



SHERIFF APPEAL COURT

**[2018] SAC (Crim) 7
SAC/2018/000008/AP**

Sheriff Principal Mhairi M Stephen QC
Sheriff Peter J Braid

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in the appeal against sentence by

WILLIAM KENNETH FRASER RUSSELL

Against

PROCURATOR FISCAL, FALKIRK

Appellant

Respondent

Appellant: C Mitchell, Advocate

Respondent: N Bowie, Advocate Depute ; Crown Agent

28 February 2018

[1] This appeal raises a point which appears from today's appeal roll to be commonly misunderstood by sheriffs and perhaps also by agents.

[2] The appellant pled guilty to a charge of assaulting his wife, subject to a bail aggravation and also to a domestic abuse aggravation. He was in the first instance, on 20 July 2017, made subject to a Community Payback Order, in terms of section 227A(1) of the Criminal Procedure (Scotland) Act 1995, that is, as an alternative to imprisonment.

[3] The CPO having been breached, and the breach admitted, on 15 December 2017, the sheriff revoked the order and of new sentenced the appellant, as he was entitled to do. The sentence imposed was one of 5 months 15 days imprisonment, which having regard to the appellant's significant record and to the nature of the offence including the aggravations might otherwise have been thought to be unremarkable. However, the minute records that one month of the sentence was attributed to the breach of the community payback order; and the sheriff states in his report that the sentence which he intended to impose for the index offence was one of 6 months discounted to four and a half for the guilty plea, but that he then sentenced the appellant to what he intended to be a consecutive sentence of one month's imprisonment for the breach of the CPO.

[4] The sheriff's approach is fundamentally flawed.

[5] Section 227A(1) of the 1995 Act allows the court to impose a community payback order instead of imposing a sentence of imprisonment; section 227A(4) allows it to impose one instead of, or as well as, a fine. When a court comes to consider a breach of a community payback order, it is essential to keep in mind under which one of those provisions the order was imposed, since the powers of the court differ according to whether it was made under subsection (1) or (4). Those powers are set out in section 227ZC, from subsection (7) onwards. Subsection (7)(a), read with (d) and (e), allows the court to impose a fine and/or to vary the order, and those powers apply to all community payback orders. However, if the court decides not to exercise those powers, and to proceed instead to revoke the order, then it must proceed under either subsection 7(b), for orders made under section 227A(1) (alternative to imprisonment), or under

subsection 7(c), for orders made under section 227A(4) (alternative to, or as well as, a fine). Crucially, and this was the error made by the sheriff in the present case, it cannot proceed under both provisions. Where the CPO was made under 227A(1), the court by definition is entitled to impose a sentence of imprisonment, since the order was imposed as an alternative to imprisonment. The provision makes it clear that any such sentence is being imposed *for the offence*, as is evident from the words used: “deal with the offender...as it could have dealt with the offender had the order not been imposed.” In such a case, there is no power to separately punish the offender for the breach, as such (although it may be that the fact of the breach could reduce any discount which might otherwise be allowed). His punishment lies in the fact that the community payback order is revoked and that he is being sentenced of new for the offence. However, in the latter case where the CPO was made under section 227A(4), the court cannot properly sentence the offender to imprisonment for the offence, since, again by definition, it merited only a fine. In such a case, the offender is truly being punished *for the breach*. That is no doubt why the period is limited to 3 months (or in the justice of the peace court, 30 days).

[6] It is important that sheriffs bear this distinction, and these provisions, in mind, not only when considering breach of an order, but indeed when explaining the order, and the consequences of breaching it, to the offender, in accordance with section 227(8)(b).

[7] For all of these reasons, as the sheriff has conceded, it was incompetent for him to sentence the appellant for breaching his CPO in addition to the sentence of

imprisonment imposed for the offence itself. We will therefore quash the sentence imposed and replace it with one of 4 months 15 days to give effect to the sheriff's intention.