APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 5
HCA/2016/000430/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

LEE CONNORS AKA LEE ANDREW HUNTER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: A Brown, QC, C Findlater; Faculty Services Limited, for Bridge Litigation, Glasgow
Respondent: J Farquharson, AD; Crown Agent

20 December 2017

[1] After trial at Edinburgh in February 2016, the appellant was convicted of six charges, including attempted murder with a firearm. Three of the charges related to his possession of the firearm, and ammunition. The two remaining charges were of breach of the peace and assault by presenting the firearm.

Background

[2] On the evening of 24 October, the appellant called his former girlfriend Kimberly Dow, in a state of distress, saying he couldn't speak to anyone else. She arranged to meet him. He was driving a black Nissan car, accompanied by a man called Coco. The appellant told Kimberly Dow that people from Manchester were after him, that he had nowhere to go and needed help. All three went to her flat. Once there, the accused took a blue bag containing a handgun from under his jumper. He unloaded the gun, put the bullets and the gun in the bag and asked if he could "stash" it in Kimberly Dow's house. She refused, but agreed to put him up for the night. She accompanied the appellant to the house of an old friend, where the appellant claimed to have "stashed" the gun. In the event, he did not stay at Kimberly Dow's house that evening.

[3] The following day a friend of Kimberly Dow, Grant McBeth, came to her house in the morning. She told him what had happened. The appellant then appeared, knocking on the window. Kimberly Dow said she did not want to speak to him. The appellant was not happy at the presence of Grant McBeth. He was "raging" and trying to gain entry through the window. Following a verbal altercation, the appellant sped off in his car. For reasons which are not specified Grant McBeth went after him. Within 5 minutes McBeth returned, beeped to gain Kimberly Dow's attention, saying to her "hurry up, he's away to get that thing." She just managed to get out of the building when the appellant "came screeching round the corner like a maniac". He was pointing the gun out of the window as the two cars came level. He said "Get down, get down, I'll dae it". McBeth said "dae what you want to dae, I'm no afraid of dying". The appellant pulled the trigger three times, whilst the gun was pointed at McBeth's face. Kimberly Dow threw her keys at his car to try to distract him. He then pointed the gun at her, saying "please babe, get in the car". She spoke into her

phone as if calling the police, and he drove off. When the gun was recovered it had three bullets in the chamber. The gun had a home-made firing pin. Each bullet had a firing pin impression, indicating that they had been struck by the firing pin but not detonated. Considering that the risk criteria might be met, the trial judge made a Risk Assessment Order.

The Risk Assessment Report

[4] As required by statute, the assessor stated her opinion whether the risk presented by the appellant was high, medium or low in these terms:

> "Having regard to such standards and guidelines as are issued by the Risk Management Authority, and undertaken this risk assessment report in a manner accredited by the Risk Management Authority I am of the opinion that Mr Lee Connor presents a high risk.

She considered that

> "... he presents with personality traits which will require a great deal of time and support to ameliorate and manage his risk. … In order to protect the public, long-term monitoring and supervision are required for Mr Connor and in the absence of treatment, management and supervision, he is likely to continue to seriously endanger the lives, or physical or psychological wellbeing of the public at large."

She was unable to address his motivation, as he continued to deny his offending behaviour. The assessor noted that the appellant: "... presents as very plausible when being interviewed and his presentation could easily convince non-professionals that he is innocent and presents no danger."

[5] Turning to the specific question of future risk, the assessor stated:

> "His risk is managed well in a prison setting although there remains the propensity for violent offending. If he were in the community, his risk would currently be unmanageable without high levels of monitoring and supervision as he has not yet learnt the skills to cope with stress and emotional difficulties without resorting to violence.

> Mr Connor requires a lot of support and interventions to adequately manage the risk he presents within the community. He requires long-term support and risk management. He is currently willing to undertake treatment interventions but does not believe he needs to do any work or that he is a risk to others. Denial itself is not predictive of recidivism but it does make individuals less amenable to undertaking treatment interventions in a meaningful way. It is worth noting that minimising his behaviour or displacing responsibility is not uncharacteristic of Mr Connor as he has been doing this since childhood."

[6] The report concluded with this statement of opinion that the appellant's behaviour

> "... indicates an enduring propensity to seriously endanger the lives or well being of the public at large. Mr Connor presents with psychopathic, narcissistic, antisocial and paranoid personality traits, which will require a great deal of time and support to ameliorate and manage his risk. ... In the absence of treatment, management and supervision, he is likely to continue to seriously endanger the public at large." (emphasis added)

The judge's decision

[7] The trial judge being unavailable due to illness, the case next called for sentencing before another judge. The solicitor advocate for the appellant did not contest the imposition of an Order for Lifelong Restriction, primarily making a submission related to allowance for time spent in custody. In making such an order the sentencing judge stated that on the basis of the conviction and the terms of the Risk Assessment Report, he was satisfied that the risk criteria were met.

The grounds of appeal

[8] An appeal against sentence was marked on the basis of (i) defective representation; and (ii) an argument that in any event an OLR was not appropriate. Only the second ground passed the sift. The basis of it is that the sentencing judge erred in finding that the risk criteria had been met. The assessor had not properly addressed the risk that the appellant would pose at a time in the future when, other than with an OLR, he would be at liberty and no longer under any post-release supervision. The information before the

sentencing judge did not suggest that the appellant presented a continuing and indefinite risk to public safety. It was submitted that his pattern of offending did not suggest that he had an enduring propensity for harm. His first offence had been at age 21, most of his convictions had been at summary level, save for one at sheriff and jury. The sentencing judge had said that he took the Risk Assessment Report at "face value". He should not have done so. He should have been more hesitant and should not merely have accepted the terms of the report. Whilst it had been a difficulty for the assessor that the appellant denied his offending, that position had now changed; the appellant had now acknowledged his offending. He has been responding well within the custodial setting. The sentencing judge had not given sufficient weight to positive factors, such as his intelligence and his motivation to be involved with his children.

Analysis and decision

[9] Section 210E of the Criminal Procedure (Scotland) Act 1995 provides:

> "For the purposes of sections 195(1) , 210B(2) , 210D(1) and 210F(1) and (3) of this Act, the risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological well-being, of members of the public at large."

[10] In relation to the making of an OLR, Section 210F provides:

> "(1) The High Court, at its own instance or on the motion of the prosecutor, if it is satisfied, having regard to—
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> (a) any risk assessment report submitted under section 210C(4) or (5) of this Act;
> (b) any report submitted by virtue of section 210D of this Act;
> (c) any evidence given under section 210C(7) of this Act; and
> (d) any other information before it,
>
> that, on a balance of probabilities, the risk criteria are met, shall, in a case where it may make a compulsion order in respect of the convicted person under section 57A

> of this Act, either make such an order or make an order for lifelong restriction in respect of that person and in any other case make an order for lifelong restriction in respect of that person."

[11] In order to enable the categorisation of low, medium or high risk to be interpreted and applied in a consistent way, the Risk Management Authority has sought to define these ratings as a description of an offender's overall risk. According to their standards and guidelines the ascription of "high" risk to an offender means that:

> "The nature, seriousness and pattern of this individual's behaviour indicates an enduring propensity to seriously endanger the lives, or physical or psychological well being of the public at large. The individual has problematic, persistent, pervasive characteristics that are relevant to risk and
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> • not likely to be amenable to change; or
>
> • the potential for change with time and/or treatment is significantly limited. Without changes in these characteristics the individual will continue to pose a risk of serious harm.
>
> Furthermore,
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> - there are few if any protective factors to counterbalance these characteristics;
> - concerted long-term measures are indicated to manage the risk, including restriction, monitoring, supervision, and where the offender has the capacity to respond, treatment;
> - the nature of the difficulties with which the individual presents are such that treatment is unlikely to mitigate the need for long term monitoring and supervision; and
> - in the absence of such measures, this individual is likely to continue to seriously endanger the lives, or physical or psychological well being of the public at large."

[12] It was in recognition of this definition of "high" risk that the court in *Ferguson* v *HMA* 2014 SLT 431 observed that where such a categorisation has been made, and the judge accepts it, it is a strong indicator pointing towards the necessity for an OLR, the final decision thereanent being for the sentencing judge. The fact that such a classification means that the assessor considers the offender to present "an enduring propensity to seriously endanger the lives, or physical or psychological well being of the public at large" and that

"the potential for change with time and/or treatment is significantly limited" are powerful factors in favour of an OLR.

[13] In the present case, the sentencing judge had regard to the factors referred to in *Ferguson*. Notwithstanding the fact that no contrary submission was made to him, he recognised that he had to examined the report with care and satisfy himself that the terms of the report justified the assessment made (para5). He gave careful consideration to the report and its conclusions (para 6). He noted that the assessor had given detailed reasoning for her conclusions, and narrated in some depth the facts upon which they were based. The sentencing judge concluded that:

> "It seemed to me that, taking the Report at face value, the facts and reasoning justified the conclusions and the Report was of assistance to the court as the report of a suitably qualified expert."

[14] It was this part of the sentencing judge's report which was seized upon by senior counsel for the appellant in his argument that the report should "not have been taken at face value" and that he had erred in finding the risk criteria to have been met. In our view, this is to take out of context the remarks of the sentencing judge: what he meant by taking the report at face value was simply that he could accept the material in it as accurate and the assessment as properly carried it out. The sentencing judge made it abundantly clear that he recognised that he had to satisfy himself as to the risk criteria, and that in addressing what to make of the Risk Assessment Report he subjected the report to an appropriate analysis to test the conclusions reached against the facts upon which it as based and the reasoning adopted.

[15] On the specific point about future risk, the sentencing judge stated:

> "I had in mind that although the time for assessing the likelihood of serious endangerment was the time of sentencing, I was required to contemplate whether there was likely to be serious endangerment at the point in the future where, but for

> the imposition of an OLR, the appellant might be predicted to be at liberty (*Ferguson* v *HMA* para [99]). I bore in mind that that point might be after a determinate or an extended sentence (para [104]). I considered that the Report addressed that future point. In section 6 the Assessor states that the appellant requires "long-term" support and risk management. In Section 7 the Assessor identifies an "enduring" propensity, indicated that "long-term" monitoring and supervision were required, and indicates that in the absence of inter alia supervision he was likely to "continue" to seriously endanger the public at large."

[16] The fact that the appellant might have been compliant within the prison system, or that he now appears at least to acknowledge his guilt, does not deprive the sentencing judge's decision of validity. We do not know the extent to which the appellant's acknowledgement of guilt carries with it a full acceptance of responsibility for his own actions. Moreover, whilst the assessor had noted that his denial of the crime imposed certain limitations on her report, she proceeded on the basis that denial is not prescriptive of recidivism, and does not prevent management work being carried out. The assessor was aware of how the appellant had conducted himself while on remand. In any event, it is a central point in her report that the risk which the appellant presents is one which is more easily managed within the prison environment.

[17] In concluding that the risk criteria were met, the sentencing judge had regard to the serious nature of the offending, observing that:

> "after an altercation the appellant had left to retrieve a gun. On his return, the appellant pointed it at the complainer's face. The gun was loaded. The appellant pulled the trigger but the bullet did not detonate. At that point he did not desist, but pulled the trigger a further two times, and each time the relevant bullet did not detonate."

[18] It was also relevant to note that on 8 March 2016 the appellant had pled guilty at the High Court in Paisley to a charge of possession of a (different) firearm, for which he had received a sentence of 5 years imprisonment.

[19] In the circumstances we cannot say that the sentencing judge was not entitled to impose an OLR and the appeal will be refused.