SHERIFF APPEAL COURT

[2022] SAC (Crim) 5
SAC/2022/000027/AP

Sheriff Principal Mhairi M Stephen QC
Sheriff T McCartney

EX TEMPORE DECISION

delivered by SHERIFF PRINCIPAL MHAIRI M STEPHEN QC

in

appeal against sentence

by

TIMOTHY HUMPHREYS

Appellant

against

PROCURATOR FISCAL ABERDEEN

Respondent

Appellant: Shand; Faculty Services (for Aberdein Considine & Co, Aberdeen)
Respondent: Edwards QC; Crown Agent

19 April 2022

[1] This is an appeal against the sentence imposed by the sheriff at Aberdeen on 6 January 2022. The appellant pled guilty as libelled to the two charges on the complaint at the first calling in the following terms:

> "(001) on 21 November 2021 on a road or other public place, namely A90 between Stracathro and Stonehaven you TIMOTHY MARK JOHN CHRISTOPHER HUMPHREYS did drive a motor vehicle, namely motor vehicle, articulated lorry registered number SV68 NDO after consuming so much alcohol that the proportion of it in your breath was 98 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)
> You TIMOTHY MARK JOHN CHRISTOPHER HUMPHREYS did commit this offence while on bail, having been granted bail on 7 May 2021 at Aberdeen Sheriff Court;
>
> (002) on 21 November 2021 on a road or other public place, namely A90 between Stracathro and Stonehaven you TIMOTHY MARK JOHN CHRISTOPHER HUMPHREYS did drive a mechanically propelled vehicle, namely motor vehicle, articulated lorry registered number SV68 NDO dangerously whereby you did drive said vehicle under the influence of alcohol, fail to maintain proper control of the vehicle and cause the vehicle to repeatedly swerve between lanes;
> CONTRARY to the Road Traffic Act 1988, Section 2 as amended you TIMOTHY MARK JOHN CHRISTOPHER HUMPHREYS did commit this offence while on bail, having been granted bail on 7 May 2021 at Aberdeen Sheriff Court."

The sheriff imposed a cumulo sentence of 6 months imprisonment (2 months of which represents the bail aggravation). The sentence was discounted from a headline sentence of 9 months imprisonment, (3 months of which was attributable to the bail aggravation). The appellant was also disqualified from driving for a period of 3 years and 7 months and until he sat and passed the extended test of competence to drive. The disposal in respect of disqualification is not appealed

[2] The circumstances of the offending which involve serious road traffic offences aggravated by bail are recorded in the sheriff's report. Briefly put, the appellant was at the relevant time an HGV driver who, whilst significantly under the influence of alcohol, drove an articulated heavy goods vehicle northbound on the main Dundee to Aberdeen Road (A90) travelling between Strathcathro and Stonehaven a distance which the sheriff records is one of approximately 20 miles. The appellant indicated to the author of the CJSWR that he was also drinking at the wheel. The offence took place on 21 November 2021 at 6.15pm. Accordingly, this driving episode was in the hours of darkness on a busy main

trunk road which is a dual carriageway in both directions. The appellant allowed his vehicle to drift from lane to lane on the northbound carriageways in an unpredictable fashion. The female driver of the car following behind him observed the danger and put on her hazard warning lights in order to warn or dissuade other motorists from attempting to overtake the lorry. The lorry continued to swerve back and forward between the lanes and at one point almost struck the nearside kerb. The appellant eventually drew into an industrial estate in Stonehaven by which time the police had been called. The female driver followed the vehicle and spoke to the driver being concerned that there might be something wrong with his health.

[3] The usual procedures were followed at Kittybrewster Police Station and the appellant was found to have a substantial amount of alcohol in his breath - 98 micrograms of alcohol in 100 millilitres of breath - which bearing in mind that the prescribed upper limit is 22 micrograms, represents a very significant breath alcohol level.

[4] The appellant admitted a schedule of previous convictions including an analogous drink driving offence in 2010 at Stonehaven Sheriff Court which resulted in a fine and disqualification of 16 months. The appellant has offended in both England and Scotland. He served a prison sentence in England (1982) for burglary. More recently, the appellant has been convicted of threatening and abusive behaviour in terms of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 aggravated by a domestic background and also of police assault. He has been prosecuted and convicted of other road traffic offences in the JP Court in Aberdeen. According to the CJSWR there are pending charges in terms of the Sexual Offences (Scotland) Act 2009 (sections 6 and 7) for which he was released on bail on 7 May 2021 and which constitutes the bail aggravation to these offences.

[5] Counsel for the appellant adopted his written submissions. He submitted that the sheriff had failed to correctly follow the requirements of section 204 of the Criminal Procedure (Scotland) Act 1995. In particular, the sheriff had not fulfilled his obligations in respect of section 204(3A) and (3B). He referred to the policy objectives of the Criminal Justice and Licensing Bill in respect of the presumption against short periods of imprisonment (paras 68-70). The sheriff had not stated in sufficiently clear and informative terms why no disposal other than a short custodial sentence was appropriate. Further, the sheriff had not recorded his reasons for passing a custodial sentence of short duration in the minute or record. This vitiated the sentence. Counsel submitted that the gravity of the offending and sentencing objectives could have been met by imposing a CPO with hours of unpaid work, as he put it, "a tough community based disposal". There were suitable options available. The sheriff had apparently regarded a community-based disposal as a soft option and he erred in so thinking. The sentence of imprisonment should be quashed and a suitable community based disposal substituted.

Decision

[6] Clearly the appellant's decision to drive an articulated heavy goods vehicle whilst under the influence of alcohol to a very significant degree is eloquent of a high degree of negligence and culpability. The appellant showed a reckless disregard for the actual and potential danger of driving an HGV whilst intoxicated. In doing so he had imperilled the safety of other road users. The fact that there was no accident or collision does not diminish the danger which the appellant posed to other motorists and their passengers on a busy trunk road. The absence of any accident was fortuitous and may explain why this matter is on summary complaint.

[7] The sheriff in his report states that he had considered the options available to the court and as pressed upon him in mitigation. A CJSWR was available which the sheriff had regard to. Nonetheless the sheriff required to balance the gravity of the offending with any mitigation. He concluded "that the seriously aggravated nature of his conduct required the imposition of a custodial sentence in order to mark the court's disapproval of that conduct, to deter others from such behaviour and to punish the appellant for his dangerous and irresponsible actions."

It appears to be acknowledged in the Note of Appeal that the sheriff had indicated that custody was imposed due to the seriousness of the offending (see paragraph 2(g). Punishment and deterrence are, of course, proper sentencing objectives and given these offences we agree that the sheriff was entitled to take that approach.

[8] Turning to the submission regarding the requirements of section 204 we consider the correct interpretation to be applied to the relevant provisions in section 204 (sub-sections 1 to 3 and 3A and 3B) is to place a restriction on the passing of a sentence of imprisonment on a person who had not previously been sentenced to imprisonment (section 204(2)) and also to impose certain procedural requirements on the court such as obtaining reports (however that requirement applies only to a first prison sentence which is not the situation in this case) and where a prison sentence is to be passed by stating the reason for its conclusion that no other method of dealing with the person is appropriate (section 204(2)). However, section 204(3A) and (3B) apply what may be considered to be something of a "double lock" by also requiring the sentencing sheriff not to impose a sentence of imprisonment for 12 months or less unless the court again considers that no other method of dealing with the person is appropriate. These provisions apply in this case. To a significant extent similar, if

not the same, factors and considerations come into play as would when a sheriff is considering whether to impose a first custodial sentence in terms of section 204(2). The sheriff will have regard to the same material and the same sentencing principles and objectives when coming to a conclusion in a particular case whether a custodial sentence of 12 months or less is the only appropriate method of dealing with an offender in terms of section 204(3A).

[9] Whereas section 204(3B) requires the court to comply with certain procedural requirements namely that the court states its reasons for being of the opinion that no other method of dealing with the person is appropriate and have these reasons entered in the record of proceedings, there is no absolute rule as to the effect of failure to comply with these requirements. The consequence of failing to comply must depend upon what can be taken to been intended by Parliament. We do not accept the submission that if a court fails to follow subsections 3A and 3B to the letter then the sentence would be invalid as appears to be suggested by counsel for the appellant. Firstly, the legislation does not say that. Nor could that be the intention of Parliament given that judicial discretion in matters relating to sentence "remains intact" (see para 70 of the policy Memorandum) and there would be significant public concern if serious road traffic offenders and others including those convicted of domestic offending could escape punishment by way of a custodial sentence for entirely technical reasons. This issue has already been considered in *Heywood* v *SJSB* 1994 SCCR 554. *R* v *Soneji* [2006] 1 AC 340 is a case concerned, as here, with the procedural requirements of legislation but about confiscation of the proceeds of crime. The House of Lords concluded that there was no absolute rule as to the effect of a failure to comply with procedural requirements and that the effect must depend upon what can be taken to have been intended. (See Lord Rodger of Earlsferry at paragraph [30]). An accused who

considers that section 204 has not been followed correctly has a remedy and may exercise his or her right of appeal in terms of section 175(2) (b) of the 1995 Act.

[10] The submission was made that the sheriff erred in failing to indicate specifically why the statutory presumption or requirement not to impose short custodial sentence was not observed or followed in this case. However, as the sheriff correctly observes, the existence of such a requirement does not mean that is it never appropriate to impose a custodial sentence of 12 months or less. Rather it means that such a sentence requires to be justified on the facts and circumstances of the case. Section 204 (3A) refers to no other sentence being "appropriate" not no other sentence being possible. What is appropriate in a particular case will depend on any aggravating and mitigating factors. We are satisfied that the sheriff had regard to section 204 in its entirety; is aware of the requirements of section 204 (3A) and of the constraints on a short sentence if imprisonment is to be imposed. In many cases the reason is plain. In this case the sheriff made it clear that the gravity of the offending required a custodial term. If the reason for imposing a short custodial term was not minuted nor specifically and separately addressed it was hiding in plain sight. The reason is identical – the gravity of the offending. In these circumstances we do not consider that the sheriff erred. Nor do we consider that a failure to minute the reasons, although suboptimal, vitiates the sentence. Nonetheless, it is important that when the clerk in a summary criminal court minutes a custodial disposal brief reasons must be given for a sentence of 12 months or less (and indeed for a first prison sentence). Section 204 (3A) certainly does not prohibit a court from imposing a custodial sentence on summary complaint even where there is no aggravation libelled. The imposition of such a sentence requires to be justified by reference to the facts and circumstances of the case.

[11] The appeal is refused.