



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 27  
HCA/2017/000628/XC

Lord Menzies  
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

**ANDREW MURRAY**

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: Findlater; Faculty Services Limited (for Ward & Co, Perth)**  
**Respondent: M Hughes, AD; Crown Agent**

9 January 2018

[1] The appellant Andrew Murray is now 22 years old. On 15 September 2017 he pled guilty to a contravention of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 and, after preparation of a Criminal Justice Social Work Report, received a sentence of 21 months' imprisonment on 24 October 2017. The sentence was restricted from the

period of 24 months which the sheriff would otherwise have imposed but for the appellant's plea of guilty.

[2] The offence to which the appellant pled guilty was one of engaging in a course of conduct which caused his then partner fear and alarm. It was committed over a 6 month period between April and October 2016.

[3] The circumstances of the appellant's conduct were explained in the report which the sentencing sheriff provided to this court. They can be summarised as follows. In May 2016 the appellant moved into a property in Coupar Angus which the complainer was the tenant of. They had previously been in a relationship. The complainer's neighbours, family and friends quickly noticed a difference in her behaviour. She stopped wearing makeup, rarely left the house and was hostile to any well-meaning enquiry. Neighbours often heard the appellant shouting in the house and heard the complainer crying and clearly being upset. The appellant was jealous of any males who were friendly with the complainer and instructed her to remove male acquaintances from her Facebook account. He regularly checked her mobile telephone and social media messages and behaved in a controlling manner. He regularly criticised her, including calling her an unfit mother. He caused damage to items in the house. He punched a hole in a bedroom wall and smashed a photograph hanging above the bed. He threw cups against a wall and repeatedly threatened to injure himself. He accused the complainer of being unfaithful to him and, if she dressed in a certain way, suggested that she was going to meet another male.

[4] The appellant continued to act in a bullying, offensive and controlling manner towards the complainer and various examples of this conduct were provided by the sheriff in his report. This included the appellant sending a photograph to a friend of his without the complainer's consent which showed him and the complainer lying on a sofa in her home

in which she could be seen in a state of partial undress. Towards the end of September 2016 the complainer left her property in order to live with her own mother having reported the appellant's actions to the police. The appellant continued to reside in the flat at Coupar Angus. On 26 September 2016 the complainer received a series of Facebook messages from the appellant during which he informed her that he had found a scrapbook which she had prepared as a tribute to her late father. The appellant made various complaints to the complainer about the content of the scrapbook. On 3 October the complainer returned to her flat and discovered that certain pictures in it had been defaced by the appellant. This was a matter of particular upset to the complainer.

[5] In light of this conduct the sentencing sheriff concluded that the appellant had pled guilty to a serious offence. He took account of the nature and characteristics of the appellant's behaviour, the affect it had on the complainer, the fact that it was committed in a domestic context and his assessment, drawn from the Criminal Justice Social Work Report, that the appellant did not accept responsibility for his conduct. The sheriff also took account of the proposals in the Criminal Justice Social Work Report for the imposition of a non-custodial penalty. He observed that the appellant was assessed as unsuitable for the Building Better Relationships accredited group work programme and considered that there was a question mark over whether he was prepared to engage satisfactorily with an order for the imposition of unpaid work.

[6] The sheriff concluded that a non-custodial disposal would not constitute an appropriate penalty for the appellant's actions and, as he put it, that he, and perhaps as important other persons, had to be made aware that such behaviour was totally unacceptable. In these circumstances he concluded that only a sentence of imprisonment was appropriate and settled on the headline period of 24 months.

[7] On the appellant's behalf Mr Findlater adopted the content of the written submissions in support of the appeal tendered in advance of the hearing. He acknowledged in those submissions the unacceptable nature of the appellant's conduct as set out in the charge to which he pled guilty but it was submitted that the conduct ought to have been viewed in the course of a dysfunctional relationship. It was submitted that the charge itself was not one which would be bound to result in a custodial sentence. Principally though, the written submissions founded upon the appellant's personal circumstances in support of the contention that a non-custodial disposal was appropriate or, in the alternative, that the period selected was excessive. It was pointed out that the appellant was aged 20 years old at the start of the offending and aged 21 at the end. It was pointed out that he was of previous good behaviour. Attention was drawn to the appellant's difficult upbringing as set out in the Criminal Justice Social Work Report and to the behavioural issues which were seen to underpin his offending by the author of that report. It was submitted that, to some extent at least, those behavioural issues resulted from the appellant's difficult upbringing. It was also explained that since the offending ceased the appellant had taken various steps to bring about change in his life. He had moved to live with the family of a friend which provided a positive and nourishing base for him. He was making positive use of his time and was looking for employment. In supplement of those submissions Mr Findlater explained to us that the appellant has been offered a place on a college course in Newcastle.

[8] In the written submissions particular emphasis was given to the suggestion that the sentencing sheriff had failed to give appropriate weight to the appellant's youth in identifying the appropriate disposal. Attention was drawn to the apparent absence of this consideration in the passages of the sheriff's report in which he assesses disposal. The written submissions reminded us of what had been said in the cases of *Kane v Her Majesty's*

*Advocate* 2013 SCCR and *Smart v Her Majesty's Advocate* 2016 SLT about the importance of taking account of an accused person's youth and upbringing in assessing sentence. The written submissions also criticised the sheriff's assessment of the appellant's suitability to participate in the sort of non-custodial disposals suggested in the Social Work Report.

[9] We have given due consideration to all of the points identified. In considering the sentence imposed in this case appropriate weight has to be given to the terms of section 204(2) of the Criminal Procedure (Scotland) Act 1995. That provision provides that:

"A court shall not pass a sentence of imprisonment on a person of or over 21 years of age who has not been previously sentenced to a period of imprisonment or detention unless the court considers that no other method of dealing with him is appropriate."

Further factors to be given appropriate weight are the appellant's age and background.

Although he was aged 22 by the date of sentencing, the appellant was only 20 and 21 at the time of the offending. There were also a number of relevant factors concerning his upbringing which were detailed in the Criminal Justice Social Work Report.

[10] In our opinion, there is force in the submission concerning the apparent lack of weight attached by the sheriff to the appellant's age and to his lack of previous offending. The Criminal Justice Social Work Report identified the presence of a number of issues of concern, such as domestic abuse, anger and emotion management, victim awareness, problem solving, consequential thinking skills and issues in relation to impulsivity. The author of the report considered that these were issues which could be addressed with benefit through intervention programmes. Although the appellant was assessed as being unsuitable for the Building Better Relationships group work programme it was proposed that work could be undertaken with him on a one to one basis. As we would understand it, this was the basis upon which the recommendation for a non-custodial sentence was made. Whilst the sheriff refers in his report

to the appellant being unsuitable for the group work programme he makes no mention of the suggestion that a one to one programme would be available.

[11] As set against these considerations full weight has to be given to the nature of the appellant's offending. He undoubtedly engaged in unpleasant and offensive behaviour. We recognise that aspects of his conduct must have caused considerable upset to the complainer, particularly given her own distressing circumstances. In no sense are we intending to suggest that such behaviour can be condoned or excused. On the contrary, it is behaviour which requires to be punished. However, it is important to note that there were no incidents of physical violence being directed towards the complainer herself.

[12] Given the appellant's age at the time offending, the fact that he had no previous history of criminal conduct and taking account of the other circumstances which we have drawn attention to, and bearing in mind that the appellant has now served a period which is the equivalent of a sentence of over 4 months' imprisonment, we are persuaded that the sentence imposed by the sheriff was excessive.

[13] We are therefore minded to quash the sentence and in its place to impose a Community Payback Order for a period of 2 years with a supervision requirement and a requirement to perform a period of 200 hours unpaid work in the community.