



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 39
HCA/2023/303/XC

Lord Doherty
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD DOHERTY

in

Appeal against Sentence

by

ALAN JAMES

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Shand; Faculty Appeals Unit (for Doonan McCaig, Solicitors, Leven)
Respondent: Bergin AD; Crown Agent

17 October 2023

Introduction

[1] The appellant pled guilty at a trial diet to a sustained course of dangerous driving (charge 4), failing to provide a specimen of breath (charge 7), behaving in an abusive and threatening manner towards police officers (charge 10), and two charges of assaulting police officers (charges 11 and 12). In addition, he was convicted after trial of assaulting his partner's brother ("B") by punching him repeatedly to his head to his injury, and of

behaving in an abusive and threatening manner towards his partner. All of the charges were aggravated by being committed when the appellant was the subject of a bail order. Charge 10 was also aggravated by religious prejudice and prejudice relating to sexual orientation, and charge 2 was also aggravated by involving abuse of his partner. All of the offences were committed during the course of the same evening while the appellant was intoxicated by alcohol. The first to be committed was the assault of B. It took place in the appellant's home when B asked him to stop being abusive towards his sister. The repeated punches to the head left B with a bleeding face. The appellant was then abusive to his partner. He left, got into his van, and drove at 60-70 mph along Cathcart Road, Glasgow, a busy road in a residential area. He collided at speed with a car, causing that vehicle to spin and collide with another car. He did not stop, but drove off at speed. He drove on to the wrong side of the road towards a police car, which had to take evasive action to avoid a head-on collision. Once again, he failed to stop. The police pursued him. He continued at speed and damaged other vehicles in the road. He was stopped eventually by other road users. He fled on foot. The police gave chase but he escaped. He was spotted later by police in Allison Street. He was hostile, threatening and abusive towards the police and he resisted arrest. He assaulted the police officers. He bit one and attempted to bite another. He spat at them. His spittle contained blood. After he had been restrained he continued to be abusive and the abuse included religious prejudice and homophobic abuse. At the police station he refused to provide a specimen of breath without reasonable excuse. It was very apparent that he was intoxicated.

The Criminal Justice Social Work Report

[2] The Criminal Justice Social Work Report noted that the appellant's case records indicate a lack of motivation over the years to engage with addiction services. The author was also concerned that the appellant provided limited information during interview to impede the department making necessary checks. The appellant was reluctant to fully discuss issues, and his responses indicated avoidance and negation of personal responsibility.

Letters of support

[3] Two letters of support were submitted to the sheriff. Both concerned his time on remand. The first letter, from a prison officer, indicated that when working in the prison kitchen the appellant had always been respectful to staff and had assisted in any way possible without hesitation. His attitude and work ethic were excellent. He had been trusted with training new members of the team which he had done "superbly well". The only time he missed shifts was if he was attending courses to better himself and address his behaviour. The second letter, dated 2 May 2023, was from a prison chaplain, who confirmed that the appellant had been working through Alcoholics Anonymous's 12 Step Programme and was currently at step 7. The chaplain indicated that there had been a noted improvement in how the appellant viewed his past problems and their causes, and that he had been working hard to address these issues. The appellant had asked the chaplain to continue to work with him after his release and the chaplain is very happy to do that.

The sheriff's disposal

[4] The sheriff sentenced the appellant on 8 June 2023. He selected a headline sentence of 30 months' imprisonment for charge 4, 6 months of which he attributed to the bail aggravation, but he discounted the sentence to 27 months' imprisonment because of the timing of the plea. The headline disqualification period he chose was 5 years, of which he attributed 1 year to the bail aggravation, but he discounted the disqualification period to 54 months to take account of the plea and he imposed a statutory extension period (Road Traffic Offenders Act 1988, s 35C) of 410 days. He selected a headline sentence of 6 months for charge 7, but discounted that to 5 months because of the plea. Two months was attributed to the bail aggravation. In relation to that offence he chose a headline disqualification period of 18 months, of which 6 months was attributed to the bail aggravation, but discounted the period to 16 months because of the plea. The sheriff selected a headline *cumulo* sentence of 9 months for charges 12 and 13, of which 3 months was attributed to the bail aggravation, but discounted the sentence to 8 months because of the plea. Separate custodial sentences of 6 months and 2 months were imposed on charges 1 and 10, and the appellant was admonished on charge 2. The sentences for charges 1 and 10 were concurrent. The sentences for charges 1, 4 and 10 were backdated to 24 October 2022, the date of the appellant's remand. The sentence for charge 7 was consecutive to the sentences on charges 1, 4 and 10; and the sentence for charges 12 and 13 was made consecutive to the sentences for charges 1, 4, 10 and 7. The result is that the total custodial sentence was 40 months.

Submissions for the appellant

[5] Counsel for the appellant, Mr Shand, submitted that the sheriff erred in imposing a custodial sentence. Bearing in mind that the appellant had already been on remand for 7 months at the time of sentencing, and that his last custodial sentence had been in 2010, a non-custodial disposal was available and would have satisfied all of the relevant sentencing purposes. He had engaged in prison on remand as was evident from the letters of support. In any case, if a custodial disposal was appropriate a lesser period would have sufficed. The total period of 40 months did not take adequate account of the totality principle. Moreover, of the 40 months, 11 months were attributable to bail aggravations. That was excessive, particularly in view of the fact that the appellant had been subject to a single bail order at the time of the offences. While it was true that there had been a succession of offences, some account should be taken of the fact that they all formed part of a course of conduct carried out on the same evening. Finally, while it was not a ground in the note of appeal, Mr Shand founded on a matter which the second sift judges had queried. He submitted that section 27(3) of the Criminal Procedure (Scotland) Act 1995 had not empowered the sheriff to increase the disqualification periods for charges 4 and 7 because of the bail aggravation. He recognised that the increase for charge 7 was academic in light of the lengthier disqualification period imposed on charge 4. He argued that the “sentence or disposal” for the subsequent offence referred to in section 27(3) was a period of imprisonment or detention, or a fine, and that a disqualification order was not a “sentence or disposal”. He accepted that that was not the natural reading of “sentence or disposal” in section 27(3), but he submitted that when regard was had to the terms of section 27(5) it was apparent that “sentence or disposal” in section 27(3) must have a more restricted meaning. He added that this was the first case he had encountered where a court had increased a disqualification

period because of a bail aggravation. In practice, courts did not appear to proceed on the basis that section 27(3) enabled disqualification periods to be increased.

Submissions for the respondent

[6] The court invited the advocate depute to address it on the competency point. He agreed with Mr Shand that there appeared to be no authority where the question had been considered. He saw some force in the contention that the words “sentence or disposal” in section 27(3) should be construed restrictively because of the terms of section 27(5). He drew the court’s attention to *Humphreys v Procurator Fiscal, Aberdeen* 2022 SCCR 182 and *Haider v Procurator Fiscal, Glasgow* 2007 SLT (Sh Ct) 137. In both of those cases the accused had been on bail at the time driving offences were committed. So far as was ascertainable from the reports, in neither case had the disqualification period been increased because of the bail aggravation. The cases were proffered as examples of how the courts had applied section 27(3). However, neither case had considered whether it would have been competent for the court to increase the disqualification period because of the bail aggravation.

Decision and reasons

[7] In the court’s judgement the sheriff was entitled to conclude that custodial sentences were necessary and appropriate given the circumstances of these offences, the appellant’s record, and the terms of the Criminal Justice Social Work Report. This was a highly reprehensible and sustained course of dangerous driving at high speed which endangered members of the public, road users, and the police. The appellant was intoxicated when he committed all of the offences. His behaviour before, during and after the dangerous driving

was self-centred and disgraceful. While his last conviction for a non-road traffic offence was in 2010, he had been convicted on four occasions of road traffic offences since then.

[8] We turn next to the submission that it was incompetent for the sheriff to increase the disqualification periods on charges 4 and 7 because of the bail aggravation. Section 27 of the Criminal Procedure (Scotland) Act 1995 provides:

“27 Breach of bail conditions: offences.

(1) Subject to subsection (7) below, an accused who having been granted bail fails without reasonable excuse—

- (a) to appear at the time and place appointed for any diet of which he has been given due notice or at which he is required by this Act to appear; or
- (b) to comply with any other condition imposed on bail,

shall, subject to subsection (3) below, be guilty of an offence and liable on conviction to the penalties specified in subsection (2) below.

(2) The penalties mentioned in subsection (1) above are—

- (a) a fine not exceeding level 3 on the standard scale; and
- (b) imprisonment for a period—

- (i) where conviction is in the JP court, not exceeding 60 days; or
- (ii) in any other case, not exceeding 12 months.

(3) Where, and to the extent that, the failure referred to in subsection (1)(b) above consists in the accused having committed an offence while on bail (in this section referred to as ‘the subsequent offence’), he shall not be guilty of an offence under that subsection but, subject to subsection (4) below, the court which sentences him for the subsequent offence shall, in determining the appropriate sentence or disposal for that offence, have regard to—

- (a) the fact that the offence was committed by him while on bail and the number of bail orders to which he was subject when the offence was committed;
- (b) any previous conviction of the accused of an offence under subsection (1)(b) above; and
- (c) the extent to which the sentence or disposal in respect of any previous conviction of the accused differed, by virtue of this subsection, from that which the court would have imposed but for this subsection.

...

(5) Where the maximum penalty in respect of the subsequent offence is specified by or by virtue of any enactment, that maximum penalty shall, for the purposes of the court’s determination, by virtue of subsection (3) above, of the appropriate sentence or disposal in respect of that offence, be increased—

- (a) where it is a fine, by the amount for the time being equivalent to level 3 on the standard scale; and
- (b) where it is a period of imprisonment—
 - (i) as respects a conviction in the High Court or the sheriff court, by 6 months; and

(ii) as respects a conviction in the, by 60 days, notwithstanding that the maximum penalty as so increased exceeds the penalty which it would otherwise be competent for the court to impose.

(6) Where the sentence or disposal in respect of the subsequent offence is, by virtue of subsection (3) above, different from that which the court would have imposed but for that subsection, the court shall state the extent of and the reasons for that difference. ...”

[9] We are grateful to Mr Shand and the advocate depute for their submissions on this matter. We do not agree with the advocate depute that Mr Shand’s submissions have some force. Nor do we think that any assistance is provided by *Humphreys* or *Haider*. In neither of those cases was the point now raised put in issue.

[10] Section 27(3) directs the court to have regard to factors (a), (b) and (c) when determining “the appropriate sentence or disposal” for the subsequent offence. An order of disqualification is a penalty. It is part of the “sentence or disposal” for the offence (*cf. Gemmell v HM Advocate* 2012 JC 223, Lord Justice-Clerk Gill at [70]; *Wilson v PF, Aberdeen* [2018] HCJAC 50, Lord Justice General Carloway delivering the Opinion of the Court at [17]). Section 27(3) applies to disqualification just as much as it does to any fine or period of imprisonment. That is the natural and ordinary meaning of the provision. There is nothing elsewhere in the 1995 Act which convinces the court that section 27(3) should be construed as applying only to fines or imprisonment. Section 27(5) makes specific provision for increasing statutory maximum penalties for fines and periods of imprisonment where the court is determining the appropriate sentence or disposal for the subsequent offence in terms of section 27(3). It does not follow from the fact that no similar provision is made for increasing statutory maximum penalties for other types of penalty, such as disqualification, that the words “sentence or disposal” in section 27(3) should be construed as being restricted to fines or imprisonment. Rather, the ordinary and natural construction is that those words extend to other penalties such as disqualification; but that in the case of

penalties other than fines or imprisonment the statutory maximum penalties are not increased by section 27(5).

[11] It follows that the competency objection is ill-founded. Of course, the fact that it is competent to increase disqualification using the section 27(3) power does not mean that it will always be appropriate to do so. In each case it will be for the court to decide how best to punish the offender for the bail aggravation. In many cases the most obvious way may be to increase a period of imprisonment and that, without more, may suffice. On the other hand there may be some cases where increasing the disqualification may be a particularly apposite way of punishing the offender. Whether one or more penalties ought to be increased in this way will depend upon the circumstances. In every case the sentencer will require to consider whether the totality of the penalties imposed is appropriate.

[12] That brings us to the remaining grounds of appeal. We are not convinced that the period of either disqualification is excessive. The sheriff's report is thorough. He was conscious of the need for the totality of the penalties to be appropriate and proportionate. With that end in view he made the sentence for charge 1 a concurrent sentence.

Nevertheless, standing back and looking at the totality of the penalties, we are persuaded that the cumulative effect is excessive. We attach more weight than the sheriff did to the appellant's commitment in prison to address his past behaviour and his alcohol abuse.

While we sympathise with the sheriff's view that this has come rather late in the day, we do not see that as a good reason to refrain from giving the appellant some credit for it. A more important consideration is that the commitment appears to be genuine and demonstrable.

In our view there is also some force in the submission that the aggregate of the periods attributed to the bail aggravations is on the high side. While we do not disagree with the sheriff's view as to the sentences which should be consecutive, we do not ignore the fact that

all of the offences were committed during an extended drunken episode in the course of a single evening. In the whole circumstances we think that the cumulative length of the sentences of imprisonment should be 32 months. In our judgement the best way to achieve an appropriate cumulative outcome is to quash the sentences of imprisonment for charges 4 and 7 and the *cumulo* sentence of imprisonment for charges 12 and 13 and substitute on charge 4 a sentence of 22 months (a headline sentence of 24 months, 4 months of which is attributed to the bail aggravation, discounted to 22 months because of the plea), on charge 7 a sentence of 4 months (a headline sentence of 5 months, 1 month of which is attributed to the bail aggravation, discounted to 4 months because of the plea), and on charges 12 and 13 a *cumulo* sentence of 6 months (a headline sentence of 7 months, 2 months of which is attributed to the bail aggravation, discounted to 6 months because of the plea). The only other parts of the sheriff's disposals which require to be revisited are the statutory extension periods. Since we are reducing the sentences of imprisonment on charges 4 and 7 the extension periods must also be reduced. We shall quash the extension periods the sheriff ordered and substitute extension periods of 335 days for charge 4 and 61 days for charge 7. We shall allow the appeal to the limited extent described. In all other respects we do not interfere with the sheriff's disposals.