SHERIFF APPEAL COURT

[2018] SAC (Crim) 1
SAC/2017/000602/AP

Sheriff A L MacFadyen
Sheriff N McFadyen

OPINION OF THE COURT

delivered by

SHERIFF NORMAN MCFADYEN

in Appeal against Sentence by

PETER DONNELLY

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

Appellant: Macintosh; Pryde & Co SSC, Edinburgh for Glasgow Law Practice, Glasgow
Respondent: MacFarlane, AD; Crown Agent

17 January 2018

[1] This appeal concerns the question whether it is competent for a court to make a non-harassment order (NHO) at the same time as deferring sentence. The appellant was found guilty after trial of charges of contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and section 47(1) of the

Criminal Law (Consolidation) (Scotland) Act 1995 and the summary sheriff adjourned sentencing for the preparation of background reports. On 4 May 2017 the sheriff deferred sentence for a period of a little under three months, as she states for clarification of the appellant's ability to work, and for a community payback order progress report, although the minutes also record that the deferral was for the appellant to be of good behaviour and she imposed an NHO for a period of two years. Whatever the purpose of deferral of sentence, the sheriff was plainly acting under section 202 of the Criminal Procedure (Scotland) Act 1995. The appeal is now concerned only with the competency of the NHO and it was only on that ground, which was not initially raised by the appellant, that the appeal sheriffs at second sift allowed leave to appeal.

[2] The challenge to competency is based on the fact, it is said, that an NHO is a sentence, in terms of section 234A of the Criminal Procedure (Scotland) Act 1995.

[3] In support of his submission that the order made was incompetent, Mr Macintosh referred us to *McLaughlin* v *McQuaid* 2005 JC 95, [2005] HCJAC 87, where it was held that, in the absence of an express provision enabling the sheriff to sit again in the same case, a requirement purporting to set up a further hearing as a progress review in relation to a probation order was incompetent (at [14]) and

> 'as a general rule, a court is functus after passing sentence, and has no power to sit again in the same case' (at [13]).

[4] He also referred us to *Duncan* v *Spiers* 2008 JC 355, to which he had been properly referred by the Crown, where the High Court held that the making of an antisocial behaviour order (ASBO) at the time of deferring sentence for good behaviour was incompetent as well as being undesirable for a number of reasons.

The court considered that the effect of section 234AA(10) of the 1995 Act was that the ASBO was a sentence. The wording actually used in subsection (10) is that an ASBO 'shall be taken to be a sentence for the purposes of an appeal', but in reaching the view that the order was incompetent the court also founded on the language of the general provision allowing for the making of an ASBO, section 234AA (1), that where qualifying circumstances arose

> 'the court may, instead of or in addition to imposing any sentence which it could impose, make an antisocial behaviour order in respect of a person'.

[5] The court also considered that there were undesirable consequences to the making of such an order. In the event that the appellant breached the order he was at risk of receiving a more severe sentence for the original offence if during the operation of the order an incident occurred which constituted an offence under section 9(1) of the Antisocial Behaviour etc (Scotland) Act 2004 , founding on the express provision in the 2004 Act against double jeopardy (section 9(3)). The court was also concerned about what it considered to be the absence of a statutory right of appeal against an ASBO, where there has been no final disposal of the charge or charges justifying the order (at [9]).

[6] The Advocate Depute accepted that the wording of the provisions in section 234A and the approach taken by the High Court in *Duncan* caused some difficulty, but did not go so far as to concede that the order made in this case was incompetent.

[7] We do not consider that *McLaughlin* v *McQuaid* is relevant here. It was concerned with the particular context of the then regime of probation orders and the general rule that a court is functus after passing sentence, and has no power to sit

again in the same case, is one which is clearly subject to exceptions (for example in the case of breach of a community payback order: section 227ZC(7))).

[8] However, given the authority of *Duncan* it is necessary to address the wording of section 234A, which provides for NHOs and to compare how that differs, if at all, in substance from that of section 234AA.

[9] Section 234A(3) states that an NHO may be appealed against 'as if the order was a sentence'. It does not say in terms that it is a sentence and it could be concluded that, other than for the purposes of determining how it may be appealed, it is not a sentence. While section 234AA(10) appears to us to be more prescriptive in stating that an ASBO 'shall be taken to *be* a sentence for the purposes of an appeal' (our emphasis), it is nonetheless also concerned explicitly with appeal procedure and we can see that the distinction between the two provisions may be more apparent than real. To that extent, therefore, it may be unsafe to rely only on the plain wording of section 234A(3) in order to draw the inference that an NHO is not a sentence.

[10] We consider that the difference in the wording of the general power to make the relevant order is more significant. Thus in an ASBO the power is to make the order 'instead of or in addition to imposing any sentence' (section 234AA(1)), whereas in an NHO it is to make the order 'instead of or in addition to dealing with the accused in any other way' (section 234A(1A)). We have no difficulty in seeing that the wording of the ASBO provision excludes the making of an ASBO until the sheriff comes to sentence the offender – or to conclude finally that only an ASBO is required. But is the expression 'dealing with the accused in any other way' to be treated as referring to disposing of the case? We are not convinced that 'dealing with' is a term of art. It is an expression used throughout the 1995 Act in different

contexts, some no doubt directly referable to disposing of a case (eg section 204(2)), others plainly of more general application (eg sections 49(3)) and 50(6)), but it does not seem to us that the use of the expression in this particular provision has a connotation of disposing finally of the case. We consider that a sheriff who defers sentence is dealing with the case. If the legislature intended to limit the power to make an NHO to the time of sentence or final disposal of the case it could readily have made that clear, most obviously by using the same or similar language to that adopted for ASBOs.

[11] It seems clear to us that a court which defers sentence under section 202 of the 1995 Act is dealing with the accused (and of course a deferred sentence can be the subject of appeal in the same way as an appeal against sentence: see section 175(2)(c) and section 186(2)). Section 234A(1A) does not require that an NHO is made at the time of final disposal of the case and we are driven to the conclusion that the NHO was not incompetent.

[12] That is sufficient to dispose of the appeal, but for the sake of completeness we should perhaps address the wider concerns which the High Court expressed in *Duncan*.

[13] As far as concerns what might be described as the double jeopardy point in *Duncan*, we would simply observe that the structure of the legislation relating to protection from harassment is different from that relating to ASBOs. While civil NHOs are provided for under the Protection from Harassment Act 1997 and that Act is the source of section 234A, the offence in section 234A(4) is free standing and does not contain any provision analogous to section 9(3) of the 2004 Act , which does apply to criminal ASBOs (section 234AA(11)).

[14] As far as concerns the matter of appeal, whatever may be the position as regards an ASBO, we do not see how an appellant who wished to have an NHO brought under review would be prevented from doing so while sentence remained deferred. If the NHO can be appealed as if it were a sentence, we cannot see how the fact that sentence was also deferred would present an obstacle to that statutory appeal – and as we have already noted a deferred sentence can itself be appealed.

[15] In any event, it would have been open to the sheriff to leave the matter as one for special conditions of bail, which would have had much the same effect as an NHO and in such a case, a breach of bail would be a matter for the sheriff to consider when it came to sentence, while no doubt avoiding punishing the appellant twice for the same behaviour on general principles.

[16] We see nothing inherently problematic in an NHO running alongside a deferral of sentence and we certainly find no reason to hold that the NHO imposed in this case was incompetent. We shall therefore answer question 4 in the stated case in the affirmative and refuse the appeal.