SHERIFF APPEAL COURT

[2016] SAC (Crim) 31
SAC/2016/000541/AP

Sheriff Principal M M Stephen QC
Sheriff J C Morris QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

APPEAL AGAINST SENTENCE

by

KEVIN JOHN BURKE

Appellant:

against

PROCURATOR FISCAL, TAIN

Respondent:

Appellant: Duff, Advocate
Respondent: Carmichael, advocate depute; Crown Agent

5 October 2016

[1] On 11 July 2016 the appellant pleaded guilty at Tain Sheriff Court to the single charge on the complaint being a contravention of section 1A of the Road Traffic Act 1988 in the following terms:

> "[001] on 26 November 2014 on a road or other public place, namely the A9 at Loth you KEVIN JOHN BURKE did cause serious injury to Kathleen MacDonald care of Police Service of Scotland, by driving a mechanically

> propelled vehicle, namely motor car registration number EF14 UMJ dangerously and did drive said vehicle when unfit to drive through tiredness, and did fall asleep, lose control of the vehicle, cross on to the opposite carriageway collide with motor car registered number X99 ASK then being driven by Alexander Sutherland, care of Police Service of Scotland, causing injuries to said Alexander Sutherland, serious injuries to said Kathleen MacDonald, then a passenger in the motor car X99 ASK and serious injuries to yourself and damage to both vehicles;
> CONTRARY to the Road Traffic Act 1988, section 1A."

The plea was tendered at a continued pleading diet.

[2] The sheriff imposed a community payback order (CPO), instead of a sentence of imprisonment, with a single requirement that the appellant complete 200 hours of unpaid work within 12 months. The number of hours had been reduced from a starting point of 300 hours (the maximum) to take account of the early plea of guilty. Further, the sheriff disqualified the appellant from driving for a period of 28 months and until he passed the extended test of competence to drive. Again the period of disqualification was reduced by one third from three and a half years. The sheriff properly obtained a criminal justice social work report which was available on the same date as the plea of guilty allowing him to sentence that day.

[3] The "stand down" criminal justice report narrates briefly the appellant's recollection of events on the day of the accident and the consequences he has suffered as a result of the serious injuries sustained at the time of the road traffic accident. He expresses his concern and remorse at the consequences for the individuals in the oncoming vehicle. The report concludes that the Lemington Spa Probation Service could accommodate the appellant in an unpaid work placement. He is fit to undertake other than heavy duties as he still suffers from ongoing *sequelae* from his injuries. He is able to pay a financial penalty.

[4] The appellant appeals the sentence imposed. It is submitted on his behalf that the sheriff erred in his assessment of the seriousness of the offence. The offence was not of such

gravity that a custodial sentence should have been in contemplation. A community payback order is an alternative to custody. The period of disqualification was also excessive having regard to an assessment of the aggravating and mitigating factors. Essentially the sheriff had erred in assessing the appellant's driving as "moving towards the upper end of the scale for dangerous driving" (paragraph 11 of the sheriff's report). Having regard to *Alexander* v *Dunn* [2016] HCJAC 3 the appellant accepted that falling asleep whilst driving constituted dangerous driving and accepted his guilt at the first opportunity. He was remorseful and most concerned about the injuries to the occupants of the other vehicle. He was a first offender with a clean driving licence. Had the sheriff carried out a careful assessment of the aggravating and mitigating factors he would have placed the degree of culpability at the lower end of the scale which would be level 3 in terms of the definitive guidelines which apply in England and Wales. The legislation is, of course, UK legislation and it is appropriate for this court to consider the guidelines which apply south of the Border. Being deprived of adequate sleep is assessed at level 3 in terms of seriousness which is the lowest category for cases of causing death by dangerous driving.

[5] We have considered the submissions and the detailed and careful report prepared by the sheriff. First of all, it must be acknowledged that the offence is a serious one namely causing serious injury by dangerous driving. Conviction of this offence carries with it a penalty of up to five years imprisonment and obligatory disqualification until the extended test of competence to drive is passed. It must be observed, however, that the offence is triable either way in the sense that the prosecutor may charge the offence either on summary complaint or on indictment. The penalties on summary complaint are, of course, restricted to the maximum custodial sentence available on complaint namely, 12 months, and a fine of £10,000.

[6] Although the sheriff has set out the facts and circumstances and his reasoning with great care we consider that there is force in the argument that he has erred in his assessment of the degree of culpability and has also failed to take fully into account the absence of aggravating factors relating to the driving and factors which may be considered mitigatory.

[7] By his plea of guilty the appellant accepts the seriousness of the offence and by falling asleep at the wheel any impact or collision which occurs is generally severe as there is little or no opportunity for braking and accordingly the combined speed of the appellant's vehicle and the oncoming vehicle is likely to be significant. Mr Sutherland, who was the driver of the other vehicle, took appropriate evasive action but was unable to avoid a collision. Fortunately, Mr Sutherland who was driving the vehicle did not sustain serious injury but did sustain injury in the form of bruising and stiffness. His wife who was the passenger suffered a fracture of the collar bone and other bruising. The appellant himself suffered the most drastic injuries and had to be airlifted to hospital. The sheriff narrates these injuries and subsequent medical treatment at paragraph [9] of his report. Neurological testing excluded any underlying cause for him falling asleep at the wheel such as epilepsy. As we heard today the appellant continues to suffer from significant ongoing symptoms on account of his injuries. The court is obliged to take into account the nature of the injuries and the fact that the offender himself suffered most severely from the effects of the collision. The seriousness of his injuries is a factor which can be regarded as mitigatory.

[8] The offence of causing serious injury by dangerous driving in contravention of the Road Traffic Act 1988, section 1A is a relatively recent offence. The provision has effect in relation to driving offences occurring after 3 December 2012. No Scottish cases were cited and we are not aware of Scottish decisions which consider this offence. *R* v *Smart* [2015] EWCA Crim 1756, an English Court of Appeal decision was referred to by the appellant

(Tab 5 of the appellant's bundle). In that case the dangerous driving involved prolonged and, therefore, dangerous overtaking whereby an oncoming motor cyclist sustained very serious injuries including a below knee amputation. The appeal court considered the definitive guidelines issued by the Sentencing Guidelines Council in England and Wales. The English decisions make reference to the sentencing guidelines for cases of causing death by dangerous driving as there is no sentencing guideline in place for this recent offence. The appeal court in *Smart* had regard to the sentencing guidelines although it appears that the sentencing judge had not. Likewise, in this case it appears that the sheriff was not referred to the sentencing guidelines which apply in England and Wales. Nevertheless, they form a relevant consideration in this jurisdiction if approached with care. We agree with the submission made on behalf of the appellant that had the sheriff been referred to the guidelines, as we have, that the circumstances of the current offence would fall within level 3 which relates to driver fatigue or "*driving when knowingly deprived of adequate sleep or rest*". Level 3 is the least serious category in the definitive guidelines for causing death by dangerous driving.

[9] However, each case turns on its own facts and circumstances. In assessing the level of the appellant's culpability it is necessary to consider whether there are any aggravating and mitigating factors with regard to both the offence and the offender. There are no further aggravating features of the driving such as prior excessive speed; overtaking when it is dangerous; drink or drugs which appear in other reported cases. Indeed, the appellant has an unblemished driving record and no previous convictions at all. He has expressed remorse and concern for the consequences of him falling asleep at the wheel. We take the view that the sheriff may also have fallen into error in considering the type of road to be an aggravating factor. The character of the road being one with a single undivided carriageway

in each direction is a matter of fact. In the absence of other aggravating features relating to the appellant's driving, in this case the type of road has relevance in the context of the consequences of the collision namely the injuries sustained by the parties involved. It is a matter of speculation that injuries would be either lessened or more serious if the accident had occurred on a motorway where there is a central reservation but where the volume of traffic and speed would be expected to be higher. The court must sentence having regard to the facts and the actual consequences of the dangerous driving which involves an assessment of the injuries suffered. Accordingly, we consider that the sheriff erred in assessing the appellant's driving as "*moving towards the upper end of dangerous driving*".

[10] We therefore consider there is force in the argument that the sentence imposed is excessive in the sense that the circumstances do not point to a custodial sentence being the appropriate sentence. If a custodial sentence is not called for then a community payback order should not be imposed given that it is an alternative to custody. In these circumstances we propose to quash the community payback order and substitute a financial penalty of £1,500. In keeping with the sheriff's decision to apply a discount of one third we will reduce that to £1,000. Similarly, a period of disqualification is obligatory and carries with it the requirement that the extended test of competence to drive be passed. We take the view that a period of disqualification of two years is appropriate standing the appellant's past exemplary driving record. We will therefore quash the disqualification and re-impose a period of 2 years with the requirement, of course, that the extended test of competence to drive be passed before the appellant can re-apply for a driving licence. That requirement satisfies any public safety and protection concerns.