



SHERIFF APPEAL COURT

**[2023] SAC (Crim) 8
SAC/2023/000208/AP**

Sheriff Principal A Y Anwar
Sheriff Principal S F Murphy

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in

APPEAL AGAINST SENTENCE

by

BRADLEY YOUNG

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: L.K. Kennedy; Culley & McAlpine, Perth
Respondent: E. Cameron, solicitor advocate, advocate depute; Crown Agent

6 October 2023

Background

[1] The appellant appeared on summary complaint at Aberdeen Sheriff Court. On

16 May 2023, at a continued pleading diet, he pled guilty to the following charge:-

“(001) on various occasions on 29 May 2021 on a road or other public place, namely Queens Links Leisure Park, Aberdeen, or elsewhere you BRADLEY JAMES YOUNG did drive a mechanically propelled vehicle, namely motor car registered number W835 SAV dangerously, reverse with members of the public holding onto the car, then accelerate and cause excessive engine and tyre noise while members of the

public held onto your car, accelerate away at speed once the car was released endangering them and others;
CONTRARY to the Road Traffic Act 1988, section 2 as amended.”

[2] When he tendered his plea, the appellant was serving a custodial sentence for a prior offence. He had also been disqualified from holding or obtaining a driving licence for a separate offence.

The summary sheriff's approach to sentence

[3] At the sentencing diet, the summary sheriff (“the sheriff”) recognised that his sentencing options were limited because of the appellant’s status. He imposed a fine of £900, discounted to £600 to take account of the timing of the plea. No time to pay was sought. In terms of section 219 of the Criminal Procedure (Scotland) Act 1995, the sheriff imposed an alternative period of imprisonment of 14 days to run concurrently with the custodial sentence the appellant was already serving.

[4] The sheriff disqualified the appellant from driving for 2 years, reduced to 16 months, taking account of the timing of the plea. Having regard to section 35D of the Road Traffic Offenders Act 1988 (“RTOA”), the sheriff considered he was obliged to apply an extension to the period of disqualification to prevent the appellant from serving his disqualification while in prison. The appellant was expected to be released from prison in mid-December 2025. The period between the date of the sentencing diet and the date of his expected release was approximately 31 months. The sheriff imposed an uplift of 30 months to the disqualification to take account of the appellant’s custodial sentence. That led to a total period of disqualification of 46 months. The sheriff also ordered that the appellant be disqualified from holding or obtaining a driving licence until he had sat and passed an extended driving test.

[5] The appellant appeals against the sentence of the sheriff and contends that (i) the period of disqualification is excessive, particularly the extension applied in terms of section 35D of RTOA, and (ii) the period of disqualification should start from the date when the appellant is in fact liberated rather than from the date of the expiry of his current custodial sentence.

Submissions for the appellant

[6] On behalf of the appellant it was submitted that the headline disqualification period of 2 years was too high and ought to have been lower taking account of the appellant's age. No issue was taken with the discount of one-third applied in respect of the time at which the guilty plea had been tendered. In respect of the extension applied under section 35D, the decisions of the Court of Appeal in England & Wales in *R v Needham* [2016] 2 Cr. App. R. (S.) 26 and *R v Anderson* (2022) Cr. App (S.) 8 were of no assistance. The approach to sentence discounting for the timing of a plea was different and no discount is applied to a period of disqualification in that jurisdiction. It was submitted that the sheriff ought to have calculated the total period of disqualification and then applied the one-third discount on a uniform basis across the appellant's sentence: *Wilson v Shanks* 2019 J.C. 1.

[7] In the event the first ground of appeal was refused, it was submitted that the period of disqualification ought to begin from the point at which the appellant was actually released from custody. Parliament had intended when enacting section 35D to ensure that the convicted individual served their disqualification in the community, not in custody. That being so, if the appellant were released early from prison, he should immediately be able to start serving his period of disqualification, rather than the starting point for the disqualification period remaining fixed at mid-December 2025. The sheriff has expressed

the view in his report that he was sympathetic to that point. The sheriff has suggested that the appellant could apply for removal of his disqualification, were he to be released early. The appellant's counsel was sceptical as to the prospects of a recently released prisoner being successfully granted a request under section 42(1) of the RTOA and noted that such a request cannot be made until 2 years of the disqualification period has passed (if the disqualification is for less than 4 years): section 42(3)(a).

[8] Finally, the appellant's counsel submitted that the period of disqualification of 46 months was at variance with the sentencing principle whereby unduly lengthy periods of disqualification are to be discouraged: *R v Thomas Kevin* [1983] 3 All ER 756 per Lord Lane LCJ at 757C-E.

Submissions for the respondent

[9] The advocate depute submitted the approach adopted by the sheriff was correct. The purpose of sections 35C and 35D is to prevent an offender from using the time spent in prison to erode the impact of a disqualification. In *R v Needham*, the Court of Appeal in England & Wales stated that the intention of Parliament was that disqualification should be served in the community.

[10] The advocate depute referred to this court's previous decision in *Buchan v Procurator Fiscal, Perth* [2019] SAC (Crim) 1. It was submitted that *Buchan* concerned the proper application of section 35C of the RTOA to a sentence to be imposed by a sheriff. The court held that the proper approach was for the sheriff to determine the headline period of disqualification, having regard to any aggravating and mitigating factors and previous convictions. Thereafter, in terms of *Wilson*, the period of disqualification fell to be discounted by the same proportion as any other part of the sentence having regard to

section 196 of the Criminal Procedure (Scotland) Act 1995 Act. Finally, the sheriff should, in relevant cases, apply section 35C of the 1988 Act and add the appropriate extension period to the discretionary disqualification period. In other words, the sheriff should not apply the discount to the appropriate extension period imposed under section 35C. Although sections 35C and 35D are distinct sections of the 1988 Act, the underlying rationale is the same for both sections and there was no good reason why the approach adopted by this court in *Buchan* should not be applied to section 35D.

[11] In the event an individual, such as the appellant, was released from prison early, it was open to them to make an application to the court under section 42(1) for the removal of the period of disqualification. The advocate depute acknowledged that an individual who received a disqualification period of less than two years could not avail themselves of that remedy.

Decision

Headline disqualification period

[12] We do not accept that the headline disqualification period of 2 years selected by the sheriff was excessive. The sheriff considered that the appellant had engaged in a serious course of dangerous driving at a "car meet". He had exposed himself, those holding on to his vehicle and members of the public to danger. The locus was a popular beachfront in Aberdeen. The sheriff noted that the area was known to attract young drivers, with some engaging in antisocial driving. The appellant undertook dangerous manoeuvres in close proximity to pedestrians. The manner of his driving had been deliberate and repeated and he had posted video footage of his manoeuvres on social media. The appellant had committed another road traffic offence resulting in disqualification and had a prior

conviction for another minor road traffic matter. The appellant was 22 years old at the time of the offence. The sheriff took account of the appellant's age in selecting the headline disqualification period.

The correct approach to discounting

[13] Section 196 of the Criminal Procedure (Scotland) Act 1995 applies equally to all elements of a sentence (such as a fine, penalty points and disqualification) so that, other than in exceptional circumstances, the level of discount should be uniform across each element (*Wilson v Shanks* 2019 J.C. 1 at paragraphs [18] and [21]). The question which arises in this appeal is whether a sentence discount should be applied to any additional period of disqualification imposed in terms of section 35D of the RTOA.

[14] Section 35D of the RTOA provides as follows:

"35D Effect of sentence of imprisonment in other cases: Scotland

(1) This section applies where a person is convicted in Scotland of an offence for which a court proposes to order the person to be disqualified under section 34 or 35 and—

- (a) the court proposes to impose on the person a sentence of imprisonment for another offence, or
- (b) at the time of sentencing for the offence, a sentence of imprisonment imposed on the person on an earlier occasion has not expired.

(2) In determining the period for which the person is to be disqualified under section 34 or 35, the court must have regard to the consideration in subsection (3) if and to the extent that it is appropriate to do so.

(3) The consideration is the diminished effect of disqualification as a distinct punishment if the person who is disqualified is also detained in pursuance of a sentence of imprisonment.

(4) If the court proposes to order the person to be disqualified under section 34 or 35 and to impose a sentence of imprisonment for the same offence, the court may not in relation to that disqualification take that sentence of imprisonment into account for the purposes of subsection (2).

(5) In this section "*sentence of imprisonment*" has the same meaning as in section 35C."

[15] In *Buchan v Procurator Fiscal, Perth* [2019] SAC (Crim) 1, this court set out the appropriate approach to sentencing discounts in the application of section 35C of the RTOA. Section 35C deals with extensions of periods of disqualification where a sentence of imprisonment is imposed for the same offence. The court held that section 196 of the 1995 Act did not apply to an extension period imposed in terms of section 35C of the RTOA: *Buchan* at paragraph [8]. Unlike section 35C which provides for mandatory extension periods, section 35D(2) affords the court a discretion in the selection of the additional disqualification period imposed. However, the court is required to have regard to the diminished effect of disqualification as a distinct punishment if the person who is disqualified is currently serving a custodial sentence. It would be illogical for the court to have regard to the diminished effect in the selection of an additional period of disqualification and then diminish the effect of that disqualification further by applying a discount to the period selected. We regard the approach set out in *Buchan* to be the correct approach in respect of both sections 35C and 35D.

[16] As Lord Justice General Carloway stated in *Wilson* at paragraph [19]:-

“There are obvious cases in which the rate of discount cannot be the same or where, in respect of one part, cannot apply at all. These include, respectively, situations where applying the same discount would reduce the penalty to below the statutory minimum or where the relevant statute does not permit a discount...”

[17] The present case is one such obvious case where the relevant statutory provision, namely section 35D, does not permit a sentence discount to be applied. If the position were otherwise, the policy objective of section 35D would be defeated. As is apparent from the terms of section 35D(3), Parliament intended that time spent in prison should not diminish

the impact of a disqualification; a driving ban should impact upon an offender while he is at liberty, not while he is unable to drive because he is serving a custodial sentence.

[18] As the sheriff correctly identified, his approach to sentencing achieved an “equitable result” between the appellant and a nominal co-accused (*McCaw v HM Advocate* 2020 J.C. 128). Were a sentence discount of one-third to have applied to the headline disqualification period of 54 months (24 months plus an additional period of 30 months in terms of section 35D), the appellant would have been disqualified from driving for 36 months. He would be subject to only a 6 month period of disqualification upon being liberated in December 2025. A nominal co-accused who was not serving a custodial sentence would be subjected to disqualification for a period of 16 months. The sheriff’s approach achieved parity in sentencing.

The commencement of the disqualification period

[19] With regard to the remaining ground of appeal, namely that the date of the disqualification should run from some date in the future when the appellant is in fact liberated, the appellant has not referred us to any authority to support such a proposition. The RTOA does not provide a mechanism for a delay in the commencement of a period of disqualification in such circumstances. Moreover, we are not satisfied that such a proposition is workable in practice; at a sentencing diet, the court cannot know whether an offender will be released early and if so, when. We agree with the sheriff that the appellant’s remedy lies in an application to the court under section 42(1) of the 1988 Act, after 2 years of the disqualification period have passed (section 42(3)(a)).

[20] On behalf of the appellant reference was made to a number of English authorities referring to a sentencing policy which recognises that long periods of disqualification

imposed upon young men which extend for a substantial period after their release from prison can be counter-productive (*Butterworths Road Traffic Service, Issue 118, at para 4.81; R v Thomas Kevin* [1983] 3 All ER 756). We are not aware of any such sentencing policy being endorsed or applied in Scotland.

[21] The appeal is refused.