SHERIFF APPEAL COURT

[2022] SAC (Crim) 3
SAC2022 00035/AP

Sheriff Principal D L Murray
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF NORMAN MCFADYEN

in

Appeal against sentence

by

WILLIAM HUTCHISON

Appellant

against

PROCURATOR FISCAL, DUNDEE

Respondent

Appellant: Gilmartin, solicitor advocate; Bruce Short, Solicitors, Dundee
Respondent: Bergin, advocate depute *ad hoc*; Crown Agent

9 March 2022

[1] This is an appeal against a sentence imposed by the sheriff at Dundee in respect of two unpleasant offences committed at Ninewells Hospital on 20 April 2020: charge (2), a charge of assaulting, obstructing or hindering a charge nurse there by attempting to kick her on the body and to punch her on the head, contrary to section 5(1) of the Emergency Workers (Scotland) Act 2005 and charge (3), a charge of threatening or abusive behaviour there including the uttering of sectarian remarks, contrary to section 38(1) of the Criminal

Justice and Licensing (Scotland) Act 2010, aggravated by religious prejudice. The appellant pleaded guilty at intermediate diet.

[2] The appellant was brought to the hospital by the police and was admitted; he proceeded to abuse staff, including by singing offensive sectarian remarks, apparently addressed to a nurse with an Irish accent. Later he started to struggle with medical staff and the complainer in the statutory assault charge tried to get him to stay in bed, and he attempted to kick and punch her, although she managed to avoid the blows landing.

[3] He had a long record for public disorder, breaches of bail and dishonesty, and had serious convictions; he had many convictions for police assault and had six convictions with racial or religious aggravations. Little seemed to have been said in mitigation, he having no memory of the events. His mental health had been affected by solvent abuse when he was sixteen and his bad behaviour was when under the influence of alcohol or other intoxicants. No-one had taken the time to speak to him and try to identify and understand the root causes of his problems. We would observe that this seems improbable given his long criminal history which, although involving a very high proportion of custodial sentences also discloses a large number of deferrals prior to sentence. Be that as it may, it was not suggested before the sheriff that anything other than a custodial sentence should be imposed and, indeed, he was told that the appellant was about to appear on petition and would not be getting bail.

[4] The sheriff selected a starting point of 10 months imprisonment in respect of charge (2) which he reduced to eight months in light of the plea of guilty and of four months in charge (3), which he reduced to three months, including one month for the religious aggravation, to be served consecutively: ie an aggregate sentence of 11 months imprisonment.

[5] This disposal is appealed on the grounds that the sentence was excessive and the overall headline sentence of 14 months was incompetent as exceeding the sheriff's powers, which on the complaint were restricted to 12 months. Leave was granted only as regards length of custodial sentence and the focus of submissions before us today was on the incompetency of the overall starting point.

[6] In his report the sheriff expresses the view that it is the resultant discounted sentence that matters as regards sentencing power, not the cumulative starting point.

[7] While that is the position in solemn proceedings, the position there is different in that it is open to a sheriff to remit the accused to the High Court for sentence and it has been held that for that reason the sheriff can select a starting point in excess of the five year maximum, provided that the sentence imposed does not exceed five years: *McGhee* v *HM Advocate* [2006] HCJAC 87, 2006 SCCR 712.

[8] The position is quite different in summary procedure where it is well established that on a single complaint it is not competent to select a starting point for sentence that exceeds the statutory maximum which is available to the court, which in the present case is 12 months, whether or not there is a single sentence or consecutive sentences are passed: *Jones* v *Nisbet* [2012] HCJAC 53, 2012 SCCR 282, at [5], per Lady Dorrian.

[9] It follows that the overall disposal was incompetent. In addition, the sheriff has given a different discount as between charges (2) and (3), discounting by a quarter in respect of charge (3), as the "usual" discount for a plea at an intermediate diet, but restricting the discount in charge (2) to one fifth for reasons of marking public disapproval, to mark the gravity of the offence and to deter others, while the determination of an appropriate level of discount is a matter for the sentencer, provided it is adequately explained, given that the primary purpose of discounting is utilitarian it will rarely be appropriate to apply a different

discount to different charges to which a plea of guilty is tendered and accepted at the same stage of proceedings, unless there is a particular feature of a charge or charges that justifies a different discount (as may arise, for example, in relation to paedophile image cases: *HM Advocate* v *Graham [*2010] HCJAC 50, 2011 JC 1, at [45]).

[10] The grounds founded on by the sheriff here do not justify any difference in approach and indeed are relevant to determination of the headline, not the discounted sentence: *Gemmell* v *HM Advocate* [2011] HCJAC 129, 2012 JC 223, at [37] per Lord Justice Clerk Gill.

[11] We are satisfied that the present aggregate sentence cannot stand, but we are equally satisfied, as was the sheriff, that this was a serious case with wholly unacceptable behaviour directed at hospital staff who were undertaking a responsible and difficult job and that plainly required to be reflected in the sentence passed. We shall quash the sentence imposed in respect of charge (2) and in its place select a starting point of eight months, which we shall reduce to six months to reflect the stage at which a plea of guilty was recorded. As regards charge (3) we see no reason to interfere with the sentence imposed there, which will remain one of three months (discounted from four months), to be served consecutively to the sentence of six months in respect of charge (2) – ie an aggregate sentence of nine months, from 21 January 2022.