SHERIFF APPEAL COURT

[2020] SAC (Crim) 1
SAC/2020/15/AP

Sheriff Principal M M Stephen QC
Appeal Sheriff P J Braid

OPINION OF THE COURT

delivered by SHERIFF PETER J BRAID

in

APPEAL AGAINST SENTENCE

by

BARRY FINLAY

Appellant

against

PROCURATOR FISCAL, PERTH

Respondent

Appellant: Paterson (sol adv); Paterson Bell, Edinburgh (for Culley & McAlpine, Perth)
Respondent: M McFarlane AD; Crown Agent

11 March 2020

[1] The appellant has appealed against the imposition of a six month non-harassment order made for the protection of his partner (or former partner) ("the complainer"), following his conviction of a charge of assaulting the complainer on 12 July 2019 by slapping her on the face ("the offence"). The non-harassment order was made on 17 December 2019, when the sheriff also imposed a community payback order ("the CPO") on the appellant which included a supervision requirement, a drug treatment requirement and a conduct

requirement (to participate in domestic abuse work), all for a period of 21 months. No appeal has been taken against the imposition of the CPO. For completeness, it should be noted that on 17 December 2019 the appellant was also sentenced on a complaint containing a charge of contravention of section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act"), in respect that he had been found in the company of the complainer in breach of his bail. For that, he received a separate community payback order containing an unpaid work requirement.

[2] Since the offence involved abuse of the appellant's partner, it was aggravated in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The circumstances were that it took place at the complainer's tenancy in Perth. The appellant and complainer had been in a relationship for some three months. There are no children of the relationship. On the date libelled, they had been in bed at the complainer's home and had just woken at around 12 noon. The appellant began arguing with the complainer in relation to another male. This continued as both got up and dressed. The argument continued into the hallway. The complainer told the appellant to leave. He refused. He then struck the complainer once to her left cheek with his open right hand. The complainer did not require medical attention but told police that she was able to feel the effect of the blow for some two hours.

[3] The appellant has a raft of previous convictions, all summary (but many resulting in custodial sentences) - mainly for offences of dishonesty but including breaches of court orders. Of some significance he was convicted and sentenced in 2013 (twice) - for separate contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, both with a domestic aggravation.

[4] The procedural history is that the appellant first appeared from custody on 17 July 2019 when he was admitted to bail with special conditions not to enter the *locus* and not to approach or contact the complainer. The usual diets were fixed. The appellant subsequently pled guilty at an accelerated diet on 21 August 2019, when sentence was deferred for him to be of good behaviour, and for a criminal justice social work report ("CJSWR"), until 5 November 2019, on which date it was again continued until 19 November, for a drug treatment and testing order assessment. However, on 21 August, apparently without any regard to the requirement to consider making a non-harassment order, the court also removed the special condition of bail. The appellant had in the meantime committed the bail offence referred to above.

[5] At the sentencing diet on 19 November, the sheriff considered whether or not to make such an order, as he was obliged to do by section 234AZA of the 1995 Act. Having concluded in terms of that provision that it could not be said that an order was not necessary for the protection of the complainer, he made the order which is the subject of this appeal. The appellant's position is that he was wrong to do so.

[6] At this stage, it is appropriate to have regard to the terms of section 234AZA, and section 234A, to which it refers. Insofar as material, section 234AZA provides:

> "**234AZA Non-harassment orders: domestic abuse cases**
>
> (1) Section 234A applies subject to this section if an offence referred to in subsection (1) of that section is one listed in subsection (2)(c).
> (2) For the purposes of this section—
> (a) *"victim"* has the same meaning as it has in section 234A,
> …
> (c) the list is—
> (i) …
> (ii) an offence that is aggravated as described in section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016
>
> (4) The court must—

(a) without an application by the prosecutor, consider the question of whether to make a non-harassment order in the person's case,

(b) after hearing the prosecutor as well as the person, make such an order unless of a negative conclusion on the question,

(c) if of a negative conclusion on the question, explain the basis for this.

(5) Here, a negative conclusion on the question is the conclusion by the court that there is no need for—

(a) the victim, or

(b) the children (if any) in mind by virtue of subsection (3),

to be protected by such an order.

(6) In the operation of section 234A along with subsection (4)—

(a) subsection (1A) of that section is of no effect (and the reference in subsection (2) of that section to an application under subsection (1A) of that section is to be ignored),

(b) further—

(i) the references in subsections (2A), (2BA) and (2C) of that section to the person against whom the order is sought are to be read as being to the person in whose case the making of a non-harassment order is being considered,

(ii) the reference in subsection (2C) of that section to representations in response to the application is to be read as being to representations on the question of whether to make a non-harassment order,

(iii) the reference in subsection (6) of that section to the prosecutor at whose instance the order is made is to be read as being to the prosecutor in the case in which the non-harassment order is made.

(7) For the avoidance of doubt, nothing in this section affects the ability to make a non-harassment order in the case instead of or in addition to dealing with the person in any other way."

[7] Section 234A insofar as material, and as applied to domestic abuse cases by section 234AZA, provides:

"**234A.— Non-harassment orders.**

(1) This section applies where a person is—

(a) convicted of an offence involving misconduct towards another person ("the victim"),

…

(1B) A non-harassment order is an order requiring the person to refrain, for such period (including an indeterminate period) as may be specified in the order, from such conduct in relation to the victim as may be specified in the order.

(2) … the court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from [harassment (or further harassment), make a non-harassment order.

(2A) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor—

(a) about any other offence involving misconduct towards the victim—

(i) of which the [person in whose case the making of a non-harassment order is being considered has been convicted, or

(ii) as regards which the person in whose case the making of a non-harassment order is being considered has accepted (or has been deemed to have accepted) a fixed penalty or compensation offer under section 302(1) or 302A(1) or as regards which a work order has been made under section 303ZA(6),

(b) in particular, by way of—

(i) an extract of the conviction along with a copy of the complaint or indictment containing the charge to which the conviction relates, or

(ii) a note of the terms of the charge to which the fixed penalty offer, compensation offer or work order relates.

(2B) But the court may do so only if the court may, under section 101 or 101A (in a solemn case) or section 166 or 166A (in a summary case), have regard to the conviction or the offer or order.

(2BA) The court may, for the purpose of subsection (2) above, have regard to any information given to it for that purpose by the prosecutor about any other offence involving misconduct towards the victim—

(a) in respect of which the person in whose case the making of a non-harassment order is being considered was acquitted by reason of the special defence set out in section 51A, or

(b) in respect of which the person in whose case the making of a non-harassment order is being considered was found by a court to be unfit for trial under section 53F and the court determined that the person had done the act or made the omission constituting the offence.

(2C) The court must give the [person in whose case the making of a non-harassment order is being considered] an opportunity to make representations on the question of whether to make a non-harassment order.

(3) A non-harassment order made by a criminal court may be appealed against—

(a) if the order was made in a case falling within subsection (1)(a) above, as if the order were a sentence,

(b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the order were a sentence passed on the person for the offence.

(3A) A variation or revocation of a non-harassment order made under subsection (6) below may be appealed against—

(a) if the order was made in a case falling within subsection (1)(a) above, as if the variation or revocation were a sentence,

(b) if the order was made in a case falling within subsection (1)(b) or (c) above, as if the person had been convicted of the offence concerned and the variation or revocation were a sentence passed on the person for the offence.

(4) Any person who is in breach of a non-harassment order shall be guilty of an offence and liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine, or to both such imprisonment and such fine; and

> (b) on summary conviction, to imprisonment for a period not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both such imprisonment and such fine.
>
> ...
>
> (6) The person against whom a non-harassment order is made, or the prosecutor in the case in which the non-harassment order is made, may apply to the court which made the order for its revocation or variation and, in relation to any such application the court concerned may, if it is satisfied on a balance of probabilities that it is appropriate to do so, revoke the order or vary it in such manner as it thinks fit, but not so as to increase the period for which the order is to run.
>
> (7) For the purposes of this section—
>
> *"harassment"* and *"conduct"* are to be construed in accordance with section 8 of the Protection from Harassment Act 1997 (c.40),
>
> *"misconduct"* includes conduct that causes alarm or distress."

[8] Section 234AZA was added to the 1995 Act by the Domestic Abuse (Scotland) Act 2018. Its effect, read with section 234A, is that, in respect of proceedings commenced on or after 1 April 2019, where a person is convicted of an offence involving domestic abuse, the sentencing court must now consider of its own volition whether to make a non-harassment order, irrespective of whether or not the Crown moves the court to do so. Indeed on one reading of subsections (4) and (6) read together, any application by the Crown would be superfluous. Further, not only must the court consider whether to make an order, it *must* make an order, unless "of a negative conclusion of the question", the meaning of which we explore further below.

[9] The sentencing sheriff correctly noted that section 234AZA required him to consider the imposition of a non-harassment order. His interpretation of that section was that it was weighted in favour of the granting of such an order unless satisfied that it would be unnecessary to do so. In considering that issue, he had regard to the Crown narration, the appellant's offending history and the terms of the CJSWR. He did not consider that "arguable grounds existed" to demonstrate why a non-harassment order would be unnecessary. In reaching that view he had regard to: the appellant's offending history

including two previous convictions with a domestic aggravation involving a different partner; the fact that the appellant had deliberately breached a special condition of bail in relation to the complainer; that this had been a relatively short relationship; that there were no children of the relationship; and that the appellant had described the complainer as complicit in the commission of both offences, thus indicating that he sought to minimise his culpability. The sheriff expressly records in his report that the complainer's views were not before him but he readily inferred that she was not supportive of an order being made. However, he afforded the factors referred to by him greater weight. He took into account that the bail order had been varied in August 2019 to remove the special condition regarding the complainer, but observed that the court had not heard the facts and did not have the benefit of the CJSWR, which shed light on the appellant's attitude towards his offending.

[10] Although the solicitor advocate for the appellant did not take issue with the sheriff's interpretation of section 234AZA, he submitted that a non-harassment order had not been necessary, and that the sheriff had therefore fallen into error in making one. The complainer did not want the protection of a non-harassment order. It was made clear to the sheriff that both parties wished the relationship to continue (although this was inconsistent with the written argument which stated that the relationship was over). Her views had not been accorded sufficient weight. There was no suggestion that she was vulnerable. The fact that she simply did not want the protection of an order was a strong indication that the order was not necessary for her protection. The court should not protect a person who did not wish to be protected. He accepted that the exercise carried out by the court of considering whether an order was necessary or not was an evaluation, rather than a discretionary decision.

[11] Subsections (4) and (5) of section 234AZA are unusually, some might say clumsily, worded, but are to the effect that the court must make a non-harassment order unless of a negative conclusion of the question; a negative conclusion of the question being that the court concludes that there is no need for the victim (or where there are any, the children) to be protected by such an order. Marrying those provisions together, the court must make a non-harassment order unless it concludes that there is no need for the victim to be protected by such an order. In other words, the court must make an order unless it is positively able to conclude that there is no need for the victim to be protected by such an order. If the court, on the information before it, is not able to so conclude, the order must be made. Thus, it will not do for a person convicted of a domestic abuse offence to say that there is no suggestion that a victim of domestic abuse is vulnerable. If such a person wishes the court to proceed upon the basis that the victim is not vulnerable, then there must be material before the court which enables such a conclusion to be drawn. We further note that the provision makes no reference whatsoever to a victim's views being sought. Indeed, where the only criterion for making an order is that of necessity, we can see why that is so. The court does not require to carry out some sort of balancing exercise, weighing necessity on the one hand, and the free will of a victim to be exposed to the risk of harm on the other. Necessity trumps the views of the victim. That said, we acknowledge that in considering necessity, the views of the victim may be relevant. If, for example, a victim were to say that (s)he had been assaulted only once, it was out of character, (s)he did not fear the accused and that there were other protective factors in place, the court may well feel able to conclude that there was no necessity for such a person to have the protection of an order. However, that is different from saying that where the court had concluded on the basis of other factors (such as previous analogous offending) that there was a need for an order (or rather, as the section

puts it, where the court was not able to conclude that there was no need for one), nonetheless an order should not be made simply because the victim did not want one. That is not what the section says, and is to conflate the questions of appropriateness (the criterion for making an order in a non-domestic abuse case) with necessity.

[12] Further, if a complainer's views are to be taken into account in considering necessity, it is again incumbent on parties to furnish the court with information as to what those views are; rather than leaving it to be inferred that because an order has not been sought, the victim must not be in favour of one being granted.

[13] Even if the factors relied on by the sheriff do not all positively point to the necessity for an order - and some of them do, in particular the fact that this offence occurred so soon into the relationship, against a background of a history of domestic offending by the appellant - there is no basis for arguing that they should have led the sheriff to conclude that there was *no* necessity for such on order. As we have pointed out in paragraph [10], the absence of information will invariably count against an appellant; that is a consequence of the manner in which the Parliament has legislated. Having decided that an order must be made, the sheriff then applied a proportionate approach to the length of the order, in deciding that it should be for only 6 months, by which time it is hoped that the supervision requirement will have begun to have some effect. It should also be noted that if the complainer turned out to be so aggrieved by the order that she felt compelled to take some action, it would be open to her to approach the Crown and ask that they apply to have it revoked under section 234A(6) (although how the appropriateness test in that subsection is to be reconciled with the necessity test in section 234AZA is a question best left to another day).

[14] It follows that the appeal must be refused. In conclusion, however, we should add that if the outcome seems unusual - that the appellant has been made the subject of a non-harassment order after a period when his special bail conditions had been removed - that is not because of any error on the part of the sheriff but because of the unusual procedural course which was adopted. It appears that the case went off the rails on 21 August 2019 when there was both an adjournment for a CJSWR and a deferral of sentence for good behaviour. There should generally be one or the other, but not both. A deferral for good behaviour is not the same as an adjournment for a report, which should not be for a period as long as the deferral was in this case. In any event, as we have drawn attention to above, it appears that the presiding sheriff on that occasion did not consider, as ought to have happened, whether to make a non-harassment order. Had that been done, it seems unlikely that the bail condition would or should have been removed in August 2019. The moral to be derived is that where an accused person has been convicted of an offence involving domestic abuse, the court should, in considering bail, be live to the need to have regard to section 234AZA. It is of course entirely possible that a sentencer may decide, on hearing the facts and on hearing from the prosecutor, that there is no necessity for the victim to be protected either by a non-harassment order or by a bail condition, and thereafter sentence may be deferred for good behaviour. In such circumstances, it would, we agree, be perverse for a non-harassment order subsequently to be imposed if the accused had indeed been of good behaviour (just as it would be wrong to impose a custodial sentence on such a person) but that is not what is said to have happened in the instant case, nor was it the basis upon which the appeal was argued.