**SHERIFF APPEAL COURT**

**[2015] SAC (Crim) 1**
**SAC/2015/000003/AP**
**SAC/2015/000004/AP**

Sheriff Principal M M Stephen QC
Sheriff Principal C A L Scott QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M M STEPHEN QC

in

SUMMARY APPEALS AGAINST SENTENCE

by

ROBBIE ROBERTSON

Appellant;

against

PROCURATOR FISCAL, STIRLING

Respondent:

**Appellant: CM Mitchell; Virgil M Crawford, Stirling**
**Respondent: Lord Advocate; Crown Agent**

4 November 2015

[1] The appellant appeals the sentences of imprisonment imposed on two complaints resulting in a *cumulo* sentence of 354 days imprisonment imposed on 15 September this year. These appeals have been lodged unconventionally as one note of appeal. In this opinion we consider both appeals in a composite fashion.

[2] The appellant, Mr Robertson, was sentenced at Stirling Sheriff Court on 15 September 2015 to two periods of imprisonment to be served consecutively. The total sentence is 354 days imprisonment to be served from that date. The first sentence is a period of 119 days in respect of offending on 1 January this year, directed towards CMcK, his ex-partner, at her home in Stirling. The offence is a contravention of section 38(1) of the Criminal Justice and Licensing (Scotland) Act 2010 by using threatening and abusive behaviour, acting in an aggressive manner towards her, including attending at her home, banging on doors and generally behaving aggressively. The offence was committed whilst the appellant was subject to two bail orders from Stirling Sheriff Court, with the latest only two weeks earlier, on 17 December 2014.

[3] In her report the sheriff indicates, step by step, her sentencing process. She selected a period of imprisonment of six months and then to reflect the plea at the intermediate diet applied 20% discount to reach 145 days; 45 of these days represented the bail aggravations. The sheriff then deducted the 26 days of the appellant's remand, (3 January until 29 January).

[4] In this appeal leave was granted solely on the question of whether the sheriff had taken proper account of the period on remand. The sheriff is required to do so in terms of section 210 of the Criminal Procedure (Scotland) Act 1995. It appears that the sheriff deducted the entire period of remand from the custodial sentence which ran from 15 September.

[5] The second appeal relates to the sheriff's sentence of 235 days imposed in respect of two assaults, committed on 13 August 2015 whilst the appellant was subject to three bail orders. That period of imprisonment is to run consecutively to the period of the sentence on the section 38 charge.

[6] This appeal is argued on two grounds:- Firstly, whether the sentence of six months imposed on each of the two charges on this complaint is excessive, with the result that the *cumulo* sentence was a headline sentence of 12 months, prior to discount. Secondly, whether the sheriff made a suitable deduction for the time spent on remand.

[7] Both offences took place at the home of the appellant's former partner, CMcK, who is the complainer in charge 2. The appellant assaulted her by pulling away a chair, on which she was sitting, causing her to fall off that chair whereupon the appellant threw another chair whilst the complainer was endeavouring to call for assistance. The complainer in the first charge was a visitor in CMcK's home and the assault was carried out in a similar manner. The sheriff characterised the assault on LC as a random act of aggression directed towards an entirely innocent third party.

[8] It was submitted today that the starting point of 12 months, arrived at by the sheriff, was excessive in circumstances where the conduct of the appellant had not caused injury to either of the complainers. The sheriff, in determining that a sentence of six months imprisonment on each charge was appropriate, took account of the accused's record which disclosed persistent offending against the same complainer. In particular, this was the second conviction for domestic assault on the same complainer within the last year; and a fourth conviction for a domestically aggravated crime of disorder. The sheriff clearly had regard to the need to protect CMcK from the accused's behaviour. The appellant has numerous convictions for assault including one on indictment. The sheriff was therefore entitled to take the view that there was a need to protect the complainer and was justified in her conclusion that the appellant's offending was escalating.

[9] The sentence selected attributed 36 days on each charge to the bail aggravations. The sheriff applied a 25% discount for the plea at the intermediate diet and then reduced the

period of imprisonment by 37 days to reflect the period, which the sheriff had been advised by the defence agent, was the period of remand. In fact, as we now know, simple arithmetic would indicate that the duration of remand had instead been from the date of the first appearance on 19 August until 15 September, a period of 27 days.

[10] Having regard to the nature of the offending it is particularly important to consider the appellant's record of offending against the complainer CMcK especially and his record of offending with particular reference to crimes of violence. In that context it cannot be said that a headline sentence of six months for an assault whilst on bail with complete disregard for the consequences, can be considered excessive. The sheriff is aware that no injury was sustained by either complainer. The sentences of six months are to be served consecutively. The appellant's behaviour demonstrated a reckless indifference to the outcome.

[11] The appellant argues with reference to *Martin* v *H.M. Advocate* 2006 SCCR 683 that the sheriff ought to have allowed a greater deduction in respect of the time spent on remand had she had proper regard to the terms of section 210 of the Criminal Procedure (Scotland) Act 1995. As the sheriff did not backdate either of the custodial sentences she required to take account of the period on remand by reference to the length of a custodial sentence which would have resulted from the period which he actually spent in custody standing the rules on early release after one half of the sentence is served. In other words, the sheriff ought to have made allowance of double the period on remand. However, when sentencing the appellant on these complaints the sheriff took full account of the periods during which the appellant was remanded. She reduced the discounted sentences by the number of days she was invited to by the defence agent which turned out to be neither the period of remand nor double the period of remand. The case of *Martin* is not authority for an absolute or rigid

approach to dealing with periods on remand but reminds sentencing judges to have regard to the release provisions of section 1(1) of the Prisoners and Criminal Proceedings (Scotland) Act 1993. Normally, a period on remand would be recognised by deduction from the sentence of imprisonment of the equivalent to the length of sentence which would result in that period actually being served in custody. The period on remand for the second complaint was 27 days rather than 37 days. We agree with their Lordships in *Martin* that too fine a mathematical approach would be inappropriate, rather, it is important that the sentence as a whole should be considered. It can be said that the sheriff allowed a generous discount on both complaints. The discount allowed by the sheriff to reflect the appellant's plea at the intermediate diet, namely 20%, on the complaint with offending on 1 January, could be said to be over generous as the appellant himself had prolonged and interrupted these proceedings by his failure to attend at an intermediate diet on 21 April resulting in a trial diet being discharged and consequent delay. The sheriff allowed discount of 25% for a plea at the intermediate diet on the second complaint.

[12] It is important to ask whether the overall sentence selected was excessive and that a miscarriage of justice arises. In our view, it is not arguable that these consecutive sentences are excessive in extent and the sheriff in her report demonstrates that all relevant issues were considered. The appellant has a bad analogous record. The sheriff was careful to discount the sentences and we consider that she had regard to the periods on remand as required by section 210. She gave full credit for the periods of remand by reducing the overall sentences in the manner sought by the appellant's solicitor. The deduction exceeded the periods of remand.

[13] We have taken the approach that we must look at the sentence and the sheriff's sentencing process in the round. Overall, we are satisfied that the sheriff did have regard to the period of remand even though the period was not precisely doubled. We are not, therefore, persuaded that a miscarriage of justice arises and we therefore refuse the appeals and affirm the sheriff's sentences.

lau