APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 18
HCA/2020/000394/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST SENTENCE

by

JOHN ANDERSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Collins, Sol Adv; Collins & Co
Respondent: Prentice QC, AD; Crown Agent

2 March 2021

[1] The appellant pled guilty at a First Diet in the Sheriff Court to charges of shipbreaking with intent to steal, possession of a knife in a public place, and two breaches of section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") by failing to comply with a curfew condition contained in the bail order made when he was liberated in relation to the first two charges. The first two offences were aggravated by having been committed whilst subject to an undertaking to appear at the Justice of the Peace Court.

[2] The appellant was sentenced to 15 months imprisonment (discounted from 18 months) in respect of each of charges 1 and 4 on the indictment (the charges of shipbreaking and possession of a knife); these sentences were ordered to run concurrently with each other and to take effect from the date on which they were imposed, namely 16 December 2020. On the first of the two bail charges the sheriff decided that the appropriate headline sentence would have been 90 days imprisonment discounted to 75 days. On the second of these charges the sheriff said that the headline sentence would have been 120 days discounted to 100 days. However, the two sentences in respect of the bail offences, the sheriff reasoned, had to be viewed in light of the fact that the appellant had been remanded in custody since 18 August 2020. He took the view that the appropriate way in which to reflect the period already spent on remand, that is the period between 18 August and 16 December, was to admonish the appellant on those two charges. It will be noted that the sentences on charges 1 and 4 were not backdated to any extent, an aspect to which we will revert.

[3] In support of the appeal Mr Collins, on behalf of the appellant, argued in the first place that the imposition of custodial sentences for charges 1 and 4 was inappropriate in view of what he described as a significant gap in the appellant's record of offending. Failing that, he contended that the overall length of the sentences was excessive in the whole circumstances. The offences arose because the appellant had relapsed into binge drinking and drug abuse. During his time on remand he had detoxified. The criminal justice social work report assessed him as suitable for a community payback order.

[4] We are not impressed by this branch of the submissions advanced for the appellant. The important point is that he has a lengthy record, predominantly for offences of dishonesty. As the sheriff points out, the appellant has accumulated sixteen convictions for

theft by shoplifting, one for theft by housebreaking and seven others for various charges involving dishonesty and he has served one period of detention and five subsequent periods of custody for crimes of dishonesty. Charge (4) was his second offence under section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995. In view of the nature and the extent of the appellant's record and the other factors on which the sheriff relied, we have no difficulty in holding that the headline custodial sentences selected by the sheriff on charges 1 and 4 were amply merited.

[5] Next Mr Collins submitted that the level of discount was insufficient. The sheriff was said to have failed properly to consider the utilitarian value of the guilty pleas. In particular, he had erred in proceeding on the basis that all the witnesses would have been serving police officers. Mr Collins said that there would in all probability have been at least two and possibly three civilian witness. Moreover, the resolution of the case saved court time and avoided unnecessary expense and inconvenience, factors to which the sheriff was said to have given insufficient weight.

[6] We are unpersuaded by these arguments. In the circumstances of the present case, the contribution of any civilian witnesses would not have been substantial and there is no reason to suppose that they would have been significantly inconvenienced had they ultimately been required to testify in person. No doubt some court time and some expense would have been saved as a result of the guilty pleas, but the sheriff had regard to this. He explains that he placed considerable emphasis on the stage at which the pleas were tendered. In the whole circumstances we do not consider that it would be appropriate for this court to interfere with what was quintessentially a discretionary decision by the sheriff as to the level of discount.

[7] Finally, Mr Collins submitted that the sheriff erred in the approach he took to the question of backdating. The sheriff took the view that he could not backdate the sentences for charges 1 and 4 as the appellant had been on bail for them throughout the proceedings. As we have mentioned, the appellant was remanded from 18 August 2020; on that date he appeared on a second petition containing the breach of bail curfew charges. All the charges from the two petitions were later rolled up in a single indictment, as is commonly done. The appellant was remanded in custody from 18 August to 25 November 2020 when the pleas were tendered. He was further remanded until the sentencing diet on 16 December 2020 so that a criminal justice social work report could be prepared. It appears that technically he remained on bail throughout in respect of charges 1 and 4 and that the basis on which he was remanded was the addition of what became charges 5 and 6 on the indictment.

[8] As I have already explained, the sheriff's approach was to select sentences of 75 days and 100 days (after discount) for charges 5 and 6 and, having done so, then to admonish the appellant on those two charges in light of the fact that the appellant had been on remand since 18 August. The sheriff considered that he had no power to backdate the sentences on charges 1 and 4 because the appellant had been on bail for them throughout the proceedings. The position appears to be that the appellant had been granted bail when he appeared on the first petition on 23 July 2020 and that his bail in respect of the charges on that petition had never been revoked.

[9] Mr Collins pointed out that the period spent on remand was equivalent to 242 days imprisonment, but in effect the appellant had received credit for only 175 days; this was on the reasonable assumption that the sheriff would have made the sentences on charges 5 and 6 consecutive to those on charges 1 and 4 and consecutive to each other, points on which the sheriff's report is silent. We agree that it is reasonable to proceed on the basis that the sheriff

would indeed have taken that approach since otherwise the appellant would have received no separate penalty for what were separate and stand-alone offences.

[10] On grounds of basic fairness we can see some force in Mr Collins' submissions on this aspect of the case. Section 210(1)(a) of the Criminal Procedure (Scotland) Act 1995 requires the court to have regard *inter alia* to any period of time spent in custody by the person on remand awaiting trial or sentence. We note that the provision is couched in wide terms in that it refers to any period of time spent in custody awaiting trial or sentence. It does not say that only a period of time spent in custody on the charge for which the person is being ultimately sentenced is to be taken into account. Accordingly in our view there was no reason why, in the circumstances of the present case, the sheriff could not have taken account when he came to impose the sentences on charges 1 and 4 of the whole of the period which the appellant had spent on remand notwithstanding that he had been remanded throughout only on the other charges, which came to be rolled up in a single indictment along with charges 1 and 4. In our opinion the appellant was entitled to have the whole of the period he had spent on remand taken into account. We consider that the sheriff erred in not so doing. The circumstances are, to some extent, similar to those considered by the appeal court in *Boyd* v *HMA* 2011 SCCR 39 where it was held that the sheriff should have had regard, in the context of backdating, to the period of time spent on remand concurrently on a separate charge that was not ultimately insisted in (see paras [5] and [6]). We are satisfied that the question of backdating in the present case becomes one that is at large for us to address.

[11] Mr Collins invited us to backdate the totality of the sentences to 18 August 2020, but we are not attracted by this solution; it would fail properly to reflect what we take to be the sheriff's intention that the sentences on charges 5 and 6 were to run consecutively to the

concurrent sentences imposed on charges 1 and 4. Failing that, Mr Collins asked us to reduce the total sentence by 242 days. This appears to us to be too blunt a solution to the problem. In our opinion, the approach which is most faithful to the sheriff's intentions is to proceed on the footing that consecutive sentences of 75 days and 100 days running from 18 August 2020 (the date of remand on charges 5 and 6) would have expired on or about 13 November 2020. We consider that the fair solution to the problem is to backdate the sentences on charges 1 and 4 to the date of 13 November rather than having them commence from the date of their imposition on 16 December 2020. Accordingly, we shall quash the sentences imposed on charges 1 and 4 and substitute for them a single *cumulo* sentence of 15 months imprisonment backdated to 13 November 2020.