APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 28
HCA/2021/67/XC & HCA/2021/41/XC

Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

NOTES OF APPEAL

by

(FIRST) GORDON DEWAR and (SECOND) BARRY McLEAN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

First Appellant: Findlater; Paterson Bell (for A.C. Miller & Mackay, Perth)
Second Appellant: Paterson, sol adv; Paterson Bell (for Kinloch & Co, Glasgow)
Respondent: Advocate Depute, A Gray, sol adv; Crown Agent

27 April 2021

Introduction

[1] These two appeals against sentence each involve offences of spitting at police officers during the course of the current Coronavirus pandemic. The court gave general guidance on the matter in the recent Crown appeal in *HMA* v *Lindsay* 2020 JC 293; 2020 SCCR 324. The present appeals provide examples of how that guidance should be applied in practice.

Gordon Dewar

[2] On 16 February 2021 at Perth Sheriff Court the appellant tendered a guilty plea to an indictment served in terms of section 76 of the Criminal Procedure (Scotland) Act 1995 containing two charges alleging offences committed on 4 December 2020 in Mill Street, Perth. The first charge was one of behaving in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that he acted in an aggressive manner towards police officers, shouted and swore at them and called them derogatory and racially offensive names, contrary to section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010; this charge was racially aggravated. The second charge was of assaulting a police officer, who was then acting in the course of her duties, by spitting on her face. The sheriff's report explains that the appellant was drunk at the time of the offences. The police had been summoned to deal with him. They intended to take the appellant home, a course of action to which he apparently took exception. He shouted and swore at the officers and, what was worse, deliberately spat in the face of one of them.

[3] In respect of charge 1, the sheriff imposed a sentence of 6 months' imprisonment discounted from 9 months to reflect the early plea. In respect of charge 2, the sheriff imposed a sentence of 22 months' imprisonment discounted from 33 months. The sentences were ordered to run concurrently. In the present appeal no issue was taken with the sentence for charge 1 or with the level of discount on the second charge. The challenge was solely to the headline sentence of 33 months imprisonment selected by the sheriff on charge 2.

[4] Mr Findlater, who appeared on behalf of the appellant, drew attention to *HMA* v *Lindsay supra*. There the court increased a sentence of 4 months' imprisonment, discounted from 6 months to reflect the guilty plea, to one of 10 months' imprisonment discounted

from 15 months. The charge was one of culpably and recklessly coughing in the faces of two police officers to the danger of their lives. The respondent had what was described as an "appalling" criminal record, which included 30 contraventions of the Police (Scotland) Act 1967, section 41(1)(a) or of the Police and Fire Reform (Scotland) Act 2012, section 90(1)(a).

[5] The appellant in the present case has a history of consistent offending dating from 2006. He has been convicted at sheriff and jury level on three occasions of a total of seven charges inferring violence. He has nine convictions for contraventions of the Police (Scotland) Act 1967, section 41(1)(a) or of the Police and Fire Reform (Scotland) Act 2012, sections 90(1)(a) or (2)(a).

[6] It was submitted on behalf of the appellant that the starting point of 33 months selected by the sheriff was excessive, particularly when the circumstances of the appellant's case were looked at in comparison to those of the respondent in *Lindsay*. In *Lindsay*, the court drew attention to the fact that the charge narrated danger to the lives of the police officers. That aggravation was absent in the appellant's case. While the appellant had been convicted on three occasions at sheriff and jury level for offences inferring violence, it was said that he had significantly less in the way of analogous convictions when compared to *Lindsay* and significantly less of a history of offending in general.

[7] We consider that the sheriff was undoubtedly right to take a serious view of the appellant's conduct in assaulting a police officer by spitting at her in the face from close range. As the sheriff aptly observes, such conduct is all the more deplorable in the course of the pandemic. Moreover, the appellant was drunk at the time.

[8] Nonetheless we consider that there is force in the submission that the sentence selected by the sheriff was excessive when compared with that imposed by this court in

Lindsay. Like the appellant in that case the present appellant has a disgraceful record of previous offending. We do not consider it appropriate or helpful to seek to draw fine distinctions between the respective records of the two offenders. The fact remains, however, that a starting point of 33 months imprisonment is more than twice the headline sentence considered appropriate by this court in *Lindsay*. Taking account of all the relevant features of the present case, we consider that a starting point of 15 months imprisonment would be appropriate. This falls to be discounted by one third to reflect the early plea. In the result, we shall quash the sentence imposed by the sheriff on charge 2 and substitute for it a sentence of 10 months imprisonment.

Barry McLean

[9] The appellant pled guilty to three charges: shouting and swearing at police officers and threatening them with violence; assaulting two officers by spitting at them; and struggling violently whilst in a police car to the danger of its occupants. He was sentenced to 9 months' imprisonment reduced from 12 months on the first charge, 18 months reduced from 2 years on the second, and 18 months reduced from 2 years on the third. The sentences on the first and third charges were ordered to run concurrently, but the sentence on the second charge (the offence of spitting at the officers) was to be consecutive. The net result was a sentence of 3 years imprisonment.

[10] Leave to appeal was granted at the second sift on the basis that, standing the decision in *Lindsay* v *HMA supra*, the starting point for the spitting charge was too high and it was arguable that the sentence on that charge should have been made concurrent with the other two sentences.

[11] In the present case the appellant has a less extensive record than the appellant in *Lindsay*, but we note that it includes a sentence of 5 years' imprisonment imposed in the High Court for offences under the Misuse of Drugs Act 1971 and the Firearms Act 1968.

[12] We have no difficulty in agreeing with the sheriff that assaulting police officers by spitting at them during the pandemic amounts to a serious offence. Nonetheless, we consider that the starting point of 2 years' imprisonment selected by the sheriff was too high, having regard to the guidance provided by this court in the case of *Lindsay*. In our opinion, the gravity of the appellant's conduct would have been sufficiently marked by a headline sentence of 12 months imprisonment, discounted to 9 months for the guilty plea.

[13] That leaves the question of whether the sheriff erred in making the sentence for the spitting charge run consecutively to the other two sentences. The sheriff took the view that this aspect of the appellant's conduct was separate from the behaviour reflected in the other charges and that the appellant's decision to assault two police officers by spitting at them at the height of the pandemic was a conscious and additional course of action which required the sentence to be treated separately and to be served consecutively. He did not consider that there should be, in effect, no additional penalty in respect of the assault by spitting charge. Before us Mr Paterson, who appeared for the appellant, submitted that the correct approach was to regard all that the appellant did as amounting to a single course of conduct. Moreover, the sheriff had failed to have regard to the totality of the sentences he imposed.

[14] We are persuaded that the sheriff erred in deciding to make the sentence for the assault by spitting a consecutive one. We note that this offence was committed at the same time and in the same circumstances as the other two offences. It constituted a component, no doubt a deplorable one, of what was in reality a single course of disorderly behaviour directed by the appellant at police officers. We acknowledge that there is no hard and fast

rule that sentences arising out of the same course of conduct have to be concurrent, but we are satisfied that in the circumstances of the present case the right course would have been to treat all the offences as amounting to a single continuing sequence of events and to impose concurrent sentences on all three charges.

[15] Accordingly, we shall quash the sentence imposed on charge 2 and in its place substitute a sentence of 9 months' imprisonment. That sentence will run concurrently with the sentences imposed in respect of charges 1 and 4. The result is that the total sentence to be served by the appellant will be one of 18 months' imprisonment.

[16] The supervised release order imposed by the sheriff will remain in place.