



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 33
HCA/2019/000081/XC

Lord Justice Clerk
Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

G O'D

Respondent

Appellant: Lord Advocate; Crown Agent
Respondent: Templeton, Adv; Jonathan Paul, Solicitors

22 May 2017

Background

[1] The 16 year old respondent pled guilty to two charges contrary to the Sexual Offences (Scotland) Act 2009 at a preliminary hearing at Glasgow High Court on 7 November 2018. On 16 January 2019 he was sentenced to periods of detention in a young offenders' institution, under section 207 of the Criminal Procedure (Scotland) Act 1995. In

mitigation, referring to a psychological report, counsel for the respondent had submitted that any period of detention should be made in terms of section 208 of the Criminal Procedure (Scotland) Act 1995 as opposed to section 207. This would have had the effect that his detention would have taken place in such place and on such conditions as may be directed by the Scottish Ministers. At the time of sentence, the respondent was the subject of a compulsory supervision order in terms of the Children's Hearings (Scotland) Act 2011 imposed on 21 June 2018 and this had been continued without variation most recently on 11 December 2018. This appeal raises the question of the competency of a sentence imposed under section 207. In support of an argument that it was not competent to proceed under section 207, reference was made to *Anderson v McGlennan* 1998 SCCR 552, a summary case in which the Crown had conceded that the imposition of a sentence of detention on a statutory child such as the respondent was not competent, and that the sentence of detention should have been imposed under section 44 of the 1995 Act which provides that in a summary case the sheriff may order a child to be detained in residential accommodation for up to a year for any offence for which it would be competent to impose imprisonment on someone over the age of 21.

Legislation

Criminal Procedure (Scotland) Act 1995

[2] 207. — *Detention of young offenders.*

“(1) It shall not be competent to impose imprisonment on a person under 21 years of age.

(2) Subject to sections 205(2) and (3) and 205B(2)(b) of this Act and to subsections (3) and (4) below, a court may impose detention (whether by way of sentence or otherwise) on a person, who is not less than 16 but under 21 years of age, where but for subsection (1) above the court would have power to impose a period of imprisonment; and a period of detention imposed under this section on any person

shall not be less than the minimum nor more than the maximum period of imprisonment which might otherwise have been imposed.

(3) The court shall not under subsection (2) above impose detention on an offender unless it is of the opinion that no other method of dealing with him is appropriate; and the court shall state its reasons for that opinion, and, except in the case of the High Court, those reasons shall be entered in the record of proceedings.

(3A) Subsections (2) and (3) above are subject to—

(a) section 51A(2) of the Firearms Act 1968 (minimum sentences for certain firearms offences); and

(b) section 29(8) of the Violent Crime Reduction Act 2006 (minimum sentence of detention for certain offences relating to dangerous weapons).

...

(5) A sentence of detention imposed under this section shall be a sentence of detention in a young offenders institution."

208. Detention of children convicted on indictment.

"(1) Subject to section 205 of this Act and subsection (3) below, where a child is convicted on indictment and the court is of the opinion that no other method of dealing with him is appropriate, it may sentence him to be detained for a period which it shall specify in the sentence; and the child shall during that period be liable to be detained in such place and on such conditions as the Secretary of State may direct.

(1A) Where the court imposes a sentence of detention on a child, the court must—

(a) state its reasons for the opinion that no other method of dealing with the child is appropriate, and

(b) have those reasons entered in the record of the proceedings.

...

(2) Subsections (1) and (1A) above are subject to—

(a) section 51A(2) of the Firearms Act 1968 (minimum sentences for certain firearms offences); and

(b) section 29(9) of the Violent Crime Reduction Act 2006 (minimum sentence of detention for certain offences relating to dangerous weapons)."

307. *Interpretation*

“(1) In this Act, unless the context otherwise requires-

...

“*child*”, except in section 46(3) of and Schedule 1 to this Act, has the meaning assigned to that expression for the purposes of section 199 of the Children's Hearings (Scotland) Act 2011 (asp 1). ”

This definition is effective from 24 June 2013. Prior to that date, the definition read:

“*child*”, except in section 46(3) of and Schedule 1 to this Act, has the meaning assigned to that expression for the purposes of Chapters 2 and 3 of Part II of the Children (Scotland) Act 1995.”

Children (Scotland) Act 1995

[3] Between 1995 and 2001 section 93 of the Children (Scotland) Act 1995 provided:

“(2) For the purposes of—

...

(b) Chapters 2 and 3 of this Part—

“*child*” means—

(i) a child who has not attained the age of sixteen years;

(ii) a child over the age of sixteen years who has not attained the age of eighteen years and in respect of whom a supervision requirement is in force; or

(iii) a child whose case has been referred to a children's hearing by virtue of section 33 of this Act.”

[4] The section currently provides that:

“(2) For the purposes of—

...

(b) Chapter 2 (except section 44) and Chapter 3 of this Part—

“*child*” means—

- (i) in relation to section 75, a person under the age of 18 years,
- (ii) in relation to any other section, a person under the age of 16 years.”

Children’s Hearing (Scotland) Act 2011

[5] *Section 199 “Meaning of “child”*

“(1) In this Act, “child” means a person who is under 16 years of age (but subject to subsections (2) to (9)).

...

(6) Subsection (7) applies if—

- (a) a compulsory supervision order is in force in respect of a person on the person's becoming 16 years of age, or
- (b) a compulsory supervision order is made in respect of a person on or after the person becomes 16 years of age.

(7) For the purposes of the application of the provisions of this Act relating to that order, references in this Act to a child include references to the person until whichever of the following first occurs—

- (a) the order is terminated, or
- (b) the person becomes 18 years of age.

...”

Submissions for the Crown

[6] The respondent is someone who fell within the definition of “child” in section 307 of the Criminal Procedure (Scotland) Act 1995, being someone between 16 and 18 subject to compulsory measures of supervision. As such the sentence imposed upon him ought to have proceeded in terms of section 208(1) of that Act, under which the Scottish Ministers could direct the place and conditions for the detainment. Where the accused is a statutory child, it is not competent to proceed to sentence under section 207, and any detention which the court determines to be necessary must be imposed under section 208. In *Anderson v*

McGlennan 1998 SCCR 552, the Crown's concession that the imposition of a sentence of detention on a statutory child such as the respondent was not competent, was accepted, the court passing the bill of suspension challenging the competency of the sentence imposed. That case proceeded under section 44 of the Criminal Procedure (Scotland) Act 1995, which is the analogue of section 208 in the context of summary proceedings. It is reasonable to infer from *Anderson v McGlennan* and from observations made in *Thomson v Principal Reporter* 1998 SC 848 that the court accepted that where detention was imposed on a statutory child the sentence required to proceed in terms of section 208. Textual consideration of sections 207 and 208 also support this conclusion: both sections provide for a sentence of detention to be imposed, but only where no other method of dealing with the offender is appropriate: the difference relates only to the place and conditions which apply to that sentence. Section 208 falls to be regarded as a *lex specialis* to the effect that whilst a sentence of detention may be imposed on a person not less than 16 but under 21, where that individual is a statutory child, he falls to be sentenced only under section 208.

Submissions for the respondent

[7] The submissions of the Lord Advocate were adopted.

Analysis and decision

[8] The trial judge points out that *Anderson v McLennan* was determined on the basis of legislation which defined a child as including someone between the ages of 16 and 18 who was subject of a supervision requirement. He contrasted this with the current definition of "child" for the purposes of section 208 which he erroneously understood to relate only to a person under 16. On that understanding the trial judge had proceeded on the basis that the definition of "child" for the purposes of section 307 continued to be determined by reference

to section 93 of the Children (Scotland) Act 1995, under which the appellant, not being a person to which section 75 of that Act applied, would not come within the definition of child, being over the age of 16. The trial judge apparently did not notice that the Children's Hearing (Scotland) Act 2011 had amended section 307 of the Criminal Procedure (Scotland) Act so that "child" for the purposes of that Act is now defined by reference to the 2011 Act. The definition of "child" for these purposes thus includes those between the ages of 16 and 18 who are subject to compulsory measures of supervision. As the submissions for the Crown pointed out, the concept of such a person as a "statutory child" has been part of the definition of "child" since the enactment of the Criminal Procedure (Scotland) Act 1975. The effect of the legislation is that the appellant was indeed a "child" at the time of being sentenced.

[9] The remaining issue is thus whether the trial judge was nevertheless entitled to proceed under section 207 rather than section 208. The trial judge noted that whilst section 208 permits the court to make an order which has the effect that the place and conditions of detention for a child are to be determined by the Scottish Ministers, it does not require such a disposal to be made. Where someone is a statutory child, the two provisions may operate in the alternative. The trial judge observed that there may be cases where a child is under supervision at the time of sentence but because of the serious nature of his offending and the danger he posed, even when being supervised at the time of committing the offences, he should nevertheless be detained in a young offenders' institution as opposed to secure accommodation such as St Mary's. The trial judge considered this to be such a case.

[10] Section 207 provides that it is not competent to impose a sentence of imprisonment on a person under the age of 21. It then deals specifically with the position of those who are

not less than 16 years of age, but under 21, providing that a sentence of detention may be imposed upon such an individual, and that in these cases the detention in question will be detention in a Young Offenders' Institution. Other than the general prohibition contained in section 207(1), section 207 does not deal with the position of children. That this is so is confirmed by examination of the exceptions contained within the section, to which we will return.

[11] Where children are concerned, the relevant section is section 208, which provides that children may also be the subject of a sentence of detention, but in these cases that detention shall be in such place and subject to such conditions as may be directed by the Scottish Ministers. On the face of it therefore, where a child is concerned, the operative section is section 208.

[12] The question which arises is whether, in the case of someone such as the appellant, the fact that the individual is a statutory child means that he must be sentenced under section 208 rather than under section 207. In our view there are good reasons to think that this is so.

[13] Each section is concerned with the imposition of a sentence of detention, one in respect of a young person, the other in respect of a child. In each the test is that no other method of dealing with the offender is appropriate. In each case the court requires to be satisfied that nothing other than detention is appropriate: it is not the case that the court may determine under section 208 that another *type* of detention ie. detention in a Young Offenders' Institution under section 207, is appropriate. Where the young person is also a child by virtue of the statutory definition, it is in our view section 208 which applies, not section 207.

[14] As we have noted, section 207 is subject to four specific exceptions. All of these differentiate between the position of an individual under 18 and one between 18 and 21; two of them specifically relate to the position of a statutory child. Section 205 relates to the punishment for murder. Section 205(2) provides that a person under 18 will be detained without limit of time in such place and on such conditions as the Scottish Ministers may direct; whereas a person over that age but under 21 will be sentenced to detention in a young offenders institution.

[15] Section 205B relates to minimum sentences for a third conviction in respect of certain drug trafficking offences. The section only applies to those over the age of 18; and if also under the age of 21 the sentence will be detention in a Young Offender's Institution. This is at least consistent with the position of a child offender being treated differently from that of an individual over 18.

[16] The remaining exceptions relate to the statutory child. Section 51A(2) of the Firearms Act 1968 also applies to minimum sentences for certain offences committed by anyone over the age of 16. Other than in exceptional circumstances the court must pass the "appropriate sentence". This is defined (subsection 4) as detention under section 207 when the offender is under 21. However, when the offender is a statutory child, the appropriate sentence is detention under section 208.

[17] Section 29 of the Violent Crime Reduction Act 2006 provides for specific penalties in connection with certain dangerous weapons. Subsection 8 provides that where the offender is under 21, the court must impose detention under section 207. However, subsection 9, the exception referred to in section 208, provides that in the case of a statutory child the court must impose detention under section 208.

[18] The exceptions all relate to circumstances where a statutory minimum sentence otherwise applies. They emphasise a difference in treatment between those under 18, which thus includes all children, statutory or otherwise, and those over that age. Moreover, the distinction is that the former fall to be sentenced on conditions which equiparate to detention imposed under section 208. In our view that suggests that where the sentence of a statutory child proceeds on the exercise of judicial discretion, the procedure will be the same as in cases where a statutory minimum is to apply, namely that a child, whether statutory or not, is not to be detained in a Young Offender's Institution but at the direction of the Scottish Ministers.

[19] These considerations support the Crown's contention that the maxim "*generalia specialibus non derogant*" applies to the circumstances of sections 207 and 208. The general provision (section 207(1)), which applies to all cases, solemn or summary, is that no person under 21 shall be the subject of imprisonment. The specific parts deal separately with the position of a child, whether statutory or not (section 208; section 44); or the position of a young person (the remainder of section 207), which by clear inference must be taken to exclude a child, for whom specific and separate provision has been made.

[20] There is no direct authority on the point. As we have noted, in *Anderson v McGlennan* the court passed without comment a bill of suspension which proceeded on the basis that "the imposition of a period of detention in a Young Offenders' Institution being incompetent" in respect of a statutory child, the sentence should be quashed. It appears of no moment that this was a summary case, since the power to order a child to be detained in secure accommodation in a summary case under section 44 is reflected in the similar statutory power in respect of indictments in section 208. In respect of a statutory child on

summary complaint, the general prohibition in section 207(1) would continue to apply, but the sentence imposed would proceed under section 44.

[21] In *Clayton, petitioner* 1992 SLT 404, the court noted that the petitioner was a statutory child at the time of sentence “So the sentence was imposed upon him under section 206(1) of the 1975 Act” (the latter corresponds with section 208 of the 1995 Act). In *Thomson v Principal Reporter* the appellant was a statutory child and thus a “child” for the purposes of section 208, under which he was sentenced to detention. At a review hearing the supervision requirement was removed. His conviction was subsequently quashed on appeal, and by the time of sentence on re-raised proceedings he was no longer a statutory child, the supervision requirement having been removed. His attempt on a further appeal to have a supervision requirement reinstated failed, since this would not be done to meet the aims of supervision but for an ulterior motive. In the course of the discussion, the court noted (i) that since he was no longer a child he could not be sentenced under section 208; but (ii) that had he remained under supervision he “could” have been sentenced to detention under section 208. Although the court used the word “could” it went on to note that had he remained a 17 year old in respect of whom a supervision requirement remained in place “He would therefore be a child once more for the purposes of sec 208 of the 1995 Act and any sentence of detention would fall to be imposed under that section...”.

[22] We accept the submission of the Lord Advocate that the underlying policy of the Act is that children should be dealt with differently from more mature offenders; and that the principle is to enable a flexible approach to be taken to the sentencing of children, according to their changing circumstances and needs. A statutory child has been included within the definition of “child” since the 1975 Act. The clear policy is that a statutory child should not

be treated any differently to a natural child. The interpretation which we have identified is also consistent with the modern approach to dealing with child offenders.

[23] The respondent remains subject to compulsory measures of supervision and thus remains a statutory child. We will therefore allow the appeal, quash the sentences imposed and substitute therefor periods of detention under section 208, namely “in such place and on such conditions as the [Scottish Ministers] may direct”, consisting of (i) 19 months in respect of charge 2; and (ii) an extended sentence in terms of section 210A of the Criminal Procedure (S) Act 1995 for a period of 6 years and four months being a custodial term two years and four months and an extension period of four years in respect of charge 6.