SHERIFF APPEAL COURT

[2016] SAC (Crim) 14
SAC/2016/000133/AP

Sheriff Principal M M Stephen QC
Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

NOTE OF APPEAL

by

PETER JENKINS

Appellant;

against

PROCURATOR FISCAL, STRANRAER

Respondent:

Act: C.M. Mitchell. Michael Lyon, Solicitors Limited, Glasgow
Alt: M Hughes, A.D. the Crown Agent

6 April 2016

[1] On 10 February 2016 at the Sheriff Court in Stranraer the appellant pled guilty at the trial diet to a contravention of section 5(1)(a) of the Road Traffic Act 1988. The appellant had been stopped at about 10pm on 29 September 2015 by police officers on mobile patrol in

Newton Stewart. The police officers had observed the vehicle swerving on the A714, Wigtown Road, Newton Stewart. He had a breath alcohol level of 87 micrograms in 100 millilitres which clearly exceeded the prescribed limit of 22 micrograms of alcohol in 100 millilitres of breath.

[2] The sheriff disqualified the appellant from driving for a period of 34 months (reduced from 3 years) and imposed a fine of £1,400 (reduced from £1,500). This is the appellant's first conviction for a drink driving offence although he has other road traffic convictions, mainly speeding.

[3] The court certified the appellant as suitable for inclusion on a drink driving rehabilitation course which, if successfully completed, could reduce the period of disqualification by a maximum of eight months.

[4] The appellant complains firstly in respect of the length of his disqualification that the headline period of disqualification of three years was grossly excessive having regard to this being a first drink driving offence and on consideration of the sentencing guidelines for Magistrates in England and Wales. It was accepted that they are not binding in this jurisdiction. The second complaint is that the financial penalty is also grossly excessive. The appellant derives income of £500 per week from his business and pays rent of £540 per month. The appellant will require to employ a driver during the period of his ban. Accordingly, it was argued that the period of disqualification and financial penalty were grossly disproportionate to the appellant's conduct.

[5] The sheriff in his report explains both his methodology and reasons for imposing the period of disqualification. He explains that he was initially inclined to impose a period of disqualification in excess of three years to reflect the extremely high level of alcohol in the appellant's breath and the attendant risk to which he put other road users. Having had

regard to the appellant's circumstances and the fact that this was his first offence for drink driving the sheriff restricted the period of disqualification to a headline sentence of three years. That period was reduced by two months to reflect the plea of guilty two days prior to trial which had resulted in the attendance of witnesses being countermanded.

[6] The sheriff summarises his reasoning on disqualification in the following terms:-

> *"My primary concern in assessing a suitable sentence for this matter was the very high level of alcohol in the appellant's breath, 1 microgram short of four times the prescribed limit. I was bound to impose a period of disqualification to protect the public from his irresponsibility and that period had to be lengthy to reflect the gross excess over the prescribed limit."*

Accordingly, it is clear that the sheriff gave significant weight to the lower prescribed limit which applies now in Scotland and to the factor or ratio by which the alcohol reading exceeded that limit.

[7] The sheriff proceeds to distinguish the Magistrates Court sentencing guidelines for England and Wales as having no direct application in this jurisdiction. However, in the event that they assist, the sheriff applies a multiplier being the ratio of 1 to 1.59 which is the difference between the Scottish prescribed limit and the limit which applies in England and Wales. The result appears to equate the appellant's alcohol reading with 138mg in England and thus the correct range of sentence had been reached in determining a headline sentence of 36 months.

[8] We consider that the sheriff's approach is erroneous. The gravity of a drink driving offence should be measured in objective, absolute terms rather than by considering the number of times by which a driver exceeds the limit. It is fallacious to equate a reading of 87 in Scotland with one of 138 in England and Wales, when one driver is likely to be considerably more impaired than the other. The fallacy of the sheriff's approach can perhaps also be seen by considering what the approach would be were the limit to be

reduced to zero (as some advocate). In that event, it would be mathematically impossible to view any transgression as being a certain number of times more than the limit.

[9] In our opinion, the proper approach to sentence in a drink driving offence is to consider the alcohol reading together with any aggravating and mitigating circumstances relating to the offence, such as the quality of the driving; and the offender, which must include consideration of his record or lack of record. Disqualification is intended to be a penalty. It should reflect the gravity of the offence; however it is also a deterrent measure and for public protection. A minimum disqualification of one year is obligatory for a contravention of section 5(1)(a) of the 1988 Act. Where the court is sentencing with public safety and protection in mind it is necessary to consider the risk posed by the offender. The level of the alcohol reading together with the offender's antecedent behaviour especially for drink driving offences form two important factors in assessing risk. That is why the minimum period of disqualification for a second drink driving offence within 10 years is three years.

[10] In our opinion the significance of the lower 'prescribed limit' in this jurisdiction relates not to the level of risk posed by the offender but rather the importance of the limit is that it now makes it an offence to drive a motor vehicle after consuming lower levels of alcohol in excess of that limit. The offence threshold is thereby lowered in Scotland.

[11] Section 5(1)(a) of the 1988 Act and therefore the law on drink driving applies throughout the UK. The difference between this jurisdiction and England and Wales relates only to the lower 'prescribed limit' by virtue of the Road Traffic Act 1988 (Prescribed Limit) (Sc) Regs 2014 which prescribe lower limits in breath, blood and urine for the purpose of the definition of *"the prescribed limit"* in section 11(2) of the Road Traffic Act 1988.

[12] Drivers who breach the lower limit will face an obligatory one year disqualification. The risk presented by drivers committing a first drink driving offence is not increased by virtue of the lower limit. A driver who has a reading of 87 micrograms of alcohol in 100 millilitres of breath is clearly guilty of an offence and also poses a risk to public safety but that risk is no greater than it was when the prescribed limit was the previous higher breath alcohol limit of 35.

[13] In this case the appellant falls to be sentenced for a first drink driving offence. He has committed other non-analogous road traffic offences. The appellant requires to carefully assess his responsibilities as a driver. Successful completion of the drink driving rehabilitation course will be one step in this process. The alcohol level in his breath is relatively high in our opinion. The sheriff was correct to consider a period of disqualification above the minimum obligatory disqualification of one year. However, we consider that the sheriff misdirected himself by applying a formulaic calculation of the period of disqualification based on the ratio of the alcohol reading above the prescribed limit rather than making an objective assessment of the alcohol reading and the other factors as we have mentioned. Accordingly, the assessment of the period of disqualification is one which we can now determine on the facts and submissions and we consider that an appropriate period of disqualification is two years which we will reduce to 22 months to reflect the plea negotiated prior to but tendered at the trial diet. The drink driving rehabilitation course, if successfully completed by 10 May 2017, will result in that period of disqualification being reduced by five months.

[14] That leaves the appeal on the level of fine imposed. Again for the reasons we have given we consider the sheriff misdirected himself as to the level of culpability and risk presented by the appellant. The fine imposed is excessive in our opinion and we will quash

the fine of £1,400 and instead order that the appellant pay a fine of £900 which we have reduced from a starting point of £1,000.