APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 35
HCA/2020/000078/XC

Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

JB

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Duff; WSA Solicitors
Respondent: Gray, solicitor advocate, AD; Crown Agent

25 August 2020

[1] The appellant appeared at the High Court at Glasgow on 6 January 2020 and tendered a plea in terms of the section 76 procedure to an indictment which libelled that on 14 April 2019 at an address in Edinburgh he did assault Adam Shafie and did repeatedly strike him on the body with a knife, to his severe injury, permanent disfigurement and to the danger of his life and did attempt to murder him.

[2] At an adjourned diet at the High Court at Glasgow on 7 February 2020 the appellant was sentenced to 4 years detention (backdated to 6 January 2020), this being discounted from a starting point of 6 years to reflect the early plea of guilty. It is against this sentence that the current appeal is directed. It was submitted on behalf of the appellant that the sentencing judge erred in imposing a custodial sentence in all the circumstances – most importantly because of the appellant's youth (he was aged 16 at the date of the offence as was his victim), the fact that he had no previous convictions and had never been in any trouble and the offence was quite out of character. Alternatively if the court concluded that the sentencing judge was correct to take the view the offence was so serious that only a custodial sentence was appropriate, it was submitted that the starting point of 6 years detention before discount was excessive in all the circumstances.

[3] The facts of the incident were set out in an agreed narrative, the salient features of which were as follows:

> "At 1700 hours on 14th April 2019, the complainer and a friend were walking on Gilmerton Road, Edinburgh across from Aldi. The appellant was in the house at 403 Gilmerton Road (his friend's house). He and his friend ran out of the house. The appellant was carrying a pink kitchen knife. He ran to the complainer and attacked him by stabbing him repeatedly with the knife. The appellant then left and went back to the house and then ran towards the woods at Ellen's Glen."

The complainer collapsed at the side of the road and a number of passers-by stopped to help him. Police with dogs conducted a search of the woods near to Ellen's Glen but did not find the appellant. The incident was captured on CCTV footage, a detailed synopsis of which was given in the narrative of facts. This showed the appellant running with his hands in his pockets, on the roadway towards the complainer. He removed his hands from his pockets just prior to reaching the complainer. The knife could be seen in the appellant's right hand. It was held in the fist and pointed towards the ground. It was pulled back prior to striking

the complainer. The appellant could clearly be seen holding the knife at head height and striking the complainer three separate blows with the knife.

[4] The complainer was treated by paramedics at the scene and then taken to Edinburgh Royal Infirmary. He sustained three penetrating stab wounds to his left anterior chest (5cm), left flank (15cm) and a superficial wound to his left back. He sustained a haemopneumothorax, a splenic laceration, injury to the tail of the pancreas, bronchopleural fistula, and left upper lobe collapse. He required surgery, from which he will have a scar. It is anticipated he will make a full physical recovery without any significant impairment, but his injuries were life threatening.

[5] At the diet on 6 January 2020 counsel for the appellant told the court that the appellant was aged 17 and had been aged 16 at the time of the offence. He had never been in trouble and lived with his mother, who was present in court with him. He was in employment. At school he had obtained a qualification to become a mechanic and had been, at the time of the incident libelled, in the process of qualifying to become an electrician. He had acted impulsively as a teenage boy who now bitterly regretted his actions. The appellant knew that there was only one sentence which the court would impose. A sentence of detention was inevitable, the appellant's counsel observed, and the appellant had faced up to what he did.

[6] At the adjourned diet for sentence on 7 February 2020 the criminal justice social work report was available, and in addition there was provided on behalf of the appellant a psychological report from Dr Suzanne Zeedyk, a developmental psychologist who considered whether the appellant had experienced childhood trauma. Dr Zeedyk concluded that he had indeed experienced significant childhood trauma resulting in toxic childhood stress which altered the body's self-regulatory system, leaving individuals less able to

manage strong emotions. In light of the CJSWR and Dr Zeedyk's report, and on the basis of the well-known authorities regarding the principles to be applied when sentencing a child, all as helpfully set out in a very detailed and full written plea-in-mitigation, counsel submitted that in the particular circumstances of this case a robust community disposal as an alternative to custody was an appropriate and proportionate sentence that reflected all that is required by society but that has, as a primary consideration of sentencing, the best interests of this child.

[7] The sentencing judge has provided a very careful and balanced report to this court, which includes his sentencing remarks. He has clearly taken account of everything said to him in mitigation, and the terms of the CJSWR and Dr Zeedyk's report. His sentencing remarks included the following:

> "[4] In the whole circumstances I have concluded nevertheless that the gravity of the index offence in your case requires, in the public interest and having regard to the sentencing objectives of deterrence, punishment and community safety, the imposition of a significant custodial sentence. In the light in particular of your young age at the time of this offence and indeed today, however, and having regard also to the favourable terms of the reports to which I have referred, and further bearing in mind the sentencing principles of proportionality in general and your own welfare in particular, I consider that I can reduce the usual range of starting-point or headline custodial sentence that would normally be imposed for such a conviction in respect of a first offender adult in your position to a period on this indictment of 6 years. A plea of guilty was of course offered on your behalf and accepted by the Crown at the earliest opportunity in these proceedings and you are therefore properly entitled to a full discount on that custodial tariff.
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> [5] You will therefore serve a sentence of 4 years detention, duly discounted from that period of 6 years. That period will be backdated to 6 January 2020, being the date of your conviction and initial remand in custody.
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> [6] In the interests of clarity I should add that I consider that to impose any community-based disposal such as that commended to the court by your counsel and by the author of the background report, or indeed to impose a lesser custodial sentence than the one I have selected in your case would be inappropriate and unrealistic given the gravity of the crime to which you have pled guilty on this indictment. Finally, it is to be hoped that the period of licence which this sentence

> will inevitably permit will assist you in your re-integration into the community in due course."

[8] In her written and oral submissions to this court counsel for the appellant argued that, having regard to the favourable terms of the CJSWR and to Dr Zeedyk's report, the sentencing judge had erred in concluding that a non-custodial sentence was not appropriate in all the circumstances. In any event, if the court was not with her in this submission she argued a starting point of 6 years detention was, in all the circumstances, too high. Her submissions in relation the CJSWR are summarised in paragraphs [03] and [04] of her written submissions as follows:

> "[03] The appellant is now aged 17 years of age. He had no previous convictions and had never been trouble before. The commission of the offence was out of character for him.
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> [04] The criminal justice social work report was in positive terms for the appellant. The appellant accepted full responsibility for the offence and described his response to what he perceived to be a threat from the victim as disproportionate and unacceptable. He described his behaviour as impulsive. He showed a good deal of insight into the negative impact that his actions had upon the victim and his family. He recognised the impact on the local community and those who witnessed his actions. He was noted to have demonstrated a positive attitude towards intervention and authority through his engagement with the criminal justice social work report writing process. The author of the report noted that she had received positive feedback about his conduct in custody and that he had demonstrated resilient personality traits. He was noted to have demonstrated that he adheres well to rules and had been given the trusted position of "pass man" while on remand. He exhibited positive attitudes such as viewing risky behaviour such as substance abuse and violence as being negative and harmful. He was assessed as suitable for a community based disposal. The author of the report identified what form a community based disposal could take, recommending supervision, unpaid work and a restriction of liberty order."

[9] Counsel for the appellant also relied on the report from Dr Zeedyk. She set out in her report what the science of Adverse Childhood Experience is and how toxic stress in childhood causes biological alterations in the body. She highlighted that toxic childhood stress alters the body's self-regulatory system, leaving individuals less able to manage

strong emotions and the behaviour that results from emotional states. Dr Zeedyk's report set out the childhood factors that, in her opinion, were relevant to the commission of the offence. She concluded that the appellant had suffered from a childhood affected by adverse childhood experience. She identified specific adversities in the appellant's life as acrimony in the family, family chaos, substance use, sudden disappearance of his father, erratic disappearances of his mother, erratic housing and care, his mother's mental health, bullying, hospital stay, observing life-threatening violence and intergenerational trauma. Dr Zeedyk noted demonstrable empathy and remorse from the appellant. She gave recommendations for possible therapeutic care.

[10] Counsel for the appellant relied on the well-known line of authorities giving guidance on the principles to be applied to the sentencing of children, and in particular *Kane* v *HM Advocate* [2003] SCCR 749 and *McCormick* v *HM Advocate* [2016] SCCR 308. We have given careful consideration to these authorities, and also to others, including *Greig* v *HM Advocate* [2012] JC 115, *VE* v *HM Advocate* [2018] HCJAC 12, *R (Smith)* v *SSHD* [2006] 1AC 159 particularly per Lady Hale at para [25], *Campbell* v *HM Advocate* [2019] SLT 1127 and *Green* v *HM Advocate* [2020] JC 90, particularly per the Lord Justice General at para [80].

[11] We have found this a particularly difficult sentencing exercise, and any remarks we make should not be interpreted as being critical of the sentencing judge. We begin by agreeing with his observations as to the seriousness of this crime. Notwithstanding the youth of the appellant, this was such a serious crime that we consider that only a custodial sentence was appropriate in all the circumstances. Without anything which might be reasonably described as provocation by the complainer, the appellant saw him walking in the public street past the house in which the appellant was situated; he seized a large kitchen knife, ran out into the public road and carried out a murderous attack on the

complainer, inflicting several blows with the knife and causing severe injury. It was only by good fortune that death did not ensue. We are in complete agreement with the sentencing judge that only a custodial sentence was appropriate to mark the seriousness of this crime.

[12] Was a starting point of 6 years (then discounted to 4 years) detention excessive having regard to the appellant's age? We have reached the conclusion that it was indeed excessive, having regard to the very supportive terms of the CJSWR and the careful report by Dr Zeedyk. Unlike some other cases involving young accused, this is not a case in which there is no glimmer of hope; it appears to us possible that the appellant will be successfully re-integrated into society. He has shown some maturity and considerable empathy. He appears to have progressed well in detention, and it is to be hoped that this progress will continue. It is clear from the authorities to which we have referred that the exercise of sentencing a child such as the appellant does not involve a direct or arithmetical equation with sentences which might be appropriate for adult offenders. From paragraph 4 of his sentencing remarks it appears that the sentencing judge has carried out a form of discounting exercise, taking as his starting point the sentence that would be appropriate for an adult offender. To that extent we consider that the sentencing judge erred in the approach he adopted. Taking all the factors in this case together, including the seriousness of the offence, the difficulties highlighted in the appellant's background by Dr Zeedyk's report, and the supportive features highlighted in the CJSWR, we have reached the conclusion that a starting point of 6 years is indeed excessive and does not pay adequate attention to the best interests of the appellant and his re-integration into society. We consider that a starting of 5 years detention is appropriate in the particular circumstances of this case.

[13] We shall accordingly quash the sentence of 4 years detention (discounted from a starting point of 6 years) which was imposed at the High Court at Glasgow on 7 February 2020 and substitute therefor a sentence of 40 months detention which is discounted by the same discount as previously awarded, from a starting point of 5 years detention.