APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 62
HCA/2017/000292/XC

Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

GRANT GAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Paterson, Solicitor Advocate; Paterson Bell
Respondent: Edwards QC; Crown Agent

8 August 2017

[1] Lest there be any misapprehension in the mind of the appellant or of any persons in court, we should make it clear that we are not concerned with a charge of culpable homicide in this case. The jury deleted culpable homicide and acquitted the appellant of that element of the charge and so that is not a matter which is before this court. What we are concerned

with today is whether the sentence of 2 years imprisonment for assault to severe injury was excessive or not.

[2] The appellant appeared for trial at the High Court in Edinburgh on a charge which initially, until the jury deleted it, included an element of culpable homicide. The trial began on 3 March 2017 and finished on 8 March 2017 when the jury returned a verdict of guilty of assault to severe injury by punching. The temporary judge imposed a sentence on 28 April 2017 of 2 years imprisonment dated from 28 April 2017.

[3] It is argued in the case and argument and again before us today, that this should not have been a custodial sentence at all and that justice would be served by what Mr Paterson described as a robust Community Payback Order. If the court were not persuaded of that view, it is argued that the custodial sentence of 2 years was excessive and we should substitute a shorter period.

[4] In this case, there are factors that count in favour of the appellant and there are factors that count against him. These are narrated in the judge's report to this court. We take account of all of these factors. In particular, in favour of the appellant, there is a doctor's letter which indicates that he suffers from depression, low mood and anxiety; he appears to have had a good work ethic; he has been a hard worker all his life and is described as a team player and we have been provided with several letters of reference; he has been involved in the local community and particularly as a coach and running an amateur football club; it is reported that he has shown genuine remorse and distress; he is in a stable relationship with his wife. The Criminal Justice Social Work Report is what we would describe as neutral - it is certainly not a bad report. He has the benefit of section 204 of the 1995 Act in that he has never served a custodial sentence before and moreover, his wife is ill and we have been shown a letter from the National Health Service indicating that

a provisional date for surgery has been identified later this month and that she will require some weeks of care after she is discharged from hospital.

[5] There are however, factors which count against the appellant. He has previous convictions for crimes of violence, including one conviction for assault to injury and two convictions for assault of police officers. Moreover, the circumstances surrounding this offence were regarded by the sentencing judge as of importance and indeed, Mr Paterson indicated to us today that it was accepted that this was a very serious matter. The trial judge in his report to us observed at paragraphs 41 to 45 the following:

> "The actions of the appellant both prior to the assault and after its perpetration, aggravated matters. Prior to the assault, the appellant was at home and could have simply stayed there. However, he chose to return to the public house clearly on the evidence for the purpose of confronting the deceased. He was clearly annoyed at some actual or perhaps only perceived slight. His wife described him as being "pissed off" by the deceased's gesture which she told him about. After the assault, knowing that the deceased was in considerable difficulty, the appellant did nothing to assist him. He simply left the scene, leaving his victim to his fate. He did not seek any assistance, not even when he arrived home. I also had to bear in mind that this was not the first time that the appellant had resorted to violence. In all the circumstances, standing the jury's verdict, I was of the view that only a custodial sentence was appropriate in this case."

[6] The sentencing judge went on to indicate that he chose a sentence of 2 years imprisonment to reflect the reduction in the charge made by the jury and had the appellant been convicted of culpable homicide, he would have imposed a longer sentence of imprisonment. There is no error of law that we can find in the sentencing judge's reasoning and we are unable in all of the circumstances of this case to categorise the sentence of 2 years imprisonment as being excessive and for these reasons, this appeal must be refused.

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