



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 28  
HCA/2018/000073/XC

Lord Menzies  
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

**BARRY LITTLE**

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

**Appellant: A Ogg (sol adv); Paterson Bell Solicitors, Edinburgh for Tod & Mitchell, Paisley**  
**Respondent: A Brown QC, AD, ad hoc; Crown Agent**

17 April 2018

[1] The appellant Barry Little is 26 years old. On 30 January 2018 he pled guilty to an offence of culpably and recklessly throwing paving stones at the window of a neighbour's house. The offence was committed on 9 December 2017 and the appellant offered to plead guilty by section 76 letter within days of his first appearance on petition.

[2] The circumstances of the offence included the fact that the householder's 10 year old son was within the living room of the premises when the appellant threw a large paving stone through the window, narrowly missing the child. Having heard a narration of the circumstances and the appellant's solicitor in mitigation, the sheriff selected a headline sentence of 30 month's imprisonment, which she decided to restrict by a period of about 25% in light of the plea of guilty. This resulted in a sentence of 22 months backdated to 11 December 2017.

[3] The appellant was granted leave to appeal on his second ground only. That ground challenged the level of discount of sentence permitted by the sheriff. It narrated that in passing sentence the sheriff stated that she was limiting the discount for the plea of guilty as the complainer was a juvenile aged 10 years and the circumstances of the offence were such that a plea of guilty was inevitable.

[4] In the report which she has prepared for this court the sentencing judge does not contradict or quarrel with what was said within the ground of appeal and she states this:

"In considering the modification I considered the age of the child as an aggravating factor in the circumstances and given the weight of evidence implicating the appellant considered a modification of 25% appropriate."

[5] In the decision of the full bench in the case of *Gemmell & others v HM Advocate* 2012 SCCR 176 the court gave authoritative guidance on the circumstances in which a discount of sentence might be permitted and on the approach to the calculation of any such discount to be afforded. At paragraph 37 of his opinion, the Lord Justice Clerk made it plain that the assessment of the headline sentence and the assessment of any discount are separate processes, governed by separate criteria, and that the only relevant consideration in relation to discount is how far the utilitarian benefits of the early plea have been achieved. As he

also made plain in paragraph 38, factors which aggravate the commission of the crime are relevant only to the sentencer's decision on the starting figure for sentence.

[6] Whilst we readily recognise that the age of the complainer in the present case constituted an aggravation of the offence, and was therefore relevant to assessment of the appropriate headline sentence, we are satisfied that the sheriff misdirected herself in taking account of that aggravating feature as a factor restricting the level of discount to be afforded. If anything, one might have thought that the utilitarian value of the plea was increased by virtue of the fact that a young child was not required to give evidence or to have the worry of the case hanging over him for a lengthy period of time.

[7] At paragraph 48 of his opinion in *Gemmell*, the Lord Justice Clerk also explained that the strength of the Crown case was not to be treated as a factor influencing the amount of discount to be permitted and he explained why this should be so. Accordingly, we are satisfied that the sheriff misdirected herself in this regard also.

[8] In light of the clear and authoritative guidance given in the case of *Gemmell* we find it surprising that the sheriff approached the assessment of sentence discount in the manner which she explains that she did. In the report which she has prepared she gives no reason for departing from, or failing to comply with, the guidance provided.

[9] In these circumstances we shall quash the sentence imposed and in its place we shall impose a sentence of 30 months' imprisonment restricted in light of the early plea to a period of 20 months, backdated to the same date as selected by the sheriff.