APPEAL COURT, HIGH COURT OF JUSTICIARY

[2022] HCJAC 34
HCA/2022/241/XC
HCA/2022/260/XC

Lord Woolman
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in

Appeal against sentence

by

ROBERT McDONALD AND EUAN MILLIGAN

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

Appellants: Brannigan; Faculty Services Limited for James McKay Solicitor, Elgin
Respondent: Goddard QC; Crownagent

30 August 2022

[1] Is it permissible for a sentencer to "discount" a sentence from a custodial disposal to a Community Payback Order (CPO) with an unpaid work requirement of the maximum of 300 hours to reflect the tendering of a plea at an early stage in the proceedings?

[2] We heard the two cases together. Mr Brannigan represented both appellants.

The facts

Robert McDonald

[3] The appellant pleaded guilty to causing death by careless driving contrary to section 2B of the RTA 1988. The sheriff sentenced him to a CPO with 2 years supervision and an unpaid work requirement of 300 hours. He also imposed a period of disqualification and required him to take an extended driving test before he could regain his licence.

[4] The deceased was a 28 year old married woman with a three year old daughter. On the morning of 28 April 2020 the appellant and the deceased were driving along the A96 to work in Keith from Elgin. The appellant's car was immediately behind the car driven by the deceased. She slowed as a van was preparing to rejoin the carriageway from a lay-by. At that point the appellant was speaking to his wife on a hands-free phone call. He ran into the back of the deceased's car at an angle, causing it to be propelled into the path of a van travelling in the opposite direction. There was a head-on collision, which resulted in the deceased sustaining multiple head and neck injuries. Emergency services were called at 8.38am. Paramedics arrived at 8.49 am and commenced CPR on the deceased. Despite their best endeavours, she was pronounced dead at the scene. The front seat passenger in the van sustained a fractured kneecap.

[5] The Crown report found no mechanical defects in either vehicle. It estimated that the appellant was travelling at approximately 20 to 30 miles an hour faster than the deceased at the point of impact, at a speed of approximately 46-49 miles per hour. It concluded that the deceased was likely to have slowed her speed immediately prior to the collision due to the presence of the van within the lay-by and the possibility of it pulling out in front of her.

[6] The sheriff rejected the submission that the level of carelessness was not of the highest. He concluded that the appellant had been distracted by the hands free call for a

number of minutes prior to the accident. He had failed to notice the obvious reduction in speed of the deceased's vehicle immediately prior to the accident and failed in his duty to maintain a sufficient distance between the two cars.

[7] The sheriff nevertheless considered that in the circumstances of this case he could impose a non-custodial sentence because the appellant was a first offender, had expressed genuine remorse, had pleaded guilty at the first opportunity, and that there was an alternative to custody.

[8] The sheriff imposed an unpaid work requirement of 300 hours to reflect the seriousness of the offence. While he was aware of the requirement to consider a discount where a plea of guilty was tendered in this case he considered that the maximum number of hours should be imposed as a direct alternative to prison. Had he imposed a custodial sentence his starting point would have been 12 months imprisonment to which he would have applied a discount.

Euan Milligan

[9] The appellant went to trial in the High Court of Justiciary on eight charges under the Sexual Offences (Scotland) Act 2009. He was acquitted on four charges. The remaining four were charges of rape contrary to section 1 of the Act involving a single complainer. The jury convicted the appellant of the statutory alternative of a contravention of section 28 of the Act, having intercourse with an older child. The trial judge sentenced the appellant to a CPO with 2 years supervision and an unpaid work requirement of 300 hours.

[10] The appellant had offered to plead to these offences in the same terms at a preliminary hearing. He submits that he should have been allowed a discount from 300 hours for the timing of the plea.

[11] The criminal justice social work report highlighted concerns about the appellant's youth and vulnerability should a custodial sentence be imposed. It invited the court to consider a financial penalty together with community payback order with supervision and an unpaid work requirement. The appellant had expressed a willingness to engage with any requirement the court saw fit to impose as an alternative to custody. The plea in mitigation invited the judge to follow the report's recommendations.

[12] The complainer was 14 years old at the time of the offences. The appellant was 17 years old. The charges formed a course of conduct that took place between January and May 2019 and involved repeated acts of vaginal intercourse and two acts of anal intercourse.

[13] The sentencing judge recognised the features which might be thought to mitigate against the imposition of a custodial sentence. He recognised, however, that the convictions were of a serious nature and he considered long and hard whether a community-based disposal was appropriate at all. Ultimately he was persuaded that the appellant should be afforded the opportunity to work through such an order under supervision. He decided that the full number of unpaid hours would adequately meet the punitive requirements of the appellant's sentence. The sentence was a direct alternative to a custodial sentence.

[14] The trial judge commented on the ground of appeal as follows:

> "In determining, in the instant case, the headline sentence I was necessarily constrained by the statutory limit of 300 hours ….I had no doubt that the egregious nature of the appellant's conduct would not have been adequately addressed - or the public interest served - by affording a full discount of 75 hours, especially in circumstances where I did not consider it practical or desirable to impose any kind of financial penalty on one or more of the charges."

Submissions for the appellants

[15] Counsel submitted that both the sheriff and the trial judge had misdirected themselves. The imposition of a CPO is an alternative to custody; not a discount. While the

matter of discount lay within the discretion of the court since there would always be some benefit from an early plea an accused should always be given at least a token discount.

[16] One of three situations should occur:

(i) where the threshold for custody is met and the court deems that no alternative to custody is suitable, it should select a headline sentence and thereafter select an appropriate level of discount;

(ii) where the threshold for custody is met, but the court determines an alternative to custody is available, such as a CPO, it should impose that order and provide a suitable discount in, for example, the number of hours' work from the headline figure;

(iii) where the threshold for custody has not been met, the court should then follow the same process as in (ii) regarding a suitable discount.

Submissions for Crown

[17] The advocate depute submitted that section 196 of the 1995 Act specifically allowed for a discount to include the selection of an alternative to a custodial sentence. Section 227A enables the court to impose a CPO "as a direct alternative to prison". The sentencing judge had a full discretion on whether, and if so to what extent, a discount may be applied. That had been affirmed in a number of cases, most notably the five-judge case of *Gemmell* v *HM Advocate* [2012] JC 223.

[18] The advocate depute drew our attention to the English Guidance on Sentencing. That states that the reduction in sentencing for a guilty plea can be taken into account by imposing one type of sentence rather than another. It goes on the say that where a court has

imposed one sentence rather than another to reflect the guilty plea there should normally be no further reduction on account of the guilty plea.

Decision

[19] Section 196 of the Act is in the following terms:

> "(1) In determining what sentence to pass on, or what other disposal or order to make in relation to, an offender who has pled guilty to an offence, a court shall take into account—
>
> (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and
>
> (b) the circumstances in which that indication was given.
>
> (1A) In passing sentence on an offender referred to in subsection (1) above, the court shall–
>
> (a) state whether, having taken account of the matters mentioned in paragraphs (a) and (b) of that subsection, the sentence imposed in respect of the offence is different from that which the court would otherwise have imposed; and
>
> (b) if it is not, state reasons why it is not."

The reference to "other disposal or order" makes it clear that it is not only the length of any sentence, whether of custody or the imposition of unpaid hours of work that may be the subject of discount, but also the mode of disposal. Thus a disposal which may be thought to be more severe than an alternative may be discounted to the alternative mode as a result of an early plea. That will most often arise when a sentencer is considering whether to impose a custodial sentence or whether an alternative disposal is available. Section 227A provides that the court may impose a CPO as a direct alternative to custody.

[20] In *Gemmell* Lord Justice Clerk Gill emphasised that the question of whether a discount should be allowed and, if so, what discount to allow, is a matter for the discretion of the sentencer. It is only in exceptional cases that the court will interfere with a

discretionary decision on discounting for which the sentencer has given cogent reasons; *Murray* v *HMA* [2013] S.C.C.R. 88 3 per Lord Justice General Carloway (para 26).

[21] There is accordingly no reason in principle why a sentencer, in the exercise of his or her discretion, should not discount a custodial sentence to a CPO with the maximum number of hours of unpaid work. If the court could not proceed in this manner, then a sentencer might feel compelled to reject the non-custodial option and sentence the accused to a term of imprisonment, suitably discounted. It is clear from the sentencing reports in the present cases that they considered that only the imposition of the maximum number of hours would reflect the gravity of the offences.

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[22] The offence was a serious one in which a young woman with a small child lost her life in tragic circumstances. The sheriff rejected the submission that the level of carelessness displayed by the appellant was not of the highest. Application of the English sentencing of Offences of Causing Death by Driving might suggest that the sentence was generous to the appellant. The sheriff explains however that for a number of reasons including the fact that he pleaded guilty by section 76 procedure and that there was available an alternative to custody he could impose a community payback order with an unpaid work requirement in order to reflect the seriousness of the offence. In taking this course the sheriff exercised his discretion to impose a mode of sentence which was less severe than the alternative of custody. The sheriff has made it clear that were he to have imposed a custodial sentence the headline sentence would have been 12 months imprisonment, to which he would have applied a discount.

[23] The sheriff explains that one of the factors that persuaded him to impose a CPO as a direct alternative to imprisonment was the fact of the early plea. The appellant had the benefit of the discount from a custodial to non-custodial sentence. Had a discount been applied to the number of unpaid hours the sheriff would, in effect, have given the appellant the benefit of a discount twice – once for the mode of disposal and again for the number of unpaid hours.

Euan Milligan

[24] It is clear from the sentencing judge's report that he thought long and hard as to whether a non-custodial sentence was appropriate. Despite the restricted terms of the verdict the appellant was convicted of serious sexual offences. He engaged in penetrative sexual activity with a 14 year old, over 3 years his junior, on numerous occasions seemingly untroubled by the fact that to do so was on each occasion illegal. The sentencing judge acknowledges that others may have taken a different view, but he was persuaded that the appellant should be afforded the opportunity to work through a CPO. He made it clear that only the imposition of the maximum number of 300 hours would adequately meet the punitive requirements of the appellant's sentence.

Conclusion

[25] It is clear that both the sheriff and the sentencing judge gave careful consideration to the question of the appropriate disposal for each appellant. In both cases the appellant was afforded the benefit of the early plea in discounting the sentence from a custodial sentence to a non-custodial disposal. In both cases the decision can be described as finely balanced.

Both sentencers have given cogent reasons. There is no warrant to interfere with the exercise of their discretion.

[26] The appeals in both cases are refused.