APPEAL COURT, HIGH COURT OF JUSTICIARY

[2025] HCJAC 14
HCA/2024/654/XC

Lord Justice General
Lord Matthews
Lord Armstrong

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

CROWN APPEAL AGAINST SENTENCE

by

HIS MAJESTY'S ADVOCATE

Appellant

against

CHRISTOPHER DAVID BROWN

Respondent

Appellant: Charteris KC, Solicitor General; the Crown Agent
Respondent: McCall KC, Black; Paterson Bell Solicitors (for Black and Markie, Dunfermline)

7 March 2025

Introduction

[1] After a trial in Edinburgh High Court lasting eight days the respondent was convicted by majority verdict of the following offence:

> "on 21 and 22 March 2023 at … Dunfermline you CHRISTOPHER DAVID BROWN did assault Henry White, c/o Police Service of Scotland, … and did repeatedly strike him on the head with your elbow, seize him on the body and pull him to the ground,

> repeatedly punch him on the body, repeatedly strike him on the head and body with your knee, ~~repeatedly strike him on the body with a television wall mounting bracket, or similar instrument,~~ seize him on the body and drag him outside and you did murder him"

In returning their verdict, the jury deleted the words scored through. At the end of the Crown case the Advocate Depute had amended the indictment by deleting reference to repeated use of a pole to strike the deceased on the head and body. She withdrew a charge of attempting to defeat the ends of justice by removing and concealing certain evidence. Having adjourned to obtain a Criminal Justice Social Work report, the trial judge sentenced the respondent to imprisonment for life with a punishment part of 13 years. The Crown appeals against the length of the punishment part on the ground that it is unduly lenient.

The Offence

[2] The Crown case depended largely on the evidence of the principal prosecution witness, Leanne McKenzie. At the time of the murder she was the respondent's girlfriend. She was also a friend of the deceased. The jury must be taken to have accepted the substance of Ms McKenzie's evidence. The following account is based mainly on what the trial judge tells us in her helpful report about her testimony.

[3] Ms McKenzie and the deceased were in the habit of meeting several times a week to drink alcohol together. The respondent would often drink with them. On the evening of 21 March 2023 Ms McKenzie went to the deceased's house, the plan being that they would purchase alcohol and return to her home for a drink. They duly did so. Ms McKenzie felt that the deceased was not himself; he seemed to feel that he would not be welcome at her home, although she assured him that he would be.

[4] On arriving at her home Ms McKenzie, the deceased and the respondent sat in her bedroom drinking Buckfast and listening to music. The respondent eventually went for a bath. When he came out of the bath the atmosphere changed because the respondent wrongly thought that Ms McKenzie and the deceased had been talking about him. The result was the first of a series of three attacks which rendered the deceased unconscious on each occasion.

[5] The respondent grabbed the deceased by his T-shirt at his neck. He pushed him back and elbowed him to the face/head, knocking him unconscious. Ms McKenzie pushed the respondent out of the bedroom. She asked the deceased to go home, but he started to say that it was his house and he referred to the respondent by a derogatory name. At this point the respondent was in the living room. He came back into the bedroom and matters deteriorated further. The respondent grabbed the deceased by his clothing, knocking him onto the floor. He then struck the deceased in the face with his knee on several occasions, causing a cut on his face, and rendering him unconscious again. The deceased was making a snoring noise but came round after a few seconds to a minute. Ms McKenzie again asked the deceased to go home, but he refused, reiterating that it was his house.

[6] At this point the deceased said that he was going to bed. The respondent came out of the living room and he and the deceased began bickering again in the hallway, with the respondent telling the deceased that it was Ms McKenzie's house and that he should go home. The deceased made a comment to the effect that he either "owned" her or "owed" her. As a result of that the respondent again attacked the deceased. He had hold of him and struck him with a fist before tackling him to the floor. Ms McKenzie managed to separate them briefly, but the fight then began again with the respondent kneeing the deceased in the face and body. By this point the deceased was not moving.

[7] Eventually Ms McKenzie managed to get the respondent to stop striking the deceased. The respondent then dragged the deceased out of the front door, indicating that he could then go home. Although Ms McKenzie wished to telephone for an ambulance, the respondent said that the deceased would be fine. The respondent left the deceased unconscious on the outside landing and locked the front door. The landing was immediately outside the front door at the top of a flight of external stairs leading into the front garden. Ms McKenzie looked out of a window around five minutes later and saw the deceased sitting on the landing or top step. The respondent was unconcerned about the deceased's condition and told Ms McKenzie to stay away from the window. He also had her mobile telephone so she could not telephone for an ambulance. When Ms McKenzie looked outside again it was dark and she could not see the deceased. She assumed that he might have walked home.

[8] In the morning Ms McKenzie heard noises outside and saw the emergency services were in attendance. The deceased was lying dead on the garden grass. The respondent panicked and left the house.

[9] An upstairs neighbour described hearing banging and a female screaming angrily on the night of the attack. This had been between about 11.00pm and midnight. It had sounded like a fight or the house being trashed. In the morning the neighbour's husband had seen the deceased's body in the garden and contacted the police.

[10] A consultant pathologist spoke to the blows to the deceased having caused a number of injuries. They were of sufficient force to have caused a total of six bilateral rib fractures, some of which were fractured in more than one place, and were associated with damage of the parietal pleura, punctures of both lungs and collapse of the right lung. The cause of death had been blunt force chest trauma.

The Judge's Approach to Sentence

[11] In her sentencing remarks the judge explained that she proceeded on the basis that the respondent had repeatedly struck the deceased and punched him to the head and body. He had dragged him outside the house where the respondent was then living.

[12] The respondent was 36 years old. He had 11 groups of previous convictions dating from 24 February 2005. These included convictions for assault, assault to injury and police assault. In 2018 he had been convicted in the High Court of assault to injury and the danger of life and of a separate offence of assault to injury. Both offences were aggravated domestically. A sentence of 42 months imprisonment with a supervised release order of 12 months had been imposed. The respondent's record also disclosed breaches of bail conditions, a contravention of section 41ZA(3) of the Prisons (Scotland) Act 1989 (possessing a personal communication device in prison), and a group of road traffic offences.

[13] The judge noted that the respondent had only been released from a period of remand in January 2023. He told the author of the CJSWR that he had not intentionally murdered the deceased. While the report's author thought that the respondent showed some remorse, he did not link his own behaviour to the death of someone he considered to be a friend. There was now a significant increase in the pattern of already serious offending behaviour. The report's author considered that until the respondent was able to address his offending behaviour and the impact of his alcohol misuse and received long-term support for his mental health, he would continue to pose a direct risk to others.

[14] The judge took into account that the respondent had accepted responsibility for the deceased's death to the extent that he had tendered a plea of guilty to culpable homicide. In her report she explains that the consequence of the amendments made by the Crown to the terms of the libel and the jury's explicit deletion when returning their verdict was that the

respondent's assault on the deceased was one which did not involve a weapon of any description. She selected the punishment part in the light of all the relevant circumstances of the case. She had regard to guidance given in *HM Advocate* v *Boyle* 2010 JC 66 which might suggest that (as a generality) the length of the punishment part would typically increase as one moved along a scale of: (i) murderous assault; (ii) murderous assault involving the use of a knife or sharp instrument with which the offender deliberately armed himself; (iii) murderous assaults involving a firearm, or attacks upon a child or a police officer; and (iv) cases of the most extreme severity. The present case did not involve the use of a weapon or implement.

[15] With regard to the aftermath of the attack, the judge thought it necessary to bear in mind Ms McKenzie's evidence that around five minutes after he had been put outside she had seen the deceased sitting on the landing or top step, making movements as if he were putting on his shoes. She had thought that he was all right and assumed when her sensor light went out that he had gone home. This accorded with the respondent's evidence. There was no evidence explaining how the deceased had ultimately come to be in the garden

Crown Submissions

[16] There was no reference made by the trial judge to the relevant sentencing guidelines and in consequence it was not clear how she had approached her assessment as to the seriousness of the offence or her assessment of the relevant aggravating and mitigating factors.

[17] The sentence imposed upon the respondent was unduly lenient and fell outwith the range of sentences which a judge at first instance, applying her mind to all the relevant

factors, could reasonably have considered to be appropriate (*HM Advocate* v *Bell* 1995 SCCR 244, 250D).

[18] The sentencing judge had regard to the guidance in *HM Advocate* v *Boyle* which suggested that the length of punishment part would typically increase as one moves along a scale of four distinct categories of murderous assault. The court placed the current case in the lowest category, thus attracting the lowest punishment part. *Boyle* was not to be taken as setting out a mechanistic approach to sentencing, but rather a structure for the exercise of judicial discretion. The rigid application of the sliding scale led to an underestimation of the appropriate punishment part in the present case (*Jakovlev* v *HM Advocate* 2012 JC 120, para [11]).

[19] *Boyle* indicated that a starting point of 12 years will not be appropriate in most cases of murder. The level of punishment parts has increased over time (*Kinlan* v *HM Advocate* 2019 JC 193, para [17]; *Laurie* v *HM Advocate* [2019] HCJAC 3; *Bruce* v *HM Advocate* [2016] HCJAC 25).

[20] The starting point should have been greater than 12 years given the seriousness of the offence and the high level of culpability. The absence of a weapon did not preclude a punishment part of a longer duration. The sentencing range ought to have been adjusted upwards given the presence of significant previous convictions and the absence of any significant mitigating factors.

[21] The respondent's attack took place in three distinct episodes. Having rendered the deceased unconscious each time, the respondent deliberately returned to continue the attack after the first and second episodes. During the third episode the deceased stopped moving. The attacks continued despite two attempts by Ms McKenzie to intervene. The pathologist testified that there were no definite classical offensive/defensive type injuries on the

deceased. Ms McKenzie's evidence was that the initial attack was prompted by nothing more than the respondent's mistaken belief that the deceased and Ms McKenzie were talking about him.

[22] After the third and final episode, the respondent dragged the deceased unconscious out of the front door and left him on the outside landing, locking the door behind him. His shoes and belongings were put outside. It was around midnight in March and the landing was at the top of a set of external stairs leading into the garden. It was agreed by joint minute that the deceased did not die immediately. He would have been alive for between 30 minutes and 3 hours following the assault. The respondent did not check on the deceased's condition or seek any assistance for him. He dismissed Ms McKenzie's suggestion to telephone for an ambulance. Had the respondent demonstrated any regard for the deceased and carried out any basic checks on him, he would have discovered that any assumptions which he might have made about his safety once outside the house were utterly wrong.

[23] The suggestion by the judge in her report that there was some complexity to being definitive as to the precise cause of the deceased's injuries was not justified. It would be entirely speculative to suggest that the deceased had fallen down the stairs and that the fall contributed to his death. That was the theory presented by the defence. The jury must be taken to have rejected it. The evidence demonstrated that the deceased was repeatedly and viciously assaulted by the respondent; there had been repeated blows to his body resulting in blunt force trauma to the chest which caused death. To the extent that the judge took the view that the respondent's culpability was limited by the possibility that the deceased had fallen down the stairs she had erred.

[24] The circumstances of the present case were similar to those in *HM Advocate* v *Callander* 2014 SCCR 135 where a headline punishment part of 17 years would have been imposed.

[25] The respondent has a history of offending, including previous convictions for assault and assault to injury from Dunfermline Sheriff Court in 2005, 2008 and 2009. He has an analogous conviction for assault to injury and danger of life and assault to injury from the High Court in 2018. The 2018 convictions led to the imposition of a sentence of 42 months imprisonment and the imposition of a Supervised Release Order. Following that conviction he continued to offend, committing further offences of violence against police officers in 2020, and in addition to being sentenced to imprisonment in respect of those offences, was returned to prison in terms of section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993. The length of the punishment part did not reflect the severity of the respondent's convictions.

[26] There were no notable mitigatory factors. The respondent tendered a plea of guilty of culpable homicide, but he was convicted by the jury of murder. In light of the jury's verdict and the respondent's continued insistence that he had not murdered the deceased, illustrated by his comments to the author of the CJSWR, there was no true acceptance of responsibility nor a demonstration of genuine remorse. The author of the CJSWR noted that the respondent stated that Ms McKenzie had lied in her evidence and that he appeared to place blame on the deceased for being heavily intoxicated, suggesting that this was the reason the respondent had responded violently towards him. Accordingly, very limited weight, if any, should be attributed to this as any kind of mitigating factor. In addition, the respondent's position made no material difference to the evidence which the Crown required to lead at the trial; the nature and extent of the assault had been disputed.

[27] The length of the punishment part imposed on the respondent was as low as that which might reasonably be imposed on an adult offender convicted of murder. Such a sentence would only be justified where the culpability of the offender was particularly low and there were significant mitigatory circumstances. The sentence fell outside the range of sentences that the judge could reasonably have considered appropriate. The offence was a very serious one and a more severe sentence was required in order to provide guidance to sentencers generally.

Respondent's submissions

[28] While the sentence was lenient, it could not properly be said to be unduly lenient. To be unduly lenient, a sentence must fall outside the range of sentences which the judge at first instance, applying her mind to all the relevant factors, could reasonably have considered appropriate (*HM Advocate* v *Bell* 1995 SCCR 244, 250D). A sentence may be lenient, but not unduly so (*HM Advocate* v *May* 1995 SLT 753, 755 E-F; *HM Advocate* v *Cooperwhite* 2013 SCCR 461, para [16]). Weight should be given to the views of the trial judge; she had heard all the evidence and was best placed to assess the level of culpability.

[29] There was no applicable sentencing guideline for the selection of punishment parts. Regard could, however, be had to the guidance given in *HM Advocate* v *Boyle.*

[30] The respondent was entitled to be sentenced on the basis of the least culpable position presented by the Crown to the jury. The judge had taken proper account of the circumstances of the case in selecting the punishment part. There was no evidence of premeditation. There had been a verbal disagreement with insults being directed from the deceased towards the respondent. The deceased was refusing to leave the property. There was evidence that violent behaviour had first been commenced by the deceased by pushing

a television onto the respondent's leg. Although the Crown had libelled the use of two weapons (a pole and a television bracket), all reference to the use of a pole (including allegations of striking the deceased to the head and body with it) had been deleted by the Crown. Reference to the television bracket was deleted by the jury. It would have been a legitimate inference that the deceased had fallen down the stairs and sustained at least some of the injuries in that way. Assessing the assault in light of the guidance in *Boyle,* this was a case at the lower end of the general scale.

[31] *HM Advocate* v *Callander* was notable for the particular brutality of the assault inflicted upon the deceased involving as it did repeated full force strikes to the face with an elbow, repeated kicking to the head and body, and stamping, all leading to several fractures, a ruptured spleen and acute head injury, all of which was aggravated by the fact that after having left the deceased to die, the accused returned and left again after learning the deceased had died. In the present case the principal Crown witness reported to the respondent that she had seen the deceased sit up on the landing/top step, making movements as if he were putting on his shoes. She had assumed that the deceased was all right and would get home. She had reported as much to the accused. The judge was correct to take the view that the facts were less serious than those in *HM Advocate* v *Callander.* The facts were also less serious than those in *Kinlan*, *Laurie* and *Bruce*. The present case did not involve stamping to the head or body. There had been no weapon used.

[32] The judge properly took account of the respondent's previous convictions. The conviction in the High Court resulted in a sentence that could have been imposed at Sheriff and Jury level. The judge considered that there was a limited acceptance of responsibility on the part of the respondent, as evidenced by the position he had maintained at trial – that he was guilty of culpable homicide and not murder. While not reflected as a discount to the

punishment part, it was plainly a relevant consideration. The respondent's position in relation to culpable homicide had clear utilitarian value in limiting the nature and extent of cross-examination of Crown witnesses.

[33] Ultimately, the punishment part selected was of sufficient duration to satisfy the requirements of retribution and deterrence. The sentence fell within the range of reasonable sentencing options.

Analysis and decision

[34] The test which falls to be applied in a Crown appeal against sentence was set out in the opinion of the court delivered by the Lord Justice General (Hope) in *HM Advocate* v *Bell* 1995 SCCR 245, 250C-E:

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence that that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate. Weight must always be given to the views of the trial judge, especially in a case which has gone to trial and the trial judge has had the advantage of seeing and hearing all the evidence. There may also be cases where, in the particular circumstances, a lenient sentence is entirely appropriate. It is only if it can properly be said to be unduly lenient that the appeal court is entitled to interfere with it at the request of the Lord Advocate."

[35] As is well-known, the "punishment part" is an order imposed when an offender is sentenced to imprisonment for life. By the order the court specifies the part of the sentence which it considers necessary to satisfy the requirements for retribution and deterrence, taking into account, amongst other things, the seriousness of the offence and any previous convictions of the offender (Prisoners and Criminal Proceedings (Scotland) Act 1993, section 2).

[36] As is made clear in *HM Advocate v Boyle* 2010 JC 66, para [14], a punishment part of 12 years is lower than would be appropriate in most cases of murder. We agree that a punishment part of that length should not be imposed unless there are strong mitigatory circumstances or exceptional circumstances, for example where the offender is a child. Here the judge selected a punishment part of 13 years. Undoubtedly, that was a low punishment part.

[37] There were no mitigatory circumstances in the present case. The judge was in error in treating the offer of a plea of guilty to culpable homicide as being of some relevance in this connection. The respondent was convicted of the crime of murder. He all along disputed his guilt of that offence. His acceptance of guilt of a lesser charge does not in any way mitigate his guilt of the more serious offence. It does not point to true remorse for his murderous conduct. It is evident from the respondent's attitude when interviewed for the CJSWR that he disputes that he is guilty of murdering the deceased and indeed blames the deceased for having been intoxicated and for in some way causing the respondent to behave as he did.

[38] There were a number of significant aggravating factors in the commission of the offence. The respondent repeatedly assaulted the deceased over the course of several hours. He attacked him on three separate occasions on the night of the offence. On each occasion he rendered the deceased unconscious. The level of violence used was substantial; it resulted in the deceased suffering multiple injuries extending to six fractured ribs, some of these were fractured in more than one location, injury to the parietal pleura, punctures of both lungs and collapse of the right lung. On any view, the respondent subjected the deceased to a prolonged and vicious series of beatings. The respondent then put the deceased out of the house and left him. He refused to allow Ms McKenzie to summon

assistance for him. The respondent did nothing to check on the deceased. The judge observes in her report that there was some complexity to being definitive as to the precise cause of the deceased's injuries. We do not agree. It is clear, as the judge acknowledges elsewhere in her report, that the respondent seriously assaulted the deceased. The jury must be taken to have rejected the defence suggestion that the fatal injuries were caused by the deceased falling down the stairs. The conviction for murder can only be explained upon the basis that the jury accepted that the respondent was responsible for a violent and sustained attack upon the deceased in which he evinced a high degree of reckless disregard for the consequences of his conduct or that he intended to murder the deceased.

[39] It was also highly relevant that the respondent had a bad criminal record, including several convictions for violent offences. He had been convicted in the High Court for *inter alia* assault to the danger of life. He has a number of other convictions for offences of violence.

[40] In the whole circumstances we consider that this could not be said to be a case at or about the lowest end of the spectrum of gravity, as the length of the punishment part selected by the judge implies. Although not entirely on all fours with the circumstances in *HM Advocate* v *Callander* 2014 SCCR 135, there are a number of similarities. The important point for present purposes is that *Callander* did not involve the use of a weapon; it involved a sustained attack over a period of perhaps five minutes. In the present case there were three separate episodes of violence, although none involved the use of a weapon. The attacks took place over a longer period of time than in *Callander*. The level of violence used by the respondent was substantial and prolonged. As in *Callander* the respondent's culpability must be regarded as being at least the equivalent of many cases which have involved the use of a bladed weapon. In *Callander* this court observed that the conduct of the

respondent in leaving the deceased to die and in failing to summon assistance was an aggravating factor. Again, one can see a degree of similarity with the circumstances of the present case. Finally, the respondent in *Callander*, like the present respondent, had a significant criminal record involving a number of offences of violence. The headline punishment part in *Callander* would have been 17 years.

[41] In *Laurie* v *HM Advocate* [2019] HCJAC 3 the fatal attack did not involve the use of a weapon. The deceased was stamped on, kicked and punched to the head and body causing 12 fractured ribs and a tearing of the mesentery. After leaving the scene the appellant and his co-accused summoned the emergency services to an incorrect address. The appellant was of a similar age to the respondent and, like the respondent, had numerous previous convictions, including 5 assaults, one of which was to severe injury. He had no convictions on indictment. An appeal against the punishment part of 18 years was refused. *Laurie* too bears some similarities to the present case.

[42] We are satisfied that the punishment part of 13 years selected by the judge was unduly lenient. We shall quash it and substitute a punishment part of 17 years.