APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 64
HCA/2019/000136/XC

Lord Drummond Young
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST SENTENCE

by

JOSH MCLEAN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: C Fyfe (sol adv); Paterson Bell, Solicitors, Edinburgh (for Bruce Short & Co, Dundee)
Respondent: M McFarlane AD; Crown Agent

10 September 2019

[1] The appellant was convicted, after trial in the sheriff court, of six charges. They all involved offences committed against his former partner. Charges 1 and 5 were contraventions of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010, aggravated in each case under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. Charges 2 and 3 were offences of common law assault; they were each

subject to the same aggravations. Charges 4 and 6 were contraventions of section 27(1)(b) of the Criminal Procedure (Scotland) Act 1995, again subject in each case to the same aggravations.

[2] Charges 4 and 6 arose from the appellant approaching or contacting his former partner in breach of bail conditions. Charges 1 and 2 arose from an incident on 31 August 2018 when the appellant attacked his former partner in a public place. Charges 3 and 4 arose from an incident on 16 September 2018 when he attacked her at the appellant's parents' home in what the sheriff describes in his report as a prolonged and vicious display of physical violence and intimidation with a knife. Charges 5 and 6 arose from an incident on 18 September 2018 when the appellant came to the complainer's home in the early hours of the morning. In the course of that incident he screamed and shouted at her and kicked the door.

[3] Having obtained a Criminal Justice Social Work Report, the sheriff sentenced the appellant to an extended sentence of 6 years imprisonment comprising a custodial element of 4 years and an extension period of 2 years. The custodial element was calculated by aggregating the following periods:

- Charges 1 and 2 a *cumulo* period of 8 months imprisonment;
- Charges 3 and 4 a *cumulo* period of 36 months imprisonment; and
- Charges 5 and 6 a *cumulo* period of 4 months imprisonment.

[4] This was important because section 210A(1) of the Criminal Procedure (Scotland) Act 1995 allows the court to impose an extended sentence under certain circumstances. In relation to a violent offence, the court may impose an extended sentence if it intends to impose a determinate sentence of 4 years or more and considers that any period on licence

would not be adequate to protect the public from serious harm. A violent offence is defined in section 210A(10) as meaning any offence inferring personal violence.

[5] Before us it was argued in the first place that the extended sentence was incompetent and secondly that the total custodial period was, in any event, excessive.

[6] In support of the first line of argument, Mr Fyfe on behalf of the appellant submitted that charges 5 and 6 were not offences inferring personal violence for the purposes of section 210A of the 1995 Act. That being so, the sheriff, it was argued, had erred in aggregating those offences with the others in order to reach the 4 year threshold required for the imposition of an extended sentence in relation to a violent offence.

[7] The sheriff helpfully set out the evidence at the trial in relation to charges 5 and 6 in his report. The complainer said that the appellant came to her door at 2.00am. She gave evidence that if she had not let him in he would have forced his way into her property. She testified that the appellant "went off his head" again, screamed and shouted at her in front of her 3 year old daughter and threatened to "batter" her in front of the child. The complainer said that this conduct went on for around 10 minutes. After the appellant left, the complainer locked the front door and then heard him kick or volley the door with full force three to five times.

[8] Mr Fyfe submitted that all this amounted to no more than threatening future violence and was not capable of being characterised as inferring personal violence for the purposes of section 210A of the 1995 Act. We are not persuaded by that submission.

[9] In our opinion, the conduct on the appellant's part, as described by the sheriff, clearly inferred personal violence against the complainer. She was the target of the appellant's behaviour in the course of a violent and aggressive episode which extended to his attempting to force his way into her home in the early hours of the morning.

[10] That is not the end of the matter, however. As we have explained, the sheriff also took charges 4 and 6 into account in the aggregating exercise that he carried out. These were each stand-alone offences of failing to comply with the conditions of bail orders by approaching or contacting the complainer.

[11] The sheriff held that the section 27(1)(b) charges, when considered in the context of the complainer's evidence, were examples of behaviour by the appellant towards the complainer that inferred personal violence. His view was that on both occasions the appellant had been the subject of a bail order not to approach or contact the complainer, but he had breached this order by on 16 September 2018 violently assaulting her and on 18 September 2018 by the conduct in which he engaged on that date.

[12] In the sheriff's view, the breaching of the bail order on each occasion was conduct that inferred personal violence because as he put it "it was patently done with a view to confronting the complainer with aggressive, threatening or violent behaviour with a view to intimidating her".

[13] With all respect to the sheriff, we consider that in regard to his reasoning on this branch of the case he fell into error. It is no doubt correct that these offences were the prelude to the violence that the appellant committed against his former partner on 16 and 18 September 2018, but we are not persuaded that it can properly be said that the infringements of the bail conditions themselves inferred personal violence.

[14] The conditions of bail to which he was subject required the appellant not to approach or contact the complainer without reasonable excuse or to attempt to do so. It was his conduct in approaching and contacting her that constituted the offence in each case under section 27(1)(b) of the 1995 Act, not what he did once he had approached and contacted her.

[15] For these reasons we do not consider that the appellant's behaviour in failing to comply with his bail conditions inferred personal violence. It follows that the sheriff's approach in including charges 4 and 6 in the group of offences said to infer personal violence was misconceived. In these circumstances, we consider that the extended sentence was incompetent. We shall therefore quash the sentence imposed by the sheriff.

[16] That leaves for this court the question as to what sentence should be imposed in place of the extended sentence. Mr Fyfe argued, somewhat faintly, that a total period of 4 years in custody was excessive. We are unable to agree with that submission. We find ourselves in complete agreement with the sheriff that these offences were serious. We agree also that they amounted to a continuation of a pattern of domestically aggravated offending as disclosed in the appellant's previous convictions. In our view the appellant engaged in a pattern of repeated and serious violence towards his former partner on three separate occasions.

[17] In the whole circumstances we shall substitute for the extended sentence a *cumulo* sentence of 4 years imprisonment.