APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 8
HCA/2022/564/XC

Lord Justice Clerk
Lord Pentland
Lord Matthews

OPINION OF THE COURT

delivered by LORD PENTLAND

in

APPEAL AGAINST SENTENCE

by

JORDAN MITCHELL

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, Sol Adv; Paterson Bell, Solicitors
Respondent: Farrell, AD; the Crown Agent

8 February 2024

Introduction

[1] This appeal against sentence first came before the court (comprising Lord Pentland and Lord Matthews) for a hearing on 14 March 2023. The sentence had been imposed in the High Court on 15 December 2022 on a remit from the Sheriff Court at Falkirk. On that date the sentencing judge imposed an extended sentence of 14 years, comprising a 4 year custodial term and a 10 year extension period,

backdated to 18 February 2022 when the appellant had first appeared on petition. The judge considered that the risk criteria specified in section 210E of the 1995 Act had not been met. Accordingly, he did not impose an order for lifelong restriction. The criteria are that the nature of, or the circumstances of the commission of, the offence(s) either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that, if at liberty, the offender will seriously endanger the lives, or physical or psychological well-being, of members of the public at large.

[2] At the hearing on 14 March 2023, having been addressed by Ms Ogg on behalf of the appellant, this court took a different view from the sentencing judge as to whether the risk criteria might be met; the court was satisfied that in the very concerning circumstances of the case the criteria might be met. In terms of section 210B the court therefore made a risk assessment order and appointed Dr John Marshall, consultant clinical and forensic psychologist and an accredited risk assessor, to prepare a risk assessment report.

[3] Dr Marshall duly reported on 7 June 2023. He concluded that the appellant presented a high risk. The appellant lodged objections to Dr Marshall's report and, as he was entitled to do in terms of the statutory scheme, instructed a risk assessment report from Dr Claire MacNab, consultant clinical psychologist. Dr MacNab also reached the conclusion that the appellant presented a high risk.

[4] The appellant lodged revised objections to Dr Marshall's report. The appeal called before this court for a continued hearing of the appeal on 8 February 2024.

Background

[5] The appellant pled guilty in Falkirk Sheriff Court on 1 June 2022 to three charges arising from events at Forth Valley Royal Hospital on 5 and 15 October 2021 and a further bail offence. The plea was tendered under section 76 of the 1995 Act.

[6] The charges were as follows:

> "(1) on 05 October 2021 at Forth Valley NHS Trust, Accident and Emergency Department, Stirling Road, Larbert, being a public place, you JORDAN MITCHELL did, without reasonable excuse or lawful authority, have with you an article which had a blade or was sharply pointed, namely a lock knife:
> CONTRARY to the Criminal Law (Consolidation) (Scotland) Act 1995, Section 49(1) as amended;
>
> (2) on 05 October 2021 at Forth Valley Royal Hospital, Stirling Road, Larbert, you JORDAN MITCHELL did behave in a threatening or abusive manner which was likely to cause a reasonable person to suffer fear or alarm in that you did state that you had killed and mutilated animals on a number of occasions and that you had intended to murder members of the public in the future;
> CONTRARY to Section 38(1) the Criminal Justice and Licensing (Scotland) Act 2010;
>
> (3) on 15 October 2021 at Forth Valley Royal Hospital, Stirling Road, Larbert, you JORDAN MITCHELL did assault Greig Smith, c/o the Police Service of Scotland and did repeatedly kick him on the body;
> and it will be proved in terms of Section 1 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 that the aforesaid offence was aggravated by prejudice relating to disability;
>
> (4) you JORDAN MITCHELL being an accused person and having been granted bail on 18 October 2021 at Falkirk Sheriff Court in terms of the Criminal Procedure (Scotland) Act 1995 and being subject to the condition inter alia conform (sic) to the directions of bail officer (sic) and attend meetings at Brockville Social Work as stipulated did between 16 February 2022 and 17 February 2022 and at Hope Street, Falkirk fail without reasonable excuse to comply with said condition in respect that you did fail to appear at the stipulated meeting;
> CONTRARY to the Criminal Procedure (Scotland) Act 1995, Section 27(1)(b)."

[7] The sheriff adjourned for a criminal justice social work and psychiatric reports until 23 June 2022; he remanded the appellant in custody. After further procedure he remitted the case to the High Court for sentence.

[8] In a brief report, the sheriff explained the procedural history and his reasoning for remitting. His view was that the risk criteria might be met, with particular regard to Professor Lorraine Johnstone's findings in a psychology risk assessment that the appellant showed some evidence of anti-social personality disorder traits. A risk assessment order can only competently be made by the High Court (section 210B).

Circumstances of the offences

[9] The following is based on the comprehensive and helpful report provided by the sentencing judge.

[10] Charge 1 came to light when the appellant attended at the Accident and Emergency Department and said he had cut his left wrist area with a knife. After discussion with medical staff, he produced from his bag the knife he had used. He was thus in possession of a lock knife in a hospital.

[11] In the course of his attendance, the conduct reflected in charge 2 occurred when the appellant told staff that he had a long-standing plan to murder people and this was why he had purchased the knife. He planned to keep killing until being arrested. He said he had been researching murder and mass murderers online and also how to avoid being detected on committing murder. He gave a disturbing history of torturing, mutilating and killing animals.

[12] Having been admitted to hospital in connection with his mental health, charge 3 arose when, on 15 October 2021, the appellant responded to the aggressive gestures of a mentally disturbed patient. The appellant kicked him to the ground and continued to run at him and to kick him repeatedly to the body until he was restrained.

[13] The terms of charge 4 are self-explanatory. The appellant well-understood that the police would come to arrest him for breach of bail conditions. Following his arrest he continued to express intentions to go to the canal and kill people and himself.

The appellant and his previous convictions

[14] The sentencing judge explains in his report that the appellant, who is now 27 years of age, was 24 and 25 when he committed the offences. While the appellant's schedule of convictions refers only to road traffic convictions attracting modest penalties, his CPO was breached and he was sentenced to an unspecified period of imprisonment. He admitted other offending, apparently unknown to the authorities, throughout his life, including killing animals from the age of 10, fire-raising and vandalism.

[15] The appellant is the youngest of three children and experienced difficulties in early childhood when his parents separated and his mother entrusted him to the care of an older child while she went drinking. He reported watching and enjoying videos of people being killed and watching violent films with his father. His father was a bully, but they have had better contact more recently. The appellant was bullied at school, does not appear to have had any adult relationships and seems to

have no friends. He has said that he wants to live alone and in isolation. He left school at 16 without qualifications and has worked only for his father, sporadically. He has stated that prior to his remand he had sold all of his possessions and isolated himself from his family.

[16] The appellant has had concerns about his own mental health but has not been found to suffer from mental illness. He has been referred to the Adult Autism Team. He reports historical use of illicit Valium and regular problematic use of cannabis.

CJSWR

[17] In a report of 21 June 2022 Sarah Ferguson, Senior Social Worker, noted contradictions in the appellant's accounts of his motivations and intentions and suggested that further assessment was required as to the imminence of the risk of harm which he presented. She reported that he has described plans to kill people and in some respects identifies with Incel ideology[1]. He had had fantasies of perpetrating mass killings. The appellant was considered to present a very high risk of further offending and a high level of needs. He was at risk of causing serious harm.

[18] In the community he was managed under the PREVENT Multi-agency Partnership. All the agencies involved were concerned that he had the capability to present a risk of serious harm to the public. The sheriff was urged to consider remitting to the High Court in order for a risk assessment report to be prepared.

[1] Incel refers to a person, usually a man, who regards himself as being involuntarily celibate and typically expresses extreme resentment and hostility towards those who are sexually active, particularly women.

Psychiatric reports

[19] Dr David Cumming, Consultant Psychiatrist, reported on 20 June 2022 that he had not met the appellant for the purpose of the report but had dealings with him in October 2021, finding that he had no mental illness. Nevertheless, he posed the question whether a risk assessment order should be made.

[20] The sheriff adjourned further and Dr Cumming produced a more detailed report of 12 July 2022, having examined the appellant on 8 July. He was unable to determine which parts of the appellant's accounts of his actions and intentions were true and which were not. He recommended that advice on risk be sought from a psychologist.

Psychology report on risk

[21] In due course, an RMA[2] accredited risk assessor, Professor Lorraine Johnstone, Consultant Clinical Forensic Psychologist, prepared a detailed report in advance of a further adjourned diet in the Sheriff Court on 14 November 2022. She entitled her report "Risk assessment report", but it was not a report made under section 210C. While it shared some features in common with such a report, it omitted others and in particular there was no explicit consideration of whether the risk criteria were or might be met.

[22] Professor Johnstone noted that autism had been found to be a biological vulnerability to being one of the rare people who become spree killers and that violent fantasies are particularly relevant to violent behaviours. She explained that

[2] Risk Management Authority

these judgments can be made retrospectively, but not prospectively. While such factors were not predictive, she explained that the making of statements, research and planning may be warning behaviours to acting out such fantasies.

[23] Professor Johnstone found the appellant to be an unreliable informant with a changeable presentation. She noted that, to her, he maintained that his accounts to other professionals of killing animals, fantasising about killing people and going into the woods and by the canal to find random people to kill were all untrue. He told her that in the build up to these offences, he had been researching Elliot Rodger, an American Incel inspired mass killer. She noted that he had also been reported to admire other mass killers. She observed from the CJSWR that, while remanded, the appellant had reported a desire to harm people and had prepared a mural in his cell referring to mass killings.

[24] Professor Johnstone noted that in her discussions with the appellant's social worker she:

> "… confirmed that the entire multi-disciplinary team were very concerned – social work, police and health. She said that the team had adjudged his risk as high and she felt certain that if the opportunity had arisen, he would have acted on his violent intention."

[25] Professor Johnstone also noted from a police report that the assault in charge 3 was preceded by the appellant making a threat to kill his victim. While it was not clear whether that was narrated to the sheriff, it was relevant to the question of risk with which the sentencing judge was concerned. She noted from the police report that the appellant had items of concern within his home, including a hunting knife.

[26] Professor Johnstone offered a summary of her assessment in the following terms:

> "(The appellant) pled guilty to the index offences whereby he has threatened to engage in a spree killing. Spree killing refers to the killing of several people at different locations over a period of several days. His account of his motivations to his offending (has) varied across time, place, and person. This has included him stating that he believes this is his true purpose, him having uncontrollable violent thoughts and urges, him feeling angry and isolated, him having an interest and gaining some sort of intrinsic reward from violence, to him making these statements purposefully to access supports. It is difficult to know where the truth lies and whether it is one, none or all of these given (the appellant's) unreliability. What is of note is that he seemed to give well-rehearsed descriptions of his fantasies, he also described plans with intent, and he identified several possible dates. In addition, when he did have the opportunity to engage with services, he opted not to do so. He offended whilst in a mental health ward and he deliberately breached his community conditions. Furthermore, when in prison, he has continued to pose a management problem - at least in the early phases of his remand. Furthermore, he has been in possession of weapons and has given conflicting accounts of where, why and how he came by these. More recently, when police searched his home, they located a range of items that could have been used to enact his fantasises; this is concerning. Thus, it seems plausible - if not likely - that he was engaging in behavioural try-outs. This is a particularly concerning aspect of his presentation because it can underscore an escalation in risk whereby fantasies are no longer enough to satisfy the unmet need. Some authors refer to this as a progression from fantasies moving to cognitive rehearsals which, like fantasies, also diminish over time and this is when the individual can seek to act on them."

[27] Professor Johnstone reported a provisional diagnosis of autism spectrum disorder. She observed that whilst the appellant fell short of a diagnosis of antisocial personality disorder or psychopathic personality disorder, he showed some traits, albeit they could be linked to his autism, and some sadistic traits.

[28] Professor Johnstone provided a summary of the appellant's response to support and supervision which was that he was essentially unwilling to cooperate and engage with such services. She added:

> "On reviewing the available information, (the appellant) has shown limited capacity and motivation to comply with or benefit from supervision, treatment, interventions and management – either from mental health, police or social work services … I am not confident that he has a genuine motivation for treatment and … he seems to view treatment as something that should be provided and done to him as opposed to him being an active agent in the process."

[29] A detailed risk assessment, HCR-20V3, was set out alongside a structured assessment of protective factors, of which there were few. Professor Johnstone discussed recent problems with violent ideation or intent, noted the appellant's repeated disclosures and considered that his plans to harm others were feasible, but also noted that he now said that he made up much of what he is reported to have said in these respects. She concluded:

> "On balance, I consider the nature, persistence and level of detail in his narratives indicative of a real difficulty in this area. I am not convinced this was for secondary gain nor am I convinced these have subsided. I have therefore rated this item as present and relevant".

[30] Risk scenarios were set out and he was considered to be at moderate to high risk of assaulting someone causing moderate injuries and at moderate risk of causing serious injury. In considering how likely it was that he would enact his plans to murder someone, she reported:

> "…Based on the data, whilst I do not believe this is an imminent risk whilst he is detained but (the appellant) is at elevated risk and this scenario will need proactively managed once he returns to the community…"

[31] There should be ongoing risk assessment and supervision focussed on eliminating situations which might indicate or elevate risk. The appellant would need a comprehensive treatment plan for transitioning back to the community. His attitudes towards violence, authorities, other people, weapons, extreme groups,

activities in the community, and women, would require to be monitored carefully with any concerns addressed immediately.

Sentencing hearing in the High Court

[32] Senior counsel appeared for the appellant and submitted that the sentencing judge should not make a risk assessment order, but should impose a determinate period of custody with post-custody supervision or an extended sentence. When the judge enquired whether she was suggesting a supervised release order she confirmed that she was not; it would not adequately address risk given the nature of the offences and the material in the reports.

[33] Senior counsel indicated her acceptance that while the offences might not be the most serious offences of violence, in the context in which they occurred, the court could view charges 2 and 3, as offences inferring personal violence whilst in possession of a knife in the case of charge 2, bringing those charges into the scope of offences of violence under and in terms of section 210A of the 1995 Act. She conceded that a lengthy period of extension would be necessary in order adequately to protect the public from risk of serious harm on the appellant's release and acknowledged that protection of the public was a sentencing consideration in this case which would justify a sentence of sufficient duration to render an extended sentence competent.

[34] Professor Johnstone had identified potentially effective treatment targets and felt that they could be addressed and an effective plan of treatment could be developed, albeit it would need to be adapted to accommodate the appellant's autism. From Professor Johnstone's observations that an Order for Lifelong

Restriction might need to be revisited in the future, it was apparent that she did not appear to consider it necessary at present.

The sentencing judge's reasons for the sentence imposed

[35] Ultimately, even having regard to all of the information about the risk which the appellant presented, the sentencing judge did not consider that he could conclude that the risk criteria might be met. He considered that senior counsel had identified a way of protecting the public by means of an extended sentence.

[36] The sentencing judge recognised that these offences would not ordinarily attract a High Court sentence. Nevertheless, when he considered all of the information in the reports, including that about the appellant's professed intentions and motivations along with the circumstances of the offences to which he had pled guilty, the sentencing judge considered that charges 2 and 3, when viewed alongside the other charges, did permit the court to impose a longer than normal sentence so as to render competent an extended sentence. He indicated to senior counsel that while those were the charges which justified an extended sentence, his provisional view was that it would be appropriate to sentence cumulatively on all of the charges to avoid the overall sentence being longer than necessary. She agreed.

[37] The sentencing judge concluded that in order to protect the public from serious harm he should impose an extended sentence with a 10 year period of extension. From a starting point of a custodial term of 5 years and 6 months, he discounted sentence for the plea of guilty to 4 years. Accordingly, he imposed an extended sentence of 14 years with a 4 year custodial term and a 10 year extension period, backdated to 18 February 2022.

The sentencing judge's comments on the grounds of appeal

[38] The sentencing judge observed that the grounds of appeal were inconsistent with the position adopted by senior counsel before him. The appellant maintained that the headline sentence was excessive with regard to his age, limited criminal record and mental health. He also complained that the extension period was excessive, referring to his limited criminal record.

[39] Viewed in isolation, the sentencing judge said that he would agree that the headline sentence might appear excessive and that the extension period was unusual in its (maximum) duration, particularly for someone with a very limited criminal record. However, given all of the information before him he considered that protecting the public from serious harm was a very pressing consideration in this case requiring a substantial prison sentence with a lengthy period of extension. By imposing a *cumulo* sentence, he ensured that the custodial term was no longer than that which he considered necessary.

[40] The sentencing judge explained that his conclusions were based on the detailed reports of an experienced social worker, who reported also on the views of her cross-agency colleagues and an RMA accredited risk assessor on whose detailed report he had relied.

The appellant's submissions at the first hearing of the appeal

[41] When the appeal first called before this court the appellant was not represented by the senior counsel who had appeared at the sentencing hearing.

[42] Ms Ogg, who now appeared for the appellant, accepted that a determinate sentence was not appropriate given the appellant's behaviour and the reports before

the court. The argument in favour of a supervised release order was, she acknowledged, a difficult one. It appeared nevertheless that the sentencing judge had selected a starting headline sentence which after discount would result in a custodial part of 4 years or more and thus allow the imposition of an extended sentence. This approach was erroneous.

[43] The offences would not normally attract a custodial sentence of 4 years or more. To select a headline sentence of 5 years and 6 months given the nature of the offences was excessive.

[44] The appellant was nearly 25 at the date of the commission of the offences and was 26 at the date of sentencing. He had four previous convictions occurring on two occasions. The first was in 2017 for careless driving and no insurance for which he was fined and admonished. There was no offending between 2017 and 2020. In 2020 he was admonished for failure to comply with a traffic direction and received a Community Payback Order for driving with a controlled drug (cannabis) above the specified limit. The appellant breached the CPO and a period of imprisonment was imposed. It was acknowledged that the appellant had indicated that he had killed and mutilated animals in the past, but there were no convictions for such behaviour nor did there appear to be any independent evidence to confirm that. The appellant's family were not aware of such behaviour. Neither the offences nor the appellant's previous convictions merited the imposition of the headline sentence selected.

[45] The appeal raised the question of whether it was appropriate to impose a sentence higher than the gravity of the offences and culpability of the appellant required simply because there were concerns as to the possible future protection of

the public and because an extended sentence was felt to be the appropriate means of dealing with that. This was not an appropriate approach. An offender should not be penalised because deficiencies in the statutory provisions meant a deterrent custodial sentence with the appropriate extended period of supervision was not available unless an excessive or inappropriate sentence was imposed.

[46] The concern of the sentencing judge was the protection of the public. The various statements made by the appellant as to mass killings and about having killed and mutilated animals caused particular concern. As Dr Cumming and Professor Johnstone acknowledged, it was difficult to know where the truth lay. Did the appellant make the statements regarding mass killings etc. because he believed this was his true purpose or in an effort to live separately from his family and obtain access to support? It was of note that Professor Johnstone considered that a particularly difficult aspect of the case was that the appellant presented differently to different people. The multi-disciplinary team who dealt with the appellant considered his risk to be high. Police officers spoke positively of the appellant while others did not. In addition to the statements made by him, the appellant assaulted the complainer in charge 3, failed to adhere to bail conditions, was found in possession of items of concern in his house and had behaved bizarrely in prison at times.

[47] During interviews with Professor Johnstone the appellant recognised that he needed help. It was submitted that his behaviour is consistent with that. On one view the cutting of his arm and the comments made at hospital were made to get attention and his own accommodation. It was of note that Professor Johnstone

stopped short of suggesting that an Order for Lifelong Restriction was appropriate and accordingly the risk criteria had not been met.

[48] The appellant needed help and support. Having regard to the nature of the offences, the nature of the appellant's previous convictions and the uncertainty as to whether he was a fantasist or simply someone seeking help, a supervised release order was appropriate, although it was recognised that the argument in favour of such a sentence was not an easy one. If such a sentence was not appropriate but an extended sentence was, then the custodial part of the sentence was correct. It was submitted, however, that the imposition of the maximum extension period was excessive. Given all the circumstances any period of licence the appellant was released on could be supplemented by a lesser extension period and that would protect the public from serious harm from the appellant.

Risk assessment order

[49] The approach adopted before the court on behalf of the appellant at the initial hearing of the appeal was in stark contrast to that taken before the sentencing judge. At that stage the appellant's senior counsel had accepted that a supervised release order was not appropriate, that an extended sentence was justified in the interests of protecting the public, and that a lengthy extension period was necessary. Despite this marked change of front, the court proceeded to give close consideration to the submissions advanced for the appellant and to all of the detailed material contained in the various reports and other papers at that stage of the case. Having done so, the court considered that the risk criteria might be met and accordingly made a risk assessment order. The court formed the provisional view that the nature and

circumstances of the offences to which the appellant pled guilty, when seen in the context of all the other information put before the court, could demonstrate a likelihood that the appellant would present a serious danger to public safety if at liberty. The court noted, in particular, Professor Johnstone's opinion that it seemed plausible - if not likely - that the appellant was engaging in behavioural try-outs. This was a particularly concerning aspect of his presentation because it could underscore an escalation in risk whereby fantasies were no longer enough to satisfy his perceived unmet need.

[50] The court continued the hearing of the appeal to allow Dr Marshall to prepare a risk assessment report.

Dr Marshall's risk assessment report

[51] Having carried out a comprehensive investigation and assessment, Dr Marshall concluded that the appellant presented a high risk. There were numerous risk factors for violence: history of violence, problems with anti-social behaviour, personality disorder, traumatic experiences, violent attitudes, lack of insight, violent ideation, mental disorder, instability, difficulties with treatment and supervision, problems with professional services and plans, problems with his living situation and personal supports and likely future problems with treatment and supervision response.

[52] A lone actor terrorism risk assessment was applied in the appellant's case because of his idiosyncratic (grievance-based) beliefs about revenge on society for his feelings of isolation, alienation, and loneliness.

[53] Risk factors present in the appellant's case that were known to be linked to lone actor terrorism were:

- *Pathway toward violence*, which included planning, having a specific weapon in mind, timeframes and locations, ideas of disposal of bodies, and referring to mass killing;
- *Fixation Warning Behaviour*, which included a consuming and chronic obsession or preoccupation with serial killing in the past, giving way to later spree killing, prior to the index offences and afterwards during supervision;
- *Novel Aggression* referred to a new type of aggression or violence in the appellant's background (e.g. assault on a vulnerable psychiatric patient);
- *Energy Burst*, which was a burst of incongruous activity after being isolated and withdrawn, which occurred when he left his home by bus to attend hospital;
- *Leakage*, such as telling professionals about mass killing;
- *Last Resort thinking*, which involved having dates in mind on which to commit an act of spree killing terrorism;
- *Personal Grievance*, in the appellant's case the idea of spree killing was framed by idiosyncratic reasoning; thwarting of occupational goals; changes in thinking and emotions; and failure of sexual intimate pair bonding (or being with a stable intimate partner);
- *Autism Spectrum Disorder and Depression*;
- *Greater creativity and innovation*, which involved previously trying to come up with new ideas for an attack, such as the use of palindrome dates (dates that are mirrored or can be reversed); and

- *Previous Criminal Violence*.

[54] All of these risk factors together showed that the appellant was far from having had fleeting personal thoughts to do harm, with no action propensity risk factors. Dr Marshall expressed the following view:

> "Combined with his uncertainty, ambivalence, or 'humming and hawing' about whether to carry out an attack, (the risk) factors, if repeated in the community in the future, will lead to a high likelihood of a mass killing spree."

[55] While the appellant denied some of the above risk factors, for example saying that his fantasy for violence had ceased, he was an unreliable informant, changing his accounts, engaging in impression management and often lying to professionals. Additionally, he was not able to describe how he had shut down intensive, absorbing, chronic violence fantasy immersion, with no support or treatment.

[56] By the end of the assessment, the appellant reluctantly informed Dr Marshall that he thought his level of intention to commit a major spree killing attack could have gone either way. Dr Marshall was of the opinion that

> "… his stepfather inadvertently finding a large knife well-hidden in his bedroom might have averted a major spree killing attack in the Falkirk area. Even if his fantasy for killing had reduced or ceased (which was doubtful), Professor Johnstone and I both agree that the appellant would quickly revert to his previous patterns of violent fantasy, ideation and planning if released at the present time."

[57] The appellant suffered from a rare combination of substantial autism spectrum and psychopathic traits. He could switch between these neurodevelopmental problems leading to: on the one hand, avoidance, isolation, literalism, rumination, and social inadequacy; and on the other, manipulation, lying, callousness and narcissistic ideas of being special. Psychopathy was a potential enabler of violent ideas. Additionally, the appellant had a Schizoid Personality

Disorder, Paranoid Personality Disorder, Avoidant Personality Disorder, Borderline and Narcissistic traits. He had extremely complex and enduring clinical needs and risks. He also suffered from depression leading to nihilistic thinking. His lifelong coping skills consisted of avoidance, isolation, cannabis abuse, and violent fantasy immersion. Professor Johnstone remarked in Dr Marshall's meeting with her that he had 'no coping skills whatsoever'.

[58] An assessment for strength-based protective factors found insufficient protective factors to mitigate or deflect the appellant's risk trajectory. The appellant told Dr Marshall in detail how he had always felt a "nobody" and had chronically fantasized about being a "somebody" - by killing people in order to gain notoriety. While he had not carried out an attack or been apprehended attempting to carry out a spree killing attack, he was swithering over whether to do so, and with no pro-social coping skills he was likely to fall back into that mind-set quickly. Importantly, he was now demonstrating to himself that he had the capacity and willingness to act violently. Recently, in prison, he had assaulted prison officers for instrumental gain.

[59] A complex risk formulation attempted to track his emerging violent interests from childhood to the tipping point in swithering to conduct a major spree (terrorist) attack in the Falkirk area. There were several scenarios of risk in the Scenario Planning risk assessment, the main one being a spree killing knife attack to enact revenge on society for the perceived injustices in his life. There were other violent scenarios in the report, beyond spree killing.

[60] A detailed treatment and risk management plan, based on a re-socializing strategy was provided by Dr Marshall for services to tackle critical risk factors such as social skills, problem-solving, and violence reduction, as well as risk management

strategies to reduce the risk for future violence. This detailed prison and community treatment and risk management plan would provide a roadmap for the appellant to progress by lowering his risk.

[61] Dr Marshall's conclusion was expressed in the following terms;

> " (The appellant) has problematic, persistent, and pervasive characteristics that are relevant to risk and which are not readily amenable to change. In his case, moreover, the potential for change with time and/or intervention is significantly limited due to the risk factors and formulation outlined. Without changes in deep-rooted lifelong characteristics and better management of neurodevelopmental problems (i.e., autism spectrum and psychopathy) (the appellant) will continue to be immersed in violent fantasy and swither about whether to act. Although other fantasies have come and gone, violent ideas have been persistent, in different forms. As can be seen from the summary of protective factors assessment above there are few or insufficient protective factors to counterbalance these problems/characteristics. I am of the opinion that the concerted long-term measures outlined below are indicated to manage (the appellant's) risk, including restriction, monitoring, and supervision. The nature of the difficulties outlined above with which he presents are such that violence reduction interventions, problem-solving training, social skill training and psychological therapy are unlikely to mitigate the need for long-term monitoring and supervision. In the absence of identified measures, (the appellant) has no positive coping skills and is highly likely to revert to withdrawn, isolated grudge-bearing and violent fantasy, then be uncertain on whether to choose to enact an attack or not. If the conditions were 'right' as per the risk factors and formulation identified, then he is more likely than not to mount a lone actor terrorist attack based on his idiosyncratic ideas. I, therefore, respectfully, recommend the Order for Lifelong Restriction (OLR)."

Dr MacNab's risk assessment report

[62] In carrying out her risk assessment, Dr MacNab consulted a wide range of materials and interviewed a range of individuals. She consulted with Professor Johnstone and also discussed the appellant's case at length with professionals from Criminal Justice Services at Falkirk Council, who were involved in the appellant's care while he was previously on bail supervision between October 2021 and February 2022. It was apparent that both previous risk assessors (Professor

Johnstone and Dr Marshall) and others who had assessed the appellant within community settings, all shared significant concerns about his risk and, crucially, his manageability in the community.

[63] The risk assessment process had highlighted the presence of a significant and highly relevant number of risk factors that were known predictors of both general violence and lone actor terrorism. Within the general violence risk assessment all twenty risk factors were present and of relevance to the appellant's risk of future offending and risk management. The threat assessment highlighted a number of risk factors that were present during his time in the community, and which together suggested that the appellant was on a trajectory towards, if not ready to act upon, a plan to commit a major spree killing attack in Falkirk.

[64] The appellant had recently been diagnosed with autism spectrum disorder. He had experienced a significant number of difficulties associated with this disorder in relation to social communication and interaction which had impacted on his ability to function in many areas of his life; this alone was insufficient to explain his violence. His attachment style and personality had been shaped by difficulties within his earlier familial and wider social relationships and experiences. The combination of his neurodevelopmental disorder and difficult experiences, including his exposure to violence, as well as his likely engaging in violence himself at a young age, had resulted in the presence of a range of problematic personality traits. He met the criteria for an Antisocial Personality Disorder and had significant psychopathic traits that were severe, pervasive and had a detrimental impact on his ability to function in all areas of his life. As the demands of daily functioning had exceeded his capacity, he had experienced low mood, immersed himself further in violent

fantasy and adopted a grievance thinking style, all of which had come together to create 'the perfect storm' and precipitated a chain of violent offences, there being clear patterns within, that had led to his current situation.

[65] There was an absence of protective factors. If the appellant were to return to the community without significant treatment and gradual testing in the community (as described in the Risk Management section of Dr MacNab's report) he would likely revert quickly to his previous pattern of behaviour.

[66] The risk management section of the report outlined a range of treatment, supervision, and monitoring recommendations in reducing the appellant's risk. Given the combination of autism, and pervasive and severe personality traits (which included psychopathic and sadistic traits) it was recommended that the appellant be provided with a level of specialist care and treatment that would address his needs and provide him with the opportunity to progress towards community living. Consideration should be given to where his care and treatment should be provided, to provide a quality of living in the context of his autism diagnosis and relatively young age. A clear treatment plan and pathway was recommended to ensure that he was not subject to detention for longer than was necessary. The appellant would require a significant level of supervision and monitoring and recommendations were provided in the report.

[67] Dr MacNab expressed her conclusion on the risk presented by the appellant as follows:

> "I consider there is a real likelihood that (the appellant) may cause further serious harm either to himself or other people if he was to be returned to the community given the presence and significance of the risk factors identified and that there are very few protective factors in his case to mitigate this risk. I am not optimistic that he has the capacity to respond to treatment given his

> limited response to previous community intervention offered. He has had significant problems with supervision in the past, and I think that he will require long term restrictions to minimise the risk of serious harm to other people.
>
> On balance, I am of the view that (the appellant's) risk is High. The nature, seriousness, and pattern of (the appellant's) behaviour indicate a propensity to seriously endanger the lives, physical, or psychological well-being of the public. Whilst he did not actually carry out his plan to spree kill between 2021 and 2022, there are highly concerning features within his behaviour in that period i.e. the 'kit' that was found in his flat, including a 3rd knife, and his ongoing self-report of plans to kill. He has repeatedly and consistently admitted to having had violent fantasies (for over 9 years) and has communicated detailed plans to commit mass murder over an extended period. He has also admitted to try-outs that have only failed to succeed because victims did not present themselves. He has assaulted a vulnerable peer whilst in hospital and perpetrated further interpersonal violence in prison. He has used his own blood to express himself, this being whilst he has been under supervision and contained. It requires to be assessed as to whether he may be amenable to change and manageable with appropriate measures, but this needs to be tested out within a secure setting, as does his capacity and willingness to engage. Given his past CPO and bail supervision failures, his amenability to supervision requires also to be tested out carefully."

The appellant's revised notice of objection

[68] In a revised notice of objection tendered for the continued hearing of the appeal it was stated that no challenge was taken to the assessment that the appellant was high risk. That accorded with the assessment by Dr MacNab.

[69] Objection was nonetheless taken to the content and findings of Dr Marshall's report. He had erred in recommending that an OLR should be imposed. He had given insufficient weight to the length of the extended sentence imposed by the sentencing judge and had failed to consider whether at the end of the extended sentence or after the expiry of the custodial part of the sentence it could be said that serious endangerment was more likely than not to occur or would occur (*Ferguson v Her Majesty's Advocate* 2014 SCCR 244, paragraph [98]).

[70] It was submitted that Dr Marshall had given insufficient weight to a number of factors: the appellant's limited record of non-analogous previous convictions and that fact that he had no convictions for harming animals or people; the nature of the index offences and, in particular, his attendance at hospital to seek assistance; the appellant's repeated requests for mental health assistance and support; the progress the appellant was now making within the prison where he was assessed as medium risk and was in employment; and the terms of Dr MacNab's report and in particular her view that the appellant would benefit from therapeutic work in relation to his risk formulation.

[71] A letter dated 19 January 2024 from HM Prison Low Moss was produced to the court. This stated that the appellant was a medium supervision level and was in employment with the timber machine sheds.

The appellant's oral submissions

[72] In her oral submissions at the continued hearing of the appeal Ms Ogg said that the appellant now accepted that the extended sentence imposed by the sentencing judge was appropriate. She invited the court simply to refuse the appeal and not to make an order for lifelong restriction. Under reference to *Ferguson v HM Advocate* 2014 SCCR 244 she observed that the views expressed by the risk assessors were not binding on the court; it had to reach its own decision.

[73] There was no reason to suppose that the appellant was anything more than a fantasist; the assessors were correct to evince scepticism about his accounts. He had only a limited number of non-analogous previous convictions. The assault referred to in charge 3 had to be seen in its full context; the victim had made aggressive

gestures towards the appellant. There was no objective evidence showing that the appellant had harmed animals. The reason he had attended Forth Valley hospital had been to seek assistance for his mental health problems. The sentencing judge had imposed a carefully structured extended sentence. Therapeutic work could be done with the appellant within the framework of the extended sentence.

Crown submissions

[74] In view of the importance of the case the court invited the Crown to make written submissions. Contrary to the appellant's suggestion, it was not for the assessors to attempt to assess risk at specified future dates. The task of assessing future risk was, in the final analysis, a matter for the court at the time of imposing sentence.

[75] Dr Marshall had taken account of the nature and extent of the appellant's previous convictions and of the whole circumstances of the offences on the present indictment. He recognised that the appellant had a tendency to lie and to be inconsistent in his accounts, but he concluded that the appellant had been honest when he said that he had thought about wanting to kill other people since he was 17 years of age.

[76] Dr MacNab noted in her report that the appellant had had several mental health referrals while he was in prison. Whatever risk classification had been assigned to the appellant by the prison authorities was of little moment. The basis on which any such assessment had been made was not known. Both risk assessors had carried out extensive investigations and had concluded that the appellant posed a high risk to the safety of the public at large while at liberty.

Decision

[77] Section 118(4)(b) of the 1995 Act provides that the court may dispose of an appeal against sentence by:

> "if the Court thinks that, having regard to all the circumstances . . . a different sentence should have been passed, quashing the sentence and passing another sentence whether more or less severe in substitution therefor …"

[78] This is a case where the court is in no doubt that the public interest requires it to exercise the power set out in section 118(4)(b). It is clear from the comprehensive risk assessments carried out by Dr Marshall and Dr MacNab (and from the other detailed and extensive information furnished to the court) that the appellant presents a particularly high risk to public safety. Numerous risk factors have been identified. There are very few protective factors. He has been assessed as presenting a high risk of carrying out a killing spree or mass murder and of acting as a lone terrorist. There is evidence that he took serious steps to prepare for committing such an attack. He has used violence in the past. He has fantasised over many years about committing mass murder. There is evidence that he should not be considered a fantasist and, on at least one occasion, might have been close to realising his aim. There is no prospect of his being managed safely in the community at the present time. The risk is such that it will not be materially mitigated by an extended sentence, particularly given that the appellant has limited capacity or motivation to comply with appropriate management. He will require close management, supervision and treatment in prison for the foreseeable future. It may never be safe to release him. The court is entirely satisfied that the risk criteria are met and that an order for lifelong restriction must be made. That sentence constitutes a sentence of imprisonment for an indeterminate period (section 210F(2)).

[79] The court will quash the extended sentence imposed by the sentencing judge and substitute for it an order for lifelong restriction. The applicable legislation requires the court to set a minimum period which the appellant must spend in custody before he is entitled to apply to the Parole Board to be released on licence (Prisoners and Criminal Proceedings (Scotland) Act 1993 sections 2, 2A and 2B). This period, known as the punishment part, is intended to satisfy the requirements of retribution and deterrence. Had the court been imposing a determinate sentence it would have been a *cumulo* extended sentence identical to that imposed by the sentencing judge. On such a hypothesis the element of public protection would have been addressed by the extension period. In accordance with the legislative scheme, the punishment part falls to be determined by taking one half of the custodial term or such greater proportion of that period as the court specifies having regard to certain factors, none of which applies in the circumstances of the present case. Therefore the punishment part in the appellant's case is to be 2 years. The sentence will be backdated to 18 February 2022.

[80] We would emphasise that the punishment part is certainly not to be taken as reflecting or implying the court's view as to the period which the appellant should actually serve in custody. It is merely the statutory minimum period which he must serve before he can apply to the Parole Board for Scotland for release on licence. Whether and on what conditions the appellant might eventually be released after the minimum period of his sentence are matters for the Parole Board to determine.