APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 94
HCA/2019/266/XC

Lord Justice General
Lord Justice Clerk
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

by

ANDREW McCAW

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh QC, Laurie; John Pryde & Co (for Bruce the Lawyers, Glasgow)
Respondent: Borthwick AD; the Crown Agent

12 December 2019

Introduction

[1] This appeal against sentence raises two issues. The first is whether, when ordering a sentence to run consecutive to a return order made under section 16 of the Prisoner and Criminal Proceedings (Scotland) Act 1993, the court can order that the sentence for the new offence can be backdated to that when the prisoner was originally remanded on the new

offence. The second, and more difficult question, is whether, when applying section 210 of the Criminal Procedure (Scotland) Act 1995, the headline sentence should take into account any period which has been spent on remand before the application of a discount under section 196 of the 1995 Act. In *McLeod* v *Her Majesty's Advocate*, unreported, High Court of Justiciary, 13 June 2017, the court decided that the period on remand should be taken into account in determining the headline sentence before any discount is applied. The alternative is that the period on remand should only be considered once the discounted sentence is determined.

Statutory provisions

[2] When a person commits an offence, having been released from prison on licence in respect of an earlier offence, the court sentencing him for the new offence may order him to be returned to prison for the whole or part of the period beginning on the date of the order for his return and is equal in length to the period which begins on the date of the new offence and the date on which the person would have served his sentence for the previous offence in full (Prisoners and Criminal Proceedings (Scotland) Act 1993, s 16(2)(a)). The court may order that the period of the return order should run concurrently with the new sentence, or that it should be served before, and be followed by, the new sentence (s 16(5)(b)).

[3] Section 210(1) of the Criminal Procedure (Scotland) Act 1995 provides that, when a court passes a sentence of imprisonment, it shall, in determining the period of that imprisonment, have regard to any time spent in custody on remand awaiting trial or sentence. If a person has spent time in custody, and a sentence is not backdated to the date of remand, the court requires to specify its reasons for not doing so.

[4] Section 196(1) of the 1995 Act provides that, in determining what sentence to pass upon an offender who has pled guilty to an offence, the court shall take into account the stage at which the offender "indicated his intention" to plead guilty. When the court applies a discount for a guilty plea, it requires to specify the headline sentence or, if there is no discount, to state why no discount was afforded (s 196(1A)).

Facts

[5] On 10 May 2019, at a continued preliminary hearing at the High Court in Glasgow, the appellant pled guilty to a charge which libelled that:

> "on 23 November 2018 at ... Wishaw you ... did assault [MC], then your partner, ... and did repeatedly punch her on the head and repeatedly kick her on the body, repeatedly seize her by the hair and drag her by the body, all to her injury; and it will be proved in terms of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 that the aforesaid offence was aggravated by involving abuse of your partner ...".

[6] The appellant and the complainer had been in a relationship for about two months. On Thursday, 22 November 2018, they had bought some alcohol and were consuming this with two friends at the complainer's address. At about 2.00am on 23 November, the complainer went to bed because she felt drunk. One of the appellant's friends left. The complainer awoke at about 10.00am and joined the appellant and the remaining friend, who were continuing to drink. Another friend arrived at 11.00am and all four drank alcohol. The appellant's two friends then began assaulting the appellant. The complainer intervened and ejected the friends from the house. Some hours later, after some arguing, the complainer retired to bed in an intoxicated state.

[7] At about 2.00pm, the appellant entered the bedroom. He was drunk and shouting "You've embarrassed me". An argument ensued. The complainer attacked the appellant by

punching and pushing him. The appellant retaliated by repeatedly punching the complainer. He seized her by the hair and dragged her from the bed. He kicked her on the body. The complainer left the house and went to that of a neighbour at about 4.15pm. The police arrived at about 4.45pm. The complainer's speech was slurred, because she was still under the influence of alcohol. She was taken to hospital suffering from tenderness to her spine, bruising around the eyes, swelling of her right cheek and bruising to the left ear. By the time the appellant was traced and arrested on 14 December 2018, he was back in the company of the complainer. He denied all allegations.

Previous convictions

[8] The appellant has an extensive criminal record, including 11 convictions for assault. Eight of these were domestically aggravated. His last conviction, which was for housebreaking with intent to rob involving a knife, was dated 1 December 2017, when he was sentenced to 2 years imprisonment. He was released on licence on 4 September 2018. The time between the present offence and the expiry of the appellant's licence was 117 days.

Sentence

[9] The sentencing judge made a return order under section 16 of the 1993 Act of 117 days. This was to be served before the sentence for the new offence. That sentence was 3 years imprisonment, of which 3 months was attributed to the aggravation. This was ordered to run from 17 December 2018, when the appellant had been remanded in custody.

Submissions

[10] The appellant submitted that the correct approach in relation to section 16 orders

was to take account of the period spent on remand when imposing the sentence for the new offence (*Barr* v *HM Advocate* 1997 SCCR 506). This involved a deduction reflecting the length of sentence which would result in the period of remand being served (*Martin* v *HM Advocate* 2007 JC 70). If this were done and the period of remand, from 17 December 2018 to 10 May 2019, were taken into account, the sentence would be reduced by a period of some 10 months.

[11] The appropriate order in the sentencing exercise was: first, to determine the headline sentence, without taking into account any period spent on remand; secondly, to discount that sentence in terms of section 196 of the 1995 Act (*Du Plooy* v *HM Advocate* 2005 JC 1 and *Gemmell* v *HM Advocate* 2012 JC 223); and, thirdly, to take into account the period on remand (see *Ghafoor* v *HM Advocate* 2007 SCCR 342, *Crighton* v *HM Advocate* 2007 SCCR 339 and *Martin* v *HM Advocate* 2007 JC 70 at 72). If this were not done, a problem of comparative justice could arise in relation to co-accused. Where there were identical offenders and offences, the offender who had pled guilty required to obtain an advantage by way of discount in a practical sense. The appropriate sentence in this case, which would reflect the intentions of the sentencing judge, would have been one of 17 months, to be served on completion of the section 16 order period.

[12] The respondent essentially agreed with the submission of the appellant.

Decision

[13] It is accepted that a sentence, which is to be served after the imposition of a section 16 order, cannot be backdated to that of remand. The period spent on remand, or rather the length of sentence which would have resulted in that period, requires to be taken into account in selecting the length of the new sentence. In this case, therefore, where the

period in remand was some 5 months, 10 months would require to be deducted from the sentence otherwise imposed.

[14] In order to achieve an equitable result in situations in which one offender has been remanded and another has not, it is necessary to apply the relevant discount, for a plea of guilty in terms of section 196, prior to taking into account the period of remand. In this respect, *McLeod* v *HM Advocate*, unreported, High Court of Justiciary, 13 June 2017, must be regarded as having been wrongly decided. The effect of this is that, instead of imposing the sentence of 27 months, a sentence of 17 months should be substituted. No order for backdating should be made and this sentence will start at the conclusion of the section 16 period.