APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 46
HCA/2023/466/XC

Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

Appeal against Sentence

by

NORMAN BOWMAN

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Collins, Sol Ad; Collins & Co
Respondent: Cameron KC, Sol Ad AD; Crown Agent

17 November 2023

[1] On 7 July 2023 the appellant was convicted of four charges in the Sheriff Court. Charge 1 libelled a course of behaviour which was abusive of the complainer in that he acted towards her in an aggressive manner, shouted, swore, and uttered offensive and derogatory remarks towards her. The conduct took place over a period of thirteen months. As libelled, the charge was a contravention of section 1 of the Domestic Abuse (Scotland) Act 2018 but the jury convicted of an alternative charge under section 38(1) of the Criminal Justice and

Licensing (Scotland) Act 2010. The offence was committed partly while the appellant was on bail, having been granted bail on 4 and 9 February 2022.

[2] Charges 2, 3 and 4 were breaches of bail conditions. In each case the appellant approached or contacted the complainer contrary to a condition of bail. Charge 2 libelled such contact on 8 February 2022 in breach of the bail order of 4 February 2022. Charge 3 was a similar charge, referring to conduct on 24 March 2022 in breach of the bail order of 9 February 2022. Charge 4 libelled similar conduct on 7 April 2022, also in breach of the bail order of 9 February 2022. Each of these three charges was aggravated in terms of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

[3] The appellant was remanded in custody from 14 April 2022 until 7 July 2023. On 14 August 2023, having considered the terms of a Criminal Justice Social Work report (CJSWR), the sheriff imposed a Community Payback Order (CPO). It consisted of a supervision requirement for 2 years and a programme requirement to undertake the Fergus Programme. A 2 year non-harassment order was also imposed.

[4] No appeal is taken against the non-harassment order but the imposition of the CPO is challenged. It is submitted in the Note of Appeal that the sheriff failed to ascribe sufficient weight to the time spent on remand. The offences of which the appellant was convicted were far less serious than those on the original indictment. That indictment contained averments that the appellant threw a mobile telephone at the complainer which struck her on the head, that he uttered threats of violence towards her and that he stole her mobile telephone. It is said that in the absence of those matters which were deleted by the jury the case would have been unlikely to have been prosecuted on indictment and would not have attracted a sentence in excess of the time which had already been spent in custody. In addition a CPO is normally imposed as a statutory alternative to custody but in this case the

sheriff had imposed the sentence notwithstanding the long period already spent in custody on remand. The period of remand had been sufficient punishment. The appellant was 63 years of age and had suffered significant health issues including two heart attacks, two strokes and blood clots leading to amputation of his left leg below the knee. He had learned his lesson in custody and had no wish to rekindle his relationship with the complainer. He had demonstrated an acceptance of responsibility and a motivation to change his behaviour.

The circumstances of the offences

[5] According to the sheriff's report the appellant did not like the complainer's friends or the people she spoke to. He would shout horrible things at her. She referred to certain violent conduct towards her but we need not narrate that since he was not convicted of it. The appellant on the other hand accepted that he was loud but not that he was aggressive. The complainer had insulted him and he had given it back to her verbally.

The sheriff's approach

[6] What was left in the indictment was still serious, in that it represented a course of conduct towards the complainer over a 13 month period and included the appellant's failing to comply with special conditions of bail in ways which were domestically aggravated. The appellant had a bad record including five assaults, two of which were to severe injury and one to the danger of life. He had received sentences of imprisonment for the more serious assaults and had had community based disposals for some of the domestically aggravated crimes. Every conviction since, including one in 2006, was domestically aggravated. These included breach of the peace, breach of section 30(1) of the 2010 Act, breaches of 127(1)(a) of the Communications Act 2003, and breaches of bail conditions. The CJSWR assessed him as

suitable for a place on the Fergus Programme for domestic offenders which usually needed a 24 month period along with a supervision order of the same duration. The report noted that he "presents an ongoing risk of harm to current and/or previous female partners" and that:

> "Information from Police Scotland indicates concerns of a domestic nature dating back to the year 2000. This indicates a pattern of abusive behaviour towards at least five known partners over an extended period."

[7] The sheriff said that the appellant was a chronic domestic offender, that he posed a risk of similar future offending, that a rehabilitative programme for domestic offenders was available and he was assessed as suitable for it. The aims of sentencing included punishment, deterrence, rehabilitation, the protection of the public and the expression of disapproval. He had already received an element of punishment by way of the time spent on remand and the sheriff's primary focus was on the rehabilitation of the appellant and the future safety of the complainer as well as any other partners that the appellant might acquire.

[8] He took account of the time spent on remand by not imposing any punitive element such as imprisonment, unpaid work, a Restriction of Liberty order or a fine. Section 227A of the Criminal Procedure (Scotland) Act 1995 allowed a court to impose a CPO but did not say that it was a possible sentence only when a judge was actually intending to impose a sentence of imprisonment. The sheriff was not intending to impose such a sentence and one reason for this was the length of time which had already been spent on remand, but all of the charges were punishable by imprisonment and a CPO was therefore still an option in terms of section 227A(1).

Submissions for the appellant

[9] On the one hand the sheriff took account of the time the appellant spent in custody and resolved that a custodial sentence was not appropriate, while at the same time he imposed a direct alternative to a custodial sentence. All elements of violence on the indictment were deleted, the appellant had served the equivalent of 30 months' imprisonment and the offences did not merit a sentence of that length. The sheriff had obviously concluded that custody would still be appropriate and imposed an alternative thereto. His interpretation of section 227A of the 1995 Act was wrong. Since the section allowed the court to impose a CPO "instead of" imposing a sentence of imprisonment, such an order could not be imposed where no such custodial sentence would have been imposed. There would be no need to qualify the section if that were the case.

Analysis

[10] No authority was cited for the contentions advanced by the appellant other than the terms of section 227A itself. That section, so far as relevant, reads as follows:

> "**227A**
>
> (1) Where a person (the 'offender') is convicted of an offence punishable by imprisonment, the court may, instead of imposing a sentence of imprisonment, impose a community payback order on the offender.
>
> …
>
> (3) Subsection (4) applies where –
>
> (a) a person (the 'offender') is convicted of an offence punishable by a fine (whether or not it is also punishable by imprisonment), and
>
> (b) where the offence is also punishable by imprisonment, the court decides not to impose –
>
> (i) a sentence of imprisonment, or

> (ii) a community payback order under subsection (1) instead of a sentence of imprisonment.
>
> (4) The court may, instead of or as well as imposing a fine, impose a community payback order on the offender imposing one or more of the following requirements -
>
> a) an offender supervision requirement,
>
> (b) a level 1 unpaid work or other activity requirement,
>
> (c) a conduct requirement."

[11] A level 1 unpaid work or other activity requirement is defined in section 227I(5) as one which specifies the work or activity to be undertaken as no more than 100 hours.

[12] It should be noted right away that while section 227A(1) says that the court may impose a CPO instead of imposing a sentence of imprisonment, section 227A(4) indicates that such an order may be imposed "instead of or as well as imposing a fine." On an ordinary and natural reading, section 227A(1) provides that sentencers may not impose both a prison sentence and a CPO.

[13] The only criterion for the imposition of a CPO under section 227A(1), leaving aside the specialty set out in section 227(3) and (4), is that the offence be imprisonable. That is a question of law and does not depend on the sentencer's assessment of the circumstances. That assessment comes into play in determining what, amongst the various disposals available, the appropriate sentence is, following the sentencing process guideline. It is not the law that one has to start with a sentence of imprisonment and then work all the way down until an appropriate sentence is reached. Furthermore, if a sentence of imprisonment is appropriate then that is the sentence which should be imposed. It is quite illogical to suggest that a sentencer should first consider that a sentence is appropriate and then decide that in fact it is not and should be substituted by a lesser sentence.

[14] This is not to undermine what is generally understood to be the hierarchy of sentences. A CPO is obviously a higher tariff sentence than a fine, for example, and whether or not to impose it will depend, as we have said, on the circumstances. Furthermore, there is no reason not to indicate, if it be the case, that a CPO is being imposed as a direct alternative to custody in order to emphasise the serious nature of the disposal.

[15] In any event, in the appellant's case, given the circumstances, a sentence of imprisonment could well have been imposed, albeit one which would have been backdated. The fact that it was not imposed was favourable to the appellant, because had it been imposed a significant sentence of imprisonment would have been added to his record.

[16] There is an almost surreal aspect to the appeal. The CJSWR indicated that the appellant had already completed the Fergus Programme previously but advised that he would like the opportunity to complete further work under its auspices; and at the time of sentencing he consented to the imposition of the CPO.

[17] Be that as it may, given the risk presented by the appellant as clearly outlined in the report, the duration of the offending in charge 1, the repeated breaches of bail in a domestic context and the appellant's record, we are quite satisfied that the sheriff's disposal was an appropriate and well considered response. It cannot be described either as incompetent or excessive.

[18] The appeal is refused.