



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 28
HCA/2023/000451/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN the LORD JUSTICE CLERK

in

Appeal against Sentence

by

DANIEL HAIG

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Meehan, KC; Paterson Bell, Solicitors, Edinburgh
Respondent: Solicitor General, KC, AD, Farrell; Crown Agent

10 July 2024

Introduction

[1] The appellant was indicted on ten charges. He pled guilty to two (charges 1 and 3) which libelled assault to injury with a garden fork or similar implement and possession of a knife, and was found guilty, after trial, of a charge of murder (charge 8). Sentence was

deferred for background reports. On 16 August 2023, the appellant was sentenced to 2 years and 3 months, discounted from 3 years on charges 1 and 3, to run concurrently with the sentence imposed on charge 8, that being detention for life with a punishment part of 16 years. The punishment part was made up of 15 years attributed to charge 8 and an additional year to mark charges 1 and 3 in respect of which the sentences had to be concurrent. The appellant was 16 years old at the time of the murder and 18 years old at the time of sentence. It is maintained that, given his youth and the terms of the Sentencing Young People guideline, the punishment part was excessive. In any event, the addition of a year for charges 1 and 3 rendered the sentence excessive.

Facts

Charges 1 and 3

[2] On 31 July 2021, the complainer, having left a party in the Clachan Bar, Baillieston to go to a nearby bookmakers, became engaged in an altercation with a group of males which included the appellant. As the complainer ran back towards the bar, the appellant swung a garden fork or similar implement towards him, striking him on the head and body and causing bleeding cuts to his face.

[3] On 2 August 2021, the appellant, accompanied by other youths, was observed on CCTV to be in possession of a knife within Glasgow Green. He was detained and searched by police officers who recovered a blue lock back knife from a rucksack in his possession.

Charge 8

[4] The incident arose out of two sets of people from different areas or schemes in the east end of Glasgow seeing each other at High Street railway station on 16 October 2021. The appellant was with a friend, Connor Mackie. They came from Parkhead, where certain

youths are known as “the Wee Men” or “Shettleston Tigers”. The deceased arrived with a group from the Baillieston area, known as “the Village”. The groups noticed each other on the platform. The appellant removed a large knife from his rucksack and put it down his waistband. Gestures and shouting between the groups ensued.

[5] The appellant produced the knife and ran towards the other group. As he was doing so, the knife fell onto the train track. There was fighting between the appellant and the deceased for around 30 seconds before the groups split up, continuing to shout and gesture towards each other. The Baillieston group moved away down the platform. The appellant then jumped onto the railway track, retrieved the knife, climbed back onto the platform and ran towards the other group, brandishing it in his right hand.

[6] The group ran in the opposite direction. The deceased tripped and fell. The appellant caught up with him. As the deceased was getting back to his feet, the appellant struck him with the knife with a single blow to the body. In his evidence, the appellant claimed that he attempted to strike the deceased in his lower abdomen, and that he had no intention to kill him, rather intending to cause minor injury. In fact, the medical evidence confirmed that the knife entered the left side of the deceased’s chest striking his heart. The deceased ran forward for a moment, before stopping in some difficulty. Others tried to help him. An ambulance was called. There were attempts made to resuscitate at the locus and latterly at the hospital. Life was pronounced extinct shortly thereafter.

Sentence

[7] In selecting the punishment part, the judge had regard to the Sentencing Young People Sentencing Guideline noting that he had “some, albeit limited, indications” of the appellant’s lack of maturity. The CJSWR provided limited information to suggest that

immaturity was a contributing factor in the offending behaviour. The judge also noted that at that age, although not at the murder incident itself, the appellant was influenced negatively by his peers. He considered the information on the appellant's background and circumstances provided in the CJSWR; and noted that the appellant had accepted responsibility and expressed remorse; that the stabbing was a single blow; and that he had no previous convictions. Whilst the information contained in the CJSWR indicated some potential for rehabilitation, this had no direct impact on the punishment part (*Elliot v HM Advocate* [2020] HCJAC 41). Aggravating factors included that the evidence indicated the appellant had the knife with him with the intention of using it to attack someone; that the deceased was only 14 years old; and was in a defenceless position when the appellant stabbed him.

The appeal

[8] The appellant submitted that the sentence was excessive in three respects. First, the *cumulo* headline sentence of 3 years on charges 1 and 3 was excessive. Second, it followed that the one year punishment part attributable to those offences was also excessive. Third, the punishment part of 15 years' detention on charge 8 was excessive, having regard to the youth and personal circumstances of the appellant.

[9] The CJSWR noted that the appellant had recognised the effects of his poor peer association and alcohol on his judgement. It outlined his difficult background circumstances, including experience of domestic violence and substance abuse from an early age. He had made progress during the time he spent on remand, initially in secure accommodation and later in Polmont YOI. Having regard to the authorities, and the Sentencing of Young People guideline, the punishment part was excessive. Reference was

made to *Hibbard v HMA*, *Kinlan v HMA*, *Elliot v HMA*, *JB v HM Advocate* 2020 SCCR 376 and *HM Advocate v Palfreman* 2023 JC 137.

Procedure on appeal

[10] As the sentencing judge records, the CJSWR contained little information related to the factors identified in the Sentencing Young People guideline as relevant to the sentencing of someone of the appellant's age. Moreover, there were certain aspects of the report which appeared to be self-contradictory. For example, whilst stating that the appellant generally demonstrated maturity in his communication with staff at St Mary's, at the same time it highlighted numerous concerns within that establishment about his behaviour towards other young people, especially when their actions caused an infringement to his time or activities, which appear to be indicators of lack of maturity. In a similar vein were references to several incidents of violence, a concern over self-harm, and an incident when he had to be placed in a standing hold by staff.

[11] An equally contradictory pattern emerges in relation to the family circumstances.

The Delphic statement:

"The family have worked hard to emancipate from previous social issues and inter-familial conflicts in order to be available for each other, not least for Mr Haig during this particularly difficult time"

appears along with a note that on 3rd September 2021 the appellant, was made subject to a Compulsory Supervision Order on grounds of a close connection with (a) someone who has committed a schedule 1 offence; and (b) someone who has carried out domestic abuse. The report notes a number of adverse childhood experiences from a young age, unstable home life, frequent moves, parental alcohol use and domestic violence. It was suggested that these may have increased a need for him to feel part of a stable group outside of the family home, explaining in part why he was drawn towards peers in the community, some of whom

present negative role models. There is a reference to poor peer association and a suggestion that the appellant may have acted impulsively to gain social status, but further detail, and their relevance to the charges or the appellant's maturity, is not further explored. Concerns over substance or alcohol abuse have been present since the appellant was 12 years old. In St Mary's he had input from both a social worker and a psychologist.

[12] All of these matters suggested that further information might be required to enable the court fully to address the relevant sentencing guideline. It is perhaps surprising that counsel at first instance or on appeal had not thought it necessary to have further investigations made to inform the court more fully.

[13] The report was not, however, all negative. During his time in St Mary's the appellant appears to have welcomed, and benefited from, structure and routine to pursue numerous hobbies, although reacting badly and inappropriately when these were disrupted for whatever reason. He is described as having an aptitude in art. He practices his acoustic guitar for two hours per day and is permitted an electric and acoustic guitar in his cell. He records his own music as well as other material he has learned by ear and from sheet music. He is self-taught in the guitar and chess, mastering both to an impressive level. Staff have commented on how quickly he picks things up and that generally when he turns his hand to a new hobby he excels at it.

[14] The circumstances of the offence were appalling, and in themselves present no mitigation. Nevertheless, the punishment part was relatively high for someone of the appellant's age, and the CJSWR suggests that a full picture of the appellant's circumstances had not been placed before the court. Accordingly, the court continued the appeal for a supplementary Criminal Justice Social Work Report to expand upon the references to: impulsivity and poor peer association; the nature of the Adverse Childhood Experiences

referred to; and the conflicting nature of the limited information given relating to the appellant's level of maturity.

[15] It appears that whilst the appellant previously presented with behavioural problems he had not been involved in criminal behaviour until the two and a half month period during which the current offences were committed, at which time the report noted a concern regarding increased isolation, and withdrawal, as well as increased anxiety and vigilance. The cause of this was not examined. Further information was sought.

[16] The court also directed that a psychological assessment referred to in the report be provided; along with reports from the social worker and psychologist in St Mary's as to their interactions with the appellant in respect of his background and offending behaviour. Finally, the court directed parties to be in a position to address the court on the relevance of the potential for rehabilitation to the punishment part when it comes to the sentencing of a young person.

Continued hearing

[17] At the continued hearing, a supplementary CJSWR was available. This suggested that resort to violence by the appellant was less about a desire to gain social status and more about not wanting to lose face or back down when feeling threatened. He has experienced a high level of violence in the community involving weapons. His judgement and perception may have been affected by residual effects of taking LSD the night before, as well as consumption of alcohol on the day of the incident.

[18] As to Adverse Childhood Experiences, the appellant was exposed to a high level of domestic violence, physical abuse and intra family conflict from a young age. A lack of predictable and safe parenting would likely distort healthy brain development in the

appellant, impacted on further by being subject to physical abuse at the hands of his mother from at least the age of 5. Repeated exposure to unsafe and harmful experiences can result in toxic stress on the body and may have elevated his fight, flight or freeze responses, and a reactive style to certain triggers or threats.

[19] In respect of maturity, although the appellant interacted maturely with staff when participating in structured activities he found engaging and rewarding - guitar, chess, art, cookery and PE- he struggled when an activity was withdrawn at short notice, or when staff were unable to facilitate an activity he had been looking forward to, resulting in emotionally dysregulated behaviours. In the absence of structure, he tended towards more immature and sensation seeking behaviours, and could at times engage in behaviours typical to that of a younger age. At times he lacked the social and emotional maturity to control impulses which resulted in more volatile behaviour that required crisis intervention.

[20] All of this is confirmed in the more detailed information available from St Mary's. That information notes exposure to significant and continuous levels of domestic violence from as early as 9 months old through until at least 2020, including violence involving the use of a knife. The report states that the appellant has grown up in an environment where violence of a serious nature was common and habitual, raising the concern that the appellant would have become normalised to violence and aggression, regarding the use thereof as acceptable, the only means of settling conflict, and something which would not attract accountability.

[21] The material indicates an escalation in the appellant's behaviour, which had previously been characterised by behavioural difficulties but no documented criminality, which coincided with his becoming more closely associated with (i) an older relative, in

respect of whom there are concerns regarding links with serious and organised crime, and (ii) the local gang “the Wee Men”.

[22] Adverse experiences included witnessing severe domestic violence between parents; physical and emotional abuse by parents; paternal criminality; parental substance misuse; parental mental health difficulties; neglect; inter-sibling violence; parent to child violence; homelessness; caregiver disruption; poor relationship with mother; sibling separation / loss; father’s encouragement of antisocial attitudes, creating a sense of torn loyalties and conflict; and concerns about child criminal exploitation and exposure to harmful sexual behaviour. Mental health difficulties have been reported from a young age, along with issues of substance misuse, anxiety, low mood, and sleep disorder.

[23] Amongst difficulties with cognition identified were: lack of impulse control; difficulty in information processing and reasoning; lack of problem-solving skills; lack of emotional intelligence; hyper vigilance to threat; and behavioural dysregulation – easily set-off and reacts intensely.

Conclusion

[24] This court now has information before it which was not before the sentencing judge. This cannot excuse the appellant’s extremely serious offending, but does provide important context to the deterioration in his behaviour in recent times culminating in the index offending. It is clear that throughout his life the appellant has witnessed high levels of family violence modelled to him by both parents. He would have learned to see violence as an acceptable way of managing difficulties and a way of gaining safety and control. He lacks skills in communication and problem solving, which impacts on his ability to navigate interpersonal conflict with peers. His behavioural dysregulation and lack of impulse control

lead to intense reactions in which violence is seen as a means of problem solving. When dysregulated, it seems that he acts in a way that is aggressive or violent towards others.

[25] The information now available to the court shows exposure to extreme domestic violence from an early age, first as a witness, later as a victim, and thereafter as a perpetrator. The appellant's mother is reported to have stabbed his father and, on a later date, to have threatened the appellant with a knife while he was holding his younger sibling. The older relative, association with whom seems to have triggered an escalation in the appellant's behaviour, is alleged to be involved in criminal behaviour in the east end of Glasgow and to have links to serious and organised crime. His father and uncle are currently serving lengthy prison sentences for violence, and an older maternal cousin is serving a prison sentence for murder. It is clear that the appellant has grown up in a familial environment in which the use of violence, including the use of weapons, has been normalised.

Rehabilitation

[26] The additional submissions presented noted numerous cases in which the court had made reference to rehabilitation when sentencing a young person. The question arising in the present case however, which was not addressed, is where the young offender's prospects of rehabilitation fit, if at all, within the statutory scheme. Section 2(2) in Pt I of the Prisoners and Criminal Proceedings (Scotland) Act 1993 provides that, in sentencing a life prisoner, the court shall specify a punishment part, that being

“such part as the court considers appropriate to satisfy the requirements for retribution and deterrence.”

In so doing, the court is to take into account the seriousness of the offence and any previous convictions of the life prisoner, but must ignore any period of confinement which may be necessary for the protection of the public. In short, as noted in the Explanatory Notes to the Convention Rights (Compliance) (Scotland) Act 2001, section 1(3)(b) of which first introduced these requirements, the “punishment part is the part of the sentence which represents the punitive element of the sentence”.

[27] On one view of it, the fact that the punishment part is to represent the punitive element of the sentence may appear to exclude factors which the court would ordinarily take into account in imposing a determinate sentence. In particular, the express reference to the seriousness of the offence and the offender’s previous convictions might suggest that other aggravating and mitigating factors are to form no part of the sentencing exercise in the case of a life prisoner. However, it is clear that this was not the intention of Parliament. The Policy Memorandum which accompanied the Bill which became the 2001 Act stated that the factors, other than risk, which a court will wish to take into account in determining the period “are the same as it must consider when setting a determinate sentence.”

[28] Thus, although the issue of rehabilitation in such cases does not appear specifically in the legislation, and may not “directly impact” on the punishment part (*Elliot v HM Advocate* [2020] HCJAC 41 at para 19, citing *Rizzo v HM Advocate* [2020] HCJAC 40 at para 17), it is equally clear that in numerous cases the court has considered the issue to be relevant to the assessment of the punishment part in the case of a young person (*Hibbard v HM Advocate* 2010 JC 149; *Campbell v HM Advocate* 2019 JC 47; and *Kinland and Boland v HM Advocate* 2019 JC 193). In *Hibbard*, a murder case, the court stated (para 14):

“... the court considers that there is some force in the general contention that the fixing of a punishment part in the case of a child may involve different considerations, or at least a different method of weighing the relevant considerations,

from those in the case of an adult. ... The court must apply the law as set out in the statute even if, in construing how that might be done, it can have regard to the terms of an international convention not incorporated into domestic law (*T, Petr*, per Lord President (Hope), p 734). But even without that regard, the court has no difficulty with the proposition that, when sentencing a child for any offence, the sentence selected ought to take into account, as a primary consideration, the welfare of the child and the desirability of his reintegration into society. It is not the only primary consideration, since the legislation requires that the seriousness of the offence be taken into account and that the period selected satisfies the requirements for retribution and deterrence. But it is one. In this way, the sentencing of a child will differ in the degree of emphasis or weight placed on the welfare of the person sentenced."

[29] This was confirmed in *Kinland*, another murder case, where the court stated (para 18)

"As the trial judge duly recognised and took into account, the sentencing of young offenders involves additional considerations from those applied when dealing with adults. The first is that the court must have regard to the best interests of the child as a primary consideration ... and to the desirability of the child's reintegration into society."

[30] The court added (para 19)

"The sentence must be fair and proportionate, in line with the guideline, which has been approved by the court, on the Principles and Purposes of Sentencing. It must in addition take account of the young offender's lack of maturity, capacity for change and the offender's best interests. Rehabilitation is an important consideration."

[31] In the majority of cases in which the issue has been considered the court referred to the speech of Lady Hale in the English House of Lords case of *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159. In that case Lady Hale identified the factors which justified a different approach being taken to the sentencing of young people compared with that of more mature offenders, adopting comments made in the decision of the United States Supreme Court in *Roper v Simmons* that

'First . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions (*Johnson v Texas* (1993) 509 US 350 at 367) . . . [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure . . . [They] have less control or less experience with control, over their own environment . . . The third broad difference is that the character of a

juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed’.

[32] The court had noted that

“[T]he first of these meant that a juvenile’s irresponsible conduct was not as morally reprehensible as that of an adult; the second meant that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them; and the third meant that even the most heinous crime was not necessarily evidence of an irretrievable (sic) depraved character. . . .” (para 24)

[33] These principles of course have informed the Guideline on Sentencing of Young People issued by the Scottish Sentencing Council and approved by the High Court of Justiciary with effect from 26 January 2022, which applies to the sentencing of the appellant in the present case, and which provides that:

“When selecting a sentence the court should, where appropriate, seek to rehabilitate the young person and to reduce the risk of reoffending. The character of a young person is not as fixed as the character of an older person, and a young person who has committed a crime may have greater potential to change.”

[34] Returning to the wording of the statutory provisions, we are satisfied that the requirement of “retribution” is sufficiently broad and flexible to encompass the prospect of a young offender’s rehabilitation. Inherent in the concept of retribution is that the court imposes upon the offender the *deserved* punishment. In any case this will involve an assessment of the aggravating and mitigating factors, including those referred to in para 24 of *R (Smith)*. In the case of a young person this may include consideration of the possibility of a greater claim to be forgiven for failing to escape the negative influences around them; as well as the offender’s level of maturity, capacity for change and prospects of rehabilitation. The weight to be attributed to these factors may vary from case to case, according to the circumstances, and in particular the seriousness of the crime under consideration. The greater the seriousness of the aggravating factors, as for example was the case in *Campbell*,

the less emphasis there is likely to be on the offender's capacity for change, immaturity or failure to escape from negative influences. These are matters unlikely to be of relevance when the court is fixing the punishment part of an adult offender. However, there is nothing anomalous about rehabilitation having more relevance in the case of young offenders than in any other case, for the reasons outlined above. When considering the terms of the statutory requirement to fix a sentence appropriate to satisfy the requirements for retribution and deterrence it is helpful to highlight the comments made by Lady Hale at para 25 of *R (Smith)*, that the considerations we have been addressing

“are **relevant to the retributive and deterrent** aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. . . . [T]hey also show that an important aim . . . of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity.”

[35] In the case of a person to whom the Sentencing of Young People Guideline applies, we are satisfied that the issue of rehabilitation does have some bearing on the fixing of the punishment part.

The result

[36] Turning now to the circumstances of the offender in the present case. There has been no dispute that the appellant appears to have reasonable prospects of rehabilitation. The trial judge had limited information but even so recognised that there was “some potential for rehabilitation”. However he considered that this did not directly impact on the punishment part. Insofar as he considered the issue of rehabilitation at all it seems to have been as part of the general capacity for change which may apply in the case of any young offender. Consideration of the appellant's prospects of rehabilitation would necessitate an assessment of his capacity for change. Insofar as the appellant's individual circumstances

are concerned, these factors are bound up together. The greater the evidence suggesting a genuine capacity for change the more the court can be satisfied of the prospects of rehabilitation.

[37] In the original CJSWR the appellant's attendance at school was noted to be positive. He had transitioned well into secondary school, but his behaviour began to deteriorate towards the end of his time there. The supplementary CJSWR notes certain positive engagement with staff at St Mary's Kenmure secure unit in the time he spent there on remand, although the reports cannot be said to be entirely positive, as we have discussed. However, the positive features are his engagement when participating in structured activities he found engaging and rewarding; a capacity to build relationships with key staff; and his emerging aptitude for learning and speed with which he picks things up, to the extent of being able to excel in certain activities.

[38] St Mary's Kenmure education staff described the appellant as "educationally capable, articulate and bright". He is said to value and find motivation in education. He has been described as showing a positive work ethic and enthusiasm to engage in sporting and organised recreational activities. Behavioural difficulties all appear to be related to his impulsivity and emotional dysregulation, both signs of immaturity. There are good indications throughout the material that the appellant is a young man with some potential. This is all the more relevant when it is recognised that the index offences were committed within a very short space of time, at a time when the CJSWR describes him as having become "increasingly remote from his family", and correlating with his increased association with negative influences.

[39] Having regard to all the known factors, and nevertheless fully acknowledging the dreadful nature of the offending, we are satisfied that the punishment part was excessive,

both in respect of the period allocated to the main charge, and as to the one year attributed to the remaining charges. In our view it is questionable whether charges 1 and 3 on their own would have attracted a custodial sentence in a first offender to whom both the Sentencing of Young People Guideline and the terms of section 207(3) of the Criminal Procedure (Scotland) Act 1995 apply. At most a community sentence might have been expected. Since that is impossible given the circumstances we shall quash the sentences on charges 1 and 3 and substitute a concurrent one of detention for 6 months, *in cumulo*.

We will also quash the punishment part of 16 years in total. The one year attributed to charges 1 and 3 was not justified, and for the reasons already given we consider that the remaining punishment part of 15 years was excessive. We will therefore substitute a punishment part of 13 years, which does not include any period in respect of charges 1 and 3. It will be recalled that this does not mean 13 years is the limit of the period to be served, it means that this is the time which must pass before the appellant may apply for parole. His eventual release will not come until the Parole Board for Scotland is satisfied that it is safe to release him.