



**SHERIFF APPEAL COURT**

**[2016] SAC (Crim) 33  
SAC/2016-000437/AP**

Sheriff Principal M M Stephen QC  
Sheriff Principal C D Turnbull  
Sheriff M G O'Grady QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL BY STATED CASE AGAINST CONVICTION

by

CLAIRE FRANCES LIZANEC

Appellant:

against

PROCURATOR FISCAL, EDINBURGH

Respondent:

**Appellant: S Collins (sol adv); Collins & Co  
Respondent: R Goddard (sol adv), AD; Crown Agent**

1 November 2016

[1] The appellant appeals by stated case her conviction following trial at Edinburgh Sheriff Court for dangerous driving on the A1 on 21 July 2014.

[2] The charge is in the following terms:

*"(001) on 21<sup>st</sup> July 2014 on a road or other public place, namely A1 Edinburgh To Newcastle Road, near the Oldhamstocks junction, East Lothian you CLAIRE FRANCES LIZANEC did drive a mechanically propelled vehicle, namely motor car registered number NA14 DHU dangerously and did drive your vehicle too close to the vehicle ahead, cross the centre line of the road on to the opposite carriageway and into the path of oncoming traffic and did cause your vehicle to collide with vehicle registration 3090FSB causing damage to it and injury to Jose Luis Vasquez Maldonado, Maria Luzmilla Padilla Amaguana, and Jose Luis Vasquez Padilla, all care of The Police Service of Scotland, and to yourself; CONTRARY to the Road Traffic Act 1988, Section 2 as amended"*

[3] The sheriff in his stated case poses two questions for the opinion of this court. The first question is the essence of the appeal. It is in the following terms:-

*"1. In the specific circumstances of the appellant's driving, did I err in convicting her of a contravention of section 2 of the Road Traffic Act 1988 instead of convicting her of a contravention of section 3 thereof?"*

The second question relates to sentence and turns on the answer to the first question of law.

It is in the following terms:-

*"2. Did I err in imposing a sentence of a fine and disqualification, with a requirement to sit an extended test?"*

[4] This appeal relates to the nature and quality of the appellant's driving on the day in question on the A1 south of Dunbar. The appellant was driving a white Nissan Qashqai southbound when at approximately 6.30pm she allowed her vehicle to cross onto the northbound carriageway colliding with an oncoming vehicle. The oncoming van driver was unable to avoid a collision. The appellant and all three occupants of the van were injured and required hospital treatment. The sheriff found that the appellant had failed to maintain proper concentration on her driving and this had been more than momentary. She had been admiring the scenery or beautiful weather conditions and failed to negotiate a sweeping right hand bend. The sheriff finds that the sole cause of the accident was the appellant's failure to drive her vehicle on the correct side of the carriageway as a result of allowing

herself to be distracted by the weather conditions. She had failed to maintain her focus and concentration on the manner and direction of her driving. In doing so she recklessly created a danger of head on collision as indeed occurred. The sheriff's findings in fact 6 and 7 describe the nature of the appellant's driving. The sheriff makes a finding in fact and law that the appellant's failure amounted to dangerous driving in terms of section 2 of the Road Traffic Act 1988. The appellant in this appeal challenges the sheriff's assessment of her driving and argues that the sheriff, on the evidence, could only convict of a contravention of section 3, careless driving.

[5] The solicitor advocate for the appellant argued that the test set out in *Allan v Patterson* 1980 JC 57 had not been met in the circumstances of this case. To satisfy that test the driving must be eloquent of a high degree of negligence – much more than the mere want of due care and attention. The evidence in this case points to this being a loss of concentration and even if the inattention was more than momentary it did not have the hallmark of recklessness which was necessary to find that the appellant's driving was dangerous. The sheriff erred in taking account of the nature of road; traffic conditions and the speed that vehicles travel on that particular stretch of the A1. These are essentially neutral considerations. The duty of the driver is the same irrespective of the road or speed limit. In this case the evidence did not justify the sheriff finding that the high test for dangerous driving had been met and he ought to have convicted instead of careless driving.

[6] The advocate depute argued that the sheriff's reasoning could not be faulted. The sheriff has set out carefully his findings based on the evidence. He has explained these findings. The sheriff was entitled to find that the appellant's inattention was more than momentary and was sufficient to meet the test that the inattention and therefore the driving fell far below the standard expected of a reasonably careful and competent driver. Under

reference to *Trippick v PF Inverness* 1994 SCCR 736 the sheriff was correct to have regard to the specific circumstances of the road, traffic volume and speed at the locus. The appellant had failed to maintain her concentration as she required to do. Her inattention was more than momentary.

[7] The question for this court is – did the Sheriff err in finding that the appellant's driving fell far below the standard of driving expected of the competent and careful driver? This is the test set out in *Allan v Patterson (supra)*. The sheriff has referred to and applied the test for dangerous driving. It is an objective test. The sheriff has made findings in fact and given a careful account of the evidence which supports these findings. The accident occurred on the main trunk road leading from Edinburgh to Newcastle, the A1. At the locus the road is a single undivided carriageway in each direction. In other words, there is no central barrier. At the locus there is a 60 mph limit. There was a constant flow of traffic in each direction travelling at or close to the maximum speed limit and the appellant required to negotiate a sweeping right hand bend. The evidence clearly justifies the sheriff finding that the appellant had allowed herself to be distracted and therefore failed to concentrate on her driving. The appellant admits not paying attention. The Highway Code makes specific reference to the need to avoid distractions and that safe driving needs concentration. This much is accepted and obvious. The appellant herself admits that she was looking at the weather or scenery rather than the road conditions whilst negotiating the bend. Inattention or distraction involves loss of one's concentration on driving and on the road. The prohibition on the use of a mobile phone in a vehicle is intended to avoid precisely that mischief, namely, the driver becoming distracted. The sheriff in his stated case has set out why the appellant's distraction or inattention was not "momentary". The appellant's vehicle was sufficiently over the middle line separating the carriageways that the

oncoming van driver assumed that it was overtaking. The sheriff, at paragraph 36 of his stated case observes:

*"This tends to indicate that the incursion was not a minor straying over the middle line, but was long enough for the appellant's car to stray well over the middle line, which supports a likely inference that the inattention was not momentary in nature."*

Indeed, the appellant did not assert that she had lost concentration for only a short period.

[8] The sheriff heard evidence at trial. His findings on that evidence will not readily be disturbed by an appeal court. He enjoyed the advantage of hearing and seeing the witnesses. He has set out his findings in fact and the evidence on which his findings are based concisely and carefully. He has applied the correct test. In particular the sheriff has properly had regard to the nature of the road together with the volume and speed of traffic on that road when the accident occurred. The test for dangerous driving includes the requirement to consider whether it would be obvious to a competent and careful driver that driving that way would be dangerous. "Dangerous" refers to danger either of injury to any person or of serious damage to property. The sheriff concludes:

*"In my view, test (b) is clearly satisfied. The stretch of road is a 60 mph zone, and therefore opposing streams of traffic have a closing speed of up to 120mph, if the speed limits are observed. The danger of head-on collision is obvious and continuous, and the likely results of such a head-on collision includes loss of life and catastrophic damage to body and property."*

The appellant's inattention led to a critical loss of concentration whilst negotiating the sweeping bend. The risk of collision and consequential injury is obvious. The sheriff's assessment of the appellant's driving having regard to the potential and actual dangers is one which, in our view, cannot be faulted. The sheriff's approach to the evidence and his application of the test for dangerous driving are matters for his judgment. Whether, the driving was dangerous becomes one of fact and degree for the sheriff (*Trippick supra*). We

do not accept the contention advanced on behalf of the appellant that the actual character of the road together with the volume and speed of the traffic on the A1 at the locus were neutral considerations when assessing the quality of the appellant's driving. We are of the view that the sheriff required to take account of the entire circumstances, as he did, as they have a direct bearing on the potential hazards which a competent and careful driver would be aware of and would have regard to when driving a vehicle. In the circumstances of this case it was open to the sheriff to convict of dangerous driving. Therefore, we propose to refuse the appeal and will answer the questions of law posed in the stated case in the negative.

(signed) *Mhairi M Stephen*