that they had been completed a considerable time previously, there was, in our opinion, no continuing basis to entitle the sheriff to consider the matter of rehabilitation when deciding on sentence for a relatively minor road traffic offence. We are also concerned that the sheriff unreasonably assumed that loss of employment might increase the risk of sexual re-offending. That conclusion is purely speculation.

[24] We are also of opinion that account must be taken of the anomaly which we have touched on earlier, namely that the sheriff's decision has the consequence that, if his approach is correct, an otherwise blameless motorist who has acquired the requisite number of penalty points on his licence, probably for relatively minor road traffic offences, will be disqualified for the mandatory period of six months whereas an offender, such as the present respondent, will be spared that penalty on account of the fact that he has previous convictions for serious sexual offences. We do not consider that such an outcome is consistent with public policy, and we take the view that it would be likely to bring the judiciary into disrepute. For that reason also, we are of opinion that the sheriff in the present case erred in law in determining that he was entitled to refrain from disqualifying the respondent.

[25] At the end of the day we do not find it necessary to answer questions 1 and 2 in the Stated Case. However, for the reasons which we have given, we shall answer question 3 in the affirmative, and we shall remit this case to the sheriff to impose an appropriate period of disqualification in terms of section 35(1) of the Road Traffic Offenders Act 1988.