



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 82
HCA/2019/000453/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

SOLEMN APPEAL AGAINST SENTENCE

by

LM

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Collins (sol adv); Collins & Co
Respondent: McFarlane, *ad hoc*, AD; Crown Agent

12 November 2019

[1] The appellant is now 17 years old. On 22 July 2019, at the Sheriff Court in

Livingston he pled guilty to a charge in the following terms:

“On 27 August 2018 at the public footpath between (...address...), Livingston, you did assault CB, then aged 16 years old, c/o the police Service of Scotland, and did repeatedly punch him to the head and body, strike him to the body with a knife, all to his severe injury, under provocation.”

[2] After calling for a Criminal Justice Social Work Report the sheriff imposed a sentence of 10 months detention, reduced from the period of 15 months, which he would otherwise have imposed but for the appellant's early offer of a plea of guilty.

The offence

[3] The offence occurred around 7.20 in the evening outside the appellant's home address. A confrontation ensued between the appellant and the complainer over a small debt which was due to the appellant. A fight broke out between the two, with the appellant striking the first blow. The fight was broken up by a bystander and the complainer was then seen to pick up an item in an agitated state and go towards the appellant in a threatening manner with it. The appellant claimed that the item which the complainer came at him with was a rock. The appellant went back into his home and took possession of two knives.

[4] The complainer then appeared outside the appellant's house with a golf club in one hand and a brick in the other. The appellant went outside and the two ran at each other, brandishing their respective weapons. The complainer struck the accused on the upper body with the golf club. After further unsuccessful effort by each to strike the other, the complainer lost his balance and the appellant struck him in the back with one of the knives which he was holding. This having happened, the complainer got up again and struck the appellant over the head with the golf club, causing it to break in the process. This brought the confrontation to an end and the complainer went to the home of a relative where an ambulance was called.

[5] On being taken to hospital the complainer was found to have suffered a stab wound about 2cm in length, which had penetrated into his pleural cavity. He was found to have a collapsed right lung, as a consequence of a haemothorax and a small pneumothorax. He

was taken to theatre to resolve the injuries and to allow for inflation of his lung. He was discharged on 29 August.

The sentencing sheriff's approach

[3] The sentencing sheriff explained that the appellant had displayed a pattern of offending from age 12. The stabbing had very serious consequences and resulted from the appellant deliberately arming himself and going back outside to confront the complainer. He explained that he took into account the appellant's youth and the need to have regard to additional considerations in sentencing young offenders, including the need to have regard to the best interests of the child as a primary consideration, all as explained in the case of *Kinlan v Her Majesty's Advocate* [2019] HCJAC 47. The sheriff also explained that he took account of the need to have regard to all relevant factors, including the seriousness of the offence, the impact on the complainer and the circumstances of the appellant, all as set out in the opinion of the Lord Justice General in *Her Majesty's Advocate v CJB* [2019] HCJAC 45.

The sheriff reported that:

“The courts have stated for many years that possession of a knife is enough to breach the custody threshold, whether or not every instance results in a custodial sentence”.

He said the appellant had not acted impulsively but had chosen to arm himself and go back outside and then use a knife. The sheriff explained that it was not hard for him to come to the conclusion that this was a crime which was so serious that no other method of dealing with it was appropriate.

Submissions

[7] On the appellant's behalf it was submitted that the sheriff had erred in imposing a custodial sentence. The appellant was 16 at the time of the offence. The Crown accepted that provocation featured in the commission of the crime and the appellant had been at

liberty without getting into any further trouble for a period of a full year between the commission of the offence and the date of sentence. Through 10 months of that period he had been subject to supervised bail, at the end of which the supervision element was removed as it was no longer thought to be necessary.

[8] Attention was drawn to the Criminal Justice Social Work Report which it was said demonstrated that the appellant had been brought up within a dysfunctional family setting. Both of his parents were involved with substance abuse and his father had spent some time in custody. In recent years his grandmother, uncle and father had all died. From around the age of 12 the appellant's behaviour had been troublesome. He had associated with a negative peer group and had been involved with offending, which had led to appearances in the children's hearing system. This however was his first criminal conviction. Despite the appellant's previous difficulties, it was noted that he had found stability in life by moving to live with his grandfather. He was keen to find employment and had been working for a brief period immediately before the sentence of detention was imposed.

[9] In all of these circumstances, it was submitted that the sheriff had erred in concluding that the only appropriate method of dealing with the appellant was by way of detention. A robust community payback order was available and the appellant was assessed as being suitable for such a disposal.

Decision

[10] In the case of *McCormick v Her Majesty's Advocate* 2016 SCCR 308, the court adopted the reasons for treating juveniles differently from adults as set out by Lady Hale in *Smith v Secretary of State for the Home Department* [2005] UKHL 51. These included that the juvenile's irresponsible conduct was not as morally reprehensible as that of an adult and that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them.

The court agreed that these considerations were 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. The court also agreed that an important aim, perhaps the most important aim of any sentence imposed on a young person 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.

[11] In the present case the appellant's difficult background and upbringing was a relevant consideration, as of course was the fact that the offence was committed under provocation. Provocation may be a particularly important consideration when dealing with a young offender, in light of the importance of taking account of the lack of maturity present and the lack of a developed sense of consequential thinking. It was also relevant to take account of the fact that the appellant had demonstrated stability over a significant period of time prior to sentencing. The offence which the appellant committed was indeed serious but it was necessary to give full weight to the circumstances just mentioned in order to determine whether a custodial sentence was appropriate.

[12] The sentencing sheriff was of course correct to take account of what had been said in the case of *CJB*. However we consider that for the purposes of the present case, perhaps the most important aspect of what was said by the Lord Justice General in that case can be found at paragraph 17, where he said this:

“In some, as in the present case, the terms of section 204(2) of the Criminal Procedure (Scotland) Act 1995 would have been applicable. A custodial sentence could be imposed only if ‘no other method of dealing with’ the offender ‘is appropriate’. That is a significant statutory restriction. Imprisonment is a sentence of last resort”.

[13] In the appellant's case, while section 204 has no application given his age, he does have the benefit of the equivalent provision to be found in section 207. The sheriff also explains in his report to this court that he had regard to the Scottish Sentencing Council's guideline on the principles and purposes of sentencing but he does not say what he saw as the sentencing purpose behind the disposal which he selected. From what he explained at paragraph 14 of his report it would appear that he had in mind protection of the public, deterrence and punishment as the principle sentencing purposes.

[14] In our opinion there was a clear focus for rehabilitation. It was identified in the appellant's recent behaviour, in his efforts to obtain employment and in the availability of supervision plan as described in the Criminal Justice Social Work Report. Given the appellant's age, rehabilitation ought to have been a sentencing purpose to which the sheriff gave priority. In the whole circumstances, we consider that there was force in the submissions presented on the appellant's behalf and we agree that the sentence selected was excessive. We therefore had in mind to quash the sentence and in its place to impose a community payback order with a supervision requirement including a supervision plan to run for a period of 18 months. We shall also attach a requirement to perform 150 hours of unpaid work in the community within a period of 12 months and that would take account of the period of around 7 weeks which the appellant spent in custody before being granted interim liberation.