SHERIFF APPEAL COURT

[2017] SAC (Crim) 15
SAC/2017000337/AP

Sheriff Principal M Stephen QC
Sheriff Principal D L Murray
Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL MM STEPHEN QC

in

Appeal by Stated Case

LESLEY McALLISTER

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: Findlater, Faculty Services, for George Mathers & Co, Aberdeen
Respondent: Cameron AD; Crown Agent

29 August 2017

[1] On 28 June 2016 a collision occurred between two motor vehicles at the junction of the A96 and Ashgrove Road in Aberdeen. At the locus the A96 is known as Powis Terrace. A red mini driven by Sarah Scott was signalling her intention to turn right into Ashgrove Road. The second vehicle was a marked police vehicle, which was displaying blue lights and sounding its siren, and was proceeding along the A96 answering a grade two

emergency call. Both vehicles had been travelling in the same direction on the A96 towards the city centre. The driver of the mini signalled her intention to turn right into Ashgrove Road and took up her correct position on the crown of the road. The police vehicle was travelling in the same direction but a distance behind the mini. The police vehicle was on the wrong side of the carriageway namely the carriageway for oncoming vehicles, and overtaking stationary or slow moving vehicles also heading towards Aberdeen City Centre. As the police vehicle approached the junction with Ashgrove Road Ms Scott commenced her right turn and the vehicles collided. A collision was almost inevitable given the circumstances. Both vehicles were damaged and the police officer in the front passenger seat of the police vehicle was injured.

[2] Both drivers were charged with a contravention of section 3 of the Road Traffic Act 1988. Following trial at Aberdeen Sheriff Court both drivers were convicted of careless driving and were disposed of in an identical manner with a fine of £400 together with four penalty points endorsed on their licences. The appellant is Lesley McAllister the police officer who had been driving the police vehicle. She appeals both conviction and sentence.

[3] The sheriff in his stated case poses four questions:

> (1) Upon the evidence before me, did I err in repelling the submission made on behalf of the appellant in terms of section 160 of the Act?
>
> (2) On the facts as stated, did I err in convicting the appellant?
>
> (3) On the facts as stated, did I err in forming the view that special reasons for non-endorsement did not exist?
>
> (4) On the facts as stated did I err in fining the appellant £400 and endorsing her licence with four penalty points?

[4] The Road Traffic Act 1988 by section 3 makes it an offence to drive a vehicle on a road without due care and attention or without reasonable consideration for other persons using the road. Essentially the question whether a person has driven without due care and attention is a question of fact for the court. The test is whether the driving falls below what would be expected of a competent and careful driver (s.3ZA(2) of the 1988 Act).

[5] The sheriff makes the following finding with regard to the co-accused:

> "(6) The co-accused was in a line of vehicles. Her car was positioned at the junction with Ashgrove Road. It was her intention to make a right turn into Ashgrove Road. She had deployed her vehicle's right indicator to signal her intention to turn right. The vehicle was correctly positioned at the junction."

[6] The sheriff goes on to find that the co-accused did not adequately check that it was safe for her to commence the right turn manoeuvre immediately prior to so doing and that she failed to register the existence of the warning siren and lights from the police vehicle. Accordingly, the standard of driving of the co-accused fell below what would be expected of a competent and careful driver.

[7] As to the appellant's driving the sheriff makes the following findings:

> "(8) The appellant observed that the co-accused's vehicle was correctly positioned and indicating an intention to turn right. Such a manoeuvre would, of necessity, involve that vehicle crossing the lane for oncoming traffic.
> (9) The appellant continued to drive in the lane for oncoming vehicles making no adjustment when approaching the car of the co-accused."

[8] Finding in Fact 9, of course, is critical to the sheriff concluding that the appellant drove without due care and attention as the manner in which she drove fell below what would be expected of a competent and careful driver. A competent and careful driver in her circumstances, that is, driving on the wrong side of the road or the side for oncoming

vehicles would have made an adjustment when approaching the junction and on seeing the red mini displaying an intention to turn right.

[9] Counsel for the appellant referred to his opinion lodged in support of the second sift application and adopted this as his submission today at the appeal hearing. He argued that the questions of law in the stated case should be answered in the affirmative which would have the effect of quashing the conviction for a contravention of section 3 of the Road Traffic Act 1988. His argument in essence was predicated on the observation that the collision only occurred because of the failure of the co-accused to drive with due care and attention. The appellant was not speeding. The collision which is part of the libel that the appellant was convicted of only occurred because of the failure of the co-accused to drive with due care and attention. He argued that it was not clear from the sheriff's findings what the appellant could or should have done to avoid a collision. A drop in speed would not have prevented a collision. Without that collision there would have been no criticism of the appellant's overtaking manoeuvre.

[10] On the question of penalty the submission was firstly that there were special reasons for non-endorsement of the appellant's licence with penalty points. The argument that the sentence imposed was excessive is based on the premise that the sheriff ought to have found that special reasons existed. In support of that submission we were referred to *Husband* v *Russell* 1978 SLT 377; *Watt* v *Murphy* 2016 SLT (Sh Ct) 247 and two English cases: *R* v *Lundt Smith* [1964] 2 QB 167 and *R* v *O'Toole* (1971) 55 Cr App R 206. All cases involved driving under emergency circumstances and deal with the question of sentence. Had the sheriff followed the guidance given in *Watt* v *Murphy* and applied that to the facts of this case he ought to have found that special reasons existed.

[11] The advocate depute submitted that the sheriff had not erred in either repelling the section 160 submission or convicting the appellant of a contravention of section 3 of the Road Traffic Act 1988. Questions one and two should be answered in the negative. Under reference to *Husband* v *Russell* (*supra*) it must be emphasised that the emergency services owe a duty to other road users and there can be no suggestion that they are entitled to take risks greater than the rest of us. The advocate depute accepted that the question of whether special reasons exist not to endorse the appellant's licence was a question for the sheriff. The Crown were, in effect, neutral on this issue.

[12] The critical findings as to the appellant's driving on the day in question are findings (8) and (9) to which we have referred. These are amplified in findings (18) and (19):-

> "(18) Prior to the incident the appellant was fully aware that the co-accused's vehicle was positioned at the junction and indicating an intention to commence a right turn. The appellant proceeded on the assumption that the co-accused would not commence a right hand manoeuvre because she, the appellant, had activated her warning siren and lights.
> (19) The appellant, in the full knowledge that she was travelling on the opposing carriageway and that the co-accused's vehicle was intending to perform a right turn which would take it across the path of her vehicle, took no steps to reduce or avoid the consequences arising if the co-accused performed her signalled manoeuvre."

In our view, these findings amply justify the sheriff's decision to convict. The sheriff explains his reasoning with regard to both the appellant and the co-accused at paragraphs [23] and [24] of the stated case. He took the view that the appellant ought to have reduced her speed and adjusted her road position to enable her to bring her vehicle to a halt in the event that the third party vehicle did commence its manoeuvre much in the same way that she would approach a red stop light which she intended to pass through. The sheriff has set out his findings in fact and the evidence upon which he makes these findings with

considerable care and clarity and his reasoning cannot be faulted. Accordingly, we propose to answer questions one and two in the negative.

[13] In determining that special reasons did not exist for non-endorsation of the appellant's licence the sheriff considered *Watt* v *Murphy* (*supra*) a case involving dangerous driving where the mandatory disqualification imposed was quashed on appeal there being special reasons to refrain from disqualification. In that case five penalty points were imposed in lieu. Today, we have been referred to certain English cases and *Husband* v *Russell* (*supra*) where a fire engine driver convicted of a section 3 offence argued that there were special reasons in terms of section 44(2) of the Road Traffic Offenders Act 1998 not to endorse his licence with penalty points. In that case the appeal court allowed an absolute discharge but pointed out that an absolute discharge does not necessarily follow because there are special reasons. Lord Prosser giving the court's opinion observed at page 379:

> "The fact remains that there is a public interest in safety on the roads but there is also a public interest in having emergency bodies, such as the fire brigade, who will reach dangerous or emergency situations quickly. No one is suggesting that these services are positively entitled to take risks greater than the rest of us. It is at the foundation of this area of the law that offences remain offences even when committed by such persons in such circumstances. Nonetheless, when it comes to special reasons as to the consequences, it is plain that the law does acknowledge that these must be taken into account, and if the court thinks that they should have a determinative effect on the disposal of the case, then the court is well entitled to take such matters into account."

In the English case of *O'Toole* a disqualification for dangerous driving was quashed and an absolute discharge substituted. Sachs L.J. observed at p 209:

> "On the facts above stated it is very difficult indeed to say that there was any moral blame on the ambulance driver, who was doing his best to get to an emergency and was impeded only by a disastrous piece of driving on the part of Mrs. Dickson - something which no other driver could really anticipate and which could not have occurred with a driver of normal sight and hearing exercising any degree of care, however small".

A damning indictment indeed of Mrs Dickson's driving. The circumstances of this case are, of course, quite different. *R* v *Lundt-Smith* (*supra*) is a case also involving special reasons where an ambulance driver driving under blue light conditions drove through traffic lights which were red and against him after slackening his speed and checking to the right and left. When driving straight across the junction against the red light he collided with a scooter. The accident resulted in the death of the rider of the scooter. In *Lundt-Smith* the prosecution conceded that special reasons existed. These cases serve to emphasise that the court will take account of the nature of the driving and the relevant facts and circumstances. In *Watt* v *Murphy* the court observed at paragraph [17] "that what properly fell to be considered by the court were the appellant's actual conduct and the circumstances in which that conduct took place". In *Watt* v *Murphy* the sheriff erred in placing reliance on the fact that the appellant was not an accredited emergency driver and then by distinguishing the cases of *Husband* v *Russell* (*supra*) and *R* v *Lundt-Smith* (*supra*) as a result. Crucially, however, there are important legal and factual distinctions to be drawn between this case and both *Watt* and *Lundt-Smith*. In both of these cases the drivers under blue light conditions had significantly reduced the speed of their vehicle approaching a junction or hazard. This, in our view, is central to the sheriff's reasoning in the present appeal. A driver under blue light conditions is not relieved of his or her obligations to drive with due care and attention.

[14] Although these cases turn on their particular facts and circumstances it is important to recognise that the sentencing court requires to balance the proper application of road traffic law and its penalties with the pressures under which first responders act when answering emergency calls. In *O'Toole*, Sachs L.J. in a passage at page 210 which was quoted

with approval in *Watt* v *Murphy* at paragraph [15], speaks of the need to take care when determining on which side of the line the case falls and:

> "The tensions under which drivers of ambulances and fire engines have to work must not be overlooked and it is within the knowledge of the court from other cases that any imposition of ill-judged penalties naturally tends, in detriment of the public interest, to cause unrest in the services on which everyone depends for rescue."

[15] In this case the penalty involved a fine and a modest number of penalty points not disqualification. The submission that there were special reasons not to endorse the appellant's licence with penalty points is accordingly made in terms of s.44 of the Road Traffic Offenders Act 1988. On the other hand in the case of disqualification a special reasons submission, such as was made in *Watt* v *Murphy*, is made in terms of s.34 of the Road Traffic Offenders Act 1988. Whether special reasons exist not to disqualify or endorse is a question of law for the court which considers any extenuating circumstances relating to the offence itself rather than the driver. Section 44(2) permits the court to refrain from endorsing a licence if there are special reasons for doing so. If special reasons do not exist the court must order that particulars of the offence and any penalty points to be attributed to the offence be endorsed on the licence. Nonetheless, if special reasons do not exist the court is entitled to regard the fact that the appellant was driving in emergency circumstances as amounting to significant mitigation, as the sheriff did here. At this point we observe that there is an important distinction to be made between a special reasons submission in the case of disqualification (as in *Watt* v *Murphy*; *O'Toole* and *Lundt Smith*) and a special reasons submission not to endorse as in this case. In cases involving disqualification the court will be concerned whether there are special reasons for avoiding disqualification and will have in mind whether the driver in question requires to be banned from the road for reasons relating to their driving and public safety on the roads. Extenuating circumstances such as

exist in cases like this are likely to have greater impact when considering the question of disqualification rather than the question of endorsation. This follows the approach in *McDade* v *Jessop* 1990 SLT 800 where Lord Prosser again delivering the opinion of the court observed at page 805:

> "Moreover, we were not satisfied that factors which might constitute special reason for not disqualifying will carry the same or similar weight in relation to endorsement. It may well be that in particular circumstances there is no good or sufficient reason for taking a particular driver off the road. In relation to endorsement, however, which has no such immediate or public consequences, it seems to us that the factors which will constitute special reasons for abstaining from endorsement may differ considerably from those which will be apposite in relation to disqualification."

It appears from his comments in the final two paragraphs of the stated case that the sheriff may have conflated s.34 and s.44 and the effect of the existence of special reasons. The sheriff may have fallen into error to that extent. However, what is important is whether the sheriff properly considered whether special reasons not to endorse existed in this case by reference to the appellant's requirement to drive under grade 2 emergency conditions. At paragraph [26] of the stated case the sheriff has considered the appellant's actual conduct and the circumstances in which that conduct took place and concludes that special reasons did not exist to refrain from endorsing the appellant's licence. He separately came to the view that reasons did not exist which would allow him to conclude that it was inexpedient to inflict punishment at all by discharging the appellant absolutely in terms of s.246(3) of the Criminal Procedure (Scotland) Act 1995. Instead, the sheriff concluded that the circumstances constituted significant mitigation resulting in the reduced penalty. For the reasons given by the sheriff, to which we have already referred, the sheriff considers that the appellant as she approached the junction ought to have been aware of the hazard presented by the vehicle signalling to turn right and ought to have taken appropriate steps to moderate

her speed and ensure that the driver of the right turning vehicle was aware of her presence. It is clear from the sheriff's findings in fact that these steps had not been taken by the appellant. Accordingly, we see no basis on which we should interfere with the sheriff's decision on the s.44 submission or on the fine imposed. We accordingly answer the remaining questions in the negative and refuse the appeal.