APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 80
HCA/2017/000504/XC

Lady Paton
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

ANTHONY HERD

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Ogg (sol adv); Paterson Bell Solicitors, Edinburgh (for McKennas, Glenrothes)
Respondent: K Harper (sol adv) AD; Crown Agent

31 October 2017

[1] On 9 August 2017, at a trial diet in the Sheriff Court in Dunfermline, the appellant pled guilty to the single charge of assault on the indictment which he faced, under deletion of the words "fire an item from a crossbow at him striking him on the head". His plea of guilty in these terms was accepted by the Crown.

[2] The sheriff selected a headline sentence of 13 months' imprisonment, which he discounted by around 10% to a period of 11 months and 2 weeks in light of the appellant's guilty plea. He then deducted a further period of 2 months to take account of the time which the appellant had spent on remand. The final sentence imposed was therefore one of 9 months and 2 weeks' imprisonment.

[3] The appellant was granted leave to appeal on a ground which challenged the level of discount afforded by the sentencing sheriff. The point argued on the appellant's behalf arises out of the procedural history of the case.

[4] The offence occurred on 11 April 2017. The appellant first appeared on Petition on 15 April and was fully committed on 21 April.

[5] On 10 May his solicitor met with a senior procurator fiscal depute, in order to discuss the case, and made an offer on the accused's behalf to plead guilty, in terms which were almost identical to the plea eventually accepted. Later that same day the procurator fiscal depute contacted the appellant's solicitor by email setting out the terms of the charge which he would recommend as acceptable to Crown Counsel. The charge as specified in that email described an assault by firing an item from a crossbow at the complainer and repeatedly striking him on the head with the crossbow to his injury. It was similar, but not identical, to the charge which eventually appeared on the indictment. Having consulted with the appellant, his solicitor responded by email to the procurator fiscal depute on 18 May. In that email it was stated that the appellant was willing to plead guilty to an assault and the terms in which he would plead were specified. The only difference of any moment between what the procurator fiscal had suggested and the response on the appellant's behalf was that the appellant denied firing the crossbow.

[6] On 25 May a further email was received from the procurator fiscal depute in which he stated "That's not enough to resolve the case, I'm afraid". In due course the appellant was served with an indictment which cited him to a first diet on 25 July 2017 with a trial diet set for 7 August.

[7] At the first diet the appellant's solicitor spoke to the procurator fiscal depute and again offered to plead in the terms set out in the email of 18 May. The offer was again rejected. A plea of not guilty was tendered to the court and a further first diet was fixed for 1 August 2017. The minute for that date shows that the Crown was still awaiting a number of pieces of information. At the next diet the appellant reiterated a plea of not guilty. The minute discloses that certain matters were still outstanding, but after discussion the sheriff was satisfied that the case was likely to proceed to trial and the case was continued to the assize of 7 August.

[8] At the trial diet a plea of guilty was in fact accepted in the terms which we have described in paragraph [1] above. It was presented and accepted on 9 August. The circumstances in which the Crown's view on the matter changed were not explained.

[9] In the report which he prepared for this court, the sheriff explains that he was advised that a plea had been offered to the Crown on 10 May 2017. An account of the history of communications between the appellant's agent and the procurator fiscal was given to him. The sheriff explains that he took no account of the discussions which took place between the Crown and the defence. He took the view that the plea offered in May had not been adhered to, that there was nothing to stop the appellant tendering a plea of guilty under deletion at either of the first diets or of explaining his position in the defence statement. He drew attention to what had been said by the court in *Spence* v *HM Advocate* 2008 JC 174 paragraph 14.

[10] On the appellant's behalf, it was submitted that unequivocal offers to plead guilty had been made on his behalf by his solicitor to the Crown, both orally and in writing. The offer which he made correlated with the plea which was eventually accepted. It was submitted that the sheriff had been wrong in declining to take account of this history.

[11] It was submitted that it was necessary to bear in mind that this was not a question of what level of discount to permit after trial. In the present case the matter did not proceed to trial. The only reason for that was that the Crown changed its mind and decided to accept what the appellant had offered to plead to at the outset. Whilst it was accepted that the appellant had failed to adhere to the guilty plea offered at each of the first diets, that was merely a factor to be weighed by the sheriff in determining the level of any discount to be afforded. It did not mean that he should blind himself to the other circumstances. It was said to be unfair to the accused to deny him the level of discount which he would likely have been afforded if the Crown had accepted the offer when first made.

[12] In the case of *Spence* v *HM Advocate* the court gave guidance as to the matter of sentence discount. In circumstances where an accused had, it was said, offered to plead to a lesser charge, and in the event had been convicted after trial of that lesser charge, it was made plain that an enquiry as to the Crown's position in the hypothetical event of the reduced plea being offered was entirely inadequate for the purposes of section 196 of the 1995 Act. What is required is an unequivocal indication of the position of the offender. It was also made plain that any such intention must be adhered to throughout the proceedings and be appropriately vouched.

[13] In the subsequent case *Balgowan* v *HM Advocate* 2011 SCCR 143, which again concerned circumstances in which the accused person was convicted after trial of a lesser charge, the court indicated that any argument in support of a discount of sentence in light of

that verdict would have to be predicated upon an earlier formal plea in similar terms having been tendered and recorded in court.

[14] In our opinion, the circumstances of the present case are a little different. Not only did the appellants in each of the cases of *Spence* and *Balgowan* tender pleas of not guilty and proceed to trial, each case was conducted on the basis of a substantive defence. The email sent by the present appellant's solicitor on 18 May did set out an unequivocal indication of his position. As was explained in paragraph 10 of the Opinion in the court of *Spence:*

> "Prior to the service of the indictment an intention to plead guilty on a restricted basis can be intimated by letter. Such action is indicative of acceptance by the accused of guilt (albeit to a limited extent)."

Whilst not guilty pleas were then tendered at each of the first diets the case did not proceed to trial. It is correct, of course, that the utilitarian value of the plea of guilty will have reduced by the time it was accepted in August 2017. That, however, was unconnected with the appellant's conduct. Had he formally tendered his reduced plea at the first diets it would have been rejected, but come its acceptance in August the sheriff would no doubt have given effect to it as if it had the same utilitarian value as it possessed in May.

[15] The position is that the Crown's attitude to the case changed at the trial diet, and the appellant's agents were informed that the Crown would then accept the plea which they had rejected on two earlier occasions. The appellant's position had not changed since May 2017.

[16] In our opinion, these are circumstances which the sheriff ought to have been prepared to consider in determining how to exercise his discretion in relation to discount of sentence. Since he declined to do so, we are satisfied that he misdirected himself in the exercise of his discretion and that we can determine the matter of discount for ourselves.

[17] We would reiterate, as has been said in previous cases, that the unequivocal intention of the offender can be vouched by tendering his plea and having it recorded at pre-

trial hearings. If that is not done the circumstances in which the court can take account of pre-indictment indications may be limited, particularly, as was made clear in the case of *Balgowan*, if the case proceeds to trial.

[18] In the present case though, for the reasons which we have given, we are prepared to approach the matter of discount by taking account of the previous history of the discussions between the appellant's agents and the Crown. We shall quash the sentence which the sheriff imposed and in its place we shall impose a headline sentence as he selected of 13 months' imprisonment, from which we shall permit a discount of 25% resulting in a sentence of 9 months and 3 weeks. As the sheriff did, we will then deduct from that a period of 2 months to reflect the time spent on remand by the appellant resulting in a sentence of 7 months and 3 weeks.