In the Supreme Court of St. Helena

Citation: SHSC 8/2023

Criminal

Appeal against sentence

Patrick Thomas

v

Attorney General

Judgment on Appeal dated 4th July 2023

The Chief Justice, Rupert Jones

Section 93 of the Welfare of Children Ordinance 2008 & Section 1 Sexual Offences (Amendment) Act 1992 apply to this ruling. Nothing may be published if it is likely or calculated to lead members of the public to identify any complainant or person under 18 involved in these proceedings

1. This appeal was decided on the papers without a hearing. Both parties consented to such a procedure and I was satisfied it was just and fair, in the interests of justice, to proceed in this manner. The prosecution chose not to present any written argument on the appeal. Nonetheless, both parties had a reasonable opportunity to present factual and legal submissions in writing addressing everything they would reasonably have wished to say in respect of the appeal. I am satisfied I have received all the relevant and necessary argument, information and evidence in order to justly and fairly determine the appeal.

A. Background Facts:

2. On 18 May 2023 Patrick Thomas, (the 'Appellant') pleaded guilty to one offence of breaching a Sexual Offences Prevention Order ('SOPO') imposed by Saint Helena Supreme Court on 14 August 2020. The offence was contrary to Section 113 of the Sexual Offences Act 2003. The charge alleged that on 3 May 2023 the Appellant contacted AB by posting 2 comments on her Facebook page which he was prohibited from doing in accordance with a Sexual Offences Prevention Order.

3. The Appellant pleaded guilty at the earliest opportunity having admitted the offence in police interview.

4. The facts are that on 29 April 2023 the Appellant was released on licence from HMP Jamestown. The Appellant had been sentenced to the SOPO and to 56 months (4 years and 8 months) imprisonment in respect of the conviction on 14 August 2020 for four substantive offences of sexual activity with a child, who was 14 years old when he abused her and when he was in his thirties. One of the conditions on his Licence reflected the same prohibition in the SOPO, namely he was prohibited from contacting or attempting to approach or contact, directly or indirectly AB.

5. On 3 May 2023 the Appellant "commented" on the Facebook account of AB. These comments were in the form of heart emojis linked to two historic images on AB's Facebook account. The Appellant was arrested the following day (4 May 2023) and made full admissions in interview. The Prison Authorities recalled the Appellant for breach of Licence that day to serve the remainder of his sentence. His sentence end date is 18/11/2024.

6. The maximum sentence available for breach of a SOPO was one of five years' imprisonment.

7. Sentence was passed at the first hearing on 18 May 2023. The Magistrates' Court (the Court), duly constituted as Chief Magistrate and two Justices, imposed a sentence of twelve months immediate imprisonment upon the Appellant.

8. The Appellant appeals against the sentence. The grounds of appeal were drafted by his representative, Walter Scott of the Public Solicitor's Office, and are considered below.

The Court's sentencing remarks

9. In its sentencing remarks, the Court observed that this was a category B2 harm/culpability case when considering the Definitive Guidelines of the Sentencing Council, with a starting point of 12 months' custody and with a range of high-level community order to 2 years. No mitigating factors were identified – aggravating features were noted as:
   i) Previous convictions - of significant concern was an earlier warning issued to the Appellant by the police for making threatening and abusive phone calls.
   ii) An earlier breach of a suspended sentence by the Appellant.
   iii) The Appellant contacted the person the order was designed to protect.
   iv) The offence occurred within days of the Appellant's release from custody.
   v) The Appellant was on Licence at the time of the breach.

10. The Court observed that the only meaningful non-custodial sentence, namely a probation order was not available as the Appellant at the time of sentence had been recalled on Licence.

11. The collective effect of the aggravating features was to increase the sentence to 18 months but credit for the plea of guilty brought the sentence down to 12 months' imprisonment.

12. The court stated:

6. That is a clear breach of the order committed against a girl who you had already sexually abused, sent abusive messages to and caused very real distress. Not only that but you contacted her within days of your release from a lengthy prison sentence for the offences against her, indicating that you have learnt nothing from your experience.
7. This is a deliberate breach that risks significant harm or distress placing it within B2 on the guidelines. The starting point is 12 months custody with a range of high level community order to 2 years. We will start the sentence at 12 months. You are heavily convicted for offences involving violence and dishonesty. Perhaps of significant concern is an earlier warning for making threatening or abusive phone calls. You have also breached a suspended sentence in the past. In this case you contacted the person the order was in part designed to protect, the offence occurred within days of release from custody and you were on licence. We can identify no mitigating factors. You say that you went on the Facebook page to access images of your son, but you could have requested these some time ago and never did, despite having a lawyer acting on your behalf for the purposes of contact with the child.

8. In light of this the appropriate custodial term is 18 months. We do not need a pre-sentence report as we have sufficient information. There is no scope for a suspended sentence as you have breached court orders in the past and this breach occurred soon after your release from prison and while on licence. You are serving a prison sentence having been recalled so there is no non-custodial option available.

The Law

13. The sentencing guidelines for offences of breaching Sexual Offenders Prevention Orders are not in dispute.

14. As far as the test I must apply in deciding this appeal, section 248 of the Criminal Procedure Ordinance 1975 states:

> **Summary dismissal of appeal**
>
> 248. On receiving a petition made under section 245, the Chief Justice must peruse the same and after perusing the record of the Magistrates' Court—
>
> (a) in the case of an appeal against sentence only – if the Chief Justice considers that the sentence is not excessive;
>
> the Chief Justice may dismiss the appeal summarily without hearing the appellant or the appellant's advocate.

15. I have not dismissed the appeal summarily so I must apply section 252 if I find the sentence passed to have been excessive:

> **Powers of Supreme Court on appeal against other orders**
> **252.** The Supreme Court may on any appeal from against any order other than a conviction, acquittal or dismissal alter or reverse any such order.

B. Grounds of Appeal

16. The argument of the Appellant is that the Court erred in: 1) placing the offence within Category B2 of the relevant sentencing guidelines; and 2) erred in the totality of the sentence when aggravating and mitigating features were taken into account. It is submitted that the sentence of 12 months imprisonment was excessive.

Ground 1 – starting point of C for Culpability rather than B?

17. Mr Scott submits that the Court erred in its conclusion that this was a category B offence, characterised by a deliberate breach falling between categories A and C for culpability.

18. The Appellant submits it should be a starting point of C for culpability – a minor breach. Mr Scott notes that the prosecution in its opening note to the Court identified the Appellant's actions as a minor breach. The Court disagreed by reference to the original sentencing comments made in 2020 with specific reference to the impact the original offending had on AB.

19. The Court categorised the offence as B for culpability.

Discussion and analysis

20. The Prosecution accepted what the Appellant said in his police interview - he saw pictures of his young son, born during his time in prison, images he had never seen before and, overcome with emotion, he regretfully pressed the heart emoji on the Appellant's Facebook account.

21. The Appellant also contends there was no deliberate, specific targeting of the victim. I do not accept this submission – this was a deliberate act and he targeted the victim's Facebook account which was private and not automatically available to him.

22. This is a finely balanced decision but nonetheless, and on balance, I consider that the culpability does not fall to be assessed as category B: 'deliberate breach falling between A and C'. I am of the view that the correct categorisation for this offence is within Culpability Category C ('Minor breach or Breach just short of reasonable excuse') rather than B ('Deliberate breach falling between A and C' – A being a 'very serious or persistent breach'). In my judgment, the breach is properly categorised at the lower end of the culpabilities - as 'minor'.

23. While it was a deliberate breach in the sense of intentional contact with the victim knowing this was prohibited, a) there was no verbal contact (no words written or spoken) nor physical contact with AB, b) the nature of contact was placing expressions of positive emotion in response to two photographs including that of his son, on her social media; and c) it was intended to be a non-threatening response (heart emojis).

24. However, because it was a targeted and deliberate contact, I accept this was at the highest end of culpability C – the highest level of minor breach.

25. I also accept that the harm was properly categorised as category 2. There is no dispute about this. The victim's statement makes clear that, unsurprisingly, she was caused to be alarmed, distressed and very nervous by this contact. It caused her moderate or significant harm that was somewhere between very serious harm or distress and little or no harm or distress. The Appellant's representative accepts the Appellant's previous history with the victim is of course material and the Court rightly identified that the offending history against AB gave rise to an increased risk of harm and distress. This properly placed it within category 2 for harm. The Appellant concedes that this categorisation is correct when considering the link with AB to the breach offence.

26. Therefore, I am satisfied that the overall offending behaviour is correctly characterised as a Category C2.

27. The starting point stated within paragraph 7 of the Court's sentencing remarks (12 months imprisonment) is accordingly in error and the sentence is excessive. The correct starting point should be a high level community order with a range of sentences from a medium level community order up to 26 weeks custody (six months' imprisonment).

Ground 2 – aggravating and mitigating factors – total sentence

28. Mr Scott submits that some of the aggravating factors identified at paragraph 7 of the sentencing remarks had the effect of double counting. He accepts that listed in the "other aggravating factors" within the Sentencing Guidelines is "*Targeting of particular individual the order was made to protect*". However, he contends that the victim is the very person the SOPO condition was designed to protect but this was integral to the categorisation of the offence in Step 1 of the sentencing exercise. He argues that the conclusion by the Court that sending two heart emojis on a Facebook account posed a risk of significant harm or distress can only have been reached by taking into account who the victim was during the Step 1 categorisation exercise.

29. He contends that the Court's comments in paragraph 6 of their sentencing note confirm they had this well in mind when categorising Harm. The Court therefore erred in considering this factor as an aggravating factor -in effect- double counting.

30. I do not accept this argument. The court was entitled to take into the deliberate targeting of the person the SOPO was designed to protect as an aggravating factor under the guidelines and I am satisfied that this offence was at the highest end of the C2 bracket.

31. The Court was also entitled to take into account the seriously aggravating factors that the offence occurred within days of release from custody and the Appellant was on Licence at the time of the breach.

32. The Court was entitled to also take into account any history of disobedience of Court Orders. Consideration of previous convictions fall within the "statutory aggravating factors" – the guidance helpfully adds that when considering previous convictions regard must be had as to *a) the nature of the offence to which the conviction relates and its relevance to the current offence: and b) the time that has elapsed since the conviction*.

33. The Appellant contends that Court erred in placing too much weight on a breach of a suspended sentence dated November 2006, some 16 ½ years previously. Though relevant, Mr Scott submitted it offered no insight into the additional culpability of the Appellant for the purposes of sentencing for this breach and should have been given little or no influence on increasing the start point for sentencing.

34. He also submits that the Court's comments that it was of particular concern that the Appellant had an earlier warning for making threatening or abusive phone calls should also not have been taken into account as an aggravating factor. The record of previous convictions indicates that the offence identified by the Court took place 22 years ago when the Appellant was 15 years of age and was dealt with by way of a police caution. The Appellant also argues that relevant is that the current breach offence lacks the elements of abusive, threatening or indecent telephone calls. It is submitted it should have been given little or no influence on increasing the start point for sentencing.

35. I do not accept these submissions. The court was entitled to take into account these matters as aggravating according to the guidelines even if they were largely historic and not as aggravating as other factors. The reality is that none of these additional aggravating factors, which the court was entitled to take into account even if somewhat historic, make any significant difference to an offence which was already highly aggravated.

36. I am satisfied that the cumulative effect of the aggravating factors was so serious as to take the offence to the top of the sentencing range for a C2 offence – to six months' imprisonment.

37. Finally, I do not accept the Appellant's argument that the Court erred in concluding that there were no mitigating circumstances. The Guidance allows for the Court to take into account certain factors reducing seriousness or reflecting personal mitigation - namely the prompt voluntary surrender / admission of the breach. However, the Appellant did not voluntarily surrender – he admitted the offence only when interviewed and not until after he had been arrested and cautioned (when he initially asked for his lawyer).

38. While the Appellant accepted his actions during his police interview and thereafter pleaded guilty at the earliest opportunity to do so, this was properly reflected in the maximum credit of a one third discount for his guilty plea and admission in interview. Applying the same reduction and credit for this mitigation, but applied to the starting point I have decided, this reduces the total sentence from one of 6 months' imprisonment to that of 4 months imprisonment.

39. I do however accept and acknowledge that, in deciding the sentence, the Appellant has been recalled to prison for breach of his licence, the length of which imprisonment is at the discretion of the Governor. The breach of licence is based upon the same facts as the breach of SOPO for which he is now being separately sentenced (the conditions for each were in identical terms).

<u>Conclusion on appeal and sentence to be passed</u>

40. In conclusion, I have decided on balance that the imposition of a starting sentence of 18 months' imprisonment prior to a 30% reduction for a plea of guilty was wrong in law and hence excessive. The starting point for the sentence for this offence should be

one of six months' imprisonment prior to a one third reduction for a plea of guilty and admission in interview. This reduces it to a final sentence of four months' imprisonment.

41. This sentence is to be served immediately from the date of the Magistrates' Court sentencing on 18 May 2023, taking into account remand time, and concurrently with the time for which the Appellant is recalled to prison for breach of his licence condition (which length is at the discretion of the Governor – see the Appendix to this decision).

42. The appeal is therefore allowed. The overall length of the sentence should be reduced from 12 months' imprisonment to that of 4 months' imprisonment. The remaining orders made as part of the sentence have not been challenged and are to continue to have effect.

Rupert Jones, The Chief Justice
Dated 4 July 2023

Appendix

1. The approach to be followed when sentencing for an offence at the same time as a defendant has been recalled to prison for breach of licence is that contained in the Magistrates' Court's decision in AG v Brandon Caswell,17 December 2021:

9. Your licence from your last sentence has been revoked and you have been recalled. S.239 of the Criminal Procedure Ordinance 1975 requires this sentence to commence at the end of the sentence you are currently serving unless we direct otherwise. Were you being sentenced in England your sentence would commence today as you had been released but then recalled.
10. We have regard to the statutory provisions in place on St Helena and compare those to England to consider how best to approach situations where someone has been recalled on their licence and then receives a further term of imprisonment. Historically courts in England had the power to order those on licence to serve the balance, or such part of the balance as they felt appropriate, of their original sentence before a new one commenced. This power went in 2004 when recall became wholly administrative. In St Helena recall is at the discretion of the Governor by virtue of the *Prison Rules 1999* and not the courts. Recall can occur for any number of reasons which may not of themselves be criminal offences. The Governor having recalled an individual may again release them on licence before the end of their sentence.
11. The impact of this is that it is not possible to aggregate two sentences together where the release date on one of them may vary. It makes having regard to totality an

impossible task. If you have been recalled based upon facts that equate to these offences it may well be unfair to order a consecutive sentence. This court cannot assume that you will serve out the balance of your existing sentence any more than it can assume you will not. This court is also prohibited from increasing the sentence imposed today to ensure that the time actually served equates to a period equivalent to the recall period and the new sentence combined, this would be to undermine the discretion of the Governor to allow early release and is not in accordance with *Jamie Costello v The Queen [2010] EWCA Crim 371*.

12. We will accordingly direct that the sentence commences today and such remand time that can apply will do so.