APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 86
HCA/2017/000542/XC

Lord Brodie
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD BRODIE

in

APPEAL AGAINST SENTENCE

by

ANTHONY STEWART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Mackintosh; John Pryde & Co
Respondent: K Harper (sol adv) AD; Crown Agent

22 November 2017

[1] This is an appeal at the instance of Anthony Stewart, who pled guilty at a continued first diet in the Sheriff Court at Glasgow on 3 July 2017 to charges 2, 3, 4 and 5 on the indictment. He pleaded not guilty to charge 1. The Crown accepted his pleas in respect of charges 2, 3, 4 and 5 but rejected his plea in respect of charge 1. The appellant accordingly

went to trial on charge 1. That trial concluded on 11 August 2017. The appellant was acquitted.

[2] On 11 August the sheriff deferred sentence in respect of the charges to which the appellant had pleaded guilty in order to obtain a Criminal Justice Social Work Report. He continued bail.

[3] The case called again on 6 September for sentence. The charges in respect of which the appellant fell to be sentenced were: charge 2 – having with him without reasonable excuse or lawful authority a bladed or sharply pointed weapon (a kitchen knife) contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 section 49(1); charges 3 to 5 – having in his possession a Class B controlled drug (respectively amphetamine, cannabis and cannabis resin) contrary to the Misuse of Drugs Act 1971 section 5(2). All charges related to one day, 18 May 2016, and all charges were subject to the aggravation that the appellant was then on bail in respect of three bail orders. The items to which the charges related had all been found by police officers in a motor vehicle which the appellant had been driving and which had been observed to carry out an illegal right turn. The knife was found in the rear passenger footwell.

[4] On 6 September 2017 having heard the appellant's solicitor in mitigation and considered the terms of the Criminal Justice Social Work Report the sheriff imposed a sentence of 12 months imprisonment (discounted from 15 months in respect of the plea) in respect of charge 2 with 2 months attributed to the bail aggravation; and 2 months imprisonment in respect of each of charges 3, 4 and 5. He ordered the sentences to be served concurrently with one another and to run from 6 September 2017.

[5] The appellant now appeals on the grounds that the imposition of a custodial sentence was excessive and, alternatively, that if the imposition of a custodial sentence was

not excessive then a shorter period of custody would have adequately met the requirements of punishment and deterrence in the case. The mitigating circumstances listed in the Note of Appeal can be summarised as follows: the appellant's uncontradicted explanation that the knife was work equipment which had fallen from his belt, had been found by him and placed out of sight in the car and the appellant having subsequently forgotten to retrieve it; while the appellant had previous convictions they demonstrated no propensity to carry knives; in that light the seriousness of charge 2 did not require a custodial sentence; the amounts of drugs found were small and sentences of imprisonment had only been imposed in respect of charges 3, 4 and 5 because a sentence of imprisonment had been imposed in respect of charge 2; the appellant had been subject to an 8.00pm to 8.00am curfew condition under his bail order for a period of 15 months, three of which were subsequent to his offer to plead guilty to charges 2, 3, 4 and 5; the appellant is a single parent with custody of his 16 year old daughter who is about to sit her Higher grade exams; the author of the Criminal Justice Social Work Report assessed the appellant as suitable for a community disposal whether by a Restriction of Liberty Order or Community Payback Order with unpaid work.

[6] The sheriff has provided a report in response to the Note of Appeal. At paragraph [13] he says this:

> "I considered carefully all of the information provided to me in mitigation of sentence. The explanation tendered for the presence of the knife in the car being driven by the appellant was implausible. There is attached to my report an image of the knife which was produced in court. Your Lordships can see that it is a kitchen knife with a 4" handle and a 6" blade. It is difficult to accept that such a knife is an item that a scaffolder would routinely have on his belt for the purpose of cutting nylon ties, when there are tools of a more suitable nature readily available, such as a Stanley knife or such."

We should say that the reference to the tools that a scaffolder might use arises in the context where it was put forward in mitigation that the appellant worked from time to time as a

scaffolder and that it was for the purpose of working as a scaffolder that he originally had the knife in his scaffolder's belt and that the scaffolder's belt had originally been in the car. Lord Turnbull, when granting leave to appeal, drew attention to this paragraph in the sheriff's report and, under reference to *Ross* v *HM Advocate* 2015 JC 271, and suggested that the sheriff had erred in rejecting the appellant's explanation without giving notice of that and affording the appellant the opportunity of advancing his explanation through a proof in mitigation.

[7] In his case and argument and in submission, Mr Mackintosh, on behalf of the appellant, developed the points made in the Note of Appeal by way of five propositions:

1. The drugs charges by themselves would not justify imprisonment – in his report at paragraph [18] the sheriff seems to accept that but for the contravention of section 49(1) of the Criminal Law (Consolidation) (Scotland) Act 1995 which constituted charge 2, custody would not have been necessary.
2. The seriousness of charge 2 turns on whether the appellant's explanation for the presence of the knife is accepted.
3. Custody is not inevitable or necessarily appropriate in all cases where there has been possession of a knife in a public place – on 30 June 2010 during the stage 3 debate on the Bill that was to become the Criminal Justice and Licensing (Scotland) Act 2010 the Scottish Parliament had rejected amendments to the Criminal Law (Consolidation) (Scotland) Act 1995 which had been intended to make imprisonment mandatory or to create a presumption of imprisonment in the event of conviction for possession of a sharp or bladed item; there required to be aggravating circumstances before possession of a knife becomes the only appropriate sentence.

4. The circumstances of the appellant's daughter and the last part of the period when the appellant was subject to curfew in terms of his bail conditions and the availability of alternatives to custody are all indicators that the sentence was excessive.

5. The sheriff erred in the way he dealt with the explanation for the presence of the knife in the car which was put forward in mitigation.

[8] The Crown has also lodged written submissions and we invited the advocate depute to address us accordingly. In the written submissions reference is made to Lord Turnbull's observations and to the case of *Ross* and to the case of *McCartney* v *HM Advocate* 1998 SLT 160. In the Crown's written submissions and as was repeated by the advocate depute before us, it is accepted that the explanation for the presence of the knife in the footwell of the appellant's vehicle was not "so manifestly absurd that it can be disregarded", to use the language of Lord Sutherland in *McCartney* at page 162D. While the Crown traditionally did not comment on matters of sentence in the written submissions it was submitted that charge 2 should be assessed at the lowest range of culpability. Reference was made to Lord Prosser's discussion of the purpose of section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 in *Crowe* v *Waugh* 1999 SCCR 610 at pages 614G to 615B. The offence of having a knife in a public place without reasonable excuse in contravention of section 49 of the Act was to be distinguished from the offence of possession of an offensive weapon in contravention of section 47 of the Act.

[9] We are immediately persuaded that the sheriff erred in his rejection of the mitigation offered in respect of charge 2 which was the most serious of the charges to which the appellant pled guilty. As is made very clear in the recent case of *Ross*, a sentencing judge is not bound to accept the veracity of what is advanced by way of mitigating circumstances,

even where it is not inconsistent with a guilty plea and where it is not challenged by the Crown, but if the judge considers an account to be implausible or if he doubts its veracity for any other reason then as a matter of fairness and procedural propriety he must so advise the accused and afford the accused the opportunity to establish what he asserts by way of proof in mitigation. If the judge does not do that, and the proffered mitigation is not manifestly absurd, then he will usually be obliged to proceed on the basis that what has been put forward in mitigation is true: *McCartney* at 162.

[10] Whereas the advocate depute and Mr Mackintosh were at one as to what should have been done by the sheriff, they were not one as to how this court should proceed to correct the sheriff's error. Mr Mackintosh in his case in argument recognised that in *McCartney* the court had remitted the case back to the sheriff to hold a proof in mitigation and that was the course which the advocate depute commended in the present case. Mr Mackintosh urged us not to follow that course. It would be unfair to do so given that the sheriff had clearly formed a view which was adverse to the veracity of the appellant's explanation. We agree with that. Even if the sheriff were able to put out of his mind his initial impression that what he had been told was implausible, the appearance would be of the matter having been pre-judged in a way adverse to the appellant. We also agree with what is said in the appellant's case and argument to the effect that it would not be proportionate in the present case to conduct a proof in mitigation before this court, although we were persuaded by Mr Mackintosh that we should view the knife and the scaffolder's belt in question. The advocate depute also suggested that the matter of sentence might be remitted to another sheriff. We were not attracted by that proposal. We therefore proceed on the basis that the appellant's explanation is true. Agreeing with both Mr Mackintosh and the advocate depute, we see it as significantly mitigating the severity of charge 2. As

appears from the Opinion of the Court given by Lord Prosser in *Crowe* v *Waugh*, the offence of contravention of section 49 of the 1995 Act is an offence with a wide spectrum of culpability associated with it. This case falls very much towards the lower end of that spectrum. Forgetfulness may not amount to "good reason" and therefore not afford a defence, but it may afford an explanation.

[11] In what we consider to have been a measured submission, Mr Mackintosh recognised that the appellant's period on curfew did not require to be reflected by a reduction: *McGill* v *HM Advocate* 2014 SCCR 14 at paragraph [16]. He was also careful not to make too much of what can be taken from the discussion in *Gorrie* v *MacLeod* 2014 SCCR 187 as to the proportionality of a custodial sentence which impacts on the children of the offender and the rights of these children under Article 8(1) of European Convention on Human Rights. We do however see the circumstances of the appellant's daughter to be relevant to the question as to whether a custodial disposal of this case is appropriate. We have been told that she will be sitting Higher grade exams during the current academic year. While it may be the case that she is presently being cared for by relatives, it is obviously an important time for her and we would immediately accept that her father being in custody can only have a disruptive effect. We consider that that is an outcome which is to be avoided where doing so is compatible with the public interest.

[12] It is true, as was apparently conceded by his solicitor before the sheriff (sheriff's report paragraph [11]), that the appellant's schedule of previous convictions "did him no credit". The sheriff counted 19 previous convictions involving 28 charges, a number of which were aggravated by breach of bail. The appellant was convicted of a directly analogous knife offence on 13 December 2002 in the sheriff court (for which he was admonished) and was convicted in the High Court at Edinburgh on 28 October 2003 for

contraventions of the Misuse of Drugs Act 1971. That provided the context in which the sheriff imposed the custodial sentence. We have however been persuaded that a custodial disposal would not be an appropriate one in this case. As we have previously indicated the culpability in relation to the contravention of section 49 of the 1995 Act is very much towards the lower end of the scale. The same can be said for the contraventions of the Misuse of Drugs Act 1971. Mr Mackintosh drew our attention to the fact that the appellant was on remand for a period of 8 days and has spent some 7 weeks in custody subsequent to a conviction. Mr Mackintosh invited us to quash the sentence and impose a community based order.

[13] We shall do as Mr Mackintosh proposes we should. We shall quash the sentence of imprisonment. We shall substitute a Community Payback Order with a requirement of unpaid work for 100 hours.