APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 30
HCA/2020/000021/XC

Lord Justice Clerk
Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST SENTENCE

by

LIAM ALEC ROBERT HAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Duguid, QC, CM Mitchell QC; John Pryde & Co
Respondent: Borthwick AD; Crown Agent

8 July 2020

[1] This is an appeal against a life sentence with a punishment part of 19 years imposed for the crime of murder, to which the appellant pled guilty in the following terms:

> "on 26 June 2019 at the house known as Eynhallow, Greeness, Cuminestown, Turriff you LIAM ALEC ROBERT HAY did repeatedly strike the rear door with a baseball bat, smash a window in the door, unlock the door, force entry to the house and there assault Anthony Edward Stewart McGladrigan, residing there and repeatedly strike him on the head and body with a knife and he was so severely injured that he died later that day at Aberdeen Royal Infirmary, Foresterhill Road, Aberdeen and you did murder him."

[2] The appellant was 20 at the time of the murder, and at the time of sentencing. The punishment part of 19 was reduced from a headline figure of 20 to account for a plea tendered at a continued Preliminary Hearing, although the case had not called on the original date set. *Per incuriam* the sentencing judge omitted to explain that reduction as required by section 196 (1A) of the Criminal Procedure (Scotland) Act 1995.

Circumstances of offence

[3] The locus was the home of the victim who lived there with his family. The grandparents of the appellant lived very close nearby, and his aunt had once lived in the home then occupied by the deceased.

[4] At the end of a drink and alcohol binge which had lasted about 5 days, the last day being at the home of the appellant's grandparents, who were on holiday, the appellant chased Austin Smith, with whom he had been drinking and abusing drugs to the home of the deceased, wielding a baseball bat. This was at about 0430 hrs on 26 June. The deceased, woken by the commotion, gave shelter to Smith, and allowed him to lock himself in the bathroom. The appellant meanwhile tried to get into the house but was refused admittance. He used a baseball bat to smash a glass panel in the door and entered the house. Until this point, much of the incident had been seen by the deceased's wife who had been watching cctv footage from the home security system on her phone, but the footage did not capture what happened thereafter. Once the appellant was in the house, Mrs McGladrigan, who by now had called 999, heard her husband say "oh my God, oh my God are you crazy?" and then "I've been stabbed". She found her husband slumped to the floor and having difficulty breathing. She tried to minister to his wounds with the advice of the 999 call operator. By this time her husband's lips were turning blue and he was very pale while still struggling to

breathe. Glancing at the fridge freezer she could see the reflection of a head and a hand with blood on it and realised that the appellant was crouching at the end of the dining table, breathing heavily. Wisely, and with considerable presence of mind, she decided not to alert the assailant to the fact that she knew he was there.

[5] When the police arrived the appellant was seen holding a blood stained knife in his right hand. He required to be told repeatedly to drop the knife before he did so. He was arrested and handcuffed. He repeatedly said to the police "watch the boy behind you," "he's behind you", "watch out for that one". He resisted getting into the police car, maintained that the police were not genuine, complained about not having his shoes (he had arrived at the house barefoot) and gave his name as "Lewis Capaldi". On arrival at the police station at about 0710 he did not know why he was arrested and when told it was for attempted murder said "No- honestly?" He was medically examined and found fit to be detained and interviewed.

[6] Mr McGladrigan was treated by paramedics at the locus and taken to Aberdeen Royal Infirmary where a blood transfusion was administered. Despite the efforts of medical staff his heart went into ventricular fibrillation and could not be restarted and life was pronounced extinct.

[7] At post mortem pathologists found nine stab wounds to the face, leg and body, all of which would have contributed to the fatal blood loss. The most significant wounds were to the left chest wall and lower back. Underlying injuries were found to the heart, the kidney and the spleen. The cause of death was specified as "multiple stab wounds to the back and chest."

Timing of the plea

[8] The appellant appeared on petition at Peterhead Sheriff Court on 28 June 2019 charged with murder. The case was indicted to a preliminary hearing diet on 21 October 2019, which diet was postponed to 6 December 2019 to allow the defence to make further enquiries into his psychiatric condition. On 6 December 2019 he pled guilty to the murder charge.

Plea in mitigation

[9] Senior counsel referred to the fact that the appellant had taken both alcohol and drugs over a period of days leading to the offence. At the time, he thought that he was being pursued. His perceptions that night were divorced from reality. He now realises the horror of what he had done. He reiterated that he was ashamed, disgusted and remorseful. He was the eldest of a family of four, with working parents and a stable background. His schooling had been disrupted because of dyslexia and finding it difficult to mix with other pupils. He started a welding course after school but struggled with the computer work and dropped out.

[10] A psychiatric report stated that the appellant displayed no evidence of any formal thought disorder or delusional beliefs. He had displayed psychotic symptoms at the time of the offence, thinking he was in danger. He also suffered hallucinations which were apparent when he was in the police van but these symptoms were transient and resolved in a short time. They were related to his significant use of illicit substances in the 7 days before the murder and did not raise an issue of diminished responsibility.

[11] The appellant had a long standing habit of drug abuse. He used MDMA, cocaine, LSD and acid. His preferred drug was M Cat (a synthetic Class B drug). The appellant

expressed considerable remorse, and also disgust at friends who continued to abuse drugs knowing the situation in which he found himself.

The sentence

[12] The sentencing judge imposed a sentence of 19 years, reduced from 20 for the plea.

Submissions for the appellant

[13] It was submitted that the sentence was excessive having regard to the youth of the appellant and the circumstances of the offence. Whilst the psychiatric report excluded diminished responsibility its author noted that there was evidence the appellant was suffering psychotic symptoms at the time of the incident, including delusions that he was at risk of harm. These symptoms included hallucinations which were evident when he was in the police van. It was submitted that the youth of the appellant was a significant factor, having regard to the authorities that in sentencing a young person it is to be borne in mind that maturity may not be developed and a primary consideration has to be the welfare and best interests of the individual, so that they can come out of prison as a responsible and valuable member of society. The trial judge had said "I also felt that in the interests of his rehabilitation, a long period to mark the serious nature of what he had done could be to his advantage." However she did not explain in what way a longer period in custody would serve his best interests. The appellant is someone who appears capable of rehabilitation, he has a supportive family and a good network of support, he has managed a reasonable level of achievement including passing SQA modules in 4 subjects. The offence was premeditated and out of character. A long punishment part deprives the appellant of the chance of earlier release. On the question of discount, the sentencing judge said:

> "I am aware that one year of discount from 20 is a low, perhaps even nominal, level of discount. I chose that figure because of the very serious nature of the crime. "

This would appear to run contrary to the need to avoid double counting referred to in para 57 of *Gemmell* v *HMA* 2012 JC 223.

Analysis and decision

[14] The modern treatment of the sentencing of young people can probably be traced back to *Kane* v *HMA* 2003 SCCR 749 where the Lord Justice Clerk (Gill) noted, para 11:

> "The sheriff thought that considerations of retribution and deterrence were decisive. These are material considerations; but there is more to sentencing than sending messages to society, particularly in the case of a young offender. The court has to consider the personal circumstances of such an offender; his home background; the extent to which he may not be solely responsible for his behavioural problems; and the opportunities that a non-custodial sentence may give for rehabilitation before he becomes trapped in the cycle of crime."

Since then there has been an increasing appreciation that whilst some general idea of the recognised levels of sentencing ranges for specific offences may provide a useful cross-reference, the sentencing of a child or a young person is in fact a wholly different exercise from that of sentencing an adult. In *H* v *HMA* 2011 JC 149 (which involved the imposition of a punishment part of 11 on a 15 year old for a concerted murder) the court (para 14) said 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."

[15] The same point was made in *Kinlan* v *HMA* 2019 JC 193:

> "[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."

[16] These observations were picked up in *Campbell* v *HMA* 2020 JC 47:

> "[26] We recognise that the trial judge identified the process of sentencing a child, whose best interests must be taken into account as a primary factor, as a different exercise from that of sentencing an adult.

> [30] The matter is further complicated when the offender is a child, where the process of sentencing involves considerations which are different from those which operate in the case of an adult."

[17] It is because the exercise of sentencing a child or young person is different from that of sentencing an adult, that an approach which simply addressed the sentence which would be imposed on an adult and then applied a discount to reflect the fact that the accused is a child or young person would be inadequate. This is a point which has been addressed several times. In *H* the court noted that whilst it was not illegitimate to have regard to adult sentencing levels to provide a background understanding of the general sentencing range for the offences in question, nevertheless "any sentence imposed on a child, with his welfare as a primary consideration, ought normally to be significantly below those levels". The court observed (para 15) that:

> "…the sentencing process should not simply involve an exercise of looking at past cases involving adult offenders committing similar crimes and then deducting a percentage"

[18] This issue was discussed also in *McCormick v HMA* 2016 SCCR 308, where the trial judge had selected the sentence by considering the length of sentence which might be appropriate for an adult in the circumstances of this case, and applied a reduction from that. Whilst it was not illegitimate to consider the sentence which an adult offender might attract, in doing so the court should take careful regard of the observations in *H* para 15.

[19] In *Green* v *HMA* 2020 JC 90, the trial judge, having selected a punishment part for a 30 year old accused, proceeded to consider the appropriate sentence for the remaining accused, aged 20 and 18. In the appeal the Lord Justice General (Carloway), delivering the opinion of the court, said (para 80):

> "It is then not just an exercise of comparing the personal circumstances of the other appellants and selecting an appropriate tariff. Mr Noonan was only 20 years old at

> the time of the murder and Mr Brown was just 18 years old. Although both were technically adults, their relative lack of maturity is a significant factor. The custodial regimes correctly treat those under 21 years old differently from those who have reached that milestone in life (see Hammond, *Literature Review of Youth Offending and Sentencing in Scotland and Other Jurisdictions* , para 3.6, 'The different stages of brain development' (suggesting a 'young adult' stage of between 18 and 25 years old)).

[20] In the present case, the sentencing judge recognised that the youth and immaturity of a young person, and their best interests, required to be taken into account in sentencing, under reference to some of the authorities listed above. However, in explaining the process by which she reached the sentence imposed she said

> "[40] I decided that an adult would have required to serve a punishment part of at least 22 or 23 years. I reduced that to 20 years to take account of youth."

[21] It appears therefore, that the appropriate punishment part was selected by considering that which would be appropriate for an adult and reducing it to take account of the youth of the appellant. As the authorities show, the problem with this approach is that it is unlikely truly to reflect the fact that the exercise of sentencing a child or young person is different from that of an adult. Such an approach is unlikely to result in a full and careful evaluation of the factors which make the exercise different of the type which was conducted in *Campbell* having regard to the issues identified by Lady Hale in *R (Smith)* v *Secretary of State for the Home Department* [2006] 1 AC 159. Furthermore, in *H* the court noted that even if a comparison were made between the appropriate sentence for a child or young person compared with an adult, the former "ought normally to be significantly below" the levels of the latter. In the present case the sentencing judge herself recognised that a headline punishment part of 20 was a severe sentence. She explained that in selecting the relevant figure:

> "I also felt that in the interests of his rehabilitation, a long period to mark the serious nature of what he had done could be to his advantage."

[22] This is a somewhat puzzling comment, particularly since the judge accepted as genuine the appellant's expressions of remorse and his difficulty in believing what he had done. She also recognised that he was well aware of the harm he had caused, both to the McGladrigan family and to his own family. The psychiatric report indicated no personality disorder or serious mental illness. The only significant issue in his background is his polysubstance abuse, which, on all accounts, has ceased during his incarceration. This substance abuse also led to a patchy employment history. The appellant has one prior conviction at summary level. He has a close and supportive family. He has accepted full responsibility for the offence and in the psychiatric report and CJSWR there is no sign of any efforts to deflect responsibility. The latter notes that he has reflected on the lifestyle choices which resulted in the abuse of drugs and led to the self-inflicted condition in which the offence was committed. A recognised aspect of sentencing a young person is that they generally have a greater capacity for change, and thus rehabilitation, than an adult. In short, there is no basis for thinking that there is in the appellant's background any reason to suggest that a longer period before he could even apply for parole would be in the interests of his rehabilitation or otherwise required by circumstances.

[23] We recognise that the appellant was not a child or even a teenager at the time of the offence, and that a punishment part at the level imposed in *H* would not be appropriate. Nevertheless, as was noted in *Green* v *HMA* 2020 JC 90, para 82, although not all of the same considerations as may be taken into account for child offenders will apply to a young adult, their youth remains a material factor in the sentencing exercise. For the reasons we have highlighted we consider that the sentencing judge may be said to have erred in the process by which she arrived at the sentence imposed, resulting in the imposition of a sentence which was excessive.

[24] The second feature of the sentence which caused us concern was the approach taken to the discount. We accept, of course, that, *per Gemmell* v *HMA* (para 31, Lord Gill) the granting of a discount is a matter for the discretion of the sentencing judge, but that discretion requires to be exercised according to the broad general principles set out in that case (para 32, Lord Gill). Central to these principles is that the only factor which is relevant to the granting of a discount is the utilitarian value of the plea. Factors relevant to general sentencing objectives, such as retribution, denunciation, public protection and deterrence, are factors to be taken into account in setting the headline sentence (para 37). The same applies to mitigating or aggravating factors such as prior convictions, planning or the severity of the crime. As was pointed out in *Gemmell* (para 55), there is nothing in the wording of section 196 of the Criminal Procedure (Scotland) Act 1995 to suggest that the court should disaggregate any individual element from the starting figure and exclude it from the application of the discount. In para 57 Lord Gill went on to explain that:

> "if the court should reduce the discount because of a factor that it has taken into account as an aggravating factor in its assessment of the headline sentence — the accused's criminal record, for example — there will be double counting, unfairly to the disadvantage of the accused."

[25] That is what appears to have happened in this case. The sentencing judge in her report explained that

> "I am aware that one year of discount from 20 is a low, perhaps even nominal, level of discount. I chose that figure because of the very serious nature of the crime."

The serious nature of the crime is a factor which requires to be, and in this case was, taken into account by the sentencing judge in selecting the headline sentence. To select that factor as a reason for restricting the discount attributed to the utilitarian value of the plea is not in accordance with the principles enunciated in *Gemmell.*

[26] We have therefore concluded that the sentencing judge erred and that the issue of sentence is at large for this court. In addressing the appropriate sentence we recollect the reasons for distinguishing the sentencing of a child or young person from that of an adult, as identified in *Smith* and summarised in *Campbell* v *HMA (*para 27), namely (i) lack of maturity and an underdeveloped sense of responsibility, with a concomitant degree of impetuosity and recklessness; (ii) a greater likelihood of falling under negative influences, from peers or otherwise, including the difficulty of extricating themselves from a criminogenic setting; and (iii) that personality traits of the young are more transitory and less fixed than in adults, resulting in a greater capacity for change, with a higher prospect of reintegration and rehabilitation. As was noted in *Campbell* (para 27):

> "These factors require to be examined, not from the standpoint of the risk the individual may present, but so that, where appropriate, the court may ensure that the sentence imposed properly allows for the process of maturation, with the possibility of the development of responsibility and the growth of a healthy adult personality."

[27] Looking at the three factors referred to in *Smith,* it seems that the influence of peer pressure may have played a role in the appellant's first starting to use drugs, but in terms of the offence itself it appears to have no bearing. The appellant was himself responsible for his choices in taking drugs and participating in a prolonged "bender". The first factor is clearly a relevant one, a lack of maturity and an underdeveloped sense of responsibility being found in youth much more often than in adults, often resulting in impetuous and ill-considered actions and decisions. This has a bearing on the drug use; not that it excuses in any way his behaviour or offers mitigation for it, but that it is one type of reckless and irresponsible behaviour to which youth may be more prone than adults. The third element is clearly a significant one in the present case, having regard to the factors favourable to a

good rehabilitative outcome, to which we have already referred. As it was put in *Smith* (para 25):

> "… an important aim, some would think the most 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. … It is important to the welfare of any young person that his need to develop into a fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done."

[28] At the same time, we understand that the welfare of the young person, and the prospect of rehabilitation and reintegration into society, are:

> "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….." (*H*, para 14)

The Guideline on the Principles and Purposes of Sentencing issued by the Scottish Sentencing Council, and approved by the High Court of Justiciary (November2018) states that amongst the purposes of sentencing are punishment (which includes deterrence), and disapproval of offending behaviour. Having regard to these purposes and to the statutory requirement to specify a punishment part by reference to deterrence and retribution, we recognise that, as was noted in *H*, para 17 :

> "Even with a child offender, the minimum period of custody for the crime of murder is likely to be significant in recognition of the need for retribution for the deliberate or wickedly reckless taking of another person's life …"

[29] This was a serious, unprovoked and distressing offence, aggravated by having been committed in the victim's own home and in the presence of members of his family. Having regard to the circumstances and the relative difference in age, it is clear that a punishment part well in excess of that imposed in *H* was appropriate. Having regard to all relevant factors we consider that an appropriate headline sentence would have been 18 years. There is usually a considerable utilitarian value in a plea of guilty to a charge of murder. Having

regard to the timing of the plea at what was the first calling of a preliminary hearing we consider that a discount of 2 years was merited, resulting in a punishment part of 16.

[30] As with all punishment parts, this is not an indication of the date when the appellant will be released. It specifies rather the period which must pass before the appellant may even apply for parole, a process which is not easy. We shall allow the appeal to the extent of substituting a punishment part of 16 years for that of 19 years imposed by the sentencing judge.