SHERIFF APPEAL COURT

[2016] SAC (Crim) 19
SAC/2016/000195/AP

Sheriff Principal C A L Scott QC
Sheriff S Murphy QC

OPINION OF THE COURT

delivered by the Vice President, SHERIFF PRINCIPAL C.A.L. SCOTT QC

in

APPEAL AGAINST SENTENCE

by

MARTIN WAINE

Appellant

against

PF, Glasgow

Respondent

Appellant: Mitchell; Michael Lyon, Solicitors, Glasgow
Respondent: McFarlane AD; Crown Agent

18 May 2016

Introduction

[1] The appellant pleaded guilty to a charge of driving a motor vehicle when using a hand held mobile telephone. The imposition of penalty points raised the spectre of

disqualification under section 35 of the Road Traffic Offenders Act 1988 *via* the "totting up" procedure.

[2] At first instance, it was contended on behalf of the appellant that any disqualification from driving would lead to exceptional hardship. A proof was assigned to determine that issue.

[3] At the proof, the appellant and his wife gave evidence. Their evidence was not challenged by the Crown. With regard to credibility and reliability, while the report prepared by the Justice of the Peace is silent on these matters, there is no suggestion on his part to the effect that he found any of the evidence led to lack credibility or reliability.

[4] Having considered the evidence and the related submissions advanced on behalf of the appellant, the Justice found that exceptional hardship had not been established. Accordingly, 3 penalty points having been imposed, the appellant was disqualified from driving for a period of 6 months by way of section 35 of the 1988 Act.

[5] In seeking to have the disqualification quashed, counsel for the appellant advanced a number of submissions designed to persuade the court that the Justice had erred in failing to hold that exceptional hardship had been made out on the evidence led at proof.

The evidence

[6] At the heart of the exceptional hardship argument, lay the undisputed fact that the appellant owns and runs a small business with some ten employees. His business involves the manufacture of bespoke industrial glass. His wife acts as the accountant for the business. The appellant lives 11 miles outside Dunoon in a relatively remote location. His company's factory premises are located in Lancashire.

[7] The appellant is the contracts manager for the business. As such, he uses his car to travel to Lancashire, to meetings in London and to other parts of England. His car is also used to transport heavy glass samples. He travels 1,500 to 2,500 miles per week. The nearest railway station to the factory is at Preston, some 30 miles away.

[8] Standing the rural location of his home and the location of the factory, when both these features are taken along with the nature and extent of his business travel, the use of public transport, to put it at its highest, would be of extremely limited value when it comes to the operation of the business.

[9] In contemplation of the engagement of a driver, the appellant found it difficult to obtain *any* quotes for such work. However, one firm estimated that, were they prepared to tender for the work, it would cost about £4,000 per week plus the cost of hotels and other expenses associated with the needs of the individual doing the driving.

[10] The appellant's role is key to the business. Without him being able to travel to meetings etc in the way he currently does and absent his specialist knowledge and experience, the company would be "severely disabled". Jobs might be lost. The survival of the business would be placed in serious jeopardy.

[11] Disqualification would also have a huge effect on the appellant's personal circumstances given that access to the family home is difficult. Were the business to fail, the appellant and his wife would lose their livelihood and would experience difficulty in meeting their mortgage commitments amounting to £700 per month.

The Justice's treatment of the evidence

[12] In the "conclusion" section of this report, the Justice comments upon the evidence led. He ventures that the appellant was "not employed as a driver. He does not require a driving licence to do his job."

[13] He found that it was "not essential" that the appellant drive himself to client meetings. It appeared to the Justice "…that a combination of public transport, taxis and perhaps the services of a driver, combined with overnight stays as necessary would enable him to attend many if not all of the meetings he needed to attend."

[14] The Justice states that "There appeared to have been no consideration given to the possibility of the other employees taking it in turns to drive the appellant where he needed to go, perhaps in conjunction with a hired driver." He also comments that, "With an effective system in place, it might be that no public transport would be required."

[15] When it came to the question of hiring a driver from a chauffeur company, the Justice of the Peace was not satisfied that there were no other drivers who could perform the function for less (ie less than the £4,000 plus "estimate" spoken to in evidence) albeit at a significant cost to the appellant and his company. He laid stress on the company turnover in concluding that the company would have the resources to invest to protect the contribution of a vital employee such as the appellant.

[16] The Justice understood that in considering a case of this kind he had an obligation to consider public safety as well as the hardship to be caused to the appellant and others.

Counsel's submissions in support of the appeal

[17] In broad terms, the argument advanced by counsel on behalf of the appellant was that the conclusion arrived at by the Justice was not borne out of the unchallenged evidence

provided by the appellant and his wife. The evidence clearly demonstrated that the appellant needed a driving licence to perform his job. Taking the evidence as a whole, including the remote location of the appellant's home and the need to transport heavy items, it was submitted that, in reality, the use of public transport or taxis was out of the question.

[18] It was also argued that the Justice's approach to matters involved not just erroneous treatment of the evidence led but also speculation over factors which did not feature in evidence, the Justice's speculation in regard to the possibility of company employees taking it in turns to drive the appellant where he needed to go being a good example.

[19] Firstly, there had been no evidence regarding the feasibility of removing employees from their existing role within the business to perform a separate (driving) role which might take them away from home for several days. Secondly, there had been no evidence concerning the HR issues which might arise on that hypothesis nor had the Justice considered any related employment law complications.

[20] It was contended that the Justice had also erred by relying upon his consideration of public safety. That, counsel asserted, was irrelevant when it came to any test for the existence of exceptional hardship. It ought not to have been included in the Justice's consideration of the matter.

[21] There had been unchallenged evidence that the business would be unlikely to survive if the appellant were to lose his ability to drive. Reference in that regard was made to the case of *Findlay* v *PF, Aberdeen* 1998 SCCR 181. In that case, the presiding Magistrate had rejected the interpretation of the facts "which were presented to her". The court expressed great difficulty in understanding how that was possible for her to do given that there was no challenge made by the Crown or by anybody else to the evidence submitted.

[22] Counsel submitted that the situation in the present case was very similar to that in the case of *Findlay*. Lord Johnston in *Findlay* had stated that:

> "What therefore the Magistrate had before her was unchallenged evidence that the business would not survive the loss of the appellant's licence. We have to say that, in that situation, it was the equivalent of the joint minute and the Magistrate was bound to accept the evidence being submitted to her on that matter."

Decision

[23] In all the circumstances, we agree with the submissions advanced on behalf of the appellant. It seems to us that the Justice's conclusion, as is suggested in the note of appeal, was irreconcilable with the unchallenged evidence presented to the court to the effect that the business was unlikely to survive. The result would be a loss of employment not just for the appellant but for all ten of the staff of a small and specialised company which depended upon his expertise for its survival. Accordingly, we have determined that the existence of exceptional hardship ought to have been held established and with that in mind we have quashed the disqualification of 6 months.