



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 23
HCA/2017/000712/XC

Lady Paton
Lord Glennie

OPINION OF THE COURT

delivered by LORD GLENNIE

in

APPEAL AGAINST SENTENCE

by

LEO STEWART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell, Solicitors
Respondent: H M Carmichael AD, ad hoc; Crown Agent

6 March 2018

[1] The accused was convicted of two charges (charges 2 and 3) of sexual exposure contrary to sections 8 and 35 Sexual Offences (Scotland) Act 2009, as well as another charge with which we are not concerned. The sheriff properly dealt with these offences in the first instance by a non-custodial order and imposed community payback orders in respect of each of the charges. The accused had not previously been in custody. Following breach of the community payback orders new orders were imposed, but the accused breached these as

well. In those circumstances the sheriff understandably took the view that a custodial sentence was necessary and no complaint is made of this.

[2] When the matter came back to him to deal with, he imposed sentences of 18 months imprisonment for each of these two offences, those periods to include 6 months in each case for bail aggravations. Those sentences were to run consecutively. The effect of that was that in respect of these two offences the accused was sentenced to a total of 36 months in prison.

[3] In circumstances such as the present, the court is required to sentence the accused afresh in respect of the original offences. In doing so in this case relevant factors were the accused's age (he was 19 at the time of the first offence and 20 at the time of the second offence), his record (which was not extensive and was non-analogous), the fact that the accused had not previously been in custody, and of course, the nature of the offences. As to the latter point it should be noted that these offences, two incidents of sexual exposure, did not involve any physical contact between the accused and the complainers. Further, there is nothing in the way the charges are set out in the indictment or in the manner in which they are described by the sheriff in his report to suggest that these were other than isolated incidents or random acts of sexual exhibitionism - it is not suggested, for example, that they were targeted at any particular individual with a view to threatening them or as part of a campaign of harassment. The sheriff does not explain in his report whether and how he took any of these matters into account. Although these offences may have caused alarm to the respective complainers, there is nothing in the sheriff's report to suggest they were unduly alarmed and in each case they apparently both just walked on.

[4] We consider that a sentence of 18 months for each offence was excessive, even taking account of the inclusion within each sentence of 6 months for the bail aggravation. We propose to quash the sentences in respect of charges 2 and 3 and substitute in each case a

sentence of 12 months for each charge, which includes 3 months for the bail aggravation in each case. As we have said, the sheriff made the sentences run consecutively, making a total of 36 months for the two offences. We think that the overall effect of this is excessive.

Accordingly, in addition to reducing the sentence to 12 months on each charge, we will order that the sentences run concurrently.