APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 25
HCA/2019/000092/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

JAMES BRAND

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: S McKenzie (sol adv); Martin & Johnston & Socha Ltd (Alloa)
Respondent: J Farquharson QC; Crown Agent

16 April 2019

[1] On 7 January 2019, the appellant's pleas of guilty to charges numbers 1 and 4 on the indictment which he faced were accepted by the Crown. The charges to which the appellant pled guilty involved serious and violent assaults perpetrated against his former partner on one occasion in 2015 (charge 1) and on three occasions between late 2016 and early 2017

(charge 4). The appellant has a record of previous convictions including public order offences and a conviction for assault to injury.

[2] Having adjourned the diet until 6 February 2019 for the preparation of a criminal justice social work report, the sheriff then imposed a sentence of 4 years imprisonment. A non-harassment order was also imposed.

[3] The appellant now appeals against the sentence imposed on the ground that the sheriff erred in failing to permit a sentence discount given his plea of guilty. In light of the basis upon which the appeal proceeds it is necessary to take account of the history of the proceedings.

[4] Charge 1 involved a very serious assault in which the complainer was rendered unconscious and sustained injury, including a fracture to the bone under her eye and other damage from which she was lucky not to have lost the sight of her right eye. This offence took place in March 2015. The appellant appeared on petition on 17 March and was admitted to bail. An indictment was then served with a first diet of 8 December 2015. There were then three further continued first diets, the last of which was on 10 February 2016, on which date the indictment was treated as not called because of witness difficulties. These proceedings required to be abandoned as a result of the complainer failing to cooperate with the Crown because of her fear of the appellant in light of threats which had been made to her shortly after the assault.

[5] The assaults which were libelled in charge 4 were reported to the police on 30 April 2017. These assaults and the assault specified in the previously abandoned proceedings became the charges on the present indictment to which the appellant pled guilty. This indictment called at a first diet on 23 October 2018 and then at a continued first diet on 28 November. On both occasions the solicitor acting for the appellant advised the court that

the case was not ready for trial and outstanding matters still required to be addressed. No specification of these difficulties features in the court minutes but at the second hearing the case was continued to the trial diet of 7 January 2019, at which the appellant pled guilty.

[6] The basis for the contention that the appellant ought to have been afforded a discount of sentence was set out in paragraphs 2 and 3 of the Note of Appeal as follows:

> "2. […] the plea was intimated to the Crown in advance of the hearing and the plea avoided the necessity of witnesses requiring to come to Court to give evidence. This included 2 child witnesses of 8 and 10 years.
>
> 3. That albeit, the plea was tendered on the first day of the Sheriff and Jury sitting, no jurors were required to attend and no witnesses were present."

[7] The correct position is that the solicitor acting for the appellant telephoned the procurator fiscal at around 4.30 pm on Friday 4 January to confirm that a plea would be tendered. Although efforts to contact the witnesses were then made these were not successful and the complainer and two child witnesses aged 10 and 8 years were in attendance at the court on the Monday morning when the plea was tendered and accepted. In his report to this court the sheriff informs us that when the case called at the sentencing diet on 6 February he was informed by the appellant's solicitor that witnesses were present on 7 January, which was, of course, correct. He also informs us that it was accepted on the appellant's behalf that a discount was unlikely given the circumstances.

[8] Accordingly, as the sheriff states in his report, the terms of the Note of Appeal directly contradict what he was told by the appellant's agent on 7 January. The Note of Appeal was drafted by the solicitors who have acted for the appellant throughout the whole proceedings. Mr McKenzie, the solicitor advocate who appeared for the appellant before us, though not in the proceedings below, was unable to explain how it came to be that a statement which was factually incorrect, and in direct conflict with what the sheriff was told

by a member of that same firm of solicitors, came to be included by them in the Note of Appeal. Nor was he able to explain the basis of the assertion in the Note of Appeal that no jurors were required to attend.

[9] At the hearing of the appeal Mr McKenzie departed from the proposition that no witnesses were present on the first day of the sheriff and jury sitting. He was not able to offer any support for the proposition that no jurors were in attendance. He sought to argue that the sheriff ought nevertheless to have permitted a discount of sentence. He submitted that there remained a utilitarian value in the plea of guilty in light of the fact that although witnesses were present none were called to give evidence.

[10] In declining to afford a discount of sentence the sheriff took account of the factually correct information which was placed before him, the observations on discount made by the appellant's agent and the whole history of the case proceedings. Having done so he concluded that it was inappropriate to afford a discount for this plea of guilty tendered at the trial diet.

[11] In the case of *Gemmell* v *Her Majesty's Advocate* 2012 JC 223, the court reiterated that the decisions whether to allow a discount and if so what discount to allow remain a matter for the discretion of the sentencer (paragraph 29 in the opinion of the Lord Justice Clerk). We note what was said by the Lord Justice Clerk at paragraph 43 of his opinion, where he observed that there will always be some benefit in an early plea, if only in the administrative benefits that result from it. But we also take account of what he said at paragraph 77, that the court's discretion to allow a discount should be exercised sparingly and only for convincing reasons. We also take account of what he said at paragraph 81 that:

> "Where the sentencer has given cogent reasons either for allowing the discount in question or for declining to apply a discount at all, I consider that it is only in exceptional circumstances that this court should interfere".

[12] In the present case we are satisfied that the sentencing sheriff gave due weight to the information placed before him and that he decided not to apply a discount for reasons which are entirely cogent.

[13] In addition, we note that what was said in paragraph 34 in the case of *Gemmell* where it was explained, under the heading of "Justification of Discounting", that the primary benefit that is realised in every case is the saving of administrative costs and the reduction of the court's workload. It therefore seems to us that in considering whether to afford a discount of sentence for a plea tendered at a trial diet the sentencer should, as the sheriff did in this case, take account of the whole proceedings. In this case the relevant proceedings, and therefore the administrative costs and court workload involved, comprised seven separate hearings.

[14] In these circumstances, in our opinion, there is no basis upon which the exercise of the sheriff's legitimate discretion can be criticised and the appeal must be refused.