



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 11
HCA/2018/000588/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

ALAN KENNAWAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Ogg, solicitor advocate; Robert Kerr Partnership
Respondent: McFarlane, ad hoc; Crown Agent**

5 February 2019

[1] The appellant Alan Kennaway is aged 23 years old. He faced an indictment in the Sheriff Court at Kilmarnock which contained 12 separate charges. At the commencement of the trial he pled guilty to charge number 12. During the course of the trial he pled guilty to charges numbers 4, 7, 8, 9, 10 and 11. By the jury's verdict he was convicted of the remaining charges, numbers 1, 2, 3, 5 and 6.

[2] The appellant commenced a relationship with a woman NR in around January 2015 which endured until towards the end of 2017. The relationship was abusive. With the exception of charge 12, each of the charges of which the appellant was convicted concerned his behaviour towards her, or towards her subsequent boyfriend, or towards her and some of her female friends. Charge 12 concerned his behaviour towards police officers after he was taken into custody on 20 April 2018.

[3] Having obtained a Criminal Justice Social Work Report the sheriff imposed a sentence which she described as an extended sentence of 7 years, comprising a period of 5 years imprisonment with 2 years extension. In fact, the sheriff imposed individual sentences on each of the charges, ranging from 3 years imprisonment to 6 months imprisonment. Some of these were to run concurrently with each other and some were were to run concurrently with each other but consecutive to others. The net total of this exercise was a period of 5 years imprisonment. The sheriff explains that an extension period of 2 years was imposed to ensure that the appellant was supervised in the community after his release.

[4] The individual sentences which the sheriff imposed were as follows:

- Charge 1 - 3 years imprisonment
- Charge 2 - 2 years imprisonment
- Charge 3 - 2 years imprisonment
- Charge 4 - 18 months imprisonment

These four periods were ordered to run concurrently.

- Charge 5 - 18 months imprisonment
- Charge 6 - 18 months imprisonment

These two periods were ordered to run concurrently with each other but consecutively to the sentences in relation to charges 1 to 4.

- Charge 7 - 6 months imprisonment discounted from 9 months
- Charge 8 - 6 months imprisonment discounted from 9 months
- Charge 9 - 6 months imprisonment discounted from 9 months
- Charge 10 - 6 months imprisonment discounted from 9 months
- Charge 11 - 6 months imprisonment, discounted from 9 months, and
- Charge 12 - 6 months imprisonment discounted from 9 months

These six periods were ordered to run concurrently with each other but consecutively to the other sentences imposed. It was this cumulative total of 5 years imprisonment which the sheriff viewed as the custodial element, to which she then added a period of 2 years extension.

[5] Charges 1, 5, 10 and 11 were charges of assault, although charges 10 and 11 were each minor matters. Charges 2, 4, 6, 8 and 12 each libelled a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010. Charge 3 was a charge of sending naked photographs of NR to her new boyfriend contrary to section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. Charges 7 and 9 were charges of contravening a condition of bail contrary to the Criminal Procedure (Scotland) Act 1995 section 27(1)(b).

[6] Although the point was not taken in the note of appeal, the sentencing exercise which the sheriff engaged in raises the question of whether the extended sentence which she imposed was a competent disposal. Ms Ogg addressed us on that matter and we heard from the advocate depute in reply.

[7] It was agreed that none of the offences of which the appellant was convicted constitutes a sexual offence as defined for the purposes of section 210A of the 1995 Act. Subsection(1)(a) of that section provides, reading short, that when a person is convicted on indictment of a violent offence, the court may, if it intends to pass a determinate sentence of imprisonment for a term of 4 years or more and considers that the period (if any) for which the offender would, apart from the section, be subject to a licence would not be adequate for the purposes of protecting the public from serious harm from the offender, pass an extended sentence on the offender.

[8] Three problems arise in the present case. First, none of the individual sentences imposed by the sheriff was for a period of 4 years or more. Second, section 210A (10) provides that for the purposes of that section a violent offence means any offence inferring personal violence. Charges 1, 5, 10 and 11 would all fall within this definition. It is questionable which, if any, of charges 2, 4, 6, 8 or 12 would. In the case of *Paterson v Webster* 2002 SLT page 1120 the court explained that an offence would infer personal violence if the libel, admitted or proved, discloses that violence was actually offered by the accused to the person of a specified complainer. A threat of personal violence would not constitute an offence inferring personal violence. None of charges 3, 7 or 9 could constitute violent offences. The third problem is that in the case of *DS v HMA* 2017 SCCR 129 the court was concerned, amongst other things, with the manner in which the sheriff had imposed an extended sentence. In giving the opinion of the court at paragraph [23] Lord Brodie said the following:

“An extended sentence is “a sentence of imprisonment”, comprising a custodial term and an extension period. It is not a sentence which is added on to a custodial sentence, nor is it an additional period of time during which the accused will be

subject to licence tagged on to the end of a custodial sentence imposed: *O'Hare v HM Advocate*. The custodial term is 'the term of imprisonment which the court would have passed on the offender otherwise than by virtue of (s.210A)', that being 'a determinate sentence of imprisonment'. Now, the terms of the section may allow an extended sentence to be imposed as a *cumulo* sentence in respect of a number of charges, but the section does not envisage the imposition of a number of separate determinate sentences of imprisonment which are then added together to make up the custodial term of an extended sentence, to which an extension period is then attached (cf *Crawford v HM Advocate* and *R(G) v HM Advocate*)."

[9] Having considered the terms of the charges of which the appellant was convicted, the terms of section 210A and the case of *DS*, it seems to us that the sheriff has approached the imposition of an extended sentence in a way which was inconsistent with the statutory provision, as its scope was explained in the case of *DS*, and without taking account of the limitations imposed by the definition of the term "violent offence".

[10] In light of the submissions on competency advanced by Ms Ogg, with which the advocate depute agreed, we are satisfied that the extended sentence was not competently imposed and we shall therefore quash that sentence and approach the matter of sentencing anew.

[11] The circumstances of the appellant's offending were these. He subjected his former partner to a sustained period of physical abuse and psychological domination over the period of nearly 3 years that their relationship endured. This conduct was covered by charges 1 and 2. His behaviour included repeatedly pushing her on the body, placing his hands around her throat and compressing it thus restricting her breathing, striking her face against a doorframe and other such conduct. He further assaulted her on 19 April 2018 after

they had separated, as reflected in charge 5, by repeatedly pushing her on the body, repeatedly punching her on the body, placing bedding over her head and holding it there so that her breathing was restricted and threatening her with further violence. After their separation he repeatedly engaged in threatening or abusive conduct towards NR or towards her and her new partner or towards her and her friends, all as encompassed by charges 4, 6 and 8. He repeatedly failed to comply with bail conditions, charges 7 and 9. He sent intimate photographs of NR to her new partner without her consent, charge 3, and he assaulted two of her female friends by kicking them, charges 10 and 11. Finally, he behaved in a threatening and abusive manner when taken into custody by police officers on 20 April, charge 12.

[12] The Criminal Justice Social Work Report which the sheriff obtained noted that the appellant took some responsibility for his behaviour but also sought to minimise aspects of his conduct towards NR. It was noted that he did have stable accommodation in his family home with good social support and that he was someone with a history of employment. However, he also had a history of abusing illegal drugs in the period of separation from NR and the risk assessment exercise which was undertaken, including the spousal assault risk assessment tool, indicated a high risk of further domestically aggravated offending.

[13] On the appellant's behalf Ms Ogg drew attention to his limited record of previous offending. She observed that he had no previous convictions for assault and had never previously served a custodial sentence. She drew our attention to the fact that after the separation there was a degree of ongoing contact between the complainer and the appellant, including a period when she visited him in prison with their children. However, she explained that for some time now there has been no contact and no attempt has been made by the appellant to continue contact with the complainer. He has put the relationship

behind him and has moved on. Ms Ogg reminded us that the appellant had a good work record and sought to stress that this was his first conviction for domestic offence related matters. She explained that within the prison setting he had expressed a willingness to undertake various rehabilitation courses and was awaiting the opportunity to commence these. She explained that he had been of good behaviour in the prison and had achieved a trusted prisoner status.

[14] In all of these circumstances the submission on the appellant's behalf came to be that the particular period selected as the custodial element by the sheriff was excessive. Ms Ogg also suggested that the sheriff had been incorrect in splitting the various charges into the groups which she did for the purposes of sentencing and that that was not a course which we should follow. It was submitted that the appellant's offending should be viewed as a single course of conduct.

[15] Having considered the circumstances of the appellant's offending, having listened to the submissions presented on his behalf, and having taken account of the content of the Criminal Justice Social Work Report, we are satisfied that the appellant engaged in an extended period of abusive and violent behaviour, both towards his former partner and towards others. We are satisfied that the seriousness of his conduct is such that no sentence other than a custodial one would be proportionate or fair. We take account of the appellant's limited record, we take account of the fact that he has conducted himself well in prison and has agreed to address his offending behaviour by undertaking rehabilitation courses. In all of these circumstances the sentences which we shall impose are as follows:

- Charge 1 - a sentence of 3 years imprisonment
- Charge 2 - a sentence of 2 years imprisonment
- Charges 3 and 4 - a sentence of 1 year imprisonment on each

These four periods will run concurrently.

- Charge 5 - a sentence of 12 months imprisonment with 3 months of that being attributable to the bail aggravation
- Charge 6 a sentence of 6 months imprisonment with 2 months being attributable to the bail aggravation

These two periods will run concurrently with each other but consecutively to the sentence in relation to charges 1 to 4.

- Charges 7 through to charge 12 – a sentence of 6 months imprisonment on each charge, discounted from the period of 9 months in light of the pleas of guilty

These six periods will be ordered to run concurrently with each other but consecutively to the other sentences imposed, with the consequence that the overall sentence is one of 4 years and 6 months imprisonment to run from the date selected by the sheriff.