



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 68
HC/2018/000373/XC

Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

CHRISTOPHER BROWN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Gilfedder (sol adv); Paterson Bell (for Liam Robertson & Co, Glasgow)
Respondent: Meehan AD; Crown Agent

2 October 2018

[1] The appellant Christopher Brown is aged 30. On 29 May 2018, at Kilmarnock Sheriff Court, he pled guilty to six charges on the indictment which he faced. Each charge concerned conduct directed at women with whom he was, at the time, in a relationship. The charges concerned three different complainers and spanned the period between 2006 and 2017. The charges were as follows:

Charge 1, a charge that on various occasions between August 2006 and December 2008 he conducted himself in a disorderly manner and did repeatedly shout, swear, break a window, act in an aggressive manner, utter threats and make abusive comments towards GW.

Charge 3, a charge of assault by repeatedly assaulting GW between August 2006 and December 2008 (with certain periods excluded) by punching her on the head and body, seizing her by the hair and pushing and pulling her, all to her injury.

Charge 5, a charge of assault on GW on a single occasion in December 2008 by kicking her on the body and causing her to fall down a flight of stairs.

Charge 6, a charge of assaulting GW on a single occasion in November 2009 by seizing her by the hair, pulling her to the floor and repeatedly striking her head against the floor to her injury.

Charge 7, a charge under section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 that on various occasions between April and August 2016 he did behave in a threatening or abusive manner in that he did repeatedly swear, utter threats, act in an aggressive manner, make abusive comments towards NL, brandish a bottle at her and strike said bottle against the headrest of a seat of a car she was then driving and following the termination of the relationship threaten her with violence.

Charge 10, a charge under section 38(1) of the 2010 Act that on various occasions between November 2016 and March 2017 he behaved in a threatening or abusive manner in that he did repeatedly shout, swear and act in an aggressive

manner and make abusive comments towards DI, damage a mobile telephone and following the termination of the relationship threaten her with violence.

[2] The Note of Appeal intimated on behalf of the appellant sets out that he appeals against the sentence of:

“93 month (*sic*) extended sentence comprising 57 month (*sic*) custodial part and 36 month (*sic*) extension period”

[3] The minute of proceedings for the sentencing diet on 10 July 2018 records that the appellant was sentenced to:

36 months imprisonment *in cumulo* on charges 1, 3, 5 and 6 discounted from the period of 48 months which would have been imposed but for the plea of guilty,

12 months imprisonment on charge 7 discounted from the period of 15 months in light of the plea of guilty, and

9 months imprisonment on charge 10 restricted from the period of 12 months in light of the plea of guilty.

[4] The minute does not state whether the sentences imposed are to run concurrently or consecutively and it makes no mention of an extended sentence.

[5] In the report which the sentencing sheriff prepared for this court she set out a note of the sentences imposed. She explained the selection of sentences as follows:

“In respect of the offences against GW, charges 1, 3, 5 and 6, I considered a *cumulo* 48 months was appropriate, which I restricted to 36 months to reflect the guilty plea at the First Diet. For charge 7, I considered 15 months restricted to 12 months, and for charge 10, 12 months restricted to 9 months, were appropriate. I took the view that as these were entirely separate matters involving different victims at different times, the sentences ought to be served consecutively, resulting in a total of 57 months.”

[6] The sheriff then went on to explain her decision in relation to extended sentence:

“I considered charges 1 and 7 to include offending of a violent nature. Given that I considered this to be a persistent course of conduct, involving physical and verbal

abuse of three different intimate partners, occurring over a lengthy period of time, during which the offender was being imprisoned for other offences of a violent and domestic nature, and the high risk assessment, I considered that a measure of control and oversight should be exercised on the offender's release from this sentence, and that the period of licence would not be adequate for the protection of the public, therefore I imposed an extended period of 36 months. I took into account not only these offences but the clear history of violence towards different women over a long period of time, which included jealousy, control, verbal abuse and physical violence which to my mind indicated a certain entrenched attitude."

[7] In the written case and argument submitted in terms of Rule 15.16 the imposition of an extended sentence, or of a supervised release order, was accepted as appropriate but it was submitted that the sentence imposed over all the charges was excessive. It was submitted that none of the injuries sustained by the complainers was severe, that the appellant regretted his conduct and was remorseful, that he understood that alcohol misuse and anger management lay at the root of his offending and he had taken steps to engage with addiction services.

[8] At the commencement of the hearing the court raised with parties the apparent deficiencies in the minute for the sentencing diet. Attention was drawn to section 299 of the Criminal Procedure (Scotland) Act 1995 which provides as follows:

"(1) Subject to the provisions of this section, it shall be competent to correct any entry in –

- (a) the record of proceedings in a prosecution; or
- (b) the extract of a sentence passed or an order of court made in such proceedings,

in so far as that entry constitutes an error of recording or is incomplete.

(4) Where during the course of an appeal, the court hearing the appeal becomes aware of an erroneous or incomplete entry, such as is mentioned in subsection (1) above, the court –

- (a) may consider and determine the appeal as if such entry were corrected;"

[9] Both Mr Gilfedder, who appeared for the appellant, and the advocate depute consented to the court proceeding with the appeal as provided for in section 299(4).

[10] In oral submissions Mr Gilfedder reiterated the concession that the imposition of an extended sentence, or of a supervised release order, could not be challenged but submitted that for the reasons set out in the written case and argument the starting point sentences selected by the sheriff were excessive.

[11] At the invitation of the court, consideration was given to the question of whether the sheriff's approach to the requirements of section 210A of the 1995 Act was appropriate. That section provides that the court may only consider the imposition of an extended sentence if, in relation to a violent offence, it intends to pass a sentence for a term of four years or more. Subsection (10) provides that a violent offence means any offence inferring personal violence. In *Patterson v Webster* 2002 SLT 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. In these circumstances Mr Gilfedder submitted that the sheriff erred if, as she seemed to have done, she concluded that charge 1 was a charge which could attract the imposition of an extended sentence. He conceded that charge 7 fell within the definition of a charge inferring personal violence, as it contained an averment that the appellant offered violence to the person of NL by brandishing a bottle at her and striking it against the headrest of the seat of the car she was driving. Despite the error in approach to charge 1, Mr Gilfedder conceded that the sheriff would have been entitled to impose an extended sentence by taking account of the consecutive sentences which had been imposed on the other charges. By the same token, if the court was persuaded that it was appropriate to reduce any or all of the individual

sentences selected, then, if the *cumulo* period became less than 4 years, it would be competent to impose a supervised release order.

[12] The advocate depute also submitted that the sheriff was in error in her assessment of charge 1 for the same reasons as identified by Mr Gilfedder. In answer to a further query from the court, concerning the appropriateness of imposing an extended sentence on the basis of an accumulated total of individual sentences ordered to run consecutively, he drew attention to the case of *DS v HM Advocate* 2017 SCCR 129.

[13] As noted above, the sheriff took the view that charges 1 and 7 included offending “of a violent nature”. This does not correspond to the statutory language for the purposes of section 210A. Nor, it seems, was she referred to the case of *Patterson v Webster*. The sheriff does not explain what view she took of charge 10. In our view, neither of charges 1 or 10 can be viewed as charges inferring personal violence for the purposes of section 210A of the 1995 Act. None of the individual sentences which the sheriff settled upon were of 4 years or more. With the exception of the sentence imposed in respect of the accumulated charges concerning GW, the other sentences were for periods very far short of that.

[14] In the case of *DS* 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*)."

[15] From the explanation given in the sheriff's report, it seems to us that she has approached the imposition of an extended sentence in a way which is inconsistent with the statutory provision, as its scope was explained in *DS*. The minute for the sentencing diet is also unsatisfactory. In these circumstances we shall quash the sentences imposed and in their place we shall impose, in relation to charges 1, 3, 5 and 6, a *cumulo* sentence of 36 months imprisonment discounted from the period of 48 months in light of the guilty plea, in relation to charge 7, a sentence of 12 months imprisonment discounted from the period of 15 months, and in relation to charge 10, a sentence of 9 months imprisonment discounted from the period of 12 months. These sentences are to run consecutively to each other and to date from 10 July 2018.