



SHERIFF APPEAL COURT

**[2016] SAC (Crim) 5
SAC/2015/000165/AP**

Sheriff Principal M M Stephen QC
Sheriff P A Arthurson QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

MARK McINALLY

Appellant:

against

PROCURATOR FISCAL, EDINBURGH

Respondent:

**Appellant: MacKenzie; Beaumont & Co
Respondent: Hughes, A.D. Crown Agent**

9 March 2016

[1] The appellant was charged by the respondent on summary complaint with a contravention of section 2 of the Road Traffic Act 1988 (Dangerous Driving). At the trial diet the prosecutor accepted the appellant's plea of guilty to a contravention of section 3 of the same Act namely driving without due care and attention on 3 December 2014 on the M90 near Echline Junction.

[2] The amended charge to which the appellant pled guilty is as follows:

*"(001) On 3 December 2014 on a road or other public place, namely M90 west bound at M9 spur, near to the Echline Junction, Edinburgh Mark Francis McNally did drive a mechanically propelled vehicle namely motor (sic) Vauxhall Astra motor car registered number AG58 ZSZ without due care and attention and did drive too close to the vehicle ahead.
CONTRARY to the Road Traffic Act 1988 section3 as amended."*

[3] The court imposed a fine of £225 and 8 penalty points. The points range for the offence is 3 to 9 penalty points. The court may order disqualification for this offence.

[4] In the note of appeal it was submitted that the sheriff erred in his assessment of the appellant's driving in the morning in question which the sheriff had indicated was "*ridiculous*" and might lead to a serious accident occurring on a high speed road such as the motorway. It was suggested that the sheriff was wrong to describe the appellant's driving in this way and that the driving was verging on dangerous driving. Further, the substance of this appeal is that the sheriff, having considered the nature of the driving and the penalties open to him erred in not discounting the imposition of 8 penalty points. Leave to appeal was allowed solely on the issue of lack of discount.

[5] Today, at the appeal hearing we allowed a late application in terms of section 187(8) of the Criminal Procedure (Scotland) Act 1995, allowing the appellant to advance a ground of appeal that the number of penalty points imposed for this offence was excessive. We did so due to the lack of authority on driving offences involving "*tailgating*" and due to the appellant having just been granted legal aid.

[6] Counsel for the appellant argued that in the absence of other aggravating factors such as undertaking, changing lanes etc the appellant's driving on the morning in question involved him travelling at the same speed as other vehicles on the motorway albeit close to the vehicle in front. This was at the lower end of the range of careless driving and this driving does not merit a starting point or headline sentence of 8 penalty points. The

imposition of penalty points at the upper range of the penalties for careless driving (3 to 9 penalty points) was manifestly excessive. It was argued that the minimum or lower end of the range (3 penalty points) was the appropriate penalty. *Esto*, the submissions on the penalty were not accepted, discount should have been afforded with the result that the appellant's licence would have been endorsed with a lower number of penalty points.

Ms Mackenzie pointed out that this appeal was comparable with the case of *Ross v PF Aberdeen*, decided along with *Gemmell v HM Advocate* [2011] HCJAC 129.

[7] We disagree with the arguments advanced in this appeal. We consider that the appeal should be refused having regard not only to the facts on which the sheriff sentenced but also on sentencing and discount principles. The course of driving by the appellant on the day in question in December 2014 has properly been described by the sheriff as "tailgating" – driving some two to three metres from the car in front at motorway speed. To drive in this manner is not momentary inattention or distraction but instead any driver who drives in this manner deliberately courts danger. The degree of culpability is high. There is a clear likelihood that a serious collision may occur with the associated risk that injury and damage is caused. The sheriff was fully justified in categorising this type of driving as being at the upper end of careless driving. The sheriff's assessment is supported by the clear advice given to drivers in the Highway Code as to stopping distances (Rule 126). At 70 mph the overall stopping distance is 96 metres. The adjective, "ridiculous" is one with which we take no exception for the reasons given by the sheriff in his report. To drive so close to the vehicle in front gives little or no chance of being able to stop without causing a collision. This is aggressive and irresponsible driving. The sheriff was correct to consider disqualification. We are of the view that the court is entitled to impose a period of disqualification for this type of aggressive driving. Having categorised the appellant's

driving to be at the very top end of the careless scale we consider that the sentence imposed of 8 penalty points and a modest fine was lenient.

[8] The appeal was also argued on the matter of discount. The principles of sentencing discount are set out in *Gemmell and Others v HM Advocate* [2011] HCJAC 129. Recently this court considered whether penalty points were susceptible to discount and concluded correctly that they are (*Watt v PF, Dunfermline* [2016] SAC (Crim) 2). *Gemmell* does not require any particular approach to discount. Indeed we agree that the question of discount is for the judgment or discretion of the sentencing court. There must be convincing reasons for allowing discount. *Gemmell* warns against a mechanistic approach to discount. It follows, as Lord Gill indicated in *Gemmell* at paragraph 81:

"81. Where the sentencer has given cogent reasons either for allowing the discount in question or for declining to apply a discount at all, I consider that it is only in exceptional circumstances that this court should interfere. I repeat what I said in HM Advocate v Graham (supra), paras [21] and [22]. Guidelines provide a structure for, but do not remove, judicial discretion. Guidelines should not lead to a mechanistic approach. The sentencing exercise should always involve the sentencer's judgment and discretion which he must in every case exercise on a consideration of all of the circumstances. Those representing an accused who has tendered an early plea should bear this in mind when considering whether to lodge an appeal based solely on the amount of the discount."

We endorse these views. The stage at which the plea was tendered in this case was at the trial diet and although there may be some utilitarian benefit in a plea at that stage, that factor, in the circumstances of this case, was marginal. However, as discount is not an automatic entitlement, the issue for this court is whether the sheriff has given cogent reasons for not discounting the penalty points. In our view the sheriff has properly and fairly set out his reasoning having given due regard to the nature of the driving.

[9] The question for the Appeal Court is whether the sentence imposed by the sheriff constitutes a miscarriage of justice. For the reasons we have already given we agree with the sheriff's assessment of the offence and we adopt the principle that it is only in exceptional

cases that this court will interfere with a discretionary decision on discount for which the sentencing sheriff has given cogent reasons. Indeed, we consider that a period of disqualification is justified on the facts of this case. Arguably, the sheriff has afforded the appellant a generously discounted penalty by firstly declining to disqualify and then, by restricting the penalty points imposed for reasons which unduly favour the appellant. The appeal is therefore refused.