APPEAL COURT, HIGH COURT OF JUSTICIARY

[2018] HCJAC 76
HCA/2018/000505/XC

Lord Menzies
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

SOLEMN APPEAL AGAINST SENTENCE

by

JOSEPH LLEWELLYN

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Gilfedder (sol adv); Gilfedder & McInnes
Respondent: McSporran QC (sol adv), AD; Crown Agent

11 December 2018

[1] The appellant Joseph Llewellyn is 18 years old. On 20 September 2018 he was sentenced to a period of 18 months detention as a consequence of having been convicted on 9 May 2018 of a charge of assault by throwing a brick or similar object at another youth, chasing him and threatening him with violence whilst in the possession of a knife or similar instrument. The offence was committed along with his older brother. The offence itself took

place on 17 September 2016, two full years before the sentence was imposed. At the time of the commission of the offence the appellant was 16 years old and a first offender.

[2] On arguing the appeal on the appellant's behalf it was submitted that it was neither necessary nor appropriate to impose a sentence of detention, there being a range of other methods of sentencing the appellant available and the sheriff had erred in his approach to sentencing. Particular emphasis was placed on the appellant's age, his lack of previous convictions and the reduced nature of the offence of which the appellant was convicted.

[3] After conviction the sheriff was informed that the appellant had been convicted in 2017 of an offence of assault to injury and a contravention of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. In respect of that offence he was made subject to a community payback order with a supervision requirement for a period of 15 months imposed on 15 June 2017.

[4] Before passing sentence in respect of the offence before him the sheriff therefore obtained a criminal justice social work report and a report from a clinical psychologist. The author of the criminal justice social work report noted that overall the appellant attended on time and engaged well during his period of supervision. Offence focused work had been completed and he had completed a 10 day Outward Bound course with the venture trust. The author noted certain concerns due to the appellant failing to attend on occasion and due to learning, through the appellant, that he had been convicted of a further offence in September 2017 as a consequence of kicking a door in a fast food restaurant. This resulted in a fine and a compensation order. The author expressed the view that the appellant displayed a lack of victim empathy and remorse. Both the social enquiry report and the report from the psychologist noted that the appellant had a history of ADHD and that he came from a family with a history of mental health difficulties, particularly in relation to his

father, and that these had contributed to a disruptive and violent family environment. The psychological report also noted that the appellant had attempted suicide on 20 September 2016 and had been seen by the local psychiatric emergency team the day before that as a consequence of some other disruptive events. As a consequence of his attempted suicide which was thought to have occurred in the context of poor social circumstances and strained family relationships. He was admitted to the acute psychiatric admissions ward of Hairmyres Hospital where he remained as an inpatient for around six weeks.

[5] Each of the two reports also identified positive recent changes in the appellant's circumstances. In addition to retaining the practical and emotional support of his mother he had developed a relationship with a young woman who was providing prosocial support. He had also been undertaking a construction course two days a week. Various training and safety certificates achieved during this course were tendered along with a letter from a police sergeant who had delivered a two week team building and leadership course in the Scottish Prison Service which had been attended by the appellant. The sergeant commended the appellant's conduct during this course and offered the opinion that he was a young man willing to acknowledge and change his offending behaviour.

[6] In his report to this court the sheriff explained that the appellant had been convicted of what he considered to be a serious offence. He took the view that even taking account of the appellant's age and lack of previous offending at the time balancing the issues of public safety, deterrence and what he took to be the generally unsupportive theme coming from the two reports available to him that no disposal other than a period of detention was appropriate.

[7] Having considered all of these matters we agree with the submission that the sheriff has erred in his approach to sentencing. We do not consider that the sheriff gave sufficient

weight to the appellant's age and circumstances at the time of the commission of the offence or to the lengthy passage of time which had elapsed prior to him being sentenced. In relation to his circumstances there is one matter in particular which strikes us as being of importance and which is not referred to in the sheriff's report. As we have already noted, the report from the clinical psychologist disclosed that the appellant was suffering from significant mental health difficulties in the period of time around the commission of the offence. The offence was committed on 17 September 2016, two days later he required to be seen as an emergency by the local psychiatric team and was then admitted for a lengthy period of in-care treatment as an acute patient.

[8] Furthermore the sentencing aim of deterrence which weighed with the sheriff is generally less relevant than that of rehabilitation in dealing with someone who has offended at the age of 16. Whilst the sheriff explained in his report that he was, of course, aware of the cases of *Kane* v *HM Advocate* and *HM Advocate* v *Gary Smith* to which attention was drawn in a note of appeal. He expressed the view that these cases were not authority for the proposition that young offenders could go scot-free or avoid a punitive element to sentencing. He considered that the recent decision of this court in *IG* v *HM Advocate* [2018] HCJAC 63 supported his understanding.

[9] We confess to having a little difficulty in understanding what the sheriff was intending to communicate in this passage. Community payback orders and other non-custodial disposals constitute sentences. No one who is sentenced by the court goes scot-free. There are also a range of punitive options available to the court apart from custody. Some can be imposed either in addition to or instead of a community payback order. The most obvious is the court's ability to include an order that the offender should carry out a period of unpaid work in the community. The decision of the court in the case of

IG was a decision by a bench constituted identically to the present bench and we therefore feel able to state with confidence that nothing which was said on that occasion was intended to dilute or distract from the guidance earlier given in cases such as *Kane* v *HM Advocate*.

[10] In all of these circumstances, we are satisfied that the sentence imposed is excessive and we are prepared to quash it and we are minded to impose in its place a community payback order but in order to do that I require to ask Mr Llewellyn to confirm that he would be prepared to accept the conditions of such an order.

Lord Turnbull: Now Mr Llewellyn we have in mind making a community payback order in this case with a supervision requirement to last for a period of two years and that would mean that during the period of that order you were required to comply with any instructions given by the supervising officer, to notify him of any change of address or times of working in your normal work. Now do you understand what I've said in relation to that Mr Llewellyn?

Appellant: Yes, yes.

Lord Turnbull: And would you, would you be prepared to comply with the terms of that order?

Appellant: Eh, yes.

Lord Turnbull: And we also have in mind imposing as part of that order a requirement to complete 200 hours of unpaid work in the community during the period of 12 months, now would you be re-, prepared to comply with that in addition?

Appellant: Eh, yes.

Lord Turnbull: And you would have to understand that if you breached the terms of either of these orders or failed to comply with the instructions of your supervising officer you could be brought back to this court and sentenced anew, do you understand that?

Appellant: Yes I understand.

Lord Turnbull: Alright

[11] In these circumstances we shall quash the sentence which was imposed and its place we shall impose a community payback order with a supervision requirement to last for a period of 2 years and we shall order that as part of that you shall be required to undertake a period of 200 hours unpaid work in the community within a period of 12 months.