APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 14
HCA/2020/353/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

Appeal against Sentence

by

RONALD McMAHON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Keenan, (sol adv); for McCusker McElroy & Gallanach Solicitors, Paisley
Respondent: Prentice QC (sol adv) AD; Crown Agent

2 February 2021

[1] The appellant pled guilty at Glasgow High Court on 26 November 2020 to a charge which libelled that on a date in July 2020 at an address in Paisley he did have in his possession, without the authority of the Secretary of State or the Scottish Ministers, a firearm which was disguised as another object, namely a stun gun disguised as a mobile phone,

contrary to the Firearms Act 1968 section 5(1A)(a) as amended. He was sentenced to 6 years' imprisonment, backdated to 1 July 2020.

[2] The offence to which the appellant pled guilty was one for which Parliament has prescribed a minimum sentence of 5 years imprisonment. It was accepted before the sentencing judge (and before this court) that there were no exceptional circumstances, and so the minimum sentence required to be 5 years imprisonment. The appellant was aged 57 and suffered from poor health. He had a bad record of previous convictions for a wide variety of offences, including a conviction in the High Court of offences under the Misuse of Drugs Act 1971, the Firearms Act, assault and wilful fire-raising which resulted in a sentence of 12 years imprisonment. Taking all these factors into account the sentencing judge concluded that a sentence of 6 years imprisonment was appropriate. No issue is taken in this appeal with that conclusion. The only issue is whether the sentencing judge should have applied a discount to this sentence to reflect the early plea of guilty.

[3] The sentencing judge made the following observations in relation to the grounds of appeal:

> "[12] The grounds of appeal are that while section 51A of the Firearms Act 1968 overrides section 196 of the Criminal Procedure (Scotland) Act 1995, I should nevertheless have discounted the period in excess of the minimum. I understand that to mean that I should have deducted 25% from 12 months and sentenced the appellant to 5 years and 9 months imprisonment. No such submission was made to me.
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> [13] I do not understand that to be a correct interpretation of the law. The opportunity under section 196 of the 1995 Act to allow a discount in respect of a plea of guilty is preserved by section 196(2) in respect of minimum sentences under the Misuse of Drugs Act 1971, but in respect of the Firearms Act 1968 there is no such sub-section. The case of *HMA* v *James McGovern* 2007 SCCR 173 has *obiter dicta* to the effect that section 196 of the 1995 Act does not apply when a minimum sentence is prescribed by the 1968 Act: see paragraph 6. Thus I do not accept that there is any warrant for discounting the sentence."

[4] The written submissions lodged on behalf of the appellant took a rather different approach from that outlined in the note of appeal, and stated as follows:

> "5. With regard to the question of a discount the note of appeal suggests that the period in excess of the minimum period ought to have been discounted for the guilty plea. With respect that is not the approach to be taken where a minimum sentence requires to be imposed. The approach to be followed was set out in *Harkin* v *Brown* 2012 SCCR 617 namely to take the whole sentence, ie 6 years, and apply the appropriate discount to that. If that takes the resultant sentence below the statutory minimum then the appropriate sentence to be imposed will be the statutory minimum. In *Harkin* v *Brown* the appellants each raised the question of whether any statutory minimum period should be deducted from the headline sentence before any discount was applied. The sentences were periods of disqualification and penalty points which had statutory minimums. The Appeal Court held that the discount required to be applied to the headline sentence without deducting from it any statutory minimum. The Appeal Court considered that that was clear from the *dictum* of the Lord Justice Clerk in *Gemmell* v *HMA* 2012 SCCR 176 at paragraph 55 and the approach taken to the sentences by the Appeal Court in that case - se *Harkin* at paragraph 5.
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> 6. The Appeal Court in *Harkin* also referred to the approach to be taken where the statutory minimum related to a sentence of imprisonment and clarified section 196(2) of the Criminal Procedure (Scotland) Act 1995. That provision allows the court to go below the statutory minimum in certain situations where a plea has been tendered (where there has been a third conviction for certain offences relating to drug trafficking). In *Harkin* the Appeal Court explained that section 196(2) would not be required if discounting only applied to that part of the sentence of imprisonment above the statutory minimum - paragraph 6. In the appeal of *Harkin* the Appeal Court applied the discount of one third to the headline period of disqualification. As the court indicated, that would have taken the disqualification down to 32 months which was below the statutory minimum. The appropriate disqualification was accordingly the statutory minimum namely 3 years."

[5] In the present case, the appellant had tendered a plea of guilty at the first preliminary hearing. The sentencing judge noted that the indictment was served on the same day as a letter under section 76 of the Criminal Procedure (Scotland) Act 1995 was received by the Crown. The appellant had clearly attempted to resolve the matter at an early stage. There was utilitarian value to the plea as court time and money were saved. It was accepted that the appellant could not benefit from the full discount of one quarter (or even perhaps one third) which might otherwise have been applied, because this would bring

the resultant sentence below the statutory minimum, the sentence that ought to have been imposed was one of 5 years' imprisonment discounted from 6 years imprisonment.

Discussion and decision

[6] We consider that the sentencing judge was in error in concluding that it was not open to her to apply a discount to reflect an early plea of guilty where the resultant sentence is in excess of the minimum period laid down by Parliament for that offence. There is no justification for such a conclusion in the terms of section 196 of the 1995 Act. Section 196(1) provides that:

> "In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account -
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> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
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> (b) the circumstances in which that indication was given."

This provision applies generally, and so applies to offences for which Parliament has provided a minimum sentence, with the important proviso that the discounted sentence cannot fall below that minimum sentence. Section 196(2) makes a particular provision in relation to the minimum sentence for a third conviction of certain offences relating to drug trafficking, provided for in section 205B(2) of the 1995 Act, and enables the court to apply a discount in that situation below the minimum sentence of 7 years' imprisonment provided that the sentence is not less than a specified lesser period. There is no such provision in relation to a minimum sentence in terms of the Firearms Act. However, that does not mean that the general provisions in section 196(1) of the 1995 Act have no application to sentencing under the Firearms Act. The result is that, for an offence for which a minimum

sentence is provided under the Firearms Act, a discounting exercise may be carried out provided that the resultant sentence does not fall below the specified minimum period.

[7] The sentencing judge found support for her view that there was no warrant for discounting the sentence in paragraph 6 of *HMA* v *McGovern*, which she states contains *obiter dicta* to the effect that section 196 of the 1995 Act does not apply when a minimum sentence is prescribed by the 1968 Act. It should be borne in mind that *HMA* v *McGovern* was a Crown appeal against the decision of a sentencing judge that exceptional circumstances existed in that case, and that the sentence was therefore unduly lenient. The focus of the case was on exceptional circumstances, and not on discount. Towards the end of paragraph 6, having noted the terms of section 196(2), the court observed as follows:

> "There is no comparable provision permitting a discount below the statutory minimum sentence provided by section 51A of the Firearms Act. It was not therefore in dispute before us that the effect of that section is to override the provisions of section 196 of the 1995 Act, so that the court is obliged to pass a sentence of not less than the statutory minimum unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so."

[8] The court in the quoted passage was not stating that there was no scope at all for discounting where a minimum sentence was required, but merely that any discount of a sentence greater than the minimum sentence could not be discounted so that the result was less than the minimum sentence.

[9] For these reasons we consider that the sentencing judge was in error in concluding that there was no warrant for discounting the sentence in this case. We consider that the approach urged on behalf of the appellant is correct. In accordance with *Harkin* v *Brown* the sentencing exercise should have been:

(1) to identify the appropriate headline sentence in all the circumstances. In the present case this was 6 years' imprisonment, and no issue is taken with that assessment;

(2) to identify the appropriate discount to reflect the stage at which a plea of guilty was tendered. The sentencing judge did not consider this, because she considered that there was no warrant for this. In this respect she was in error. The indictment was served on the same day as a section 76 letter was received, and a plea of guilty was tendered at the preliminary hearing. In these circumstances, it might be expected that a discount of at least 25% would be applied;

(3) applying such a discount would result in a sentence of less than the minimum sentence of 5 years. There was no suggestion that there were exceptional circumstances. The sentence therefore required to be discounted from the headline of 6 years to the minimum sentence of 5 years.

[10] We shall accordingly allow this appeal, quash the sentence of 6 years' imprisonment and substitute a sentence of 5 years imprisonment, being the minimum sentence laid down by Parliament. This sentence will be backdated to 1 July 2020.