



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 17
HCA/2019/84/XC

Lord Justice Clerk
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE FOLLOWING UPON A
REFERENCE FROM THE SCOTTISH CRIMINAL CASES REVIEW COMMISSION

by

ALAN ROBERT BAKER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Templeton; Paterson Bell
Respondent: Gillespie, AD; Crown Agent

7 March 2019

Background

[1] On 1 August 2017, the appellant pled guilty on summary complaint to an aggravated contravention of section 38(1) of the Criminal Justice & Licensing (Scotland) Act 2010. Sentence was deferred twice, the case finally calling on 7 September 2017 alongside an

indictment in respect of which the appellant had been convicted of assault and attempted robbery in shop premises, during which a knife was brandished at an employee.

[2] The appellant has over 100 previous convictions dating back to 1997.

[3] In relation to the indictment, the sheriff imposed a sentence of 3 years and 6 months imprisonment with a 12 month supervised released order (SRO). On the summary complaint he imposed a sentence of 6 months, to run consecutively to the first sentence. [4]

Leave to appeal against conviction and sentence in respect of the indictment was refused, no grounds having been stated in respect of sentence. The present appeal follows the reference by the SCCRC of an issue questioning the competency of the imposition of the supervised release order, standing that the cumulative effect of the sentences imposed resulted in a period in excess of four years.

The SCCRC Reference

[5] The SCCRC did not consider that the sentences, separately or *in cumulo*, could be considered excessive, and did not criticise the imposition of a consecutive sentence.

However, by imposing a consecutive sentence, the sheriff deliberately imposed a sentence in excess of four years, making the imposition of an SRO incompetent.

[6] The effect of section 27(5)(a) of the Prisoners and Criminal Proceedings (Scotland) Act 1993 was that the sentences passed on the appellant constituted a single term of imprisonment of 4 years. Under section 209(1) of the Criminal Procedure (Scotland) Act 1995 an SRO can only be made where the accused has been sentenced to a period of imprisonment of less than 4 years. On that basis alone, the making of an SRO was incompetent.

[7] Separately, the effect of the “single terming” of the sentences was that the appellant became a long term prisoner, subject to the release provisions relevant to such a prisoner, namely release on licence. However, section 209(4) of the 1995 Act provides that an SRO will have no effect during any period spent by an offender on licence. The licence period would come to an end when the single term sentence had elapsed. Were the SRO then to come into effect, it would be contrary to the terms of section 209(7)(b) of the 1995 Act, which provides that no part of the relevant period of the SRO is to be later than the date on which the entire term of imprisonment specified in the sentence has elapsed. On that basis also the sentence was incompetent. Reference was made to *Loughlin v HMA* 2018 SCCR 19 where the appellant was sentenced to a term of imprisonment consecutive to a term he was serving at the time with the result that he became a long-term prisoner entitled to release only on licence. The sheriff had also imposed a supervised release order for 12 months, assuming that the order would be effective for the six months following the expiry of his licence. The court considered the imposition of the SRO to be contrary to section 209(7) since it would include a period after the end of the total term of imprisonment. Since the entire term of imprisonment imposed on the appellant would elapse at the end of any licence period, a supervised release order could not commence at that point.

[8] The SCCRC considered, based on remarks made by the sheriff at the time of sentencing, that it was the sheriff’s intention that the appellant be subject to post release supervision. The SCCRC found that if the SRO element of the sentence were to be revoked, then the appellant would still be subject to a period of post release supervision as a result of the licence conditions which would be imposed upon his release.

Decision

[9] In *Shovlin v HMA* 1999 SCCR 421 the court endorsed the view that sentencing courts generally concern themselves only with the period of time they regard as appropriate by way of sentence, without taking any account of the actual time the offender will serve.

There are, however, exceptions. Sections 209 and 210A of the 1995 Act both make provision for circumstances where the court considers that additional supervision on release must be imposed for the protection of the public from serious harm from the offender on his release.

This necessarily requires the court to consider the practical effect of the sentence which it would otherwise impose, including whether he would be a long term or a short term prisoner within the provisions of the 1993 Act. Save in relation to sexual offences, the nature of the order which the court may impose differs according to whether the custodial term to be imposed is one under which the offender would be categorised as a short term prisoner, liable to unconditional release, or a long term prisoner, liable to release on licence.

[10] In the case of the former, the prisoner would normally be released unconditionally as soon as he had served half the custodial sentence imposed, in accordance with the provisions of section 1(1) of the 1993 Act. Thus, in relation to a custodial term of 42 months the prisoner would be released after 21 months, and would not be the subject to any supervision, unless the court had determined that an SRO required to be made for the protection of the public. Section 209 of the 1995 Act emphasises the distinction between release on licence and supervision by specifying that an SRO shall have no effect during any period in which the person is subject to a licence under Part I of the 1993 Act.

[11] The maximum duration of an SRO is a period of 12 months “after the date of the person’s release”; and no part of the period specified may “be later than the date by which the entire term of imprisonment specified in his sentence has elapsed” (section 209(7)).

[12] Had the sheriff been sentencing the appellant only for the indictment offence, or had he imposed concurrent sentences in respect of both the indictment and complaint, there would have been no difficulty, because the appellant would have remained a short term prisoner, and the SRO would have taken effect on his release. Had the sheriff considered that a longer sentence was required (something to which he did give consideration) there would equally have been no difficulty, because any release would automatically have rendered the appellant subject to supervision in the form of licence. Moreover, an extended sentence could have been imposed.

[13] However, the effect of section 27(5)(a) is that the consecutive sentences, passed at the same time, are to be treated for the purposes of the 1993 Act as a single term, in this case a term of four years. The appellant thus falls within the category of a long term prisoner, and his release will, under the 1993 Act, be subject to licence. The effect of this, taken together with section 209(4)(c) of the 1995 Act and the definition of "relevant period" in section 209(7) of that same Act means that it was not competent for the sheriff to impose an SRO, since such a component of the sentence could not be given effect.

[14] On behalf of the appellant we were invited either to make the sentences concurrent with each other, leaving the SRO in place, or to remove the SRO element of the sentence. At the time of sentence, the sheriff considered that a sentence over four years, indeed an extended sentence, might be appropriate. He moderated the sentence which he did impose, but added an SRO and made the summary sentence consecutive. It appears therefore, that the sheriff was concerned that the appellant should serve a considerable period in custody, and should also be subject to supervision on release. Making the two sentences concurrent would not achieve the first of these objectives in the same way as simply removing the SRO

would. We agree with the commission that in this case the latter course of action is to be preferred.