APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 26
HCA/2020/000199/XC

Lord Justice Clerk
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

IAIN LINDSAY

Respondent

Appellant: A Prentice QC Sol Adv, AD; Crown Agent
Respondent: Dean of Faculty; John Pryde & Co for Blackwater Law, Glasgow

12 June 2020

[1] This is a Crown appeal against the sentence imposed upon the respondent following his plea of guilty under section 76 of the Criminal Procedure (Scotland) Act 1995 on a charge that he

> "did culpably and recklessly cough in the faces of James Iredale and Scott MacDonald, both Police Constables, of the Police Service of Scotland, then in the execution of their duties to the danger of their life."

[2] The facts were that whilst at the charge bar being "booked in" the respondent turned towards the officer on his right and coughed once in his face, before turning to the second officer and doing the same. The respondent was not displaying any symptoms of Covid 19, but both officers (and those with whom they live) were caused significant alarm and distress. There was little if any mitigation. It was accepted (it could not be otherwise) that the respondent had a bad record. It was submitted that he had a drink problem that was at the root of much of his offending.

[3] The sheriff imposed a sentence of 6 months imprisonment reduced to 4 months to reflect the plea of guilty. She did so on the basis that:

- The offence was not planned, was completed in a matter of seconds, and was not accompanied by any threats, violence or aggression.
- The objective risk to the officers, given the very low rate of Covid 19 in the Highlands as at 15 April 2020 was very small. In addition. the respondent was not displaying any symptoms of Covid 19 at the time. However, the subjective impact on the officers and others had to be considered.
- The emergency services deserve and require the protection of the courts as they perform their duties. The purpose of the sentence was to deter other offenders from similar behaviour, to punish the respondent and to express disapproval of the offending behaviour.

In her report the sheriff states:

> "I acknowledge that the sentence imposed was less than might often be seen on indictment, but I consider it was within the range of appropriate disposals, having regard to all the circumstances in this case."

Submissions for the appellant

The sentence generally

[4] In support of the appeal it was submitted that the sentence was unduly lenient and that the sheriff erred in failing to give sufficient weight to the nature of the conduct, the previous convictions and the objective of deterrence.

[5] The respondent's record displays a variety of criminal conduct including convictions for public disorder, dishonesty and assault and numerous convictions for contraventions of section 41(1)(a) of the Police (Scotland) Act 1967or section 90(1)(a) of the Police and Fire Reform (Scotland) Act 2012.

[6] He also has a conviction under section 1(1) of the Emergency Workers (Scotland) Act 2005. There has been no discernible reduction in the frequency of his behaviour. His most recent conviction for such offences was on 2 September 2019 where he received an 8 month custodial sentence. Prior to that was 2 July 2019 when he received a four month sentence.

[7] The Sheriff took into account that the offence was not planned, but failed to recognise that the actions were nonetheless deliberate and designed to cause significant fear and alarm. Although the respondent was not displaying any symptoms the terms of Government medical advice issued is well known: a person can have Covid-19 and transmit it without displaying any symptoms. The respondent's conduct displayed an utter disregard for others. His actions were not conducive to maintaining a relatively low level of infection in the locality. In carrying out their duties police officers will often be unable to avoid close proximity to others. As at 29 April 2020 of 827 Police Scotland employees tested 163 were positive for Covid-19.

[8] According to the sheriff, the purposes of the sentence selected were punishment, disapproval and deterrence. It was submitted that the length of the sentence selected fell well short of achieving these.

The discount

[9] The sheriff applied a discount of one third "in light of the considerable utilitarian value of the plea of guilty; particularly due to the current inability to conduct trials and backlog, caused by the Covid19 pandemic".

[10] The Appellant acknowledged that a one third discount was appropriate given the early plea by section 76 letter. However, it was submitted that insofar as the sheriff was suggesting that an enhanced discount was appropriate because of the Covid 19 pandemic, she fell into error, for the following reasons:

(i) The existing discounting regime is designed already to provide a substantial incentive to accused persons, if they are going to plead guilty, to do so at the earliest opportunity.

(ii) The benefits of an early plea were described in *Gemmell* v *HMA* 2012 JC 223:

> "In some cases, there is a saving of inconvenience to complainers and witnesses. In a small minority of cases there is a saving in jury costs. There is also a benefit to the criminal justice system in the avoidance of undue delay between arrest and sentencing. But the primary benefit that is realised in every case is the saving of administrative costs and a reduction of the court's workload."

(iii) The existence of a backlog, and the potential effect of a plea on backlog, has not been identified as a relevant factor. There is good reason for that.

(a) The fundamental reasons for a discount are focused on the utilitarian benefits in the individual case and only indirectly on any broader "system" benefit. They are not affected by the existence of a backlog, even a serious one.

(b) There is a real risk to confidence in the fair and sound administration of justice if the court is perceived to be using additional "inducements" to plead

guilty as a mechanism for tackling a backlog. It is important not to undermine public confidence that serious crime will be met with a just punishment.

(c) Backlog waxes and wanes. Sentencing judges may have different perceptions of the seriousness of the backlog at any given time. To treat backlog as a relevant factor in the discount would undermine the relative clarity of the approach which the Court currently takes to this issue (an approach which is based principally on the timing of the plea in the criminal justice process), and would also undermine comparative justice between similar offenders who are sentenced at different times, or by different judges at around the same time.

(vi) The present and well understood approach to discounts give ample encouragement to the guilty to tender a guilty plea at the earliest possible stage. It is not appropriate to offer greater "inducement" than already exists to plead guilty.

Submissions for the respondent

The sentence generally

[11] It is well established that for the court to consider a sentence as unduly lenient it would require to fall:

> "outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge ... There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate." (*HM Advocate* v *Bell* 1995 SCCR 244).

[12] The Sheriff has properly considered all relevant matters in this case including the aggravating issues of the respondent's records of convictions; as well as the significantly

mitigating factors including the brevity of the incident, and the low risk in practice at the time (as opposed to the theoretical risk). The sentence might be lenient, but not unduly so. It was well within the range of appropriate disposals.

The discount

[13] The issue of the discount is not a live issue in the case, given (a) that it was not raised as an issue in the Note of Appeal, and the sheriff, understanding that no issue was taken with the discount, offered no further comment on her reasoning; and (b) the discount generally considered appropriate for a section 76 plea is one third. The discount was therefore appropriate for the timing of the plea. There was no increased discount given in this case and the premise of the appellant's argument is thus unsound.

[14] In any event, the issue of discounting in the current, unprecedented, situation has been considered in England & Wales in Attorney General's Reference of *R* v *Manning* [2020] EWCA Crim 592 where the Lord Chief Justice noted:

> "In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19."

The conditions in which the respondent is held reflect these observations. He is confined to his cell for at least 23 hours a day. Meals are taken within the cell. There is no access to recreation, work, programmes or support to help occupy his time. There is no family contact through visits. Telephone calls are limited to 10 minutes per prisoner per day. The respondent has been unable to get hold of his family. He and his fellow prisoners are anxious about contracting the virus while in custody. The respondent leaves his cell for

approximately 30 minutes per day when he and two others are taken from their cells in "pods" for exercise.

[15] In all these circumstances the test for undue leniency has not been met and the appeal should be refused.

Analysis and decision

The sentence generally

[16] In our opinion the sentence as a generality meets the test of undue leniency. The respondent has an appalling record and, apart from referring to it as a "bad record", the sheriff gives no indication that she really took this into account and reflected it in the sentence which she imposed. The respondent's record runs to 11 pages. He has appeared on complaint well over a 100 times, on over 170 charges, as well as appearing on indictment for assault. Of particular relevance are 30 separate occasions of contravening section 41(1)(A) of the Police (Scotland) Act 1967or section 90(1)(a) of the Police and Fire Reform (Scotland) Act 2012. The greater majority of these offences were serious enough to warrant a sentence of imprisonment of 3 months or more, and in several cases 6 months or more. He was convicted three times on such charges in 2019 alone, receiving sentences of, 2, 4 and 8 months imprisonment.

[17] The sheriff appears to have considered that it was a mitigating factor that the offence was not planned, was completed in a matter of seconds, and was not accompanied by any threats, violence or aggression. However, as the Advocate Depute submitted, this is to ignore the fact that the offence was clearly deliberate, repeated towards the second officer and designed to cause significant fear and alarm, which the respondent must have known would be the result of his actions. We cannot see that the fact that the respondent was not

displaying Covid 19 symptoms is a factor in his favour: there appears to be a real risk that the condition may be transmitted by those who are asymptomatic carriers of it, even if the risk may be a small one. As the sheriff correctly states, the emergency services deserve and require the protection of the courts as they perform their duties. Assaults upon them, or other behaviour culpably and recklessly endangering their health or lives in the execution of their duties, require to be treated with appropriate severity. The sheriff did not take sufficient account of the fact that the charge to which the respondent pled guilty was of culpably and recklessly endangering the lives of the officers, even if that endangerment was, as is often the case, potential rather than actual. The alarm and distress suffered by the officers was certainly real. Had the sheriff taken full account of the appellant's record, his deliberate and calculated actions, the nature of the offence, and the general risk involved, we cannot see that she could have selected a starting point of less than 15 months. We therefore consider that the sentence selected was unduly lenient, in being outwith the range of reasonable sentences available to the sheriff.

The discount

[18] A discount of 30% to one third is often granted in cases where the plea has been tendered at the earliest possible opportunity by section 76 letter. In the present case the sheriff granted such a discount and it is not suggested that she was wrong to do so. Whether or not the court was facing an unprecedented situation the appellant might reasonably have expected to be awarded a discount of one third. There is no question of the sheriff having increased the discount because of the current emergency, so it is rather difficult to understand why she even made reference to it. The matter is therefore somewhat academic in the present case. However, we are advised that the issue is one which is

repeatedly arising in courts up and down the country and that some guidance on the issue may be welcome.

[19] As the court in *Gemmell* v *HMA* made clear, the allowance of a discount following a plea of guilty is a matter for the discretion of the sentencing judge, to be exercised according to broad general principles. The fundamental basis for the granting of any discount is that it should be "based on the objective value of an early plea in the administrative and other costs, and the personal inconvenience, that it saves" (*Gemmell*, Lord Justice Clerk (Gill) para 33).

[20] In paragraph 34 the Lord Justice Clerk went on to say that "the primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload." It seems clear from the detailed figures examined in subsequent paragraphs that the savings in cost were a particularly significant aspect of the issue, but that the effect which a plea of guilty has on the workload of the court, in a general sense, was also already taken into account in the selection of a discount under the general principles elaborated upon in *Gemmell*. We agree with the advocate depute that there is no basis for any specific backlog in a general or occasional sense to be treated as a separate identifiable justification for awarding a discount. Workload does fluctuate, and perceptions of workload are not universal. The effect of pleas of guilty on the workload of the courts in a conventional sense is already factored in to the levels of discount generally granted.

[22] In this respect it is necessary to bear in mind the risks inherent in sentence discounting, also identified in *Gemmell*:

> "***Incentive to plead guilty***
>
> [73] There are two significant risks in sentence discounting. The first is that the allowance of substantial discounts may cause accused persons who have a stateable defence to play safe and plead guilty for the sake of the discount. The greater the

> potential discount, the greater is the risk of that, in my view. The prospect of a substantial discount is therefore a potentially dangerous incentive that may undermine the presumption of innocence (Ashworth and Redmayne, The Criminal Process, pp 312–314).
>
> ***Public confidence in the criminal justice system and the credibility of sentences***
>
> [74] The second risk is that the allowance of substantial discounts may cause the sentencing decisions of the criminal courts to lose credibility and in this way may erode the authority of the courts generally."

Elaborating on these reasons, the Lord Justice Clerk concluded (para 77): "that the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons." Moreover, the court should be wary of increasing the level of discount given for the same reasons all as identified by the Lord Justice Clerk in paras 78 and 79 of *Gemmell.*

[23] The current discounting regime is a relatively generous one. Its operation is relatively clear and is based on broad general principles. We do not consider that the likelihood of an increased backlog within the court system is a convincing reason to award a discount any greater than would follow from the operation of those general principles.

The current regime within prisons

[24] In *R* v *Manning* [2020] EWCA Crim 592 the Court of Appeal stated that current conditions in prisons represent a factor which can properly be taken into account in deciding on the necessary length of any custodial sentence, or whether, in that jurisdiction, to suspend it (paras 41 and 42) on the basis that, on established principles, the court will take into account the likely impact of a custodial sentence upon an offender which is likely to be heavier during the current emergency than it would otherwise be. In this jurisdiction also, the impact of the sentence on the individual offender is of course a relevant factor. However, it is necessary to distinguish between circumstances which are permanent and inevitable (see for example *HMA* v *RC* [2019] HCJAC 62) and those which are transitory and

likely to change. The conditions which arise as a consequence of Covid 19 are unlikely to be permanent, and one can expect that in the short to medium term prisons will find better ways of adapting to the conditions dictated by the virus. There are already signs that this may be happening. We were given information about the current regime in Inverness Prison which suggests that efforts are being made to provide structured activities, recreation, fresh air and exercise. It is said that steps have been taken to facilitate contact between prisoners and their families by phone, and in writing. Visits from solicitors can take place. It is anticipated that a form of "virtual" family access will be made available within the prison from late June.

[25] In addition, it is necessary to note what were the circumstances of *R* v *Manning* namely that the court was

> "being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service."

The advocate depute was correct in our opinion to describe the circumstances facing the court as essentially a "threshold" decision, about whether custody should be imposed immediately or not. In cases where that threshold issue is in a very fine balance, and where any ensuing sentence would be a very short one, then we accept that the fact that prisons may not currently be operating normally may be a factor to weigh in the mix. However, beyond that we do not consider that it has a role to play, and we do not accept that, once the custody threshold has been crossed, it has any role to play in the selection of the eventual sentence. There are several reasons for this. As we have noted above, there is already a generous discount scheme applicable to those who plead guilty. Adding another layer, which would presumably have to apply whether or not there had been a plea with utilitarian value, would merely add confusion. The current situation as a whole may be

unprecedented, but that the regimes within penal establishments may from time to time have to be enforced with greater rigour than at others is not. As with the issue of backlog, it is something which may vary in intensity from time to time for a raft of reasons. What would be the threshold for taking these into account? It would be impossible to identify. It is reasonable to anticipate that in the short to medium term the Scottish Prison Service will find ways of adapting to the requirements imposed by the prevalence of Covid 19 and find reasonable ways of improving the situation for those in their care. To take account of the current emergency as a reason for discounting a custodial sentence would discriminate unfairly against prisoners who may have been given a short term sentence shortly before the lockdown, in favour of those upon whom such sentences are imposed now. Furthermore, short term prison sentences are subject to both automatic early release and discretionary early release. The latter in particular provides an administrative method by which the most serious consequences of imprisonment in the short term may be mitigated.

[26] In the circumstances we will therefore allow the appeal and increase the sentence to one of 15 months. We will apply a discount of one third bringing the total sentence to 10 months.