SHERIFF APPEAL COURT

[2019] SAC (Crim) 1
SAC/2018-000638AP

Sheriff Principal M M Stephen QC
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

WILLIAM BUCHAN

Appellant

against

PROCURATOR FISCAL, PERTH

Respondent

Appellant: Keenan, Solicitor Advocate; PDSO Edinburgh
Respondent: Carmichael A.D.; Crown Agent

19 December 2018

[1] The appellant appeals the sentence of eight months imprisonment imposed following his plea of guilty to the following charge:

> "(001) on 26th September 2018 on a road or other public place, namely the unclassified U50 road, between Findo Gask and Balgowan, Perth you WILLIAM JOHN BUCHAN did DRIVE a motor vehicle, namely motor car registered number WJB856 after consuming so much alcohol that the proportion of it in your breath was 153 microgrammes of alcohol in

100 millilitres of breath which exceeded the prescribed limit namely 22 microgrammes of alcohol in 100 millilitres of breath;
CONTRARY to the Road Traffic Act 1988 section 5(1)(a)"

[2] The appellant pled guilty when he appeared from custody at Perth Sheriff Court on 27 September 2018. His plea of not guilty to another charge was accepted by the respondent's depute and he was released on bail pending preparation of a criminal justice social work report. He admitted a schedule of previous convictions which disclosed that he had been sentenced to imprisonment for two years for possession of indecent images of children prosecuted on indictment. It was accepted that the appellant had two previous convictions for contravention of section 5(1)(a). One such offence in 2000 does not appear on the schedule.

[3] At the sentencing diet on 24 October 2018 the sheriff sentenced the accused to 12 months imprisonment; disqualified him from holding or obtaining a driving licence for nine years and ordered forfeiture of the vehicle he was driving when he committed the offence. Having regard to section 196 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") the sheriff discounted the sentence of imprisonment and the period of disqualification by one third reaching a sentence of eight months imprisonment and six years disqualification.

[4] The first ground of appeal relates to the competence of the sentence of imprisonment. It is, of course, clear that the maximum sentence available to the sheriff in respect of this offence is six months. The sentence of imprisonment therefore falls to be quashed as incompetent. The remaining grounds of appeal relate to the appropriateness of a custodial sentence of any length. It was unclear from the note of appeal whether the appeal also related to the period of disqualification and the forfeiture order but the solicitor advocate for

the appellant said that he took no issue with either of those aspects of the sentence. In any event, leave to appeal the forfeiture order has not been granted.

[5] The solicitor advocate for the appellant submitted that the sheriff erred in imposing a prison sentence of one year as the maximum available for this statutory offence is six months. In any event, the sheriff erred in selecting a custodial sentence when there were more constructive community based disposals available which would assist the appellant address his alcohol problems. He presented a letter from the Tayside Council on Alcohol dated 18 December confirming that the appellant had attended on six occasions. No indication is given as to the counselling or treatment provided. On one occasion the appellant had relapsed into alcohol use. A community payback order with supervision and an alcohol treatment requirement would assist the appellant to address his problematic alcohol use and ultimately protect the public. This could be made available along with hours of unpaid work if necessary. Although this offence was the appellant's third contravention of section 5(1)(a) there had been a considerable gap in that offending. Ten years had elapsed since his second such offence in 2007. As we have already observed, the appellant did not challenge the period of disqualification and, moreover, acknowledged that an extension period would be added if the appeal was refused.

[6] The appellant was extremely intoxicated when traced and detained by the police. The level of intoxication was dangerously high and to the extent that he could not stand. The reading of 153mg in 100 millilitres of breath is worrying not only for the safety of other road users but also for the appellant himself. Clearly, he has an alcohol problem. He minimises the effect of his offending and has limited insight as to the effect of his drinking. As a matter of concession it is known that he has had two previous convictions for contraventions of section 5(1)(a). In 2007 he was disqualified for five years. The appellant's

stated intention of engaging with alcohol treatment is questionable. The criminal justice social work report indicates "*if Mr Buchan continues to drive whilst he is under the influence of alcohol he is at risk of causing serious harm to himself or other road users*". Aside from this being a statement of the obvious the writer of the report who had supervised the appellant on his previous order notes a history of him approaching specialist resources to tackle alcohol misuse followed by disengagement. Nevertheless, the report considered that a community payback order with supervision and a requirement to attend alcohol treatment might formalise and facilitate the appellant's access to specialist interventions aimed at addressing alcohol issues. The appellant has attended Tayside Council on Alcohol recently albeit once under the influence of alcohol.

[7] The sheriff has clearly considered the terms of the report and sets out her reasoning for imposing a custodial sentence (at para 19 of her report). She referred to the frequency of offending and the level of incapacity. She observes that the previous five year ban, and non-custodial disposals, had not deterred the appellant from driving after he had been drinking. The risk to other road users presented by a driver as significantly intoxicated as the appellant is obvious. The appellant decided to drive to a supermarket on the outskirts of Perth at a busy time of day simply to buy a newspaper. An incident involving another vehicle had occurred. The appellant appears for sentence for a third drink driving offence. Accordingly, we find no fault in the sheriff's reasoning on the imposition of a custodial sentence. We consider that the level of alcohol alone takes the appellant beyond the custody threshold. Although the lengthy period of disqualification will take the appellant off the road for a considerable period, and will achieve a measure of public protection, that is not the only sentencing consideration. When the high reading is combined with the appellant's record for drink driving, that points to a custodial term being the most appropriate sentence

for reasons of public safety on the roads, punishment and deterrence. We will therefore impose a sentence of imprisonment of six months which will be reduced to four months to reflect the appellant's plea of guilty at the first calling. This is the sentence which the sheriff states is the term she would have imposed had she had in mind the limit on her sentencing powers.

[8] Turning to the question of disqualification the headline sentence of nine years is high but must be set against the context of this being the third such offence and one in which the level of alcohol and the level of risk and danger faced by other road users was also high. In determining the appropriate period of disqualification the court now requires to extend the period of disqualification where a sentence of imprisonment is also imposed (section 35C of the Road Traffic Offenders Act 1988 ("RTOA")). This provision came into force on 16 July 2018 (in relation to offences committed on or after that date) and applies to Scotland. Sections 35A and 35B apply similar but more extensive provisions to England and Wales and have been in force since 2015. Section 35C provides:-

> "35C Extension of disqualification where sentence of imprisonment also imposed: Scotland
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> (1) This section applies where a person is convicted in Scotland of an offence for which the court –
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> (a) imposes a sentence of imprisonment, and
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> (b) orders the person to be disqualified under section 34 or 35.
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> (2) The order under section 34 or 35 must provide for the person to be disqualified for the appropriate extension period, in addition to the discretionary disqualification period.
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> (3) The discretionary disqualification period is the period for which, in the absence of this section, the court would have disqualified the person under section 34 or 35.

(4) The appropriate extension period is –

(a) in the case of a life prisoner, a period equal to the punishment part of the life sentence;

(b) in the case of a custody and community prisoner, a period equal to half the custody part of the sentence of imprisonment;

(c) in the case of a person serving an extended sentence, a period equal to half the confinement term;

(d) in any other case, a period equal to half the sentence of imprisonment imposed."

This case meets the criteria of section 35C(1) as the sheriff has imposed a sentence of imprisonment and has ordered that the appellant be disqualified in terms of section 34 of the 1988 Act. Where section 35C applies any order for disqualification under section 34 or 35 of the 1988 Act must provide for the person to be disqualified for the appropriate extension period in addition to the discretionary disqualification period. The use of the term 'discretionary disqualification period' may be unfortunate or something of a "misnomer" (as Treacy LJ observed in *R* v *Needham &* Ors [2016] EWCA Crim 455) as there has conventionally been a distinction between obligatory and discretionary disqualification. Many of the offences to which section 34 RTOA applies are offences involving periods of obligatory disqualification. For this type of offence the court must disqualify for a minimum period of one year. Nevertheless, the discretionary disqualification period mentioned in section 35C(2) refers to any order under section 34 or 35 which includes both obligatory and discretionary disqualification. In the circumstances of this case the extension period is "*a period equal to half the sentence of imprisonment imposed*" (35C(4)(d)) being a period of two months. It is the intention of parliament that the court's order must provide for the appropriate extension period. The reason for this is clear. Time spent in prison should not erode the impact of disqualification. The ban should impact whilst the offender is at liberty

not when disabled from driving by virtue of being a serving prisoner. Accordingly, in our view, to achieve this purpose the proper approach is for the sheriff to determine the headline period of disqualification having regard to any aggravating and mitigating factors and previous convictions. In terms of *Wilson* v *Procurator Fiscal, Aberdeen* [2018] HCJAC 50 the period of disqualification falls to be discounted by the same proportion as any other part of the sentence having regard to section 196 of the 1995 Act. Having determined the discounted period of disqualification the court should, in relevant cases, then apply section 35C and add the appropriate extension period. That is not a discretionary matter. The court must extend the period of disqualification by the simple measure of adding one half of the sentence of imprisonment imposed to the actual or discounted period of disqualification. In this case, the sheriff has not had regard to section 35C. It is likely that there is a degree of novelty surrounding this provision as it came into force only in July 2018 and, of course, only applies in circumstances where imprisonment is the appropriate disposal. Nonetheless, it is important that sentencers are aware of its terms.

[9] Accordingly, we must allow the appeal against the imposition of a custodial term of eight months and quash that sentence. Then, having considered the facts and circumstances anew, we refuse the appeal against the imposition of a custodial sentence and substitute a period of four months imprisonment, duly discounted from a headline sentence of six months by virtue of s.196 of the 1995 Act. The period of disqualification of six years imposed by the sheriff then falls to be increased by the appropriate extension period in terms of section 35C(2). That extension period is a period equal to half the sentence of imprisonment which in the circumstances of this case will be two months. The appellant will therefore be disqualified from driving for six years and two months.