SHERIFF APPEAL COURT

[2016] SAC (Crim) 7
SAC/2015-145/AP

Sheriff Principal Scott QC
Sheriff A L MacFadyen

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in

APPEAL AGAINST SENTENCE

by

CHENAO LI

Appellant

against

PROCURATOR FISCAL, STIRLING

Respondent

Appellant: Keenan, Solicitor Advocate
Respondent: Prentice QC AD; Crown Agent

8 April 2016

[1] The appellant pleaded guilty at an intermediate diet to contraventions of section 5(1)(a) of the Road Traffic Act 1988 and section 7(6) of the same Act. It can be seen from the complaint that these offences took place on 22 and 31 August 2015 respectively.

[2] The appellant was fined £750 discounted from £1,000 in relation to the contravention of section 5 of the 1988 Act and £1,200 discounted from £1,500 in relation to the contravention of section 7. The appellant was also disqualified from driving for a period of 3 years and an order was made for forfeiture of the appellant's motor vehicle. The present appeal is brought solely to challenge the forfeiture order.

[3] The appeal is predicated upon the hypothesis that the forfeiture order made by the sheriff was disproportionate and excessive in the circumstances of the case. Whilst accepting that issues of public protection properly arose, the solicitor advocate for the appellant argued that protection of the public had already been addressed by way of the significant period of disqualification imposed. It was contended that the sheriff in ordering forfeiture of the vehicle had failed to afford adequate consideration to the value of the vehicle (£15,000) and, moreover, had erred in the court's approach to public protection. Reference was made to the case of *Whitefield* v *PF, Portree* 2012 HCJAC 70. Put shortly, when the entire disposal by the court was considered, it was maintained that that part of it representing the financial penalty which, in effect, had been created by the forfeiture order, rendered the overall disposal excessive.

[4] The solicitor advocate for the appellant referred to the cases of *Craigie* v *Heywood* 1996 SCCR 654; *Carron* v *Russell* 1994 SCCR 681; and *Quinn* v *PF, Glasgow*, unreported, 25 August 2010. He highlighted the extreme nature of the driving in *Craigie* and the fact that, in *Quinn*, a forfeiture order had been quashed by the High Court on appeal. The solicitor advocate queried whether the forfeiture order made in the present case was necessary for public protection and submitted that it would not preclude the appellant from driving a different motor vehicle upon the expiry of the disqualification period. There was, it was argued, a limit to the protection afforded by the forfeiture order. Even if the forfeiture order

did afford the public a measure of protection, the solicitor advocate for the appellant queried whether Parliament had intended that such an order should apply in the circumstances of the present case.

[5] In light of comments made at the second sift, the Crown had submitted written submissions for the benefit of the court and the advocate depute presented a concise yet helpful oral submission under reference to what appeared in writing. The advocate depute contended that each case involving the making of a forfeiture order would likely be very fact specific. There could be no doubt that the protection and safety of the public were important features. The case of *Craigie* made that clear. It was argued that any conduct which might demonstrate a cavalier attitude (on the part of an appellant) towards public safety constituted a weighty factor. Beyond all that, the advocate depute adhered to the terms of his written submissions.

[6] In her report, the sheriff provides a clear indication as to her rationale for making the forfeiture order. This was, of course, a situation in which the appellant had committed two significant road traffic offences, both drink related, and involving the use of the same motor vehicle, within a period of just over a week. In relation to the section 5 offence, the appellant had been nearly three times over the limit and as far as the section 7 offence was concerned, he had been obstructive and uncooperative. In having regard to the need for public protection, the sheriff records that she viewed the appellant's attitude as being "cavalier and irresponsible" "…not to mention downright dangerous". She rejected the proposition that he was remorseful and expressed concern regarding the appellant's ability to appreciate the serious nature of his offending and its consequences.

[7] It is also plain that, in mitigation, the information made available to the court suggested that the appellant came from a wealthy family who had provided the money to

purchase the £15,000 car and that the appellant could meet a "substantial" fine. The appellant's solicitor advocate did not seek to depart from that analysis, on appeal. Indeed, the impression formed by the sheriff to the effect that the appellant had access to unlimited means did not appear to be challenged and was to an extent confirmed as it emerged that prior to conviction the appellant's family had simply placed another motor vehicle at his disposal.

[8] Under reference to Wheatley's *Road Traffic Law in Scotland*, 5th Edn, paragraph 8.11.5 at page 317, the sheriff was of the view that the appellant met the criteria set out therein. She also concluded that the forfeiture order imposed would be utilised to "tailor a sentence that achieves public protection". She had regard to the fact that the appellant had blatantly disregarded his bail undertaking in respect of the first offence when he committed the second offence under section 7(6) of the 1988 Act. The sheriff noted the proximity in time of the two offences and the fact that the second offence was arguably an escalation in the appellant's offending. In her assessment, forfeiture of the appellant's motor vehicle was, therefore, a reasonable measure to prevent re-offending.

[9] Against that background, and standing the scope of the argument presented on appeal, we have some difficulty in identifying the basis upon which the sheriff is said to have erred or misdirected herself. It seems to us that the case of *Whitefield supra* is of very limited assistance in the present context and might readily be distinguished on its own particular facts. Moreover, we do not consider that the other authorities cited on behalf of the appellant actually support the granting of this appeal.

[10] In the case of *Craigie* we note that the court detected "…*a disposition of such a nature that it would be appropriate to have a fairly severe penalty in this case and certainly that it would be appropriate that he should not have a car in order to repeat these performances*". In *Carron* the gap

between the appellant's two convictions was in the order of 16 months. The court was not persuaded that the forfeiture of the car could be said to be excessive in the serious circumstances of that case. It considered that the case could be said to be exceptional because of its particular circumstances. The case of *Quinn*, in our view, falls to be distinguished on its own facts. For instance, the appellant with significantly more limited means than those of the appellant in the present case, would have required to continue making payment of finance charges notwithstanding the fact that she would no longer have the benefit of the car in question.

[11] However, in so far as it has been argued on appeal that the sheriff failed to give proper weight to the value of the appellant's motor vehicle, we do not find that to be a compelling argument. Leaving aside the fact that it conflicts with what is said in Wheatley at page 317, as the sheriff points out in the final paragraph of her report, on the information provided to her, there was no basis upon which she might conclude that forfeiture of the vehicle would be in any way disproportionate. More importantly, the sheriff, rightly in our view, had proper regard to the fact that the cavalier nature of the appellant's offending posed a clear risk to the public. When the level of the reading relating to the section 5(1)(a) offence is taken along with repeat offending a matter of days later, all against the background of the appellant's subsequent attitude to his offending, it was, in our opinion, entirely legitimate for the sheriff to consider a forfeiture order.

[12] Her consideration of the order and its subsequent imposition were, to our mind, beyond the criticism levelled for the purposes of this appeal. We do not consider that the overall disposal in this case can be described as excessive on the facts and circumstances presented to the sheriff. It is to be noted that the minimum period of disqualification was imposed here. Whilst the solicitor advocate for the appellant sought to found to some extent

upon the observation that the sheriff had proceeded to sentence the appellant without calling for reports that feature is, in our view, essentially neutral for the purposes of the appeal. The plea in mitigation had stressed the appellant's prosperous background with no limitation being suggested as far as his means were concerned. In our opinion, whilst a forfeiture order can never constitute an absolute safeguard when it comes to protection of the public, that observation does not serve to restrict its use where there are compelling circumstances suggesting that an offender's conduct was redolent of an exceptional disregard for the consequences of his behaviour. We have concluded that the conduct of the appellant in this case was sufficient to meet that test. Accordingly, the forfeiture order will stand. The appeal is refused.

[13] For completeness, and in more general terms, we find ourselves in agreement with the submissions presented on behalf of the Crown. In particular, each case requires to be considered on its own facts and circumstances with public protection, the overall penalty imposed on an offender and the financial means of the offender all being factors which *may* be relevant, either together or in isolation, when considering the making of a forfeiture order in relation to a motor vehicle.

[14] Finally, there was some discussion in regard to a sentence which appears within paragraph 8.11.5 in Wheatley's *Road Traffic Law in Scotland*, at page 317. That sentence reads:

> *"It is inappropriate to consider the level of fine that might be imposed and the value of the car in deciding whether to order forfeiture."*

[15] In support of that proposition the case of *Wilson* v *Hamilton* 1996 SCCR 193 is cited in the footnote at page 317. Having perused the opinion of the court in *Wilson*, it is difficult to understand why it might support the aforementioned proposition. Indeed, where the court requires to consider whether the overall sentence imposed upon an offender might be said

to be excessive, we find it equally difficult to accept that the level of fine imposed and the value of the motor vehicle might not be taken into consideration. At all odds, this apparent discrepancy had no bearing upon our disposal in the present appeal.