



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 11
SAC2017/000315/AP**

Sheriff P J Braid
Sheriff K Maciver QC

OPINION OF THE COURT

delivered by SHERIFF P J BRAID

in

APPEAL AGAINST SENTENCE by

EDWARD ARMSTRONG

Appellant

against

THE PROCURATOR FISCAL, LIVINGSTON

Respondent

Appellant: V.Dow; Wardlaw Stephenson Allan, (Galashiels)

Respondent: M Hughes AD; Crown Agent

5 July 2017

[1] On 2 May 2015 the appellant was sentenced to 7 months imprisonment in respect of each of two charges of attempting to obtain money by fraud from householders in Mid Calder, offences which might colloquially be described as bogus workmen offences. The complainer in the first charge is said to be 79 years of age. The sentences were concurrent with each other but consecutive to a sentence already being served by the appellant.

[2] The sentences were imposed following pleas of guilty tendered by the appellant following his apprehension on a non-appearance warrant granted on 28 March 2017 when he failed to appear at a diet which had been continued without plea on 14 March 2017 which was the first calling of the case in court and on that date, 14 March, we observed that the dates fixed for the appellant's co-accused were 31 May 2017 for the intermediate diet and 21 June 2017 for the trial diet.

[3] In selecting the sentence of 7 months the sheriff allowed no discount. The appellant takes no issue with the headline sentence of 7 months nor with the consecutive aspect of the sentence. The sole ground of appeal is that the sheriff is said to have erred by failing to apply any discount.

[4] In his report the sheriff states that he did consider the question of discount but also considered in the exercise of his discretion that the history of the case did not merit giving the appellant any discount due to the failure to appear on 28 March resulting in the warrant for his apprehension having to be obtained to secure his attendance. The sheriff observed accurately that it could not be said that the appellant had cooperated fully in the prosecution process.

[5] The appellant submitted that while the matters referred to by the sheriff were relevant to discount the sheriff was not entitled to conclude that the utilitarian benefit of the plea had been entirely elided. Reference was made to the cases of *Gemmell v HM Advocate* 2012 JC 223 and *Leonard v Houston* 2008 JC 92.

[6] We acknowledge that the sheriff had a wide discretion available to him and that there will be many cases where an accused's failure to appear, even at an early stage in a case, will completely elide the utilitarian value of a plea but in order to decide whether a failure to appear does or does not completely elide the utilitarian value of a plea it is

necessary to consider what the utilitarian value of the plea is. Much will depend on the nature of the case. A failure to appear in, for example, a contravention of section 103 of the Road Traffic Act 1988 may well completely elide any discount, where the only witnesses may be police officers. At the other extreme, in a case involving child witnesses, even a late plea is likely to have some utilitarian value. In the present case the sheriff has failed to give any consideration to that aspect.

[7] Furthermore, a failure to cooperate fully in the prosecution process, as the sheriff put it, may be a reason to reduce any discount which might otherwise be given but it is not a reason in itself to allow no discount whatsoever. In addition while the sheriff refers to the history of the case as not meriting any discount it is not clear to us why he reached that view given that the appellant, despite his failure to appear previously, nonetheless tendered a plea of guilty on his first appearance in court and before the dates fixed for the co-accused have passed.

[8] Accordingly we have concluded that the sheriff did err. The question of discount is therefore at large for us. As was said in *Leonard* it will always be a question of fact and degree as to whether or not the utilitarian value of a plea has been completely elided by an accused's lack of cooperation. In the present case there was undoubtedly a significant utilitarian value to the plea having regard to the fact that no trial against the appellant was required and having regard to the age of the complainer in charge 1 and also the relatively early stage of when the plea was tendered.

[9] That all said, as the appellant himself acknowledges, the utilitarian value of the plea has been reduced by his failure to appear but we cannot say that the value is completely diluted when no trial diet had to be postponed or discharged and no witnesses had to be countermanded. Had the plea been tendered at the earliest opportunity discount of one

third is likely to have been appropriate. We consider that in the circumstances of this case that should be reduced to one fifth.

[10] Accordingly we will quash sentences imposed and of new sentence the appellant to concurrent sentences of 172 days imprisonment (discounted from 215) consecutive to any sentence currently being served by him, however, concurrent with each other but consecutive to the current sentence as the original sentence was.