SHERIFF APPEAL COURT

[2021] SAC (Crim) 006
SAC/2021/132/AP
SAC/2021/187/AP

Sheriff Principal M M Stephen QC
Appeal Sheriff N McFadyen
Appeal Sheriff S Murphy QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

Appeal against sentence and Bill of Suspension

by

WILLIAM HEPBURN

Appellant

against

PROCURATOR FISCAL, PETERHEAD

Respondent

Appellant: Findlater, Advocate; George Mathers & Co, solicitors and advocates Aberdeen
Respondent: Farquharson QC, AD; Crown Agent

13 July 2021

[1] The appellant was convicted after trial at Peterhead Sheriff Court of contraventions of sections 3 and 30 of the Sexual Offences (Scotland) Act 2009. He was convicted of charge 1 as amended (a contravention of section 30) which involved various acts of sexual touching involving a complainer who was a child of 14 or 15 at the relevant time. The offence was committed over a period of two years and nine months immediately prior to the

complainer's 6th birthday at various locations. Charge two involved a continuation and progression of this sexual conduct towards the same complainer perpetrated once she had reached her 16th birthday and which continued for more than four years until December 2017 by which time she had reached the age of 20.

[2] The sheriff, having convicted the appellant following trial on 12 November 2020, adjourned for the purpose of obtaining a Criminal Justice Social Work Report (CJSWR). That report was prepared in December 2020 however, when the complaint called in court on 14 December another sheriff continued the case to call before the trial sheriff on 18 January 2021. However, the trial sheriff did not find the report helpful as the appellant continued to deny his guilt. She considered that the author had failed to effectively challenge the appellant as to his version of events in which he also attempted to discredit his victim. The case was continued further and the sheriff requested a meeting with the author of the CJSWR which meeting duly took place at Peterhead Sheriff Court together with the social worker's supervisor and the court social worker. Sentence was thereafter delayed until 15 April 2021 for a number of reasons including the availability of the sheriff. The sheriff on 18 January 2021 adjourned the case for a further period to allow the defence solicitor time to consider the CJSWR and to give him an opportunity to speak directly to the Criminal Justice Social Work Department about the report, an opportunity which he appears to have declined.

[3] Ultimately, on 15 April 2021 the sheriff having addressed herself to the terms of section 204(2) and (3A) of the Criminal Procedure (Scotland) Act 1995 imposed a custodial sentence of the maximum available to her on summary complaint namely 12 months imprisonment there being, in the sheriff's opinion, no other appropriate sentence.

[4] The sheriff at paragraph [15] of her report states:

> "[15] I considered that the maximum sentence that I could impose – that of twelve month – was the appropriate sentence to impose in this case. Any less would not be sufficient given the serious nature of the offence; it would not be a deterrent nor would it sufficiently reflect the disapproval for this kind of offence. I was mindful that Mr Hepburn had not served a custodial sentence before: again however I had to carry out a balancing exercise and did not consider that factor justified any reduction to this period."

The sheriff at paragraph [13] narrates that she was of the view that a community disposal in this case would be no sentence at all and would have no deterrent value. "Principally, such a disposal would fail utterly to express the disapproval society has for the egregious behaviour of the appellant. An important factor in determining the appropriate sentence here has been the attitude of the appellant. Not only has he shown no remorse, but he continues to place blame on the victim". The sheriff accepted also at para [13] that the appellant is at low risk of further offending and can be managed safely in the community. That, however, was but one factor. The appellant at the date of sentencing was aged 79 and had been a regular visitor to the complainer's home where she lived with her father and brother.

[5] The appellant firstly appeals sentence on the basis that the imposition of a custodial sentence was excessive standing all the circumstances. The sheriff had failed to attach sufficient weight to the particular circumstances of the appellant and the findings of the CJSWR. In particular, it is stated in the written case and argument lodged in support of the appeal against sentence

> "that the learned sheriff sought to excessively punish the appellant and indicated her desire to do so from the date of conviction. It is submitted that the irregular meeting with the social work in an attempt to have the social worker amend her report lends support to that."

[6] Subsequent to the lodging of the note of appeal against sentence the appellant lodged a bill of suspension seeking to suspend the sentence of imprisonment imposed by the sheriff.

The bill of suspension cites the procedural irregularity narrated above. The sheriff chose to meet with the author of the CJSWR together with the author's supervisor and the court social worker. The full extent of that discussion is not known as it took place in the absence of the appellant and of those representing both the appellant and the respondent. It is clear from the sheriff's report that she was dissatisfied with the original CJSWR. It is submitted on behalf of the appellant and now complainer that the sheriff's behaviour demonstrates a determination to influence the author to provide a basis for the learned sheriff to impose the maximum sentence. It demonstrates that the learned sheriff had closed her mind to the issue of sentence and non-custodial alternatives. Rather than being reassured by the contents of the CJSWR and persuaded by the mitigation advanced in terms of risk instead, the sheriff was determined to justify her stated wish to impose a sentence of imprisonment. The sheriff had made repeated comments as to her intended sentencing disposal namely, custody. The sheriff paid lip service to the requirements of s 204 and failed to consider the terms of the report properly ignoring community-based sentencing options. The sheriff erred in characterising a community disposal as "no sentence at all".

[7] In his oral submissions on the bill, counsel suggested that the bill augmented the note of appeal against sentence. It drew the court's attention to the irregular procedure adopted by the sheriff in arranging a meeting in her chambers with the author of the CJSWR and others outwith the presence of the accused and, indeed, the procurator fiscal depute. Proceedings, whether pre or post-conviction, should take place in the presence of parties (*McKay* v *HMA* 2015 HCJAC 55; *Drummond* v *HMA* 2003 SCCR 108). That the sheriff offered a similar facility to the defence agent on another occasion is irrelevant as it is the sentencer's purpose that is of concern to the appellant and ought to be of concern to the appeal court. The sheriff did not have an open mind on the question of sentence; she paid lip service to the

provisions of section 204(2) and (3A) raising the question whether she had closed her mind to other appropriate disposals.

[8] The advocate depute agreed that the sheriff's approach was unusual. However, the point is whether the sheriff had closed her mind to the sentencing options and what the effect of that might be in circumstances where the appellant had been convicted of serious sexual offences towards a young woman.

Decision

[9] The sheriff's decision to convict the appellant of charge 1 (as amended) and charge 2 on the complaint is not challenged on appeal. Instead, the appeal is directed towards the sheriff's sentence and her overall approach towards sentencing the appellant, who had not given evidence at trial and who had made exculpatory statements to the criminal justice social worker who prepared the pre-sentencing report. The appellant continued to deny his guilt and attempted to deflect responsibility onto the complainer. This, of itself, is by no means unusual in criminal proceedings.

[10] Following conviction of the appellant the sheriff had a duty in terms of section 21 of the Criminal Justice (Scotland) Act 2003 to provide a report to the criminal justice social work department on the facts in order that the pre-sentence report could be prepared. The criminal justice social work department were accordingly aware or ought to have been aware of the sheriff's decision to convict and the evidence which supported that decision. The criminal justice social work department therefore ought to have been aware of the gravity of the offending.

[11] It is instructive to remember that the provisions of section 204 of the Criminal Procedure (Scotland) Act 1995 require that the court does not pass a sentence of

imprisonment on a person of or over 21 years of age who has not previously been sentenced to imprisonment by a court unless the court considers that no other method of dealing with him is appropriate. In order to fulfil the court's duty in determining that matter the sheriff requires to take into account (by virtue of subsection 2A)

> (a) such information as the court has been able to obtain from an officer of the local authority or otherwise about his circumstances;
>
> (b) any information before it concerning his character and mental and physical condition;

Subsection (2A)(c) is not relevant given the circumstances of this case. That is the extent of the information which the court requires to obtain and assess before determining whether there is another appropriate method of dealing with the offender rather than custody. Of course, the court also requires to have regard to the terms of section 204(3A) namely, the presumption against short sentences of 12 months or less.

[12] Against that background it appears that the sheriff took issue with part 5(a) of the report together with the risk assessment. Part 8 of the report which is headed Review of Relevant Sentencing Options is provided for the court's information in order to give a menu of non-custodial options which the court may consider. Nonetheless, it is the trial sheriff who had the benefit of hearing and seeing the witnesses and who convicted the appellant who has the duty to apply the provisions of section 204 and sentence according to the gravity of the offence and any mitigating factors relating to both the offending and the offender.

[13] The sheriff's decision to engage directly with the author of the CJSWR outwith the presence of the parties is highly irregular. It matters not that the defence solicitor was given the opportunity to seek a meeting separately with the criminal justice social work

department. We cannot see that that is of any assistance or ameliorates this irregular procedure. The bill is concerned with the sheriff's conduct. In any event the defence solicitor declined to do so due to the nature of what the sheriff proposed being inappropriate.

[14] Unfortunately, the sheriff's decision to adopt this procedure raises the question of bias or the appearance of bias. The test for bias or lack of impartiality was set out by Lord Hope of Craighead in *Porter* v *McGill* [2001] UK HL 67, [2002] 2AC 357 at [103]. The test is whether "the fair-minded and informed observer, having considered the facts, … would conclude that there was a real possibility that the tribunal was biased"? Here it is argued that the sheriff had made statements in open court leading to the sentencing diet on 15 April 2021 about her displeasure as to the appellant's position namely, that having declined to give evidence at trial, he had used the interview with the social worker as a platform to put forward a defence to the action and malign the complainer. It can be argued that the sheriff had shown bias, or the appearance of bias, towards the appellant and that she was determined to impose the maximum custodial sentence despite the terms of the criminal justice social work report.

[15] We have the sheriff's comments in her report on the appeal against sentence however the sheriff has declined to provide any report following the lodging and warranting of the bill of suspension. Although the sheriff was transparent with parties as to her intention to challenge the author of the report at a meeting held in private it is unavoidable that we must conclude that the procedure adopted by the sheriff was not only irregular but could give rise to the possibility of bias in the mind of a fair and informed observer. It has long been established that the prohibition on conducting any part of the criminal process in the absence of the accused is "deeply rooted in the criminal law of Scotland" (*Aitken* v *Wood* 1921

JC 84). In that case, a magistrate examined an injury to the arm of a complainer in private after evidence had concluded. Even though the present irregularity occurred after conviction the sheriff developed an improper form of proceeding in the absence of any other party by having the meeting with the author of the criminal justice social work report in private. That in itself is irregular and raises the question whether there was, at least, the appearance of bias in so doing. This unwise decision on the part of the sheriff produced no discernible outcome in the sense of there being a supplementary CJSWR prepared, but does serve to underline her dissatisfaction with what she clearly thought was a report which leant too far towards the accused. The answer is that the sheriff should not have adopted that approach. She was the trial sheriff who had heard the evidence and required to discharge her duty to sentence the appellant having regard to the statutory restriction on imposing a first sentence of imprisonment and also a short sentence. If she considered that the CJSWR did not adequately challenge the appellant on the evidence she could have raised that concern in open court and invited the appellant's solicitor to address her on whether a supplementary report should be obtained addressing particular issues or questions.

[16] In these circumstances, and given that the sheriff has failed to provide a supplementary report to the appeal court on the statement of facts in the bill of suspension, we are entitled to conclude that the procedure adopted by the sheriff has left her open to the criticism that she was determined to challenge, in private, the author of the CJSWR as to the content of the report which she found painted too favourable a gloss on the appellant: his attitude to the offences and his personal circumstances. We do not accept that the sheriff was trying to engineer a different conclusion to the report or its recommendations however the sheriff, due to her unfortunate decision to proceed as she did, has allowed that point to be made on appeal and has opened herself up to adverse critical analysis. The submissions

made before us today in support of the bill as to the sheriff's manner of proceeding, lend weight to the contention that the sheriff gave at least an appearance of bias against the accused and accordingly the bill falls to be passed.

[17] Counsel for the appellant did not contend that by passing the bill the sentence should be suspended simpliciter and no sentence imposed rather that this court should determine the appropriate sentence. However, there being little, if any, reference to the plea in mitigation in the sheriff's report, we heard counsel for the appellant on his personal circumstances which are to a significant extent as reported on in the CJSWR. The appellant is now 79 and has health problems. Following the approach of the sheriff we determined sentence as if the appellant had not previously been sentenced to a period of imprisonment there being no such sentence in the schedule of previous convictions, although the CJSWR referred to a previous sentence and counsel confirmed that the appellant had previously served a three month sentence. Standing the charges of which the appellant has been convicted and the terms of the section 21 report, incorporated into the sheriff's report on sentence, we are of the view that a custodial sentence is the only appropriate sentence standing the nature and gravity of the offending which took place over a significant period of time involving the same complainer. However, having regard to the appellant's circumstances we consider that it is not necessary to impose the maximum sentence on summary complaint and having regard to the provisions of section 204(3A) we consider that this is a case where a short custodial sentence is justified having regard to the gravity of the offending and the need for punishment. We will therefore quash the sentence imposed by the sheriff and impose a sentence of eight months imprisonment.