



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 24
HCA/2024/000137/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

Appeal against Sentence

by

DAVID MOFFAT

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Lindsay; John Pryde & Co SSC
Respondent: McLean, AD ad hoc; Crown Agent

29 May 2024

Introduction

[1] Section 80 of the Sexual Offences Act 2003 provides that a person is subject to the notification requirements of Part 2 of the Act for the period set out in section 82 if he is *inter alia* convicted of an offence listed in Schedule 3. The schedule contains an extensive list of

offences. Section 82 sets out the notification periods applying to different categories of offender.

The appeal

[2] The sole issue in this appeal concerns the length of the notification period to which the appellant is subject under and in terms of the 2003 Act. The appellant pled guilty to a total of five offences: charge 3 involved causing a former partner fear and alarm by repeatedly sending her abusive and threatening messages; charge 4 was one of causing fear and alarm to his former partner's new partner by sending him abusive and derogatory messages on social media and threatening to kill his former partner; charges 6 and 8 were contraventions of section 6 of the Sexual Offences (Scotland) Act 2009 by intentionally causing others to look at sexual images; and charge 10 was one of behaving in a threatening and abusive manner in a police station.

[3] An offence under section 6 of the 2009 Act is listed in schedule 3 to the 2003 Act as being a sexual offence for the purposes of Part 2 of the Act; accordingly the convictions arising from charges 6 and 8 attract the notification requirements. None of the other offences to which the appellant pled guilty is listed in the schedule; so they do not attract the notification requirements.

[4] The effect of section 80 is automatic and not dependent on any statement made by the sentencing court (*Kidd v Procurator Fiscal, Edinburgh* [2012] HCJAC 163, paragraph [1]; *Speirs v HM Advocate* [2013] HCJAC 151, paragraph [1]).

The Sheriff's approach

[5] In sentencing the appellant, the Sheriff imposed a *cumulo* sentence of 32 months' imprisonment on all five charges; this was reduced from 42 months to reflect the guilty pleas, which were tendered and accepted at a first diet. The Sheriff did not state what sentences she would have imposed on any of the charges had she not elected to impose a *cumulo* sentence. In particular, she did not explain what sentences she would have imposed on the two sexual offences, namely those arising from charges 6 and 8.

[6] The result of the Sheriff's approach is that the appellant, having been sentenced cumulatively to a single term of 32 months' imprisonment for offences which included sexual ones, became subject to the notification requirements for an indefinite period because the term of imprisonment was in excess of 30 months; this is the effect of section 82 of the 2003 Act.

[7] The practice of the National Sex Offender Policing Unit of Police Scotland, which is responsible for monitoring offenders' compliance with notification requirements, is to treat a cumulative sentence of this type (i.e. a sentence imposed for a combination of sexual and non-sexual offences) as a single sentence imposed for a sexual offence. Such an approach accords with the legislation. In the present case this means that the appellant would be regarded as having received a sentence for a sexual offence exceeding 30 months' imprisonment.

[8] The basis of the appeal is that the sentences for the sexual offences should have been and were in fact intended by the Sheriff to have been less than 30 months' imprisonment with the result that the applicable notification period should be one of 10 years because of the terms of section 82 of the 2003 Act.

The Sheriff's initial report

[9] In her initial report to this court the Sheriff set out at length the circumstances of the case, but she dealt only briefly with the sole point at issue in the appeal. She accepted on reflection that she had erred in imposing a single *cumulo* sentence and that she ought to have imposed individual sentences in respect of the sexual offences. She added, somewhat opaquely, that it might be disproportionate for the appellant to be subject to the notification requirements in respect only of the two sexual offences. The Sheriff did not explain what sentences she would have imposed for the sexual offences. We therefore asked her to provide a supplementary report focussing on that aspect of matters.

The Sheriff's supplementary report

[10] In her supplementary report the Sheriff says that, if she had appreciated the implications for the notification period, she would have imposed, after discount, a sentence of 21½ months *in cumulo* for the non-sexual offences and separately sentences, again after discounts, of 4½ months and 6 months consecutively for the two sexual offences: thus making a total of 10½ months for the sexual offences. It can be seen that these various sentences add up to the original total imposed by the Sheriff of 32 months in custody. Although the Sheriff does not say so explicitly, it is clear that her intention would have been to make the sentences on the sexual offences run consecutively to the *cumulo* sentence on the three non-sexual offences.

Sections 80 and 82 of the 2003 Act

[11] Had the Sheriff imposed the sentences referred to in her supplementary report, the effect of section 80 of the 2003 Act would still have been that the appellant became subject to

the notification requirements. Section 82 would have operated differently, however. The effect of subsections (3) and (4) would have been that the notification period would have fallen to be calculated as if the appellant had been sentenced to a term of imprisonment equal to the aggregate of the sentences imposed on charges 6 and 8, that is to say 10½ months. Since that is a sentence of more than 6 months but less than 30 months the notification period would have been one of 10 years.

Decision

[12] Matters having now been clarified, all that remains for this court to do is to ensure that the notification period to which the appellant will be subject conforms properly to the statutory scheme in the light of what the Sheriff has explained about what she intended to do. To achieve that we shall allow the appeal by quashing the single *cumulo* sentence imposed by the Sheriff and in its place substituting the following sentences:

Charges 3, 4 and 10 (the non-sexual offences): 21½ months imprisonment *in cumulo*.

Charges 6 and 8 (the sexual offences): 4½ months on charge 6 and consecutive to that 6 months on charge 8. These sentences will run consecutively to the sentence imposed on charges 3, 4 and 10.

[13] This, we emphasise, does not result in any change to the overall length of the custodial term selected by the Sheriff, but it has the effect that the appellant will become subject to the notification requirements for a period of 10 years rather than for an indefinite period.

Postscript

[14] We would add that in the recent case of *His Majesty's Advocate v Fergusson* [2024] HCJAC 22 the court stressed that where a cumulative sentence is selected, its component parts need to be explained by reference to what would have been imposed, on the charge or group of charges if they had stood alone (para [30]). In cases where a sentence or sentences fall to be imposed for a combination of sexual and non-sexual offences sentencers should consider whether the effect of imposing a *cumulo* sentence would be unjustifiably to increase the notification period. If that would be the effect then a different approach to sentencing will be necessary.