SHERIFF APPEAL COURT

[2018] SAC (Crim) 17
SAC/2018/254/AP

Sheriff Principal D L Murray
Appeal Sheriff M O'Grady

STATEMENT OF REASONS

Delivered by SHERIFF PRINCIPAL D L MURRAY

in

APPEAL AGAINST SENTENCE

by

THOMAS FLANNIGAN

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: C Findlater, Advocate
Respondent: M Hughes, Advocate Depute, Crown Agent

4 July 2018

[1] The appellant Thomas Flanagan (22) appeals against a sentence imposed on him by the sheriff at Glasgow on 10 May 2018 of 170 days' imprisonment.

[2] The appellant was convicted on a plea of guilty at a trial diet on 6 February 2018 of contraventions of Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The charges to which the accused pled guilty were:

> "(001) on two occasions between 31 October 2017 and 2 November 2017 both dates inclusive: at Glasgow West End Police Office, Dumbarton Road, Glasgow, you, THOMAS FLANNIGAN did behave in a threatening or abusive manner which was likely to cause a liege or person to suffer to suffer fear or alarm in that you did repeatedly attend at the charge bar there, refuse to leave, shout and swear at police officers, challenge them to fight, offer threats of violence towards them and struggle violently with them; CONTRARY to Section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010."

[3] The sheriff had imposed a restriction of liberty order (ROLO) on 9 February 2018 charging him to remain within his dwelling house between the hours of 7am and 7pm each day for a period of 170 days along with the other conditions of such an order. The appellant assented to the said order. G4S presented two breach reports to the court dated 3 April 2018 and 29 April 2018. Both were at level two and both concerned repeated time violations. On 10 May 2018 the appellant admitted the full terms of both breaches. The sheriff revoked the ROLO under the terms of Section 245F(2) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"). He thereafter sought to apply the requirements of Section 245G of the 1995 Act which provides:

> "245G **Disposal and Revocation of Restriction of Liberty Order**
> (1) Where the court revokes a restriction of liberty order under section 245E(2)(b) or 245F(2) of this Act, it may dispose of the offender in any way which would have been competent at the time when the order was made, but in so doing the court shall have regard to the time for which the order has been in operation."

[4] The sheriff in his report narrates he had regard to the following material:

(i) the charge in the complaint and the terms in which he [the appellant] pled to it;

(ii) the Crown narration presented at the diet on 6 February 2018;

(iii) the plea in mitigation presented then;

(iv) the stage of the plea of guilty;

(v) a psychiatric report dated 8 February 2018;

(vi) a criminal justice social work report dated 28 December 2017;

(vii) the appellant's schedule of previous convictions;

(viii) the G4S electronic monitoring services breach report dated 3 April 2018

(ix) the G4S electronic monitoring services breach report dated 29 April 2018

(x) the G4S electronic monitoring services breach report dated 8 May 2018

(xi) the application dated 13 March 2018 presented on behalf of the appellant; and

(xii) the submission made on behalf of the appellant on 10 May 2018.

The sheriff noted that he took no account of the application dated 13 March 2018 which was made on behalf of the appellant under section 245G of the 1995 for the order to be revoked on the grounds of the motion that he no longer wished to comply with it as it had been overtaken by the breach proceedings, or of the breach report dated 8 May 2018.

[5] The sheriff narrates that he determined to assign a custodial sentence because he considered it to be appropriate having regard to what the appellant had done and the context in which he had done it. It was proportionate to the nature of the offence and took proper account of the appellant's attitude to a non-custodial disposal.

[6] He records that in committing the original offence the appellant had gone far beyond the making a nuisance of himself to the police on both occasions, but particularly for the second it was relevant to take account of the fact that he had a history of similar offending. He had amassed 12 convictions under Section 38(1) of the 2010 Act between 10 March 2013 and 26 June 2017, with the last two being only a month apart, and he committed the present offence while on deferred sentence on another contravention of Section 38(1) of the 2010 Act, committed whilst on bail. He had also served a number of placements on a Community Payback Order of 18 months' duration for a Communications Act offence which he breached twice. For the first, the court made no order on 16 February 2017, for the second the court revoked the order on 29 March 2017 and sentenced him to a period of imprisonment.

[7] The sheriff concluded this did not provide a sound basis on which to consider him for a Community Payback Order that would have a real chance for him to address his repeat offending behaviour with any success. He records that he was not persuaded from that view by the fact that he had been placed on such an order on 18 April 2018 as it was in its initial stages and he had no information about his progress. The sheriff was concerned about the appellant's attitude towards the ROLO. He notes:

> "He started testing its boundaries only four days after he had agreed to abide by it and persisted in this course of almost daily and sometimes more than once daily, violations as set out in the two breach reports. What these reports indicate is that he sought to test the boundaries of the order almost from the outset and then moved on to a more serious and concerning repeated disregard of the order. The ready inference that I drew was that he gave no indication that he would respect the demands of the ROLO. Then, only slightly more than a month after it started, he instructed his solicitor to lodge an application to revoke it because he no longer wished to comply with it, and he withdrew his consent to abide by it. This attitude, from which he did not depart, strengthened my view that he would not comply with a non-custodial disposal in any real, meaningful or worthwhile sense …"

> "In deciding on the length of the custodial sentence I had regard to the time which the order had been in operation. I interpret the phrase "in operation" in Section 245G(1) of the 1995 Act as meaning the time within which the ROLO was operating as it was intended to operate, rather than the time it was in existence. Had Parliament intended the latter, I would have expected the wording to read "the time for which the order had been in existence". In other words I read the language as importing a qualitative aspect to the appellant's response to the ROLO rather than a merely temporal one. On that approach in this case, the ROLO had a life of only some four days before the appellant started testing its boundaries and from then on there was a consistent pattern of violations. As a result I concluded there was little allowance to be made for the time that it was in operation. In effect, he had withdrawn his compliance to the ROLO as soon as 21 March."

Submission

[8] The only ground of appeal live before the court concerns the sheriff's application of Section 245G of the 1995 Act to the custodial sentence imposed. It was accepted that the sheriff was correct to proceed as he did at paragraph 25. It would be perverse if an offender could receive credit for time spent throughout the subject of an ROLO where no compliance

at all had been demonstrated. It had, however, to be recognised that Section 245G only comes into operation when an order has been breached, therefore in every case an offender will have demonstrated a failure to comply with the order.

[9] It was submitted that the sheriff was correct in assessing that a qualitative assessment will be required in every case. The focus of the appeal was that the sheriff had fallen into error as to the qualitative aspect of the appellant's response to the ROLO.

[10] The appellant was subject to the ROLO from 9 February 2018 until 10 May 2018, a total of about 90 days – approximately half the duration of the order. It was submitted that the sheriff ought to have undertaken a more detailed qualitative examination of the appellant's compliance with the order. A table had been prepared showing precisely the number of seconds each day the appellant failed to comply with his ROLO up to 28 April 2018 and it was made clear the appellant did not seek to gain any credit for the operation of the order after 28 April 2018. Material was produced demonstrating that the appellant had completed the 12-hour restriction period without incurring any time violations on 36 days before 28 April 2018. Therefore, for these 36 days the appellant had demonstrated compliance with the order. It was noted the number of time violations, particularly in February, were minor and consistent with the sheriff's assessment that the appellant was testing the boundaries of the order. However, where he had not incurred any time violations within a particular 12-hour period, then, standing the language used in Section 245G the sheriff should afford the appellant credit for that day. Section 245G is silent as to the amount of credit to be given in these circumstances and it was submitted that the sheriff had failed to give adequate credit for the days when the appellant had complied with the order. The sheriff had interpreted section 245G in a qualitative sense rather than a quantitative sense ie. because of the repeated time violations, the appellant should receive

no credit for the days when he had complied with the order. It was submitted the sheriff had erred in his interpretation of Section 245G. It was not suggested that the time violations noted by G4S should be completely disregarded, but that the correct approach should be to look at the whole time the order had been in operation and therefore allow an appropriate discount from any headline sentence.

[11] The appeal is only in respect of the application of Section 245G. The first point to be made is that, as was accepted by Counsel, this does not involve an arithmetical calculation of the days of compliance with the order. Thus while the table of compliance produced by the appellant was useful, a formulaic application of such a table to calculate the allowance to be given for the days of compliance with the order was not what section 245G required. What is required is a qualitative assessment. We identify four factors as relevant to such an assessment: (i) the overall attitude and engagement with the order, which should take some account of the proportion of compliance; (ii) the impact of any completed or partially completed requirements on an offender's behaviour; (iii) the proximity of the breach in the conditions of the order to its commencement and (iv) any evidence of circumstances which have impeded the offender's compliance with the order.

[12] We agree with the sheriff's assessment that the ROLO had been in force for only some four days before the appellant started testing its boundaries and thereafter there was a consistent pattern of violations. Although we specifically reject an approach which seeks to apply a directly proportionate discount, we consider that in this case the sheriff in making his qualitative assessment failed to give sufficient account for the number of days of compliance, and in all the circumstances, we consider that the headline sentence imposed by the sheriff of 180 days which he discounted to 170 days, should be reduced to 135 days after applying a similar discount to that allowed by the sheriff.