APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 50
HCA/2018/399/XC

Lord Justice General
Lord Drummond Young
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

REFERENCE BY THE SHERIFF APPEAL COURT

under section 175A of the Criminal Procedure (Scotland) Act 1995

of

NOTE OF APPEAL AGAINST SENTENCE

by

CAMERON JOSHUA WILSON

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

Appellant: A Ogg (sol adv); Paterson Bell (for David Sutherland & Co, Aberdeen)
Respondent: Lord Advocate (Wolffe QC), K O'Mahony AD; the Crown Agent

4 September 2018

Introduction

[1] This reference from the Sheriff Appeal Court raises an important question of

principle concerning whether, in a road traffic case where there are separate parts to a sentence, notably a fine and the imposition of disqualification or penalty points, the court requires to apply the same rate of discount to each part.

Facts

[2] On 9 November 2017, at the Justice of the Peace Court in Aberdeen, the appellant pled guilty to speeding on 12 April 2017 on the A90 at Stonehaven. He was driving at 80mph in a 60mph zone; contrary to orders made under the Road Traffic Regulation Act 1984.

[3] The original pleading diet was on 28 August 2017 when, in the absence of the appellant, the case was adjourned until 19 September. The same happened on that date. The complaint was personally served upon the appellant on 3 October. When he did not appear on 17 October, a warrant for his arrest was issued. He appeared by arrangement on 9 November. In mitigation, it was said that he had attempted to pay the original fixed penalty notice of £100 and three penalty points by attending in person at the Procurator Fiscal's office in Aberdeen and then by post. It would appear that both efforts came too late.

[4] The JP imposed a fine of £250, which she discounted by one-fifth to £200 for the early plea. No trial diet had been fixed. The JP imposed four penalty points; the compulsory range being between three and six. The appellant had previously acquired five penalty points for speeding in October 2015. The JP reasoned that:

> "I did not think it appropriate to discount the points to three ... given that a warrant had been issued and 20% of a discount would have reduced the penalty points by 0.8 of a point which I was unable to do."

The issue

[5] Section 196 of the Criminal Procedure (Scotland) Act 1995 provides:

> "(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account – (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which that indication was given."

[6] In *Gemmell* v *HM Advocate* 2012 JC 223, the Lord Justice Clerk (Gill), with whom the majority agreed, reasoned as follows:

> "[53] A central question in these appeals is whether a sentence discount should be applied across the board or whether individual elements in the headline figure should be ring fenced from the application of the discount. The cases to which I have referred are unanimous in deciding that discounting cannot apply to the public protection element in the sentence. All of these decisions can be traced back to para 19 of *Du Plooy* [v *HM Advocate* 2005 JC 1].
>
> [54] In my opinion, these authorities are in error. I reach that view on an interpretation of section 196 of the 1995 Act and on a review of some practical considerations.
>
> [55] Section 196(1) entitles the court to allow a discount 'in determining what sentence to pass ...'. It does not limit the scope of the discount in any way. The straightforward reading of the section is that the discount, if allowed, applies to the whole sentence. In my view, there is nothing in the wording of section 196 to suggest that when the conditions of the section are fulfilled the court should disaggregate any individual element from the starting figure and exclude it from the application of the discount."

[7] Three of the cases in *Gemmell* were road traffic contraventions. In the first (*Ross*), there had at first instance been a discount of one-third in the fine from £750 to £500, but none applicable to the seven penalty points. The court reduced the points to five (a full third would have been to 4.7) on appeal. In the second (*Hart*), a fine of £500 had been imposed, having been discounted from £650. It was not clear whether the court at first instance had applied a discount to the six penalty points imposed. If a discount of approximately one-quarter had applied to the penalty points imposed, this would have resulted in a reduction

(arithmetically) to 4.5. The court imposed four on appeal. In the third (*Ogilvie*), a fine of £175, which had been discounted by one-third, was imposed. The disqualification period of 15 months had been discounted from 24 months. The latter was slightly higher than one-third, but the appeal by the Crown against sentence was refused.

The reference

[8] The Sheriff Appeal Court explained that they often see cases in which there is a discrepancy between the rate of discount as applied on the same complaint to fines and penalty points. Having regard to the *dictum* of the Lord Justice Clerk in *Gemmell* v *HM Advocate* (*supra*), one view was that the same rate of discount should be applied to both parts of the sentence. On the other hand, that may not have been what the Lord Justice Clerk had intended. Another question raised by the SAC was whether *Gemmell* obliged the court to disapply any consideration of road safety or public protection when deciding whether there should be a discount and, if so, the rate of that discount in relation to penalty points or disqualification from driving. In *Watt* v *Dunn* 2016 SCCR 131, the SAC had considered that public protection did not provide a valid reason for declining to discount penalty points, but the overall sentence had not constituted a miscarriage of justice.

[9] The SAC observed that, in some road traffic cases, the offender could not be given a discount, because the appropriate number of points or period of disqualification were the minimums available. The discount thought appropriate could take the points or period below the minimum. Points may be indivisible into whole numbers. Discounting a narrow range of penalty points may result in potential unfairness in terms of "comparative justice "; such as where a first offender was given the minimum points and a repeat offender was given the same points because of the operation of the discount. It was not immediately

obvious why the repeat offender, who had pled guilty early, should escape the ordinary operation of the totting-up provisions. There was a tension between the statement in *Gemmell* v *HM Advocate* (*supra*), that discount remained a matter for the discretion of the sentencer, and a requirement that the same rate of discount should apply to different parts of the sentence.

[10] As the matter was one of principle, the SAC referred the case to this court on the following questions:

> "(1) What is the proper construction of section 196 of the 1995 Act in road traffic cases where the sentencing process involves the imposition of a fine or other penalty and separately the imposition of penalty points?
> (2) In keeping with the court's discretion on matters of discount, may the court adopt a discriminating approach to discount over separate penalties in road traffic cases?
> (3) May the court take account of public safety on the roads when considering whether to discount and what level of discount to apply to penalty points or to disqualification in appropriate cases? and
> (4) What is the proper approach to the interpretation of section 175A of the 1995 Act when the Sheriff Appeal Court or any party to an appeal proposes a reference to the High Court of Justiciary under that provision?"

Submissions

Appellant

[11] The appellant maintained that the power to refer a case under section 175A was confined to complex or novel points. There was no such point in this case. Following *Gemmell* v *HM Advocate* (*supra*), the position was clear. It had been applied in a number of cases thereafter. Although the statutory provisions in Scotland (1995 Act, s 196) and England (Criminal Justice Act 2003, s 144) were similar, the English Sentencing Guidelines for Reduction in Sentence for a Guilty Plea (1 June 2017) stated (p 4, para B) that reduction only applied to the punitive elements of the sentence. No reduction should be made in ancillary orders such as periods of disqualification. The position in Scotland was different.

In *Gemmell*, under reference to *Tudhope* v *Eadie* 1983 SCCR 464, the Lord Justice Clerk (Gill) said (at para 72) that penalty points were a penalty in themselves. Although the imposition of points had a preventative purpose, it also had a punitive and deterrent effect (*Malige* v *France* (1999) 28 EHRR 578 at para 39). All the judges in *Gemmell* had held (paras [71-72], [132], [153], [156] and [167]) that points fell within the phrase "other disposal or order" used in section 196. A similar approach had been taken in *Harkin* v *Brown* 2012 SCCR 617 and *Watt* v *Dunn* (*supra*).

[12] There was no entitlement to a discount. It remained a matter for the discretion of the court of first instance. The discretion was not unfettered. It required to be exercised in accordance with broad principles. It should not be a haphazard exercise, but should reflect the common understanding of sentencers (*Gemmell*, at para [29-32]; *Saini* v *Harrower* 2017 SCCR 530). Public protection did not justify declining to discount (*Gemmell*; *Watt* v *Dunn* (*supra*)). Sentences could not be disaggregated, If a sentencer determined that a discount was appropriate, that discount should be applied to all component parts of the sentence, subject to statutory minimum requirements.

[13] Penalty points and disqualification did not fall into a special category. Public protection was not relevant in determining the utility value of the plea. The court was only concerned with the utilitarian value of the plea; that is savings in terms of court time and expense. In the road traffic cases in *Gemmell* v *HM Advocate (supra)* (*Ross* and *Hart*) the court discounted both the fines and the penalty points at approximately the same rates. That approach was followed in *Harkins* v *Brown (supra)* and *Saini* v *Harrower* (*supra*). Any disaggregation would complicate the sentencing process and undo the policies and objectives set out in *Gemmell*.

[14] In the appellant's case, the JP should not have discounted the fine but not the points. The difficulty with the fraction of a point could be solved by rounding up. There had been utilitarian value to the plea. No trial had been fixed. The appellant had been thwarted from paying the fixed penalty and accepting the penalty points. He had demonstrated an unequivocal intention to plead guilty from an early stage (*Herd* v *HM Advocate* 2017 SCCR 535).

Respondent

[15] The respondent agreed that the imposition of penalty points was a penalty eligible for discounting as long as the statutory minimum was not crossed (*Gemmell* v *HM Advocate* at paras [70-72], [131-2], [143], [167]. *Gemmell* was clear. Whether to apply a discount was a matter for the judgment of the sentencing court (*ibid* at para [29]). The discretion was not wholly unfettered, but must take into account the principles upon which sentence discounting is based (*ibid* paras [32] and [145]), *Saini* v *Harrower* (*supra*) at para 5). If a sentencer had provided cogent reasons for declining to apply a discount at all, the appellate court would only interfere with that decision in exceptional circumstances (*Gemmell* at para [81]; *Saini* at para [5]). The utilitarian value of a plea was the only matter which could be taken into account in determining the application of a discount or the rate of any such discount.

[16] If it was thought that a more discriminating approach to sentencing was required, whereby different rates of discount could be applied to different parts of a road traffic sentence, a larger bench would be required to reconsider *Gemmell* v *HM Advocate* (*supra*). The desirability of flexibility had to be weighed alongside the need for predictability. If a

court applied a particular discount to a fine and a different one to penalty points, that may be seen as inconsistent and constitute an error in law.

Decision

[17] The principles in *Gemmell* v *HM Advocate* 2012 JC 223 are clear. In light of the Sheriff Appeal Court's advice that sentencers are having difficulty in applying them, it is important that they be restated in unequivocal terms in the specific context of road traffic contraventions and under reference to the questions posed.

(1) What is the proper construction of section 196 of the 1995 Act in road traffic cases where the sentencing process involves the imposition of a fine or other penalty and separately the imposition of penalty points.

Section 196 applies to both a fine and other parts of a sentence such as penalty points or disqualification from driving. All are penalties and, in a given case, should be discounted for an early plea of guilty at approximately the same rate. Other than in exceptional cases, such as where statutory minimums apply or a discount is otherwise impracticable, the rate of discount should be uniform across all parts of the sentence. Any differential would require to be fully reasoned in the event of a challenge.

[18] The passages in *Gemmell* v *HM Advocate* (*supra* paras [53-55]), in which the Lord Justice Clerk (Gill) refers to disaggregating "any individual elements from the starting figure", relate to the factors which will, when combined, instruct the headline sentence of, say, imprisonment or a fine (eg retribution, deterrence and protection of the public; see *Gemmell*, LJC (Gill) at para [60]). The reference is not to different parts of a sentence (eg imprisonment and penalty points). In terms of *Gemmell*, the function of the sentencer is to

determine, first, the headline sentence, which may involve the imposition of different parts making up the whole sentence. The sentencer should then select the appropriate rate of discount; usually in terms of a percentage or fraction. Both the headline sentence and the discount are assessed "as a delicate art based on competence and expertise" (*ibid* para [59]). The sentencer should then "simply" apply the discount, if any, to all parts of the headline sentence. There will normally be no rational basis for selecting different rates of discount for different parts.

[19] There are obvious cases in which the rate of discount cannot be the same or where, in respect of one part, cannot apply at all. These include, respectively, situations where applying the same discount would reduce the penalty to below the statutory minimum or where the relevant statute does not permit a discount. Comparative justice only arises where two or more accused are convicted of the same charge. There may be cases where the application of a discount to one accused, who has pled guilty early, will result in an imbalance in relation to another accused who has not. This may occur in cases where one accused is a repeat offender and another is not. This is the effect of any penalty discounting system, whether applicable to specific road traffic offences or otherwise. There may be an element of inconsistency in the imposition of sentences for similar offences, but that again is the general effect of discounting. It is a pragmatic feature designed to improve the efficiency of the justice system. It must be applied in a consistent fashion.

[20] In relation to the indivisibility of certain numbers of penalty points by particular rates of discount, an element of pragmatism must again be employed. This is seen in what happened in the road traffic cases assessed in *Gemmell* v *HM Advocate* (*supra*). The fractions arrived at may require to be rounded up or down to achieve a practical result. This should

not be a difficult exercise. In this case, for example, the discount of 0.8 penalty points could easily be rounded up to 1 point.

(2) Can the court operate a discriminating approach to discount over separate penalties in road traffic cases?

No. For the reasons given above, a "discriminating" approach to discount, in so far as this is taken to mean the application of different discounts to different parts in the one sentence, is not normally legitimate.

[21] As a generality, whether to discount a sentence and at what rate, remain matters for the discretion of the judge at first instance (*Gemmell* v *HM Advocate* (*supra* LJC (Gill) at para [29]). However, discretion is not the equivalent of caprice or whim. It requires to be exercised in accordance with recognised principles (*ibid* para [32], *Saini* v *Harrower* 2017 SCCR 530, LJC (Dorrian), delivering the Opinion of the Court, at para [5]). There may be some merit in the idea that sentencers should be given an overriding discretion to disapply, or reduce the rate of, any discount in relation to the selection of penalty points or a period of disqualification. This is based on the notion that the nature of the imposition of points or disqualification from driving has a different purpose from a fine or imprisonment. This idea was rejected by all of the judges in *Gemmell*; each agreeing with the application of the same, or approximately the same, rates of discount for the fines and the penalty points in the road traffic cases. The approach outlined in *Gemmell* was endorsed, as it was bound to be, in *Harkin* v *Brown* 2012 SCCR 617 (Lord Carloway, delivering the Opinion of the Court, at para [7]). It is based upon the need for predictability and certainty in the sentencing process, which outweigh other considerations, such as flexibility, in this area. It is disappointing to

note that, as the Sheriff Appeal Court have recorded, some sheriffs and JPs are not implementing the principles set out in these cases.

(3) Can the court take account of public safety when considering whether to discount and what level of discount to apply to penalty points or disqualification in appropriate cases?

No.

[22] The court has repeatedly stated that the only matter to be taken into account, in deciding whether to allow a discount and in assessing the rate of discount, is the utilitarian value of the plea (*Gemmell* v *HM Advocate*, LJC (Gill) at para [33] and [37]; Lord Eassie at paras [137] and [141]; Lord Wheatley at para [166]). This was made clear in *Saini* v *Harrower* (*supra* LJC (Dorrian) at para [4]), which explained the rationale in *Gemmell* for overruling *Horribine* v *Thomson* 2008 JC 306. The essential consideration is how early in the proceedings did the accused indicate an intention to plead guilty (*ibid* para [41]). Public protection is irrelevant (*ibid* paras [49 – 60]), although it may play an important part in the assessment of the headline sentence. *Watt* v *Dunn* 2016 SCCR 131 was correct to say that, in considering whether there has been a miscarriage of justice, the appellate court should generally consider the sentence (and its component parts) in the round. Errors in individual component parts will not necessarily have been productive of a miscarriage. However, in so far as it is seen as endorsing the reduction of a discount for reasons other than utilitarian value, it is in error and falls to be disapproved to that extent.

(4) What is the proper approach to the interpretation of section 175A of the 1995 Act when the Sheriff Appeal Court proposes a reference to the High Court?

It is primarily a matter for the SAC to decide whether a case raises a point which is "complex or novel". It is the SAC's view that is determinative. The High Court cannot normally refuse to entertain a reference.

[23] In this case, the SAC has explained that the particular points are complex, as is demonstrated by the cases referred and the others, which the SAC report as containing discrepancies in the discount rates as applied to different parts of the one sentence. The court has no difficulty in understanding how the test for a reference was met in these circumstances.

[24] The court will remit the appeal to the Sheriff Appeal Court for further consideration in light of the court's answers to the reference. In that regard, the JP has misdirected herself in not discounting the penalty points at the same rate as the fine and in failing to consider rounding up the fraction of a point which the equivalent discount would have afforded.