SHERIFF APPEAL COURT

[2019] SAC (Crim) 16
SAC/2019-000297/AP

Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff A Cubie

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

Appeal against Sentence

by

IAN FOSTER

Appellant;

against

PROCURATOR FISCAL, EDINBURGH

Respondent;

Appellant: McIntosh, Advocate; Russell Gibsons & McCaffrey Solicitors
Respondent: M MacTaggart, solicitor advocate AD; Crown Agent

22 October 2019

[1] The appellant, on 30 August 2018, drove a motor vehicle in Couperfield, Edinburgh without a valid driver's licence and therefore without the requisite insurance. He was subject to two bail orders from Glasgow Sheriff Court both granted on 18 June 2018. The appellant was subsequently prosecuted by the respondent on summary complaint in the

Justice of the Peace Court in Edinburgh. The complaint libelled three charges all contraventions of the Road Traffic Act 1988:- (charge 1) section 187(1)(a)); (charge 2) section 87(1) and (charge 3) section 143(1) and (2). The appellant pleaded guilty at a continued intermediate diet to driving without a valid licence and without insurance (charges 2 and 3). The respondent's depute accepted his not guilty plea to charge 1 – taking and driving away the vehicle without the owner's consent.

[2] The justice heard both the respondent's narration and the plea in mitigation. She determined that fines of £130 and £550 were appropriate on charges 2 and 3 respectively. She reduced these fines to £100 (£10 of which represented the bail aggravations) and £400 (£40 of which represented the bail aggravations) by virtue of the timing of the plea and the application of section 196 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). The appellant's licence was endorsed with six penalty points imposed on the no insurance charge this being the minimum number for such an offence. The court allowed payment of the fines at the rate of £30 per month.

[3] In his note of appeal the appellant challenges the justice's selection of the headline fines which total £680. No issue is taken with the level of discount afforded. Two strands of argument emerge from the note of appeal which support the contention that the fines imposed were excessive. Firstly, the appellant argues that the headline fines of £680 are excessive there being no particular aggravating features to the offending other than the bail orders and in light of the appellant's very limited financial means. He is in receipt of state benefits by way of employment support allowance. Secondly, it was argued that "*The excessive nature of the headline sentence is also illustrated by the fact that repayment of the fine at £30 a month would take almost a full two years. As it is, it will still take the better part of one and half years even after consideration of the level of discount afforded to reflect the utility of the plea*".

[4] The written case and argument for the appellant develops these grounds further. Although no issue is taken with the level of discount applied to the headline fines nevertheless, as the headline sentence is said to be excessive the resultant net fines must also be excessive. That argument is again supported by the contention that the level of the total fine results in an excessive sentence due to the fact that it would take the appellant considerable time to repay the fine at the rate of £30 per month, the submission being that the period it will take to repay the fine is itself an indicator that the fine imposed is excessive.

Appellate procedure

[5] When this appeal called before two appeal sheriffs on 17 July 2019 (Sheriff Principal Murray and Appeal Sheriff O'Grady), counsel for the appellant moved that the appeal be allowed having regard to the note of appeal and the written case. It was submitted that the headline sentence is excessive in itself and excessive having regard to the length of time it will take to repay at the rate of £30 per month. The court was referred to *Paterson* v *McGlennan* 1991 JC 141 and the decision of this court in *Jackson* v *Murphy* 2016 SLT (Sh Ct) 55. These authorities also deal with the question whether a fine is excessive having regard to the appellant's means and the time it would take to repay. In *Jackson* the fine would take 92 weeks to be paid by instalments of £10 per fortnight as allowed by the justice. In *Jackson* the court allowed the appeal and reduced the fines imposed on directly analogous offences from £120 (no valid licence) to £60 and from £340 (no insurance) to £165 with the reduced fines of £225 being paid at the same instalment rate. In *Jackson* the Sheriff Appeal Court followed *Paterson* v *McGlennan* (*supra*) and allowed the appeal on the basis that 92 weeks to repay was too long and confirms that the "*fines should be seen as excessive and amounting to a miscarriage of justice*".

[6] At the first calling of this appeal the bench considered *Jackson* in particular paragraph 5 which is in the following terms:

> *"5. The High Court of Justiciary have indicated on a number of occasions that when a fine is to be paid by instalments it ought to be capable of being paid in about a year. Paterson, being a decision by a court of five judges, provides a good example. In that case, the court considered that as the fines would take 90 weeks to pay, and it was not satisfactory in view of the appellant's income to increase the instalments, they were excessive."*

[7] The bench on 17 July 2019 considered that this appeal raised a matter of wider importance with regard to the period over which a fine ought to be capable of being repaid and whether *Jackson* v *Murphy* was correctly decided. Accordingly, the court determined that the appeal should be heard by a bench of three appeal sheriffs to consider these questions and whether a guideline decision might be issued in terms of section 189(7) of the 1995 Act. Parties were appointed to lodge submissions or where appropriate supplementary submissions.

Submission on behalf of the Appellant

[8] Mr McIntosh advanced two grounds which pointed to the headline fine being excessive. Firstly, the level of the headline fines was excessive *per se* having regard to the offence itself and the offender's means. Secondly, the fines are demonstrably excessive by virtue of the length of time it will take to repay - almost two years for the headline fines and almost 17 months for the discounted fines.

[9] In support of the first ground counsel considered that the justice had erred in her approach to the gravity of the offending and had therefore erred in her approach to the level of the headline fines. Apart from the bail aggravations there was little else which added to the gravity of the offences. With reference to the police summary which is produced it was clear that there was no significant collision involving the vehicle whilst being driven by the

appellant. Any damage is described as "*minor damage to the front bumper (minor scuffing)*". It appears that the justice may have been unduly and improperly influenced by the idea that the vehicle had been in a collision which resulted in damage (report page 4).

[10] The justice was made aware that the appellant had medical problems and relied on state benefits. This remains the case. He receives £220 per fortnight, £90 of which is required for food. The appellant has recently taken himself away from the negative influence of friends in the central belt and is currently living in Inverness. He is living rent free for the time being but will in due course have to obtain suitable longer term accommodation for which he will require to pay rent. Increasing the instalments on the fine was therefore not sustainable in the longer term. He still has health issues and had been referred by his new GP for an assessment in respect of his mental health.

[11] Counsel reviewed certain of the authorities which address the question of time to pay fines: *Paterson* v *McGlennan* (*supra*); *Jackson* (*supra*); *Brown* v *McGlennan* 1995 SCCR 627; *Ritchie* v *PF Peterhead* [2009] unreported HCJAC; and *Kauser* v *PF Glasgow* [2009] HCJAC all support the proposition that when a fine is to be paid by instalments it ought to be capable of being paid within approximately one year. In all the cases referred to the court ultimately allowed the appeal and reduced the fine imposed in the lower court based on the period for repayment being far too long and therefore the fine in itself was excessive. It was submitted that the court's decision in *Tonner* v *Procurator Fiscal Dunfermline* 1995 SCCR 469, where the appeal was refused, is inconsistent with the court's opinion in *Paterson* v *McGlennan*, a decision of a bench of five judges. The approach of the High Court in *Paterson* followed by the Sheriff Appeal Court in *Jackson* should be preferred. These decisions are consistent with practice in the sheriff court and also paragraph 23-39 of Renton and Brown, Criminal Procedure (6th Edition) which is in the following terms:

> *"**23-39** Where a fine is imposed the court may, of its own motion, or an application by the offender, order payment to be made by instalments of such amount and at such times as it thinks fit. The court should take the offender's income into account in fixing the level of instalment. The relation between the fine and instalment should normally be such that the fine is payable in a period of a year or a little more than a year."*

Accordingly there is no requirement to reconsider *Jackson* which was correctly decided and followed *Paterson*. Should it be appropriate to review this court's decision in *Jackson* the appeal should be remitted to the High Court of Justiciary. If minded to issue a guideline opinion counsel requested that we address the common practice in the Justice of the Peace Court, followed by the justice in this case, of flagging up the court's maximum powers on sentence. Instead, it is the sentencing court's duty to impose a fine which reflected the nature of the offences and the ability of the offender to pay. It is neither helpful nor appropriate for the justice to mention the maximum penalty available to the court. Counsel accepted that it was a legitimate consideration for the court to have regard to the level of the financial penalty payable if a fixed penalty notice is issued.

[12] The fines imposed by the justice in this case being objectively excessive having regard to the gravity of the offence and the appellant's means, and having regard to the time it will take to repay the fines at the rate of £30 per month, it was submitted that the fines imposed by the justice ought to be quashed and a lower fine substituted which could be paid off within about a year at a similar instalment rate however counsel accepted that a repayment period of between 12 months and 18 months could not be considered excessive.

[13] The advocate depute adopted the written submissions for the crown. He did not agree that the appeal should be remitted to the High Court. The authorities referred to by the appellant including *Paterson* v *McGlennan* do not set down any rule or principle which must be followed by the sentencing court when assessing whether the period for repayment

of the fine is reasonable or excessive. The authorities consider what is excessive in particular and specific circumstances. However, with reference to *Tonner*, the appeal court declined to accept that a lengthy period over which the fines would be repaid rendered the financial penalty excessive in circumstances where the fines, taken by themselves, were reasonable and that the appellant had requested that the instalments be limited to £5 per fortnight. However, the advocate depute accepted that the fact that the appellant himself or his solicitor requested a low instalment arrangement did not render an appeal unarguable on the question of whether the fine was excessive.

[14] On the facts of this case the appeal should be refused. The justice has considered the gravity of the offences committed whilst the appellant was subject to two bail orders. The justice took into account the appellant's personal circumstances but properly considered the offences to be serious. The justice on the final page of her report states "*It seemed that these financial penalties were affordable and proportionate reflecting the aggravations and mitigating factors, and would be paid in slightly over 13 months at the rate said to be affordable to the appellant*." The advocate depute conceded that there is an arithmetical error in the justice's report where she refers to the penalty taking slightly over 13 months to repay. In fact the period is 70 or 71 weeks but certainly less than 18 months and squarely within the period of one year to 18 months said to be reasonable or "not excessive" by counsel for the appellant.

Decision

[15] The circumstances which gave rise to the appellant's offending will be all too familiar in the Justice of the Peace Court and also in the Sheriff Court. The appellant decided to drive his mother's car when he had no valid licence and therefore was not insured. His mother discovered that her vehicle was parked in a different parking space from that she had used when she parked it the night before. It had minor damage to the front bumper

which had not been there before. The status of the appellant's driving licence was not mentioned at the appeal hearing but from the plea in mitigation before the justice it can be inferred that the appellant held a provisional licence but decided to drive outwith it's terms without being accompanied by a qualified driver and displaying 'L' plates. No documentation or DVLA printout has been produced. However, at the appeal hearing, counsel referred to the police report which confirms the damage sustained to the vehicle and that the appellant's mother had contacted the police about this on 30 August indicating that her son, who was staying with her, had professed ignorance of how the vehicle came to be damaged. Matters appear to have been resolved more than a month later when the appellant attended Leith Police Station, accompanied by his mother, and admitted being the driver following a section 172 requirement being made. It is understandable that the offences caused the justice concern. Driving without insurance is a serious matter standing the "*potential adverse outcomes for other road users and members of the public generally*". She makes the following observations in her report about the consequences of driving having not yet passed the test of competence to drive:- "*It seemed to be that the risk of potential harm was increased by the lack of a valid licence in the circumstances as narrated. In fact harm did occur as there was a collision with resultant damage which was not disputed by the appellant's agent. I decided that the sentence should reflect the increased risk of harm to the public.*" On the facts the justice was entitled to come to that view. Having regard to these circumstances and the fact that the appellant was subject to two bail orders when he committed these offences the justice then considered the appellant's circumstances namely that he was reliant on state benefits of £220 per fortnight. He had no dependants and paid £37 per month rent. The appellant, through his agent, offered to pay any fine at the rate of £30 per month. Although there was mention of medical issues there was no further specification or vouching.

[16] The justice has fully and carefully explained why she selected the level of fine she did for these offences. She correctly identified the factors which aggravate the offending namely, the bail orders from Glasgow Sheriff Court and that the appellant's driving caused damage, albeit minor, to his mother's vehicle. Far from softening these aggravating features the police report provided at the appeal hearing not only confirms the minor nature of the damage but also that the appellant initially failed to admit his involvement in causing that damage. Although there is no mention in her report, the justice would be aware of the level of the fixed penalty for the 'no insurance' offence (£300) and is entitled to have regard to that when setting her tariff for these offences. The justice must, in terms of section 211(7) of the 1995 Act, have regard to the offender's means, as far as known to the court, before setting the fines. The justice took into account that the appellant was a first offender reliant on state benefits, with no dependents and was willing to pay the fine at £30 per month. In these circumstances, we do not consider that the justice erred in her approach to the headline sentence and we reject the proposition that the fines of £130 and £550 for contraventions of section 87(1) and section 143(1) and (2) are excessive. No issue was taken with the level of discount afforded which reduces the financial penalty to £100 and £400 respectively. We see no merit in this ground of appeal.

[17] The second ground of appeal seeks to emphasise the excessive nature of the headline sentence as illustrated by the fact that repayment of the headline fines would take almost two years to repay and even the discounted fines will take almost a year and a half (71 weeks). This argument relies on the proposition that a fine ought to be capable of being repaid over a period of about a year and if that cannot be achieved by instalments that reflect the appellant's means then the level of fine is likely to be regarded as excessive.

[18] Any analysis of the authorities in relation to the timescale within which a fine should be paid must begin with *Paterson v McGlennan*, standing the weight which the court in *Jackson* afforded to it. The proposition that fines should be paid off within a period of one year has its origin in *Paterson,* but one sentence in isolation - "*We are of the view that the fine was excessive*"- has been invested with an authoritative status which was neither intended nor merited. *Paterson* was a five judge case because of the issue of the immediate imposition of an alternative period of imprisonment in default of payment of a fine. No authority or legal analysis was provided or relied upon in argument or by the judges in *Paterson* in relation to the period within which it would be reasonable to repay the fine.

[19] In *Paterson* the court focused on the specific circumstances of the case and the offender's means determining that 90 weeks involved an excessive period and reducing the fines to a level which could be repaid within 60 weeks. It appears that the court considered whether to increase the amount of instalments but decided against that in view of the appellant's income. *Paterson* sets no guideline or rule other than finding on the facts of the case that ninety weeks was excessive. *Johnston* v *Lockhart* 1987 SCCR 337 was not cited to us but was discussed during submissions. In *Johnston* the appellant was convicted of assault and fined £1,000 payable at the rate of £20 per week. Although the sheriff in his report describes the assault as a serious and extremely vicious attack which was entirely without provocation, he determined that a monetary penalty would be an appropriate disposal but made the observation that "*any monetary penalty imposed on a matter of such seriousness as this should not exceed an amount which the accused can be expected to pay by instalments within one year. To require payment over a longer period is, in my view, excessive*". The appellant appealed on the ground that he could not afford to pay instalments of £20 per week. The Lord Justice Clerk (Ross) giving the opinion of the court stated:

> "*These were very serious offences and if the disposal was to be by way of fine, then the fine plainly had to be substantial. If the appellant was unable to pay these fines at the rate fixed by the sheriff, the result may be that it would take him longer to pay the fine. The sheriff appeared to proceed upon the view that the monetary penalty imposed should not be such as to exceed the amount which an accused can be expected to pay by instalments within one year and the sheriff expresses the view that to require payment over a longer period is excessive. With that expression of opinion as a general rule we do not agree. It will all depend on the circumstances and no general rule can be laid down in this regard. Accordingly, even if the appellant is unable to continue with his payments at the rate of £20 per week, we are satisfied that the sheriff was fully entitled in imposing these fines. The appeal against sentence is therefore refused.*"

Johnston is entirely consistent with the court's earlier decision in *White* v *Hamilton* 1987 SCCR 12 when an appeal against sentence was refused in respect of a fine of £1,000 payable at the rate of £10 per week. The decision in *Johnston* is clear authority for there being no general rule. Where the offending is serious and the court decides to impose a financial penalty then the fine plainly had to be substantial. The appellant in *Johnston* had the option of making application to the means enquiry court to alter the rate of instalments. It is perhaps important to observe that the instalment is intended to be the minimum rate of payment. The offender has the option to make a higher payment should his circumstances improve.

[20] We were referred to *Ritchie* v *PF Peterhead* (*supra*) where the court allowed an appeal against sentence due to the level of fines imposed for directly analogous matters being excessive. The fines of £300 and £400 (reduced from £400 and £500) were payable at the rate of £10 per fortnight which would take two and a half years to repay which was too long a period. The court allowed the appeal also being satisfied that the level of the fines was too great having regard to the fact that the appellant was on benefits. The court issued a note however the court offers no opinion as to the question of the period over which the fines should be repaid. In *Kauser* v *PF Glasgow* the court was not satisfied that proper consideration had been given to the appellant's ability to pay fines of £175 and £600 again

for directly analogous matters. The fines would take nearly two years to pay if left at the level imposed. Again, the appeal was allowed due to the appellant's means with fines of £100 and £300 substituted payable at the rate of £8 per week which would take approximately a year to pay.

[21] In *Jackson* v *PF Perth* this court considered grounds of appeal similar to those advanced in this case. In *Jackson* it was submitted that the fines were excessive having regard to the appellant's means and also that the discounted fines would take ninety two weeks to pay at the instalment rate of £10 per fortnight set by the court. The justice had set the fines having regard to the appellant's limited income derived from state benefits explaining that he considered it appropriate to impose fines comparable to the fixed penalty for a 'no insurance' case. The court, following *Paterson* v *McGlennan*, allowed the appeal and reduced the fines by more than one half with the result that the net or discounted fines for driving without a licence was £60 and for driving without insurance was £165. The resulting cumulo fine of £225 should be repayable in forty five weeks. In *Jackson* the court correctly observed that "*Each case will depend on its own circumstances and we do not consider that there can be an absolute rule*" and having regard to *Paterson* considered that the fines were excessive and amounted to a miscarriage of justice as the original fines would take 92 weeks to pay by instalments. Whilst we agree with the outcome in *Jackson* in the sense that the appeal was allowed, as will be clear, we do not agree with the observation in the court's opinion (paragraph 5) that "*the High Court of Justiciary has indicated on a number of occasions that when a fine is to be paid by instalments it ought to be capable of being paid in about a year*". *Paterson* is not authority for that proposition. As we have mentioned *Paterson* set no rule or principle but decided in the particular circumstances of the case that 90 weeks to pay a fine was excessive.

The appeal court is entitled to consider whether to increase instalments but did not find that to be appropriate in either *Paterson* or *Jackson*.

[22] The unfortunate consequence of the decision in *Jackson* was that the financial penalty imposed in respect of the contravention of section 143 gave rise to a fine a little more than half of the fixed penalty. We consider that this precise outcome in *Jackson* to be undesirable and wrong in principle. The sentencing court is entitled to have regard to the level of fixed penalties for road traffic offences. The court in *Jackson* considered that the justice was not entitled to proceed upon the basis of possible future developments which might improve the appellant's financial standing allowing him to pay off the fine more quickly. However, the court did not express a view on the appropriateness of the justice setting fines comparable to fixed penalties. A fixed penalty notice or conditional offer of fixed penalty is an administrative alternative to prosecution. The fixed penalty for an endorsable offence such as driving without insurance is six penalty points and a fine of £300. A conditional offer of fixed penalty would not normally be issued in other than straightforward cases. Where there are bail aggravations or other alleged offending, as here, the circumstances would most likely be reported by the police for prosecution. On summary complaint,-the level of fine for an offence with a fixed penalty equivalent (such as a contravention of section 143) should lead to a sentence being imposed of no less than the level of the fixed penalty, other than in very exceptional circumstances. The effect of this court's decision in *Jackson* was to reduce the level of fine for a no insurance charge well below that payable on fixed penalty notice. Other than in exceptional cases or fines imposed together with a level one community payback order (section 227A(4) of the 1995 Act) this outcome should be avoided. Otherwise, the utility of the fixed penalty notice will be undermined raising the likelihood of motorists electing to decline the fixed penalty notice and risk prosecution burdening the

courts with summary proceedings on complaint which ought to have been disposed of administratively. We also observe that it is within judicial knowledge that the cost of insurance for a young driver is likely to be a multiple of the £300 fixed penalty and is a valid consideration in setting the level of headline fine.

[23] Accordingly, we do not agree that the authorities set out any rule or principle to the effect that when a fine is to be paid by instalments it ought to be capable of being paid in about a year. *Paterson* sets no such rule. We consider that the following passage in Nicholson: Sentencing Law and Practice (10.33) remains a correct statement of sentencing law and practice. "*The length of time over which a fine is to be paid by instalments should not be unreasonably long. However, there is no general rule to the effect that a fine should be of an amount which can be paid within one year, and there are several examples where the High Court has approved, or imposed, fines which would require considerably longer than one year for payment. It is to be noted that there used to be a rule in England that fines should be of an amount which could be paid within one year. However, that rule has now been departed from.*"

Recent developments in sentencing law, in particular the presumption against short prison sentences (section 204 of the 1995 Act), mean that the sentencer must consider first of all imposing a non-custodial sentence. Although the offences which are the subject of this appeal do not involve imprisonment nevertheless, if the court decides that a fine is the appropriate disposal it is entitled to impose fines appropriate to the gravity of the offending and these may be substantial. The court must take into account the offender's means and ability to pay however "*the result may be that it will take longer to pay the fines*" (*Johnston* v *Lockhart supra*). As a matter of generality where a fine is to be paid by instalments the period for repayment should not be unreasonably long or burdensome for the offender. This is a matter on which the court must exercise its judgement as to what is reasonable. Although

there is no general rule that a fine payable by instalments should be repaid within a year clearly the court in *Paterson* considered 90 weeks to be excessive for fines involving road traffic offending but declined to set any rule or guidance as to what a reasonable period might be. In the circumstances of the present case counsel for the appellant identified a practice of setting fines which were repayable within period between a year and eighteen months. Without inhibiting the court's discretion on matters of sentence, we consider that achieving payment within such a period (12 to 18 months) will generally provide a useful and realistic check of the level of fine to be imposed. Such a check does not have the status of a rule but it is nonetheless an approach which may assist sentencers. We consider that reflects practice and affords a reasonable margin in straightforward cases but would emphasise, as this court did in *Jackson*, that each case will depend on its own circumstances.

[24] On appeal, when considering the question of whether a fine is or is not excessive by the measure of how long it will take to pay by instalments, we are of the view that the court must look at the actual fines payable by the appellant not the headline fines as proposed in the note of appeal. This is a matter of common sense involving a purely arithmetic exercise of how long it will take to pay the fine imposed. Accordingly, as the fines in this case will be payable by instalments over a period of some 71 weeks we do not accept that the fines imposed are excessive and we will refuse the appeal.

[25] Finally, we find it unnecessary to express a concluded view on the matter of the justice mentioning the court's maximum powers of sentence within her report. Counsel considered this to be not only an objectionable practice but one commonly encountered in reports from the Justice of the Peace Court. In this case, the justice proceeds to analyse the gravity of the offending and the appellant's circumstances including his means. She clearly demonstrates that she has weighed up the aggravating and mitigating factors in reaching

her decision on the level of fine to impose which she indicates is at the lower end of the scale. This is undoubtedly correct. Of course, it is not essential for the justice to state the maximum sentence available to the court on sentencing. Nevertheless, the practice is unobjectionable if carried out as a check or reminder. In the end of the day the court's duty is to sentence in accordance with any aggravating or mitigating circumstances relating to the offence and the offender and having regard to the offender's means as far as known to the court.

[26] We propose to issue this opinion in terms of section 189(7) of the 1995 Act. It provides guidance when the court is imposing a financial penalty in summary criminal proceedings which is to be payable by instalments.