APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 34
HCA/2021/164/XC

Lord Justice General
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL AGAINST SENTENCE

following a reference from the Scottish Criminal Cases Review Commission

by

DILLIN ARMSTRONG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: J Keenan (sol adv); Paterson Bell
Respondent: J McDonald (sol adv) AD; the Crown Agent

24 June 2021

Introduction

[1] This is an appeal against sentence following a reference by the Scottish Criminal Cases Review Commission. It concerns the application of the principle of comparative justice.

[2] The appellant, who was aged 24 at the time of the offence, was convicted of a charge which libelled that:

> "on 31 December 2018 at Delta Drive, Musselburgh … you … did assault Rhys Robert Reynolds … and utter threats, pursue him, drag him to the ground, repeatedly strike him on the head and body with knives, and poles, or similar instruments, restrain him, repeatedly punch, kick and stamp on his head and body, stab him on the body with a broken piece of pole or similar instrument and repeatedly strike him on the body with same, all causing him to lose consciousness all to his severe injury, permanent disfigurement, permanent impairment and to the danger of his life and did attempt to murder him".

The trial judge imposed an extended sentence of 13 years, 10 of which were custodial.

[3] There were five co-accused, four of whom were also convicted of attempted murder, although two of those convictions were in different terms. Of the four who were convicted of the attempted murder, their ages ranged between 16 and 21. The trial judge imposed extended sentences on them of between 10 and 14 years (7 to 11 custodial). Ultimately, after two separate sentence appeal hearings, presided over by a bench of two judges (one of whom was the same), the court reduced these sentences to periods of imprisonment or detention of between five and seven years. None of the substituted sentences involved an extension period.

The offence

[4] The appellant, along with the five co-accused, was a member of a gang. The complainer was a member of a rival gang. He went with three members of his gang to the appellant's house, where they broke windows and a communal door entry system. The appellant and his co-accused gave chase. During the chase the complainer stumbled, fell and was set upon by his pursuers.

[5] The attack was recorded on CCTV. The trial judge describes what it shows as brutal. The appellant's gang engaged in a frenzied attack on the complainer. The images show the appellant holding a small metallic object in his hand, dragging the complainer to the ground, before kicking and stamping on him. The appellant was pulled away, but freed himself, picked up part of a broken metal pole and stabbed the complainer in the lower back. He struck the complainer with an object, stamped on his back again, punched him repeatedly to the head whilst he was lying on the ground, and kicked him powerfully to the head. He stamped on the complainer once more, picked up the broken metal pole, and struck him in the upper chest or face area. He stamped on the complainer a third time, this time on the face with his heel.

[6] The complainer sustained multiple lacerations, some of which were in the region of vital organs. He suffered multiple skull fractures, with bleeding into the brain, a scalp wound penetrating to the bone, and an injury to the torso, which required 16 stitches. Many of the injuries were potentially life-threatening.

[7] The Criminal Justice Social Work Report recorded that the appellant (i) had a troubled background, (ii) suffered from ADHD, (iii) has only been employed for one short period, and (iv) has no qualifications. He offended as a child and was dealt with by supervision requirements through the Children's Hearing.

[8] The appellant has a total of 18 previous convictions commencing with racially aggravated harassment in 2011, when he was sixteen. Six of the convictions are for violence. In particular, there is an assault to injury and permanent disfigurement in January 2013, which attracted a CPO with 170 hours of work in the community. At the same time, he was convicted of a statutory breach of the peace, which the sheriff dealt with by a series of deferred sentences. Soon after, there was a breach of bail and a consequent further 70 hours

of unpaid work. A few months later, a conviction for vandalism added 120 more hours. A breach of the CPO resulted in a restriction of liberty condition for several months. At the same time there was an assault to injury and more unpaid work in the community.

[9] After a break in offending of over two years, in November 2015 the appellant was convicted of vandalism, statutory breach of the peace and impeding the police. Further CPOs with work in the community and an RLO followed. In early 2016 there was a racially aggravated assault, attempted theft and racial harassment convictions which were again dealt with by deferrals. Meantime, the appellant received his first custodial sentences for another statutory breach of peace, vandalism and impeding the police. Further short periods of imprisonment followed for a charge of assault and one of assault to injury and, later in the year, another statutory breach of the peace and vandalism. In 2017 a short prison sentence was imposed for an assault to injury and robbery. In the following year, there were convictions for assault and a statutory breach of the peace. Many of the convictions involved breaches of bail. He spent substantial periods on remand and, in total, a period of 22 months in custody. The CJSWR described his behaviour as involving a clear pattern of impulsive conduct and recklessness. His offending had occurred whilst he was under the influence of drink and drugs and had been consistent and heightened during periods when he had lacked structure to his life.

[10] The CJSWR records that the appellant said that he had been drinking and taking cocaine prior to the offence. He had been under the impression that the complainer and his gang were intent on stealing the appellant's cocaine. He had been the first to catch the complainer after a significant chase. The trial judge specifically took this into account when sentencing the appellant.

[11] The CJSWR records that the appellant lacked insight into the offence and regarded himself as the victim. There was evidence that he was capable of causing significant harm (both physical and psychological) to his victims. Although he had been aware that there was a link to his alcohol and drug intake, he had not engaged with the support which had been offered to him. The CJSWR recommended a period of post-release supervision. The appellant was assessed as presenting an imminent risk of serious harm.

Comparative sentencing

[12] Aaron Thomson (19) was also convicted of attempted murder, but under deletion of stabbing the complainer with the broken pole. He too was given an extended sentence of 13 years (10 years custodial). Jason Dodds (18) was convicted only of an assault to injury, having left the scene before the serious violence took place. He received a 7 year extended sentence (4 years custodial). Dean Renton (21) had pled guilty to the charge, with an additional element of striking the complainer with a stone or paving slab. The trial judge would have imposed an extended sentence of 14 years (11 custodial) in his case, but he reduced this in light of the plea to an 11 year period (8 custodial).

[13] On 7 January 2020, on appeal, these three sentences were all reduced, with the extended element being removed. Although a detailed *ex tempore* opinion was delivered, it was not published. Mr Thomson was given a determinate sentence of 6 years. Mr Renton was given one of 5 years, which had been reduced from 7 years for the guilty plea. Mr Dodds received a CPO involving 150 hours of unpaid work. In reducing the sentences on Thomson, Renton and Dodds, the court placed emphasis on *McCormick* v *HM Advocate* 2016 SCCR 308 (Lady Dorrian, delivering the opinion of the court, at paras [5] and [6]). This outlined the importance of acknowledging the lack of maturity and underdeveloped sense

of responsibility which are to be found in the young. Juveniles are more vulnerable and susceptible to negative influences and peer pressures. When these factors were combined with the backgrounds of the appellants and the degree of "provocation" from the complainer, the sentences imposed by the trial judge could not be supported.

[14] The appellate court said that there was no basis for an extended sentence. The trial judge had given no explanation as to why he thought that to be appropriate. The reason for the court considering that there was no basis for an extended sentence, particularly in Mr Renton's case, is unclear. He had a not dissimilar background to the appellant in terms of upbringing, including ADHD. He had several previous convictions, although only two of these were for assault; one with a truncheon in 2018 attracting a 60 day sentence. The CJSWR did report that he had some awareness of the harm which he had caused. He had been taking courses in prison to address his issues with alcohol and drugs, notably cocaine. The CJSWR reported that, due to his history of dangerous and reckless behaviour even at a young age, the likelihood of further offending was high. He was assessed as being at very high risk of further offending and of causing serious harm because of the consistent pattern of violent and impulsive offending, some anti-social attitudes, lack of steady employment, the use of drugs and alcohol, peer associations and ADHD. There was specific reference to the court considering an extended sentence in order to focus on the areas of risk and to support the appellant's resettlement into the community after prison.

[15] Billy Stewart (aged 16 at the time of the offence) and Kane Reilly (17) were convicted in identical terms to the appellant. The trial judge imposed an 11 year extended sentence on Mr Reilly (8 years custodial) and 10 years extended on Mr Stewart (7 years). On appeal, these sentences were reduced to 6 and 5 years respectively, with no extended period. A written opinion dated 7 February 2020 was produced but it was not uploaded to the SCTS

website. The court focused on the ages of the appellants under reference to *Kinlan* v *HM Advocate* 2019 JC 193, *LM* v *HM Advocate* [2019] HCJAC 84 and *McCormick*; all of which dealt with the responsibilities of juveniles in comparison to adults. The court required to take into account any lack of maturity, capacity for change and the juveniles' best interests. The sentence must have regard to the Scottish Sentencing Council's *Principles and purposes of sentencing*. The court was not satisfied that the trial judge had done this. It regarded the sentences as "clearly disproportionate given the appellants' age".

Appeal proceedings and the reference

[16] The appellant originally presented a Note of Appeal dated 13 January 2020 (ie soon after the reduction of the sentences for Thomson, Renton and Dodds). No comparative justice point was taken. On 12 February 2020 leave to appeal was refused as unarguable at first sift. On 12 March 2020, at second sift, the same result followed. There had been an opinion from a solicitor advocate, which did mention the reduction in the co-accused's sentences, but which contained no real analysis of the differences, or lack of them, between the accused. The sift judges described the opinion as anecdotal and vague. It is unfortunate that, for whatever reason, they did not have access to the *ex tempore* (but unextended) opinion in the first appeal or to the Opinion in the second appeal. It is equally unfortunate that all of the appeals were not heard together. In the appellant's case, this was because he alone had originally contemplated an appeal against both conviction and sentence. His appeal followed a different route from those of his co-accused.

[17] The appellant turned to the SCCRC; the solicitor advocate providing an opinion which referred to comparative justice. He stated that the appellant's representatives had not been able to obtain the relevant reports/opinions in relation to the appeals involving the co-

accused. That is wrong. They could, of course, have attended the hearing of the co-accused's appeals. This might have been facilitated by appropriate communication with the other legal representatives. Even if they had not been able to attend the hearings, the appellant's representatives would have had a legitimate interest in obtaining such documentation as might have assisted his appeal. Any request for a transcript of the decision of 7 January 2020 would have been regarded sympathetically. The *ex tempore* opinion in the appeals by Thomson, Renton and Dodds should have been extended, especially given the existence of co-accused with an interest in the outcome of these appeals. Similarly, a request for a copy of the opinion in the appeals of Messrs Stewart and Reilly would have been granted.

[18] The SCCRC had regard to *Thomas* v *HM Advocate* [2014] HCJAC 66, where the Lord Justice Clerk (Carloway), delivering the opinion of the court (at para [14]), stated that the principle of comparative justice applied as between co-accused convicted of the same offence, even where different judges had been involved. A previous sentence on a co-accused must be a factor to be taken into consideration when sentencing another accused subsequently on the same charge. The SCCRC did not consider Mr Dodds as a helpful comparator, given the lesser crime of which Mr Dodds had been convicted. Similarly, the sentences of Mr Reilly and Mr Stewart had limited value, as they were notably younger than the appellant. Mr Reilly had a short record, none of which was for violence. Mr Thomson had critical words of the libel deleted.

[19] The SCCRC then focused on the headline sentence which had been selected for Mr Renton (14 years extended; 11 custodial). Mr Renton's involvement, so far as described in the evidence, included kicking the complainer, walking into an adjacent garden, returning and kicking him again. He moved away before returning once more, lifting a rock or paving

slab above his head and throwing it forcibly at the complainer as he lay on the ground. That was at the end of the assault and looked as if it had been intended to finish off the complainer. Mr Renton walked away again then returned, shouted at the complainer and kicked him to the head with such ferocity that it was likened to a penalty kick in a rugby match. Witnesses thought that this would prove fatal. Mr Renton walked away again. The complainer tried to sit up and then got to his feet, before stumbling off in the opposite direction. Mr Renton returned, picked up the stone, and set off once more in the direction of the complainer.

[20] The SCCRC observed that Mr Renton had extensive previous convictions. The CJSWR referred to his consumption of alcohol and ingestion of drugs. He was said to be at a very high risk of re-offending and causing physical harm. Mr Renton, like the appellant, had a poor upbringing and also had ADHD.

[21] The SCCRC found it difficult to fault the imposition of an extended sentence in the appellant's case, given his previous convictions and the terms of the CJSWR, which recommended post-release supervision. The requirements of section 210A of the 1995 Act had been met. The SCCRC noted that the appellant was one of the main protagonists, being the person who led the chase and was responsible for bringing the complainer to the ground. On the other hand, it was Mr Renton who challenged the complainer to a fight and who threw the heavy stone onto him after the others had left the scene. That appears to have been the basis for the trial judge's imposition of a greater headline custodial term on Mr Renton, when compared with that of the appellant and Mr Thomson. On that basis, the SCCRC reasoned that it did not seem appropriate that the appellant's sentence should now be significantly longer than the 7 year headline sentence imposed on Mr Renton and which was subsequently reduced to reflect his plea of guilty.

Submissions

[22] The appellant submitted that the length of the sentence was excessive, even when looked at in isolation. It had been unnecessary to impose an extended sentence. The appellant was in a stable relationship and had a two year old daughter. His previous convictions were all at a summary level. He had disassociated himself from the use of the paving slab, which had been deleted from the libel against him. The complainer had caused a disturbance at the appellant's home and this amounted to some degree of provocation, although not in the legal sense. The CJSWR had confirmed that the appellant suffered from ADHD. He had not been taking his medication at the time of the offence. An issue of comparative justice also arose. The sentence was excessive when compared to that of Mr Renton.

[23] The Advocate depute was asked if the Crown wished to make any submissions on the application of the principle of comparative sentencing, but she declined to do so.

Decision

[24] The principle of comparative justice is an important one. Co-accused persons who have been convicted of the same, or a similar, offence, ought to attract substantially the same sentences (*Thomas* v *HM Advocate* [2014] HCJAC 66, LJC (Carloway), delivering the opinion of the court, at para [14]). If it were otherwise, the sentences, or at least one of them, will be perceived to be unfair. The severity of, or leniency in, a particular sentence on one co-accused must be a factor to be taken into account in sentencing the other co-accused. Any significant difference in sentence ought to be capable of rational explanation (*Lambert* v *Tudhope* 1982 SCCR 144 LJC (Wheatley) at 146). That may relate to the backgrounds of the

accused, notably their previous convictions (*Skilling* v *McLeod* 1987 SCCR 245 LJC (Ross), delivering the opinion of the court, at 248). It may be that the roles played by each co-accused were radically different, where the conviction is based on art and part guilt (*Cosgrove* v *HM Advocate* 2008 JC 102, Lord Macfadyen, delivering the opinion of the court, at para [9]; although cf *Simpkins* v *HM Advocate* 1985 SCCR 30, LJG (Emslie) at 35). It may also be that one or more of the co-accused may be significantly younger than the others. The exercise involves scrutinising all of the sentences in order to see that the comparison principle has been fully applied.

[25] Each case will, of course, depend upon its own facts and circumstances. However, an adult who has been convicted of an attempted murder of the nature of the attack in this case can expect to attract a custodial sentence in the region of at least 10 years imprisonment (see eg 12½ years in *Nelson* v *HM Advocate* [2020] HCJAC 31; cf the slightly lower 9 years for an adult discussed in *HM Advocate* v *Clark* 2010 JC 90; and, for more serious attempts, the 16 years in *Iqbal* v *HM Advocate* [2018] HCJAC 65). If the offender has significant previous convictions, as the appellant has, the sentence is likely to be higher than 10 years.

[26] In this context, there is a marked distinction between a conviction for an aggravated assault (eg to severe injury and permanent disfigurement/impairment and assault to danger of life) and attempted murder. In the latter, the quality of the offending behaviour demonstrates either an intention to kill or such wicked recklessness that it is to be regarded as murderous. The nature of the crime is very serious indeed. It is interesting to observe that this type of attempted murder would be classified as Level 3 in the English Sentencing Council's Guidelines (2009). Where there are serious and long term consequences to the victim, the starting point should be 15 years for an adult (aged 18 and over) first time offender with a range of 12 to 20 years.

[27] The submission that, looked upon in isolation, an extended sentence of 13 years, with a custodial element of 10 years, is excessive is not well founded. Such a sentence would have been appropriate in this case for an older offender.

[28] The Scottish Sentencing Council considers a young person to be someone who is under the age of 25. Its draft guideline on *Sentencing young people* takes into account the research on how young people develop physically and psychologically and on the differences between young and older people. Young people are generally less able to exercise good judgment and they have a greater potential for rehabilitation. Specific regard must be had to their maturity, capacity for change and best interests; the latter being a primary consideration in persons under 18. The aims of the sentence for a young person include: increasing the likelihood of societal reintegration; reducing the likelihood of unnecessary stigmatisation; benefiting society by reducing the possibility of re-offending; offering an opportunity for understanding the consequences of offending; addressing the underlying causes of the offending; and assisting connections with society.

[29] That is illustrated here by the second appellate decision of the court. Mr Stewart and Mr Reilly, who were aged only 16 or 17 at the time of the offence received significantly lower prison terms than those which might be imposed upon an adult. The sentences would still be substantial custodial terms; here 5 and 6 years detention (cf 7½ years in *HM Advocate* v *Clark*). Although the exercise should not be seen as purely arithmetic, the older in years, the greater the assessment of culpability is likely to be. The rationale for the similar sentence of Mr Thomson, who was aged 19, is not only his youth but the deletion of the reference to the use of the pole.

[30] The SCCRC reasoned that a comparison between the appellant's sentence and those for the teenaged co-accused may not be particularly helpful. That is not strictly accurate. A

comparison is necessary to ensure that the sentence imposed upon the appellant is fair, when seen against those of the younger offenders. A problem arises when the headline sentence selected for Mr Renton, who was aged 21, is examined. It is not easy to see why, when compared to those 5 and 6 year terms imposed on the teenaged participants, a headline custodial disposal of only 7 years was selected. Given the additional use of the paving slab, the court is driven to the conclusion that Mr Renton's sentence on appeal was significantly lenient.

[31] Nevertheless, Mr Renton's sentence cannot be ignored. It must, as a matter of comparative justice, be taken into account when dealing with the appellant's appeal. There is little room for any distinction in relation to record, although the appellant does have a larger number of assault convictions. There is, however, a significant difference between their respective ages; the appellant being at the outer limit of the definition of young person in the guideline. It was he too who seemed to instigate the extreme violence, even if it was Mr Renton who completed it. The existence of some victim empathy and remorse in Mr Renton's case, together with his efforts to address his problems in prison, also provide some room for distinction.

[32] An extended sentence is appropriate in the case of a violent offender if the period for which the offender would otherwise be subject to licence would not be adequate for protecting the public from serious harm (1995 Act s 210A). It is difficult to understand the reasons for overturning the trial judge's imposition of an extended sentence in Mr Renton's case. The judge may not have explained his reasons adequately, perhaps because the imposition of an extended sentence was not specifically challenged in Mr Renton's Note of Appeal. Standing the nature of the offence, his record and the terms of the CJSWR, an extended sentence was the obvious course of action.

[33] The SCCRC concluded that an extended sentence was merited in the appellant's case. The court agrees; standing the violent nature of the appellant's participation in the offence, his record and the terms of the CJSWR in relation to his lack of remorse, empathy or attempts to rehabilitate himself in prison. Having regard to the principle of comparative justice, the sentence imposed by the trial judge must be reduced. In all the circumstances, the court will substitute an extended sentence of 11 years with a custodial element of 8 years. The appeal is allowed to that extent.