APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 36
HCA/2024/247/XC

Lord Justice Clerk
Lady Wise
Lord Armstrong

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

Against

DAVID DOCHERTY

Respondent

Appellant: The Lord Advocate (Bain KC); the Crown Agent
Respondent: Graham KC; John Pryde & Co

_____

3 September 2024

Introduction

[1] This is a Crown appeal against a sentence imposed at the High Court in Glasgow in respect of various firearms offences and an offence of attempting to pervert the course of justice. The respondent was indicted on eighteen charges. All but four of the charges were

withdrawn at the close of the Crown case, of which the respondent was ultimately convicted. These were as follows:

(a) Charge 1 – culpable and reckless conduct by discharging a loaded shotgun in the direction of the living room window at 235 Sandwood Road, Glasgow, shattering the window and spraying pellets of shot;

(b) Charge 2 – possession of a shotgun without a licence contrary to section 2(1) of the Firearms Act 1968, as amended, during the events forming the basis of charge 1;

(c) Charge 17 – possession of a firearm or imitation firearm with intent to cause another person, in this case a police officer, to believe that unlawful violence would be used against him, contrary to section 16A of the 1968 Act, as amended;

(d) Charge 18 – attempt to pervert the course of justice by concealing or destroying evidence, in that he removed and disposed of false registration plates from, and set fire to, the vehicle involved in charge 17.

[2] On 19 April 2024 the respondent was sentenced to a total of 40 months imprisonment, broken down as follows:

(a) Charge 1, 12 months;

(b) Charge 2, 9 months, concurrent;

(c) Charge 17, 24 months to run consecutively; and

(d) Charge 18, 4 months to run consecutively to all other sentences.

These sentences were to commence at the conclusion of any sentence the respondent was currently liable to serve.

Circumstances

Charges 1 and 2

[3] In the early hours of the morning of 28 July 2020 the respondent discharged a shotgun through the living room window of the locus, smashing the glass and scattering pellets from the firearm. Pellets were recovered from the locus. The respondent did not hold a shotgun certificate. Fortunately, the 66 year old occupant of the house was not present, but she reported the matter to the police on returning home the following morning.

Charges 17 and 18

[4] On 24 April 2021, Police Constables Tom Marshall and Christopher Walsh were on mobile patrol in Argyle Street, Glasgow as armed response officers. Their attention was drawn to a white Citroen vehicle. They carried out a PNC check which disclosed that the registered keeper of the vehicle and only insured person was a female, whereas the driver was a stocky male and the respondent was the passenger. The officers pursued the vehicle until it came to a halt in Lancefield Quay, Glasgow. PC Marshall stepped out and approached the driver's side of the vehicle. The respondent pointed what appeared to be a firearm towards Marshall, who jumped back and returned to the police vehicle. He immediately reported to his colleague that a firearm had been presented at him. The Citroen must then have been driven away, because later on that date the same vehicle was discovered in Milngavie, in a burnt out condition. There was evidence from which it could be inferred that the respondent was responsible for destroying the vehicle.

The sentence

[5] The temporary judge referred to the respondent's record of previous convictions which was lengthy and contained convictions for violence. The judge noted that no person

was present in the house into which the shotgun was discharged in charge 1 and the most serious charge, charge 17, was of short, albeit highly alarming duration. He attached particular weight to the respondent's current status as a person serving a significant custodial sentence (4 years imprisonment from 11 September 2023), and in particular the relatively lengthy periods of time until he would commence the current sentences and thereafter regain his liberty. In this respect the temporary judge focused on the issue of rehabilitation, stating that the combination of the two sentences would provide sufficient time for the respondent to consider his lifestyle and have the opportunity for rehabilitation. In mitigation counsel referred to the respondent's mother being in poor health and that he had a 16 year old son suffering from mental health issues.

[6] The judge considered that an overall sentence of 6 years was merited. However, that headline sentence fell to be reduced having regard to the time which the respondent had spent on remand. This had been interrupted by the 4 year sentence but 16 months were exclusively in relation to the present offences. The temporary judge doubled this to deduct 32 months, leaving a balance of 40 months which he distributed as shown above. He ordered that the sentences should run consecutively to any sentence which the respondent was currently serving or liable to serve, to ensure that he obtained no benefit from the fact that he was currently imprisoned in respect of another offence.

[7] In his report the temporary judge indicates that having regard to *HMA* v *Fergusson* [2024] HCJAC 22, issued after imposition of the present sentences, he considers he ought to have imposed a *cumulo* sentence and explained what each offence merited as a sentence and why a shorter overall sentence was appropriate. He did not consider the sentencing guidelines issued by the Sentencing Council for England & Wales which relate to offences of the kind under consideration.

The appeal

Crown Submissions

[8] It is submitted that the sentence imposed was unduly lenient. The sentences did not achieve the applicable sentencing purposes in the present case. These were the protection of the public, punishment of the offender and expressing disapproval of offending behaviour. The temporary judge made no reference to these purposes in his report. He did however refer to rehabilitation, but this was of limited application in the present case standing the respondent's criminal history.

[9] The temporary judge had underestimated the seriousness of the offences. Charges 1 and 17 in particular were extremely serious, and involved planning and premeditation. There was a very high degree of recklessness in firing a shotgun through the window of a residential property and the potential harm was significant. Death or serious injury could have resulted in charge 1. There was no indication that the respondent was aware that no-one was in the property at the time. There was actual harm to the property. The circumstances of charge 17 indicated an intention to cause harm. Significant alarm and distress was caused to the victim. The duration of the offence was of limited relevance standing its serious nature. Charge 18 involved the destruction of evidence implicating the respondent in an extremely serious offence (charge 17).

[10] The headline sentence of 6 years imprisonment was far below what was necessary and appropriate for the offending. The temporary judge:

(i) placed too much weight on the length of the sentence which the respondent was currently serving, and which he would serve before the sentence on the instant charges commenced;

(ii) wrongly failed to have regard to relevant sentencing guidelines from England & Wales or guidance of the Court of Appeal of England & Wales in *R* v *Avis* [1998] 1 Cr App R 420 and *R* v *Sheen* [2012] 2 Cr App R (S) 3, all relevant to the offences;

(iii) paid insufficient regard to the aggravating factors of (a) the respondent's appalling criminal record; and (b) that the victim in charge 17 was a police officer, in uniform and acting in the execution of his duty.

Only limited mitigating factors were identified and those which were are without vouching.

[11] Charge 2 would have fallen within category A1 of the relevant English Guideline with a range of 2 years 6 months to 4 years 6 months. Charge 17 would have been in category A2 with a range of 4-8 years and a starting point of 6 years.

Submissions for the respondent

[12] Senior counsel for the respondent did not seek to defend the approach of the temporary judge which he described as singularly unhelpful and disclosing a perverse way of approaching sentence. The report contains "too much arithmetic and too little logic". It was conceded that the sentence for charge 1 was unduly lenient. The approach in relation to other charges was not defended, but no concession was made in the absence of a clearer understanding of the judge's thinking process. The task should have been approached by identifying appropriate individual sentences; and whether they should be concurrent or consecutive; then by reflecting on the totality thereof; and deciding whether a different *cumulo* sentence would be appropriate; and finally determining how to account for the time spent on remand, bearing in mind that commencement at a future, as well a past, notional date would appear to be competent (*O'Doherty* v *HMA* [2022] HCJAC 31).

Decision

[13] We are satisfied that the sentences imposed in this case meet the test for undue leniency.

Seriousness

[14] It is clear that the temporary judge underestimated the seriousness of the offences, especially charges 1 and 17, both of which are extremely serious. The seriousness of an offence is to be determined by the levels of culpability and harm involved. Harm in this context includes harm which might have been caused by the offence. In the present case both culpability and harm are high.

[15] In relation to both charges 1 and 17 there is a degree of planning or premeditation, in charge 1 by taking into a public place a loaded shotgun, illicitly possessed, and discharging it; and in charge 17 by taking the weapon with him in the first place, producing and using it to prevent further action by police officers performing a legitimate stop exercise. Charge 1 also involved a significant, indeed remarkable, degree of recklessness. The respondent discharged a firearm into a random living room window. The fact that no-one was present was no more than the result of luck. The temporary judge was quite wrong to consider this, as it seems he did, as limiting the seriousness of the offence. There is nothing to suggest that the respondent was in fact aware that no one was present in the property. Presenting a weapon at a police officer as the respondent did was clearly designed to alarm, intimidate and frighten, and this implies the intent to cause harm. These are all factors listed at paragraph 10 of the Scottish Sentencing council's Sentencing Process Guideline as relevant to the assessment of culpability.

[16] As to harm, the shotgun was fired into a living room window, the very place where someone is reasonably likely to have been present, and potentially in the line of fire. The potential level of harm was grave, raising the possibility of death or serious injury had someone been present. As to charge 17 the temporary judge fixed on the short duration of the incident as opposed to its severity and effect. The officer in question immediately jumped back, and must have been shocked and distressed by the incident. The trial judge does not seem to have reflected properly on the most serious aggravating factor of this offence, namely a threat to a uniformed police officer acting in the execution of his duties.

[17] The respondent's previous convictions are a further, and serious, aggravating factor. His record stretches back to 2005. It contains numerous appearances at sheriff and jury level and one at the High Court. Most significant are those for offences of violence, including serious assault, and police assault, in particular a conviction in 2016 for culpable and reckless conduct, involving possession of a knife, a struggle with police officers and the permanent disfigurement of one officer.

[18] The charges indicate a pattern of offending involving the use of firearms, charges 1 and 2 dating from July 2020 and charge 17 from almost a year later, April 2021.

Sentencing purposes

[19] The temporary judge also erred in his consideration of the relevant sentencing purposes. The only one he specifically refers to is the one which has virtually no application, namely rehabilitation. The respondent is now 35 years of age. He has offended on a more or less continuous basis since he was at most 17. His convictions cover a vast range of offending; apart from the repeated violent offending already referred to, and the carrying and use of weapons, he has convictions for drugs offences, various offences of

dishonesty (fraud, forgery, assault and robbery), road traffic offences and breach of conditions of bail or other court orders, all on a repetitive basis. He has proven resistant to sentences which were designed to help him, and to rehabilitate, such as probation (tried on more than one occasion and repeatedly breached) and restriction of liberty order, also breached. The prospect of rehabilitation is remote and certainly not something which should have been selected for special attention, compared to truly relevant factors such as protection of the public, punishment and public disapproval.

Guidelines from England & Wales

[20] The sentencing judge did not consider sentencing guidelines from England & Wales, two of which have relevance here, in respect of charges 2 and 17. The court has repeatedly noted that whilst such guidelines must be used with a degree of caution, having regard to the different systems involved, differing sentencing regimes and different early release provisions, they remain, in cases where there is no specific guideline from the Scottish Sentencing Council on the subject, of assistance as guidance on general levels of sentencing in the areas concerned, and in particular as a cross check for the sentence selected. Had the temporary judge consulted these guidelines he would immediately have seen that the figures selected by him were verging on derisory. It is clear that there is a "major disparity" (*HM Advocate* v *AB*, para 13) when the sentences imposed on charges 2 and 17 are cross-checked with the relevant guidelines. We consider that the Lord Advocate was right to suggest that charge 2 would, under the guidelines, be likely to be considered a category A1 offence. Charge 17, involved "conduct intended to maximise fear or distress", and to make the officer believe the weapon would be used against him; it clearly caused distress and alarm, although the exact degree thereof is not known. There are aggravating factors, and

no mitigating factors. Having regard to the identity of the victim, which is not referred to in the English guideline but which we think would have to be taken into account, suggests that the offence would be at the upper end of A3, edging into A2. Either way, reference to the guidelines as a cross check would clearly have shown the inadequacy of the sentences selected.

Time on remand

[21] A further error is in relation to the allowance of 32 months credit for the time spent on remand, having regard to the case of *O'Doherty* which the judge seems to have overlooked. As explained in that case the former practice of simply doubling remand period for a short term sentence or adding a half for a long term one, is unlikely to reflect the reality of current early release practice.

General approach

[22] Recognising that the temporary judge did not at the time have the benefit of the decision in *Fergusson*, nevertheless we are of the view that he rather approached things back to front. Having identified that a *cumulo* sentence of 6 years might be appropriate, he then deducted 32 months, to account for the time on remand. That left a period of 40 months which he then allocated as already noted. As senior counsel for the respondent submitted, he should first have addressed the individual charges, considered whether concurrent or consecutive sentences were appropriate, reflected on the overall effect thereof and whether an adjusted *cumulo* sentence would be appropriate, and then considered how to reflect time on remand.

[23] As a final point to note, the sentencing judge did not obtain a CJSWR, being persuaded by Counsel that he could and should proceed to sentence there and then, having

regard to the respondent's prior convictions and the fact that he was serving a sentence. The judge did not appear to consider the question whether the nature of the offences raised the possibility that an extended sentence might be merited. We have considered that matter, and whether we should obtain a CJSWR to address risk, but given the sentence which we have determined is appropriate we do not think that it can be said that the period during which the offender would be on licence would be inadequate for the protection of the public. We have therefore concluded that a CJSWR is not necessary.

Conclusion

[24] The overall effect of the errors is that it falls to this court to sentence of new. In our view appropriate individual sentences for the offences in question, having regard to their serious nature, and the respondents appalling record, would be:

> Charge 1, 5 years 6 months; charge 2, four 4 years concurrent; charge 17, 4 years 6 months, consecutive to the sentence on charges 1 and 2; charge 18, 18 months, consecutive to the sentence on charge 17, to reflect the different circumstances and intent of the offences.

The total of these offences would come to the figure of 11 years and 6 months. However, we are mindful that in sentencing for multiple offences in this way the court must stand back and reflect on the overall total sentence, and ask whether the overall sentence is fair and proportionate in all the circumstances as reflecting the overall criminality of the offender. Imposing the sentences consecutively to reflect their differing nature and intent would result in an excessive overall sentence, particularly having regard to the association between charges 17 and 18. Having regard to all these factors we consider that a headline *cumulo* sentence should be one of 10 years. That leaves the issue of how to deal with the matter of

the time spent on remand. The precise situation which arises in this case, where the time on remand was continuous but interrupted by a subsequent sentence, was not under consideration in *O'Doherty* but similar problems of calculation arise. Senior Counsel for the respondent submitted that whilst backdating to a notional date would mean the entire 4 year sentence would be rendered nugatory, and thus an unsatisfactory outcome, were the court simply to impose the sentence from the date of our decision, making it concurrent with the remainder of the sentence currently being served, the end result, having regard to the release provisions which would otherwise have applied, would be little different than were the court able realistically to carry out an *O'Doherty* type calculation. There is much force in this contention, and that is the course of action we shall adopt.