



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 19
SAC/2017/000425/AP**

Sheriff Principal C D Turnbull
Sheriff N A Ross

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in

APPEAL AGAINST SENTENCE

by

NEIL COOPER

Appellant:

against

PROCURATOR FISCAL, ABERDEEN

Respondent:

**Appellant: Mackintosh; Faculty Appeals Service for George Mathers & Co, Aberdeen
Respondent: Bowie, solicitor advocate; Crown Agent**

12 December 2017

[1] The appellant was convicted, after trial, of a contravention of section 3 of the Sexual Offences (Scotland) Act 2009.

[2] The appellant was in employment. He had no previous convictions. The registration requirements of the Sexual Offences Act 2003 were drawn to the sheriff's attention. The sheriff was invited to obtain a Criminal Justice Social Work Report with a view to imposing a community payback order comprising a supervision requirement. In determining the

appropriate sentence to impose, the sheriff formed the view that the offence before him fell at the lower end of the scale for offences of this type. He did not consider that it was of sufficient severity to justify the imposition of a community payback order. The sheriff determined that the appropriate disposal was to impose a fine of £300.

[3] A conviction under section 3 of the Sexual Offences (Scotland) Act 2009 has the consequence of triggering the notification requirements of the Sexual Offences Act 2003. As noted by the Lord Justice General (Gill) in *Hay v HMA* 2014 JC 19 at 28, registration as a sex offender is not a sentence. The effect of the notification requirements is a matter to which a court can have regard to when selecting an appropriate sentence (see *HM Advocate v KH* 2014 JC 195 at paragraph [12]; and *Main v Scottish Ministers* 2015 SC 639 at paragraph [33]).

[4] In the present case, the sheriff proceeded on the basis that as Parliament had determined what the consequential notification period would be he could have no regard to the length of that period when imposing what he determined was the appropriate sentence in the circumstances of the case.

[5] In our view, such an approach is misconceived. The notification requirements which follow upon a particular disposal are, of course, determined by statute; however, the sentence selected by the sheriff determines what the notification period is.

[6] The appellant also relies on the terms of s.227A(4) of the 1995 Act and contends that a community payback order is not a higher disposal than a simple fine. The appellant also argues that the automatic imposition of five years notification on an offender who is fined for an offence at what the sheriff describes as “the lower end” of s.3 of the Sexual Offences (Scotland) Act 2009 represents a disproportionate interference with his Article 8 rights.

[7] Whether or not a fine is a lesser or greater disposal than a community payback order imposed under s.227A(4) of the 1995 Act is, in our view, a somewhat subjective and

academic comparison that, in each case, would inevitably depend upon (a) the amount of the fine in question; and (b) the requirements of the community payback order it is being compared with. Having regard to the decision we have reached, such a comparison is not necessary in this case.

[8] In relation to the argument predicated upon a perceived contravention of the appellant's Convention rights, the "automatic imposition" of a five year notification period is not part of the sentence. In any event, the High Court of Justiciary has already determined that the 2003 Act does not offend against the Convention (see *Hay* at page 31).

[9] We consider that the sheriff erred in that he did not take into account the effect of the notification requirements. In cases where the legislature has imposed automatic registration requirements which vary according to the sentence passed, the period and consequences of the requirements are relevant considerations in the sentencing exercise and should be taken into account.

[10] Parties did not challenge the sheriff's description of this offence as falling at the lower end of the scale and as not being sufficiently serious to justify a community payback order. In such circumstances, we consider that the requirement to register as a sex offender for a five year period, which automatically follows from the imposition of a fine, is unnecessary for the purposes of public protection and has an disproportionately penal effect on the appellant.

[11] In the foregoing circumstances, we will allow the appeal; quash the sentence imposed by the sheriff; and, having regard to the terms of the criminal justice social work report, impose a community payback order with an offender supervision requirement for a period of six months.