APPEAL COURT, HIGH COURT OF JUSTICIARY

[2023] HCJAC 11
HCA/2023/55/XC

Lord Justice General
Lord Woolman
Lord Matthews

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the

NOTE OF APPEAL UNDER SECTIONS 108 AND 110
OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CRAIG RAEBURN

Respondent

Appellant: CG McKenna (sol adv) AD; the Crown Agent
Respondent: C Miller; PDSO Edinburgh

28 April 2023

[1] On 17 January 2023, at Edinburgh Sheriff Court, the respondent pled guilty under the procedure set out in section 76 of the 1995 Act. The indictment libelled a single charge that:

> "you …. being subject to Sexual Offences Prevention Order granted at Edinburgh Sheriff Court on 23 February 2017 … preventing you from … using any device capable of accessing the internet unless it has the ability to store and record the history of its internet use and to make any such device available for inspection upon the request of a police officer, and from deleting or disguise (*sic*) any such history … and from using any file cleaning software or any such device did between …. 5 December 2020 and 23 December 2020 … at … Tranent … without reasonable excuse breach the terms of said order in that you did download mobile applications from the internet and repeatedly install a separate internet browser and then delete said applications and browser; CONTRARY to the Sexual Offences Act 2003, Section 113(1)(a)."

The sheriff imposed a fine of £1,000, (modified from £1,500 in respect of the early plea).

[2] The sheriff recorded that the police had called at the respondent's home on a routine unannounced visit. The respondent handed them a tablet device and a mobile phone. It transpired that the respondent had been using a Firefox browser application. He had downloaded and deleted the app on his phone on 52 separate occasions.

[3] The respondent had several previous convictions. The initial one was in January 2017 and consisted of contraventions of section 52(1)(a) and section 52A(1) of the Civic Government (Scotland) Act 1982, that is taking indecent photographs of children and possessing such photographs, and a breach of bail under section 27(1)(b) of the 1995 Act. He was sentenced to a total of 10 months imprisonment and made the subject of a SOPO for a period of 5 years. In September 2018, he was convicted of breaches of sections 23 and 24(2) of the Sexual Offences (Scotland) Act 2009, that is causing a child to look at a sexual image and to see or hear a sexual communication. He was sentenced to 20 months imprisonment and subject to an extended period of 12 months under section 210(A) of the 1995 Act. In June 2019, he was convicted of an analogous offence to the present one, namely a breach of his SOPO (2003 Act, s 113(1)(a)). He was sentenced to 15 months imprisonment.

[4] In mitigation, the sheriff considered that the respondent had pled guilty at the earliest opportunity. The respondent had had a "turbulent time of late, with both his father

and sister passing away". At the time of the offence, the respondent had been "scared for his safety and had used the internet browser to search for articles about himself". The sheriff took into account the absence of further breaches since the date of the offence in December 2020. It was on this basis that he thought it appropriate to impose a significant financial penalty "as a direct alternative to a custodial sentence". The appellant's initial Note of Appeal was that the terms of section 113(1)(b) of the 2003 Act meant that, on a conviction on indictment, only a custodial sentence (of up to 5 years) was competent. On receipt of that Note, the sheriff accepted that a financial penalty was not competent. This is, of course, erroneous. Section 199(2)(b) provides that, instead of imprisonment, the court may impose a fine. This was quickly recognised by the Crown and an amended Note followed.

[5] The Crown submitted that the sentence was unduly lenient in terms of section 108 of the 1995 Act. The sheriff had failed to give adequate weight to the gravity of the respondent's offending, which had occurred over a period of time and had involved 52 separate incidents. The sentence failed to satisfy the purposes of sentencing in the Scottish Sentencing Council's Principles and Purposes of Sentencing Guideline; in particular the protection of the public, punishment, rehabilitation and the expression of disapproval of offending behaviour. The offence committed was serious. It had significant aggravating, and no mitigatory, features. A substantial period of imprisonment was merited where the respondent had previously been sentenced to 15 months for an identical offence.

[6] The respondent conceded that the sentence was unduly lenient. The Court required to consider the matter *de novo*. The respondent had no convictions prior to 2017 and he had complied with the SOPO since December 2020. He had committed the offences during a troubled period of his life. There was no suggestion that the breach was for the purposes of

committing any other criminal acts. He had pled guilty and a discount should be applied to reflect the utilitarian value of the plea. He had already paid the fine.

[7] Standing the fact that the respondent had a recent, previous conviction for an identical offence, which had attracted a sentence of 15 months imprisonment, a further custodial sentence was inevitable. The Crown's submission that the sheriff failed to give adequate weight to the gravity of the offence and the previous convictions is a sound one. The concession by the respondent that the sentence was unduly lenient was correctly made. The court will take that concession, the early plea under section 76 and the payment of the fine into account in quashing the sentence of a fine and substituting therefor a sentence of twelve months imprisonment, reduced from a headline period of eighteen months.