



SHERIFF APPEAL COURT

**[2015] SAC (Crim) 2
SAC/2015/000001/AP**

Sheriff Principal Stephen Q.C.
Sheriff Principal Pyle
Sheriff Principal Lewis

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL STEPHEN Q.C.

in application for

INTERIM SUSPENSION

by

DAVID MACKAY

Appellant;

against

PROCURATOR FISCAL, INVERNESS

Respondent:

**Appellant: Forbes; Faculty Services
Respondent: Edwards; Crown Agent**

1 December 2015

[1] In this application David Mackay, the appellant, has lodged a note of appeal seeking permission of the High Court of Justiciary to appeal this court's refusal to grant leave to appeal against the sentence imposed at Inverness Sheriff Court on 22 September 2015.

[2] The background to this case is that the appellant, who is aged 63, pleaded guilty to an amended complaint of being in charge of a vehicle after having consumed so much alcohol that the proportion of alcohol in his breath was 104mgs of alcohol in 100mls of

breath, nearly five times the legal maximum. The plea was tendered at the intermediate diet. The offence took place on 29 June 2015 in a vehicle on a road near Inverness.

[3] On 22 September the appellant was fined £500 and disqualified from holding or obtaining a driving licence for eight months. On the same day, a note of appeal was lodged seeking *inter alia* interim suspension of the disqualification which was refused by the sheriff. The note of appeal challenged the sheriff's decision to impose a period of disqualification and also his refusal to discount the period of disqualification. On 29 September this court allowed interim suspension. Subsequently leave to appeal was refused at both the first and the second sift following which the interim suspension was automatically recalled.

[4] On 11 November the appellant lodged a note of appeal in terms of section 194ZB(1) of the Criminal Procedure (Scotland) Act 1995 seeking the permission of the High Court of Justiciary to appeal the decision by the Sheriff Appeal Court to refuse leave to appeal the sheriff's sentencing decision. The current note of appeal includes the same or similar grounds of appeal to the original note of appeal.

[5] We now refer to section 194ZB of the 1995 Act which regulates and makes provision for appeals from this court to the High Court of Justiciary. The first two sub-sections are of particular importance. They state - *(1) An appeal on a point of law may be taken to the High Court against any decision of the Sheriff Appeal Court in criminal proceedings, but only with the permission of the High Court. (2) An appeal under subsection (1) may be taken by any party to the appeal in the Sheriff Appeal Court.*

[6] We also refer to the Act of Adjournal Criminal Procedure Rules 1996, Schedule 2, Part IVA, rule 19E which makes provision for the lodging and determining of such appeals. The rules require in the first instance that the note of appeal be lodged with this court (Rule 19E.2) and provides for the documents including the judgment of the Sheriff Appeal Court

to be sent to the High Court of Justiciary (Rule 19E.3). Form 19E.1B is the form of minute of procedure in a note of appeal under the section. It can be seen that this minute provides for interim suspension of orders for disqualification in terms of section 41(2) of the Road Traffic Offenders Act 1998[or refusal to suspend such orders] by this court .

[7] This court accordingly has a function in respect of appeals where the note of appeal seeks to appeal to the High Court of Justiciary and where permission of that court is required. In our opinion this court is therefore entitled to take notice of questions of competency on the lodging of any appeal in terms of section 194ZB and of course when considering interim suspension. This court may only consider whether to suspend the sheriff's order *ad interim* if the note of appeal is competent in terms of the statute.

[8] The appellant today argues that the appeal is competent. The relevant section allows an appeal to the High Court of Justiciary subject to permission against *any decision* of the Sheriff Appeal Court and we were referred to various provisions in the 1995 Act including section 187 where reference is made to a "*decision*" in the context of the first and second sift procedure. Reference has also been made to section 194ZK which provides for finality of proceedings in the High Court there being no equivalent provision in respect of decisions of this court. Indeed, counsel for the appellant doubted whether this court had jurisdiction to hear an application for interim suspension at all standing the terms of s 41(2) of the Road Traffic Offenders Act 1988 which provides:- "(2) Where a person ordered to be disqualified appeals , whether on appeal against a summary conviction or a conviction on indictment or his sentence, the court [hearing the appeal] may, if it thinks fit, suspend the disqualification on such terms as it thinks fit." Therefore, it is for the court which hears the appeal to consider whether or not to suspend *ad interim* the disqualification imposed in the lower court.

[9] The Advocate Depute submitted with reference to s 194ZB(2) that the appeal was not competent as there had been no appeal before this court which would allow a further appeal in terms of s 194ZB

[10] We are of the opinion that the application for interim suspension cannot be entertained by this court as the note of appeal on which it depends is incompetent. The appellant is not and has not been a party to any appeal before this court. If an appeal requires leave, there is no appeal before the court unless and until leave is granted. The right of appeal under sections 175 and 186 of the Criminal Procedure (Scotland) Act 1995 is subject to the requirement of leave which in an appeal against sentence in summary criminal jurisdiction is regulated by section 187. Therefore the right of appeal is restricted. Where leave to appeal is required a note of appeal which is refused leave is of no effect and is incompetent. Section 187 of the 1995 Act confers power on this court to grant or refuse leave. It is our view that this court's decision to grant or refuse leave cannot be appealed. Section 187 is clear in its terms and it appears to us that no other court or authority has vested in it the statutory power to consider leave to appeal or to review the Sheriff Appeal Court's decisions on leave to appeal. Nothing we say derogates from the High Court of Justiciary's exercise of its *nobile officium* or inherent jurisdiction in criminal matters.

[11] We have carefully considered section 194ZB and the ancillary rules which support our conclusion. Section 194ZB(2) provides that an appeal may be taken by "any party to the appeal" in this court. The appellant was refused leave at the first and second siftings which has the result of rendering his note of appeal as originally lodged of no effect and incompetent. The rules to which we have referred likewise envisage that appeals under section 194ZB are taken against a decision of this court in the sense of a decision on an appeal and that there is a judgment of the court. This is evident from consideration of the rules which provide for

the court's judgment to accompany the papers to the High Court of Justiciary or to follow when finalised. Form 19E1-B is the minute of procedure which requires the clerk to certify that the judgment is transmitted and therefore that the statutory requirements have been met. For these reasons we refuse *interim* suspension as the underlying note of appeal is incompetent and we direct the clerk to refuse the note of appeal as incompetent.

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