



SHERIFF APPEAL COURT

**[2023] SAC (Crim) 11
SAC/2023/000207/AP**

Sheriff Principal S F Murphy KC
Sheriff Principal N Ross

STATEMENT OF REASONS

delivered by Sheriff Principal S F Murphy KC

in

Appeal against Sentence

by

RYAN DOCHERTY

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

**Appellant: Vengoechea; Gavin Bain & Co, Aberdeen
Respondent: Ewing KC, AD; Crown Agent**

18 October 2023

[1] The appellant pled guilty to a contravention of section 5A(1)(a) and (2) of the Road Traffic Act 1988 before the sheriff at Aberdeen on 18 May 2023. The charge was in the following terms:

“on 9 July 2022 on a road or other public place, namely B977 Kintore to Hatton of Fintry road, at the junction of the unclassified road leading to Hogholm, Kintore, Aberdeenshire, you RYAN DOCHERTY did drive a motor vehicle, namely motor car registration number RY04 DOC when the proportion of Delta-9-Tetrahydrocannabinol in your blood was 3 microgrammes of

Delta-9-Tetrahydrocannabinol per litre of blood which exceeded the specified limit for that drug, namely 2 microgrammes of Delta-9-Tetrahydrocannabinol per litre of blood;

CONTRARY to the Road Traffic Act 1988, Section 5A(1)(a) and (2) and the Drug Driving (Specified Limits)(Scotland) Regulations 2019.”

[2] He was fined £667 and disqualified from driving for 22 months. No issue has been taken with the fine imposed. This appeal is concerned solely with the period of disqualification.

[3] On 27 October 2022, in a separate and unrelated prosecution for contravention of section 2 of the Road Traffic Act 1988, the appellant was disqualified from driving for 18 months from that date. The present sentence was accordingly imposed approximately 6 months into the period of disqualification which was being served in relation to those separate proceedings. Further, the present offence was committed following the commencement of prosecution in those separate proceedings.

[4] At the point when he imposed the period of disqualification which is the subject of the present appeal, the sheriff was aware that the previous period of disqualification had at least 10 months remaining. He explained that he selected a starting point for disqualification of 18 months, on account of the fact that it was the appellant's second road traffic offence within a short period of time. He then discounted this figure by one third to reflect the early plea. He then noted that the overlapping effect of the two, unrelated, periods of disqualification running concurrently was that the present offence would only attract a very short period of disqualification. He accordingly extended the calculated period of 12 months by a further 10 months to take account of the pre-existing period of disqualification. Had he not done so, the period in the instant case would be only 2 months beyond the pre-existing period, which would not adequately reflect the seriousness of the

commission of the second offence. The sheriff correctly noted that it was not competent to defer or impose consecutive periods of disqualification.

[5] A period of disqualification has to commence from the date of its imposition and it cannot be post-dated (section 37(1) of the Road Traffic Offenders Act 1988). In terms of sections 35C and 35D thereof it may be extended or increased to take account of any period of imprisonment being served or to be served by an accused person.

[6] Protection of the public is a material factor in selecting the period but punishment and deterrence may also be relevant considerations – *Rennie v Frame* 2006 JC 60.

[7] The appellant's position was that the approach taken by the sheriff produced a period of disqualification which was disproportionate in relation to the present offence. Furthermore the sheriff failed to take proper account of the appellant's youth and immaturity. The sheriff failed to appreciate that public protection, punishment and deterrence were duplicated within both periods of disqualification: reliance was placed on the case of *Ibbotson v HMA* [2022] HCJAC 35. The *cumulo* effect of the period of disqualification was excessive as the sheriff had failed to consider properly the overall period which had resulted in these circumstances.

[8] Counsel noted that sections 35C and 35D of the Road Traffic Offenders Act 1988, as amended, require a sentencing court to add an extension to a period of disqualification where the accused is also being sentenced to a period of imprisonment, or where he is serving a custodial sentence at the time when a period of disqualification is imposed. The extension period is effectively to be equivalent to the period of imprisonment which the accused is due to serve, on account of the consideration that a disqualification would be of no effect if it were to be served while the offender was incarcerated. This court has given guidance on the approach to be taken by the sentencing sheriff in these circumstances in the

cases of *Buchan v PF Perth* [2019] SAC (Crim) 1 and *Young v PF Aberdeen* [2023] SAC (Crim) 8. The case of *R v Needham* (2016) EWCA Crim 455 which was cited to us is not in point for present purposes in our view.

[9] We note that there is no similar statutory provision in relation to the present situation, ie where the accused is subject to a pre-existing period of disqualification when a subsequent disqualification falls to be imposed. The two situations are not the same, for the reasons which we consider below.

[10] The case of *Ibbotson* related to the overall effect of consecutive sentences for two separate convictions for rape. In the course of delivering the Opinion of the Court

Lord Woolman stated:

“[4] Before proceeding to sentence, the court closely assesses the individual circumstances of each case. That includes considering (a) any existing sentences to which the individual is subject, and (b) the *cumulo* effect of consecutive sentences: see, for example, *Graham v HM Advocate*, 2019 SCCR 19 at para [57].

[5] Approaching the matter on that basis, we conclude that the *cumulo* sentence is not proportionate. The interests of justice do not require both sentences to duplicate the same purposes of punishment deterrence, protection of the public and rehabilitation.”

[11] The issue in the present case is the effect of an existing period of disqualification on the imposition of a subsequent disqualification. The duplication of the effects of public protection, punishment and deterrence is a relevant consideration, particularly in the circumstances of this case because the original disqualification was the first experienced by the appellant who is still a young man who is said to be immature. At 24 years of age at the time of sentencing he fell within the definition of a young person in paragraph 2 of the Scottish Sentencing Council’s guidelines for Sentencing Young People. Accordingly in his case rehabilitation fell to be the main consideration in his case in terms of paragraph 13 of the Guidelines. Counsel for the appellant accepted that the sheriff required to take account

of the effect of the existing disqualification period but she contended that the overall result of the sheriff's approach was excessive.

[12] We agree with the sheriff that he was both bound and entitled to impose an increased period of disqualification, to reflect the requirements for punishment, deterrence and public protection. He required to take account of the effect of the existing disqualification which would reduce the period of disqualification imposed as a result of the present offence. The sheriff applied the correct principle. The sheriff added an extension period similar to the approach of sections 35C and 35D of the Road Traffic Offenders Act. However, the situation with an existing period of disqualification is not similar. Where an accused is in custody, disqualification has no effect until he is liberated. By contrast, where an accused is already subject to a period of disqualification the intentions behind the imposition of disqualification - public protection, punishment and deterrence - must be presumed to be taking effect and need not be duplicated by extending for the equivalent of the whole of the remaining period of the original driving ban, albeit these factors may be reinforced by a further period of disqualification. These considerations were not drawn to the attention of the sheriff.

[13] Furthermore the sheriff was required to take into account the issue of rehabilitation as the appellant had been 23 at the time of the offence and was 24 at the time of sentencing. We presume that factor was taken into account in determining the headline sentence as that is the point at which it is appropriate to do so.

[14] In our view the correct approach is to decide upon the appropriate period of disqualification in relation to the offence before the court and thereafter to consider the position with regard to any pre-existing disqualification by determining an appropriate

overall period which reinforces and gives effect to the aims of the second disqualification without resulting in an excessive period overall across the two periods of disqualification.

[15] We agree that in the present case the period of disqualification imposed was excessive, having regard to the whole effect of the combined periods of disqualification for a young offender. We consider that the starting point selected by the sheriff in the present case appropriately reflected the commission of a second significant road traffic offence within a relatively short timescale, so we agree with the sheriff's selected period of 18 months with application of a discount of one-third to 12 months. The resulting period was the minimum period which could be imposed for a contravention of section 5A(1)(a) of the 1988 Act as amended (in terms of section 34 and Schedule 2 to the Road Traffic Offenders Act 1988). However, we consider that, taking account of the existing disqualification and of the duplication of purposes, that period of disqualification should be extended by a lesser period than the 10 months selected by the sheriff, in order to achieve a proportionate overall period of disqualification in all the circumstances. We therefore increase the sentence of 12 months by adding a lower period of a further 4 months, which results in a total period of 16 months' disqualification in relation to the present case.