APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 9
HCA/2017/266/XC

Lord Justice General
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST CONVICTION AND SENTENCE

by

RYAN LAWSON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Findlater; Faculty Services Ltd (for Sheena Mair & Co, Peterhead)
Respondent: McSporran QC (sol adv) AD; the Crown Agent

10 January 2018

General

[1] On 15 March 2017, at the Sheriff Court in Dundee, the appellant was found guilty of three charges of assault on former partners. The first (charge 3), in April 2014, libelled pushing, pulling and seizing the complainer A-MM by the neck. The second (charge 6), in January 2015, consisted of pushing LN to the floor to her injury and seizing her by the

throat. There was a rider of provocation in relation to the first element. The third (charge 8), in March 2015, again involved LN, this time involving grabbing her by the throat.

[2] The appellant also pled guilty to a number of other charges. These were: (charge 7) a breach of bail by approaching LN in March 2015; (charges 10 and 11) failures to appear at trial diets; (charges 12 and 13) breach of special conditions of bail relative to reporting to the police and curfew restrictions; and (charge 14) an attempt to pervert the course of justice by providing the police with a false identity in August 2016.

[3] The sheriff imposed sentences of 6 months on each of the three assault charges (3, 6 and 8), and 3 month sentences on each of the remaining charges. The sentences on charges 10 and 11, and those on 12 and 13, were to run concurrently with each other, but otherwise all the sentences were consecutive. The effect was a total of 30 months imprisonment. That was coupled with a Supervised Release Order of 12 months and Non-Harassment Orders of indeterminate duration in respect of both complainers.

Proceedings at First Instance

[4] The libel in respect of charge 6 had been substantially more serious than that of which the appellant was ultimately convicted. It had originally included kicking the complainer and repeatedly punching her on the head and body. The evidence on this charge was that the complainer and the appellant had been out drinking. When they got home, the appellant had pushed the complainer in the kitchen and, according to the complainer, then "just lost it". The incident went on for several hours. In the bedroom, the appellant had become angry. He had told the complainer that he was leaving the house with the intention of having sexual relations with her sister. She slapped him at that point. He had then grabbed her and thrown her into "the drawers". He became angry again

sometime later and had seized the complainer by the throat. The complainer said that, in relation to being thrown into the drawers, the appellant had "pushed me to get me out of the way".

[5] In cross-examination, the complainer confirmed that she had had an argument with the appellant in the kitchen, before moving back to the bedroom. The argument had continued. The following exchange then took place:

> "Q And then I have you noted as saying that you slapped him on the face and he pushed you away to get you away from him.
>
> A Yes.
>
> Q And then you fell on the drawers.
>
> A Yes."

[6] The appellant did not give evidence, nor was there any account given by him to others available to be placed before the jury.

[7] Having heard submissions on the matter, under reference to *Carr* v *HM Advocate* 2013 SCCR 471, the sheriff withdrew a special defence of self-defence on charge 6 from the jury's consideration. The sheriff observed that, for the defence to be made out, the appellant would have to have reacted to an immediate danger of attack and the jury would have to have been in a position to infer that there was an apprehension of continuing violence. There was no evidence of any apprehension of further attack.

Ground of appeal and submissions

[8] The appellant maintained that the sheriff had erred in withdrawing the defence. The appellant had been attacked. The complainer had followed him into the bedroom and had slapped him. The appellant had pushed the complainer in order to get her out of his

way. The slap to the face had been met with a push to the body. When due allowance was made for the heat of the moment, the defence ought not to have been withdrawn. It was accepted that neither self-defence nor provocation could have applied to the element of the charge involving the subsequent seizing by the throat.

[9] The respondent maintained that the sheriff had been correct in holding that self-defence could not arise simply as a result of the slap. As the appellant had not given evidence, there was no basis for the defence. The three requirements of imminent danger, absence of reasonable opportunity to escape and proportionate retaliatory force had not been demonstrated.

Decision

[10] The only direct evidence about this incident came from the complainer, who said that she had slapped the appellant, following upon his statement that he intended to have sexual relations with her sister. The push which then followed, and which culminated in the complainer falling against the drawers, may have been a reaction to that slap. The jury appear to have held that this was so, given their rider of provocation. However, it falls far short of the test for self-defence, which involves an apprehension of, amongst other things, continuing violence. The appellant did not give evidence that he was anticipating such an attack. In these circumstances, the sheriff was entitled to take the view that there was no evidence from which it could be inferred that the appellant might have been acting in self-defence. This is the case, notwithstanding the strictures in *Carr* v *HM Advocate* 2013 SCCR 471 (Lady Smith delivering the Opinion of the Court at para [13]). The appeal against conviction is accordingly refused.

Sentence

[11] In selecting the sentences which he did, the sheriff had regard to the appellant's previous convictions. There was one in 2012, for housebreaking with intent to steal and possession of a machete, which resulted in a Community Payback Order with 110 hours of unpaid work. There was a contravention of the Police (Scotland) Act 1967, section 41(1)(a), which also attracted a CPO, with 200 hours of unpaid work. Finally, and most significant, there was a conviction for wilful fire-raising in August 2013, which had resulted in a sentence of 8 months imprisonment. This offence involved the appellant setting fire to the home of an ex-partner, who was resident at the time.

[12] The sheriff had regard to the Criminal Justice Social Work Report, which had assessed the appellant as a controlling and violent person within his intimate relationships. His continuing denial, minimisation and blaming of his victim indicated that his behaviour was likely to continue and to lead to further offences of the same nature. The imposition of a Supervised Release Order had prompted the sheriff to reduce the length of the custodial sentences and had been something requested by the appellant's agent. The sheriff considered that the Non-Harassment Orders sought by the Crown were justified for the same reason as he had considered that the SRO was necessary. The Orders were indefinite, as he could not identify a point at which the appellant would no longer constitute a threat to the two complainers. The Order could be revoked or varied in due course.

[13] It was maintained that, although a custodial sentence was appropriate, that selected was excessive. The libels had been significantly reduced. The appellant's record was, for the most part, not especially relevant or aggravating. All disposals had been at summary level. Each of the assault charges could have been dealt with on a summary complaint. The appellant was aged 26 and had been self-employed as a gardener. He was single and living

with his parents. He had no outstanding criminal charges. When imposing consecutive sentences, the court required to consider the resultant cumulative total (*Nicholson* v *Lees* 1996 JC 173). The sentences selected were individually excessive as was the overall period of 30 months. The sheriff had erred in considering that a SRO was necessary to protect the public from serious harm, having regard to the limited nature of the appellant's record. Although the CJSWR had mentioned serious harm, the appellant's attitude to domestic abuse generally and his own conduct in particular, it did say that he was suitable for a community based disposal. Given the restricted nature of the assaults and the appellant's limited record, it was inappropriate to impose two indefinite Non-Harassment Orders. An indeterminate order was appropriate only where there had been misconduct over a number of years towards a particular victim. That was not the case here.

[14] The court is not satisfied that any element of the sentences imposed was excessive. Individually the sentences selected were relatively modest; no doubt because the sheriff took into account the cumulative effect of the consecutive sentences and reduced the individual elements accordingly. In particular, the appellant had a significant previous conviction for fire-raising and the adverse comments in the CJSWR, in relation to the danger which he posed to the public, were of considerable significance. On that basis, both the SRO and the Non-Harassment Orders were justified in the context, of course, that the latter can be varied or revoked in due course. In all these circumstances, the appeal against sentence is also refused.