SHERIFF APPEAL COURT

[2016] SAC (Crim) 2
SAC/2015/000050/AP

Sheriff Principal C A L Scott QC
Sheriff Beckett QC

OPINION OF THE COURT

delivered by SHERIFF J BECKETT QC

in

APPEAL AGAINST SENTENCE

by

STEVEN WATT

Appellant;

against

PROCURATOR FISCAL, DUNFERMLINE

Respondent:

Appellant: Party
Respondent: McFarlane AD; Crown Agent

13 January 2016

[1] The appellant was prosecuted on a summary complaint for speeding on 4 July 2015 on the M90 near Dunfermline, his speed of 96mph exceeding the limit of 70mph. He was offered a fixed penalty notice with a fine of £100 and 3 penalty points. He was unable to pay and proceedings were raised in the Justice of the Peace Court at Dunfermline.

[2] The appellant pled guilty at the first opportunity and he was fined £315 and 4 penalty points were imposed. A discount reduced the fine from £460 but no discount was applied to the penalty points.

[3] In presenting his own appeal, the appellant explained that he would have paid the fixed penalty if he could have done so, but he was unemployed at the time. His argument was that he ought to have been dealt with on the same basis as the fixed penalty and that therefore the penalties imposed by the Justice were excessive.

[4] This is a common situation and it may be helpful if we record that the High Court of Justiciary has generally taken the view that once a case comes to court, the sentencer's discretion is not circumscribed by what might have happened had a fixed penalty offer been accepted: *Lappin* v *O'Donnell* 2001 JC 137, *Blair* v *Craigen* 1999 GWD 17-818, (an exception is found in the particular circumstances of *Stockton* v *Gallacher* 2004 JC 165.)

[5] In *Lappin*, a court of three judges observed, at para 4, that:

> "It is the task of the court to make an impartial, objective assessment of the material circumstances surrounding the commission of the offence. The court should do that on the material presented and not on the basis of the reaction of those who detected or investigated the offence."

Having reviewed a number of earlier decisions, in para 6 the court went on to say, in relation to an unpaid fixed penalty, that:

> "We consider that on this basis the history is not in principle irrelevant, though we find it difficult to envisage its having significance."

[6] In the appellant's case, leave to appeal was granted only in relation to the question of discount on the penalty points. In that regard the Justice explained in her report that she considered that the penalty points should not be discounted because of the risk to public

safety presented by the appellant's driving. Whilst that approach may gain some support from what is stated in Renton & Brown, Criminal Procedure 6th Ed at chapter 22, paras 26.0.3(iv) and 26.0.12, purporting to rely on the opinion of the court in *Gemmell* v *Her Majesty's Advocate* 2012 JC 223, it is not supported by what was done by the court in *Gemmell* and it is only supported, so far as penalty points are concerned, by what Lord Osborne said at para 132 of his opinion. Lady Paton, at para 156, was prepared to contemplate that public protection might relevantly bear on the level of discount of a period of disqualification, but she did not say the same in relation to penalty points and she concurred in the disposals of the appeals involving penalty points. To the extent that Lord Osborne and Lady Paton were prepared to envisage limiting discount on disqualification and penalty points on account of public protection, their views appear to us to be inconsistent with the views of the majority.

[7] The Lord Justice Clerk (Gill) rejected the suggestion that penalty points should not be subject to discount at paras 69 - 72 of his opinion. At para 60, in relation to discounting sentences generally, he said this:

> "[60] It follows from my interpretation of section 196 that that part of the sentence that is referable to the protection of the public should not be excluded from the application of the discount."

Lord Eassie, at paras 141-143, and Lord Wheatley, at paras 166-167, agreed with the Lord Justice Clerk's approach both generally and in relation to the issue of discounting periods of disqualification and penalty points.

[8] When it came to disposal, Lord Osborne favoured the same discount of penalty points in each case as his colleagues and all of the penalty points under consideration were made subject to conventional levels of discount. In giving the opinion of the court in *Harkin* v

Brown 2012 SCCR 617, Lord Carloway (as he then was), at paras 4-6, appears to us to have interpreted *Gemmell* as we have done.

[9] For the sake of clarity, we wish to make it plain that we consider that it follows from the decision of the majority in *Gemmell*, that penalty points are susceptible to discount in the same way as any other penalty and that the consideration of public protection does not justify declining to discount for an early plea of guilty. In *Harkin* it was established that a discount cannot reduce the number of penalty points below the statutory minimum.

[10] We consider that the Justice erred in considering that public protection provided a valid reason for declining to discount the 4 penalty points.

[11] It does not automatically follow that the appeal should succeed. We are enjoined by statute to consider whether there has been a miscarriage of justice by reason of the sentence imposed, section 175(2) and (5) of the Criminal Procedure (Scotland) Act 1995 as amended. In making that assessment, this court will generally consider sentences in the round and errors in components of the sentencing process will not necessarily be seen to give rise to a miscarriage of justice: *Robertson* v *Procurator Fiscal, Stirling* [2015] SAC (Crim 1) at paras 12 and 13, *Murray* v *HM Advocate* 2013 SCCR 88 in the opinion of the then Lord Justice Clerk (Carloway) at para 32, *McGill* v *HM Advocate* 2014 SLT 238 para 13.

[12] In this case, given the speed at which the appellant was travelling, we are not persuaded that the imposition of 4 penalty points can be said to be excessive or inappropriate so as to represent a miscarriage of justice and the appeal is refused.