SHERIFF APPEAL COURT

[2021] SAC (Crim) 2
SAC/2020/000361/AP

Sheriff N McFadyen
Sheriff L A Drummond
Sheriff F Tait

OPINION OF THE COURT

delivered by SHERIFF N MCFADYEN

in

Crown Sentence Appeal

by

PROCURATOR FISCAL, HAMILTON

Appellant

against

JOHN DONNELLY

Respondent

Appellant: Edwards QC AD; Crown Agent
Respondent: Laurie; Faculty Appeals Unit

9 March 2021

Introduction

[1] In this case the Procurator Fiscal at Hamilton appeals under s 175(4) of the Criminal Procedure (Scotland) Act 1995 against a sentence of admonition imposed by a summary sheriff there and her decision not to impose a non-harassment order, both in respect of the assault to injury of the respondent's ex-wife, aggravated in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. Such an appeal can be made on a point of

law (section 175(4A)(a)) or, for present purposes, where it appears to the Lord Advocate, that the sentence was unduly lenient or the decision not to impose a non-harassment order was inappropriate (section 175(4A)(b) (i) and (ii)).

[2] The respondent went to trial on a charge that he did on 5 December 2017 at an address in Strathaven assault his former wife KD

> "and did strike her on the head and cause her to fall against furniture there, repeatedly strike her on the head and body with your hand, seize her by the clothing and pull her by same and cause her to strike her head against furniture there, kick her on the body and repeatedly seize her by the clothing and strike her body against the ground there, all to her injury
> and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner or ex-partner".

He was found guilty on 27 February 2020 after a two day trial under deletion of the words "kick her on the body".

[3] Although the appellant in this case does not rest on a point of law, he identifies what might be described at least as procedural infelicities, if not irregularities. As we have noted, this was a case which proceeded to trial. There were a number of delays at different stages in the history of the case, some affected by the COVID pandemic and a criminal justice social work report was called for, but it would appear that the diet for sentencing was ultimately adjourned to enable the matter to call before the summary sheriff who had presided at the trial and that, while he was present in the court house, he was treated as being unavailable and the case called before another summary sheriff who proceeded to sentence the respondent.

[4] The Sheriff tells us that she was sitting in a busy remand court. She was told that no criminal justice social work report was available through no fault of the respondent and she

was invited to proceed to sentence without having heard, or it would seem, sought to have heard anything about the facts of the case, beyond what she felt she could glean from the terms of the charge and a joint minute (which for practical purposes related only to injury and treatment). She noted that the respondent had been convicted in February 2020 and it was now November. She was told that the respondent was a first offender and had found the extended period over which sentence had been deferred to be stressful. There had been no further incidents or indeed any offending, the relationship of 20 years had ended and the summary sheriff felt able to conclude that it was unlikely that there would be any repetition of the respondent's behaviour. She admonished the respondent and did not impose a non-harassment order, although this was a case to which section 234AZA of the 1995 Act applied, requiring the imposition of such an order unless the court was satisfied that it was not necessary for the victim to be protected by such an order. The summary sheriff explains that she considered the question of a non-harassment order; the Crown had no recent information regarding the views of the complainer, but having regard to the fact that the relationship had ended three years previously, without any further incident and the respondent had been ordained throughout the proceedings, she did not consider there was a need for a non-harassment order in terms of section 234AZA(4)(c) and (5). The minutes of procedure do not record any consideration of the imposition of a non-harassment order.

[5] As regards the availability of a criminal justice social work report the summary sheriff was clearly misinformed; a report had been prepared and we have seen it. Had she read the report she might have appreciated that, although the offence was committed in December 2017 and there had been no offending since then, there had been difficulties resulting in police calls during 2018 and there was, at least as late as April 2020, an ongoing

business relationship between the respondent and the complainer which required to be conducted through lawyers.

[6] That might have placed her on notice that the position as regards a non-harassment order was less straightforward than one of an apparently isolated, almost three year old, first offence. But, more fundamentally, this was a case where the sentencing summary sheriff essentially knew nothing of the facts of the case and was simply not in a position to proceed to sentence.

[7] Having heard counsel in the appeal when it first called before us on 12 January 2021 we considered that we could not properly reach a conclusion without a report from the summary sheriff who presided at the trial and, accordingly, we continued the appeal for the purpose of obtaining a report, appointing the trial sheriff to provide a report setting out a summary of the evidence at trial and the conclusions that he reached in convicting the respondent.

Report from trial sheriff

[8] When the appeal called again on 9 March 2021 we had the benefit of a full report from the summary sheriff who presided at the trial and supplementary written submissions from both parties, as well as their original written submissions, for which we are grateful. The trial sheriff confirmed that he had indeed been present in the building and available when the respondent was sentenced.

[9] The trial sheriff reports that the complainer's evidence was that, on the day in question, she had returned from the gym. The respondent wanted to speak to her, because she had recently announced that she wanted a divorce. They were in the bedroom and she turned her back to him; he punched her on the head with closed fist. She got up, but was

confused and fell backward onto the bed. The trial sheriff has noted her as saying "He was punching me with both of his fists on my upper body ... I was trying to cover my face ... I rolled onto my right side ... into the foetal position." She was confused, frightened and crying. The respondent grabbed her by the clothing, pulling and pushing her around the bedroom which led to her being "banged off the furniture" and falling onto the floor. He then left the room and telephoned his sister, PS, telling her: "I've just attacked K". The Complainer later attended at Hairmyres Hospital, East Kilbride. She was noted to have "tenderness to the left rib area and a minor head injury" (as was agreed in the Joint Minute, paragraph 4). The Complainer told the doctor that she had sustained injuries as a result of falling down "4 or 5 stairs". The doctor noted that the injuries were consistent with the history provided (Joint Minute, paragraph 4).

[10] In cross-examination, it was put to the complainer that she was the aggressor and she denied this. She was shown a photograph which appeared to show scratches to the face of the respondent on the date in question and she indicated that these may have happened when she was trying to push him away in the course of the attack on her, but she did not assault him.

[11] The respondent gave evidence that, in the course of a discussion about divorce, the complainer told him "Stop shouting at me. Stop telling me what to do" and he put his hand on her shoulders and said: "What's happened to us?" Then "She went crazy ... lashed out with her fists and hands ... she kicked me on the face." He continued: "I can't remember what I did ... she's lying on her back ... I'm on top of her ... I genuinely don't remember what happened." He said:

> "she's trying to get past me ... she fell against the chest ... I had a moment of panic ... I don't remember what I did ... I pushed her and she fell to the floor ... maybe she tripped ... I could have pushed her ... she went down on to the tallboy".

He then left the room and telephoned his sister, saying: "We've been at it … I can't take it anymore."

[12] The Complainer had later tape recorded a conversation with the respondent regarding the events and a transcript was put to him. On the tape, he was heard saying inter alia: "I know that I lost my temper … I think that I slapped the back of your head … it was a 'red mist' moment." When asked in Court about this, the respondent stated:

> "I don't feel that I was completely in control at that point ... I don't know if I slapped her … I can't explain why I said that … the 'red mist' is being out of control. You're not 100% in control of your actions..."

Later, when interviewed by the police, the respondent stated:

> "I can't remember what I done … it was instinct ... I was out of control … so I put her on the bed … we were struggling ... my hands were still on her ... I can't remember what I was thinking ... I don't know if I pushed her away ... she fell and hit her left hand side on the corner of the tallboy ..."

[13] In cross-examination the respondent said:

> "I didn't grab her. I held her in an affectionate way ... I could have left the room, but didn't … she fell back and hit the tallboy ... I might have pushed her away … the 'red 'mist' meant that I was not in control ... I didn't have the ability to know what was happening … I don't know if I slapped her."

[14] Unsurprisingly, the trial sheriff did not find the respondent to be credible and reliable, at least to the extent to which his evidence could be said to be exculpatory, which itself seems doubtful.

[15] The trial sheriff tells us that he ordered a criminal justice social work report, given the serious nature of the assault, notwithstanding the absence of criminal convictions and he requested assessment for suitability for the Caledonian Project, which (inter alia) seeks to

help men who have been convicted of domestic violence. He considered that the respondent required supervision to address any anger management issues/poor impulse control issues (the 'red mist', as he would have it) that might lead him to offend again in this fashion. He considered it unlikely that he would have dealt with the respondent by way of a fine or compensation order and he would not have admonished the respondent. He would have given appropriate weight to the complainer's view as to the necessity or otherwise of a non-harassment order.

Submissions for appellant

[16] In the appellant's original submissions it was argued that the sentencing sheriff erred in placing too great an emphasis on the time which had passed since the commission of the offence in relation to sentence and had failed to take into consideration the procedural history of the case, including two defence motions to adjourn the case at diets of trial and a lengthy delay due to the pandemic. Moreover, she fell into error in proceeding to sentence the respondent when she had not heard the evidence at trial and the trial sheriff was in the building. She did not have sufficient information as to the gravity of the offence before her: there was a shortfall of information before her. She did not consider all relevant material, including the criminal justice social work report. She did not require to have the up to date views of the complainer as regards a non-harassment order in order to make an order: reference was made to the terms of s234AZA(4)(c) of the Criminal Procedure (Scotland) Act 1995 and *Barry Finlay* v *Procurator Fiscal Perth* [2020] SAC Crim 1, 2020 SC (SAC) 7 at [11]. It was submitted that the sentence imposed failed adequately to punish the respondent and insufficient regard had been given to the serious nature of the offence. In particular the sentence imposed failed to satisfy the need for retribution and deterrence,

particularly for an offence which was aggravated by section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The disposal was outwith the range of disposals which a judge at first instance, applying his mind to all the relevant factors, could have considered appropriate: *Bell* v *HM Advocate* 1995 SCCR 244.

[17] In further submissions in light of the trial sheriff's report the advocate depute founded on the report as setting out facts which clearly demonstrated the sentencing sheriff's erroneous approach to the case and she founded on the trial sheriff's observations as to sentence and the imposition of a non-harassment order. The complainer had been contacted and was still seeking a non-harassment order. She was still being contacted by the respondent through Facebook and posts on Facebook. She was seeking a non-harassment order in respect of herself and their youngest child, who resided with her. The court could make such an order under section 234AZA(3)(a), in respect of a child usually residing with the victim if the court was satisfied that it was appropriate for the child to be protected by the order.

Submissions for respondent

[18] In the respondent's initial submissions reference was also made to *Bell* and in particular to passages there indicating that mere leniency is insufficient (per Lord Justice General Hope at p250) and in particular to the consideration of cases where the issue is a narrow one and

> "it will be appropriate to identify the purpose which is sought to be achieved by declaring the sentence unduly lenient. This is a relevant factor, as the appeal court has a discretion as to whether or not to pass a different sentence if it is satisfied that the original sentence was unduly lenient. But it is not obliged to impose a more severe sentence if, in all the circumstances, it does not consider this appropriate.

> It should and will do so if a more severe sentence is necessary for the protection of the public, or because the offence is a very serious one and a more severe sentence is required in order to provide guidance to sentencers generally" (at p250-251).

[19] The sentencing sheriff did consider relevant factors, accorded them proper weight and the sentence imposed fell within the range of sentences which could reasonably have been considered appropriate in the circumstances of the case. She had dealt appropriately with the question of time that had passed and had properly recognised the procedural history of the case. Her decision to proceed to sentence was pragmatic and reasonable. The respondent was a first offender who had not re-offended. The criminal justice social work report described him as a person who posed a low risk of further offending and was not identified as posing a risk to others. He was identified as suitable for a deferred sentence, which was not so far removed from an admonition. The seriousness of the assault was towards the lower end of the spectrum and the sentence imposed, when set against the other mitigating factors present, was not outwith the appropriate range of disposals. Even if the court were to consider the sentence imposed as being unduly lenient, *Bell* was authority for the proposition that an appeal court was not obliged to impose a more severe sentence. She accepted that the criminal justice social work report described police attendances in 2018, but there had been no calls since then. The sentencing sheriff had taken account of relevant factors in deciding not to impose a non-harassment order.

[20] In her supplementary submissions in light of the trial sheriff's report, counsel for the respondent continued to submit that there had been no shortfall on information available to the sentencing sheriff, who had applied her mind to "all the relevant factors" (*Bell*, per Lord Justice General Hope, at p250). The only thing that was new was the trial sheriff's view that the respondent had "anger management issues/poor impulse control issues", but that was

not significant given that he was a first offender, the incident at issue had taken place nearly three years previously, and there had been no further offending in the interim period. We were referred again to the consideration in *Bell* as to when an appellate court should interfere with a lenient sentence. There was no reasonable basis for considering that a firmer disposal was required.

[21] The trial sheriff had been asked to report on the evidence and conclusions on the evidence and his comments as regards how he would or would not have dealt with the case should be ignored.

[22] The respondent denied contacting the complainer by Facebook; on the contrary, his position was that the complainer used Facebook to make comments essentially addressed to him about coercive control and the like. He only contacted her by way of solicitors' correspondence. He had sent two texts to their daughter ahead of Christmas and her birthday in order to try to maintain their relationship. However, it was clear contact from him was unwelcome and he did not intend to contact her further. It was not necessary for the court to make a non-harassment order as the complainer did not need protection from harassment and it certainly was not necessary with regard to the daughter.

Discussion

[23] This was a case where the sentencing sheriff was simply not in a position to pass sentence, having taken no steps to inform herself of the facts of the case. We repeat that this was a case where the summary sheriff who had heard the evidence at the trial was present in the building. He would have been well-equipped to form a view on the appropriate range of sentences and to decide on the appropriate sentence in the case. If, as was suggested in the sentencing sheriff's report, there was a difficulty in the trial sheriff hearing

the case at a particular time in the day, no doubt arrangements could have been made for it to call at a different time. If there was some insurmountable reason why the case could not have been called before him at some convenient point in the day, it could no doubt have been continued, again, for him to be available.

[24] There will, of course, be cases where the trial sheriff is unavailable and it is not reasonable or practicable for the case to be adjourned for his or her attention, yet the case should nonetheless be dealt with – typically because of a long absence from the court, or where the circumstances are very straightforward and the trial sheriff has deferred sentence for good behaviour and put a note on the complaint about his or her intended disposal in the event of good behaviour (as may happen in a simple case). But other than in that sort of simple case where the sentencing sheriff is essentially implementing the decision of the sheriff who heard the facts, any sheriff who has not heard the facts and comes to sentence an offender requires to take steps at least to attempt to ascertain the facts. That applies in any case, whether or not there has been a trial. Where there has been a trial that will mean ascertaining from parties, as best they can assist, on what factual basis the trial court convicted.

[25] What happened in this case was unacceptable and seems to us to have been irregular, but the question for us is whether it resulted in an unduly lenient sentence on the one hand and an inappropriate decision not to impose a non-harassment order on the other; and even if the sentence was unduly lenient, whether it is necessary for this court to interfere with it.

[26] We see no reason to ignore the observations of the trial sheriff as regards sentence, since he was well placed to form a view, having seen and heard the witnesses giving evidence, but we acknowledge that the decision is for us. Having considered the trial

sheriff's report on the facts, and the further submissions of parties, we have no hesitation in concluding that a sentence of admonition was unduly lenient. This was a sustained attack on a woman in her own home, with a domestic aggravation and where there were alarming statements by the respondent, including in his own evidence at trial as regards red mist and, by implication, anger management. There is a vast spectrum of behaviour in domestic violence cases, but this was by no means at the lowest end of the spectrum. The criminal justice social work report makes troubling reading, demonstrating a degree of denial and victim blaming which is not consistent with the respondent's evidence at trial, but it does confirm that he presented low risk of further offending. He was suitable for community disposals, but not the Caledonian Programme. We consider that in this case anything short of a community sentence as an alternative to custody would not only be lenient, but unduly so.

[27] That does not mean that the appeal necessarily succeeds, because the court requires to consider whether it should interfere with the sentence, notwithstanding it was unduly lenient. *Bell* confirms the discretion of an appeal court not to interfere with a sentence which is unduly lenient. While the Court there gave examples of cases where it may choose to interfere with such a sentence, as being necessary for the protection of the public, or because the offence was a very serious one and a more severe sentence was required in order to provide guidance to sentencers generally, these are only expressed as examples and were of course given in the context of solemn proceedings. We approach the matter in this case on the basis of asking ourselves whether an appropriate sentence in this case would have been significantly more severe or demanding than that which was imposed. Approached on that basis, we conclude that it would indeed be appropriate to impose, with the consent of the respondent, a community sentence in the form of a community payback order with a

requirement of 18 months supervision and 160 hours of unpaid work to be completed within 12 months.

[28] As regards the non-harassment order the sentencing summary sheriff has set out in her report her reasons for concluding that an order was not necessary. Nothing is minuted about that and we do not understand the reasons to have been explained at the time. Given the terms of section 234AZA(4)(c), which requires the sentencer to explain the basis of a decision to conclude that such an order is unnecessary, such reasoning requires to be given in court and it should be minuted. We consider that the sentencing summary sheriff has failed to justify her decision in this matter and, especially bearing in mind what is said in the criminal justice social work report about events since the offence and the business relationship between the respondent and complainer and what we are told about the complainer's continuing attitude, an order should have been imposed.

[29] We are not in a position to determine the merits of competing references to Facebook, but the fact that there are competing concerns certainly does nothing to drive us to the view that an order is unnecessary. On the other hand, bearing in mind the age of the daughter (who is now 14) and that there is no suggestion that she witnessed the offending, we do not consider it appropriate to extend any order to contact with her. Given the period that has elapsed since the offence we consider that an order prohibiting any direct contact with the complainer for two years would be appropriate.

[30] Our decision was given at the conclusion of the appeal on 9 March 2021 and we undertook to issue our reasons in due course. We accordingly sustained the appeal, quashed the sentence of admonition, imposed a community payback order with a requirement of 18 months supervision and 160 hours of unpaid work to be completed within

12 months and imposed a non-harassment order prohibiting contact with the complainer for a period of two years.