APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 87
HCA/2017/000277/XC

Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

MB

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Markie; Paterson Bell Solicitors, Edinburgh
Respondent: K Harper (sol adv) AD; Crown Agent

22 November 2017

[1] This is an appeal at the instance of MB, who went to trial in the Sheriff Court at Dunfermline on 24 February 2017 on an indictment containing nine charges of what is described by the sheriff in his report as indecent exposure towards young girls (contraventions of section 35 of the Sexual Offences (Scotland) Act 2009). On 3 March 2017 the jury returned verdicts of guilty on charges 1, 2, 4, 6 and 7 (which related to the period

30 December 2014 to 29 October 2015). The sheriff adjourned sentencing for the purpose of the preparation of reports, including a forensic psychologist's report. On 24 April 2017, having considered these reports and a plea in mitigation on behalf of the appellant, the sheriff, being satisfied that no other method of disposal was suitable because of the nature of the offences, imposed an extended sentence in terms of section 210A of the Criminal Procedure (Scotland) Act 1995, that being a sentence of 33 months comprising a custodial term of 21 months (of which 3 months related to the bail aggravation in respect of charge 7) and an extension period of 12 months.

[2] The appellant now appeals on the grounds that the sentence imposed was excessive. That proposition is elaborated by submissions in the Note of Appeal that alternatives to a custodial disposal were available; that the offences were not contact offences and therefore bizarre rather than sinister; that the appellant had only one previous conviction, albeit for sexual assault on an adult complainer; that the appellant had observed a curfew condition imposed in a bail order; that *esto* a custodial disposal was appropriate, a 21 month custodial period was excessive; and *esto* a custodial disposal was appropriate, the test for imposition of an extended sentence was not met.

[3] As appears from the appellant's case and argument, he departs from his contention that the imposition of a custodial sentence was inappropriate. He limits his submission, first, to the contention that the length of the custodial sentence was excessive and, second, that the imposition of an extended sentence was inappropriate, if not incompetent. In elaborating the first of these contentions under reference to the case and argument, Mr Markie, on behalf of the appellant, pointed to: the fact that the offences were not contact offences; the fact that the appellant had never served a custodial sentence; the fact that the appellant had observed a curfew condition imposed in a bail order; the fact that the

Criminal Justice Social Work Report assessed the appellant as at the bottom of the medium grade of risk of reoffending and as only just meeting the criteria for the Scottish Government approved sex offender group work programme – Moving Forward Making Changes; the fact that the appellant had a number of protective factors; and the fact that the psychological report prepared by Dr Flynn assessed the appellant as at moderate risk of reoffending. In support of the second contention Mr Markie pointed to the terms of section 210A of the 1995 Act and what had been said in *S (D)* v *HM Advocate* [2017] HCJAC 12 at paragraph [21], following what had been said in *Wood* v *HM Advocate* 2017 SLT 190 at pages 195 to 196. Mr Markie also drew attention to the terms of the report by Dr Flynn and the terms of the sheriff's report.

[4] We propose to give effect to Mr Markie's second contention. He submitted that the sheriff had failed to explain in his report why the license period which would relate to an appropriate determinate sentence would not have been sufficient to protect the public from serious harm. We see force in that. However, in addition, despite Mr Markie's concession to the contrary, we are not satisfied that the sheriff had sufficient material before him to conclude that the appellant does indeed present a risk of "serious harm" to the public as that expression is to be understood in the context of section 210A of the 1995 Act. In saying that we do not intend in any way to trivialise the offences in respect of which the appellant has been convicted. We recognise that Dr Flynn appears to have accepted that the appellant does present a risk, albeit a moderate risk, of what she describes as "serious harm to the public" but what is or is not "serious harm to the public" as that expression is to be construed in terms of section 210A, is a matter for the court rather than for any witness. The sheriff addresses risk in the penultimate page of his report and expresses the opinion that the appellant does present a risk of serious harm. That opinion is based on the sheriff's view

that the appellant may in future commit contact offences. While we note that the appellant has a conviction for a contact offence towards an adult complainer (an indecent touching), we do not see that single conviction as a sufficient basis for the conclusion that the sheriff reached. While we would accept that a conviction for a contact offence may be an indicator of the possibility of the appellant committing a further contact offence in future we do not see that conviction, even when taken with the more recent offences, as justifying the conclusion that the appellant presents a risk of "serious" harm to the public. Accordingly, as we have already foreshadowed, we shall quash the sentence in so far as it makes provision for an extended sentence in terms of section 210A of the 1995 Act.

[5] The question then arises as to what sentence should be substituted for the sentence that has been quashed, it not now being argued that a custodial disposal was inappropriate. The appellant was convicted of a series of five offences over a period of some 10 months, which although not involving contact will have been distressing to the young girls who witnessed his behaviour. The appellant has a previous conviction for assault by touching a woman's buttocks under her clothing in respect of which he was made subject to a Community Payback Order. The offence described in charge 7 was committed during the course of that Community Payback Order and when the appellant was subject to a bail order. We consider that to be significance. In the circumstances, as previously indicated, while we shall quash the extended sentence, we have not been persuaded that the 21 month period of custody including the 3 months attributable to the bail aggravation was other than appropriate. We shall therefore substitute the sentence imposed by the sheriff with a determinate sentence of 21 months' imprisonment to run from the date selected by the sheriff.